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Does Conviction For Murder As A Crime Against Humanity Require Proof Of Premeditation? What Of The Differing Terms Used In The English And French Versions Of Article 3(A) Of The Ictr Statute And Article 5(A) Of The Icty Statute?

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE ICTR

ISSUE: DOES CONVICTION FOR MURDER AS A CRIME AGAINST HUMANITY REQUIRE PROOF OF PREMEDITATION? WHAT OF THE DIFFERING TERMS USED IN THE ENGLISH AND FRENCH VERSIONS OF ARTICLE 3(A) OF THE ICTR STATUTE AND ARTICLE 5(A) OF THE ICTY STATUTE?

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50. Table of Select Decisions in the Rwanda and Yugoslavia Tribunals.

I. Introduction and Summary of Conclusions[1]

A. Issues

This memorandum considers the premeditation requirement, or lack thereof, to convict individuals for murder as a crime against humanity, as provided for in Article 3(a) of the Statute of the International Tribunal of Rwanda (hereinafter "ICTR Statute") and Article 5(a) of the Statute of the International Tribunal of Yugoslavia (hereinafter "ICTY Statute"). Following a short background on the Rwanda conflict in Part II, Part III of this memorandum attempts to identify these guiding principles for addressing the premeditation question by reviewing a few key cases in the Tribunals. Part IV then considers the treatment of murder as a crime against humanity in domestic courts, and whether evidence of premeditation is required for conviction. Next, Part V examines the origins of the terms "murder" and "assassinat" used in the ICTR and ICTY Statutes, such as the text of the Nuremberg Charter, international conceptions of everyday murder, and domestic conceptions of everyday murder in common and civil law jurisdictions. Finally, Part VI offers a prescription for the future adjudication of murder as a crime against humanity under Article 3(a) of the ICTR Statute, suggesting that the Tribunal dispense with any premeditation requirement and understand "murder" to encompass both first- and second-degree murder as conceived by English-speaking jurisdictions.

B. Summary of Conclusions

Based on the history of the ICTR Statute, prior decisions in the Rwanda and Yugoslavia Tribunals, and comparative studies of domestic criminal justice systems, it seems that premeditation should ***not*** be a necessary element of murder as a crime against humanity. To

[1] ISSUE 5: Does conviction for Murder as a Crime Against Humanity require proof of premeditation? What of the differing terms used in the English and French versions of Article 3(a) of the ICTR Statute and Article 5(a) of the ICTY Statute? Is it murder as defined in English-speaking jurisdictions, including both murder in the first degree and murder in the second degree, or is it "assassinat" from French law, meaning only murder in the first degree?

arrive at this decision, the Tribunal should focus on three main conclusions, one of which argues for requiring premeditation while the other two weigh in against calling for premeditation.

(1) In the case of ambiguity in two translations of its statute, due process dictates that the Tribunal should apply the meaning most favorable to the accused.

It is an axiom of criminal law that where two interpretations of a statute seem equally plausible, the court should apply the version most favorable to the accused. Since the French and English versions of the statute for the Rwanda Tribunal are equally authoritative, and no evidence is dispositive in deciding whether murder in article 3(a) should include non-premeditated killing, the Tribunal would best honor due process by applying the French version of the statute, so that conviction for murder as a crime against humanity requires premeditation. The adoption of the French term "assassinat" to decide the scope of murder under article 3(a) is particularly appropriate since most of the defendants before the Rwanda Tribunal rely on the French version of the statute, since French is their native language.[2]

In addition, it is more respectful of due process to use the more restrictive term "assassinat" to define the scope of murder under article 3(a) because the travaux préparatoires of the statutes for the Yugoslavia and Rwanda Tribunals demonstrate some uncertainty over the use of the English term "murder" in reference to crimes against humanity. In the Secretary-General's report that presaged the ICTY Statute, the explanatory paragraph to Article 5 opts to use the term "willful killing" instead of "murder," stating that "[c]rimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic,

[2] Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 DUKE J. COMP & INT'L L. 307, 330 (2000) [Reproduced in accompanying notebook, item 40.]

racial or religious grounds."Document0zzFN_F129[3]

(2) Customary international law, codified in the statutes of the Yugoslavia and Rwanda Tribunals, does not require premeditation as an element of murder as a crime against humanity.

As the International Law Commission noted in drafting a code of internationally-recognized crimes against humanity, "murder is a crime that is well defined and understood in every State. This prohibited act does not require any further explanation."[4] According to the customary practice of states, murder includes not only premeditated killing but also non-premeditated intentional killing and reckless killing. International law scholar Cherif Bassiouni concludes that, given this broad definition of murder in the world's major criminal justice systems, murder as intended in article 6(c) of the Nuremberg Charter (and consequently in the clauses of other instruments that are framed in the same terms) includes a closely related form of unintentional but foreseeable death that in common law systems is called "manslaughter," and in civil law systems is homicide with *dolus* (involuntary manslaughter) and homicide with *culpa* (voluntary manslaughter).[5] Under Bassiouni's interpretation of article 6(c), the narrow definition of murder

[3] Report of the Secretary General, U.N. Doc.S/25704 (1993), para. 48, reprinted in 32 I.L.M. 1159 (1993). [Reproduced in accompanying notebook, item 48.]

However, it is important to note that the French translators of Article 5 did not use the term "assassinat" in their commentary to Article 5 of the ICTY Statute, showing indecision over the appropriate word choice just like their English-speaking counterparts. Instead, the French commentary uses the term "homicide intentionnel" (i.e. all intentional homicide, both premeditated and non-premeditated.) Justin Hogan-Doran, *Murder as a Crime Under International Law and the Statute of the International Criminal Tribunal for the Former Yugoslavia: Of Law, Legal Language, and a Comparative Approach to Legal Meaning*, 11 LEIDEN J. INT'L L. 165, 178 n. 60 (1998). [Reproduced in accompanying notebook, item 42.]

[4] *Report of the International Law Commission to the General Assembly*, Commentary to Article 18 (Crimes Against Humanity), ILC Draft Code of Crimes Against the Peace and Security of Mankind, UN Doc A/51/10/11 (1996). [Reproduced in accompanying notevbook, item VI44.]

[5] M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 290 (2nd ed., 1999); cited in Kay Ambos and Steffen Wirth, *The Current Law of Crimes Against Humanity: An analysis of UNTAET*

suggested by "assassinat" in article 3(a) of the ICTR Tribunal Statute seems entirely too restrictive to be in alignment with international conceptions of murder evident in domestic legal systems, and an element of premeditation seems unnecessary to convict for murder as a crime against humanity under the Statute.

(3) Public policy dictates that the court punish murder as a crime against humanity like murder as a war crime, i.e., without requiring premeditation.

Assigning the same standard of proof to murder as a crime against humanity as to willful killing as a war crime recognizes the general objective of the Rwanda and Yugoslavia Tribunals – to ensure the respect for human life, whether of a combatant or non-combatant. Assigning a higher standard of proof to murder as a crime against humanity gives the undesirable impression that murder as a war crime is more subject to prosecution than murder as a crime against humanity. Deciding that once the core elements of the offence of murder as a war crime are established, the foundation is laid for proof of murder as a crime against humanity as long as the additional core element of widespread or systematic attack against a civilian population is established avoids this unfortunate eventuality. [6]

II. Factual Background

Since April 6, 1994, the United Nations Commission on Human Rights estimates hat at least 500,000 and possibly one million civilians, primarily members of the Tutsi minority, perished due to war crimes and crimes against humanity in Rwanda.[7] In light of the heinousness of these

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Regulation 15/2000, 13 CRIMINAL LAW FORUM 1, 47 (2002). [Reproduced in accompanying notebook, items 30 and 39, respectively.]

[6] Kay Ambos and Steffen Wirth, *The Current Law of Crimes Against Humanity: An analysis of UNTAET Regulation 15/2000*, 13 CRIMINAL LAW FORUM 1, 52 (2002). [Reproduced in accompanying notebook, item 39.]

crimes, the United Nations Security Council created the International Criminal Tribunal for Rwanda via Resolution 955 on November 8, 1994 in order to prosecute perpetrators of war crimes and crimes against humanity.[8]

Now in session, the International Tribunal for Rwanda seeks to try and punish those who perpetrated genocide[9] and crimes against humanity[10] during the period between 1 January 1994 and 31 December 1994, the time over which the Tribunal has jurisdiction.[11] The crimes against humanity – namely, murder, rape, torture, extermination, enslavement, deportation, imprisonment, and persecutions – must be committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.[12]

It is the purpose of this memorandum to determine whether the offense of murder, established by Article 3(a) of the ICTR Statute, is further restricted by a requirement that the murder of civilians be premeditated to constitute a crime against humanity, in addition to meeting the chapeau requirement of a widespread or systematic attack against a civilian population. Although only two decisions from Trial Chambers II of the Rwanda and Yugoslavia

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[7] *Report of the Special Rapporteur of the Commission on Human Rights*, U.N. Doc S/1994/1157, Annex I, pt. 24 (1993), *cited in* C. SCHELTEMA & W. VAN DER WOLF, 1 THE INTERNATIONAL TRIBUNAL FOR RWANDA: FACTS, CASES AND DOCUMENTS 247 (1999). [Reproduced in accompanying notebook, item 38.]

