peacemaking should be identified by scholars and experimental curriculums developed for staff colleges in all those countries likely to contribute to peacemaking operations. The questions to be considered will range from philosophical and legal problems to the development of codes of conduct, and on to rather minute arrangements for accommodating national and international command and control and coordinating communications.

As a start, the advanced war colleges in the United States—the National Defense University and the Naval War College—could develop programs on the command and staff levels to prepare officers and other officials of the United States Government for peacemaking roles. Those courses should be open, as well, to officers of other countries likely to participate in peacemaking. The military establishments of other countries should be encouraged to do the same. Existing NATO training programs should urgently focus on the special operational problems likely to be presented by peacemaking. Other regional military training programs should also develop this focus.

At a later stage, an international command and staff college for peacemaking operations should be established with a student body drawn from mid-level and senior military and governmental personnel of countries that have committed themselves to participating in international peacemaking as well as from the ranks of officials in the United Nations.

W. MICHAEL REISMAN*

WAR CRIMES IN YUGOSLAVIA AND THE DEVELOPMENT OF INTERNATIONAL LAW

Whatever the practical achievements of the international tribunal for Yugoslavia may prove to be, the United Nations Security Council has established the first truly international criminal tribunal[1] for the prosecution of persons responsible for serious violations of international humanitarian law. Its creation portends at least some deterrence to future violations and gives a new lease on life to that part of international criminal law which applies to violations of humanitarian law. These are major, though obvious, achievements.[2] However, the tragic and massive

---

beyond traditional peace keeping. Telephone interview with Maj. Gen. John O. B. Sewall (U.S. Army, ret.), Senior Fellow, Institute for National Strategic Studies, National Defense University (Oct. 15, 1993).

The special training needs of peace enforcement missions have prompted discussion in a number of military and academic settings. Among the groups addressing the issue is the Henry Stimson Center in Washington, D.C. As part of a larger investigation of future training needs for UN operations, the Center is undertaking a detailed investigation into the special curricular and training needs of peace enforcement missions. Telephone interview with Matthew Vaccaro, Research Associate, Henry L. Stimson Center (Oct. 4, 1993).

* The research assistance of Natalie Coburn is gratefully acknowledged.

[1] The post–World War II Nuremberg and Tokyo tribunals are regarded by some commentators as victors' courts.

[2] *See generally* James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AJIL 639 (1993); Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, FOREIGN AFF., Summer 1993, at 123. For criticism of the tribunal, see Alfred P. Rubin, *International Crime and Punishment*, NAT'L INTEREST, Fall 1993, at 73. No attempt has been

abuses in Yugoslavia have also triggered additional institutional and normative developments, which are the subject of this Editorial.

The first noteworthy development is the ground-breaking determination by the Security Council that the commission of atrocities in the former Yugoslavia, particularly in Bosnia-Hercegovina, constituted a threat to international peace, and that the creation of an ad hoc international criminal tribunal would contribute to the restoration of peace. It was on this basis, pursuant to chapter VII of the UN Charter, that the Security Council decided in its Resolutions 808 and 827 to establish such a tribunal.[3] The singling out of violations of humanitarian law as a major factor in the determination of a threat to the peace creates an important precedent, and the establishment of the tribunal as an enforcement measure under the binding authority of chapter VII, rather than through a treaty creating an international criminal court whose jurisdiction would be subject to the consent of the states concerned, may foreshadow more effective international responses to violations of humanitarian law.[4]

Second, the statute of the tribunal contributes significantly to affirming certain major components of international humanitarian law as customary law.[5] In his commentary on the statute approved by the Security Council, the UN Secretary-General emphasized that the principle *nullum crimen sine lege* requires that "the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise."[6] That "part of conventional international humanitarian law which has beyond doubt become part of international customary law," according to the Secretary-General, is the law of armed conflict embodied in the Geneva Conventions for the Protection of War Victims of August 12, 1949; the Hague Convention (No. IV) Respecting the Laws and Customs of War on Land and annexed Regulations of October 18, 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948; and the Charter of the International Military Tribunal of August 8, 1945.[7] The Geneva Conventions constitute "the core of the customary law applicable in international armed conflicts."[8]

