ARTICLES

CRIMES AGAINST HUMANITY AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: IS A CONNECTION WITH ARMED CONFLICT REQUIRED?

Stuart Ford*

* Stuart Ford, J.D., LL.M. The author wishes to thank the Open Society Institute and Open Society Justice Initiative for their funding of this research. In particular, Dr. Kelly Askin, Tracey Gurd, and Heather Ryan provided very helpful advice and comments on various drafts. The author is an Assistant Prosecutor at the Extraordinary Chambers in the Courts of Cambodia, but this article was completed before he began work there. It does not represent the views or opinions of the Office of the Co-Prosecutors or any other part of the Extraordinary Chambers.

I. A POTENTIAL PROBLEM OF LITIGATING CRIMES AGAINST HUMANITY AT THE EXTRAORDINARY CHAMBERS

The Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (known hereafter as the "Extraordinary Chambers" or the "EC"),[1] is a unique experiment. It is a mixed tribunal containing elements of both Cambodian and international law.[2] The tribunal will prosecute "senior leaders" and "those who were most responsible" for the atrocities that occurred between 1975 and 1979, when Cambodia was ruled by the Communist Party of Kampuchea.[3] While mixed national/international tribunals have been created before, most notably in Sierra Leone, none has tried to render justice for crimes that were committed so far in the past.

The gap of three decades between the crimes and the court proceedings has created a number of significant obstacles for the Extraordinary Chambers. Some are obvious, like the difficulty in finding physical evidence and witnesses. Some obstacles are less

1. It is also sometimes informally called the "Khmer Rouge Tribunal," but this name is disfavored.

2. For instance, the substantive law will be a combination of Cambodian criminal law (including homicide, torture and religious persecution) and crimes under international law (including genocide, war crimes and crimes against humanity). *See* Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, arts. 3-6 [hereinafter Extraordinary Chambers Law]. Procedural rules at the EC are also a mix of national and international rules. The Extraordinary Chambers uses Cambodian procedural law, but "shall" exercise its jurisdiction "in accordance with international standards of justice, fairness and due process of law" as described in Articles 14 and 15 of the International Covenant on Civil and Political Rights. *Id.* art. 33. To meet this mandate the ECCC judges have passed a special set of "Internal Rules" that will apply to cases before the ECCC. The Internal Rules are based on Cambodian criminal procedure but incorporate minimum international standards of justice, fairness and due process.

3. *See* Extraordinary Chambers Law, art. 2.

obvious, like the potential problem of the rapid development of international criminal law, particularly in the law of crimes against humanity, since the end of the Cold War. The crimes within the jurisdiction of the EC occurred prior to this recent period of development, and there is a possibility that the EC's definition of crimes against humanity cannot be applied without violating the principle of legality.

Crimes against humanity has been a crime under international law since 1946, but unlike genocide or "grave breaches" of the Geneva Conventions it was not the subject of an international convention that codified the elements of a crime against humanity. As a result of the lack of a widely accepted definition, different courts defined the crime differently. The definition that will be used in the Extraordinary Chambers is very similar to that used in Article 3 of the Statute of the International Criminal Tribunal for Rwanda (ICTR).[4] However, this articulation differs from that used by the Yugoslav war crimes tribunal, as well as that of the Nuremberg Charter, the Tokyo Charter, Control Council Order No. 10 and the Rome Statute of the International Criminal Court. In 1975, crimes against humanity did exist as an explicit crime, but the elements of that crime were defined by customary international law, not by a treaty.

This creates a potential problem in determining what the elements of a crime against humanity were at the time the crimes within the jurisdiction of the EC were committed. The principle of legality, which prohibits the retroactive application of criminal law, is a fundamental principle of law. The purpose of the principle of legality is to ensure that no one is held criminally liable for an act that the accused could not predict would be a crime at the time the act was committed. Foreseeability is an important component of the principle of legality, and an accused can be guilty of a crime even if the law was unsettled at the time the act was committed, as long as criminal liability was foreseeable. If the definition of crimes against humanity that is contained in the Statute of the Extraordinary Chambers was unforeseeable in 1975, then the EC may be limited to the 1975 definition. Several writers have noted the existence of this potential problem with the subject matter jurisdiction of the court and offered opinions

4. *Compare* Extraordinary Chambers Law, art. 5 *with* Statute of the International Criminal Tribunal of Rwanda, S.C. Res. 955, art. 3, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR]. The Extraordinary Chamber's definition of crimes against humanity is much closer to the one in the ICTR than it is to the definitions that appear in the International Criminal Tribunal for Yugoslavia (ICTY) or the International Criminal Court (ICC). The ICC, ICTY, and ICTR are discussed in more detail supra in Sections II(I)(3)–II(I)(5).

on whether it will affect the court.[5] However, as far as the author is aware, none has undertaken a full analysis of it.

The question of whether crimes against humanity can only take place in connection with an armed conflict is the most likely area in which there could be a substantive difference between the 1975 definition and the modern definition. Consequently, this article will focus on the nexus with armed conflict. It will begin with a history of the development of crimes against humanity, focusing on the requirement of a connection with armed conflict, and then proceed to an analysis of whether crimes against humanity required a nexus with armed conflict in 1975. Once the state of customary international law in 1975 has been examined, this article will apply the principle of legality to try to draw some conclusions about whether or not the Extraordinary Chambers can use the definition in its Statute without violating that principle.

II. HISTORY OF THE DEVELOPMENT OF CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW

Like most legal concepts, "crimes against humanity" evolved over time. It grew out of the body of rules regulating the use of force during war that was developed during the late nineteenth and early twentieth centuries, and it shares much of its early history with the history of the development of the laws that govern armed conflicts.[6] Even after it became a specified crime in the

5. *See* Helen Horsington, *The Cambodian Khmer Rouge Tribunal: The Promise of a Hybrid Tribunal*, 5 MELB. J. OF INT'L L. 462, 473-74 (2004) (describing a potential problem with EC's definition of crimes against humanity); William A. Schabas, *Should the Khmer Rouge Leaders be Prosecuted for Genocide or Crimes Against Humanity?*, SEARCHING FOR THE TRUTH MAGAZINE, Oct. 2001, at 37 (noting that defendants at the EC will argue that the definition of crimes against humanity violates the principle of legality); Dr. Gregory H. Stanton, *The Khmer Rouge Did Commit Genocide*, SEARCHING FOR THE TRUTH MAGAZINE, Nov. 2001, at 32. (responding to William Schabas and arguing that crimes against humanity did not require a nexus with armed conflict in 1975); Raymund Johansen, *International Criminal Law was not Intended to Supplant Domestic Criminal Law*, SEARCHING FOR THE TRUTH MAGAZINE, Dec. 2001, at 40 (arguing that the nexus with armed conflict was an artificial jurisdictional element inserted into the Nuremberg Charter and that it never represented a substantive element of crimes against humanity); Suzannah Linton, *Random Thoughts on Schabas-Stanton-Johansen*, SEARCHING FOR THE TRUTH MAGAZINE, Jan. 2002, at 31 (agreeing with Johansen that a nexus with armed conflict was not part of the customary definition of crimes against humanity in 1975). Searching for the Truth Magazine is a publication of the Documentation Center of Cambodia, http://www.dccam.org/, a Cambodian NGO that works to document the crimes and atrocities of the Khmer Rouge era. The legal articles that appear in Searching for the Truth Magazine are short and non-technical.

6. *See* Stuart Ford, *Legal Processes of Change: Article 2(4) and the Vienna Convention on the Law of Treaties*, 4 J. ARMED CONFLICT L. 75, 76-79 (1999) (discussing the evolution of the prohibition on the use of force in international relations); Leslie

wake of WWII, it retained its connection to the laws governing armed conflicts[7] for many years.

From the 1960s and into the 1980s, it was not clear whether the nexus with armed conflict remained a substantive element of the crime. The International Law Commission, after much internal debate, had suggested progressively developing crimes against humanity by removing the nexus with armed conflict in 1954, but the Commission's suggestion was not acted upon by the United Nations. Many developing states tacitly supported the removal of the nexus requirement during the negotiation of the 1968 Convention on Statutes of Limitation, but an almost equal number of developed states opposed them. Certain crimes that fall under the heading of crimes against humanity, like genocide and apartheid, were codified in international conventions. However, crimes against humanity was not codified in an authoritative manner, and evidence of state practice remained scarce. Therefore, there was lingering uncertainty over whether the nexus with armed conflict was still required.

That uncertainty was resolved in the 1990s. The debate reemerged at the International Law Commission, and in the creation of the ad hoc tribunals for the former Yugoslavia and Rwanda. By 1998, the result, was a general acceptance that crimes against humanity was no longer a subset of the laws and customs of war, but represented an independent crime that can occur irrespective of whether or not there is an armed conflict. Unfortunately, it is not clear exactly when the requirement of a

---

C. Green, *International Regulations of Armed Conflicts*, *in* 1 INTERNATIONAL CRIMINAL LAW, CRIMES 355, 362-66 (M. Cherif Bassiouni ed., 2d ed. 1999) (describing the development of laws governing the conduct of armed conflicts during the late nineteenth and early twentieth centuries).

7. Terminology will be important throughout this article. The phrases "armed conflict" and "war" are both used in this paper, but they are not interchangeable. Prior to the Charter of the United Nations, there was a distinction drawn in international law between war and lesser uses of force. Most of the rules that had been devised to regulate uses of force applied only to wars, not to lesser uses of force. *See* Ford, *supra* note 6, at 76-78. After the Charter was written, the term "war" was dropped from international law in favor of "armed conflict." Armed conflict includes all uses of force and thus encompasses both the earlier concept of "war" and also the lesser uses of force that existed but were not regulated prior to 1946. *Id.* at 78-79; Green, *supra* note 6, at 371 (noting that the 1949 Geneva Conventions replaced "war" with "armed conflict"). The Charter also did away with the need for a declaration of war. Today, all uses of armed conflict are regulated, irrespective of whether they are termed wars or whether a formal declaration of war is made. *See* Ford, *supra* note 6, at 80-81.

This paper will use "war" in its historical sense when describing events that occurred before and during WWII. The term "armed conflict" will be used for events after WWII. Unfortunately, the terminology may get a little confused in the period immediately after WWII because some commentators and documents continued to refer to wars rather than armed conflicts for several years after the United Nations Charter came into force.

nexus disappeared from the customary definition of crimes against humanity.

A. BEFORE WORLD WAR I—THE ORIGINS OF THE TERM "LAWS OF HUMANITY"

There have been restrictions on how and when wars can be fought for as long as war has existed.[8] However, most of the modern law governing armed conflicts descends from rules first established in late nineteenth century Europe. Those rules were based, to some extent, on the norms and customs established in earlier periods,[9] but were also driven by the changing nature of warfare[10] and the emergence of the modern nation-state.[11]

The precursor to the phrase "crimes against humanity" first appeared in the Preamble of the Declaration of St. Petersburg in 1868. The Declaration of St. Petersburg was created in response to the invention of bullets that exploded on contact with their target and prohibited them in certain circumstances.[12] While the Declaration's prohibition was limited in scope—it only prohibited exploding bullets that weighed less than 400 grams and only applied if all the belligerents were parties to the Declaration—the Preamble has had lasting significance:

> [T]he progress of civilization should have the effect of alleviating as much as possible the calamities of war; the only legitimate objective which states should endeavor to accomplish during war is to weaken the military forces of the enemy; for this purpose it is sufficient to disable the greatest possible number of men; this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; *the employment of*

8. *See* Green, *supra* note 6, at 355-61 (discussing the historical development of rules that govern the use of force); M. Cherif Bassiouni, *Crimes Against Humanity*, *in* 1 INTERNATIONAL CRIMINAL LAW, CRIMES, *supra* note 6, at 521, 524-29 (noting at 524 "For over seven thousand years, humanitarian principles regulating armed conflicts evolved gradually in different civilizations."); Remigiusz Bierzanek, *War Crimes: History and Definition*, *in* 3 INTERNATIONAL CRIMINAL LAW, ENFORCEMENT 87, 87-89 (M. Cherif Bassiouni ed., 2d ed. 1999).

9. *See* Green, *supra* note 6, at 358-61 (discussing the slow accumulation of rules in Europe during the Middle Ages); Bassiouni, *supra* note 8, at 529-31 (discussing the rules and norms that were developed during the Middle Ages).

10. *See* Green, *supra* note 6, at 364 (discussing the Declaration of St. Petersburg and the calling of the first Hague Conference in 1874, which was precipitated by the development of explosive bullets and the desire to regulate the use of this new form of ammunition).

11. *Id.* at 362-65; *id.* at 362 ("Members of fighting units were now mustered in national armies and war was no longer a matter of personal relations between princely commanders. . . .").

12. *Id.* at 364.

> *such arms would, therefore, be contrary to the laws of humanity.*[13]

The Preamble is important to humanitarian law because it embodies the principles of humanity and distinction. However, it is also important to the evolution of crimes against humanity because it suggested that the failure to follow the rules of war would be "contrary to the laws of humanity."

The language about "laws of humanity" seemed to resonate, because it was used again in the Hague Conventions of 1899 and 1907, which form the basis for much of the modern law regulating warfare.[14] In its Preamble, the 1907 Convention dealing with the laws and customs of war noted that its goal was to "diminish the evils of war, as far as military requirements permit," and to serve "the interests of humanity and the ever progressive needs of civilization" by "revis[ing] the general laws and customs of war" and providing a "general rule of conduct for the belligerents."[15] However, the parties to the Convention also recognized that it could not provide rules for every conceivable use of force, so they included what has come to be known as the Martens Clause (after the Russian diplomat who drafted it[16]):

> Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rules of the principles of the laws of nations, as they result from the usages established among civilized peoples, *from the laws of humanity,* and the dictates of public conscience.[17]

Language similar to the Martens Clause has subsequently been included in other agreements concerning humanitarian law,[18] in-

---

13. *Id.* at 364 (quoting the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29 - Dec. 11, 1868, *reprinted in* THE LAWS OF ARMED CONFLICTS 101 (Dietrich Schindler & Jiri Tomans eds., 3d rev. ed. 1988) (emphasis added)).

14. *See* Green, *supra* note 6, at 365.

15. *See* Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Preamble, *reprinted in* 2 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW 25 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000) [hereinafter DOCUMENTS AND CASES]. Similar language was included in the 1899 Convention. *See* Convention (II) with Respect to the Laws and Customs of War on Land, Jul. 29, 1899, Preamble, available from the website of the International Committee of the Red Cross at http://www.icrc.org/ihl.nsf/FULL/150?OpenDocument (last visited on Mar. 28, 2006) [hereinafter ICRC].

16. *See* Bassiouni, *supra* note 8, at 536 n.97.

17. *See* Convention (IV), *supra* note 15, at 25 (emphasis added). The 1899 Convention also includes a version of the Martens Clause. *See* Convention (II), *supra* note 15, Preamble.

18. *See* Green, *supra* note 6, at 365.

cluding each of the Geneva Conventions of 1949,[19] and Protocols I and II to the Geneva Conventions.[20]

The phrase "laws of humanity," as it was used in the Martens Clause, is clearly not a reference to a particular law or crime. Nor is it a phrase that appears to have had a specific legal meaning prior to its inclusion in the Declaration of St. Petersburg. In part, it may be a reference to the many national laws and military regulations that governed aspects of armed conflicts. In the late nineteenth century, many countries had codes that governed the conduct of their armed forces, which were based on or influenced by the so-called "Lieber Code" adopted by the United States during the American Civil War.[21] These could be viewed as the laws of humanity that governed armed conflicts. However, the language also has clear moral and humanitarian overtones and probably was not intended solely as a reference to nations' domestic laws.

It may also be a reference to the "natural law" doctrine,[22] the principle of humanity, or common sense. Natural law suggests that there are certain limitations on our actions that exist because of our very nature. These "laws" do not change from place to place and from time to time and are separate and independent of positive law (the laws that states enact).[23] The principle of humanity is a pillar of modern humanitarian law and posits that it is unlawful and immoral to cause unnecessary suffering—suffering that is unrelated or disproportionate to military objec-

19. *See* Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 63; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 62; Convention (III) relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 142; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 158. All four Geneva Conventions of 1949 contain the same language about the effect of denouncing the Conventions: "The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience." The Geneva Conventions are available at the ICRC website at http://www.icrc.org/ihl (last visited Mar. 28, 2006).

20. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Jun. 8, 1977, art. 1(2) [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, Jun. 8, 1977, Preamble [hereinafter Protocol II]. Protocols I and II can be found on the ICRC website at http://www.icrc.org/ihl.nsf/INTRO?OpenView (last visited Mar. 29, 2006).

21. *See* Green, *supra* note 6, at 363; Bassiouni, *supra* note 8, at 534.

22. *See* Bassiouni, *supra* note 8, at 527.

23. *See Natural Law (ethics)*, Microsoft Encarta Online Encyclopedia 2005, http://encarta.msn.com/encyclopedia_761553008/Natural_Law_(ethics).html (last visited Mar. 29, 2006).

tives.[24] Lastly, it may also be a reference to common sense—the idea that some things are obviously wrong and should not be done even if there is no specific rule prohibiting them.[25]

M. Cherif Bassiouni suggests that the "laws of humanity" are an early version of a "general principle[ ] of law recognized by civilized nations."[26] Indeed, most countries seemed to agree that there existed "laws of humanity" that were somehow distinct from the "laws of nations" (treaties) and the "usages established among civilized peoples" (customary international law) that governed how hostilities could be conducted. They also seemed to agree that these laws of humanity were unwritten and could fill in gaps in the existing laws and customs of war. In this way it does look like a "general principle of law" as defined in the Statute of the International Court of Justice (ICJ).[27]

However, it has the same problems that have limited the usefulness of "general principles of law"—nobody could define "laws of humanity." Everyone assumed that an observer would be able to identify a violation of the "laws of humanity," even though there were no written rules and even though the people using the phrase may have had very different ideas about what it meant. This is a problematic basis for a crime under international law. Indeed, it seems possible that the phrase "laws of humanity" persisted in part because it had no fixed definition. Countries could agree that there were "laws of humanity," but they did not have to go through the difficult, time-consuming and

24. *See* Bassiouni, *supra* note 8, at 530-31 (discussing the evolution of the principle of humanity). The Declaration of St. Petersburg (1868) incorporates the principle of humanity when it states that "it is sufficient to disable the greatest possible number of men; this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable." *See supra* note 13.

25. *See, e.g.*, DOCUMENTS AND CASES, *supra* note 15, at 43-44 n.65 (describing the statement of Baron Marschall von Bieberstein at the Hague Conference of 1907 where he suggested that "[c]onscience, good sense and the sense of duty imposed by the principles of humanity" should guide military operations).

26. *See* Bassiouni, *supra* note 8, at 535 ("This historical evolution demonstrates that what became known as 'Crimes Against Humanity' existed as part of 'general principles of law recognized by civilized nations' long before the Charter's formulation in 1945."). "General principles of law recognized by civilized nations" was adopted as a catch-all source of international law by the International Court of Justice in 1946. *See* Statute of the International Court of Justice, art. 38(1). *See generally* Ford, *supra* note 6, at 84 (describing the role of Article 38 of the Statute of the ICJ in defining the sources of international law).

27. *See* Ford, *supra* note 6, at 84 n.70 (noting that "general principles of law" were probably included in the Statute of the ICJ to prevent gaps in international law in situations where there was no treaty or customary law). *Cf.* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 19 (2d ed. 2001) (noting that international tribunals tend to examine 'general principles of law' only if there is no applicable convention of customary norm).

probably futile process of trying to define them. In this way, the phrase may be somewhere between a hortatory statement and a rhetorical flourish. However, to the extent that countries recognized the existence of "laws of humanity," those laws were always part of the regime that regulated the conduct of war.

B. World War I—The First Suggestion of Criminal Punishment for Violating the "Laws of Humanity"

World War I saw the international community take the first steps toward the creation of a specific crime called "crimes against humanity." There were two principal developments during World War I. The first was the 1915 joint declaration of France, Great Britain, and Russia denouncing the massacre of ethnic Armenians in the Ottoman Empire. The second was the report of the special commission convened by the victors to examine the question of who was responsible for the war and what penalty they should pay. Together, these two documents advanced the concept of the "laws of humanity" considerably.

On May 24, 1915, during World War I, France, Great Britain and Russia sent a joint declaration to the Ottoman Empire condemning the widespread massacre of Armenians, and vowing to hold responsible those members of the Ottoman government implicated in the massacres.[28] The joint declaration is noteworthy because it describes the massacres as "crimes of Turkey against humanity and civilization."[29] The declaration itself is very short[30] and does not appear to use the words in a legal sense, even though there is the threat of some sort of punishment. However, there were no prosecutions for the members of the Ottoman government responsible for the Armenian massacres,[31] and the Al-

28. *See* Bassiouni, *supra* note 8, at 536-37.

29. *See* Joint Declaration, Fr.-Gr. Brit.-Russ., May 24, 1915, *available at* http://www.armenian-genocide.org/Affirmation.160/current_category.7/affirmation_detail.html (last visited Apr. 6, 2006).

30. *Id.* The complete text of the declaration is: "For about a month the Kurd and Turkish populations of Armenia has been massacring Armenians with the connivance and often assistance of Ottoman authorities. Such massacres took place in middle April at Erzerum, Dertchun, Eguine, Akn, Bitlis, Mush, Sassun, Zeitun, and throughout Cilicia. Inhabitants of about one hundred villages near Van were all murdered. In that city Armenian quarter is besieged by Kurds. At the same time in Constantinople Ottoman Government ill-treats inoffensive Armenian population. In view of those new crimes of Turkey against humanity and civilization, the Allied governments announce publicly to the Sublime-Porte that they will hold personally responsible [for] these crimes all members of the Ottoman government and those of their agents who are implicated in such massacres."

31. *See* Bassiouni, *supra* note 8, at 540-41. Provisions that would have allowed the Allies to try those responsible for the massacres were included in the language of the Treaty of Sevres. Peace Treaty of Sevres, Aug. 10, 1920, art. 230 (never adopted, superseded by the Treaty of Peace with Turkey Signed at Lausanne), *available at*

lies eventually provided an amnesty.[32] Consequently, the legal legacy of the joint declaration is quite limited. Nevertheless, it is generally agreed that this is the birth of the phrase "crimes against humanity."

The second major step was the creation of the "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties" (hereafter "Commission"). It was created by the victorious powers in 1919, to report upon the "responsibility of the authors of the war," the "facts as to the breaches of the laws and customs of war," the "responsibility for these offences attaching to particular members of the enemy forces," and the "constitution and procedure of a tribunal appropriate for the trial of these offences."[33] The report is important for several reasons. Most importantly, while the Commission was asked to report on breaches of "the laws and customs of war," it enlarged its own mandate and referred consistently to breaches of "the laws and customs of war and of the laws of humanity."[34] This is certainly not an accident, as the United States' representatives refused to endorse the report, in part, because they "object[ed] to declaring the laws and principles of humanity as a standard whereby the acts of their enemies should be measured and punished by a tribunal."[35]

---

http://www.lib.byu.edu/~rdh/wwi/versa/sevindex.html. Article 230 of the Treaty of Sevres called on the Turkish government "to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war . . . ." Article 230 also gave the Allies the right to designate which tribunal would hear cases related to the massacres. However, the Treaty of Sevres never went into effect and was replaced with the Treaty of Lausanne, which did not include any provisions for criminal prosecutions. *See* Bassiouni, *supra* note 8, at 540-41. Treaty of Peace with Turkey Signed at Lausanne, Jul. 24, 1923, *available at* http://www.lib.byu.edu/~rdh/wwi/1918p/lausanne.html (last visited Apr. 6, 2006).

32. *See* Bassiouni, *supra* note 8, at 541. *See also* Declaration of Amnesty, and Protocol, Jul. 24, 1923, art. III, *available at* http://www.austlii.edu.au/au/other/dfat/treaties/1924/13.html (last visited Apr. 6, 2006). The Declaration provided that "[n]o person" was to be "disturbed or molested . . . on account of any military or political action taken by him" between 1914 and 1922. *Id.*, art. II. At the same time, a "[f]ull and complete amnesty" was to be granted for "all crimes or offenses committed during the same period which were evidently connected with the political events which have taken place . . . ." *Id.*, art. III.

