

From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity

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I. INTRODUCTION

The 1948 Genocide Convention represents the most significant treaty in international criminal law to address massive human rights abuses. However, international law has also developed an elaborate body of law outside the treaty process that addresses a broad range of systematic atrocities. This corpus, known as “crimes against humanity,” remains primarily a product of customary international law, and thus its elaboration involves a different intellectual task from that in comprehending the Genocide Convention and other treaties.¹

A definition of “crimes against humanity” as a label for a category of international crimes was first articulated in the Nuremberg Charter in 1945,² with a similar definition appearing shortly thereafter in the Tokyo Charter,³ and with further modifications in Allied Control Council Law No. 10.⁴ Subsequent efforts at codification were not successful,⁵ although international instruments relating to specific aspects of “crimes against humanity” were adopted,⁶ and national prosecutions resulted in a small body of helpful case law.⁷ A recent development was the adoption of the Rome Statute of the International Criminal Court⁸ which elaborates

1. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INT'L LAW: BEYOND THE NUREMBERG LEGACY 45 (1997).

2. Charter of the Int'l Military Trib., annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 6(c), 59 Stat. 1544, 82 U.N.T.S. 279.

3. Charter of the Int'l Military Trib. for the Far East, Jan. 19, 1946, art. 5(c), T.I.A.S. No. 1589, *reprinted* in 1 BENJAMIN B. FERENCZ, DEFINING INT'L AGGRESSION 522, 523 (1975) [hereinafter Tokyo Charter].

4. Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Allied Control Council Law No. 10; December 20, 1945, Official Gazette of The Control Council for Germany, No. 3 (1946), *reprinted* in M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 590 (1992) [hereinafter CCL No. 10].

5. For further details see the present study Section II (c), The ILC and the Codification of “Crimes Against Humanity.”

6. *See Statute of the Int'l Criminal Trib. for the Former Yugoslavia*, U.N.S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), *amended* by U.N.S.C. Res. 1166, U.N. SCOR, 53rd Sess., 3878th mtg., U.N. Doc. S/RES/1166 (1998) [hereinafter ICTY Statute]; *see also* Statute of the Int'l Criminal Trib. for Rwanda, U.N.S.C. Res. 955, U.N. SCOR, 49th Sess., 3453th mtg., at art. 3, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

7. *See* Attorney General of Israel v. Eichmann, 36 I.L.R. 5, (Can. S.Ct. 1968); Regina v. Finta, [1994] 1 S.C.R. 701; Fédération Nationale des Déportés et Internes Résistants et Patriotes v. Barbie, 78 I.L.R. 125 (Cass. Crim. [France] 1985).

8. *Rome Statute of the International Criminal Court*, art. 7, U.N. Doc. A/CONF.183/9 (1998).

the definition of this offence,⁹ and precisely determines its elements.¹⁰

The absence of a specialized convention for “crimes against humanity,” and its consideration as a category of international crimes whose specific contents consist of a number of crimes contained in the laws of most national legal systems, required an exhaustive study to distinguish such a category of crimes from “ordinary” municipal crimes (i.e., murder, assault, torture, etc.).

The purpose of this study is to examine the past and present contours of the prohibition of “crimes against humanity”, analyzing and scrutinizing the essential elements of this crime, with a view to obtaining and drawing together basic criteria that could eventually guide the adjudication of this offence. Furthermore, this clarification of “crimes against humanity” is particularly timely with respect to the soon functioning International Criminal Court (ICC).

Since the evolution of “crimes against humanity” also contains significant developments regarding the enumerated acts of which it is comprised, this study will focus on one enumerated act that is of particular interest and deserves more detailed comment, the crime of persecution. Because the contemporary status of “crimes against humanity” under international law cannot be understood or appreciated without reference to its history, and since the existence of a new crime under customary international law would require a painstaking review of State practice and elements of *opinio juris*, the first part of this study will trace the evolution of the legal prohibition of “crimes against humanity.” This first part provides an overview of the definitions of “crimes against humanity” prior to and post World War II; the codification of this offense by the International Law Commission (ILC); its formulation in the Statutes of the two *ad hoc* Tribunals; and the Rome Statute of the International Criminal Court.

Part two deals with the general requirements that elevate a crime under ordinary criminal law to a “crime against humanity”. This second part examines and analyzes the general requirements of “crimes against humanity” as set out in the Nuremberg and Tokyo Charters, the Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the ICC through the case law of the International and National Tribunals.

9. *Rome Statute of the International Criminal Court, U.N. Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, U.N. Doc. A/Conf.183/9 (1998), available at <http://www.un.org/law/icc/index.htm>.

For instance, the definition does not require any nexus to armed conflict, does not require proof of a discriminatory motive, and recognizes the crime of apartheid and enforced disappearance as inhumane acts.

10. *Finalized draft text of the Elements of Crimes*, U.N. Preparatory Comm'n for the Int'l Criminal Court, U.N. Doc. PCNICC/2000/1/Add.2 (2000), available at <http://www.un.org/law/icc/prepcomm/commissn.htm>.

Part three is an attempt to resolve the incoherence regarding the definition of the *actus reus* and the *mens rea* of the crime of persecution through the case law of the International Tribunals. Finally, the conclusion brings together the main points raised throughout the essay and highlights the controversial issues of “crimes against humanity” as contained in the Rome Statute.

II. EVOLUTION OF THE LEGAL PROHIBITION OF “CRIMES AGAINST HUMANITY”

A. *Developments Prior to and During the World War II*

The concept of “crimes against humanity” traces its origins to the preamble of the Fourth Hague Convention of 1907 concerning the Law and Customs of War on Land,¹¹ an instrument concerned with war crimes in the technical and narrow sense. The Convention recalls in paragraph two of the preamble that the Contracting Parties are “animated by the desire to serve,” even in the case of war, “the interests of humanity and the ever-progressive needs of civilization.” The so-called “Martens Clause,”¹² which can be found in the above Hague Convention and subsequent humanitarian law conventions, “first articulated the notion that international law encompassed transcendental humanitarian principles that existed beyond conventional law.”¹³ This clause provides that:

Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and 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 dictates of the public conscience.¹⁴

The specific origin of the term “crimes against humanity” as the label for a category of international crimes can be traced to May 28, 1915, when the governments of France, Great Britain, and Russia issued a joint declaration denouncing the Ottoman government’s massacre of the

11. Convention Respecting the Laws and Customs of War on Land, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, [hereinafter Hague IV], reprinted in BASSIOUNI, *supra* note 4, at 638.

12. The Martens Clause is named after Fyodor Martens, the Russian diplomat and jurist who drafted it at the first Hague Conference to address the laws of war.

13. Beth Van Schaak, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSN’L L., 787, 795–97 (1999).

14. Hague IV, *supra* note 11 (emphasis added).

Armenian population in Turkey as constituting “crimes against civilization and humanity” for which all members of the Turkish government would be held responsible together with its agents implicated in the massacres.”¹⁵ The relevant part of this declaration reads as follows:

En présence de ces nouveaux crimes de la Turquie contre l’humanité et la civilisation, les Gouvernements alliés font savoir publiquement à la Sublime Porte qu’ils tiendront personnellement responsables des dits crimes tous les membres du Gouvernement ottoman ainsi que ceux de ses agents qui se trouveraient impliqués dans de pareils massacres.¹⁶

However, the treaty of Versailles (1919) did not include such a crime. It contained provisions only for prosecuting German military personnel for war crimes (Article 228).¹⁷

In January 1919 the Preliminary Conference decided to create a Commission of Fifteen Members for the purpose of inquiring into the responsibilities relating to the war. The Commission was instructed, *inter alia*, to inquire into and to report upon “the facts as to breaches of the laws and customs of war committed by the forces of the German Empire and their Allies, on land, on sea, and on the air during the 1914–1919 war.”¹⁸ The Report, dated 29 March 1919, stated in Chapter II: “in spite of the explicit regulations, of established customs, and of the clear *dictates of humanity*, Germany and her allies have piled outrage upon outrage.”¹⁹ The majority of the Commission came to the conclusion that the First World War “was carried on by the Central Empires together with their allies, Turkey and Bulgaria, by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary *laws of humanity*,” and that “all persons belonging to enemy countries . . . who have been guilty of offences against the laws and customs of war or the *laws of humanity*, are liable to criminal prosecution.”²⁰

In 1920, Turkey agreed in the Treaty of Sevres to bring to justice

15. M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 62 (2d rev. ed., 1999).

16. *La Documentation Internationale, La Paix de Versailles*, Vol. 3, *Responsibilités des auteurs de la Guerre et Sanctions*, Paris, 1930, Annex I to the main report, quoted in U.N. WAR CRIMES COMMISSION, *HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR*, 35 (1948). See also BASSIOUNI, *supra* note 15.

17. Treaty of Peace Between the Allied and Associated Powers and Germany, Versailles, June 28, 1919, reprinted in BASSIOUNI, *supra* note 4, at 551–52.

18. Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. YEAR BOOK OF INT’L L. 179, 180–81 (1946).

19. *Id.*

20. *Id.* It is, however, not clear whether the 1919 Commission, in using the term “crimes against the law of humanity,” had in mind offences which were not covered by the other expression “violation of the laws and customs of war.”

those responsible for the massacres against Armenians.²¹ The Allies who joined that Treaty insisted that language imposing liability for “crimes against humanity” be included.²² Although the Treaty of Sevres envisioned the prosecution of those responsible for the massacres, the Allies never designated a tribunal to try the accused. Nor did the League of Nations create a tribunal competent to deal with the massacres.²³

Unfortunately, the Treaty of Sevres was never ratified and it never came into force.²⁴ It was replaced by the treaty of Lausanne, which not only failed to include provisions for the prosecution of Turkish nationals for these “crimes against civilization and humanity,” but was also accompanied by a “Declaration of Amnesty” for all offences committed between 1914–1922, which were obviously connected with political decisions.²⁵

Interestingly, Egon Schwelb, legal officer for the United Nations War Crimes Commission has observed that the distinction made in 1919—between violations of the laws and customs of war on the one hand, and offences against the laws of humanity on the other—corresponds roughly to the two categories of “war crimes” and “crimes against humanity” as they are set out in Article 6(b) and (c) of the Nuremberg Charter.²⁶

Another development took place in 1943–1944 when the London International Assembly²⁷ recommended that in defining the scope of the retributive action of the Allies, ‘a comprehensive view should be taken including not only the customary violations of the laws of war . . . but any other serious crime against the local law, committed in time of war, the perpetrator of which has not been visited by appropriate punishment’.²⁸

21. *Treaty of Peace Between the Allied Powers and Turkey*, 15 AM. J. OF INT'L L. 179, 235 (Supp. 1921). See also Schwelb, *supra* note 18, at 182.

22. Schwelb, *supra* note 18, at 181–82.

23. David Matas, *Prosecuting Crimes Against Humanity: The Lessons of World War I*, 13 FORDHAM INTL L.J. 86, 91 (1989–1990).

24. Schwelb, *supra* note 18, at 182.

25. See *Treaty of Peace Between the Allied powers and Turkey (Treaty of Lausanne)*, July 24, 1923, 28 L.N.T.S. 11, 18 AM. J. INT'L L. 1 (Supp. 1924).

26. Schwelb, *supra* note 18, at 181–83.

27. The London International Assembly (LIA), an unofficial body comprised of distinguished jurists representing, in an unofficial capacity the view of the European Allies. It was established during the Second World War by an unofficial body, the League of Nations Union.

28. *The Punishment of War Criminals: Recommendations of the London International Assembly (Report of Commission I)*, reprinted in BASSIOUNI, *supra* note 4, at 562. See also Schwelb, *supra* note 18, at 184.

In October 1943, it proposed the establishment of an international criminal court whose jurisdiction was to encompass “crimes in respect of which no national court had jurisdiction.” This category was meant to include offences subsequently described as “crimes against humanity.”²⁹

The unprecedented record of crimes by the Nazi regime led the United Nations War Crimes Commission (UNWCC),³⁰ an inter-governmental agency established in 1943, to recommend “to the Allied Governments that the retributive action of the United Nations should not be restricted to what was traditionally considered as war crimes in the technical sense, namely, a violation of the laws and customs of war.”³¹

Finally, Article 29 of the Instrument of Surrender of Italy foreshadowed an extension of the retributive action of the Allies beyond the perpetrators of “war crimes.”³² In other words, it foreshadowed the Charter’s codification of “crimes against humanity” by imposing on Italy the obligation to apprehend into the hands of the United Nations not only persons suspected of having committed “war crimes,” but also persons suspected of “analogous offences,” an expression roughly indicating what have become known as “crimes against humanity.”³³

B. “Crimes Against Humanity” under the Nuremberg Charter, Tokyo Charter and Control Council Law No. 10

On August 8, 1945 the four major Allied powers in World War II ratified the London Agreement.³⁴ Appended to that agreement was the Charter of the International Military Tribunal for the Trial of the Major War Criminals, which marked the birth of the modern notion of “crimes against humanity.”³⁵ Article 6 of the Charter identified the crimes committed in the European theatre as “crimes against peace,” “war crimes,” and “crimes against humanity.” In Article 6(c), the Charter defined this last criminal category as:

29. WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 30 (2000). For the drafting history of “crimes against humanity” see *id.* at 30–37.

30. History of the U.N. War Crimes Comm’n and the Development of the Laws of War compiled by the U.N. War Crimes Comm’n (1948) [hereinafter UNWCC], reprinted in BASSIOUNI, *supra* note 4, at 570.

31. Schwelb, *supra* note 18, at 184–85.

32. Armistice With Italy: Instrument of Surrender, Sept. 29, 1943, 61 Stat. 2742, T.I.A.S No. 1604, at para. 29. See also Schwelb, *supra* note 18, at 184–85.

33. Schwelb, *supra* note 18, at 185.

34. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, August 8, 1945, 59 Stat. 1544, 82 U.N.T.S 279, E.A.S. No. 472, reprinted in 39 AM. J. INT’L L. 257 (Supp. 1945), and in BASSIOUNI, *supra* note 4, at 579–81.

35. Tokyo Charter, *supra* note 3.

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.³⁶

As observed by the International Law Commission, Article 6(c) contained two types of crimes against humanity, “murder . . . and other inhumane acts” and “persecution on political, racial, or religious grounds.”³⁷ This categorization makes it clear that the ILC viewed the phrase “on political, racial or religious grounds” as clarifying the basis of persecution, rather than imposing a requirement of discriminatory motive for inhuman acts.³⁸

On October 6, 1945 the four governments signatory to the London Agreement drew up a Protocol in Berlin to conform the French and English texts of Article 6(c) to the Russian.³⁹ It is to be noted that the London Agreement was executed in triplicate, in English, French, and Russian, each text to have equal authenticity (Art. 7 of the Charter). The discrepancy which was found to exist was this: in the English and the French texts, Article 6(c) was divided into two parts by a semicolon between the words “war” and “or persecutions.” However, in the Russian text, “which was equally authentic, there was no semicolon dividing the paragraph, but a comma had been placed between what corresponds to the words ‘war’ and ‘or persecutions’ in Russian.”⁴⁰ Yet, it is beyond any doubt that the qualification “in execution of or in connection with any crime within the jurisdiction of the tribunal” applies to the whole context of the paragraph and constitutes a very important restriction on the scope of the concept of “crimes against humanity.”⁴¹

36. *Id.*

37. *Report of the International Law Commission*, U.N.GAOR, 5th Sess., Supp. No. 12, at para. 120, U.N. Doc. A/1316 (1950).

38. Phyllis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 *FORDHAM INT'L L.J.* 457, 462–63 (1998). It should be noted that the 1949 Memorandum of the Secretary-General on the Charter and Judgment of the Nuremberg Tribunal supported the interpretation by the ILC in such matters. The Memorandum states that it could be argued that the phrase “on political, racial or religious grounds” refers not only to persecutions but also to the first type of crimes against humanity. The British Chief Prosecutor possibly held that opinion as he spoke of “murder, extermination, enslavement, persecution on political racial or religious grounds.”

39. Protocol to Agreement and Charter, London, 6 October 1945, *reprinted in* BASSIOUNI, *supra* note 4, at 585–86.

40. Schwelb, *supra* note 18, at 188.

41. BASSIOUNI, *supra* note 15 at 27–31.

Moreover, it is to be noted that the change from the semicolon to the comma was intended to strengthen the link between “crimes against humanity” and “crimes against peace” particularly with war crimes, in order to avoid the criticism that Article 6(c) was entirely new to international law.⁴² It was further pointed out that the consequence of limiting the scope of Article 6(c) was the exclusion of all Nazi crimes against the Jews before 1939.⁴³

Following the example of Article 6(c) of the Statute of the International Military Tribunal at Nuremberg, the Tokyo Charter incorporated this same category of crimes in Article 5(c) of its Charter.⁴⁴ The Tokyo Charter did not provide any further guidance on “crimes against humanity” because it primarily prosecuted “crimes against peace.”⁴⁵ The Tokyo Charter narrowed the definition by omitting religious persecution. That was probably due to the fact that the draftsmen assumed that persecutions on religious grounds had actually not been committed on a large scale in comparison with Japanese aggression and warfare.

It is worth noting that the Allied Control Council Law No. 10 (CCL No. 10) governed the prosecution of war criminals within each of the Allied occupation zones in Germany.⁴⁶ The definition of “crimes against humanity” in Article II(c) of CCL No. 10 does not contain the words “in execution of or in connection with any crime within the jurisdiction of the Tribunal.” Article II (c) removed the requirements of a connection with either “crimes against peace” or “war crimes.”⁴⁷ Thus, under CCL No. 10 formulation, “crimes against humanity” stood as a separate category of international crimes, unrelated to the initiation and conduct of war or to the commission of acts falling within the definition of “war crimes.”

42. *Id.* at 29.

43. *Id.* at 30.

44. Tokyo Charter, *supra* note 3. Article 5(c) of the Tokyo Charter states:

Crimes Against Humanity: Namely, 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 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.

45. Although both Tribunals were to try only major war criminals, the IMT was established pursuant to an international treaty while the IMTFE was proclaimed in a military order issued by General Douglas MacArthur, supreme commander of Allied forces in the Pacific.

46. CCL No. 10, *supra* note 4.

47. *Id.* Article II (c) of CCL No. 10 defines “crimes against humanity” as follows: “Atrocities and offences, 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.”

From the above, it is clear that Article II(c) of CCL No. 10 differs from Articles 6(c) and 5(c) respectively of the London and Tokyo Charters. These differences are: headings for Article II (c) defining “crimes against humanity” as “Atrocities and Offences”; inclusion of the overly broad terms, “included but not limited to”; the addition of the terms “imprisonment” and “rape” although both are subsumed within the words “or other inhumane acts” contained in all three texts; and the removal of any connection between the specific crimes listed in Article II (c) and “crimes against peace” or “war crimes.” This formulation was later followed by the International Law Commission in its 1950 restatement of the “Nuremberg Principles.”⁴⁸

C. The ILC and the Codification of “Crimes Against Humanity”

In 1947, the United Nations General Assembly created the International Law Commission (ILC) as a permanent body having as its object “the promotion of the progressive development of international law and its codification.”⁴⁹ On the same day, the U.N. General Assembly adopted another resolution in which it decided “to entrust the formulation of the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal to the ILC.”⁵⁰ At its second session in 1950 the ILC completed its formulation of the Nuremberg Principles. Principle VI(c) formulates “crimes against humanity” as follows:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.⁵¹

Notably, the omission of the phrase “before or during war” used in Article 6(c) of the Nuremberg Charter was due to the ILC’s view that it

48. *International Law Commission Report on the Principles of the Nuremberg Tribunal*, U.N. GAOR, 5th Sess., Supp. No. 12 at 11, U.N. Doc. A/1316 (1950), reprinted in BASSIOUNI, *supra* note 4, at 624–26.