These statements will undoubtedly be quoted often to support the characterization of the Geneva Conventions as declaratory of customary law.[9] However, the

---

made to prosecute those responsible for egregious violations of humanitarian law and human rights in Uganda, Iraq, Cambodia and occupied Kuwait. The credibility of the international system of justice requires prosecutions for atrocities everywhere, not only those committed in the former Yugoslavia. *See also infra* note 4.

[3] For the statute of the tribunal, see Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704 [hereinafter Commentary] and Annex (May 3, 1993), *reprinted in* 32 ILM 1159, 1192 (1993).

[4] On a permanent international criminal court, see Report of the Working Group on the draft statute for an international criminal court, Annex to Report of the International Law Commission on the work of its forty-fifth session, UN GAOR, 48th Sess., Supp. No. 10, at 255, UN Doc. A/48/10 (1993); James Crawford, *The ILC's Draft Statute for an International Criminal Tribunal*, *infra* p. 140.

[5] *See generally* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989).

[6] Commentary, *supra* note 3, para. 34, 32 ILM at 1170.

[7] *Id.*, para. 35, 32 ILM at 1170 (footnotes omitted).

[8] *Id.*, para. 37, 32 ILM at 1170.

[9] *See, e.g.*, TASK FORCE OF THE ABA SECTION OF INTERNATIONAL LAW AND PRACTICE, REPORT ON THE INTERNATIONAL TRIBUNAL TO ADJUDICATE WAR CRIMES COMMITTED IN THE FORMER YUGOSLAVIA 12–13 (1993) [hereinafter ABA REPORT].

Secretary-General's list of unquestionably customary instruments does not include Additional Protocol I to the Geneva Conventions. Although its norms are largely customary,[10] the Protocol also contains some provisions that are not, as yet, customary law. Perhaps the Secretary-General thought it would be unwise to list only those provisions of the Protocol that have undoubtedly acquired the status of customary law.

For purposes of the ad hoc tribunal's jurisdiction—though not for the elaboration of customary law—this omission was somewhat remedied by the robust interpretation of the U.S. representative, Ambassador Madeleine K. Albright, immediately after the tribunal's statute was adopted in the Security Council. In the view of the United States, the application of the law of the former Yugoslavia, which incorporated Protocol I, satisfies the principle *nullum crimen sine lege*. Hence, Ambassador Albright said, "it is understood that the 'laws or customs of war' referred to in Article 3 include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including . . . the 1977 Additional Protocols to these Conventions."[11]

The tribunal may have an opportunity to develop and further clarify customary law by interpreting and applying the provisions of the statute on subject matter jurisdiction, especially Article 3, which provides only an illustrative list of laws and customs of war. Fulfillment of this function, however, will depend both on effective and vigorous use of the tribunal and on the cases presented to it.

The third development of note is the concerted and successful effort to treat the conflicts in the territory of the former Yugoslavia as international armed conflicts, which triggers the applicability of the entire body of international humanitarian law, including provisions of Hague law and Geneva law (grave breaches) establishing the personal responsibility of the perpetrators.

Whether the conflicts in Yugoslavia are characterized as internal or international is critically important. The fourth Hague Convention of 1907, which codified the principal laws of war and served as the normative core for the post–World War II war crimes prosecutions, applies to international wars only. The other principal prong of the penal laws of war, the grave breaches provisions of the Geneva Conventions and Protocol I, is also directed to international wars. Violations of common Article 3 of the Geneva Conventions, which concerns internal wars, do not constitute grave breaches giving rise to universal criminal jurisdiction.[12] Were any part of the conflict deemed internal rather than international, the perpetrators of even the worst atrocities might try to challenge prosecutions for war crimes or grave breaches, but not for genocide or crimes against humanity.