33. *See* Commission on Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, Mar. 29, 1919, *reprinted in* DOCUMENTS AND CASES, *supra* note 15, at 37 [hereinafter Report of the Commission].

34. *See* Report of the Commission, *reprinted in* DOCUMENTS AND CASES, *supra* note 15, at 40, 42-44, 46-48. Some variation on the phrase "laws of humanity" appears at least ten times in the report, which is only twelve pages long (excluding Annexes).

35. *See* Report of the Commission, Annex II, *reprinted in* DOCUMENTS AND CASES, *supra* note 15, at 53.

The Commission's references to the "laws of humanity" are important because the Report is explicitly a legal document. The Commission members were reporting on the crimes they believed had been committed during World War I and proposing how to prosecute individuals for those crimes. The inclusion of the "the laws of humanity" as a third basis for liability, alongside the laws of war and the customs of war, is of real significance. Ultimately, the Commission recommended that the law to be applied by the tribunal would be "the principles of the laws of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience."[36] Unfortunately, it was still not clear how the "laws of humanity" and the "dictates of public conscience" were to be defined. The Commission did provide a list of thirty-two types of crimes it believed were committed;[37] however, it did not indicate which crimes it believed were violations of the laws of war, which were violations of the customs of war, and which were violations of the "laws of humanity,"[38] making it very difficult to know how the Commission intended to define the "laws of humanity."[39]

The recommendations contained in the Commission's Report were not acted on, in part, because the American representatives on the Commission refused to endorse the report.[40] Amongst other things, the Americans argued that the Report inappropriately attempted to expand the laws and customs of war because the "laws of humanity" were "moral offenses" not legal prohibitions and there was no acceptable definition of the "laws

36. *Id.* This language is taken from the Martens Clause. *See* Convention (IV), *supra* note 15.

37. *See* Report of the Commission, ch. II, *reprinted in* DOCUMENTS AND CASES, *supra* note 15, at 41-42.

38. The reference to "dictates of public conscience" appears to have been included in the recommendation about the jurisdiction of the proposed tribunal because it was part of the Martens Clause, but it does not figure prominently in the Report, and there is no suggestion elsewhere in the Report that the Commissioners believed that violating the "dictates of public conscience" was a punishable crime.

39. While Bassiouni argues that the Commission's Report "clearly expressed recognition for the fact that 'laws of humanity' did exist, could be ascertained, and could be breached" he does not try to guess how the Commissioners would have defined laws of humanity. *See* Bassiouni, *supra* note 8, at 539, 537-39. One possibility is that a definition can be arrived at by process of elimination. If one were to eliminate the crimes that are violations of the laws and customs of war, presumably what would be left would constitute the "laws of humanity." Unfortunately, almost all of the thirty-two crimes listed by the Commission were already a violation of the laws and customs of war, which suggests that crimes against humanity added little, if anything, to the existing prohibitions.

40. *See* Report of the Commission, Annex II, *reprinted in* DOCUMENTS AND CASES, *supra* note 15, at 49-54 (containing the reasons for the American representatives' refusal to endorse the Commission's recommendations).

of humanity" that could form the basis for prosecution.[41] The Japanese representative also objected to the Report of the Commission for many of the same reasons.[42]

When the Treaty of Versailles was signed in June 1919, the American objections seemed to have carried the day. The treaty contained provisions for prosecuting German military personnel for "violations of the laws and customs of war,"[43] but did not include jurisdiction over violations of the "laws of humanity." However, even this more limited undertaking was eventually frustrated, as the Allies consented to having the trials take place in Germany where the vast majority of alleged war criminals were never tried at all.[44]

C. World War II and the International Military Tribunal (IMT)

While there were attempts to further develop international criminal law in the period between World War I and World War II, none of these efforts resulted in anything concrete.[45] The sheer scale of the atrocities that took place during World War II forced a change,[46] affecting virtually all aspects of the laws and

41. *Id.* at 50, 52-53 (arguing that the laws of humanity were primarily moral offenses, that as legal offenses they would be "uncertain" and would vary "according to the conception of the members of the high court" and objecting to "declaring the laws and principles of humanity as a standard whereby the acts of their enemies should be measured and punished by a judicial tribunal").

42. *See* Report of the Commission, Annex III, *reprinted in* Documents and Cases, *supra* note 15, at 54-55.

43. *See* Treaty of Peace between the Allied and Associated Powers and Germany, concluded at Versailles June 18, 1919, *available at* http://www.lib.byu.edu/~rdh/wwi/versailles.html (last visited Apr. 12, 2006) [herinafter Treaty of Peace]. Article 228 stated that the "German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war."

44. *See* Bierzanek, *supra* note 8, at 92-94. The attempt to try the ex-Kaiser was frustrated by the Netherland's refusal to extradite him. *Id.* at 92.

45. *See* Antonio Cassese, *From Nuremberg to Rome: International Military Tribunals to the International Criminal Court, in* 1 The Rome Statute of the International Criminal Court: A Commentary 4-5 (Antonio Cassese et al. eds., 2002). *See also* Bierzanek, *supra* note 8, at 96.

See Olivia Swaak-Goldman, *Crimes Against Humanity, in* 1 Substantive and Procedural Aspects of International Criminal Law, Commentary 145, 145-46 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000) (noting that the phrase "crimes against peace and humanity" was used to condemn Italian atrocities committed during the Italo-Abyssinian War of 1935-1936, while the destruction of neutral shipping during the Spanish Civil War was condemned as contrary to "the most elementary dictates of humanity"). This language is similar to that which had been used previously in documents like the Declaration of St. Petersburg, the Martens Clause, and the 1915 Joint Declaration, but the condemnations apparently did not result in any formal legal proceedings for violations of the laws of humanity.

46. *See* Bassiouni, *supra* note 8, at 562 ("Never before had such atrocities occurred on such a scale, and for as long a time as those which occurred during World

customs that regulate the use of force. It had an impact on the rules governing when force could be used, resulting in the creation of the United Nations and the establishment of a universal prohibition on the use of force in international relations[47] and the rules on how combatants and non-combatants should be treated, resulting in the Geneva Conventions of 1949.[48] It also influenced international criminal law and resulted in the first modern international tribunal with authority to try individuals for violations of the laws and customs of war.

Throughout World War II, the Allies stated that they intended to punish those individuals responsible for war crimes.[49] Work began on a process for trying war criminals in late 1943, with the creation of a United Nations Commission for the investigation of war crimes.[50] The work of the Commission culminated in the London Agreement of August 8, 1945.[51] The London Agreement created the International Military Tribunal ("IMT") to try "major war criminals."[52] The IMT adopted many

War II. The discovery of these atrocities toward the end of the war left little time for deliberate reflections due to the tremendous political and public pressure to bring those responsible to justice quickly."). *See also* Bierzanek, *supra* note 8, at 106 ("[T]he crimes of the Germans and Japanese during World War II, which reached dimensions unparalleled in human history, so immensely shocked world public opinion that the punishment of war criminals came to be regarded among the most urgent problems to be solved after the war."); Cassese, *supra* note 45, at 5-6 ("It took the full extent of the atrocities committed during World War II . . . .to jolt the international community out of its complacency.").

47. *See* Ford, *supra* note 6, at 78-79.

48. *See* Green, *supra* note 6, at 371 (noting that the Geneva Conventions I, II, and III largely filled in gaps in the laws of war that became apparent during World War II, while Geneva Convention IV substantially expanded the protections accorded to civilians during armed conflicts, "an issue which had become of supreme concern in the light of German practice in occupied Europe").

49. *See* Beirzanek, *supra* note 8, at 97-98 (describing the various statements of the Allied nations regarding their intention to try Axis war criminals). Perhaps the most famous of these statements was the Moscow Declaration of November 1, 1943, which warned that the Allies would "pursue persons responsible for war crimes to the uttermost ends of the earth and deliver them to the accusers in order that justice [would] be done." *Id.* at 97 (quoting the Moscow Declaration). The Moscow Declaration was expressly referenced in the Preamble to the London Agreement. *See infra* note 51.

50. *See* Bierzanek, *supra* note 8, at 98.

51. *See* Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, *reprinted in* DOCUMENTS AND CASES, *supra* note 15, at 59-67 [hereinafter London Agreement].

52. The Charter of the International Military Tribunal [hereinafter IMT Charter] was attached to the London Agreement as an annex and made a part of the Agreement. *See* London Agreement, art. 2, *reprinted in* DOCUMENTS AND CASES, *supra* note 15, at 59 ("The constitution, jurisdiction, and functions of the International Military Tribunal shall be those set out in the Charter annexed to this Agree-

of the recommendations found in the 1919 Report of the Commission on the Responsibility of the Authors of the War.[53] The IMT was a fully international tribunal that applied international law.[54] It did away with the head of state defense,[55] and it created a category of crimes (called "crimes against humanity")[56] which was the successor to the "laws of humanity."[57]

Article 6 of the IMT Charter defines three crimes that would fall within the jurisdiction of the Tribunal: 1) crimes against peace; 2) war crimes; and 3) crimes against humanity. While war crimes, defined as "violations of the laws or customs of war," were relatively uncontroversial,[58] both crimes against peace and crimes against humanity caused controversy. The inclusion of crimes against peace, defined as planning, preparing or initiating a war of aggression or a war in violation of international treaties, was viewed by some as a violation of the principle of legality because it had not clearly been prohibited prior to World War II.[59]

---

ment, which Charter shall form an integral part of this Agreement."). The London Agreement variously refers to the people to be charged as "war criminals whose offenses have no particular geographical location" and "major war criminals." *See* London Agreement, arts. 1, 3.

53. *See supra* notes 33-36.

54. It was created by an international agreement between the four signatories to the London Agreement: the United States of America, France, the United Kingdom, and the Soviet Union. *See* London Agreement, Preamble. Moreover, the signatories indicated that they were "acting in the interests of all the United Nations." *Id.* Ultimately, nineteen other countries formally adhered to the London Agreement. *See* DOCUMENTS AND CASES, *supra* note 15, at 60 n.1. The Tribunal was composed of judges from each of the signatories, who sat together to form a single multinational panel. *See* IMT Charter, arts. 2-4. It adopted its own rules of procedure and evidence, not those of the signatories' national systems. *Id.*, arts. 13, 19. Moreover, it had jurisdiction over international crimes, including "violations of the laws or customs of war," violations of international treaties and obligations, and "crimes against humanity." *Id.*, art. 6. The Allies certainly intended to create an international tribunal. *See* Bassiouni, *supra* note 8, at 543 (noting that Allies intended the IMT to be an international tribunal for the most serious war criminals and also set up national tribunals to try lesser war criminals). Moreover, the IMT stated in its Judgment that it was applying international law. *See infra* note 75.

55. IMT Charter, art. 7 ("The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.").

56. IMT Charter, art. 6(c) (defining "crimes against humanity").

57. Bassiouni, *supra* note 8, at 548 (noting that crimes against humanity were the "progeny" of the earlier references to the laws of humanity and the Allies' joint declaration condemning the Armenian massacres during World War I); *id.* at 551 (noting that the French delegation, in particular, pushed for a close link between crimes against humanity and the references to the laws of humanity from the 1919 Commission Report).

58. *See* Treaty of Peace *supra* note 43. The Treaty of Versailles had established in 1919 that violations of the "laws and customs of war" could lead to criminal prosecution.

59. For example, the Commission on responsibility for WWI noted in 1919 that, while "premeditation of a war of aggression . . . is conduct which the public con-

Similar arguments were raised against "crimes against humanity,"[60] as it had been unclear at the end of World War I, and in the years between the wars, whether the "laws of humanity" were sufficiently definite and accepted to give rise to criminal liability.[61] These arguments were summarily dismissed, largely for political reasons.[62]

Crimes against humanity was defined as:

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[63]

A plain reading of this language suggests that crimes against humanity is comprised of two independent subparts—a prohibition

---

science reproves . . . by reason of the purely optional character of the institutions at The Hague for the maintenance of peace . . . a war of aggression may not be considered as an act directly contrary to positive law . . . ." *See* Report of the Commission, ch. IV(a), *reprinted in* DOCUMENTS AND CASES, *supra* note 15, at 44. The Kellogg-Briand Pact (1928) closed some of the gaps in the prohibition on the use of force in international relations, but still left loopholes. *See* Ford, *supra* note 6, at 76-78 (describing the evolution of the prohibition on the use of force between World War I and World War II). Prior to the IMT, it was not at all clear that wars of aggression were illegal and could give rise to criminal liability. *See* Green, *supra* note 6, at 369 (noting that "criticism may be directed at the manner in which the Tribunal concluded that the [Kellogg-Briand] Pact . . . had made resort to 'aggressive' war an international crime"). *See also* Bierzanek, *supra* note 8, at 100 (noting that the Kellogg-Briand Pact did not contain any sanctions for its violations or any mechanism for its enforcement). The IMT avoided the problems presented by the lack of any criminal provisions in the Kellogg-Briand Pact by concluding that violations of international law give rise to individual criminal responsibility even in the absence of specific criminal provisions related to the breach. *Id.* at 100.

60. Bassiouni, *supra* note 8, at 543-546 (describing the problems presented by the principle of legality). *Id.* at 546 ("The drafters were mindful of the importance of the principles of legality but their concern was how to avoid its application in a rigid manner which would have precluded the inclusion in the Charter of 'crimes against peace' and would have caused difficulties with 'crimes against humanity.'"). *See also* Cassese, *supra* note 45, at 8 (noting that the inclusion of crimes against humanity and crimes against peace was criticized on the grounds that these crimes had not existed prior to 1945). *Cf.* Lamb, *infra* note 381, at 736 (concluding that crimes against humanity, as defined by the Charter of the IMT, represented new international law).

61. *See supra* notes 40-45.

62. *See* Bassiouni, *supra* note 8, at 547 (noting that the creation of the IMT was the result of political and legal compromises that were necessary to gain agreement amongst the participants). In particular, a decision was made that the legal process had to be "fair" but "swift," and that "no technical legal argument could be allowed to prevail and result in dismissal of the charges or acquittal . . . ." *Id.* "The facts were to drive the law and the proceedings would be based on the facts, rejecting legalistic considerations." *Id.* at 548. In the end, the trials were designed to have "the appearance of legality and fairness" but to reach a "preordained" result. *Id.*

63. IMT Charter, art. 6(c).

on "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war" and a prohibition on "persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal . . . ."

However, while there is not much documentary evidence regarding the creation of the definition of crimes against humanity,[64] the plain reading described above is incorrect. Slightly less than one month after the London Agreement was signed, the four signatories to the IMT Charter signed the October 6th Protocol, which clarified a "discrepancy" in the definition of crimes against humanity.[65] First, the October 6th Protocol removed the semicolon between "war" and "or" in the English text of Article 6(c) that seemed to separate crimes against humanity into two separate subparts.[66]

The October 6th Protocol also substantively amended the French text of the Charter to better reflect the Allies' intent. By virtue of this amendment, the French text became the authoritative version.[67] In the amended French text, the phrase "in execution of or in connection with any crime within the jurisdiction of the Tribunal" clearly modifies both subparts of the definition of crimes against humanity.[68] As a result, a proper reading of Arti-

64. *See* Bassiouni, *supra* note 8, at 556 (noting the absence of records and suggesting that the lack of records was part of a deliberate policy of the drafters of the London Agreement to deprive defense counsel of evidence that acknowledged the possibility that crimes against humanity violated the principle of legality).

65. Nuremberg Trial Proceedings Volume I: Protocol Rectifying Discrepancy in the Charter (Oct. 6, 1945), *available at* http://www.yale.edu/lawweb/avalon/imt/proc/imtprot.htm (last visited Apr. 19, 2006) [hereinafter October 6th Protocol].

66. October 6th Protocol, *supra* note 65. ("[T]he undersigned, signatories of the said Agreement on behalf of their respective Governments, duly authorized thereto, have agreed that Article 6, paragraph (c), of the Charter in the Russian text is correct, and that the meaning and intention of the Agreement and Charter require that the said semicolon in the English text should be changed to a comma. . . .").

67. *See* Bassiouni, *supra* note 8, at 553 ("The new French wording of Article 6(c) is the mo[st] important and decisive in view of the fact that it is contained not only in the French, but also in the English and Russian[ ] texts of the [ ] Protocol, so that it is clear that all four Contracting parties have agreed that the text, as it is declared in the amended French wording, correctly reproduces the meaning of the Agreement and the intention of all four Parties.") (quoting Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178, 195 (1946)).

68. October 6th Protocol, *supra* note 65. The Protocol amended the French text of Article 6(c) to read: "Les Crimes Contre L'Humanite: c'est a dire l'assassinat, l'extermination, la reduction en esclavage, la deportation, et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre, ou bien les persecutions pour des motifs politiques, raciaux, ou religieux, lorsque ces actes ou persecutions, qu'ils aient constitue ou non une violation du droit interne du pays ou ils ont ete perpetres, ont ete commis a la suite de tout crime rentrant dans la competence du Tribunal, ou en liaison avec ce crime." *Id.*

The key change is to the phrase "lorsque ces actes ou persecutions . . . ont ete commis a la suite de tout crime rentrant dans la competence du Tribunal, ou en

cle 6(c) demonstrates that both subparts required a connection with one of the other crimes within the jurisdiction of the Tribunal.[69] To put it another way, under the IMT Charter, crimes against humanity could not exist except in conjunction with either war crimes or a crime against peace.[70]

The final Judgment of the IMT reflects this understanding of crimes against humanity.[71] The IMT acknowledged that a "policy of persecution, repression, and murder of civilians" occurred before the beginning of the war in 1939. It similarly stated that the "persecution of Jews during the same period is established beyond all doubt."[72] Nevertheless, the IMT concluded that crimes against humanity could only have occurred after the outbreak of war in 1939 because they require a connection to war:

> To constitute Crimes against Humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes Against Humanity within the meaning of the Charter, but from the beginning of the war in 1939 War Crimes were committed on a vast scale, which were also Crimes Against Humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity.[73]

---

liaison avec ce crime." In English, this translates as "when these acts or persecutions . . . were committed as part of a crime within the jurisdiction of the Tribunal or in connection with such a crime." "These acts" is a reference to the "murder, extermination, enslavement, deportation, and other inhumane acts" described in the first subpart of the definition. Consequently, it is clear from the French text that the requirement of a connection with a war modifies both subparts of the definition of crimes against humanity.

69. Bassiouni, *supra* note 8, at 552-55 (describing the impact of the October 6th Protocol on the interpretation of Article 6(c) of the IMT Charter); *id.* at 553 ("[I]t is now beyond doubt that the qualification 'in execution of or in connection with any crime within the jurisdiction of the Tribunal' undoubtedly applies to the whole context of the paragraph and constitutes a very important restriction on the scope of the concept of crimes against humanity.") (quoting Egon Schwelb, *Crimes Against Humanity*, 23 BRIT Y.B. OF INT'L L. 178, 195 (1946)).

70. Green, *supra* note 6, at 369 ("[A]s defined in both the Charter and the Judgment, crimes against humanity were only committed if they were part and parcel of the war of aggression or of war crimes.").

71. *See International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 249 (1947) [hereinafter *Nuremberg Judgment*).

72. *Id.*

73. *Id.*

While there were plausible arguments that the new articulation of the crime of "crimes against humanity" violated the principle of legality,[74] the IMT dismissed all such suggestions. In the view of the Tribunal, the IMT Charter was not an "arbitrary exercise of power," but represented "the expression of international law existing at the time of its creation."[75] This may have been a stretch when applied to crimes against humanity, but the IMT Charter did have the effect of finally providing a definition of crimes against humanity.[76]

The IMT's definition was tied to the traditional laws and customs of war because it required that crimes against humanity be committed in connection with either war crimes or an aggressive war. One could not be convicted of crimes against humanity in the absence of a war. This is not surprising because, as noted earlier, crimes against humanity evolved out of the traditional laws and customs of war in the late nineteenth and early twentieth centuries.[77] It is clear from the Judgment of the Tribunal that the IMT viewed crimes against humanity as a subsidiary of traditional war crimes.[78] As one leading scholar has written, the Al-

74. *See supra* notes 60-62.

75. *Nuremberg Judgment, supra* note 71, at 216. The Tribunal was on safest ground when it argued that the war crimes articulated in Article 6(b) merely stated existing international law. *Id.* at 248. The Tribunal also made an effort to justify the prohibition on aggressive war by relying on the Kellogg-Briand Pact and similar statements that had been made renouncing war "as an instrument of national policy." *Id.* at 217-20. However, the Tribunal made no effort to justify its conclusion that crimes against humanity represented existing international law. *Id.* at 248-49. Instead, the Tribunal noted that it was "bound by the Charter" in defining crimes against humanity and added that the crimes against humanity that had been committed were also punishable as war crimes. *Id.* at 248, 249. The failure to articulate an argument that crimes against humanity represented existing international law appears to be a tacit admission that such an argument would have been unconvincing.

76. *See Nuremberg Judgment, supra* note 71, at 216. Indeed, the Tribunal seems to hint at this when it suggests that the IMT Charter not only represents existing international law but also "is itself a contribution to international law." *See also* Cassese, *supra* note 45, at 8 (noting that while crimes against humanity and crimes against peace may have violated the principles of legality in 1945, as the result of the WWII tribunals they did become customary international law).

77. *Supra* Section II(A). *See also* Bassiouni, *supra* note 8, at 545 ("[T]he historical-legal foundation of 'Crimes Against Humanity' is found in international humanitarian law and in the normative aspects of the international regulation of armed conflicts.").

78. The Tribunal devoted four pages to its discussion of the existence of a prohibition on aggressive war. *Nuremberg Judgment, supra* note 71, at 217-20. By contrast, the legal basis for crimes against humanity was not treated separately but subsumed within the discussion of war crimes. *See id.* at 248. Even within the discussion of the legal basis for war crimes, it is relegated to a single paragraph at the very end of the discussion. *Id.* at 249.

More than twenty pages were spent detailing the evidence of Germany's aggressive wars. *See id.* at 186-214. Similarly, more than twenty pages were devoted to a detailed discussion of the evidence of war crimes. *See id.* at 224-47. The evidence

lies and the IMT judges treated crimes against humanity as "simply an extension of war crimes . . . ."[79]

D. The Other World War II War Crimes Tribunals

While the International Military Tribunal at Nuremberg is the best known and most influential of the World War II tribunals, it was not the only one. In fact, it only tried a limited number of the most senior German war criminals. Several other tribunals were set up to try other classes of offenders, including the courts set up under Control Council Law No. 10 that operated in the Allied Zones in occupied Germany, and the International Military Tribunal for the Far East (IMTFE) at Tokyo, which tried Japanese leaders. The IMT at Nuremberg had the most impact on the law of crimes against humanity, both because it was first and because it was the best-known, but the other tribunals must be considered as well. All three of these structures defined crimes against humanity slightly differently, as the definitions appear to have been tailored to the specific character of the conflict, as well as to the needs of the victors.

1. The Tokyo War Crimes Tribunals

Just a few months after the IMT Charter was created by the Allied governments, General Douglas MacArthur issued the Charter of the International Military Tribunal for the Far East (hereafter "IMTFE Charter").[80] Unlike the London Agreement, the IMTFE Charter was not signed by the governments of the Allied powers; it was essentially an American undertaking,[81]

---

for crimes against humanity, on the other hand, is not separately discussed, although the Tribunal does treat the "persecution of the Jews" in a separate subsection within its discussion of the evidence of war crimes. *Id.* at 243-47. Ultimately, the Tribunal suggested that the evidence for crimes against humanity was essentially the same as that supporting the charges of war crimes. *Id.* at 249.

Susan Lamb has suggested that the Tribunal may have intentionally blurred the distinctions between war crimes and crimes against humanity in order to blunt criticisms that crimes against humanity violated the principle of legality. *See* Lamb, *infra* note 381, at 737.

79. Bassiouni, *supra* note 8, at 545. *See also* Swaak-Goldman, *supra* note 45, at 148.

80. *See* Charter of the International Military Tribunal for the Far East, dated Jan. 19, 1946, *reprinted in* Documents and Cases, *supra* note 15, at 73-77 [hereinafter IMTFE Charter]. *See also* Cassese, *supra* note 45, at 7 (describing the creation of the IMTFE); Bassiouni, *supra* note 8, at 566-67 (describing the creation of the IMTFE).

