Apartheid as a Crime Against Humanity: A Submission to the South African Truth and Reconciliation Commission

Ronald C. Slye
Seattle University School of Law
APARTHEID AS A CRIME AGAINST HUMANITY: A SUBMISSION TO THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION

Ronald C. Slye*

I. INTRODUCTION ........................................................................................................... 273

II. THE LEGAL DEFINITION OF A CRIME AGAINST HUMANITY .............................. 274
   A. Definitions .................................................................................................................. 274
      1. Charter of the International Military Tribunal ....................................................... 274
      2. Control Council Law No. 10 .................................................................................. 275
      3. International Tribunal for the Former Yugoslavia ............................................... 276
      4. International Tribunal for Rwanda ........................................................................ 277
      5. Draft Code of Crimes against the Peace and Security of Mankind ...................... 278
   B. Categories of Crimes against Humanity that Apply to Apartheid ......................... 279
      1. Persecution on Political, Racial, or Religious Grounds ...................................... 280
      2. Other Inhumane Acts ............................................................................................. 283
   C. Elements Common to All Acts That Qualify as a Crime against Humanity ............ 283
      1. Widespread or Systematic ..................................................................................... 284
      2. Individual Responsibility and Intent ....................................................................... 285
      3. No Nexus with Armed Conflict ............................................................................. 286

III. Apartheid as a Crime against Humanity ................................................................. 288
   A. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity ............................................................... 290
   B. International Convention on the Suppression and Punishment of the Crime of Apartheid ................................................................................................. 292
   C. Post-Apartheid Convention Developments: The International Consensus Becomes Unanimous .................................................................................. 295

IV. GENOCIDE .................................................................................................................. 296
   A. Specific Intent ............................................................................................................ 297

* Visiting Professor, Seattle University School of Law. From 1996–1998 I was a consultant in international law to South Africa’s Truth and Reconciliation Commission. These introductory comments, and the contents of the submission itself, do not necessarily reflect the opinion of the Commission. I am grateful to all who contributed to the drafting of the submission, in particular Margaret DeGuzman and the Allard K. Lowenstein International Human Rights Law Clinic at Yale Law School, and Scott Christensen of Hughs, Hubbard & Reed and the Lawyers Committee for Human Rights.
The question of whether apartheid is a crime against humanity might seem an odd one for many people living outside South Africa—and indeed for the vast majority of people living inside South Africa. With the recent demise of legalized apartheid in South Africa, one might ask if apartheid’s status under international law has any contemporary relevance beyond a small group of legal academics. The status of apartheid under international law—in particular whether apartheid constitutes a crime against humanity—is a question that the South African Truth and Reconciliation Commission (“TRC”) was obligated to address in its final report.

But the importance of this question goes well beyond the immediate mandate of that Commission. While apartheid as a legal institution no longer exists, its legacy will continue to be felt within South Africa. In addition, racism continues to be an all too pervasive phenomenon in most, if not all, societies worldwide. It is for this reason that a group of international jurists and human rights organizations submitted to the TRC this statement of international law that argues why apartheid meets the definition of a crime against humanity. These signatories hope that this submission will contribute to the emerging moral and legal consensus that racism in any form will not be tolerated, and that institutionalized racism gives rise to international criminal liability that does not diminish with the passage of time.¹

The apartheid system of legalized racial discrimination systematically used violence to impoverish, malnourish, and in other ways violate the fundamental rights of the overwhelming majority of South Africans because of their race. That system must surely qualify as “persecution based on race” and thus as a crime against humanity.² Numerous authoritative international bodies concur in this judgment: the U.N. General Assembly in scores of resolutions has consistently asserted that apartheid is a crime against humanity, and the U.N. Security Council has made similar assertions, at times unanimously.³ By January 1, 1996,

---


2. “Persecution based on race” is a part of every definition of crimes against humanity that has been considered since the first definition articulated in the Nuremberg Charter. See infra notes 31–49 and accompanying text.

3. See infra note 101 and accompanying text.
ninety-nine states had ratified the Convention on the Suppression and Punishment of the Crime of Apartheid,\footnote{Jean-Bernard Marie, International Instruments Relating to Human Rights: Classification and Status of Ratifications as of 1 January 1996, 17 Hum. RTS. L.J. 61, 73 (1996).} (the "Apartheid Convention"), which declared apartheid a crime against humanity and obligated member states to prosecute those guilty of the crime of apartheid—six more ratifications than the convention prohibiting torture,\footnote{As of January 1, 1996, the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment had ninety-three ratifications. See id. at 69.} and only three less than the convention outlawing slavery.\footnote{As of January 1, 1996, the Slavery Convention had 102 ratifications, and the Supplementary Convention on the abolition of slavery, the slave trade, and institutions and practices similar to slavery had 114 ratifications. See id. at 68.}

Within South Africa’s new, non-racial\footnote{I use the term "non-racial" here in deference to colleagues in South Africa, who note that the use of the term "multi-racial" in South Africa echoes the rhetoric of the apartheid government, which claimed that its ideology was multi-racial—i.e. that apartheid recognized many different races, and was designed to create separate living spaces for each racial group. This is obviously not the intent of the current government.} democracy, however, particularly in the context of the TRC, the assertion that apartheid is a crime against humanity produced a reaction among a small but vocal minority who argued that apartheid, however evil, does not qualify as a crime against humanity.\footnote{Hermann Giliomee, Asmal Offers ‘No Fresh View, No Ground-Breaking Synthesis’ of Truth, Cape Times, Oct. 23, 1996, at 2.} South African lawyers and politicians had pursued this line of argument during the apartheid era in response to the numerous U.N. resolutions and, more particularly, in response to the Apartheid Convention.\footnote{See, e.g., H. Booysen, Convention on the Crime of Apartheid, 2 S. Afr. Y.B. INT’L L. 56, 82–90 (1976).}

In the immediate post-apartheid era the debate over the international status of apartheid was further complicated by assertions that apartheid was in fact genocide—a particular kind of crime against humanity—and that the apartheid government was quite similar to the Nazi government in its ideology, policies, and effects. While the TRC in fact may have uncovered evidence that apartheid exhibited the requisite intent to qualify as genocide,\footnote{See infra note 116; 2 Truth and Reconciliation Commission of South Africa Report, 510–23 (1998) (reporting on the TRC’s special investigation into biological and chemical warfare). To provide genocide, one must show that certain acts were committed with “the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such.” See infra note 106.} the comparison to Nazi Germany shifted the debate in parts of South African society from whether apartheid meets the legal definition of a crime against humanity to a debate about the similarities and differences between the South African National Party government and the Nazi Party government, and between apartheid and the Nazi per-
secution and holocaust. The question of whether apartheid is a crime against humanity was thus conflated with a debate over a comparison between two distinct historical realities—a debate that may be important from a historical and political point of view, but that is largely irrelevant to the foregoing legal question.

This submission made to the TRC by the Allard K. Lowenstein International Human Rights Law Clinic, the Lawyers Committee for Human Rights, and twenty-one international law professors regarding apartheid as a crime against humanity (reproduced below) grew out of the debate within South Africa concerning apartheid, crimes against humanity, genocide, and Nazism. This submission is an authoritative statement by experts in international law concerning the legal status of apartheid and was drafted in part to clarify the relevant issues for a legal evaluation of apartheid—not only within the TRC, but also in broader South African and international society. The submission argues that apartheid does qualify as a crime against humanity under international law, even though it may not qualify as genocide, and even though there may be important differences between the policies of apartheid and Nazism.