In the *Nicaragua* case, the International Court of Justice contrasted the conflict between the contras and the Sandinista Government with that between the United States and Nicaragua. The first, as internal, was governed by common Article 3 only; the second, as international, fell under the rules on international

[10] MERON, *supra* note 5, at 62–70, 74–78.

[11] UN Doc. S/PV.3217, at 15 (May 25, 1993).

[12] The International Law Commission has made Article 22 of its Draft Code of Crimes against the Peace and Security of Mankind, entitled "Exceptionally serious war crimes," applicable to both international and internal armed conflicts; but Article 22 has yet to take root as a norm of international law. Report of the International Law Commission on the work of its forty-third session, UN GAOR, 46th Sess., Supp. No. 10, at 270, UN Doc. A/46/10 (1991).

conflicts.[13] I am not suggesting any parallels between the parties to the conflicts in Nicaragua and in the former Yugoslavia and would simply submit that any attempt to apply the *Nicaragua* Court's distinctions to the conflict in Yugoslavia would result in byzantine complexity, making prosecutions difficult and often impossible.

The black letter of international humanitarian law still adheres, at least in theory, to a categorical (though often artificial) distinction between internal and international conflicts. Because of the involvement of foreign actors, most internal conflicts are in fact mixed internal-international conflicts. The conflicts in Yugoslavia, and especially Bosnia-Hercegovina, are prime examples. Yet despite their concurrent or successive character as internal, mixed or international, there are valid reasons to consider the entire conflict as international, and therefore subject to the rules on international wars. The relevant factors in the transition of the Yugoslav conflicts from internal to international were the recognition by foreign states of Slovenia, Croatia and Bosnia-Hercegovina; the admission of these states to the United Nations; and the agreements concluded between the parties to the conflicts under the auspices of the International Committee of the Red Cross (ICRC), which provide for the application of the Geneva Conventions, in whole or in part. Notwithstanding these agreements, the parties' position on the nature of the conflict remains unclear. The unacknowledged, but clear, intervention in the Bosnian conflict by Belgrade on behalf of the Serbs, and against the Government of Bosnia-Hercegovina, could transform the conflict from internal to international, even under classic principles of international law.

The various proposals submitted to the Security Council and the Secretary-General on establishing the tribunal treat all the aspects of the conflict as international, ensuring the possibility of prosecutions for classic war crimes and grave breaches of the Geneva Conventions. The UN War Crimes Commission shares the view that the conflicts in Yugoslavia are international and thus that all the laws of war, including, of course, the rules governing war crimes, are applicable.[14] The Secretary-General's proposals on the tribunal's subject matter jurisdiction, particularly those pertaining to war crimes and grave breaches of the Geneva Conven-

[13] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, 114 (Judgment of June 27). The Court considered common Article 3 as reflecting a customary norm ("laws of humanity"), *id.* at 113–14, and as a minimum yardstick applicable not only to noninternational armed conflicts but also to international armed conflicts, *id.* at 114. Invoking this ICJ pronouncement, the ABA Task Force recommended that certain provisions of common Article 3 be incorporated into Article 5 of the statute, which enumerates crimes against humanity. The Task Force noted that

> such modifications would also confirm that these crimes will be within the Tribunal's subject-matter jurisdiction even if it should determine that they were committed in a *non-international* armed conflict, and thus were not covered by parallel provisions in Article 2 of the Statute, which address only grave breaches of the Conventions committed in *international* armed conflict.

ABA REPORT, *supra* note 9, at 15 (footnotes omitted).

[14] The Commission stated that

> the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian issues the parties have concluded among themselves, justify an approach whereby it applies the law applicable in international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia.

Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/25274, Ann. I, para. 45 (1993) [hereinafter UN War Crimes Commission].

tions,[15] are clearly based on the assumption that the conflicts are international. Moreover, in the report approved by the Security Council as a basis for its action, the Secretary-General emphasized that the tribunal should apply only those rules of international customary law applicable in international armed conflicts.[16] It is fair to conclude, I submit, that the statute of the tribunal constitutes a determination that the conflicts in Yugoslavia are international in character.

This characterization should not prevent individual defendants from arguing that they fought in an internal war and therefore could not be accused of grave breaches of the Geneva Conventions or war crimes under the Hague Regulations. In contrast to the Nuremberg Charter,[17] the statute of the ad hoc tribunal does not preclude challenges of its authority by defendants. The tribunal may rule on challenges concerning the international character of the conflicts and, indeed, other jurisdictional matters. Whether it will be ready assertively to question the Security Council resolutions under which it was established, or its constitutive charter, the statute, is another matter. Be that as it may, by internationalizing the conflicts, the United Nations enhances and expands the applicability of humanitarian and criminal international law.

Fourth, there has been a movement toward international criminalization of the offenses under common Article 3 of the Geneva Conventions committed in non-international armed conflicts. As a basis for criminal prosecutions, common Article 3 does not fit the black letter law of either the Hague Regulations or the grave breaches provisions of the Geneva Conventions. However, Article 3 of the statute of the tribunal, which lists violations of the laws and customs of war, is merely illustrative ("Such violations shall include, but not be limited to . . ."). Again, the interpretive statement of Ambassador Albright is relevant; she pointed out that the "laws or customs of war" referred to in Article 3 of the tribunal's statute cover the entire body of humanitarian law "in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions."[18] Thus, in the view of the United States, because Article 3 could be a basis for criminal prosecutions in the law of the former Yugoslavia, it could form such a basis for those before the tribunal as well. The British representative, Sir David Hannay, apparently agreed: "it would be our view that the reference to the laws or customs of war in Article 3 is broad enough to include applicable international conventions."[19] The French representative, Ambassador Jean-Bernard Mérimée, approached the matter from the perspective of Yugoslav law: "the expression 'laws or customs of war' used in Article 3 of the Statute covers specifically, in the opinion of France, all the obligations that flow from the humanitarian law agreements in force on the territory of the former Yugoslavia at the time when the offences were committed."[20]

I agree with James O'Brien that,

> [w]hether or not it is well-established international law that common Article 3 gives rise to individual criminal responsibility, the prohibitions in that article

[15] Commentary, *supra* note 3, para. 35, 32 ILM at 1170.

[16] *Id.*, paras. 33–37, 32 ILM at 1170, and text at notes 5–8 *supra*.

[17] *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, Aug. 8, 1945, Art. 3, 59 Stat. 1544, 82 UNTS 279, *reprinted in* 39 AJIL 257 (1945) [hereinafter Nuremberg Charter or London Agreement].

[18] UN Doc. S/PV.3217, at 15 (May 25, 1993).

[19] *Id.* at 19.

[20] *Id.* at 11.

> are part of the law of the former Yugoslavia, and the tribunal can therefore rely on it without fear of invoking criminal law of which the defendants did not know.[21]

It remains to be seen if the tribunal will regard the above interpretive statements as authoritative. This possibility is weakened by the fact that in his proposals the Secretary-General stressed that reference to the domestic practice of Yugoslavia will be limited to the matter of penalties.[22] Article 24 of the new statute limits the penalty that may be imposed by the new tribunal to that of imprisonment. Departing both from the law and practice of Nuremberg and from the law of the former Yugoslavia, the statute thus adopts an abolitionist policy.

It should be understood that common Article 3 clearly imposes several important prohibitions on the behavior of parties to noninternational armed conflicts, norms that were recognized as customary in the *Nicaragua* case. That these prohibitions are not listed among the grave breaches provisions of the Geneva Conventions pertains to universal jurisdiction, not substantive law, and does not detract from their normative character.[23] Jurisdictional obligations can be otherwise created, for example by national law,[24] or, exceptionally, by mandatory resolutions of the Security Council.

