

Fordham International Law Journal

Volume 22, Issue 2

1998

Article 5

Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court

Phylilis Hwang*

*

Copyright ©1998 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court

Phylilis Hwang

Abstract

In Part I, this Article surveys the evolution of crimes against humanity. This part reviews interpretations of crimes against humanity by post-World War II tribunals, national courts, and the International Law Commission ("ILC"). Part II examines the formulation of crimes against humanity in the statutes that established the International Criminal Tribunals for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"). It also looks at how the reports issued in connection with the ICTY statute and the case law from the ICTY dealt with crimes against humanity. Part III draws some preliminary conclusions regarding the status of crimes against humanity in international law in the period directly preceding the Rome Conference and analyzes the relative authority of the various sources of law discussed in Parts I and II. In Part IV, this Article surveys the issues raised by government delegates regarding crimes against humanity during the negotiations on the draft statute for an ICC from 1994 to 1998. Finally, Part V examines the debates on crimes against humanity that took place during the Rome Conference and analyzes the definition of crimes against humanity adopted in the Rome Statute.

DEFINING CRIMES AGAINST HUMANITY IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

*Phyllis Hwang**

INTRODUCTION

Despite the Nuremberg and Tokyo tribunals at the end of World War II, the promise of ending impunity for egregious violations of human rights and humanitarian law has remained unfulfilled for the past half century. As a result, individuals who have transformed previously unimaginable atrocities into recurring news headlines have escaped justice for their crimes. On July 17, 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court ("Rome Conference") adopted the Rome Statute of the International Criminal Court ("Rome Statute").¹ The International Criminal Court ("ICC") will have jurisdiction over genocide, war crimes, and crimes against humanity when national courts are unable or unwilling to prosecute such crimes.² This Article examines the definition of crimes against humanity in Article 7 of the Rome Statute³ and its consistency with contemporary international law. It confines its analysis to the opening paragraph of the definition, the "chapeau," which sets out the essential elements of crimes against humanity. Although Article 7 also contains significant developments regarding the enumerated acts that may constitute crimes against humanity, and

* B.A., Brown University; J.D., Columbia University. The author is currently counsel at the Taiwan Association for Human Rights based in Taipei, Taiwan. She previously served as counsel on the International Criminal Court campaign at Human Rights Watch. The views expressed herein are solely those of the author and do not reflect the views of either organization. The author is grateful for the valuable comments of Beth Van Schaack. Comments may be directed to the author by e-mail at phylshawang@yahoo.com.

1. UNITED NATIONS, DIPLOMATIC CONFERENCE OF Plenipotentiaries on the Establishment of an INT'L CRIMINAL COURT, ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, U.N. Doc. A/Conf.183/9 (1998) (adopted by United Nations on July 17, 1998) (visited Dec. 22, 1998) <<http://www.un.org/icc>> [hereinafter ROME STATUTE].

2. *Id.* arts. 5, 12, 17 (setting forth crimes within jurisdiction of International Criminal Court ("ICC") in Article 5, preconditions to exercise of jurisdiction in Article 12, and issues of admissibility in Article 17).

3. *Id.* art. 7.

the definitions of such acts,⁴ a discussion of these issues is beyond the scope of this Article.

In Part I, this Article surveys the evolution of crimes against humanity. This part reviews interpretations of crimes against humanity by post-World War II tribunals, national courts, and the International Law Commission ("ILC").⁵ Part II examines the formulation of crimes against humanity in the statutes that established the International Criminal Tribunals for the former Yugoslavia⁶ ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR").⁷ It also looks at how the reports issued in connection with the ICTY statute and the case law from the ICTY dealt with crimes against humanity. Part III draws some preliminary conclusions regarding the status of crimes against humanity in international law in the period directly preceding the Rome Conference and analyzes the relative authority of the various sources of law discussed in Parts I and II. In Part IV, this Article surveys the issues raised by government delegates regarding crimes against humanity during the negotiations on the draft statute for an ICC from 1994 to 1998. Finally, Part V examines at the debates on crimes against humanity that took place during the Rome Conference and analyzes the definition of crimes against humanity adopted in the Rome Statute.

I. EVOLUTION OF CRIMES AGAINST HUMANITY

A. *Developments Prior to World War II*⁸

The concept of crimes against humanity traces its origins to

4. For example, the inclusion of rape and other forms of sexual violence in Article 7(1)(g) of the Rome Statute of the International Criminal Court ("Rome Statute") constitutes an important improvement on the original Nuremberg definition of crimes against humanity. *Id.* art. 7(1)(g). On the other hand, the requirement in Article 7(1)(h) that acts of persecution be committed in connection with another enumerated act is unprecedented and deeply regrettable. *Id.* art. 7(1)(h). Also highly controversial were the definitions of "deportation or forcible transfer of population" in Article 7(2)(d), "forced pregnancy" in Article 7(2)(f), "enforced disappearance of persons" in Article 7(2)(i), and "gender" in Article 7(3). *Id.* art. 7(2)(d), (f), (i), 7(3).

5. G.A. Res. 174(II), U.N. GAOR, 2d Sess., 123d mtg. at 105, U.N. Doc A/519 (1947).

6. *Statute for the International Criminal Tribunal for the Former Yugoslavia*, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute].

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

8. For a comprehensive discussion of the history of crimes against humanity, see

the preamble of the 1907 Hague Convention Concerning the Laws and Customs of War on Land, in which the Martens Clause makes reference to the "laws of humanity."⁹ This language was echoed in a 1915 Allied condemnation of the Armenian genocide in Turkey.¹⁰ Following World War I, an investigatory commission established by the Paris Peace Conference also invoked the laws of humanity; however, the Treaty of Versailles¹¹ and the Treaty of Lausanne¹² declined to prosecute crimes against humanity.¹³

B. *The Nuremberg Charter and Its Legacy*

On August 8, 1945, the four major Allied powers in World War II signed the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis ("London Agreement").¹⁴ The Charter of the International Military Tribunal¹⁵ ("Nuremberg Charter"), annexed to the London Agreement, contained the first codification of crimes against humanity.¹⁶ Article 6 of the Nuremberg Charter, entitled the "Jurisdiction and General Principles" of the Nuremberg Tribunal, defined crimes against humanity in paragraph (c) as follows:

Crimes Against Humanity: namely, murder, extermination,

M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* (1992); Matthew Lippman, *Crimes Against Humanity*, 17 B.C. THIRD WORLD L.J. 171, 172-73 (1997).

9. Hague Convention Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague Convention].

10. Vahkn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications*, 14 YALE J. INT'L L. 221, 233-40 (1989).

11. Treaty of Peace between the Allied and Associated Powers and Germany, June 28, 1919, 2 BEVANS 43, S. TREATY DOC. NO. 66-49, reproduced in 13 AM. J. INT'L L. 151 (Supp. 1919).

12. Treaty with Turkey and Other Instruments Signed at Lausanne, Aug. 6, 1923, U.S.-TURK., 49 Stat. 2692, reproduced in 18 AM. J. INT'L L. 1 (Supp. 1924) (entered into force Aug. 18, 1934) [hereinafter Treaty of Lausanne].

13. See Lippman, *supra* note 8, at 174-77.

14. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 280, 59 Stat. 1544 [hereinafter London Agreement].

15. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280 (entered into force Aug. 8, 1945) [hereinafter Nuremberg Charter]; Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280, annexed to London Agreement, *supra* note 14.

16. *Id.*

enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.¹⁷

Because crimes against humanity were prosecuted along with other crimes, the Nuremberg Tribunal often failed to clarify the content or the scope of crimes against humanity, in particular, the distinction between this crime and war crimes or the meaning of key terms such as "any civilian population."¹⁸ The Tokyo Tribunal, established by the Charter of the International Military Tribunal for the Far East¹⁹ ("Tokyo Charter"), did not provide any further guidance on crimes against humanity because it primarily prosecuted crimes against peace.²⁰ The definition on crimes against humanity in the Tokyo Charter was substantially similar to the one found in the Nuremberg Charter.²¹

Allied Control Council Law No. 10 ("Control Council Law No. 10") governed the prosecution of war criminals within each of the Allied occupation zones in Germany.²² The definition of crimes against humanity in Article II(c) of Control Council Law

17. Nurnberg Charter, *supra* note 15, art. 6, 59 Stat. at 1551, 82 U.N.T.S. at 283.

18. Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289, 310 (1994). Even in the cases of Julius Streicher and Baldur von Schirach, who were only convicted of crimes against humanity, "[t]he Tribunal's discussion of the charges . . . are essentially factual and do not in any way explain how exactly [their] acts violated Article 6(c)." *Id.* at 308.

19. Charter of the International Military Tribunal for the Far East, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Jan. 19, 1946, T.I.A.S. No. 1589, *reprinted in* 4 TREATIES AND OTHER INT'L AGREEMENTS OF THE UNITED STATES OF AM. 27 (1946).

20. Lippman, *supra* note 8, at 202.

21. Two notable differences in the Charter of the International Military Tribunal for the Far East ("Tokyo Charter") definition were the deletion of persecution on religious grounds and the addition of a clause on the bases for responsibility, which stated that "[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan." *See* BASSIOUNI, *supra* note 8, at 34 (quoting Tokyo Charter).

22. *See* Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin (Jan. 31, 1946), *reprinted in* BASSIOUNI, *supra* note 8, at 590 (defining crimes against humanity as "[a]trocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian popula-

No. 10 removed the requirement of a connection with either crimes against peace or war crimes.²³ This modification enabled U.S. tribunals to de-link crimes against humanity from armed conflict in *United States v. Josef Altstoetter*²⁴ (the "Justice Case") and *United States v. Otto Ohlendorf* (the "Einsatzgruppen Case").²⁵ Another significant development that emerged from these tribunals was the restriction of the definition of crimes against humanity to the "systematic commission of severe, State-sponsored delicts."²⁶

Following the judgments issued by the Nuremberg, Tokyo, and Control Council Law No. 10 tribunals, subsequent international instruments affirmed and expanded upon the definition of crimes against humanity.²⁷ The Convention on the Prevention and Punishment of the Crime of Genocide²⁸ ("Genocide Convention") and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity²⁹ ("Convention on Statutory Limitations") explicitly stated the principle that crimes against humanity do not require a

tion, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.").

23. *Id.* art. III(c)

24. *United States v. Josef Altstoetter*, reprinted in III TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL CONCIL LAW NO. 10, at 954 (1951)

25. *United States v. Otto Ohlendorf*, reprinted in IV TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL CONCIL LAW NO. 10, at 411 (1950)

26. Lippman, *supra* note 8, at 212.

27. Such instruments included the Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal: the Report of the Sixth Committee, U.N. GAOR, 1st Sess., pt. 2, 55th plen. mtg. at 1144, U.N. Doc. A/236 (1946) (also appears as G.A. Res. 95, U.N. Doc. A/64/Add.1, at 188 (1946)); the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, G.A. Res. 2391, U.N. GAOR, 23rd Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968) [hereinafter Convention on Statutory Limitations]; the International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, G.A. Res. 3068 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, at 75, U.N. Doc. A/9030 (1973) [hereinafter Apartheid Convention]; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess. Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).

28. Genocide Convention, *supra* note 27.

29. Convention on Statutory Limitations, *supra* note 27.

nexus with armed conflict.³⁰

C. Codification of Crimes Against Humanity by the International Law Commission

In 1947, the United Nations General Assembly created the ILC to codify international law.³¹ One of the ILC's first tasks was to formulate the "principles of international law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal."³² In its report on the "Formulation of the Nuremberg Principles,"³³ ("1950 Formulation of the Nuremberg Principles") the ILC based its comments on the following definition of crimes against humanity: "murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime."³⁴ The omission of the phrase "before or during war," used in Article 6(c) of the Nuremberg Charter,³⁵ was due to the ILC's view that it only referred to a "particular war, the war of 1939."³⁶ The ILC, however, warned that the deletion did not signify that "crimes against humanity can be committed only during a war, since such crimes may take place also before a war in connection with crimes against peace."³⁷

The ILC also observed that Article 6(c) had contained two types of crimes against humanity, "murder . . . and other inhuman acts" and "persecution on political, racial, or religious

30. See Genocide Convention, *supra* note 27, art. I, 78 U.N.T.S. at 280 (declaring that "[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."); Convention on Statutory Limitations, *supra* note 27, art. I (stating that "[n]o statutory limitation shall apply to war crimes . . . [and] [c]rimes against humanity whether committed in time of war or in time of peace.").