While this submission is in part concerned with the status of apartheid under international law, it is also concerned with the legal definition of crimes against humanity. Although at first glance the assertion that apartheid is a crime against humanity seems straightforward, a careful review of international law concerning apartheid and crimes against humanity reveals how undeveloped the law is in this area. Moreover, the international response to apartheid was driven as much by Cold War political concerns as by principled legal norms. These factors combined to make apartheid’s legal status under international law more contentious than one might assume. Nevertheless, this submission unequivocally concludes that apartheid is a crime against humanity.

Crimes against humanity committed in the last two decades in Cambodia, the former Yugoslavia, and Rwanda remind us of the continued capacity of human beings to plan and implement the worst atrocities imaginable. This submission, as a small contribution to the work of the TRC, reiterates the moral and legal consensus of the international community that such atrocities are crimes committed not only against their immediate victims, but also against humanity. We hope that the reiteration and recognition of this truth will embolden (and in some cases shame) governments, organizations, and peoples to commit themselves to ensuring that such crimes are not repeated.

11. For a recent discussion of the political dynamics of international reaction to apartheid, see, for example, KADER ET AL., RECONCILIATION THROUGH TRUTH: A RECKONING OF APARTHEID’S CRIMINAL GOVERNANCE (1996).

and that those who do commit such crimes are held to some international account.

MEMORANDUM OF LAW IN SUPPORT OF CONCLUDING THAT APARTHEID IS A CRIME AGAINST HUMANITY UNDER INTERNATIONAL LAW

We, the undersigned international jurists, make this submission to the South African Truth and Reconciliation Commission ("TRC") to assist you in determining whether apartheid is a crime against humanity. We do not profess to be experts on apartheid and its effects, or for that matter on South Africa. Our expertise lies in the area of international law. In this submission, we set forth and discuss the definition of crimes against humanity under international law. It is our hope that this definition, when combined with the wealth of factual material being compiled by the TRC, will allow it to make a clear and convincing determination of whether apartheid is a crime against humanity.

While we make this submission as experts in international law, we also make this submission as supporters of the new South Africa—as people who have watched with wonder your country’s political transition to a non-racial democracy that respects and ensures the human rights of all its peoples. We fully support the efforts of the TRC to expose the painful truth of apartheid as means to furthering reconciliation. It is in support of your efforts to expose the truth and promote reconciliation that we make this submission.

Catherine Admay
Lecturer
Duke University School of Law

Philip Alston
Professor of International Law
Head of Department of Law
European University Institute

Abdullahi An-Na‘im
Professor of International Law
Emory University School of Law

M. Cherif Bassiouni
Professor of Law De Paul University
College of Law
Director of the International Criminal Justice and Weapons Control Center

Thomas Buergenthal
Lobingier Professor of International and Comparative Law
Presiding Director, International Rule of Law Center

George Washington University
Law School
<table>
<thead>
<tr>
<th>Name</th>
<th>Position and Affiliation</th>
</tr>
</thead>
<tbody>
<tr>
<td>William S. Dodge</td>
<td>Associate Professor of Law, Hastings College of the Law, University of California</td>
</tr>
<tr>
<td>Cynthia Crawford Lichtenstein</td>
<td>Professor of Law, Boston College Law School, Former President, American Branch of the International Law Association, Honorary Vice President, American Society of International Law</td>
</tr>
<tr>
<td>John Dugard</td>
<td>Professor of Law, University of the Witwatersrand</td>
</tr>
<tr>
<td>Richard Falk</td>
<td>Albert G. Milbank Professor of International Law and Practice, Woodrow Wilson School of Public and International Affairs, Politics Department, Princeton University</td>
</tr>
<tr>
<td>Steven R. Ratner</td>
<td>Professor of Law, University of Texas, Austin</td>
</tr>
<tr>
<td>Gregory H. Fox</td>
<td>Senior Research Associate, Yale Law School</td>
</tr>
<tr>
<td>Anne-Marie Slaughter</td>
<td>J. Sinclair Armstrong Professor of International, Foreign, and Comparative Law</td>
</tr>
<tr>
<td>Thomas M. Franck</td>
<td>Murray and Ida Becker, Professor of Law, New York University</td>
</tr>
<tr>
<td>Ronald C. Slye</td>
<td>Visiting Professor, Seattle University School of Law</td>
</tr>
<tr>
<td>Claudio Grossman</td>
<td>Dean and Professor of Law, Washington College of Law, American University</td>
</tr>
<tr>
<td>Henry Steiner</td>
<td>Professor of Law, Director of the Human Rights Program, Harvard Law School</td>
</tr>
<tr>
<td>David J. Harris</td>
<td>Professor of Public International Law, Human Rights Law Centre, University of Nottingham</td>
</tr>
</tbody>
</table>
I. INTRODUCTION

The legislative mandate of the Truth and Reconciliation Commission ("TRC" or "Commission") authorizes it to investigate crimes that rise to the level of crimes against humanity under international law. The Promotion of National Unity and Reconciliation Act empowers the TRC to inquire into: "gross violations of human rights, including violations which were part of a systematic pattern of abuse;"13 "the nature, causes and extent of gross violations of human rights,"14 "the question whether such violations were the result of deliberate planning,"15 and "accountability, political or otherwise, for any such violation."16

As discussed below, certain acts or series of acts constitute crimes against humanity, if they are undertaken on a widespread or systematic basis—in other words, if they are massive in scale or result from deliberate and systematic planning. By empowering the TRC to inquire into the systematic patterns of abuse that occurred in South Africa, whether those abuses were the result of deliberate planning, and what degree of accountability attaches to these and other human rights violations, the Promotion of National Unity and Reconciliation Act clearly authorizes the TRC to investigate crimes that rise to the level of crimes against humanity. We conclude that there is no legal impediment to the TRC confirming international consensus that apartheid is a crime against humanity.

Through its collection and analysis of detailed information concerning gross violations of human rights, the TRC will have before it a body of evidence far more comprehensive than has been available to any other body that has ever considered the international legal status of apartheid.

---

15. Id. § 4(a)(iv).
16. Id. § 4(a)(v).
Consequently, the TRC is ideally situated to demonstrate that the policy and implementation of apartheid constitutes a crime against humanity under international law.

There are two steps in demonstrating that the policy of apartheid is a crime against humanity. The first step consists of defining the legal elements of a crime against humanity. The second step involves explaining how the policy of apartheid, or specific acts and policies that implemented apartheid, fall within that definition. The first inquiry, discussed in Part II below, concerns the legal definition of "crimes against humanity" in international law and constitutes the major part of this submission. We only briefly discuss the second step, as the Commission has uncovered more material relevant to this part of the inquiry than is available to us. In Part III we discuss the international opinion developed in the last three decades that apartheid qualifies as a crime against humanity. Finally, in Part IV we discuss the legal definition of genocide, a particular kind of crime against humanity, and emphasize that even if apartheid does not meet the definition of genocide, it may still constitute a crime against humanity.

II. THE LEGAL DEFINITION OF A CRIME AGAINST HUMANITY

A. Definitions

1. Charter of the International Military Tribunal

The definition of crimes against humanity was first codified in an agreement for prosecuting major criminals "whose offenses had no particular geographical location." This so-called London Agreement has as an annex the Charter of the International Military Tribunal ("IMT"), which defined those crimes over which it would have jurisdiction in the trials at Nuremberg. Those crimes included crimes against peace, war crimes, and crimes against humanity. The IMT Charter defines crimes against humanity 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.\footnote{18}

As discussed below, developments in international law have clarified
what constitutes an "inhumane act" and what constitutes "persecution."

