

AN ALTOGETHER DIFFERENT ORDER: DEFINING THE ELEMENTS OF CRIMES AGAINST HUMANITY

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*Nothing is more pernicious to an understanding of these new crimes, or stands more in the way 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.*¹

Hannah Arendt

I. INTRODUCTION

In the wake of the establishment of ad hoc tribunals for the former Yugoslavia and Rwanda in 1993 and 1994 and the July 1998 adoption of the Rome Statute of the International Criminal Court,² much has been written on the history and the future of international criminal law.³ This Article attempts the more modest task of selecting

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1. HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 272 (1963).

2. U.N. Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf.183/9 (1998).

3. See generally M. CHERIF BASSIOUNI, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY (1998); REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF ADRIAAN BOS (Herman A.M. von Hebel et al. eds., 1999); ROY S. LEE, THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS (1999). For works focusing on the two ad hoc Tribunals, see VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS (1995); M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1996); KARINE LESCURE & FLORENCE TRINTIGNAL, INTERNATIONAL JUSTICE FOR FORMER YUGOSLAVIA: THE WORKING OF THE INTERNATIONAL CRIMINAL TRIBUNAL OF THE HAGUE (1996); VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE

one category of international criminal law—crimes against humanity—and examining the efforts to define the elements of the various offenses encompassed within the category's reach. This task is particularly relevant given the ongoing work of the Preparatory Commission for the Establishment of an International Criminal Court ("PrepCom"), which is scheduled to prepare a draft text of the elements of crimes against humanity by June 30, 2000.⁴ Additionally, this Article attempts to contribute to the jurisprudence of the international criminal tribunals currently in existence, with particular emphasis on the often-overlooked work of the International Criminal Tribunal for Rwanda.

Part II of this Article provides an overview of the three definitions of crimes against humanity elaborated in the statutes of the two ad hoc Tribunals and the Rome Statute. Part III then considers the general requirements that elevate an act to a crime against humanity. Part IV examines the elements of specific offenses, focusing on the three acts that have received particular judicial consideration: murder, extermination, and rape. The Article concludes by observing that the divergent approaches adopted in the three fora under consideration here—the two ad hoc Tribunals and the conferences on the permanent Court—expose distinct and sometimes inconsistent underlying policy goals.

II. THREE DEFINITIONS OF CRIMES AGAINST HUMANITY

The Rome Statute⁵ and the statutes of the International Criminal Tribunals for the Former Yugoslavia (ICTY)⁶ and Rwanda (ICTR)⁷

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (1997); JOHN R.W.D. JONES, *THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA* (1998). For recent works on crimes against humanity in particular, see M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* (2d. ed. 1999); Phyllis Hwang, *Defining Crimes Against Humanity In The Rome Statute Of The International Criminal Court*, 22 *FORDHAM INT'L L.J.* 457 (1998); Darryl Robinson, *Defining "Crimes Against Humanity" at the Rome Conference*, 93 *AM. J. INT'L L.* 43 (1999); Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 *COLUM. J. TRANSNAT'L L.* 787 (1999). For additional sources, see citations in Simon Chesterman, *Never Again . . . and Again: Law, Order and the Gender of War Crimes in Bosnia and Beyond*, 22 *YALE J. INT'L L.* 299 (1997).

4. See *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, U.N. Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Resolution F, ¶¶ 5-6, U.N. Doc. A/Conf.183/10 (1998).

5. Rome Statute of the International Criminal Court, *supra* note 2, art. 7 [hereinafter Rome Statute].

provide different definitions as to what constitutes a crime against humanity. All three instruments state that certain acts (referred to as “crimes” in the statutes of the ICTY and ICTR) committed under defined circumstances constitute crimes against humanity. In the statutes of the ICTY and ICTR, the relevant acts are: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial, and religious grounds; and other inhumane acts.⁸ In addition to these acts, the Rome Statute includes the crime of apartheid and the enforced disappearance of persons. The Rome Statute also elaborates the types of acts requisite for crimes against humanity.⁹ For example, while the relevant articles of the ad hoc Tribunals use the unadorned term “rape,”¹⁰ the Rome Statute refers to “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.”¹¹

A crime against humanity requires that the acts outlined above take place under defined circumstances. The ICTY Statute mandates that the act be “committed in armed conflict, whether international or internal in character, and directed against any civilian population.”¹² By contrast, the ICTR Statute defines a crime against humanity as an act “committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds.”¹³ This definition is closer to the position of the Rome Statute, which requires that a crime against humanity be “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”¹⁴ The Rome Statute further provides that an “[a]ttack directed against any civilian population” means a course of conduct involving the multiple

6. See Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N.S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at art. 5, U.N. Doc. S/RES/827 (1993), amended by U.N.S.C. Res. 1166, U.N. SCOR, 53rd Sess., 3878th mtg., U.N. Doc. S/RES/1166 (1998) [hereinafter ICTY Statute].

7. See Statute of the International Criminal Tribunal for Rwanda, U.N.S.C. Res. 955, U.N. SCOR, 49th Sess., 3453th mtg., at art. 3, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

8. See ICTY Statute, *supra* note 6, art. 5; ICTR Statute, *supra* note 7, art. 3.

9. See Rome Statute, *supra* note 2, arts. 7(1)-(3).

10. See ICTY Statute, *supra* note 6, art. 5(g); ICTR Statute, *supra* note 7, art. 3(g).

11. Rome Statute, *supra* note 2, art. 7(1)(g). “Forced pregnancy” is further defined in art. 7(2)(f) of the Rome Statute, *supra* note 2.

12. ICTY Statute, *supra* note 6, art. 5.

13. ICTR Statute, *supra* note 7, art. 3.

14. Rome Statute, *supra* note 2, art. 7(1).

commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”¹⁵

This Part will examine three significant differences in the definitions of crimes against humanity: (a) the requirement of an armed conflict in the ICTY Statute; (b) the requirement of discriminatory grounds in the ICTR Statute; and (c) the significance of the words “widespread or systematic” in the ICTR and Rome Statutes.

A. Requirement of an Armed Conflict in the ICTY Statute

One of the most significant differences between the statutes of the ICTY and the ICTR is that the former requires proof of the existence of an armed conflict (either international or internal) while the latter does not.¹⁶ The requirement of an armed conflict recalls Article 6(c) of the Nuremberg Charter,¹⁷ which limited the Nuremberg Tribunal’s jurisdiction to crimes against humanity committed before or during the World War II. The Tribunal held that acts before 1939 were excluded due to the requirement that crimes against humanity be committed “in execution of or in connection with” war crimes or crimes against peace.¹⁸ It is now well settled that customary international law does not require the existence of an armed conflict for an act to be a crime against humanity,¹⁹ a position reflected in the ICTR Statute and the Rome Statute. Thus, the ICTY Statute’s armed conflict prerequisite is above and beyond the requirements of customary international law.

The ICTY Statute’s further requirement that crimes against humanity also be “directed against any civilian population” led to some uncertainty as to whether it was necessary to establish a nexus between the act and the armed conflict, or between the act and an

15. *Id.*, art. 7(2)(a).

16. *See* Prosecutor v. Tadic, No. IT-94-1-A, ¶¶ 238-72 (Int’l Crim. Trib. Former Yugo., App. Chamber, Jul. 15, 1999).

17. Charter of the International Military Tribunal, Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, E.A.S. No. 472, 82 U.N.T.S. 279.

18. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 498 (1948).

19. *See* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Tadic, No. IT-94-1-AR72, ¶¶ 78, 140-41 (Int’l Crim. Trib. Former Yugo., App. Chamber, Oct 2, 1995); *see also* Van Schaack, *supra* note 3, at 819-33; Robinson, *supra* note 3, at 45-46.

attack on a civilian population. This dilemma was resolved by the ICTY Appeals Chamber, which in *Prosecutor v. Dusko Tadic*²⁰ held that “[t]he armed conflict requirement is satisfied by proof that *there was* an armed conflict; that is all that the Statute requires, and in so doing, it requires more than does customary international law.”²¹ This finding is of significance in establishing the importance to be attached to the Appeals Chamber’s construction of the ICTY Statute when interpreting the Statute of the ICTR and the Rome Statute, in particular concerning the nexus between the act and the attack on the civilian population.²² If the Appeals Chamber had found that the armed conflict requirement was a discreet element that needed to be proven, it might have affected other elements of the definition of crimes against humanity, giving rise to parallel jurisprudence on the subject.

B. Requirement of Discriminatory Grounds in the ICTR Statute

A second difference between the Statutes of the ad hoc tribunals is that, unlike the ICTY Statute, the ICTR Statute requires that crimes against humanity be “committed as part of a widespread or systematic attack against any civilian population *on national, political, ethnic, racial or religious grounds*.”²³

Although the text of the ICTY Statute did not require a crime against humanity to have discriminatory grounds, based on comments in the Report of the Secretary-General and statements by three Security Council members after they voted on the Statute, the ICTY Trial Chamber II found there to be such a requirement.²⁴ The holding was overturned on appeal. As noted by the Appeals Chamber, Article 7 of the Rome Statute considered and rejected a similar discrimination requirement.²⁵ Furthermore, the Appeals Chamber found that customary international law does not impose such a requirement and nor do the extraneous materials relied on by the Trial Chamber warrant a departure from the Statute’s clear wording.²⁶

20. No. IT-94-1-A (Int’l Crim. Trib. Former Yugo., App. Chamber, Jul. 15, 1999).

21. *Id.*, ¶ 251.

