2008

Extraordinary Chamber for the Cambodian Courts, ECCC, Crimes Against Humanity as Customary International Law in 1975 and The Evidentiary Threshold for Discriminatory Intent

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

Issue: Crimes Against Humanity as Customary International Law in 1975 and The Evidentiary Threshold for Discriminatory Intent

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J.D. Candidate, 2009
Spring Semester 2008

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I. INTRODUCTION

A. Issues

This memorandum examines two issues related to crimes against humanity as defined in Article 5 of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") Statute. First, whether all of the offenses listed in Article 5 were part of customary international law and applicable to Cambodia in 1975. Because the Cambodian tribunal was established nearly thirty years after the Khmer Rouge perpetrated crimes against the Cambodian population, it is necessary to show that the crimes described in the ECCC Statute were either part of customary international law or of Cambodian law in 1975, the year the Khmer Rouge began its campaign against the people of Cambodia.[1] This inquiry is necessary as the ECCC may not be able to prosecute Khmer Rouge leaders if the charged crimes were not based in international law or part of Cambodian law in 1975 due to the principle of nullum crimen sine lege.[2]

The second issue relating to Article 5 of the ECCC Statute is what evidentiary threshold and types of evidence are available to establish the requisite discriminatory intent for the listed offenses of crimes against humanity. Crimes against humanity as defined in Article 5 of the ECCC Statute, requires a requisite intent or "mens rea." Proving the state of mind of the individual defendant presents particular problems, especially when evidence may be limited due

[1] *See* Herbert D. Bowman, *Not Worth the Wait: Hun Sen, The UN, and the Khmer Rouge Tribunal*, 24 UCLA PAC. BASIN L.J. 51 (Fall, 2006) [attached as Tab 22].
[2] Nullum crimen sine lege is the general principle of law that prohibits the prosecution or assignment of guilt for acts not considered as crimes when committed. *Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, delivered to the General Assembly Security Council*, fifty-third session Fifty-fourth year, Agenda item 110(b), at para. 60, available via the University of Minnesota Human Rights Library [attached as Tab 38].

to the elapsed time between the alleged crime and its prosecution.[3] Both the discriminatory intent based on political, religious, and ethical grounds, as well as the knowledge requirement for prosecution of leaders, may be problematic in the prosecutions before the ECCC. This memorandum addresses some of the evidentiary issues, as related to intent, which the ECCC prosecutions are likely to face.

B. Summary of Conclusions

i. Most of the offenses of crimes against humanity described in Article 5 of the ECCC Statute were part of international customary law and applicable to Cambodia in 1975.

Customary international norms in the humanitarian law realm are created through state practice and opinio juris, often evidenced via treaties and conventions.[4] Conventions, state declarations or actions, an international tribunal, and soft law declarations occurred before 1975 that evidenced the formation of a customary international norm recognizing crimes against humanity as a punishable offense. Furthermore, the specific offenses listed in Article 5's definition of crimes against humanity were also evidenced as part of customary international law via the same conventions, state declarations, and soft law examples. Thus, as customary international norms are binding on all states,[5] Cambodia was bound by the norm establishing crimes against humanity as a punishable offense.

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[3] *See generally* Bowman, *supra* note 1; Mann (Mac) Bunyanunda, Note: *The Khmer Rouge on Trial: Whither the Defense?*, 74 S. CAL. L. REV. 1581 (2001) (discussing the loss of documents and death of many witnesses during the 25 year period since the Khmer Rouge's leadership in Cambodia) [attached at Tab 23].
[4] Theodor Schieder, *Customary International Law*, *in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 61, 62 (Rudolf Bernhardt, ed., North-Holland 1984) [attached at Tab 34].
[5] *Id*.

ii. The offense of rape is questionable as a customary international norm in 1975.

While most of the specific offenses listed in Article 5 of the ECCC statute were included as crimes against humanity under customary international law, the offense of rape was less likely part of customary international law in 1975. Rape or sexual assault was largely unmentioned in international law until the Yugoslavian and Rwandan Tribunals in the 1990s.[6] Although rape and sex crimes were mentioned in a few different contexts before 1975, treatment of rape as a crime by itself had, at best, mixed application.

iii. Crimes against humanity did not include a nexus to armed conflict under customary international law even in 1975, and thus, the Cambodia tribunal should conclude that a nexus to armed conflict is not part of the crimes against humanity definition under Article 5 of the ECCC Statute.

One of the strongest arguments by the defense that is likely to come before the ECCC Tribunal is that crimes against humanity, as a customary international crime in 1975, included a nexus to armed conflict. Such an argument is based on the inclusion of a nexus by the Nuremberg Tribunal and varying national laws.[7] However, the Nuremberg Principles, Control Council Law No. 10, and various soft law declarations demonstrate that even by 1975 such a nexus to armed conflict for crimes against humanity was not applicable.[8]

iv. The appropriate evidentiary threshold to prove the discriminatory intent for the crimes against humanity listed in Article 5 is that the accused knew there

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[6] David S. Mitchell, Article: *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219, 223 (2005) [attached at Tab 29].
[7] The Avalon Project, *Judgment of the International Military Tribunal for the Trial of German Major War Criminals* (1996), *available at:* http://www.yale.edu/lawweb/avalon/imt/proc/judcont.htm [attached at Tab 38].
[8] *See* Michael Scharf, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 LAW & CONTEMP. PROB. 41 (1997) [attached at Tab 33]; Principles of the Nuremberg Tribunal, 1950, *available at* http://deoxy.org/wc/wc-nurem.htm [attached at 5].

was an attack directed against the civilian population on the basis of national, political ethnical, racial, or religious grounds and that his conduct was part of that attack.

The knowledge requirement as provided above is recognized as one of the elements of crimes against humanity.[9] Case law from the ICTY and ICTR most clearly examine the individual knowledge element.[10] However, cases from the Nuremberg Tribunal also mention the requirement of individual knowledge.[11]

v. The evidentiary threshold to prove that the attacks were committed on the basis of national, political, racial, etc. grounds requires a lesser burden than that of the defendant's specific intent, concerning knowledge of the attacks in general and his individual conduct as part of that attack.

Cases from the Nuremberg Tribunals, ICTR, and the Sierra Leone Tribunal demonstrate that a lesser burden is required to prove that attacks against civilians were committed on national, political, or racial grounds.[12] In particular, the ICTR Appellate Chamber accepted the discriminatory intent on the basis of ethnic grounds as indisputable, approaching common knowledge.[13]

vi. A wide variety of evidence is available to prove the intent behind crimes against humanity, including witness testimony (both expert and lay witness),

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[9] *See* Prosecutor v. Stanislav Galic, ICTY-IT-98-29, Judgment and Opinion, December 5, 2003 (discussing the elements of the offense of crimes against humanity) [attached at Tab 17]. The Galic Case provides that "in addition to the intent to commit the underlying crime, the accused must know that there is an attack directed against the civilian population and that the acts performed by him or her are part of that attack." *Galic*, ICTY-IT-98-29.
[10] *See Galic*, ICTY-IT-98-29 [attached at Tab 17]; Prosecutor v. Andre Rwamakuba, ICTR-98-44C-I, Summary of Judgment, September 20, 2006 [attached at Tab 10]; Prosecutor v. Sylvestre Gacumbitsi, ICTR-2001-64-T, Judgment, June 17, 2004 [attached at Tab 18].
[11] *See* The Avalon Project, *supra* note 7 (discussing the use of Nazi documents to demonstrate the individual defendant's alleged intent) [attached at Tab 38].
[12] *See* Patricia M. Wald, *Symposium-Judgment at Nuremberg: Article: Genocide and Crimes Against Humanity*, 6 WASH. U. GLOBAL STUD. L. REV. 621, 630 (2007) (discussing the "common knowledge" of the discriminatory intent of various states' policies) [attached at Tab 41].
[13] *See Id.*

military documents, etc. Such evidence can show the means and methods used in the course of attack, the status of the victims, their numbers, the discriminatory nature of the attack, the command structure of the Khmer Rouge, etc. From these factual findings, ECCC judges can make the necessary inferences to determine the knowledge or mens rea of the accused, as well as the less burdensome discriminatory intent on the basis of political, religious, etc. grounds.