81. *See* Cassese, *supra* note 45, at 7 n.14 (noting that the IMTFE Charter was drafted by the American military and the other Allies were consulted only after it had been issued); Bassiouni, *supra* note 8, at 566.

modeled on the IMT at Nuremberg.[82] In particular, it included crimes against humanity within its jurisdiction, and used a definition that was almost identical to that used by the IMT.[83] The only significant difference between the two definitions is that the IMTFE omits religious persecution from its definition of crimes against humanity.[84] Ultimately, the IMTFE's definition of crimes against humanity is so similar to the IMT's definition that it added little to what the IMT had already established with regard to crimes against humanity.

2. *Trials of "Lesser" War Criminals in Europe*

The Nuremberg Tribunal only tried a handful of the most senior German leaders. The Allies also needed a way to deal with the larger number of lower ranking Germans who were believed to have been responsible for various crimes during World War II. They could not use the German court system because they had already dissolved the German government and assumed direct control of the country.[85] This had been accomplished by dividing Germany into separate American, British, French and Soviet Zones. Each occupying country established its own military government in its Zone, but the Allies also created a Control Council, composed of one representative from each Zone, to deal with issues that affected the whole country.[86] One of the

82. *See* Cassese, *supra* note 45, at 7-8; Bassiouni, *supra* note 8, at 566 (noting that the IMTFE Charter was "substantially the same" as the IMT Charter).

83. *See* IMTFE Charter, supra note 80, art. 5(c) (defining crimes against humanity). *See also* Bassiouni, *supra* note 8, at 566-67 (noting similarities in how the IMT and the IMTFE defined crimes against humanity).

84. The IMT prohibited "persecutions on political, racial, or religious grounds . . . ." *See* IMT Charter, Art. 6(c). By contrast, the IMTFE prohibited only "persecutions on political or racial grounds . . . ." *See* IMTFE Charter, *supra* note 80, art. 5(c). Religious persecution is not included. It has been suggested that religious persecution was omitted because "the Nazi crimes against Jews did not have a counterpart in the Asian conflict." *See* Bassiouni, *supra* note 8, at 567. The omission does not seem to have impacted the IMTFE's ability to prosecute Japanese war criminals.

85. *See* Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by Allied Powers, dated Jun. 5, 1945, *available at* http://www.yale.edu/lawweb/avalon/wwii/ger01.htm (last visited Apr. 21, 2006). The Declaration states that the United States, Great Britain, France and the Soviet Union assumed "supreme authority" over Germany, "including all the powers possessed by the German Government . . . ." *Id.*, Preamble. It goes on to state that the Allies had the power to "issue proclamations, orders, ordinances and instructions" as necessary to implement the provisions of the Declaration. *Id.*, art. 13. All Germans, whether civilian or military, were required to carry out those instructions "unconditionally." *Id.*

86. *See* The Berlin (Potsdam) Conference: Protocol of the Proceedings, dated Aug. 1, 1945, *available at* http://www.yale.edu/lawweb/avalon/decade/decade17.htm (last visited Apr. 21, 2006). The Potsdam Conference established that "supreme authority in Germany is exercised, on instructions from their respective Governments, by the Commanders-in-Chief of the armed forces of the United States of America,

purposes of the Control Council was to arrest and try "[w]ar criminals and those who have participated in planning or carrying out Nazi enterprises involving or resulting in atrocities or war crimes."[87] This goal was implemented through the promulgation of Control Council Law No. 10, which provided a mechanism for trying the so-called "lesser" war criminals in occupied Germany.[88]

Control Council Law No. 10 contains the three main crimes that were present in the IMT Charter—war crimes, crimes against peace and crimes against humanity.[89] However, each crime is defined slightly differently than in the Charter. The changes seem to have been made in an attempt to expand the scope of the crimes. For example, language about "including but not limited to" was inserted in each of the crimes. Crimes against humanity were also modified to include imprisonment, torture and rape in the list of prohibited acts,[90] even though those acts would already have been prohibited by the IMT's reference to "other inhumane acts."[91] Finally, the definition of crimes against humanity was changed to remove the phrase "in execution of or in connection with any crime within the jurisdiction of the Tribunal," which appeared in the IMT Charter. This is the most significant change, as it appears to remove the required connection to either a war crime or a crime against peace.[92]

The expanded scope of the definitions has led to debates about whether Control Council Law No. 10 was meant to be an expression of international or domestic law. The law refers to the IMT Charter and purports to integrate its provisions,[93] which suggests the crimes have an international character. At least one of the courts created under the law concluded that it was applying international law.[94] On the other hand, the law was promulgated by the Control Council acting in its capacity as the

---

the United Kingdom, the Union of Soviet Socialist Republics, and the French Republic, each in his own zone of occupation, and also jointly, in matters affecting Germany as a whole, in their capacity as members of the Control Council." *Id.*, Section II(A)(1).

87. *Id.*, Section II(A)(5).

88. *See* Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity dated Dec. 20, 1945, *available at* http://www.yale.edu/lawweb/avalon/imt/imt10.htm (last visited Apr. 21, 2006) [hereinafter Control Council Law No. 10].

89. *See* Control Council Law No. 10, *supra* note 88, art. II(1).

90. *Compare* IMT Charter, art. 6(c), *with* Control Council Law No. 10, *supra* note 88, art. II(1)(c).

91. *See* Bassiouni, *supra* note 8, at 564.

92. *Id.* at 564.

93. *See* Control Council Law No. 10, *supra* note 88, art. I.

94. *See* Bassiouni, *supra* note 8, at 564 (quoting the decision in The Justice Case).

government of Germany.[95] Moreover, the law was intended to have effect only in Germany, which suggests a domestic character.[96] Regardless of how Control Council Order No. 10 should be viewed, in the immediate aftermath of WWII the IMT's definition of crimes against humanity was viewed as the most accepted statement of international law, including the requirement of a nexus with armed conflict.[97]

E. The Aftermath of World War II—Codifying the Legacy of Nuremburg

The newly-formed United Nations wasted no time in working to solidify the legacy of Nuremberg.[98] In Resolution 95(I) of December 11, 1946, the General Assembly affirmed the "principles of international law recognized by the Charter of the Nürmberg Tribunal and the judgment of the Tribunal."[99] However, the General Assembly did not try to articulate those principles. Instead, the General Assembly asked the Committee on the Progressive Development of International Law and Its Codification, which was created that very same day, to formulate the Nuremberg Principles.[100]

The Committee met throughout the first half of 1947 and eventually prepared a report which recommended establishing a permanent International Law Commission to advise the General Assembly.[101] In November of 1947, the General Assembly agreed, and the International Law Commission (ILC), a body of experts ("persons of recognized competence in international

95. *See supra* notes 85-86.

96. *See* Control Council Law No. 10, Preamble (stating that the law was designed to establish a legal basis for the prosecution of war criminals "in Germany"). Article IV of the law states that "[w]hen any person in a Zone in Germany is alleged to have committed a crime . . . in a country other than Germany" that person is to be transferred to the third country for trial. *Id.*, art. IV. The clear implication is that the courts created under Control Council Law No. 10 did not have jurisdiction over crimes committed outside the territory of Germany. If they were truly international courts, they would have had jurisdiction over war crimes committed outside Germany.

97. *See infra* notes 112-17, 121-23.

98. For example, its third resolution was a call to member states to extradite and punish war criminals in accordance with the IMT Charter. *See* G.A. Res. 3(I) (Feb. 13, 1946), *available at* http://www.un.org/documents/resga.htm.

99. G.A. Res. 95(I) (Dec. 11, 1946).

100. G.A. Res. 94(I) (Dec. 11, 1946) (creating a committee to study "the methods by which the General Assembly should encourage the progressive development of international law and its eventual codification"); G.A. Res. 95(I) (Dec. 11, 1946) (directing the Committee to formulate the Nuremberg principles).

101. *See* Formulation of Nuremberg Principles, Report by J. Spiropoulos, Apr. 12, 1950, *available in* 2 Y.B. Int'l L. Comm'n, L. 181, 188 ¶ 30 (1950). The document is available in electronic form at http://untreaty.un.org/ilc/documentation/english/a_cn4_22.pdf (last visited Apr. 26, 2006).

law") which provides advice on the codification and development of international law to the General Assembly,[102] was created.[103] The ILC took over work on the Nuremberg Principles.[104]

The ILC met to discuss the formulation of the Nuremberg Principles in 1949.[105] Drafting work was done within a Sub Committee of the ILC and draft principles were discussed by the whole Commission.[106] The draft principles followed the definition of crimes against humanity contained in the Charter of the IMT, including the connection with war crimes or crimes against peace.[107] At the end of the ILC's first session, the Commission decided to refer the draft to a rapporteur for further work. In his report, the Rapporteur recommended adopting a definition of crimes against humanity that was worded slightly differently from the one used in the Charter of the IMT, but which retained the requirement of a connection between crimes against humanity and either war crimes or crimes against peace.[108] He acknowledged that according to the Charter of the IMT, crimes against humanity were an international crime only if they were committed in connection with either war crimes or crimes against peace but argued that the IMT had "applied article 6(c) in a very restrictive way."[109] The Rapporteur also suggested the Judgment of the IMT had not precluded the possibility that a broader definition of crimes against humanity (one that did not require a connection with war crimes or crimes against peace) might exist outside of the Charter of the IMT.[110]

---

102. *See* Statute of the International Law Commission, arts. 1, 2 & 16, attached to G.A. Res. 174(III) (Nov. 21, 1947).

103. G.A. Res. 174(III) (Nov. 21, 1947).

104. G.A. Res. 177(III) (Nov. 21, 1947) (delegating the task of formulating the Nuremberg Principles to the International Law Commission). *See generally* Origin and Background of the Development and Codification of International Law at notes 11-14, *available at* http://untreaty.un.org/ilc/ilcintro.htm (last visited Apr. 21, 2006) (describing the formation of the International Law Commission).

105. *See* Report of the International Law Commission on its First Session, dated Apr. 12, 1949, *available in* 1 Y.B. INT'L L. COMM'N 278 (1949). The document is available in electronic form at http://untreaty.un.org/ilc/documentation/english/a_cn4_13_corr1-3.pdf (last visited Apr. 26, 2006).

106. *Id.* ¶ 28.

107. Formulation of the Principles recognized in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal, *available in* 1 Y.B. INT'L L. COMM'N 183, 183 ¶ 60 (1949) (noting that the Sub Committee's draft "followed closely" the provisions of article 6 of the Charter of the IMT and that the Sub Committee had "adopted" the IMT's definition of crimes against humanity "without any modification"). The document is available in electronic form at http://untreaty.un.org/ilc/documentation/english/a_cn4_w6.pdf (last visited Apr. 26, 2006). *See also* Formulation of Nuremberg Principles, *supra* note 101, at 189-90 ¶ 40 (quoting the Sub Committee's definition of crimes against humanity).

108. *Id.* at 194.

109. *Id.*

110. *Id.* at 194 n.65.

The Rapporteur's report was considered by the ILC in June of 1950.[111] His suggestion that crimes against humanity might not require a connection with crimes against peace or war crimes was immediately questioned by the members of the ILC.[112] Several members of the ILC spoke against the Rapporteur's suggestion. The Brazilian representative argued that if the acts described in the definition were not connected with war crimes or crimes against peace, then they were not international crimes at all but merely "common crimes."[113] The Mexican representative "thought the solution would be to consider that crimes against humanity committed without any connexion with war were not crimes under international law, but crimes under domestic law,"[114] and the U.S. representative agreed.[115] The Panamanian representative concurred, stating that the "end of the paragraph [stating the required connection with war crimes or crimes against peace] was necessary to make them crimes under international law."[116]

As a result of the debate, the ILC decided to keep the requirement of a connection with armed conflict in the definition of crimes against humanity and to delete the Rapporteur's footnote, which suggested that crimes against humanity might not require such a connection.[117] Ultimately, the ILC adopted the following definition of crimes against humanity in the Nuremberg Principles:

> Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in conne[ct]ion with any crime against peace or any war crime.[118]

The commentary that accompanies the definition stresses that crimes against humanity could occur outside of armed conflicts,

111. *See* Summary of the 48th Meeting of the ILC, Jun. 16, 1950, *available in* 1 Y.B. INT'L L. COMM'N 51 (1950). The document is also available in electronic form at http://untreaty.un.org/ilc/documentation/english/a_cn4_sr48.pdf (last visited Apr. 26, 2006).

112. *Id.* at 55-58.

113. *Id.* at 56 ¶ 94-95, 113.

114. *Id.* at 57 ¶ 113.

115. *Id.* at 56 ¶ 95 (arguing that the acts listed in the definition of crimes against humanity could not be considered crimes under international law if they were not connected to either war crimes or crimes against peace).

116. *Id.* at 56 ¶ 103.

117. *Id.* at 58 ¶¶ 126, 130-33.

118. Report of the International Law Commission to the General Assembly on its Second Session, *available in* 2 Y.B. INT'L L. COMM'N 364, 377 (1950). The document is also available in electronic form at http://untreaty.un.org/ilc/documentation/english/a_cn4_34.pdf (last visited Apr. 26, 2006).

but only if they are committed in connection with a crime against peace.[119]

The General Assembly, upon receiving the ILC's Nuremberg Principles, invited the member states to comment on them.[120] In the debate that followed, the French delegation took the position that crimes against humanity existed in international law separate from the Charter of the IMT. According to the French, this underlying principle of crimes against humanity was broader than the one described in the IMT Charter and did not require a connection with armed conflict.[121] Israel supported the French position,[122] but it was opposed by the majority of the delegates.[123]

The debate between ILC members and amongst member states of the United Nations about the Nuremberg Principles demonstrates that it was generally accepted that a connection with war was a substantive element of crimes against humanity in the early 1950s. The connection with war made what would otherwise be crimes only punishable under national laws into crimes in international law.[124] This acceptance was not universal, but the definition of crimes against humanity in the Nuremberg Principles appears to have accurately captured the state of customary international law in 1951 and for some time afterwards.

---

119. *Id.* at 377 ¶¶ 122-23.

120. *See* G.A. Res. 488(V) (Dec. 12, 1950). The General Assembly carefully refrained form saying it agreed with the ILC's Nuremberg Principles. *Id.* ("Considering that the International Law Commission has formulated certain principles recognized, according to the Commission, in the charter and judgment of the Nuremberg Tribunal, and that many delegates have made observations during the fifth session of the General Assembly on this formulation.").

121. *See* Second Report on a Draft Code of Offences Against the Peace and Security of Mankind by Mr. J. Spiropoulos, Special Rapporteur, dated Apr. 12, 1951, *available in* 2 Y.B. INT'L L. COMM'N 44, 55 ¶ 118 (1951). This document is available in electronic form at http://untreaty.un.org/ilc/documentation/english/a_cn4_44.pdf (last visited Apr. 26, 2006). *See also* Observations of Governments of Member States relating to the Formulation of the Nuremberg Principles prepared by the International Law Commission, dated Apr. 19, 1951, *available in* 2 Y.B. INT'L L. 104, 109 (1951) (criticizing the ILC for requiring a connection between crimes against humanity and war crimes).

122. *See* Second Report on a Draft Code of Offences Against the Peace and Security of Mankind, *supra* note 121, at 56 ¶ 124. *See also* Summary Record of the 90th Meeting of the ILC, dated May 28, 1951 *available in* 1 Y.B. INT'L L. COMM'N 63, 70 (1951) (noting that France had criticized the definition of crimes against humanity as being too narrow, but that the other delegations had not supported that view). The document is available in electronic form at http://untreaty.un.org/ilc/documentation/english/a_cn4_sr90.pdf (last visited Apr. 28, 2006).

123. *See* Second Report on a Draft Code of Offences Against the Peace and Security of Mankind, *supra* note 121, at 55-56 ¶¶ 116, 120, 121, 123.

124. *See supra* notes 113-16.

F. THE GENOCIDE CONVENTION OF 1948

The Nuremberg Principles were not the only attempt to codify the legacy of WWII. In 1946, the United Nations General Assembly affirmed that genocide, described as "the denial of the right of existence of entire human groups," was "a crime under international law which the civilized world condemns."[125] The General Assembly asked the Economic and Social Council to draw up a convention prohibiting genocide. Drafting work was done on the convention throughout 1947 and was submitted to the General Assembly in late 1948.[126] The General Assembly unanimously adopted the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the Genocide Convention),[127] making it illegal to commit any of the enumerated acts on members of a national, racial, ethnical, or religious group, with the intent of destroying that group "in whole or in part."[128]

Genocide is a subset of crimes against humanity—it covers many of the same physical acts, but requires a very specific intent that was not part of the definition of crimes against humanity as used by the IMT. Article I of the Genocide Convention states that genocide is a crime "whether committed in time of peace or in time of war."[129] The language was added during the drafting process to clarify that genocide was not limited to acts committed during armed conflict.[130] Therefore, the Genocide Convention makes it clear that after 1948 at least one form of crime against humanity—genocide—was no longer explicitly linked to armed conflicts.

However, it did not change the general requirement of a connection to armed conflict for crimes against humanity other than genocide. The ILC's Nuremberg Principles were formulated three years after the Genocide Convention, demonstrating that, even several years after the Genocide Convention, the gen-

125. G.A. Res. 96(I) (Dec. 11, 1946).

126. *See* Matthew Lippman, *Genocide*, *in* 1 INTERNATIONAL CRIMINAL LAW, CRIMES 589-615, 595 (M. Cherif Bassiouni ed., 2d ed. 1999) (describing WWII prosecutions for genocide and their impact on the genesis of the Genocide Convention).

127. *See* G.A. Res. 260(III) (Dec. 9, 1948) (containing the Genocide Convention as an annex).

128. Genocide Convention, art. II, *in* DOCUMENTS AND CASES, *supra* note 15, at 83-85. The enumerated acts are: 1) killing members of the group; 2) causing serious bodily or mental harm to members of the group; 3) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; 4) imposing measures intended to prevent births within the group; or 5) forcibly transferring children of the group to another group. *Id.*

129. Genocide Convention, art. I, *in* DOCUMENTS AND CASES, *supra* note 15, at 83.

130. *See* Matthew Lippman, *supra* note 126, at 596.

erally-accepted definition of crimes against humanity required a connection with armed conflict.[131] Thus, the Genocide Convention removed the requirement of a nexus for genocide but did not alter the nexus requirement for the rest of crimes against humanity.

G. THE 1950's – THE INTERNATIONAL LAW COMMISSION'S WORK ON THE DRAFT CODE OF OFFENSES AGAINST THE PEACE AND SECURITY OF MANKIND

As originally envisaged by the General Assembly, the formulation of the Nuremberg Principles was merely the first step in the process of drafting a code of "offences against the peace and security of mankind or of an International Criminal Code."[132] When the International Law Commission was created in late 1947, the work of drafting a code of offences was assigned to the ILC.[133]

The ILC has two principal roles: 1) the codification of existing international law; and 2) the progressive development of new international law.[134] The drafting of the new code of offences would be an example of the ILC's progressive development of new international law.[135] Consequently, the Rapporteur took the position that ILC should not necessarily be bound by the Nuremberg Principles (which were an attempt to codify existing international law). Rather, the ILC should be willing to expand, contract, or modify the Nuremberg Principles.[136]

The Rapporteur's initial draft of offences placed crimes against humanity, as defined in the Charter of the IMT, and genocide, as defined in the Genocide Convention, together under

131. *See supra* notes 113-16, 121-23. All of these statements were made after the Genocide Convention had been opened for signature in 1948.

132. *See* G.A. Res. 95(I) (Dec. 11, 1946).

133. G.A. Res. 177(III) (Nov. 21, 1947).

134. *See* Statute of the International Law Commission, art. 15, attached to G.A. Res. 174(III) (Nov. 21, 1947) ("'Progressive development of international law' is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law .... '[C]odification of international law' is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive state practice, precedent and doctrine.").

135. *See* Draft Code of Offences Against the Peace and Security of Mankind, Report by J. Spiropoulos, Special Rapporteur, dated April 26, 1950, *available in* 2 Y.B. INT'L L. COMM'N 253-278 (1950), at 255 ¶ 2 (noting that the Rapporteur was not codifying existing international law but rather engaging in a task of a more "speculative nature"); *id.* at 257 ¶ 20 (noting that the ILC had discussed the issue and concluded that the draft code of offences represented the progressive development of international law).

136. *Id.* at 260 ¶¶ 43-45.

the heading of "Crime No. VIII."[137] However, this was awkward because genocide is essentially a subset of crimes against humanity.[138] The Rapporteur was certainly aware of this problem and noted that the "distinction between these two crimes is not easy to draw."[139] However, he described two significant differences: 1) "genocide is different from crimes against humanity in that, to prove it, no connexion with war need be shown"; and 2) "crimes against humanity do not necessarily involve offences against or persecutions of groups."[140] Nevertheless, he was still unhappy with his formulation and suggested that crimes against humanity be dropped so as to avoid overlap with genocide and because he thought that governments might be reluctant to accept the inclusion of crimes against humanity.[141]

The ILC reviewed the Rapporteur's first report in June of 1950 and endeavored to draft a code of offences based on it.[142] The ILC's initial draft separated genocide and crimes against humanity into different crimes but essentially retained the Nuremberg Tribunal's definition of crimes against humanity, including the connection to armed conflict.[143] The ILC was apparently not satisfied with its work because it referred the draft code back to the Rapporteur and asked him to reconsider his report in light of it.[144] In his second report, the Rapporteur made some very minor changes to the definition of crimes against humanity,[145] but the report focused on the reactions of governments to the ILC's

137. *Id.* at 263.

138. *See supra* Section II(F).

139. *See* Draft Code of Offences Against the Peace and Security of Mankind, *supra* note 135, at 263 ¶ 65.

140. *Id.*

141. *Id.* at 263 ¶ 66.

142. *See* Report of the International Law Commission to the General Assembly on its Second Session, *available in* 2 Y.B. INT'L L. COMM'N 364-385 (1950), at 380 ¶¶ 151, 157 (noting that the ILC discussed the Rapporteur's report and decided to create a Drafting Sub-Committee to produce a "provisional draft of a code").

143. *See* Text Prepared by the Drafting Committee, *available in* 1 Y.B. INT'L L. COMM'N 257 (1950). The document is available in electronic form at http://untreaty.un.org/ilc/documentation/english/a_cn4_r6.pdf (last visited Apr. 28, 2006). In the Sub-Committee's draft, crimes against humanity could only occur in connection with: 1) the planning, preparation or use of armed force in international relations; 2) activities organized or tolerated by one state that were intended to create terror in the population of another state; and 3) forcible attempts to annex territory. *Id.*

144. *See* Report of the International Law Commission to the General Assembly on its Second Session, *supra* note 142, at 380 ¶ 157.

145. The definition of crimes against humanity was still clearly based on Article 6(c) of the IMT Charter and retained a connection to armed conflict. *See* Second Report on a Draft Code of Offences Against the Peace and Security of Mankind, *supra* note 121, at 59 ¶ 9. Crimes against humanity could only be committed in connection with: 1) the planning, preparation or use of force; 2) activities organized or tolerated by one state that were intended to create terror in the population of

formulation of the Nuremberg Principles[146] and on the thorny question of how to define aggression.[147]

The ILC considered the Rapporteur's second report during its third session, in 1951. During the discussion of crimes against humanity, the debate about whether a connection with armed conflict was required surfaced again.[148] The Rapporteur's draft qualified the definition of crimes against humanity by requiring that they be committed "in execution of or in connexion with" certain other offences defined in his draft code.[149] Those other offences were the analogous offences to crimes against peace and war crimes, and included the planning, preparation or use of force, and violations of the laws or customs of war.[150] The French representative proposed deleting the reference to a connection with other crimes so that crimes against humanity would not be connected with armed conflicts.[151] Various other representatives opposed the proposal.[152]

However, the strongest opposition came from the Rapporteur. He noted that the French proposal was far more than a simple drafting change and that it would create a brand new crime under international law.[153] Moreover, he warned that the creation of a brand new crime was likely to jeopardize the success of the entire draft code. He asked the Commission to "bear in mind the fact that in the General Assembly many delegations might refuse to accept the draft Code as a whole for the sole reason that it contained that new crime."[154] Ultimately, the French representative's proposal was put to a vote and decisively defeated.[155]

---

another state; 3) forcible attempts to annex territory; and 4) violations of the laws or customs of war. *Id.*

146. *Id.* at 45-57.