22. See discussion *infra* Part III.B.4.

23. ICTR Statute, *supra* note 7, art. 3 (emphasis added).

24. See *Prosecutor v. Tadic*, No. IT-94-1-T, ¶ 652 (Int’l Crim. Trib. Former Yugo., Trial Chamber, May 7, 1997).

25. See *id.* ¶ 291; see also Van Schaack, *supra* note 3, at 841-45; Robinson, *supra* note 3, at 46-47.

26. See *Prosecutor v. Tadic*, No. IT-94-1-A, ¶¶ 273-305 (Int’l Crim. Trib. Former Yugo., App. Chamber, Jul. 15, 1999). Although the text of the ICTR Statute is clear, it bears noting

C. “Widespread or Systematic” in the ICTR Statute

The English, Chinese, Russian, and Spanish versions of the ICTR Statute require that an act be committed as part of a “widespread *or* systematic” attack against a civilian population.²⁷ By contrast, the French text uses the words “*généralisée et systématique*,”²⁸ and the Arabic version uses similarly conjunctive language. The Rwandan Tribunal dealt with this inconsistency in a footnote to the *Prosecutor v. Jean-Paul Akayesu*²⁹ judgment, asserting that, as “Customary International Law requires only that the attack be either widespread or systematic, there are sufficient reasons to assume that the French version suffers from an error in translation.”³⁰

Such an argument is problematic. Although the *Akayesu* interpretation lessens the burden of proof on the Prosecutor, similarly situated ad hoc Tribunals have tended to adopt the reasonable interpretation most favorable to the accused (for example, with respect to the elements of genocide).³¹ The question of whether the requirements were conjunctive (widespread *and* systematic) or disjunctive (widespread *or* systematic) was a lively topic of debate during the July 1998 Diplomatic Conference, which adopted the Rome Statute.³²

In any case, an *Akayesu*-type approach seems unnecessary. Despite holding that the requirements were alternatives, the *Akayesu* court held that the April 1994 attack against the civilian population had been both widespread *and* systematic.³³ Trial Chamber II made a

that the burden on the Prosecutor to prove discriminatory grounds is supplemental to the requirements of customary international law. *See, e.g.*, *Prosecutor v. Rutaganda*, No. ICTR-96-3-T, § 2.3. (Int’l Crim. Trib. Rwanda, Trial Chamber I, Dec. 6, 1999) (section references are derived from the ICTR web page <www.ictor.org>).

27. ICTR Statute, *supra* note 7, art. 3 (emphasis added).

28. Statut Du Tribunal International Pout Le Rwanda, U.N.S.C. Res. 955, U.N. SCOR, 49th Sess., 3453th mtg., at art. 3, U.N. Doc. S/RES/955 (1994).

29. No. ICTR-96-4-T (Int’l Crim. Trib. Rwanda, Trial Chamber, Sep. 2, 1998).

30. *Id.*, ¶ 579 n.144. The Rwandan Tribunal continues:

In the original French version of the Statute, these requirements were worded cumulatively: ‘Dans le cadre dune adieux generalise et systematic’, thereby significantly increasing the threshold for application of this provision. Since Customary International Law requires only that the attack be either widespread or systematic, there are sufficient reasons to assume that the French version suffers from an error in translation.

Id.

31. *See infra* text accompanying note 128.

32. *See* Van Schaack, *supra* note 3, at 844; Robinson, *supra* note 3, at 47.

33. *See* No. ICTR-96-4-T, ¶ 173 (Int’l Crim. Trib. Rwanda, Trial Chamber, Sep. 2, 1998). “[T]he Chamber finds beyond a reasonable doubt that a widespread *and* systematic attack

similar finding in *Prosecutor v. Kayishema*.³⁴ It was therefore open to the Tribunal to affirm that, as a matter of customary international law, the requirements were alternatives, while noting that on the facts, even the stricter cumulative requirement would have been satisfied. The disjunctive interpretation has been affirmed by the Rwandan Tribunal in *Kayishema*³⁵ and *Prosecutor v. Rutaganda*³⁶ and seems unlikely to be reversed.³⁷

The words “widespread or systematic” do not appear in the ICTY Statute. Trial Chamber II held in *Prosecutor v. Tadic*, however, that such a requirement was contemplated in the requirement that the attack be directed against a civilian “population.”³⁸ As previously noted, it is now well settled as a matter of customary international law that the two elements are alternatives. This position was adopted by the Yugoslav Tribunal in the case known as the *Vukovar Hospital Rule 61 Decision*,³⁹ and the matter was explicitly decided by Trial Chamber II in *Tadic*⁴⁰ and implicitly affirmed on appeal.⁴¹ The phrase “widespread or systematic” is also included in the definition of crimes against humanity in the Rome Statute.⁴²

began in April 1994 in Rwanda, targeting the civilian Tutsi population and that the acts referred to in paragraphs 12-24 of the indictment were acts which formed part of this widespread and systematic attack.” *Id.* (Emphasis added.)

34. No. ICTR-95-1-T, ¶ 582 (Int’l Crim. Trib. Rwanda, Trial Chamber, May 21, 1999).

35. *Id.* ¶ 123 n.63. “Despite the French text containing the conjunctive ‘and’ instead of the disjunctive ‘or’ between the terms widespread or systematic, the Trial Chamber is in no doubt that the correct interpretation is the disjunctive. The matter has already been settled in the *Akayesu* Judgement and needs no further debate here.” *Id.*

36. No. ICTR-96-3-T, § 2.3 (Int’l Crim. Trib. Rwanda, Trial Chamber I, Dec. 6, 1999).

37. Note, however, the *obiter dicta* a 1998 Yugoslav Tribunal judgment, which used the conjunctive “and,” perhaps inadvertently. See *Prosecutor v. Delalic*, No. IT-96-21-T, ¶ 178 (Int’l Crim. Trib. Former Yugo., Trial Chamber, Nov. 16, 1998) (the case is known as *Celebici*). “While the fact that these acts are not alleged to have occurred on a widespread and systematic scale in this particular situation may have been of relevance had they been charged as crimes against humanity under Article 5 of the Statute, there is no such requirement incorporated in Articles 2 and 3, with which the Trial Chamber is here concerned.” *Id.* (emphasis added). Compare this with the typographical error in *Akayesu* that refers to Article 7 of the Rome Statute as requiring a “widespread of [sic] systematic attack.” No. ICTR-96-4-T, ¶ 577 (Int’l Crim. Trib. Rwanda, Trial Chamber, Sept. 2, 1998).

38. No. IT-94-1-T, ¶ 648 (Int’l Crim. Trib. Former Yugo., Trial Chamber, May 7, 1997).

39. Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, *Prosecutor v. Mksic*, No. IT-95-13-R61, ¶ 30 (Int’l Crim. Trib. Former Yugo., Trial Chamber, Apr. 3, 1996) [hereinafter *Vukovar Hospital Rule 61 Decision*].

40. *Tadic*, No. IT-94-1-T, ¶¶ 646-48.

41. See, e.g., *Prosecutor v. Tadic*, No. IT-94-1-A, ¶ 271 (Int’l Crim. Trib. Former Yugo., App. Chamber, Jul. 15, 1999).

42. *Supra* note 2, art. 7 (emphasis added).

The requirements for a crime against humanity under the three definitions may be summarized as follows. First, there are the general requirements for an act to fall into the category of crimes against humanity. The act must have been committed: (a) in armed conflict (ICTY Statute only); (b) as part of a widespread or systematic attack; (c) against any civilian population; and (d) on discriminatory grounds (ICTR Statute only). Second, the act must constitute one of the enumerated acts in Article 3(a)-(i). It should be highlighted that the mental element for a crime against humanity incorporates two parts. Initially, it is necessary to establish that the accused knew the context in which his or her acts took place in order for it to be “part of” a widespread or systematic attack. This is a discrete requirement in the chapeaux of Article 7 in the Rome Statute.⁴³ Next, one must establish the mental element required for the specific act alleged. As will become clear in the case of the ICTR Statute, it is not necessary to prove a third element of subjective intent to discriminate on the part of an accused.

III. GENERAL REQUIREMENTS FOR CRIMES AGAINST HUMANITY

A. Committed in Armed Conflict

As indicated above, the ICTY Statute’s requirement that an act be “committed in armed conflict” is easily satisfied by establishing that an armed conflict was taking place.⁴⁴

B. Committed as Part of a Widespread or Systematic Attack

The requirement that an act be committed as part of a widespread or systematic attack is more complex. It is instructive to isolate four elements of this concept: the definitions of “widespread or systematic” and “attack,” and what have come to be called the “policy” and “nexus” requirements. These will be considered in turn.

1. *Widespread or systematic.* From the above discussion, it is clear that the terms “widespread” and “systematic” are considered to be alternative requirements. “Widespread” refers to the number of victims, whereas “systematic” refers to the existence of a policy or

43. *Id.*, art. 7(1). “[C]rime 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.” *Id.* (emphasis added); see Robinson, *supra* note 3, at 51-52.

44. See *supra* text accompanying note 21.

plan. The purpose of these requirements is to exclude isolated and random acts from the category of crimes against humanity, and the terms are included in the chapeaux of the relevant articles of the ICTR and Rome Statutes.⁴⁵ The Yugoslav Tribunal implied the requirements from the use of the term “population,” as the term indicated that the crimes committed were of a collective nature.⁴⁶

It would be unhelpful to engage in the gruesome calculus of establishing a minimum number of victims necessary to make an attack “widespread.” In *Akayesu*, ICTR Trial Chamber I cited the International Law Commission’s (ILC) commentary to its 1996 Draft Code of Crimes to the effect that “widespread” may be defined as “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”⁴⁷ Similarly, Trial Chamber II in *Kayishema* understood “widespread” to mean an attack “directed against a multiplicity of victims.”⁴⁸

In the same way, “systematic” is not susceptible to precise definition. Again citing the ILC, *Akayesu* explained “systematic” as “thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources.”⁴⁹ In *Prosecutor v. Kayishema*, a systematic attack was said to be one “carried out pursuant to a preconceived policy or plan.”⁵⁰

2. *Attack*. Unlike the ICTY Statute, an “attack” under the terms of the Rwandan Tribunal bears no necessary relation to an armed conflict. Instead, it refers to the context of the acts, which are enumerated in Article 3, paragraphs (a) through (i) of the ICTR Statute. In *Akayesu*, ICTR Trial Chamber I held that an attack may be defined as an unlawful act of the kind enumerated in the ICTR Statute, noting that an attack may be non-violent in nature.⁵¹ In

45. See *Prosecutor v. Tadic*, No. IT-94-1-T, ¶ 648 (Int’l Crim. Trib. Former Yugo., Trial Chamber, May 7, 1997).

46. See *supra* text accompanying note 38; see also Van Schaack, *supra* note 3, at 834-35.

47. *Prosecutor v. Akayesu*, No. ICTR-96-4-T, ¶ 580 (Int’l Crim. Trib. Rwanda, Trial Chamber, Sep. 2, 1998).

