2010

Chapeau Elements of Crimes Against Humanity, crimes against humanity, crimes against humanity and chapeau elements

R. Garrison Mason Jr.

CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW

MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Issue: Chapeau Elements of Crimes Against Humanity

Prepared by R. Garrison Mason Jr.
J.D. Candidate, 2010
Spring Semester, 2010

TABLE OF CONTENTS

BIBLIOGRAPHY OF SOURCES

Statutes and Rules

1. Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, resolution 57/228 of 18 December 2002

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. Elements of Crimes, International Criminal Court, adopted 9 September 2002 (ICC-ASP/1/3 (part II-B))

4. Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006)

5. 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)

6. Rome Statute of the International Criminal Court, adopted by the Security Council on 17 July 1998, U.N. Doc A/CONF.183/9 (1998)

7. Statute of the International Tribunal for Rwanda, adopted by Security Council on 8 November 1994, U.N. Doc. S/RES/955 (1994)

8. Statute of the Int'l Criminal Trib. For the Former Yugoslavia, U.N.S.C. Res. 827, U.N. SCOR, 48th Sess., 3217 mtg., U.N. Doc. S/RES/827 (1993)

Cases

<u>International Criminal Tribunal of Rwanda</u>

9. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998)

10. Prosecution Appeal Brief, Prosecutor v. Akayesu, Case No. ICTR-96-4-A (July 10, 2000)

11. Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Judgment (June 1, 2001)

12. Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment (May 21, 1999)

13. Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment (Jan. 27, 2000)

14. Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment (Dec. 6, 1999)

International Criminal Tribunal for the Former Yugoslavia

15. Prosecutor v. Kunarac, Case Nos. IT-96-23-T, IT-96-23/I-T

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

17. Prosecutor v. Kupreski, Case No. IT-95-16-T, Judgment (Jan. 14, 2000)

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

19. Prosecutor v. Tadic, Case No. IT-94-I-T, Brief of Argument of the Prosecution (Cross-Appellant) (January 12, 1998)

20. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment (July 15, 1999)

U.N. Documents

21. Draft Code 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)

22. Final Report of the Commission of Experts Established Pursuant to the Security Council Resolution 780, U.N. SCOR, 49th Sess., U.N. Soc. S/1994/674 (1994)

23. G.A. Res. 174(II), U.N. GAOR, 2d Sess., 123rd plen. mtg., U.N. Doc. A/519 (1947)

Law Reviews and Articles

24. Mohamed Elewa Badar, *From the Nuremberg Charter to the Rome Statute: Defining The Elements of Crimes Against Humanity*, 5 San Diego Int'l L. J. 73 (2004)

25. Catherine R. Blanchet, *Some Troubling Elements in the Treaty Language of the Rome Statute of the International Criminal Court*, 24 Mich. J. Int'l L. 647 (2003)

26. Eric H. Blinderman, Anniversary Contributions: International Criminal Law: The Conviction of Saddam Hussein for the Crime Against Humanity of "Other Inhumane Acts," 30 U. Pa. J. Int'l L. 1239 (2009).

27. Jessie Chella, Persecution: *A Crime Against Humanity In The Rome Statute of the International Criminal Court*

28. Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 Duke J. Comp. & Int'l L. 307 (2000)

29. Margaret McAuliffe deGuzman, *The Road from Rome: The Developing Law of Crimes Against Humanity*, Human Rights Quarterly 22 (2000) 335-403

30. Paul J. Magnarella, *Some Milestones and Achievements at the International Criminal Tribunal for Rwanda: The 1998 Kambada and Akayesu Cases*, 11 Fla. J. Int'l L. 517 (1997)

31. Guenael Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 Harv. Int'l L. J. 237 (2002)

32. Darryl Robinson, *Defining "Crimes Against Humanity" at the Rome Conference*, The American Journal of International Law, Vol. 93, No. 1 (Jan. 1999)

33. Beth Van Schaak, *The definition of Crimes Against Humanity: Resolving the Incoherence*, 37 Colum J. Transnat'l L., 787 (1999)

34. Johan D. Van der Vyver, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, 12 U. Miami Int'l & Comp. L. Rev. 57 (2004)

I. INTRODUCTION

A. Scope

This memorandum discusses each of the "chapeau" elements of crimes against humanity, namely the interpretation of the terms "widespread," "systematic," "attack," "civilian," "population," and "on national, political, ethnical, racial or religious grounds."* Because the language "on national, political, ethnical, racial or religious grounds" is rarely found in the context of crimes against humanity, and because it can be interpreted in multiple ways, special attention is paid to that element. In addition, this memorandum discusses the relationship between the chapeau elements of crimes against humanity and the enumerated acts as set forth in Article 5 of the Law on the Establishment of the Extraordinary Chambers ("ECCC Statute").

B. Summary of Conclusions

i. The term "widespread or systematic attack" means that the attack must be either on a vast scale or in furtherance of a State or organizational policy.

The term "widespread" means only that the attack must be on a "vast scale," meaning either the commission of multiple acts or the presence of a large number of victims. The term "systematic" means that the attack was perpetrated as part of a methodical plan. The term "attack" means simply that any one of the enumerated acts were committed. While the "attack" must be proven in either instance, only one of the "widespread or systematic" elements need be proven to satisfy the *chapeau*'s requirements.

ii. The term "civilian population" means that a specific group of people must be targeted and that the majority of those people are non-combatants.

The term "population" simply means that the crimes must be of a collective nature and to include a larger body of victims than that caused by isolated acts. Due to the "on national,

political, ethnical, racial or religious grounds" language, however, the population must be targeted due to the enumerated discriminatory grounds in the *chapeau*.

Based on customary international law, the term "civilian" should be broadly interpreted by the ECCC, including people who may have held arms at one point or another, so long as they weren't actively involved in a resistance at the time of the attack. At the same time, the fact that the target of an attack may have included combatants does not preclude the finding that the population was "civilian."

iii. The attack must also be in furtherance of a State or organizational plan or policy, as mandated by customary international law.

The Office of the While the ECCC Statute does not explicitly require that the attack be in furtherance of a State or organizational plan or policy, the requirement has been a consistent element in customary international law and is also required by the Rome Statute. The policy or plan does not have to be that of a State though, and the requirement can be satisfied so long as the organization has a formulated plan and is able to move freely within a defined territory.

iv. The phrase "on national, political, ethnical, racial or religious grounds" refers to the "attack" and not any of the enumerated acts, therefore not increasing the level of intent that the prosecution need prove.

The ECCC should acknowledge that the burden faced by the Office of the Prosecution is not heightened by the inclusion of the phrase "on national, political, ethnical, racial or religious grounds" in the ECCC Statute. The interpretation that the discrimination element requires a specific level of intent has been discussed by both the ICTY and the ICTR, and both have found that there is no such requirement. Instead, both ad hoc tribunals have determined that, instead of increasing the level of intent required on behalf of the perpetrator, both the language and customary international law lead to a conclusion that it is the "attack" that must be discriminatory, not the "act."

v. The *mens rea* needed to be proven in regards to that of the *chapeau* elements is that of "knowledge," and knowledge may be proven through the use of circumstantial evidence.

As has been developed through customary international law, and as explicitly pronounced in the Rome Statute, the applicable *mens rea* to the *chapeau* elements of crimes against humanity is that of knowledge. Knowledge, however, need not be proven directly, and "constructive knowledge" satisfies the knowledge requirement. As a result, the prosecution is able to use any circumstantial evidence to show that the accused would have had knowledge of the attack.

II. BACKGROUND

Under Article 5 of the ECC Statute, "[the] Extraordinary Chambers shall have the power to bring to trial all Suspects who committed crimes against humanity during the period 17 April 1975 to 6 January 1979."[1] "Crimes against humanity" are then defined as: "any acts committed as part of a widespread or systematic attack against any civilian population, on national, political, ethnical, racial or religious grounds, such as:

- murder;
- extermination;
- enslavement;
- deportation;

---

*What are the requirements of the proof of the chapeau elements in article 5 of the ECCC Law pertaining to Crimes Against Humanity? What is the connection, if any, of these requirements with the proof of the substantive crimes enumerated in that article? In answering this question, please refer to Article 9 of the UN-Cambodia Agreement that describes that the ECCC shall charge Crimes Against Humanity as defined in the Rome Statute of the ICC.