147. *Id.* at 60-69.

148. During the formulation of the Nuremberg Principles, the French delegation had argued that crimes against humanity should not require a connection with armed conflict. The French view had not been widely accepted. *See supra* notes 121-23.

149. *See supra* note 145.

150. *Id.*

151. *See* Summary Record of the 91st Meeting, dated May 29, 1951, *available in* 1 Y.B. INT'L L. COMM'N 72, 74 ¶¶ 23-25 (1951); *Id.* at 75 ¶ 50. The document is available in electronic form at http://untreaty.un.org/ilc/documentation/english/a_cn4_sr91.pdf (last visited Apr. 28, 2006). This position was consistent with France's position during the formulation of the Nuremberg Principles, where it had also advocated the removal of the nexus with armed conflict. *See supra* note 121.

152. *See* Summary Record of the 91st Meeting, dated May 29, 1951, *supra* note 151, at 74 ¶28 (describing the French proposal as "going too far"); *Id.* at 75 ¶ 43 (opposing the French proposal); *Id.* at 75 ¶ 47 (opposing the French proposal).

153. *Id.* at 74 ¶ 30-32.

154. *Id.* at 74 ¶ 32.

155. *Id.* at 76 ¶ 67.

The French representative immediately tabled a new proposal that crimes against humanity be tied instead to "any of the crimes defined in this code."[156] The Rapporteur again opposed the amendment on the grounds that, although most of the crimes in the code related to armed conflicts, genocide was one of the crimes in the draft code, genocide could occur during peacetime,[157] and therefore the French proposal would create the possibility of crimes against humanity occurring without a connection with armed conflict.[158] Despite the Rapporteur's opposition, the amendment was adopted.[159] Consequently, by 1951, the ILC's definition of crimes against humanity had become:

> Inhuman acts by the authorities of a State or by private individuals against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds, *when such acts are committed in execution of or in connection with other offences defined in this article.*[160]

The newly defined crimes against humanity was still not an independent crime. It could only be committed in conjunction with other international crimes, but the ILC's formulation would have allowed the application of crimes against humanity without a connection to armed conflict.

The General Assembly postponed consideration of the ILC's draft in 1951 and then again in 1952.[161] In 1953, the Commission discussed the matter again and requested that the Rapporteur present an updated report to the ILC's 1954 session.[162] In his updated report, the Rapporteur concluded that the comments of member states were too contradictory to convince him

156. *Id.* at 76 ¶ 68.

157. *See* Genocide Convention, art. I, *reprinted in* DOCUMENTS AND CASES, *supra* note 15, at 83-85 ("The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law . . . .").

158. *See* Summary Record of the 91st Meeting, dated May 29, 1951, *supra* note 151, at 77 ¶¶ 69, 78.

159. *Id.* at 77 ¶ 76.

160. Report of the International Law Commission on its Third Session, May 16 – Jul. 27, 1951, *available in* 2 Y.B. INT'L L. COMM'N 123, 136 (1951) (emphasis added). The document is available in electronic form at http://untreaty.un.org/ilc/documentation/english/a_cn4_48_corr1-2.pdf (last visited Apr. 28, 2006).

161. *See* International Law Commission, Draft Code of Offences Against the Peace and Security of Mankind (Part I) at notes 10-11 (describing the history of the draft code). The document is available in electronic form at http://untreaty.un.org/ilc/summaries/7_3.htm (last visited Apr. 28, 2006). *See also* Report of the International Law Commission Covering the Work of its Fifth Session, Jun. 1 – Aug. 14, 1953, *available in* 2 Y.B. INT'L L. COMM'N 231 ¶¶ 167-68 (1953).

162. Report of the International Law Commission Covering the Work of its Fifth Session, *supra* note 161, at 231 ¶ 169.

to modify the text that had been adopted by the ILC in 1951.[163] During the discussions of the Rapporteur's report before the 1954 session of the ILC, the proposal to drop the connection between crimes against humanity and other international crimes was again debated.[164] The debate was essentially a reprise of the earlier debates about the Nuremberg Principles[165] and the earlier drafts of the Code.[166] Several representatives argued that crimes against humanity existed outside of and was broader than the Nuremberg Principles,[167] while the others responded that the amendment would effectively propose the creation of a new and overly-broad crime under international law.[168] In particular, the Rapporteur warned that the proposed amendment would require that "any violation of human rights that constituted an ordinary crime [ ] be treated as an international offence."[169] The issue was eventually put to a vote, and the proposed deletion of the connection with other crimes was approved on a very close vote, with six in favor, five opposed and one abstention.[170]

At the very next meeting, the ILC Commissioners realized that the Rapporteur had been right, and that the deletion of the connection with other crimes had left them with a definition of crimes against humanity[171] where just about any human rights violation committed by a private individual for any political, racial, religious or cultural reason would constitute an international crime.[172] The ILC decided to reconsider how to limit the definition so that it did not turn too many domestic crimes into international ones.[173] The debate continued during the next two sessions, with various solutions being proposed. Ultimately, the

163. *See* Troisieme Rapport de J. Spiropoulos, Rapporteur Special, dated Apr. 30, 1954, *available in* 2 Y.B. INT'L L. COMM'N 118 (1954). The Rapporteur did note that Yugoslavia had suggested the removal of the connection between crimes against humanity and the other crimes in the draft code. *Id.* On the other hand, the Netherlands had criticized the definition of crimes against humanity for exceeding the scope of the IMT Charter. *Id.*

164. *See* Summary Record of the 267th Meeting, dated Jul. 13, 1954, *available in* 1 Y.B. INT'L L. COMM'N 129, 132 (1954).

165. *See supra* notes 113-16, 121-23.

166. *See supra* notes 148-155.

167. *See* Summary Record of the 267th Meeting, *supra* note 164, ¶¶ 41, 45, 47-48.

168. *Id.* ¶¶ 42, 46, 52, 54.

169. *Id.* ¶ 54.

170. *Id.* ¶ 59.

171. After the deletion of the connection with other crimes, the ILC's definition was now: "Inhuman acts by the authorities of a State or by private individuals against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds."

172. *See* Summary Record of the 268th Meeting, dated Jul. 15, 1954, *available in* 1 Y.B. INT'L L. COMM'N, 134, 135 (1954) (acknowledging that the text, as amended, was "unsatisfactory" and "meaningless").

173. *Id.* ¶ 11.

ILC presented the following text to the General Assembly in its 1954 report:

> Inhuman acts such as murder, extermination, enslavement, deportation, or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.[174]

The Commission noted that it had "decided to enlarge the scope of the paragraph so as to make the punishment of the acts . . . independent of whether or not they are committed in connexion with other offences defined in the draft Code."[175] Both sides of the debate realized that this definition of crimes against humanity was considerably broader than existing international law.[176]

This represented the last work that would be done on the draft code for many years.[177] In 1954, the General Assembly decided to postpone consideration of the draft code because of difficulties arising out of the definition of aggression.[178] The draft code was not raised again by the General Assembly until the late 1970s.[179]

H. The 1960s and 1970s – Adolf Eichmann's Trial, the Conventions on Statutes of Limitations and the Apartheid Convention

1. The Eichmann Trial

The most significant war crimes trial to occur during the 1960s was that of Adolf Eichmann. He had been an officer in the German S.S. during World War II, where he was responsible for the logistics of identifying and transporting people to concentra-

174. Report of the International Law Commission Covering the Work of its Sixth Session, Jun. 3 – Jul. 28, 1954, *available in* 2 Y.B. Int'l L. Comm'n 140, 150 (1954).

175. *Id.* at 150.

176. Proponents called it "a great step forward in the progress of international law." *See* Summary Record of the 269th Meeting, *available in* 1 Y.B. Int'l L. Comm'n 140-146 ¶ 40 (1954). Opponents described it as "far too revolutionary in the present state of international law." *Id.* ¶ 42.

177. *See generally* International Law Commission, Draft Code of Offences Against the Peace and Security of Mankind, *supra* note 161, at notes 13-16 (describing the lull in work on the draft code between 1954 and the late 1970s).

178. *See* G.A. Res. 897(IX) (Dec. 4, 1954). The difficulty of finding an acceptable definition of aggression was exacerbated by the Cold War, which divided the East and West. That confrontation was the cause of much deliberate delay in the work of the United Nations, particularly efforts to develop international criminal law. *See* Cassese, *supra* note 45, at 10 ("The overriding explanation for why the substantial work of this period was unable to come to fruition can thus be found within the political stagnation caused by the Cold War . . . ."). Consideration of the draft code was postponed again in 1957, 1968 and 1974. *See* G.A. Res. 1186(XII) (Dec. 11, 1957); International Law Commission, Draft Code of Offences Against the Peace and Security of Mankind, *supra* note 161, at nn.13-14.

179. *See infra* Section II(I)(1).

tion camps. In 1960 he was kidnapped in Argentina by Israeli agents and flown to Israel where he was put on trial for war crimes, "crimes against the Jewish people," and crimes against humanity.[180]

Under Israeli law, crimes against humanity were defined as "murder, extermination, enslavement, starvation, or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds."[181] This definition, most notably, removed the connection with armed conflicts. This is not surprising, as Israel had been the only country that had supported France's proposal for the removal of the connection with armed conflicts from the Nuremberg Principles' definition of crimes against humanity.[182] "Nevertheless, it does not appear that the conviction of Eichmann for crimes against humanity was based on any of his acts prior to the outbreak of war in 1939."[183]

2. *The 1968 Convention on the Non-Applicability of Statutes of Limitations to War Crimes and Crimes Against Humanity*

The late 1960s and the early 1970s saw the creation of two treaties which dealt with crimes against humanity. The first was the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.[184] The parties to the Convention agreed that statutes of limitation should not apply to war crimes or crimes against humanity. What is interesting about the Convention is the definition of crimes against humanity. The Convention defines crimes against humanity as including four categories of crimes: 1) crimes against humanity "as they are defined in the Charter of the International Military

180. A complete (and very voluminous) record of the trial proceedings is available at http://www1.us.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/ (last visited May 4, 2006). Of particular interest is the Judgment of the trial court (the District Court of Jerusalem), *see* http://www1.us.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Judgment/, and the Judgment of the appeals court (the Supreme Court of Israel), *see* http://www1.us.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Appeal/.

181. Richard Baxter, *The Municipal and International Law Basis of Jurisdiction Over War Crimes*, *in* 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW, JURISDICTION AND COOPERATION 65, 81 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973) (quoting the Nazis and Nazi Collaborators (Punishment) Law 5710-1950); RATNER & ABRAMS, *supra* note 27, at 52.

182. *See supra* note 122.

183. Baxter, *supra* note 181, at 84. *See also* RATNER & ABRAMS, *supra* note 27, at 52 (noting that whether crimes against humanity required a nexus with armed conflict was irrelevant to Eichmann's conviction).

184. *See* G.A. Res. 2391(XXIII) (Nov. 26, 1968) (containing the text of the Convention as an annex).

Tribunal"; 2) "eviction by armed attack or occupation"; 3) "inhuman acts resulting from the policy of apartheid"; and 4) genocide "as defined in" the 1948 Genocide Convention.[185] This definition is potentially important because, by adopting the definition of crimes against humanity in the Charter of the IMT, the Convention apparently adopts the IMT's requirement of a connection with armed conflict. The Convention also mentions two kinds of crimes against humanity that do not require a connection with armed conflict — apartheid[186] and genocide[187] — but the overall impression is that the Convention requires a connection with armed conflict except where specific crimes, like apartheid and genocide, had developed that were explicitly not connected with armed conflict.

The Convention on Statutes of Limitation is fundamentally a political document. Many of the newly-created developing states viewed the IMT Charter and the Genocide Convention as embodying the viewpoints of the developed states and wished to use the Convention on Statutes of Limitation to expand the definition of crimes against humanity.[188] For example, the representative of Dahomey (now Benin) stated that the definition of crimes against humanity in the Charter of the IMT "represented the views of the allied Powers in 1945 . . ." and argued that "because of their limited purpose, those definitions were no longer suitable for present-day world needs."[189]

---

185. *See* Convention on the Non-Applicability of Statutory Limitations, *supra* note 184, art. I(b).

186. In 1966 the General Assembly had declared that "the policies of apartheid practised by the Government of South Africa [were] a crime against humanity." *See* G.A. Res. 2202(XXI), ¶ 1 (Dec. 16, 1966). There was no armed conflict going on in South Africa at the time, and it was generally agreed that, to the extent that apartheid represented a crime against humanity, it could occur in the absence of an armed conflict. However, many Western states opposed the inclusion of apartheid as a crime against humanity. *See infra* note 198.

187. The Genocide Convention specifically states that genocide does not require a nexus with armed conflict. *See supra* notes 129-30.

188. *See* Robert H. Miller, *The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 65 AM. J. INT'L L. 476, 485 (1971).

189. *See* U.N. GAOR, 3rd Comm. 23rd Sess., 1567th mtg., ¶ 24, U.N. Doc. A/C.3/SR.1567 (Oct. 10. 1968). Other countries expressed similar positions. For example, the representative of Tanzania noted that the Charter of the IMT "and the principles formulated in Europe in 1945 were of much less interest to the [African and Asian] countries than was the present-day fact of apartheid." *See* U.N. GAOR, 3rd Comm., 23rd Sess., 1568th mtg., ¶12, U.N. Doc. A/C.3/SR.1568 (Oct. 10, 1968). The Kenyan representative said that "[i]t was not sufficient to refer to international law in defining the crimes in question since that law, which had been formulated in the past by the developed countries, did not take into account certain present-day realities which were of the highest importance for the young countries." *See* U.N. GAOR, 3rd Comm., 23rd Sess., 1566th mtg., ¶5, U.N. Doc. A/C.3/SR.1566 (Oct. 9, 1968).

The language about "eviction by armed attack or occupation" was added at the request of Arab states that were looking to criminalize the actions of Israel in the territories it had seized during the 1967 conflict in the Middle East.[190] It was supported by countries like Libya,[191] Syria[192] and Yemen.[193] The language about "inhuman acts resulting from the policy of apartheid" was added at the request of African states, including Guinea, Mauritania, Mali, Kenya, Upper Volta (now Burkina Faso), Burundi, Ivory Coast, Congo Brazzaville, and Tanzania,[194] that wished to criminalize the actions of South Africa and Portugal.[195] These additions were supported by several Soviet Bloc countries,[196] and a number of other developing countries.[197]

The expansion of crimes against humanity was opposed by many Western states and Latin American states on the grounds that the changes were either too political, too vague to serve as the basis for criminal prosecutions, or an inappropriate attempt to modify the substantive elements of the crime in a treaty about statutes of limitation.[198] Less than half of the member states of

190. *See* Miller, *supra* note 188, at 490.

191. The Libyan representative to the debates argued that the definition of crimes against humanity had to be broad enough to include both the IMT's definition and crimes deriving from a policy of aggression "such as those caused by Zionist expansion in the Middle East." U.N. GAOR, 3rd Comm., 23rd Sess., 1573rd mtg., ¶ 19, U.N. Doc. A/C.3/SR.1573 (Oct. 15, 1968).

192. The Syrian representative "welcomed" the fact that the "systematic policy of eviction of the Arab population practised by Israel since 1948 . . . came within the scope of the convention." U.N. GAOR, 3rd Comm., 23rd Sess., 1573rd mtg., ¶ 20, U.N. Doc. A/C.3/SR.1573 (Oct. 15, 1968).

193. The Yemeni representative was "pleased" that the convention would apply to the "new crimes committed by the neo-nazi regime in Israel." U.N. GAOR, 3rd Comm., 23rd Sess., 1573rd mtg., ¶ 40, U.N. Doc. A/C.3/SR.1573 (Oct. 15, 1968).

194. U.N. GAOR, 3rd Comm., 23rd Sess., 1565th mtg., ¶ 31 (Guinea); U.N. Doc. A/C.3/SR.1565 (Oct. 9, 1968); *id.* ¶ 37 (Mauritania); *id.* ¶ 41 (Mali); U.N. GAOR, 3rd Comm., 23rd Sess., 1566th mtg. ¶ 5 (Kenya), U.N. Doc. A/C.3/SR.1566 (Oct. 9, 1968); *id.* ¶ 8 (Upper Volta); U.N. GAOR, 3rd Comm., 23rd Sess., 1567th mtg., ¶ 23(Burundi), U.N. Doc. A/C.3/SR.1567 (Oct. 10, 1968); *id.* ¶ 25 (Dahomey); U.N. GAOR, 3rd Comm., 23rd Sess., 1568th mtg., ¶ 7 (Ivory Coast), U.N. Doc. No. A/C.3/SR.1568 (Oct. 10, 1968); *id.*, ¶ 8 (Congo Brazzaville); *id.* ¶ 13 (Tanzania);

195. *See* Miller, *supra* note 188, at 491.

196. *Id. See also* U.N. GAOR, 3rd Comm., 23rd Sess., 1565th mtg., ¶ 27 (Ukraine), U.N. Doc. A/C.3/SR.1565 (Oct. 9, 1968).; U.N. GAOR, 3rd Comm., 23rd Sess., 1566th mtg., ¶ 12 (Soviet Union), U.N. Doc. A/C.3/SR.1566 (Oct. 9, 1968).; U.N. GAOR, 3rd Comm., 23rd Sess., 1567th mtg., ¶ 2 (Yugoslavia), U.N. Doc. A/C.3/SR.1567 (Oct. 10, 1968); *id.* ¶ 4 (Poland); *id.* ¶ 22 (Czechoslovakia); *id.* ¶ 31 (Byelorussia).

197. U.N. GAOR, 3rd Comm., 23rd Sess., 1563rd mtg., ¶ 33 (United Arab Republic), U.N. Doc. A/C.3/SR.1563 (Oct. 8, 1968); U.N. GAOR, 3rd Comm., 23rd Sess., 1565th mtg., ¶ 2 (Libya), U.N. No. A/C.3/SR.1565 (Oct. 9, 1968); *id.* ¶ 18 (India); *id.* ¶ 20 (Iraq); *id.* ¶ 24 (Morocco); U.N. GAOR, 3rd Comm., 23rd Sess., 1566th mtg., ¶ 3 (Cyprus), U.N. Doc. A/C.3/SR.1566 (Oct. 9, 1968).

198. *See* Miller, *supra* note 188, at 491. Western states explicitly opposing the additions included the United Kingdom, the United States, France, Norway,

the United Nations voted in favor of the Convention, and no Western state did so.[199] Western countries refused to join the Convention, and in 1975 it would have been quite clear that the Convention was primarily the work of developing countries in Africa, with the support of Soviet-aligned countries in Eastern Europe.[200]

However, at the Convention there was some debate about the necessity of a nexus with armed conflict in the definition of crimes against humanity from which it is possible to shed light on many states' views. In early 1967, the UN Secretary-General's office had prepared draft language for a convention on statutes of limitation in response to a request from the Economic and

---

Belgium, Italy, New Zealand, the Netherlands, Portugal, Australia, and Canada. and Japan. U.N. GAOR, 3rd Comm., 23rd Sess., 1564th mtg., ¶ 2 (United Kingdom), U.N. Doc. A/C.3/SR.1564 (Oct. 8, 1968); U.N. GAOR, 3rd Comm., 23rd Sess., 1565th mtg., ¶ 10 (United States), UN Doc. A/C.3/SR.1565 (Oct. 9, 1968) (arguing that the draft convention was "not the appropriate vehicle" for the redefinition of international crimes); *id.* ¶ 13 (France) (decrying the addition of "new and imprecise elements" to the definitions of crimes against humanity); *id.* ¶ 22 (Norway) (arguing that the additions were "extremely vague and imprecise" and stating that the convention should not undertake to "define new types of crimes against humanity"); *id.* ¶¶ 32-33 (Belgium); *id.* ¶ 35 (Italy) (stating that Italy could not support the convention if it "attempted to redefine war crimes and crimes against humanity"); U.N. GAOR, 3rd Comm., 23rd Sess., 1568th mtg., ¶ 10 (New Zealand), U.N. Doc. A/C.3/SR.1568 (Oct. 10, 1968,) (supporting a definition of crimes against humanity that was clear, precise and "based on established law"); *id.* ¶ 29 (the Netherlands) (stating that it was not "advisable . . . to try to redefine all crimes against humanity"); U.N. GAOR, 3rd Comm., 23rd Sess., 1573rd mtg., ¶ 10 (Portugal), U.N. Doc. A/C.3/SR.1573 (Oct. 15, 1968); *id.* ¶ 12 (Australia) (supporting the IMT's definitions of crimes against humanity and arguing that it was "inappropriate in the present context to extend the categories of crime under existing international law"); *id.* ¶ 23 (Canada); *id.* ¶ 38 (Japan).

Latin American states opposing the additions included Chile, Peru, Venezuela, Ecuador, and Uruguay. *See* U.N. GAOR, 3rd Comm., 23rd Sess., 1563rd mtg., ¶ 36 (Chile), U.N. Doc. A/C.3/SR.1563 (Oct. 8, 1968); U.N. GAOR, 3rd Comm., 23rd Sess., 1567th mtg., ¶ 32 (Peru), UN Doc. A/C.3/SR.1567 (Oct. 10, 1968); U.N. GAOR, 3rd Comm., 23rd Sess., 1568th mtg., ¶ 4 (Venezuela), U.N. Doc. A/C.3/SR.1568 (Oct. 10, 1968); U.N. GAOR, 3rd Comm., 23rd Sess., 1573rd mtg., ¶ 31 (Ecuador), U.N. Doc. A/C.3/SR.1573) (Oct. 15, 1968); *id.* ¶ 35 (Uruguay).

199. *See* Miller, *supra* note 188, at 477-78, 500. Ultimately it passed because a large number of countries abstained or refused to vote on it.

200. By December 31, 1975, it had nineteen members: Albania, Belarus, Bulgaria, Cameroon, Cuba, Guinea, Hungary, India, Kenya, Mexico, Mongolia, Nigeria, Philippines, Poland, Romania, Soviet Union, Rwanda, Tunisia, and Ukraine. By January 1, 1980, it had only one more member: Gambia. The major Western countries, like the United States, the United Kingdom, France, Germany, Canada, Australia, Italy and Spain, have never become parties to the Convention. *See* Office of the United Nations High Commissioner for Human Rights, http://www.unhchr.ch/html/menu3/b/treaty6.htm (last visited May 26, 2006) (describing the status of the Convention and listing the parties).

Social Council.[201] The proposed language limited crimes against humanity to the definition contained in the Charter of the International Military Tribunal, and thus required a nexus with armed conflict.[202] The proposal was debated in the 1967 meeting of the Commission on Human Rights, where the necessity of a nexus was raised. According to the summary of the debate, "certain representatives" believed the proposed definition was too narrow and that "the definition of crimes against humanity should now be revised to make such crimes punishable *per se*, whether or not they were prepared or carried out in connexion with any war."[203] "Some other representatives" disagreed.[204] It appears from the language used to describe the two factions that they were supported by approximately the same number of states.

As a result of the disagreement over the language of the draft convention, the Commission decided to appoint a working group to refine the text.[205] However, the working group was not able to reach a consensus on the language. "Some" members of the group, including the United States, urged the adoption of a definition that would have limited crimes against humanity to something similar to genocide.[206] However, a much broader definition that would have eliminated the nexus with armed conflict, received "considerable support."[207] The Commission on Human

201. *See* Commission on Human Rights, Report of the Twenty-Third Session, Feb. 20 – Mar. 23, 1967, ¶¶ 136-37, *in* Economic and Social Council Official Records, Forty-Second Session, Supp. No. 6.

202. *Id.* ¶ 144.

203. *Id.* ¶ 144.

204. *Id.* ¶ 145.

205. *Id.* ¶ 153.