2. Control Council Law No. 10

Shortly after the passage of the IMT Charter, Control Council Law
No. 10 was promulgated to empower the Allied powers to prosecute in
their respective zones of occupation "war criminals and other similar of-
fenders, other than those dealt with by the International Military
Tribunal."\footnote{19} Control Council Law No. 10 defined crimes against human-
ity as:

atrocities and offenses, including but not limited to murder, ex-
termination, enslavement, deportation, imprisonment, torture,
rape, or other inhumane acts committed against any civilian
population, or persecutions on political, racial or religious
grounds whether or not in violation of the domestic laws of the
country where perpetrated.\footnote{20}

This definition differed from the IMT Charter in two important re-
spects. First, it specifically mentioned "imprisonment, torture, [and]
rape" as additional inhumane acts that qualify as crimes against human-
ity. This was not considered to be an expansion of the definition, but
rather a further elaboration of the phrase "other inhumane acts." Second,
the Control Council Law's definition of "crimes against humanity"
eliminated the IMT Charter's requirement that the crimes be committed
before or during the war, or in execution of or in connection with crimes
against peace or war crimes.\footnote{21} This change seems to sever the nexus to
armed conflict required by the IMT Charter. While international jurists at
the time disagreed over whether Control Council Law No. 10 made such
a substantive change in the definition of crimes against humanity, there is
consensus today that the requirement of a connection or nexus to armed
conflict has been eliminated. Consequently, as we discuss below, the le-
gal definition of crimes against humanity no longer requires a nexus to
armed conflict.

\footnote{18. Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(c), 59 Stat. 1546,
1547, E.A.S. No. 472, 82 U.N.T.S. 284 [hereinafter IMT Charter].}
\footnote{19. Allied Control Council Law No. 10, Dec. 20, 1945, \textit{reprinted in} 1 \textit{Trials of War
Criminals before the Nuremberg Military Tribunals under Control Council Law
No. 10} xvi (1946–49).}
\footnote{20. \textit{Id.} art. II(l)(c).}
\footnote{21. \textit{See id.}}
3. International Tribunal for the Former Yugoslavia

In an effort to prosecute persons responsible for serious violations of international humanitarian law, the U.N. Security Council, acting under Chapter VII of the U.N. Charter, established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia ("ICTY"). This was the first chance for a functioning tribunal to adjudicate crimes against humanity since Nuremberg, and the definition provided in the ICTY statute is almost identical to Control Council Law No. 10. The ICTY Statute defines crimes against humanity as:

the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.\(^{22}\)

This definition limits crimes against humanity to those committed in armed conflict. Here the drafters of the ICTY Statute introduced some confusion because the commentary to this article, in the Report of the Secretary-General explained that "Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are...

\(^{22}\) Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), art. 5, at 13, U.N. Doc. S/25704 (1993) [hereinafter ICTY Statute]. Note that persecution is a crime against humanity, if it is committed on "political, racial and religious grounds" (emphasis added), whereas previous definitions required that an act be committed either on political, racial, or religious grounds. See id. The ICTY notes that the use of "and" in the ICTY Statute is a deviation from customary international law, and therefore the drafters must not have meant to require that all three grounds be present for persecution to constitute a crime against humanity. Instead, each of these three grounds sufficiently constitutes a crime against humanity. See Prosecutor v. Dusko Tadic a/k/a "Dule": Opinion and Judgment, U.N. Doc. IT-94-1-T, ¶ 713, 36 I.L.M. 908, 960 (1997).
committed in an armed conflict, international or internal in character." As we will discuss later, the decisions of the ICTY clarified that armed conflict is not a necessary element of crimes against humanity.

4. International Tribunal for Rwanda

A year after the formation of the ICTY, the United Nations established the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda ("ICTR"). The ICTR Statute defines crimes against humanity as:

the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.

This definition differs from earlier definitions in two important ways. First, the definition replaces the requirement of a nexus to armed conflict with a requirement that crimes be committed in a widespread or systematic manner in order to constitute a crime against humanity.

Second, the definition requires that in order for any of the crimes listed to rise to the level of a crime against humanity, it must be motivated by "national, political, ethnic, racial or religious grounds." Prior definitions did not require this qualification for all acts encompassing crimes against humanity; only persecution had to be motivated by these

23. ICTY Statute, supra note 22, at ¶ 47.
26. See ICTR Statute, supra note 25, at 1603.
27. See id.
grounds in order to constitute a specific crime against humanity. This provision in the ICTR statute also adds the "ethnic" ground which had not been included in prior definitions, reflecting the development of international criminal law since the Convention on the Prevention and Punishment of the Crime of Genocide. Like the ICTY statute, the persecution provision contains the conjunction "and" instead of "or," but this will presumably be interpreted according to the reading given by the ICTY.

5. Draft Code of Crimes against the Peace and Security of Mankind

In its 1996 Draft Code of Crimes Against the Peace and Security of Mankind, the International Law Commission ("ILC") defines crimes against humanity as:

any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group:

(a) murder;
(b) extermination;
(c) torture;
(d) enslavement;
(e) persecutions on political, racial, religious or ethnic grounds;
(f) institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;
(g) arbitrary deportation or forcible transfer of population;
(h) arbitrary imprisonment;
(i) forced disappearance of persons;
(j) rape, enforced prostitution and other forms of sexual abuse;

28. Since 1947, the ILC has been empowered by the General Assembly to prepare a draft code of offenses against the peace and security of mankind, including a definition of crimes against humanity. See United Nations, The Work of the International Law Commission (5th ed. 1996).
other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.  

The modern ILC definition reflects the evolution of the concept of crimes against humanity since the Second World War. The category of "institutionalized discrimination on racial . . . grounds" was explicitly included in the definition to reflect the opinion of the ILC that apartheid by definition is a crime against humanity. If the TRC adopts the ILC definition, the question of whether apartheid constitutes "institutionalized discrimination on racial . . . grounds" is not controversial. Acceptance of the ILC definition is not necessary to a finding that apartheid constitutes a crime against humanity. All definitions of crimes against humanity include the categories of "persecution on racial grounds" and "other inhumane acts." As we argue below, apartheid is a crime against humanity if policies and acts undertaken in its name constitute persecution or other inhumane acts. We agree with the widespread sentiment that apartheid constitutes a crime against humanity under any of the definitions discussed above.

In the remainder of this section, we discuss in more detail those key legal elements that must be proved before any act or series of acts qualifies as a crime against humanity. First, we discuss the two key categories under which apartheid may constitute a crime against humanity: persecution on racial grounds, and other inhumane acts. Second, we discuss the requirements for an act to constitute a crime against humanity: the prohibited acts must be committed on a widespread or systematic basis, and there must be individual intent and responsibility. The presence of an armed conflict, however, is not required.

B. Categories of Crimes against Humanity that Apply to Apartheid

There are two categories of crimes against humanity under which apartheid might fall. They are specifically found in all definitions of crimes against humanity: (1) persecution on political, racial or religious grounds, and (2) other inhumane acts committed against any civilian population.


30. By expressly mentioning institutionalized discrimination, the ILC was reacting in part to the perceived controversy surrounding the Convention on the Suppression and Punishment of the Crime of Apartheid (the "Apartheid Convention") and its definition of crimes against humanity. As discussed below, this controversy arose not because states thought apartheid could not qualify as a crime against humanity, but because of other fundamental issues raised by the Apartheid Convention. See infra notes 83–93 and accompanying text.
1. Persecution on Political, Racial, or Religious Grounds

The category of persecution on political, racial, or religious grounds is found in all definitions of crimes against humanity. Since apartheid was a state-wide system of racial discrimination, it is reasonable to conclude that apartheid constitutes a crime against humanity under this category.

