

## TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY OF CONCLUSIONS	, .	1
II.	FACTUAL BACKGROUND	.	1
III.	LEGAL DISCUSSION	.	2
A.	<i>Crimes Against Humanity from its Historical Context</i>	.	2
	1. Before the Second World War	.	3
	2. Nuremberg Tribunal.	.	4
	3. Tokyo Tribunal.	, .	5
	4. Yugoslavian Tribunal	.	7
	5. Rwanda Tribunal	, , , .	8
B.	<i>Crime of Extermination as Distinguished from Genocide</i>	.	9
C.	<i>Crime of Extermination as Defined Under International Law</i>	.	11
	1. The Requirement of an International Element	, .	11
	2. The Essential Elements of Crime of Extermination under International Law. ....		13

## LEGAL MEMORANDUM

TO: Deputy Prosecutor of the International Criminal Tribunal for Rwanda  
FROM: Christopher Lee  
RE: Elements of the Crime Against Humanity of Extermination  
DATE: December 18, 1998

---

### I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

This memorandum examines the elements of the crime against humanity of extermination as it relates to the Rwandan Tribunal. Specifically, it attempts to answer the question, "Under international law what are the elements of the crime of extermination?" The crime of extermination is one of the enumerated acts of a broader offense known as "crimes against humanity." Hence, this memorandum first examines the development of the concept of "crimes against humanity" from its historical context, before narrowing its focus to the term "crime of extermination." Finally, this paper lists the elements of the crime of extermination that was developed by the International Criminal Tribunal for Rwanda (ICTR) and its significance to the Rwanda Trial.

### II. FACTUAL BACKGROUND

The events that eventually lead to the mass killings in Rwanda can be traced back as far as the turn of the century when the Belgian colonialists introduced a permanent distinction in the population by dividing the country into three ethnic groups.<sup>1</sup> The Hutus represented the majority of this group with about 85% of the population.<sup>2</sup> About 14% were Tutsis while Twa counted for

---

<sup>1</sup> See Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, 176 note 709 (1998).

<sup>2</sup> Id.

the remaining 1% of the population.<sup>3</sup> It was during this period that every Rwandan was required to carry an identification card mentioning his or her identity.<sup>4</sup> This method of identification managed to survive even after Rwanda's independence and it was only after the tragic events in 1994 that it was abolished.<sup>5</sup> The distinction between the Hutus and Tutsis was based on lineage rather than ethnicity.<sup>6</sup> Not surprisingly, the demarcation line was often blurred since one could move from one status to another simply by marriage or wealth.<sup>7</sup>

In 1994, after witnessing killings of the magnitude approaching that of the Jewish holocaust, the world decided that an international tribunal was needed to prosecute individuals accused of genocide, crimes against humanity, and other internationally related crimes. In 1994, the International Criminal Tribunal for Rwanda (ICTR) was created to oversee the prosecution of these criminals. However, before offenders could be prosecuted and convicted, the Tribunal needed to research and resolve some issues regarding international law. This legal memorandum, in its attempt to help the deputy prosecutor of the ICTR, attempts to answer only one of the many issues that arose during the prosecution of individuals before the Rwanda Tribunal.

### III. LEGAL DISCUSSION

#### A. *Crimes Against Humanity from its Historical Context*

To understand whether and to what extent crimes against humanity apply to the armed conflict in Rwanda, it is necessary to examine its history and its gradual development into customary international law. Crimes against humanity is not as clear in content or legal status as

---

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Id.

genocide and a certain level of ambiguity exists from the way it was developed and interpreted from the Nuremberg Trial.<sup>8</sup> However as it underwent a gradual evolution, cases such as *Eichmann, Barbie, Touvier* and *Papon* all contributed to the refinement of this concept.<sup>9</sup>

#### 1. Before the Second World War

The concept of crimes against humanity had been recognized long before there was even a Nuremberg trial. As early as 1874, George Curtis used the term "crimes against humanity" to describe slavery in the United States.<sup>10</sup> In 1915, France, Great Britain and Russia issued a joint declaration condemning the Turkish massacre of Armenians living in Turkey as "crimes against civilization and humanity."<sup>11</sup> Similar terms such as "crimes against mankind" and "crimes against human family" were used far earlier in human history.<sup>12</sup> However, the seeds of the United Nations' Charter of crimes against humanity as we know today were founded on the First Hague Convention of 1899 on the "Laws and Customs of War" and the Fourth Hague Convention of 1907 on the "Regulations Respecting the Laws and Customs of War on Land."<sup>13</sup> The two conventions used the term "laws of humanity" as their preamble to describe what they considered to be violations of international law during war.<sup>14</sup> The intent was to provide protection against a number of crimes which were later to be defined in future developments.<sup>15</sup> Although the conventions were mainly concerned with war crimes, the preamble was derived from the larger

---

<sup>7</sup> Id.