Cases from various tribunals offer examples of the differing types of evidence available to establish the requisite intents needed for the prosecution of crimes against humanity. In particular, the ICTR, which employs the same definition as the ECCC of crimes against humanity, [14] offers examples of evidence that can lead to the inference of the intent or disposition of the individual defendant.[15] Because of difficulties associated with the Cambodian Trials, specifically the elapsed time between the trials and the commission of the atrocities, the ECCC prosecution may need to be creative in the evidence that is offered to prove the requisite intents.

II. FACTUAL BACKGROUND

From April 1975 until January 1979, the Khmer Rouge implemented a violent plan to transform Cambodia into an agrarian, homogenous, and uniform society.[16] The radical transformation of Cambodian society required the "racial, social, ideological, and political purification of the Cambodian nation, through the sociological and physical liquidation of a

[14] *See* Statute of the International Tribunal for Rwanda, adopted by Security Council on November 8, 1994, U.N. Doc. S/RES/955 (1994), *available at* http://www.ictr.org [attached at Tab 7]. Article 3 of the ICTR Statute provides the definition of the offense of crimes against humanity.
[15] *See* Rwamakuba, ICTR-98-44C-I (discussing the evidence necessary to convict the accused of crimes against humanity).
[16] Kathreryn M. Klein, Article: *Bringing the Khmer Rouge to Justice: The Challenges and Risks Facing the Joint Tribunal in Cambodia*, 4 NW. U. J. INT'L HUM. RTS. 549, 549 (2006) [attached at Tab 25].

variety of groups considered to be irremediably tainted by their association with the old social order or otherwise unsuited to the intended new order."[17] During their rule, the Khmer Rouge subjected Cambodian citizens to a purifying revolution,[18] including torture, forced labor, and forced evacuation from urban homes to the countryside.[19] The Khmer Rouge instituted systematic killing, considered necessary to implement the new society.[20] Any individuals that posed political threats were killed, including members within the Khmer Rouge ranks and the educated.[21] Certain racial and ethnic groups were annihilated as well, including the Vietnamese minority, many of the Muslim Cham, and Buddhist monks.[22] By the end of their rule in 1979, between 1.7 and 2 million Cambodians, nearly one-fifth of the Cambodian population, were either murdered or had died of starvation.[23]

Although the Khmer Rouge lost power in 1979, political, economic, and practical reasons[24] have prevented the legitimate trial of Khmer Rouge's leaders until present.[25] This memorandum looks to address many of the issues that face the ECCC as Khmer Rouge leaders face trial for "crimes against humanity," as defined in Article 5 of the ECCC Statute.

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[17] Beth Van Schaak, Note: *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot,* 106 YALE L.J. 2259, 2269 (1997) [attached at Tab 32]; *see also* Brian D. Tittemore, *Khmer Rouge Crimes: The Elusive Search for Justice* (stating that the Khmer Rouge "strove to build a socially and ethnically homogenous society by abolishing all pre-existing economic, social, and cultural institutions, and transforming the population of Cambodia into a collective workforce") [attached at Tab 35].

[18] Bowman, *supra* note 1, at 54.

[19] Klein, *supra* note 16, at 549.

[20] Talitha Gray, Note: *To Keep You is no Gain, to Kill You is no Loss—Securing Justice through the International Criminal Court,* 20 ARIZ. J. INT'L & COMP. LAW 645, 677 (2003) [attached at Tab 24].

[21] *See Id.* at 677.

[22] *Id.*; *see also* Jason Abrams, Symposium: *Universal Jurisdiction: Myths, Realities, and Prospects: The Atrocities in Cambodia and Kosovo: Observations on the Codification of Genocide,* 35 NEW ENG. L. REV. 303, 305-306 (2001) [attached at Tab 37].

[23] Gray, *supra* note 20, at 658; Klein, *supra* note 16, at 549.

[24] *See e.g.,* Bowman, *supra* note 1, at 55-56; Gray, *supra* note 20, at 680-681.

[25] Cambodia did try two of the Khmer Rouge leaders in 1979 and found them guilty in absentia, but the international community has failed to recognize the trials as legitimate. Scott Luftglass, Note: *Crossroads in Cambodia: The United Nation's Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge,* 90 VA. L. REV. 893, 902 (2004) (discussing the "widely regarded as a farcical trial of both Pol Pot and Ieng Sary, the Standing Committee Member and Deputy Prime Minister of Foreign Affairs") [attached at Tab 27].

Many conventions and treaties, state declarations and actions, international tribunal jurisprudence, and various soft law declarations demonstrate the creation of "crimes against humanity" as a customary international law norm by 1975. The Hague Conventions, joint state declarations, Nuremberg Tribunals, and Geneva Conventions all demonstrate the emergence of a customary international law norm recognizing the offense of crimes against humanity, in general, and the specific offenses listed in Article 5, in particular. However, the specific offense of rape under crimes against humanity was less likely recognized as part of customary international law in 1975.[26]

Another issue that is evident to arise within the ECCC is whether the offense of crimes against humanity defined in Article 5 of the ECCC statute requires a nexus to armed conflict. Although the Nuremberg Charter limited crimes against humanity to those acts perpetrated during times of war,[27] there is evidence that crimes against humanity under customary international law in 1975 were applicable in times of war or peace.[28] This issue is very relevant for the Cambodian tribunal, as most of the Khmer Rouge atrocities committed were not related to any international armed conflict but were perpetrated as part of a national homogenous unification plan against civilian Cambodians by their own government.[29] However, the Detention Orders of some ECCC defendants already include allegations or notations to link the alleged commission of crimes against humanity to the conflict between Cambodia and Vietnam from 1975 to 1979. For example, the Provisional Detention Order of Khieu Samphan notes "that there was a state of international armed conflict between Democratic Kampuchea and the

[26] *See* Mitchell, *supra* note 6 (discussing rape as a preemptory norm of jus cogens under current international law while most sources provided as evidence occurred after 1980).
[27] *See* The Avalon Project, *supra* note 7 (discussing the Nuremberg Charter's requirement that the offense of crimes against humanity be related to an armed conflict).
[28] *See* Scharf, *supra* note 8; *see also* Principles of the Nuremberg Tribunal, *supra* note 8.
[29] *See* Klein, *supra* note 16; Van Schaak, *supra* note 17 (characterizing the Khmer Rouge national policy).

Socialist Republic of Vietnam during all or part of the period between 17 April 1975 and 6 January 1979."[30] The detention order in this ECCC case illustrates the concern around whether the offense of crimes against humanity requires a nexus to armed conflict.

Two intent or mens rea requirements emerge from the chapeau of Article 5 for crimes against humanity. The first is the discriminatory intent on racial, political, or ethnic grounds. The evidentiary threshold needed to prove discriminatory intent requires a less stringent standard, especially as a discriminatory, governmental policy becomes well-known and proven.[31] For example, the Nuremberg Tribunals quickly deciphered the state policy of persecution against the Jews and accepted such policy as evidence in all cases of the discriminatory intent against Jews.[32] Furthermore, the Rwandan Appellate Chamber found that the discriminatory intent on ethnic grounds was not disputable, as a state policy to attack Tutsi civilians was evident.[33] Thus, although the prosecutors in the Cambodia Tribunal must initially demonstrate a discriminatory intent on political, religious, and ethnic grounds, it is possible that the discriminatory intent, especially on political grounds, will become accepted knowledge by the court.