The definition of a crime of persecution has only recently been defined clearly. The ICTY classifies crimes against humanity recognized by the Nuremburg Charter into two categories: the murder type (murder, extermination, enslavement, deportation), and the persecution type (persecution on political, racial, or religious grounds). The first category is well defined, based on its prevalence in domestic legal systems. The second is not so clearly defined or prevalent.

Case law from the Nuremberg tribunals and the decisions of the current ad hoc international criminal tribunals for the former Yugoslavia and Rwanda provide authoritative examples of acts or omissions that qualify as persecution. The ICTY looked to definitions of persecution offered by experts in international law and concluded that persecution is an act or omission committed against someone on account of his or her race, religion, politics or ethnicity. Furthermore, this persecution requires discrimination that is intended to infringe on an individual’s fundamental rights.

31. See Prosecutor v. Dusko Tadic, supra note 22, ¶ 694.
32. See id.
33. See id.
34. Professor Bassiouni defines the crime of persecution as:

State Action or Policy leading to the infliction upon an individual of harassment, torment, oppression, or discriminatory measures, designed to or likely to produce physical or mental suffering or economic harm, because of the victim's beliefs, views or membership in a given identifiable group (religious, social, ethnic, linguistic etc.), or simply because the perpetrator sought to single out a given category of victims for reasons peculiar to the perpetrator.

M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law 317 (1992). Another definition considered by the ICTY was offered by M. Le Gunehec of the Cour de Cassation in the Barbie case:

[A]bove all these crimes offend the fundamental rights of mankind; the right to equality, without distinctions of race, colour, or nationality, and the right to hold one’s own political and religious opinions. Such crimes not only inflict wounds or death, but are aggravated by the voluntary, deliberate and gratuitous violation of the dignity of all men and women: these are victimised only because they belong to a group other than that of their persecutors, or do not accept their dominion.

35. See Prosecutor v. Dusko Tadic, supra note 22, ¶ 698.
36. See id. at ¶ 697.
Apartheid as a Crime Against Humanity

The convictions of Nazi defendants for crimes against humanity provide examples of the types of activities that qualify as persecution. The Nuremberg Tribunal listed the following acts as constituting persecution and noted their progressive severity: deprivation of the rights to citizenship, to teach, to practice professions, to obtain education, and to marry freely; arrest and confinement, beatings, mutilation, and torture; confiscation of property; deportation to ghettos; slave labor; and extermination.  

Individuals were convicted of a crime against humanity for advocating and inciting violence against Jews; for authorizing the use of firing squads to punish the relatives of suspected saboteurs; for signing a decree that provided for the secret deportation, detention, and summary sentencing of those accused of resisting German occupation; for contributing to the process for singling out Jews for persecution by imposing collective fines on the Jewish community; for signing decrees extending anti-Semitic legislation to the newly occupied territories; for drafting and administering various decrees excluding Jews from the social and economic sectors of German society; for serving as a judge and thus as "an instrument in the program of the leaders of the Nazi State of persecution and extermination"; and for signing a series of decrees requiring

37. See United States v. von Weizsaecker (The Ministries Case), in 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 471 (1946-49), supra note 19, at 471. See also TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL No. 10, at 64–65 (1949), where crimes against humanity:

were the crimes which the average man would think of as most characteristic of the Nazis, and which we may describe as degradation or extermination of national, political, racial, religious, or other groups. These crimes cover the vast and terrible world of the Nuremberg laws, yellow arm bands, 'Aryanization,' concentration camps, medical experiments, extermination squads, and so on . . . [T]he concept of 'crimes against humanity' comprises atrocities which are part of a campaign of discrimination or persecution, and which are crimes against international law even when committed by nationals of one country against their fellow nationals . . . . (emphasis added).

38. The defendant Julius Streicher ardently advocated the boycott of Jewish businesses and the racially exclusionary Nuremberg Decrees. The Tribunal ruled that "Streicher's incitement to murder and extermination . . . clearly constitutes persecution on political and racial grounds . . . ." 22 TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 549 (1948) [hereinafter IMT Trials].

39. See id. at 535 (conviction of Keitel).
40. See id. at 535–36.
41. See id. at 527 (conviction of Goering).
42. See id.
43. See id. at 545–46 (conviction of Frick).
registration, ghettoization, affixation of the Star of David, and the de-
portation of Jews from occupied territory.45

The Nuremberg tribunal also indicated that certain acts of economic
discrimination or deprivation, "such [as] offences against personal prop-
erty as would amount to an assault upon the health and life of a human
being (such as the burning of his house or depriving him of his food sup-
ply or his paid employment)” might constitute a crime against hu-
manity.46 Even theft, if committed within the proper context, can con-
stitute a crime against humanity.47

Acts of persecution committed against political opponents of a re-
gime also qualify as crimes against humanity when the persecution is on
account of their political opinion or affiliation. The French Court of Cas-
sation recently confirmed that persecution against political opponents
falls within the definition of crimes against humanity.48

Thus, as the ICTY has noted, the crime of persecution can include a
wide variety of acts.49 In the case of apartheid, persecution of an individ-
ual on account of his or her race would qualify as a crime against hu-
manity under the ICTY definition. Furthermore, persecution of an indi-
vidual on the basis of his or her political opposition to apartheid,
regardless of their race, would also constitute a crime against humanity.

45. See 22 IMT Trials, supra note 38, at 576 (conviction of Seyss-Inquart).
959 (quoting Trial of Fredrich Flick and Five Others (“Flick Case”), Vol. IX, Law Reports of
Trials of War Criminals 51 (U.N. War Crimes Commission London, 1949)).
47. In the Ministries Case, the tribunal held that theft could constitute a crime against hu-
manity:
The defendant contends that stealing the personal property of Jews and other con-
centration camp inmates is not a crime against humanity. But under the
circumstances which we have here related, this plea must be and is rejected. What
was done was done pursuant to a governmental policy, and the thefts were part of a
program of extermination and were one of its objectives. . . . Without doubt all such
acts are crimes against humanity and he who participates or plays a consenting part
therein is guilty of a crime against humanity.
United States v. von Weizsaecker (The Ministries Case), 14 NUERNBERG MILITARY
TRIBUNALS, TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UN-
DER CONTROL COUNCIL LAW NO. 10, at 611.
48. See Federation Nationale des Deportes et Internes Resistants et Patriotes and Others
"inhumane acts and persecution committed in a systematic manner in the name of a State prac-
ticing a policy of ideological supremacy, not only against persons by reason of their
membership of a racial or religious community, but also against the opponents of that policy,
whatever the form of their opposition").
49. See Prosecutor v. Dusko Tadic, supra note 22, ¶¶ 704, 710, 711.
2. Other Inhumane Acts

Like the category of "persecution on political, racial, or religious grounds," the category of "other inhumane acts" is found in all definitions of crimes against humanity. While there is some disagreement on how extensive the category of other inhumane acts is, there is consensus that at least the following are included: medical experimentation, serious and direct injury to body or health, mutilations, torture, rape, prolonged or arbitrary imprisonment, food deprivation, sterilizations, violation of cadavers, and other egregious physical assaults.50

We follow other commentators in adopting the statutory rule of construction known as *ejusdem generis*—a rule of construction that strictly interprets an expansive phrase as referring to acts similar to those specifically listed. Thus, in order for an act be considered "inhumane" for purposes of the definition of crimes against humanity, it must be comparable in its cruelty, severity, and unjustness to those acts specifically mentioned in the definition itself (e.g., murder, deportation, enslavement). In comparison to other definitions, the ILC definition provides more examples of acts that qualify as inhumane, and includes acts that severely damage physical or mental integrity, health, or human dignity.51

C. Elements Common to All Acts That Qualify as a Crime against Humanity

For persecution or inhumane acts to qualify as a crime against humanity, they must be part of a widespread or systematic pattern. Furthermore, for an individual to be held responsible for a crime against humanity, he must have acted with the requisite intent and he must be aware of the context within which his acts are committed. Finally, while many crimes against humanity are committed in the context of an armed conflict, acts with no connection to an armed conflict may also qualify as a crime against humanity.