<sup>8</sup> Oppenheim & Wolf, *Global War Crimes Tribunal Collection*, 283 (1997).

<sup>9</sup> See generally Matthew Lippman, *Crimes Against Humanity*, B.C. Third World L.J. 171 (1997).

<sup>10</sup> John R.W.D. Jones, *The practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 49 (1998).

<sup>11</sup> See Vahakn Dadrian, *The History of the Armenian Genocide* (1995).

<sup>12</sup> See 12 N.Y.L. Sch. 1. Hum. Rts. 545 (1995).

<sup>13</sup> M. Cherif Bassiouni, *Crimes Against Humanity in International Law*, 165, 166 (1992).

<sup>14</sup> Id. at 166.

meaning of violations of "the laws of humanity."<sup>16</sup> However, it was not until the Second World War that the term "crimes against humanity" was widely used and defined to prosecute war criminals for their atrocities.

## 2. The Nuremberg Tribunal

Crimes against humanity was first defined during the Nuremberg trial when the offense was used to convict war criminals.<sup>17</sup> Crimes against humanity was defined in Article 6(c) of the Nuremberg Charter as:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the (Second World) war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the (Nuremberg) Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>18</sup>

The Nuremberg Charter Article 6(c) defined two types of crimes against humanity: crimes of the murder-type such as murder, extermination, enslavement, deportation, and other inhumane acts and crimes of the persecution-type based on political views, race, and religion.<sup>19</sup> Crimes of the murder-type were defined as any inhuman act committed against any civilian population whether it was the perpetrator's own fellow citizen or of another nationality.<sup>20</sup> While the offense

---

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> See Telford Taylor, *The Anatomy of the Nuremberg Trials* (1992).

<sup>18</sup> Nuremberg Charter, art. 6(c). See also Oppenheim & Wolf, *supra* note 8, at 283,284. Crimes against peace and war crimes were the other two categories of crimes that were defined during the Nuremberg trial. The original definition of crimes against humanity included a semi-colon between the phrase "the war" and "or persecutions" which was later modified with a comma. The substitution of the semi-colon with the comma changed the interpretation of the term "crimes against humanity" to mean acts committed in connection to the war. The definition of crimes against humanity was also limited in that it applied to acts committed in connection with crimes against peace and war crimes.

<sup>19</sup> Morris & Scharf, *supra* note I, at 160.

<sup>20</sup> Id.

of crimes against humanity was significant in prosecuting war criminals for their atrocities, it was considered secondary or ancillary to war crimes and crimes against peace.<sup>21</sup> Moreover, "it was unclear at the outset as to whether norms prohibiting 'crimes against humanity' were intended to overlap with norms prohibiting war crimes or whether they were supposed to be independent judicial concepts." In 1946, the United Nations War Crimes Committee on Facts and Evidence sought to clear up any ambiguity by stating that: "crimes against humanity as referred to in the Four Power Agreement of 8 August 1945, were war crimes within the jurisdiction of the (United Nations War Crimes) Commission.,,23

Consequently, crimes against humanity was interpreted by the Nuremberg Tribunal as crimes committed during the Second World War era rather than to any other situation.<sup>24</sup> Hence, the Nuremberg Charter in its original form would not have been applicable to the current Rwanda situation.<sup>25</sup> Fortunately, since the Nuremberg trials, the definition and meaning of the concept of "crimes against humanity" has undergone substantial change.<sup>26</sup>

### 3. The Tokyo Tribunal

At the Tokyo Tribunal, eleven nations including Australia, Canada, China, France, Great Britain, India, the Netherlands, New Zealand, the Philippines, the Soviet Union and the United States acting through a single Chief Counsel for the prosecution filed a joint indictment against

---

<sup>21</sup> Id. at 162. Crimes against Peace is defined in Article 6(a) of the Nuremberg Charter as planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing.