[1] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) [Reproduced in accompanying notebook at Tab 4]

- imprisonment;
- torture;
- rape;
- persecutions on political, racial, and religious grounds;
- other inhumane acts."[2]

This memo will discuss what are known as the *chapeau* elements of crimes against humanity. Margaret McAuliffe deGuzman[3] explains best the concept of the *chapeau* elements when she writes:

> The *chapeau* elements are those contained in the first paragraph of the definition of crimes against humanity, as distinct from the enumerated acts listed underneath the *chapeau*. Crimes against humanity involve the commission of one or more inhumane acts as well as the fulfillment of the *chapeau* elements of the crime. In order to prove the commission of a crime against humanity, a prosecutor must demonstrate that the accused has committed the elements of the enumerated, such as murder, torture, or rape. In addition, the prosecutor must prove the elements required by the *chapeau* of crimes against humanity…The *chapeau* elements are crucial since they elevate what would otherwise constitute a crime under domestic jurisdiction to an act of international concern."[4]

---

[2] *Id.*

[3] Margaret McAuliffe deGuzman Professor deGuzman is a graduate of Yale Law School, the Fletcher School of Law & Diplomacy, and Georgetown University's School of Foreign Service. She was a Fulbright Scholar in Senegal and is currently a Ph.D. candidate at the Irish Center for Human Rights of the National University of Ireland. Margaret deGuzman also served as a legal advisor to the Senegal delegation at the Rome Conference on the International Criminal Court. Most recently, Professor deGuzman taught international human rights law at Georgetown University's Institute for International Law and Politics. She is currently involved in expert groups drafting a convention on crimes against humanity and general rules and principles of international criminal procedure.

[4] Margaret McAuliffe deGuzman, The Road from Rome: The Developing Law of Crimes Against Humanity, Human Rights Quarterly 22 (2000) 335-403, 337, FN 5 [Reproduced in accompanying notebook at Tab 29].

Under the ECCC Statute, those *chapeau* elements are: (1) a widespread or systematic attack; (2) against a civilian population; (3) on national, political, ethnical, racial, or religious grounds. Each of these elements will be discussed in turn. In particular, attention will be paid to elements that have been considered necessary by other tribunals, as well as elements that are a part of the ECCC Statute that are not typical of crimes against humanity definitions, namely the "on national, political, ethnical, racial or religious grounds" language.

III. THE *CHAPEAU* ELEMENTS

A. WIDESPREAD OR SYSTEMATIC ATTACK

The most important of the *chapeau* elements is that the attack be "widespread or systematic."[5] It is the "widespread or systematic" element that transforms a domestic crime into one subject to international concern and jurisdiction and "into attacks *against humanity* rather than isolated violations of the rights of particular individuals."[6]

The concept of a "widespread or systematic attack" has long been a part of the definition of crimes against humanity.[7] Still, the ICTR Statute was the first binding international legal

[5] "One of the distinguishing features of 'crimes against humanity' is their pattern of occurrence. 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." Mohamed Elewa Badar, From the Nuremberg Charter to the Rome Statute: Defining The Elements of Crimes Against Humanity, 5 San Diego Int'l L. J. 73, 109 (2004) [Reproduced in accompanying notebook at Tab 24].

[6] deGuzman, *supra* note 4, at 375

[7] "All of the State negotiators agreed that inhumane acts had to pass a certain threshold to become a crime against humanity in the international setting. Criminalization of murder, for instance, was not the issue. Instead, the issue was determining at what point the international community had the right and the obligation to step in and prosecute murders committed by an actor. One group of States initially argued for the approach taken by the International Criminal Tribunal for the Former Yugoslavia, which had no statutory jurisdictional threshold. However, the delegates eventually agreed that the threshold test should incorporate terms used in previous

instrument to include the language "widespread or systematic attack" in its definition,[8] and the Rome Statute followed the ICTR's example. Therefore, the interpretations of the ICTR and the Rome Statute provide the most relevant precedent to the ECCC and may be seen as the most persuasive authority on the "widespread or systematic" requirement.

In order to satisfy the "widespread or systematic attack" requirement, "it is instructive to isolate four elements of this concept: the definitions of 'widespread or systematic' and 'attack,' and what has have come to be called the 'policy' and 'nexus' requirements."[9] These different elements will be discussed in turn.

i. *Widespread*

The term "widespread" refers to the number of victims, whereas the term "systematic" refers to the existence of a policy or plan.[10] "Widespread" can be defined as "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims."[11] As the International Law Commission ("ILC") Draft Code has explained,

> 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

---

jurisprudence and commentary, namely 'widespread' and 'systematic.'" Catherine R. Blanchet, Some Troubling Elements In The Treaty Language Of The Rome Statute Of The International Criminal Court, 24 Mich. J. Int'l L. 647, 655 (2003) [Reproduced in accompanying notebook at Tab 25]. *See also* Badar, *supra* note 5, at 109 [Reproduced in accompanying notebook at Tab 24]

[8] deGuzman, *supra* note 4, at 364 [Reproduced in accompanying notebook at Tab 29]

[9] Simon Chesterman, An Altogether Different Order: Defining the Elements of Crimes Against Humanity, 10 Duke J. Comp. & Int'l L. 307, 314 (2000) [Reproduced in accompanying notebook at Tab 28]

[10] Badar, *supra* note 5, at 109. [Reproduced in accompanying notebook at Tab 24]

[11] *Id.*

> 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 situations 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.[12]

In most situations involving alleged crimes against humanity, the presence of inhumane acts on a vast scale is almost commonplace. For example, in the Saddam Hussein trial, Trial Chamber I analyzed whether the "widespread" element was met during the attack on residents of Ad-Dujayl. In its analysis, the Trial Chamber held that the attack was widespread because it was "taken over by military forces for several days, a sizeable percentage of its population was arrested (and later detained and executed), and the ultimate penalties against the population were inflicted over a several year period."[13] And while the Rome Statute does require that there be "multiple commission[s] of [the enumerated] acts,"[14] certainly the Khmer Rouge's unlawful arrests, torture, and murder of thousands of people over a period of almost four years would satisfy the "vast scale" requirement.

---

[12] Draft Code 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) [Reproduced in accompanying notebook at Tab 21]

[13] Eric H. Blinderman, Anniversary Contributions: International Criminal Law: The Conviction of Saddam Hussein for the Crime Against Humanity of "Other Inhumane Acts," 30 U. Pa. J. Int'l L. 1239, 1252-53 (2009) [Reproduced in accompanying notebook at Tab 26]

[14] While the Rome Statute requires the commission of multiple acts, customary international law does not. As an example, the execution by Soviet authorities of Hungarian leader Imre Nagy was a crime against humanity despite the fact that there was only one victim. Even though the inhumane act was not on a "vast scale," the fact that it was a political leader meant that the goal was to injure an entire population. *See* Badar, *supra* note 8 at 110 [Reproduced in accompanying notebook at Tab 24]

ii. *Systematic*

As mentioned briefly above[15], the term "systematic" "refers to a pattern of conduct or methodical plan."[16] As the ILC explained in its Draft Code:

> 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 inhumans 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] systemic' in considering whether such acts constituted crimes against humanity.[17]

The Trial Chambers in *Prosecutor v. Tadic* expanded on this definition, writing that the term "systematic" requires "thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources."[18] In that sense, the "systematic" element is closely related to the policy requirement,[19] where "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."[20]

iii. *Attack*

---

[15] See *infra* p.13

[16] *Id.* at 111 [Reproduced in accompanying notebook at Tab 24]

[17] Draft Code Against the Peace and Security of Mankind, *supra* note 12 [Reproduced in accompanying notebook at Tab 21]

[18] Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, at para. 648 (May 7, 1997) [Reproduced in accompanying notebook at Tab 18]

[19] See *infra* pp. 22-25

[20] Badar, *supra* note 8, at 111-12 [Reproduced in accompanying notebook at Tab 24], citing M Cherif Bassiouni, Crimes Against Humanity in International Criminal Law 62, 196-199 (2d. rev. ed., 1999)

The term "attack" can be "can be described as a course of conduct involving the commission of acts of violence," a somewhat different interpretation than under the laws of war.[21] As explained by the ICTY Trial Chamber II in *Kunarac*:

> 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.[22]

While the Statute of the International Criminal Tribunal for the Former Yugoslavia ("ICTY Statute") contains the requirement that the crimes be committed "in armed conflict,"[23] the Statute of the International Criminal Tribunal for Rwanda ("ICTR Statute") and the ECCC Statute contain no such requirements.[24] Nor, moreover, is the "armed conflict" a necessary element of crimes against humanity in the ICTR or ECCC Statutes.