Perpetrators of atrocities in internal wars should not be treated more leniently than those engaged in international wars. Whether or not the indictments and convictions are based on common Article 3, the extension of the concept of war crimes under international law to abuses perpetrated in noninternational armed conflicts is a welcome, though still very tentative, development.

The fifth significant development is that the due process protections in the statute exceed those in the Charters of the Nuremberg and Tokyo Tribunals. Articles 20 and 21 of the statute are exemplary in this regard, based as they are[25] on the extensive catalog in Article 14 of the International Covenant on Civil and Political Rights. In contrast to the International Law Commission's proposal for a permanent criminal tribunal, Article 21(4)(d) of the tribunal's statute, which tracks Article 14(3)(d) of the Political Covenant, appears not to allow trials *in absentia.* In the words of the Secretary-General, "[t]here is a widespread perception that . . . this would not be consistent with article 14 of the International Covenant on Civil and Political Rights, which provides that the accused shall be

[21] O'Brien, *supra* note 2, at 647.

[22] Commentary, *supra* note 3, para. 36, 32 ILM at 1170.

[23] Article 146(3) of the fourth Geneva Convention obligates all state parties to "take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article." Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention No. IV), Aug. 12, 1949, 6 UST 3516, 75 UNTS 287. Suppression involves punishment. COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 594 (Oscar M. Uhler & Henri Coursier eds., 1958).

[24] As pointed out above, common Article 3 was incorporated in the law of former Yugoslavia. The United States Army appears to regard violations of that article as encompassed by the notion of war crimes and would prosecute for war crimes captured military personnel accused of breaches of Article 3. U.S. DEP'T OF THE ARMY, THE LAW OF LAND WARFARE, para. 499 (Field Manual No. 27–10, 1956); *Uniform Code of Military Justice*, 10 U.S.C. §§802, 818 (1988). These texts mention neither common Article 3 nor other provisions of the Geneva Conventions. U.S. military personnel accused of violating common Article 3 would be prosecuted for the substantive offenses listed in the UCMJ. I am grateful to Mr. George Peirce and to Major William Hudson for the information on which this note is based.

[25] The Secretary-General emphasizes this point in his report. *See* Commentary, *supra* note 3, paras. 101, 106, 32 ILM at 1184, 1185.

entitled to be tried in his presence."[26] Thus, the Secretary-General and the Security Council interpret Article 14 as pro-defendant. Again, on the basis of Article 14, the right of appeal to a chamber of the tribunal was incorporated in the statute,[27] which goes beyond Nuremberg.[28] The incorporation of the norms under Article 14 of the Covenant in the statute of the first international criminal court since the post–World War II tribunals stands as a significant precedent that enhances the importance of these norms *per se* and in the context of international criminal tribunals.

Sixth, again going beyond the Nuremberg Charter, the new statute follows Control Council Law No. 10, adopted by the four occupying powers as a charter for war crimes trials by their national courts in Germany, by providing that rape can constitute a crime against humanity.[29] Both morally and legally, the importance of this provision cannot be overstated. Nevertheless, the possibility of prosecuting the far more frequent cases of rape that are regarded as "lesser" war crimes or grave breaches should not be neglected. The references to war crimes and grave breaches in the charters proposed for the ad hoc tribunal, together with the recognition by the United States and the ICRC that rape can be a war crime or a grave breach, strengthen the case for such prosecutions.[30]

My seventh and final point pertains to the nexus between crimes against humanity and war. Crimes against humanity were defined in the Nuremberg Charter as murder, extermination, enslavement, deportation and other inhumane acts com-

[26] *Id.*, para. 101, 32 ILM at 1184 (footnote omitted). Article 44(1)(h) adopted by the working group of the ILC, *supra* note 4, at 305–06, allows *in absentia* trials when the tribunal "concludes that the absence of the accused is deliberate." This provision was adopted after considerable controversy. For views rejecting *in absentia* trials, see Meron, *supra* note 2, at 125.