<sup>22</sup> Oppenheim & Wolf, *supra* note 8, at 283.

<sup>23</sup> Id. at 284.

<sup>24</sup> Id.

<sup>25</sup> Id.

<sup>26</sup> Id.

twenty-eight Japanese on April 29, 1946.<sup>27</sup> The indictments were divided into three sections: "crimes against peace"; "murder"; and "other conventional war crimes and crimes against humanity.,,28 Article S(c) of the Tokyo Charter defined crimes against humanity as:

...murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.<sup>29</sup>

The Tokyo Charter was different from the earlier Nuremberg Charter in that it included the language "Leaders, organizers, instigators... execution of such plan.,,30 The Tokyo Charter also differed in that the categories of persons to be held responsible were added and that it did not make "persecution" subject to "religious" grounds.<sup>31</sup>

Although the Tokyo trial commenced almost simultaneously with the Nuremberg trial, there were some marked differences between the two. One such difference was in the procedural aspect. **In** Nuremberg, each signatory of the Charter had the right to appoint a Chief Prosecutor, whereas in Tokyo the Supreme Commander, General MacArthur, appointed the Chief of Counsel and was solely responsible for the prosecution of the trials.<sup>32</sup> Moreover, no Japanese organizations were indicted whereas criminal organizations were indicated in Nuremberg.<sup>33</sup>

---

<sup>27</sup> Bassiouni, *supra* note 13, at 211.

<sup>28</sup> Bassiouni, *supra* note 13, at 211.

<sup>29</sup> Tokyo Charter, art. 5(c).

<sup>30</sup> Bassiouni, *supra* note 13, at 34.

<sup>31</sup> Bassiouni, *supra* note 13, at 34.

<sup>32</sup> Bassiouni, *supra* note 13, at 212.

<sup>33</sup> Bassiouni, *supra* note 13, at 212.

Finally, in terms of fairness, some believe the Tokyo proceedings and judgments were not as substantially fair as it was in the Nuremberg trial.<sup>34</sup>

#### 4. The Yugoslavia Tribunal

Almost fifty years after the world's first international criminal court was established in Nuremberg to prosecute German war criminals, the world was again compelled to establish an international criminal court, this time, in the former Yugoslavia.

In 1992, the Commission of Experts on the Former Yugoslavia pursuant to Security Council resolution 780 defined crimes against humanity to be "gross violations of fundamental rules of humanitarian and human rights law committed by persons demonstrably linked to a party to the conflict, as part of an official policy based on discrimination against an identifiable group of persons, irrespective of war and the nationality of the victim."<sup>35</sup>

In 1993, the UN. Security Council adopted Resolution 808 to establish a war crimes tribunal after the UN. War Crimes Commission concluded that war crimes and crimes against humanity had been committed in the former Yugoslavia.<sup>36</sup> Along with other war crimes, the offense of crimes against humanity was defined under Article 5 of the Statute of the Yugoslavia Tribunal. Article 5 of the UN. Charter gave the Yugoslav War Crimes Tribunal "the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g)

---

<sup>34</sup> See generally A.C. Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (1987); R.H. Minear, *Victor's Justice: The Tokyo War Crimes Trial* (1971).

<sup>35</sup> Oppenheim & Wolf, *supra* note 8, at 283.

rape; (h) persecutions on political, racial and religious grounds; and (i) other inhumane acts.,<sup>37</sup> Although the Security Council based much of the Yugoslavia Tribunal Statute on the Nuremberg Charter, it made considerable improvements from its much criticized predecessor.<sup>38</sup> Among the statute's improvements are a more detailed and concise Rules of Procedure and Evidence, improved accessibility to evidences, better protection for defendants against self-incrimination, protection against double jeopardy, and the right to appeal.<sup>39</sup>

Another often heard criticism of Nuremberg was its application of ex post facto laws against the German defendants.<sup>40</sup> Offenses such as conspiracy and crimes of aggression which were never heard of or recognized in Europe were used to convict the accused.<sup>41</sup> For Yugoslavia, however, the Security Council tried to avoid similar criticisms by adopting resolutions which warned the people of former Yugoslavia of existing international laws and in particular the Geneva conventions.<sup>42</sup> The international tribunal in Yugoslavia was also defined on the basis of customary international law.<sup>43</sup>

## 5. The Rwanda Tribunal

Only a year after the Yugoslavia Tribunal was established, the international community was once again compelled to establish an international tribunal to prosecute persons who committed atrocities. The International Criminal Tribunal for Rwanda (ICTR) was established in

---

<sup>36</sup> Michael P. Scharf, *Balkan Justice*, 234 (1997). In October of 1992, the U.N. Security Council adopted Resolution 780 establishing a War Crimes Commission to investigate atrocities in the former Yugoslavia.

