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PERSECUTION

ABILA STUDY GROUP

CRIMES AGAINST HUMANITY

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PERSECUTION AS A CRIME AGAINST HUMANITY

Proposed Revised Text of Article 2(1)(h) of the Draft Articles on Prevention and Punishment of Crimes Against Humanity [ILC Draft]

Article 2 Definition of crimes against humanity

1. For the purpose of the present draft articles, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

[...]

(h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, ~~in connection with any act referred to in this paragraph;~~

Explanatory Notes

1. This proposal is intended to bring the language presently included in Draft Article 2(1)(h) in line with customary international law, the practice of contemporary international tribunals, and the Convention’s core objective of preventing crimes against humanity.¹
2. This brief reviews the founding documents and practice of international tribunals, as well as the opinions and domestic law of certain States, concerning the requirement

¹ This proposal focuses exclusively on the nexus requirement. Other discussions on Draft Article 2(1)(h) have addressed expanding the list of discriminatory grounds contained in this definition of persecution, and the ABILA Study Group suggests that States consider including these proposals in Draft Article 2. See, e.g., ABILA Study Group Proposal on Children (advocating that “age” be included in this definition); UNGA Sixth Committee, ‘Workshop on a Convention on the Prevention and Punishment of Crimes against Humanity’ (21 March 2024) UN Doc A/C.6/78/INF/3, para 20 (noting that the “question of adding other protected categories, including Indigenous Peoples and persons with disabilities, to article 2(1)(h) was raised”); International Disability, Peace and Security Network Crimes against Humanity Working Group, Policy Brief, ‘Disability: A Missing Piece of the International Criminal Law Puzzle’ (July 2025) <<https://uscd.org/wp-content/uploads/2025/07/IDPSN-CAHWG-CAH-Disability-Policy-Note-Revised-July-2025-V2.pdf?ref=disabilitydebrief.org>> 3-7 (advocating for inclusion of “disability”).

that persecution be committed “in connection with any act referred to in” Draft Article 2(1) of the Convention, commonly referred to as the “nexus requirement”. It then examines the implications of this requirement in light of the Convention’s goal to prevent atrocities, using the examples of Nazi Germany as well as present-day Afghanistan.

3. The Charter of the International Military Tribunal (IMT), the founding document that governed the first international criminal prosecution of the crime against humanity of persecution at Nuremberg, limited its mandate to persecution “in execution of or in connection with any crime within the jurisdiction of the Tribunal”.² However, this language was intended to address concerns about introducing crimes against humanity as a new legal category, not about the crime against humanity of persecution *per se*. By linking them to crimes against peace or war crimes, the drafters limited the IMT’s jurisdiction over crimes against humanity to those committed after the start of World War II in Europe,³ thereby mitigating concerns over retroactivity⁴ and sovereignty.⁵
4. Four months later, Control Council Law No. 10, which set out the basis for the separate Nuremberg Military Tribunals, omitted the nexus requirement in its definition of persecution.⁶ Since then, the UN Security Council and nearly all international and internationalized tribunals—including the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda, Special Court for Sierra Leone, Extraordinary Chambers in the Courts of Cambodia (ECCC), and Kosovo Specialist Chambers—have excluded any language requiring such a nexus.⁷

² Charter of the International Military Tribunal (8 August 1945) art 6(c).

³ Christopher K Hall, Niamh Hayes, Joseph Powderly in Otto Triffterer, Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd ed, Hart 2016) 226.

⁴ Beth Van Schaack, Ron C Slye, *International Criminal Law and Its Enforcement: Cases and Materials* (5th ed, Foundation Press 2025) 603 (“It is generally understood that this so called ‘war nexus’ was added to counter the claim that the Allies were legislating retroactively.”).

⁵ David Luban, ‘The Legacies of Nuremberg’ (1987) 54(4) *Social Research* 779, 789 (“Article 6(c) [...] restricts its criminalization of ‘persecutions on political, racial or religious grounds’ by adding the crucial phrase ‘in execution of or in connection with any crime within the jurisdiction of the Tribunal.’ The result is that persecutions on political, racial, or religious grounds are not crimes against humanity unless the perpetrator has also launched an aggressive war or committed war crimes. Persecutions do not, that is, cost a state its sovereignty until it has already forfeited it on other grounds.”).

⁶ Control Council Law No. 10, ‘Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity’ (20 December 1945) art II(1)(c).