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."[25] The ICTR Trial Chamber II in *Kayihema* held similarly,

---

[21] *Id.* at 105

[22] Prosecutor v. Kunarac, Case Nos. IT-96-23-T, IT-96-23/I-T, at para. 416 [Reproduced in accompanying notebook at Tab 15]

[23] "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…." Statute of the Int'l Criminal Trib. For the Former Yugoslavia, U.N.S.C. Res. 827, U.N. SCOR, 48th Sess., 3217 mtg., U.N. Doc. S/RES/827 (1993), Art. 5. [Reproduced in accompanying notebook at Tab 8].

[24] *See* Statute of the International Tribunal for Rwanda, adopted by Security Council on 8 November 1994, U.N. Doc. S/RES/955 (1994) [Reproduced in accompanying notebook at Tab 7]; ECCC Statute, *supra* note 1 [Reproduced in accompanying notebook at Tab 4]

[25] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, at para. 581 (Sept. 2, 1998) [Reproduced in accompanying notebook at Tab 9].

that an "attack" is simply "an event that encompasses the enumerated crimes."[26] This view that an attack is simply any of the enumerated acts is also widely held among scholars of customary international law.[27] The ECCC, as well, should adopt this interpretation of the term "attack." Certainly, the Khmer Rouge's attack encompassed multiple commissions of the enumerated acts and, hence, the "attack" requirement should be easily satisfied.

B. ON A CIVILIAN POPULATION

All codifications of the definition of crimes against humanity have included the requirement that the attack be committed against a civilian population.[28] The term "civilian" requires that the attack be committed against noncombatants,[29] whereas the term "population" requires that a large number of civilians must be targeted.[30] The definitions of "civilian" and "population," however, are somewhat murky within the context of international law.

i. *Civilian*

[26] Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, at para. 122 (May 21, 1999) [Reproduced in accompanying notebook at Tab 12].

[27] See Badar, *supra* note 5, at 108 [Reproduced in accompanying notebook at Tab 24] ("Generally speaking, the concept of an 'attack' may be defined as an unlawful act as the kind enumerated in Articles 5(a) to (i) and 3(a) to (i) of the ICTY and ICTR Statutes, respectively.")

[28] deGuzman, *supra* note 4, at 360 [Reproduced in accompanying notebook at Tab 29]

[29] Badar, *supra* note 5, at 101 [Reproduced in accompanying notebook at Tab 24], citing La Documentation Internationale, La Paix de Versailles, Vol. 3, Responsibilities 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, 193 (1948)

[30] *Id.* at 104 [Reproduced in accompanying notebook at Tab 24]

It is generally agreed that crimes against humanity must be committed against civilians rather than combatants.[31] In reference to Article 6(c) of the Nuremberg Charter, for example, the UNWCC stated 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."[32] However, what constitutes a "civilian" is not entirely clear.[33] As Margaret McAuliffe deGuzman[34] explains, "the lines between combatants and noncombatants become particularly murky in internal conflicts where the warring factions are not under the control of governments. In the conflicts in the former Yugoslavia and Rwanda, for example, large networks of persons not formally enlisted in an army were actively involved in the conflict."[35]

In its analysis of the "civilian target" element of crimes against humanity, the Commission of Experts on the ICTY wrote that the term:

> "should not lead to any quick conclusions concerning people who at one particular point in time did bear arms….A head of family who…tries to protect his family gun-in-hand does not thereby lose his status as a civilian. Maybe the same is the case for the sole policeman or local defence guard doing the same, even if they joined hands to try to prevent the cataclysm….[T]he distinction between improvised self-defence and actual military defence may be subtle, but none the less important. This is no less so when the legitimate authorities in the

[31] Final Report of the Commission of Experts Established Pursuant to the Security Council Resolution 780, U.N. SCOR, 49th Sess., U.N. Soc. S/1994/674 (1994) [Reproduced in accompanying notebook at Tab 22] (holding that the term "any civilian population" principally applies to non-combatants)

[32] Badar, *supra* note 5, at 101 [Reproduced in accompanying notebook at Tab 24]

[33] deGuzman, *supra* note 4, at 361 [Reproduced in accompanying notebook at Tab 29]

[34] At the time of the Article, Margaret McAuliffe deGuzman was a law clerk to the Honorable James. R. Browning of the Ninth Circuit Court of Appeals. She earned a JD. From Yale Law School, an M.A.L.D. from the Fletcher School of Law and Diplomay and a BSFS from Georgetown University's School of Foreign Service.

[35] deGuzman, *supra* note 8, at 361 [Reproduced in accompanying notebook at Tab 29],

> area – as part and parcel of an overall plan of destruction – had previously been given an ultimatum to arm all the local defence guards."[36]

The jurisprudence of both the ICTY and the ICTR have also led to the conclusion that the term "civilian" should be interpreted broadly rather than narrowly.[37]

In one example of this broad interpretation of the term "civilian," the ICTY Trial Chamber in *Msksic* held in its decision 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."[38] The French Cour de Cassation has held the same, writing in the *Barbie* decision that "members of the Resistance could be victims of crimes against humanity as long as the necessary intent for crimes against humanity was present."[39]

The decisions of the ICTR are also particularly illustrative, as the ICTR has discussed specifically "whether a civilian population may lose its character as civilian if there are certain non-civilians present."[40] In *Musema,*[41] *Akayesu,*[42] and *Rutaganda,*[43] the ICTR has held that "the

---

[36] Final Report of the Commission of Experts, *supra* note 31 [Reproduced in accompanying notebook at Tab 22]

[37] *See* Guenael Mettraux, Crimes Against Humanity In The Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, 43 Harv. Int'l L.J. 237, 257 (2002) [Reproduced in accompanying notebook at Tab 31]

[38] Badar, *supra* note 5, at 102 [Reproduced in accompanying notebook at Tab 24] (citing Prosecutor v. Mile Msksic, 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, at para. 29 (April 3, 1996)

[39] French Cour de Cassation, *Federation Nationale des Deportes et Internes Resistants et Patriotes v. Barbie*, quoted in Tadic, *supra* note 18, at para. 641 [Reproduced in accompanying notebook at Tab 18]

[40] Badar, *supra* note 5, at 102 [Reproduced in accompanying notebook at Tab 24]

fact that there are certain individuals among the civilian population who are not civilians does not deprive the population of its civilian character." Therefore, the attack must target predominately civilians, but not all victims or targets must be civilian. Moreover, "a person shall be considered to be a civilian for as long as there is a doubt as to his or her statuts."[44]

Thus based on customary international law, the term "civilian" should be broadly interpreted by the ECCC, including people who may have held arms at one point or another, so long as they weren't actively involved in a resistance at the time of the attack. At the same time, the fact that the target of an attack may have included combatants does not preclude the finding that the population was "civilian."