<sup>37</sup> Christine Van den Wyngaert, *International Criminal Law A Collection of International and European Instruments*, Kluwer Law International 429 (1996).

<sup>38</sup> Scharf, *supra* note 35, at 70.

<sup>39</sup> Scharf, *supra* note 35, at 70.

<sup>40</sup> Scharf, *supra* note 35, at 70.

<sup>41</sup> Scharf, *supra* note 35, at 70.

<sup>42</sup> Scharf, *supra* note 35, at 70.

1994 after the Security Council concluded the situation in Rwanda constituted a grave threat against international peace and security within the meaning of Chapter VII of the United Nations Charter.<sup>44</sup> Article 3 of the Rwanda Tribunal Statute gave the Tribunal the power to prosecute persons responsible for inhuman acts which constituted crimes against humanity.<sup>45</sup> It specifically states that the Tribunal "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: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; and (i) other inhumane acts.,<sup>46</sup> The statute closely resembles its predecessor statute Article 5 of the Yugoslavia Tribunal.

*B. Crime of Extermination as Distinguished from Genocide*

In 1948, the United Nations General Assembly adopted the definition of genocide from the Convention for the Prevention and Punishment of the Crime of Genocide.<sup>47</sup> The Convention defined genocide as "the act of committing certain crimes, including the killing of members of the group or causing serious physical or mental harm to members of the group with the intent to destroy, in whole or in part, a national, racial or religious group, as such.,<sup>48</sup>

---

<sup>43</sup> Scharf, *supra* note 35, at 71.

<sup>44</sup> The Prosecutor v. Jean-Paul Akayesu (Case No. ICTR-96-4-T) UNITED NATIONS International Criminal Tribunal for Rwanda CHAMBER I (last modified Sept. 8, 1998) <<http://www.un.org/ictt/english/judgements/akayesu.html>>.

<sup>45</sup> Wyngaert, *supra* note 37, at 468.

<sup>46</sup> Wyngaert, *supra* note 37, at 468.

<sup>47</sup> Oppenheim & Wolf, *supra* note 8, at 176.

<sup>48</sup> The Convention on the Prevention and Punishment of the Crime of Genocide which was adopted in 1948 by the United Nations General Assembly states "Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

(a) Killing members of the group;

Although genocide and extermination are closely related in that both are crimes directed against a large number of victims, there are important differences between the two in its legal definition and application. The major difference between genocide and the crime of extermination is that genocide requires a special intent whereas crime of extermination does not.<sup>49</sup> This distinction was noted in the *Eichmann* case after the Nuremberg trials.<sup>50</sup> Consequently, genocide is distinct from other crimes in that it embodies a special intent or *dolus specialis*.<sup>51</sup> The special intent of a crime is the specific intention required as a basic element of the crime.<sup>52</sup> Thus to convict a person of genocide would require proof that he had a specific intent to produce the act charged. In Yugoslavia, the commission of experts in concluding that genocide was committed, observed that the practices of ethnic cleansing were not coincidental, sporadic or random but rather were systematic, well organized and planned by high officials.<sup>53</sup>

The special intent required for genocide is most analogous to specific intent crimes in the United States that prosecutors must prove for crimes like first-degree murder and conspiracy. Hence, special intent requires that a certain mental element or criminal intent be found before the perpetrator can be found guilty of the crime.

On the other hand, no such special intent is required for the crime of extermination. Requiring only a general intent, the crime of extermination could apply to situations that would

- 
- (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.

The ICTR adopted this interpretation in using it to prosecute certain people who committed such acts in Rwanda.