48. No. ICTR-95-1-T, ¶ 123 (Int’l Crim. Trib. Rwanda, Trial Chamber, May 21, 1999).

49. No. ICTR-96-4-T, ¶ 580.

50. No. ICTR-95-1-T, ¶ 123.

51. No. ICTR-96-4-T, ¶ 581.

The concept of ‘attack’ maybe [*sic*] defined as a [*sic*] unlawful act of the kind enumerated in Article 3(a) to (I) [*sic*] of the Statute, like murder, extermination, enslavement etc. An attack may also be non violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid

Kayishema, Trial Chamber II held that an attack is the *event* that encompasses the enumerated crimes.⁵² Both definitions are essentially circular. By contrast, the Rome Statute defines “attack” as “a course of conduct involving the multiple commission of [proscribed] acts”⁵³

Because the combined force of these definitions indicate that the act of an accused must form “part of” such an attack, it is possible to view this as a requirement that more than one such act take place. Nevertheless, it would be unwise to require multiple acts before one act may be found. For example, it is possible that a single act of extermination might be committed on such a scale as to amount to a “widespread or systematic attack,” which constitutes a crime against humanity.⁵⁴ It would be perverse to hold that such an attack amounts to a crime against humanity only upon proof of additional acts.

As used in the ICTR Statute, “attack” is best understood as qualifying the words “widespread” and “systematic.” In this regard, it refers to the context that elevates an act from the level of a domestic crime to a crime against humanity. By itself, the term “attack” does not add a discrete requirement to establish that an act was a crime against humanity.

3. *The policy requirement.* Whether the attack is widespread, systematic, or both, the relevant act or acts must be connected to some form of policy. There is no requirement that the policy come from the central government; the policy may be that of an organization or other private group.⁵⁵ This policy requirement essentially reiterates the position that isolated and random acts cannot amount to crimes against humanity. Crimes against humanity shock the conscience of mankind and warrant intervention by the international community precisely because they are not isolated,

Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.

Id. This was affirmed in *Prosecutor v. Rutaganda*, No. ICTR-96-3-T, § 2.3 (Int'l Crim. Trib. Rwanda, Trial Chamber I, Dec. 6, 1999).

52. No. ICTR-95-1-T, ¶ 122. “The attack is the event in which the enumerated crimes must form part. Indeed, within a single attack, there may exist a combination of the enumerated crimes, for example murder, rape and deportation.” *Id.*

53. Rome Statute, *supra* note 2, art. 7(2)(a).

54. *Cf. Prosecutor v. Tadic*, No. IT-94-1-T, ¶ 649 (Int'l Crim. Trib. Former Yugo., Trial Chamber, May 7, 1997).

55. *See id.* ¶¶ 654-55; *Kayishema*, No. ICTR-95-1-T, ¶ 125-26.

random acts of individuals, but instead result from a deliberate attempt to target a civilian population.⁵⁶

4. *The nexus requirement.* The words “as part of” indicate the need for a connection between the relevant act and a widespread or systematic attack. Article 18 of the ILC’s Draft Code of Crimes provides that crimes against humanity must be “instigated or directed by a Government or by any organization or group.”⁵⁷

Both the *Tadic* Trial Chamber decision⁵⁸ and the *Kayishema*⁵⁹ decision cite to the Draft Code’s “instigated or directed” expression, suggesting that there is an additional requirement to prove this element. The commentary accompanying the Draft Code of Crimes (also cited in both judgments)⁶⁰ provides that the inclusion of this requirement was

intended to exclude the situation in which an individual commits an inhumane act while acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or organization. This type of isolated criminal 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 or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State.⁶¹

When citing the Draft Code of Crimes, the Trial Chamber in *Tadic* observed that this requirement was “more explicit” than the criteria necessary to satisfy the policy requirement.⁶² The nexus test is also more restrictive—indeed, it goes beyond that required by customary international law. Importantly, the decisions of both the Trial Chamber in *Tadic* and the Trial Chamber II in *Kayishema* left the same sentence out of the commentary, denoting its absence with ellipses:⁶³ “[i]t would be extremely difficult for a single individual acting alone to commit the inhumane acts as envisaged in Article

56. See *Tadic*, No. IT-94-1-T, ¶ 653.

57. *Draft Code of Crimes Against the Peace and Security of Mankind: Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May–26 July 1996*, U.N. GAOR, 51st Sess., Supp. No. 10, art. 18, at 93, U.N. Doc. A/51/10/ (1996), revised by U.N. Doc. A/51/10/Corr.1 (1996) [hereinafter *Draft Code of Crimes*].

58. See *Tadic*, No. IT-94-1-T, ¶ 655.

59. See No. ICTR-95-1-T, ¶ 125.

60. See *id.*; *Tadic*, No. IT-94-1-T, ¶ 655.

61. *Draft Code of Crimes*, *supra* note 57.

62. See No. IT-94-1-T, ¶ 655.

63. See *id.*; *Kayishema*, No. ICTR-95-1-T, ¶ 125.

18.”⁶⁴ One paragraph after it quoted the truncated ILC commentary, the *Tadic* Trial Chamber directly contradicted the omitted material. Referring to the *Vukovar Hospital Rule 61 Decision*, the Trial Chamber affirmed that, in fact, “a single act by a perpetrator can constitute a crime against humanity.”⁶⁵

Given that the Trial Chamber’s omission and its resultant position run contrary to the apparent position of the ILC in the Draft Code of Crimes, it is questionable whether the court may justifiably rely on the Draft Code. This analysis is supported by an examination of the recent Appeals Chamber decision in *Tadic*.⁶⁶ The requirement that an act be “instigated or directed” by a Government or organization or group was closely related to the Trial Chamber’s apparent finding in *Tadic*, specifically, that crimes against humanity cannot be committed for “purely personal motives.”⁶⁷ However, the Appeals Chamber in *Tadic* held that there was no such requirement.⁶⁸

In *Tadic*, the Appellate Chamber cited a number of examples where, although acts for “purely personal motives” were found to be crimes against humanity, the acts would have failed to meet the requirements of a test that required proof that those acts were “instigated or directed” by a government, organization, or group.⁶⁹ In particular, the *Tadic* appellate decision considered the so-called

64. *Draft Code of Crimes*, *supra* note 57.

65. *Tadic*, No. IT-94-1-T, ¶ 649.

66. No. IT-94-1-A, ¶ 269–272 (Int’l Crim. Trib. Former Yugo. App. Chamber, Jul. 15, 1999).

67. *See* No. IT-94-1-T, ¶ 659 (Int’l Crim. Trib. Former Yugo. Trial Chamber, May 7, 1997).

Thus if the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his act for purely personal motives completely unrelated to the attack on the civilian population, that is sufficient to hold him liable for crimes against humanity. Therefore the perpetrator must know that there is an attack on the civilian population, know that his act fits in with the attack and the act must not be taken for purely personal reasons unrelated to the armed conflict.

Id.

68. The *Tadic* Appeals Chamber stated that it did not believe

that the Trial Chamber meant to reach such a conclusion [that crimes against humanity cannot be committed for “purely personal motives”]. Rather, the requirement that the accused’s acts be part of a context of large-scale crimes, and that the accused knew of this context, was misstated by the Trial Chamber as a negative requirement that the accused not be acting for personal reasons. The Trial Chamber did not, the Appeals Chamber believes, wish to import a ‘motive’ requirement; it simply duplicated the context and *mens rea* requirement, and confused it with the need for a link with an armed conflict, and thereby seemed to have unjustifiably and inadvertently added a new requirement.

No. IT-94-1-A, ¶ 269 (Int’l Crim. Trib. Former Yugo. App. Chamber, Jul. 15, 1999).

69. *Tadic*, No. IT-94-1-T, ¶ 655; No. ICTR-95-1-T, ¶ 125.

denunciation cases rendered after the Second World War.⁷⁰ These cases indicate that “instigated or directed” requires the act and the widespread or systematic attack to have a tight connection—an even closer nexus than required by customary international law. Following the denunciation cases, “instigated or directed” implies some form of *causal* link. However, this should not imply that where an accused is found to have denounced another person for “purely personal motives,” the act could not have been “instigated or directed.” For example, during the Allied occupation of Germany 1945-1955, the Supreme Court of the British Zone held that an accused was guilty of a crime against humanity under Control Council Law No 10, when after a tenancy dispute, the accused denounced her landlord solely “out of revenge and for the purpose of rendering him harmless.”⁷¹ The Supreme Court held that an individual act may be transformed into a crime against humanity

if the character, duration or extent of the prejudice were determined by the National Socialist rule of violence and tyranny or if a link between them existed. If the victim was harmed in his or her human dignity, the incident was no longer an event that did not concern mankind as such. If an individual’s attack against an individual victim for personal reasons is connected to the National Socialist rule of violence and tyranny and if the attack harms the victim in the aforementioned way, it, too, becomes one link in the chain of the measures which under the National Socialist rule were intended to persecute large groups among the population. There is no apparent reason to exonerate the accused only because he acted against an individual victim for personal reasons.⁷²

On the basis of the earlier discussion of “widespread or systematic,” it appears that the concerns expressed in the ILC’s commentary accompanying the Draft Code of Crimes do not require the addition of “instigated or directed” to exclude “isolated criminal conduct on the part of a single individual.”⁷³ Similarly, the Rome

70. *See id.*, ¶ 259–62.

71. Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen [Decision of the Supreme Court of the British Zone] 1 (1948), 122.

72. *Id.*

73. *Draft Code of Crimes*, *supra* note 57. *Cf. Draft Code of Offenses Against the Peace and Security of Mankind: Report of the International Law Commission to the General Assembly*, art. 2(11), U.N. Doc. A/2693 (1954), reprinted in [1954] 2 Y.B. INT’L L. COMM’N 140, at 150 (“inhuman acts” punishable under this draft code were limited to acts “by the authorities of a State or by private individuals acting *at the instigation or with the toleration of* such authorities”)(emphasis added). *But cf.* Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Prosecutor v. Nikolic, No. IT-94-2-R61, ¶ 26 (Int’l Crim. Trib. Former Yugo. Trial Chamber I, Oct. 20, 1995).

Statute includes no requirement of instigation or direction.⁷⁴ Instead, its definition refers to the attack as being “*pursuant to or in furtherance of* a State or organizational policy to commit such attack.”⁷⁵ This is clearly broader than a requirement that an individual act be instigated or directed by that policy, and would appear to encompass circumstances such as the denunciation cases.