31. G.A. Res. 174(II), U.N. GAOR, 2d Sess., 123d mtg. at 105, U.N. Doc A/519 (1947).

32. G.A. Res. 177(II), U.N. GAOR, 2d Sess., 123d mtg. at 111, U.N. Doc. A/519 (1947).

33. *Report of the International Law Commission*, U.N. GAOR, 5th Sess., Supp. No. 12, U.N. Doc. A/1316, at 11 (1950) [hereinafter *1950 ILC Report*].

34. *Id.*

35. Nuremberg Charter, *supra* note 15, art. 6(c), 82 U.N.T.S. at 288, 59 Stat. at 1557.

36. *1950 ILC Report*, *supra* note 33, ¶ 124.

37. *Id.*

grounds.”³⁸ This categorization makes it clear that the ILC viewed the phrase “on political, racial or religious grounds” as clarifying the bases of persecution, rather than imposing a requirement of a discriminatory motive for inhuman acts. This interpretation is also supported by the 1949 Memorandum of the Secretary-General on the Charter and Judgment of the Nuremberg Tribunal, which stated:

It might perhaps be argued that the phrase “on political, racial or religious grounds” refers not only to persecutions but also to the first type of crimes against humanity. The British Chief Prosecutor possibly held that opinion as he spoke of “murder, extermination, enslavement, persecution on political racial or religious grounds.” This interpretation, however, seems hardly to be warranted by the English wording and still less by the French text.³⁹

Finally, in interpreting the term “any civilian population,” the ILC focused on the word “any” to conclude that the term would extend the application of the definition to acts committed by the perpetrator against his own population.

In 1951, the ILC adopted the first Draft Code of Offenses against the Peace and Security of Mankind⁴⁰ (“1951 Draft Code”) after consideration of government submissions and reports by Special Rapporteur Mr. Jean Spiropoulos. Crimes against humanity were defined in Article 2(10) of the 1951 Draft Code as:

“Inhuman acts by the authorities of a State or by private individuals against any civilian population, such as mass murder, or extermination or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds, when such acts are committed in execution of or in connection with the offenses defined in this article.”⁴¹

Instead of requiring a nexus with either war crimes or crimes against peace, this formulation required crimes against human-

38. *Id.*

39. *Prosecutor v. Dusko Tadic*, Case No. IT-94-I-T (May 7, 1997), Opinion and Judgment, International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, ¶ 652 [hereinafter *Tadic Judgment*] (citing SECRETARY-GENERAL, MEMORANDUM ON THE CHARTER AND JUDGEMENT OF THE NUREMBERG TRIBUNAL: HISTORY AND ANALYSIS at 67, U.N. Sales No. E.49.II. (1949)).

40. *Draft Code of Offences Against the Peace and Security of Mankind*, U.N. GAOR, 6th Sess., U.N. Doc. A/1858 (1951) [hereinafter *1951 ILC Draft Code*].

41. *Id.* art. 2(10).

ity to be connected with "the offenses defined in this article."⁴² Among the crimes enumerated in Article 2 of the 1951 Draft Code was genocide, and the Genocide Convention of 1948 had already recognized that genocide could be committed in time of peace.⁴³ Thus, the 1951 Draft Code definition of crimes against humanity continued to move away from the requirement of a nexus with armed conflict.⁴⁴ Another development in this definition was its explicit recognition that both State authorities and private individuals may commit crimes against humanity.⁴⁵

In 1954, the ILC amended the definition of crimes against humanity to read: "Inhuman acts such as murder, extermination, enslavement, deportation or persecution, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities."⁴⁶ The revision eliminates altogether the requirement that crimes against humanity be committed in connection with another crime. As explained by the ILC, this revision was done with the intention to "enlarge the scope of the paragraph."⁴⁷ On the other hand, the application of the definition was narrowed, at least with respect to private actors, by the new requirement that private individuals act "at the instigation or toleration" of State authorities.

Rather than maintaining the two categories of crimes against humanity, as set forth in the ILC's 1950 Formulation of Nuremberg Principles, the 1954 formulation collapses both persecution and other crimes—murder, extermination, enslavement, and deportation—under the single category of "inhuman acts."⁴⁸ Furthermore, the discriminatory grounds that had immediately

42. *Id.*

43. Genocide Convention, *supra* note 27, art. I, 78 U.N.T.S. at 280.

44. *ILC 1951 Draft Code*, *supra* note 40. Other crimes defined in Article 2 of the Draft Code of Offenses Against the Peace and Security of Mankind ("1951 Draft Code") included aggression, terrorism, genocide, and war crimes. *Id.*

45. Article 6(c) of the Nuremberg Charter did not bar the prosecution of private individuals. See Nuremberg Charter, *supra* note 15, art. 6(c), 59 Stat. at 1557, 82 U.N.T.S. at 288. Indeed, three private individuals who were industrialists, rather than government officials, were prosecuted under Allied Control Council Law No. 10. See Lippman, *supra* note 8, at 205.

46. *Draft Code of Offences Against the Peace and Security of Mankind*, U.N. GAOR, 9th Sess., Supp. No. 9, at 11, U.N. Doc. A/2693 (1954) [hereinafter *1954 ILC Draft Code*].

47. *Id.* cmt. to art. 2(11).

48. *Id.* at 11.

followed the word "persecution" in earlier versions were moved to the latter part of the definition.⁴⁹ Their new placement suggests that it may be necessary to establish that the other inhuman acts, and not just persecution, were committed on discriminatory grounds. The ILC, however, did not indicate its intent to impose this additional requirement nor did it offer any explanation for these changes.

Following the submission of the 1954 Draft Code of Offenses against the Peace and Security of Mankind ("1954 Draft Code"), further discussion on this work was suspended for several decades because the "Cold War had made the entire exercise highly controversial."⁵⁰ In 1981, the Allied General Assembly requested the ILC to return to its work on the Draft Code of Offenses against the Peace and Security of Mankind⁵¹ ("Draft Code of Offences"), which in 1987 was renamed the Draft Code of Crimes Against the Peace and Security of Mankind ("1991 Draft Code").⁵² The Draft Code that was finally adopted by the ILC in 1991 defined twelve crimes, but did not contain a specific article on crimes against humanity.⁵³ Article 21, defining "systematic or mass violations of human rights," bore the closest resemblance to this crime.⁵⁴ The definition of "systematic or mass violations of human rights," however, differs from the 1954 Draft Code definition of crimes against humanity in a number of significant ways.⁵⁵ Because the ILC did not indicate that this crime was intended as a substitute for crimes against humanity, its sig-

49. *Id.*

50. *Report of the International Law Commission*, U.N. GAOR, 46th Sess., Supp. No. 10, at 238, U.N. Doc. A/46/10 (1991) [hereinafter *1991 ILC Report*].

51. G.A. Res. 106, U.N. GAOR, 36th Sess. (1981).

52. *1991 ILC Report*, *supra* note 50.

53. *Id.*

54. *Id.* Article 21 of the Draft Code of Crimes Against the Peace and Security of Mankind ("1991 Draft Code") on "systematic or mass violations of human rights" states that "[a]n individual who commits or orders the commission of any of the following violations of human rights . . . in a systematic manner or on a mass scale; . . . shall, on conviction thereof, be sentenced . . ." *Id.* art. 21.

55. The "systematic and mass scale" criteria are new, reflecting interpretations of crimes against humanity by national courts in the intervening years. There is no examination of whether the individual is acting in an official or private capacity, and thus, even in the case of the latter, there is no requirement that such actions were taken at the instigation of or with the tolerance of State authorities. Finally, the definition does not address whether this crime may be committed in time of peace, nor is there any reference to the relevant group of protected persons, the civilian population.

nificance in reflecting the development of crimes against humanity in international law is limited.

After receiving government observations on the 1991 Draft Code and examining further reports by the Special Rapporteur Mr. Doudou Thiam, the ILC adopted another Draft Code of Crimes in 1996 ("1996 Draft Code").⁵⁶ The 1996 Draft Code contained a shorter list of enumerated crimes, but included crimes against humanity this time. The chapeau to Article 18 provided that "[a] crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group."⁵⁷

The ILC affirmed that crimes against humanity do not require a nexus with armed conflict. The ILC cited Control Council Law No. 10, the Genocide Convention, the Statute for the International Criminal Tribunal for the former Yugoslavia⁵⁸ ("ICTY Statute"), the Statute for the International Criminal Tribunal for Rwanda⁵⁹ ("ICTR Statute"), and the ICTY's case law as standing for the proposition that crimes against humanity may be committed in peace time.⁶⁰

The 1996 Draft Codes's definition also imposed the two "general conditions" for an act to reach the level of a crime against humanity.⁶¹ First, the act must be committed in a "systematic manner or on a large scale."⁶² While conceding that these conditions were not found in the Nuremberg Charter, the ILC observed that the Nuremberg Tribunal took note of these elements when determining whether certain inhumane acts rose to the level of crimes against humanity definition and that the 1996 Draft Code's definition is intended to reflect "subsequent developments in international law since Nuremberg."⁶³ The ILC also clarified that these conditions existed in the alternative. "Consequently, an act could constitute a crime against humanity

56. *Report of the International Law Commission*, U.N. GAOR, 48th Sess., Supp. No. 10, ¶ 45, U.N. Doc. A/51/10 (1996) [hereinafter *1996 ILC Report*].

57. *Id.* art. 18.

58. ICTY Statute, *supra* note 6.

59. ICTR Statute, *supra* note 7.

60. *1996 ILC Report*, *supra* note 56, cmt. to art. 18, ¶ 6.

61. *Id.* ¶ 3.

62. *Id.*

63. *Id.*

if either of these conditions is met.”⁶⁴

For an act to be systematic, it must be committed “pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts.”⁶⁵ This requirement was imposed to avoid the prosecution of a “random act” as a crime against humanity.⁶⁶ On the other hand, the term “large scale” referred to situations “involving a multiplicity of victims, for example, as a result of the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.”⁶⁷ Here, this requirement aimed to exclude an “isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim.”⁶⁸

The ILC also required a second condition, that crimes against humanity be “instigated or directed by a Government or by any organization or group.”⁶⁹ While the ILC discussed the need to exclude isolated acts by an individual, it was also concerned with distinguishing ordinary criminal conduct from a crime against humanity, which is a crime of an international nature. Thus, the ILC explained that it is this second element that “gives the act its *great* dimension.”⁷⁰

The 1996 Draft Code required more active involvement on the part of the relevant authorities than the 1954 Draft Code, which only required State instigation or tolerance of the act. The 1996 Draft Code’s definition, however, encompassed acts instigated or directed not only by State authorities, but also by “any organization or group.”⁷¹ This definition would enable groups that exercise *de facto* control over a territory, without official recognition as the legitimate state authority, to be held responsible for crimes against humanity. Indeed, the ILC’s failure to give any guidelines on what constitutes an “organization” or a “group,” except to say that they “may or may not be affiliated with a Government,”⁷² suggests that the definition may even ap-

64. *Id.* ¶ 4.

65. *Id.* ¶ 3.

66. *Id.*

67. *Id.*

68. *Id.* ¶ 4.

69. *Id.* ¶ 5.

70. *Id.* (emphasis added).

71. *Id.*

72. *Id.*

ply to criminal organizations or corporations.

Finally, the 1996 Draft Code's definition made no reference to "any civilian population" or to a general requirement of the discriminatory motive. Following the 1954 Draft Code's formulation, it listed persecution as among the inhumane acts. The grounds for discrimination, however, clearly apply to acts of persecution only.