<sup>49</sup> See Morris & Scharf, *supra* note 1, at 167-177 note 695.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

not have been covered by genocide. For instance, extermination would apply to situations where groups of individuals who do not share any common characteristics are killed.<sup>54</sup> It would also cover situations where some members of a group are killed while others are spared.<sup>55</sup>

### C. *The Crime of Extermination as Defined Under International Law*

The Hague Conventions of 1899 and 1907 set the stage for outlawing, what we know today as, "crimes against humanity." The Conventions and earlier usages of the term demonstrate that "crimes against humanity" was recognized and existed as part of general principles of law long before its formulation in 1945.<sup>56</sup> However, it was not until Nuremberg that the term "extermination" was conceived to describe gross violations of international law. Hence, it was as early as 1945 that the term "extermination" started to become part of customary international

#### 1. The Requirement of an International Element

For the most part, international crimes can be found under the criminal laws of the world's major criminal justice system.<sup>58</sup> The international crime of crimes against humanity, and in particular extermination, can be found in various national legal systems all over the world.<sup>59</sup> The label and elements of the crime may be different in the various systems but the same facts which

---

<sup>53</sup> Morris & Scharf, *supra* note 1, at 172 note 695.

<sup>54</sup> Morris & Scharf, *supra* note 1, at 188 note 749.

<sup>55</sup> Morris & Scharf, *supra* note 1, at 188 note 749.

<sup>56</sup> Bassiouni, *supra* note 13, at 168.

<sup>57</sup> Many regard positions taken at, and resolutions adopted by the U.N. General Assembly as evidence of customary international law, however this has been sharply contested. See Barry E. Carter & Phillip R. Trimble, *International Law*, 146-147 (1995).

<sup>58</sup> Bassiouni, *supra* note 13, at 244.

<sup>59</sup> Bassiouni, *supra* note 13, at 245. In the United States, the crime of extermination would be most analogous to serial murder.

support prosecutions and punishment are basically the same under international and national systems.<sup>60</sup> But what distinguishes international crimes from national crimes is the existence of additional legal elements such as that of "state action or policy."<sup>61</sup> This international element is a pre-requisite to an international crime in addition to the legal elements required by each of the specific crimes contained in crimes against humanity.<sup>62</sup> Not all harmful conduct can be internationally criminalized and certain criterias must be met before a conduct which is criminal in a given state or states can be criminal under international law.<sup>63</sup> What makes a crime an international crime is the notion that certain persons are incapable of being tried by their own national legal system by virtue of their status or position and are beyond the reach of law. This is especially true in places like Rwanda where often the legal system is inadequate to deal with high officials or heads of state. Thus, necessity dictates that certain crimes be universally criminalized so that all persons, regardless of their positions or status, must answer for their crimes.<sup>64</sup> It is also viewed that conduct which can be categorized as internationally criminal rises to a level that threatens the peace and security of mankind and therefore should be banned universally.<sup>65</sup> Another view is that, even if such conduct is not so threatening, the conduct is so shocking or

---

<sup>60</sup> Bassiouni, *supra* note 13, at 244.

<sup>61</sup> Bassiouni, *supra* note 13, at 245. According to Cherif M. Bassiouni, the pre-requisite legal element of state action or policy has the following characteristics:

- a) The specific crimes are committed as part of "state action or policy";
- b) The action or policy is based on discrimination-persecution against an identifiable group of persons;
- c) The acts committed are otherwise crimes in the national criminal laws of that State;
- d) They are committed by State Officials or their agents in furtherance of "state action or policy";

The specific crimes are connected to war under the Law of the Charter, but not under Post-Charter Legal Developments.

<sup>62</sup> Bassiouni, *supra* note 13, at 247.

<sup>63</sup> Bassiouni, *supra* note 13, at 259.

<sup>64</sup> Bassiouni, *supra* note 13, at 247.

<sup>65</sup> Bassiouni, *supra* note 13, at 260.

repugnant to the common values of the world community that it should and must be banned.<sup>66</sup> Finally, even if the conduct is only potentially threatening or does not rise to the level of shocking, the conduct should be banned if the conduct is state sponsored and cannot be prevented, controlled or suppressed without being internationally criminalized.<sup>67</sup> The Holocaust would satisfy all of the above criterias and therefore would be viewed as a crime that had all the international elements. Torture, which was banned by an international convention in 1984, would also satisfy the international element criteria because it is often state sponsored and cannot be prevented, controlled or suppressed without internationally criminalizing it.<sup>68</sup>

## 2. The Essential Elements of the Crime of Extermination under International Law

Extermination is one of the enumerated acts of crime against humanity.<sup>69</sup> Extermination is essentially the same as murder but on a larger scale.<sup>70</sup> In a sense, one can think of extermination as mass murder and hence conclude that it is more serious and grievous than murder. Extermination is also a fundamental violation of jus cogens or natural law. The law is so fundamental that states cannot agree to contravene it.<sup>71</sup> The notion that crimes against humanity and hence extermination is a violation of jus cogens gives the international community the legal authority and the universal subject-matter jurisdiction to outlaw and punish the offense as a

---

<sup>66</sup> Bassiouni, *supra* note 13, at 260.

