

**NEW ENGLAND SCHOOL OF LAW
RWANDA GENOCIDE PROSECUTION PROJECT**

**WHEN, IF EVER, A SINGLE ACT CAN CONSTITUTE A CRIME
AGAINST HUMANITY**

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I. INTRODUCTION

This memorandum will deal with the issue of whether, if ever, a single act can constitute a crime against humanity when the Statute of the International Criminal Tribunal for Rwanda requires such acts to be “part of a widespread or systematic attack.”

While this memorandum will deal with crimes against humanity, it will not deal with the crime of genocide. Genocide, as defined in the Convention on the Prevention and Punishment of the Crime of Genocide,¹ requires an intent by the perpetrator different from that of other acts constituting crimes against humanity. This memorandum seeks to determine whether, if ever, a single act may constitute a crime against humanity. Because genocide requires the intent to destroy a particular group, it would appear that a single act would not be able to fall within the reaches of genocide, and is, thus, excluded from consideration in this memorandum.

II. BRIEF ANSWER

A single act may constitute a crime against humanity if six necessary elements are present. If the act is (1) part of a widespread or systematic attack (2) against a civilian population (3) that is a plan or policy by a government or group with de facto power (4) completed with

¹ See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter “Genocide Convention”]. Art. II of the Genocide Convention provides that:

In the present Convention, genocide means any of the following acts committed with 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 intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group . . .

Id. at Art. II.

discriminatory intent and the perpetrator had (5) knowledge of this larger widespread attack and (6) intended his act to fit into this larger attack, and were not taken for purely personal reasons, the act may constitute a crime against humanity.

III. FACTUAL BACKGROUND

“On April 6, 1994, the plane carrying Rwanda’s President Juvenal Habyarimana crashed as it was landing in Kigali, Rwanda. All its passengers were killed.”² Within hours, moderate opposition members of the Habyarimana government and their families had been murdered.³ Within the next week, mass killings of Tutsi had begun and spread beyond Kigali.⁴ Estimates of the number of victims killed in the ensuing three months range from 200,000 to one million.⁵ Worldwide outcry led to United Nations Security Council Resolution 955⁶ establishing the Ad Hoc International Criminal Tribunal for Rwanda [hereinafter “ICTR”]. The ICTR is charged

² See Mariann Meire Wang, *The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact*, 27 Colum. Hum.Rts.L.Rev. 177, 177 (1995) [hereinafter “Meire Wang”].

³ Anthony Goodman, *Rwanda Genocide Said Planned Months in Advance*, 1994 Reuters News Service, Dec. 2, 1994, [hereinafter “Genocide Planned”].

⁴ *Id.* See also Amnesty International, *Mass Murder by Government Supporters and Troops in April and May 1994* AFR 77/11/94, at 4 [hereinafter “Mass Murder in Rwanda”].

⁵ . “In all, the numbers of persons killed throughout the territory is [estimated to be] 200,000 to 500,000. In fact, even the latter figure is probably less than reality. Some observers think that the figure is closer to 1 million.” Report on the situation of human rights in Rwanda submitted by Mr. R. Degni-Segui, Special Rapporteur of the Commission on Human Rights, under Paragraph 20 of Commission resolution E/CN.4/S-3/1 of 25 May 1994, UN Doc. E/CN.4/1995/7, 51st Sess. 28 June 1994 [hereinafter “28 June Special Rapporteur Report”]. See also *Genocide Planned*, *supra* note 3.

⁶ Security Council Resolution 955 (1994) Establishing the International Tribunal for Rwanda

with the investigation and prosecution of individuals charged with committing acts of genocide and other crimes against humanity during the temporal jurisdiction of the Tribunal (1 January to 31 December 1996).⁷

IV. LEGAL DISCUSSION

A Brief Discussion of Crimes Against Humanity and Its' Evolving Definition

The law surrounding the concept of crimes against humanity has developed slowly over the past fifty years, typically expanding quickly after world wars or regional conflicts of great magnitude, and then idling quietly during times of relative peace. Elements required for an act to constitute a crime against humanity in 1997 have evolved out of peace treaties, war crimes conventions and ad hoc criminal tribunal statutes. In turn, these guidelines have been interpreted and refined by courts through out the world. A review of this history is necessary to understand the development of this body of law.⁸

The first section of this memorandum will provide a brief history of this evolution and will set out what are currently held to be the six pre-requisite elements for an act to constitute a crime against humanity. The second section of this memorandum will look at each of these elements in depth. The following section will attempt a factual analysis of the events occurring in Rwanda during the temporal jurisdiction of the International Criminal Tribunal for Rwanda to determine if these elements were present, thus leading to the possibility that acts of violence occurring during

(November 9, 1994), *reprinted in* 33 I.L.M. 1598 [hereinafter "ICTR"].

⁷ *Id.* at art. 1.

⁸For a good background of historical legal foundations in international humanitarian law and the regulation of armed conflicts *see* M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law 147-191 (1992). *See also* M. Cherif Bassiouni, Crimes Against Humanity: The Need For a Specialized Convention, 31 Colum.J.Transnat'l L. 457 (1996).

that time may constitute crimes against humanity. The final section will deal with violent acts not constituting crimes against humanity.

A. The Martens Clause

“The history of crimes against humanity begins with the Martens Clause.”⁹ This Clause was incorporated into the eighth paragraph of the Hague Convention of 1907¹⁰ and provided that in cases not covered by the Convention, the belligerents remain under the protection of the rule of the principles of the laws of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictate of public consciences.¹¹ While the Clause had little impact at the time, and remained an insignificant development, it was later discovered and utilized by the authors of the Nuremberg Charter’s prohibition on crimes against humanity,¹² thus setting the stage for the modern development of the concept of crimes against humanity.

B. World War One and Developments

The concept of crimes against humanity was invoked after World War One by the commission established by the Paris Peace Conference to inquire into the legal liability of those

⁹ Matthew Lippman, Crimes Against Humanity, 17 B.C.Third World L.J. 171, 173 (1997) [hereinafter “Lippman”].

¹⁰ *See Id.*

¹¹ *See* Convention (No. IV) Respecting the Laws and Customs of War on Land, With Annex of Regulations, Oct. 18, 1907, Preamble, 36 Stat. 2277, T.S. No. 5391, 1 Beavans 631 [hereinafter “Hague Convention”], *reprinted in* The Law of War: A Documentary History (Leon Friedman, ed. 1972) [hereinafter “The Law of War”].

¹² *See* Lippman, *supra* note 9, at 173. *See also*, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(c), 59 Stat. 1544, 82 U.N.T.S. 279, *reprinted in* The Law of War, *supra* note 11, at 883 [hereinafter “Nuremberg Charter”].

responsible for [the war].¹³ The Commission on Responsibility concluded that “Germany and her allies” had committed acts outside the established customs of humanity.¹⁴

The Commission on Responsibility advanced the law of crimes against humanity in two important ways. First, the Commission took the bold step of recommending a tribunal be created for the prosecution of those charged with “outrages against the laws of humanity.”¹⁵ Second, in addition to attempting the unprecedented step of extending criminal liability to heads of state,¹⁶ the Commission, by limiting the concept of ‘laws of humanity’ and ‘dictates of humanity’ to aggravated violations of the laws and customs of war against civilians and prisoners of war victims, laid the very foundation of the scope of protection provided for by crimes against humanity. So, while the Commission’s proposed tribunal never materialized,¹⁷ and the treaty

¹³ See Commission on the Responsibility of the Authors of the War and Enforcement of Penalties, 14 Am.J.Int’l L. 95, 96 (1920) [hereinafter “Commission on Responsibility”]. For additional history on the Commission, and subsequent commissions mandated to investigate war crimes, see M. Cherif Bassiouni, The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), 88 Am.J.Int’l L. 784 (1994).

¹⁴ See Lippman, *supra* note 9, at 174. “The Commission [concluded] that the German Empire and her allies were responsible for “outrages of every description committed on land, at sea and in the air, against the laws and customs of war and . . . the laws of humanity.” *Id.*, quoting Commission on Responsibility, *supra* note 13 at 113.

¹⁵ Lippman, *supra* note 9, at 174.

¹⁶ Immunity for the Kaiser, as well as other officials, “would involve laying down the principle that the greatest outrages against the laws and customs of war and the laws of humanity if approved against him, could in no circumstances be punished. Such a conclusion would shock the conscience of civilized mankind.” Commission on Responsibility, *supra* note 13, at 116.

¹⁷ Both of the American representatives, Robert Lansing and James Brown Scott, objected to the proposal to punish war crimes and violations of the principles of humanity. They believed that, unlike the laws and customs of war, the laws and principles of humanity “vary with the individual” and should be excluded from legal consideration.” Commission on Responsibility, *supra* note 13, at 113.

ultimately ratified announced an amnesty “for all crimes and offenses,”¹⁸ the basic requirement that crimes against humanity be directed against a civilian population and that these acts bear individual criminal responsibility were established at this early date.

C. World War Two and Developments

The carnage that occurred during the Second World War led to war crimes prosecutions in both Europe and the Far East. Prosecution and punishment for war crimes was provided for by both the Nuremberg Charter (concerning itself with the European theater) and the Tokyo Charter (dealing with the Far East). For several reasons the Nuremberg Charter has more heavily influenced the development of this area of law than has the Tokyo Charter. Both charters will be discussed below. This will be followed by a discussion of the precedents coming out of the decisions from the Nuremberg Judgments as well as from Control Council Law No. 10.

1. The Nuremberg Charter

The concept of crimes against humanity emerged again during the war crimes debate after World War Two. President Roosevelt, in a March 1944 statement, castigated Adolph Hitler for “committing . . . crimes against humanity in the name of the German people.”¹⁹

The definition of crimes against humanity in the Nuremberg Charter is the necessary starting point in the study of the modern law of crimes against humanity. This definition, the result of extensive negotiation between the four victorious allied powers after the war,²⁰ has shaped every

¹⁸ See Treaty with Turkey and Other Instruments, *signed* at Lausanne (Treaty of Lausanne), Ch. VIII, *reprinted in* 18 Am.J.Int'l L. 1, 92-93 (Declaration of Amnesty) (Supp. 1924).

¹⁹ Statement by the President, Mar. 24, 1944 *quoted in* Report of Robert H. Jackson United States Representative to the International Conference on Military Trials 12, 13 (1945) [hereinafter “Jackson Report”].

²⁰ For an excellent history of the negotiations that went into the formulation of the Nuremberg

definition of crimes against humanity since 1945. The definition provides that “murder, extermination, enslavement, deportation, and other 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 crimes within the jurisdiction of the Tribunal”²¹ may be a crime against humanity for which there would be individual criminal responsibility.²² Additionally, these acts would still fall within the jurisdiction of the Tribunal even if they were not “in violation of the domestic law of the country where perpetrated.”²³

The Nuremberg Charter, thus, provided the first major development in the law of crimes against humanity and expanded the idea originally presented in the Martens Clause, that of war time protection of civilians and prisoners of war. The Charter delineated specifically prohibited acts, while also allowing for additional, non-specified “other acts” to fall within the jurisdiction of the Tribunal. The Charter also specifies that the acts must be committed against a ‘civilian’

Charter, and the definition of crimes against humanity specifically, *see* Lippman, *supra* note 9, at 177-89.

²¹ Nuremberg Charter, *supra* note 12, at art. 6(c) . Article 6(c) of the Charter provides:
The following acts or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- ...
- (c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other 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 a violation of the domestic law of the country where perpetrated.

Id.

²² *See* Redraft of Definition of “Crimes” Submitted by Soviet Delegation, July 23, 1945, *in* Jackson Report, *supra* note 19, at 327 (Document XLIII).