In sum, after the Nuremberg Judgment, the ILC quickly moved to reject the need for a nexus between crimes against humanity and armed conflict and in 1954, eliminated altogether the need for crimes against humanity to be committed with any other crime. With regard to the requirement of a discriminatory motive, the ILC's early interpretation of the Nuremberg Charter strongly suggested that the grounds for discrimination apply only to acts of persecution. The ILC's 1954 formulation of crimes against humanity in the 1954 Draft Code may suggest that other inhumane acts must also be committed on discriminatory grounds, but neither the ILC's comments nor the subsequent definition in 1996 lend support to this argument.

All ILC drafts of crimes against humanity, save the 1996 version, identified "any civilian population" as the relevant group of protected persons.⁷³ The only time that the ILC interpreted this term, however, was in 1951, to explain that crimes against humanity could encompass acts committed by the perpetrator against his own population.⁷⁴

The requirement of State participation in crimes against humanity, at first explicitly rejected in the 1951 Draft Code's definition,⁷⁵ was incorporated in the 1954 Draft Code's revision.⁷⁶ The 1996 Draft Code's definition required crimes against humanity to be instigated or directed by authorities, rather than instigated or merely tolerated, as provided in the 1954 Draft Code. The 1996 Draft Code, however, broadened the term "authorities" to include organizations and groups in addition to governments.

Finally, the 1996 Draft Code required crimes against hu-

73. See 1951 ILC Draft Code, *supra* note 40; 1954 ILC Draft Code, *supra* note 46. But see 1991 ILC Report, *supra* note 50.

74. See 1951 ILC Draft Code, *supra* note 40.

75. *Id.*

76. 1954 ILC Draft Code, *supra* note 46.

manity to be committed in a systematic manner or on a large scale.⁷⁷ Inquiry into systemacity involves an examination of whether there is a "preconceived plan or policy," while a "multiplicity of victims" is required to establish a large scale violation.⁷⁸

D. *Domestic Prosecution of Crimes Against Humanity*

According to the principle of universal jurisdiction, certain crimes are so offensive to the universal community as a whole that any national court may assert jurisdiction over their perpetrators without relying on the usual bases of jurisdiction—territoriality,⁷⁹ nationality,⁸⁰ or passive personality.⁸¹ Crimes against humanity are recognized as being among the crimes over which universal jurisdiction exists.⁸² Since the Nuremberg Tribunal, several domestic courts have undertaken prosecutions of crimes against humanity, invoking either the traditional bases for jurisdiction or the principle of universal jurisdiction.⁸³ This section focuses on interpretations of crimes against humanity by domestic courts in the past decade, as these interpretations will have particular relevance for understanding the state of international law prior to the Rome Conference.

1. France: Prosecution of Klaus Barbie

In February 1982, the public prosecutor of Lyon charged Klaus Barbie, a former head of the Gestapo based in Lyon, with crimes against humanity.⁸⁴ Barbie had previously been convicted, in absentia, for war crimes, but this time he was expelled from his refuge in Bolivia and forced to stand trial in France.⁸⁵

Applying the Nuremberg Charter definition of crimes

77. 1996 ILC Report, *supra* note 56.

78. *Id.*

79. Territorial jurisdiction exists when the offense is committed on the state's territory.

80. Nationality jurisdiction exists when the accused is a national of the state.

81. Passive personality jurisdiction exists when the victim is a national of the state.

82. Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 800 (1988).

83. Lippman, *supra* note 8, at 240-43, 253-55.

84. Prosecutor v. Barbie, Judgment of Oct. 6, 1983, Cass. crim., 1984 D.S. Jur. 113, J.C.P. 1983, II, G, No. 20, 107 (1983).

85. Wexler, *supra* note 18, at 331-33.

against humanity,⁸⁶ the Indicting Chamber of the Court of Appeals of Lyon on October 4, 1985, declined to charge Barbie for arresting and torturing to death a Jewish member of the Resistance because it was unclear whether his victim had been selected for being Jewish or for participating in the resistance.⁸⁷ Under the appellate court's strict interpretation of the term "any civilian population," members of the Resistance could not be considered civilians.⁸⁸ While rejecting the lower court's ruling, the Court of Cassation's interpretation, in turn, introduced new obstacles to the prosecution of crimes against humanity. In its opinion of December 20, 1985, the Court of Cassation defined crimes against humanity as:

the inhumane acts and the persecutions which, in the name of a State practicing a hegemonic political ideology, have been committed in a systematic fashion, not only against persons because they belong to a racial or religious group, but also against the adversaries of this [State] policy, whatever the form of their opposition.⁸⁹

This interpretation emphasizes three elements of crimes against humanity. The first element is that the crimes must be committed in a systematic manner.⁹⁰ The second element requires that the perpetrator must act with a discriminatory motive, based on the race, religion, or ideology of the victim.⁹¹ The Court of Cassation's final element requires that crimes against humanity be committed in accordance with a State's "hegemonic political ideology."⁹²

In affirming Barbie's conviction on June 3, 1988, the Court of Cassation further held that:

[t]he fact that the accused . . . took part, in perpetrating that crime, in the execution of a common plan to bring about the deportation or extermination of the civilian population during the war or persecutions on political, racial or religious grounds, constitutes not a separate offense or an aggravating

86. The Court of Cassation ruled in its October 1983 and January 1984 opinions that the Nuremberg Charter had been incorporated into French law. *Id.* at 337.

87. *Barbie*, J.C.P. 1983, II, G, No. 20.

88. Wexler, *supra* note 18, at 339.

89. *Id.* at 342.

90. *Id.*

91. *Id.*

92. *Id.*

circumstance but . . . an essential element of the crime against humanity consisting in the fact that the acts . . . were performed in a systematic manner in the name of a State practicing . . . a policy of ideological supremacy.⁹³

The additional requirement of a "common plan" has been criticized as a misinterpretation of Article 6 of the Nuremberg Charter, which included this language to provide for the criminal liability of conspirators, but did not intend to add this as a substantive element of the definition of crimes against humanity.⁹⁴

2. France: Prosecution of Paul Touvier

Paul Touvier was a French officer in the Milice (Militia) of the Vichy regime. Tried in absentia for treason, Touvier received two death sentences in 1946 and 1947 and a presidential pardon in 1971.⁹⁵ Shortly thereafter, several individuals filed charges of crimes against humanity against Touvier.⁹⁶ Investigation into the Touvier case, however, was postponed until 1979, when the Minister of Foreign Affairs affirmed the imprescriptibility of crimes against humanity.⁹⁷ The Indicting Chamber of the Court of Appeals in Paris dismissed all eleven charges against Touvier, citing lack of evidence.⁹⁸ With regard to Touvier's involvement in the killing of seven Jews in Rillieux, the appellate court held that Touvier lacked the requisite intent.⁹⁹ It ruled that an individual:

cannot be held to have committed a crime against humanity unless it is also established that he had a specific motivation to take part in the execution of a common plan by committing in a systematic manner inhuman acts or persecutions in the name of a State practicing a policy of ideological supremacy.¹⁰⁰

Relying on the *Barbie* judgments of 1985 and 1988, the Court of

93. *Federation Nationale des Deportes et Internes Resistants et Patriotes and Others v. Barbie*, 78 I.L.R. 124, 137 (1988) (Court of Cassation, Criminal Chamber 1983-85); see Lippman, *supra* note 8, at 258 (citing *Barbie*).

94. Wexler, *supra* note 18, at 361.

95. *Id.* at 322.

96. *Id.* at 322-25.

97. *Id.*

98. *Prosecutor v. Touvier*, 100 I.L.R. 341, 350 (1992) (Court of Cassation, Criminal Chamber 1992).

99. *Id.* at 349-50.

100. *Id.* at 358.

Appeals applied three elements of crimes against humanity identified therein: 1) the systematic nature of the crimes; 2) the perpetrator's participation in a common plan; and 3) the perpetrator's intent to carry out a State policy of political hegemony.¹⁰¹ With regard to the last element, the Court of Appeals, however, refused to rule that the Vichy regime practiced a hegemonic political ideology.¹⁰² In reversing the lower court's decision regarding the Rillieux massacre,¹⁰³ the Court of Cassation held that because Touvier proceeded on the basis of orders from the Gestapo, which did practice a hegemonic ideology, his acts fell within the definition of crimes against humanity.¹⁰⁴

3. Canada: Prosecution of Imre Finta

Imre Finta served in the Royal Hungarian Gendarmerie in 1944 and headed the investigative unit at Szeged, Hungary, where approximately 9,000 Jews were confined, robbed, and deported to concentration camps in Auschwitz and Strasshof.¹⁰⁵ In 1988, Finta was charged with war crimes and crimes against humanity.¹⁰⁶ A jury acquitted Finta of all charges, and this acquittal was upheld by both the Ontario Court of Appeal and the Supreme Court of Canada.¹⁰⁷ Among the issues examined by the Supreme Court was whether the trial judge had properly instructed the jury on the requisite *mens rea* for crimes against humanity.¹⁰⁸

101. Lippman, *supra* note 8, at 258.

102. *Id.*

103. As for the other 10 dismissed charges, six charges were not appealed, and the Court of Cassation affirmed the finding of insufficient evidence for the remaining four charges. Wexler, *supra* note 18, at 351-52.

104. *Id.* at 352.

105. Regina v. Finta, [1994] S.C.R. 701, 812 (Can.).

106. Finta, [1994] 1 S.C.R. at 812. The Canadian Criminal Code defines crimes against humanity as:

murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations.

CRIMINAL CODE § 7(3.76) (Can.).

107. Judith H. Bellow & Irwin Cotler, *Regina v. Finta*, 90 AM. J. INT'L L. 460, 461-62 (1996).

108. *Id.* at 461-62.

In distinguishing international crimes from domestic crimes, the Supreme Court 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."¹⁰⁹ The Supreme Court further ruled that:

[t]he mental element required to be proven to constitute a crime against humanity is that the accused was aware of or willfully blind to the facts or circumstances which would bring his or her acts within the definition of a crime against humanity. However, it would not be necessary to establish that the accused knew that his or her actions were inhumane. For example, if the jury was satisfied that Finta was aware of the conditions within the boxcars [in which the Jews were deported], that would be sufficient to convict him of crimes against humanity even though he did not know that his actions in loading the people into those boxcars were inhumane.¹¹⁰

Finally, the Supreme Court also held that the trial judge properly instructed to jury to examine whether Finta "knew or was aware that he was assisting in a policy of persecution."¹¹¹ While noting that the element of State policy of persecution or discrimination was not found in the Canadian Criminal Code, the Supreme Court held that this was a "pre-requisite legal element of crimes against humanity."¹¹²

4. Cases Viewed Together

In sum, the decision by the French Court of Cassation in *Barbie* added a number of new elements to the definition of crimes against humanity. Contrary to the ILC's 1950 Formulation of Nuremberg Principles,¹¹³ the French Court of Cassation ruled that the perpetrator of a crimes against humanity must be motivated by discriminatory intent based on political, racial, or religious grounds.¹¹⁴ Even if such an interpretation were based on the language and structure of the ILC's 1954 Draft Code, it

109. *Finta*, [1994] 1 S.C.R. at 813.

110. *Id.* at 820; see Bellow & Cotler, *supra* note 107, at 472 (arguing that trial judge erred in instructing jury to ask: "Does he know it is an inhumane act?").

111. *Regina v. Finta*, [1994] S.C.R. 701, 822-23 (Can.).

112. *Id.*

113. 1950 ILC Report, *supra* note 33.

114. *Barbie*, J.C.P. 1983, II, G, No. 20.

still deviates from the ILC definition by omitting social and cultural grounds as possible bases for discrimination. The Supreme Court of Canada also required a discriminatory motive, even though it is not explicitly included in Section 7(3.76) of the Canadian Criminal Code.¹¹⁵

The requirement that crimes against humanity be committed in a systematic manner is not entirely new because this had been raised in the Justice Case decided under Control Council Law No. 10. The ILC, however, had never recognized this element in its reports or Draft Codes. Nevertheless, the French courts in the *Barbie* and *Touvier* judgments fully accepted systematicity as an integral element of crimes against humanity.