49. G.A. Res. 174 (II), U.N. GAOR, 2d Sess., 123rd plen. mtg., art. 1 at 105, U.N. Doc A/519 (1947).

50. G.A. Res. 177 (II), U.N. GAOR, 2d Sess., 123rd plen. mtg., at 111, U.N. Doc A/519 (1947). See LYAL S. SUNGA, *THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW: DEVELOPMENTS IN CODIFICATION AND IMPLEMENTATION* 8–9 (1997).

51. D.H.N. Johnson, *The Draft Code of Offences Against the Peace and Security of Mankind*, 4 INT’L & COMP. L.Q. 445, 449–50 (1955).

only referred to “a particular war, the war of 1939.”⁵² Moreover, the ILC developed several formulations for “crimes against humanity” during its work on what was first called the “Draft Code of Offences Against the Peace and Security of Mankind,” which was subsequently renamed in 1987 by the ILC as the “Draft Code of Crimes Against the Peace and Security of Mankind.” These formulations occurred in 1954,⁵³ 1991,⁵⁴ and 1996.⁵⁵ Following the submission of the 1954 Draft Code, further discussion on this work was suspended for several decades because the “Cold War” had made the entire exercise highly controversial.⁵⁶

52. *Report of the International Law Commission*, U.N. GAOR, 5th Sess., Supp. No. 12, at para. 123, U.N. Doc. A/1316 (1950).

53. *Report of the International Law Commission to the General Assembly, Draft Code of Offences Against the Peace and Security of Mankind*, U.N. GAOR, 9th Sess., Supp. No. 9, ch. 3, art. 2, sec. 11, U.N. Doc. A/2691 (1954). Article 2 of the Draft Code of Offences Against the Peace and Security of Mankind (1954 Draft Code) states:

The following acts are offences against the peace and security of mankind: Inhuman acts such as murder, extermination, enslavement, deportation, or persecutions, committed against any civilian population on social, 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.

54. *Draft Code of Crimes Against the Peace and Security of Mankind, in Report of the Int'l Law Commission on the Work of Its Forty-Third Session*, U.N. GAOR, 46th Sess., Supp. No. 10, at 265, U.N. Doc. A/46/10 (July 19, 1991) [hereinafter Report of the Int'l Law Comm'n]. Article 21 (Systematic or Mass Violation of Human Rights) states:

An individual who commits or orders the commission of any of the following violations of human rights: murder; torture; establishing or maintaining over persons a status of slavery, servitude or forced labour; persecution on social, political, racial, religious or cultural grounds, in a systematic manner or on a mass scale; or deportation or forcible transfer of population shall, on conviction thereof, be sentenced

55. *Draft Code of Crimes Against the Peace and Security of Mankind*, U.N. GAOR, 48th Sess., at 6-7, U.N. Doc. A/CN.4/L.532 (July 8, 1996). Article 18 of the Draft Code of Crimes Against the Peace and Security of Mankind (1996 Draft Code) states that:

A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a government or by any organization or group:

- a) murder;
- b) extermination;
- c) torture;
- d) enslavement;
- e) persecution on political, racial, religious or ethnic grounds;
- f) institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;
- g) arbitrary deportation or forcible transfer of population;
- h) forced disappearance of persons;
- i) rape, enforced prostitution and other forms of sexual abuse;
- j) other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.

56. See Report of the Int'l Law Comm'n, *supra* note 54.

Almost fifty years ago, the 1954 Draft Code of Offences was criticized by D.H.N. Johnson, in particular Article 2 of the Code which consists of an amended version of Nuremberg Principle VI(c).⁵⁷ He noted that “inhumane acts” were linked to a requirement that they be committed on social, cultural, political, racial, and religious grounds. However, under the Nuremberg principles it was only persecution which was required to be on “political, racial or religious grounds.”⁵⁸ He added, with concern, “it now seems that it is necessary to show that any of the “inhuman acts,” including murder, extermination, enslavement and deportation, as well as persecutions, were committed on “social, political, racial, religious or cultural grounds.”⁵⁹

Johnson also questioned the requirement of state involvement particularly in the light of the Genocide Convention.⁶⁰ Under the Genocide Convention, individuals were responsible under any circumstances, while under the Code an individual is responsible for “inhumane acts” only if it can be shown that he committed these acts “at the instigation or with the toleration” of the authorities of a State. To paraphrase Johnson’s criticism, individuals will be held legally responsible for crimes against humanity only if a “state action or policy connection” exists.⁶¹

The 1991 Draft Code was also criticized by Prof. Bassiouni because of the confusion between individual and State responsibility evident in several aspects of that Code.⁶² Furthermore, the basis for State criminal responsibility was not identified. He adds, “with respect to those offences that are product of ‘State action or policy,’ the Draft Code of Crimes failed to identify those international or jurisdictional elements that are indispensable for distinguishing between conduct that is wholly within the national criminal jurisdiction of a given State and conduct that constitutes an international crime irrespective of national law.”⁶³

57. Johnson, *supra* note 51, at 465.

58. *Id.* For the redrafting of the 1954 Draft Code, see Doudou Thiam, Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, Agenda Item 5, U.N. Doc. A/CN.4/398 (1986), *reprinted in* 2 Year Book of Int'l L. Comm'n 53, 38th Sess., U.N. Doc. A/CN.4/SER.A/1986/Add.1 (1986). Mr. Thiam’s 1991 version was more specific and far more elaborate than the 1954 Draft Code.

59. Johnson, *supra* note 51, at 465.

60. *Convention on the Prevention and Punishment of the Crime of Genocide*, U.N. GAOR, 3rd Sess., Pt. I, at 174, U.N. Doc. A/810 (1948), *reprinted in* 45 AM. J. INT'L L. 7 (Supp. 1951).

61. Johnson, *supra* note 51, at 465.

62. BASSIOUNI, *supra* note 15, at 186.

63. *Id.* at 186–92. *See also* SUNGA, *supra* note 50, at 124–62.

Additionally, the text of Article 21 of the 1991 Draft Code is marred by two obvious drafting errors.⁶⁴ In the first place, the phrase “in a systematic manner or on a mass scale” relates only to the crime of persecution. However, as evidenced by the title of Article 21 and by its subsequent presentation together with commentary,⁶⁵ one can discern that the element of systematic or mass violation refers to all of the first four offenses listed in Article 21.⁶⁶

Secondly, the word “individual” as inserted in the *chapeau* of Article 21 of the 1991 Draft Code signifies that any individual, not only government officials or State agents, may be held legally responsible for crimes enumerated in Article 21. Consequently, a perpetrator may be held criminally responsible within the purview of the Code even if he commits murder or torture systematically, or on a mass scale on purely private grounds which is a matter of domestic prosecution. This would indeed contradict the current law of crimes against humanity.

The 1996 Draft Code required two “general conditions” for an act to reach the level of a “crime against humanity.” First, the act must be committed in a “systematic manner or on a large scale.” As clarified by the ILC’s Report,⁶⁷ for an act to be systematic, it must be committed “pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts.”⁶⁸ This requirement was imposed to distinguish between the prosecution of a “random act” which falls under domestic prosecution, and acts which constitute “crimes against humanity.” On the other hand, the term “large scale” referred to situations “involving a multiplicity of victims, for example, as a result of the cumulative effect of a serious of inhuman acts or the singular effect of an inhumane act of extraordinary magnitude.”⁶⁹ This requirement aimed to exclude any “isolated inhumane act committed by a perpetrator acting on his own initiative and direct against a single victim.”⁷⁰

The second condition required by the ILC was that crimes against humanity be “instigated or directed by a Government or by any organization

64. Christian Tomuschat, *Crimes Against the Peace and the Security of Mankind and the Recalcitrant Third State*, in *WAR CRIMES IN INTERNATIONAL LAW*, 41, 49–50 (Yoram Dinstein & Mala Tabory eds., 1996).

65. *Report of the International Law Commission on the Work of its Forty-third Session*, U.N. GAOR, 46th Sess., Supp. No. 10, at 265, U.N. Doc. A/46/10 (1991).

66. *Id.*

67. *Report of the International Law Commission on the work of its forty-eighth session* U.N. GAOR, 51st Sess., Supp. No. 10, ch. 2, art. 18, at para. 3, U.N. Doc. A/51/10 (1996), available at <http://www.un.org/law/ilc/reports/1996/96repfra.htm>.

68. *Id.*

69. *Id.* at para. 4.

70. *Id.*

or group This definition would enable groups that exercise *de facto* control over a territory, without official recognition as the legitimate state authority, to be held responsible for crimes against humanity.”⁷¹

A further point that deserves particular mention is that Article 18 of the 1996 Draft Code does not include as a requirement of crimes against humanity that the prohibited acts be committed against a civilian population. The Commentary to the Draft Code does not offer an explanation why the victimization of a civilian population does not feature as an element of the offense of “crimes against humanity.” It might be held that the ILC while adopting the 1996 Draft Code followed the Yugoslav Tribunal in the Rule 61 Decision in the *Vukovar* case.⁷² In this decision the Trial Chamber referred to the Commission of Experts Established Pursuant to Security Council Resolution 780, which noted that while the term “any civilian population” principally applies to non-combatants, it does not necessarily exclude those “who at one particular point did bear arms.” If indeed this was the reasoning behind the ILC’s decision to remove any reference to civilian populations in Article 18, then it may be considered a progressive development regarding the legal prohibition of crimes against humanity.

Given the fact that the concept of “crimes against humanity” has been developed by the ILC in 1954, 1991 and 1996, it is beyond any shadow of doubt that the definition of “crimes against humanity” and the identification of its elements have still not been fully resolved.

D. The Statutes of the ICTY and ICTR: The Security Council’s Formulations

The two *ad hoc* Tribunals have contributed to developing and broadening the notion of “crimes against humanity.” One of the most significant differences between the Statutes of the ICTY⁷³ and the ICTR⁷⁴ is that the former requires proof of the existence of an armed conflict, while the latter does not.⁷⁵ The requirement of an armed conflict in Article 5 of

71. HWANG, *supra* note 38, at 467.

72. *Prosecutor v. Mile Mksic, Miroslav Radic, and Veselin Sljivancanin*, (Case No. IT-95-13-R 61) Review of the Indictment Pursuant to Rule 61 of the Rules and Procedure and Evidence, April 3, 1996, at para. 29, *quoted in* Tadic, Case No. IT-94-1-T, Opinion and Judgment, at para. 643 (May 7, 1997) [hereinafter *Vukovar Hospital Decision*].

73. See ICTY Statute, *supra* note 6, at art. 5.

74. See ICTR Statute, *supra* note 6, at art. 3.

75. ICTY Statute, *supra* note 6. Article 5 of the ICTY grants the International

the ICTY Statute is similar to that of Article 6(c) of the Nuremberg Charter which limited the Nuremberg Tribunal's jurisdiction to "crimes against humanity" committed "before or during the war," although the latter was further limited by requiring that "crimes against humanity" be committed "in execution of or in connection with war crimes or crimes against peace."⁷⁶ However, in its Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, rendered in *Tadic*, the Appeals Chamber elaborated on the fact that "crimes against humanity" may be committed notwithstanding the absence of any connection with an armed conflict. The Appeals Chamber states that:

Tribunal jurisdiction to prosecute crimes against humanity only "when committed in armed conflict" whether of an international or internal character. Article 5 define crimes against humanity as follows:

The International Tribunal shall have 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) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

While Article 3 of the Statute of the ICTR defines crimes against humanity as follows:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as a part of a wide spread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

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

76. *Id.* It should be noted that Article 5 of the Statute of ICTY is modelled on Article 6(c) of the Nuremberg Charter, but with several clarifications. The first is to include rape as a specifically listed type of crime constituting a crime against humanity. But since rape and sexual assaults fall within the meaning of "other inhumane acts," as listed in Article 6(c) of the Nuremberg Charter and Article 5(i) of the ICTY Statute, the specific inclusion of rape in Article 5(g) does not alter, but clarify existing law. The second clarification is the removal of the "war connection" required by Article 6(c) of the Charter between acts constituting crimes against humanity and the initiation and waging of an aggressive war (Article 6(a)) and war crimes (Article 6(b)). The basis of that removal as stated by Prof. Bassiouni is the evolution of customary international law.

It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law. . . .”⁷⁷

A second difference between the Statutes of the two *ad hoc* Tribunals is that, unlike the ICTY Statute, the Rwanda Statute requires that “crimes against humanity” be “committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.”⁷⁸ This requirement seems to emphasize the policy element.⁷⁹ In other words, it is not the single killing that is targeted, but mass killings, unless the single killing can be linked to a “systematic” policy or to “widespread” attacks.⁸⁰

Although Article 5 of the ICTY Statute does not require that the acts should be committed on a “widespread or systematic” basis in order to constitute “crimes against humanity,” the Yugoslav Tribunal has pointed out in several decisions that the term “widespread or systematic” constitutes an essential element of the notion of “crimes against humanity” under the ICTY Statute. In the Opinion and Judgment rendered in *Tadic*, the Trial Chamber held that: “It is now well established that the requirement that the acts be directed against a civilian ‘population’ can be fulfilled if the acts occur on either a widespread basis or in a systematic manner. Either one of these is sufficient to exclude isolated or random acts.”⁸¹

“Crimes against humanity” as defined by the ICTY and ICTR Statutes has influenced both the 1995 *ad hoc* Committee,⁸² and the 1996, 1997–1998 Preparatory Committee on the Establishment of an International

77. Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, at para. 141 (Oct. 2, 1995). For a legislative history of Article 5 ICTY, see M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA*, 538–54 (1996).

78. ICTR Statute, *supra* note 6, at art. 3.

79. For a discussion of the policy element as an element for “crimes against humanity,” see *infra* Section 3(E).

80. BASSIOUNI, *supra* note 15, at 193–99.

81. Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, at para. 644 (May 7, 1997).

82. *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 50th Sess., Supp. No. 22, at 16–17, U.N. Doc. A/50/22 (Sept. 6, 1995).

Criminal Court in the deliberations of these two bodies with respect to the definition of “crimes against humanity” as it stands now in Article 7 of the Rome Statute.⁸³ Thus, the creation of these Tribunals paved the way for the development of a body of international jurisprudence on “crimes against humanity,” which assists and guides the delegations assembled at the Rome Conference.

E. The ICC Statute: The Latest Development

Article 7 of the Rome Statute expands the specific crimes which constitute “crimes against humanity” and adds much needed specification. The *chapeau* of Article 7 of the ICC Statute reads as follows: “For the purpose of this Statute, ‘crimes against humanity’ means any of the following acts when committed as a part of widespread or systematic attack directed against any civilian population, with the knowledge of the attack.”⁸⁴ The phrase “attack directed against any civilian population” is precisely determined under paragraph 2 of Article 7 as “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”⁸⁵

The structure of Article 7 is divided in two parts: the general elements and the specific crimes. The general elements are intended to be the international or jurisdictional elements needed to make this category of crimes an international one. These general elements are defined as “widespread or systematic attack against any civilian population.” The term “attack” and the subsequent international requirement that it be “with knowledge” reflect the particular nature of the overall conduct that leads to the commission of the specific crimes described in (a) to (k).⁸⁶ The “acts” must be carried out in a “widespread or systematic” manner, reflecting “the policy element.” Lastly, there is the general requirement that the attack as characterised by its “widespread or systematic” nature and manner, must be directed against a “civilian population.” It is therefore the cumulative effect of these three general elements that constitute the international or jurisdictional element that transforms the specific crimes listed in (a) to (k) from domestic crimes to a category of international crimes.⁸⁷

83. *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Volume II (Compilation of proposals), U.N. GAOR, 51st Sess., Supp. No. 22A, U.N. Doc. A/51/22 (1996).

84. *Rome Statute of International Criminal Court*, *supra* note 8, at art. 7(1).

85. *Id.* at art. 7(2)(a).

86. I am indebted to Prof. Bassiouni for this analysis.

87. BASSIOUNI, *supra* note 15, at 202-03.

Finally, the definition of this offense under the ICC Statute reflects the development of customary international law requiring neither a nexus between “crimes against humanity” and armed conflict nor a requirement of a discriminatory intent.

Having examined the developing law of crimes against humanity, the following section will discuss and examine the international and jurisdictional elements, which elevate an ordinary act under domestic prosecution to a crime against humanity under international criminal law.

III. GENERAL REQUIREMENTS FOR “CRIMES AGAINST HUMANITY”

In order to amount to a crime against humanity, the acts of an accused must be part of a widespread or systematic attack ‘directed against any civilian population.’ This phrase has been interpreted by the international tribunals as encompassing the following five elements: (1) there must be an attack; (2) the acts of the perpetrator must be part of the attack; (3) the attack must be directed against any civilian population; (4) the attack must be widespread or systematic; (5) the perpetrator must know that the acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that the acts fit into such a pattern.⁸⁸ Yet, the choices of the international community with respect to the elements of “crimes against humanity” both reflect and shape the international legal and moral order. The decision to reject a requirement of a nexus with armed conflict evidences the erosion of the traditional approach to State sovereignty.⁸⁹ This section will evaluate the elements of “crimes against humanity” that have been included or proposed in various international documents and relevant case law.

A. *Nexus to Armed Conflict*

1. *Nuremberg and the Post World War II Trials*

As indicated in Part I, the Nuremberg and Tokyo Charters define “crimes against humanity” as requiring a nexus with the other crimes over which the International Military Tribunal (IMT) had jurisdiction, namely crimes against peace and war crimes. Disagreement remains,

88. Prosecutor v. Kunarac, Case No. IT-96-23/1-A), Judgment, at para. 85 (June 12, 2002) (footnotes omitted).

89. Margaret McAuliffe deGuzman, *The Road from Rome: The Developing Law of Crimes Against Humanity*, 22 HUM. RTS. Q. 335, 354 (2000).

however, over whether the requisite *nexus* in the definition suggests that international law requires a connection between “crimes against humanity” and armed conflict, or that the Nuremberg Charter limited the jurisdiction of the IMT to a certain set of crimes against humanity (*i.e.*, those connected with crimes against peace and war crimes).⁹⁰ Interestingly, in 1946, Schwelb observed that, “crimes against humanity,” as defined in the Nuremberg Charter, are not the “cornerstone of a system of international criminal law equally applicable in times of war and of peace, protecting the human rights of inhabitants of all countries.”⁹¹ He added:

The term as interpreted in the Nuremberg Judgment, has a considerably narrower connotation. It is, as it were, a kind of by-product of war, applicable only in time of war or in connexion with war and destined primarily, if not exclusively, to protect the inhabitants of foreign countries against crimes committed, in connexion with an aggressive war, by the authorities and organs of the aggressor State. It serves to cover cases not covered by norms forming part of the traditional ‘laws and customs of war’. It denotes a particular type of war crime, and is a kind of *clausula generalis*, the purpose of which is to make sure that inhumane acts violating general principles of the laws of all civilized nations committed in *connexion* with war should not go unpunished. As defined in the Nuremberg Judgment, the crime against humanity is an “accompanying” or an “accessory” crime to either crimes against peace or violations of the laws and customs of war.⁹²

The judgments of the Nuremberg and Tokyo Tribunals did not clarify whether the *nexus* requirement was intended as an element of the substantive offense, or simply as a restriction on the jurisdiction of the Tribunals. Likewise, cases under CCL No. 10 did not reveal a consensus position. The *Einsatzgruppen* and *Justice* cases under CCL No. 10 Trials suggested that the nexus requirement was legally unnecessary.⁹³ On the contrary, in *United States v. Flick et al.*, the court acquitted the defendant of “crimes against humanity” for his acquisition of Jewish property before the war, finding itself without jurisdiction.⁹⁴ In *United States v. von Weizsaecker et al.*, the tribunal dismissed the counts of “crimes against humanity” against officials in the Nazi foreign ministry

90. RATNER & ABRAMS, *supra* note 1, at 49–50.

91. Schwelb, *supra* note 18, at 206.

92. *Id.*

93. *United States v. Ohlendorf* (Einsatzgruppen Trial), 15 I.L.R. 656 (1948); *United States v. Alstotter* (1948 Justice Case), in TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 VOL. III 956 (U.S. Gov. Printing Office 1951). As mentioned already in the present study, the nexus to war was not included in the definition of crimes against humanity contained in CCL No. 10. Notwithstanding, the preamble to CCL No. 10 indicated that it was intended to give effect to the Nuremberg Charter, the formulation of Article II(c) of CCL No. 10 removed the connection requirement with either crimes against peace or war crimes.