[8] S.C. Res. 955, U.N. SCOR, 49th Sess., 3453th mtg., S/RES/827 (1994). [Reproduced in accompanying notebook, item 17.]

[9] Statute of the International Tribunal for Rwanda (hereinafter ICTR Statute), adopted by Security Council on 8 November 1994, art. 2, U.N. Doc. S/RES/955 (1994), *available at* http://www.ictr.org. [Reproduced in accompanying notebook, item 6.]

[10] ICTR Statute, art. 3. [Reproduced in accompanying notebook, item 6.]

[11] ICTR Statute, art. 1. [Reproduced in accompanying notebook, item 6.]

[12] ICTR Statute, art. 3. [Reproduced in accompanying notebook, item 6.]

Tribunals[13] have held that premeditation is required, the question has not been decisively resolved and remains relevant to the future operation of the Tribunal.

III. Contradictory Decisions on the Premeditation Element of Murder As a Crime Against Humanity

As noted in Part II of this memorandum, the Trial Chambers of the ICTY and ICTR have not ruled consistently on the premeditation element of murder as a crime against humanity. Although the decisions have been contradictory, even within the same Trial Chambers of the Tribunals, the Chambers have established several principles supporting or undermining the premeditation requirement. Part III of this memorandum attempts to identify these guiding principles for addressing the premeditation question by reviewing a few key cases in the Tribunals. It addresses first those decisions opposing and then those supporting the premeditation requirement.

A. ICTY and ICTR Decisions Opposing Requiring Premeditation to Convict for Murder as a Crime Against Humanity

Several decisions in the Yugoslavia and Rwanda Tribunals recognize and support a homogenization of sorts in the treatment of murder as a war crime and as a crime against humanity, with neither requiring premeditation for conviction.[14] For instance, in *Prosecutor v. Blaskic*, Trial Chamber I of the Yugoslavia Tribunal noted that the offense of murder as a crime against humanity under article 5(a) of the ICTY Statute was the same as for willful killing as a

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[13] *Prosecutor* v. *Clement Kayishema and Obed Ruzindan*, ICTR-95-1-T, 21 May 1999, Trial Chamber II, and *Prosecutor v. Kupreskic and Others*, IT-95-16, 14 January 2000, Trial Chamber II. [Reproduced in accompanying notebook, items 24 and 26, respectively.]

[14] See, for example, *Prosecutor v. Blaskic*, IT-95-14, 3 March 2000, Trial Chamber I, and *Prosecutor* v. *Zejnil Delalic, Zdravko Mucic alias 'Pavo', Hazim Delic, Esad Landzo alias 'Zenga'*, IT-96-21-T, 16 November 1998, Trial Chamber II. [Reproduced in accompanying notebook, items 20 and 21, respectively.] Both cases are discussed in greater detail in Part III(B) of this memo.

war crime under article 2.[15] Weighing the defense of duress to the "killing of innocents" in *Prosecutor v. Erdemovic*, Appeals Chamber Judge Antonio Cassese similarly stated, "I do not consider that, as far as this issue is concerned, it makes any difference whether one refers to such an offence as 'killing', 'unlawful killing', or 'murder' provided that it is understood that it is the killing of innocents without lawful excuse or justification…"[16]

(1) Prosecutor v. Akayesu

Focusing on the mental state required for murder as a crime against humanity under customary international law, Trial Chamber II of the Yugoslavia Tribunal settled on the broader definition of murder in the 1998 case *Prosecutor v. Akayesu*.[17] In *Akayesu*, the Chamber decided that since customary international law dictates that murder, not just premeditated murder, constitutes a crime against humanity, the use of "assassinat" must have resulted from an error in translation.[18] Consequently, *Akayesu* enunciated the following standard for murder as a crime against humanity. It must be an "unlawful, intentional killing of a human being" in which:

a. the victim is dead;
b. the death resulted from an unlawful act or omission of the perpetrator or a subordinate; and
c. at the time of killing [but presumably not before the killing] the perpetrator or a subordinate had the intention to kill or to inflict grievous bodily harm on the

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[15] *Prosecutor v. Blaskic*, IT-95-14, 3 March 2000, Trial Chamber I, para. 181. [Reproduced in accompanying notebook, item 20.]

[16] *Prosecutor v. Erdemovic*, IT-96-22, 7 October 1997, Appeals Chamber, Separate and Dissenting Opinion of Judge Antonio Cassese, para. 12 fn. 8. [Reproduced in accompanying notebook, item 22.]

[17] *Prosecutor v. Akayesu*, ICTR-96-4-T, 9 February 1998, Trial Chamber II. [Reproduced in accompanying notebook, item 19.]

[18] *Akayesu*, para. 588.

deceased having know that such bodily harm is likely to cause the victim's death, and is reckless whether death ensues or not.[19]

Hence, murder as a crime against humanity under the *Akayesu* standard seems to encompass both premeditated and non-premeditated murder, included depraved heart-type murder in which the defendant may not explicitly aim to kill the victim, but acts with a high degree of recklessness in causing the victim's death.

(2) Prosecutor v. Jelisic

In *Prosecutor v. Jelisic*, Trial Chamber I of the Yugoslavia Tribunal adopted the definition of murder proposed in *Akayesu*, since premeditation is not required to convict for murder as a crime against humanity in customary international law.[20] As evidence that "murder" rather than "assassinat" is the proper standard under customary international law, the Trial Chamber noted that the term "meurtre," encompassing both premeditated and non-premeditated murder, appears in the segments of the Statute of the International Criminal Court and of the Draft Code of Crimes against the Peace and Security of Mankind that address crimes against humanity.[21]

(3) *Celebici* case

Following *Akayesu* and *Blaskic*, Trial Chamber II of the Rwanda Tribunal held in the *Celebici* case[22] that the court should not give undue regard to the difference between alternative

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[19] *Akayesu*, para. 589.

[20] *Prosecutor v. Jelisic*, IT-95-10, Judgment of 14 December 1999, Trial Chamber I, para. 35. [Reproduced in accompanying notebook, item 23.]

[21] See Rome Statute of the International Criminal Court, art. 7, adopted by Security Council on 17 July 1998, U.N. Doc. A/CONF.183/9 (1998), *available at* http://www.un.org/law/icc. [Reproduced in accompanying notebook, item 15.] See also Draft Code of Offences against the Peace and Security of Mankind, art. 2, U.N. GAOR, 51st Sess., U.N. Doc. A/51/10 (1996), *available at* http://www.un.org/law/ilc/texts/offences.htm. [Reproduced in accompanying notebook, item 13.]

[22] Officially labeled *Prosecutor v. Zejnil Delalic, Zdravko Mucic alias 'Pavo', Hazim Delic, Esad Landzo alias 'Zenga'*, IT-96-21-T, Trial Chamber II, 16 November 1998. [Reproduced in accompanying notebook, item 21.]

descriptions of homicide under Article 3 (crimes against humanity) and Article 5 (war crimes) of the ICTR Statute since "for the purposes of proof of the constituent elements of the substantive offence itself, nothing determines whether the offence is 'murder' or 'willful killing.'"[23] The Chamber concluded that no difference of consequence flows from the use of "willful killing" in place of "murder" for the purposes of prosecution of offences which incorporate these terms.[24] Accordingly, the Trial Chamber concluded that the *mens rea* required to establish the crimes of willful killing and murder is the same, and neither crime requires premeditation for conviction.[25]

(4) Prosecutor v. Blaskic and Prosecutor v. Krnojelac

Following the decision of the Rwanda Tribunal in *Celebici*, the Yugoslavia Tribunal issued these two decisions in repeating the argument that the *mens rea* necessary to convict for murder as a crime against humanity and "willful killing" as a war crime is identical, with no evidence of premeditation required in either case.[26] In *Prosecutor v. Krnojelac*, the Court was particularly explicit, asserting that "the elements of the offence of murder are the same under both Article 3 and Article 5 of the Statute. Accordingly, once the constituent elements of the offence of murder as a war crime are established, the foundation is laid for proof of murder as a crime against humanity as long as the additional core element of widespread or systematic attack against a civilian population is established."[27] The Tribunal clearly rejected any premeditation

[23] *Celebici*, para. 431.

[24] *Celebici*, para. 438.

[25] *Celebici*, para. 439.

[26] See *Prosecutor v. Blaskic*, IT-95-14, 3 March 2000, Trial Chamber I, para 181. [Reproduced in accompanying notebook, item 20.] See also *Prosecutor v. Krnojelac*, IT-97-25, 5 March 2002, Trial Chamber II, para. 323. [Reproduced in accompanying notebook, item 25.]

[27] *Krnojelac*, para. 323. Internal quotation marks omitted.

requirement in the murder offense, so long as the killings in question served as part of a "widespread or systematic attack" against the targeted group.

(5) Prosecutor v. Musema and Prosecutor v. Rutagunda

Echoing the emphasis on customary international law first enunciated in *Akayesu*, Trial Chamber I of the Rwanda Tribunal twice accepted the standard of "murder" rather than solely "premeditated murder" as most appropriate for Article 3(a) of the ICTR Statute. In accordance with that decision, the Chamber enunciated in *Rutagunda*[28] and reiterated in *Musema*[29] the following elements of murder under Article 3(a):

(a) The victim is dead;

(b) The death resulted from an unlawful act or omission of the Accused or a subordinate;

(c) At the time of the killing the Accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless as to whether or not death ensures;

(d) The victim was discriminated against, on any one of the enumerated discriminatory grounds;

(e) The victim was a member of the civilian population;

(f) The act or omission was part of a widespread or systematic attack on the civilian population.