ii. *Population*

There are also differing interpretations as to the term "population." One interpretation is that the term "population" is "merely another way of stating the requirement of a 'widespread or systematic' attack, meaning simply that "crimes against humanity do not encompass isolated acts but require a broader context."[45]

Beginning with the Nuremberg Charter, the term "population" "indicates that a larger body of victims is visualized and that single or isolated acts committed against individuals are

---

[41] Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment, at para. 207 (Jan. 27, 2000) [Reproduced in accompanying notebook at Tab 13]

[42] Akayesu, *supra* note 25, at paras. 582, 610 [Reproduced in accompanying notebook at Tab 9]

[43] Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment, at para. 72 (Dec. 6, 1999) [Reproduced in accompanying notebook at Tab 14]

[44] Prosecutor v. Kunarac, Case Nos. IT-96-23-T, IT-96-23/1-T, Judgment, at para. 426 (Feb. 22, 2001) [Reproduced in accompanying notebook at Tab 15]

[45] deGuzman, *supra* note 4, at 362 [Reproduced in accompanying notebook at Tab 29]

outside the scope."[46] This interpretation has been fairly continuous in the context of international law. The Trial Chamber in the *Tadic* judgment, for example, wrote:

> The 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.[47]

The *Tadic* judgment is consistent with the interpretation of the term "population" among international scholars, who have held that a "population" is "a sizeable group of people who possess some distinctive features that mark them as targets of the attack."[48] In that sense, "randomly or fortuitously assembled"[49] groups, "such as a crowd at a football game,"[50] would not be considered a population.

However, the ICTY Statute does not contain the same "attack on a civilian population on national, political, ethnical, racial, or religious grounds" language as does the ECCC Statute.[51] As Mohamed Elewa Badar[52] explains,

---

[46] Badar, *supra* note 5, at 104 [Reproduced in accompanying notebook at Tab 24] *citing* Egon Schwelb, Crimes Against Humanity, 23 Brit. Year Book of Int'l L. 179, 188 (1946)

[47] Prosecutor v. Tadic, *supra* note 18, at para. 644 (May 7, 1997) [Reproduced in accompanying notebook at Tab 18]. *But compare with* para. 649, where the Trial Chamber wrote: "Clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails criminal responsibility, and an individual need not commit numerous offences to be held liable."

[48] Guenael Mettraux, *supra* note 37, at 255 [Reproduced in accompanying notebook at Tab 31]

[49] *Id.*

[50] *Id*.

[51] *See* ICTY Statute, *supra* note 23, at Art. 5 [Reproduced in accompanying notebook at Tab 8]; ECCC Statute, *supra* note 1, at Art. 5 [Reproduced in accompanying notebook at Tab 4]

> "It has been observed that the term 'population' as employed in the ICTR Statute [and ECCC statute] as 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. This interpretation is contrary to the humanitarian law's definition, where the 'civilian population comprises all persons who are civilians.'"[53]

As is discussed *infra* pages 25-38 (Part C – On National, Political, Ethnical, Racial, or Religious Grounds), this analysis is correct, and the inclusion of the "on national, political, ethnical, racial or religious grounds" language does conflict with the typical crimes against humanity definition. Therefore, for the ECCC, the requirement of a "population" entails not only that the crimes be of a collective nature, but also that the attack (and not the individual act) must be on discriminatory grounds, i.e., that a specific group of people are targeted by the attack.

iii. Policy Requirement

While the ECCC does not explicitly state that the attack must be in furtherance of a policy, that requirement has nonetheless become an essential element of customary international law, and one that would have been essential during the period of Democratic Kampuchea as well. Article 6(c) of the Nuremberg Charter did not explicitly contain a policy requirement, but "the Nuremberg judgment provided a short descriptive passage which emphasized the 'policy of

---

[52] Mohamed Elewa Badar's bio includes: Resident Representative of the International Institute of Higher Studies in Criminal Sciences (ISISC), Siracuza, Italy, for the Afghanistan Judicial Training Programme; Judge, Ministry of Justice, Egypt (2001-Present); Prosecutor, Public Prosecution Office, Ministry of Justice, Egypt (1997-2000); Former Police Investigator, Ministry of Interior, Egypt (1991-1997). Ph.D. Candidate in International Criminal Law, The Irish Centre for Human Rights, with a Doctoral thesis entitled "Towards a Unified Concept for Mens Rea in International Criminal Law (2002-2005); LL.M. in International Human Rights Law, The Irish Centre for Human Rights, National University of Ireland, Galway, 2001; Diploma in International Legal Relations, Ain Shams University, Cairo, 1999; LL.B. & Bachelor's of Police Sciences, Police Academy, Police College, 1991.

[53] Badar, *supra* note 5, at 105 [Reproduced in accompanying notebook at Tab 24]

terror' and 'policy of persecution, repression, and murder of civilians."[54] Since that time, national courts have interpreted the elements of crimes against humanity to include such an element.[55]

More recently, the ICTY has interpreted the phrase "directed against any civilian population" to mean "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."[56] The ICTR has written that "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."[57] And while there exists the possibility that, under customary international law, the policy requirement is only necessary to prove a crime against humanity if the attack is systematic, rather than widespread,[58] the Elements of Crimes of the Rome Statute negate this

---

[54] *Id.* at 112

[55] "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. 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 direct against particular groups of people. 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." *Id.* at 112-13.

[56] Prosecutor v. Tadic, *supra* note 18, at para. 644 [Reproduced in accompanying notebook at Tab 18].

[57] Prosecutor v. Kayishema, *supra* note 26, at para. 124 [Reproduced in accompanying notebook at Tab 26].

[58] "…the existence of a policy or plan may be evidentially relevant, but is not a legal element of the crimes."Prosecutor v. Kunarac, Case No. IT-96-23-1/A, Judgment, at para. 98 (June 12, 2002) [Reproduced in accompanying notebook at Tab 16].

possibility.[59] In the introduction to the section on crimes against humanity, paragraph 3 of the Elements of Crimes remarks:

> "Attack directed against a civilian population' in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that 'policy to commit such attack' requires that the State or organization actively promote or encourage such an attack against a civilian population."[60]

The Elements of Crimes also clarifies that not only an active policy of a state may meet this requirement, but also that inaction aimed at encouraging an attack may also satisfy the element.[61]

However, despite the Elements of Crimes' use of the word "State," the policy need not be that of a "State" to satisfy the requirement. The 1996 ILC Draft Code states that the policy requirement could be satisfied when "instigated or directed by a Government or by any organization or group."[62] The ICTY's *Tadic* and *Kupreski* cases have held similarly, that "the

---

[59] The reason that the Rome Statute is applicable to crimes in 1975 is due to the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, resolution 57/228 of 18 December 2002 [Reproduced in accompanying notebook at Tab 1]. Article 9 of that Agreement states that "the subject matter jurisdiction of the Extraordinary Chambers shall be…crimes against humanity as defined in the 1998 Rome State of the International Criminal Court." *Id.* at art. 9.

[60] Elements of Crimes, International Criminal Court, adopted 9 September 2002 (ICC-ASP/1/3 (part II-B)) [Reproduced in accompanying notebook at Tab 3]

[61] *Id.* at FN 6, "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. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action."

[62] "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 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

law or 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"[63] and that such a policy does not have to be "explicitly formulated nor need it be the policy of a State."[64] Therefore, as a matter of customary international law, while a policy must be proven, it need not be the policy of State, but can be the policy of any organization or entity.

Thus, while the ECCC Statute does not explicitly contain a requirement that the attack must be in furtherance of a plan or policy, customary international law mandates that the element be included. However, the plan or policy need not be that of a State, and any organization or entity which has the ability to move freely within the territory can satisfy the policy requirement.

C. ON NATIONAL, POLITICAL, ETHNICAL, RACIAL, OR RELIGIOUS GROUNDS

i. A History of the Discrimination Element

---

conduct on the part of a single individual would not constitute a 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." Badar, *supra* note 5, at 112-113 [Reproduced in accompanying notebook at Tab 24], *citing* 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).