The requirement articulated in both the *Barbie* and *Touvier* decisions that crimes against humanity must be committed as part of a common plan in furtherance of a State policy of political hegemony is completely novel and raises complex problems of interpretation.¹¹⁶ There are two elements of this requirement. First, there must be a "common plan" to commit the prohibited acts, and second, the commission of such acts must be in furtherance of a State policy.

With regard to the first element, it is unclear who the architect of the common plan must be. If it is the State's common plan, then this requirement goes beyond the condition in the 1954 Draft Code, which only called for State participation in crimes against humanity in the form of either instigation or tolerance.

As for the second element, the definition does not call for a State policy to commit crimes against humanity, but for a very specific kind of policy. The French Court of Cassation required a State policy of political hegemony, while the Canadian Supreme Court wanted a State policy of discrimination. The focus on the State is problematic in situations where crimes may be committed to further the objectives of a non-state actor. Furthermore, aside from the difficulties of interpreting a term as

115. The requirement that inhumane acts be committed against "any civilian population or any identifiable group of person" suggests an implicit requirement of discriminatory intent because the perpetrator must have a basis on which to identify such groups.

116. See *Tadic Judgment*, Case No. IT-94-I-T, ¶ 653 (holding that "[t]raditionally this requirement [that the acts target a civilian population] was understood to mean that there must be some form of policy to commit these acts.").

vague as "political hegemony," it is undesirable to define the requisite State policy narrowly because it would exclude inhumane acts that have been systematically committed to advance other policy objectives of a State. To construe the definition in such a rigid manner would lead to the absurd result reached by Professor Bassiouni, who has argued that the practice by the United States and Canada of placing citizens of Japanese ethnicity in concentration camps during World War II did not constitute crimes against humanity.¹¹⁷ His reasoning was this practice was "not motivated by, nor seeking to result in, 'persecution' of that group of persons even though it discriminated against an identifiable group."¹¹⁸

The decisions in the *Barbie*, *Touvier*, and *Finta* cases were delivered in a vacuum of guidance from the ILC about the proper scope and content of crimes against humanity. During the ILC's suspension of consideration of the Draft Code, there were also no international tribunals adjudicating cases of crimes against humanity.¹¹⁹ Critics of the French interpretation of crimes against humanity have characterized the new elements in the definition—the requirements of a "common plan" and a "State policy of political hegemony"—as "blatant attempts to exonerate, in advance, the Vichy government from wrong"¹²⁰ or to shield the French government from responsibility for acts in the Algerian War.¹²¹ Whether or not the interpretations by domestic courts were the result of impure motives or an erroneous reading of international law, they nevertheless directed the development of crimes against humanity, as is evident from the ICTY

117. BASSIOUNI, *supra* note 8, at 252. Bassiouni has also stated that "[t]hroughout history . . . the terms 'persecute' and 'persecution' have come to be understood to refer to discriminatory practice resulting in physical or mental harm, economic harm, or all of the above." *Id.* at 317. Thus, the internment of Japanese-Americans and Japanese-Canadians, which constituted forcible transfer of population and persecution (both listed within the list of enumerated acts under the 1996 International Law Commission ("ILC") definition of crimes against humanity) of a population according to State policy, do qualify as crimes against humanity, regardless of the primary objective of that State policy.

118. *Id.*

119. Although the *Finta* decision was issued in 1994, the Canadian Supreme Court in *Regina v. Finta* made no reference to the Statute of the International Criminal Tribunal for the Former Yugoslavia ("ICTY Statute") or the Secretary-General's Report on the ICTY Statute, discussed in Part II.

120. See Wexler, *supra* note 18, at 355.

121. *Id.* (citing and translating Pierre Poncela, *L'humanité, une victime peu présente*, 34 D.S. JUR. CHRONIQUE 229-30 (1991)).

Statute, the ICTR statute, the reports issued in connection with those tribunals, and the 1996 ILC Draft Code.

II. *ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA*

A. *The Statutes for the Tribunals and the Reports of the Secretary-General and Commission of Experts*

Responding to the atrocities in the former Yugoslavia and Rwanda, the U.N. Security Council acted under Chapter VII of the United Nations Charter to establish *ad hoc* tribunals to prosecute the perpetrators of serious violations of international humanitarian law.¹²² The ICTY Statute was adopted unanimously by the Security Council on May 25, 1993.¹²³ The following year, the ICTR Statute was also adopted.¹²⁴ The two tribunals had jurisdiction over war crimes—the grave breaches of the Geneva Conventions of 1949 and/or violations of the laws or customs of war—genocide, and crimes against humanity.¹²⁵

The chapeau to the definition of crimes against humanity in Article 5 of the ICTY Statute reads: “The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population.”¹²⁶ In the U.N. Secretary-General’s report on the ICTY Statute, he noted, in an opinion contrary to the language of the Article 5, that crimes against humanity are “prohibited regardless of whether they are committed in an armed conflict, international or internal in character.”¹²⁷ The report also observes that inhumane acts have to be “committed as part of a

122. U.N. Charter, art. 1, ch IV.

123. ICTY Statute, *supra* note 6.

124. ICTR Statute, *supra* note 7.

125. See ICTY Statute, *supra* note 6, arts. 2-5; ICTR Statute, *supra* note 7, arts. 2-4. Because the situation in Rwanda involved an internal armed conflict, the ICTR only looked at violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II to the Geneva Conventions.

126. ICTY Statute, *supra* note 6, art. 5. The crimes enumerated were murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial, and religious grounds, and other inhumane acts. *Id.*

127. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., U.N. Doc. S/25704, ¶ 47 (1993) [hereinafter *Secretary-General's Report*].

widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.”¹²⁸

In 1992, the Secretary-General, at the request of the Security Council, appointed a Commission of Experts (“Commission”) to assess the violations of international humanitarian law committed in the former Yugoslavia.¹²⁹ In its final report issued in May 1994, the Commission presented factual findings and provided legal commentary on the ICTY Statute (“Commission’s Report”).¹³⁰ The Commission stated that “crimes against humanity apply to all contexts,” and to both international and internal armed conflict.¹³¹

Focusing on the word “civilian,” the Commission noted that while the term “any civilian population” principally applies to noncombatants, it does not necessarily exclude those “who at one particular point in time did bear arms.”¹³² For example, crimes committed against those who use arms to defend themselves or their community, such as the “sole policeman or local defense guard,” may still come within the definition of crimes against humanity.¹³³ The Commission urged that “[i]nformation of the overall circumstances is relevant for the interpretation of the provision in a spirit consistent with its purpose.”¹³⁴

The Commission also noted other conditions for crimes against humanity. The acts must be carried out pursuant to a “policy of persecution or discrimination.”¹³⁵ The acts also must be committed in a systematic manner or on a mass scale.¹³⁶ Although the Commission presented systematicity and mass scale as alternative conditions, using the word “or,” in its subsequent discussion, it seems to treat the two as related elements in a sin-

128. *Id.* ¶ 48.

129. S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg., U.N. Doc. S/RES/780 (1992).

130. *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, U.N. SCOR, Annex, U.N. Doc. S/1994/674 (May 27, 1994) [hereinafter *Commission of Experts’ Report*]; Annexes to the Final Report, U.N. Doc S/1994/674/Add.2, ¶ 75 (1994) [hereinafter *Annexes to Commission of Experts’ Report*].

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* ¶ 78.

135. *Id.* ¶ 84.

136. *Id.*

gle requirement.¹³⁷

Closely following the Secretary-General's observations of the ICTY Statute, the definition of crimes against humanity in the ICTR Statute deleted any reference to armed conflict but incorporated a requirement of a discriminatory motive. The ICTR Statute was adopted after the Commission issued its report on the ICTY Statute. The chapeau of Article 3 of the ICTR Statute, defining crimes against humanity, reads: "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."¹³⁸

In sum, it is important to note that the articles on crimes against humanity in the ICTY Statute and the ICTR Statute open with the phrase, "The International Tribunal . . . shall have the power to prosecute persons responsible for the following crimes."¹³⁹ As such, these articles are not intended to define crimes against humanity, but, rather, to define the scope of the Tribunals' jurisdiction over crimes against humanity. Therefore, the nexus with armed conflict in Article 5 of the ICTY Statute was interpreted in the U.N. Secretary-General's report as not reflecting the state of international law, which prohibits crimes against humanity even in peacetime, but merely imposing a restriction on the ICTY's jurisdiction. The Secretary-General's observation was affirmed by the Commission and the ICTR Statute, which deleted the reference to armed conflict altogether.

The Secretary-General's report stated that crimes against humanity must be committed as part of a "widespread or systematic attack" and on discriminatory grounds.¹⁴⁰ The Commission took the latter element a step further by requiring a "policy of persecution or discrimination," echoing the language of the *Finta* decision.¹⁴¹ Neither the Secretary-General nor the Commission explain the basis for the requirement of discriminatory

137. For example, the Commission states that "[i]t is the overall context of large-scale victimization carried out as part of a common plan or design which goes to the element of systemacity." *Id.* Also, the heading of this section is "Widespread and Systematic Nature of Acts." *Id.*

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

139. *Id.*; ICTY Statute, *supra* note 6, art 5.

140. *Secretary-General's Report*, *supra* note 127.

141. *Commission of Experts' Report*, *supra* note 130.

intent. Indeed, such a requirement would appear to be at odds with the recognition that crimes against humanity may be directed against "any civilian population" because only national, political, ethnic, racial, or religious groups can claim to have suffered crimes against humanity. The Commission's interpretation of "any civilian population" did not address this point, merely noting that the term applies foremost to noncombatants, but may in certain situations be extended to others.¹⁴²

B. Decisions by the International Criminal Tribunal for the Former Yugoslavia

In February 1995, the Prosecutor of the ICTY indicted Dusko Tadic for war crimes and crimes against humanity. Tadic, a Bosnian Serb, was alleged to have participated with Serb forces in the "killings, torture, sexual assaults and other physical and psychological abuse" of Bosnian Muslims and Croats in the Omarska, Keraterm, and Trnopolje camps and in neighboring villages.¹⁴³ Tadic challenged the ICTY's jurisdiction over crimes against humanity, contending that Article 5 of the ICTY Statute¹⁴⁴ constituted an *ex post facto* law. Tadic argued that the definition of crimes against humanity did not conform to contemporary international law, which required such crimes to be committed in an international armed conflict.¹⁴⁵ In its decision on the Defense Motion for Interlocutory Appeal on Jurisdiction¹⁴⁶ ("Tadic Decision on Jurisdiction"), the Appeals Chamber of the ICTY rejected this argument by affirming that crimes against humanity can even be committed in peacetime:¹⁴⁷

It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be commit-

142. *Id.*

143. Tadic Judgment, Case No. IT-94-I-T, ¶ 38.

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

145. Prosecutor v. Dusko Tadic, Case No. IT-94-I-AR72, ¶ 139 (1995), Decision of the Appeals Chamber on the Defense Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber [hereinafter Tadic Decision on Jurisdiction].