The addition to Article 14(3)(d) of the Political Covenant of the reference to the right of the accused to be tried in his presence was proposed by Israel, which did not mention any qualifications whatsoever to the exercise and scope of that right. MARC J. BOSSUYT, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 298–300 (1987); UN GAOR 3d Comm., 14th Sess., 961st mtg., ¶13, UN Doc. A/C.3/SR.961 (1959). In its General Comment No. 13 (1984), the Human Rights Committee did not entirely exclude the possibility of *in absentia* trials ("When exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defence is all the more necessary."). UN Doc. HRI/GEN/1, at 15 (1992).

The controversy concerning the exclusion of *in absentia* trials has continued even since the adoption of the tribunal's statute. France, reflecting perhaps the broader permissibility of *in absentia* judgments in civil law countries, has thus argued that "[t]he Statute of the Tribunal does not explicitly exclude the possibility of judgment in the defendant's absence, but does not actually provide for it." Note No. 803 from the Permanent Mission of France to the United Nations, paras. 4, 6 (Oct. 28, 1993). Of course, as in the criminal procedure of the United States and many other countries, there are rules against abuse by the accused of the right to be tried in his presence. Rule 21 of the U.S. draft Rules of Procedure and Evidence for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia describes the circumstances in which the accused shall be considered to have waived the right to be present. *See* Letter from the United States Embassy at The Hague to the Secretary-General of the United Nations (Nov. 18, 1993).

[27] Commentary, *supra* note 3, para. 116 and Art. 25, 32 ILM at 1187.

[28] Meron, *supra* note 2, at 125; O'Brien, *supra* note 2, at 655.

[29] Control Council Law No. 10 expanded the formulation of crimes against humanity by including rape among the prohibitions listed in Article II(1)(c). CONTROL COUNCIL FOR GERMANY, OFFICIAL GAZETTE, Jan. 31, 1946, at 50, *reprinted in* NAVAL WAR COLLEGE, DOCUMENTS ON PRISONERS OF WAR 304 (International Law Studies vol. 60, Howard S. Levie ed., 1979).

[30] Theodor Meron, *Rape as a Crime under International Humanitarian Law*, 87 AJIL 424, 428 (1993).

mitted 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, i.e., crimes against peace and war crimes, and whether or not in violation of the domestic law of the country where perpetrated.[31] Control Council Law No. 10[32] deleted the jurisdictional nexus between war crimes and crimes against peace. Although largely because of an amending Protocol to the Charter the Nuremberg Tribunal did not consider crimes committed before the war to be crimes against humanity,[33] it may have been guided by jurisdictional considerations and not necessarily by a conceptually narrow definition of crimes against humanity.

Most crimes against humanity listed in the London Agreement, for instance violations of the law of belligerent occupation, were also war crimes under customary international law, and therefore could not, then or now, be seen as *ex post facto*. In the trials of lesser war criminals by U.S. occupation courts, war crimes were often merged with crimes against humanity.

An innovative feature of the Nuremberg Charter was that certain crimes against the perpetrator's own citizens were considered crimes against humanity. Today, however, because of the intervening development of international law and the recognition, through human rights law and otherwise, of the central status of the individual as a subject of international law, this facet of the London Agreement would not be regarded as innovative. Many human rights conventions, e.g., on the prohibition of torture, render certain types of behavior between citizens of the same state as internationally criminal, regardless of their commission in wartime. The tangled meshing of crimes against humanity and human rights militates against requiring a link with war for the former. The better opinion today, I submit, is that crimes against humanity exist independently of war. The recent edition of Oppenheim's treatise by Jennings and Watts, for example, considers crimes against humanity "as a self-contained category, without the need for any formal link with war crimes."[34] The International Law Commission expressed the view that crimes against humanity may be committed before a war,[35] and in the *Barbie* case the French Cour de cassation appeared to regard the nexus with war as unnecessary ("In fact, in contrast to crimes against humanity, war crimes are directly connected with the existence of a situation of hostilities").[36] Nevertheless, neither in the literature nor in the work of the ILC can one find consistent positions on the nexus requirement.[37]

[31] Nuremberg Charter, *supra* note 17, Art. 6(c).