²³ Lippman, *supra* note 9, at 193.

population. While the Nuremberg Judgments provided a limited definition of ‘civilian,’ this definition was swiftly expanded, as will be seen in the following section. The requirement of a civilian population also helped to begin the separation of the law of crimes of humanity from that of humanitarian law. The Charter also recognized that persecutions against a specific group based on discriminatory intent violated the ‘laws of humanity.’

Finally, the Charter mandated that the enumerated acts be “in execution of or in connection with any crime within the jurisdiction of the Tribunal”²⁴ The Nuremberg Charter thus limited the Tribunal’s jurisdiction to events after Germany’s invasion of Poland in 1936.²⁵

2. The Tokyo Charter

The Tokyo Charter was the foundation document which defined the jurisdiction and powers of the International Military Tribunal in Tokyo.²⁶ The Tokyo Charter mandated the just and prompt trial and punishment of the major war criminals in the Far East.²⁷ The definition of crimes against humanity contained in the Tokyo Charter differed from that of the Nuremberg Charter only in omitting the requirements that such acts were “committed against any civilian population.”²⁸ The Tokyo Tribunal focused almost exclusively on crimes against peace and “no

²⁴ See Nuremberg Charter, *supra* note 21 at art. 6(c).

²⁵ See Lippman, *supra* note 9, at 193.

²⁶ See Charter of the International Military Tribunal For the Far East, Apr. 26, 1946, *reprinted in* Richard H. Minar, *Victors’ Justice: The Tokyo War Crimes Trial* 185 (1971) [hereinafter “Tokyo Charter”]. For additional history of the Tokyo Charter, see M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 33-34 (1992).

²⁷ See Tokyo Charter *supra* note 26, at art. 1.

²⁸ Art. 6(c) of the Tokyo Charter provides:
Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhuman acts committed

explicit charges of crimes against humanity” were made.²⁹

3. Judgments Following the Nuremberg Charter

The major decisions concerning crimes against humanity following World War Two were handed down by the Nuremberg Tribunal and the American courts following Control Council Law No. 10.³⁰ The Nuremberg Tribunal dealt with the major Nazi war criminals³¹ while Control Council Law No. 10 dealt with other defendants. While the Nuremberg Judgments maintained the narrow definition of crimes against humanity as set out in article 6(c) of the Charter, the decisions under Control Council Law No. 10 initiated the expansion of the protections under crimes against humanity that continues today.

a. Nuremberg Judgments

Twenty-two high ranking Nazi officials were convicted of crimes, including crimes against

before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime with in the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Id.

²⁹ Lippman, *supra* note 9, at 202.

³⁰ While there were numerous individual domestic prosecutions of Nazi war crimes that followed World War Two, they will only be discussed to a limited degree in this memorandum. Possibly the two most famous domestic prosecutions were those of Klaus Barbie in France and Adolf Eichmann in Israel. Both of these prosecutions took place decades after the end of the war. The Barbie decision, in the context of who is a civilian deserving of the protection of crimes against humanity, will be discussed *infra* section, V(C)(1). For additional history about French prosecutions of war crimes, see Leila Sadat Wexler, The Interpretation of the Nuremberg Principles By the French Court of Cassation: From Touvier to Barbie and Back Again, 32 Colum.J.Transnat'l L. 289 (1994). Additionally, an excellent discussion of the Eichmann case may be found in Matthew Lippman, The Trial of Adolf Eichmann and the Protection of Universal Human Rights Under International Law, 5 Hous.J.Int'l L. 1 (No. 1) (1982)

³¹ See Lippman, *supra* note 9, at 189.

humanity, at Nuremberg.³² The convictions of the Nazis for crimes against humanity and other acts stand for the general rule that crimes against humanity are those that are “part of a systematic course of conduct.”³³ Additionally, the Nuremberg Tribunal ruled that acts constituting crimes against humanity must have occurred on a widespread or massive scale, with some type of deliberate plan or policy by the government.³⁴ The Nuremberg Charter did not expressly require either widespread or systematic conduct, but the Tribunal maintained a close adherence to the Indictments. Those Indictments charged that the Nazi singling out of various “groups for political, racial and religious persecution”³⁵ constituted “deliberate and systematic genocide, the extermination of racial and national groups against the civilian population of certain occupied territories.”³⁶ Thus, the Tribunal’s interpretation of the Nuremberg Charter and

³² *See Id.*

³³ *See United States v. Hermann Goering et al (indictment), reprinted in 1 Trial of the Major War Criminals Before the International Military Tribunal, 27, 65 (count four) (1948) [hereinafter “Nuremberg Judgment”].*

³⁴ Only two defendants, Julius Streicher and Baldur von Schirach were indicted for crimes against humanity and not war crimes. *See Lippman, supra* note 9, at 193. Streicher published anti-Semitic writings that reached over half a million people in 1935, *see Id.* 194, and called for the annihilation of the Jews by 1938. *See Id.* The Tribunal ruled that “Streicher’s incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes and constitutes crimes against humanity.” *Id.* at 195.

[V]on Schirach oversaw the deportation of over sixty thousand Viennese Jews in his positions of Gauleiter of Vienna as well as Reich Governor for Vienna and Reich Defense Commissioner of the Gauleiter of Vienna. *See Lippman, supra* note 9, at 194. After convicting von Schirach, the Tribunal noted in this case that “while [von Schirach] did not originate the policy of deporting Jews . . . [h]e knew that the best the Jews could hope for was a miserable existence in the ghettos of the East.” *Id.* at 195. For an extended survey of the convictions of Nazi war criminals for crimes against humanity, *see Lippman, supra* note 9, at 195-202.

³⁵ Lippman, *supra* note 9, at 189.

³⁶ Nuremberg Judgment, *supra* note 33, at 43-44 (Count Two).

Indictments created the requirement of widespread or systematic action, as well as deliberate plan or policy by the government.

b. Control Council Law No. 10

Following World War Two, each allied power began the job of prosecuting war criminals found in their respective zones of control.³⁷ The law developed for this task by the Americans was contained in Control Council Law No. 10.³⁸ Control Council Law No. 10 tracked the Nuremberg Charter in that it defined crimes against humanity to include murder, extermination, enslavement and deportation.³⁹ Of the major decisions to be handed down by the American tribunals under Control Council Law No. 10, however, only one maintained the narrow precedent of the Nuremberg Judgments. The other decisions expanded protection to include new classes of civilians, while also clarifying the scope and necessary elements of crimes against humanity.

1. Judgments Under Control Council Law No. 10

i. The Flick Judgment

³⁷ See Lippman, *supra* note 9, at 205.

³⁸ Control Council Law No. 10, *reprinted in* VI Trials of the War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 art. 6(c), XVIII, XIX (1952).

³⁹ *Id.* Article. 6(c) of Control Council Law No. 10 defines crimes against humanity as:
Atrocities and offences, including but not limited to mean extermination, deportation, imprisonment, torture, rape, or other inhuman 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.

See also M. Cherif Bassiouni, Crimes Against Humanity In International Criminal Law, 35-39 (1992).

The *Flick* Judgment is important in the study of crimes against humanity because it was one of the first serious attempts by the American courts to consider the scope of crimes against humanity. In doing so, the *Flick* Tribunal dealt with the issue of “other acts,” as set out in the Nuremberg Charter, and helped to determine what crimes against humanity were not.

The *Flick* Judgment dealt with acts by Friedrich Flick and others, allegedly exerting economic and political pressure on the Jewish owners of certain German industries which were subsequently acquired by the Flick firm.⁴⁰ These acts occurred prior to the Nazi invasion of Poland in 1939 and, therefore, could not be connected to any type of armed conflict or war crime.

In its’ decision, the *Flick* Tribunal noted the precedent of the Nuremberg Tribunal’s failure to “consider[], much less decide[], that a person becomes guilty of a crime against humanity merely by exerting anti-Semitic pressure to procure by purchase or through State expropriation industrial property owned by Jews.”⁴¹ The Tribunal thus held that, because property is not mentioned in Control Council Law No. 10 and because the doctrine of *ejusdem generis* dictates that the scope of ‘other persecutions’ to include only “such as affect the life and liberty of the oppressed peoples,”⁴² the compulsory taking of industrial property falls outside the category of crimes against humanity, and, thus, outside of the Tribunal’s jurisdiction.⁴³ In so doing, the *Flick*

⁴⁰ See Lippman, *supra* note 9, at 205.

⁴¹ United States v. Friedrich Flick, *reprinted in* VI Trials of the War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No. 10, 1187, 1212 [hereinafter “Flick Judgment”]. (1952) The Tribunal also held that “[d]espite the elastic nature of this concept [of crimes against humanity], earlier discussions all concur that crimes against humanity are directed against physical threats and injuries and does not encompass property offenses.” *Id.*

⁴² Lippman, *supra* note 9, at 206.

⁴³ See Flick Judgment, *supra* note 41, at 1215-16.

Tribunal became the only American court under Control Council Law No. 10 to maintain the narrow precedent of the Nuremberg Judgments.⁴⁴

ii. The Medical Judgment

The *Medical Judgment* was the second decision handed down by an American war crimes court under Control Council Law No. 10.⁴⁵ The defendants⁴⁶ were convicted of acts, including organization and administration of the euthanasia program, involving the gassing of “incurables,”⁴⁷ Jews and non-German nationals.⁴⁸ Additional convictions were handed down for “aiding, abetting and taking a consenting part in medical experiments upon non-German nationals without their consent.”⁴⁹

“The *Medical Judgment* thus held that State-sponsored euthanasia and involuntary medical experiments against non-Germans during war time constitutes crimes against humanity.”⁵⁰ This decision supports the requirement of a state plan or policy against a protected civilian population. It is important to note that the Tribunal did not extend its’ protection to German civilians. That step was taken in the next major decision, the Justice Case.

⁴⁴ See Lippman, *supra* note 9, at 205.

⁴⁵ See Lippman, *supra* note 9, at 237.

⁴⁶ Karl Brandt was Reich Commissioner for Medical and Health Services. Karl Gebhardt was a consulting surgeon in the SS and chief clinical officer of the Reich Physician SS and Police. *Id.* at 209.

⁴⁷ *Id.* at 207.

⁴⁸ See United States v. Karl Brandt, *reprinted in* II Trials of the War Criminals Before the Nuremberg Military Tribunals Under Control Council Law 10, 171 [hereinafter “Medical Judgement”].

⁴⁹ Medical Judgment, *supra* note 48, at 227.

iii. The Justice Judgment

The *Justice Judgment* under Control Council Law No. 10 is an extremely important decision because it significantly extended the concept of crimes against humanity.⁵¹ The defendants in these cases, “leading officials, judges and lawyers”⁵² were “charged with participating in a ‘government-organized system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetuated in the name of law by the authority of the Minister of Justice and through the instrumentality of the courts.’”⁵³

The *Justice* Tribunal expanded the concept of crimes against humanity when it held that the “prohibition on crimes against humanity [were] ‘not surplusage,’ but . . . intended to supplement the preceding sections on war crimes by including acts absent from the preceding definition.”⁵⁴ The Tribunal also held that crimes against humanity protected “any civilian population”⁵⁵ and that domestic law would not serve as a barrier to prosecution.⁵⁶ In so doing, the Tribunal clearly held that “acts by Germans against German nationals may constitute crimes against humanity within the jurisdiction of the Tribunal to punish.”⁵⁷ For the first time, the protection of the

⁵⁰ Lippman, *supra* note 9, at 210.