146. *Id.*

147. *Id.* ¶ 141.

ted in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary.¹⁴⁸

In its Review of the Indictment pursuant to Rule 61 of the Rule of Procedure and Evidence of Dragan Nikolic¹⁴⁹ ("Nikolic Rule 61 Decision"), the Trial Chamber of the ICTY ("ICTY Trial Chamber") reaffirmed that although Article 5 of the ICTY Statute required a nexus with armed conflict, such a requirement is unnecessary under international law. The ICTY Trial Chamber also noted that Article 5 required crimes against humanity to be committed under a second set of circumstances, that is, the acts must be "directed against any civilian population." The ICTY Trial Chamber interpreted this term as having three elements. First, the civilian population must be "specifically identified as a group by the perpetrators of these acts."¹⁵⁰ Although the ICTY Trial Chamber does not articulate the bases for such an identification, this interpretation suggests the ICTY Trial Chamber's acceptance of the need for a discriminatory motive. The other two components raised by the ICTY Trial Chamber are that the crimes must be "organized and systematic" and "of a certain scale and gravity."¹⁵¹ The ICTY Trial Chamber's approach in reading these elements into the meaning of "any civilian population" is a novel one. The ICTY Trial Chamber also appeared to require both elements to be present, rather than accepting them as alternative conditions.¹⁵²

In another decision pursuant to Rule 61 of the Rules of Procedure and Evidence¹⁵³ ("Rule 61"), regarding Mile Msksic, Miroslav Radic, and Veselin Sljivancanin¹⁵⁴ ("Vukovar Hospital

148. *Id.*

149. Prosecutor v. Dragan Nikolic, Case No. IT-94-2-R61 (1995), Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, International Criminal Tribunal for the Former Yugoslavia, Trial Chamber. According to Rule 61 of the Rules of Procedure for the ICTY, a second confirmation of the indictment would enable the ICTY to issue an international arrest warrant for the accused. See International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991: Rules of Procedure and Evidence, Rule 61, U.N. Doc. IT/32, *reprinted in* 33 I.L.M. 484 (1994) [hereinafter Rule 61].

150. *Nikolic*, Case No. IT-94-2-R61.

151. *Id.*

152. *Id.* ¶ 26.

153. Rule 61, *supra* note 149, 33 I.L.M. 484 (1994).

154. Prosecutor v. Mile Msksic, Miroslav Radic, and Veselin Sljivancanin, Case No.

Rule 61 Decision”), the ICTY Trial Chamber revisited the interpretation of “any civilian population.” Focusing on the term “civilian,” the ICTY Trial Chamber relied on the *Barbie* decision and the Commission report to interpret this term as extending beyond noncombatants, under certain circumstances.¹⁵⁵ Next, the ICTY Trial Chamber noted that a crime against humanity must:

be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognized as guilty of a crime against humanity if his acts were part of the specified context identified above.¹⁵⁶

The judgment against Dusko Tadic was delivered on May 7, 1997. In the 300 page Tadic Opinion and Judgment¹⁵⁷ (“Tadic Judgment”), Tadic was convicted of eleven out of thirty-one counts. The opinion contained a comprehensive discussion of the elements of crimes against humanity and the requisite mental element.

The ICTY Trial Chamber did not spend much time on the first element, the requirement that crimes against humanity must be committed in armed conflict.¹⁵⁸ Affirming that international law now de-links crimes against humanity from armed conflict, the ICTY Trial Chamber recognized that this nexus had nevertheless been imposed as a restriction on the ICTY Trial Chamber’s jurisdiction.¹⁵⁹ It further held that the crimes against humanity occurred in a context that conformed to the definition of armed conflict as articulated by the Appeals Chamber.¹⁶⁰

IT-95-13-R61 (Apr. 3, 1996), Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, International Criminal Tribunal for the Former Yugoslavia, Trial Chamber. This case involved killings and beatings by the Yugoslav People’s Army, directed against patients, civilians, and former resistance fighters who had sought shelter at the Vukovar Hospital.

155. *Id.*

156. *Id.* ¶ 30.

157. Tadic Judgment, Case No. IT-94-I-T (Oct. 2, 1995).

158. *Id.*

159. *Id.*

160. *Id.* ¶ 628 (holding that “[a]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”).

The ICTY Trial Chamber then turned to the interpretation of “any civilian population,” examining each word in turn, in a complex, multi-level analysis. With regard to the word “any,” the ICTY Trial Chamber followed the approach of the ILC in its 1950 Formulation of the Nuremberg Principles, noting that the nationality of the targeted population was irrelevant. Crimes against humanity could be committed against individuals who shared the same nationality as the perpetrator or even against civilians who were stateless.¹⁶¹

In determining whether an individual qualifies as a “civilian,” the ICTY Trial Chamber cited with approval the Commission’s observation that while the term applies primarily to non-combatants, it may also cover those who were once non-civilians but had since laid down their arms or those who use force in self-defense.¹⁶² Furthermore, the ICTY Trial Chamber held that if a population was “predominantly” civilian, then the presence of a few non-civilians would not defeat this characterization.¹⁶³

Finally, the word “population” was treated as the rug under which all the remaining elements of crimes against humanity were swept. As explained by the ICTY Trial Chamber:

[t]he “population” element is intended to imply crimes of a collective nature and thus exclude single or isolated acts Thus the emphasis is not on the individual victim but rather on the collective, the individual being victimized not because of his individual attributes but rather because of his membership of a targeted civilian population. This has been interpreted to mean, as elaborated below, that the acts must occur on a widespread or systematic basis, that there must be some form of a governmental, organizational or group policy to commit these acts and that the perpetrator must know of the context within which his actions are taken, as well as the requirement . . . that the actions be taken on discriminatory grounds.¹⁶⁴

The above paragraph and the structure of the opinion made it clear that the ICTY Trial Chamber viewed the term “population” as having three essential components: “widespread or systematic” commission of the acts that constitute crimes against hu-

161. *Id.* ¶ 635.

162. *Id.* ¶ 636.

163. *Id.* ¶ 638.

164. *Id.* ¶¶ 636-41.

manity; a discriminatory motive for those acts; and a governmental, organizational, or group policy to commit those acts.

As noted earlier, the ICTY Trial Chamber in the Nikolic Rule 61 Decision had already taken the approach of reading "widespread" and "systematic" criteria as a component of "any civilian population."¹⁶⁵ Here, the ICTY Trial Chamber confirmed that these conditions existed in the alternative and that "[e]ither one of these is sufficient to exclude isolated or random acts."¹⁶⁶ The ICTY Trial Chamber observed that the U.N. Secretary-General's Report, Vukovar Hospital Rule 61 Decision, and the 1996 ILC Draft Code also treated these conditions as alternatives. The Tadic Judgment did not elaborate on how to construe "widespread" or "systematic," but it cited the relevant portions of the ILC's comments to Article 18 in the 1996 Draft Code.¹⁶⁷ Finally, the ICTY Trial Chamber affirmed that a single act committed in the context of a widespread or systematic attack could constitute a crime against humanity.¹⁶⁸

With regard to the requirement of a discriminatory motive, the ICTY Trial Chamber conceded that the "law in this area is mixed."¹⁶⁹ Although the opinion cited several sources that reject the need for establishing discriminatory intent and noted that the ICTY Statute itself does not include this element, the ICTY Trial Chamber ultimately imposed this requirement because it had been raised in the Secretary-General Report and "since several Security Council members stated that they interpreted Article 5 as referring to acts taken on a discriminatory basis."¹⁷⁰ France, the United States, and Russia were the states that supported the inclusion of a discriminatory motive.¹⁷¹

Turning to the final component of "population," the ICTY Trial Chamber required that there be "some form of policy to commit these acts."¹⁷² This approach is somewhat puzzling because the inquiry into systemacity, one alternative in the first component of "population," already addresses the issue of

165. See *supra* note 151 and accompanying text.

166. Tadic Judgment, Case No. IT-94-I-T (Oct. 2, 1995).

167. *Id.* ¶ 648 (1997); see *supra* notes 60-68 and accompanying text.

168. Tadic Judgment, Case No. IT-94-I-T, ¶ 648.

169. *Id.* ¶ 650.

170. *Id.* ¶ 652.

171. *Id.*

172. *Id.* ¶ 653.

whether or not an action was taken pursuant to a policy.¹⁷³ If the “policy element” is treated here as a separate component, then even when the first element of “population” has been established by demonstrating that inhumane acts were committed on a widespread basis, there would still be a need to show the existence of a policy to commit such acts. The ICTY Trial Chamber, however, then went on to say that the policy does not have to be explicit, but can be inferred.¹⁷⁴ If the “policy” component can simply be established by the fulfillment of either alternative of the first condition, then it would appear not to be an additional element at all.

The formulation of the policy requirement is also unfortunate because of the necessary specificity of the requisite policy. A general policy of ethnic cleansing, as was present in the former Yugoslavia, does not appear to be sufficient under the ICTY Trial Chamber’s formulation because there must be a “policy to commit these acts.” Thus, it appears that within the general policy of ethnic cleansing there would also need to be a specific policy to commit murder, rape, torture, and so forth. The ICTY Trial Chamber, however, does not address this point because of its willingness to infer the existence of a policy from evidence of the widespread or systematic commission of such acts.

In the subsequent paragraph, the ICTY Trial Chamber notes that the “policy” element raises another issue, that is, the “nature of the entity behind the policy.”¹⁷⁵ It is here that this component adds an additional requirement, the need for the acts to be committed pursuant to a policy of a state or of “forces which, although not those of the legitimate government, have *de facto* control over, or are able to move freely within defined territory.”¹⁷⁶ The ICTY Trial Chamber cited with approval the formulation in the ILC 1996 Draft Code, which referred to a “government or any organization or group.”¹⁷⁷ Although the ICTY Trial Chamber failed to elaborate further on what sorts of entities may fall into this category, it cited the observation of the

173. *Id.* ¶ 648.

174. “Notably, if the acts occur on a *widespread or systematic* basis that demonstrates a policy to commit those acts, whether formalized or not.” Tadic Judgment, Case No. IT-94-I-T, ¶ 653 (May 7, 1997) (emphasis added).

175. *Id.* ¶ 654.

176. *Id.*

177. *Id.*

1991 ILC Report that “private individuals with de facto power or organized in criminal gangs or groups might also commit” systematic or mass violations of human rights.¹⁷⁸

Finally, with regard to the requisite mental element for crimes against humanity, the ICTY Trial Chamber noted that there are two components. First, the accused must know of the broader context in which he commits his acts.¹⁷⁹ While the *Finta* decision articulated a similar mental element by requiring the accused to have knowledge of the “facts or circumstances which would bring his or her acts within crimes against humanity,”¹⁸⁰ the ICTY Trial Chamber elaborated on this further by explaining that the perpetrator must have “knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis.”¹⁸¹ Secondly, the Trial Chamber ruled that the accused cannot commit any crimes against humanity for purely personal reasons.¹⁸² It offered as an example a case arising under German penal law in 1948, where a man had denounced his wife for being pro-Jewish and anti-Nazi.¹⁸³ Although there were personal motivations behind the denunciation, the ICTY Trial Chamber noted that he had nevertheless been convicted of a crime against humanity because “his behavior fitted into the plan of persecution against Jews in Germany.”¹⁸⁴

In sum, the Tadic Decision on Jurisdiction established early on that a nexus between crimes against humanity and armed conflict, while required by the ICTY Statute, did not reflect contemporary international law. This position was reaffirmed by the Nikolic Rule 61 Decision, the Vukovar Hospital Rule 61 Decision, and the Tadic Judgment. The Vukovar Hospital Rule 61 Decision is also significant because it began to apply the “widespread” and “systematic” criteria, elements that had been identified in the Secretary-General and Commission reports and briefly raised in the Nikolic Rule 61 Decision. The Vukovar Hospital Rule 61 Decision was also the first opinion by the ICTY to

178. *Id.* ¶¶ 654-55.

179. Tadic Judgment, Case No. IT-94-I-T (May 7, 1997).

180. *Id.*

181. *Id.* ¶ 659.

182. *Id.*

183. *Id.* ¶ 658 (citing Obersten Gerichtshofes, Decision of the District Court (Landgericht) Hamburg of 11 Nov. 1948, STS 78/48, Justiz und NS-Verbrechen II, 1945-66, 491, 499 (unofficial translation)).