51. See Draft Code, *supra* note 29. The language here is similar to the TRC's definition of gross violations of human rights, in particular the category of severe ill treatment.
1. Widespread or Systematic

Individual crimes only constitute crimes against humanity when they are part of a widespread or systematic phenomenon. This requirement elevates what would otherwise be common crimes to international crimes. An isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single individual is not an international crime against humanity unless it is part of such a widespread or systematic phenomenon. Thus, an isolated act that is somehow connected to other similar acts may rise to the level of a crime against humanity. As recently stated by the ICTY:

Crimes against humanity are to be distinguished from war crimes against individuals. In particular, they must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognized as

52. The U.N. War Crimes Commission established after the Second World War stated that "As a rule systematic mass action . . . was necessary to transform a common crime . . . into a crime against humanity." United Nations War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War 179 (1948). This position was echoed in the decisions of the Nuremberg Military Tribunals. See United States v. Altstoetter ("The Justice Case"), supra note 44, at 973 ("systematically organized and conducted by or with the approval of government"); United States v. Ohlendorf (The Einsatzgruppen Case), 4 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 498 (1946) ("Crimes against humanity are acts committed in the course of wholesale and systematic violation of life and liberty.").

53. The commentary to the Draft Code notes that "[t]he thrust of this requirement is to exclude a random act which was not committed as part of a broader plan or policy." Draft Code, supra note 29, at 94–95. While it is generally true that only an organized state has the level of organization and resources required to instigate the prohibited acts on a mass or systematic scale, crimes against humanity can also be instigated by a non-state entity. See Draft Code, supra note 29, at 95 ("necessary instigation or direction may come from a Government or from an organization or group") (emphasis added). The massive and systematic crimes instigated by the emerging Republika Srpska in the former Yugoslavia illustrate this assertion. See Prosecutor v. Dusko Tadic, supra note 22, U.N. Doc. IT-94-1-T, ¶ 654, 36 L.L.M. 908, 945 ("[T]he law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory."). See also Kadid v. Karadzic, 70 F.3d 232, 241–42 (2d Cir. 1995) (recognizing that individuals acting on behalf of non-state entities can be held accountable for genocide, a particular crime against humanity). But see Bassiouni, supra note 34, at 248–49 (1992) ("‘Crimes against humanity’ are collective crimes which cannot be committed unless they are part of a given state’s policy because their commission requires the use of the state’s institutions, personnel and resources in order to commit, or refrain from preventing the commission of [crimes against humanity].").
guilty of a crime against humanity if his acts were part of the specific context identified above.\textsuperscript{54}

2. Individual Responsibility and Intent

An individual act constitutes a crime against humanity when (1) the perpetrator of the act exhibits the general intent to commit the underlying act (e.g., killing, torture, assault), and (2) the perpetrator is aware of the broad context in which his or her act occurs.\textsuperscript{55} Regarding the first element, it is not necessary for the perpetrator to have a concrete idea of the consequences of his act nor is it necessary that he exhibit an "abominable attitude."\textsuperscript{56} It is likewise not necessary to show that the individual perpetrator was aware that his or her actions were inhumane. Whether a particular act is considered to be inhumane is judged according to a reasonable person standard.\textsuperscript{57} Thus, even if an individual act does not immediately result in severe harm to the victim, and even if the perpetrator did not intend to inflict such severe harm or realize that his or her act was inhumane, the act may nevertheless qualify as a crime against humanity if a reasonable person would have concluded that such harm was likely to result from the act.

The second element requires that there be some link between the individual's actions and the massive or systemic practice that gives rise to a crime against humanity.\textsuperscript{58} As stated recently by the ICTY, in order for an individual to be found guilty of a crime against humanity, the perpetrator "must know that there is an attack on the civilian population, [and] know that his act fits in with the attack."\textsuperscript{59} Willful ignorance is no defense to this knowledge requirement.\textsuperscript{60}

The responsibility of leaders, organizers, instigators, and accomplices for crimes against humanity has been a consistent part of all


\textsuperscript{55} See Prosecutor v. Dusko Tadic, supra note 22, ¶ 656.

\textsuperscript{56} Id. at ¶ 657.

\textsuperscript{57} See, e.g., The Queen v. Finta [1994] 1 S.C.R. 701, at 820 (Can.). The Supreme Court of Canada held that it was sufficient to show that the conditions to which the defendant consigned the victims were inhumane even if the defendant did not know or think so at the time.

\textsuperscript{58} See Prosecutor v. Dusko Tadic, supra note 22, ¶ 659.

\textsuperscript{59} Id.

\textsuperscript{60} See id. at ¶ 657 (quoting majority holding in The Queen v. Finta that "the mental element required to be proven to constitute a crime against humanity is that the accused was aware of or wilfully [sic] blind to facts or circumstances which would bring his or her acts within crimes against humanity" (emphasis added)).
definitions of crimes against humanity. Individual responsibility for crimes against humanity extends to accomplices, aiders, and abettors. As stated by one of the Nuremberg-era courts with respect to the crimes of the Holocaust:

\[\text{[t]here is no excuse or justification for any man who took a conscious or consenting part in the measures which constituted these abominable and atrocious crimes, and it is immaterial whether they originated or executed them, or merely implemented them, justified them to the world, or gave aid and comfort to their perpetrators.}\]

3. No Nexus with Armed Conflict

While the Nuremberg Tribunal only prosecuted crimes against humanity that had been committed within the context of an international armed conflict, international law evolved to eliminate this nexus requirement. Control Council Law No. 10 included within its jurisdiction crimes against humanity committed outside the context of an armed conflict. In 1954, the ILC's Draft Code of Crimes Against the Peace and Security of Mankind deliberately rejected the nexus requirement.

There was initially some disagreement over whether Control Council Law No. 10 and the ILC definition accurately reflected international law on this issue at the time, but by the late 1960s little doubt remained that the overwhelming majority of states no longer insisted that acts be connected to an armed conflict in order to qualify as crimes against humanity under international law. The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity explicitly states that crimes against humanity can be committed in either wartime or peacetime. Five years later, the International Convention on the Suppression and Punishment of the Crime of Apartheid stated that

---

61. See IMT Charter, supra note 18, art. 6; ICTY Statute, supra note 22, art. 7; Draft Code, supra note 29, pt. 2.
63. See supra text accompanying notes 19–22.
65. See Statutory Limitations Convention, supra note 1, at art. 1. While many western states abstained or voted against this Convention, it is clear from the travaux preparatoires of the Convention that these states withheld their support for reasons unrelated to the removal of the nexus with armed conflict. See Question of the Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity: Report of the Third Committee, U.N. Gen. Assembly, 23d Sess., Agenda Item 55, U.N. Doc. A/7342, ¶ 19–20 (1968) (indicating United States acceptance, on behalf of France, Mexico, and the Netherlands, of language defining crimes against humanity as occurring in times of war or peace).
apartheid is a crime against humanity whether committed in wartime or peacetime.  