The second mens rea element of the Article 5 chapeau is the individual's knowledge of the wider context of an attack against civilians and knowledge that his conduct is part of that attack. Although the individual knowledge requirement was first alluded to in the Nuremberg Tribunals, the ICTY and ICTR cases discuss this knowledge requirement in more detail.[34] The Nuremberg and ICTR cases also provide diverse examples of the types of evidence that allow

[30] Provisional Detention Order of Khieu Samphan, Criminal Case No: 002/14-08-2006, Investigation No.: 002/19-09-2007-ECCC/OCIJ.
[31] *See* Abrams, *supra* note 22.
[32] The Avalon Project, *supra* note 7.
[33] Prosecutor v. Andre Rwamakuba, ICTR-98-44C-I, Summary of Judgment, September 20, 2006 (discussing appellate decision to stipulate that the discriminatory intent of attacks against Tutsi in Rwanda were "notorious facts not subject to reasonable dispute") [attached at Tab 10].
[34] The case in the ICTY of Stanislav Galic spoke in depth about this requirement. Prosecutor v. Stanislav Galic, ICTY-IT-98-29, Judgment and Opinion, December 5, 2003 [attached at Tab 17].

judges to infer the intent of a specific defendant. Equipped with examples from the Nuremberg tribunals, the ICTY, and the ICTR, ECCC prosecutors must be creative in the introduction of evidence to ECCC judges to show the requisite knowledge of the individual defendants. The elapsed time between prosecution and the atrocities, as well as the cloak of secrecy around the Khmer Rouge leadership, [35] create great obstacles for the Cambodian prosecutors to prove the knowledge of individual defendants. However, evidence to demonstrate the requisite level of knowledge by the defendants is possible in the Cambodian context, especially given the large number of documents kept by the Khmer Rouge in specific instances, such as documents from the Tuol Sleng prison.[36]

III. LEGAL DISCUSSION

A. Crimes Against Humanity in Customary International Law

i. Customary International Law

Three basic sources of international law exist: treaties, custom, and general principals of law.[37] International treaties bind all parties to the provision of the treaty.[38] Treaties can also be of a "fundamentally norm-creating character" and, if a rule of custom ensues, can generate rights and duties for third parties who did not sign the treaty itself.[39] General principles of international law are basic, fundamental rules recognized by the international community.[40] General

[35] Luftglass, *supra* note 25, at 899 (discussing the secrecy behind the Khmer Rouge leadership and its potential use to the ECCC defense).
[36] *See* Gray, *supra* note 20, at 679-680 (comparing the meticulous records kept by the Khmer Rouge in relation to the Tuol Sleng prison to those of the Nazis).
[37] Mitchell, *supra* note 6, at 232 (2005); Schieder, *supra* note 4.
[38] Mitchell, *supra* note 12, at 232.
[39] *Id*.
[40] *Id*.

principles often parallel systems of domestic law.[41] Furthermore, they are the lowest source in the hierarchy of sources, serving where neither treaty nor customary international law applies.[42]

Customary law demonstrates a customary rule within the international community, binding all states to it.[43] The international order has a horizontal structure in that sovereign states create the international law and bind themselves to it.[44] As for the relationship between the different sources of international law, treaties take precedence between the parties to the treaty over customary law, while customary law prevails over general principles of law.[45] This hierarchical order between different sources of international law is not strict, as the varying sources are often used to complement or supplement each other.[46] Often the varying sources of international law are used to express a customary norm; such provisions of a treaty can be expressions of a customary norm.[47] Furthermore, the use of treaties to create or express international law has increased, decreasing the need to identify the creation of customary norms in many respects.[48] Treaties often confirm the illegality of actions under customary norms, provide a forum for governments to make public statements in support of a particular norm, or outline implementation procedures for a particular norm.[49] Thus, the distinction between treaty and customary law in the area of humanitarian law has substantially decreased.[50]

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[41] *Id.*
[42] *Id.*
[43] Schieder, *supra* note 4.
[44] *Id.*, at 61.
[45] *Id.*, at 62.
[46] *Id.*
[47] *Id.* at 65.
[48] Kristin Nadasdy Wuerffel, Note: *Discriminating Among Rights?: A Nation's Legislating a Hierarchy of Human Rights in the Context of International Human Rights Customary Law*, 33 Val. U.L. Rev. 369, 384 (1998) [attached at Tab 36].
[49] Van Schaack, *supra* note 17, at 2276.
[50] M. Cherif Bassiouni, Symposium, *The Normative Framework of International Humanitarian law: Operlaps, Gaps, and Ambiguities*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 199 (1998) [attached at Tab 20].

The elements of customary law are state practice and opinio juris, or the conviction that the practice reflects binding legal obligation.[51] Thus, states act or practice the behavior because they understand such behavior to be legally obligated.[52] In examining state practice, the most conclusive evidence of state practice is positive acts by states within the international system,[53] as state practice requires the state to consent to the rule by engaging in "constant and uniform" behavior.[54] However, "customary law does not need clear and unequivocal support by all States…; strong opposition, on the other hand, excludes the formation of new law."[55] Furthermore, although traditionally state practice has *reflected* an international norm, state practice is currently designed to *create* the norm.[56] In the human rights context, many scholars refer to the "paper practice" or words of states, as opposed to deeds of states, to evidence state practice in the creation of a customary international norm.[57] Evidence of state practice in the human rights context includes the incorporation of human rights provisions in domestic law, international organization resolutions, and statements by national leaders.[58] Opinio juris requires the states to act out of a sense of legal obligation.[59] The legal convictions or pronouncements of state organs, and not the population at large, are necessary.[60] Furthermore, violation of the customary norm does not mean that the norm no longer exists, as disappearance or replacement of a customary norm requires international acceptance.[61] Thus, once a customary international

[51] Schieder, *supra* note 4, at 62.
[52] Wuerffel, *supra* note 48, at 379.
[53] Schieder, *supra* note 4, at 62.
[54] Mitchell, *supra* note 6, at 233.
[55] Schieder, *supra* note 4, at 63.
[56] Wuerffel, *supra* note 48, at 386.
[57] *Id*.
[58] *Id*. at 385-386.
[59] Mitchell, *supra* note 6, at 233.
[60] Schieder, *supra* note 4, at 63.
[61] *Id*. at 64.

norm is formed, it is difficult to get rid of it and states, not in a treaty that expresses otherwise, are bound by it.

ii. Crimes Against Humanity

"Crimes against humanity," as a general concept, was part of customary international law in 1975 and thus, binding on Cambodia, precluding treaty obligations to the contrary. Furthermore, with the exception of rape, the offenses listed within Article 5 of the ECCC in defining "crimes against humanity" were recognized offenses of crimes against humanity in 1975, again binding Cambodia. By 1945, with the creation of the Nuremberg Tribunals, accompanied by the Nuremberg Principles, "crimes against humanity" in general were part of customary international law.[62] The inclusion of specific offenses within the Nuremberg Charter's definition of crimes against humanity left only imprisonment, torture, and rape as offenses listed in Article 5's definition outside of codified customary international law.[63] However, both imprisonment and torture were part of customary international law by 1975, leaving rape as the only questionable customary international norm at that time.

The principle of nullum crimen sine lege, or the general principle of law that prohibits the prosecution or assignment of guilt for acts not considered crimes when committed, requires that any crimes listed in the ECCC statute were crimes under international law and domestic law in 1975, the year that the Khmer Rouge began its campaign against the people in Cambodia.[64] Article 5 of the ECCC Statute lists nine offenses that constitute crimes against humanity. Those

[62] *See* Nuremberg Principles, *supra* note 8 (stating that crimes against humanity were part of customary international law during the Nuremberg Tribunal).
[63] *Compare* Agreement for the Prosecution and Punishment of the Major War Criminals for the European Axis, and Charter for the International Military Tribunal, London, 8 August 1945, *available at* www.icrc.org [attached at Tab 1] *with* Article 5 in Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004, U.N. Doc NS/RKM/1004/006 [attached at Tab 4].
[64] *Report of the Group of Experts*, *supra* note 2, at para. 60.

offenses are: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial, and religious grounds; and other inhuman acts.[65] Thus, to establish whether the varying enumerated offenses in Article 5 of the ECCC Statute were part of customary international law in 1975, and thus, binding on Cambodia and the Khmer Rouge leaders, state practice and opinio juris must be examined from the standpoint of 1975.