[28] *Prosecutor v. Rutaganda*, ICTR-96-3, 6 December 1999, Trial Chamber I, para. 79-80. [Reproduced in accompanying notebook, item 28.]

[29] *Prosecutor v. Alfred Musema*, ICTR-96-13, 27 January 2000, Trial Chamber I, para. 215. [Reproduced in accompanying notebook, item 27.]

B. ICTY and ICTR Decisions Supporting Requiring Premeditation to Convict for Murder as a Crime Against Humanity

While thus far only two cases from the Trial Chambers – *Prosecutor v. Kayishema and Ruzindan*[30] and in *Prosecutor v. Kupreskic and Others*[31] – support the premeditation requirement for murder as a crime against humanity, their arguments are quite persuasive and suggest that the premeditation question is still unsettled in both the ICTR and ICTY.

(1) Prosecutor v. Kayishema and Ruzindan

Rejecting out of hand the interpretation of murder as a crime against humanity proposed by the Yugoslavia Tribunal in *Akayesu*, Trial Chamber II of the ICTR Tribunal held that murder as a crime against humanity indeed requires premeditation in the 1999 case *Prosecutor v. Kayishema and Ruzindan.*[32] The Trial Chamber held that the argument that the French version of the crimes against humanity provision suffered from an error in translation was unconvincing, since both the French and English versions of the tribunal statutes are, by definition, equally authoritative.[33]

Consequently, the Trial Chamber in *Kayishema* relied on general principles of interpreting treaty language. As the Court noted, one may find that there is no exactly equivalent term when interpreting a word from one language to another, particularly when addressing legal concepts. Since the French drafters chose to use the word "assassinat," they must have intended that murder as a crime against humanity should encompass only premeditated murder, in accordance

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[30] *Prosecutor* v. *Clement Kayishema and Obed Ruzindan*, ICTR-95-1-T, 21 May 1999, Trial Chamber II. [Reproduced in accompanying notebook, item 24.]

[31] *Prosecutor v. Kupreskic and Others*, IT-95-16, Judgment of 14 January 2000, Trial Chamber II. [Reproduced in accompanying notebook, item 26.]

[32] *Kayishema*, paras. 137-8. [Reproduced in accompanying notebook, item 24.]

[33] *Kayishema*, para. 137.

with the ordinary meaning of "assassinat." There is no single English word denoting only premeditated murder, so the drafters of Article 3(c) chose the closest corresponding term, "murder."[34]

The Chamber noted that customary international law requires no premeditation for murder a as a crime against humanity, but maintained that the Tribunal must follow the ICTR Statute specifically rather than any provisions of customary international law. Only the crimes as stated in the ICTR Statute reflect "the intention of the international community for the purposes of trying those charged with violations of international law in Rwanda," which presumably was to establish a higher standard of *mens rea* for murder as a crime against humanity than dictated by customary international law.[35]

(2) Prosecutor v. Kupreskic and Others

In *Prosecutor v. Kupreskic and Others*, Trial Chamber II of the Yugoslavia Tribunal alluded to *Kayishema* in asserting that murder as a crime against humanity requires premeditation; that is, the perpetrator must formulate the intent to kill "after a cool moment of reflection."[36] However, the defendant need not *desire* that his actions will kill the victim, so long as he is aware that death would result from his conduct "in the ordinary course of events." The defendant must have premeditated his intent to kill the victim or his intent to "inflict serious injury in reckless disregard of human life."[37]

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[34] *Kayishema*, para. 138.

[35] *Id*.

[36] *Prosecutor v. Kupreskic and Others*, IT-95-16, Judgment of 14 January 2000, Trial Chamber II, para. 561. [Reproduced in accompanying notebook, item 26.]

[37] *Kupreskic*, para. 560.

The formulation proposed by *Kayishema* is problematic under principals of criminal law, however, since a premeditated act cannot also be reckless and requires more than a mere general intent (i.e. the intent to act and accept whatever consequences ensue, whether death or bodily injury.)[38] In adopting a premeditation requirement while at the same time allowing for depraved heart-type murder, Trial Chamber II staked out a contradictory position that leaves the mental state required for murder as a crime against humanity veiled in ambiguity.

IV. Treatment of Murder as a Crime Against Humanity in Domestic Courts

A. Domestic Law Opposing Requiring Premeditation: *Regina v. Finta* and *In re Alhbrecht*

Like Trial Chamber II of the ICTR, some domestic courts require for murder as a crime against humanity only that the killing be willful (intentional or extremely reckless) but not necessarily premeditated. Two such cases are *Regina v. Finta*[39] and *In re Ahlbrecht*.[40]

(1) Regina v. Finta (Canada)

Adjudicated in Canada, Regina v. Finta is among the few North American cases to focus on crimes against humanity in recent years. In *R. v. Finta*, the Canadian Supreme Court ruled that the *mens rea* for crimes against humanity and war crimes is identical – namely, that the perpetrator was aware of or willfully blind to facts or circumstances that rendered his act a

[38] Guy Cumes, *Murder as a Crime against Humanity in International Law: Choice of Law and Prosecution of Murder in East Timor*, 11 EUR. J. CRIME, CRIM. LAW & CRIM. JUST. 40, 55 (2003). [Reproduced in accompanying notebook, item 41.]

[39] *R v. Finta*, [1994] 88 CCC 417. [Reproduced in accompanying notebook, item 29.]

[40] 18 ANNUAL DIGEST OF THE TRIALS OF WAR CRIMINALS 396 (1947), case 141, *cited in* Justin Hogan-Doran, *Murder as a Crime Under International Law and the Statute of the International Criminal Tribunal for the Former Yugoslavia: Of Law, Legal Language, and a Comparative Approach to Legal Meaning*, 11 LEIDEN J. INT'L L. 165, 179 (1998). [Reproduced in accompanying notebook, item 42.]

crime.[41] The court thus did not even require that homicide as a crime against humanity be intentional to constitute murder, much less premeditated; even manslaughter-type crimes would suffice for conviction under the Canadian interpretation of murder as a crime against humanity, a much more liberal standard that contemplated by the Rwanda Tribunal in accepting the English version of Article 3(a).

(2) *In re Ahlbrecht* (the Netherlands)

The Special Court of Cassation of the Netherlands considered the premeditation requirement of murder as a crime against humanity several years ago in *In re Ahlbrecht (No. 2)*.[42] There, the *Cour de Cassation* considered an appeal from the trial of a member of the German Waffen SS who had shot, deliberately but without premeditation, a person in his custody. In particular, the Court considered the discrepancies between Article 289 of the Dutch Criminal Code (*moord*), which applied only to premeditated killings, and the terms used in various versions of the Nuremberg Charter, such as "assassinat," "murder," and "ubiystwo" (Russian term denoting all forms of intentional killing.)[43]

Considering the aims and purposes of prosecuting crimes against humanity, the *Cour de Cassation* stated that,

> [i]n case of such a contradiction between three equally authentic texts, that construction must be accepted which leads to the most reasonable results. Now it would be unreasonable if attacks on the lives of civilians in occupied territory should be termed war crimes[44] only if they were premeditated, whilst ill-treatment and deportation of such civilians and ill-

[41] *R. v. Finta*, [1994] 88 CCC 417, para. 3. [Reproduced in accompanying notebook, item 29.]

[42] *Supra*, note 40.

[43] *Id.*

[44] Under modern law, of course, offenses against civilians would be treated as crimes against humanity, but apparently the Dutch criminal code did not have provisions that specifically targeted crimes against humanity, only war crimes.

> treatment of prisoners of war and sailors, equally set out in the terms of Article 6(b) [of the Nuremberg Charter] should be so termed in all cases.[45]

As a consequence, the Court in *In re Ahlbrecht* determined that it should construe murder as a crime against humanity in the broader sense of the English and Russian texts of the Nuremberg Statute, so that premeditation is not required for conviction.

B. Domestic Law Requiring Premeditation: Crimes against Humanity in the French Penal Code

In 1994, France passed a new version of the Code pénal which expressly provided for the offenses of crimes against humanity. Prior to 1994, France had tried several cases involving crimes against humanity but defined those crimes in reference to the Nuremberg Charter rather than in their own terms.[46] Under the new Code pénal, France prosecutes crimes against humanity based solely on domestic law.

The content of the new law was a matter of some negotiation and debate between the Sénat and the Assemblée Nationale.[47] The Senate favored simply reproducing Article 6(c) of the Nuremberg Charter, but the National Assembly insisted on a slightly different formulation, which, unlike Article 6(c), does not require that the perpetrator have been carrying out a State policy of ideological hegemony for conviction. Further, the new law does not limit the scope of crimes against humanity to the criminality of the State,[48] and explicitly divides crimes against

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[45] *Id.*

[46] CATHERINE ELLIOT, FRENCH CRIMINAL LAW 131 (2001). [Reproduced in accompanying notebook, item 33.]

[47] CATHERINE ELLIOT, FRENCH CRIMINAL LAW 138 (2001). [Reproduced in accompanying notebook, item 33.]