The most recent authoritative statements of the international law of crimes against humanity confirm that a nexus to armed conflict is not required. The Statute of the ICTR and decisions by both the Trial and Appeals Chambers of the ICTY support the conclusion that a nexus is no longer required, as we will discuss below. The ICTR statute omits any mention of a nexus to armed conflict. In contrast, the statute for the ICTY does include a nexus with armed conflict in its definition of crimes against humanity. In one of its first decisions, however, the Appeals Chamber of the ICTY suggested that the statute's definition of crimes against humanity did not reflect the definition of the crime under customary international law. The Appeals Chamber noted:

It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, ... customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council [in promulgating the statute] may have defined the crime in Article 5 more narrowly than necessary under customary international law.

In a subsequent opinion, the Trial Chamber of the ICTY reaffirmed this view. The Chamber noted that the inclusion of the requirement of an armed conflict in the statute deviates from the doctrine as it has developed since the Nuremberg Charter, beginning with Control Council Law No. 10, which no longer links the concept of crimes against humanity with armed conflict. In support of its position that no nexus with armed conflict is required, the Trial Chamber opinion cites the Secretary-General's statement that crimes against humanity "are aimed at any ci-

67. See supra note 25 and accompanying text.
68. See supra note 22 and accompanying text.
70. See Prosecutor v. Dusko Tadic, supra note 22, ¶ 627
villian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character."\(^7\)

Other authoritative bodies and experts have also concluded that crimes against humanity can take place in both peacetime and wartime. Since 1954, the ILC has consistently defined crimes against humanity without requiring a link to an armed conflict.\(^7\) Finally, the majority of international jurists who have studied this issue also agree that the definition of crimes against humanity does not include a nexus to armed conflict.\(^7\)

We agree with the consensus that international law does not require that an act be committed in the context of an armed conflict to constitute a crime against humanity. Certainly by 1968, when the Convention on the Non-Applicability of Statutory Limits to War Crimes and Crimes Against Humanity was ratified, the nexus to armed conflict was no longer required. The question of whether or not an armed conflict existed in South Africa during apartheid is thus irrelevant to a determination of whether apartheid was a crime against humanity under international law after 1968.

III. APARTHEID AS A CRIME AGAINST HUMANITY

Apartheid, as a form of systematic racial discrimination, violates international law. The prohibition against racial discrimination is found in

---

71. ICTY Statute, supra note 22, ¶ 47.
72. See, e.g., Draft Code of Crimes Against the Peace and Security of Mankind, Seventh Report by Doudou Thiam, Special Rapporteur, [1989] 2 Y.B. Int'l L. Comm'n 81, 86, ¶ 38 U.N. Doc. A/CN.4/SER.A/1989/Add.1 (the concept of crimes against humanity now is "separate from... war crimes... not only the 1954 draft code but even conventions which have entered into force (on genocide and apartheid) no longer link that concept to a state of war").
Apartheid as a Crime Against Humanity

all the major international human rights treaties and is universally recognized as a rule of customary international law. In addition, freedom from discrimination is regularly included as one of the rights from which derogation is not permitted in time of war or other national emergency.

Systematic racial discrimination is a violation of a *jus cogens* norm of international law. *Jus cogens* are peremptory norms of international law from which no state may derogate by agreement or otherwise. *Jus cogens* binds all states, and no state may "opt out" of a *jus cogens* norm. Although few norms of international law rise to such peremptory status, the prohibition against systematic racial discrimination is one of them. The fact that apartheid, as systematic racial discrimination, is recognized as a violation of a *jus cogens* norm is further evidence that most states recognize apartheid as an international crime.

As we have argued above, general human rights treaties and customary international law provide strong support for demonstrating that apartheid is a violation of international law and an international crime. In addition, the overwhelming majority of states have indicated their con-


75. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(f)(1987) [hereinafter RESTATEMENT] (systematic racial discrimination violates a rule of customary international law).

76. See, e.g., ICCPR, *supra* note 74, art. 4(1); ACHR, *supra* note 70, art. 27(1).

77. See, e.g., RESTATEMENT, *supra* note 75, § 702, cmt. n (indicating that systematic racial discrimination is a violation of jus cogens).

78. See, e.g., *id.* (listing genocide; slavery or slave trade, murder or causing the disappearance of an individual; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; and systematic racial discrimination as violations of jus cogens).

79. For those human rights norms that have risen to the level of jus cogens, their violation is recognized as an international crime. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (criminalizing genocide); Slavery Convention, Sept. 25, 1926, 212 U.N.T.S. 17 (criminalizing slavery) (amended by the Protocol opened for signature or acceptance at the Headquarters for the United Nations, New York, Dec. 7, 1953); Draft Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 23 I.L.M. 1027 (criminalizing torture).
viction that apartheid is a crime against humanity in connection with two major international treaties: the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968 and the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1976. Both conventions support the conclusion that apartheid is a crime against humanity, although the use of these conventions to conclude that apartheid is a crime against humanity has not been without controversy. The controversies surrounding these two conventions—including the fact that some states did not sign or ratify them—lead us to discuss in some detail the circumstances surrounding the treatment of apartheid and crimes against humanity in each convention.

A. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity

As early as the late 1960s, international sentiment began to develop among states that apartheid is a crime against humanity. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968 ("Statutory Limitations Convention") singled out apartheid in its definition of crimes against humanity: "[C]rimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, N[ue]mberg . . . , eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid. . . ."80 Although it is true that this convention was not universally accepted,81 forty of the forty-three countries that abstained or voted against the Statutory Limitations Convention did so on technical grounds having nothing to do with whether apartheid was a crime against humanity.82 Most of the states

80. Statutory Limitations Convention, supra note 1.
81. The General Assembly resolution endorsing the Convention was passed by a vote of 58-7-36. See U.N. GAOR, 23d Sess., 1727th plen. mtg. at 6, U.N. Doc. A/PV.1727 (1968). Those voting in favor included Israel, as well as the largest democracy in the world, India. The following states voted against endorsing the convention: Australia, El Salvador, Honduras, Portugal, South Africa, the United Kingdom, and the United States. France abstained. Most of the industrialized countries and many countries in Latin America abstained. (The following states abstained: Afghanistan, Argentina, Austria, Belgium, Bolivia, Brazil, Canada, Colombia, Costa Rica, Denmark, Ecuador, Finland, Greece, Guatemala, Guyana, Haiti, Iceland, Ireland, Italy, Jamaica, Japan, Laos, Luxembourg, the Netherlands, New Zealand, Nicaragua, Norway, Panama, Peru, Spain, Sweden, Thailand, Turkey, Uruguay, and Venezuela.)
82. It is always dangerous to ascribe too much meaning to an individual state's vote. While it is probably fair to assert that a favorable vote indicates support for all of the provisions of the document in question, the meaning of a vote abstaining from or opposing is less clear. Certainly it does not necessarily indicate a disagreement with all of the provisions of the text in question, nor whether or not a particular norm is a part of customary international law, nor for that matter whether the state in question disagrees with the proposition that some of the docu-
voting against the convention or abstaining did so because of the convention’s attempt to apply its terms retroactively, thus violating a basic principle of criminal law: *nullum crimen sine lege* ("no crime without law," which is interpreted as a general prohibition against retroactive criminal law). Others opposed the convention because of the definition of crimes against humanity. Those states that criticized the definition of crimes against humanity did so not out of a belief that apartheid could not be considered a crime against humanity but because the definition was not general enough. These states were concerned that by singling out one ideology—apartheid—the convention implied that similar acts undertaken in the name of other ideologies might not be considered as severe. 83

Even states that ultimately voted for the resolution endorsing the convention criticized the inclusion of a specific reference to apartheid. Chile, for example, argued for removing the reference to “inhuman acts resulting from the policy of apartheid” because it added nothing legally to the definition and merely expressed a condemnation of a particular ideology. The Chilean representative was quick to point out that removing the reference would in no way mean that inhuman acts arising out of apartheid would not qualify as a crime against humanity; if these acts met