State practice and opinio juris concerning crimes against humanity, and thus, customary international law, can be discerned from the various conventions, state declarations, international tribunals, and soft law documents or declarations by international organizations, as evidence of states' intention to create a customary international norm.[66] Before 1975 many conventions, including the Hague Conventions, the Geneva Conventions, and the Genocide Convention, had occurred, demonstrating both state practice and opinio juris toward the recognition of a customary international norm denouncing crimes against humanity. Furthermore, the Nuremberg Tribunals suggest strong support and the establishment of opinio juris for the recognition of a customary international norm denouncing crimes against humanity.

a. The Hague Conventions in 1899 and 1907

The concept of crimes against humanity originated with the concept of "crimes against the laws of humanity," a phrase found in the Preamble to the 1907 Hague Conventions.[67] Although the Hague Conventions dealt mainly with crimes of war, many of the convention provisions required the humanitarian treatment of prisoners or the targeting of only military objectives or personnel.[68] Thus, the Conventions evidenced an emerging norm against murder, extermination, and torture.

[65] Article 5 ECCC Statute, *supra* note 63.
[66] Wuerffel, *supra* note 48, at 386.
[67] Bassiouni, *supra* note 50, at 199.
[68] *See Id.* (discussing the various aspects of the Hague Conventions).

b. Joint Declaration in 1915 of France, Great Britain, and Russia

State practice demonstrating a customary international norm regarding crimes against humanity is also evidenced by various declarations of state governments. The term "crimes against humanity" originated as a category of international crimes in the joint declaration of the governments of France, Great Britain, and Russia in 1915.[69] The joint declaration denounced as "crimes against civilization and humanity" the Turkish massacre of more than a million Armenians in Turkey and declared that those responsible would be criminally liable.[70] Thus, even in 1915, states were acting affirmatively to condemn the offense of crimes against humanity, supporting the creation of a customary international norm denouncing crimes against humanity and calling for prosecution of those responsible.

c. The Nuremberg Tribunals in 1945

Crimes against humanity were first codified as criminal offenses in the Charter of the Nuremberg War Crimes Tribunal.[71] Although the Charter initially represented an advance over existing international law at the time of adoption,[72] the Nuremberg Charter based the inclusion of crimes against humanity on the Hague Conventions, practices and experiences in the aftermath of World War I, and the Allied declarations during World War II, calling the Charter an expression of international law that existed at the time of its creation.[73] The International Law Commission of the United Nations (ILC), under the direction of the General Assembly to "formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal" [74] took the expression of international law further

[69] Scharf, *supra* note 8, at 54.
[70] *Id.* at 52.
[71] *Id.*
[72] The Avalon Project, *supra* note 7.
[73] Scharf, *supra* note 8, at 52 (discussing the Nuremberg Charter's legal basis).
[74] Introductory note for the Principles of the Nuremberg Tribunal, *supra* note 8.

by declaring that "crimes against humanity" are "punishable as crimes under international law."[75]

The Nuremberg Tribunals defined crimes against humanity as:

> [M]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal [i.e. war crimes or crimes against peace], whether or not in violation of the domestic law of the country where perpetrated.[76]

The Nuremberg Tribunal definition of crimes against humanity, accompanied by the Nuremberg Principles, demonstrate that the international community in 1945 already recognized "crimes against humanity" as an offense that was contrary to customary international law.[77] Because the specific offenses of murder, extermination, enslavement, deportation, and other inhumane acts, as well as persecutions on political, racial, or religious grounds, were defended as crimes under customary international law in 1945,[78] the inclusion of these offenses within the definition of crimes against humanity under Article 5 of the ECCC statute is accurate, as they were part of customary international law in 1975. Thus, after the Nuremberg Tribunals with the inclusion of the Nuremberg Principles, which made "crimes against humanity" and the specific offenses of murder, extermination, enslavement, deportation, other inhumane acts, and persecutions on political, racial, or religious grounds crimes under customary international law,[79] only the remaining Article 5 offenses of imprisonment, torture, and rape are left outside of customary international law in 1950.

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[75] Principle VI of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, as Adopted by the International Law Commission of the United Nations, 1950, available at: http://deoxy.org/wc-nurem.htm [attached at Tab 5].
[76] Article 6(c) of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and the Charter of the International Military Tribunal, London, 8 August 1945 [attached at Tab 1].
[77] *See* Nuremberg Principles, *supra* note 8 (providing the offense of crimes against humanity was part of customary international law).
[78] *See Id.* (providing the specific offenses listed under the crimes against humanity).
[79] *See Id.*

d. The Universal Declaration of Human Rights in 1948

Although the United Nation's General Assembly resolutions are not binding as soft law, the Universal Declaration of Human Rights (UDHR) was a significant international declaration and thus, lends support to the establishment of a customary international norm denouncing various offenses within crimes against humanity. Because the UN General Assembly represents the community of states, UN General Assembly Resolutions demonstrate state opinion about international law.[80] Furthermore, in 1948, when it was originally adopted, forty-eight of the UN's fifty-six members voted in its favor,[81] evidencing strong state support for the principles included within the declaration. Article 2 of the UDHR entitles all to rights and freedoms "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,"[82] lending support to the customary norm against persecutions on various grounds. Article 4 relates specifically to the denunciation of slavery or servitude,[83] complementing the already established customary norm against enslavement. Article 5 provides additional weight to the creation of a customary international norm against torture.[84] The offense of imprisonment under international customary law is supported by Article 9 of the Universal Declaration of Human Rights which states that "no one shall be subjected to arbitrary arrest, detention or exile."[85] Thus, the UDHR provides

[80] Mitchell, *supra* note 6, at 256.
[81] Wuerffel, *supra* note 48, at 369.
[82] Article 2, Universal Declaration of Human Rights, Adopted and proclaimed by the General Assembly Resolution 217A(III) of 10 December 1948 [attached at Tab 8].
[83] Article 4, Universal Declaration of Human Rights, Adopted and proclaimed by the General Assembly Resolution 217A(III) of 10 December 1948 (stating that "no one shall be held in slavery or servitude…") [attached at Tab 8].
[84] Article 5, Universal Declaration of Human Rights, Adopted and proclaimed by the General Assembly Resolution 217A(III) of 10 December 1948 (stating that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment) [attached at Tab 8].
[85] Article 9, Universal Declaration of Human Rights, Adopted and proclaimed by the General Assembly Resolution 217A(III) of 10 December 1948 [attached at Tab 8].

additional weight for the emergency of a customary international norm against crimes against humanity and the specific offenses of persecution, enslavement, torture, and imprisonment.

e. The 1948 Geneva Conventions

The four Geneva Conventions codified the international rules concerning the treatment of prisoners of war and civilians in occupied territory.[86] Each of the Conventions enumerates specific "grave breaches" or war crimes under international law for which criminal liability exists for anyone who commits such acts.[87] The relevant "grave breaches" under the Geneva Conventions include: willful killings, torture, or inhumane treatment, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer and unlawful confinement of a civilian.[88]

Because the Geneva Conventions are one of the most widely ratified treaties of the world,[89] it is evident that many States acted to create the legal obligation not to perpetrate such grave breaches. The obligation not to perpetrate the specific grave breaches of willful killings, torture, etc. are important, as they directly correlate with the offenses of "crimes against humanity" in Article 5 of the ECCC. Although the enumerated crimes of murder, extermination, and other inhumane acts were already a part of customary international law, the offenses in Article 5 of imprisonment and torture are either directly mentioned or implied within the 1949

[86] Scharf, *supra* note 8, at 41.
[87] *Id*.
[88] Bassiouni, *supra* note 50 (referring to the Articles 50, 51, 130 and 147 of the Geneva conbentions); Scharf, *supra* note 8, at 43 (1997) (referring to Articles 50 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949; Article 51 of the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949; Article 130 of the Geneva Convention Relative to the Treatment of Prisons of War, Aug. 12, 1949; and Article 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949).
[89] Scharf, *supra* note 8, at 43.