<sup>67</sup> Bassiouni, *supra* note 13, at 260.

<sup>68</sup> Bassiouni, *supra* note 13, at 260.

<sup>69</sup> The other enumerated acts are: murder, enslavement, deportation, imprisonment, torture, rape and other inhumane acts.

<sup>70</sup> Bassiouni, *supra* note 13, at 290.

<sup>71</sup> See Barry E. Carter & Phillip R. Trimble, *International Law*, 130-132 (1995).

violation of customary international law.<sup>72</sup> States therefore that sponsor or condone extermination should expect to be punished or sanctioned by the world community.

Although the offense of crimes against humanity can be traced back since its inception of a legal definition in 1945, none of its acts (i.e. murder, extermination, enslavement, deportation, and other inhumane acts) had been thoroughly defined until the Rwanda crises. The Nuremberg Tribunal did established that certain elements had to be met in order for an act to constitute crimes against humanity but it did not go further in defining or breaking down any of the acts that were part of the offense.<sup>73</sup> Nuremberg only established that crimes against humanity were acts that had certain characteristics. These characteristics are: first, crimes against humanity involved crimes that were grave in nature such as extermination and murder and not lesser inhumane acts; second, only acts that were committed on a mass scale constituted crimes against humanity; third, the act or acts committed must have been atrocious inhumane acts; and finally, the act had to be somehow linked to war.<sup>74</sup> Similarly, the Tokyo Tribunal did not provide much in defining the offense of crimes against humanity including extermination. Rather the Tokyo Tribunal focused

---

<sup>72</sup> See generally Mark R. Von Sternberg, *A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the "Elementary Dictates of Humanity,"* 22 BKNJIL 150-155 (1996).

<sup>73</sup> Jean-Marie Simons, *The Alien Tort Claims Act: Justice or show Trials?*, 11 B.U. Int'l L.J. 49, 50 (1994).

<sup>74</sup> Id. This last requirement was subsequently dropped after Nuremberg when the Allies met after the Second World War during the Control Council Law No. 10. (CCL. 10). CCL. 10 defines crimes against humanity under Article II(c) as: Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated. The words "rape" and "imprisonment" were added and were not present in Article 6(c) of the Nuremberg Statute. Similarly, the phrase "Atrocities and offenses, including but not limited to" was not included in Article 6(c). CCL 10 was meant to be a national legislation and was not intended to be an international instrument. See Bassiouni, *supra* note 13, at 35.

almost exclusively on crimes against peace and no explicit charge of crimes against humanity was ever made.<sup>75</sup>

There is much disappointment in the international community's efforts to define and expand on the concept of crimes against humanity after Nuremberg and Tokyo. Professor Cherif Bassiouni<sup>76</sup> in 1986 among of a panel of experts once commented that:

The term "crimes against humanity" has a very lofty resonance, but it has a very hollow legal significance. Look at the definition as it is found in article 6(c) of the [Nuremberg] charter: "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal..." Each one of these elements should be broken down and should constitute the subject of separate conventions, much more carefully defined. We have had 40 years to define these terms and still have not done so.<sup>77</sup>

The comment by professor Bassiouni in 1986 seems to indicate that following the Nuremberg and Tokyo Tribunal and prior to the Rwanda Tribunal, there appears to be virtually no attempt by the international community to further define the acts that constituted crimes against humanity. In fact, it was not until the Rwanda Tribunal in the *Jean-Paul Akayesu* case that elements of crime of extermination was specifically listed.<sup>78</sup>

Although there is not much authoritative literature (if any) that specifically defines the offense of crime of extermination, the elements that constitute the crime of extermination would

---

<sup>75</sup> Lippman, *supra* note 9, at 202. Although none of the charges were explicit, presumably some of the crimes constituted crimes against humanity.