184. *Id.*

affirm that the term "civilian" could apply to individuals who were not strictly non-combatants, a position that was taken by the Commission and later re-affirmed by the Tadic Judgment.¹⁸⁵

The Tadic Judgment noted three elements of the term "population." The ICTY Trial Chamber's first required the "widespread or systematic" commission of acts of crimes against humanity, applying these criteria as alternatives and not cumulatively.¹⁸⁶ Second, the ICTY Trial Chamber required a discriminatory motive, citing the intent of the Security Council as a dispositive factor.¹⁸⁷ Finally, there needed to be a governmental, organizational, or group policy to commit inhumane acts, although the ICTY Trial Chamber was willing to infer the existence of such a policy from the widespread or systematic commission of those acts.¹⁸⁸ In clarifying the requisite mental state, the ICTY Trial Chamber noted that the defendant must have knowledge that his acts took place within the context of a widespread or systematic attack.¹⁸⁹

III. *THE STATUS OF CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW PRIOR TO THE ROME CONFERENCE*

Article 38 of the Statute for the International Court of Justice¹⁹⁰ ("ICJ Statute") recognizes four sources of international law: "1) international conventions, whether general or particular . . . ; 2) international custom, as evidence of a general practice accepted as law; 3) the general principles of law recognized by civilized nations; 4) . . . judicial decisions and the teachings of the most highly qualified publicists."¹⁹¹ In examining the diverse treatment of the elements of crimes against humanity by the bodies discussed in Parts I and II, and in weighing the relative authority of these various interpretations, it is important to

185. *Prosecutor v. Mile Mksic, Miroslav Radic, and Veselin Sljivancanin*, Case No. IT-95-13-R61 (Apr. 3, 1996), Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, International Criminal Tribunal for the Former Yugoslavia, Trial Chamber.

186. Tadic Judgment, Case No. IT-94-I-T (May 7, 1997).

187. *Id.*

188. *Id.*

189. *Id.*

190. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179 (1945).

191. *Id.* art. 38(1), 59 Stat. at 1060, 3 Bevans 1224.

keep in mind the hierarchy of the sources of law that has been established by the ICJ Statute.

The scope of crimes against humanity is difficult to determine precisely at any given point in time because of the absence of a specialized convention on this crime.¹⁹² Nevertheless, evidence of one aspect of the definition—the deletion of the nexus between crimes against humanity and armed conflict—can be found in the Genocide Convention, a treaty defining a particular crime that constitutes a crime against humanity. More generally, the Convention on Statutory Limitations applies to crimes against humanity “whether committed in time of war or in time of peace.”¹⁹³ While the ICTY Statute incorporates the requirement of a nexus with armed conflict,¹⁹⁴ the ICTY itself has repeatedly stated in the Tadic Decision on Jurisdiction and subsequent decisions that this restriction is intended to limit the jurisdiction of the ICTY, not to reflect contemporary international law.¹⁹⁵

The development of international law regarding the need for a discriminatory motive in crimes against humanity has been uneven and confused. The structure of the Nuremberg Charter definition, and its subsequent interpretation by the ILC and the U.N. Secretary-General in 1949, strongly suggested that the grounds for discrimination applied only to the crime of persecution and not to the definition of crimes against humanity as a whole. On the other hand, recent national law decisions on crimes against humanity have understood a discriminatory motive to be a requisite element; notably, the *Finta* court in Canada required that crimes against humanity be committed according to a State policy of discrimination. Moreover, the requirement of a discriminatory motive was incorporated by the Security Council, either explicitly or implicitly, into the ICTY Statute and ICTR Statute, affirmed by the U.N. Secretary-General and the Commission, and applied by the ICTY.

The interpretations of the ILC can be considered authoritative because the U.N. General Assembly gave this body a man-

192. M. Cherif Bassiouni, *Crimes Against Humanity: The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457 (1994).

193. Convention on Statutory Limitations, *supra* note 27, art. 1(b).

194. ICTY Statute, *supra* note 6.

195. Tadic Decision on Jurisdiction, IT-94-I-AR72 (Oct. 2, 1995).

date to formulate principles of international criminal law.¹⁹⁶ It is questionable, however, what weight should be given to the reports by the Secretary-General of the United Nations or by the Commission. With regard to the latter body, it is important to note that the Commission's initial mandate, as defined by the Security Council, was only to "examine and analyze the information submitted [by States and humanitarian organizations] . . . with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law."¹⁹⁷ Clearly, the Security Council did not envision that the Commission would provide an authoritative legal interpretation of the crimes identified in the ICTY Statute. This was also explicitly recognized by the Commission, which stated in its report that the "Commission's mandate is to provide the Secretary-General with its conclusions on the evidence of such violations and *not to provide an analysis of the legal issues*."¹⁹⁸ Despite the questionable authority of the Commission's report, the ICTY in the Vukovar Hospital Rule 61 Decision and the Tadic Judgment relied heavily on the Commission's Report to argue that the term "any civilian population" does not apply strictly to non-combatants.

The decisions of the ICTY constitute an important source of international law, not only as judicial decisions but also as decisions of an international tribunal. In the Tadic Judgment, the ICTY applied the requirement of a discriminatory motive because this requirement had been the understanding of the Security Council.¹⁹⁹ The views of the Security Council members carry weight both because the Yugoslav and Rwandan tribunals were established under its authority, and also because the expression of such views constitute state practice, which contributes to customary international law.²⁰⁰

The acceptance of the requirement of a discriminatory motive by the national courts of France and Canada may also constitute either evidence of customary international law or of the

196. See *supra* note 31 and accompanying text.

197. S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg., U.N. Doc. S/RES/780 (1992).

198. *Commission of Experts' Report*, *supra* note 130, ¶ 41 (emphasis added).

199. See *supra* note 170 and accompanying text.

200. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102 (1996) (noting that state practice includes diplomatic acts and official statements).

principles of municipal law recognized by civilized nations.²⁰¹ It is important to note, however, that a "significant minority of jurists holds that national law principles, even if generally found in most legal systems, cannot *ipso facto* be international law."²⁰² The concerns about incorporating national legal principles directly into international law are even more salient when the motivations behind a national court's interpretation of a legal principle may be suspect, as has been suggested with regard to the French courts' interpretation of crimes against humanity.²⁰³

The relevance of national court decisions for reflecting the development of crimes against humanity in contemporary international law is also greatly diminished by the fact that these courts were invariably punishing acts that occurred during World War II, not acts that occurred in recent years. To avoid applying an *ex post facto* criminal norm, the courts thus had to apply the definition of crimes against humanity as it existed and was understood fifty years ago, rather than the "current" definition of crimes against humanity, whatever that may be.²⁰⁴

The elimination of the nexus with armed conflict in recent international law gave rise to two concerns about the definition of crimes against humanity: first, how to exclude isolated acts from crimes against humanity; and second, how to distinguish an ordinary crime from one that rises to the level of international concern. Thus, it is no coincidence that the cases discussing Control Council Law No. 10, which applied a definition of crimes against humanity that de-linked these crimes from crimes against peace and war crimes, also restricted its application to the systematic commission of State-sponsored acts.²⁰⁵ Similarly, the 1954 Draft Code definition, which removed the nexus with armed conflict, was also the first formulation by the ILC to incorporate a requirement of State involvement in crimes against hu-

201. HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 47-48 (1996) (citing OSCAR SCHACTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 5 (1991)).

202. *Id.*

203. See *supra* note 121 and accompanying text.

204. Polyukhovich v. The Commonwealth, (1991) 1 I.L.R. 3, ¶ 68 (Aust.) (stating that there is "moral tension . . . between a desire to ensure that fundamental justice is not avoided by an overly technical scrutiny and a fundamental objection to individuals being called to account by victors in a war according to laws which did not exist at the time.").

205. See Lippman, *supra* note 8.

manity, either by commission, instigation, or toleration.²⁰⁶

In response to the first concern, of excluding isolated and random acts, the solution has been to impose a criteria of the "widespread or systematic" commission of these acts. The criteria of "systematic" was first raised by the U.S. courts under Control Council Law No. 10 and then also applied by the French courts in the *Barbie* and *Touvier* judgments.²⁰⁷ The terms "mass scale" or "widespread" were subsequently added by the U.N. Secretary-General and the Commission in their reports.²⁰⁸ The decisions of the ICTY imposed a uniformity in the language, by using the terms "widespread" and "systematic" and clarifying that these criteria existed as alternatives.²⁰⁹ The gradual and consistent application of these elements by national and international tribunals, coupled with the ILC's inclusion of these elements in the 1996 Draft Code, demonstrates that contemporary international law requires that crimes against humanity be committed on a "widespread or systematic" basis.²¹⁰

The incorporation of a State action and, later, a State policy element in the definition of crimes against humanity is more problematic. In 1954, the ILC merely required government instigation or tolerance of a crimes against humanity.²¹¹ In the intervening decades when the ILC suspended consideration of the Draft Code, national courts were left to interpret crimes against humanity.²¹² This suspension proved to be troubling because national interests may have prompted the courts to define the crime too narrowly. Thus, the national courts not only introduced a policy requirement, but also further imposed a require-

206. See 1954 ILC Draft Code, *supra* note 46.

207. *Federation Nationale des Deportés et Internes Résistants et Patriotes and Others v. Barbie*, 78 I.L.R. 124, 137 (1988) (Court of Cassation, Criminal Chamber 1983-85); *Prosecutor v. Touvier*, 100 I.L.R. 341, 358 (1992) (Court of Cassation, Criminal Chamber 1992).

208. 1991 ILC Report, *supra* note 50; *Report of the International Law Commission on the Work of Its Forty-Sixth Session*, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994) [hereinafter 1994 ILC Report]; *Secretary-General Report*, *supra* note 127.

209. *Tadic Judgment*, Case No. IT-94-I-T (May 7, 1997); *Prosecutor v. Dragan Nikolic*, Case No. IT-94-2-R61 (1995), Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, International Criminal Tribunal for the Former Yugoslavia, Trial Chamber.

210. 1996 ILC Report, *supra* note 56.

211. 1954 ILC Draft Code, *supra* note 46.

212. 1991 ILC Report, *supra* note 50; 1994 ILC Report, *supra* note 208; *Secretary-General Report*, *supra* note 127.

ment for specific types of policy. The Commission adopted the *Finta* court's requirement of a policy of discrimination or persecution.

The 1996 ILC Draft Code, however, treated "policy" as an indicator of "systematic" and required State, organizational or group involvement to be evidenced by instigation or direction. The *Tadic* Judgment in the next year followed a similar approach.²¹³ Although the ICTY appears at first to require a separate showing of policy, in addition to the "widespread" or "systematic" criteria, a closer examination reveals that the ICTY was willing to infer the "policy" element from the establishment of either the "widespread" or "systematic" criteria. The significance of the "policy" element appears to lie in its examination of the "nature of the entity behind the policy." Thus, the 1996 Draft Code and the 1997 *Tadic* Judgment have a two-fold importance: in adding organizations and groups as entities that may be liable for crimes against humanity, and in casting doubt as to whether international law requires a showing of "policy" as an additional element of establishing crimes against humanity.

IV. NEGOTIATIONS ON THE DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT (1994-1998)²¹⁴

Prompted by Trinidad and Tobago, whose government was keen on establishing a permanent International Criminal Court to prosecute narcotics trafficking crimes, the U.N. General Assembly passed a resolution in 1992, requesting the ILC to draft a statute for such a court.²¹⁵ In September 1994, the ILC submitted the Draft Statute for an International Criminal Court²¹⁶ ("Draft ICC Statute") to the General Assembly. Article 20(d) of the Draft ICC Statute listed crimes against humanity as one of

213. *Tadic* Decision on Jurisdiction, Case No. IT-94-I-AR92.

214. For a comprehensive history of the drafting of and negotiations on the draft ICC Statute, see Christopher Keith Hall, *The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 91 AM. J. INT'L L. 177 (1997) [hereinafter Hall 1]; Christopher Keith Hall, *The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 92 AM. J. INT'L L. 124 (1998) [hereinafter Hall 2]; and Christopher Keith Hall, *The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 92 AM. J. INT'L L. 331 (1998) [hereinafter Hall 3].