Geneva Conventions.[90] The Geneva Conventions' inclusion of imprisonment and torture further develop the elements of these offenses under customary international law via state practice and opinio juris.

f. The Genocide Convention of 1950

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide provided an absolute obligation for treaty parties to prosecute people responsible for the perpetration of genocide.[91] The Genocide Convention defined genocide as any of the following acts when committed "with intent to destroy, in whole or in part, a national, ethnical, racial, or religious groups, as such":

> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.[92]

Although limited in its application by the requirement of intent to destroy a target group and the exclusion of "political groups" as a target group,[93] the Genocide Convention again adds weight to state practice and opinio juris at the time of a customary international norm against the perpetration of specific acts of violence against civilians. Specifically the offenses of murder, extermination, persecutions on racial and religious grounds (political grounds are not included),

[90] *See* Geneva Convention relative to the Protection of Civilian Persons in Time of War, *opened for signature August 12, 1949*, 75 U.N.T.S. 135 (entered into force October 21, 1950) [attached at Tab 2].
[91] Scharf, *supra* note 8, at 44.
[92] *Id.*, at 44-45 (citing Article 4 of the Convention on the Crime of Genocide, 9 Dec. 1948).
[93] *See Id.*

and other inhumane acts in Article 5's definition of crimes against humanity are supported as part of customary international law by the Genocide Convention.[94]

g. The International Covenant on Civil and Political Rights in 1966

The International Covenant on Civil and Political Rights (ICCPR) also provides evidence of a developing customary international norm recognizing various offenses of crimes against humanity before 1975. The ICCPR was originally drafted in 1966.[95] Countries that signed the Covenant defended the fundamental right to life, irrespective of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[96] State parties also declared that no person can be tortured, enslaved, arbitrarily imprisoned, or made to do forced labor.[97] In addition to supplementing the established international customary law norm against several offenses already recognized under Nuremberg, the ICCPR shows continuing state support and practice, along with opinio juris, toward a customary international law norm against imprisonment and torture which are also listed in Article 5 of the ECCC statute, as offenses under crimes against humanity.

h. The 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Finally, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1975 demonstrated a customary international law norm, recognizing torture as a prosecutable crime in international

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[94] It is important to note that the omission of "political groups" from the Genocide Convention has potentially serious consequences for the prosecutors at the ECCC. Due to the omission of "political groups" from the definition of genocide, the killing of approximately one million people in Cambodia by the Khmer Rouge may go unprosecuted under the crime of genocide, as the defendants can argue that because the victims were of the same ethnic group and targeted for political reasons, genocide was not committed. Bassiouni, *supra* note 50; Van Schaack, *supra* note 17, at 2269; Patricia M. Wald, *supra* note 12, at 627.

[95] International Covenant on Civil and Political Rights, New York, 1966, *available at:* http://www.un.org/cyberschoolbus/treaties/civil.asp [attached at Tab 3].

[96] Wuerffel, *supra* note 48, at 379 (citing the ICCPR).

[97] ICCPR, *supra* note 95.

law. The broad definition of torture forced States to include a large number of crimes under law as torture.[98] Although soft law, the Torture Convention was adopted by consensus of the General Assembly, evidencing the emergence of an international customary law norm against the commission of torture.[99] Thus, a survey of state practice and opinio juris before 1975 demonstrates that crimes against humanity were recognized as part of customary international law.

Even if an argument was made that the offenses of crimes against humanity listed in Article 5 were not part of customary international law in 1975, many offenses and crimes committed by the Khmer Rouge could still be prosecuted under Cambodian treaty and domestic law applicable in 1975. Cambodia may be held to some of the offenses as part of treaty law, as Cambodia, even under Khmer Rouge rule, were party to many conventions before 1975. For example, Cambodia ratified all four of the Geneva conventions on December 8, 1958, thus, binding itself to the principles within.[100] Also, Cambodia was a party to the Genocide Convention without reservation since 1951 when the treaty was first entered into force, and the Khmer Rouge never denounced the Convention.[101] Cambodia had signed the 1930 Convention on Forced Labour, which criminalized forced labor.[102] Furthermore, Cambodian national law also provided support to the prosecution of some of the specific offenses mentioned in Article 5's definition of crimes against humanity. The pre-1975 Cambodian criminal law, specifically the 1956 Penal Code, represents the primary domestic law under which the Khmer Rouge would

[98] *See Report of the Group of Experts, supra* note 2, at para. 78 (citing the Torture Convention which defined torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons.")
[99] *Id.*, at para. 78.
[100] *Id.*, at para. 73.
[101] *Id.*, at para. 62.
[102] *Id.*, at para. 77.

be subject in 1975.[103] The most relevant crimes under the 1956 Cambodian Penal Code include: homicide, torture, rape,[104] other physical assaults, arbitrary arrest or detention, attacks on religion, and other abuses of governmental authority.[105] Therefore, even if it was held that some of the offenses of crimes against humanity in Article 5 were not part of customary international law in 1975, ECCC prosecutors may still prosecute similar offenses under Cambodian law from 1975, whether via Cambodian treaty law or domestic law from the 1956 Penal Code.

iii. Rape as a Crime Against Humanity Offense

While much evidence exists to demonstrate that the offenses listed as crimes against humanity in Article 5 of the ECCC statute were part of customary international law in 1975, the offense of rape as a customary international norm is less evident. Rape and other crimes of sexual violence have historically received little attention in international law.[106] The Lieber Instructions of 1863, which codified laws of land warfare during the United States Civil War, specified rape as a capital crime.[107] However, the 1907 Hague Conventions departed from the Lieber Instructions and did not expressly prohibit rape.[108] The Convention instead only requires that "family honour and rights, the lives of persons, and private property… must be respected."[109] The Nuremberg Charter did not mention rape or sexual assault and thus, no one

[103] *Id.*, at para. 84-85.
[104] It is interesting to note that even though rape was unlikely recognized as a crime against humanity in 1975 the Cambodian criminal penal code listed it as a specific crime under Cambodian domestic law. The 1956 Penal Code provides the ECCC prosecutors with an opportunity to prosecute the offense of rape, as a crime under Cambodian domestic law without the need for it to have been recognized as a customary international law norm.
[105] *Report of the Group of Experts, supra* note 2, at para. 86.
[106] Mitchell, *supra* note 6, at 223.
[107] Eileen Meier, Article: *Prosecuting Sexual Violence Crimes During War and Conflict: New Possibilities for Progress,* 10 INT'L LEGAL THEORY 83, 89 (2004) [attached at Tab 28]; Mitchell, *supra* note 6, at 236.
[108] Mitchell, *supra* note 6, at 237.
[109] *Id*.

was prosecuted for such crimes in the trials.[110] Similarly, the Tokyo Charter that prosecuted those in Japan for crimes committed during World War II did not mention rape.[111] However, defendants were prosecuted for rape crimes, but they were ancillary to those for other war crimes.[112] The Control Council Law No. 10 listed rape as a crime against humanity,[113] but no individual was ever prosecuted for rape crimes.[114] The Fourth Geneva Convention prohibits rape in Article 27, but fails to mention rape or sexual assault under "grave breaches."[115] Furthermore, both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights imply the prohibition of rape under "inhuman or degrading treatment," but neither expressly prohibits rape.[116]

After examination of the various Conventions and legal prosecutions by the international community, it is evident that customary international law regarding a prohibition against rape was questionable in 1975. Although some conventions and state practice did denounce rape as a crime, its denouncement was subtle or lacked the specific language or practice to make it a customary international law norm. This is most evident with the prosecution of rape in the Tokyo trials via other war crimes, or the UDHR or ICCPR's lack of the specific language prohibiting rape and sexual violence.[117] Due to the varying applications and language of the conventions and declarations, suggesting a lack of state practices and opinio juris, rape had not defiantly emerged as a customary international norm by the time the Khmer Rouge began its campaign against the citizens of Cambodia. Thus, the offense of rape within Article 5 of the

[110] Meier, *supra* note 107, at 90; Mitchell, *supra* note 6, at 237.
[111] Mitchell, *supra* note 6, at 237-238.
[112] *Id*.
[113] *Id.*, at 238; Wald, *supra* note 12, at 625.
[114] Meier, *supra* note 107, at 89-90.
[115] Mitchell, *supra* note 6, at 238; *see also* Meier, *supra* note 107, at 91-92.
[116] Mitchell, *supra* note 6, at 245; *see* International Covenant on Civil and Political Rights, supra note 95; Universal Declaration of Human Rights, supra note 82.
[117] *See supra* notes 111-116.