[63] Prosecutor v. Tadic, *supra* note 18, at para. 654 [Reproduced in accompanying notebook at Tab 18].

[64] Prosecutor v. Kupreski, Case No. IT-95-16-T, Judgment, at para. 551 (Jan. 14, 2000) [Reproduced in accompanying notebook at Tab 17]

The Charter of the International Military Tribunal for the Trial of the Major War Criminals was signed in 1945 as an appendix to the London Agreement.[65] It was under this Charter that "crimes against humanity" originated.[66] From the beginning, there was a discrimination element. However, the discrimination element was there presented as a part of the crime against humanity of "persecution" and was not meant to be a requisite element of the other enumerated offenses.[67] Thus, IMT Article 6(c) defined crimes against humanity as:

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, *or persecutions on political, racial or religious grounds* in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.[68]

[Emphasis added]. According to the ILC, established in 1947 for "the promotion of the progressive development of international law and its codification,"[69] Article 6(c) contained two distinctly separate types of crimes against humanity.[70] One category encompassed "murder, extermination…and other inhumane acts" while the other encompassed "persecutions on

---

[65] Jessie Chella, Persecution: A Crime Against Humanity In The Rome Statute of the International Criminal Court, p.43, [Reproduced in accompanying notebook at Tab 27]; 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 [Reproduced in accompanying notebook at Tab 2].

[66] Chella, *supra* note 65, at 45.

[67] Badar, *supra* note 5, at 85 [Reproduced in accompanying notebook at Tab 24].

[68] Charter of the Int'l Military Trib., *supra* note 65 [Reproduced in accompanying notebook at Tab 2]

[69] G.A. 174 (II), U.N. GAOR, 2d Sess., 123rd plen. mtg., art. 1 at 105, U.N. Doc A/519 (1947) [Reproduced in accompanying notebook at Tab 23]

[70] Badar, *supra* note 5, at 81 [Reproduced in accompanying notebook at Tab 24]

political, racial or religious grounds…."[71] In this ILC interpretation of the language, the discrimination element was not a requirement for all crimes against humanity, but was a modifier for the specific crime of persecution.

While, for a time, there existed a controversy over the discrimination element due to issues with the translation into other languages,[72] the United Nations issued an analysis during the Trial of the Major War Criminals, seemingly putting the controversy to rest.[73] In that analysis, the U.N. explicitly stated that the discrimination element only referred to the specific crime of persecution, writing:

> 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.*[74]

---

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

[72] Badar, *supra* note 5, at 95 [Reproduced in accompanying notebook at Tab 24], *citing* Egon Schwelb, Crimes Against Humanity, 23 Brit. Year Book of Int'l L. 179, 188 (1946)

[73] Interestingly enough, the confusion over a discrimination element began almost immediately. The London Agreement had been written in English, French, and Russian, each having equal authenticity.[73] As Mohamed Elewa Badar explains, "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." *Id.* at 81.

[74] Memorandum of the Secretary-General on the Charter and Judgement of the Nuremberg Tribunal, quoted in Prosecutor v. Tadic, *supra* note 18, at para. 650 [Reproduced in accompanying notebook at Tab 18]

[Emphasis added]. The International Law Commission agreed with the U.N.'s analysis as well.[75]

The U.N. "[entrusted] 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"[76] from the ILC's inception. In 1950, the ILC completed the Nuremberg Principles. Principle VI(c), defined crimes against humanity as:

> 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. [emphasis added][77]

Again, the discrimination element was deemed to apply only to the crime of persecution and was not seen as a required element for the rest of the crimes against humanity. As a result of the ILC's formulation, the question of a discrimination element was essentially dismissed for the next fifty years.[78]

It was not until the creation of the ICTY and ICTR Statutes in 1993 and 1994, respectively, that the discrimination element once again became a source of controversy. The two statutes differed, as the ICTR Statute explicitly required a form of discrimination as part of its *chapeau* elements whereas the ICTY Statute did not. Still, while the ICTY and ICTR Statutes differed in their language, the creation of the tribunals had "paved the way for the development

---

[75] Badar, *supra* note 5, at 81 [Reproduced in accompanying notebook at Tab 24]

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

[77] Draft Code Against the Peace and Security of Mankind, *supra* note 12 [Reproduced in accompanying notebook at Tab 21]

[78] *See* Badar, *supra* note 5, at 96 [Reproduced in accompanying notebook at Tab 24]

of a body of international jurisprudence on crimes against humanity, which helped guide the delegations assembled at the Rome Conference."[79] Article 7 of the Rome Statute reads:

> For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (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 principle of international law;
> (f) Torture;
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparative gravity;
> (h) 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 recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
> (i) Enforced disappearance of persons;
> (j) The crime of apartheid;
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[80]

There was controversy in the delegations over whether a discriminatory intent should be required as part of the Rome Statute. As Darryl Robinson, a former advisor to the Chief Prosecutor at the ICC, has explained: "All participants agreed that the specific crime of *persecution* required a discriminatory motive (as discrimination is the essence of the crime of persecution), but the majority maintained that not all crimes against humanity required a discriminatory motive."[81] As

---

[79] Darryl Robinson, Defining "Crimes Against Humanity" at the Rome Conference, The American Journal of International Law, Vol. 93, No. 1 (Jan. 1999), pp. 43-57 at 45 [Reproduced in accompanying notebook at Tab 32].

[80] Rome Statute of the International Criminal Court, adopted by the Security Council on 17 July 1998, U.N. Doc A/CONF.183/9 (1998), Art. 7 [Reproduced in accompanying notebook at Tab 6].

[81] Robinson, *supra* note 79 [Reproduced in accompanying notebook at Tab 32]; *See also* Badar, *supra* note 5, at 100 [Reproduced in accompanying notebook at Tab 24] ("A few delegations,

evidenced, the only requirement for discriminatory grounds in the Rome Statute relates to the specific crime of persecution.

Since Article 9 of the U.N.-Cambodia Agreement specifies that "the subject matter jurisdiction of the Extraordinary Chambers shall be…crimes against humanity as defined in the 1998 Rome State of the International Criminal Court,"[82] there would an inherent contradiction if Article 5 of the ECCC Statute did not contain the same individual requirements as Article 7 of the Rome Statute. To determine whether that contradiction exists and, if so, how to overcome it, the discrimination element found in Article 5 of the ECCC must first be interpreted.

The discriminatory grounds requirement can be interpreted in two separate ways. The first is that the "act" must be committed with a discriminatory intent, i.e., that the acts of murder, extermination, enslavement, etc. be committed on "national, political, ethnical, racial or religious grounds." The second interpretation is that the "attack" must be committed on discriminatory grounds, i.e., that the widespread or systematic attack must be committed "on national, political, ethnical, racial, or religious grounds." As Margaret McAuliffe deGuzman explains in an article in *Human Rights Quarterly*:

---

notably France, suggested that crimes against humanity required an element of discrimination (for example, 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.")

[82] U.N.-Cambodia Agreement, *supra* note 59, at Art. 9 [Reproduced in accompanying notebook at Tab 1]

> Confusingly, the discrimination element is subject to two rather different interpretations. First, this element may be viewed in relation to the subjective mental state of the perpetrator – what the ICTY Office of the Prosecutor has termed "discriminatory *intent*." This interpretation would require that each individual perpetrator act with a specific intent to discriminate. A discriminatory intent requirement would mean that the perpetrator's purpose in attacking the victim would transcend the individual victim; the perpetrator would need to have a specific purpose to attack the group to which the victim belongs.
>
> A second way to interpret the discrimination element is in relation to the widespread or systematic attack – what the ICTY Office of the Prosecutor has termed "*discriminatory grounds*." A discriminatory grounds requirement would mean that the broader attack within which an individual's act occurs must be targeted against a particular group. While the individual actor might have purely personal motives, the attack itself would have a discriminatory purpose. This requirement would have no effect on the mental element of the individual perpetrator. A requirement of discriminatory grounds would constitute a jurisdictional element; in order for a court to exercise jurisdiction over a situation as a crime against humanity, the widespread or systematic attack would have to be directed against a particular group.[83]

Thus, the interpretation of Article 5 of the ECCC Statute will not only determine whether a contradiction exists with Article 7 of the Rome Statute, but will directly affect what must be proven by the Office of the Co-Prosecutors in order to obtain a conviction.