⁵¹ *See Id.*

⁵² *Id.*

⁵³ *United States v. Josef Altstoetter*, reprinted in III Trials of the War Criminals Before the Nuremberg Military Tribunal Under Control Council Law 10, 954, 985 (1951) [hereinafter “Justice Judgement”].

⁵⁴ *Justice Judgment*, *supra* note 53, at 972.

⁵⁵ *Id.*

⁵⁶ *See* Lippman, *supra* note 9, at 212.

⁵⁷ *Justice Judgment*, *supra* note 53, at 973.

prohibition of crimes against humanity was extended to the citizens of the same nationality as that of the perpetrator of the act.

The *Justice* Tribunal also addressed the requirements of government involvement and systematic action. Noting that the Control Council Law No.10 “employs the words ‘against any civilian population’ rather than ‘against any civilian individual,’”⁵⁸ the Tribunal held the definition “precludes the isolated crime.”⁵⁹ This provision, the Tribunal held, is “directed against offenses and inhuman acts and persecutions on political, racial, or religious grounds systematically organized and conducted by or with the approval of government.”⁶⁰ The *Justice* Tribunal thus “affirmed that crimes against humanity were limited to the systematic commission of severe, State sponsored delicts.”⁶¹ The Tribunal also extended the concept of crimes against humanity “to encompass acts committed by Germans against German nationals prior to, and

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* “It is not the isolated crime by a private German individual which is condemned, nor is it the isolated crime perpetuated by the German Reich through its officers against a private individual.” *Id.* Rather, the Tribunal noted:

[w]e hold that crimes against humanity as defined in Control Council Law No. 10 must be strictly construed to exclude isolated cases of atrocity or persecution whether committed by private individuals or by governmental authorities. As we construe it, that section provides for punishment of crimes committed against German nationals only where there is proof of conscience participation in systematic government or approved procedures amounting to atrocities and offenses of the kind specified in the act and committed against populations or amounting to persecutions on political, racial or religious grounds.

Id.

⁶¹ Lippman, *supra* note 9, at 212.

independent of, the initiation of aggressive war.”⁶²

Thus, the decisions handed down from the *Justice* Tribunal following Control Council Law No. 10, even more so than those coming out of the Nuremberg Tribunals, extended the protection of the prohibition of crimes against humanity, and interpreted the requirements expressed or implied in the Nuremberg Charter. In addition to the ‘large scale or systematic action’ brought about by a government’s plan or policy against a civilian population, the decisions under Control Council Law No. 10 determined that this action could be against *any* civilian population.

The Control Council Law No. 10 decisions also held that these requirements prevented the possibility of a single act constituting a crime against humanity. But, as Control Council Law No. 10 expanded the precedent of the Nuremberg Judgments, future tribunals would expand this precedent, as well.

4. United Nations War Crimes Commission

Shortly after the War, the Allied Powers charged the United Nations War Crimes Commission with responsibility for investigating and compiling evidence of war crimes. In addition to investigation, the Commission also issued legal opinions relating to war crimes and the penal liability of purported perpetrators.⁶³

In consideration of defining war crimes, the Legal Committee recommended that the War Crimes Commission “transcend the strict standard of war crimes and expand its’ jurisdiction to crimes against humanity.”⁶⁴ Those crimes encompassed, according to the Legal Commission,

⁶² *Id.*

⁶³ See United States War Crimes Commission, History of the United Nations War Crimes Commission 120, 169 (1948) [hereinafter “War Crimes Commission”].

⁶⁴ War Crimes Commission, *supra* note 63, at 176.

“crimes committed against any person without regard to nationality, stateless persons included, because of race, nationality, religious or political belief, irrespective of where they have been committed.”⁶⁵

In 1945, after much debate, the War Crimes Commission determined that “crimes against humanity . . . were war crimes with in the jurisdiction of the Commission.”⁶⁶ Two years later, the Commission issued its’ findings and determined that crimes against humanity were acts which by their “number, magnitude and savagery . . . contributed to a systematic pattern of abuse.”⁶⁷ Additionally, “[s]uch systematic offenses were required to have been carried out pursuant to an official governmental policy.”⁶⁸ Thus, the elements of mass or systematic pattern and official governmental plan or policy were seen as pre-requisites for an act to constitute a crime against humanity by a non-judicial body.

D. Post-Nuremberg United Nations Developments

Of all the post-Nuremberg United Nations developments concerning crimes against humanity, two in particular are important to the issue in question. These developments are the Genocide Convention⁶⁹ and the Draft Codes of Crimes Against the Peace and Security of Mankind.⁷⁰

⁶⁵ *Id.*

⁶⁶ *Id.*, at 177.

⁶⁷ *Id.*, at 179.

⁶⁸ *Id.* “The report detailed that there were two types of crimes against humanity—the ‘murder type’ and the ‘persecution type.’” *Id.*, at 178. “These delicts were designed to protect civilians and may be committed prior to, or during, the war.” *Id.* “The nationality of the victim and whether the act was contrary to domestic law is irrelevant.” *Id.* The perpetrators, as well as those who planned and ordered crimes against humanity, were all criminally liable. *See Id.*, at 178-79.

⁶⁹ *See* Genocide Convention, *supra* note 1.

1. The Genocide Convention

While this memorandum will not deal with the issue of genocide at any length,⁷¹ the Genocide Convention is an important document in the discussion of crimes against humanity for at least two reasons. First, the Genocide Convention supports the notion that crimes against humanity, of which genocide is deemed to be an “aggravated crimes against humanity,”⁷² may occur “in time of war or in time of peace.”⁷³ Thus, the Genocide Convention severs the long standing requirement of crimes against humanity being somehow connected to armed conflict. The Convention also provides for the punishment of “constitutionally responsible rulers, public officials or private individuals”⁷⁴ charged with crimes against humanity.

2. Draft Code of Crimes Against the Peace and Security of Mankind

⁷⁰ For additional history on post Nuremberg Charter developments on crimes against humanity, see M. Cherif Bassiouni, *Crimes Against Humanity in International Law*, 470-499 (1992).

⁷¹ See *supra* note 1 for brief discussion.

⁷² Nicodeme Ruhashyankio, Special Rapporteur, Study of the Question of the Prevention and Punishment of the Crime of Genocide, UN ESCOR, 31st Sess., 107, U/N. Doc. E/CN.4/Sub.2/416 (1978), *quoting* Stefan Glaser, *Droit International Penal Conventionnel* 109 (1970), *quoted in* Lippman, *supra* note 9, at 228. Glaser notes the difference between crimes against humanity and genocide:

[It] is not so much objective as subjective, in that it relates to the motives of the perpetrator. The same act—for example, murder—may be, or rather has been described as, either a crimes against humanity or an act of genocide, depending on the motives of the person committing it if his aim is to eliminate the victim because of the latter’s race, religion or political beliefs, with no other intent, his act constitutes a crime against humanity, where if committed to destroy, in whole or in part, a national, ethnic, racial or religious group, it will be qualified as genocide.

Id.

⁷³ Genocide Convention, *supra* note 1, at art. 1.

After the events of World War Two, the newly created United Nations General Assembly affirmed the “principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgments of the Tribunal.”⁷⁵ The task of formulating the principles of international law as set forth in the Nuremberg Charter and judgments was given to the newly created International Law Commission [hereinafter “ILC”] in late 1947.⁷⁶ Principle VI(c) adopted by the ILC set forth the Commission’s first definition of crimes against humanity.⁷⁷ The development of the definition of crimes against humanity by the ILC can be viewed as the codification of customary international law and, thus, a persuasive indication of the common practices of states throughout the world.

By 1951 the ILC had reformulated and expanded the definition of crimes against humanity⁷⁸ and also included the provision “that ‘[i]nhuman acts’ also could be committed on ‘social’

⁷⁴ *Id.* at art. IV.

⁷⁵ See M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 39-45 (1992).

⁷⁶ See *Id.*

⁷⁷ See *Id.* Principle 6(c) defines crimes against humanity as:

Murder, extermination, deportation, and other inhuman acts done against any civilian population, or persecution on political, racial or religious grounds, where such acts are done or such persecutions are carried out or in execution of or in connexion with any crimes against peace or any war crimes.

⁷⁸ The definition thus included:

[I]nhuman acts committed by the authorities of a State or by private individuals against any civilian population, such as mass murder, or extermination or enslavement, or deportation, when such acts are committed in execution of or in connexion with the offences defined [planning, preparing and waging of aggressive war, State terrorism, forceful annexation, war crimes].

Second Report by Mr. J. Spiropoulos, *Draft Code of Offences Against the Peace and Security of Mankind*, art. I(a), U.N. Doc., A/CN.4/44 (1951), reprinted in [1951] II Y.B. Int’l L. Comm’n.

grounds and that in order to be held liable, private individuals must act ‘at the instigation or with the toleration’ of the State authorities.”⁷⁹

The work on the Draft Codes has continued in the past 50 years. In his 1989 report, the Special Rapporteur maintained that a crime against humanity “requires either an act directed against the mass of people or an inhumane act directed against a single person which is part of a plan or system of persecution.”⁸⁰ However, the Special Rapporteur noted, “where the mass element is absent, an individual act should constitute a link in a chain and be part of a system or plan. The notion of system, plan and receptiveness is necessary in order to categorize an act committed against an individual victim as a crime against humanity.”⁸¹ Thus, for the first time, the possibility that a single act may provide a “link” in a larger, systematic plan by a government against a civilian population, was proposed.

The 1991 version of the Draft Code saw a significant reformulation in the definition of crimes against humanity. The ILC abandoned the designation of crimes against humanity and re-titled the article ‘systematic or mass violations of human rights.’⁸² This emphasis on serious

43, 57, 59, U.N. Doc. 1858 (1951).

⁷⁹ Draft Code of Offences Against the Peace and Security of Mankind, U.N. GAOR, 9th Session, Supp. (No. 9) at 9, U.N. Doc. A/12693 (1954) *quoted in* Lippman, *supra* note 9, at 231 [hereinafter “1954 ILC Draft”]. “Inhuman acts such as murder, extermination, enslavement, deportation or persecution, committed against any civilian population on political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.” *Id.* at n. 304.

⁸⁰ 1954 ILC Draft *quoted in* Lippman, *supra* note 9 at 88-89.

⁸¹ *Id.* at 87.

⁸² Lippman, *supra* note 9, at 263. [1991] II Y.B. Int’l L. Comm’n 103. Art 21 defines “systematic or mass violations of human rights” as:

An individual who commits or orders the commission of any of the following violations of human rights: murder; torture; establishing

violations of fundamental human rights thus “substantively and symbolically severed [crimes against humanity] from armed conflict and conceptualized [them] as a safeguard of fundamental human rights.”⁸³

The 1991 Draft Code retains the concept of “systematic or mass violations” in more than just name. “The text sanctions systematic or mass violations of human rights. The systematic element requires a recurrent practice or plan while the mass-scale component is directed at the number affected. Isolated acts--no matter how atrocious--are not encompassed within the text.”⁸⁴

Additionally, the 1991 Draft Code encompasses public officials as well as private individuals.⁸⁵ The ILC did not “rule out the possibility that private individuals with de facto power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article”⁸⁶

E. The International Criminal Tribunal for the Former Yugoslavia

The ethnic fighting that occurred after the break up of the former Yugoslavia led to the first

or maintaining over persons a status of slavery, servitude or forced labour; persecutions on social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale; or deportation or forcible transfer of population

reprinted in Commentaries on the International Law Commission’s 1991 Draft Code of Crimes Against the Peace and Security of Mankind, (M. Cherif Bassiouni, ed. 1993) at 249. For additional commentary *see Id.* at 249-261.