ECCC statute was not likely part of customary international law in 1975, and is ripe for appeal by ECCC defendants.

iv. Crimes against humanity and the nexus to armed conflict

One issue that has already arisen concerning the Khmer Rouge leaders' criminal liability for "crimes against humanity" in the ECCC is whether crimes against humanity must be linked to an armed conflict.[118] The definition of crimes against humanity under the Nuremberg Charter left open the question of whether crimes against humanity had to be linked to war to be required by international law or merely by the Nuremberg Charter.[119] The ECCC must address this issue, as defendants will argue that none of the alleged atrocities were committed during an armed conflict, but during political consolidation after a civil war,[120] and thus, they are not guilty of committing "crimes against humanity." The adoption of either a broader or narrower view of the nexus to armed conflict could determine whether many of the actions of the Khmer Rouge constitute crimes against humanity and furthermore, provides precedent on the nexus issue in international law.[121]

Many developments between 1945 and 1975 evidence that crimes against humanity under customary international law extended to atrocities committed during peacetime. The Control Council Law No. 10[122] did not include a linkage to war in its definition of crimes against

[118] The concern of the prosecutors at the ECCC regarding this issue is evident, as a link to armed conflict is mentioned in the Detention Order of various defendants. For example, in the Provisional Detention Order of Khieu Samphan, the Court notes that Samphan's alleged crimes were committed when "there was a state of international armed conflict between Democratic Kampuchea and the Socialist Republic of Vietnam during all or part of the period between 17 April 1975 and 6 January 1979." Provisional Detention Order of Khieu Samphan, No: 002/19-09-2007-ECCC/OCIJ.
[119] Scharf, *supra* note 8, at 53.
[120] Bunyanunda, *supra* note 3, at 1591.
[121] Luftglass, *supra* note 25, at 923.
[122] The Control Council Law No 10 was legislation adopted following the major German war criminals' trials at the Nuremberg Tribunal to provide uniform standards to prosecute lower level criminals.

humanity.[123] Also, the United Nations War Crimes Commission, in its 1948 authoritative report, concluded that individuals could be liable for crimes against humanity committed both during war and peacetime under international law.[124] The Nuremberg Principles suggested that crimes against humanity in general did not require a nexus to war, but retained the limitation for crimes against humanity persecutions.[125] The Genocide Convention in 1948 also dropped any nexus with war for genocide.[126] In 1968, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity implied that crimes against humanity were not limited by a nexus to war.[127] Although the ICTY requires a nexus to armed conflict, the definition of crimes against humanity in both the ICTR and ICC does not require a link to armed conflict.[128] Thus, a strong argument exists to demonstrate that a nexus to armed conflict was not part of customary international law in relation to crimes against humanity in 1975.

B. The Evidentiary Threshold of Discriminatory Intent in Crimes Against Humanity

The chapeau of Article 5 of the ECCC Statute creates elements of discriminatory intent in establishing the commission of crimes against humanity. Article 5 reads in its entirety:

> Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack against any civilian population, on national, political, ethnical, racial, or religious grounds, such as:
> --murder;
> --extermination;

[123] Bunyanunda, *supra* note 3, at 1590; Scharf, *supra* note 8, at 53.
[124] Scharf, *supra* note 8, at 53.
[125] *Id*. Specifically, the International Law Commission's Report on the Nuremberg Principles stated that "the Commission is of the opinion that such crimes [crimes against humanity] may take place also before a war in connexion with crimes against peace." Nuremberg Principles, *supra* note 8.
[126] Wald, *supra* note 12, at 621.
[127] Bunyanunda, *supra* note 3, at 1590; Scharf, *supra* note 8, at 54 (stating that Article 1 says that limitations do not apply to "crimes against humanity whether committed in time of war or in time of peace").
[128] Luftglass, *supra* note 25, at 922.

--enslavement;
--deportation;
--imprisonment;
--torture;
--rape;
--persecutions on political, racial, and religious grounds;
--other inhuman acts.[129]

Thus, the chapeau of Article 5 creates two potential mens rea elements. The first is with respect to the planned attack occurring against civilians on the basis of the victim's nationality, politics, ethnicity, race, or religion. The second is the requisite knowledge of the wider context that there is an attack directed against any civilian population and that his conduct is part of the attack on the civilian population.[130]

The chapeau of Article 5 makes crimes against humanity determinative of a state policy or action.[131] Most of the specific crimes listed within the definition of crimes against humanity under Article 5 of the ECCC statute can occur only as a result of state action or policy carried out by state or non-state actors, i.e. extermination, enslavement, deportation, torture, and persecution.[132] Furthermore, the policy or plan is directed against a group based on specific characteristics of the group or individuals targeted on a "widespread or systematic" basis. Due to the element of state action or policy within the definition of crimes against humanity, it follows that, if a state has developed and attempted to carry out a policy or engaged in acts whose outcomes include crimes against humanity offenses, then those within the government that

[129] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004, U.N. Doc NS/RKM/1004/006 [attached at Tab 4].
[130] This requisite intent is discussed more broadly by the ICTY in the Galic Case. Prosecutor v. Stanislav Galic, ICTY-IT-98-29, Judgment and Opinion, December 5, 2003 [attached at Tab 17]. However, such definition of individual knowledge or intent has become accepted.
[131] The element of state action has been interpreted differently in varying tribunals. While Nuremberg required traditional, affirmative state action, the ICTY and ICTR have required either state action or state inaction in allowing the atrocities to occur, as evidence of state action to prosecute crimes against humanity. Luftglass, *supra* note 25, at 924.
[132] *See* Bassiouni, supra note 50, at 199.

created or intended to carry out the policy could be charged with crimes against humanity or with complicity to commit crimes against humanity.[133] This policy element "is the jurisdictional element that makes 'crimes against humanity' a category of international crimes that distinguishes it from other forms of mass victimization which otherwise are within national criminal jurisdiction."[134]

Evidence of all kinds is necessary to establish any of the allegations against the ECCC defendants. In the Nuremberg Tribunals, the prosecutions against the defendants rested in large measure on Nazi Regime documents of their own making, as several thousands of documents were tendered for evidence.[135] However, thirty-three witnesses gave evidence for the Prosecution, sixty-one witnesses, in addition to nineteen of the individual defendants, gave evidence for the Defense, and thirty-eight thousand affidavits were submitted.[136] The Tokyo Tribunals relied heavily on witness testimony and secondary sources of documentation due to a lack of primary documentation.[137] Both the ICTY and ICTR have relied on both eye-witness and documentary evidence to make the case against the accused.[138] The ICTY, in a case against Stanislav Galic, heard 120 witnesses for the prosecution and 51 for the defense, while receiving over 600 exhibits from each the prosecution and defense before sentencing him to life in prison.[139] In another case, the ICTY heard over 60 witnesses and reviewed close to 1,000

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[133] *See Id*.
[134] *Id*.
[135] The Avalon Project, *supra* note 7; *see also* Kristina D. Rutledge, Comment and Note: *"Spoiling Everything"- But for Whom? Rules of Evidence and International Criminal Proceedings*, 16 REGENT U.L. REV. 151 (2003) (stating that over 300,000 affidavits and meticulous records were the foundation of the prosecutions case in the Nuremberg Tribunals) [attached at Tab 31].
[136] The Avalon Project, *supra* note 7.
[137] Rutledge, *supra* note 135, at 152. The lack of primary documentary evidence in the Tokyo Tribunals was due to the destruction of documents by Japanese officials before surrender. *Id.*
[138] Rutledge, *supra* note 135, at 152.
[139] Prosecutor v. Stanislav Galic, ICTY-IT-98-29, Case Information Sheet, December 5, 2003 [attached at Tab 16].