Article 7 of the Rome Convention does not contain a discriminatory requirement.[84] However, several international tribunals either have the requirement within their respective statutes or have discussed whether such a requirement might stem from customary international law. As "[the] Statute of the ICTR is the only international instrument to explicitly require discrimination for the commission of crimes against humanity,"[85] this Part III(C) will focus

[83] deGuzman, *supra* note 4, at 335-403 [Reproduced in accompanying notebook at Tab 29]

[84] Rome Statute, *supra* note 80 [Reproduced in accompanying notebook at Tab 6]

[85] deGuzman, *supra* note 4 at 364 [Reproduced in accompanying notebook at Tab 29]

mainly on the opinions and case law stemming from the ICTR decisions as evidence of how to interpret the discriminatory grounds requirement.[86]

ii. Case Law of the ICTR and *Prosecutor v. Akayesu*

"Apart from the ICTR Statute, no international legal instrument defining crimes against humanity includes a discrimination element."[87] Article 3 of the ICTR Statute states:

> The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population *on national, political, ethnic, racial or religious grounds*:
>
> 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. [emphasis added][88]

As evidenced directly above, the ICTR Statute is (absent the introduction) identical to that of the ECCC. As the ICTR was faced with the same issue of how the statute should be interpreted, and why it should be interpreted that way, the writings of the Trial Chamber and Appeals Chamber serve as valuable insight both into how to interpret the ECCC Statute and also into why it should be interpreted in such a manner.

The seminal ICTR case in the interpretation of the "discrimination element" is the case of *Prosecutor v. Akayesu*.[89] Jean Paul Akayesu was indicted on seven counts of crimes against

---

[86] For further discussion on the historical progression of the definitions of crimes against humanity, see Beth Van Schaack, The definition of Crimes Against Humanity: Resolving the Incoherence, 37. Colum. J. Transnat'l L. 787 [Reproduced in accompanying notebook at Tab 33].

[87] *Id.* at 365.

[88] ICTR Statute, *supra* note 24, at art. 3 [Reproduced in accompanying notebook at Tab 7].

humanity, among other crimes, for the specific acts of murder, extermination, rape, torture, and other inhumane acts.[90] In its determination of the elements of crimes against humanity, the Trial Chamber actually discussed at length the historical progression of crimes against humanity and came to the conclusion that crimes against humanity could be broken down into four separate elements. Those elements were:

> (i) the act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health;
> (ii) the act must be committed as part of a widespread or systematic attack;
> (iii) the act must be committed against members of the civilian population;
> (iv) *the act must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds.*[91]

---

[89] Prosecutor v. Akayesu, Case No. IT-96-4-A, Judgment (June 1, 2001) [Reproduced in accompanying notebook at Tab 11]. See also: Paul J. Magnarella, *Some Milestones and Achievements at the International Criminal Tribunal for Rwanda: The 1998 Kambada and Akayesu Cases*, 11 Fla. J. Int'l L. 517 (1997) (discusses how discriminatory intent was required as a result of the Akayesu Trial Chamber decision).

[90] *Id.*

[91] While the Trial Chamber did reach the conclusion that "the act must be committed on one or more discriminatory grounds," its manner of arriving at this conclusion is somewhat ambiguous. Perhaps ironically, much of the history that the Trial Chamber cites in deriving this conclusion seems to directly contradict the proposition that the "act" (and not merely the "attack") must be performed with a discriminatory intent. Most notably, seemingly in an explanation of the intent required to be guilty of crimes against humanity, the Trial Chamber looked to the *Eichmann* case, writing the following:

> "In the *Eichmann* case, the accused, Otto Adolf Eichmann, was charged with offences under Nazi and Nazi Collaborators (punishment) Law, 5710/1950, for his participation in the implementation of the plan known as the Final Solution of the Jewish Problem'. Pursuant to Section I (b) of the said law:
>
> > 'Crime against humanity means any of the following acts: murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds.'
>
> *The district court in the Eichmann [case] stated that crimes against humanity differs from genocide in that for the commission of genocide special intent is required. This special intent is not required for crimes against humanity* [emphasis added]. Eichmann was convicted by the District court and sentenced to death. Eichmann appealed against his conviction and his appeal was dismissed by the supreme court.

[emphasis added]. However, while the elements as set forth by the Trial Chamber required the "acts" of murder[92] and rape[93] to be conducted with a discriminatory intent, the elements of extermination[94] and torture[95] required only that the "attack" be committed on discriminatory grounds. Needless to say, the Office of the Co-Prosecutor objected to this interpretation, writing in its Appellate Brief:

> The Prosecution submits that if the 'intention' referred to is defined as including the conscious desire of the perpetrator that his crime further the attack on the group discriminated against, or knowledge or foresight that such a result is the likely consequence of his actions, then this holding is correct. However, the Prosecution submits that it contradicts other findings by the Trial Chamber concerning murder and rape."[96]

The Appeals Chamber, in its resulting Judgment, disagreed with the elements set forth by the Trial Chamber and provided a much more thorough analysis as to why it is the "attack" (and not the "act") that must be committed on discriminatory grounds.

As explained by the Appeals Chamber:

The statute referenced by the Trial Chamber referred to "*persecution* on national, racial, religious, or political grounds," in much the same fashion as those statutes evinced in Part I. Moreover, the Trial Chamber specifically recognized that "[the] special intent is not required for crimes against humanity." Prosecutor v. Akayesu (Trial Chamber), *supra* note 25, at para. 568 [Reproduced in accompanying notebook at Tab 9].

[92] *Id.* at para. 590, "The victim must have been murdered because he was discriminated against on national, ethnic, racial, political or religious grounds."

[93] Id. at para. 598, "the act [of rape] must be committed…(c) on certain catalogued discriminatory grounds, namely national, ethnic, political, racial, or religious grounds."

[94] Id. at para. 592, "the attack must be on discriminatory grounds, namely: national, political, ethnic, racial, or religious grounds"

[95] Id. at para. 595, "(c) the attack must be launched on discriminatory grounds, namely: national, ethnic, racial, religious and political grounds."

[96] Prosecution Appellant Brief, Prosecutor v. Akayesu, Case No. ICTR-96-4-A (July 10, 2000) [Reproduced in accompanying notebook at Tab 10]

> The issue before the Appeals Chamber is to determine whether this ingredient of crimes against humanity within the jurisdiction of the Tribunal, as referred to in the chapeau of Article 3 of the Statute, requires the perpetrator to have knowledge that his act is part of a widespread or systematic attack against a civilian population on discriminatory grounds, or is in furtherance of the attach, or whether this ingredient requires that the perpetrator of each crime enumerated in the article must have the discriminatory intent to commit the said crime against his victim in particular, on one of the enumerated grounds.[97]

The Appeals Chamber found that: "(1) Article 3 of the Statute does not require that all crimes against humanity enumerated therein be committed with a discriminatory intent;" and that "(2) Article 3 restricts the jurisdiction of the Tribunal to crimes against humanity committed in a specific situation, that is, 'as part of a widespread or systematic attack against any civilian population' on discriminatory grounds."[98]

In its analysis, the Appeals Chamber looked to the *Tadic*[99] case, where the ICTY was faced with the same issue. While the ICTY Stature does not contain any language resembling a discrimination element, the Appeals Chamber still felt that the *Tadic* decision was applicable and "[endorsed] the general conclusion and review contained in *Tadic*," that discriminatory intent was not an element of the crime (unless the crime was persecution).[100] The Appeals Chamber instead found that the term "on national, political, ethnical, racial or religious grounds" was a means of restricting the jurisdiction of the Tribunal to only those crimes committed as part of an attack on discriminatory grounds.[101] In this way, the Tribunal had no jurisdiction over acts that

---

[97] Prosecutor v. Akayesu (Appeals Chamber), *supra* note 89, at para. 459 [Reproduced in accompanying notebook at Tab 11].