94. *United States v. Flick*, in TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 VOL. VI, 1216 (U.S. Gov. Printing Office 1951).

and other bureaucracies, noting that CCL No. 10 was meant to go no further than the Nuremberg Tribunal itself, which codified international law.⁹⁵

From the above quoted judgments, one might deduce the legacy of the Nuremberg trials is one of uncertainty with regard to the nexus requirement.⁹⁶ Subsequent international instruments support the view that a nexus to armed conflict is not a requirement.⁹⁷

In its report on the development of the laws of war at the conclusion of the Nuremberg and CCL No. 10 trials, the UNWCC concluded that international law may now sanction individuals for “crimes against humanity” committed not only during war but also during peace.⁹⁸ It is to be noted that the war-connecting link was removed in a 1950 Report of the ILC.⁹⁹

The next developments were the adoption of the ICTY and ICTR Statutes by the Security Council. However, the existence of armed conflict was explicitly required under the ICTY Statute; the elimination of such requirement was evident at the Statute of the ICTR.

Interestingly, the U.N. Secretary General’s report to the Security Council, to which the Draft ICTY Statute was annexed, states that crimes against humanity “are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.”¹⁰⁰ Most notably, in the *Tadic* case, the Appeals Chamber found that Article 5 did not impose any substantive connection

95. United States v. von Weizsaecker, in TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 Vol. VII 694 (U.S. Gov. Printing Office 1951).

96. RATNER & ABRAMS, *supra* note 1.

97. The Convention on the Prevention and Punishment of the Crime of Genocide of 1948, which dealt with this particularly serious form of “crimes against humanity,” affirmed that genocide is a crime “whether committed in time of peace or in time of war.” Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan 12, 1951). Likewise, the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity refers to crimes against humanity “whether committed in time of war or in time of peace.” Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391, U.N. GAOR, 23rd Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968). Similarly, the conventions and declaration on apartheid and forced disappearance, which declare that such acts can amount to crimes against humanity, do not suggest any nexus to armed conflict (Article 1).

98. UNWCC, *supra* note 30.

99. *International Law Commission Report on Principles of the Nuremberg Tribunal*, *supra* note 48.

100. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. SCOR, 48th Sess., at para. 47, U.N. doc. S/25704 (1993).

between the crime and the armed conflict. The Appeals Chamber held, remarkably, that under Article 5 “[a] nexus between the accused’s acts and the armed conflict is not required The armed conflict requirement is satisfied by proof that there was an armed conflict; that is all the Statute requires, and in so doing, it requires more than does customary international law.”¹⁰¹ The Appeals Chamber emphasised that “the armed conflict requirement is a jurisdictional element, not a substantive element of the *mens rea* of crimes against humanity.”¹⁰² Recently, in *Krnjelac*, the Trial Chamber of the Yugoslav Tribunal refers to this element as a “jurisdictional requirement.”¹⁰³

2. Domestic Prosecution of “Crimes Against Humanity”

As mentioned above, the war-connecting link was removed in a 1950 Report of the ILC. But since a Report of the ILC has no binding effect, unless it is considered as a progressive codification of customary international law and therefore binding to its content, the practice of States remains an important element in addition to the element of *opinio juris* to establish customary international law.¹⁰⁴ Nearly all domestic prosecutions since World War II for “crimes against humanity” have concerned crimes associated with the war and the axis power. The Israeli Statute, used for the prosecution of *Eichmann*, lacks a nexus requirement, although the issue was irrelevant during his prosecution.¹⁰⁵ The *Barbie* and *Touvier* decisions skirted the nexus question, as both defendants’ actions were clearly linked to other crimes.¹⁰⁶ In 1992 France enacted a new Criminal

101. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, at para. 251 (July 15, 1999).

102. *Id.* at para. 249.

103. Prosecutor v. Krnjelac, Case No. IT-97-25-T, Judgment, at para. 53 (March 15, 2002). More demanding, the Appeals Chamber in *Kunurac* asserts that the existence of an armed conflict is “a purely jurisdictional prerequisite which is satisfied by proof that there was an armed conflict and that objectively the acts of the accused are linked geographically as well as temporally with the armed conflict.” Thus, this requirement amounts to an objective contextual element which requires the Prosecutor to prove the existence of an armed conflict “at the relevant time and place” beyond a reasonable doubt. See Prosecutor v. Kunarac et al., Case No. IT-96-23-A, Judgment, at para. 85 (June 12, 2002); Prosecutor v. Simic et al., Case No. IT-95-9-T, Judgment, at para. 38, (October 17, 2003); Prosecutor v. Stakic, Case No. IT-97-24-T, Judgment, at para. 618 (July 31, 2003).

104. See Statute of the International Court of Justice, June 26, 1945, art. 38(1)(b)-(c), 59 Stat. 1055, 1060.

105. Attorney General of Israel v. Eichmann, 36 I.L.R. 5 (Dist. Ct. of Jerusalem, 1961), 36 I.L.R. 277 (S. Ct. of Israel, 1962).

106. Fédération Nationale des Déportés et Internes Résistants et Patriotes v. Barbie, 78 I.L.R. 125, (Ct. of Cassation Crim. Chamber 1988); Touvier, 100 I.L.R. 338, 362 (Ct. App. of Paris & Cassation Crim. Chamber 1992). For further details on these cases and the French prosecution of war criminals in general, see Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From*

Code of Crimes Against Humanity of which Article 212-1 lacks the nexus requirement.¹⁰⁷ In *Regina v. Finta*, neither the Ontario Court of High Justice nor the Supreme Court addressed the nexus requirement.¹⁰⁸

3. *The Rome Conference*

There were different views as to whether it was necessary to include a nexus to an armed conflict, which was not included in the ICTR Statute. One perspective emphasized that three of the major precedents (the Nuremberg and Tokyo Charters and the ICTY Statute) required a *nexus* to armed conflict, and the deviation of the ICTR Statute should not be considered sufficient to change international law.¹⁰⁹ The Report of the Preparatory Committee on the Establishment of an international criminal court (1996) reveals that several views were expressed that “crimes against humanity” could occur in time of armed conflict or in time of peace. The Report also stated that the armed conflict *nexus* that appeared in the Nuremberg Charter was no longer required under existing law, with attention being drawn to Article I of the Genocide Convention, CCL No. 10, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, the ICTR Statute, the ICTY Appeals Chamber decision in the *Tadic*, and the 1996 Draft Code. The view was also expressed that although “crimes against humanity” often occur in situations involving armed conflict, these crimes could also occur in time of peace or in situations that were ambiguous.¹¹⁰

The most important consideration preoccupying delegates’ concerns was that to include a *nexus* requirement would arguably render Article 7 of the ICC Statute redundant and ineffective. In other words, if a *nexus* was required, then almost every act falling within Article 7 would already be subsumed under Article 8 (war crimes), and it would always

Touvier to Barbie and Back Again, 32 COLUM. J. TRANSNAT’L L. 289 (1994).

107. Quoted in INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS, 1062 (Jordan J. Paust et al. eds., 1996).

108. *Regina [R.] v. Finta*, (1994)1 S.C.R. 701 (Can.).

109. Darryl Robison, *Crimes Against Humanity: Reflections on State Sovereignty, Legal Precision and the Dictates of the Public Conscience*, in ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 144-49 (Flavia Lattanzi & William A. Schabas eds., 1999).

110. *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 51st Sess., Supp. No. 22, at 22, U.N. Doc. A/51/22 (1996), reprinted in M. CHERIF BASSIOUNI, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 399 (1998).

be preferable to prove the offence under Article 8, since plan, policy, and scale as defined in the *chapeau* of Article 8 are not ingredient elements for war crimes.¹¹¹ As evidenced from the *chapeau* of Article 7 of the ICC, States' delegates finally decided not to include the *nexus* requirement.¹¹² This will make the ICC much more effective in responding to mass atrocities.¹¹³

B. Discriminatory Intent

1. From Nuremberg to Rwanda

Unlike Article 3 of the ICTR Statute, Article 5 of the ICTY does not contain an express requirement that crimes against humanity be committed "on national, political, ethnic, racial or religious grounds." This requirement of discrimination was not contained in the Nuremberg Charter, which clearly recognized two categories of "crimes against humanity": those related to inhumane acts such as murder, extermination, enslavement and deportation; and persecution on political, racial or religious grounds. Nor can support for this position be found in CCL No. 10. Likewise, the Tokyo Charter does not contain this requirement.¹¹⁴

The analysis of the Nuremberg Charter and Judgment prepared by the United Nations shortly after the Trial of the Major War Criminals stated:

It might perhaps be argued that the phrase "on political, racial or religious grounds" refers not only to persecutions but also to the first type of crimes against humanity. The British Chief Prosecutor possibly held that opinion as he spoke of "murder, extermination, enslavement, persecution on political racial or religious ground. This interpretation, however, seems hardly to be warranted by the English wording and still less by the French text . . . Moreover, in its statement with regard to von Schirach's guilt the Court designated the crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts" and "persecutions on political, racial or religious grounds."¹¹⁵

The above citation clearly shows that the requisite discriminatory grounds were limited to the second category of "crimes against humanity," namely the persecution type.

Turning to the ICTR Statute, it has been observed that the inclusion of the words "on national, political, ethnic, racial or religious grounds" in

111. William J. Fenrick et al., *Article 8: War Crimes*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL LAW: OBSERVERS' NOTES, ARTICLE BY ARTICLE 173, 181 (Otto Triffterer ed., 1999).

112. *Rome Statute of International Criminal Court*, *supra* note 8, at art. 7(1).

113. Robinson, *supra* note 109, at 148.

114. Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, at para. 650 (May 7, 1997).

115. Memorandum of the Secretary-General on the Charter and Judgement of the Nuremberg Tribunal, *quoted in Tadic*, Case No. IT-94-1-T, at para. 650.

the *chapeau* of Article 3 raises two important questions of interpretation. Firstly, is it the “attack” (understood as the widespread or systematic context of the act in question) or the individual act itself that must be committed on discriminatory grounds? Secondly, does the requirement incorporate some additional mental element by requiring discriminatory intent on the part of an accused?¹¹⁶ Addressing this point, the Rwanda Tribunal has proposed the following interpretation of the provision:

Firstly, in a scenario where the perpetrator’s intention is to exterminate the Tutsi group and, in furtherance of this intent, he kills a Belgium Priest who is protecting the Tutsi, the Trial Chamber opines that such an act would be based on discrimination against the Tutsi group . . . [secondly,] where the perpetrator attacks people on the grounds and in the belief that they are members of a group but, in fact, they are not, for example, where the perpetrator believes that a group of Tutsi are supporters of the *Rwandese Patriotic Front* RPF and therefore accomplices. In the scenario, the Trial Chambers opines that the Prosecution must show that the perpetrator’s belief was objectively reasonable-based upon real facts rather than being mere speculation or perverted deduction.”¹¹⁷

However, the above observations do not purport to outline the requirements for discrimination, but they do indicate two important factors. Firstly, it is the element of discrimination on the basis of ethnicity (in this case) that is required, rather than the specific ethnicity of the victim. Secondly, it is indeed possible that a distinct “widespread or systematic attack directed against a civilian population” could include a discriminatory element that is premised on a mistake (such as the belief that a particular group of Tutsi civilians is supporting the *Rwandese Patriotic Front*). Thus, in the context of such an attack, however, it is not necessary to inquire into the subjective state of mind of the accused.¹¹⁸

To read the widespread and systematic attack against a civilian population on discriminatory grounds as necessarily requiring that an enumerated crime be committed for discriminatory reasons would be to

116. Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 DUKE J. COMP. & INT’L L. 307, 326 (2000). It should be noted that the French Court of Cassation in the *Barbie* case ruled that the perpetrator of crimes against humanity must be motivated by discriminatory intent based on political, racial, or religious grounds. Likewise, the Supreme Court of Canada required a discriminatory motive, even though it was not explicitly included in Section 7(3.76) of the Canadian Criminal Code. See Criminal Code, R.S.C., ch. 46, sec 7(3.76) (1985), *repealed by Crimes Against Humanity and War Crimes Act*, ch. 24, at para 42, 2000 S.C. 26 (Can.).

117. Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgement, at para. 131–32 (May 21, 1999).

118. Chesterman, *supra* note 116, at 327–28.

transform this merely jurisdictional limitation under Article 3 of the ICTR Statute into a substantive element of the *mens rea* of crimes against humanity. In *Rutaganda*, the Prosecution asserted that any other interpretation would mean that the perpetrators of crimes against humanity could evade conviction by invoking other motives in defence of their conduct. It argues that this would create significant lacunae by failing to protect victims who are killed on non-discriminatory grounds by perpetrators who, nonetheless, fully realise that their acts are connected to, or part of, a widespread or systematic attack against a civilian population on discriminatory grounds.¹¹⁹

It is to be noted that the Prosecution has raised the same ground of Appeal in *Akayesu*.¹²⁰ The issue before the *Akayesu* Appeals Chamber was to determine whether the inclusion of this discriminatory grounds within the *chapeau* of Article 3 of the ICTR Statute, (a) requires the perpetrator to have knowledge that his act(s) is part of or is in furtherance of a widespread or systematic attack against a civilian population on discriminatory grounds, or (b) whether this ingredient (the discriminatory grounds) requires that the perpetrator of each crime enumerated in Article 3 of the Rwandan Statute must have the discriminatory intent to commit the said crime against his victim in particular, on one of the enumerated grounds.¹²¹ Considering this ground of Appeal by the Prosecution, the Appeals Chamber finds that:

The meaning to be collected from Article 3 of the Statute is that even if the accused did not have a discriminatory intent when he committed the act charged against particular victim, he nevertheless knew that his act could further a discriminatory attack against a civilian population; the attack could even be perpetrated by other persons and the accused could even object it. As a result, where it is shown that the accused had knowledge of such objective nexus, the Prosecutor is under no obligation to go forward with a showing that the crime charged was committed against a particular victim with a discriminatory intent.¹²²

Finally, the Appeals Chamber concludes that Article 3 of the ICTR Statute does not require that all crimes against humanity enumerated therein be committed with a discriminatory intent.¹²³

Even though the ICTY Statute does not require a discriminatory intent for all “crimes against humanity,” this discriminatory element was reluctantly adopted in the *Tadic* judgment.¹²⁴ The only reason why the

119. Prosecution’s Appeal Brief, *Rutaganda*, filed Dec. 11, 2000, para. 2.15.

120. Prosecution Appeal Brief, *Akayesu*, Case No. IT-96-4-A, filed July 10, 2000.

121. Prosecutor v. *Akayesu*, Case No. IT-96-4-A, Judgment, at para. 459 (June 1, 2001).

122. *Id.* at para. 465.

123. *Id.* at para. 469.

124. *Tadic*, Case No. IT-94-1-T, at para. 652.

Trial Chamber included this discriminatory element was because it was incorporated in the Report of the Secretary-General in paragraph 48, and because "several Security Council members stated that they interpreted Article 5 as referring to acts taken on a discriminatory basis".¹²⁵ Additionally, this requirement is not contained in the 1996 ILC Draft Code.¹²⁶

The adoption of discriminatory element in the *Tadic* Judgment was criticised by the Prosecution. The Prosecution argued that the ICTY should rely on statements of Security Council members as tools for interpretation only where there is an "obvious lacuna" in the text of the Statute.¹²⁷ The Prosecution also demonstrated that the Trial Chamber destabilized the structure of the Statute. Firstly, this interpretation relegated the persecution clause to a residual provision that would apply to "a small class of cases not covers by other provisions of Article 5."¹²⁸ Secondly, it rendered Article 5(i), the "other inhuman acts" clause, redundant. The Prosecution further argued, that the persecution clause should instead be read to provide a basis for additional criminal liability for inhuman acts when committed on discriminatory intent. In other words, if a defendant is charged with an intentional killing motivated by racial animus, she or he should be held responsible under Article 5(a) "murder" as well as under Article 5(h) "persecution."¹²⁹

Moreover, such a subjective element is open to criticism by those whose criminal justice systems do not grant any relevance to subjective motives in the determination of individual criminal responsibility.¹³⁰ Finally, the Appeals Chamber in *Tadic* found that the Trial Chamber erred in finding that all crimes against humanity require a discriminatory intent. It held that "[S]uch an intent is an indispensable legal ingredient of the offence only with regard to those crimes for which this expressly required, that is, for Article 5(h), concerning various types of persecution."¹³¹

125. *Id.*

126. See *Draft Code of Crimes Against the Peace and Security of Mankind*, *supra* note 55.

127. Prosecutor v. *Tadic*, Case No. IT-94-1-T, Brief of Argument of the Prosecution (Cross-Appellant), at para 68 (January 12, 1998), *quoted in* Van Schaak, *supra* note 13, at 839.

128. Van Schaak, *supra* note 13, at 839. See *Tadic*, Case No. IT-94-1-T, at para. 702.

129. Van Schaak, *supra* note 13, at 839.

130. David Donat-Cattin, *Crimes Against Humanity*, in *THE INTERNATIONAL CRIMINAL COURT: COMMENTS ON THE DRAFT STATUTE* 49, 56 (Flavia Lattanzi ed., 1998) (it is to be noted that motives may be taken into consideration by the judge once individual responsibility has been established at the time of penalty determination).

131. Prosecutor v. *Tadic*, Case No. IT-94-1-A, Judgment, at para. 305 (July 15, 1999).

2. *No Discriminatory Intent Under Article 7 of the ICC Statute*

A few delegations, notably France, suggested that crimes against humanity required an element of discrimination (for example, that they must be committed on national, political, ethnic, racial or religious grounds) as contained in the ICTR Statute. However, the overwhelming majority of delegations were opposed to this requirement. The opponents expressed their view that the inclusion of such a criterion would complicate the task of the Prosecution by significantly increasing its burden of proof in requiring evidence of such a subjective element, and that crimes against humanity could be committed against other groups including intellectuals, and social, cultural or political groups, since the definition of genocide might not be expanded to cover them. In the view of the majority, customary international law required a discriminatory element only for the inhuman act of “persecution,” and not for other “crimes against humanity.” The view of the majority not to include a discriminatory ground of all crimes against humanity meets the criteria elaborated within international law and practice.¹³²

C. *“Attack Directed Against any Civilian Population”*

It is notable that the Nuremberg Charter as well as the three Statutes under consideration contain the words “against any civilian population” in the provision of “crimes against humanity.”¹³³ The expression “directed against” is an expression which specifies that in the context of a crime against humanity the civilian population is the primary object of the attack.¹³⁴ That is to say that, the phrase ‘directed against’ requires “that the civilian population which is subjected to the attack must be the primary rather than an incidental target of the attack.”¹³⁵ In order to determine whether the attack may be said to have been so directed, the Appeals Chamber of the Yugoslav Tribunal set forth the following decisive factors: the means and method used in the course of the attack; the status of the victims and their numbers; the discriminatory nature of the attack; the nature of the crime committed in its course; and the

132. *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 51st Sess., Supp. No. 22, at 22, U.N. Doc. A/51/22 (1996).

133. See Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(c), 58 Stat. 1544, 82 U.N.T.S. 280, Article 5 of the ICTY, Article 3 of the ICTR, and *Rome Statute of International Criminal Court*, U.N. GAOR, 53rd Sess., art. 7, U.N. Doc. A/CONF.183/9 (1998) [hereinafter ICC Statute].

134. *Prosecutor v. Kunarac*, Case No. IT-96-23/1-A, Judgment, at para. 85 (June 12, 2002) (footnotes omitted).

135. *Id.* at para. 92.

resistance of the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.¹³⁶

The requirement in the Nuremberg Charter and the three Statutes that enumerated acts be “directed against any civilian population” contains several elements which will be discussed below.