---

83. France, a country that abstained from voting on the Convention, made the following statement regarding the proposed definition of crimes against humanity: “Furthermore, the words ‘including inhuman acts resulting from the policy of apartheid’ were superfluous, since the convention declared that all crimes against humanity lacked the protection of statutory limitation, regardless of the political, racial or social doctrine which gave rise to them.” U.N. GAOR 3d Comm., 23d Sess., 1565th mtg. at 2, ¶ 13, U.N. Doc. A/C.3/SR.1565 (1968). The French representative also “felt that it was most essential, when defining crimes against humanity, to avoid giving a list of examples which could not be regarded as exhaustive.” Id. at ¶ 14. The representative from Saudi Arabia stated that “[i]t was pointless, in his view, to mention crimes resulting from the policy of apartheid, because apartheid was doomed to disappear sooner or later, and the convention should be universal in scope.” U.N. GAOR 3d Comm., 23d Sess., 1566th mtg. at 3, ¶ 25, U.N. Doc. A/C.3/SR.1566 (1968). Finally, the representative from China reiterated the Chinese government’s firm opposition to apartheid, and noted that it had voted for all U.N. resolutions condemning it. The Chinese representative went on to argue, however, that apartheid should not be specifically mentioned in the definition “since such a convention should be generally applicable and should produce lasting results.” U.N. GAOR 3d Comm., 23d Sess., 1568th mtg at 1, ¶ 5, U.N. Doc. A/C.3/SR.1568 (1968).

the general definition they would so qualify.\textsuperscript{85} Saudi Arabia argued that the definition should not just mention one form of crime against humanity and not others.\textsuperscript{86}

Of all the states that abstained or voted against the convention, only the United States, the United Kingdom, and Austria indicated that they might not agree that the policy of apartheid as it was understood at the time constituted a crime against humanity. The concerns that led to the opposition of these three states might be explained by their agreement with other states that the treaty should be as universal as possible and not single out a particular ideology. The United Kingdom, for example, made the following statement regarding apartheid and the definition of crimes against humanity:

Furthermore, although her delegation fully understood and shared the anxiety that the policy of apartheid aroused in the Committee, it considered it inappropriate specifically to mention inhuman acts resulting from that policy in a text intended to be universal. The United Kingdom amendment proposed a definition which could readily be applied by all States, which allowed for the progressive development of international law, and did not exclude the possibility of including other crimes among crimes against humanity which might arise.\textsuperscript{87}

Even if the \textit{travaux preparatoires} indicate that the United States,\textsuperscript{88} the United Kingdom, and Austria\textsuperscript{89} did not agree in 1968 that apartheid was a crime against humanity (and it is unclear based on their recorded statements whether they did), subsequent resolutions of the U.N. Security Council show a change in their position.\textsuperscript{90}

\textbf{B. International Convention on the Suppression and Punishment of the Crime of Apartheid}

In the mid-1970s, the international community adopted a convention specifically designed to define and criminalize apartheid as a crime

\begin{footnotesize}
\begin{itemize}
\item[85.] \textit{Id.}
\item[88.] For a statement of the U.S. position, see U.N. Doc. A/C.3/SR. 1549, ¶ 11 (noting that the Convention should only refer to crimes against humanity as defined under international law).
\item[89.] For a statement of the Austrian position, see U.N. Doc. A/C.3/SR. 1573, ¶ 24 (noting that the Convention applied to "new crimes" is not covered by Austrian legislation).
\item[90.] See \textit{infra} notes 94–96 and accompanying text.
\end{itemize}
\end{footnotesize}
against humanity. Article I(1) of the International Convention on the Suppression and Punishment of the Crime of Apartheid ("Apartheid Convention"), adopted in 1973, declares that:

apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination . . . are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.\textsuperscript{91}

The Apartheid Convention was not unanimously adopted. However, a careful review of the debates leading up to the adoption of the Apartheid Convention, including the statements of country representatives explaining their votes, shows that support was withheld on mostly technical grounds. The classification of apartheid as a crime against humanity was generally not at issue.

Those states that refused to endorse the Apartheid Convention, either by voting against or abstaining during the General Assembly vote, cited two major reasons.\textsuperscript{92} One concern was the convention’s unprecedented attempt to expand international criminal jurisdiction and enforcement. The Apartheid Convention created criminal liability for individuals who (regardless of their motive or place of residence), abetted, encouraged, or cooperated in the crime of apartheid.\textsuperscript{93} Thus an individual or organization that had no intention of supporting apartheid might be criminally liable for acts that had the unintended effect of encouraging apartheid. In addition, any state would have mandatory jurisdiction to prosecute such an individual or organization.\textsuperscript{94}

The Apartheid Convention’s broad grant of jurisdiction to prosecute an individual guilty of the crime of apartheid (regardless of the nationality of the perpetrator or the situs of the crime), goes beyond the enforcement regime of the Genocide Convention, which limits enforcement to tribunals of the state in which the genocide occurred, or to an

\textsuperscript{91} See supra note 66, at 245.

\textsuperscript{92} On the art of interpreting a state’s position based on its votes of abstention or opposition, see generally, Restatement, supra note 77.


\textsuperscript{94} See Apartheid Convention, supra note 91, arts. IV(b) and V, at 246.
international tribunal. The United States representative illustrated the concern of many states:

We do not, for example, accept that an American citizen vacationing in a foreign country could be extradited to another foreign country and tried in that third foreign country for something that he has said on the territory of the United States, a result which would flow quite clearly from the provisions of this convention. In short, the concern was that the Apartheid Convention was drafted so broadly that it both criminalized acts that were not criminal under most national legal systems, and obligated all states to prosecute individuals regardless of nationality for acts that had occurred outside the territory of the prosecuting state.

The other reason cited by a number of states in refusing to support the Apartheid Convention concerned the expansion of the powers of the Human Rights Commission, which was designated as the monitoring and enforcement body under the convention. As articulated by the United States representative, the question was whether “States parties to a convention can confer additional powers upon an organ created under the United Nations Charter.”

It was these concerns, more than any qualms about confirming the criminal nature of apartheid, that were at the heart of many states’ reluctance to support the convention. In fact, the United States representative went so far as to state that the Apartheid Convention was unnecessary in part because “the most serious offenses defined in the draft convention were already punishable under the Convention on the Prevention and Punishment of the Crime of Genocide.” Thus, with the exception of

95. See Convention on the Prevention and Punishment of the Crime of Genocide, supra note 79, art. VI.

96. U.N. GAOR (Provisional), 28th Sess., 2185th mtg. at 16, U.N. Doc. A/PV.2185, ¶ 25 (1973). The Apartheid Convention itself does not mention speech as an act that can result in criminal liability. The United States was presumably concerned with the interpretation of the phrase “abet” or “encourage,” which could give rise to criminal liability. The concern was certainly heightened by the fact that these phrases could be interpreted and applied to United States citizens by non-United States courts, thus leaving open the possibility of extraterritorial infringement on the United States constitutional right to freedom of speech as interpreted by United States courts. See id.

97. U.N. GAOR (Provisional), 28th Sess., 2185th mtg. at 16, U.N. Doc. A/PV.2185, ¶ 26 (1973). In addition to this structural or constitutional issue, the U.S. representative also noted that this use of the Human Rights Commission also posed a practical problem: placing the Human Rights Commission “in the untenable position of having to discharge its functions under a convention which the majority of its members have not signed and do not support.” Id. at 16.

certain isolated statements made by the United States and the United Kingdom, the classification of apartheid as a crime against humanity was never at issue in the debates surrounding the Apartheid Convention.