[98] *Id.* at para. 469.

[99] Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment (July 15, 1999) [Reproduced in accompanying notebook at Tab 20]. See *infra* pp. 36-38.

[100] Akayesu, Case No. IT-96-4-A, *supra* note 88, at para. 464 [Reproduced in accompanying notebook at Tab 11].

might normally be viewed as crimes against humanity, unless they were a part of a discriminatory attack.[102] As the Appeals Chamber explained,

> It is within this context, and inlight of the nature of the events in Rwanda (where a civilian population was actually the target of a discriminatory attack), that the Security Council decided to limit the jurisdiction of the Tribunal over crimes against humanity solely to cases where they were committed on discriminatory grounds. This is to say that the Security Council intended thereby that the Tribunal should not prosecute perpetrators of other possible crimes against humanity.[103]

The same sort of interpretation is logically applicable to the ECCC and its prosecution of the Khmer Rouge.

As is stated in Article 1 of the ECCC Statute, "The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia…."[104] While the phrase "on national, political, ethnical, racial or religious grounds" is fairly broad, it nonetheless serves as a restrictive element on the jurisdiction of the Tribunal. Unfortunately, the documented history of the creation of the Law on the Establishment of the Extraordinary Chambers is somewhat sparse, so it is difficult to know for certain whether that was the creators' actual intent. That being said, the fact that the discussions surrounding the creation are undocumented may actually allow for the *Akayesu* interpretation to be granted even more weight.

iii. Case Law of the ICTY and Customary International Law

---

[101] *Id.* at paras. 460-469.

[102] *Id.* at para. 464.

[103] *Id.*

[104] ECCC Statute, *supra* note 1 [Reproduced in accompanying notebook at Tab 4].

In regard to the question of a discrimination element, there is one important case derived from the ICTY. The *Tadic* Judgment of the Appeals Chamber of the ICTY is important in several regards.[105] First, it provides a tribunal's declaration that a discriminatory intent is not a requisite element of crimes against humanity.[106] Second, the *Tadic* judgment sets forth case law as evidence that a discriminatory intent is not required under customary international law.[107] While the ICTY Statute does not contain any discrimination element, the ICTY was nonetheless faced with the question of whether discriminatory intent was a necessary element to crimes against humanity in its *Tadic* case.[108]

Essentially, the Trial Chamber had ruled that, in order to satisfy the elements of crimes against humanity under the ICTY Statute, the act must "not be unrelated to the armed conflict."[109] As explained by the Appeals Chamber, "The Trial Chamber further held that the requirement that the act must 'not be unrelated' to the armed conflict involved two aspects. First, the perpetrator must know of the broader context in which the act occurs. Secondly, the act must not have been carried out for the purely personal motives of the perpetrator."[110]

On appeal, the prosecution questioned whether a discrimination element was actually necessary. As summarized by the Appeals Chamber: "The Prosecution argues that the weight of

---

[105] Prosecutor v. Tadic (Appeals Chamber), *supra* note 98 [Reproduced in accompanying notebook at Tab 20].

[106] *Id.*

[107] *Id.*

[108] *Id.* at paras. 238-272.

[109] Prosecutor v. Tadic (Trial Chamber), *supra* note 18, at para. 634 [Reproduced in accompanying notebook at Tab 18].

[110] Prosecutor v. Tadic (Appeals Chamber), *supra* note 98, at para. 239 [Reproduced in accompanying notebook at Tab 20].

authority supports the proposition that crimes against humanity can be committed for purely personal reasons and that the sole authority relied on by the Trial Chamber in support of its finding in fact suggests that, even where perpetrators may have been personally motivated to commit the acts in question, their conduct can still be characterised as a crime against humanity."[111]

In its decision, the Appeals Chamber agreed "that the weight of authority supports the proposition that crimes against humanity can be committed for purely personal reasons, provided it is understood that the two aforementioned conditions – that the crimes must be committed in the context of widespread or systematic crimes directed against a civilian population and that the accused must have *known* that his acts, in the words of the Trial Chamber, 'fitted into such a pattern' – are met."[112] It then went into a detailed discussion of the "case-law as evidence of customary international law."[113] While too detailed to summarize here, the *Tadic* judgment is now continually cited for the proposition that discriminatory intent is not a required element of the customary international law prohibiting crimes against humanity.

IV. *MENS REA* AND THE RELATION BETWEEN THE ENUMERATED ACTS AND THE CHAPEAU ELEMENTS

There is no mention of the *mens rea* applicable to crimes against humanity within the context of the ECCC Statute.[114] Therefore, the *mens rea* that must be proven by the prosecution

[111] *Id.* at para. 242.

[112] *Id.* at para. 255.

[113] *Id.* at p. 115

[114] ECCC Statute, *supra* note 1 [Reproduced in accompanying notebook at Tab 4].

is that found in customary international law from April 17, 1975 to January 6, 1979.[115] However, the *mens rea* must be at least equal to that found in the Rome Statute, as Article 9 of the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea mandates that the Rome Statute governs the law of crimes against humanity.[116] Without such requirements, either Article 5 of the ECCC Statute or Article 9 of the UN-Cambodia Agreement would be violated.

Article 30(1) of the Rome Statute states that "unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge."[117] Article 30(2) then defines intent as follows: "For the purposes of this article, 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 the consequence or is aware that it will occur in the ordinary course of events."[118] The Article 30(2) definition of intent applies to the enumerated acts though, and not to the *chapeau* elements of the crime.[119] Therefore, it will not discussed in this paper.[120]

---

[115] *Id.*

[116] U.N. Cambodia Agreement, *supra* note 59 [Reproduced in accompanying notebook at Tab 1].

[117] Rome Statute, *supra* note 80, at art. 30(1) [Reproduced in accompanying notebook at Tab 6].

[118] *Id.* at art. 30(2).

[119] Elements of Crimes, *supra* note 60 [Reproduced in accompanying notebook at Tab 3].

[120] While they are not specifically discussed in this paper, several articles deserve mention for their discussion on the requisite intent. Johan D. Van der Vyver, The International Criminal Court and the Concept of Mens Rea in International Criminal Law, 12 U. Miami Int'l & Comp. L. Rev. 57 (2004) [Reproduced in accompanying notebook at Tab 34] discusses intent at some length, with specific sections concerning: general intent and specific intent; *Versari in re Illicita*;

However, the Article 30(1) knowledge requirement does apply to the chapeau elements. That knowledge is defined as "awareness that a circumstance exists or a consequence will occur in the ordinary course of events."[121] It is the knowledge requirement that transforms the enumerated crimes into crimes against humanity, and is discussed in detail below.

A. KNOWLEDGE

In addition to proving intent to commit the underlying offense for a conviction, "the perpetrator must know that there is an attack on the civilian population and that his acts comprise part of that attack; or he must at least take the risk that his acts are part of the attack. It suffices that, through the function he willingly accepted, he knowingly took the risk of participating in the implementation of that attack. The perpetrator need not know the specific details of the attack."[122]

In the *Tadic* judgment, the Trial Chamber discussed specifically the knowledge required by the perpetrator of the wider context in which his acts occurred and looked to *R. v. Finta* for guidance. In *R. v. Finta*, the majority found that "[t]he mental element required to be proven to constitute a crime against humanity is that the accused was aware of or willfully blind to facts or circumstances which would bring his or her acts within crimes against humanity. However, it would not be necessary to establish that the accused knew that his actions were inhumane."[123]

---

and malice aforethought; along with the specific intent required for certain crimes against humanity.