1. *The Clarification of the Adjective “Any”*

Before examining the meaning of the word “civilian,” it seems preferable to refer to *Tadic*, where the Trial Chamber illustrates the meaning of the adjective “any” by stating “the inclusion of the word ‘any’ 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.”¹³⁷ The term “any civilian population” must be interpreted broadly. It seeks to place emphasis more on the collective aspect of the crime than on the status of the victims.¹³⁸ The words of the Trial Chamber are self-explanatory; however the remaining aspects, namely the definition of a “civilian” and the implications of the term “population,” require further examination.

2. *The Meaning of “Civilian”*

The UNWCC stated in reference to Article 6(c) of the Nuremberg Charter that “the words ‘civilian population’ appear to indicate that ‘crimes against humanity’ are restricted to inhumane acts committed against civilians as opposed to members of the armed forces”¹³⁹ On the contrary, Schwelb observed in his analysis of the text of Article 6(c) of the Nuremberg Charter that members of the armed forces may be

136. *Id.* at para. 91.

137. Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, at para. 634 (May 7, 1997). See also Prosecutor v. Jelusic, Case No. IT-95-10-T, Judgment, at para. 54 (December 14, 1999). It should be pointed out that Schwelb in his analysis of the text of Article 6(c) of the Charter wrote that “From the word ‘against any civilian population’ it follows that a crime against humanity can be committed both against the civilian population of territory which is under belligerent occupation and against the civilian population of other territories, irrespective of whether they are under some other type of occupation or whether they are under no occupation at all. The civilian population protected by the provision may therefore also include the civilian population of a country which was occupied without resort to war. . . .” Schwelb, *supra* note 18, at 188.

138. *Jelusic*, Case No. IT-95-10-T at para. 54.

139. U.N. WAR CRIMES COMMISSION, *supra* note 16, at 193.

considered as potential victims of crimes against humanity of persecution.¹⁴⁰ Focusing on the word “civilian,” the Commission of Experts Established Pursuant to Security Council Resolution 780 noted that while the term “any civilian population” principally applies to non-combatants, it does not necessarily exclude those “who at one particular point in time did bear arms.”¹⁴¹ Thus, for instance, crimes committed against those who use arms to defend themselves or their community, such as the “sole policeman or local defence guard,” may still come within the definition of “crimes against humanity.”¹⁴²

The above-mentioned principle, as expressed in the statement of the Commission of Experts, was confirmed, *inter alia*, in the *Vukovar* decision of the ICTY.¹⁴³ In that case the Trial Chamber held that “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.”¹⁴⁴ This exact issue was examined in the *Barbie* case.¹⁴⁵ 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.”¹⁴⁶

It could be argued that a civilian population may lose its character as *civilian* if there are certain non-civilians present. The case law of the

140. Schwelb, *supra* note 18, at 190–91. In 1946, Schwelb wrote: “The Charter speaks of ‘any civilian population.’ This appears to indicate that the term ‘crime against humanity’ is restricted to inhumane acts committed against civilian populations as distinct from members of the armed forces. This restriction applies at least to those acts constituting crimes against humanity which are enumerated in the passage of Article 6(c) preceding the words ‘against any civilian population’ i.e. to murder, extermination, enslavement, deportation, and other inhumane acts. In interpreting the text, doubts may arise as to whether this restriction to the civilian population applies also to such acts constituting crimes against humanity as do not fall under any of these enumerated categories of the murder type. On the face of it, it would appear that ‘persecutions on political, racial, or religious grounds’ are such acts. It could therefore be maintained that persecutions, as distinct from crimes of the murder type, may be committed by acts directed against members of the armed forces.”

141. *Final Report of the Commission of Experts Established Pursuant to the Security Council Resolution 780*, U.N. SCOR, 49th Sess., Annex, at 21, U.N. Doc. S/1994/674 (1994).

142. *Id.* at 22.

143. *Vukovar Hospital Decision*, *supra* note 72, at para. 29.

144. *Id.*

145. *Fédération Nationale des Déportés et Internes Résistants et Patriotes. v. Barbie*, *quoted in Tadic*, Case No. IT-94-1-T, at para. 641.

146. *Id.* “In this case the *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 during the Second World War, but only for ‘persecutions against innocent Jews,’ and held that prosecution was barred by the statute of limitations for crimes committed by Barbie against combatants who were members of the Resistance or whom Barbie thought were members of the Resistance, even if they were Jewish, because these acts could only constitute war crimes and not crimes against humanity.”

Rwanda Tribunal is more illustrative regarding this issue. In *Musema*,¹⁴⁷ as well as *Akayesu*¹⁴⁸ and *Rutaganda*,¹⁴⁹ the ICTR held that “[t]he fact that there are certain individuals among the civilian population who are not civilians does not deprive the population of its civilian character.” That is to say, the targeted population must be predominantly civilian in nature but the presence of certain non-civilians in their midst does not change the character of that population.¹⁵⁰ In addition, in *Kunarac*, the Trial Chamber stated that “a person shall be considered to be a civilian for as long as there is a doubt as to his or her status”.¹⁵¹ The Judgment continues:

As a group, the civilian population shall never be attacked as such. Additionally, customary international law obliges parties to the conflict to distinguish at all times between the civilian population and combatants, and obliges them not to attack a military objective if the attack is likely to cause civilian casualties or damage which would be excessive in relation to the military advantage participated.¹⁵²

The *Kunarac* Trial Judgment also provides that the term “any” civilian population includes a state’s attack on that state’s population. It is “therefore unnecessary to demonstrate that the victims are linked to any particular side of the conflict.”¹⁵³ Most notably, in *Rutaganda*, the Trial Chamber considers as an ingredient legal element of crimes against humanity that the *actus reus* must be committed against members of the civilian population.¹⁵⁴ This finding was appealed by the Prosecution on the ground that the Trial Chamber committed an error of law of general

147. Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment, at para. 207 (Jan. 27, 2000).

148. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, at paras. 582, 610 (Sept. 2, 1998).

149. Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment, at para. 72 (Dec. 6, 1999).

150. Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, at para. 128 (May 21, 1999). The *Blaskic* Trial Chamber further held that it is the “specific situation of the victim at the moment the crimes were committed, rather than his status, that must be taken into account in determining his standing as a civilian” and therefore “soldiers within an intentionally targeted civilian population does not alter the civilian nature of the population,” Prosecutor v. Blaskic, Case No. IT-95-14-T Judgment, at para. 214 (Mar. 3, 2000); See also Prosecutor v. Bagilishema, Case No. ICTR-95-01A Judgment, at para. 79 (June 7, 2001).

151. Prosecutor v. Kunarac, Case Nos. IT-96-23-T, IT-96-23/1-T, Judgment, at para. 426 (Feb. 22, 2001).

152. *Id.*

153. *Id.* at para. 423.

154. *Rutaganda*, Case No. ICTR-96-4-T, at paras. 66, 72.

significance to the Tribunal's jurisprudence in finding that the *actus reus* of a crime against humanity must be committed against a civilian population.¹⁵⁵

As evidenced by the case law of the ICTY and the ICTR, it is beyond any shadow of doubt that both Tribunals adduced clarifications as regards the notion of "civilian population" on the basis of Common Article 3 of the 1949 Geneva Conventions, while assuring that reference to the latter provision was made only by way of analogy.¹⁵⁶ Moreover, it is to be noted that in several decisions the ICTY and ICTR justified their reference to Common Article 3 of the Geneva Conventions by pointing to the customary status of the notion of civilian population contained in these instruments.¹⁵⁷

3. The Meaning of "Population"

The Nuremberg Charter and the three Statutes under consideration require that the prohibited acts be directed against any civilian "population."¹⁵⁸ The term "population" as it is employed at the Nuremberg Charter "indicates that a larger body of victims is visualized and that single or isolated acts committed against individuals are outside the scope."¹⁵⁹ Likewise, in *Tadic*, the Trial Chamber interpreted the term "population" by stating that:

[T]he requirement in Article 5 of the Statute that the prohibited acts must be directed against a civilian "population" does not mean that the entire population of a given State or territory must be victimized by these acts in order for the acts to constitute crimes against humanity. Instead the "population" element is intended to imply crimes of a collective nature and thus exclude single or isolated acts which, although possibly constituting war crimes or crimes against national penal legislation, do not rise to the level of crimes against humanity.¹⁶⁰

Surprisingly, the Trial Chamber appeared to contradict itself when it later concluded that a single act could in fact constitute a "crime against humanity": "Clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population

155. *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, Prosecution Appeal Brief, filed Dec. 11, 2000, at 40-42.

156. Flavia Lattanzi, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals*, in *INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW* 473, 488 (Horst Fischer, et al. eds., 2001).

157. *Id.* See the broad definition given to civilians for the purpose of the Geneva Conventions in *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, at paras. 244-77 (Nov. 16, 1998).

158. See the Nuremberg Charter art. 6 (c); the ICTY Statute, art. 5; the ICTR Statute art. 3; and the ICC Statute, art. 7(1).

159. Schwelb, *supra* note 18, at 191.

160. *Tadic*, Case No. IT-94-1-T, at para. 644

entails individual criminal responsibility, and an individual need not commit numerous offences to be held liable.”¹⁶¹

It has been observed that the term “population” as employed in the ICTR Statute as a part of the phrase “attack against any civilian population on national, political, ethnic, racial or religious grounds,” may be interpreted as requiring the targeted population to represent a specific group.¹⁶² This interpretation is contrary to the humanitarian law’s definition, where the “civilian population comprises all persons who are civilians.”¹⁶³

In light of the above, the “population” element is intended to imply crimes of collective nature and thus exclude single or isolated acts. “Thus the emphasis is not on the individual victim but rather on the collective, the individual being victimized not because of his individual attributes but rather because of his membership of a targeted civilian population.”¹⁶⁴ Recently, in *Kunarac*, the Appeals Chamber emphasized:

The use of the word “population” does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack. . . . It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian “population” rather than against a limited and randomly selected number of individuals.¹⁶⁵

4. The Meaning of “Attack”

The term “attack” in the context of a “crime against humanity” carries a slightly different meaning than under the laws of war.¹⁶⁶ It can be described as a course of conduct involving the commission of acts of violence.¹⁶⁷ The term was precisely defined in the judgment rendered by

161. *Id.* at para. 649.

162. Chesterman, *supra* note 116, at 325.

163. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to Protection of Victims of International Armed Conflicts, Dec. 7, 1978, art. 50, 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 448 (Adam Roberts & Richard Guelff eds., 3d ed., 2000).

164. *Tadic*, Case No. IT-94-1-T, at para. 644.

165. Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Judgment, para. 90 (June 12, 2002) (footnotes omitted).

166. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Dec. 7, 1978, art. 49, at para. 1, 1125 U.N.T.S. 3 (defining “attacks” as “acts of violence against the adversary, whether in offence or in defence.”)

167. *Tadic*, Case No. IT-94-1-T at para. 644. The Trial Chamber in that case stated that: “the inclusion in Article 5, that the acts be ‘directed against any civilian population,’ ensures that what is to be alleged will not be one particular act but instead, a course of conduct.”

Trial Chamber II in *Kunarac*,¹⁶⁸ where the Chamber wrote:

the term ‘attack’ in the context of a crime against humanity is not limited to the conduct of hostilities. It may also include situations of mistreatment of persons taking no active part in hostilities, such as someone in detention. However, both terms are based on a similar assumption, namely that war should be a matter between armed forces or armed groups and that the civilian population cannot be a legitimate target.¹⁶⁹

Unlike the ICTY Statute, an “attack” under the terms of the ICTR bears no necessary relation to an armed conflict. Instead, it refers to the context of the acts, which are enumerated in Article 3, paragraphs (a) through (i) of the ICTR Statute. In *Akayesu*, the ICTR Trial Chamber I held that an attack may be defined as an unlawful act of the kind enumerated in the ICTR Statute, like murder, extermination, etc., noting that an attack may be non-violent in nature.¹⁷⁰ Likewise, in *Kayishema*,¹⁷¹ Trial Chamber II defined the term attack as an event that encompasses the enumerated crimes.

Most notably, the ICTY noted that the existence of an attack upon one side’s civilian population would not disprove or cancel out that side’s attack upon the other’s civilian population:

When establishing whether there was an attack upon a particular civilian population, it is not relevant that the other side also committed atrocities against its opponent’s civilian population The existence of an attack from one side against the other side’s civilian population would neither justify the attack by that other side against the civilian population of its opponent nor displace the conclusion that the other side’s forces were in fact targeting a civilian population as such Each attack against the other’s civilian population would be equally illegitimate and crimes committed as part of this attack could, if all other conditions being met, amount to crimes against humanity.¹⁷²

A major source of concern is that the term “attack” as defined in subparagraph 2(a) of Article 7 of the ICC Statute could bind the Court to exercise jurisdiction in cases of crimes in which the conduct is a single act and there is not “the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance

168. *Kunarac*, Case Nos. IT-96-23-T, IT-96-23/1-T, at paras. 415–16.

169. *Id.* at para. 416.

170. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, at para. 581 (Sept. 2, 1999). The Trial Chamber in that case asserts: “[t]he concept of ‘attack’ may be defined as an unlawful act of the kind enumerated in Article 3(a) to (i) . . . of the Statute, like murder extermination, enslavement etc. An attack may also be non violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.”

171. *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgment, at para. 122 (May 21, 1999).

172. *Kunarac*, Case No. IT-96-23/1-A, at para. 87 (footnotes omitted).

of a State or organizational policy to commit such attack,” as Article 7(2)(a) reads. On the other hand, there is no doubt that a single act might intentionally cause great suffering and be “of concern to the international community as whole.”¹⁷³ Presumably, one can argue that if only one of the Twin Towers in the United States of America were to have been attacked, this act would not have fulfilled the provision of Article 7(2)(a) as there was no multiple commission of acts. Such a single attack in any case would have been a crime against humanity and it deserves to be dealt with by an international criminal jurisdiction even though it does not satisfy the above mentioned conditions under Article 7 of the Rome Statute.

The lack of such provision of the *actus reus* under Part 3 of the ICC Statute on the one hand, and the inclusion of the provision of *nullum crimen sine lege* on the other has preoccupied scholarly concerns, since some omission resulting in “crimes against humanity” may not fulfill the requirement of being “part of a widespread or systematic attack.”¹⁷⁴ In this respect the requirement in Article 22(2) of the ICC Statute that “the definition of a crime shall be strictly construed and shall not be extended by analogy” may be problematic, since acts of murder or extermination, could be committed through omissions (the so called “commission through omission”). Accordingly, the Court will find that it has no jurisdiction concerning such acts.

In order to illustrate the above issue, a scholar exemplifies the “[c]ase of a village being isolated by an organized force that does not allow any communication with the external world. Casualties from famine generated by such criminal conduct may amount to hundreds or thousands.”¹⁷⁵ He added “the omission to save the lives of the population may run the risk not to be qualified as an attack, or part of an attack, especially considering the fact that “crimes against humanity” can be committed in peace time, and not only in the course of an armed conflict.” Finally, he recommends the deletion of any reference to the term “attack” in the general part of

173. See U.N. Preparatory Comm’n for the Int’l Criminal Court, *supra* note 10, at 9.

174. It should be noted that the *travaux préparatoires* of the ICC before the Diplomatic Conference defines, in para. 1 of Article 22(G), entitled “Actus reus (act and/or omission)” the objective element of crimes as follows: “Conduct for which a person may be criminally responsible and liable for punishment as a crime can constitute either an act or an omission, or a combination thereof.” See *Decisions Taken by the Preparatory Committee at its Session Held From 11 to 21 February 1997*, at 26–27, U.N. Doc. A/AC.249/1997/L.5 (1997).

175. Donat-Cattin, *supra* note 125, at 54–55.

the definition of “crimes against humanity” and includes the phrase “acts when committed as a part of a widespread or systematic commission of such acts against any population.”¹⁷⁶ Unfortunately, the finalized draft text of the Elements of Crimes does not provide any assistance in this matter.¹⁷⁷

In principal, the acts of the accused must constitute part of the attack. It was held that the nexus between the acts of the accused and the attack requires the existence of two elements: (i) the commission of an act which, by its nature or consequences, is objectively part of the attack; coupled with (ii) knowledge on the part of the accused that there is an attack on the civilian population and that his act is part thereof.¹⁷⁸ But this does not mean that the acts of the accused must be committed in the midst of that attack. A crime which is committed before or after the main attack against the civilian population, or away from it, could still, if sufficiently connected, be part of that attack. On the contrary, a crime would be regarded as an “isolated act” when it is so far removed from the attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of the attack.¹⁷⁹

Generally speaking, the concept of “attack” may be defined as an unlawful act of the kind enumerated in Articles 5(a) to (i) and 3(a) to (i) of the ICTY and ICTR Statutes respectively, like murder, extermination, enslavement, etc. However, “[a]n attack may also be non-violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973. . . .”¹⁸⁰ Likewise, “exerting pressure on the population to act in a particular manner may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.”¹⁸¹

176. *Id.*

177. It is to be noted that the original proposal for Article 7(2)(a) referred to a “policy to commit such acts”, but this was changed to “policy to commit such attack” in order to accommodate a concern raised that the former formulation might be restrictively interpreted as requiring a policy to commit the specific act perpetrated by the accused. See Women’s Caucus for Gender Justice, *Priority Concerns about Crimes Against Humanity*, 1 July 1998, *quoted in* Robinson, *supra* note 109, at 162. As stated by Robinson: “The concern was that the formulation might be interpreted as requiring, in a prosecution of rape as a crime against humanity, proof of a policy to commit rape specifically. The arguably circular reference to a “policy to commit such attack” was therefore proposed in order to clarify that what is required is proof of a policy to commit multiple inhuman acts against a civilian population; sexual assaults occurring as part of that attack (possibly entailing, for example, murder and persecution) would qualify as crime against humanity, even if the ringleaders had not specifically contemplated sexual assaults when they unleashed their campaign.”

178. *Kunarac*, Case No. IT-96-23/1-A, at para. 99 (footnotes omitted).

179. *Id.* at para. 100.

180. *Akayesu*, Case No. ICTR-96-4-T, at para. 581; *Prosecutor v. Rutaganda*, Case No. ICTR-96-4-T, Judgement, at para. 70 (Dec. 6, 1999).

181. *Akayesu*, Case No. ICTR-96-4-T, at para. 581.

D. The Mass or Systematic Nature of the Acts
“Widespread or Systematic”

One of the distinguishing features of “crimes against humanity” is their pattern of occurrence.¹⁸² The “widespread or systematic” requirement is fundamental in distinguishing crimes against humanity from common crimes, which do not rise to the level of crimes under international law.¹⁸³ It is to be noted that “the requirement that the attack be ‘widespread’ or ‘systematic’ comes in the alternative.”¹⁸⁴ Once it is convinced that either requirement is met, the Trial Chamber is not obliged to consider whether the alternative qualifier is also satisfied.

1. The Term “Widespread”

The term “widespread” refers to “the number of victims,” whereas “systematic” refers to the existence of a policy or plan. The former “may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”¹⁸⁵ The commentary to the ILC Draft Code further explains this requirement by stating:

The second alternative requires that the inhumane acts be *committed on a large scale* meaning that the acts are directed against a multiplicity of victims The Nuremberg Tribunal further emphasized that the policy of terror was “certainly carried out on a vast scale” in its consideration of inhumane acts as possible crimes against humanity The term “large scale” in the present text . . . is sufficiently broad to cover various situation[s] involving multiplicity of victims, for example, as a result of the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.¹⁸⁶

The danger in interpreting the terms “widespread or systematic” as only descriptive of the manner in which the victimization occurs might

182. Recent authorities tend to support the view that the threshold test is disjunctive, not conjunctive. For further discussion on this issue, see *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, at paras. 645-48 (May 7, 1997); Robinson, *supra* note 109, at 152-55.

183. *Tadic*, Case No. IT-94-1-T, at paras. 646-48.

184. *Kunarac.*, Case No. IT-96-23/1-A, at para. 93 (footnotes omitted).

185. *Akayesu*, Case No. ICTR-96-4-T, at para. 580.