In order to be a crime against humanity, it is not necessary to prove a causal connection, namely that an act was “instigated or directed by a Government or by any organization or group.” Instead, the requirements are closer to those adopted by the ICTY Appeals Chamber in *Tadic*. In that case, the Appeals Chamber held that there are two elements which must be proved to satisfy the nexus requirement: (1) the alleged crimes were *related* to the attack on a civilian population; and (2) the accused *knew* that his or her crimes were so related.⁷⁶ This test appears to reflect customary international law, and is consistent with the provisions of the Rome Statute. The two elements will be considered in turn.

a. Related to the widespread or systematic attack. Where an act was in fact instigated or directed by the relevant policy, the relation requirement is clearly satisfied. The relationship exists, for example, where soldier A murders a person of the Utopian ethnic group when asked (or ordered) to do so as part of a widespread or systematic attack. Similarly, where B murders a Utopian because he hears organized propaganda calling for the death of Utopians, his act is related to the propaganda attack. The definition adopted here would also encompass broader situations. If, taking advantage of the widespread killing of Utopians, C rids herself of a troublesome Utopian business associate by publically denouncing her as a Utopian, that act may be *related* to the attack without requiring proof that her act was *instigated* by the attack. However, the definition has its limits. Where D takes advantage of the confusion during the conflict to kill an elderly relative who was not a Utopian, his act would not amount to a crime against humanity. Although this is murder, it lacks the necessary connection to a widespread or

74. See *supra* note 2, art. 7(2)(a).

75. *Id.* (emphasis added).

76. See Prosecutor v. Tadic, No. IT-94-1-A, ¶ 271 (Int’l Crim. Trib. Former Yugo. App. Chamber, Jul. 15, 1999). The ICTY Statute imposes an additional requirement that the act must occur during an armed conflict. See *id.*

systematic attack against a civilian population that would transform a domestic crime into a crime against humanity.

b. With knowledge of the relation to the widespread or systematic attack. Because it is this context that transforms an individual's act into a crime against humanity, an accused must be aware of this context in order to be culpable of such a crime.⁷⁷ Actual or constructive knowledge is enough. In *R. v. Finta*,⁷⁸ the Canadian Supreme Court held that the accused must be aware of or willfully blind to facts or circumstances that would bring his or her acts within the scope of a crime against humanity.⁷⁹ In the hypothetical situations indicated above, it is clear that this requirement would be satisfied in relation to A, B, and C, but it would not arise in relation to D. Nor would the requirement be satisfied in the case of E who, while living in a remote community with no knowledge of the ongoing conflict, kills a Utopian in order to take her property. Finally, as was held by the *Tadic* Appeals Chamber, the fact that an act was taken for "purely personal motives" is irrelevant to the question of whether the act constituted a crime against humanity.⁸⁰

C. Directed Against Any Civilian Population

All three Statutes under consideration contain the words "against any civilian population". Some scholars posit that whereas this qualifies the *act* in the ICTY Statute, in the ICTR Statute it qualifies the *attack*.⁸¹ On this basis, the ICTR Statute may require that to invoke Article 3, a substantial number of inhumane acts need to have been committed.⁸² In light of the above discussion of the terms "widespread or systematic attack," however, it appears that the jurisprudence of the Yugoslav Tribunal incorporates the requirement that an act be committed *as part of* a widespread and systematic attack.⁸³ Moreover, as this Article has discussed, the word "attack"

77. See *Prosecutor v. Kayishema*, No. ICTR-95-1-T, ¶ 134 (Int'l Crim. Trib. Rwanda Trial Chamber, May 21, 1999).

78. [1994] 1 S.C.R. 701.

79. See *id.* at 706. This and other supporting cases were cited in *Tadic*. No. IT-94-1-T, ¶ 657 (Int'l Crim. Trib. Former Yugo. Trial Chamber, May 7, 1997).

80. See *Prosecutor v. Tadic*, No. IT-94-1-A, ¶ 270 (Int'l Crim. Trib. Former Yugo. App. Chamber, Jul. 15, 1999). *But see Kayishema*, No. ICTR-95-1-T, ¶ 122.

81. See, e.g., Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda 194-96* (1998).

82. See *id.*

83. See discussion *supra* Part III.B.2.

does not add any discrete requirement.⁸⁴ It is therefore submitted that it is in fact the *widespread or systematic context* of the act that must be directed against the civilian population. In principle, this means that the victims or intended victims must be civilians, though it raises questions about the meanings of the terms “civilian” and “population.”

1. *Definition of civilians.* The inclusion of the word “civilians” reflects the origins of the expression “crimes against humanity” in the Second World War. In both *Akayesu* and *Kayishema*, the Rwandan Tribunal largely followed the *Tadic* Trial Chamber decision in adopting the definition of “civilian” used in the context of armed conflict.⁸⁵ Because the ICTR Statute does not require the existence of an armed conflict, however, it was necessary to adopt a definition that would also apply in times of relative peace. In *Kayishema*, ICTR Trial Chamber II stated that it

considers that a wide definition of civilian is applicable and, in the context of the situation of Kibuye *Prefecture* where there was no armed conflict, includes all persons *except* those who have the duty to maintain public order and have the legitimate means to exercise force. Non-civilians would include, for example, members of the FAR, the RPF, the police and the Gendarmerie Nationale.⁸⁶

Although the policy in the first clause and the factual conclusions drawn in the remainder of the quote are individually correct, by conflating the two issues, the statement substantially *narrows* the definition of “civilian”—most notably by limiting the class of “civilians” to a substantially smaller group than would be the case during armed conflict. The limitation of the term “civilian” to mean only “those who have the duty to maintain public order and have the legitimate means to exercise force”⁸⁷ should not be understood as a general statement of law. Rather, it merely reflects Trial Chamber II’s understanding of the particular situation in Kibuye Prefecture.

Because the terms “civilian” and “civilian population” are terms of art in international humanitarian law, it is appropriate for the terms to find their meanings within the context of both international and non-international armed conflict. On the basis of this analysis, it will be possible to find a meaning more appropriate to situations

84. See discussion *supra* Part III.B.1.

85. See Prosecutor v. Akayesu, No. ICTR-96-4-T, ¶ 582 (Int’l Crim. Trib. Rwanda Trial Chamber, Sep. 2, 1998); *Kayishema*, No. ICTR-95-1-T, ¶ 127–29.

86. No. ICTR-95-1-T, ¶ 127 (emphasis in original).

87. *Id.*

where there is no armed conflict. Additional Protocol I (relating to international armed conflicts) defines a “civilian” as a person who does not belong to the armed forces.⁸⁸ The Commentary on the Additional Protocol I shows that there was some debate over whether to include police forces within the definition of “armed forces.”⁸⁹ The problem was particularly acute because some states provide for automatic incorporation of police forces into their armed forces during times of war, whereas in other states, the roles of internal law-keeper and combatant are regarded as incompatible. In the end, the terms “para-military” and “armed law enforcement agency” were substituted for the term “police forces” in the definition of armed forces.⁹⁰ In keeping with this distinction, Article 59 prohibits attacks on non-defended localities and specifically provides that the presence of “police forces retained for the sole purpose of maintaining law and order” does not alter a locality’s status as “non-defended.”⁹¹ The Commentary provides that

[a]s regards police forces left behind in the locality, this can only refer to members of uniformed police units which form part of the armed forces of the State as laid down in paragraph 3 of Article 43 (*Armed forces*). In fact the civilian police force falls under the civilian population and therefore does not need to be evacuated when the locality is declared a non-defended locality.⁹²

Additional Protocol II, which applies to non-international armed conflicts, refers to “armed forces” in the description of its material field of application.⁹³ The Commentary states that this term should be understood “in the broadest sense,” and that

[i]n fact, this term was chosen in preference to others suggested such as, for example, “regular armed forces”, in order to cover all the armed forces, including those not included in the definition of the army in the national legislation of some countries (national guard, customs, police forces or any other similar forces).⁹⁴

88. Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* June 8, 1977, art. 50(1), 1125 U.N.T.S. 3, 26 [hereinafter Additional Protocol I].

89. See COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF AUG. 12, 1949, 517–18 [hereinafter COMMENTARY].

90. See Additional Protocol I, *supra* note 88, at 23 (art. 43); COMMENTARY, *supra* note 89.

91. See *id.* at 30 (art. 59); see also *id.* at 31 (art. 60(4)) (referring to “demilitarized zones”).

92. COMMENTARY, *supra* note 89, at 702–03.

93. See Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* June 8, 1977, art. 1, 1125 U.N.T.S. 608, 611 [hereinafter Additional Protocol II].

94. COMMENTARY, *supra* note 89, at 1352.

These definitions of the term “armed forces” may appear contradictory but, in fact, merely reflect the different purposes for which the term is employed. In Additional Protocol I, a narrow definition of “armed forces” expands the protection to civilians during an international armed conflict. In Additional Protocol II, the term “armed forces” affects the scope of protection in precisely the opposite way—a *broader* definition of “armed forces” expands the situations in which Additional Protocol II will apply. In the context of crimes against humanity, the most appropriate definition of “civilian” is the broader usage employed by Additional Protocol I. This definition even accords with the fundamental guarantees of Additional Protocol II, which apply to “[a]ll persons who do not take a direct part or who have ceased to take part in hostilities.”⁹⁵ It is thus convenient to distinguish between three situations: (a) international armed conflict; (b) non-international armed conflict; and (c) no armed conflict.

a. International armed conflict. In the context of an international armed conflict, a “civilian” is defined in the Geneva Conventions and Additional Protocol I as a person who is not a member of the armed forces of any party to the conflict.⁹⁶ This definition reflects the clarity of the term “civilian” within international humanitarian law, as applicable to international armed conflicts.

b. Non-international armed conflict. In the context of a non-international armed conflict, a “civilian” is a person who is not taking a direct part or who has ceased to take part in hostilities.⁹⁷ This definition reflects the different usage of the term “armed forces” in Additional Protocol II and “civilians” are drawn instead from the category of persons to whom the fundamental guarantees apply. This category of civilians would exclude, for example, active members of non-state armed forces and police who take part in actions against a civilian population.

c. No armed conflict. Where there is no armed conflict within the meaning of the Geneva Conventions and their protocols, it is necessary to extrapolate from the preceding two situations. It would be inappropriate to adopt the definition used in international armed

95. Additional Protocol II, *supra* note 93, at 62, art. 4(1).

96. See Additional Protocol I, *supra* note 88, and accompanying text.

97. See Additional Protocol II, *supra* note 93 and accompanying text.

conflict, since that definition is significant primarily because of the complementary nature of war crimes and crimes against humanity. The more appropriate definition parallels the category of persons to whom the fundamental guarantees of Additional Protocol II apply. Thus, where there is no armed conflict, a civilian is a person who is not taking a direct part in or who has ceased to take part in the relevant hostilities. This category of civilians will exclude, for example, police who take part in actions against a civilian population.