exhibits before sentencing Milan Martic to 35 years in prison.[140] In addition, the ICTR has relied heavily on propaganda, including radio addresses endorsing the killing of various ethnic groups.[141] Thus, just as different tribunals have used varying methods of evidence, the ECCC must use a wide variety of evidence to prove the specific mens rea of the individual defendants charged with the offense of crimes against humanity.

i. Planned attack against civilians on national, political, ethnical, racial, or religious grounds

The discriminatory intent standard outlined in Article 5 of the ECCC statute is much less than the "intent" needed to establish genocide.[142] While genocide requires the intent to destroy in whole or in part an enumerated group, crimes against humanity merely require that the state policy or attack against civilians be on a basis of racial, religious, political, etc. grounds.[143] The definition of crimes against humanity also includes a broader protected group and range of acts that qualify for prosecution than genocide.[144]

Evidence of the discriminatory basis is proven by examination of the status of victims and their numbers, as well as by examining the state policy or plan itself along with official statements or records, or the words and actions of those committing the atrocities via witness testimony. Hate speech was ruled to show discriminatory intent in a media case at the ICTR.[145] The existence of a state plan or policy has also been used to demonstrate the discriminatory intent on the basis of ethnical and religious grounds during the Nuremberg Tribunals.[146]

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[140] Prosecutor v. Milan Martic, ICTY-IT-95-11, Case Information Sheet and Judgment, June 12, 2007 [attached at Tab 14].
[141] Rutledge, *supra* note 135, at 152.
[142] *Cf.* Abrams, supra note 22, at 303.
[143] Wald, supra note 12.
[144] *Id*, at 630.
[145] *See Id.* (discussing the media case and use of hate speech to show the discriminatory intent necessary to prove persecution as a crime against humanity under the ICTR statute).
[146] *See* The Avalon Project, *supra* note 7.

As official pronouncements of intent to carry out a policy against civilians are not always available or link all potential perpetrators, circumstantial evidence, such as the scale of the atrocities or the status of the victims, are needed to show the requisite intent.[147] In the Nuremberg trials, the Nazi Party had formulated and documented a policy of persecution against Jews. The anti-Jewish policy was outlined in Point 4 of the Party Programme, which declared that only those of German blood were members of the race and thus, citizens, while "no Jew can be a member of the race."[148] The programme limited the political and social rights of the Jews in Germany.[149] Speeches and public declarations of the Nazi leaders, as well as publications, portrayed Jews in a negative light or ridiculed them.[150] Also, throughout the Nazi leadership, discriminatory laws or restrictions were placed against the Jews.[151] The creation of pogroms and ghettos, as well as an order of the Security Policy which required Jews to wear a yellow star, added further evidence to the policy or plan directed against Jews.[152] The "final solution" of the Jews was made evident via original reports and Nazi declarations. Furthermore, testimony from officials within the Nazi party demonstrated the state policy of discrimination and extermination of Jews.[153] The Nuremberg Tribunal heard evidence from Hoess, the Commandant of Auschwitz from 1940 to 1943, that the camp saw the extermination of 2,500,000 people, with another 500,000 dying from disease and starvation.[154] The Nazi documents, speeches, and witness testimony of Nazi officials and victims demonstrated the discriminatory intent or persecution of the Jews by evidencing a state policy directed against them.

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[147] Abrams, *supra* note 22, at 309.
[148] The Avalon Project, *Persecution of the Jews*, *supra* note 7.
[149] *See Id*.
[150] *Id*.
[151] *See Id*.
[152] *See Id*.
[153] *Id*.
[154] *Id*.

Rwandan Tribunal trials also provide examples of the different types of evidence that is used to demonstrate the discriminatory intent on the basis of national, political, ethnic, racial or religious grounds. The Rwandan Tribunal employs the same definition of crimes against humanity as the ECCC,[155] and thus, can demonstrate how to prove the specific crimes with the requisite discriminatory intent, as they are described in either Article 3 of the ICTY statute or Article 5 of the ECCC statute. In regards to the discriminatory intent in Rwanda, the Appellate Chamber held "that genocide against Tutsi and widespread or systematic attacks against a civilian population *based on Tutsi ethnic identification* occurred in Rwanda…are notorious facts not subject to reasonable dispute."[156] Therefore, the discriminatory intent on ethnic, racial, political, etc. grounds is often common knowledge or accepted as undisputable.

ii. Knowledge of the policy or plan and that conduct is part of the planned attack on civilians

The state policy element of crimes against humanity under the chapeau of Article 5 of the ECCC Statute extends one step further, as it requires that the government official facing charges of crimes against humanity have knowledge of the policy or plan and knowledge that his conduct is part of the policy or plan. Since government officials or leaders can be held responsible for the state policy, it is necessary to show that they had knowledge of the policy and took actions in either implementing the policy or allowing the policy to progress.

Although the perpetrator must be shown to have knowledge of the wider context of the attack and that his own acts are part of the widespread or systematic attack, he need not have the

[155] Statute of the International Tribunal for Rwanda, *Article 3: Crimes Against Humanity*, adopted by Security Council on November 8, 1994, U.N. Doc. S/RES/955 (1994), *available at* http://www.ictr.org [attached at Tab 7].
[156] Prosecutor v. Andre Rwamakuba, ICTR-98-44C-I, Summary of Judgment, September 20, 2006 (emphasis added) [attached at Tab 10].

same intent as the actual participants in the attacks.[157] Furthermore, the existence of a state policy, as part of a widespread and systematic attack, is often stipulated, proven by "expert" evidence, or referenced by testimony.[158] A recent Appellate Court decision regarding the atrocities in Rwanda found that the existence of a widespread and systematic was a "notorious fact not subject to reasonable debate."[159] In situations like the Balkans and Sierra Leone, where an ongoing conflict is almost always accompanied by a pattern of civilian abuse, the widespread and systematic attack on civilians qualifies as "common knowledge."[160] Thus, the leadership position of varying defendants is potential evidence of knowledge. For example, Goering was prosecuted and found guilty of all crimes in the Nuremberg Tribunals. As Commander-in Chief of the Luftwaffe, Plenipotentiary for the Four Year Plan, and his tremendous influence with Hitler, Goering was the most prominent man in the Nazi Regime after Hitler.[161] Goering's own admissions that Hitler kept him informed of all military and political problems, as well as documents written by him in his position of Plenipotentiary or anti-Jewish decrees signed by him, were sufficient to prove his position in the Nazi Regime, and his knowledge of the policies or plans to use foreign civilians in slave labor and persecutions of the Jews.[162]

Leadership positions are also relevant in demonstrating knowledge, even when the leader exercised little direct authority over policy or police matters, as complaints are often registered with party leaders. M. De Vabras, or "Frick," was the chief Nazi administrative specialist and bureaucrat, appointed Reichminister of the Interior in Hitler's cabinet.[163] Although control of concentration camps and execution of orders for protective custody fell under jurisdiction of the

[157] Wald, *supra* note 12, at 630.
[158] *Id*.
[159] *Id.* at 630 (citing Prosecutor v. Karemera, Case No. ICTR-98-44-AR73(c), Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision (Dec. 19, 2003)).
[160] *Id*.
[161] The Avalon Project, *supra* note 7.
[162] The Avalon Project, *Goering, supra* note 7.
[163] The Avalon Project, *M. De Vabras, supra* note 7.