186. Draft Code of Crimes Against The Peace and Security of Mankind, in report of International Law Commission, commentary section, U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996), available at www.un.org/law/ilc/reports/1996/96repfra.htm; *Tadic*, Case No. IT-94-1-T, at para. 648.

transform domestic crimes into international crimes on the basis of the quantitative outcome of the harm and the manner in which it is performed without wars.¹⁸⁷ Conversely, the absence of a large number of victims might exclude such acts from falling under the category of “crimes against humanity.” However, it was held that “an individual committing a crime against a single victim or a limited number of victims might be recognised as guilty of a crime against humanity if his acts were part of the specific context identified above.”¹⁸⁸

The execution by Soviet authorities of Hungarian leader Imre Nagy in 1956 is an example of a crime against humanity lacking a large number of victims.¹⁸⁹ “In this case, it might be argued that such a planned, systematic act is not against a ‘population’ at all, but only against one person, and to class it as a ‘crime against humanity’ would risk collapsing such crimes into common crimes.”¹⁹⁰ Yet, to avoid any misunderstanding, a convincing interpretation would regard the target “against” whom the action is committed as more than the victim himself. In applying the above interpretation to the case of Imre Nagy, it would represent a “crime against humanity,” even though the murder itself was not a mass scale, because the killing of a political leader is systematic insofar as it is meant to intimidate the entire “civilian population” of his supporters.¹⁹¹

Yet, it must be emphasized that a single isolated act may constitute crime against humanity, as far as it is a part of a policy or plan. That was the decision of the Trial Chamber in *Tadic*:

Clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility, and an individual perpetrator need not commit numerous offences to be held liable. Although it is correct that isolated, random acts should not be included in the definition of crimes against humanity, that is the purpose of requiring that the acts be directed against civilian population and thus “[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.”¹⁹²

A further point that deserves particular mention is that, although the requisite scale of offensiveness, number of victims and multiplicity of acts could occur throughout a territory or region, the element of “widespread” does not depend on establishing any requisite geographic range. As evidenced by the case law of the ICTY convictions for “crimes against

187. BASSIOUNI, *supra* note 15, at 243–46.

188. Vukovar Hospital Decision, *supra* note 72, at para. 30.

189. RATNER & ABRAMS, *supra* note 1, at 59–60.

190. *Id.* at 60.

191. *Id.*

192. *Tadic*, Case No. IT-94-I-T, at para. 649. See also, Vukovar Hospital Decision, *supra* note 72, at para. 30.

humanity” have resulted from acts committed in one town.¹⁹³ Thus, a single large-scale act would suffice, or a series of smaller discrete acts that cumulatively reach the requisite scale and gravity.

In sum, “[t]he concept of ‘widespread’ may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”¹⁹⁴

2. The Term “Systematic”

Whereas the notion of “widespread” refers to a multiplicity of victims, the term “systematic” refers to a pattern of conduct or methodical plan. Although the term is not susceptible to a precise definition, it was explained in the commentary to the ILC Draft Code as follows:

The first alternative requires that the inhumane acts be committed in a systematic manner meaning pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhuman acts . . . the Nuremberg Tribunal emphasized that the inhumane acts were committed as a part of the *policy of terror* and were “in many cases . . . organized [and] systematic” in considering whether such acts constituted crime[s] against humanity.¹⁹⁵

The term was further explained in *Akayesu* as “thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources.”¹⁹⁶ Yet, “the term “systematic” poses a very stringent test, requiring not only the existence of a policy but also highly organized and orchestrated implementation of the policy in accordance with a developed plan.”¹⁹⁷ Prof. Bassiouni, in his major text on the subject, notes that the requirement of “widespread or systematic” as included in the ICTR Statute emphasizes the policy element. He adds, “it is not the single killing that is targeted, but mass killings, unless the single killing can be linked to a “systematic” policy or to “widespread”

193. Prosecutor v. Jelusic, Case No. IT-95-10-T, Judgment, at para. 57 (Dec. 14, 1999). In this case the Trial Chamber convicted the accused of crimes against humanity that were committed in one town, Brcko.

194. *Akayesu*, Case No. ICTR-96-4-T, at para. 580; Prosecutor v Rutaganda, Case No. ICTR-96-3-T, Judgment, at para. 69 (Dec. 6, 1999).

195. Draft Code of Crimes Against The Peace and Security of Mankind, in report of International Law Commission, commentary section, U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996), available at www.un.org/law/ilc/reports/1996/96repfra.htm; *Tadic*, Case No. IT-94-1-T, at para. 648.

196. *Tadic*, Case No. IT-94-1-T, at para. 648.

197. Robinson, *supra* note 109, at 161–62.

attacks.”¹⁹⁸ He concludes “the word, “systematic” reflects more of an existent policy whose proof is more likely to be of a more specific nature than that of “widespread” attacks, which can be proven objectively and is more general in nature.”¹⁹⁹ Prof. Meron has argued neither widespread nor systematic are required under Article 5 of the ICTR. He wrote that the scope of the Rwanda Statute is clouded by the requirement that crimes against humanity are required to be committed as “widespread or systematic.” He adds with concern “One may ask whether . . . the Security Council has not inadvertently made the burden of proving crimes against humanity more difficult to meet.”²⁰⁰

The notion of “systematicity” raises the question of whether it is necessary to prove that a policy or plan is behind an attack under “crimes against humanity” or whether the proof of any plan or policy is but one manner to demonstrate the systematic character of the attack. This key question should better be resolved through the case law of the international and national tribunals as discussed below.

E. The Unresolved Question of a General Policy Requirement

Although, Article 6(c) of the Nuremberg Charter does not explicitly refer to a “policy,” the Nuremberg judgment provided a short descriptive passage which emphasizes the “policy of terror” and “policy of persecution, repression, and murder of civilians.”²⁰¹ In the intervening decades when the ILC suspended consideration of the Draft Code, national courts were left to interpret the essential elements of “crimes against humanity.”²⁰² Consequently, the policy element of “crimes against humanity” was affirmed by the decisions of national courts. For instance, the French *Cour de Cassation* in the *Barbie* and *Touvier* cases required that “the criminal act be affiliated with the name of a state practicing a policy of ideological hegemony.”²⁰³ The Netherlands *Hoge Raad* in the *Menten* case held that “the concept of crimes against humanity also requires . . . that the crimes in question form part of a system based on terror or constitute a link in consciously pursued policy directed against particular

198. BASSIOUNI, *supra* note 15, at 196–99.

199. *Id.*

200. Theodor Meron, *International Criminalisation of Internal Atrocities*, 89 AM. J. INT’L L. 554, 557 (1995).

201. UNWCC, *supra* note 30, at 572–73.

202. See generally *Report of the International Law Commission on the Work of its Forty-Third Session*, U.N. GAOR, 46th Sess., Supp. No. 10, at 206–08; see generally U.N. Doc. A/46/10 (1991).

203. *Barbie*, French Court of Cassation (Criminal Chamber), June 3, 1988, *reprinted in* 100 I.L.R. 331, 336 (1995); *Touvier* French Court of Appeal of Paris (First Chamber of Accusation), April 13, 1992, *reprinted in* 100 I.L.R. 338, 350–51 (1995); Court of Cassation (Criminal Chamber), 27 Nov. 1992, 100 ILR 338 at 351).

groups of peoples.”²⁰⁴ Likewise, the Supreme Court of Canada in the *Finta* case held that “what distinguishes a crime against humanity from any other criminal offence under the Canadian *Criminal Code* is that the cruel and terrible actions which are essential elements of the offence were undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race.”²⁰⁵

The policy element has subsequently been reflected in the decisions of the ICTY, ICTR, and in the work of the ILC. However, the Statute of the ICTY does not include the phrase “widespread or systematic.” The *Tadic* judgment interpreted the phrase “directed against any civilian population” as meaning “that the acts must occur on a widespread or systematic basis, that there must be some form of governmental, organization or *group policy* to commit these acts”²⁰⁶

In *Kayishema*, the ICTR wrote: “for an attack against a civilian population to pass the threshold required by the definition of the crime against humanity, it is necessary to prove the existence of a prior plan or policy.”²⁰⁷ Yet, it might seem questionable whether it is necessary to prove that a policy or plan is behind an attack under “crimes against humanity” or whether the proof of any plan or policy is but one manner to demonstrate the systematic character of the attack. The issue is not consistently articulated in the two *ad hoc* Tribunals’ jurisprudence, although each Trial Chamber concurs that systematic and widespread remain disjunctive, thus arguably proof of a plan or policy is a necessary element of crimes against humanity only when opting to establish that an attack was systematic.²⁰⁸ In a recent judgment held by the ICTY, the Appeals Chamber emphasised, “the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime.”²⁰⁹

A further point that deserves particular mention is that the *chapeau* of the “Elements of Crimes” adopted by the Preparatory Commission has a

204. Public Prosecutor v. Menten, The Netherlands, District Court of Amsterdam, Extraordinary Penal Chamber, *reprinted in* 75 I.L.R. 361–63 (1981).

205. R. v. Finta, [1994] 1 S.C.R. 701, 814 (Can.).

206. *Tadic*, Case No. IT-94-1-T, at para. 644 (emphasis added).

207. Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, at para. 124 (May 21, 1999).

208. It is to be noted that other Trial Chambers refrain from imposing the burden of proving a policy or plan as a general requirement of crimes against humanity but appear to have taken cognisance of it as a means of proving systematicity. See Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, at para. 203 (Mar. 3, 2000).

209. Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Judgment, at para. 98 (June 12, 2002).

provision which states: "It is understood that a 'policy to commit such attack' requires that the State or organization actively promote or encourage such an attack against any civilian population."²¹⁰ This provision also has a footnote at its end which states: "[A] policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack . . ." ²¹¹ Accordingly, not only is "active policy" of a State a requisite element to constitute the policy element under "crimes against humanity," but also its failure to act in order to suppress such attack. The "action" requirement was included to address the concern that a policy (and therefore an "attack") should not be inferred simply from a State's failure to act, where there may be innocent reasons for the inaction and where there is in fact no underlying policy to encourage crimes.²¹²

As a result of the progressive evolution of customary international law it is no longer required that the policy is the policy of a State. The 1996 ILC Draft Code contains a requirement that in order to constitute a "crime against humanity" the enumerated acts must be "instigated or directed by a Government or by any organization or group."²¹³ In *Tadic*, the Trial Chamber considered that at the present stage of customary international law, "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."²¹⁴ Accordingly, the policy element may be attributed either to a State or to a governmental organization or to an

210. U.N. Preparatory Comm'n for the Int'l Criminal Court, *supra* note 10, at 9.

211. *Id.* at n.6.

212. Darryl Robinson, *The Elements of Crimes Against Humanity*, in *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 74-76 (Roy S. Lee et al. eds., 2001).

213. *Report of the International Law Commission on the Work of its Forty-Eighth Session*, U.N. GAOR, 51st Sess., Supp. No. 10, at 95-96, U.N. Doc. A/51/10 (1996). The commentary on Article 18 of the 1996 Draft Code clarifies this issue: "this alternative is intended to exclude the situation in which an individual commits an inhumane acts 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 or organization. This type of isolated criminal conduct on the part of a single individual would not constitute crime against humanity The instigation or direction of a Government or any organization or group, which may not be affiliated with a Government, gives the act its great dimension and makes it as a crime against humanity imputable to private persons or agents of a State."

214. *Tadic*, Case No. IT-94-I-T, at para. 654. It should be noted that in Article 2 of the Rules of Procedure and Evidence of the ICTY, the term "State" is defined as: "A State Member or non-member of the United Nations or a self-proclaimed entity *de facto* exercising governmental functions, whether recognized as a State or not."

entity which exercise *de facto* authority over a territory. Likewise, in the *Kupreskic* case, the Trial Chamber held that such a policy does not have to be “explicitly formulated nor need it be the policy of a State” in order to fulfill the “systematic” aspect of an attack.²¹⁵

Importantly, such a policy need not be formalized and can be deduced from the way in which the acts occur.²¹⁶ That is to say, the policy element should be a flexible test, of a lower threshold than the term “systematic,” which needs a much more rigorous test.²¹⁷ Yet, one might conclude that the recognition of the policy element does not reintroduce “systematic” as a mandatory requirement in all cases.

It also can be questioned whether there must be a link between the perpetrator of a “crime against humanity” and the organization behind the policy, or whether the offence must be committed by organs of a State (or governmental authority), and whether it may be perpetrated by individuals not acting in an official capacity. The case law of the ICTY considers these points. In the *Kupreskic* case, the Trial Chamber held that:

While crimes against humanity are normally perpetrated by State organs, i.e., individuals acting in an official capacity such as military commanders, serviceman, etc., there may be cases where the authors of such crimes are individuals having neither official status nor acting on behalf of a governmental authority. The available case-law seems to indicate that in these cases some sort of explicit or implicit approval or endorsement by State or governmental authorities is required, or else that it is necessary for the offence to be clearly encouraged by a general governmental policy or to clearly fit within such a policy.²¹⁸

An accused may be held responsible for committing “crimes against humanity” irrespective of whether he “has taken part in the formulation of a discriminatory policy or practice by the governmental authority.”²¹⁹ Perpetrators of crimes against humanity can therefore be individuals “having neither official status nor acting on behalf of a governmental authority.”²²⁰ The *Weller* case may prove to be of some relevance to this

215. Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, at para. 551 (Jan. 14, 2000).

216. *Tadic*, Case No. IT-94-1-T, at para. 653.

217. The “systematic” requirement poses a very stringent test, involving not only an underlying “policy,” but also highly organized and orchestrated execution of those acts in accordance with a developed plan.

218. *Kupreskic*, Case No. IT-95-16-T, at para.555.

219. *Id.* at para. 625

220. *Id.* at para. 555.

issue.²²¹ “This case gave rise to six different judgments by German courts after World War II and involved the ill-treatment of Jewish civilians by two persons under the command of Weller, a member of the SS, who was at the time not in uniform and was acting on his own initiative. On appeal to the Supreme Court for the British zone, it was held that the offence did indeed constitute a crime against humanity, on the grounds that it was sufficient for the attack on human dignity to be connected to the national-socialist system of power and hegemony.”²²²

Another central concern is that Article 7(2)(a) of the ICC Statute defines the phrase “attack directed against any civilian population” to mean a course of conduct involving the multiple commission of acts referred to in Article 7(1). The prosecution must establish the existence of an “attack directed against any civilian population,” *i.e.*, multiple inhumane acts in furtherance of a policy, and prove that this attack was either widespread (involving a very large number of victims) or systematic (involving a very high degree of orchestration).²²³ Thus, if the prosecutor chooses to prove the “widespread” element, the concern about completely unrelated acts is addressed, because of the policy element. If the prosecutor chooses to prove the “systematic” element, some element of scale must still be shown before ICC jurisdiction is warranted, because a course of conduct involving multiple commissions of acts is required.²²⁴

In sum, while the requirements are disjunctive, an evidentiary overlap may arise in the proof of the “widespread or systematic” requirement. The fact that an attack was widespread could itself be evidence of the systematic nature of the attack.²²⁵ Indeed, in practice, these two criteria will often be difficult to separate since a widespread attack targeting a large number of victims generally relies on some form of planning or organization.²²⁶

F. Mens rea “The Accused had Knowledge of the Wider Context in Which His or Her Conduct Occurs”

Article 5 of the ICTY Statute and Article 3 of the ICTR Statute lack a

221. The *Weller* case (unpublished), *quoted in* . *Kupreskic*, Case No. IT-95-16-T, at para. 555.

222. *Id.*

223. Robinson, *supra* note 109, at 163–64.

224. Darryl Robinson, *Defining “Crimes Against Humanity” at The Rome Conference*, 93 AM. J. INT’L L. 43, 49–51 (1999).

225. *See generally* Prosecutor v. Jelusic, Case No. IT-95-10-T, Judgment, at para. 53 (Dec. 14, 1999).

226. Prosecutor v. Blaskic, Case No. IT-95-14-T Judgment, at para. 207 (Mar. 3, 2000).

provision which determine the nature of the *mens rea* of a “crime against humanity.” However, Article 7 of the ICC Statute does provide that criminal acts must be perpetrated “in the knowledge” of the widespread or systematic attack.²²⁷ In other words, the Rome Statute does not require that the accused’s knowledge encompass the required nexus between his conduct and the attack against the civilian population, only that there existed an attack.²²⁸

In order to satisfy the requisite *mens rea* of the accused under “crimes against humanity,” three important aspects of this mental element must be examined. First, the accused must have knowledge of the general context in which his acts occur and then of the nexus between his action and that context.²²⁹ National and international case law supports this first aspect. In *Tadic*, the Trial Chamber held that “the perpetrator must know of the broader context in which his act occurs.”²³⁰ The former judgement relies in particular on the Decision of the Supreme Court of Canada in *Regina v. Finta*.²³¹ It is also based upon the decision rendered by the ICTR Trial Chamber hearing the *Kayishema* and *Ruzindana* case which considered that the *mens rea* contained two parts; that is, (1) knowledge of the attack and its widespread or systematic character and (2) awareness of the fact that the criminal activity constitutes part of the attack.²³² The Rwanda Tribunal wrote: “to be guilty of crimes against humanity the perpetrator must know that there is an attack on a civilian population and that his act is part of the attack.”²³³

227. According to the *Tadic* Appeal Judgement, “Article 7(1) of the Statute of the International Criminal Court thus articulates a definition of crimes against humanity based solely upon the interplay between the *mens rea* of the defendant and the existence of a widespread or systematic attack directed against a civilian population.” Prosecutor v. *Tadic*, Case No. IT-94-1-A, Judgment, at para. 291 n.354 (July 15, 1999).

228. *Rome Statute of the International Criminal Court*, *supra* note 8, at art. 30. According to the ICC Statute, “knowledge means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”

229. *Blaskic*, Case No. IT-95-14-T, at para. 247.

230. Prosecutor v. *Tadic*, Case No. IT-94-1-T, Opinion and Judgment, at para. 656 (May 7, 1997).

231. *R. v. Finta*, [1994] 1 S.C.R. 701, 820 (Can.).

232. Prosecutor v. *Kayishema*, Case No. ICTR-95-1-T, Judgment, at para. 133 (May 21, 1999).

233. *Id.* The Trial Chamber held that “part of what transforms an individual’s act into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore *an accused should be aware of this greater dimension* in order to be culpable thereof. Accordingly, *actual or constructive knowledge of the broader context of the attack*, meaning that the accused must know that his act is part of a widespread or systematic attack on a civilian population and pursuant to some kind of

Likewise, the Appeal Chamber, in *Tadic* expressly recognises that “the acts of the accused must comprise part of a pattern of widespread or systematic attack directed against a civilian population and that the accused must have known that his acts fit into such pattern.”²³⁴

Knowledge of the attack and its widespread or systematic character, or of “the broader context in which the acts occurs,” should not be confused with knowledge that this amounts to “crimes against humanity” as a question of law. An accused cannot answer that while being aware of the fact that his or her criminal activity constitutes part of the attack, he or she was not aware that this met the definition of “crimes against humanity.”²³⁵ The judgement of the Canadian Supreme Court in the *Finta* case is illustrative of this matter:

However, it would not be necessary to establish that the accused knew that his or her actions were inhumane. For example, if the jury was satisfied that Finta was aware of the conditions within the boxcars [in which the Jews were deported] that would be sufficient to convict him for crimes against humanity even though he did not know that his action in loading the people into those boxcars were inhumane.²³⁶

The second aspect of the *mens rea* is “knowing participation in the context.” Addressing this point, the Yugoslav Tribunal ruled that: “the accused need not have sought all the elements of the context in which his acts were perpetrated, it suffices that, through the functions he willingly accepted, he knowingly took the risk of participating in the implementation of that context.”²³⁷ Accordingly, negligence is not a sufficient mental state to hold a person guilty of crimes against humanity.