⁸³ Lippman, *supra* note 9 at 263.. *See also* International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 15(2), G.A. Res. 2200(XXI), U.N. GAOR, 21st Sess., Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967).

⁸⁴ *See* Lippman, *supra* note 9, at 263

⁸⁵ Lippman, *supra* note 9, at 264.

⁸⁶ *Id.*

international criminal tribunal since Nuremberg and Tokyo.⁸⁷ Prosecution of persons responsible for serious violations of international humanitarian law, including crimes against humanity was provided for in article 1 of the Statute of the Yugoslavia Tribunal.⁸⁸

The judgments handed down by the International Criminal Tribunal for the Former Yugoslavia [hereinafter “Tribunal”] have expanded the concept of crimes against humanity in at least four areas. First, despite the Security Council’s requirement that crimes against humanity be committed “in either internal or international armed conflict,”⁸⁹ the Tribunal adopted the “wider definition [of crimes against humanity] in the commentary, which effectively discards any nexus with war”⁹⁰ The Tribunal held that this nexus requirement was “particular to . . . the Nuremberg Tribunal . . . [and that] there is no logical or legal basis for this requirement and it has been abandoned in subsequent State practice with respect to crimes against humanity.”⁹¹ The Tribunal concluded that it is “now a ‘settled rule of customary international law’ that crimes

⁸⁷ See Lippman, *supra* note 9, at 265. For additional commentary on the ICTFY, see M. Cherif Bassiouni, *Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal*, 18 *Fordham Int’l L.J.* 1191 (1995). See also Christian Tomuschat, *International Criminal Prosecution: The Precedent of Nuremberg Confirmed*, 5 *Crim.L.F.* 237 (1994).

⁸⁸ See Secretary-General’s Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia [May 3, 1993] [with Annex to the Statute of the International Tribunal], *reprinted in* 32 *I.L.M.* 1159, 1170, at art. 1 [hereinafter “Statute of ICTFY”]. Prohibited acts include: murder, extermination, enslavement, deportation, imprisonment, torture and rape. See *Id.*

⁸⁹ International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dus’ko Tadic* (Oct. 2, 1995), *reprinted in* 35 *I.L.M.* 32, 72 (1996) [hereinafter “Tadic Decision”].

⁹⁰ Theodor Meron, *Preparing to Wage Peace: Toward the Creation of an International Peacekeeping Command and Staff College*, 88 *Am.J.Int’l L.* 76, 87 (1994).

⁹¹ Statute of ICTFY, *supra* note 88, at 72.

against humanity are not required to be connected, or even related to, an international armed conflict.”⁹² Eliminating the requirement of international armed conflict is significant because it may extend protection to civilians caught in the middle of internal conflicts.

Secondly, in addition to severing the connection with international armed conflict, the Yugoslavia Statute has no explicit requirement of State sponsorship of crimes against humanity.⁹³ Lack of this requirement may extend responsibility for crimes against humanity to independent militias involved in the fighting.⁹⁴ This development mirrors the steps taken by the ILC in recognizing the possibility of a non-governmental group exerting de facto power in an armed conflict.

Additionally, the Tribunal’s use of the word “any” civilian population⁹⁵ also “arguably extends crimes against humanity to atrocities committed by a State or armed band against its own nationals.”⁹⁶ Finally, the Tribunal did not require that crimes against humanity be “motivated by political, racial or religious animus . . . [and includes] rape as a crimes against humanity.”⁹⁷

⁹² Tadic Decision, *supra* note 89, at 72.

⁹³ See Lippman, *supra* note 9, at 266.

⁹⁴ See *Id.*

⁹⁵ See Statute of ICTFY, *supra* note 88, at art. 1.

⁹⁶ James C. O’Brien, The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia, 87 Am.J.Int’l.L. 639, 649 (1993).

⁹⁷ Lippman, *supra* note 9, at 266-67.

V. ELEMENTS OF CRIMES AGAINST HUMANITY

The previous section of the memorandum looked at the history of the development of the modern definition of crimes against humanity. This section will provide a more detailed discussion of the six elements necessary for an act to constitute a crime against humanity: (1) widespread or systematic action, (2) governmental plan or policy, (3) civilian population, (4) discriminatory intent, (5) knowledge of this larger plan by the perpetrator and (6) intent of the perpetrator to take part in this larger plan.⁹⁸

A. Widespread or Systematic Action

“Widespread or systematic action” has long been the hallmark of crimes against humanity.⁹⁹ Recent developments by the Yugoslavia Tribunal, however, have opened up the

⁹⁸ For additional history on prerequisite legal elements for criminal responsibility, *see* M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 235-261 (1992).

⁹⁹ While the Nuremberg Charter did not explicitly require a “widespread or systematic manner,” *see* Report of the International Law Commission on the work of its forty-eighth session 6 May-26 July 1996, U.N. GAOR, 51st Session, Supp. (No. 10), U.N. Doc. A/51/10 [1996], at 94 [hereinafter “1996 ILC Report”], the Nuremberg Tribunal stressed that the Nazi acts were “committed as part of the *policy of terror* and were ‘in many cases . . . organized and systematic’ in considering whether such acts constituted crimes against humanity.” Commentary to the 1996 ILC Report, *supra* at 94. (emphasis added).

The Tokyo Tribunal, while not discussing crimes against humanity at any length, did affirm in its’ decisions that “civilian and military officials with power and authority were liable for a failure to intervene to halt war crimes and crimes against humanity . . . [and that] duty was triggered in the cases of serious and widespread official delicts of which a decision maker was aware or should have been aware.” *The Tokyo War Crimes Trial, reprinted in II The Law of War: A Documentary History*, (Leon Friedman, ed. 1972) at 1039.

Early versions of the Draft Code also emphasized the mass or widespread nature of crimes against humanity. The 1951 version of the Draft Code defined crimes against humanity as: “[I]nhuman acts committed by the authorities of a State or by private individuals against any civilian population, such as mass murder, extermination” Second Report by Mr. J. Spiropoulos, *Draft Code of Offences Against the Peace and Security of Mankind*, art. I(9), U.N. Doc. A/CN.4/44, *reprinted in* [1951] II Y.B.Int. The 1991 and 1994 Draft Codes also maintain the requirement of widespread and systematic acts. The 1994 Report of the ILC noted that:

The definition of crimes against humanity encompasses inhuman acts of a very serious character involving widespread or systematic violations . . .

discussion of when, if ever, a single act may constitute a crime against humanity.

While the *Tadic* Tribunal maintained the requirement of widespread or systematic action,¹⁰⁰ it

[and that] [t]he hallmarks of [crimes against humanity] lie in this large scale and systematic nature . . . [and that] the particular forms of unlawful acts (murder, enslavement, . . .) are less crucial to the definition than factors of scale and deliberate policy.

Tadic Decision, *supra* note 89, at 42, *citing* Report of the International Law Commission on the work of its 49th Session (1994), UN GAOR, 49th Sess., Supp. (No. 10), U.N. Doc. A/49/10 at 76.

The commentary to the 1996 ILC Report also notes the requirement of large scale or systematic manner. *See* 1996 ILC Report, *supra* note 99, at 94. The commentary notes the requirement that “the inhuman acts be committed in a systematic manner meaning pursuant to a pre-conceived plan or policy. The implementation of this plan or policy could result in the repeated or continued commission of inhuman acts.” *Id.* The purpose of this requirement is “to exclude a random act which is not committed as part of a broader plan or policy.” *Id.* The second alternative, that the “inhuman acts be committed on a large scale,” *Id.*, means that these inhuman acts are directed against a multiplicity of victims.” *Id.* at 94-95. The purpose of this requirement is to exclude “an isolated inhuman act committed by a perpetrator acting on his own initiative and directed against a single victim.” *Id.* at 95.

The decisions handed down after World War Two upheld the requirement of widespread or systematic action, as well. Of the Nuremberg decisions, only Wilhelm Frick was convicted of war crimes and crimes against humanity. Frick, the Reich Protector of Bohemia and Moravia, “was aware that euthanasia was being practiced during the war, yet did nothing to stop . . . the approximately 275,000 victims from being killed. *See* Nuremberg Judgment, *supra* note 33, at 546.

Under Control Council Law No. 10, the Justice Tribunal affirmed that crimes against humanity were limited to the systematic commission of severe, state-sponsored delicts. *See* Justice Judgment, *supra* note 53, at 979.

Domestic prosecutions of Nazi war criminals in Holland also required the presence of widespread or systematic action. In *Public Prosecutor v. Menton*, the Dutch Supreme Court held that crimes against humanity must “form part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of people.” 75 I.L.R. 331, 362-63 (1987) (The Netherlands, Sup. Ct. 1981). The Court of Cassation of Holland held that the isolated shooting of a prisoner and the mistreatment of several others lacked widespread or systematic action and were, therefore, not crimes against humanity. *See* *In re Albrecht*, *reprinted in* Annual Digest and Reports of Public International Law Cases [1949] 396, 398 (1955).

¹⁰⁰ The *Tadic* Tribunal noted with acceptance the Report of the Ad Hoc Committee on the Establishment of a Permanent International Criminal Court and article 18 of the ILC’s Draft Code which both provide that crimes against humanity require a widespread or systematic manner. The Ad Hoc committee on the Establishment of a Permanent International Criminal Court provides that crimes against humanity “usually involved a widespread or systematic attack against a civilian population rather than isolated offences.” The Report of the Committee on the

also touched on the “related issue [of] whether a single act by a perpetrator can constitute a crime against humanity.”¹⁰¹ The Tribunal noted that the “issue has been the subject of intense debate, with the jurisprudence immediately following the Second World War being mixed.”¹⁰² The Tribunal went on to note that while the American tribunals typically followed the general rule that a massive nature was required,¹⁰³ the British tribunals tended to find “that the mass element was not essential to the definition, in respect to either the number of acts or the number of victims and that ‘what counted was not the mass aspect, but the link between the act and the cruel and barbarous political system’”¹⁰⁴

Most significantly, the Yugoslavia Tribunal, in the Vukovar Hospital decision stated that:

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 crimes against humanity.”¹⁰⁵

Establishment of a Permanent International Criminal Court, U.N. Doc. GAOR, A/50/22 (1995) at 17. Art. 18 of the Draft Code requires this act to be committed “in a systematic manner or on a large scale.” 1996 ILC Draft Code, *supra* note 99.

¹⁰¹ *Id.* at 43.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *See, e.g.,* Trial of Josef Altstotler and Others, Vol. VI, Law Report of Trials of War Criminals (United Nations War Crimes Commission, London, 1949) 79-80 and the Trial of Fredrich Flick and Five Others, Vol. IX Law Reports, 51 (in which isolated cases of atrocities and persecution were held to be excluded from the definition of crimes against humanity) *quoted in* Tadic Decision, *supra* note 89, at 943.

¹⁰⁵ Tadic Decision, *supra* note 89, at 943, *quoting* Report of ILC, Special Rapporteur, D. Thiam, Ybk ILC 1986, Vol. II, ILC, A/CN.4/466 at para. 93. In the same report, the Special Rapporteur noted that “[e]ven an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution.” *Id.* at para. 89, *quoting* Henri Meyrowitz, *La Repression Par Les Tribunaux all Emands des Crimes Contre l’ Humanity et Ale Appartenance a Uneorganisation Criminelle* 282 (1960) (unofficial translation) [hereinafter “Meyrowitz”].

Importantly, the Tribunal noted that “an individual committing a crime against a single victim or a limited number of victims might be recognized as guilty of a crime against humanity if his acts were part of a widespread or systematic plan.”¹⁰⁶ Thus, while it is necessary for there to be a larger, widespread action occurring, the single act of an individual actor may now be considered a link in that larger action and constitute a crime against humanity.

