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United States Delegation

Crimes Against Humanity:
Lack of a Requirement for a Nexus to Armed Conflict

One of the most important issues to be decided with respect to the statute for an international criminal court is whether the definition of crimes against humanity will include the requirement that all such crimes be committed in connection with armed conflict. There are compelling reasons for this committee to determine that crimes against humanity, when committed either in times of war or in times of peace, must be included within the jurisdiction of the international criminal court. Moreover, no nexus to armed conflict is required under existing law.

It is certainly the case that crimes against humanity are closely related to war crimes, and indeed the phrase "crimes against humanity" can be traced to both the Nuremburg tradition, as well as important instruments from the turn of this century related to the law of armed conflict.[1] Nevertheless, crimes against humanity, even at Nuremburg were considered more than a mere extension of crimes committed in connection with armed conflict. They were part of an effort to define and proscribe acts which simply did not fit within the traditional notions of war crimes.

The major innovation of Nuremburg -- now well-accepted by the world community -- is that the atrocities and depredations which have traditionally been held to be war crimes if committed against the nationals of another state, similarly constitute criminal conduct when conducted against one's own nationals. This central tenet, underscored by the development of humanitarian and human rights law over the past fifty years in the direction of protecting individuals from conduct by states, is the framework in which we must judge the proper contours of a definition of these crimes. It suggests that we must look to the nature of the acts, and the objective of protecting individuals.

The Nuremburg precedent presents a mixed picture. Article 6(c) of the Charter of the Nuremburg International Military Tribunal provided for jurisdiction over crimes against humanity committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal."[2] At the same time, Control Council Law No. 10, under which persons within the

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[1] The preambles of the First Hague Convention of 1899 on the Laws and Customs of War and the Fourth Hague Convention of 1907 refer to "crimes against humanity." The legal roots of crimes against humanity, under other names and related principles, stretch back in time.

[2] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, August 8, 1945, 82 UNTS 279. Article 6(c) provides in full:

> Crimes Against Humanity: namely, 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.

Allies' zones of occupation were tried, did not include the nexus requirement.[3] The record of the development of the Nuremburg and Tokyo Charters does not, however, indicate that the drafters believed that the nexus was required as a matter of law.[4] Indeed, there was no reason for them to reach a legal conclusion on that point. The drafters had determined to take the very significant -- and fully justified -- step of applying criminal sanctions to acts by states against their own citizens. In the specific circumstances of the crimes committed during and in connection with World War II, the acts for which prosecutions were brought would be punishable regardless of whether the nexus was included.

The International Law Commission (ILC), in connection with its development of the Code of Crimes Against the Peace and Security of Mankind, has not included a nexus requirement, and its rapporteur stated that although "first linked to a state of belligerency . . . the concept of crimes against humanity gradually came to be viewed as autonomous and is today quite separate from that of war crimes."[5] Even the ILC draft in 1954, not so long after World War II, removes the nexus.[6] This itself is a strong indication that, even as of end of the War, the

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Article V(c) of the Tokyo Charter, which is similar to Article 6(c) of the London Charter, also includes the nexus requirement.

[3] The military tribunals in several cases concluded that Control Council Law No. 10 in fact removed the nexus requirement, and thus broadened the jurisdiction of the lesser military tribunals. United States v. Ohlendorf (Case No. 9), IV Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10, at 49; United States v. Altstoetter (Case No. 3), III Trials of War Criminals, at 974. Tribunals in other cases took the opposite view. United States v. Flick (Case No. 5), VI Trials of War Criminals, at 1213; United States v. Weizsaecker (Case No. 11), XIII Trials of War Criminals, at 112.

[4] An analysis of the article, its history, and the related Berlin Protocol of October 6, 1945 indicates that the inclusion of the nexus requirement in Article 6(c) was deliberate, but the reasons remain obscure. See Schwelb, Crimes Against Humanity, 23 Brit.Y.B. Int'l L. 178, 195 (1946)(". . . it 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."). It is worthwhile noting that the inclusion in Article 6(c) of liability for crimes both "before and after the war" implies, as the UN War Crimes Commission concluded in reviewing this provision, that "international law contains penal sanctions against individuals, applicable not only in time of war, but also in time of peace. . . . attacks on fundamental liberties . . . that is inhuman acts, constitute international crimes not only in time of war, but also, in certain circumstances, in time of peace." History of the United Nations War Crimes Commission and the Development of the Laws of War, 192-93 (1948).

[5] 2 Y. B. Int'l L. Comm'n 86, A/CN.4/SER.A/1989/Add.1(Part 1)(1989).

[6] 2 Y.B. Int'l L. Comm'n 150, UN Doc. A/CN.4/SER.A/1954/Add.1(1954).

nexus was not a part of customary international law.[7] The latest ILC reformulation of crimes against humanity follows the same course as its earlier drafts in rejecting the nexus requirement.[8]

The statutes for the UN's International Tribunals for the former Yugoslavia and for Rwanda are consistent with this trend. The Rwanda statute includes no nexus requirement in its article on crimes against humanity.[9] This is particularly instructive, as inclusion of a nexus could have eliminated the relevance of crimes against humanity (depending on a judgment on the nature of the conflict in that country) for purposes of the Rwanda prosecutions. Thus, the Security Council, in a situation where inclusion of the nexus to armed conflict would in fact have made a difference, made a judgment that not only made sense, but implicitly recognized the state of the law in this area.