Generally speaking, the gravity and the scale of “crimes against humanity” ordinarily leads to the presumption that several protagonists were involved in its perpetration.²³⁸ It has been proposed that a distinction should be made in the formulation of the crime itself regarding the sufficient intent and knowledge required for each participant in the criminal enterprise.²³⁹ That is to say, general intent should be required

policy or plan, is necessary to satisfy the requisite *mens rea* element of the accused.” See *id.* at para. 134.

234. Prosecutor v. *Tadic*, Case No. IT-94-1-T, at para. 248.

235. See *Rome Statute of the International Criminal Court*, *supra* note 8, at art. 32(2): “A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for article 33.”

236. R. v. *Finta*, 1 S.C.R. at 820 (Can.). See also *Tadic*, Case No. IT-94-1-T, at para. 657.

237. *Blaskic*, Case No. IT-95-14-T, at para. 251.

238. BASSIOUNI, *supra* note 15, at 209. Those protagonists may be categorized as follows: policy makers and senior executors; mid-level facilitators; low-level executors.

239. *Id.* Prof. Bassiouni proposed that general intent should be required with

with respect to the senior executors and policy makers, while specific intent should be required with respect to the low level executors.²⁴⁰

One might disagree with the above proposal for two reasons. First, according to the requirement of specific intent, the prosecution not only must prove that the accused had the intent to commit the underlying offence and that he or she had awareness of the “broader context in which his or her acts occurs” but also he must prove the specific intent of the accused “low level executor.” That is, the Prosecution must demonstrate that the accused had a particularly racist or inhumane frame of mind, or that he or she personally shared the goals of the attack against the civilian population. It may be difficult to affirmatively prove that an accused consciously desired the promotion of the regime and this would run the risk of enquiring into the accused’s motives, which are irrelevant. In addressing this point the Appeals Chamber, in *Tadic*, made it clear that the motive of the accused for taking part in the attack is irrelevant and that a crime against humanity may be committed for purely personal reasons.²⁴¹

With regard to the requirement of “specific knowledge,” the case law opposes this proposal. As evidenced by the judgement of the ICTY, the *mens rea* specific to a “crime against humanity” does not require that the agent be linked to the ideology, policy or plan in whose name mass crimes were perpetrated nor even that he supported it. Rather, “[i]t suffices that he knowingly took the risk of participating in the implementation of the ideology, policy or plan.”²⁴² As the Trial Chamber in the *Blaskic* case has already asserted:

The person who has “knowledge” of the plan, policy or organisation as part of which the crimes take place is not only the one who fully supports it but also the one who, through the political or military functions which he willingly performed and which resulted in his periodic collaboration with the authors of the plan, policy or organisation and in his participation in its execution, implicitly accepted the context in which his functions, collaboration and participation must most probably have fit.²⁴³

respect to the former two categories, while specific intent which is more difficult to be proved, should be required with respect of the latter category. That is to say, it is reasonable to assume that policy makers and senior executors have more access to information and more knowledge of the attack than those at the lower levels of the echelon of command.

240. *Id.*

241. *Tadic*, Case No. IT-94-1-A, at paras. 248, 252; Prosecutor v. Kunarac, Case Nos. IT-96-23-T, IT-96-23/1-T, Judgment, at para. 433 (Feb. 22, 2001).

242. *Blaskic*, Case No. IT-95-14-T, at para. 257.

243. *Id.* at para. 255.

In the *Papon* case, the French *Cour de Cassation* confirmed this approach and maintained that Article 6 of the Nuremberg Statute did not require that an aider and abettor to a crime against humanity necessarily support the policy set by the principal perpetrators. The Criminal Chamber of the Court stated: “the last paragraph of Article 6 of the International Military Tribunal . . . does not require that the accomplice to a crime against humanity support the policy of ideological hegemony of the principal perpetrator”²⁴⁴

In addition, Darryl Robinson observed that the obligation to prove all mental elements of the crime does not impose a significant burden on the Prosecution. He added, “[g]iven the inescapable notoriety of a widespread or systematic attack against a civilian population, it is unlikely that an accused could commit an inhumane act as part of such attack, while credibly claiming to have been completely unaware of the attack.”²⁴⁵

The *Krnjelac* Trial Chamber adopts the same language providing that it is sufficient for the conviction of crimes against humanity that the perpetrator through his acts or the function which he willingly accepted, he knowingly took the risk of participating in the implantation of that attack.²⁴⁶

The third aspect of the *mens rea* is “the evidence” or the test which the Court should follow in order to prove the “knowledge” of the accused. As evidenced by the case law of the two *ad hoc* Tribunals, “knowledge of the attack” can be actual or constructive.²⁴⁷ It may be inferred from a concurrence of concrete facts, such as the historical and political circumstances in which the acts occurred, the scope and gravity of the acts perpetrated, or the nature of the crimes committed and the degree to which they are common knowledge.²⁴⁸ Yet, the important distinction, which has implications with respect of to the policy of deterrence, would be left to the determination of the judicial body adjudicating a given case.²⁴⁹

Moreover, in addition to the intent to commit the underlying offence, the perpetrator needs to know that there is an attack on the civilian population and that his acts comprise part of the attack, or at least to take the risk that his acts are part of the attack. This, however, does not entail knowledge of the details of the attack.²⁵⁰ The *Kunarac* Trial Judgment observes that the “Prosecution does not need to prove that the accused

244. *Id.* at para. 256.

245. Robinson, *supra* note 109, at 165.

246. Prosecutor v. Krnjelac, Case No. IT-97-25-A, Judgment, at para. 59 (Mar. 15, 2002).

247. *Tadic*, Case No. IT-94-1-T, at para. 659; Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, at para. 557 (Jan 14, 2000); and Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, at para. 134 (May 21, 1999).

248. *Blaskic*, Case No. IT-95-14-T, at para. 259.

249. *Id.* at para. 258.

250. *Kunarac*, Case Nos. IT-96-23-T, IT-96-23/1-T, at paras. 433–35.

chose his victims for their civilian status. . . . The Prosecution must show that the perpetrator could not reasonably have believed that the victim was a member of the armed forces.”²⁵¹

Given the fact that the provision of crimes against humanity provides that the attack should be directed against a “civilian” population, it might be questioned whether the Prosecution should have to prove that the accused chose his victims for their civilian statuses. Addressing this point, the Trial Chamber in *Kunarac* ruled that “in case of doubt as to whether a person is a civilian, that person shall be considered to be civilian . . . and the Prosecution must show that the perpetrator could not reasonably have believed that the victim was a member of armed forces.”²⁵²

It might perhaps be argued whether a lower threshold of mental state is sufficient to hold the accused criminally responsible and liable for crimes against humanity. However, although the submissions of the OTP have not yet included the lower threshold of taking the risk that one’s act is part of the attack; the *Blaski* Trial Chamber provided that the mental state requirement of Article 5 is satisfied if an accused “knowingly took the risk of participating in the implementation of that context.”²⁵³ He “need not have sought all the elements of the context in which his acts were perpetrated.”²⁵⁴ The Chamber provided that proof is not required that “the agent had the intent to support the regime or the full and absolute intent to acts as its intermediary so long as proof of the existence of direct and indirect malicious intent or recklessness is provided.”²⁵⁵ All in all, the *mens rea* requirement is a fundamental principle for the potential offender. To find him guilty, the prosecution has to prove that the accused has actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his acts were part of a widespread or systematic attack on a civilian population, and he did not commit his act for purely personal motives completely unrelated to the attack on the civilian population.²⁵⁶ For example, he could have the *mens rea* for ordinary murder as a crime

251. *Id.* at para. 435.

252. *Id.*

253. *Blaskic*, Case No. IT-95-14-T, at para. 251.

254. *Id.*

255. *Id.* at para. 254. *See also* paras. 255, 257.

256. *Tadic*, Case No. IT-94-1-T, at para. 659; *Kayishema*, Case No. ICTR-95-1-T, at para. 134; *Prosecutor v Rutaganda*, Case No. ICTR-96-3-T, Judgment, at para. 71 (Dec. 6, 1999).

under national jurisdiction, but not for murder as a crime against humanity. Thus, in this category of international crimes the subjective element or the *mens rea* of the alleged offender is the decisive component in determining whether or not the accused's conduct satisfied the threshold of such international crime. This issue will be discussed in detail while examining the objective and the subjective elements of persecution as a crime against humanity.

IV. THE ACTUS REUS AND THE MENS REA OF PERSECUTION

Having examined and evaluated the general requirements of "crimes against humanity," this part of the paper will examine the international case law on the objective and subjective elements of persecution as a crime against humanity.²⁵⁷

Unfortunately, although often used, the term has never been precisely defined in international criminal law, nor is "persecution" known as such in the world's major criminal justice systems.²⁵⁸ In his attempts to fill this definitional *lacuna* Prof. Bassiouni wrote: "[t]hroughout history, the terms 'persecute' and 'persecution' have come to be understood to refer to discriminatory practices resulting in physical or mental harm, economic harm, or all of the above."²⁵⁹ He also observed that the words "persecute" and the act of "persecution" have come to acquire a universally accepted meaning for which a proposed definition is:

State action or policy leading to the infliction upon an individual of harassment, torment, oppression, or discriminatory measures, designed to or likely to produce physical or mental suffering or economic harm, because of the victim's beliefs, views, or membership in a given identifiable group (religious, social, ethnic, linguistic etc.), or simply because the perpetrator sought to single out a given category of victims for reasons peculiar to the perpetrator.²⁶⁰

A general definition of "persecution" was originally offered for "crimes against humanity" in the *Barbie* case where M. Le Guehec of the *Cour de Cassation* wrote:

Above all these crimes offend the fundamental rights of mankind; the right to equality, without distinctions of race, colour or nationality, and the right to hold

257. The term "persecution" within the meaning of "crimes against humanity" first appears in the drafting of the Nuremberg Charter, in which Justice Robert H. Jackson proposed to supplement the punishment of those who contravened the laws, rules, and customs of land and naval warfare with a separate provision prohibiting "atrocities and offences, including atrocities and persecutions on racial or religious grounds, committed since 1933." U.S. DEP'T OF STATE, REPORT OF JUSTICE ROBERT H. JACKSON: U.S. REP. TO THE INT'L CONF. ON MILITARY TRIALS 50 (1949).

258. *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, at para. 694 (May 7, 1997), citing BASSIOUNI, *supra* note 4, at 318.

259. BASSIOUNI, *supra* note 15, at 326-27.

260. *Id.* at 327.

one's own political and religious opinions. Such crimes not only inflict wounds or death, but are aggravated by the voluntary, deliberate and gratuitous violation of the dignity of all men and women: these are victimised only because they belong to a group other than that of their persecutors, or do not accept their dominion.²⁶¹

Judge Cassese observes that the above definition is “both acceptable and effective, so long as we take it in its broader meaning.”²⁶² He continues, “it must be interpreted as also covering inhumane acts directed against enemy civilians not because they are Jewish, partisans or political opponents but only because they belong to the enemy.”²⁶³ However, the Charter of the Nuremberg Tribunal and the Statutes of the ICTY and ICTR all sanction “persecutions” on political, racial and religious grounds under “crimes against humanity,” none define this sub-characterisation, or state which forms it may take. Notwithstanding, “persecution” is broadly defined under the ICC Statute; it is however restricted to acts perpetrated “in connection” with any of the enumerated acts under Article 7(1) of the Statute (i.e. murder, extermination, enslavement, etc.), or it has to be committed together with another crimes within the jurisdiction of the ICC (i.e. genocide, war crimes, or aggression).²⁶⁴ Furthermore, neither national nor international case law provides an authoritative single definition of what constitutes “persecution.”²⁶⁵

261. Report of Councillor Le Gunehec, *quoted in Tadic*, Case No. IT-94-1-T, at para. 696.

262. *Tadic*, Case No. IT-94-1-T, at para. 696.

263. *Id.*

264. Article 7(1)(h) states: “Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.” ICC Statute, *supra* note 133. Article 7(2)(g) provides: “‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.” ICC Statute, *supra* note 133. For a commentary of Article 7(1)(h) and (2)(g), see Machteld Boot & Christopher K. Hall, *Persecution*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 146, 146-48 (Otto Triffterer ed., 1999).

265. Persecution has, since Nuremberg, been understood to involve acts which may not be violent or even severe standing alone, but, when taken together and in light of the fact that they are targeted against a particular group, amount to a “crime against humanity.” For example, the persecution of the Jews under Nazi Germany involved a progression of violation of rights, starting with the deprivation of rights of citizenship and economic and property rights, and then leading to arrest and confinement in concentration camps, torture, deportations, slave labour and finally murder. It was not necessary that the rights infringed at the earlier stages of the persecution were “universally recognized” or even that they were fundamental violations of international law. Rather, persecution was proven by showing deprivation of rights accorded under

The Trial Chambers in *Tadić*, *Kupreskić*, *Blaskić*, and *Kordić* recognized that the international crime of persecutions has never been comprehensively defined.²⁶⁶

Neither international treaty law nor case law provides a comprehensive list of illegal acts encompassed by the charge of persecution, and persecution as such is not known in the world's major criminal justice systems.²⁶⁷ The Trial Chamber agrees with the Defence that the crime of persecution needs careful and sensitive development in light of the principle of *nullum crimen sine lege*.²⁶⁸

Hence, in the absence of a consistent and uniform definition of "persecution," the term may well be open-ended, and consequently, infringe the principles of *nullum crimen sine lege* and non-retroactivity of criminal law. In addition, the ambiguity of the *actus reus* and the *mens rea* of "persecution" as a "crime against humanity" may place the term in a grey area where both "crimes against humanity" and "genocide" overlap.²⁶⁹

The purpose of this part is to dissipate the present confusion, to analyze and examine the evolutionary development of the term following the case law²⁷⁰ where the term raises significant questions: must the "crime of persecution" as a category of crimes against humanity be linked to other acts enumerated in these Statutes or it can stand alone? Could this crime include other acts not specifically listed therein? What are the *actus reus* and *mens rea* of the crime of persecution? Is there a precise definition of this crime?

national law. It is sufficient that there be consensus among states that the rights are fundamental.

266. Prosecutor v. Kordic, Case No. IT-95-14/2-T, Judgment, at para. 192 (Feb. 26, 2001).

267. Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, at para. 694 (May 7, 1997).

268. *Kordic*, Case No. IT-95-14/2-T, at para. 192.

269. In this regard, see M. CHERIF BASSIOUNI, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, in 1 INT'L CRIMINAL LAW 617, 618 (M. Cherif Bassiouni ed., 2d ed. 1999); See Schabas, *supra* note 29, at 10-12, 252-56; William A. Schabas *The Crime of Genocide in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW 447, 460-61 (Hort Fischer et al. eds., 2001).

270. The most important sources available to date on the definition of Article 5(h) are the discussions of persecution. See Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, at paras. 567-636 (Jan. 14, 2000); *Kordic*, Case No. IT-95-14/2-T, at paras. 188-220; at paras. 184-205 of the *Miroslav Kvočka et al.*, (see note 303 *infra*); and Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, at paras. 431-36 (Mar. 15, 2002). Although these discussions are only by Trial Chambers, not the Appeals Chamber, and they represent to a certain extent *obitum dictum*, they are the most elaborate and coherent presentations of the elements of persecutions in international case-law.

A. *The Objective Element or the "Actus Reus" of Persecution*

Unlike the sub-characterization of murder within the meaning of crimes against humanity which represents only one crime, that of "persecution" may assume several different criminal forms.²⁷¹ According to the *Tadic* judgment, an act of persecution or omission can be of varying severity, "from killing to a limitation on the type of professions open to the targeted group."²⁷² Thus, it is clear that "persecution" may take diverse forms, and does not necessarily require a physical element.²⁷³

The lack of definition of the specified acts which may constitute a crime of persecution emphasises the need to identify the *actus reus* of this offense.

1. *The Nexus Requirement*

A preliminary question confronting the *actus reus* of the crime of persecution provided for in the three Statutes under consideration is whether this crime must be criminalized only in connection with another crime within the jurisdiction of these Statutes or if it may stand alone. Addressing this point, the ICTY Trial Chamber in *Kordic and Cerkez* concurred with the *Kupreskic* decision that the *actus reus* for persecution requires no link to crimes enumerated elsewhere in the Statute, and found that, consonant with customary international law, the crime of persecution may indeed encompass crimes not enumerated elsewhere in the Statute.²⁷⁴

271. Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, at para. 218 (Mar. 3, 2000).

272. Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, at paras. 694, 704 (May 7, 1997).

273. *Kupreskic*, Case No. IT-95-16-T, at para. 568. In *Tadic* Opinion and Judgment the Trial Chamber held that "persecution can take numerous forms, so as long as the common element of discrimination in regard to the enjoyment of a basic fundamental right is present, and persecution does not necessarily require a physical element." *Tadic*, Case No. IT-94-1-T, at para. 707. Other example mentioned as acts of persecution include those of an economic and judicial nature. *Tadic*, Case No. IT-94-1-T, at para. 710.

274. Prosecutor v. Dario Kordic and Mario Cerkez, Case No. IT-95-14/2-T, Judgment, Feb. 26, 2001, at paras. 193-94. In this regard the Trial Chamber in *Kupreskic* case held that "an examination of customary international law indicates that as customary rules on crimes against humanity gradually crystallised after 1945, the link between crimes against humanity and war crimes disappeared. This is evidenced by; (a) the relevant provision of Control Council Law No. 10, which omitted this qualification; (b) national legislation (such as the Canadian and the French laws); (c) case-law; (d)

Although, the jurisprudence of the Yugoslav Tribunal thus far appears to have accepted that customary international law no longer requires a link between the crime of persecution and any other crimes enumerated elsewhere in the Statute, the text of Article 7(1)(h) of the ICC Statute deviates from this passage by requiring that the occurrence of this offence must be in connection with other crimes in the jurisdiction of the ICC.²⁷⁵ This requirement is confirmed in the draft text of the Elements of Crimes adopted by the Preparatory Commission.²⁷⁶ To the extent that it is required that persecution be connected with war crimes or the crime of aggression, this requirement is especially striking, in light of the fact that the Statute of the ICC reflects customary international law in abolishing the nexus between crimes against humanity and armed conflict.²⁷⁷ This restriction poses a rigid limitation on the prosecution of “persecutory acts” that may occur before the commencement or preparation of the other crimes.²⁷⁸ For example, the case of racial laws modelled on Nazi/Fascist regimes’ laws discriminating against Jewish people would not be punishable under the jurisprudence of the ICC unless another crime is proved.²⁷⁹

Given that this provision (the requisite link between persecution and other crimes within the jurisdiction of the ICC) appears not to be consonant with customary international law, this restriction might be easily circumvented for two reasons. First, Article 10 of the Rome

such international treaties as the Convention on Genocide of 1948, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968, and the Convention on Apartheid of 1973; and (e) the prior jurisprudence of the International Tribunal. This evolution thus evidences the gradual abandonment of the nexus between crimes against humanity and war crimes.” *Kupreskic*, Case No. IT-95-16-T, at para. 577.

275. For the text of Article 7(1)(h) see ICC Statute, *supra* note 264. It should be noted that the delegations at the Preparatory Commission of the ICC were divided over whether “persecution” could occur in the absence of other crimes. Some delegations noted that the Nuremberg and Tokyo Charters required that persecution be committed in connection with war crimes or crimes against peace. These delegations insisted on such a “connection requirement,” to avoid a sweeping interpretation criminalizing all discriminatory practices. Other delegations resisted a “connection requirement,” which did not appear in instruments such as CCL No. 10, the ILC Draft Codes, or the ICTY or ICTR Statutes. Finally, a compromise was reached requiring a connection between the persecutory acts and any other crime within the Jurisdiction of the Court “or any act referred to in paragraph 1.”

276. U.N. Preparatory Comm’n for the Int’l Criminal Court, *supra* note 10, at 15. Element 4 of crime against humanity of persecution reads as follows: “[t]he conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.”

277. *Kupreskic*, Case No. IT-95-16-T, at para. 580.

278. *Donnat-Cattin*, *supra* note 125, at 72-73.