2. *Population.* Article 5 of the ICTY Statute requires that the prohibited acts be directed against any civilian “population.”⁹⁸ This was interpreted in the *Tadic* Trial Chamber decision as requiring that the prohibited acts be part of a widespread or systematic attack.⁹⁹ Obviously, there is no need to read such a requirement into the ICTR Statute (or the Rome Statute).

Because the term “population” occurs in the ICTR Statute as part of the phrase “attack against any civilian population on national, political, ethnic, racial or religious grounds,”¹⁰⁰ it could mistakenly be interpreted as requiring the targeted population to represent a specific group. However, this interpretation is not supported by international humanitarian law’s definition, where the “[t]he civilian population comprises all persons who are civilians.”¹⁰¹ Furthermore, it has already been noted that the requirement of “discriminatory grounds” is a requirement of the ICTR Statute, which goes beyond customary international law.¹⁰² It is appropriate, therefore, to consider this element separately and distinctly from other considerations that are held to reflect customary international law. In accordance with customary international law, the ICTR statute uses the term “population” to encompass more than a specific group within the target population.

The better view is that the term “population” should be used more loosely. Rather than requiring an attack to be directed against “civilians,” reference to a “civilian population” has the effect of incorporating the definitions of “population” from international humanitarian law. Accordingly, the presence of individuals who do

98. See ICTY Statute, *supra* note 6.

99. See Prosecutor v. Tadic, No. IT-94-1-T, ¶ 644–48 (Int’l Crim. Trib. Former Yugo. Trial Chamber, May 7, 1997).

100. ICTY Statute, *supra* note 6.

101. See Additional Protocol I, *supra* note 88, at 26 (art. 50(2)).

102. See *supra* note 26 and accompanying text.

not come within the definition of “civilians” does not deprive a population of its civilian character.¹⁰³ This view is supported by Additional Protocol I, which provides that “[t]he civilian population comprises all persons who are civilians.”¹⁰⁴ The use of the term “any civilian population” in the three statutes avoids an inference that it is the civilian population *as a whole* that must be targeted.

D. On Discriminatory Grounds

As indicated in Part II.B, the ICTR Statute’s discriminatory grounds condition exceeds the requirements of customary international law for crimes against humanity. The inclusion of the words “on national, political, ethnic, racial or religious grounds”¹⁰⁵ in Article 3 raises two important questions of interpretation. First, is it the “attack” (understood as the widespread or systematic context of the act in question) or the individual act itself that must be committed on discriminatory grounds? Second, does the requirement incorporate some additional mental element by requiring discriminatory *intent* on the part of an accused? The question of discrimination was dealt with briefly in *Akayesu*¹⁰⁶ and *Rutaganda*,¹⁰⁷ but in *Kayishema*, Trial Chamber II made the following observations:

Firstly, in a scenario where the perpetrator’s intention is to exterminate the Tutsi group and, in furtherance of this intent, he kills a Belgium [*sic*] Priest who is protecting the Tutsi, the Trial Chamber opines that such an act would be based on discrimination against the Tutsi group.

... [Secondly,] where the perpetrator attacks people on the grounds and in the *belief* that they are members of a group but, in fact, they are not, for example, where the perpetrator believes that a group of Tutsi are supporters of the RPF and therefore accomplices. In the scenario, the Trial Chamber opines that the Prosecution must show that the perpetrator’s belief was objectively reasonable—based upon real facts—rather than being mere speculation or perverted deduction.¹⁰⁸

103. See Additional Protocol I, *supra* note 88, at 26 (art. 50(3)). Cf. *Tadic*, No. IT-94-1-T, ¶ 638; *Prosecutor v. Akayesu*, No. ICTR-96-4-T, ¶ 582 (Int’l Crim. Trib. Rwanda Trial Chamber, Sept. 2, 1998); *Prosecutor v. Kayishema*, No. ICTR-95-1-T, ¶ 128 (Int’l Crim. Trib. Rwanda Trial Chamber, May 21, 1999).

104. Additional Protocol I, *supra* note 88, at 26 (art. 50(2)) (emphasis added).

105. See ICTR Statute, *supra* note 7.

106. See *Akayesu*, No. ICTR-96-4-T, ¶ 583–84.

107. *Prosecutor v. Rutaganda*, No. ICTR-96-3-T, ¶ 71–74 (Int’l Crim. Trib. Rwanda Trial Chamber I, Dec. 6, 1999).

108. No. ICTR-95-1-T, ¶ 131–32.

It is clear that Trial Chamber II deemed it necessary to prove some form of the accused's discriminatory intent to commit a prohibited act. This requirement is consistent with the dicta in the *Tadic* Appeals Chamber decision that asserted that (unlike Article 5 of the ICTY Statute) Article 3 of the ICTR Statute requires "a discriminatory intent for all crimes against humanity."¹⁰⁹ Some of the delegates on PrepCom supported this view.¹¹⁰

Nevertheless, these observations are merely illustrative. While they do not purport to outline the requirements for discrimination, they do indicate two important factors. First, it is the element of *discrimination* on the basis of ethnicity (in this case) that is required, rather than the specific ethnicity of the victim. Of course, this discrimination does not require the intent to exterminate a particular ethnic group. Indeed, the use of the term "intent" is misleading. A person who denounces a Tutsi relative for "purely personal motives" may commit a crime against humanity even though she does not intend to discriminate against Tutsis as such.¹¹¹

This is supported by an examination of one of the few cases (as pointed out in the *Tadic* Appeals Chamber decision)¹¹² in which discrimination was held to be a necessary element of crimes against humanity. In *R. v. Finta*,¹¹³ the Supreme Court of Canada stated that "with respect to crimes against humanity the additional element is that the inhumane acts were *based on discrimination* against or the persecution of an identifiable group of people."¹¹⁴ However, Justice Cory (on behalf of the majority) went on to state that "[w]hat distinguishes a crime against humanity from any other criminal offense under the Canadian Criminal Code is that the cruel and terrible actions which are essential elements of the offense were undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race."¹¹⁵ There is, therefore, no reason to

109. Prosecutor v. Tadic, No. IT-94-1-A, ¶ 274 (Int'l Crim. Trib. Former Yugo. App. Chamber, Jul. 15, 1999).

110. See *Summary of the Proceedings of the Preparatory Committee During the Period 25 March–12 April 1996*, U.N. GAOR, Preparatory Committee on the Establishment of an International Criminal Court, at 16–17, U.N. Doc. A/AC.249/1 (1996). Some delegates argued that crimes against humanity required proof of the defendant's discriminatory animus; others argued 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 this subjective element." *Id.*

111. See *supra* notes 67–68 and accompanying text.

112. See *Tadic*, No. IT-94-1-A, ¶ 290.

113. [1994] 1 S.C.R. 701.

114. *Id.* at 813 (emphasis added).

115. *Id.* at 814.

require proof of subjective intent on the part of an accused to discriminate against a particular group on national, political, ethnic, racial, or religious grounds. It is only necessary that the “attack” (understood as the widespread or systematic context of the act in question) discriminates on one or more of those bases.¹¹⁶

It is only through such an interpretation that Article 3(h) of the ICTR Statute has any meaning. Article 3(h) refers to “[p]ersecutions on political, racial and religious grounds.”¹¹⁷ While the term “persecution” incorporates some element of discriminatory intent, there is no such necessary implication in the phrase “widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.”¹¹⁸ In relation to the second observation quoted from *Kayishema*, it is indeed possible that a distinct “widespread or systematic attack directed against a civilian population” could include a discriminatory element that is premised on a mistake (such as the belief that a particular group of Tutsi civilians is supporting the Rwandese Patriotic Front). In the context of such an attack, however, it is not necessary to inquire into the subjective state of mind of the accused.

IV. REQUIREMENTS FOR SPECIFIC CRIMES AGAINST HUMANITY

Having elaborated the general requirements of crimes against humanity, this Part will examine attempts to define the specific elements of individual offenses. The focus will be on three offenses that have received relatively detailed consideration particularly in the Rwandan Tribunal: murder, extermination, and rape.¹¹⁹

A. Murder

1. *Assassinat or meurtre?* A preliminary question confronting the crime of murder under the ICTY Statute and the ICTR Statute is whether it corresponds to the French concept of *assassinat* or *meurtre*. The French versions of both Statutes (which are as authoritative as

116. Additionally, the accused must have actual or constructive knowledge of the context of his or her act to satisfy the “knowledge” requirement. See discussion *supra* Part III.B.4.b.

117. ICTR Statute, *supra* note 7, art. 3(h).

118. ICTR Statute, *supra* note 7, art. 3.

119. See also Robinson, *supra* note 3, at 52–54 (elaborating on persecution, enforced disappearance, apartheid and other inhumane acts).

the English editions)¹²⁰ use the term *assassinat*. *Assassinat* corresponds to *meurtre aggravé* (aggravated murder) and would restrict Article 5(a) of the ICTY Statute and Article 3(a) of the ICTR Statute to only intentional and premeditated killings, thus excluding “reckless” murder.¹²¹

In the Rwandan Tribunal,¹²² Trial Chambers I and II have taken differing positions on this issue, and of the two, Trial Chamber I’s interpretation is less persuasive. In *Akayesu*, Trial Chamber I held that because customary international law dictates that it is the act of “murder” (as opposed to the more restrictive act of *assassinat*) that constitutes a crime against humanity,¹²³ the inclusion of *assassinat* in the French version of the Statute must be due to an error in translation.¹²⁴ But here, there is no clear error of translation. In fact, as pointed out by Trial Chamber II in *Kayishema*,¹²⁵ by including *assassinat*, the French version of the ICTR Statute merely reflects the text of the ICTY Statute, and more importantly, both the ICTR and TCTY statutes draw on the text of Article 6(c) of the Nuremberg Charter.¹²⁶

On the other hand, Trial Chamber I was correct in stating that customary international law presently requires the standard reflected by *meurtre* rather than by *assassinat*. Reflecting this distinction, the Rome Statute uses the French term *meurtre* in Article 7(1). Given the apparent conflict between customary international law and the literal terms of the ICTR Statute, the question shifts to which authority the Tribunal is obliged to follow.

120. See PROVISIONAL RULES OF PROCEDURE OF THE SECURITY COUNCIL, AS AMENDED 21 DEC. 1982, at rule 41, U.N. Doc. S/96/Rev.7, U.N. Sales No. E.83.I.4 (1983).