The Yugoslavia Tribunal's statute, on the other hand, includes the phrase "when committed in armed conflict" in its relevant article.[10] The Yugoslavia example is similar to that of Article 6(c) of the London Charter, in that its drafters as well were not presented with a situation in which a nexus to armed conflict would make a difference with respect to actual prosecutions. Unlike the case with Rwanda, there was a general appreciation with regard to Yugoslavia that the conflict there involved armed conflict. Thus, there was no real impact to including the phrase "when committed in armed conflict."

It is not clear, despite the words chosen for the Yugoslavia statute, that a nexus was in fact intended. The Secretary-General's report, which was approved by the Security Council, provides with respect to Article 5 that "[c]rimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.[11] In any event, the Tribunal's own appellate chamber in the Tadic Case noted that the Security Council "may have defined the crime in Article 5 more

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[7] The ILC's formulation of the principles of international law recognized at Nuremburg, while retaining the nexus language from the Charter's Article 6(c), includes a notation emphasizing that crimes against humanity can be committed before a war. "Principles of International Law Recognized by the Charter of the Nuremburg Tribunal and Judgement of the Tribunal," in Report of the International Law Commission, 5 UN GAOR, Supp. No. 12 (A/1316)(1950) at 11 (Principle VI). The ILC's mandate for this exercise was solely to express the Nuremberg principles, and not to consider their parameters in light of international law. Thus, there was no opportunity at the time for the ILC to remove the nexus language, even if it had determined that such a step was warranted.

[8] 5 UN GAOR, Supp. No. 10, UN Doc. A/50/10 (1995)(new crimes against humanity article from the 47th session of the ILC).

[9] Article 3 of the statute annexed to UN Security Council resolution 955 (1994).

[10] Article 5 of the statute annexed to the report of the Secretary–General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704, May 3, 1993, approved by the Security Council in resolution 827 (1993).

[11] UN Doc. S/25704, para. 48 (emphasis added). A report of the Secretary-General concerning the Rwanda Tribunal cites the language of the Yugoslavia statute and goes on to say that "Article 3 of the Rwanda statute makes no reference to the temporal scope of the crime; there is, therefore, no reason to limit its application in that respect." Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), UN Doc. S/1995/134 at 11, note 5.

narrowly than necessary under customary international law."[12] The Tadic opinion also states with unmistakable clarity that "it is by now a settled rule of customary international law that crimes against humanity do not require a connection between crimes against humanity and any conflict at all."[13]

Developments since World War II in related areas of the law confirm this conclusion. The Genocide Convention of 1948,[14] which covers acts naturally considered to be the foremost examples of "crimes against humanity" (even if for definitional purposes they are often separately categorized), specifically applies regardless of the existence of an armed conflict. Indeed, the Convention, which has now has 121 parties, was drafted with the understanding that it reflected customary international law.[15] In addition, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968[16] does not include a nexus to war crimes in its article on crimes against humanity.

More generally, states have entered into a large number of widely-accepted treaties in the human rights field which reflect the principle that the rights of individuals must be protected and that states do not have discretion to violate the fundamental rights of their own citizens. These rights and principles do not generally depend on extraneous factors, such as the existence of armed conflict between two or more states, for the basic protections to be applicable. It would be inconsistent with developments in human rights law since World War II to insist that fundamental protections of this importance depend on this type of unrelated element. It makes no sense to contend that offenses of the magnitude contemplated are crimes against humanity only in the context of armed conflict, and would not be crimes if the citizens against which the attack was directed did not have time to fight back.

The International Criminal Court must have the ability to prosecute and punish the kinds of atrocities that have been witnessed by the world community in recent decades which have no relation to war. It would ring hollow to establish a court that could not address the types of crimes committed by the Khmer Rouge, for example. If we do not cover such situations, it might be concluded that we have not maintained our responsibility to address the most serious crimes.

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[12] Tadic Case, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, October 2, 1995, at 73. The tribunal stated as well: "Although the nexus requirement in the Nuremburg Charter was carried over to the 1948 General Assembly resolution affirming the Nuremburg principles, there is no logical or legal basis for this requirement and it has been abandoned in subsequent State practice with respect to crimes against humanity."

[13] Id.

[14] Convention on the Prevention and Punishment of the Crime of Genocide, 1948. Article 1 provides that the parties "confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish." (emphasis added)

[15] See the preamble and Article 1 of the Genocide Convention, and General Assembly Resolution 96(I) (1946) which affirmed that genocide is a crime under international law and requested ECOSOC to "undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide . . . ."

[16] 754 UNTS 73.

In sum, crimes against humanity are among the most serious crimes that can be committed. Moreover, the acts themselves violate the laws of all civilized countries and legal systems. There is no question that these are crimes of the gravest variety, that they deserve the harshest punishment, and that the persons who commit such acts know that they are doing wrong.[17] Thus, there is no question that a crime has been committed, but only whether linkage to armed conflict is required for the international community to take cognizance of it. There is no sound reason in theory or precedent to do so. It is precisely for these types of situations, where local law enforcement mechanisms are likely to be unavailing, that the need for an international criminal court may be most compelling.

[17] Even the International Court of Justice has recognized that "elementary considerations of humanity (can be) even more exacting in peace than in war." The Corfu Channel Case, I.C.J. Reports 1949, p. 22