206. *Id.* ¶ 155, art. II, ¶ 2 ("For the purposes of the present convention, any of the acts enumerated in paragraph A of this Article [murder, torture, or inhuman treatment], when committed with intent to destroy in whole or in part a national, ethnical, racial or religious group, as such shall be considered 'crimes against humanity', whether or not committed in time of war."). The inclusion of the specific intent requirement of genocide would have severely limited the scope of crimes against humanity.

207. *Id.* ("For the purposes of the present convention, 'crimes against humanity' shall mean inhuman acts such as genocide, murder, extermination, enslavement, deportation or persecutions, including inhuman acts resulting from the policy of apartheid, committed in time of war or in peace time against the civilian population or certain elements of that population on social, political, economic, racial, religious or cultural grounds by the authorities of the State or by private individuals acting at the instigation or with the toleration of such authorities."). This definition is obviously based on the ILC's 1954 draft Code, with the addition of references to genocide and apartheid. *See supra* note 174 (describing the ILC's 1954 draft Code).

See also Commission on Human Rights, Report of the Twenty-Third Session, *supra* note 201, ¶ 177 (noting that "some representatives" criticized the broader definition as "vague and perhaps too extensive," while others thought that the ILC's formulation, "although never formally approved by the General Assembly, should be given due consideration.").

Rights was unable to reconcile the two camps and simply forwarded both proposals to the General Assembly.[208] Nevertheless, given the language used to describe the strength of the support for the various proposals, it appears that the definition that eliminated the nexus requirement received more support in the working group.

Upon receiving the competing proposals from the Commission on Human Rights, the General Assembly appointed a Joint Working Group to complete the work of preparing a draft convention.[209] The Joint Working Group produced a draft convention that adopted the definition of crimes against humanity that was based on the ILC's 1954 draft code:

> Crimes against humanity, which for the purpose of the Convention shall mean inhuman acts such as genocide, murder, extermination, enslavement, deportation, eviction by armed attack or occupation, or persecutions, including inhuman acts resulting from the policy of *apartheid*, committed in time of war or in peace-time against the civilian population or certain elements of that population on social, political, economic, racial, religious, or cultural grounds by the authorities of the State or by private individuals acting at the instigation or with the toleration of such authorities.[210]

As the Western states would later argue,[211] the Joint Working Group's definition was vague, overtly political, imprecise, overbroad, and certainly an attempt to use the draft Convention to redefine crimes against humanity. Yet it is important because it indicates that there was significant support for the removal of the nexus.

The draft convention prepared by the Joint Working Group was then circulated to member states, who were invited to submit comments.[212] The Secretary-General's office received and compiled those comments. While most of the comments focused on whether or not apartheid belonged in the definition, Dahomey (now Benin) noted with approval the removal of the nexus with

208. *Id.* ¶ 181. *See also* Question of Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, Report of the Secretary-General, dated Aug. 21, 1968, U.N. Doc. A/71774, ¶¶ 2-3.

209. *See* Question of Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, Report of the Secretary-General, *supra* note 208, ¶ 4. It is not unusual for issues to be referred to one of the General Assembly's committees for preliminary work before they are discussed in a plenary session.

210. *Id.*, Annex 1, art. 1(b).

211. *See supra* note 198.

212. *See* Question of Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, Report of the Secretary-General, *supra* note 208, ¶ 4.

armed conflict.[213] Another six states (Bulgaria, Central African Republic, Poland, Togo, Ukraine, and the Soviet Union) endorsed the Joint Working Group's language, which implies support for the removal of the nexus with armed conflict, even though they did not mention the nexus requirement explicitly.[214] However, it appears that an even larger number of states criticized the language for being too vague, imprecise or expansive.[215]

The Joint Working Group's draft language, as well as the comments of member states, was then debated before the Third Committee (Social, Humanitarian and Cultural) in October and

213. *See id.* at 15 (Dahomey) ("Moreover, it is essential that crimes against humanity should not be tied to a state of war and war crimes.").

214. *See id.* at 6 (Bulgaria) ("The text contained in paragraph 9 of the above-mentioned report of the working group should continue to serve as an appropriate basis for the convention itself."); *id.* at 8 (Central African Republic) ("The Government of the Central African Republic has approved the draft convention concerning the punishment of war criminals and of persons who have committed crimes against humanity."); *id.* at 36 (Poland) ("The preamble and article I of the draft convention [the definitions of war crimes and crimes against humanity], which correspond to the international requirements and which meet with the approval of the Polish Government, constitute a particular achievement."); *id.* at 41 (Togo) ("Article 1, paragraph 2 of the convention [the definition of crimes against humanity] thus has the merit of defining this crime and giving examples of it."); *id.* at 43 (Ukraine) ("The provisions of *article I* of the draft convention, which were drafted on the basis of discussion of various proposals, represent in our view a fairly successful enumeration of those crimes to which statutory limitation will not be applied."); *id.* at 45 (Soviet Union) ("This draft, which takes into consideration the positions of the majority of States Members of the United Nations, is on the whole a positive document . . . ."). The support of so many Soviet Bloc states is indicative of the political nature of the definitions.

215. *See id.* at 9 (Chile) (advocating removal of apartheid); *id.* at 14 (Cuba) (arguing that the definition of crimes against humanity was too "loose, vague and obscure"); *id.* at 17 (Denmark) (criticizing the expansion of crimes against humanity); *id.* at 20 (Italy) (criticizing the "extremely imprecise" definition of crimes against humanity); *id.* at 22 (Japan) (describing the definition as "too general" to be useful); *id.* at 23 (Laos) (criticizing the definition as "unacceptable"); *id.* at 26 (Norway) ("[I]t is the opinion of the Norwegian authorities that the provisions of the draft convention, as now presented, are too broad in scope and somewhat lacking in precision."); *id.* at 47 (United States of America) (arguing that the definition of crimes against humanity was "needlessly broad and lack[ed] juridical precision"); Question of Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, Note by the Secretary General, dated Sept. 18, 1968, U.N. Doc. A/7174/Add.1, at 3 (United Kingdom) (arguing that crimes against humanity should be limited to the IMT's definition); Question of Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, Note by the Secretary General, dated Oct. 14, 1968, U.N. Doc. A/7174/Add.2, at 2 (Madagascar) (criticizing expansion of crimes against humanity beyond IMT's definition); Question of Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, Note by the Secretary General, dated Oct. 17, 1968, U.N. Doc. A/7174/Add.3, at 4 (Israel) (expressing concern that the language was too imprecise and ambiguous).

November of 1968.[216] It was these debates that led to the final language of the 1968 Convention on Statutes of Limitation. While there was no explicit discussion about the necessity of a nexus with armed conflict, a number of representatives indicated that they supported the definition of crimes against humanity drafted by the Joint Working Group.[217] As noted above, a number of Western states and Latin American states opposed the Joint Working Group's definition.[218]

The Joint Working Group's language was never voted on by the General Assembly. Four countries, the United States, France, Mexico, and the Netherlands, proposed an amendment to the Joint Working Group's language that would have limited

---

216. *See* Question of the Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, Report of the Third Committee, dated Nov. 21, 1968, U.N. Doc. A/7342. ¶¶ 5-7.

217. *See* U.N. GAOR, 3rd Comm., 23rd Sess., 1563rd mtg., ¶ 33 (United Arab Republic), U.N. Doc. A/C.3/SR.1563 (Oct. 8, 1968) (noting that the United Arab Republic had "striven for the inclusion of the principles set forth in article I"); U.N. GAOR, 3rd Comm., 23rd Sess., 1565th mtg., ¶ 2 (Libya), U.N. Doc. A/C.3/SR.1565 (Oct. 9, 1968) (noting that Libya "whole-heartedly supported the existing text of Article I"); *id.* ¶ 12 (Syria) (noting that Article I "was the most important" and represented an acceptable "balance" between the events of the past and the events of the present); *id.* ¶ 25 (Malaysia) (noting that Malaysia "had no difficulty whatever in agreeing to article I, as currently worded"); *id.* ¶ 31 (Guinea) (endorsing the Joint Working Group's definition); *id.* ¶ 37 (Mauritania) (arguing that Article I was of "fundamental importance"); *id.* ¶ 39 (Bulgaria) (endorsing the Joint Working Group's definition); *id.* ¶ 41 (Mali) (finding the "text of article I acceptable as it stood"); U.N. GAOR, 3rd Comm., 23rd Sess., 1566th mtg., ¶ 5 (Kenya), U.N. Doc. A/C.3/SR.1566 (Oct. 9, 1968) (noting that Kenya "supported article I sub-paragraph (b) as drafted by the Joint Working Group); *id.* ¶ 8 (Upper Volta) (opposing efforts by the United States, France, Mexico and the Netherlands to amend the Joint Working Group's definition of crimes against humanity); U.N. GAOR, 3rd Comm., 23rd Sess., 1567th mtg., ¶ 2 (Yugoslavia), U.N. Doc. A/C.3/SR.1567 (Oct. 10, 1968) (endorsing Article I of the Joint Working Group's draft); *id.* ¶ 3 (Poland) (noting that the Polish delegation found the Joint Working Group's definitions of crimes against humanity "acceptable"); *id.* ¶ 11 (Israel) (noting that Israel would prefer the broader definition offered by the Joint Working Group rather than the narrower definition offered by the United States, France, Mexico and the Netherlands); *id.* ¶ 21 (Indonesia) (finding the Joint Working Group's definition to be "acceptable"); *id.* ¶ 22 (Czechoslovakia) (agreeing to "article I as it appeared in the draft prepared by the Joint Working Group); *id.* ¶ 24 (Dahomey) (stating that Article I of the draft convention "was of the utmost importance to international law"); *id.* ¶ (Byelorussia) (stressing the "importance of article I of the draft convention"); U.N. GAOR, 3rd Comm., 23rd Sess., 1568th mtg., ¶ 7 (Ivory Coast), U.N. Doc. A/C.3/SR.1568 (Oct. 10, 1968) (supporting "the draft convention submitted by the Joint Working Group as it stood"); *id.* ¶ 8 (Congo Brazzaville) (endorsing Article I of the draft convention); *id.* ¶ 11 (Algeria) (arguing that Article I "should be retained" as it was now worded); *id.* ¶ 14 (Tanzania) (noting that Tanzania had voted in favor of the Joint Working Group's draft of Article I); *id.* ¶ 17 (Liberia) (finding "the text of the draft satisfactory on the whole"); *id.* ¶ 26 (Hungary) (stating that "the text of article I adopted by the Joint Working Group was entirely acceptable to his delegation").

218. *See supra* note 198.

crimes against humanity to the IMT definition plus genocide.[219] This amendment was known as the "Four Powers" amendment. Several other countries, including Upper Volta, then proposed an amendment to the Four Powers Amendment that inserted references to apartheid and "eviction by armed attack or occupation."[220] The Upper Volta sub-amendment was voted on first and approved.[221] The Four Powers amendment—as modified by the Upper Volta amendment—was voted on next and also approved.[222] This resulted in the language for Article I that was eventually incorporated into the 1968 Convention on Statutes of Limitation.

Even though the Joint Working Group's language was not adopted, there is evidence that many countries would have accepted the removal of the nexus with armed conflict from the definition of crimes against humanity. A close reading of the negotiating history of the 1968 Convention on Statutes of Limitation reveals that there were two significant factions within the General Assembly. One group, composed primarily of developing countries in Africa, with the support of Soviet Bloc countries, would have accepted the removal of the nexus with armed conflict from the definition of crimes against humanity, although it seemed to be more concerned with the inclusion of apartheid in the definition. Another group, composed largely of Western European, North American and South American countries, opposed efforts to broaden the scope of crimes against humanity and wished to retain the IMT's definition, including the nexus with armed conflict. Perhaps more importantly, neither faction represented a clear majority, although it appears there was slightly more support for the group that wanted to broaden the definition of crimes against humanity.

3. *The 1974 European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes*

The 1968 Convention on Statutes of Limitation was followed in 1974 by the European Convention on the Non-Applicability of

219. *See* Question of the Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, Report of the Third Committee, dated Nov. 21, 1968, UN Doc. A/7342, ¶ 19.

220. *Id.* ¶ 20. The countries that supported amending the Four Powers amendment were India, Kuwait, Mali, Senegal, the United Arab Republic, and Upper Volta. *Id.*

221. U.N. GAOR, 3rd Comm., 23rd Sess., 1568th mtg., ¶ 41, U.N. Doc. A/C.3/SR.1568 (Oct. 10, 1968) ("The second sub-amendment submitted by India, Kuwait, Mali, Senegal, the United Arab Republic, and Upper Volta . . . was adopted by 59 votes to 13, with 26 abstentions.").

222. *Id.*

Statutory Limitation to Crimes Against Humanity and War Crimes,[223] which limits crimes against humanity to genocide as defined in the 1948 Genocide Convention.[224] It does not even cover crimes against humanity as described in the Charter of the IMT, let alone the broader definition proposed by the ILC in 1954. This may be the result of Western European opposition to the way crimes against humanity was defined in the 1968 Convention on Statutes of Limitations and a more general opposition by Western states to the enlargement of crimes against humanity.[225]

4. *The Apartheid Convention*

In 1973, the General Assembly opened the Apartheid Convention for signature.[226] It declared that apartheid was a crime against humanity[227] and provided for individual criminal responsibility.[228] Significantly, apartheid is defined without reference to the existence of armed conflict.[229] Rather, it depends on the establishment and maintenance of domination by one racial group over any other racial group.[230] The Convention was aimed particularly at the "practices of racial segregation and discrimination as practised in southern Africa."[231] Given the focus on the practices of South Africa, it is perhaps not surprising that many African countries signed the treaty quite quickly.[232] It was also

223. *See* European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes, dated Jan. 25, 1974, *reprinted in* DOCUMENTS AND CASES, *supra* note 15, at 535-37.

224. *Id.*, art. 1(1).

225. *See generally supra* Section II(H)(2).

226. G.A. Res. 3068(XXVIII) (Nov. 30, 1973) (containing the text of the International Convention on the Suppression and Punishment of the Crime of Apartheid).

227. Apartheid Convention, *supra* note 226, art. I.

228. *Id.*, art. III.

229. *Id.*, art. II.

230. *Id.*

231. *Id.*

232. Information on signatures, accessions and ratifications of the Apartheid Convention can be found at the website of the United Nations Office of the High Commissioner for Human Rights. *See* http://www.unhchr.ch/html/menu3/b/treaty8_asp.htm (last visited May 26, 2006). By the time the Convention entered into force on July 18, 1976, it had over thirty parties: Algeria, Argentina, Belarus, Benin, Bulgaria, Burkina Faso, Chad, Ecuador, Guinea, Hungary, Iraq, Jamaica, Jordan, Kenya, Mongolia, Nigeria, Oman, Panama, Philippines, Poland, Qatar, Romania, Soviet Union, Rwanda, Somalia, Sudan, Syria, Trinidad and Tobago, Uganda, Ukraine, United Arab Emirates. By January 1, 1980, it had an additional twenty-seven members: Barbados, Burundi, Cameroon, Cape Verde, Cuba, Democratic Republic of Congo, Egypt, El Salvador, Ethiopia, Gambia, Ghana, Guyana, Haiti, India, Kuwait, Liberia, Libya, Madagascar, Mali, Nepal, Niger, Peru, Sao Tome and Principe, Senegal, Seychelles, Tunisia, and Tanzania.

The list of parties overlaps considerably with the parties to the 1968 Convention on Statutes of Limitations. *See supra* note 200.

signed by several Soviet allies in Eastern Europe and by some countries in Central America, South America and the Middle East. It had not been signed by any Western countries by the time it entered into force on July 18, 1976. In fact, major Western powers, like the United States, the United Kingdom, France, Germany, Canada, Australia, Italy and Spain, have never become parties to the Apartheid Convention.[233]

I. THE 1980's AND 1990's – THE ILC, THE *AD HOC* CRIMINAL TRIBUNALS, AND THE INTERNATIONAL CRIMINAL COURT

1. The ILC Once Again Takes Up Work on a Draft Code of Offences Against the Peace and Security of Mankind

In December 1978, the General Assembly "recall[ed]" that it had postponed consideration of the ILC's Draft Code of Offences Against the Peace And Security of Mankind repeatedly since 1954 and invited member states to submit comments on the draft. Furthermore, the General Assembly tentatively decided that it would discuss the Draft Code and the member states' comments during the 35th session, in 1980.[234] In 1980, the General Assembly repeated its invitation,[235] and in 1982, after a hiatus of nearly thirty years, the ILC once again took up the draft code of offences.[236]

The process, unsurprisingly, was slow,[237] and it was not until 1984 that the ILC began its work by basically accepting the 1954 draft code's definition of crimes against humanity, including the

233. *See supra* note 232.

234. *See* G.A. Res. 33/97 (Dec. 16, 1978).

235. *See* G.A. Res. 35/49 (Dec. 4, 1980) (noting that "further comments and observations on the Draft Code . . . are yet to be submitted by Member States").

236. *See* G.A. Res. 36/106, ¶ 1 (Dec. 10, 1981).

237. The first year, the ILC only appointed a Special Rapporteur and asked him to prepare a report for the 1983 session. Report of the International Law Commission on the work of its Thirty-Fourth Session, May 3 – Jul. 23, 1982, *available in* 2 Y.B. INT'L L. COMM'N (2) 1, 121 (1982) (describing the ILC's decisions regarding the draft code of offences against the peace and security of mankind). The Rapporteur's first report and the ILC session of 1983 merely cataloged the problems that the ILC would have to address in updating the draft code of offences and discussed the methodology of the project. Report of the International Law Commission on the work of its Thirty-Fifth Session, May 3 – Jul. 22, 1983, *available in* 2 Y.B. INT'L L. COMM'N (2) 13 (1983) (describing the problems the ILC would have to overcome in completing work on the draft code of offences). The Rapporteur's 1984 report proposed beginning with the ILC's 1954 draft code. Special Rapporteur's Second Report on the Draft Code of Offences Against the Peace and Security of Mankind, dated Feb. 1, 1984, *available in* 2 Y.B. INT'L L. COMM'N (1) 89 (1984). The Special Rapporteur suggested reconsidering the 1954 draft code and expanding "the list of offences proposed by it so as to reflect the international reality of today." *Id.* ¶ 5.

absence of a nexus with armed conflict.[238] The Rapporteur argued in favor of this definition of crimes against humanity,[239] and none of the commissioners disputed using it during discussion of the Rapporteur's report.[240] Two years later, in 1986, the Rapporteur proposed a slightly updated definition of crimes against humanity, again without a nexus with armed conflict.[241] He noted that crimes against humanity had originally been "linked to the state of belligerency,"[242] but expressed his opinion that "crimes against humanity can [now] be committed not only within the context of an armed conflict, but also independently of any such armed conflict."[243] He suggested that this change took place in 1954,[244] but was almost certainly wrong on this point.[245] In 1991, the ILC provisionally adopted a definition of crimes

238. The ILC concluded that the "1954 draft provided a good working basis, and [decided] that the offences it contained should be retained." *See* Report of the International Law Commission on the work of its 36th Session, May 7 – Jul. 27, 1984, *available in* 2 Y.B. INT'L L. COMM'N (2) ¶ 49 (1984). The discussion of crimes against humanity in the ILC's report is quite brief, and there is no mention of any controversy or debate surrounding the absence of a nexus with armed conflict. *See id.* ¶¶ 37, 46.

239. *See* Special Rapporteur's Second Report, *supra* note 237, ¶ 11 (noting that the "1954 draft itself departed from the Nurnberg context by defining crimes against humanity regardless of any relation to war crimes."). Later in his report, the Special Rapporteur suggests that the ILC's 1954 definition of crimes against humanity had become law by 1984. *See id.* ¶ 40 ("[I]t was only when sufficient time had elapsed after the Nurnberg trials that the concept of a crime against humanity finally acquired its own autonomy and became detached from the state of war."). He does not indicate when he thought this change had occurred.

240. The Commissioners discussed the Special Rapporteur's Report at the 1816th through 1823rd meetings (May 9th through May 21st). The minutes of the meetings are available in 1 Y.B. INT'L L. COMM'N 4 (1984). While most of the Commissioners who spoke mentioned crimes against humanity, none explicitly questioned or debated the absence of a nexus with armed conflict. The aspect of crimes against humanity that seemed to most interest the Commissioners was how to draw the line between simple violations of human rights that should be dealt with domestically and violations that are serious enough to give rise to international criminal responsibility. There was also considerable debate about whether to add (and how to define) apartheid as a specific form of crimes against humanity. The absence of a nexus with armed conflict was not controversial.

241. *See* Special Rapporteur's Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, dated Mar. 11, 1986, *available in* 2 Y.B. INT'L L. COMM'N (1) 86 (1986) (defining crimes against humanity to include "[i]nhuman acts which include, but are not limited to, murder, extermination, enslavement, deportation, or persecutions, committed against elements of a population on social, political, racial, religious or cultural grounds").

242. *Id.* ¶ 6.

243. *Id.* ¶ 11.

244. *Id.* ¶ 28 ("The 1954 draft code first rendered crimes against humanity autonomous by detaching them from the context of war.").

245. Even the Commissioners who were in favor of removing the nexus with armed conflict from the 1954 definition of crimes against humanity recognized that they were not describing the law as it stood in 1954 but were proposing a substantial expansion of international law. *See supra* note 176. At the time, there was consider-

against humanity that did not include a nexus with armed conflict,[246] and while the text underwent further drafting changes prior to the completion of the ILC's work in 1996, it remained without a nexus with armed conflict.[247]

The ILC defended its decision not to include a nexus with armed conflict by arguing that the "autonomy of crimes against humanity" had been recognized in legal instruments since the Charter of the International Military Tribunal. In particular, the ILC noted Control Council Law No. 10, the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the Statute of the International Criminal Tribunal for Rwanda (ICTR). The commentary also notes the ICTY's suggestion in the *Tadic* case that it is a "settled rule of customary international law" that crimes against humanity do not need a nexus with international armed conflict.[248]

---

able doubt within the Commission about whether the member states would accept the ILC's proposed expansion of the definition. *See supra* notes 151-55.

In his 1984 report, *see supra* note 237, the Special Rapporteur had not taken a position on when the transition had supposedly taken place, other than to argue that it was prior to 1984.

246. *See* Report of the International Law Commission on the work of its 43rd Session, Apr. 29 – Jul. 19 1991, *available in* 2 Y.B. INT'L L. COMM'N (2) 96 (1991). The provisional title of the crime dropped the term "crimes against humanity," preferring instead the title "systematic or mass violations of human rights." *See id.*, art. 21. The definition also included a requirement that torture, murder, slavery and persecution be carried out "in a systematic manner or on a mass scale" before it would qualify as a crime. Deportation or the forcible transfer of population would not require this added element. *Id.* This drafting change was made to restrict the crimes covered by the draft Code to those of an "extremely serious character." *See id.* at 103, art. 21, Commentary ¶ 3. As a result, the provisional text adopted by the Commission was considerably narrower than the definition proposed by the Special Rapporteur.

In his 1989 report, the Rapporteur had proposed a definition that covered "all" inhuman acts committed on social, political, racial, religious or cultural grounds, including "mass destruction" of property. *See* Special Rapporteur's Seventh Report on the Draft Code of Crimes Against the Peace and Security of Mankind, dated Feb. 24,1989, *available in* 2 Y.B. INT'L L. COMM'N (1) 81, 86 (1989). The Rapporteur had suggested in his accompanying commentary that an individual act could constitute a crime against humanity, if it were "part of a system, or us carried out according to a plan, or has a repetitive nature . . . ." *Id.* at 88 ¶ 60. In its 1991 provisional draft, the ILC limited the scope of acts that could be considered violations to torture, murder, slavery, persecution and forcible deportation or transfer, and made the systematic or widespread nature of the acts a required element of the crime.

247. *See* Report of the International Law Commission on the work of its 48th Session, May 6 – Jul. 26, 1996, *available in* 2 Y.B. INT'L L. COMM'N (2) 47 (1986). The final definition specifically prohibited more acts, including institutionalized discrimination, arbitrary imprisonment, forced disappearances, rape, and other inhumane acts. *Id.* It retained the requirement that such acts be committed in a systematic manner or on a large scale. *Id.* The changes were largely inspired by the wording of Article 3 of the Statute of the International Criminal Tribunal for Rwanda. *See* Bassiouni, *supra* note 8, at 568.