121. See *infra* notes 122–29 and accompanying text.

122. Until January 2000, the Yugoslav Tribunal had not defined murder in this context, although two defendants have been convicted after pleading guilty to a count of crimes against humanity (murder). See *Prosecutor v. Erdemovic*, No. IT-96-22-T (Int’l Crim. Trib. Former Yugo. Trial Chamber I, Nov. 29, 1996); *Prosecutor v. Jelusic*, No. IT-95-10-T (Int’l Crim. Trib. Former Yugo. Trial Chamber I, Dec. 14, 1999); see also *infra* notes 139–40.

123. See *Prosecutor v. Akayesu*, No. ICTR-96-4-T, ¶ 588 (Int’l Crim. Trib. Rwanda Trial Chamber, Sep. 2, 1998); see also *Prosecutor v. Rutaganda*, No. ICTR-96-3-T, § 2.3 (Int’l Crim. Trib. Rwanda Trial Chamber I, Dec. 6, 1999); *Prosecutor v. Musema*, No. ICTR-96-13-T, ¶ 214 (Int’l Crim. Trib. Rwanda Trial Chamber I, Jan. 27, 2000).

124. See *Akayesu*, No. ICTR-96-4-T, ¶ 588.

125. No. ICTR-95-1-T, ¶ 138 (Int’l Crim. Trib. Rwanda Trial Chamber, May 21, 1999).

126. See 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. In addition, the Canadian Criminal Code uses “assassinat” in its definition of crimes against humanity. See R.S.C., ch. C-46, § 7 (1985) (Can.).

In the absence of a clear translation error, the Tribunal should apply the version more favorable to the accused. This is particularly important when the accused is relying on the French version of the Statute—as was largely the case in Rwanda. Because “*meurtre*” imposes a higher burden of proof than would “killing,” in *Akayesu*, the Trial Chamber held that the version more favorable to the accused should be applied.¹²⁷ In relation to genocide, the ICTR and ICTY statutes have already adopted the position most favorable to the accused. Both their articles on genocide refer to “killing members of the group,” and their respective French versions refer to “*meurtre de membres du groupe*.”¹²⁸

Moreover, in the *travaux préparatoires* of the statutes for the ICTY and ICTR, the English term “murder” has involved some uncertainty as to its use 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 “wilful killing” instead, 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, racial or religious grounds.”¹²⁹

Given the uncertainty over the terminology in relation to crimes against humanity, the ad hoc Tribunals should acknowledge that the appropriate crime under their Statutes is that of *assassinat*, but note at the same time that *meurtre* now reflects customary international law.

2. *Requirements for murder.* The 1996 ILC Draft Code unhelpfully provides that

[m]urder is a crime that is clearly understood and well defined in the national law of every State. This prohibited act does not require any further explanation. Murder was included as a crime against humanity in the Nürnberg Charter (Article 6 (c)), Control Council Law No. 10 (Article II, paragraph c), the Statutes of the International Criminal Tribunals for the former Yugoslavia (Article 5) and Rwanda (Article 3) as well as the Nürnberg

127. See *Akayesu*, No. ICTR-96-4-T, ¶ 501; see also *Rutaganda*, No. ICTR-96-3-T, ¶¶ 44–62.

128. ICTY Statute, *supra* note 6, art. 4; ICTR Statute, *supra* note 7, art. 2. The wording of the ICTR and ICTY statutes reflects that of the Genocide Convention. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 280.

129. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. SCOR, at 13, U.N. Doc. S/25704 (1993) (emphasis added).

Principles (Principle VI) and the 1954 draft Code (Article 2, paragraph 11).¹³⁰

Given that murder and *assassinat* are equated in the above documents, this definition needs refinement.

In *Akayesu* and *Rutaganda*, ICTR Trial Chamber I defined the requisite elements of murder:

1. the victim is dead;
2. the death resulted from an unlawful act or omission of the accused or a subordinate;
3. 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 whether death ensues or not.

Murder must be committed as part of a widespread or systematic attack against a civilian population. The victim must be a member of this civilian population. The victim must have been murdered because he was discriminated against on national, ethnic, racial, political or religious grounds.¹³¹

The Trial Chamber's definition should not be retained. First, reference to "a subordinate" is inappropriate and confusing. Article 6 of the ICTR Statute provides for individual criminal responsibility,¹³² and it is not necessary to incorporate command responsibility into specific offenses. Following Trial Chamber I's definition, if a subordinate of the accused possessed the requisite intention to kill, the supervisory accused would be guilty of murder even if he or she *accidentally* killed. Second, the court failed to

130. *Draft Code of Crimes, supra* note 57.

131. *Akayesu*, No. ICTR-96-4-T, ¶¶ 589-90, *affirmed by Rutaganda*, No. ICTR-96-3-T, § 2.3; *Prosecutor v. Alfred Musema*, No. ICTR-96-13-T, ¶ 215 (Int'l Crim. Trib. Rwanda Trial Chamber I, Jan. 27, 2000).

132. *See* ICTR Statute, *supra* note 7, art. 6. Article 6 provides:

- (1) A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.
- (2) The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
- (3) The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
- (4) The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

Id.

adequately elaborate on the third element's requirement of *mens rea*. Although the common law definition of reckless murder (gross negligence) appears to be intended as an alternative to murder with intent, the use of the phrase “*and is reckless whether death ensures or not*” creates ambiguity. This discussion of *mens rea* in the third element contradicts the definition of murder as the “*intentional killing of a human being.*” Finally, the requirement that the victim “*must have been murdered because he was discriminated against*” is unclear and, on the basis of the above discussion, unnecessary; in particular, it appears to incorporate a motive requirement that might be construed to exclude “*purely personal*” murders.¹³³

In *Prosecutor v. Kayishema*, Trial Chamber II provides a definition that better reflects the meaning of premeditated murder (*assassinat*) in the Statutes of the ICTY and ICTR:

The accused is guilty of murder if the accused, engaging in conduct which is unlawful:

1. causes the death of another;
2. by a premeditated act or omission;
3. intending to kill any person or,
4. intending to cause grievous bodily harm to any person.¹³⁴

Although the numbering is ambiguous, it is clear that (3) and (4) are alternatives, one of which is required with both (1) and (2). The reference to “*any person*” covers transferred malice (where A shoots at B, intending to kill him, but instead kills C). The requirement of premeditation reflects the *Nouveau code pénal français* definition of *assassinat*: “*Murder committed with premeditation constitutes an assassination. It is punished with life imprisonment.*”¹³⁵ While Trial Chamber II's definition improves on that by Trial Chamber I, it calls into question the significance of the qualification “*premeditated.*” Under French law, it is clear that premeditation is an aggravating circumstance, as clearly indicated in the definition of *assassinat*; a comparable distinction is found in the American categories of first and second degree murder. If it is accepted that premeditation is a necessary part of murder (*assassinat*), then it is necessary to provide a definition.

133. Cf. discussion *supra* Part III.B.4.

134. No. ICTR-95-1-T, ¶ 140. (Int'l Crim. Trib. Rwanda, Trial Chamber, 1999).

135. “*Le meurtre commis avec préméditation constitue un assassinat. Il est puni de la réclusion criminelle à perpétuité.*” NOUVEAU CODE PÉNAL [N.C. PÉN.] (Fr.), arts. 221-23, quoted in *Kayishema*, No. ICTR-95-1-T, ¶ 137 n.74 (author's translation).

Trial Chamber II elaborated on the definition of “premeditation” by stating that “[t]he result is premeditated when the actor formulated his intent to kill after a cool moment of reflection.”¹³⁶ The phrase “cool moment of reflection” may, however, be confusing. The *Nouveau code pénal français* defines premeditation as “the intention formed before the action to commit a crime or a given offense.”¹³⁷ The Latin root of premeditation is *praemeditatio*, from the verb *praemeditare*, which means “to prepare oneself for a reflection.” The best definition would include an objective requirement that such intention must precede the killing by a length of time sufficient to permit reflection. This definition would comply with the French and American authorities, but does not require nor suggest the necessity of a subjective inquiry into the state of mind of the accused.

On January 14, 2000, the ICTY handed down its *Prosecutor v. Kupreskic*¹³⁸ judgment, giving somewhat ambiguous support to the ICTR Trial Chamber II’s interpretation of murder. In *Kupreskic*, the ICTY cited *Akayesu* with apparent approval in identifying the constituent elements of murder:

They comprise the death of the victim as a result of the acts or omissions of the accused, where the conduct of the accused was a substantial cause of the death of the victim. It can be said that the accused is guilty of murder if he or she engaging in conduct which is unlawful, intended to kill another person or to cause this person grievous bodily harm, and has caused the death of that person.¹³⁹

The ICTY Trial Chamber went on to note, however, that

[t]he requisite *mens rea* of murder under Article 5(a) is the intent to kill or the intent to inflict serious injury in reckless disregard of human life. In *Kayishema* it was noted that the standard of *mens rea* required is intentional and premeditated killing. The result is premeditated when the actor formulated his intent to kill after a cool moment of reflection. The result is intended when it is the actor’s purpose, or the actor is aware that it will occur in the ordinary course of events.¹⁴⁰

This appears to support the position that the law of the Statutes should reflect the higher burden of proof imposed by the term

136. *Kayishema*, No. ICTR-95-1-T, ¶ 139.

137. “*Le dessein formé avant l’action de commettre un crime ou un délit déterminé.*” [N.C. PÉN.], arts. 132-72 (author’s translation).

138. No. IT-95-16-T (Int’l Crim. Trib. Former Yugo., Trial Chamber II, 2000).

139. *Id.*, ¶ 560.

140. *Id.*, ¶ 561.

“*assassinat*,” though without implying the same of customary international law.

3. *Summary of requirements for murder.* In addition to the general requirements for a crime against humanity, the following *actus reus* and *mens rea* must be satisfied for a conviction of murder:

- *Actus reus:* The accused, by his or her unlawful act or omission, caused the death of another.
- *Mens rea:* One of the following mental elements is satisfied: (1) the accused intended to cause the death of any person, or (2) the accused intended to cause grievous bodily harm to any person.

For the purposes of the ICTY and ICTR Statutes, the act or omission must also be premeditated. This requirement will be satisfied if such intention precedes the act or omission by a length of time sufficient to permit reflection.