B. Plan or Policy

The second traditional element necessary for an act to constitute a crime against humanity is that the act was “instigated or directed by a Government or by any organization or group.”¹⁰⁷ The commentary to the 1996 ILC report notes that it is the Code’s intention to “exclude the situation in which an individual commits an inhuman act while acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group”¹⁰⁸ It is the instigation “of a Government or *any* organization or group, which may or may not be affiliated with a Government, [that] gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State.”¹⁰⁹

The prosecution of Klaus Barbie in France demonstrated the application of the requirement of a government plan or policy necessary to make an act a crime against humanity. In that case, the

¹⁰⁶ Vokovar Hospital Decision, para. 30, *discussed in Tadic Decision, supra* note 89.

¹⁰⁷ 1996 ILC Report, *supra* note 99, at 95.

¹⁰⁸ *Id.* The commentary goes on to note that “[t]his type of isolated criminal conduct on the part of a single individual would not constitute a crime against humanity.” *Id.*

¹⁰⁹ *Id.* at 95-96. *See also* Nuremberg Judgment re: defendant Streicher and von Schirach at 129 and 144. *See also* Tadic Decision, *supra* note 89, at 945.

court noted that crimes against humanity were “inhuman acts and persecutions committed in a systematic manner in the name of a State practicing a policy of ‘ideological supremacy”¹¹⁰

The Court of Cassation, in its decision upholding the conviction of Barbie for crimes against humanity, specifically noted the importance of a State policy and the execution of a plan to carry out that policy.¹¹¹ The Dutch court in the *Menton* case also upheld the requirement that the crimes in question must form a part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of people.¹¹²

The possibility, however, that groups other than recognized governments may possess the power to instigate the necessary widespread or systematic action against a civilian population is now an accepted one. The Yugoslavia Tribunal, in the *Tadic* decision, while noting that the “traditional concept” concept of crimes against humanity required “not only that a policy must be present, but that the policy must be that of a State . . . ,”¹¹³ decided that it was “not bound by past

¹¹⁰ *Federation Nationale Des Deportés Et Internes Résistants Et Patriotes and Others v. Barbie*, reprinted in 78 I.L.R. 124, 137 (1988) (Court of Cassation, Criminal Chamber 1983-85) [hereinafter “Barbie Judgment”].

¹¹¹ *See Id.* The Court noted that:

[t]he fact that the accused . . . took part, in perpetrating [crimes against humanity], in the execution of a common plan to bring about the deportation or extermination of the civilian population during the war or persecution on political, racial or religious grounds, constitutes not a separate offence or an aggravating circumstance but . . . an essential element of the crimes against humanity constituting in the facts that the acts . . . were performed in a systematic manner in the name of a State practicing . . . a policy of ideological supremacy.

Id.

¹¹² *Public Prosecutor v. Menton*, reprinted in 75 ILR 362, 363 (1987). *See also* *Tadic Decision*, *supra* note 89, at 944.

¹¹³ *Tadic Decision*, *supra* note 89, at 944-45. The Tribunal went on to note that:

doctrine but must apply customary international law as it stood at the time of the offences.”¹¹⁴ In this area, the Tribunal held, “the 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.”¹¹⁵

The *Tadic* Tribunal approved of changes in the Draft Code that expanded responsibility for crimes against humanity to non-state actors.¹¹⁶ Additionally, in 1995, a United States Court of Appeals in *Kadic v. Karadzic*¹¹⁷ held that “non-state actors” could be liable for committing crimes against humanity.¹¹⁸ “Therefore, although a policy must exist to commit these acts [of crimes against humanity], it need not be the policy of a State.”¹¹⁹

The previous opinion was . . . that crimes against humanity, as crimes of a collective nature, required a State policy because their commission required the use of a State’s institutions, personnel and resources in order to commit, or refrain from preventing the commission of, the specified crimes described in art. 6(c) [of the Nuremberg Charter].

Id.

¹¹⁴ *Id.* at 945.

¹¹⁵ *Id.*

¹¹⁶ *Id.* In its’ decision, the Tribunal noted with approval that the Draft Codes: do not confine possible perpetrators of the crimes to public officials or representatives alone . . . the article does not rule out the possibility that private individuals with de facto power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article.

Id.

¹¹⁷ 70 F.3d 232 (2d Cir. 1995), *cert. den’d*, 64 U.S.L.W. 3832 (18 June 1996).

¹¹⁸ *Id.*

¹¹⁹ *Tadic* Decision *supra* note 89, at 945. Still, in *Prosecutor v. Dragan Nikolic*, the Trial Chamber stated that “[a]lthough they need not be related to a policy established at state level, in the conventional sense of the term, they cannot be the work of isolated individuals alone.”

C. Civilian Population

The requirement that acts constituting crimes against humanity be directed against a ‘civilian population’ has been part of the definition of crimes against humanity from the beginning.¹²⁰

The two main issues in this area are (1) how ‘civilian’ is defined, i.e., who is a ‘civilian’ and (2) what populations are protected, specifically, what must the character of the targeted population be in order to warrant protection.¹²¹

1. Defining ‘Civilian’

The primary question with respect to defining ‘civilian’ is whether a person who has been part of the fighting or the resistance qualifies as a ‘civilian.’ The *Barbie* case dealt specifically with this issue.¹²² In that case, the lower court’s ruling that members of the French Resistance could not be classified as civilians was quashed by the Cour de Cassation. The Cour de Cassation held that “members of the resistance could be victims of crimes against humanity as long as the necessary intent for crimes against humanity was present”¹²³ Additionally, Common

Prosecutor v. Dragan Nikolic, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-94-2-R61-20, Trial Chamber I, at para. 26, 20 Oct. 1995.

¹²⁰ See Nuremberg Charter, *supra* note 12. *But see* Tokyo Charter which eliminated the requirement of “against any civilian population” *supra* note 26.

¹²¹ See Tadic Decision *supra* note 89, at 939.

¹²² See Barbie Decision, *supra* note 110 at 139.

[T]he Chambre d’ Accusation of the Court of Appeal of Lyons ordered that an indictment for crimes against humanity be issued against Klaus Barbie, head of the Gestapo of Lyons . . . but only for ‘persecutions against innocent Jews,’ and held that prosecution was barred by the statute of limitations for crimes committed by Barbie against other combatants who were members of the Resistance or whom Barbie thought were members . . . even if they were Jewish, because these acts could only constitute war crimes

Tadic Decision *supra* note 89, at 940, *discussing* the Barbie Decision, *supra* note 110, at 139.

Article 3 to the Geneva Conventions of 1949 provides that “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause [shall be afforded protection]”¹²⁴

¹²³ *See Id.*

[N]either the driving force which motivated the victims, nor their possible membership of the Resistance, excluded the possibility that the accused acted with the element of intent necessary for the commission of crimes against humanity. [Thus, to the Court] not only was the general population considered to be one of a civilian character despite the presence of Resistance members in its midst but members of the Resistance themselves could be considered victims of crimes against humanity if the other requisite elements are met.

Tadic Decision *supra* note 89, at 940-41 *discussing* Barbie Decision, *supra* note 110, at 139.

¹²⁴ Convention (I) For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, U.N.T.S. No. 970, Vol. 75 at 31 (1950). Common Article 3 provides in full:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people.

See also Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva Convention III), *entered into force* 21 Oct. 1950; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, U.N.T.S. No. 973, Vol. 75 at 287 (1950) and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the

The Yugoslavia Tribunal also utilized a broad definition of ‘civilian,’ holding that:

[A] wide definition of civilian population is justified. Thus the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity . . . although crimes against humanity must target a civilian population, individuals who at one time performed acts of resistance may in certain circumstances be victims of crimes against humanity.¹²⁵

2. What Populations are Protected

There are two questions that must be addressed concerning the issue of protected populations. The first is whether or not the presence of military or resistance fighters, in an otherwise civilian population, causes that population as a whole to lose its protection. The Yugoslavia Tribunal has held that the presence of resistance fighters does not cause an otherwise civilian population to lose its protection.¹²⁶

The second question involves the nationality of the civilian population—specifically, whether acts against a population having the same nationality of the perpetrator constitutes crimes against humanity. While the Nuremberg Judgement held that acts against German nationals did not constitute crimes against humanity,¹²⁷ that narrow definition of ‘civilian population’ was subsequently abandoned, starting with Control Council Law No. 10.¹²⁸ The British military courts following World War Two went even further in expanding the scope of protection to all

Protection of Victims of Non-International Armed Conflicts (Protocol II), *entered into force* 7 Dec. 1978.

¹²⁵ Tadic Decision, *supra* note 89, at 940-41.

¹²⁶ *See Id.*

¹²⁷ *See e.g.* Medical Judgment, *supra* note 48, at 227.

¹²⁸ *See e.g.* Justice Judgment, *supra* note 53, at 972.

populations than did the American courts, at least at that time.¹²⁹

The most recent decisions settle the issue of nationality of the civilian population. In the *Tadic* decision, the Yugoslavia Tribunal held that the phrase ‘directed against any civilian population’ “makes it clear that crimes against humanity can be committed against civilians of the same nationality as the perpetrator, or those who are stateless, as well as those of a different nationality.”¹³⁰

E. Discriminatory Intent

The Statute for the ICTR requires discriminatory intent by the actor before an act can constitute a crime against humanity.¹³¹ This requirement has drawn criticism from respected sources.¹³²

Despite the express requirement of discriminatory intent in the ICTR’s Charter, support for this requirement is not abundant.¹³³ “The requirement of discrimination was not contained in the Nuremberg Charter . . . nor can support for this position be found in Control Council Law No.

¹²⁹ See *Tadic Decision*, *supra* note 89, at 940. The Courts of “the British Zone determined that crimes against humanity were applicable in all cases where the perpetrator and victim were of the same nationality, [and] regardless if whether the victim was civilian or military.” *Id. quoting* Meyrowitz, *supra* note 105, at 282.

¹³⁰ *Tadic Decision*, *supra* note 89, at 939.

¹³¹ ICTR Statute, *supra* note 6, at art. 3. Art. 3 provides: “The International Tribunal for Rwanda shall have the power to prosecute persons responsible for 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” *Id.*

¹³² See *Tadic Decision discussing* Amnesty International, *The International Criminal Court: Making the Right Choices*, Part I, 40 (1997).

¹³³ See *Tadic Decision*, *supra* note 89, at 939.

10, as well as cases taken on the basis of this law.”¹³⁴ Additionally, the Tokyo Charter did not mandate discriminatory intent.¹³⁵ Moreover, discriminatory intent is not required in either the latest ILC Draft Code or in the Statute for the ICTFY.¹³⁶

However, many “commentators and national courts have found that some form of discriminatory intent is inherent in the notion of crimes against humanity, and thus required for ‘inhuman acts.’”¹³⁷ Additionally, the Yugoslavia Tribunal, while not mandated to do so by its’ own Statute,¹³⁸ held in the *Tadic* decision that because the requirement of discriminatory intent on national, political, ethnic, racial or religious grounds for all crimes against humanity was included in the Report of the Secretary General, the Trial Chamber would required discriminatory intent for all crimes against humanity under article 5 of the ICTFY Statute.¹³⁹ So, while the historical precedent for the requirement of discriminatory intent is not abundant, the modern trend supports the requirement that discriminatory intent be present prior to an act being declared a crime against humanity.

F. Knowledge and Intent

There are two final requirements necessary for an act to constitute crimes against humanity.

¹³⁴ *Id.* at 944. See e.g., Medical Judgments, Vol. II Trials of the War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No. 10, 181, 196-98 (1950).