[32] Control Council Law No. 10, *supra* note 29.

[33] 2 LASSA OPPENHEIM, INTERNATIONAL LAW 579 n.5 (Hersch Lauterpacht ed., 7th ed. 1952).

[34] 1 OPPENHEIM'S INTERNATIONAL LAW 996 (Robert Y. Jennings & Arthur Watts eds., 9th ed. 1992).

[35] [1950] 2 Y.B. Int'l L. Comm'n 377, para. 120, UN Doc. A/CN.4/SER.A/1950/Add.1.

[36] Fédération Nationale des Déportés et Internés Résistants et Patriotes v. Barbie, 78 ILR 125, 136 (Fr. Cass. crim. 1985).

[37] In the definition of crimes against humanity (Principle VI(c)) in its 1950 report on the formulation of the Nuremberg principles, the ILC retained the nexus with crimes against peace and war crimes. [1950] 2 Y.B. Int'l L. Comm'n, *supra* note 35, at 377. The nexus with other crimes was eliminated from the definition of crimes against humanity (Art. 2(11)) in the 1954 Draft Code of Offences against the Peace and Security of Mankind, [1954] 2 Y.B. Int'l L. Comm'n 150, UN Doc. A/CN.4/SER.A/1954/Add.1, and today the ILC considers the autonomy of crimes against humanity to be absolute. [1986] 2 Y.B. Int'l L. Comm'n 56, UN Doc. A/CN.4/SER.A/1986/Add.1. *See also* Doudou Thiam, Seventh Report on the Draft Code of Crimes against the Peace and Security of

Although crimes against humanity were undoubtedly committed in the former Yugoslavia in wartime (the tribunal's temporal jurisdiction begins on January 1, 1991), rendering the Nuremberg limitation largely irrelevant to the new tribunal's jurisdiction, the views of states, expert bodies and other organizations on the nexus question will evidently affect both the construction of the statute[38] and the development of customary law. The UN War Crimes Commission clearly rejected the nexus with war and defined crimes against humanity as being "irrespective of war."[39] Italy's proposal for the statute of the tribunal considered "the reference to 'crimes against mankind' in the wording of the Nürnberg Tribunal statute [to be] obsolete, in that it envisaged a link with a war crime, thus largely restricting the scope of action of the Court to be set up."[40] The proposals by France, the United States and the Organization of the Islamic Conference did not refer to any such requirement. The ABA task force ably led by Monroe Leigh stated that, "[w]hile the Statute follows the Nuremberg precedent in asserting jurisdiction over crimes against humanity that are 'committed in armed conflict,' the Task Force recognizes that, as a general principle, there are compelling reasons to punish crimes against humanity having no nexus to armed conflict."[41] In its suggestions to the United Nations concerning the statute, the ICRC affirmed that, "unlike [war crimes], [crimes against humanity] can be committed independently of an armed conflict and, even when committed during a conflict, are not necessarily related to it."[42] O'Brien notes that most governments' comments on the proposed statute did not connect crimes against humanity to other crimes or to an armed conflict.[43]

Article 5 of the statute, dealing with crimes against humanity, gives the tribunal competence regarding such crimes "when committed in armed conflict, whether international or internal in character, and directed against any civilian popula-