B. Extermination

1. *The rationale for extermination as a crime against humanity.* As with murder, the most significant pronouncements on the crime of extermination have come from the Rwandan Tribunal. Once again, however, Trial Chambers I and II have adopted inconsistent positions. In *Akayesu* and *Rutaganda*, Trial Chamber I held that extermination is a crime against humanity, pursuant to Article 3(c) of the Statute. Extermination is a crime which by its very nature is directed against a group of individuals. Extermination differs from murder in that it requires an element of mass destruction which is not required for murder.¹⁴¹

The Chamber defined the essential elements of extermination:

1. the accused or his subordinate participated in the killing of certain named or described persons;
2. the act or omission was unlawful and intentional.
3. the unlawful act or omission must be part of a widespread or systematic attack;
4. the attack must be against the civilian population;
5. the attack must be on discriminatory grounds, namely: national,

141. See *Prosecutor v. Akayesu*, No. ICTR-96-4-T, ¶¶ 591-92 (Int'l Crim. Trib. Rwanda Trial Chamber, Sep. 2, 1998), affirmed by *Prosecutor v. Rutaganda*, No. ICTR-96-3-T, § 2.3 (Int'l Crim. Trib. Rwanda Trial Chamber I, Dec. 6, 1999). Extermination is included in Article 3(b) of the ICTR Statute, *supra* note 7.

political, ethnic, racial, or religious grounds.¹⁴²

The Chamber's definition of extermination is flawed and fundamentally unhelpful. First, as discussed in Part IV.A.2 in relation to murder, reference to a subordinate is inappropriate.¹⁴³ Reference to "participat[ion]" in the killing of certain persons appears to suggest either that more than one person must be involved in the killing or that ancillary offenses such as aiding and abetting in the substantive offense may be incorporated into its definition. Moreover, as will be discussed below, reference to "intentional" sets an inappropriately high *mens rea*. Similarly, reference to "unlawful" may exclude actions that should be punishable under extermination, such as deprivation of food from a civilian population. Finally, elements three through five merely restate the general requirements for a crime against humanity.

Extermination is not simply "murder on a mass scale." As Cherif Bassiouni explains,

extermination implies intentional and unintentional killing. The reason for the latter is that mass killing of a group of people involves planning and implementation by a number of persons who, though knowing and wanting the intended result, may not necessarily know their victims. Furthermore, such persons may not perform the *actus reus* that produced the deaths, nor have specific intent toward a particular victim.¹⁴⁴

Although Bassiouni's quote overlaps with the accessory offenses provided for elsewhere in all three Statutes, the thrust of his interpretation is borne out in the Rome Statute, which provides an illustration of extermination: "[e]xtermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population"¹⁴⁵ After quoting Bassiouni and the Rome Statute, Trial Chamber II in *Kayishema* summarized that the requisite elements of extermination:

[t]he actor participates in the mass killing of others or in the creation of conditions of life that lead to the mass killing of others, through his act(s) or omission(s); having intended the killing, or being reckless, or grossly negligent as to whether the killing would result and; being aware that his act(s) or omission(s) forms part of a

142. See *Akayesu*, ¶¶ 591-92.

143. See ICTR Statute, *supra* note 7, art. 6.

144. M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY* (1st ed. 1992), *quoted in* Prosecutor v. *Kayishema*, No. ICTR-95-1-T, ¶ 143. (Int'l Crim. Trib. Rwanda, Trial Chamber, 1999) [hereinafter *CRIMES AGAINST HUMANITY*]; see M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 302 (2d. ed. 1999).

145. Rome Statute, *supra* note 2, art. 7(2)(b), *quoted in* *Kayishema*, No. ICTR-95-1-T, ¶143.

mass killing event; where, he [*sic*] act(s) or omission(s) forms part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.¹⁴⁶

With this elaboration, Trial Chamber II greatly improves upon the definition of extermination provided by Trial Chamber I.

In particular, through the crime of extermination, the law can punish and deter the mass killing of civilians where the killing would not match the crimes of genocide or murder. Such a distinction is particularly important given the limited definition of murder (*assassinat*) embodied in crimes against humanity (at least for the purposes of the Statutes of the ICTY and ICTR). Two examples illustrate acts that would not amount to murder or genocide but would meet extermination's criteria:

- D orders the incarceration of 1,000 members of a town because he believes that the town has provided food to members of a rebel force. D then withholds food and water in reckless disregard as to whether this kills the detainees. Many die. (D may be guilty of additional crimes for his conduct in relation to those who survive.)
- In an area with food rationing, E orders that no ration tickets be given to members of one political party. Many die.

Arguably, an implication of the foregoing analysis is that Jean-Paul Akayesu's conviction might have fallen more comfortably under the scope of premeditated murder (*assassinat*) or genocide. In particular, his ordering the deaths of certain named persons who were later killed corresponds to *assassinat*. Where such killing took place with an intention to destroy the Tutsi population, in whole or in part, it amounts to genocide.¹⁴⁷

2. *Requirements for extermination.* The requirements for extermination should reflect the policy considerations discussed above, covering situations in which large numbers of people are killed by conduct that may not in itself amount to premeditated murder (*assassinat*) or genocide, but should nevertheless be punished as a crime against humanity. In terms of the *actus reus*, two elements need to be considered: the necessity of scale, and the level of involvement of the accused.

146. *Kayishema*, No. ICTR-95-1-T, ¶ 144.

147. *See Akayesu*, No. ICTR-96-4-T, ¶ 735-44. This is a distinct question from whether an accused should be convicted of more than one offense in relation to the same set of facts.

It is only in the *actus reus* that extermination equates with murder “on a massive scale.”¹⁴⁸ For both, a “large number” of people must be killed.¹⁴⁹ ICTR Trial Chamber I found Jean-Paul Akayesu guilty of extermination for ordering the execution of sixteen people.¹⁵⁰ As noted earlier in the discussion of “widespread,” it is inappropriate to put a specific number to the term “mass killing.”¹⁵¹ In *Kayishema*, Trial Chamber II made reference to a “mass killing event.”¹⁵² This served to clarify that there must be some connection between the deaths, a purpose that may be served more simply by reference to their proximity in time or space. For example, in Nazi Germany, “an extermination” might refer to conditions in a camp. It would be inappropriate to refer to the conditions in Germany as a whole as “an extermination.”

The second element concerns the involvement of the accused. The decisions in both *Akayesu* and *Kayishema* include forms of the word “participate” in the requirements for extermination, thus confusing the substantive and ancillary offenses. If a person aids and abets murder, that person is guilty of aiding and abetting murder under the forms of participation.¹⁵³ It appears that the use of the term “participate” was intended to address the question of culpability when many people are killed, but their deaths cannot be traced to individual responsibility. Thus, Bassiouni writes that an accused “may not perform the *actus reus* that produced the deaths, nor have specific intent toward a particular victim.”¹⁵⁴ The *actus reus* should not be expanded in this way. As discussed later, although extermination requires a lesser *mens rea* requirement than murder, this is balanced by the requirement that the *actus reus* involve “mass killing.” It is also inappropriate to extend the *actus reus* to include what would otherwise be ancillary (or “participatory”) offenses: the

148. Note that this limits Trial Chamber II’s statement in *Kayishema*. No. ICTR-95-1-T, ¶ 142 (“The Chamber agrees that the difference between murder and extermination is the scale; extermination can be said to be murder on a massive scale.”).

149. *Id.*, ¶ 146.

150. See *Akayesu*, No. ICTR-96-4-T, ¶¶ 735-44.

151. See *Kayishema*, No. ICTR-95-1-T, ¶ 145.

152. *Id.* ¶ 144.

153. See ICTY Statute, *supra* note 6, art. 7(1); ICTR Statute, *supra* note 7, art. 6(1); Rome Statute, *supra* note 2, art. 25(3)(c). The Statutes of the ICTY and ICTR also provide for the separate offense of complicity to commit genocide. See ICTY Statute, *supra* note 6, art. 4(3)(e); ICTR Statute, *supra* note 7, art. 2(3)(e). This provision of an ancillary offense in addition to the forms of participation reflects the wholesale inclusion of articles of the Genocide Convention in the two Statutes. This may be compared with the Rome Statute, *supra* note 2, art. 25.

154. CRIMES AGAINST HUMANITY, *supra* note 144.

actus reus should require more than participation. At the same time, however, “caused” may present too high a threshold for a crime that will normally involve more than one person. The appropriate level of involvement of the accused is reflected by using the phrase “contributed directly” in the definition of extermination’s *actus reus*.

Once it is established that extermination applies to situations where an accused has contributed directly to the mass killing of others, the question of *mens rea* is simplified—the *mens rea* definition should include “intent” to cause the mass killing. As has already been observed, however, extermination may occur in circumstances where there is no specific intent with regard to certain victims. It is therefore appropriate to include recklessness or gross negligence as to the consequences of the accused’s actions.

3. *Summary of requirements for extermination.* In addition to the general requirements for a crime against humanity, the following *actus reus* and *mens rea* must be satisfied for the crime of extermination:

- *Actus reus:* The accused, by his or her acts or omissions, contributed directly to the mass killing of others. The term “mass killing” refers to circumstances in which a large number of persons are killed within a certain time or space. The contribution of the accused need not be the sole cause of the killings. It may include, for example, the infliction of conditions of life calculated to bring about the death of the victims.
- *Mens rea:* One of the following mental elements must be satisfied: (a) The accused intended that the mass killing take place; or (b) the accused was reckless or grossly negligent as to whether the mass killing took place.

C. Rape

Rape and crimes of sexual violence remain the most controversial of the offenses covered by international criminal law. A great deal has been written on the subject, and in the space available, it is not possible to do justice to this *corpus*.¹⁵⁵ The present section

155. See generally Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT’L L. 424 (1993); Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN’S L.J. 243 (1994); Jennifer Green et al., *Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique*, 5

will be limited to an examination of the jurisprudence of the Tribunals.

In *Akayesu*, ICTR Trial Chamber I defined rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. As elaborated in the opinion,

[t]he Chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual frame work of state sanctioned violence. This approach is more useful in international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹⁵⁶

This definition was approved by Trial Chamber II *quater* of the Yugoslav Tribunal in the case known as *Celebici*.¹⁵⁷

In its discussion of rape as a violation of the laws or customs of war in *Prosecutor v. Furundzija*,¹⁵⁸ ICTY Trial Chamber II considered these observations, but discussed the physical act of rape in more detail. The opinion provides a more “mechanical description” of the crime:

It is apparent from our survey of national legislation that, in spite of inevitable discrepancies, most legal systems in the common and

HASTINGS WOMEN'S L.J. 171 (1994); Sharon A. Healey, *Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia*, 21 BROOKLYN J. INT'L L. 327 (1995); Patricia Viseur Sellers & Kaoru Okuizumi, *Intentional Prosecution of Sexual Assaults*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 45 (1997); Doris E. Buss, *Women at the Borders: Rape and Nationalism in International Law*, 6(2) FEMINIST LEGAL STUD. 171 (1998); Kate Nahapetian, *Selective Justice: Prosecuting Rape in the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 14 BERKELEY WOMEN'S L.J. 126 (1999). See also Chesterman, *supra* note 3 and sources cited therein.