¹³⁵ See *Tadic* Decision, *supra* note 89, at 944.

¹³⁶ See *Id.*

¹³⁷ *Id.* at 943. See e.g., *R. v. Finta*, 88 C.C.C. 3d 417, 419 (Sup. Ct. of Canada) (1994). “With respect to crimes against humanity, the additional element is that the inhuman acts were based on discrimination against or the persecution of an identifiable group of people.” *Id.* (Cory, J., concurring).

¹³⁸ See Statute of ICTFY, *supra* note 88, at art. 5. See also *Tadic* Decision, *supra* note 89, at 944

¹³⁹ See *Tadic* Decision, *supra* note 89, at 944.

The first requirement is that the perpetrator has knowledge of the larger plan or policy directed against the civilian population. The second requirement is that the perpetrator intends his act to be part of that larger plan or policy. As these requirements are linked they will be discussed together.

1. Knowledge

For a single act to constitute a crime against humanity it must be shown that the act is a link in the larger, widespread plan or policy against a civilian population.¹⁴⁰ To do this, the perpetrator must, first, have knowledge of this widespread plan or policy against the civilian population and, second, the act must not be done for purely personal reasons.¹⁴¹ If both of these elements are present, along with the other necessary elements, “that is sufficient to hold [the perpetrator] liable for crimes against humanity.”¹⁴²

Knowledge by the perpetrator may be presumed. Evidence of this can be seen in domestic prosecutions for crimes against humanity early as 1947. In a case decided by the Spruchgericht at Stade, Germany, the accused, who had been stationed near the concentration camp at Buchenwald, was assumed to have known that numerous persons were deprived of their liberty there on political grounds.¹⁴³ Additionally, it was held that it was not necessary for the perpetrator to have knowledge of exactly what would befall the victim.¹⁴⁴

¹⁴⁰ See Section V (A) *supra* and accompanying footnote.

¹⁴¹ Tadic Decision, *supra* note 89, at 946.

¹⁴² *Id.*

¹⁴³ Case No. 38, Annual Digest and Reports of Public International Law Cases for the Year 1947, 100-01 (1951).

¹⁴⁴ Tadic Decision, *supra* note 89, at 946, *discussing* Vol. I Entscheidungen des Obersten

In *R. v. Finta*, the Canadian Supreme Court addressed the issue of knowledge necessary to find liability for crimes against humanity. In that case the majority held that the knowledge required to be proven was “that the accused was aware or willfully blind to facts or circumstances which would bring his or her acts within crimes against humanity . . . it would not be necessary to establish that the accused knew that his acts were inhuman.”¹⁴⁵

Mere knowledge of the widespread plan or policy is not enough, however, for an act to constitute a crime against humanity. The Nuremberg Tribunal, in the *Hess* case, “required both knowledge of and active involvement in crimes against humanity.”¹⁴⁶ The Tribunal, while finding that Hess “possessed knowledge of crimes against Jews in Eastern Europe,”¹⁴⁷ concluded that he neither “participated nor ordered such delicts.”¹⁴⁸ Ultimately, the Tribunal failed to find Hess sufficiently connected to crimes against humanity and war crimes.¹⁴⁹

a. Act not for purely personal motives

In addition to knowledge of the larger widespread plan or policy against a civilian population, to constitute a crime against humanity the act must not be undertaken for purely personal

Gerichtshofes Fur Die Britische Zone in Stratsachen, case 2, 6-10, case 4, 19-25, case 22, 91-95, case 25, 105-10, case 31, 122-26, case 34, 144-43. One case is particularly relevant in this area. In that case, the two defendants had informed the police in 1944 that the director of the company for which they worked had criticized Hitler. After the denouncement, the director was arrested and eventually taken to a concentration camp. The defendants were initially acquitted for lack of ‘mens rea,’ as “they lacked a concrete idea of the consequences of their action or an ‘abominable attitude.’” *Id.* at case 16, 60-62. On appeal, the case was remanded after the Obersten Gerichtshofes held that “crimes against humanity does not require either a concrete idea of the consequences or an ‘abominable attitude.’” *Id.*

¹⁴⁵ Tadic Decision, *supra* note 89, *discussing* *R. v. Finta*, *supra* note 137.

¹⁴⁶ Lippman, *supra* note 9, at 198.

¹⁴⁷ *See* Nuremberg Judgment, *supra* note 33, at 529.

¹⁴⁸ *Id.*

reasons.¹⁵⁰ “While personal motives may be present, they should not be the sole motivation for the act”¹⁵¹ “Even if the perpetrator’s interest is only to injure one particular person, if the act is closely related to the larger scheme, it may constitute a crime against humanity, assuming all the other elements are present.”¹⁵² Therefore, if an actor “has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his act for purely personal motives completely unrelated to the attack on the civilian population, this is sufficient to hold him liable for crimes against humanity.”¹⁵³

2. Intent

In addition to having knowledge of a widespread or systematic attack against a civilian population, a perpetrator must intend for his act to be part of this larger attack. The most recent Draft Code is explicit in its’ requirement of intent. The commentary noted that “the Commission decided to use the phrase ‘intentionally commits’ to further underscore the necessary intentional element”¹⁵⁴

¹⁴⁹ *See Id.*

¹⁵⁰ *See Tadic Decision, supra* note 89, at 946.

¹⁵¹ *Id.*

¹⁵² *See Id., quoting* OGHBZ, Decision of the Dist. Ct. (Landgericht) Hamburg of 11 Nov. 1948, STS 78/48, Justic and NS-Verbrechan II, 1945-1966, 491-99 (unofficial translation.). One case is particularly illustrative of this point. In that case, the defendant was convicted of crimes against humanity after denouncing his wife for her pro-Jewish, anti-Nazi remarks. The OGH found that although the defendants motive was to separate from his wife, the defendant sealed his wife’s fate by informing the Gestapo of her comments. The Court held that defendants actions fit “into the plan or persecutions against Jews in Germany and that although [defendant’s] intent was only to harm this one individual, it was closely related to the general persecution of the Jews.” *Id.*

¹⁵³ *Tadic Decision, supra* note 89, at 946.

¹⁵⁴ 1996 ILC Report, *supra* note 99, at art. 2.

The Court of Appeals of Paris, in the *Touvier* case¹⁵⁵ held that a person “cannot be held to have committed a crime against humanity unless it is also established that he had a specific motivation to take part in the execution of a common plan by committing in a systematic manner inhuman acts or persecution in the name of the State”¹⁵⁶ In a more recent decision, the Canadian Supreme Court held that the standard in proving the necessary mens rea was that the “defendant intentionally and voluntarily committed the act.”¹⁵⁷

VI. FACTUAL ANALYSIS

The previous section of this memorandum provided a more in-depth discussion of the six necessary pre-requisite elements necessary for an act to constitute a crime against humanity. This section will look at the situation in Rwanda between 1 January and 31 December 1994. Utilizing United Nations and human rights organization reports, as well as newspaper accounts, a determination will be made as to whether or not these necessary elements were present.¹⁵⁸

A. Widespread or Systematic

Article 3 of the ICTR Statute requires that crimes against humanity be part of a “widespread or systematic attack.”¹⁵⁹ This widespread or systematic nature must be present in order for a

¹⁵⁵ *Touvier*, reprinted in 100 I.L.R. 338 (Court of Appeals of Paris) (First Chamber of Accusation) 13 April 1992 [hereinafter “*Touvier I*”] and *Id.* at 358 (Court of Cassation) (Criminal Chamber) 27 Nov. 1992 [hereinafter “*Touvier II*”]. See also Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles By the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 Colum.J.Transnat’l L. 289 (1994).

¹⁵⁶ *Touvier II*, *supra* note 153, at 343.

¹⁵⁷ *R. v. Finta*, 88 C.C.C. 417, 758 (Sup. Ct. of Canada) (1994).

¹⁵⁸ For a discussion on elements of individual criminal responsibility, see M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 339-395 (1992).

single act to constitute a link in that attack.¹⁶⁰ The attack against the Tutsi was not only widespread, but reliable reports indicate that it was also systematic.

1. Widespread

Estimates of the numbers of Tutsi killed in Rwanda during 1994 range from 200,000¹⁶¹ to 1 million, approximately 75% of Rwanda's Tutsi population.¹⁶² The killings, which started in Kigali,¹⁶³ spread throughout the country.¹⁶⁴ Non-governmental human rights organizations ("NGO's") and the United Nations Special Rapporteur ("Special Rapporteur") reported massive numbers of murdered Tutsi in almost every prefect in the country.¹⁶⁵ Significantly, the Special Rapporteur and others deemed the level of killing in Rwanda to be that of the level necessary to declare genocide.¹⁶⁶

¹⁵⁹ Statute of ICTR, *supra* note 88, at art. 3.

¹⁶⁰ See Section V (A) *supra* for discussion.

¹⁶¹ See Amnesty International, Mass Murder in Rwanda, *supra* note 4, at 1.

¹⁶² See Virginia Morris and Michael Scharf, Insider's Guide to the International Criminal Tribunal, *quoting* Philip Gourevitch, After the Genocide, The New Yorker, 18 Dec. 1995, at 84. See also Final Report of the Commission of Experts Established Pursuant to S.C. Res 935 (1994), para. 57, U.N. Doc. 5/1994/1405 (1994). Human Rights Watch/Africa reported that in the first six weeks of killing, "[a]t least 200,000 and perhaps as many as 500,000 unarmed and unresisting civilians have been slain." Human Rights Watch/Africa, Genocide in Rwanda, May 1994, Vol. 6, No. 4 at 2 [hereinafter "Genocide in Rwanda"]. Additionally, Reuters News Service reported on June 11, 1994, approximately two months after the onslaught, that relief agencies were reporting up to 500,000 people had been killed in the preceding two months. See Genocide Planned, *supra* note 5.

¹⁶³ See 28 June Special Rapporteur Report, *supra* note 5, at para. 23.

¹⁶⁴ Human Rights Watch/Africa reported approximately 2800 people murdered in Kibugo, 5800 in Cyahinda, 4000 murdered in Kibeho, 4000 more in Shangi parish, etc. See Human Rights Watch/Africa, Genocide in Rwanda, *supra* note 162, at 3.

¹⁶⁵ *Id.*

¹⁶⁶ See 28 June Special Rapporteur Report, *supra* note 5, at para. 43 (reporting that "[e]minent

2. Systematic

In addition to the widespread nature of the killing in Rwanda during 1994, the Hutu killing of Tutsi was also a systematic one.¹⁶⁷ At least two years prior to the killings in 1994, a “systematic indoctrination campaign by the Hutu extremist hierarchy was carried out poisoning every level of the Hutu society.”¹⁶⁸ One source reported that this led to the Hutu being “brainwashed and duped” into believing that the Tutsi were “cockroaches” out to destroy the Hutu.¹⁶⁹

In addition to the generalized propaganda indoctrinating Hutu against Tutsi, according to UN reports, steps were being taken by the Hutu led government to gain detailed information about the Tutsi population, including census data providing the number of Tutsi in any given community, their sex and age.¹⁷⁰ Additionally, documents recovered by the Special Rapporteur from the Hutu government were found to provide detailed “information on the planning of massacres in areas with large Tutsi population.”¹⁷¹ The existence of “death lists” was also widely known.¹⁷² The existence of these lists by the militia was so widely known and available

persons, including the Secretary-General of the United Nations, have not hesitated to describe the massacre of the Tutsi as genocide.”) *Id.*

¹⁶⁷ See, e.g., 28 June Special Rapporteur Report, *supra* note 5, at para. 27 (calling the massacres “systematic in nature.”); See also Michael G. Karnavas, Rwanda’s Quest for Justice: National and International Efforts and Challenges, 21 May *Champion* 19 (1997) [hereinafter “*Champion*”] (noting that the “genocide in Rwanda was not the result of a spontaneous outburst of ancestral hatred between the Hutu and Tutsi, rather it was methodically orchestrated and planned at least two years before it started on April 6, 1994) *Id.* at 16-17. See also Human Rights Watch/Africa, *Genocide in Rwanda*, *supra* note 162, at 2.