[48] In the trial of Klaus Barbie, the *Cour de Cassation* rejected the distinction between war crimes and crimes against humanity based on the type of the victim but ruled that only victims defined by race, religion, or opposition to a state policy of ideological hegemony were protected by the law against crimes against humanity. Crim., Dec. 20, 1985, B. no. 407, *cited in* CATHERINE ELLIOT, FRENCH CRIMINAL LAW 132 (2001). [Reproduced in accompanying notebook, item 33.]

humanity into three offenses, unlike earlier national law, which did not distinguish among the various types of crimes against humanity.[49]

(1) Execution of a concerted plan

Perhaps the most significant distinguishing feature of French law on crimes against humanity is that French law, unlike international law, requires the execution of a concerted plan.[50] The necessity of participation in some general plan, now codified by the legislature, was first established by the *Cour de Cassation* in its judgment against Klaus Barbie, deciding that his participation in a concerted plan of deportation or extermination constituted "not a distinct offence nor an aggravating circumstance, but an essential element of the crime against humanity."[51] The reason behind the court's decision is not entirely clear, but a circular issued on May 14, 1993, suggests that the general plan concept found favor with the court because it is more objective than the emphasis on motive in international law.[52] Unfortunately, prosecutors may find it difficult to prove the existence of a concerted plan to the satisfaction of the court.[53]

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[49] CATHERINE ELLIOT, FRENCH CRIMINAL LAW 139 (2001). [Reproduced in accompanying notebook, item 33.]

[50] The Nuremberg Charter actually expressly provides for the liability of perpetrators who execute a general plan of unlawful action, but international law held that the execution of the general plan was only secondary to the principal offense itself. *Id.*

[51] The French text reads "non une infraction distincte ou une circonstance aggravante, mais un élément essential du crime contre l'humanité." Crim., June 3, 1994, B. no. 246, *cited in* CATHERINE ELLIOT, FRENCH CRIMINAL LAW 139 (2001). [Reproduced in accompanying notebook, item 33.]

[52] Crim. 93/a/F1, 14 May 1993, *cited in* CATHERINE ELLIOT, FRENCH CRIMINAL LAW 139 (2001). [Reproduced in accompanying notebook, item 33.]

[53] For example, in the case against Paul Touvier, the chief of the militia for the Lyonnaise region during the German occupation of France, the *Chambre d'accusation* initially rejected the label of a crime against humanity on the massacre of seven Jews at Rillieux-du-Pape because there was insufficient evidence that the massacre formed part of a concerted plan. To quote the court, "everything shows that [the massacre] cannot be placed within a methodical plan of extermination coldly executed, but essentially constitutes a spectacular, ferocious, and relatively improvised on the spot criminal reaction." CA Paris, April 13, 1992, quashed by Crim., Nov. 27, 1992, JCP 93, éd. G, II, 17977, note critique Dobkine, *cited in* CATHERINE ELLIOT, FRENCH CRIMINAL LAW 140 (2001). [Reproduced in accompanying notebook, item 33.]

(2) Genocide as a crime against humanity

As aforementioned, the 1994 law divides crimes against humanity into three segments. Article 211-1 addresses the crime of genocide and closely follows Article 2 of the 1948 Genocide Convention, except for the requirement of a concerted plan.[54] This concerted plan must tend to the total or partial destruction of a human group; a plan to *persecute* but not to *exterminate* does not suffice.[55] While the concerted plan requirement narrows the availability of the genocide charge, the 1994 law expands its applicability by identifying the victims according to "any arbitrary criteria." By contrast, the Genocide Convention contains a limited list of potential victims which excludes, for instance, the mentally ill.[56] Likewise, the 1994 law is liberal on the number of victims necessary for a genocide charge, never naming a minimum number of victims in the statute.[57]

(3) Aggravated war crimes

Article 212-2 identifies the offense of aggravated war crimes, which sanctions the same acts as Article 211-1, but when they are committed during wartime against individuals fighting against an ideological system that perpetrates crimes against humanity. This segment follows the 1985 ruling by the *Cour de cassation* in the trial of Klaus Barbie,[58] which established that crimes

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[54] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. [Reproduced in accompanying notebook, item 10.]

[55] CATHERINE ELLIOT, FRENCH CRIMINAL LAW 140 (2001). [Reproduced in accompanying notebook, item 33.]

[56] CATHERINE ELLIOT, FRENCH CRIMINAL LAW 141 (2001). [Reproduced in accompanying notebook, item 33.]

[57] *Id.*

[58] Crim., Dec. 20, 1985, B. no. 407; *supra*, note 48.

against humanity can be committed against freedom fighters during wartime (in either a national or international conflict.)[59]

(4) "Unnamed" crime against humanity

Finally, Article 212-1 is the known as the unnamed crime against humanity (le crime contre l'humanité innommé) and largely follows Article 6(c) of the Nuremberg Statute, except, again, for the requirement of the concerted plan to deprive the victims of their fundamental human rights. The unlawful acts executed in pursuance of this concerted plan must be inspired by political, philosophical, racial or religious motives.[60] Article 212-1 identifies specific crimes against humanity encompassed by French law: deportation, slavery or the massive and systematic practice of summary executions, the abduction of people followed by their disappearance, and torture or inhuman acts.

Significantly, Article 212-1 does not include the crime of murder, which now falls within the *actus reus* of genocide, as a "voluntary attack on life" in the execution of a concerted plan aimed at the total or partial destruction of some group of people.[61] While Article 212-1 never explicitly limits murder as an act of genocide to "assassinat," or premeditated murder, one may assume that most murders committed in pursuance of a concerted plan to exterminate a particular group are premeditated in advance of their commission. Hence, French courts likely favor requiring premeditation to convict for murder as a crime against humanity, at least as an element of genocide.

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[59] CATHERINE ELLIOT, FRENCH CRIMINAL LAW 141 (2001). [Reproduced in accompanying notebook, item 33.]

[60] One should note that philosophical motives were *not* an element of the Nuremberg Statute. CATHERINE ELLIOT, FRENCH CRIMINAL LAW 141 (2001). [Reproduced in accompanying notebook, item 33.]

[61] CATHERINE ELLIOT, FRENCH CRIMINAL LAW 140-41 (2001). [Reproduced in accompanying notebook, item 33.]

V. Bases of Interpreting the ICTY and ICTY Statutes

A. Origins of the terms "murder" and "assassinat": Text of Nuremberg Charter, art. 6(c), Control Council Law No. 10, art. II(1)(c), and the Tokyo Charter, art. 5(c)

In alignment with the canons of construction outlined in the Vienna Convention on the Law of Treaties, courts should interpret treaty language in accordance with its ordinary meaning, taken in context of its object and purpose. After considering related prior or subsequent agreements among the parties to the treaty, the courts should refer to (a) the preparatory work of the treaty, and (b) the circumstances of its conclusion.[62]

Since the ordinary meaning of Article 3(a) of the ICTR Statute is unclear, prompting the request for this memorandum, and the travaux préparatoires of the Statute are not dispositive,[63] the Tribunal should refer to the treaties on which the Statute was based for aid in interpreting the scope of murder as a crime against humanity. It has been widely noted that the treaty language of Article 3(a) comes verbatim from Article 6(c) of the Nuremberg Charter,[64] which was also closely replicated by the Control Council Law No. 10, art. II(1)(c), and the Tokyo Charter, art. 5(c), and the Statute of the International Court of Justice, art. 38(1).[65]

Unfortunately, there is virtually no information regarding the choice of the respective terms "murder" and "assassinat" for article 6(c). It is noted that the Nuremberg Charter mirrored in

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[62] Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27. [Reproduced in accompanying notebook, item 18.]

[63] See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, at 13, U.N. Doc. S/25704 (1993). [Reproduced in accompanying notebook, item 48.]

[64] Officially known as the Charter of the International Military Tribunal, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Annex, Aug. 8, 1945, art. 6(c), 82 U.N.T.S. 284. [Reproduced in accompanying notebook, item 9.]

[65] Guy Cumes, *Murder as a Crime against Humanity in International Law: Choice of Law and Prosecution of Murder in East Timor*, 11 EUR. J. CRIME, CRIM. LAW & CRIM. JUST. 40, 50 (2003). [Reproduced in accompanying notebook, item 41.]

part the Fourth Hague Convention of 1907 in its focus on crimes that violate "the laws of humanity, and the dictates of the public conscience,"[66] but that particular document did not specifically address crimes against humanity, instead focusing on war crimes and proper treatment of prisoners of war.[67] However, there is at least indirect evidence that the framers of the Nuremberg Charter did not see a conflict between the English and French versions of Article 6(c), based on the lack of any action to reconcile the French and English texts in contrast to the efforts to correct discrepancies between the English (and French) and Russian versions of the statute.

As originally conceived, Article 6(c) the Nuremberg Statute contained slightly different punctuation in the English and French versus the Russian translations. The seemingly minor difference had great import regarding the jurisdiction of the Tribunal, determining whether the crimes of murder, enslavement, deportation and other inhumane acts referred to by Article 6 must have some connection to crimes against peace or war crimes to fall within the jurisdiction of the court. (The English and French versions, unlike the Russian translation, suggested that those crimes did *not* require any such jurisdiction tie.)[68]

To reconcile the English/French and Russian versions of the Nuremberg Statute, the Allies issued a protocol on October 6, 1945, changing the English and French versions to comport with the Russian punctuation and corresponding jurisdictional requirements. The resulting version of

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[66] *Report to the President by Mr. Justice Jackson*, June 6, 1945, citing to the Preamble of the Hague Convention, *available at* http://www.yale.edu/lawweb/avalon/imt/jackson/jack08.htm. [Reproduced in accompanying notebook, item 47.]