<sup>76</sup> Professor Bassiouni is considered by many to be a leading expert in the area of international criminal law and has written numerous books and articles on the subject of crimes against humanity.

<sup>77</sup> Duane W. Layton, *Forty Years After the Nuremberg and Tokyo Tribunals: The Impact of War Crimes Trials on International and National Law*, 80 Am. Soc'y Int'l L. Pmc. 72 (1988).

<sup>78</sup> See The Prosecutor v. Jean-Paul Akayesu (Case No. ICTR-96-4-T) UNITED NATIONS International Criminal Tribunal for Rwanda CHAMBER I (last modified Sept. 8, 1998) <<http://www.un.org/ict/english/judgements/akayesu.html>>.

be similar to the elements of crimes against humanity that developed over the years subsequent to Nuremberg. In comparing the formulations of the Nuremberg Charter, the Tokyo Charter and CCL No. 10, the United Nations War Crimes Commission (UNWCC) offered these conclusions that may be helpful in defining the elements of crime of extermination. The UNWCC noted the following pertaining to crimes against humanity:

- (a) There are two types of crimes against humanity, those of the "murder type" (murder, extermination, enslavement, deportation and the like), and those of the "persecution type" committed on racial, political or religious grounds.
- (b) Crimes against humanity of the murder type were offenses committed against the civilian population. Offenses committed against members of the armed forces were outside the scope of this type, and probably also outside the scope of the persecution type.
- (c) Isolated offenses did not fall within the notion of crimes against humanity. As a rule systematic mass action, particularly if it was authoritative, was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law. Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims.
- (d) It was irrelevant whether a crime against humanity had been committed before or during the war.
- (e) The nationality of the victims was likewise irrelevant.
- (t) Not only the ringleaders, but also the actual perpetrators of crimes against humanity were criminally responsible.
- (g) It was irrelevant whether or not a crime against humanity had been committed in violation of the *lex loci*.
- (h) A crime against humanity may be committed by enacting legislation which orders or permits crimes against humanity, e.g. unjustified killing, deportations, racial discrimination, suppression of civil liberties, etc.<sup>79</sup>

---

<sup>79</sup> UNWCC at 178-179. See also Bassiouni, *supra* note 13, at 38,39.

From the factors listed by the UNWCC for crimes against humanity, the following elements of the crime of extermination can be construed. First, the crime of extermination is an offense committed against the civilian population and does not apply to members of the armed or military force. Second, the offense must have been perpetrated on a massive systematic scale. Isolated or attacks against individuals did not fall within the category of extermination. Similarly, random acts of violence did not suffice as a massive systematic attack. Third, the nationality of the victim did not matter. Crime of extermination could be perpetrated against nationals or non-nationals alike. Fourth, the offense by its magnitude or savagery is so serious or grave that it endangers the international community or shocks the conscious of mankind and warrants international intervention.<sup>80</sup> Fifth, the leaders who direct such an offense and the actual perpetrators who carry out their orders would both be held criminally responsible.<sup>81</sup> Sixth, the offense had to be committed based on discriminatory grounds like race, politics, ethnic origin, and religion. Finally, the offense did not have to be connected to war.

Although mainly focused on the broader offense of crimes against humanity, the Yugoslavia Tribunal and the events before and after the creation of the Tribunal also shed light on what the elements of crime of extermination would be. After the adoption of Resolution 827 establishing the tribunal, Madeleine Albright<sup>82</sup> made the following statement in the Security Council:

. . . it is understood that Article 5 applies to all acts listed in that article, when committed contrary to law during a period of armed conflict in the territory of the former Yugoslavia, as part of a widespread or systematic attack against any

---

<sup>80</sup> The fourth element precludes lesser known crimes like assault and battery.

<sup>81</sup> The fifth element would preclude command responsibility as a defense.

<sup>82</sup> Madeleine Albright was then the Permanent Representative of the United States of America to the United Nations.

civilian population on national, political, ethnic, racial, gender or religious grounds.<sup>83</sup>

Madeleine Albright's statement before the Security Council sets out the following elements for crimes against humanity: the act must have been committed as part of a widespread or systematic attack; the act must have been committed against any civilian population; the act must have been unlawful; the act must have been committed during an armed conflict; the act must have been committed based on discriminatory grounds such as national, political, ethnic, racial, gender or religious grounds.