C. Post-Apartheid Convention Developments: The International Consensus Becomes Unanimous

Finally, as more information came to light concerning the policy and practice of apartheid and its effects, those states that had earlier appeared reluctant to publicly describe apartheid as a crime against humanity reversed their positions. By 1976 it was clear that much of the international community agreed that apartheid was a crime against humanity. It was in that year that the Security Council, in direct response to the South African government’s murder of school children in Soweto unanimously stated that “apartheid is a crime against the conscience and dignity of mankind.” While the resolution did not use the phrase “crimes against humanity,” its language echoes previous declarations of apartheid as a crime against humanity. Subsequent Security Council resolutions referred favorably to that 1976 resolution. Finally, in 1984, the U.N. Security Council issued a Resolution explicitly referring to apartheid as a crime against humanity. All of the members of the Security Council, in-
cluding the United Kingdom, voted for the resolution, except for the United States, which abstained. 103

IV. GENOCIDE

The crime of genocide falls under the general category of crimes against humanity but is also a distinct type of human rights violation. Unlike the general category of crimes against humanity the crime of genocide was codified early, in the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"), which has been accepted and ratified by over one hundred states. 104 The crime of genocide is also part of customary international law. 105 As defined in the Genocide Convention, certain acts qualify as genocide regardless of whether or not they were committed in the context of an armed conflict. The Convention defines genocide as:

any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures to prevent births within the group;


105. The International Court of Justice, for example, has stated that the prohibition against genocide is a jus cogens norm. See Reservation to the Convention on Genocide, 1951 I.C.J. Rep. 15, 23. The first case to be brought under Article IX of the Genocide Convention is still pending before the International Court of Justice. See generally Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)) 1993 I.C.J. Rep. 325.
(e) Forcibly transferring children of the group to another group.106

Thus, the crime of genocide includes two major elements that distinguish it from other crimes against humanity: (1) a specific intent to cause that destruction, and (2) actions that are directed towards the physical destruction of a group. It is the intent requirement that most distinguishes genocide from other forms of crimes against humanity. Thus murder, extermination, enslavement, deportation, and other inhumane acts that qualify as a crime against humanity remain outside the scope of the Genocide Convention unless committed with the specific intent to eliminate, in whole or in part, a protected group.

The drafters of the Genocide Convention took great care to limit the scope of the definition of genocide. The convention arose in response to the Nazi atrocities of World War II and their prosecution,107 and was explicitly designed to capture the uniqueness of those particular crimes. The drafters were concerned in part that an overly expansive definition would dilute the effectiveness of the convention and might lead to governments abstaining from joining the convention.108 In the Study on the Draft Convention, the drafters comment:

Genocide is the deliberate destruction of a human group. This literal definition must be rigidly adhered to; otherwise there is a danger of the idea of genocide being expanded indefinitely to include the law of war, the right of people's to self-definition, the protection of minorities, the respect of human rights, etc.109

The crime of genocide is thus a carefully defined and specialized subcategory of the broader international crime of crimes against humanity.

A. Specific Intent

The primary element that distinguishes genocide from crimes against humanity is the requirement of specific intent. Under the Genocide Con-

106. Convention on the Prevention and Punishment of the Crime of Genocide, supra note 74, art. II.
107. The first international document to use the term genocide was the indictment against major German war criminals before the Nuremberg Tribunal. See 1 IMT Trials supra note 38, at 43–44. The indictment accused the Nazis of conducting deliberate and systematic genocide, viz. the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups. Although the Nuremberg Tribunal did not directly use the word genocide in its judgment, it referred to the concept of genocide by detailing how the mass murders were part of a plan to annihilate various groups.
109. Id.
vention, the crime of genocide is not committed simply by the physical
destruction of a group, in whole or in part, of a racial, national, ethnic or
religious group; there must be a specific intent to destroy such a group in
whole or in part. As the Brazilian representative remarked during the de-
bates of the Sixth Committee:

[Genocide was characterized by the factor of particular intent to
destroy a group. In the absence of that factor, whatever the de-
gree of atrocity of an act and however similar it might be to the
acts described in the convention, that act could still not be called
genocide.]

Proof of the intent to commit genocide could be shown, like in the
Nazi criminal trials, with specific written or oral orders. Intent can also
be shown through actions. Certain policies or acts in and of themselves
may foreseeably result in such a large number of deaths that one can in-
fer the requisite intent.

B. Physical Destruction Requirement

The specific intent requirement of the Genocide Convention can only
be fulfilled by an intent to physically destroy the group, in whole or in
part. The convention's references to killing and serious bodily or mental
harm highlight that it is the actual or attempted physical destruction of a
group that is the focus of the Genocide Convention rather than a cultural
or social destruction. This focus was apparent in early United Nations
resolutions that compared genocide to homicide:

Genocide is a denial of the right of existence of entire human
groups, as homicide is the denial of the right to life of individual
human beings: such denial of the right of existence shocks the
conscience of mankind, results in great losses to humanity in the
form of cultural and other contributions represented by these
human groups, and is contrary to moral law and to the spirit and
aims of the United Nations.

In earlier drafts of the convention, there were proposals to include
cultural genocide in the definition of genocide. After much debate,
however, the concept of cultural genocide was explicitly excluded.\textsuperscript{114} Additional proposals to include political and social groups were similarly excluded.\textsuperscript{115} Therefore, under a strict application of the Genocide Convention, acts directed only towards the destruction of the culture or socio-economic status of a group, and not towards its physical destruction, are not sufficient to constitute genocide.

\section*{C. Apartheid and the Definition of Genocide}

Although apartheid is one of the worst examples of human rights abuses that humans have endured, it may not fit within the specific, narrow definition of genocide. To equate apartheid with genocide, the TRC would have to show that those who formulated and implemented apartheid did so with the specific intent to eliminate in whole or in part a protected group. In South Africa, the racially and ethnically defined groups of blacks and coloreds would qualify as protected groups. Although specific acts undertaken by individuals or groups who had the relevant intent to destroy a group in whole or in part might qualify as genocidal acts,\textsuperscript{116} the policy of apartheid as a whole does not appear to have been primarily aimed at extermination, but rather at domination and exploitation. If the requisite intent is in fact found, then of course apartheid would qualify as genocide. While apartheid may not qualify as genocide, this does not mean that apartheid is a less severe crime under international law.

In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial or religious group on grounds of the national or racial origin or religious belief of its members such as:

1. Prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;

2. Destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.

\textit{Id.}

\textsuperscript{114} See the arguments, pro and con, in LEO KUPER, GENOCIDE 3, n. 35 (1981).


\textsuperscript{116} One example of such intent might be found in the recent revelations concerning the apartheid regime's chemical and biological warfare programs, in particular the suggestion that efforts were made to develop chemical or biological weapons that would only apply to black people.
CONCLUSION

This submission has set forth the elements that must be met in order to establish that apartheid is a crime against humanity. As experts in international law, we agree with the international consensus that apartheid, as a widespread and systematic policy of racial discrimination implemented with widespread and systematic inhumane acts, constitutes a crime against humanity. The wealth of information collected by the TRC confirms that apartheid consisted of widespread and systematic persecutions on racial grounds, as well as other inhumane acts, and demonstrates that apartheid clearly meets the definition of a crime against humanity.

As international jurists interested in human rights, we have followed the recent history of South Africa and its tremendous efforts to overcome a system of hatred, division, and oppression in favor of a society that recognizes, protects, and promotes the fundamental rights of all of its citizens. We hope that with this submission we have made a small but constructive contribution to these efforts to secure human rights and enhance the rule of law.