[67] Laws and Customs of War on Land (Hague IV), October 18, 1907, *available at* http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm. [Reproduced in accompanying notebook, item 14.]

[68] See LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST 53-54 (2001) for a succinct explanation of the jurisdictional requirements of the two versions of the Nuremberg Statute. [Reproduced in accompanying notebook, item 31.]

the Nuremberg Statute required that all crimes against humanity be connected to crimes against peace or war crimes to fall within the jurisdiction of the Tribunal.[69]

In contrast to the official action taken to ensure uniformity among the English, French and Russian versions of Article 6(c) on the question of punctuation, there seems to be no evidence of attempts to change the term "murder" or "assassinat" to decide on a single premeditation standard for murder as a crime against humanity. In particular, the French delegation apparently made no effort to alter the draft of the Nuremberg Statute proposed by the American delegation (which became the basis of the final English version) to replace "murder" in Article 6(c) with a term that more closely comports with "assassinat," such as "premeditated murder." Indeed, the French delegates commented on the American draft on June 28, 1945,[70] and proposed other changes to the draft on July 19, 1945,[71] without ever raising any question as to whether Article 6(c) made all murder or only premeditated murder a crime against humanity under the Tribunal. In addition, the French delegation accepted the British redefinition of "crimes," which included "murder and ill-treatment of civilians and deportations of civilians to slave labour and persecution on political, racial or religious grounds committed in pursuance of [a] common plan or conspiracy."[72] Nowhere does this definition of "crimes" in Article 6(c) suggest that murder

[69] LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST 54 (2001). [Reproduced in accompanying notebook, item 31.]

[70] Observations of the French Delegation on American Draft, June 28, 1945, *available at* http://www.yale.edu/lawweb/avalon/imt/jackson/jack15.htm. [Reproduced in accompanying notebook, item 44.]

[71] Draft Article on Definition of "Crimes", Submitted by French Delegation, July 19, 1945, *available at* http://www.yale.edu/lawweb/avalon/imt/jackson/jack35.htm. [Reproduced in accompanying notebook, item 45.]

[72] Revised Definition of "Crimes", Prepared by British Delegation and Accepted by French Delegation, July 28, 1945, *available at* http://www.yale.edu/lawweb/avalon/imt/jackson/jack52.htm. [Reproduced in accompanying notebook, item 49.]

as a crime against humanity must be premeditated, so long as it is carried out in pursuance of a "common plan" to persecute a specific group based on political, racial, or religious grounds.

Unfortunately, once again we are left to divine the intent of the drafters of the Nuremberg Statute. It is equally plausible that the French delegates thought that the definition of murder as a crime against humanity would be limited in accordance with the restrictive scope of "assassinat" or that the French intended "assassinat" to have a more liberal definition than in domestic French law. Their expectations as to the premeditation requirement are unclear. However, prosecutions of crimes against humanity in domestic French courts, addressed in the Part VI of this memorandum, suggest that France does intend that murder as a crime against humanity encompass only premeditated murder, making "assassinat" rather than "murder" the more appropriate standard for the Rwanda Tribunal to follow.

B. International conceptions of everyday murder

Although, as noted in the first segment of this memo, almost all nations have well-established conceptions of murder is their own legal systems, developing a uniform international conception of murder is more challenging. Using the Nuremberg Charter and Article 38(1)(c) of the International Court of Justice as guiding documents, Yugoslavia Tribunal law clerk Justin Hogan-Doran identified three general elements to a common international definition of murder.[73] This definition is a compromise position between the common law and civil law conceptions of murder. Naturally, a defining element of murder across all common law and civil law jurisdictions is that the victim be killed.[74] Under the common law, the remaining requirements are (a) that the acts of the accused be a significant or substantial cause of death of the victim, and

[73] Justin Hogan-Doran, *Murder as a Crime Under International Law and the Statute of the International Criminal Tribunal for the Former Yugoslavia: Of Law, Legal Language, and a Comparative Approach to Legal Meaning*, 11 LEIDEN J. INT'L L. 165 (1998). [Reproduced in accompanying notebook, item 42.]

[74] *Id.* at 168.

(b) that there be no significant intervening acts overriding the original contributing cause of the accused.[75] The civil law establishes slightly different rules, requiring that the acts of the accused meet the standards of "adequate causation," in that (a) the act forseeably caused the victim's death, and (b) death was the probable outcome of that act.[76]

Incorporating elements of the common and civil law definitions, in light of the treatment of murder at the Nuremberg Tribunals and at the International Court of Justice, Hogan-Doran proposes the following international consensus rule on murder:

1. The conduct of the accused was a significant, substantial, or adequate cause of the death, meaning that the acts are more than a trivial cause or a step in the chain of events leading to death, and death can properly be imputed to the conduct of the accused; and
2. The conduct of the accused was a continuing and operative cause of that death, meaning that the causal connection or sequence of events, begun with the acts of the accused and resulting in death, was not interrupted or taken over by such acts or omissions that the accused can no longer be said to be "causally responsible" for the victim's death.[77]

While the international community has developed some limited common definition of murder, for the purposes of interpreting the premeditation requirement (or lack thereof) of murder under Article 3(a) of the ICTR Statute, international standards are obviously not dispositive. A brief examination of U.S. and French law of everyday murder, and specifically of

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[75] *Id.* at 169.

[76] *Id*.

[77] Justin Hogan-Doran, *Murder as a Crime Under International Law and the Statute of the International Criminal Tribunal for the Former Yugoslavia: Of Law, Legal Language, and a Comparative Approach to Legal Meaning*, 11 LEIDEN J. INT'L L. 165, 170-71 (1998). [Reproduced in accompanying notebook, item 42.]

first-degree murder, may give a better idea of the ordinary meaning of "murder" and "assassinat" by which to evaluate the language of Article 3(a).[78]

C. Everyday murder in common law jurisdictions

(1) *Mens rea* requirements in United States criminal law

In the course of development of common law crimes, courts often held conduct to be criminal that did not include any bad state of mind. However, since about the year 1600, common law jurisdictions have generally defined common law crimes in terms which require, in addition to prescribed action or omission, some prescribed bad state of mind.[79] The common law recognizes that one generally cannot be guilty of a crime without having a "guilty mind."[80]

In codifying the common law (as most jurisdictions in the United States have done), state legislatures have distinguished three broad categories of crimes, each with a requisite mental state: (1) offenses requiring "bad-mind" mental states such as intentionality, knowledge, and maliciousness; (2) offenses requiring a negligent mental state, and (3) offenses requiring no particular mental state (strict liability crimes.)[81] Murder falls in the first category – requiring at least a reckless state of mind to impose culpability.[82]

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[78] For the purposes of this memorandum, United States law represents the common law rule of murder and French law represents the civil law formulation. Viewing a narrow sample of other domestic laws, among common law jurisdictions, Canada has enacted a statute similar to the United States and the Scottish Law Commission has issued a Draft Criminal Code suggesting that the crime of murder be codified in a similar fashion (since the offense is not heretofore codified in Scotland, like the rest of the United Kingdom.) Germany, a prime example of the civil law approach, defines murder in a similar fashion to France in its Strafgesetzbuch (penal code.) [See accompanying notebook, items 2, 5, and 8].

[79] Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815 (1980), and Turner, *The Mental Element in Crimes at Common Law*, 6 CAMB. L.J. 31 (1936), *cited in* LaFave § 5.1. [Reproduced in accompanying notebook, item 35.]

[80] This rule is expressed more succinctly in the Latin phrase *actus not facit reum nisi mens sit rea* (an act does not make one guilty unless his mind is guilty), *noted in* LaFave § 5.1. [Reproduced in accompanying notebook, item 35.]

[81] LaFave § 5.1.

[82] *Id.*

The Model Penal Code, an outline of suggested revisions to state criminal laws in the United States, similarly distills the broad spectrum of criminal mental states into four categories: (a) intentionality, (b) knowledge, (c) recklessness, and (d) negligence.[83] Many modern criminal codes in the United States expressly provide for these four basic types of culpability.[84]

(2) Murder defined in United States criminal law

(a) Prevailing standard under various state laws

Confusingly, common law courts historically defined murder as the "killing of a human being with malice aforethought."[85] In keeping with that definition, the crime of murder traditionally comprised only premeditated murder, with "malice" implying intent to kill, perhaps including an element of hatred or ill will, and "aforethought" meaning an advance plan to commit the killing.[86] This definition has little relevance to modern common law conceptions of murder, in which premeditation is usually ***not*** required for conviction. In most common law jurisdictions today, courts recognize four kinds of murder: (1) intent-to-kill murder; (2) intent-to-do-serious-bodily-injury murder; (3) depraved-heart murder; and (4) felony murder.[87]

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[83] Model Penal Code §2.02(2). [Reproduced in accompanying notebook, item 3.]