248. *See* Report of the International Law Commission on the work of its 48th Session, *supra* note 247, at 48 ¶ 6. The reference to the ICTY's Statute is a little odd

2. *The Responses of Member States to the ILC's Work*

The responses of U.N. member states to the General Assembly's call for comments[249] on the ILC's 1954 draft code of offences are more important than the deliberations of the ILC itself because the ILC cannot create new international law, while the views of member states could be evidence of the *opinio juris* necessary to create new customary international law.[250] One of the most striking things about the comments is how the influence of the Cold War permeates them.[251] The comments received in 1982,[252] 1983,[253] 1985[254] and 1987[255] largely represent the viewpoints of Soviet allies. A number of developing states also responded, but it is clear that the Eastern Bloc states were acting in a coordinated manner.[256] None of the major Western states commented.

---

because Article 5 actually includes a requirement of a nexus with armed conflict. *See infra* note 265. Of course, in the *Tadic* case, the ICTY suggested that this limitation in its own statute was potentially unnecessary. The *Tadic* case is discussed in more detail below. *See infra* notes 277-81.

249. *See supra* notes 234-35.

250. *See infra* notes 303-07 (describing the elements of customary international law).

251. *Cf.* Cassese, *supra* note 45, at 9-10 (noting the impact of the Cold War on the development of international criminal law).

252. *See* Comments and observations received from Governments pursuant to General Assembly Resolution 36/106, dated May 1982, *in* 2 Y.B. INT'L L. COMM'N (1) 273 (1982).

253. *See* Comments and observations received from Governments pursuant to General Assembly Resolution 37/102, dated May 1983, *in* 2 Y.B. INT'L L. COMM'N (1) 153 (1983).

254. *See* Observations of Member States and intergovernmental organizations received pursuant to General Assembly Resolution 39/80, dated May 1985, *in* 2 Y.B. INT'L L. COMM'N (1) 84 (1985).

255. *See* Observations of Member States received pursuant to General Assembly Resolution 41/75, dated May 1987, *in* 2 Y.B. INT'L L. COMM'N (1) 11 (1987).

256. Between 1982 and 1987 comments were received from Barbados, Belarus, Brazil, Czechoslovakia, East Germany, Egypt, Finland, Gabon, Mongolia, Qatar, the Soviet Union, Suriname, Ukraine, Uruguay, and Venezuela. The developing states are numerically superior to the Eastern Bloc states, but the Eastern Bloc states had clearly coordinated their responses. For example, Belarus stated that a draft code of offences was important at a time "when imperialist circles are counting on exacerbating tension in the world and on preparation for war and would like to discard the legal and ethical rules . . ." that govern international relations. *See* 1982 Comments, *supra* note 252, at 275. Other Eastern Bloc states echoed this theme. Czechoslovakia accused the West of encouraging "an intensified arms race" and "notions of a limited nuclear war." *Id.* at 275. East Germany worried about the "aggravated international situation and the resultant risk of a new world war . . . ." *Id.* at 276. Ukraine claimed that there had been a deterioration of the international situation caused by "the irresponsible action of imperialist circles . . . that have embarked on a course of confrontation, escalation of the arms race, and revival of the 'cold war.'" *Id.* at 277. The Soviet Union used similar language. *Id.* at 279. In 1985, Mongolia also blamed the "increased risk of nuclear war" on the "aggressive forces of imperialism." 1985 Comments, *supra* note 254, at 86.

None of the states' comments directly addressed whether they believe a nexus with armed conflict is necessary. Crimes against humanity were mentioned in passing several times,[257] but the main focus of the comments was on the expansion of the subject matter jurisdiction of the draft code to include various crimes which states thought should be added. Nevertheless, the Eastern Bloc states seemed to generally agree that the ILC's 1954 draft code of offences constituted an acceptable basis for further work.[258]

3. *The International Criminal Tribunal for the Former Yugoslavia*

In the midst of the ILC's work on the draft Code, the Cold War ended, the former Soviet Union collapsed, and ethnic conflicts that had been suppressed under communist rule erupted in parts of Eastern Europe and the former Soviet Union.[259] The end of the Cold War heralded a period of rapid change in international criminal law, particularly the creation of new mechanisms for accountability.

The disintegration of the former Yugoslavia first came to the attention of the Security Council in 1991, when the Council expressed concern for "the fighting in Yugoslavia, which is causing a heavy loss of human life . . . ."[260] Yugoslavia was on the Security Council's agenda again repeatedly in 1991 and 1992.[261] In re-

257. For example, a number of Eastern Bloc states refer to the first use of nuclear weapons as "the gravest crime against humanity." *See* 1982 Comments, *supra* note 252, at 275. (Belarus and Czechoslovakia); *id.* at 279 (Soviet Union). East Germany and Uruguay both refer affirmatively to the definition of crimes against humanity used by the IMT, but it does not appear that they were explicitly taking the position that a nexus with armed conflict was still required. *See id.* at 276 (East Germany notes that the work of the ILC should be predicated on the Charter of the IMT); *id.* at 280 (Uruguay notes that the "the crimes against humanity defined in the Charter" of the IMT represent international crimes).

258. Belarus called it an "acceptable basis for further work." *See* 1982 Comments, *supra* note 252, at 274. Czechoslovakia called it a "suitable basis." *Id.* at 275. *See also id.* at 277 (Ukraine); *id.* at 279 (Soviet Union); 1983 Comments, *supra* note 253, at 154 (Suriname); 1985 Comments, *supra* note 254, at 86 (Mongolia).

259. *See* Stuart Ford, *OSCE National Minority Rights in the United States: The Limits of Conflict Prevention*, 23 SUFFOLK TRANSNAT'L L. REV. 1, 5-6 (1999) (discussing the collapse of the Soviet Union and the outbreak of conflicts in Yugoslavia, Nagorno-Karabakh, Trans-Dniester and Ossetia in the early 1990s). *See also* Cassese, *supra* note 45, at 11 (noting that the end of the Cold War caused a "fragmentation of the international community" and resulted in the "implosion of previously multi-ethnic societies" ultimately leading to "gross violations of international humanitarian law on a scale comparable to those committed during World War II").

260. S.C. Res. 713 (Sept. 25, 1991). U.N. Security Council Resolutions are available online at http://www.un.org/documents/scres.htm.

261. In 1991, the Security Council addressed the former Yugoslavia three times, in resolutions 713, 721 and 724. In 1992, the Security Council addressed the former Yugoslavia more than twenty times, in resolutions 727, 740, 743, 749, 752-58, 760-62,

sponse to evidence that atrocities were taking place in the former Yugoslavia, the Security Council created a Commission of Experts in late 1992 to "examine and analyze" the evidence of grave breaches of the Geneva Conventions and "other violations of international humanitarian law."[262] In February 1993, the Security Council accepted the Commission of Experts' recommendation and decided to establish the International Criminal Tribunal for the Former Yugoslavia (ICTY).[263] In May, the Security Council adopted the Statute of the ICTY, which had been drafted by experts working under the direction of the Secretary General.[264]

The definition of crimes against humanity in the Statute of the ICTY is intriguing. Under Article 5, the ICTY would have the power "to prosecute persons responsible for [crimes against humanity] when committed in armed conflict, whether international or internal in character . . . ."[265] In effect, the ICTY's definition of crimes against humanity requires a nexus with armed conflict. This seems a little odd, given that the drafters would have considered the work of the ILC on the draft Code of Offences Against the Peace and Security of Mankind.[266] However, the Secretary-General's Report on the statute suggests why a nexus with armed conflict was included.

First, there was the problem of the Security Council's power to create a tribunal. The Secretary-General's Report noted that an international tribunal would normally be established by treaty[267] but concluded that the Security Council would have the authority to create the ICTY by virtue of its power under Chapter VII of the United Nations Charter to maintain international peace and security.[268] However, the drafters of the Report were

764, 769-71, 776-77, 780-81, 786-87, and 798. In many ways, the Security Council's responses to the conflict in the former Yugoslavia were ineffective. The creation of the International Criminal Tribunal for Yugoslavia was motivated in part by guilt over the international community's inability to craft effective political and military responses to the conflict and by a desire to be seen to be doing something concrete to end the bloodshed. *See* Cassese, *supra* note 45, at 12.

262. *See* S.C. Res. 780, ¶ 2 (Oct. 6, 1992). The idea of creating a tribunal to try those responsible for the atrocities in Yugoslavia was first raised by lawyers and politicians in early 1992. *See* Cassese, *supra* note 45, at 12 n.28.

263. *See* S.C. Res. 808, ¶ 1 (Feb. 22, 1993).

264. *See* S.C. Res. 827, ¶ 2 (May 25, 1993) (deciding to adopt the Statute proposed by the Secretary General in his report pursuant to Security Resolution 808). The Secretary General's Report Pursuant to Paragraph 2 of S.C. Res. 808 (May 3, 1993), UN document number S/25704, is available from the website of the ICTY at http://www.un.org/icty/legaldoc-e/index.htm (last visited May 11, 2006).

265. *See* Secretary-General's Report, *supra* note 264, art. 5.

266. *Id.* ¶ 17 (noting that the Secretary-General had "consulted" texts prepared by the International Law Commission). The ILC texts consulted surely must have included the draft Code of Offences.

267. *Id.* ¶ 19.

268. *Id.* ¶ 22.

aware that the Security Council is a political, not a legislative body, and it did not have the power to create new international crimes to be used at the ICTY. While the Security Council could create the ICTY, it would be limited to applying existing international law.[269]

The second problem was the principle of legality.[270] The drafters of the Report were concerned that the principle of legality would prevent the prosecution of individuals for violations of international criminal law unless it was indisputable that the crimes within the jurisdiction of the ICTY represented established customary law.[271] Consequently, the ICTY would use only that part of international criminal law that had become "beyond doubt" part of customary international law.[272]

The Secretary-General's Report concluded that the four sources of international criminal law that were beyond doubt were: 1) the Geneva Conventions of 1949; 2) the Hague Convention of 1907; 3) the Genocide Convention; and 4) the "Charter of the International Military Tribunal of 8 August 1945."[273] The drafters apparently doubted that those definitions of crimes against humanity that eliminated the nexus with armed conflict had become customary international law. There is a reference to Control Council Law No. 10 (which did not require a nexus with armed conflict)[274] in a paragraph on the origins of crimes against humanity,[275] but it was not listed as being "beyond doubt" part of customary international law.[276]

The decision to restrict the ICTY's subject matter jurisdiction to crimes that were indisputably customary international law was vindicated by the early attacks on the jurisdiction of the court. The very first defendant, Dusko Tadic, challenged virtually every aspect of the ICTY's existence, including its subject matter jurisdiction. That challenge resulted in an interlocutory opinion by the Appeals Chamber on the jurisdiction of the ICTY.[277] Mr. Tadic's lawyers argued that the customary interna-

269. *Id.* ¶ 29.

270. The principle of legality is discussed in detail in Section V.

271. *See* Secretary-General's Report, *supra* note 264, ¶ 34 ("In the view of the Secretary-General, the application of the principle of nullem crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond doubt part of customary law so that the problem of the adherence of some but not all States to specific conventions does not arise.").

272. *Id.* ¶ 35.

273. *Id.* ¶ 35.

274. *See supra* note 92.

275. *See* Secretary-General's Report, *supra* note 264, ¶ 47.

276. Indeed, there is some doubt about whether Control Council Law No. 10 was meant to state a crime under international law at all. *See supra* notes 93-96.

277. *See* Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, dated Oct. 2, 1995. Copies of the ICTY's decisions

tional definition of crimes against humanity was that used by the IMT, and that the ICTY had improperly expanded the definition by changing the nexus with "war" to a nexus with "armed conflict, whether international or internal." This was alleged to be a violation of the principle of legality.[278]

The ICTY responded by concluding that the Charter of the IMT and the Nuremberg Principles had unnecessarily included a nexus with armed conflict, and that there was "no logical or legal basis for this requirement."[279] The court noted that Control Council Law No. 10 had not required a nexus with armed conflict and then went on to point out that the treaties that had codified the crimes of genocide and apartheid had similarly omitted any nexus with armed conflict.[280] Ultimately, the ICTY concluded that the customary law of crimes against humanity does not require a nexus with international armed conflict and suggested that it "may not require a connection between crimes against humanity and any conflict at all."[281]

---

are available from the ICTY website at http://www.un.org/icty/cases-e/index-e.htm (last visited May 12, 2006).

278. *See* Prosecutor v. Tadic, *supra* note 277, ¶ 139. Mr. Tadic's lawyers were essentially arguing that the term "war" as it was used before and during WWII equated to the modern term "international armed conflict" and that the inclusion of "internal armed conflicts" expanded the definition of crimes against humanity to cover crimes that would not have fallen under the jurisdiction of the IMT.

279. *Id.* ¶ 140. The ICTY seems to be wrong on this point. The discussions amongst the ILC commissioners, as well as the comments of the member states, indicate that, at least in the late 1940s and early 1950s, the nexus with armed conflict was seen as a legal requirement of crimes against humanity. It was believed that it was the nexus with armed conflict that made what would otherwise be domestic crimes into international crimes. *See supra* notes 112-16, 121-23.

280. *See* Prosecutor v. Tadic, *supra* note 277, ¶ 140. There are potential problems with the ICTY's arguments. For example, there is some doubt about whether Control Council Law No. 10 was intended to describe international crimes. *See supra* notes 93-96. Moreover, it was clear in the early 1950s that the IMT Charter and the Nuremberg Principles stated the accepted definition of crimes against humanity, not Control Council Law No. 10. *See supra* note 124. In addition, the lack of a nexus with armed conflict in the genocide convention and the apartheid convention is not necessarily inconsistent with the requirement of a nexus with armed conflict in the customary definition of crimes against humanity. *See supra* note 131.

281. Prosecutor v. Tadic, *supra* note 277, ¶ 141. The court went on to suggest that the Security Council may have defined crimes against humanity "more narrowly than necessary under customary international law." *Id.* In fact, it seems likely that the drafters kept the nexus with armed conflict out of a desire to limit the jurisdiction of the ICTY to crimes that were "beyond doubt" part of customary international law. *See supra* notes 271-76. In 2002, the Appeals Chamber re-visited the issue and concluded that the nexus with armed conflict was "purely jurisdictional," but nonetheless required evidence that there was an armed conflict and that the "acts of the accused are linked geographically as well as temporally with the armed conflict." Prosecutor v. Kunarac et al., ¶ 83 (Case Nos. IT-96-23 and IT-96-23/1-A), Judgment dated Jun. 12, 2002.

4. *The International Criminal Court*

At about this same time, the issue of whether crimes against humanity required a nexus with armed conflict was being faced by the drafters of the Rome Statute of the International Criminal Court (ICC). In 1994, the General Assembly had created an Ad Hoc Committee on the Establishment of an International Criminal Court to take over the work of the ILC.[282] The ILC, recognizing the difficulties of defining a crime that was primarily the product of customary international law, had not offered a definition of crimes against humanity in its draft statute, noting instead that there were "unresolved issues about the definition of the crime."[283] In the commentaries that accompanied the draft, the ILC reprinted Article 5 of the ICTY (which does require a nexus with armed conflict) and the analogous text from its own draft Code of Offences (which does not require a nexus) but did not take a position on which one was authoritative.[284]

The Ad Hoc Committee was similarly unable to make up its mind. It noted that there were "different views" amongst its members about whether crimes against humanity required a nexus with armed conflict, and decided to give the question "further consideration."[285] This debate continued during the Rome Conference with "a significant number of delegations" taking the position that a nexus with armed conflict was required,[286] although ultimately the Rome Statute did not require a nexus with armed conflict.[287]

---

282. *See* G.A. Res. 49/53 (Dec. 9, 1994) (thanking the ILC for its draft statute and deciding to convene an Ad Hoc Committee comprised of member states of the UN to further study the matter).

283. *See* Report of the International Law Commission on the work of its 46th Session, May 2 - Jul. 22, 1994, *available in* 2 Y.B. INT'L L. COMM'N (2) 38, 40 (1994).

284. *Id.* at 40.

285. *See* Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, ¶ 79, U.N. Doc. A/50/22 (1995). *See also* Otto Triffterer ed., Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article (Nomos Verlagsgesellschaft 1999) at 123 (noting that it was "unresolved whether [crimes against humanity] needed to take place during armed conflict . . .").

286. *See* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 43 (2d ed. 2004) (citing Herman von Hebel & Darryl Robinson, *Crimes within the Jurisdiction of the Court, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 79, 92 (Roy Lee ed., 1999)).

287. *See* Rome Statute of the International Criminal Court, art. 7. The Rome Statute is available from the website of the ICC at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf (last visited May 12, 2006).

5. *The International Criminal Tribunal for Rwanda*

In July 1994, the Security Council established a Commission of Experts to "examine and analyse . . . evidence of grave violations of international humanitarian law" committed in Rwanda.[288] In its interim report of October 1994, the Commission of Experts recommended that the Security Council take "all necessary and effective action" to ensure that those responsible for the atrocities in Rwanda were "brought to justice before an independent and impartial international criminal tribunal."[289] The Security Council followed the Commission's recommendation and established the International Criminal Tribunal for Rwanda (ICTR) in November of 1994.[290]

The Commission of Experts recommended that the ICTR have jurisdiction over crimes against humanity, but noted that the formulation of crimes against humanity in the Charter of the IMT had led to a "certain level of ambiguity in the content and legal status" of crimes against humanity.[291] The Commission had already concluded that the conflict in Rwanda was a non-international armed conflict,[292] so it could not directly apply the Nuremberg definition, which required a nexus with an armed conflict.[293] So, the Commission argued that crimes against humanity did not require a nexus with armed conflict.[294] The first argument put forward by the Commissioners is that crimes against humanity is

288. *See* S.C. Res. 935, ¶ 1, U.N. Doc. S/RES/935 (Jul. 1, 1994).

289. *See* Letter dated 1 October 1994 from the Sec'y Gen. addressed to the President of the SCOR (Oct. 4, 1994), ¶ 150, U.N. Doc. S/1994/1125 (transmitting the interim report of the Commission of Experts to the Security Council) [hereafter Interim Report of Commission of Experts on ICTR].

290. *See* S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994). The Statute of the ICTR was attached as an annex to this Resolution. In fact, the Security Council only partially followed the Commission's recommendations. The Commission had originally recommended that the Security Council amend the Statute of the ICTY to give it jurisdiction over Rwanda. *See* Interim Report of the Commission of Experts on ICTR, *supra* note 289, ¶ 152. The Commission believed that the creation of a new tribunal would be less efficient and lead to "less consistency" in the application of international criminal law. *Id.* ¶ 140. The Security Council declined this aspect of the Commission's advice. It appears that a separate tribunal was created, at least in part, because of Rwandan opposition to simply expanding the ICTY. *See* U.N. SCOR, 49th Sess., 3453rd mtg., at 5, U.N. Doc. S/PV.3453 (Nov. 8, 1994) (where the representative from New Zealand noted that many changes to the structure of the ICTR, including whether it would be part of the ICTY, were made in response to the concerns of Rwanda).

291. *See* Interim Report of the Commission of Experts on ICTR, *supra* note 289, ¶ 109.

292. *Id.* ¶¶ 89-91 ("The armed conflict between the period 6 April and 15 July 1994 qualifies as a non-international armed conflict.").

293. *Id.* ¶ 113 ("If the normative content of 'crimes against humanity' had remained frozen in its Nuremberg form, then it could not possibly apply to the situation in Rwanda . . . .").

294. *Id.* ¶¶ 113-18.

based on the "'principles of humanity' first invoked in the early 1800s by a State to denounce another State's human rights violations" and therefore applied to individuals "regardless" of whether the criminal act was "perpetrated during a state of armed conflict."[295] The Commission next noted that the Genocide Convention and the Apartheid Convention do not require a nexus with armed conflict.[296] Finally, the Commissioners noted that the Commission of Experts for the ICTY had proposed a definition of crimes against humanity that did not require a nexus with armed conflicts.[297] No mention was made of the various formulations offered by the International Law Commission. Ultimately, the Security Council adopted a definition of crimes against humanity for the ICTR that was different from the one proposed by the Commission of Experts, but also did not require a nexus with armed conflict.[298] Unfortunately, it is difficult to determine precisely how the Security Council arrived at the definition it included in the Statute of the ICTR because there appear to be no records of the drafting process.[299]

---

295. *Id.* ¶ 115. This argument is probably wrong. First of all, while States may have used the phrase "principles of humanity" to condemn one another's human rights violations in the 1800s, modern crimes against humanity clearly have their origins in the Martens clause that accompanied conventions that regulated armed conflicts, and crimes against humanity were initially conceived of as a part of the laws and customs of war. *See supra* Sections II(A)-II(C). Moreover, in the years immediately after the Nuremberg trials, leading scholars and the United Nations' member states believed that the requirement of a nexus with armed conflict was a substantive element of the crime. *See supra* notes 112-16, 121-23. There appeared to be a widespread belief that a nexus with armed conflict was what made crimes against humanity an international crime, rather than just a domestic crime. *See supra* note 124. There were those who felt the nexus with armed conflict was legally unnecessary, but they were distinctly in the minority. *See supra* notes 121-22.

296. *See* Interim Report of the Commission of Experts on the ICTR, *supra* note 289, ¶ 116.

297. *Id.* ¶ 117. The Commission fails to note that the Statute of the ICTY ultimately required a nexus with armed conflict, apparently because the drafters of the ICTY statute were not certain whether the customary definition of the crime required one or not. *See supra* notes 271-76.

298. *See* S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994). The ICTR Statute is attached as an annex to the Resolution. Article 3 of the Statute defines crimes against humanity as any of a number of specific acts that are "committed as part of a widespread and systematic attack against any civilian population." In contrast, the Commission had proposed a definition that required specific acts "committed by persons demonstrably linked to a party to the conflict, as part of an official policy based on discrimination against an identifiable group of persons." *See* Interim Report of the Commission of Experts on the ICTR, *supra* note 289, ¶ 118. Neither required a nexus with armed conflict

299. The ICTY Statute had been proposed by the Secretary-General and adopted by the Security Council. *See supra* note 264. Along with the proposal, the Secretary-General prepared a report which provided legal explanations for the decisions contained in the proposal. By contrast, for the ICTR, the Security Council drafted the Statute itself. *See* The Secretary-General, Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955, ¶ 9, U.N. Doc. S/

III. THE STATUS OF CRIMES AGAINST HUMANITY IN 1975

A potentially crucial question for the Extraordinary Chambers is whether the customary definition of crimes against humanity required a nexus with armed conflict in the period 1975 to 1979. As many writers have warned[300]—including the Group of Experts that initially advised the United Nations on establishing the Extraordinary Chambers in Cambodia—if crimes against humanity required a nexus with armed conflict in 1975, then many of the atrocities committed in Cambodia may not qualify as crimes against humanity.[301] There is some doubt about whether a nexus with armed conflict was required because, unlike geno-

---

1995/134 (Feb. 13, 1995) ("The statute of the Rwanda Tribunal, which was an adaptation of the statute of the Yugoslav Tribunal, was drafted by the original sponsors of Security Council Resolution 955 (1994) and discussed among members of the Council."). Unfortunately, there is little evidence of the drafting process in the official records of the Security Council. Between October 4, when the Commissioners interim report was forwarded to the Security Council, and November 8, when Resolution 955 was passed, the ICTR only appears twice in the official meeting records. Neither contains any substantive discussion of crimes against humanity, although the records of the Security Council meeting on November 8 indicate that the process of drafting the ICTR Statute had been "long and arduous." *See* U.N. SCOR, 49th Sess., 3453rd mtg., at 10, U.N. Doc. S/PV.3453 (Nov. 8, 1994) (where the representative from Pakistan noted that the negotiations on "finalization of the draft resolution and the Statute of the Tribunal were long and arduous"); *id.* at 12 (where the representative from Spain noted that the ICTR Statute was the product of "intensive consultations and negotiations").