⁷ UNSC Res 827 (25 May 1993) UN Doc S/RES/827 (1993) para 1, approving UN, ‘Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)’ (3 May 1993) UN Doc S/25704, annex (Statute of the International Criminal Tribunal for the former Yugoslavia) art 5(h); UNSC Res 955 (8 November 1994) UN Doc S/RES/955 (1994), annex (Statute of the International Criminal Tribunal for Rwanda) art 3(h); Statute of the Special Court for Sierra Leone (entered into force 12 April 2002) art 2(h); Law on the

5. Notably, the ICC’s retention of a nexus requirement in Article 7(1)(h) of the Rome Statute was primarily a jurisdictional and drafting compromise—it functioned as a constraint tied to the ICC’s jurisdictional framework, not as a substantive statement of law.⁸
6. Indeed, in the *Kupreškić* case, the ICTY Trial Chamber considered the question of whether the Rome Statute’s reintroduction of a linkage requirement should have any bearing on its own consideration of the crime against humanity of persecution.⁹ Rather than adopting the Statute’s language, the Chamber concluded that such a condition was “not consonant with customary international law”.¹⁰ Further, the Chamber concluded that persecution encompasses non-enumerated discriminatory acts such as discriminatory laws and attacks on political, social, or economic rights, as long as such acts are examined in their context and their cumulative effect is considered.¹¹
7. The ECCC Trial Chamber likewise rejected the defense argument in Case 002/01 that persecution should be linked to another offense.¹² The Chamber instead applied customary international law as it existed in 1975, with no nexus requirement.¹³ The Chamber noted that “the ECCC Law [...] contains no requirement that persecution be linked to another crime within the jurisdiction of this court”.¹⁴
8. During the International Law Commission’s 2019 discussions on the Draft Articles, several States supported removing the phrase “in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes” from the

Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (27 October 2004) art 5; Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (3 August 2015) art 13(1)(h).

⁸ See, e.g., Kriangsak Kittichaisaree, *International Criminal Law* (OUP 2001) 121; Darryl Robinson, ‘Defining “Crimes Against Humanity” at the Rome Conference’ (1999) 93(1) AJIL 43, 53-55 (describing the compromise requiring a connection).

⁹ *Prosecutor v Kupreškić et al* (Trial Judgment) (14 January 2000) IT-95-16-T, para 580.

¹⁰ Ibid.

¹¹ Ibid. paras 611, 615(c), 615(e).

¹² *Prosecutor v Nuon & Khieu* (Case 002/01) (Trial Judgement) (7 August 2014) 002/19-09-2007/ECCC/TC, paras 431-433 (considering the accused’s argument that the agreement creating the ECCC referenced the Rome Statute’s definition of crimes against humanity).

¹³ Ibid, para 432 (quoting *Prosecutor v Kaing* (Case 001) (Appeal Judgment) (3 February 2012) 001/18-07-2007-ECCC/SC, para 261).

¹⁴ *Prosecutor v Nuon & Khieu* (n 12) n 1293.

definition of persecution.¹⁵ For instance, Brazil questioned whether “there is actually the need to require [...] a link” to genocide or war crimes, while Chile, France, Peru, Sierra Leone, and Uruguay urged its deletion entirely.¹⁶ Chile noted that the nexus requirement reflects the ICC’s unique jurisdiction rather than international law generally,¹⁷ and warned that retaining it could wrongly “imply that the intentional and severe deprivation of human rights by reason of the identity of a group is not sufficiently serious to be considered an international crime of itself”.¹⁸ Leading international criminal law scholars likewise agree that customary international law does not require a connection, even to other acts listed within the crimes against humanity provision.¹⁹

9. More recently, both Brazil and Malta suggested that persecution should be a “stand-alone” crime.²⁰ Australia supported considering this position,²¹ noting that eliminating the nexus requirement was “consistent with the definition of persecution under customary international law and in other international criminal law treaties”.²²
10. Domestic laws in several jurisdictions also do not require a link to other crimes, whether genocide, war crimes, or other crimes against humanity. For instance, the German Code of Crimes Against International Law, though designed to implement the Rome Statute within the German legal system, omits any requirement that persecution be connected to another prohibited act.²³ Its legislative history notes that “[t]he requirement of such a connection does not correspond to the current state of customary international law, as

¹⁵ UNGA, International Law Commission (71st Session), ‘Fourth Report on Crimes Against Humanity’ (18 February 2019) UN Doc A/CN.4/725, paras 60, 64.

¹⁶ Ibid, paras 63-64.

¹⁷ This view is shared by a number of experts. See, e.g., Kittichaisaree (n 8) 121; Antonio Cassese et al, *Cassese’s International Criminal Law* (3rd ed, OUP 2013) 107.