[121] Rome Statute, *supra* note 80, at art. 30(3) [Reproduced in accompanying notebook at Tab 6]

[122] Mettraux, *supra* note 37, at 261 [Reproduced in accompanying notebook at Tab 31].

[123] Prosecutor v. Tadic (Trial Chamber), *supra* note 18, at para. 657 [Reproduced in accompanying notebook at Tab 18], *citing* R. v. Finta, [1994] 1 R.C.S., 701

Constructive knowledge is also sufficient, depending on the definition given to "constructive knowledge." The Trial Chamber in *Tadic* has also held that "if the perpetrator has knowledge, either actual or constructive…that is sufficient to hold him liable for crimes against humanity." As Van der Vyver[124] writes, if constructive knowledge "was intended to denote cases where knowledge cannot be proven by direct evidence but may be construed on basis of the surrounding facts and circumstances – where, therefore, 'constructive knowledge' is a matter of evidence and not of substantive law – reliance on such knowledge to substantiate a conviction for a crime against humanity cannot be faulted."[125]

Therefore, while knowledge of the attacks is a substantive requirement, that requirement can be satisfied merely through "constructive knowledge," essentially leading to a mental requirement of willful blindness. The importance of the ability to use constructive knowledge to satisfy the requirement is especially prevalent in considering the prosecution's evidentiary burden, which is discussed below[126].

---

[124] Johan D. van der Vyver is a former professor of law at the University of the Witwatersrand in Johannesburg, South Africa. He is an expert on human rights law and has been involved in the promotion of human rights in South Africa. In 1990-91, Professor van der Vyver was the visiting I.T. Cohen Professor of International Law and Human Rights at Emory; he continued to visit Emory in alternate years to teach courses in international human rights. In 1995, he was appointed the I.T. Cohen Professor of International Law and Human Rights at Emory. He also served as a fellow in the Human Rights Program of The Carter Center from 1995-1998. He is the author of many books and more than two hundred law review articles, popular notes, chapters in books and book reviews on human rights and a variety of other subject matters.

Education: BCom, 1954, LLB, 1956, Honns BA, 1965, Potchefstroom University for Christian Higher Education; Doctor Legum, University of Pretoria, 1974; Diploma of the International and Comparative Law of Human Rights of the International Institute of Human Rights (Strasbourg, France), 1986; Doctor Legum (honoris causa) (University of Zululand), 1993; Doctor Legum (honoris causa) (Potchefstroom University for Christian Higher Education), 2003. Available at: http://www.law.emory.edu/faculty/faculty-profiles/johan-d-van-der-vyver.html

[125] Van der Vyver, *supra* note 120, at 68 [Reproduced in accompanying notebook at Tab 34]

[126] See *infra* pp. 41-43

B. BURDEN OF PROOF

After having established the proper definition of "knowledge," there still remains the question of how "knowledge" of the attack and, in turn, the relationship between the "widespread or systematic attack on a civilian population" on discriminatory grounds and the enumerated acts, may be proven. The decisions of the ICTR and ICTY offer the best analysis as to how the knowledge requirement may be proven.

First, knowledge of the attack may be actual or constructive.[127] As Guenael Mettraux[128] writes:

> Knowledge of the attack and the perpetrator's awareness of his participation may be inferred from circumstantial evidence, examples of which include the accused's position in the military or civilian hierarchy; his voluntary assumption of an important role in the broader criminal campaign; his participation in the violent takeover of enemy villages; his acts of capture, detention, rape, brutalization, or murder; his presence at the scene of the crime; his membership in a group involved in the commission of such crimes; his utterances and references to the superiority of his group over the enemy group; and the consistency and predictability of his criminal acts. The perpetrator's knowledge may also be inferred from public knowledge, based on the extent of media coverage, the scale of the acts of violence, and the general historical and political environment in which the acts occurred. The indicia of knowledge should be assessed as a whole.[129]

---

[127] "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. Yet, the important distinction, which has implications with respect to the policy of deterrence, would be left to the determination of the judicial body adjudicating a given case." Badar, *supra* note 5, at 120 [Reproduced in accompanying notebook at Tab 24].

[128] Guenael Mettraux's bio includes: Associate Legal Officer, Chambers of the International Criminal Tribunal for the Former Yugoslavia. License en Droit, Universite de Lausanne, 1996; L.L.M., University College London, 1997; M. Phil., London School of Economics, 2001.

[129] Mettraux, *supra* note 37, at 262 [Reproduced in accompanying notebook at Tab 31].

The *Tadic* case also makes this clear, with the Trial Chamber holding that "if the perpetrator has knowledge, *either actual or constructive*…that is sufficient to hold him liable for crimes against humanity."[130]

Moreover, the prosecutor's ability to prove knowledge based on circumstantial or secondary evidence is necessary. As Van der Vyver writes:

> In *Tadic*, the ICTY in that sense confirmed that knowledge can be 'implied from the circumstances.' Not every perpetrator of genocide, crimes against humanity or war crimes boast about their evil deeds, though many do. Courts are often obligated to construe a certain mental disposition based on secondary evidence. Provided the possession of guilty knowledge is a *sine qua non* (beyond reasonable doubt) of the surrounding facts and circumstances, a conviction for the crime based on intent and knowledge would be fully justified.[131]

So while knowledge may be the requisite *mens rea* of the crime, the ability to use "constructive knowledge" to satisfy this requirement is extremely important when it comes to the prosecution's evidentiary burden. The ability to use constructive knowledge allows for the inclusion of any circumstantial evidence that may prove that the perpetrator had, or should have had, knowledge of the attack.

V. CONCLUSION

The ECCC should not have any difficulty in establishing that the *chapeau* elements of crimes against humanity have been met in its facts, but establishing the proper precedent is important not only for the validity of the Tribunal but also for the future progression of customary international law. Within the *chapeau* elements, there are essentially four elements

---

[130] Prosecutor v. Tadic, *supra* note 18, at para. 657 [Reproduced in accompanying notebook at Tab 18].

[131] Johan D. Van der Vyver, *supra* note 120, at 68-69 [Reproduced in accompanying notebook at Tab 34]

that must be proven: (1) a widespread or systematic attack; (2) on a civilian population; (3) in furtherance of a State or organizational plan or policy; and (4) that the attack was "on national, political, ethnical, racial or religious grounds.

The widespread or systematic attack is the most important of the elements, but it is also that which is typically the easiest to satisfy. Whether the Khmer Rouge's attack was on a "vast scale" as required by the term "widespread" or part of a methodical plan as required by the term "systematic," the prosecution should have no problem in proving either or both of these elements, even though only one need be proven.

The plan or policy requirement requires that the attack be in furtherance of a state or organizational plan or policy. Whether the Khmer Rouge's plan was to convert Cambodians into "old people" through agricultural labor, promote the rise of communism, other, or some combination, history has shown that the Khmer Rouge were certainly following specific policies. And while the Tribunal has jurisdiction only over the time when the Khmer Rouge were in power, it may nonetheless be important as a matter of customary international law that the policy need not be that of a State, but that the requirement can be satisfied by any organization or entity.

Perhaps the most unique aspect of the *chapeau* elements is the requirement that the attack be on discriminatory grounds, whether those be "national, political, ethnical, racial or religious." The fact that the "discriminatory grounds" element does not increase the burden of the prosecution by heightening the requisite level of intent of the perpetrator is already well-established by cases from the Tribunals of the ICTY and the ICTR. The precedent set by those Tribunals, both in their interpretation of customary international law and in the proper way to interpret the specific language of the statute, will be valuable to the Office of the Prosecution.

Lastly, the factor that joins the enumerated crimes to the *chapeau* elements of crimes against humanity is the *mens rea* requirement. As has been established through customary international law and also in the Rome Statute, knowledge is the proper *mens rea* to be applied. Knowledge of the attack, however, need not be proven directly, but rather "constructive knowledge" can satisfy the requirement as well. This allows the prosecution to include any circumstantial evidence which it deems relevant to proving the knowledge of the perpetrator.