The Secretary-General subsequently seemed to question the Security Council's approach. *See* The Secretary-General, Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955, ¶ 12, U.N. Doc. S/1995/134 (Feb. 13, 1995) (noting that the Security Council had "elected to take a more expansive approach to the choice of applicable law than the one underlying the statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they are considered part of customary international law"); *see also* U.N. SCOR, 49th Sess., 3453rd mtg., at 9, U.N. Doc. S/PV.3453 (Nov. 8, 1994) (where the Brazilian representative argued that the ICTR Statute should have been "the object of comprehensive, in-depth legal deliberations specifically focused on the circumstances of Rwanda" and should have been "reviewed by a panel of jurists"). The Secretary-General's comment is apparently a reference to his earlier position that the ICTY should have jurisdiction only over crimes that were "beyond doubt" part of customary international law. *See supra* note 272.

300. *See supra* note 5.

301. *See* Identical Letters dated March 15, 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council, U.N. Doc. A/53/850 and S/1999/231 (containing the report of the Group of Experts appointed to "evaluate the existing evidence with a view to determining the nature of the crimes committed by Khmer Rouge leaders in the years 1975-1979"). The Group of Experts concluded that if crimes against humanity did require a nexus with armed conflict in 1975, then "the vast majority of the Khmer Rouge's atrocities would not be crimes against humanity; historians have not linked the bulk of the atrocities of the Khmer Rouge to the armed conflicts in which it engaged . . . ." *Id.* ¶ 71.

cide and war crimes, in 1975 there was no widely-accepted convention that defined crimes against humanity. Therefore, exploring the state of customary international law in 1975 is important to understanding whether there are any limitations on how the Extraordinary Chambers can prosecute individuals for crimes against humanity.

A. CUSTOMARY INTERNATIONAL LAW

Customary international law is one of the primary sources of international law.[302] For a new custom to form there must be evidence of two things: 1) a general practice amongst states; and 2) a belief amongst states that the practice is legally required (sometimes called *opinio juris*).[303]

The practice of states does not need to be perfectly uniform to qualify as a general practice.[304] A certain amount of countervailing practice is to be expected, particularly for newly-formed customs. Therefore, it can be hard to tell when a practice has shifted from a situation where some states support it but other states are opposed, to a situation where support for the practice has become general.[305] The question is even more difficult when

---

This paper takes no position on whether an armed conflict existed in Cambodia at any given point between 1975 and 1979, but merely notes that others who have studied the question have suggested that there were important periods during which there was no armed conflict.

302. *See* Statute of the International Court of Justice, art. 38. There are three primary sources of international law: 1) international conventions; 2) international custom; and 3) "general principles of law recognized by civilized nations." *Id.* "[J]udicial decisions and the teachings of the most highly qualified publicists" are described as a "subsidiary means" of determining the rules of international law. *Id.*

303. *See id.* (describing custom as "a general practice accepted as law"). *See also* Ford, *supra* note 259, at 30-38 (discussing the evidentiary requirements of customary international law); RATNER & ABRAMS, *supra* note 27, at 18.

304. *See* Ford, *supra* note 259, at 32-33 (noting that the International Court of Justice has not been consistent in determining how uniform a practice must be before it can be called general). At times the ICJ has found a practice to be general despite a history of recurrent violations of the norm. In other cases, it has required that practice be "extensive and virtually uniform." *Id.* It appears that the amount of uniformity may be related to the length of time over which the practice has occurred. Thus practice may need to be more uniform when the proposed custom is argued to have formed quickly. *Id.* at 33-34. *See also* RATNER & ABRAMS, *supra* note 27, at 18 (noting that "great debate surrounds the degree of consistency required to show state practice").

305. While it is hard to describe the concept of a general practice without using words like "majority" and "minority," the requirement of a general practice is not simply a euphemism for "more than 50% of states." The ICJ has suggested that a practice may sometimes need to be "virtually uniform" before it can be considered a general practice. Ultimately, the level of uniformity required appears to vary with the unique facts of each case. However, the length of time over which the customary international law of crimes against humanity has developed—more than fifty years—suggests that a lower standard of uniformity may be required. *See supra* note 304.

the best evidence of state practice only rarely occurs.[306] In such cases, the practice of states must be inferred from less reliable sources.[307] *Opinio juris* can also pose a problem because states rarely provide public legal justifications for their actions. A state's legal intent must often be inferred from the circumstances surrounding its acts.

B. Crimes Against Humanity in International Law

As described above, crimes against humanity has a history which predates World War II. However, it did not exist as a specifically articulated crime with concrete elements before World War II, and it was not until 1951 that the definition of crimes against humanity in the Nuremberg Principles, including a nexus with armed conflict, was widely accepted as customary international law. Objections to the removal of the nexus with armed conflict continued until the 1998 negotiations of the Rome Statute.[308]

Therefore, 1951 to 1998 is the continuum on which the transition to a definition that does not require a nexus occurred.[309] However, unlike customs that form around international conventions, there is no clear date that represents the point when the practice became general. Instead, over time more and more states came to accept that a nexus was not required until a critical point was reached where the absence of a nexus represented a general practice amongst states, even though there was still opposition to the change. Unfortunately, it is very difficult to tell exactly when the tipping point occurred.

---

306. *See* Ratner & Abrams, *supra* note 27, at 20 (noting that the "unwillingness of governments" to prosecute individuals for violations of international criminal law between the end of WWII and the early 1990s means that there is little actual state practice, and that scholars must rely "upon the statements of governments as evidence of their belief about the meaning of the law").

307. The definition of crimes against humanity used during actual prosecutions or in treaties (or other legally binding commitments) prohibiting, punishing, or requiring prosecution of crimes against humanity would be the best evidence of how states believe the crime should be defined.

General statements about how crimes against humanity should be defined, particularly when made in a political context, may be accorded less weight because of the risk that they simply represent an attempt to gain some temporary advantage. For instance, many of the statements made by Soviet Bloc states during the Cold War seemed to have been primarily attempts to gain some advantage over the West. *See, e.g., supra* Section II(H)(2) (describing the drafting of the 1968 Convention on Statutes of Limitation). It is not at all clear that the Soviet Bloc states felt legally bound to comply with the statements they were making.

308. *See supra* notes 283-87.

309. The large amount of time between the two endpoints of the process, as well as the paucity of state practice during this period, is probably the result of the stagnation of international criminal law during the Cold War. *See supra* note 178.

The discussion in Part II helps narrow the time during which the tipping point was reached. If 1951 and 1998 are respectively the date when it was certain that a nexus was required and the date when it was certain that a nexus was not required, then 1968 (the year of the first Convention on Statutes of Limitations) appears to represent a point when those who would have removed the nexus were almost equally balanced against those who opposed the removal, and 1984 (the year the ILC again recommended to the UN that it adopt a definition of crimes against humanity that did not require a nexus with armed conflict) appears to represent a point when those who would remove the nexus probably represented the mainstream of opinion within the international community. Consequently, it seems likely that the tipping point occurred at some point between 1968 and 1984.[310] However, there is very little state practice during this period, which makes it difficult to know whether the tipping point occurred at the beginning, middle or end of that period.[311]

---

310. This conclusion depends on what level uniformity is required before a general practice is acknowledged. If a court were to apply the ICJ's "extensive and virtually uniform" standard, then a general practice might not have existed until 1998. However, the author believes that a looser standard is probably more appropriate. *See supra* note 304.

311. As noted below, looking at the inclusion of definitions of crimes against humanity in the domestic laws of states in 1975 could provide evidence of whether states believed a nexus was required. *See infra* Section III(C). Another way to approach the problem might be to look at the contemporaneous writings of scholars. If there was a general practice among states in favor of removal of the nexus, this might be apparent in the writings of legal scholars who were analyzing the status of international criminal law at the time.

A comprehensive study of contemporaneous writings is beyond the scope of this paper. However, it is worth noting that in their 1973 work, A TREATISE ON INTERNATIONAL CRIMINAL LAW, Messrs. Bassiouni and Nanda do not even describe crimes against humanity as a separate crime. Crimes against humanity are discussed but are usually conflated either with war crimes or the Genocide Convention. *See* M. CHERIF BASSIOUNI & VED P. NANDA, 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW, CRIMES AND PUNISHMENT 64 (1973) (conflating crimes against humanity and genocide); *id.* at 523 (conflating crimes against humanity with war crimes).

In their second volume, on jurisdiction, they describe the importance of crimes against humanity in terms of its coverage of "the enemy's conduct with respect to its own population," language that implies the existence of an ongoing armed conflict. *See* M. CHERIF BASSIOUNI & VED P. NANDA, 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW, JURISDICTION AND 77 (1973). They then go on to note that Adolf Eichmann was tried in Israel using a definition of crimes against humanity that went "far beyond" the scope of the IMT Charter. *Id.* at 84. Although they never directly criticize the scope of crimes against humanity under Israeli law, the implication is that Israel went beyond what they viewed as the limits of then-existing international law.

In 1980, Mr. Bassiouni proposed a draft international criminal code. It is potentially significant that he recommended that crimes against humanity be defined using the same language as the ILC's Nuremberg Principles, including a nexus with armed conflict. *See* M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW, A DRAFT INTERNATIONAL CRIMINAL CODE 75 (1980). He does note in the commentary that

In short, the customary definition of crimes against humanity may well have lost the requirement of a nexus with armed conflict before 1975, but due to the paucity of state practice between those two dates, it is not certain.

C. Crimes Against Humanity in the Domestic Law of States

There is another way to assess how countries viewed crimes against humanity—how they have treated it in their domestic laws.[312] As a matter of international criminal law, countries are not required to have domestic laws criminalizing crimes against humanity as a prerequisite to exercising jurisdiction over the crime. Nevertheless, states have made it a crime in their domestic laws.

This section will look at: 1) whether countries have domestic laws that prohibit crimes against humanity; 2) how crimes against humanity are defined in domestic legislation; and 3) what year that legislation was passed. If a significant number of states prohibited crimes against humanity in their domestic legislation before 1975, and those same states did not require a nexus with armed conflict, then this would be persuasive evidence that crimes against humanity did not require a nexus with armed conflict in 1975. Investigating every state in the world in 1975 is beyond the scope of this paper. Instead, this section will try to look at a sample of states. Unfortunately, the sample is skewed in favor of English language jurisdictions and developed countries.[313]

1. Germany

Germany was the first country to have a domestic legal system that defined crimes against humanity without a nexus with armed conflict. In the wake of WWII, the victorious Allies issued Control Council Law No. 10, which provided for the prosecution of those responsible for committing atrocities during WWII. It was based on the IMT Charter, but was significantly

there were several prosecutions under Control Council Order No. 10, which did not require a nexus, but he does not endorse that definition. *Id.*

This is far from an exhaustive study of contemporaneous writings. Nevertheless, it suggests that if a general practice eliminating the nexus with armed conflict had arisen by 1975, contemporaneous scholars did not seem to recognize it.

312. The way in which countries define crimes against humanity in their domestic laws may be evidence of the generality of state practice, but also an indicator of what states viewed as required by international law (sometimes known as *opinio juris*). Both of these are factors that contribute to the formation of customary international law. *See supra* notes 303-307 (describing custom formation).

313. This bias is a consequence of the author's native language (English) and the difficulty of finding information about the legal systems of developing countries.

broader than the Charter in many respects. In particular, it defined crimes against humanity without a nexus to armed conflict.[314]

However, it appears that the novel aspects of Control Council Law No. 10, including the prohibition on crimes against humanity without a nexus to armed conflict, disappeared after 1949. West Germany became independent in 1949 with the adoption of the Basic Law for the Federal Republic of Germany, which formed the constitution for the new country. It seems that the Basic Law completely replaced the laws passed by the Control Council. According to Human Rights Watch, there was no German domestic legislation prohibiting crimes against human rights prior to June 2002.[315] In 2002, Germany adopted a new law to cover violations of international criminal law, called the Code of Crimes Against International Law.[316] The new law covers genocide, war crimes and crimes against humanity.[317] Crimes against humanity are defined without a nexus with armed conflict.[318] Thus, it appears that after a hiatus of more than fifty years, crimes against humanity are once again prohibited in German domestic law.

2. *Israel*

Israel was one of the earliest supporters of the removal of the nexus requirement,[319] so it is not surprising that Israeli domestic law did not require a nexus with armed conflict. The 1950 Nazi and Nazi Collaborators (Punishment) Law—the law which was used to convict Adolf Eichmann—did not require any nexus with armed conflict.[320]

---

314. *See supra* Section II(D)(2) (describing Control Council Law No. 10 in more detail).

315. *See generally* Human Rights Watch, Universal Jurisdiction in Europe: The State of the Art, Report dated Jun. 2006, at note 283 (stating that the only international crime explicitly defined in German law prior to June 2002 was genocide). It is available from the Human Rights Watch website at http://hrw.org/reports/2006/ij0606/index.htm (last visited Aug. 11, 2006). *See also infra* note 317 (noting the prohibition on crimes against humanity in the 2002 Code of Crimes Against International Law).

316. *See* Code of Crimes Against International Law, dated Jun. 26, 2002. An English translation is available at http://www.iuscrim.mpg.de/forsch/legaltext/vstgbleng.pdf (last visited Aug. 11, 2006).

317. *Id.*, arts. 6-8.

318. *Id.*, art. 7. The law only requires that the enumerated acts be done as part of a "widespread or systematic attack against any civilian population."

319. *See supra* note 122.

320. *See supra* Section II(H)(1) (discussing the Eichmann trial in more detail). *See also* RATNER & ABRAMS, *supra* note 27, at 52.

3. *France*

France was also an early supporter of the removal of a nexus with armed conflict. It first took that position during the General Assembly debates on the ILC's Nuremberg Principles in the early 1950s.[321] However, while crimes against humanity are mentioned in a 1952 law on the protection of refugees,[322] the law contains no definition of crimes against humanity. The first attempt to define crimes against humanity appears to have occurred in 1964 with Law No. 64-1236. That law incorporates the definition of crimes against humanity in the IMT Charter,[323] which requires a nexus with armed conflict.[324]

Ratner and Abrams argue that as late as 1986, the French government took the official position that crimes against humanity required a nexus with armed conflict.[325] The new French Penal Code, which came into force in 1994, provided an updated definition of crimes against humanity that did not require a nexus with armed conflict.[326] Therefore, given France's early support for the removal of the nexus with armed conflict, it is potentially significant that French domestic law retained the nexus until the early 1990s.

4. *United States*

The United States has never had a domestic law which prohibits crimes against humanity, either with or without a nexus to armed conflict.

5. *Canada*

Canada has had a law since 1987 permitting prosecutions for crimes against humanity "if they were regarded at the time of their commission as contravening international law or 'criminal according to the general principles of law recognized by the community of nations.'"[327] This definition avoids the problem of defining crimes against humanity precisely, including whether or not a nexus with armed conflict is necessary.[328]

In 2000, Canada adopted a new Crimes Against Humanity and War Crimes Act which provides a slightly more detailed but

321. *See supra* note 121.
322. *See* Law No. 52-893, art. 2(IV)(a) (Jul. 25, 1952).
323. *See* G.A. Res. 3(I) (Feb. 13, 1946).
324. *See* RATNER & ABRAMS, *supra* note 27, at 52.
325. *Id.* at 53.
326. *See* Penal Code, art. 212-1.
327. RATNER & ABRAMS, *supra* note 27, at 53 (quoting R.S.C. 1985, C-46, § 3.76 (Can.)).
328. *Id.*

ultimately still ambiguous definition of crimes against humanity.[329] According to that law, crimes against humanity are "murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group," but only if at the time they were committed they "constitute[d] a crime against humanity according to customary international law or conventional international law [or general principles of law]."[330] The law goes on to state that the definition of crimes against humanity in the Rome Statute constitutes customary international law for any acts committed after July 17, 1998.[331] This would seem to conclusively remove the nexus requirement for acts committed after July 17, 1998 but leaves open the question of whether acts committed prior to that date needed to be in connection with an armed conflict.

6. Australia

Australia first criminalized war crimes in the War Crimes Act 1945. The original act allowed for the creation of "military courts for the trial of person charged with the commission of war crimes."[332] However, "war crimes" were limited to violations of "the laws and usages of war."[333] The War Crimes Act 1945 was substantially rewritten by the War Crimes Amendment Act 1998.[334] The amendment broadened the law considerably, but it retained the requirement of a connection with armed conflict,[335] and even today, Australian domestic law requires a connection with armed conflict.

7. United Kingdom

The United Kingdom passed a domestic law implementing the Geneva Conventions in 1957[336] and a law implementing the Genocide Convention in 1969.[337] A 1991 War Crimes Act al-

329. *See* Crimes Against Humanity and War Crimes Act 2000, S.C., ch. 24 (Can.).
330. *Id.*, art. 4(3).
331. *Id.*, art. 4(4).
332. Polyukhovich v. Australia (1991), 172 C.L.R. 501 (Austl.) (quoting the original text of the War Crimes Act 1945).
333. *Id.*
334. *See* War Crimes Amendment Act, 1988 No. 3 (Austl.). The 1988 amendments removed all of the substantive provisions of the 1945 law and replaced them with new ones. The only thing left intact was the original title of the Act.
335. *See* War Crimes Act § 7(1) (1945) (Austl.) (as amended by War Crimes Amendment Act). It goes on to state that the prohibited acts do not constitute crimes if their connection to an armed conflict is only "incidental" or "remote." *Id.* § 7(2). *See also* RATNER & ABRAMS, *supra* note 27, at 53.
336. *See* Geneva Conventions Act (1957) (U.K.) (amended by *Geneva Conventions Act 1995*).
337. *See* Genocide Convention Act (1969) (U.K.).

lowed for the prosecution of "murder, manslaughter or culpable homicide," but only if it occurred during WWII and in a place which was either a part of Germany or under German occupation.[338] According to Ratner and Abrams, as late as 1989, a special commission set up by the British government was advising that introducing a law prohibiting crimes against humanity in the absence of a nexus with armed conflict would constitute "retrospective legislation."[339] Apparently, crimes against humanity were not explicitly prohibited under British domestic law until passage of the International Criminal Court Act of 2001.[340] The law defines crimes against humanity by reference to Article 7 of the Rome Statute.[341]

8. *Ireland*

Ireland passed domestic legislation to criminalize violations of the Geneva Conventions in 1962.[342] Genocide was made a crime in Irish law in 1973.[343] In 1998, the International War Crimes Tribunals Act was passed, which created a mechanism for international tribunals (including the ICTR and ICTY) to request that Irish authorities collect evidence and to arrest individuals suspected of committing crimes within the jurisdiction of the tribunals.[344] The law contains the complete texts of the charters of the ICTR and ICTY, including their definitions of crimes against humanity.[345] As a result, crimes against humanity are "international tribunal crimes" for which Ireland will turn over suspects to tribunals. However, it appears that crimes against humanity are still not expressly prohibited by Irish domestic law.

---

338. *See* War Crimes Act 1991, ch. 13, § 1(1) (U.K.).

339. *See* RATNER & ABRAMS, *supra* note 27, at 53 (quoting THOMAS HETHERINGTON & WILLIAM CHALMERS, WAR CRIMES: REPORT OF THE WAR CRIMES INQUIRY 63-64 (1989)).

340. *See* International Criminal Court Act 2001, ch. 17, §§ 51, 58 (U.K.) (making it a crime to commit war crimes, crimes against humanity or genocide). *See also* Human Rights Watch, *supra* note 315, at note 422 (noting that jurisdiction can only be exercised over crimes against humanity if they were committed after the International Criminal Court Act entered into force).

341. *See* International Criminal Court 2001, ch. 17, § 50 (U.K.).

342. Geneva Conventions Act arts. 3-4, 1962 (Act No. 11/1962) (Ir.). The law was amended in 1998 to incorporate the two optional Protocols to the Geneva Conventions. Geneva Conventions (Amendment) Act 1998 (Act No.35/1998) (Ir.).

343. Genocide Act art. 2(1), 1973 (No.28/1973) (Ir.) (defining genocide by reference to the Genocide Convention).

344. *See* International War Crimes Tribunals Act, 1998 (No.40/1998) (Ir.).

345. *Id.* Schedules 3 and 4.

9. *Belgium*

Belgium has been at the forefront of the domestic application of international criminal law in recent years.[346] Belgium started, in 1993, by providing a mechanism to prosecute individuals in Belgium for grave breaches of the Geneva Conventions.[347] The law was expanded in 1999 to also prohibit genocide and crimes against humanity.[348] Crimes against humanity are described as encompassing those acts committed "en temps de paix ou en temps de guerre."[349] Accordingly, Belgian law does not require any proof of a nexus with armed conflict.

The 1993 law provided for universal jurisdiction over war crimes, which was then extended to include genocide and crimes against humanity in 1999. This created problems for the Belgian government after a number of prominent politicians had criminal complaints filed against them.[350] Under pressure, the government repealed the 1993 and 1999 laws in 2003. The provisions covering the substantive crimes were then incorporated into the Penal Code without the universal jurisdiction provisions.[351] The Penal Code does not require a nexus with armed conflict for crimes against humanity.[352]

10. *The Netherlands*

The Netherlands prohibited certain wartime offenses in 1952 and introduced legislation to implement the Genocide Convention in 1964.[353] However, crimes against humanity were not prohibited in Dutch domestic law until the passage of the International Crimes Act in 2003.[354] Section 4 of that Act requires only that the enumerated acts be committed "as part of a widespread or systematic attack directed against any civilian pop-

346. *See generally* Human Rights Watch, supra note 315, at Section VI (providing a case study of universal jurisdiction for international criminal law in Belgium).

347. *See* Loi relative à la répression des infractions graves aux conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions, Moniteur Belge (Aug. 5, 1993).

348. *See* Loi relative à la répression des violations graves de droit international humanitaire, Moniteur Belge (Feb, 10, 1999).

349. *Id.*

350. *See* Human Rights Watch, *supra* nn. 315, at nn. 140-143.

351. *Id. See also*, Arts. 136bis (genocide), 136ter (crimes against humanity), and 136quater (war crimes) of the Belgian Penal Code.

352. *See* Art. 136ter of the Belgian Penal Code.

353. *See* Human Rights Watch, *supra* note 315, at note 320.

354. *Id.* at nn.318-19. *See also* DUTCH FOREIGN MINISTRY, INTRODUCTION TO THE INTERNATIONAL CRIMES ACT, available at http://www.minbuza.nl/en/themes, international-legal-order/international-criminal-court/background-information/Introduction-to-the-International-Crimes-Act.html (last visited Aug. 11, 2006) (noting that prior to 2003 "there existed a lacuna [in Dutch law] with regard to crimes against humanity, which were not criminalized").

ulation."[355] A nexus with armed conflict is not required in Dutch law.

11. Nigeria, Guinea, Kenya and Rwanda

Guinea, Kenya, Nigeria and Rwanda are the only four African countries to have become parties to both the 1968 Convention on Statutes of Limitation and the Apartheid Convention by 1976.[356] These conventions seem to represent African efforts to broaden the definition of crimes against humanity prior to 1975. Consequently, of all the African states, these are the most likely to have criminalized crimes against humanity in their domestic laws and removed the nexus with armed conflict. Unfortunately, information on the state of African laws is hard to find, and the conclusions presented here are tentative.

First, it appears that Nigeria has never prohibited crimes against humanity in its domestic laws.[357] Second, Guinea only became a party to the Geneva Conventions in 1984,[358] and the Genocide Convention in 2000.[359] According to the ICRC, Guinea's 1998 Penal Code prohibits some acts which would probably constitute war crimes.[360] However, it seems unlikely that Guinea prohibited crimes against humanity in its domestic law prior to 1975. Kenya became a party to the Geneva Conventions in 1966,[361] and Kenya's Geneva Conventions Act came into force in 1968.[362] Kenya is not a party to the Genocide Conven-

355. Wet Internationale Misdrijven [International Crimes], Stb. 2003, No. 270. An English translation is available at http://www.minbuza.nl/en/themes,international-legal-order/international-criminal-court/background-information/International-Crimes-Act.html (last visited Aug. 11, 2006).

356. *See supra* notes 200, 232.

357. The Nigerian Criminal Code Act contains no provisions related to crimes against humanity. *See* Criminal Code Act, ch. 77, Laws of the Federation of Nigeria 1990, *available at* http://www.nigeria-law.org/Criminal%20Code%20Act-Tables.htm (last visited Aug. 14, 2006).