215. G.A. Res. 47/33, U.N. GAOR, 47th Sess., U.N. Doc. A/RES/47/33 (1992).

216. 1994 ILC Report, *supra* note 208.

the "Crimes within the jurisdiction of the Court."²¹⁷ The General Assembly subsequently authorized the creation of an Ad Hoc Committee on the Establishment of an International Criminal Court ("Ad Hoc Committee") to review the substantive and administrative issues arising out of the Draft ICC statute.²¹⁸

The Ad Hoc Committee convened two sessions in 1995, from April 3 to 13 and from August 14 to 25. During the Ad hoc Committee discussions on crimes against humanity, delegates emphasized that the ICC's jurisdiction should be limited to serious crimes rather than isolated offenses. Accordingly, some delegations expressed the view that elements such as a nexus to armed conflict and criteria referring the "widespread or systematic" nature of the crimes should be included in the definition of crimes against humanity. Others recognized that crimes against humanity "could be committed against any civilian population" and argued that the inclusion of a discriminatory motive was "questionable and unnecessary."²¹⁹

Following the submission of the Report of the Ad Hoc Committee on the Establishment of an International Criminal Court²²⁰ ("Ad Hoc Committee Report"), the U.N. General Assembly determined that further review of the draft ICC Statute was necessary and established the Preparatory Committee on the Establishment of an International Criminal Court ("Preparatory Committee"). In 1996, the Preparatory Committee met from March 25 to April 12 and from August 12 to 30. The Preparatory Committee's 1996 Report contained nine different proposals for crimes against humanity, in addition to the Chairman's informal text.²²¹ There continued to be disagreement over the necessity of a nexus with armed conflict or of a discriminatory motive. While generally supporting the inclusion of the "widespread or systematic" criteria, delegations had various views on what the terms would entail. Some of the suggested components for "widespread or systematic" included: an element of planning,

217. *Id.* art. 20(d).

218. G.A. Res. 49/53, U.N. GAOR, 49th Sess., Agenda Item 137, U.N. Doc. A/RES/49/53 (1994).

219. *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 50th Sess., Supp. No. 22, ¶¶ 77-79, U.N. Doc. A/50/22 (1995).

220. *Id.*

221. *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 51st Sess., Supp. No. 22A, Vol. 2, ¶¶ 65-70, U.N. Doc. A/51/22 (1996).

policy, or conspiracy; a multiplicity of victims or a massive scale of violations; and consent of the government or of the party in charge of the territory.²²²

At the end of 1996, the U.N. General Assembly renewed the mandate of the Preparatory Committee for four more sessions, with the last one held in the spring of 1998.²²³ The third session of the Preparatory Committee, held from February 11 to 21, included a working group on the definition of crimes. The criteria of "widespread or systematic" in the definition of crimes against humanity continued to be a point of contention, with the debate extending to whether the conditions should be viewed as alternatives or cumulative.²²⁴ There was also ongoing disagreement over whether a nexus to armed conflict and a discriminatory motive needed to be included. The definition of crimes against humanity that emerged from this Preparatory Committee session contained the following chapeau in the first paragraph:

For the purpose of the present Statute, any of the following acts constitutes a crime against humanity when committed [as part of a widespread and/or systematic commission of such acts against any population]: as part of a widespread and/or systematic commission of such acts against any [civilian] population [committed on a massive scale in armed conflict on political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds]²²⁵

The second paragraph defined each of the acts listed in the first

222. *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 51st Sess., Supp. No. 22A, Vol. 1, ¶¶ 21-24 U.N. Doc. A/51/22 (1996).

223. G.A. Res. 51/207, U.N. GAOR, 51st Sess., Supp. No. 49, at 342, U.N. Doc. A/51/49 (1996).

224. Hall 2, *supra* note 214, at 126-27 (1998). Christopher Hall explained that there was:

considerable disagreement on the scale or gravity of the offenses to be included in the ICC's jurisdiction According to some states, the ICC should have jurisdiction over crimes against humanity only when the acts were both widespread and systematic. A larger number of states, however, argued that this requirement would unduly restrict the scope of the ICC's jurisdiction and urged that the ICC have jurisdiction when the acts were either widespread or systematic.

Id.

225. Decisions Taken by the Preparatory Committee at Its Session Held from 11 to 21 February 1997, Annex I: Report of the Working Group on the Definition of Crimes, U.N. Doc. A/AC.249/1997/L.5, at 4 (1997).

paragraph that may constitute crimes against humanity.²²⁶

The definition of crimes against humanity was not taken up again in any of the subsequent Preparatory Committee sessions that preceded the Rome Conference. A minor revision was made to the text during an intersessional meeting convened in Zutphen, the Netherlands, in January 1998.²²⁷ The Zutphen text modified the opening clause of the "crimes against humanity" chapeau, for consistency with opening clauses of the definitions for the other crimes, to read: "For the purpose of the present Statute, a crime against humanity means any of the following acts when committed"²²⁸ The Zutphen revision and the remainder of the February 1997 Preparatory Committee text on crimes against humanity served as the basis for negotiations in the Rome Conference.²²⁹

V. ROME CONFERENCE

Pursuant to U.N. General Assembly Resolution 52/160,²³⁰ the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court ("Rome Conference") was held in Rome from June 15 to July 17, 1998.²³¹ There were at least three levels of negotiations and decision-making at the Rome Conference. The Committee of the Whole initially served as the forum where government delegations expressed their general positions on issues such as the definitions of crimes and the preconditions to the exercise of the ICC's jurisdiction. Debate on the details of the provisions took place in Working Groups, which were organized according to the component parts of the statute. As the Rome Conference continued, the Committee of the Whole convened less fre-

226. *Id.* at 5.

227. The Zutphen session, convened by the Chairman of the Preparatory Committee, Adrian Bos, and attended by the members of the Bureau, Chairs of different Working Groups, Coordinators and the Secretariat, did not make substantive changes but only made slight editorial modifications "for the purposes of consistency or of reflecting discussions in the Preparatory Committee." *Report of the Inter-Sessional Meeting From 19 to 30 January 1998 in Zutphen, The Netherlands*, U.N. Doc. A/AC.249/1998/L.13, at 8-9 (1998).

228. *Id.* at 33.

229. *Draft Statute for an International Criminal Court*, U.N. Doc. A/Conf.183/2/Add.1 (1998).

230. G.A. Res. 52/160, U.N. GAOR, 52nd Sess., U.N. Doc. A/52/160 (1997).

231. *Id.*

quently, meeting only to approve text generated by the working groups and to forward such text to the drafting committee. Finally, informal sessions were often convened to deal with particularly contentious issues on which the working groups could not achieve consensus.²³²

A. Preliminary Discussions on Crimes Against Humanity

The definition of crimes against humanity was discussed in the Committee of the Whole on the morning of June 17.²³³ Aside from the diverse views on which acts may be considered crimes against humanity,²³⁴ the debate centered primarily on two issues. First, while many countries expressed the view that crimes against humanity can be committed in times of peace, other states insisted on a nexus with armed conflict. Certain delegations even went so far as to state that crimes against humanity should only be limited to acts occurring in armed conflicts of an international nature.²³⁵

Second, there was considerable disagreement over whether the criteria of "widespread" and "systematic" should be treated cumulatively or as alternatives, that is, whether the two words should be connected by an "and" or an "or." One delegate proposed the deletion of "widespread," noting that this term would be difficult to apply. Another issue raised by the French delegate was whether the definition should include the requirement of a discriminatory motive. Only three delegates addressed this proposal, however, and they all opposed it. In summing up the morning's debate, the Chairman of the Committee of the Whole also failed to mention the French proposal.²³⁶

The next debate on crimes against humanity took place in the working groups, which convened on the morning of June 22. The issues relating to the "widespread" and "systematic" criteria emerged as the primary source of contention, with debate con-

232. See *Rules of Procedure for the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, U.N. Doc. A/Conf.183/6 (1998).

233. Author's notes on the Proceedings of the Rome Conference (June 17, 1998) (on file with the *Fordham International Law Journal*) [hereinafter Notes].

234. Another related issue was whether the enumerated acts should be defined within the article.

235. Notes, *supra* note 233 (June 17, 1998).

236. *Id.*

tinuing on whether “and” or “or” should be used to connect the two terms. Two states continued to propose the deletion of “widespread.” Discussion also turned to the meaning of the terms. Emphasizing the need to exclude isolated incidents, delegations generally interpreted “widespread” to indicate a “multiplicity of persons” or a “massive” attack. With regard to “systematic,” delegates noted that this indicates some degree of planning, pattern, coordinated activity, or scheme. The U.S. delegate proposed that systematic should be defined as an “attack that constitutes or is part of, or in furtherance of, a preconceived plan or policy, or repeated practice over a period of time.”²³⁷

Although a near consensus had been reached on the exclusion of a nexus between crimes against humanity and armed conflict, China, later joined by Turkey, continued to insist upon such a link. France conceded defeat on the inclusion of a discriminatory motive in the definition, noting that although “it was important to include these grounds in the chapeau as it was part of its legal tradition, . . . other states did not support it on this point.”²³⁸ The debate on the inclusion of a reference to “civilian population” focused on whether non-combatants should be the only victims of crimes against humanity. Finally, the United Kingdom raised the point that planning by a government or organization should be an additional criteria.

In sum, the principle issues that emerged during the Committee of the Whole and working group discussions on crimes against humanity were the requirement of a nexus between crimes against humanity and armed conflict, and the treatment of “widespread” and “systematic” as either alternative or cumulative criteria. Attempts were also made to define “widespread” and “systematic.” The requirement of a discriminatory motive in the chapeau of crimes against humanity was quickly dropped when it became apparent early on that there was virtual no support for its inclusion. The very limited discussion of “civilian population” failed to reflect the complex analysis that the ICTY had undertaken for this term.

237. NGO COALITION FOR AN INTERNATIONAL CRIMINAL COURT (DEFINITIONS TEAM), INFORMAL REPORT OF JUNE 23, 1998 (1998) (on file with the *Fordham International Law Journal*).

238. *Id.*

B. *The Canadian Proposal for the Chapeau to Crimes
Against Humanity*

On July 1, the Canadian delegation introduced a compromise proposal for the chapeau to crimes against humanity, aimed at meeting the concerns of those countries who wanted "widespread" and "systematic" to be treated as cumulative criteria. The Canadian chapeau read as follows:

(1) For the purpose of the present Statute, a crime against humanity means any of the following acts when knowingly committed as part of a widespread or systematic attack against any civilian population

(2) For the purpose of paragraph 1: (a) "attack against any civilian population" means a course of conduct involving the commission of multiple acts referred to in paragraph 1 against any civilian population, pursuant to or knowingly in furtherance of a governmental or organizational policy to commit those acts.²³⁹

Canada also issued a *Background Paper on Some Jurisprudence on Crimes Against Humanity* in support of its proposal. Citing the Tadic Decision on Jurisdiction, the paper affirmed that customary law no longer required crimes against humanity to be linked with armed conflict. It referred to the Tadic Judgment to argue that "widespread" and "systematic" should be treated as alternatives and that the definition should require a showing of governmental, organizational, or group policy. Finally, the paper emphasized that a single crime can constitute a crime against humanity if it was committed as part of an attack, relying on the Vukovar Hospital Rule 61 Decision and the Tadic Judgment.²⁴⁰

1. Government Responses to Canadian Proposal

In the informal session conducted on the Canadian proposal in the morning of July 1, some delegates continued to express their preference for "widespread and systematic" and China seemed unwilling to give up on the nexus with armed conflict.²⁴¹ The introduction of the definition of "attack against any civilian

239. CANADIAN DELEGATION, BACKGROUND PAPER ON SOME JURISPRUDENCE ON CRIMES AGAINST HUMANITY (July 1, 1998) [hereinafter CANADIAN PROPOSAL] (on file with the *Fordham International Law Journal*).