¹⁸ UNGA, ‘Fourth Report on Crimes Against Humanity’ (n 15) para 64.

¹⁹ See, e.g., Cassese (n 17) 107; Gerhard Werle, Florian Jessberger, *Principles of International Criminal Law* (4th ed, OUP 2020) 427 (“With this [‘in connection with’] design, the ICC Statute lags behind customary international law, since the crime of persecution, like crimes against humanity in general, has developed into an independent crime.”).

²⁰ UNGA, ‘Crimes against Humanity: Report of the Secretary-General’ (12 January 2024) UN Doc A/78/717, para 49.

²¹ Ibid.

²² UNGA Sixth Committee (78th Session) ‘Summary Record of the 41st Meeting (2 April 2024) UN Doc A/C.6/78/SR.41, para 51.

²³ See Code of Crimes Against International Law (Germany) (2002) Federal Law Gazette I, 2254 (as amended) <https://legislationline.org/sites/default/files/documents/a8/GERM_Code%20of%20Crimes%20against%20international%20Law.pdf> sec 7(10).

the International Criminal Tribunal for the former Yugoslavia has recently confirmed on several occasions”.²⁴

11. At least twenty-five more countries that proscribe persecution have no nexus requirement.²⁵ The absence of a nexus requirement in domestic legislation across a wide range of jurisdictions—spanning civil law, common law, and mixed systems—underscores the breadth of State practice and its representative character across different regions and legal traditions.
12. Moreover, the nexus requirement undermines the Convention’s goal of preventing crimes against humanity, as it allows acts of persecution to remain unchecked when not linked to other crimes—a situation that has historically preceded an escalation of violence. For instance, the Nazi persecution of Jews became manifest in 1933 with business boycotts as well as legislation restricting their ability to work, followed two years later by the Nuremberg Laws, stripping them of citizenship.²⁶ Those measures

²⁴ Draft Law on the Introduction of the International Criminal Code (Germany), BT-Drucksache 14/8524 (13 March 2002) <<https://dserver.bundestag.de/btd/14/085/1408524.pdf>> 22 (unofficial translation) (citing to both the ICTY *Kupreškić et al.* and the *Kordić & Čerkez* Trial Judgments).

²⁵ Armenian Criminal Code (2024) art 135(1)(8); Burundian Criminal Code (2017) art 198(8); Cambodian Criminal Code (2025) art 188(8); Criminal Code of Czechia (2023) sec 401(e); Organic Law 74-25 of the Dominican Republic (entering into force in August 2026) art 82(13); Penal Code of Ecuador (2021) art 86; Finnish Criminal Code (2022) ch 11, sec 3(5); French Penal Code (2026) art 212-1(8); Criminal Code of Georgia (2021) art 408; Criminal Code of Hungary (2025) sec 143(h); Lithuanian Criminal Code (2024) art 100; Criminal Code of Montenegro (2024) art 427; Criminal Code of North Macedonia (2023) art 403-a; Penal Code of Norway (2008) art 102(h); Penal Code of Panama (2016) art 441(10); Criminal Code of Poland (2026) art 118a(3)(2); Law No 31/2004 of Portugal (2004) ch 2, art 9(h); Republic of Korea, Act on the Punishment of Crimes Within the Jurisdiction of the International Criminal Court (2007), Act no 8719, art 9(7); Criminal Code of Romania (2018) art 439(j); Law Amending the Penal Code of Senegal (2007) art 431-2(7); Criminal Code of Serbia (2022) art 371; Criminal Law of Slovakia (2025) art 425(g); Criminal Code of Spain (2024) art 607bis(1)(1); Swedish Act on Criminal Responsibility for Genocide, Crimes Against Humanity and War Crimes (2014) sec 2(8); Penal Code of Timor-Leste (2009) art 124(h). While the Swiss Criminal Code does contain the linkage language, it also recognizes persecution when it is “for the purpose of the systematic oppression or domination of an ethnic group”. Swiss Criminal Code (2025) SR 311.0, art 264a(i). The practice of States that implemented the provisions of the Rome Statute by referral—that is, by incorporating the Statute in a schedule or annex to their domestic implementation law—should be weighted differently from that of many of the States listed above, which chose to incorporate the Rome Statute crimes by redrafting relevant substantive definitions, taking into account not only the Rome Statute but other sources of international law, including customary international law and the requirements of their national legal system. This approach allowed those States to address the ICC’s jurisdictional limits and ensure that such limits did not unduly constrain their national exercise of jurisdiction over the international crime of persecution, in line with customary international law and relevant precedents.