358. Http://www.cicr.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P (last visited Aug. 14, 2006) (listing the parties to the Geneva Convention).

359. Http://www.unhchr.ch/html/menu3/b/treaty1gen.htm (last visited Aug. 14, 2006) (listing the parties to the Genocide Convention).

360. *See* International Humanitarian Law National Implementation *available at* http://www.icrc.org/ihl-nat.nsf/WebALL?openview (last visited Aug. 14, 2006) (describing the implementation of the Geneva Conventions in various countries).

361. *See* http://www.cicr.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P (last visited Aug. 14, 2006) (listing the parties to the Geneva Convention).

362. Geneva Conventions Act, ch. 198 (1968) (Kenya), *available at* http://www.kenyalaw.org/kenyalaw/klr_app/frames.php. Kenya Law Online is a service of the National Council for Law Reporting, a body created by the Kenyan government to publish Kenya Law Reports. *See* About Kenya Law Reports, http://www.kenyalaw.org/about/index.php.

tion,[363] and Kenyan law does not appear to criminalize either genocide or crimes against humanity.

Rwanda joined the Geneva Conventions in 1964 and the Genocide Convention in 1975.[364] In 1996, in response to the 1994 atrocities, Rwanda passed a law which created a mechanism to conduct trials of those accused of committing crimes against humanity and genocide.[365] However, the law was quite limited and only allowed prosecutions for crimes committed after October 1, 1990.[366] Moreover, while it allowed for prosecutions for genocide and crimes against humanity, it relied on references to the crimes "as defined" in the Genocide Convention, the Geneva Conventions, and the 1968 Convention on Statutes of Limitation.[367] In 2003, Rwanda adopted domestic legislation explicitly defining war crimes, genocide, and crimes against humanity.[368] The law defines crimes against humanity as requiring only a widespread or systematic attack against a civilian population.[369]

12. Others

According to a June 2006 Human Rights Watch report, neither Norway nor Denmark has incorporated any international crimes into its domestic laws, and each relies on prosecuting individuals under common domestic crimes like murder, rape and assault.[370] In 1946, China criminalized a class of acts that was broader than the typical definition of war crimes, but still required that those acts be committed "before or during a period of hostilities."[371] Prior to passage of the Implementation of the Rome Statute of the International Criminal Court Act in 2002, South Africa did not have any statutory or common law defini-

363. Http://www.unhchr.ch/html/menu3/b/treaty1gen.htm (last visited Aug. 14, 2006) (listing the parties to the Genocide Convention).

364. International Humanitarian Law National Implementation *available at* http://www.icrc.org/ihl-nat.nsf/WebALL?openview (last visited Aug. 14, 2006) (describing the implementation of the Geneva Conventions in various countries). *See also* http://www.cicr.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P (last visited Aug. 14, 2006) (listing the parties to the Geneva Convention).

365. *See* Organic Law No. 08/96 (Rwanda) (1996) on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity. A translation, in English, is available from the website of Prevent Genocide International at http://www.preventgenocide.org/law/domestic/rwanda.htm (last visited Aug. 14, 2006). A copy, in French, is available from the ICRC website at http://www.icrc.org/ihl-nat.nsf/0/2F8A6D659284E2F4C1257084004F0A04.

366. Organic Law, *supra* note 365, art. 1.

367. *Id.*

368. *See* Law No. 33 bis/2003, Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes (2003) (Rwanda), *available at* http://www.icrc.org/ihl-nat.nsf/0/2C4E9B18DD164434C1257084004C3D9C.

369. *Id.*, art. 5.

370. *See* Human Rights Watch, *supra* note 315, at nn.93-96.

371. *See* RATNER & ABRAMS, *supra* note 27, at 53-54.

tion of war crimes, genocide or crimes against humanity.[372] South Africa defines crimes against humanity by reference to the Rome Statute and does not require a nexus with armed conflict.[373] Crimes against humanity were first criminalized in Spain in 2004[374] and require only that they be "parte de un ataque generalizado o sistemático contra la población civil."[375] The Soviet Union never criminalized crimes against humanity or genocide and the Russian Federation only criminalized genocide in 1997.[376] It appears that crimes against humanity are still not prohibited in Russian domestic law.

This examination of the treatment of crimes against humanity in the domestic laws of states is incomplete. In 1975 there were 144 member states in the United Nations,[377] but this section has only examined the laws of twenty-one countries. In addition, the selection of those countries was unavoidably biased in favor of English language jurisdictions and developed countries. Nevertheless, the results are striking. Very few countries prohibited crimes against humanity in their domestic laws prior to 1975. Only Israel and Germany used a definition of crimes against humanity that did not require a nexus with armed conflict, and it appears that Germany only used that definition during the period that it was occupied by the Allies between 1946 and 1949. France, which had been an early supporter of removing the nexus with armed conflict, defined crimes against humanity using the IMT definition. China prohibited some acts which might be considered crimes against humanity but required a connection with armed conflict. No other country was found that prohibited crimes against humanity in its domestic laws prior to 1975. In

372. *See* Anton Katz, *An Act of Transformation: The Incorporation of the Rome Statute of the ICC into National law in South Africa*, 12(4) AFR. SEC. REV. 25, 27 (2003), *available at* http://www.iss.co.za/pubs/ASR/12No4/F3.pdf (last visited Aug. 14, 2006).

373. *Id.*

374. *See* Human Rights Watch, Universal Jurisdiction in Europe, *supra* note 315, at nn.383-84.

375. *See* Spanish Criminal Code, art. 607bis (1995) (Spain), *available at* http://noticias.juridicas.com/base_datos/Penal/lo10-1995.html (last visited Aug. 15, 2006).

376. *See* Prevent Genocide International, webpage on Russian Federation available at http://www.preventgenocide.org/ru/statia357.htm (quoting an excerpt from the 1997 Russian Federal Criminal Code, Article 357, which prohibits genocide). *Cf.* Fourteenth periodic report of States parties due in 1994: Russian Federation, Report on compliance with the International Convention on the Elimination of All Forms of Racial Discrimination, U.N. Doc. CERD/C/299/Add.15, ¶ 20 (Jul. 28, 1996) (noting that the 1997 Criminal Code's inclusion of genocide sets it apart from the 1960 Criminal Code). The report is available at http://www.unhchr.ch/tbs/doc.nsf/23a89bf90e53e6ccc125656300593189/9c2a2d5b40020ece80256587005964ca?OpenDocument (last visited Aug. 15, 2006).

377. *See* Growth in United Nations Membership, 1945-2006, available at http://www.un.org/Overview/growth.htm (last visited Aug. 16, 2006).

short, there is little evidence of a widespread acceptance of crimes against humanity in the domestic laws of states prior to 1975—with or without a nexus with armed conflict.

In fact, countries did not seem to integrate crimes against humanity into their domestic laws in large numbers until after the negotiation of the Rome Statute in the summer of 1998. However, while crimes against humanity may not have been widely prohibited in domestic laws prior to 1999, that does not directly affect its existence in international law. In fact, one would expect there to be a significant delay between the creation of a crime in international law and its incorporation into the domestic laws of states. For example, the Genocide Convention was created in 1948 and the Geneva Conventions in 1949, yet many states did not criminalize them in their domestic laws until years or decades later.[378] Despite the relatively slow incorporation of war crimes and genocide into domestic law, they were still widely recognized as constituting international law shortly after they were created (and long before they become domestic law in most countries). Consequently, the late adoption of crimes against humanity in domestic law does not prove that it was not customary international law. As discussed above, the widespread acceptance of the Nuremberg Principles demonstrates that crimes against humanity (as defined in the IMT Charter) were part of international criminal law by the early 1950s at the latest.[379]

IV. THE PRINCIPLE OF LEGALITY

The principle of legality[380] prohibits individuals from being found criminally responsible for conduct which was not criminal at the time of its commission.[381] Unlike the Rome Statute,[382] the

378. The United Kingdom implemented the Genocide Convention in 1969 and the Geneva Conventions in 1957, delays of twenty-one years and eight years, respectively. *See supra* notes 336-37. Ireland had delays of twenty-five years and thirteen years, respectively. *See supra* note 342-43. The Netherlands had delays of sixteen years and three years, respectively. *See supra* note 353.

379. *See supra* note 124.

380. The principle of legality is also sometimes referred to by two Latin maxims: 1) *nullum crimen sine lege*; and 2) *nullum poena sine lege*. These translate as "no crime without law" and "no punishment without law." *See* RATNER & ABRAMS, *supra* note 27, at 21. The principle of legality encompasses both concepts.

381. *See* Susan Lamb, *Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law*, *in* ANTONIO CASSESE, 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 733, 733 (2002); RATNER & ABRAMS, *supra* note 27, at 21. William Schabas has described the principle of legality as forbidding "prosecution of crimes that were not recognized as such at the time they were committed." *See* Schabas, *supra* note 286, at 70. Other authors have recognized that the "core prohibition" in the principle of legality is the prohibition "on the retroactive application of criminal law." *See* Bruce Broomhall, *Article 22: Nul-*

Extraordinary Chambers Law does not specifically discuss the principle of legality. However, the Extraordinary Chambers are obligated to "exercise their jurisdiction in accordance with international standards of justice, fairness, and due process of law," as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights (ICCPR).[383] Article 15(1) of the ICCPR states, in part, that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."[384] Consequently, the principle of legality does apply at the Extraordinary Chambers. It is also required by customary international law, Cambodia's treaty obligations, and the Constitution of Cambodia.[385]

---

lum Crimen Sine Lege, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 447, 447 (Otto Triffterer ed., 1999).

382. *See* Rome Statute of the International Criminal Court, arts. 22-23. The prohibition on retroactive application of the law is contained in Article 22. *Id.*, art. 22(1) ("A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the court."). The prohibition on punishment without law is contained in Article 23. *Id.*, art. 23 ("A person convicted by the Court may be punished only in accordance with this Statute.").

383. Extraordinary Chambers Law, art. 33.

384. International Covenant on Civil and Political Rights art. 15(1), Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368, *available at* http://www.ohchr.org/english/law/ccpr.htm. The text of the ICCPR was included as an annex to G.A. Res. 2200 (Dec. 16, 1966). Article 15 of the ICCPR is very similar to the language of Article 11 of the Universal Declaration of Human Rights (UDHR). *See* Universal Declaration of Human Rights, G.A. Res. 217(III), UN GAOR, 3rd Sess., Supp. No. 13, UN Doc. A/810 (1948).

385. The principle of legality is one of the most fundamental customary requirements of international criminal law. *See* Lamb, *supra* note 381, at 734 (describing the principle of legality as a "well-established norm[ ] of customary international law"); Broomhall, *supra* note 381, at 447 (describing it as a "fundamental principle of any criminal justice system"); RATNER & ABRAMS, *supra* note 27, at 21 (describing it as a "fundamental precept of international criminal law"). It became customary international law shortly after the end of World War II. *See* Lamb, *supra* note 381, at 740-41; Broomhall, *supra* note 381, at 453-54. As a matter of customary international law, the Extraordinary Chambers would be obligated to apply the principle of legality to any prosecutions for crimes against humanity.

The principle of legality has been included in numerous human rights treaties, including the ICCPR and the Universal Declaration of Human Rights. *See* Broomhall, *supra* note 381, at 453-54. It is also incorporated into the Third Geneva Convention of 1949. *See* Lamb, *supra* note 381, at 741. Cambodia is a party to the ICCPR and the Geneva Conventions, and the Universal Declaration of Human Rights is incorporated into Cambodian law by Article 31 of the Cambodian Constitution. *See* Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties, as of Jun. 9, 2004, *available at* http://www.unhchr.ch/pdf/report.pdf (last visited May 25, 2006); International Committee for the Red Cross, States party to the Geneva Conventions and their Additional Protocols, dated Dec. 4, 2005 *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_gc/$File/Conventions%20de%20Geneve

The principle of legality prevents someone from being prosecuted for a crime, unless there was an existing law which made that act criminal. This prohibition on the retroactive application of criminal law is considered essential to the rule of law.[386] It is based on the assumption that rational actors will modify their actions to take into account the law.[387] However, before actors can conform their actions to the law, it is essential that the law be known or knowable. If the law was unknowable at the time of the action (as it is in the case where it is applied retroactively), then actors cannot modify their behavior to conform to the law, and it is unfair to prosecute them for its violation.[388] Essentially, the principle of legality prevents actors from being punished for actions they could not predict were illegal and thus could not avoid.

Unfortunately, the principle of legality is harder to apply in the context of international law than it is in domestic law. In international law, there is no one body that has exclusive legislative power. Rather, international law can be formed in numerous ways. Consequently, it can sometimes be difficult to know the extent of the law, particularly when dealing with customary law, which is the sum product of the actions of states and may not be written down anywhere.[389] This has led some to argue that crimes based on customary international law are automatically a violation of the principle of legality because customary law is inherently uncertain.[390] However, this argument goes too far. Laws do not have to be written to be knowable; there is no theoretical reason why unwritten customs cannot be sufficiently well-developed that actors should be expected to take them into account when choosing their course of action.[391] Rather than an

%20et%20Protocoles%20additionnels%20ENG.pdf (last visited May 25, 2006); Cambodian Constitution, art. 31, *available at* http://www.constitution.org/cons/cambodia.htm ("The Kingdom of Cambodia shall recognize and respect human rights as stipulated in . . . the Universal Declaration of Human Rights . . . .").

386. *See* Broomhall, *supra* note 381, at 450-51 (noting that legal systems that allow retroactive application of criminal laws increase the discretion of the judiciary and police, and in extreme form, result in "the abandonment of the rule of law"). Such a legal system would increase the discretion of the legislative authorities to an undesirable degree by allowing them to punish acts which were undertaken in the reasonable belief they were legal.

387. *Id.* at 450.

388. *See* Chauvy v. France, App. No. 64915/01, Eur. Ct. H.R., 295, ¶ 43 (2004) (holding that a "law" is only valid if "it is formulated with sufficient precision to enable the citizen to regulate his conduct").

389. *See* Lamb, *supra* note 381, at 743 (noting the difficulty of applying the principle of legality to customary international law).

390. *See* Lamb, *supra* note 381, at nn.4, 61.

391. *Cf.* S.W. v. United Kingdom, No. 47/1994/494/576, Eur. Ct. H.R. 52, ¶ 35 (1995). The court was interpreting Article 7 of the European Convention on Human Rights, which mirrors the language of both the Article 11 of the UDHR and Article

arbitrary focus on whether a law is written or not, the essence of the principle of legality has to do with whether a law is knowable or not.

In this regard, the European Court of Human Rights has interpreted the principle of legality to require "accessibility and foreseeability."[392] This view of the principle of legality acknowledges that the law need not be perfectly certain to be enforceable[393] and allows for the gradual development of criminal law so long as the results are foreseeable.[394] Moreover, a development or expansion of the law is not unforeseeable simply because the accused did not foresee it. Such a development can meet the principle of legality even though the accused would have needed "appropriate legal advice" to assess the direction of the law.[395] In effect, this interpretation assumes that actors are rational and that they can and should make reasonable predictions about the future course of the law and act accordingly. Holding those actors liable for foreseeable developments of the law is not funda-

---

15 of the ICCPR. It concluded that the "law" at issue "comprises written as well as unwritten law . . . ." *Id.*

Ratner and Abrams acknowledge that customary norms may be definite enough to pass muster under the principle of legality, although they note that there are potential dangers inherent in the use of customary law. *See* RATNER & ABRAMS, *supra* note 27, at 21-22. For example, it may be problematic to rely too heavily on scholarly writings to determine the content of customary international law because scholarly writings tend to argue for the extension or expansion of international law and may not accurately represent the contemporaneous state of customary law. *Id.* at 22.

This article has focused on the actions of states, rather than the writings of scholars. No essential argument relies exclusively on scholarly writings, although they have been used to "flesh out" arguments. Consequently, the author believes that the danger that Ratner and Abrams describe has been minimized.

392. In S.W. v. United Kingdom, *supra* note 391, the European Court of Human Rights concluded that a law would not violate the principle of legality enshrined in the European Convention in Human Rights—which is essentially the same as that found in the UDHR and the ICCPR—so long as it was accessible and foreseeable. *Id.*, ¶ 35.

393. Perfect certainty is not required. *See* Chauvy v. France, App. No. 64915/01, Eur. Ct. H.R. 295, ¶ 43 (2004) ("Those consequences need not be foreseeable with absolute certainty."). Moreover, it is probably impossible because laws are "inevitably couched in terms which, to a greater or lesser extent, are vague . . . ." *Id.* Nor would it even be desirable because it would result in "excessive rigidity" and prevent the law from adapting to changing circumstances. *Id.*

394. *See* S.W. v. United Kingdom, No. 47/1994/494/576, Eur. Ct. H.R. 52, ¶ 43 (1995) (holding that a foreseeable "evolution" of criminal law did not violate the principle of legality). *See also* Radio France v. France, App. No. 53984/00, 2004-II Eur. Ct. H.R. 40, ¶ 20 (noting that the principle of legality "does not outlaw general clarification of the rules of criminal liability" provided that the result is reasonably foreseeable).

395. *See* Chauvy, *supra* note 393, at ¶ 44 ("A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.").

mentally unfair and does not violate the principle of legality. Moreover, this flexible interpretation of the principle of legality acknowledges that there is always bound to be some uncertainty when interpreting laws and prevents the law from being excessively rigid.

The European Court of Human Right's treatment of the principle of legality is more convincing than that endorsed by the IMT and the other World War II courts, which tended to treat the principle of legality as an obstacle that had to be overcome because of overriding political considerations.[396] To a lesser extent, the ICTY and ICTR have also treated the principle of legality as an obstacle to be overcome, rather than as an essential component of the rule of law.[397] In contrast, the International Criminal Court has a narrow definition of the principle of legality that limits criminal responsibility to the crimes as they are defined in the Rome Statute, prohibits the extension of those crimes by analogy, and specifies that any ambiguities about the application of the principle must be resolved in favor of the accused.[398] However, the International Criminal Court has the advantage of being treaty-based, which allows the elements of the crimes to be carefully negotiated and defined. That level of specificity in the elements of the crimes is unlikely to be present where the crime is based on customary international law. The Rome Statute acknowledges that its application of the principle of legality may be narrower than required under international law.[399]

Just as the IMT, ICTY, and ICTR have used a definition of the principle of legality that is too loose, the ICC uses a definition that is narrower than necessary. Only the European Court of Human Right's emphasis on foreseeability adequately protects

396. *See* Lamb, *supra* note 381, at 735-40 (concluding that the arguments and conclusions reached by the WWII courts regarding the principle of legality were all legally flawed); RATNER & ABRAMS, *supra* note 27, at 22 (describing the IMT's view of the principle of legality as "extremely loose and controversial"). *See also supra* note 62 (noting that the IMT's finding that it was applying existing international law was motivated more by political than legal considerations).

397. *See* Lamb, *supra* note 381, at 742-45 (noting that the principle of legality "has not, in practice, served to limit the *ad hoc* Tribunals' exercise of its jurisdiction in any meaningful way"). The ICTY and ICTR have consistently ruled in favor of the expansion of their own jurisdiction. For example, in the Tadic case, *supra* note 277, at ¶ 92, the ICTY concluded that its "primary purpose" was "not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed." This understanding of its purpose led the ICTY to embrace an extremely broad view of its own jurisdiction.

398. *See* Rome Statute, *supra* note 382, art. 22.

399. *Id.* (noting that its application of the principle of legality "shall not affect the characterization of any conduct as criminal under international law independently of this Statute").

the important policy justification for the principle of legality—that an actor must be able to predict what the law prohibits before it is fair to punish him for failing to comply with the law—while retaining an element of flexibility.

V. CONCLUSION

The discussion of the principle of legality leads to the ultimate question: Can the Extraordinary Chambers try people for crimes against humanity using the definition contained in the EC Law? There is a strong argument that it can. As noted above, the state of crimes against humanity may have been uncertain in 1975. The crime was in the middle of undergoing a transition from requiring a nexus with armed conflict to dispensing with the nexus requirement. That transition probably occurred at some point between 1968 and 1984—and may well have occurred before 1975—but there is insufficient evidence of state practice to pin down the date more precisely. However, the fact that the law may have been uncertain in 1975 does not automatically violate the principle of legality because some uncertainty is permissible.[400] Rather, the appropriate inquiry is whether the senior leaders of the Communist Party of Kampuchea (hereafter "CPK") could have predicted that they would be charged with crimes against humanity in the absence of an armed conflict. To some extent, this question is probably artificial.[401] Nevertheless, the inquiry is not whether senior leaders of the CPK did anticipate that they would be charged, but whether it was possible that they could have anticipated it.

As members of the government of a state, it should be assumed that they had access to appropriate legal advice on the state of international law.[402] Although the state of the law was somewhat uncertain, the review of the development of crimes against humanity above suggests that an international lawyer would probably have advised the CPK in 1975 that crimes against humanity was undergoing a transition and that there was a growing belief amongst states that the nexus with armed conflict was unnecessary. She would have noted the Charter of the IMT and the Nuremberg Principles, both of which require a nexus with armed conflict. These fundamental documents represented the

400. *See supra* notes 393-95.

401. The author does not know whether the CPK leadership ever contemplated being charged with crimes against humanity or received any legal advice on the state of crimes against humanity during the period 1975-1979, although it seems unlikely.

402. *See supra* note 395. If citizens of a state can be assumed to have access to legal advice to know the state of domestic law, then members of the government of a state can probably be assumed to have access to legal advice on the state of international law.

state of crimes against humanity immediately after WWII. However, a search would also have identified other significant documents and events, including the ILC's 1954 draft code of offences, the Eichmann trial, as well as the 1968 Convention on Statutes of Limitation.[403] These indicate a trend toward removal of the nexus requirement. Indeed, by 1968, the group of states supporting removal of the nexus requirement was larger than the group opposing removal.[404] She might also have noted that the two aspects of crimes against humanity which had already been codified, genocide and apartheid,[405] did not require a nexus with armed conflict. In short, while she would probably have concluded that the exact state of the law was uncertain due to the scarcity of state practice, she would probably have warned the senior leaders of the CPK that there was: 1) a well-established historical trend toward the elimination of the nexus requirement; and 2) a distinct possibility that the nexus requirement had already been removed from customary law.[406]

In conclusion, even though it is uncertain exactly when the nexus requirement was eliminated from the definition of crimes against humanity, there is a strong argument that the Extraordinary Chambers can try people using the definition in the EC Law because either: 1) the nexus requirement had already disappeared from the definition of crimes against humanity by 1975; or 2) it was foreseeable in 1975 that the nexus requirement would be eliminated, and the information necessary to come to this conclusion was accessible. On the other hand, there is also some evidence that removal of the nexus requirement did not become a "general practice" until later, perhaps during or immediately after the negotiation of the Rome Statute.[407]

---

403. It is worth noting that virtually all of the information used in Sections II(A)-II(H) of this paper to identify the status of crimes against humanity would have been accessible in 1975. There can be little doubt that the evidence necessary to predict the course of the law was accessible. Thus it meets the first prong of the accessible and foreseeable test.

404. *See supra* notes 222-23.

405. The Genocide Convention was opened for signature in 1948. *See supra* Section II(F). The Apartheid Convention was opened for signature in 1973. *See supra* Section II(H)(4). Neither convention required a nexus with armed conflict.

406. In this way, the situation is analogous to that in S.W. v. United Kingdom, No. 47/1994/494/576, Eur. Ct. H.R. 52, ¶ 35 (1995). There, the accused was ultimately held to be liable for raping his wife despite the existence of a common law principle that a husband could not be guilty of raping his wife. The court concluded that the common law immunity for husbands had been under attack for some time, and the law was going through an "evident evolution" towards the elimination of that immunity. Consequently, the accused's conviction did not the principle of legality because "judicial recognition of the absence of the immunity had become a reasonably foreseeable development of the law." *Id.* ¶¶ 40-44, 43.

407. *See supra* notes 265-276 (describing the inclusion of a nexus requirement in the statute of the ICTY); *supra* notes 283-287 (describing objections to the removal

of the nexus with armed conflict during the negotiation of the Rome Statute); *supra* notes 377-78 (noting that the Rome Statute may have been a turning point in how states defined crimes against humanity in their domestic laws).