279. *Id.* See also, Herman von Hebel & Darryl Robinson, *Crimes within the Jurisdiction of the Court*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, AND RESULTS* 79, 101-02 (Roy S. Lee ed., 1999).

Statute states that “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”²⁸⁰ This provision clearly conveys the idea that the framers of the Statute did not intend to affect, amongst other things, *lex lata* as regards such matters as the definition of war crimes, crimes against humanity and genocide.²⁸¹ Thus, the issue should not be insurmountable, since Article 10 provides a good safeguard.

Second, although the Statute of the ICC limits persecution to acts performed in connection with other crimes falling within its jurisdiction, in practice the list of acts which may potentially be characterised as persecution is extensive in view of the broad range of crimes listed thereunder.²⁸² Furthermore, the possibility of connection to “other inhumane acts” as provided for in Article 7(1)(k) ensures that persecution will not be a mere auxiliary offense or aggravating factor. Moreover, it is to be noted that this connection requirement ensures that it is not necessary to demonstrate that the connected inhumane acts were committed on a widespread or systematic basis; it will suffice to show a connection between the persecution and any instance of murder, torture, rape, deportation or “other inhumane acts,” which need not be committed on a widespread or systematic basis.²⁸³

2. Types of Persecution

From the above, it is evident that the essential difference between the *actus reus* of persecution provided for in the Statutes of the two *ad hoc* Tribunals and that of the ICC is that the former requires no link between the *actus reus* of persecution and other acts or crimes enumerated

280. For an extensive interpretation of Article 10 of the ICC, see Fenrick, *supra* note 111, at 315–32.

281. *Kupreskic*, Case No. IT-95-16-T, at para. 580.

282. *Prosecutor v. Kordic*, Case No. IT-95-14/2-T, Judgment, at para. 197 (Feb. 26, 2001). See ICC Statute, *supra* note 133, at arts. 6–8. Paragraph 1 of Article 7, entitled “Crimes against humanity”, sets out the following acts: (a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) persecution; (i) enforced disappearance of persons; (j) apartheid; (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health. A number of these enumerated crimes are not listed in the Statutes of the two *ad hoc* Tribunals.

283. von Hebel & Robinson, *supra* note 279, at 101–02.

elsewhere in the Statute, while the latter does.²⁸⁴ The jurisdiction of the ICC over persecution is clearly limited to specific acts or crimes within its Statute which comply with the principle of legality, while under the Statutes of the two *ad hoc* Tribunals there are no clearly defined limits on the expansion of the types of acts which qualify as persecution. Thus, the issue under the Statutes of the ICTY and ICTR is problematic, and raises the question of what types of acts, aside from other categories of crimes against humanity, may be deemed to constitute persecution under these Statutes.

In an attempt to catalogue the scope of persecutory acts within the meaning of “crimes against humanity” the ILC notes that these acts include:

A prohibition on practicing certain kind of religious worship; prolonged and systematic detention of individuals who present a political, religious or cultural group; a prohibition on the use of a national language, even in private; systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other group. Such acts would come within the scope of this Article when committed in a systematic manner or on a mass scale.²⁸⁵

In the 1996 Draft Code this enumeration was replaced with a recognition that “the inhumane act of persecution may take many forms with its common characteristic being the denial of the human rights and fundamental freedoms to which every individual is entitled without distinction, as recognised in the Charter of the United Nations (Articles 1 and 55), and the International Covenant for Civil and Political Rights (Article 2).”²⁸⁶

The Judgment of the IMT considered the following acts, amongst others, in its finding of persecution: the passing of discriminatory laws; the exclusion of members of an ethnic or religious group from aspects of social, political, and economic life; and the creation of ghettos.²⁸⁷ Examining the persecution of the Jews, the IMT thus noted *inter alia* that: “[T]he persecution of the Jews at the hand of the Nazi Government has been proved in the greatest detail before the Tribunal. It is a record of consistent and systematic inhumanity on the greatest scale”²⁸⁸

284. *Kupreskic*, Case No. IT-95-16-T, at para. 581; *Kordic*, Case No. IT-95-14/2-T, at paras. 193-94.

285. *Report of the International Law Commission on the Work of its Forty-third Session*, U.N. GAOR, 46th Sess., Supp. No. 10, at 236, U.N. Doc. A/46/10 (1991).

286. *Report of the International Law Commission*, U.N. GAOR., 48th Sess., Supp. No. 10, at 98, U.N. Doc. A/51/10 (1996), available at <http://www.un.org/law/ilc/reports/1996/96repfra.htm>.

287. *Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, available at <http://www.yale.edu/lawweb/avalon/imt/proc/judwarcr.htm>.

288. *Id.*

Recalling the anti-Jewish policy as formulated in Point 4 of the Programme of the Nazi party of 24 February 1920,²⁸⁹ and examining in great detail acts committed long before 1939, the Tribunal wrote:

With the seizure of power, the persecution of the Jews was intensified. A series of discriminatory laws were passed, which limited the offices and professions permitted to Jews; and restrictions were placed on their family life and their rights to citizen ship Programs were organised, which included the burning and demolishing of synagogues, the looting of Jewish business A collective fine of one billion marks was imposed on the Jews, the seizure of Jewish assets was authorised and the movement of Jews was restricted by regulations to certain specified districts and hours. The creation of ghettos was carried out on an extensive scale, and by an order of the Security Police, Jews were compelled to wear a yellow star to be worn on the breast and back.²⁹⁰

Furthermore, the Nuremberg Tribunal found Göring guilty of crimes against humanity, in particular, for being “[T]he active authority in the spoliation of conquered territory” and for having imposed the fine of a billion Reich marks on the Jews.²⁹¹ The Rebuttal statement of the Prosecution before the Nuremberg Tribunal has been interpreted to include economic deprivation of this more personal type, and the finding of the Nuremberg Tribunal characterising certain acts of economic discrimination as persecution support the conclusion that economic measures of a personal, as opposed to an industrial type, can constitute persecutory acts.²⁹²

In addition to economic measures a variety of other acts can constitute persecution if done with the requisite discriminatory intent. The trial of Streicher before the Nuremberg Tribunal is useful in considering the varying manifestations of persecutory acts.²⁹³ Streicher was convicted of crimes against humanity because through his speaking, writing and preaching hatred of the Jews he “injected into the mind of thousands of Germans which caused them to follow the National Socialists policy of

289. The Anti-Jewish policy was formulated in Point 4 of the “Party Programme” which declared “Only a member of the race can be a citizen. A member of the race can only be one who is of German blood, without consideration of creed. Consequently, no Jew can be a member of the race.”

290. Judgement of the International Military Tribunal for the Trial of German Major War Criminals, *supra* note 287.

291. Judgement of the International Military Tribunal for the Trial of German Major War Criminals, (Göring Case), *available at* <http://www.yale.edu/lawweb/avalon/imt/proc/judgoeri.htm>.

292. Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, at para.707 (May 7, 1997).

293. See Judgment of the International Military Tribunal for the Trial of German Major War Criminals (Streicher Case), *available at* <http://www.yale.edu/lawweb/avalon/imt/proc/judstrei.htm>.

Jewish persecution and extermination” in Germany as well as elsewhere. Thus his “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 as defined in the Charter and constitutes a Crime Against Humanity.”²⁹⁴

It is also clear that some courts have used the term persecution to describe acts other than those enumerated in the Statutes of the two *ad hoc* Tribunals. In the line of the Nuremberg Judgement, the U.S. Military Tribunal in the *Justice* case held that the national pattern or plan for racial persecution was one of actual extermination of Jewish and Polish people, but that “lesser forms of racial persecution were universally practiced by governmental authority and constituted an integral part in the general policy of the Reich.”²⁹⁵ In summary, what was considered to be persecution in the *Justice* case was the use of a legal system to implement a discriminatory policy.

Recent judgements of the ICTY show that the crime of “persecution” encompasses not only bodily and mental harm and infringements upon individual freedom but also acts which appear less serious, such as those targeting property, so long as the victimised persons were specially selected on grounds linked to their belonging to a particular community.²⁹⁶ Convicting Kordic and Cerkez of crimes against humanity, the Tribunal said that the acts must reach a similar level of gravity as the other offences enumerated in Article 5 of the ICTY Statute in order to constitute the crime of persecution.²⁹⁷

In its definition of the *actus reus* of persecution the Trial Chamber of the ICTY set forth a four-part test in which an act of persecution is constituted by a gross or blatant denial; on discriminatory grounds; of a fundamental right, laid down in international customary or treaty law; reaching the same level of gravity as the other crimes against humanity enumerated in Article 5 of the Statute.²⁹⁸ This holding was further

294. *Id.*

295. United States. v. Altstoetter, in 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 1063 (1951) [hereinafter *The Justice Case*].

296. Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, para. 218, 233 (Mar. 3, 2000).

297. *Kordic*, Case No. IT-95-14/2-T, at para. 195.

298. *Kupreskic*, Case No. IT-95-16-T, at para. 621; *Kordic*, Case No. IT-95-14/2-T, at para. 195. In its commentary to Article 18(e) of the 1996 Draft Code, the ILC formulated persecution as a “denial of human rights and fundamental freedoms”. Draft Code of Crimes Against the Peace and Security of Mankind, Commentary to art. 18, at para. 11, in Report of the Int’l Law Comm’n on the Work of Its Forty-Eighth Session, U.N. GAOR, 51st Sess., Supp. No. 10, at 14, U.N. Doc. A/51/10 (1996), available at <http://www.un.org/law/ilc/texts/dcodefra.htm>.

reinforced in the *Krnjelac* Trial Judgment.²⁹⁹ However, according to the prosecution, such a restrictive holding would exclude certain acts from the scope of the crime of persecution, such as certain property destruction, and dismissal from employment, that do not necessarily rise, in and of themselves, to the level of inhumane acts prescribed under Articles 5 of the ICTY Statute.

In a recent case before the Yugoslav Tribunal, the accused, Milomir Stakic, was indicted for his participation in a persecutorial campaign which included the denial of fundamental rights to Bosnian Muslims and Bosnian Croats, including the right to employment, freedom of movement, right to proper judicial process or right to proper medical care.³⁰⁰ The prosecution submitted that these rights are fundamental rights and violations thereof amount to persecutions.³⁰¹ Accordingly, the Trial Chamber observed that these extensive numbers of persecutory acts were proved, and pointed to a comprehensive picture of persecutions.³⁰²

In addition, the Yugoslav Tribunal emphasised the unique nature of the crime of persecution as a crime of cumulative effect. The Tribunal wrote: "acts of persecution must be evaluated not in isolation but in context, by looking at their cumulative effect. Although individual acts may not be inhumane, their overall consequences must offend humanity in such way that may be termed 'inhumane.'"³⁰³

Although a comprehensive list of acts which may constitute persecutions has never been established,³⁰⁴ those acts which the Yugoslav Tribunal has found may constitute persecutions include: participation in "the seizure, collection, segregation and forced transfer of civilians to camps, calling-out of civilians, beatings and killings;"³⁰⁵ "murder, imprisonment, and deportation;" such attacks on property as would constitute "a destruction of the livelihood of a certain population;"³⁰⁶ the causing of the "humanitarian

299. See Prosecutor v. Krnjelac, Case No. IT-97-25-T, Judgment, at para. 434 (Mar. 15, 2002).

300. Prosecutor v. Stakic, Case No. IT-97-24-T, Judgment, at para. 306 (July 31, 2003).

301. *Id.* at para. 770.

302. *Id.* at para. 817.

303. *Kordic*, Case No. IT-95-14/2-T at para. 199.

304. *Krnjelac*, Case No. IT-97-25-T at para. 443.

305. Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, at para. 717 (May 7, 1997).

306. *Kupreskic*, Case No. IT-95-16-T, at paras. 628-31. There is clear support in the case law of the ICTY for the inclusion of property violations in the *actus reus* of persecutions under Article 5 (h). In *Blaskic*, the Trial Chamber held that: the destruction

crisis in Potocari, the burning of homes in Srebrenica and Potocari, the terrorisation of Bosnian Muslim civilians, in Potocari or in carefully orchestrated mass scale executions, and the forcible transfer of the women, children and elderly out of the territory controlled by the Bosnian Serbs.”³⁰⁷ Also included are “harassment, humiliation, and psychological trauma”,³⁰⁸ the “destruction and plunder of property, unlawful detention and the forcible transfer of civilians,” murder and physical and mental injury;³⁰⁹ constant humiliation and degradation;³¹⁰ and the destruction and looting of residential and commercial properties.³¹¹

3. A Proposed Understanding

In light of the above quoted judgments, the commentary of the ILC, and the elaborate definition of persecution under the Statute of the ICC, one can discern the following regarding the *actus reus* of persecution: “The term ‘persecutory’ act can include acts enumerated elsewhere in the Statute as well as acts not specifically enumerated therein but which nevertheless amount to gross or blatant denials, on discriminatory grounds, of the victim’s fundamental rights guaranteed by international law.”³¹²

An act of persecution must result in a “deprivation of fundamental rights contrary to international law.” Such a deprivation should include as a minimum rights which are regarded as so fundamental that no derogation from these rights is permitted.³¹³ The court will have the

of property must be construed to mean the destruction of towns, villages and other public or private property belonging to a given civilian population or extensive devastation not justified by military necessity and carried out unlawfully, wantonly and discriminatorily. In the same context, the plunder of property belonging to a particular population, whether it be the property of private individuals or of state or “quasi-state” public collectives. *Blaskić*, Case No. IT-95-14-T, at para. 234.

307. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, at para. 537 (Aug. 2, 2001).

308. Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment, at para. 192 (Nov. 2, 2001).

309. *Blaskić*, Case No. IT-95-14-T, at para. 234. See also paras. 218, 233.

310. Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, at paras. 807-08 (July 31, 2003).

311. *Id.* at paras. 809-10.

312. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, at para. 715 (May 7, 1997); See also *Blaskić*, Case No. IT-95-14-T, at para. 218; Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgment, at para. 195 (Feb. 26, 2001); *Krstić*, Case No. IT-98-33-T, at para. 535.

313. See *General Comment adopted by the Human Rights Committee under Article 40 of the International Covenant on Civil and Political Rights*, No. 24, U.N. Human Rights Comm., 52nd Sess., at para. 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994). The Human Rights Committee enumerated a list of rights included within the provisions of the ICCPR which may not be the subject of reservations because these provisions represent customary law. Most notably, almost all the rights and freedoms provided for

flexibility to determine the cases before it, depending on the forms which attacks on humanity may take. Keeping into consideration that each case has to be examined on its merits.

The discriminatory acts charged as persecution must not be considered in isolation, but in context by looking at their cumulative effect. Although individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may be termed “inhumane.”³¹⁴

With regard to acts not specifically mentioned in the Statute, a “violation of the right to equality in some serious fashion that infringes on the enjoyment of a basic or fundamental right” may nevertheless amount to persecution, irrespective of whether or not such acts are legal under national law.³¹⁵

Persecution encompasses not only bodily and mental harm and infringements upon individual freedom, but also acts which appear less serious, such as those targeting property, so long as the victimised persons were specially selected on grounds linked to their membership in a particular community.

Taken in isolation, certain acts or omissions such as denial of employment or evictions from property may not appear to rise to the level of persecution. However, the composite pattern of less grave acts could constitute a “gross or blatant denial” of fundamental rights,³¹⁶ and satisfy the *actus reus* of persecution. The *Krnjelac* Trial Judgment observes, “the acts must amount to persecution, though it is not required that each alleged underlying act be regarded as a violation of international law.”³¹⁷

B. The Subjective Element or the “Mens rea” of Persecution

Defining the appropriate *mens rea* for the crime of persecution is a

in the international human rights instruments, as well as in other regional human rights instruments are subject to limitations and restrictions. These limitations on the rights and freedoms of individuals are not arbitrary, but must meet three requirements. First, it must be prescribed by law (the principal of legality); second, it must have justified one of the specified legitimate aims pursued in the particular provision, and third, the limitation in all circumstances must be necessary in a democratic society. See Mohamed Elewa Badar, *Basic Principles Governing Limitations on Individual Rights and Freedoms in Human Rights Instruments*, 7 INT'L J. HUMAN RTS. 63 (2003).

314. *Krstic*, Case No. IT-98-33-T, at para. 535; Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, at para. 622 (Jan. 14, 2000).

315. *Tadic*, Case No. IT-94-1-T at paras. 697, 710; See *Kupreskic*, Case No. IT-95-16-T, at paras. 614–15.

316. *Kupreskic*, Case No. IT-95-16-T, at paras. 615, 619–20.

317. *Krnjelac*, Case No. IT-97-25-T, at para. 434.

complex task. It is unquestionable that the *mens rea* of persecution is based on discriminatory grounds.³¹⁸ This discriminatory animus is an essential ingredient of the *mens rea* of this offense, the sole category in which discrimination comprises an integral element of prohibited conduct. This heightened *mens rea* is precisely what distinguishes “persecution” from other “crimes against humanity.” In the three Statutes under consideration the discriminatory intent relates solely to the grounds pronounced therein.

1. Discriminatory Grounds

International instruments which include persecution as a crime against humanity require that persecution be committed on one of several enumerated grounds. The Nuremberg Charter included persecution “on political, racial or religious grounds,” as did CCL No. 10. In contrast, the Tokyo Charter excluded persecution on religious grounds.³¹⁹ In the 1954 Draft Code, both crimes of the “murder” type and “persecution” were included as “inhumane acts,” which referred to “social, political, racial, religious or cultural grounds.” The Convention on the Prevention and Punishment of the Crime of Genocide contains the additional grounds of ethnicity, as do the 1991 and 1996 ILC Draft Code.

The ICTR Statute, in contrast to previous instruments, not only mentions several grounds in the paragraph covering the crime of persecution (political, racial or religious grounds) but also in the *chapeau* of the Article covering crimes against humanity (national, political, ethnic, racial or religious grounds). Under the ICTY Statute the mental element of the crime of persecution consists of acting with discriminatory intent on political, racial, and religious grounds.³²⁰ The use of the cumulative

318. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, at para. 305 (July 15, 1999).

319. It should be pointed out that the Tokyo Charter narrowed the definition by omitting religious persecution. That is probably due to the fact that the draftsmen assumed that persecutions on religious grounds had actually not been committed on a large scale in comparing with Japanese aggression and warfare.

320. The Trial Chamber in *Tadic*, stated 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 and several Security Council members stated that they interpreted Article 5 as referring to acts taken on a discriminatory basis, the Trial Chamber adopts the requirement for all crimes against humanity.” See *Tadic*, Case No. IT-94-1-T, at para. 652. This finding was overruled in *Tadic Appeal* where the Appeals Chamber asserts that: “The Prosecution was correct in submitting that the Trial Chamber erred in finding that all such crimes against humanity require a discriminatory intent. Such an intent is an indispensable legal ingredient of the offence only with regard to those crimes for which this is expressly required, that is, for Article 5 (h), concerning various types of persecution.” See *Tadic*, Case No. IT-94-1-A, at para. 305.

“and” in the listing of “grounds” probably represents a naked drafting error by the U.N. Secretariat. Addressing this point the Tadic Trial Chamber remarkably observes that “it is highly unlikely that the Statute’s drafters intended the word ‘and’ to require all three grounds to be present. The Statute should therefore be read in accordance with custom whereby each of the three grounds in and of itself is a sufficient basis of persecution.”³²¹

Article 7(1)(h) of the ICC Statute adds to the specificity of “persecution” by adding to the grounds by which such persecution is perpetrated. Specifically, it adds the following grounds: national, cultural, gender, “other grounds that are universally recognized as impermissible under international law,” and “ethnic” grounds. This Article extends the protection against persecution to a much wider extent,³²² but it seems to exclude acts committed against individuals within the meaning of persecution. Various proposals nevertheless suggest that this crime covers conduct against both individuals and groups by which emphasis is put on the notion that groups consist of individual members.³²³ The ILC commentary to the 1991 Draft Code refers to both individuals and groups of individuals.³²⁴ Likewise, the 1996 Siracusa Draft includes a similar provision in Article 20-4. Similarly, the Yugoslav Tribunal followed the same line of reasoning. In *Tadic*, the Trial Chamber wrote: “what is necessary is some form of discrimination that is intended to be and results in an infringement of an *individual’s* fundamental rights.”³²⁵

From a conceptual point of view, it is questionable whether for the crime of persecution, the *actus reus* must be discriminatory, or is it sufficient that the *mens rea* is discriminatory? In principle, and according to the law of the Yugoslav Tribunal to be guilty of persecution, the accused must have a discriminatory intent for the crime of persecution and the act must in fact deny a fundamental right to the victim, but it is not

321. *Tadic*, Case No. IT-94-1-T, at para. 713; *See Kupreskic*, Case No. IT-95-16-T, at para. 570, n.834; *See also* Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, at para. 235 (Mar. 3, 2000).