On October 20, 1995, Trial Chamber I in the *Nikolic* case established the following three distinct components for crimes against humanity:

First, the crimes must be directed at a civilian population, specifically identified as a group by the perpetrators of those acts. Secondly, the crimes must, to a certain extent, be organised and systematic. Although 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. Lastly, the crimes, considered as a whole, must be of a certain scale and gravity.<sup>84</sup>

In the *Tadic* case rendered on May 7, 1997, by Trial Chamber II, Judges McDonald, Stephen and Vohrah stated the following discerning the applicability of Article 5 of the Tribunal's Statute:

1. The acts or omissions in question must be committed in armed conflict;
2. There must be a nexus between those acts or omissions and the armed conflict;
3. The acts must be part of a widespread or systematic occurrence of crimes directed against a civilian population;
4. There must be a discriminatory intent behind these crimes;
5. A policy element behind the discrimination may or may not be necessary; and

---

<sup>83</sup> UN Doc. S/PV.3217, at 15 (25 May, 1993). See also Jones, *supra* note 10, at 49.

<sup>84</sup> Jones, *supra* note 10, at 50.

6. The accused must act with the requisite intent.<sup>85</sup>

In regards the third element, the Chamber noted that isolated or random acts are generally not to be included in the definition of crimes against humanity unless the isolated act is a product of a political system based on terror or persecution.<sup>86</sup> Thus, a "deliberate attempt to target a civilian population" and "some form of policy to commit these acts" must be present.<sup>87</sup> Also, the term "population" does not mean an individual victim but rather the "collective," meaning that the individual is being victimized because of his membership in a particular targeted group and not because of his individual attributes.<sup>88</sup> Also in regards the definition of "civilian," individuals involved in the conflict or a resistance movement can qualify as a civilian and therefore as a victim of crimes against humanity.<sup>89</sup> In regards the fourth and fifth element, the Chamber held that there must be a discriminatory intent behind the offense and for all acts constituting crimes against humanity and the accused must have acted with the requisite intent.<sup>90</sup> Finally, the Chamber held that the offense had to have been committed during an armed conflict.<sup>91</sup>

In 1998, under the auspices of the U.N., the ICTR handed down its first conviction in Rwanda in the case of Jean-Paul Akayesu. At the conclusion of the trial, the ICTR listed the following as the essential elements of the crime of extermination:

1. the accused or his subordinate participated in the killing of certain named or described persons;
2. the act or omission was unlawful and intentional;

---

<sup>85</sup> Jones, *supra* note 10, at 52.

<sup>86</sup> Jones, *supra* note 10, at 54-55.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* The Chamber held that the requisite mens rea for crimes against humanity was (1) intent to commit the underlying offence, combined with (2) knowledge of the broader context in which the offence occurs.

<sup>91</sup> *Id.*

3. the unlawful act or omission must be part of a widespread or systematic attack;
4. the attack must be against the civilian population;
5. the attack must be on discriminatory grounds, namely, political, ethnic, racial, or religious grounds.<sup>92</sup>

The above elements utilized to convict Jean-Paul Akayesu for the crime against humanity of extermination appears to have derived from previous Tribunals dating back to Nuremberg. The requirement of a widespread attack can similarly be found in the Nuremberg Tribunal which states crimes against humanity are committed on a massive scale. The other elements are similar to the factors that the UNWCC concluded, pertaining to crimes against humanity. Moreover, the Yugoslavia Tribunal correspondingly lists many of the elements that are stated above in their definition of crimes against humanity. For example, elements 3, 4, and 5 are similar to the conclusions that the Chamber reached in the *Tadic* case. However, unlike the Statute of the ICTY, the Statute of the ICTR does not appear to require a nexus with armed conflict. Also, in contrast to the ICTY's Statute, the ICTR's Statute does explicitly require a discriminatory intent for crimes against humanity.

The Rwanda Tribunal seems to have filled a gap that was sadly lacking prior to its creation in 1994. The acts that constituted crimes against humanity were never thoroughly defined until the ICTR saw a need for it during the Rwandan crises.

---

<sup>92</sup> See *The Prosecutor v. Jean-Paul Akayesu* (Case No. ICTR-96-4-T). The Akayesu case is currently on appeal