¹⁶⁸ See *Champion*, *supra* note 167, at 16-17.

¹⁶⁹ See *Id.*

¹⁷⁰ See 28 June Special Rapporteur Report, *supra* note 5, at para. 25.

¹⁷¹ See *Id.*

that by 1994 “individuals could pay the militias to have their names removed.”¹⁷³

In addition to having detailed census data and death lists information, the Rwandan Government also utilized an extensive network of roadblocks to prevent the escape of Tutsi.¹⁷⁴ By mid-May, the militia had in place a dense network of roadblocks.¹⁷⁵ “In some cases, the barriers were separated by no more than a few hundred yards, making escape virtually impossible.”¹⁷⁶

Once the killing started, Tutsi victims were “hunted down to the very last refuge and killed there.”¹⁷⁷ The killings were “systematic in nature”¹⁷⁸ and “whole families were exterminated.”¹⁷⁹ Tutsi attempting to hide in the woods or forest were killed after their attackers set fire to the trees.¹⁸⁰

¹⁷² See Guy Vassall-Adams, *Rwanda: An Agenda for International Action* 29 (1994).

¹⁷³ *Id.* quoting Economist Intelligence Unit, *Rwanda Country Report, Second Quarter, 1994*. See also 28 June Special Rapporteur Report, *supra* note 5, at para. 25 (noting the existence of “lists of names of person to be executed.”) *Id.*

¹⁷⁴ See, e.g., Amnesty International, *Mass Murder in Rwanda*, *supra* note, 4, at 5-6 (noting the “consistent, coordinated nature of the road blocks operation, and the persistent pattern by which Tutsi in general . . . were screened out and killed.”) *Id.* See also Human Rights Watch/Africa, *Genocide in Rwanda*, *supra* note 162, at 3. “Within hours of the plane crash, the Presidential Guard had set up road blocks around the capital of Kigali” *Id.* The Special Rapporteur also noted that “barricades were set up between 30 and 45 minutes after the crash of [the president’s] aircraft, and even before the news of it had been announced on the national radio” 28 June Special Rapporteur Report, *supra* note 5, at para. 25.

¹⁷⁵ See Human Rights Watch/Africa, *Genocide in Rwanda*, *supra* note 162, at 6.

¹⁷⁶ See *Id.*

¹⁷⁷ See 28 June Special Rapporteur Report, *supra* note 5, at para. 27.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

Witnesses report that the killings took on a sadistic ritual of collective chanting and dancing. Women and children were raped; babies were smashed against rocks; victims were mutilated by having their breasts and penises cut off; scores of living victims were soaked with gasoline and torched.¹⁸¹

By late April, leaders of the militia reportedly were calling upon their members to finish the *nettoyage* (“cleaning up”) of the Tutsi.¹⁸² In areas still maintaining some form of peace or calm, prefects were removed and replaced with Hutu extremists.¹⁸³ This would lead to the arrival of government forces and the initiation of killings.¹⁸⁴ Militia members began to make nightly visits to stadiums, churches and other locations where Tutsi had retreated for protection. Groups of individuals, anyone showing the capacity for leadership, were targeted for extermination and killed.¹⁸⁵

In addition to murder, rape was used by the Hutu as a systematic tool against the Tutsi.

¹⁸⁰ *Id.*

¹⁸¹ *See* Report on the situation of human rights in Rwanda submitted by Mr. Rene-Degni Segui, Special Rapporteur of the Commission on Human Rights, under Paragraph 20 of Commission resolution E/CN.4/S-3/1 of 25 May 1994, UN Doc. E/CN.4/1996/68 (29 Jan. 1996) [hereinafter “29 Jan. Special Rapporteur Report”].

¹⁸² *See* Human Rights Watch/Africa, *Genocide in Rwanda*, *supra* note 162, at 5.

¹⁸³ *See Id.* at 4-5.

¹⁸⁴ *See Id.* On April 19, 1994, “Theodore Sindikubwabo, president of the “rump” government of Rwanda, removed the prefect of Butare and replaced him with a hard-line military man from the north of Rwanda. That evening units of the Presidential Guard flew into Butare airport [and the] massacre began almost immediately . . . the killings continued night and day for the next three days.” *Id.* *See also* 28 June Special Rapporteur Report, *supra* note 5, at para. 23. Cyargugu province also remained calm until its prefect was removed and replaced by a hard-liner. *See Id.* It is also alleged that in Cyargugu the armed Forces blocked all the roads leading to Zaire to prevent Tutsi from escaping. *See Id.*

¹⁸⁵ *See* Human Rights Watch/Africa, *Genocide in Rwanda*, *supra* note 162, at 5.

Amnesty International reported that Tutsi women were subjected to sexual violence on a massive scale, perpetrated by members of the Hutu militia groups including the *Interahamwe*, by civilians, and by soldiers of the Rwandan Armed Forces, including the Presidential Guard.¹⁸⁶

“Testimonies from survivors confirm that rape was extremely widespread and that thousands of women were individually raped, gang-raped, raped with objects such as sharpened sticks or gun barrels, held in sexual slavery . . . or sexually mutilated . . . many women were killed immediately after being raped.”¹⁸⁷

The evidence that the attack against the Tutsi by the Hutu in Rwanda between January 1 and December 31, 1994 was both widespread and systematic is overwhelming. The sheer number of victims, leading the United Nations to declare that genocide had occurred in Rwanda, attests to the widespread nature. The evidence of a pre-existing plan, including the use of death lists, census data to determine where the Tutsi lived and roadblocks to prevent escape attests to the systematic nature in which the killings occurred.

B. Plan or Policy

That the killing of Tutsi was a plan or policy of the Hutu led Rwandan government is incontrovertible. As early as 1992 or 1993, extremists in the Hutu government of President Habyarimana began to organize and consolidate their power in the face of the Arusha peace accords.¹⁸⁸ These actions, taken with the knowledge and possible urging of Habyarimana

¹⁸⁶ See Amnesty International, *Shattered Lives, Sexual Violence during the Rwandan Genocide and its Aftermath*, 1, ISBN 1-56432-208-4, Sept. 1996. See also Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 *Am.J.Int'l L.* 424 (1993).

¹⁸⁷ Amnesty International, *Shattered Lives*, *supra* note 186, at 2.

¹⁸⁸ See Meire Wang, *supra* note 2, at 181.

himself,¹⁸⁹ included several steps. First, these hard liners established the *Coalition for the Defense de la Repulique* (CDR),¹⁹⁰ a new and extremist wing of the *Movement Republican Nationale pour le Developpement et al Democratic* (MRND), the party of the late president.¹⁹¹

The second step was the formation, training and deployments throughout the country of militias known as the *Interahamwa* (“those who attack together”) and the *Impuzamngambi* (“those with a single purpose”).¹⁹² The third step included the dissemination of extremist and hate propaganda against the Tutsi.¹⁹³ These components, along with propaganda speeches by government officials, were used in the government’s planned attack against the Tutsi in 1994.

a. Militias

In the months prior to the death of President Habyarimana, government officials and the regular armed forces were supplying military weapons to *Interahamwe* and *Impuzamugambia* militia forces.¹⁹⁴ In addition to supplying arms, government forces provided the militias with

¹⁸⁹ *See Id.*

¹⁹⁰ *See Id.*

¹⁹¹ *See* Human Rights Watch/Africa, *Genocide in Rwanda*, *supra* note 162, at 2.

¹⁹² *See* Human Rights Watch/Africa, *Genocide in Rwanda*, *supra* note 162, at 2.

¹⁹³ *See* *Genocide Planned*, *supra* note 3.

¹⁹⁴ *See* Amnesty International, *Mass Murder in Rwanda*, *supra* note 4, at 1. *See also* Human Rights Watch/Africa, *Genocide in Rwanda*, *supra* note 162, at 2. (reporting “that Rwandan authorities distributed firearms to militia members and other Hutu supporters as early as 1992 and gave out more in later 1993 and early 1994.”) *Id.* *See also* Human Rights Watch/Africa, *Radio Broadcasts Incite Violence*, 1994. Human Rights Watch monitors reported:

[t]wo weeks before the killings began . . . [Human Rights Watch was warned of] the impending violence: ‘For the last two weeks, all of Kigali has lived under the threat of an instantaneous, carefully-prepared operation to eliminate all those who give trouble to President Habyariman. [Army] officers who support him have trained

intensive training. In February 1994, United Nations Assistance Mission in Rwanda (UNAMIR) officials protested against the existence of training camps and the massive distribution of arms to civilians at a time when the government and Rwandan Patriotic Front (RPF) were supposed to be preparing for demobilization of their combatants.¹⁹⁵ Additionally, Reuters News Service reported the existence of training camps for Hutu militia where men would undergo three weeks of training that included indoctrination of ethnic hatred against the Tutsi.¹⁹⁶ Finally, the Special Rapporteur reported that militia allied with the MRND and CDR were found to have been guilty of incitement to violence against the Tutsi, and of massacres of civilian populations.¹⁹⁷ These militia, the Special Rapporteur noted, had been trained by members of the Presidential Guard and by members of the armed forces.¹⁹⁸

The killings initiated by the armed forces after the crash of the president's plane "set the militia killing machine in motion."¹⁹⁹ Militia joined with the Presidential Guard and within a week of the crash these forces were reported to have killed an estimated 20,000 people in Kigali before moving beyond the capital city. In addition to the mass killings, militia forces, along with regular government forces, were implicated in the mass rapes and other sexual violence against Tutsi women.²⁰⁰

1700 young people of his party militia. They have guns and grenades.'
Id. at 2.

¹⁹⁵ See Amnesty International, *Mass Murder in Rwanda*, *supra* note 4, at 9.

¹⁹⁶ See *Genocide Planned*, *supra* note 3.

¹⁹⁷ See Vassall-Adams, *supra* note 172, at 26.

¹⁹⁸ See *Id.*

¹⁹⁹ See Amnesty International, *Mass Murder in Rwanda*, *supra* note 4, at 3.

²⁰⁰ See Amnesty International, *Shattered Lives*, *supra* note 183, at 1.

b. Propaganda

Propaganda was instrumental in getting the Hutu government's plan of attack against the Tutsi out to the population of Rwanda. This propaganda occurred in two forms: radio broadcasts and political speeches by government officials.

1. Radio Broadcasts

Since 1990, the Rwandan government repeatedly told the Hutu population that the RPF was fighting to return Tutsi dominated rule in the country and to seize Hutu land.²⁰¹ This message, and other hate propaganda, was repeatedly broadcast on national radio.²⁰² In the ensuing four years, the role of *Radio and Television Libres des Mille Collines* (RTL), a radio station controlled by the late president's family and inner circle,²⁰³ was that of encouraging violence against the Tutsi on a national level.²⁰⁴

By autumn of 1993, RTL had begun a campaign of hate-filled propaganda against the

²⁰¹ See Amnesty International, *Mass Murder in Rwanda*, *supra* note 4, at 9.