[84] For example, Ala.Code § 13A-2-2; Alaska Stat. § 11.81.900; Ariz.Rev.Stat.Ann. § 13-105; Ark.Code Ann. § 5-2-202; Colo.Rev.Stat.Ann. § 18-1-501; Conn.Gen.Stat.Ann. § 53a-3; Del.Code Ann. tit. 11, § 231; Haw.Rev.Stat. § 702-206; Ill.Comp.Stat.Ann. ch. 720, §§ 5/4-4, -5, -6, -7; Ind.Code Ann. § 35-41-2-2; Ky.Rev.Stat.Ann. § 501.020; Me.Rev.Stat.Ann. tit. 17-A, § 35; Mo.Ann.Stat. § 562.016; Mont.Code Ann. § 45-2-101; N.H.Rev.Stat.Ann. § 626:2; N.J.Stat.Ann. § 2C:2-2; N.Y.Penal Law § 15.05; N.D.Cent.Code § 12.1-02-02; Ohio Rev.Code Ann. § 2901.22; Or.Rev.Stat. § 161.115; Pa.Cons.Stat.Ann. tit. 18, § 302; S.D.Cod.Laws § 22-1-2; Tenn.Code Ann. § 39-11-301; Tex.Penal Code Ann. § 6.03; Utah Code Ann. § 76-2-103; Wash.Rev.Code § 9A.08.010; all noted in LaFave § 5.1.

[85] BLACK'S LAW DICTIONARY 462 (2d pocket ed. 2001). "**Murder**, n. The killing of a human being with malice aforethought."

[86] LaFave § 14.1. [Reproduced in accompanying notebook, item 36.]

[87] *Id.*

Regardless of the kind of murder, it always consists of three elements: (1) some conduct (affirmative act, or omission to act where there is a duty to act) on the part of the defendant; (2) an accompanying "malicious" state of mind (intent to kill or do serious bodily injury; a depraved heart; an intent to commit a felony); and (3) conduct that legally causes the death of a living-human-being victim. Also, in many jurisdictions, the death in question must occur within a year and a day after the defendant's conduct.[88]

Intent-to-kill murder

Intent-to-kill murder is the most common type. Generally, this crime means that A, intending to kill B, manages to kill B by some action. If A means to kill B but accidentally kills C in the process of attempting to kill B, A is held guilty of murdering C.[89] Traditionally, courts held that a defendant "intended" to kill when he (a) desired the death, or (b) knew that the death was substantially certain to result from his action. Today, courts usually limit "intent" to instances where it is the actor's purpose to cause the harmful result, and use the word "knowledge" to cover instances in which the actor knows that the harmful result is substantially certain to occur. *However, the intent to kill need not be premeditated to qualify for intent-to-kill murder.*[90]

Intent-to-commit-serious bodily injury murder

Intent-to-commit-serious-bodily injury murder refers to killing in which the defendant intended to seriously harm the victim, but not actually kill him or her. "Serious bodily injury" (sometimes known as "grievous bodily harm") is more than plain "bodily injury."[91] Courts infer

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[88] *Id.*

[89] LaFave § 14.2. [Reproduced in accompanying notebook, item 36.]

[90] *Id.*

[91] The Model Penal Code explains the distinction, noting that "bodily injury" means any physical pain, illness or any

the intent to do serious bodily harm from the defendant's conduct, including any words he uses, taken in the context of the circumstances surrounding the killing. Use of a deadly weapon leads to a particularly strong inference that the defendant intended to do serious bodily injury to the victim, if not actually kill him.[92]

As noted in Part III of this Memorandum, Trial Chamber II of the Yugoslavia Tribunal seemed to accept intent-to-commit-serious-bodily injury murder as a crime against humanity in *Prosecutor v. Kupresic and Others.*[93] In *Kupresic*, the Chamber held that a perpetrator may be convicted of murder as a crime against humanity even if he intended only to inflict grievous bodily injury to the victim rather than kill him, so long as the harmful act, if not the intent to kill, was premeditated.[94]

Depraved heart murder

Depraved heart murder is killing in which the defendant acts with gross negligence (i.e. "criminal negligence"), such that a reasonable person would realize that the conduct entails an unjustifiable and very high risk of death or serious bodily injury to the victim. Some jurisdictions maintain that the defendant must himself be cognizant of the risk created as well as failing the reasonable person standard.[95]

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impairment of physical condition, whereas "serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. MPC § 210.0. [Reproduced in accompanying notebook, item 3.]

[92] LaFave § 14.3. [Reproduced in accompanying notebook, item 36.]

[93] *Prosecutor v. Kupreskic and Others*, IT-95-16 14 January 2000, Trial Chamber II, paras. 560-561. [Reproduced in accompanying notebook, item 26.]

[94] *Id.*

[95] See, for example, Ala.Code § 13A-6-2 (Alabama), Ariz.Rev.Stat.Ann. § 13-1104 (Arizona), N.H.Rev.Stat.Ann. § 630:1-a (New Hampshire), and N.Y.Penal Law § 125.25 (New York), all of which require a subjective mental state of recklessness. See also Ark.Code Ann. § 5-10-103 (Arkansas) and Colo.Rev.Stat.Ann. § 18-3- 102 (Colorado), in which the defendant must "knowingly" cause death in circumstances manifesting extreme indifference); Ill.Comp.Stat.Ann. ch. 720, § 5/9-1 (Illinois), in which the defendant must know "that such acts create a strong

For depraved heart murder, as distinguished from manslaughter, the degree of risk of death or serious bodily injury must be more than a mere unreasonable risk, more even than a high degree of risk – best described as a "very high" degree of risk, given the circumstances surrounding the act.[96] Although "very high degree of risk" means something quite substantial, it is still something far less than certainty or substantial certainty.[97] Further, the social utility of the defendant's conduct is material to determining whether the risk was justifiable.[98]

Felony murder

At the early common law one whose conduct brought about an unintended death in the commission or attempted commission of a felony was guilty of murder. Today, most jurisdictions in the United States have limited the felony murder law in any of four ways: (1) by permitting its use only as to certain types of felonies (such as requiring that the underlying felony attempted or committed be dangerous to life or that they have been felonies at common law); (2) by more strict interpretation of the requirement of proximate or legal cause; (3) by a narrower construction of the time period during which the felony is in the process of commission; and/or (4) by requiring that the underlying felony be independent of the homicide.[99]

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probability of death; and Ky.Rev.Stat.Ann. § 507.020 (Kentucky), in which the defendant "wantonly" engages in conduct leading to death.

[96] See, e.g., State v. Brunell, 159 Vt. 1, 615 A.2d 127 (1992).

[97] See, for example, Commonwealth v. Ashburn, 331 A.2d 167 (Pa. 1975), approving the trial judge's correction of defense counsel's assertion that for the crime to be murder, death must be at least 60% certain.

[98] La Fave § 14.4. [Reproduced in accompanying notebook, item 36.] For example, a defendant who speeds through crowded streets in order to rush a passenger to the hospital for an emergency operation, and kills another driver or a pedestrian in the process, would not be guilty of depraved heart murder. By contrast, a defendant speeding through crowded streets solely for the thrill of the drive could be held liable for murder if he killed somebody in the process.

[99] La Fave § 14.5. [Reproduced in accompanying notebook, item 36.]

(b) Standard under the Model Penal Code

According to the Model Penal Code, murder is criminal homicide committed (a) purposefully, (b) knowingly, or (c) recklessly under circumstances manifesting extreme indifference to the value of human life.[100] Prosecutors impute recklessness and indifference to human life if the defendant committed the killing during the course of committing, attempting to commit, or fleeing after committing certain felonies: namely robbery, rape or deviant sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape. [101]

Under the Model Penal Code, murder is always a first degree felony, whether or not premeditated, and possibly carries the death penalty.[102]

(3) First-degree murder defined in United States criminal law

The division of murder into degrees is a relatively new phenomenon in the evolution of the common law, and has been achieved primarily through legislative enactments.[103] The overwhelming majority of American jurisdictions divide murder into first-, second-, and third-degree offenses.[104]

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[100] Model Penal Code § 210.2. [Reproduced in accompanying notebook, item 36.]

[101] *Id.* The Model Penal Code limits the common law felony murder rule such that only specific offenses hold the defendant responsible for murder. Participation in these enumerated offenses establishes a presumption of recklessness and indifference to the value of human life, which establishes the basis for a murder conviction. The Model Penal Code does not contemplate the strict liability aspects of the traditional felony murder doctrine.

[102] *Id.* Under Model Penal Code § 210.6(1), only murder, as opposed to manslaughter or negligent homicide (or any non-deadly offenses), warrants capital punishment. Even in murder cases, MPC § 210.6 requires a non-capital sentence unless one or more aggravating factors apply and no mitigating factors apply. Further, a unanimous jury verdict is necessary to impose a capital sentence for murder. Model Penal Code § 210.6(2). [Reproduced in accompanying notebook, item 3.]

[103] It is worth remembering that the Model Penal Code, which some states now follow, does not divide murder into degrees. All murder is a first-degree felony, and only capital murder is distinguished from other murder-type killings. Model Penal Code § 210.1. [Reproduced in accompanying notebook, item 3.]

[104] As earlier noted, the Model Penal Code does not distinguish among degrees of murder. All murder is a first-degree felony, and differences in punishment are to hinge on mitigating or aggravating factors considered during sentencing.