²⁶ See, e.g., Richard D Heideman, ‘Legalizing Hate: The Significance of the Nuremberg Laws and The Post-War Nuremberg Trials’ (2017) 39 Loyola of Los Angeles International and Comparative Law Review 5, 5-10; Anti-Defamation League, ‘Nazi Germany and Anti-Jewish Policy’ (2005) <<https://www.adl.org/sites/default/files/nazi-germany-and-anti-jewish-policy.pdf>> 1-2.

were implemented years before such oppression intensified into even greater violence, including deportation, imprisonment, torture, and enslavement—acts that ultimately culminated in the systematic murder of 6 million Jews.²⁷ Recognizing persecution without requiring a nexus from the outset would permit States to avoid the escalation of violence that almost inevitably follows.²⁸

13. The situation in Afghanistan offers another compelling example of why eliminating the nexus requirement is critical to realizing the Convention’s prevention mandate. During the Taliban’s first regime (1996–2001), official decrees barred women and girls from education, prohibited employment outside the home, and imposed severe restrictions on movement and dress, all enforced through the Ministry for the Propagation of Virtue and the Prevention of Vice.²⁹ The same structural patterns have re-emerged since August 2021.³⁰ Yet, under the current formulation of Draft Article 2(1)(h), such legalized and systematic oppression, without evidence of another enumerated act, would likely not meet the Draft’s definition of persecution. The Taliban’s violent and brutal enforcement of these decrees serves as yet another example of how unchecked persecution often evolves into broader atrocities.³¹ Replicating the nexus requirement in the Convention would force States to wait until violence escalates before they could act pursuant to the Convention, effectively depriving them of an additional means to intervene and prevent

²⁷ See, e.g., United States Holocaust Memorial Museum, ‘Holocaust Encyclopedia: Introduction to the Holocaust’ <<https://encyclopedia.ushmm.org/content/en/article/introduction-to-the-holocaust>>.

²⁸ This phenomenon has been identified as an “atrocity cascade”. See, e.g., Leila Nadya Sadat, ‘Genocide in Syria International Legal Options, International Legal Limits, and the Serious Problem of Political Will’ Vol 5 *Impunity Watch* 1-20 (2015) 1, 17.

²⁹ See, e.g., UN Human Rights Council, ‘Study on the So-Called Law on the Promotion of Virtue and the Prevention of Vice: Report of the Special Rapporteur on the Situation of Human Rights in Afghanistan, Richard Bennett’, UN Doc A/HRC/58/74 (12 March 2025) paras 15-21.

³⁰ See, e.g., *ibid* para 3 (“[T]he Special Rapporteur provides an analysis of the law on the promotion of virtue and the prevention of vice [...] tracing a clear trajectory of escalating repression since the [Taliban] retook power and drawing parallels with the group’s draconian rule from 1996–2001.”); UN Human Rights Council, ‘Situation of Human Rights in Afghanistan: Report of the Special Rapporteur on the Situation of Human Rights in Afghanistan’, UN Doc A/HRC/55/80 (23 February 2025) paras 2, 14-31.

³¹ See, e.g., ICC, Press Release ‘Situation in Afghanistan: ICC Pre-Trial Chamber II issues arrest warrants for Haibatullah Akhundzada and Abdul Hakim Haqqani’ (8 July 2025) <<https://www.icc-cpi.int/news/situation-afghanistan-icc-pre-trial-chamber-ii-issues-arrest-warrants-haibatullah-akhundzada>> (“Pre-Trial Chamber II considered that the Taliban have implemented a governmental policy that resulted in severe violations of fundamental rights and freedoms of the civilian population of Afghanistan, in connection with conducts of murder, imprisonment, torture, rape and enforced disappearance. [...] Specifically, the Taliban severely deprived, through decrees and edicts, girls and women of the rights to education, privacy and family life and the freedoms of movement, expression, thought, conscience and religion.”); UNGA and UNSC, ‘The Situation in Afghanistan and Its Implications for International Peace and Security: Report of the Secretary-General’, UN Doc A/79/797-S/2025/109 (21 February 2025) paras 39-43.

further atrocities from occurring or to punish persecutory acts that led to those atrocities in the first place.

14. In sum, removing the nexus requirement from Draft Article 2(1)(h) would ensure consistency with customary international law. Moreover, several States have expressed support for this position, and domestic legislation in at least twenty-five jurisdictions across different regions and legal traditions reflects this approach. Significantly, removing the nexus requirement appears to be a crucial step toward achieving the Convention's core objective of preventing and punishing crimes against humanity.