---

Mankind, [1989] 2 Y.B. Int'l L. Comm'n 86, UN Doc. A/CN.4/SER.A/1989/Add.1 (pt. 1) ("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." And "[c]rimes against humanity may be committed in time of war or in time of peace; war crimes can be committed only in time of war." *Id.* at 87). The draft articles of the Draft Code of Crimes against the Peace and Security of Mankind provisionally adopted by the ILC on first reading abandon the "distinction between crimes against peace, war crimes, and crimes against humanity." Report of the International Law Commission on the work of its forty-third session, UN GAOR, 46th Sess., Supp. No. 10, at 259, UN Doc. A/46/10 (1991). By combining in a single article (draft Article 21, entitled "Systematic or mass violations of human rights") some violations of human rights with elements previously considered crimes against humanity, the ILC appears to support the latter's autonomy from war. *Id.* at 265.

Orentlicher sums up the evolution of the nexus requirement by observing that "while post-Nuremberg developments have tended to free crimes against humanity from a wartime context, the trend has been inconclusive." Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2539 (1991). *See also* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 257 (1992); Yoram Dinstein, *International Criminal Law*, 20 ISR. L. REV. 206, 211 (1985); Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178, 193–97, 205–06 (1946).

[38] In any event, the ad hoc tribunal's task will be largely to interpret its statute, rather than to resort to the customary law of crimes against humanity. O'Brien, *supra* note 2, at 649 n.44.

[39] UN War Crimes Commission, *supra* note 14, para. 49.

[40] UN Doc. S/25300, at 11 (Feb. 17, 1993). [41] ABA REPORT, *supra* note 9, at 16 n.53.

[42] Some Preliminary Remarks by the International Committee of the Red Cross on the Setting-up of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia 8 (Mar. 25, 1993).

[43] O'Brien, *supra* note 2, at 649 & n.45.

tion." The interpretive statements of the United States[44] and the United Kingdom[45] suggest that the words "in armed conflict" can be understood as meaning "during armed conflict," regardless of a substantive link with either another crime within the jurisdiction of the tribunal or the state of war. O'Brien comments that, "[o]n its face, the Yugoslav statute requires only a connection between crimes against humanity and armed conflict, which is not itself a crime under the statute; it thus marks a modest advance over the Nuremberg Charter by expressly removing the requirement of connection to another crime under international law."[46]

Maintenance of even such a reduced nexus to war, however, is disappointing. It may have been triggered by the drafters' concern that some members of the Security Council would be opposed to the criminalization of peacetime human rights abuses.

While the black letter of the statute confers jurisdiction on the tribunal only for crimes against humanity committed in armed conflict, the Secretary-General's commentary appears to provide a different and much wider definition of such crimes, specifying that they are prohibited "regardless of whether they are committed in an armed conflict, international or internal in character."[47] Thus, the restrictive approach to crimes against humanity adopted in the statute of the ad hoc tribunal will be tempered by the wider definition in the commentary, which effectively discards any nexus with war; this tempering may have important consequences on the future development of customary law in this field.

The reaction of the international community to the appalling abuses in the former Yugoslavia has brought about certain advances—some of them of considerable importance—in international criminal and humanitarian law. One may hope that these institutional and normative developments will enhance prospects for firm responses to future atrocities.

THEODOR MERON*

[44] The U.S. representative stated:

> [I]t is understood that Article 5 applies to all acts listed in that article, when committed contrary to law during a period of armed conflict in the territory of the former Yugoslavia, as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, gender, or religious grounds.

UN Doc. S/PV.3217, at 16 (May 25, 1993).

[45] "Article 5 covers acts committed in time of armed conflict." *Id.* at 19.

[46] O'Brien, *supra* note 2, at 650.

[47] Commentary, *supra* note 3, para. 47, 32 ILM at 1173.

* I am grateful to Monroe Leigh, Andreas Lowenfeld and James O'Brien for their comments and to my research assistant Jenny Edelstein for her help. *See also* note 24 *supra*.