Intent-to-kill and felony murder (usually limited to the felonies of rape, robbery, kidnapping, arson, and burglary) are typically treated as first-degree murder.[105] In addition, certain aggravating factors may raise a killing from second- to first-degree murder even absent evidence of premeditation or the commission of another felony in the course of the killing.[106]

Evidently, while premeditated murder is one kind of first-degree murder, the common law imposes the most serious penalties for other kinds of aggravated murder in addition to premeditated killings, suggesting that the Tribunal should view murder as a crime against humanity, a grave offense whose nearest analogy is first-degree murder in domestic courts, more expansively than encompassing solely premeditated murder.

Premeditated intent-to-kill murder

To be culpable of premeditated intent-to-kill murder in the first degree, the defendant must not only intend to kill his victim but must premeditate the killing and deliberate about its enactment. Cases have clarified the specific meaning of the terms "premeditate" and "deliberate"; that is, the defendant must act with a "cool mind that is capable of reflection," and must in fact reflect for at least a short period prior to acting.[107]

It is not sufficient for conviction of first-degree murder that the defendant simply had time to premeditate and deliberate, if he did not actually take the opportunity to reflect. The prosecutor must present some affirmative evidence to support a finding that the defendant did in fact

[105] La Fave § 14.7. [Reproduced in accompanying notebook, item 36.]

[106] La Fave § 14.8. [Reproduced in accompanying notebook, item 36.]

[107] See State v. Bowser, 199 S.E. 31, 33 (N.C. 1938) ("Deliberation means the act is done in a cool state of the blood"); Byford v. State, 994 P.2d 700, 713 (Nev. 2000) ("Deliberation remains a critical element of the mens rea necessary for first-degree murder, connoting a dispassionate weighing process and consideration of consequences before acting"); State v. Brown , 836 S.W.2d. 530, 539 (Tenn. 1992) ("In order to establish first-degree murder, the premeditated killing must also have been done deliberately, that is, with coolness and reflection").

premeditate and deliberate.[108] Further, a defendant will not be convicted of first-degree murder if he could not deliberate the crime before acting due to intoxication, emotional upset, mental disturbance (less than that required for an insanity defense), or terror. He could, of course, be found culpable of second-degree murder, which requires no premeditation, in those circumstances.[109]

The prosecutor may rely on three brands of evidence in demonstrating that the defendant premeditated his offense: (1) facts about how and what the defendant did prior to the actual killing which show he was engaged in activity directed toward the killing, i.e. planning activity; (2) facts about the defendant's prior relationship and conduct with the victim from which motive may be inferred; and (3) facts about the nature of the killing from which it may be inferred that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design.[110]

Felony murder

In most U.S. jurisdictions, a defendant may be criminally liable for first-degree murder if he kills in the course of committing some serious felonies, usually comprised of rape, robbery, killing, arson, and burglary. Prosecutors prefer to charge defendants with first degree murder of the felony-murder variety, rather than the premeditated intent-to-kill kind, because the felony-murder approach dispenses with the need to prove premeditation and deliberation, which is often a difficult task. In some cases, the prosecutor simply charges the defendant with first-degree murder without specifying the felony-murder or premeditated intent-to-kill kind, leaving it to the

[108] See, for example, State v. Hamric, 151 S.E.2d 252, 262 (1966) ("where a deadly weapon is used in a homicide there is a presumption of second degree murder and the state has the burden of proving that such killing was deliberate and premeditated").

[109] La Fave § 14.7. [Reproduced in accompanying notebook, item 36.]

[110] La Fave § 14.8. [Reproduced in accompanying notebook, item 36.]

jury to decide whether the evidence supports either or both types.[111]

Aggravating factors which elevate killings to first-degree murder

Some U.S. jurisdictions have elevated murders to the first-degree status based on the manner of killing, such as by bombing or by procuring execution by perjury. More commonly, states raise killings to first-degree murder because of the status of the victim. Lastly, a few states identify other aggravating characteristics that make a crime murder in the first-degree: that the murder was committed for pay, that it involved multiple victims, or that the alleged perpetrator had a prior murder conviction or was incarcerated at the time of the killing.[112]

Since murder as a crime against humanity under the ICTR Statute must be part of a widespread or systematic attack on a civilian population, it certainly includes "aggravating characteristics" – a concerted effort to violate fundamental civil liberties – that would justify the harsh penalty of conviction by the Tribunal, comparable to elevating a killing to first-degree murder in a domestic court. This might justify allowing non-premeditated murder to qualify as a crime against humanity under Article 3(a) of the ICTR Statute.

D. Everyday murder in civil law jurisdictions

(1) *Mens rea* requirements under the French penal code

It may be helpful to first consider the general and specific intentions required to assign culpability under French law. For all crimes, the defendant must have *le dol general* – recognized as a "criminal awareness and desire" to commit some crime; negligence does not

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[111] See, for example, State v. Metalski, 185 A. 351 (N.J. Ct.Err. & App. 1936) (proof of both premeditated and deliberate intent-to-kill murder, and of murder in commission of robbery); Commonwealth v. Bartolini, 13 N.E.2d 382 (Mass. 1938) (proof of both deliberately premeditated intent-to-kill murder, and of murder committed with extreme atrocity or cruelty).

[112] La Fave § 14.8. [Reproduced in accompanying notebook, item 36.]

suffice to assign culpability for most crimes.[113] Like Anglo-American law, French law imputes awareness to the defendant, generally assuming that he is aware of the law he breaks. Likewise, the prosecution has a light burden to demonstrate "desire" for the purposes of general intention; the defendant must only desire to commit the wrongful act rather than desire to commit the result of that act.[114]

In addition to having the requisite general intention, for certain serious and major crimes, the defendant must demonstrate *le dol spécial* to commit the particular crime with which he is charged, i.e., the intention to cause a result forbidden by the law. For example, the special intention required for murder is the intention to kill.[115]

Depending upon the specific intention required for a particular crime, the prosecution may not have to prove that the defendant wanted to produce the harm that actually resulted from his conduct; an intent to produce some lesser result may suffice. This lower burden of proof for a *dol indéterminé* or *dol imprécis* applies where the defendant could not have known precisely what would result from his conduct, as where a defendant hits his victim in the nose, perhaps resulting in only a bruise but perhaps breaking the nose or knocking the victim unconscious.[116]

Like Anglo-American law, French law recognizes that a defendant may act not intentionally but rather negligently or recklessly to produce some harm that he foresees but does not desire. This "indirect" or "oblique" intention is *le dol éventuel*, and does not amount to a specific intention but a lesser fault treated as an aggravating factor in relation to involuntary murder and

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[113] "Il n'y a point de crime ou de délit sans intention de le commettre." CODE PÉNAL § 121-3 (2000). [Reproduced in accompanying notebook, item 1.] In translation, this section means, "[t]here is no serious crime or major crime in the absence of an intention to commit it."

[114] CATHERINE ELLIOT, FRENCH CRIMINAL LAW 67 (2001). [Reproduced in accompanying notebook, item 32.]

[115] CATHERINE ELLIOT, FRENCH CRIMINAL LAW 69 (2001). [Reproduced in accompanying notebook, item 32.]

[116] *Id.*

non-fatal offenses against the person.[117] The oblique intention may also constitute an offense in its own right where the defendant's actions pose an immediate risk of death or serious injury.[118]

For certain serious crimes, the prosecution must do more than demonstrate the defendant has the general and specific intent to commit the crime in question. Where the particular offense requires *le dol aggravé*, the prosecutor must prove the existence of some *mens rea* beyond *le dol général* or *le dol spécial*. For example, the French crime of "assassinat" (obviously important to understanding Article 3(a) of the ICTR Statute) requires a *dol aggravé* of premeditation in addition to the general intent to use some violent force and the specific intent to cause the victim's death.

Generally, *le dol aggravé* applies to a crime where a particular motive is a necessary element, such as terrorism (in which the motive is to intimidate and disrupt the public order) or genocide (in which the motive is the total or partial destruction of a national, ethnic, racial, or religious group.) The prosecutor may seek a longer punishment for defendants who have *le dol aggravé* in addition to the general and specific intent to commit the crime.[119]

In contrast to *le dol aggravé*, *le dol dépassé* applies where the harm caused by the defendant exceeds the harm he intended or expected to cause. For instance, the defendant might wish only to injure his victim but instead killed him. In the case of *le dol dépassé*, the defendant receives a stronger punishment than deserved based on his intention, but a weaker punishment than merited

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[117] See, for example, CODE PÉNAL, arts. 222-19 and 222-20, which cover "Involuntary Offences Against the Physical Integrity of the Person."

[118] CODE PÉNAL, art. 223-1. "The direct exposure of another person to an immediate risk of death or injury likely to cause mutilation or permanent disability by the manifestly deliberate violation of a specific obligation of safety or prudence imposed by any statute or regulation is punished by one year's imprisonment and a fine of € 15,000."