²⁰² See *Id.*

²⁰³ Owners and directors of RTL included a son-in-law of the president, father of a son-in-law, the head of the CDR, governor of Kigali City, Minister of Postal Services and Communications. See *Id.* Additionally, the station was run (for a time) by Ferdinand Nahimana, who had been in charge of the national radio when it was used to promote the killing of Tutsi in an earlier massacre. See *Id.*

²⁰⁴ See Human Rights Watch/Africa, *National Radio Broadcasts Incite Violence*, April 15, 1994, at 1 (reporting that on April 12 a call for violence was issued by the Rwandan Minister of Defense and the [CDR]). See also *Genocide Planned*, *supra* note 3 reporting that:

Racist hate propaganda was disseminated as far back as 1993, especially by Radio-Television Libre des Milles Collines, a private radio station owned by members of President Habyarimana's party . . . [as well as that] [p]osters, leaflets and radio broadcasts on [RTL] dehumanised Tutsis as 'snakes,' 'cockroaches' and 'animals.' Individuals targeted in the radio broadcasts were among the first killed (along with their families) in April, 1994.

Tutsi.²⁰⁵ By late 1993, RTLM broadcasts were even more virulent and began targeting individuals, calling them “enemies” and “traitors.”²⁰⁶ Once the killing had begun, radio broadcasts encouraging Hutu to “fill the half-empty graves” with Tutsi bodies were a common occurrence.²⁰⁷

The Special Rapporteur also noted the deep involvement of RTLM in the murder of Tutsi, calling it “notorious” in the role it played in the killings.²⁰⁸ The Special Rapporteur took particular notice that the messages put out by the radio station differed significantly between those broadcast in French, and those broadcast in Kinyarwanda, the native Rwandan language spoken by the majority of Rwandans.²⁰⁹ While the French broadcasts were relatively inoffensive, the Rapporteur noted “those spoken in Kinyarwanda were highly aggressive, calling for the complete “cleansing” of the Tutsi by May 5.”²¹⁰

In addition to the government controlled RTLM, the State-owned Radio Rwanda also played a role in inciting violence against the Tutsi.²¹¹ As early as May 19, 1994, the station “was ordering listeners to extirpate [forcibly remove] the rebels to the last man and eliminate anyone suspected of opposing the regime.”²¹²

²⁰⁵ *See Id.*

²⁰⁶ *See Id.*

²⁰⁷ *See Id.*

²⁰⁸ *See* 28 June Special Rapporteur Report, *supra* note 5, at para. 59.

²⁰⁹ *See Id.*

²¹⁰ *See Id.*

²¹¹ *See* Human Rights Watch/Africa, Genocide in Rwanda, *supra* note 162, at 2.

The effects of these broadcasts, especially those in Kinyarwanda, cannot be underestimated. This propaganda campaign, as noted by a United Nations official, was “made more dangerous by the fact that the generally illiterate Rwandanese rural population listens very attentively to broadcasts in Kinyarwanda, they hold their radio sets in one hand and their machetes in the other, ready to go into action.”²¹³

2. Political Speeches

Propaganda inciting violence against the Tutsi was also spread by political speakers throughout Rwanda. As early as 1992, Leon Mugesera, an official in the president’s political party, gave a speech at a party conference in which he called for Hutu to kill Tutsi and dump their bodies in the rivers of Rwanda.²¹⁴

Even after the killing had begun, government officials spoke out, encouraging, even demanding, violence against the Tutsi. An example of this occurred on April 19, 1994 in Butare province. In his speech that day, Mr. Sindikubwab, the president of the “rump” government, spoke to the residents of Butare, telling them “the enemy are among you, get rid of them.”

C Civilian Population

The issue of the nationality of the civilian population under attack is not at issue here. That a population of the same nationality as that of the perpetrator is protected is now a settled issue.²¹⁵ Whether or not any given individual Tutsi victim of Hutu violence is a civilian or not will have to be determined on a case by case basis.

²¹² *See Id.*

²¹³ 28 June Special Rapporteur Report, *supra* note 5, at para. 59.

²¹⁴ *See Genocide Planned, supra* note 3.

The main question here, as discussed in section V (C) (1) above, is whether the victim is someone who can be classified as military or a member of a resistance force. Uniformed members of the armed forces are not protected under the laws of crimes against humanity, but they are protected under the relevant Geneva Conventions of 1949.²¹⁶ However, members of the armed forces no longer taking part in the hostilities are protected under the laws of crimes against humanity.²¹⁷

Additionally, while members of resistance forces are technically a fighting force, they have been declared civilians by at least one court.²¹⁸ Ultimately, if the status of an individual is in question, the presumption is made that the person is a civilian and, therefore, deserving of protection.²¹⁹

D. Discriminatory Intent

Article 3 of the ICTR Charter requires acts to be conducted with discriminatory intent.²²⁰ In evaluating the atmosphere in which the violence that was wrought on the Tutsi was conducted, it is helpful to review the evidence concerning the propaganda put out by the Hutu government, as discussed in section VI (2) (b) (i) and (ii) above. That the Hutu government incited hate filled violence against the Tutsi merely because they were Tutsi is incontrovertible

E. Knowledge and Intent

²¹⁵ See Section V (C) (2), *supra* concerning the element of civilian population.

²¹⁶ See Geneva Conventions of 1949, *supra* note 124, at art. 3.

²¹⁷ See *Id.*

²¹⁸ See generally *Federation Nationale Des Deportés Et Internes Résistants Et Patriotes and Others v. Barbie*, reprinted in 78 I.L.R. 124 (1988) (Court of Cassation, Criminal Chamber 1983-85).

²¹⁹ See Geneva Conventions of 1949, *supra* note 124, at art. 3.

²²⁰ Statute of ICTR, *supra* note 6, at art. 3.

As discussed in previous sections, for an act to constitute a link in the larger widespread or systematic attack against a civilian population, the actor must have knowledge of this larger attack and intend for his act to fit into this plan. Additionally, the act cannot be completed for purely personal motives.²²¹

The extent of the hate filled propaganda coming from both RTLM and Radio Rwanda is important in this area, as is the sheer magnitude of the killings. It would be difficult, if not impossible, to believe that every person in Rwanda was not aware of the attack against the Tutsi. They heard it from their radios, they read it in the papers, they listened to it from their politicians.

The standard for knowledge on the part of a perpetrator is a relatively liberal one.²²² Concrete awareness of the consequences of one's acts is not required.²²³ Considering the staggering events occurring throughout Rwanda, especially between April and June 1994, it should be presumed that every Hutu that took up arms against the Tutsi was aware of the larger, widespread plan by their government against the Tutsi.

The standard for proving intent is a higher one than for proving knowledge. It must be proven that the perpetrator intended his act to fit into the larger widespread attack against the civilian population. Additionally, it must be proven that the act was not taken for purely personal motives. While the intent to injure one specific person may be present, as long as it fits into the larger attack, it can be considered to constitute a crime against humanity.²²⁴

²²¹ See Section V (E) (1) (a) *supra* for discussion.

²²² See Section V (E) (1) *supra* for discussing presumption of knowledge.

²²³ See Section V (E) (1) *supra*, and note 143 for discussion.

Determination of the intent of each individual perpetrator must, necessarily, be made on a case-by-case determination.

VII. OTHER VIOLATIONS NOT CONSTITUTING CRIMES AGAINST HUMANITY

Various reports by the Special Rapporteur for Human Rights in Rwanda have noted the occurrence of different types of killings in Rwanda during 1994.²²⁵ In addition to the fighting between the Rwandan government forces and the Rwandan Patriotic Front, the actions of which are governed by relevant humanitarian law, including the Geneva Conventions of 1949,²²⁶ the Special Rapporteur noted assassinations of Hutu,²²⁷ and killings in the form of private revenge.²²⁸ Both types of killings will be discussed briefly.

A. Assassination of Hutu

In his report of 28 June, the Special Rapporteur noted that members of the Hutu ethnic group had been victims of massacres.²²⁹ “These acts [the Special Rapporteur noted] constitute murders, and more specifically political assassinations, violating the right to life, which is a

²²⁴ See Section V (E) (1) *supra*, and note 150 for discussion.

²²⁵ See generally 28 June Special Rapporteur Report, *supra* note 5. See also Report on the situation of human rights in Rwanda submitted by Mr. Rene Degni-Segui, Special Rapporteur of the Commission on Human Rights, under Paragraph 20 of Commission resolution S-3/1 of 25 May 1994, 51st Sess., UN Doc. E/CN.4/1995/70 (11 Nov. 1995) [hereinafter “11 Nov. Special Rapporteur Report”], as well as Report on the situation of human rights in Rwanda submitted by Mr. Rene Degni-Segui, Special Rapporteur of the Commission on Human Rights, under Paragraph 20 of Commission resolution S-3/1 of 25 May 1994, UN Doc. E/CN.4/1995/71 (17 Jan. 1995).

²²⁶ See generally Geneva Conventions of 1949, *supra* note 124.

²²⁷ See 28 June Special Rapporteur Report, *supra* note 5, at para. 49.

²²⁸ See generally 11 Nov. Special Rapporteur Report, *supra* note 226.

²²⁹ See 28 June Special Rapporteur Report, *supra* note 5, at para. 49.

fundament right contained in many international instruments.²³⁰ These acts are in violation of the International Covenant on Civil and Political Rights of 16 December 1966,²³¹ and the African Charter on Human and Peoples' Rights of 27 June 1981.²³² Both of these instruments are binding on the Rwandese State.²³³ While these assassinations are in violation of these international instruments, they do not constitute crimes against humanity because they lack the necessary larger, State sponsored plan or policy elements required of crimes against humanity.

B. Private Revenge

In his report of 11 November, the Special Rapporteur noted the occurrence of private individuals taking revenge against people suspected of having taken part in the massacres of the Tutsi.²³⁴ That the massacres of the Tutsi were carried out with apparent impunity and in the open, thus exposing the Hutu perpetrator's identity, has provided Tutsi with the opportunity to exact revenge on those they believe responsible for the murders of their families and friends.²³⁵ These acts, while surely in violation of domestic criminal law, also lack the larger plan or policy of a government to qualify as crimes against humanity. These acts, thus, fall outside the jurisdiction of the ICTR.

VIII. CONCLUSION

For an act to constitute a crime against humanity, it requires a widespread or systematic attack

²³⁰ *Id.* at para. 50.

²³¹ Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171..

²³² African charter on Human and Peoples' Rights (Banjul Charter), 27 June, 1981, *reprinted in* 21 I.L.M. 59 (1981).

²³³ *See* 28 June Special Rapporteur Report, *supra* note 5, at para. 51.

²³⁴ *See* 11 Nov. Special Rapporteur Report, *supra* note 226. at para. 40.

²³⁵ *See Id.* at para. 42.

against a civilian population that is a plan or policy by a government or group with de fact power, completed with discriminatory intent by a perpetrator who has knowledge of this larger widespread attack and intends for his act to fit into this larger attack. Recent developments by international courts have expanded the law to include the possibility that an individual act can constitute a link in the over-all larger attack, thus exposing the individual perpetrator to criminal responsibility for crimes against humanity. As long as the perpetrator had knowledge of this larger attack, focused his act against a civilian victim with discriminatory intent and intended this act to fit into the larger plan, that perpetrator may bear individual criminal responsibility for crimes against humanity.

An analysis of the situation occurring in Rwanda during the temporal jurisdiction of the ICTR shows that the necessary plan or policy by the Rwandan government, attacking Tutsi solely based on discriminatory factors, was present. The hate filled propaganda inciting Hutu violence against Tutsi was extremely widespread and available to the degree that the presumption that every Hutu had to have known about this planned attack against Tutsi must be made. All that remains to be determined in any given case of Hutu violence against Tutsi is the individual motive of the Hutu perpetrator. This determination must, naturally, be made on a case-by-case basis.