156. *Akayesu*, No. ICTR-96-4-T, ¶ 597-598.

157. *Prosecutor v. Delalic*, No. IT-96-21-T, ¶ 479 (Int'l Crim. Trib. Former Yugo., Trial Chamber, Nov. 16, 1998). “Thus, the Trial Chamber considers rape to constitute a physical invasion of a sexual nature, committed on a person under circumstances that are coercive.” *Id.* In its findings, the Trial Chamber found that the act of forcing one man to perform fellatio on another man “constituted, at least, a fundamental attack on their human dignity” and amounted to inhuman or cruel treatment under Article 2 and 3 of the ICTY Statute. It went on to note that this act “could constitute rape for which liability could have been found if pleaded in the appropriate manner.” *Id.* ¶ 1066.

158. No. IT-95-17/1-T (Int'l Crim. Trib. Former Yugo. Trial Chamber II, Dec. 10, 1998).

civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus.¹⁵⁹

Although the court noted that in some national jurisdictions, forcible oral sex amounts to sexual assault rather than rape, it included forced fellatio within the definition of rape. The Chamber held that because the case at bar involved extremely serious offenses, charging an accused who committed such acts with rape would not contravene the general principle of *nullum crimen sine lege*.¹⁶⁰ The ICTY Trial Chamber II summarized the objective elements of rape:

- (i) the sexual penetration, however slight:
 - (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
 - (b) of the mouth of the victim by the penis of the perpetrator;
- (ii) by coercion or force or threat of force against the victim or a third person.¹⁶¹

In addition to the necessary relationship between rape and a “widespread or systematic attack against any civilian population,” two substantive questions are raised by the definitions adopted in the ad hoc Tribunal jurisprudence. First is the question of lack of consent—long a controversial topic in national jurisdictions—that is implicit in the references to “sexual penetration . . . by coercion”¹⁶² and “under circumstances that are coercive.”¹⁶³ One possible resolution to the uncertainty inherent in these formulations would be to modify the definition in *Akayesu* to include “under circumstances that are coercive *and that the accused knows or ought to know are coercive*.” Second, and related to the issue of consent, is the question of the requisite *mens rea*.

As indicated earlier, the Rome Statute provides some guidance on these questions,¹⁶⁴ but is far from comprehensive. The elements of rape and, in particular, crimes of sexual violence were revisited in March 2000 and remain the subject of vigorous debate within the PrepComs. In the absence of any compromise, it seems probable that the provisions will be left relatively vague.

159. *Id.*, ¶ 181.

160. *See id.* ¶ 184.

161. *Id.* ¶ 185.

162. *Id.*

163. Prosecutor v. Delalic, No. IT-96-21-T, ¶ 479 (Int'l Crim. Trib. Former Yugo., Trial Chamber, Nov. 16, 1998).

164. *See supra* text accompanying note 11.

V. CONCLUSION

In the abstract, the ongoing project to define the elements of crimes against humanity can only progress so far. Ultimately, the International Criminal Court itself will have to interpret its Statute on the basis of the facts presented in the cases that come before it. The accumulated knowledge of the two ad hoc Tribunals will be of assistance, but their experience also suggests four discrete—and sometimes incompatible—policy ends.

First, the minimalist view advocates that the Tribunals exist simply to adjudicate the cases presented to them; this view does not require the elaboration of abstract tests as presented here and, in fact, may suggest against it. Second is the view that the Tribunals were established to tell the story of what happened in the former Yugoslavia since 1991 and in Rwanda in 1994. This view stems from the ad hoc nature of the Yugoslav and Rwandan Tribunals and may require a more expansive view of their mandates.¹⁶⁵ Although it raises

165. The tension between these two views may be seen most clearly in the different positions adopted on the question of *concoirs d'infractions*. Usually translated into English as “cumulative charges,” this issue has arisen a number of times in the jurisprudence of the ad hoc Tribunals with inconsistent results. *Concoirs d'infractions* is a civil law concept with no real parallel in common law systems. A more appropriate (if less economical) translation is “multiple offenses in relation to the same set of facts.” An alternative translation would be “multiple legal qualifications arising from the same set of facts.”

Part of the confusion concerns the failure to distinguish between charging, convicting, and sentencing an accused for multiple offenses in relation to the same set of facts. It is perfectly acceptable to charge a person with more than one offense in relation to the same set of facts. Where one crime is a lesser included offense of the other, or in jurisdictions where multiple convictions in relation to one transaction are not permitted, this should be done in the alternative. If an accused is not charged in the alternative, it is nevertheless open to a tribunal to convict that accused of one offense and not another. Whether an accused should be *convicted* of two such crimes raises distinct questions. These questions are not identical with those presented by the issue of multiple *sentencing*. A much quoted passage in *Tadic* deferred the issue, stating that it could best be dealt with “if and when matters of penalty fall for consideration.” Decision on the Defence Motion on the Form of the Indictment, Prosecutor v. Tadic, No. IT-94-1-T, ¶ 17 (Int'l Crim. Trib. Former Yugo. Trial Chamber, Nov. 14, 1995). It is unclear whether the ICTY Trial Chamber intended to hold that convictions of multiple offenses were permissible under the ICTY Statute. Nevertheless, the decision has been interpreted to indicate that the issue of *concoirs d'infractions* is relevant only at the sentencing stage.

A second source of confusion concerns a translation error in the *Akayesu* judgment. In *Akayesu*, Trial Chamber I reviewed relevant international jurisprudence and the position in Rwanda. *Akayesu*, No. ICTR-96-4-T, ¶ 469. The Chamber held that it is acceptable to convict an accused of two offenses in relation to the same set of facts in three circumstances: (1) where the offenses have different elements; (2) where the provisions creating the offenses protect different interests; or (3) where it is necessary to record a conviction for both offenses in order fully to describe what the accused did. *See id.* The Chamber held that it is *not* justifiable to convict an accused of two offenses in relation to the same set of facts: (1) where one offense is a lesser included offense of the other, for example, murder and grievous bodily harm, robbery and

issues of ICTY procedure that are beyond the scope of this Article, a third position focuses on the Yugoslav Tribunal's relationship to the UN Security Council's continuing efforts to restore international peace and security to the Balkans.

The fourth perspective posits that the Tribunals should see themselves as part of the emerging jurisprudence of international criminal law. But this last position is undermined by the Tribunals' own inconsistencies with customary international law. This larger picture of juridical coherence has thus far been under-emphasized, with the result that the jurisprudence of the ad hoc Tribunals has been piecemeal and, at times, inconsistent. The eventual establishment of a permanent International Criminal Court will resolve some of these uncertainties by providing a firmer basis for a coherent jurisprudence, but divergent policy goals are certain to arise in the course of its work as well.

Writing on Adolf Eichmann's 1961 war crimes trial in Jerusalem,¹⁶⁶ Hannah Arendt subtitled her work "A Report on the Banality of Evil."¹⁶⁷ The title reflected her growing unease about the trial as it progressed; Arendt began her initial coverage for the *New Yorker* with some excitement, as "an obligation I owe my past," but later came to view "the whole thing [as] *stinknormal*, indescribably

theft, or rape and indecent assault; or (2) where one offense charges accomplice liability and the other offense charges liability as a principal (for example, genocide and complicity in genocide). In relation to the case at bar, the Chamber held that it was permissible to convict Akayesu of crimes against humanity (murder), crimes against humanity (extermination) and genocide in relation to the same set of facts. *See id.* The basis on which this finding was made requires some clarification, however. The English text states that the offenses of genocide, crimes against humanity, and violations of the laws of war "have different purposes and are, therefore, *never* co-extensive." *Id.* (English version only, emphasis added). This sentence does not appear in the French version. The result is that there are two possible interpretations of the *Akayesu* judgment. The first, based on the English version, is the view that charges of genocide, crimes against humanity, and violations of the laws of war are "never co-extensive." *Id.* On this view, because they protect different interests, and will never be subsumed within a single offense, such charges will always comply with the test in *Akayesu*. It would always be possible to *charge* and *convict* an accused of more than one of these offenses, regardless of the extent of the overlap. Under the second interpretation, relying primarily on the French version of *Akayesu*, it is permissible to charge an accused with multiple offenses where those offenses have different elements or protect different interests. Whether multiple convictions for such offenses are appropriate will depend on whether the criteria referred to earlier are satisfied. In other words, it will be necessary to examine, in the specific circumstances, whether the offenses *as proven* have different elements and protect different interests. Broadly, this second position is that adopted by the majority in *Kayishema*.

166. *See* Cr.C. (Jm.) 40/61 Attorney General of Israel v. Eichmann, 1961, *reprinted in* 56 AM. J. INT'L L. 805 (1962) (unofficial translation); Cr.A. In re Eichmann, 1962, *aff'd on other grounds, reprinted in* 36 I.L.R. 5 (1968).

167. ARENDT *supra* note 1, at 272.

inferior, worthless.”¹⁶⁸ The most widely cited element of this unease concerned the strenuous attempts of the Israeli Court to give the evils of the Holocaust a human face in a man who remained, to Arendt, “terribly and terrifyingly normal.”¹⁶⁹ But at the same time Arendt was concerned with the way the Prosecutors and the Court had characterized the crimes in question. “Nothing is more pernicious,” she wrote, “to an understanding of these new crimes,” and nothing “stands more in the way of the emergence of an international penal code,” than the “common illusion” that domestic crimes and crimes against humanity are essentially the same: “The point of the latter is that an altogether different order is broken and an altogether different community is violated.”¹⁷⁰ It remains to be seen whether the internationalization of the criminal process discussed in this Article will one day make it possible to view crimes against humanity as crimes against us all.

168. See Gerry J. Simpson, *War Crimes: A Critical Introduction*, in *THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES 1-2* (Timothy L.H. McCormack & Gerry J. Simpson eds., 1997) (citing letters from Arendt in ELISABETH YOUNG-BRUEHL, HANNAH ARENDT: FOR THE LOVE OF THE WORLD 329-31 (1982)).

169. ARENDT, *supra* note 1, at 276.

170. *Id.* at 272 (referring to genocide, then more clearly viewed as a species of crimes against humanity). A third concern was the failure to admit witnesses for the defense. See *id.* at 274.