[119] CATHERINE ELLIOT, FRENCH CRIMINAL LAW 72 (2001). [Reproduced in accompanying notebook, item 32.]

by the harm actually caused.[120] Trial Chamber II of the Yugoslavia Tribunal apparently departed from the French conception of *le dol dépassé* in *Prosecutor v. Kupresic and Others*, where it held that the premeditated intent to cause serious bodily injury would suffice to convict for murder as a crime against humanity, with no mitigation in sentencing for the lack of intent to kill.[121]

(2) "Meurtre" defined under the French penal code

Code pénal, art. 221-1 states that "The wilful causing of the death of another person is murder. It is punished with thirty years' criminal imprisonment."[122] Under French law, three basic characteristics apply to the offence of murder: (1) the victim must have been born (excluding foetuses); (2) it is not murder where a person takes his own life in a suicidal act; (3) a positive act by the defendant is required (excluding murder by omission), and psychological torture does not suffice as that positive act.[123] Interestingly, there is some suggestion that the victim need not be alive at the time of killing, so long as the perpetrator believed the victim was alive during the course of the crime.[124]

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[120] For example, article 222-7 provides for a fifteen-year punishment where the defendant commits acts of violence against his victim without intending to cause death, but where death results. By contrast, article 222-9 assigns a ten-year imprisonment to a defendant who causes serious but non-fatal wounds to his victim, and article 221-1 gives a maximum thirty-years in prison for murder, where the defendant actually intends to kill his victim. CATHERINE ELLIOT, FRENCH CRIMINAL LAW 72-73 (2001). [Reproduced in accompanying notebook, item 32.]

[121] *Prosecutor v. Kupreskic and Others*, IT-95-16, 14 January 2000, Trial Chamber II, paras. 560-561. [Reproduced in accompanying notebook, item 26.]

[122] The French text reads: "Le fait de donner volontairement la mort à autrui constitue un meurtre. Il est puni de trente ans de réclusion criminelle." CODE PÉNAL, art. 221-1. [Reproduced in accompanying notebook, item 1.]

[123] CATHERINE ELLIOT, FRENCH CRIMINAL LAW 149 (2001). [Reproduced in accompanying notebook, item 34.]

[124] In 1986, the criminal division of the *Cour de cassation* ruled that the life of victim is not a precondition for the offense of murder in a case in which a defendant attacked a victim at his house after the victim had, unbeknownst to the defendant, already succumbed to fatal wounds received in a fight in a café earlier that evening. The court ruled that the second attack constituted attempted murder. Crim., Jan. 16, 1986, D. 1986, pp. 839 and 850, note Roujou de Boubée (Fr.), *cited in* CATHERINE ELLIOT, FRENCH CRIMINAL LAW 149 (2001). [Reproduced in accompanying notebook, item 32.] However, one may debate whether the conviction for attempted murder rather than murder implicitly recognizes that one cannot kill a victim who is already dead.

In addition to meeting these three characteristics, a murder conviction requires a specific *mens rea*, comprised of both the *dol général* (general intent) and *dol spécial* (special intent), i.e. the desire to kill. If the defendant intent only to wound the victim, he is criminally liable only for a non-fatal offense, even if death results.[125] Typically, murder carries a maximum sentence of thirty years, as noted in Article 221-1. However, courts may impose a life sentence if the murder occurs under aggravating circumstances based on the status of the victim[126] or falls into one of four specific categories: "assassinat";[127] murder combined with another serious offense;[128] murder that prepares or facilitates a major offense, either to enable the escape or assure the impunity of the defendant;[129] and poisoning.[130]

(3) "Assassinat" defined under the French penal code

Code pénal, art. 221-3 defines "assassinat," stating that "Murder committed with premeditation is assassination. Assassination is punished by a criminal imprisonment for life."[131] Conviction for "assassinat" requires that the defendant have premeditated the crime – i.e. formed

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[125] CATHERINE ELLIOT, FRENCH CRIMINAL LAW 150 (2001). [Reproduced in accompanying notebook, item 32.] Contrast again with *Prosecutor v. Kupresic*, *supra*, note 121.

[126] In contrast to U.S. law, in which the aggravating circumstances might also encompass the manner by which the murder was effected, French law allows only the status of the victim to serve as an aggravating factor. CODE PÉNAL, art. 221-4. [Reproduced in accompanying notebook, item 1.]

[127] CODE PÉNAL, art. 221-3. [Reproduced in accompanying notebook, item 1.]

[128] CODE PÉNAL, art. 221-2, para. 1. [Reproduced in accompanying notebook, item 1.] In this case, the offenses are distinct, such as where a man rapes a woman and then kills her. The murder does not facilitate the rape, and the rape does not facilitate the murder.

[129] In French: "Le meurtre qui a pour objet soit de préparer ou de faciliter un délit, soit de favoriser la fuite ou d'assurer l'impunité de l'auteur ou du complice d'un délit est puni de la réclusion criminelle à la perpétuité." CODE PÉNAL, art. 221-2, para. 2. [Reproduced in accompanying notebook, item 1.]

[130] CODE PÉNAL, art. 221-5. [Reproduced in accompanying notebook, item 1.]

[131] The French text reads: "Le meurtre commis avec préméditation constitue un assassinat. Il est puni de la réclusion criminelle à perpétuité." CODE PÉNAL, art. 221-3. [Reproduced in accompanying notebook, item 1.]

a plan to commit the murder prior to killing the victim.[132] In short, the defendant must have intended to kill the victim not only at the time of the crime but also before it.[133]

For the purposes of interpreting Article 3(a) of the ICTR Statute, it is worth repeating that French criminal law punishes most severely not only premeditated murder ("assassinat") but also murder combined with or facilitating another major offense, poisoning, and murder with aggravating circumstances based on the status of the victim.[134] Again analogizing imposing lengthier punishments for the most serious murders in domestic courts to convicting of murder as a crime against humanity in the Tribunal, with its attendant stigma, one sees that more liberally interpreting Article 3(a) to include non-premeditated murder actually mirrors the approach taken by French courts, where premeditation is only one factor in assessing the degree of culpability in the killing. Only the naked language of the term "assassinat" in Article 3(a) of the ICTR Statute, rather than any common law-civil law distinction in the treatment of murder, suggests that the Tribunal must narrowly interpret the offense of murder as a crime against humanity, which suggests that the Tribunal may fairly adopt a more liberal conception of Article 3(a) without particularly violating the due process of defendants from civil law jurisdictions.[135]

VI. Conclusion

Writing on Adolf Eichmann's 1961 war crimes trial in Jerusalem in her book *Eichmann in Jerusalem: A Report on the Banality of Evil*, *New Yorker* reporter Hannah Arendt noted that "[n]othing is more pernicious to an understanding of these new crimes, or stands more in the way

[132] As defined by CODE PÉNAL, art. 132-72, which states "La préméditation est le dessein formé avant l'action de commettre un crime ou un délit déterminé."

[133] CATHERINE ELLIOT, FRENCH CRIMINAL LAW 153 (2001). [Reproduced in accompanying notebook, item 32.]

[134] *Supra*, page 3.

[135] See Conclusion 1, page 2, for the opposing viewpoint.

of the emergence of an international penal code that could take care of them, than the common illusion that the crime of murder and the crime of genocide are essentially the same. The point of the latter is that an altogether different order is broken and an altogether different community is violated."[136] One may come to the same conclusion regarding the basic crime of murder and murder as a crime against humanity. Murder as a crime against humanity flouts the international rule of law, spreading hateful and discriminatory attacks on civilians based on political, racial, or religious grounds.[137] Its pernicious nature distinguishes it from most murders in domestic law, which are personally motivated, and makes it a uniquely offensive to the international community.

Based on the seriousness of murder as a crime against humanity and the extraordinary international interest in prosecuting murder under Article 3(a) of the ICTR Statute and similar instruments, it seems appropriate that the Tribunal act in accordance with customary international law and *not* require premeditation for conviction of murder under Article 3(a). To require premeditation in order to comport with the definition of "assassinat" used in French criminal law imposes a heavy burden on the Prosecutor, and, as evidenced in the trial of French war criminal Paul Touvier, may result in acquittal despite abundant evidence that the defendant willfully killed innocent civilians for discriminatory purposes.

Further, dispensing with the premeditation requirement is not particularly burdensome for the defendant. The Prosecutor must still prove that the accused killed as part of a widespread or systematic attack on the group of victims, motivated by political, racial, or religious grounds.

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[136] HANNA ARENDT, EICHMANN ON TRIAL: A REPORT ON THE BANALITY OF EVIL 272 (1963), *cited in* Simon Chesterman, *An altogether different order: defining the elements of crimes against humanity*, 10 DUKE J. COMP & INT'L L. 307, 342-43 (2000). [Reproduced in accompanying notebook, item 40.]

[137] As provided in the ICTR Statute, art. 3. Some laws covering crimes against humanity, like the new French penal code, allow for broader discriminatory grounds, such as ethnicity or sexual orientation.

This standard comports with expectations of murder defendants in common law countries and with customary international law. While protecting the defendant is paramount to the fairness of the Tribunal, favoring the defense by requiring an unusually specific *mens rea* to convict for murder under Article 3(a), as contemplated by adopting "assassinat" as the defining offense, unnecessarily handicaps the Tribunal from protecting the international community and the rule of law to which it also owes a duty.

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MEMORANDUM FOR THE
OFFICE OF THE PROSECUTOR
OF THE ICTR

ISSUE: PROOF OF PREMEDITATION IN CONVICTIONS FOR MURDER AS A CRIME AGAINST HUMANITY

PREPARED BY JENNIFER E. PRUDE
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