240. *Id.*

241. Notes, *supra* note 233 (July 1, 1998).

population" attracted a broad range of comments. Some delegates expressed the view that the "commission of multiple acts" language was sufficient to exclude isolated acts from the definition as crimes against humanity, while others felt this term was still not enough to ensure that only acts committed on a massive scale would be prosecuted as crimes against humanity.²⁴² The U.K. delegate also suggested that "multiple commission of acts" would be more appropriate than "multiple acts."²⁴³

As for the reference to "policy" in paragraph 2(1) of this paper, Costa Rica raised concerns about the difficulties in establishing policy.²⁴⁴ The Swiss delegate observed that the proposal, which refers to a "governmental or organizational policy," did not track the language of the Tadic Judgment, which referred to policies by a government, organization, or group.²⁴⁵ Finally, there was some confusion about the significance of the word "knowingly."²⁴⁶

A working group session on crimes against humanity met on the morning of July 3. The discussion of the chapeau, however, was limited and did not raise any new points. The Chair of the working group adopted the chapeau as it stood, noting that some delegations had problems with "knowingly" and "multiple acts." The remainder of the session was devoted to a discussion of the enumerated acts.²⁴⁷

2. Non-Governmental Organization Responses to the Canadian Proposal

The Canadian proposal was also strongly criticized by non-governmental organizations ("NGOs") observing the Rome Conference.²⁴⁸ While welcoming the treatment of "widespread" and

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. The text of crimes against humanity submitted to the Committee of the Whole is contained in Article 5: Crimes Within the Jurisdiction of the Court. COMMITTEE OF THE WHOLE, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, art. 5, U.N. Doc. A/Conf.183/C.1/L.44 (1992).

248. See THE SOUTH ASIAN HUMAN RIGHTS DOCUMENTATION CENTER, THE NORTH AMERICAN RE-WRITE CUSTOMARY INTERNATIONAL LAW: AN "AND" BY ANY OTHER NAME IS STILL AN "AND" (July 2, 1998) (on file with the *Fordham International Law Journal*) [hereinafter SAHRDC Paper]; HUMAN RIGHTS WATCH, COMMENTS ON THE CANADIAN PROPO-

"systematic" as alternative criteria in paragraph 1, NGOs viewed the explanatory definition of "attack directed against any civilian population" in the second paragraph as an ill-disguised attempt to reintroduce these criteria as cumulative. As argued by the South Asian Human Rights Documentation Center, the prosecutor "must still prove that the attack against the civilian population was 'widespread' (involving multiple acts) and 'systematic' (pursuant to or knowingly in furtherance of a policy)."²⁴⁹ A related point of concern was that the requirement of a "policy" would make it more difficult to establish "systematicity." One NGO stated, "While systematic has an established meaning in international law and can be demonstrated by a pattern of official actions or tolerance of abuse, 'governmental or organizational policy' may be susceptible to a narrower interpretation, such as a showing of affirmative and formal administrative acts."²⁵⁰

There were also strong objections to the double knowledge requirement contained in the Canadian proposal. Not only did the perpetrator have to "knowingly commit [acts] as part of a widespread or systematic attack," as set forth in paragraph 1, but the second paragraph further requires that the attack must be committed "pursuant to or knowingly in furtherance of a governmental or organizational policy."²⁵¹ The second knowledge requirement is problematic because it is ambiguous as to whom it should be imputed. If it applies to those participating in the attack, "then the prosecutor would have to prove the intent of third parties with respect to the policy behind the attack in order to secure a conviction for crimes against humanity."²⁵² Moreover, if the knowledge requirement applies to the perpetrator, then this requirement clearly exceeds the language of the Tadic Judgment, which only required the defendant to have "knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis."²⁵³ Also, legal commentators have generally rejected such a high knowledge requirement:

SAL ON CHAPEAU TO CRIMES AGAINST HUMANITY (on file with the *Fordham International Law Journal*) [hereinafter HRW Comments].

249. SAHRDC Paper, *supra* note 248.

250. HRW Comments, *supra* note 248.

251. CANADIAN PROPOSAL, *supra* note 239.

252. SAHRDC Paper, *supra* note 248.

253. Tadic Judgment, Case No. IT-94-I-T, ¶ 659 (Oct. 2, 1995).

Public officials acting in furtherance of "state action or policy" do not, however, need to know that they are part of an overall scheme or design, nor do they need to know the specifics of the overall scheme or design beyond their own role if they know that their conduct is illegal or that the orders under which they are acting are manifestly illegal.²⁵⁴

Two other problems with the Canadian proposal are worth noting. The term "commission of multiple acts referred to in paragraph 1"²⁵⁵ is troubling because it allows for the misinterpretation that the commission of murders is insufficient to qualify as an attack, but that murders have to be committed in conjunction with other inhumane acts such as torture or enslavement. Additionally, as noted above in the discussion of the Tadic Judgment, the requirement of a "policy to commit those acts" suggests that a general policy of suppression would be insufficient for the purposes of this definition; rather, there must be a policy to commit specific acts.

C. *The Final Definition*

On July 6, the Bureau of the Committee of the Hole released a Discussion Paper containing a compromise proposal for some of the more contentious aspects of the Draft ICC Statute, including the definitions of crimes, the preconditions to the exercise of jurisdiction, and the role of the prosecutor.²⁵⁶ The chapeau to the definition of crimes against humanity in paragraph 1 and the relevant explanatory note in paragraph 2 read as follows:

(1) For the purpose of the present Statute, a crime against humanity means any of the following acts when committed as part of a widespread or systematic attack against any civilian population and with knowledge of the attack.

(2) For the purpose of paragraph 1: (a) "attack against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

254. BASSIOUNI, *supra* note 8, at 256.

255. CANADIAN PROPOSAL, *supra* note 239.

256. COMMITTEE OF THE WHOLE, *Discussion Paper, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, U.N. Doc. A/Conf.183/C.1/L.53, at 2-3 (July 6, 1998).

This definition contains four substantive modifications.²⁵⁷ First, the phrase "multiple commission of acts" replaces "commission of multiple acts." Second, the Discussion Paper deletes the second knowledge requirement previously contained in paragraph 2. Third, the requisite policy is no longer a policy to commit the acts, but a "policy to commit such an attack." Finally, the relevant entity behind the policy is the State, not the government.

Although the Committee of the Whole examined the Discussion Paper, there was no extensive debate on crimes against humanity, given the highly politicized and controversial nature of the other issues in that paper. The subsequent Bureau Proposal distributed on July 10 contained no further changes.²⁵⁸ Except for a minor grammatical revision, substituting the final "and" in paragraph 1 with a comma, the Discussion Paper's formulation of the chapeau and its explanatory note was thus incorporated as Article 7 of the Rome Statute.²⁵⁹

CONCLUSION

As can be said of much of the Rome Statute, the definition of crimes against humanity in Article 7 gives cause for celebration in certain respects and continued vigilance or possible concern in others. The elimination of the connection between armed conflict and crimes against humanity accurately reflects the current state of international law, which rejected the need for such a nexus as early as 1954, as expressed by the ILC. Although the ICTY Statute does require a link with armed conflict, this requirement has been resoundingly interpreted in the decisions emerging from the ICTY as a restriction on the ICTY's

257. A fifth modification that does not change the substance of the chapeau is that the words "knowingly committed as part of a[n] . . . attack" in the Canadian proposal are replaced in the Committee of the Whole Discussion Paper, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court ("Discussion Paper") by the phrase "committed . . . with knowledge of the attack."

258. COMMITTEE OF THE WHOLE, *Bureau Proposal, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, U.N. Doc. A/Conf.183/C.1/L.59, at 2-3 (1998).

259. ROME STATUTE, *supra* note 1, art. 7. Article 7 also differed from the Bureau Proposal in other aspects of the definition of crimes against humanity, with regard to the addition of rape and other forms of sexual violence among the enumerated acts, the order of the definitions in paragraph 2, the addition of the definition of enforced pregnancy, and the addition of the definition of gender. *Id.*

jurisdiction rather than a restriction in the definition of crimes against humanity itself.

While the need for a discriminatory motive has been unclear, recent developments in international law, particularly with regard to the ICTY, reveal a growing acceptance of this element. It was therefore surprising that the deletion of this requirement was relatively uncontroversial in Rome. Nevertheless, this outcome is certainly welcome. The requirement lacks textual basis, not only historically, but also because it conflicts with the recognition of "any civilian population" as the relevant group of protected persons by allowing only certain groups to claim that they have suffered crimes against humanity.

The Rome Statute appropriately treats the "widespread" or "systematic" criteria as alternative elements, following the practice of the ILC and the ICTY. The explanatory note to paragraph 1, however, potentially undermines the alternative nature of these criteria by requiring the "multiple commission of acts . . . pursuant to or in furtherance of a State or organizational policy to commit such an attack."²⁶⁰ The term "multiple commission of acts" is novel because the word "attack" has never been interpreted before in the decades of jurisprudence on crimes against humanity. It imposes a slightly higher threshold than that required by "widespread" because the latter can simply involve a quantitative inquiry into the multiplicity of the victims, and not of the acts. Indeed, the ILC noted in 1996 that the "widespread" criteria could be fulfilled by the "singular effect of an inhumane act of extraordinary magnitude."²⁶¹ While the "multiple commission of acts" element thus adds a new component to the definition of crimes against humanity, it is important to keep in mind the observation of the Indian delegate that "anything more than one could be multiple."²⁶² Thus, the additional burden is not unduly onerous.

The need to establish a "State or organizational policy" is problematic because this requirement would appear to establish a higher threshold than that which is required to establish systematicity. As noted by the ILC in 1996 and affirmed by the ICTY in the Tadic Judgment, systematicity can be demonstrated

260. CANADIAN PROPOSAL, *supra* note 239.

261. See *supra* note 68 and accompanying text.

262. Notes, *supra* note 233 (July, 1 1998).

by a plan, which may be less explicit and formalized than a policy. To require a demonstration of a policy on top of the establishment of either the "widespread" or "systematic" criteria is even more troubling because it, in effect, treats the latter two criteria as cumulative. The ILC and the ICTY clearly retreated from this approach, despite the interpretations by national courts that required a State policy as an element of crimes against humanity. Rather than talking about a "policy," the ILC in its 1996 Draft Code noted the need for instigation or direction by a government, organization, or group. While the ICTY did refer to policy in the Tadic Judgment, it mitigated the potential dangers of the use of the word by emphasizing that such a "policy need not be formalized and can be deduced from the way in which the acts occur."²⁶³ Most importantly, the ICTY indicated that it would infer the existence of a policy from the widespread or systematic commission of acts.

In construing the "policy" requirement, the future ICC should keep in mind that the importance of this element, as understood by the ILC and the ICTY, is not to demonstrate systematicity, but to establish some degree of State or organizational involvement in acts of crimes against humanity. Accordingly, the ICC should follow the interpretation of the ICTY and be willing to infer policy from the way acts are committed, rather than insist upon proof of a formalized policy. This approach would be consistent not only with contemporary international law, but also with the intent of the delegates at the Rome Conference who clearly sought to incorporate the widespread and systematic criteria as alternative components. The Tadic Judgment and its treatment of the policy element will have particular relevance for interpreting the Rome Statute because the Canadian proposal for the chapeau to crimes against humanity was justified on the basis of the ICTY's reasoning in this decision. Moreover, the decisions of the ICTY articulate principles of international law that, according to Article 21 of the Rome Statute, may be applied by the ICC.²⁶⁴

As for other aspects of the "policy" requirement, Article 7

263. Tadic Judgment, Case No. IT-94-I-T (May 7, 1997).

264. ROME STATUTE, *supra* note 1, art. 21(1)(b) (providing that "[t]he Court shall apply . . . [i]n the second place, where appropriate, applicable treaties and the principles and rules of international law.").

appropriately recognizes the relevant entity orchestrating the policy can be either a state or an organization. International law now recognizes that non-State actors may be subject to international criminal liability. Although the definition fails to track the terminology used by the ILC and the ICTY accurately, the difference between organizations and groups remain unclear. The former term implies a greater degree of formality in its structure, but the impact, if any, of this omission on the prosecution of crimes against humanity remains to be seen.

Finally, Article 7 defines the requisite policy as the “policy to commit such an attack.” This general formulation is an improvement on the policies previously articulated by national courts or the ICTY. Requiring the establishment of a specific, narrowly-defined policy, such as a policy to impose political hegemony, to discriminate, or to commit particular acts would have unduly constrained the future ICC prosecutor in seeking justice for crimes against humanity.