322. Article 7(1)(h) includes various groups of people not previously afforded protection against persecution ICC Statute, *supra* note 133, art. 7, at para. 1 at 7.

323. Boot & Hall, *supra* note 264, at 147.

324. *Report of the International Law Commission on the Work of its Forty-Third Session*, U.N. GAOR, 46th Sess., Supp. No. 10, at para. 150, U.N. Doc. A/46/10 (1991).

325. Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, at para. 697 (May 7, 1997). In *Tadic* the Trial Chamber emphasized that: “the persecutory act must be intended to cause, and result in, an infringement on an *individual’s* enjoyment of a basic or fundamental right.” *Id.* at para. 715.

necessary that his act in fact be discriminatory against the group intended. The jurisprudence of the ICTY is divided with regard to this issue. Trial Chamber II has asserted that the acts need to result in discriminatory consequences.³²⁶ Trial Chamber I held that it is sufficient that the intention of the perpetrator, in undertaking the discriminatory acts, was to deny fundamental human rights on racial, religious, or political grounds.³²⁷ This wording indicates that, it is not relevant if the perpetrator was mistaken and the people discriminated against did not actually qualify under these racial, religious or political grounds.

This issue was resolved in the recent *Tuta and Stela* Trial Judgment.³²⁸ The Trial Chamber asserted that the discriminatory bases for persecution must be interpreted broadly. Thus, persons who are considered by the perpetrator to belong to the victim group due to their close affiliations or sympathies for the victim group could fall within the discriminatory bases. The reason asserted for this conclusion is that it is the perpetrator who defines the victim group while the targeted victims have no influence on the definition of their status. The Trial Chamber subsequently found that “in such cases, a factual discrimination is given as the victims are *discriminated in fact* for who or what they are on the basis of the perception of the perpetrator.”³²⁹

From the above citations, one can discern that under customary international law the crime of persecution encompasses conduct against both individuals and groups. Moreover, it is to be noted that although, there is no definitive list of persecutory grounds in customary international law, it is a common feature that whatever grounds are listed are alternatives, the Prosecutor need only to prove one of the listed bases, each of which is sufficient in and of itself to constitute a basis for persecution.³³⁰ Most notably, the jurisprudence of the Yugoslav Tribunal has interpreted the scope of the enumerated discriminatory grounds of persecution broadly. For example, groups and “non-groups” in the former Yugoslavia—that is, “Muslims” (*Kupreskic* case), “non-Croat” (*Blaskic* case), and “non-Serb” (*Tadic* case) can be the object of persecution. Thus, a discriminatory mental state against a group negatively defined can satisfy the “grounds” requirement under Article 5 of the Yugoslav Statute.³³¹

326. *Krnjelac*, Case No. IT-97-25-T, at para. 432; *Prosecutor v. Vasiljevic*, Case No. IT-98-32-T, Judgment, at para. 249 (Nov. 29, 2002).

327. *Kvočka*, Case No. IT-98-30/1-T, at para. 195.

328. *Prosecutor v. Naletilic*, Case No. IT-98-34-T, Judgment, at para 636 (Mar. 31, 2003).

329. *Id.*

330. *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, at paras. 711–13 (May 7, 1997); *See also Blaskic*, Case No. IT-95-14-T, at para. 235.

331. *Kvočka*, Case No. IT-98-30/1-T, at para. 195.

2. Specific Intent or “*Dolus Specialis*”

It is a commonplace to state that “crimes against humanity” are crimes requiring two components, “knowledge” and “intent.” With regard to the crime of persecution, a “particular intent” is required in addition to the above two components. This intent is the discriminatory intent which sets the crime of persecution apart from other crimes against humanity.³³² As the Trial Chamber of the Yugoslav Tribunal stressed in *Blaskic*, the crime of persecution “obtains its specificity” from its particular, discriminatory *mens rea*: “It is the specific intent to cause injury to a human being because he belongs to a particular community or group, rather than the means employed to achieve it, that bestows on its individual nature and gravity: . . .”³³³ In *Stakić* the Trial Chamber opines that the term “discriminatory intent” amounts to the requirement of a “*dolus specialis*.”³³⁴ The definition of the mental element in the Statute of the ICC states that “a person has intent where: (a) in relation to conduct, that person means to engage in the conduct; (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.”³³⁵ But the words “particular intent” that appear in the jurisprudence of the Yugoslav Tribunal do more than simply reiterate that persecution is a crime of intent.³³⁶ This jurisprudence introduces a precise description of the intent, namely “the discriminatory intent.” This discriminatory intent requirement of the crime of persecution is thus different from the general level of intent required for other crimes against humanity, where mere knowledge of the context of “a widespread or systematic attack against a civilian population” is sufficient.³³⁷

The Trial Chamber of the ICTY, in *Kordic and Cerkez*, set forth a two-part test in order to determine whether the accused possessed the requisite *mens rea* for the crime of persecution:

332. Prosecutor v. Kordic, Case No. IT-95-14/2-T, Judgment, at para. 212 (Feb. 26, 2001).

333. *Blaskic*, Case No. IT-95-14-T, at para. 235; *Kordic*, Case No. IT-95-14/2-T, at para. 212.

334. Prosecutor v. Stakic, Case No. IT-97-24-T, Judgment, at para. 737 (July 31, 2003).

335. *Rome Statute of International Criminal Court*, *supra* note 8, at art. 30 (2).

336. I am indebted to Prof. William A. Schabas for this observation.

337. *Blaskic*, Case No. IT-95-14-T, at para. 244; *Kordic*, Case No. IT-95-14/2-T, at para. 212.

The accused must have had the specific intent to commit the underlying act (such as murder, extermination, or torture). Then, if the act is to entail additional, criminal, liability as a crime against humanity, the accused must also have had the requisite *mens rea* for crimes against humanity, which has been defined as knowledge of the context of a widespread or systematic attack directed against a civilian population. With regard to the crime of persecution, a particular intent is required, in addition to the specific intent (to commit the act and produce its consequences) and the general intent (the objective knowledge of the context in which the accused acted). This intent—the discriminatory intent—is what sets the crime of persecution apart from other Article 5 crimes against humanity.³³⁸

The *Krnjelac* Trial Judgment does provide some clarity as regards the quality or degrees of discriminatory intent required. The Judgment states that the accused “must *consciously intend* to discriminate” and that it “is not sufficient for the accused to be aware that he is in fact acting in a way that is discriminatory.”³³⁹ Thus, the *mens rea* standard required for the crime of persecution amounts to the “conscious desire” standard for genocide.

As the above citation clearly shows, the prosecution must go beyond establishing that the offender meant to engage in the conduct, or meant to cause the consequence. The prosecution must also prove the requisite *mens rea* for crimes against humanity.³⁴⁰ With regard to the crime of persecution the offender must also be proven to have particular intent, or *dolus specialis*. Where this particular intent is not established, the act remains punishable, but not as persecution. It may be classified as crime against humanity or it may be an ordinary crime under domestic prosecution.

Noting the complexity of proving this, the prosecutor of the Yugoslav Tribunal argued that it suffices to show merely that the accused had objective knowledge that his acts fitted within widespread or systematic attack based on discriminatory intent.³⁴¹ Rejecting the prosecution’s argument, the Trial Chamber wrote:

An adoption of the Prosecution’s formulation of the requisite *mens rea* would eviscerate the distinction between persecution and the other enumerated crimes against humanity. Such an approach also would dilute the gravity of persecution as a crime against humanity, making it difficult to reach principled decisions in sentencing. Given the fact that the *actus reus* of persecution overlaps with the *actus reus* of other Article 5 crimes, the sole distinction between the two lies in the *mens rea*. Yet despite acknowledging the more stringent intent requirement, the Prosecution essentially adopts the *mens rea* formulated by the International Tribunal for crimes against humanity in general (“the objective knowledge that such acts fit into a widespread or systematic attack against a civilian population”), simply tacking on the additional requirement that the accused had the objective

338. *Kordic*, Case No. IT-95-14/2-T, at paras. 211–12.

339. *Krnjelac*, Case No. IT-97-25-T, at para. 435 (emphasis added).

340. See *infra* Section III(G).

341. *Kordic* Case No. IT-95-14/2-T, at para. 216.

knowledge that attack was “based on political, racial or religious grounds”. This approach does not incorporate the requisite heightened *mens rea* that justifies the increased gravity of criminal liability for the crime of persecution. Rather, it simply requires that the accused have known one more thing.³⁴²

Though some familiarity has developed with regard to the *mens rea* required for the crime of persecution, the remaining aspect yet to assay is whether a discriminatory attack is a sufficient basis from which to infer the discriminatory intent of acts carried out within that attack, or whether proof is required of a discriminatory intent in relation to each specific act charged. In the *Vasiljevic* case, the Trial Chamber emphasised that “the discriminatory intent must relate to the specific act charged as persecution. It is not sufficient that the act merely occurs within an attack which has a discriminatory aspect.”³⁴³ In this context the *Vasiljevic* Trial Chamber criticised the fact that, in other cases before the Tribunal, it was held that “a discriminatory attack is a sufficient basis from which to infer the discriminatory intent of acts carried out within that attack.”³⁴⁴ It continued by stating:

[t]his approach may lead to the correct conclusion with respect to most of the acts carried out within the context of a discriminatory attack, but there may be acts committed within the context that were committed either on discriminatory grounds not listed in the Statute, or for purely personal reasons. Accordingly, this approach does not necessarily allow for an accurate inference regarding intent to be drawn with respect to all acts that occur within that context.³⁴⁵

To the extent that the accused acted as a direct perpetrator in carrying out the crime of persecution the *Vasiljevic* Judgment is certainly laudable. In such cases where the accused is closely related to the actual commission of crimes one might agree that proof is required of the fact that the direct perpetrator acted with discriminatory intent in relation to the specific act. However, this requirement might be problematic in cases where the accused is considered the co-perpetrator behind the commission of the crime of persecution together with other persons. In the *Stakic* case, Dr. Milomir Stakic was considered the co-perpetrator of the crimes together with other persons. In such context the Trial Chamber asserts:

342. *Id.* at para. 217.

343. Prosecutor v. Vasiljevic, Case No. IT-98-32-T, Judgment, at para. 249 (Nov. 29, 2002).

344. *Id.* at para. 249.

345. *Id.*

[t]o require proof of discriminatory intent of both the Accused and the acting individuals in relation to all the single acts committed would lead to an unjustifiable protection of superiors and would run counter to the meaning, spirit and purpose of the Statute . . . This Trial Chamber, therefore, holds that proof of a discriminatory attack against civilian population is a sufficient basis to infer the discriminatory intent of an accused for the acts carried out as part of the attack in which he participated as a (co-)perpetrator.³⁴⁶

The Trial chamber continues asserting that:

In cases of indirect perpetration, proof is required only of the *general discriminatory intent* of the indirect perpetrator in relation to the attack committed by the direct perpetrators/actors. Even if the direct perpetrator/actor did not act with a discriminatory intent, this, as such, does not exclude the fact that the same act may be considered part of a discriminatory attack if only the indirect perpetrator had the discriminatory intent.³⁴⁷

All in all, the proof of specific intent or *dolus specialis* will remain crucial to the Prosecution. However, although the defence can stress that the prosecutor must prove the specific discriminatory intent of the offender, in practice it is hard to imagine a case where an offender somehow has the objective knowledge that his or her acts are committed in the context of a widespread or systematic attack against a civilian population, yet remains ignorant of the grounds on which that attack has been launched.³⁴⁸

V. GENERAL REMARKS AND CONCLUSION

The Nuremberg Charter was the first international instrument that dealt specifically with “crimes against humanity” as a distinct category of international crimes. It defined “crimes against humanity” as requiring a nexus with other crimes over which the IMT had jurisdiction, namely crimes against peace and war crimes. Thus, the Charter’s formulation of “crimes against humanity” can be viewed as a jurisdictional extension of the international protection afforded to civilian populations from crimes committed against them by those of the same nationality in connection with war.³⁴⁹ It can also be viewed as an extension of the “scope of the humanitarian law of war rather than as an autonomous source of rights which accrued to individuals in periods of peace as well as in war.”³⁵⁰ The Tokyo Charter incorporated the same category of “crimes against humanity” as stated in the Nuremberg Charter, but provides no further

346. *Stakic*, Case No. IT-97-24-T, at para. 742.

347. *Id.* at para. 743 (emphasis added).

348. *Kordic*, Case No. IT-95-14/2-T, at para. 218.

349. BASSIOUNI, *supra* note 15, at 559.

350. Matthew Lippman, *Crimes Against Humanity*, 17 B.C. THIRD WORLD L.J., 171, 201 (1997).

guidance on this offense.³⁵¹

The trend towards severing the connection between “crimes against humanity” and armed conflict was accelerated by Control Council Law No. 10 as well as the Genocide Convention, providing that such crimes could be committed in periods of peace as well as war. The substantive principles contained in the ILC Draft Code helped define key elements of “crimes against humanity.” The developments reflected in the Draft Code include the elimination of the war nexus, a substantial extension of the list of enumerated acts, and a requirement of widespread or systematic attack. Most notably, although the ILC Draft Codes do not represent binding international law, they may, nevertheless, be viewed as evidence of “customary international law” or of “general principles of international law” as enunciated in Article 38 of the Statute of the International Court of Justice.³⁵²

The Statutes of the ICTY and ICTR represent important recent codifications of the law of “crimes against humanity.”³⁵³ Although the definition of “crimes against humanity” provided in the ICTY Statute is not quite as progressive as 1996 ILC Draft Code, it reflects several major developments in the law since the Nuremberg Charter. First, it includes rape as a specifically enumerated crime. Second, it clarifies that discriminatory intent is required only for persecution and not for other inhumane acts.

The ICTR Statute definition of “crimes against humanity” is more progressive than the ICTY Statute as it eliminates the nexus requirement between this offence and armed conflict. However, it does require that all the enumerated crimes must be committed on discriminatory grounds. This requirement of discriminatory intent represents a significant regression in the development of the definition of “crimes against humanity.” In addition, this discriminatory element raises significant questions, and subsequently is subject to two rather different interpretations. First, is it the “attack” (understood as the widespread or systematic context of the act in question) or the individual act itself that must be committed on discriminatory grounds? Second, does the requirement incorporate some additional mental element by requiring discriminatory intent on the part of an accused?

351. It is primarily prosecuted as “crimes against peace.”

352. Bassiouni & Manikas, *supra* note 76, at 547. See also Statute of the International Court of Justice, art. 38, 59 Stat 1055, 1060 (1945).

353. Statute of the International Court of Justice, art. 38(d).

The evolutionary development of the definition of “crimes against humanity” has been further accelerated under Article 7 of the Rome Statute. The ICC definition may be viewed in some sense as resolving two long-disputed aspects of the definition. First, “crimes against humanity” no longer requires a nexus of armed conflict, whether of internal or international character. Second, there is no requirement that the enumerated crimes constituting “crimes against humanity” other than the crime of persecution be committed with discriminatory intent. Although Article 7 of the ICC Statute gives cause for celebration in certain aspects, it also adds new ambiguities. The term “attack” as defined in sub-paragraph (2)(a) of Article 7 could bind the jurisdiction of the future court in cases of crimes in which the conduct is single. This single act might intentionally cause great suffering and be “of concern to the international community as whole.”³⁵⁴

The “widespread or systematic attack” requirement is fundamental in distinguishing “crimes against humanity” from domestic crimes. It is this element that turns these crimes into attacks against humanity rather than isolated violations of the rights of a particular individual. The result of this requirement is a high-threshold but disjunctive test (widespread or systematic) coupled with a low-threshold but conjunctive test (multiple and policy). An attack need not necessarily be “widespread” (understood as requiring large-scale activity involving a great number of victims), but it must at least have some element of scale, affecting multiple victims. An attack need not necessarily be “systematic” (understood as requiring methodical organization or orchestration), but it must at least be pursuant to or in furtherance of some sort of plan or policy of a State organization.³⁵⁵

Thus, in construing the “policy” requirement, the ICC should keep in mind that the importance of this element, as understood by the ILC and the ICTY, is not to demonstrate systematicity, but to establish some degree of State or organizational involvement in acts of “crimes against humanity.”

The foregoing analysis has demonstrated that in order to meet the standard of knowledge required for *mens rea*, it must be proved that:

the accused willingly agreed to carry out the functions he was performing; that these functions resulted in his collaboration with the political, military or civilian authorities defining the ideology, policy or plan at the root of the crimes . . . and lastly; that he contributed to its commission through intentional

354. See generally *supra* Section III(B)(4). The author has raised the argument that if only one of the Twin Towers in The United States of America were to have been attacked, this act would not have fulfilled the provision of Article 7(2)(a) as long as there is no multiple commission of acts.

355. Darryl Robinson, *supra* note 207 at. 63–64.

acts or by simply refusing of his own accord to take the measures necessary to prevent their perpetration.³⁵⁶

In addition, the perpetrator need not specifically intend to participate in the attack, nor must he or she realize that the attack is in furtherance of a policy.³⁵⁷

Unlike the enumerated crimes constituting "crimes against humanity," which are also covered as war crimes, persecution is a crime unique within the meaning of "crimes against humanity." Persecution was recognized as a "crime against humanity" in the Nuremberg Charter, the Tokyo Charter, CCL No. 10, and the Statutes of the ICTY and ICTR. However, none of these precedents provide a definition of this offense. In the ICC Statute persecution refers to the intentional and severe deprivation of fundamental rights on certain specific discriminatory grounds. In addition, the Rome statute definition also includes persecution on any other grounds that are universally recognized as impermissible under international law. Despite this development, the Statute of the ICC limits the crime of persecution to any act or crimes within its jurisdiction.

The foregoing analysis of the *actus reus* and *mens rea* of the crime of persecution reveals the ongoing efforts by the Yugoslav Tribunal to reshape the elements of this offense. Although there are now several ICTY judgments that address the elements of the crime of persecutions in some detail, it still remains a somewhat elusive offense, some element of which will most probably be further crystallized in future cases. The relevant international jurisprudence on the elements of the offense is still quite limited, even if the recent *Kvočka*, *Krnoyelac*, *Vasiljevic*, and *Stakic* Trial Judgements provide some elucidation of the law of persecution as a crime against humanity.

The definition of persecution by the Yugoslav Tribunal is of great significance since it allows a court to charge an accused with persecution as a crime in itself, and not only as an auxiliary offense or an aggravating factor. This should provide guidelines for the potential offender, Judge, and Prosecutor, as well as for the new established International Tribunals.

356. Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, at para. 257 (Mar. 3, 2000).

357. See U.N. Preparatory Comm'n for the Int'l Criminal Court, *supra* note 10, at 9. The second paragraph of the introduction indicates that is not required that the perpetrator knew the precise details of the policy. This passage implies that *some* awareness of an underlying policy is probably required, but leaves considerable ambiguity as to the extent of that awareness.

Nevertheless, it is still possible that the ICC will not follow the Yugoslav Tribunal and will try to connect persecution to one of the enumerated acts listed in Article 7 or other crimes within its jurisdiction.

The traditional elements of “crimes against humanity” are still required and the analysis can only be made case by case. Much progress has been made on defining the elements of “crimes against humanity;” however, the road from the Nuremberg Charter to the Rome Statute is still being paved.