Reichminister, Frick argued that since he exercised little direct control over police matters that he had no knowledge of the atrocities committed in the concentration camps.[164] However, he received complaints from various lower level Nazis about the atrocities in the camp. Thus, the Tribunal concluded, based on the complaints and witness testimony, that he knew of the atrocities committed and continued to sign decrees authorizing "special measures" to continue.[165]

The ICTY also presents examples of how leadership positions demonstrate the knowledge of the individual defendant. In determining that Stanislav Galic had knowledge of the plan to attack civilians during the siege on Sarajevo and his actions as part of the attack, the court heard evidence that demonstrated that Galic, as commander of the Sarajevo-Romanija Corps (SRK), not only had control of the troops below him, but that he had control over the pace and scale of the attacks themselves.[166] Testimony and documentary evidence showed that Galic had received complaints about the attacks on civilians from his troops, and he had the ability to punish those who went against his orders or violated military discipline.[167] However, Galic very rarely, if ever, disciplined any of his troops for violations.[168] Thus, his position of commander and decisions not to address complaints of civilian attacks helped demonstrate his guilt. Furthermore, witness testimony pointed to a reduction in the frequency of attacks after pressure was put on Galic to have them stopped,[169] and that an increase in shelling and sniping occurred when demands from the Serb military authorities were not met.[170] Therefore, not only did Galic

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[164] *Id*.
[165] *Id*. Similarly, the Tribunal also found that his position within the Nazi Regime provided him with knowledge of the policies of occupation in Europe and therefore, by accepting the office of Reich Protector he assumed responsibility for carrying out those policies. *Id.*
[166] Prosecutor v. Stanislav Galic, ICTY-IT-98-29, Case Information Sheet, December 5, 2003 [attached at Tab 16].
[167] *Galic*, Case Info, ICTY-IT-98-29.
[168] *Galic*, Judgment and Opinion, ICTY-IT-98-29 [attached at Tab 17].
[169] *Galic*, Case Info, ICTY-IT-98-29.
[170] *Galic*, Judgment and Opinion, ICTY-IT-98-29.

have control via his position, his decisions to continue the attacks were evident and portray his knowledge of his own actions in the plan to attack civilians.

The Rwanda Tribunal also regarded political activities or a leadership position as relevant in determining guilt. In the case of Andre Rwamakuba, the Tribunal stated that any factual allegations related to political activities or role as a member of ruling party or as Minister of the Interim Government provided context or background from which to infer the defendant's intent or disposition.[171] However, despite the ease with which the discriminatory intent on ethnic grounds was established, the Tribunal found that the Prosecution failed to prove the allegations against the defendant, as hearsay evidence and inconsistent witness testimony discredited the prosecution's case.[172]

In another Rwandan Tribunal case against Sylvestre Gacumbitsi, the defendant was found guilty of crimes against humanity for extermination and rape.[173] In the case against the defendant for extermination of Tutsis, the Chamber heard much witness testimony to determine that the accused knew of the widespread and systematic attack against a civilian population as he planned and led certain operations.[174] The Chambers reached this legal conclusion as witness testimony demonstrated that the defendant had participated in preparatory meetings with local officials to launch an attack against the Tutsi, incited local officials to single out and kill Tutsi, delivered and distributed boxes of weapons in different locations, and accompanied the communal police and drove around in communal vehicles to ensure that his instructions were followed.[175]

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[171] Prosecutor v. Andre Rwamakuba, ICTR-98-44C-I, Summary of Judgment, September 20, 2006 [attached at Tab 10].
[172] *Rwamakuba,* ICTR-98-44C-I.
[173] Prosecutor v. Sylvestre Gacumbitsi, ICTR-2001-64-T, Judgment, June 17, 2004 [attached at Tab 18].
[174] *Gacumbitsi*, ICTR-2001-64-T.
[175] *See Gacumbitsi*, *Crimes Against Humanity – Extermination*, ICTR-2001-64-T. The types of evidence used in the Gacumbitsi case are visible in other ICTR cases. For example, the ICTY case involving Emmanuel Ndindabahizi

In regards to the rape conviction of Gacumbitsi, for similar reasons as stated in the above paragraph, the Chamber found that the defendant knew of the widespread and systematic attack against the Tutsi civilian population. Furthermore, the Chamber found that the chose of victims based on their Tutsi ethnic origin or relationship with a person of Tutsi ethnic origin demonstrated the discriminatory intent on ethnic grounds.[176] Also, utterances by the defendant that sticks should be stuck into the Tutsi women's and girls' genitals if they resisted, as recounted by eyewitness testimony, demonstrated the defendant's instigation of the rape of Tutsi women and girls since immediately after he made such utterances to instigate the rapes, eight Tutsi women and girls were raped by men within earshot of the defendant's instigation.[177]

It is important to note that the Chamber found that the defendant's governmental position did not, per se, place him in a position of superiority over all other officials in the area.[178] However, he was found to have the specific responsibility for the maintenance of law and order in the region.[179] These factual findings are important, as they demonstrate that the Rwandan Tribunal still required specific knowledge of the individual defendant despite a top governmental leadership position. Such a position can only be used as a contextual or background fact to infer intent or disposition of an individual. However, in another ICTR case, the court did note that the defendant's position as Minister of Government lent considerable authority to his words or incitements to violence.[180] Thus, his incitements to kill or rape Tutsis were potentially heeded with greater strength because of his high leadership position. Therefore, although a

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included the distribution of machetes and incitement to violent through witness testimony. Prosecutor v. Emmanuel Ndindabahizi, ICTR-01-71-T, Summary of Judgment.

[176] *See Gacumbitsi, Crimes Against Humanity – Rape,* ICTR-2001-64-T.

[177] *Gacumbitsi, Crimes Against Humanity – Rape,* ICTR-2001-64-T.

[178] *See Gacumbitsi, Factual Findings,* ICTR-2001-64-T.

[179] *See Gacumbitsi, Factual Findings,* ICTR-2001-64-T.

[180] Prosecutor v. Emmanuel Ndindabahizi, ICTR-01-71-T, Summary of Judgment [attached at Tab 11].

governmental leadership position provides background or context to infer knowledge, a high level position is not per se evidence of an individual defendant's guilt.

iii. Evidentiary Threshold for Discriminatory Intent and Knowledge in Cambodia

Many of the atrocities committed by the Khmer Rouge against the Cambodian population are crimes against humanity under the Article 5 ECCC statute definition. The question remains as to how, or if, the prosecution can prove the criminal liability of the individuals charged within the Cambodian context.

The Group of Experts, a three-member group, was sent to Cambodia in 1999 on a fact finding mission by the UN.[181] The group was asked to evaluate existing evidence to determine the nature of crimes committed by the Khmer Rouge, assess feasibility of apprehending and detaining Khmer Rouge leaders, and to determine the options for trying Khmer Rouge leaders before an international or national tribunal.[182] The Group of Experts determined that the Khmer Rouge leaders had committed crimes under international and Cambodian law, including crimes against humanity.[183]

Luckily for the prosecution in the ECCC, the Khmer Rouge, like the Nazis, kept meticulous records.[184] The Documentation Center of Cambodia has collected in excess of 600,000 pages of Khmer Rouge documents.[185] These documents are vital to the prosecution of those charged with crimes against humanity before the ECCC.

[181] Bowman, *supra* note 1, at 57; *Report of the Group of Experts*, *supra* note 2.
[182] Tittemore, *supra* note 17.
[183] *Id.* (stating that the Group of Experts found that, "in particular forced labor, torture, and crimes against internationally protected persons" had been committed).
[184] Gray, supra note 20, at 679-680; Luftglass, *supra* note 25, at 901.
[185] Gray, *supra* note 20, at 679-680.

Although it must initially be proven in the ECCC Tribunal, the discriminatory intent of the Khmer Rouge leaders in an attack on the civilian population on political grounds may become undisputed. Due to the extensive evidence of a state policy of attack on political grounds, its acceptance is likely to become common knowledge or at least more accepted, like the intent on ethnic grounds in Rwanda. However, the discriminatory intent on ethnic or religious grounds is likely to continue to prove more difficult and less accepted.

Proving the discriminatory intent of a widespread or systematic attack against civilians on national, political, ethnical, racial or religious grounds is possible in the context of Cambodia. In implementing the "Year Zero" policy, the discriminatory intent on the basis of political grounds is evident. Anyone that posed a possible threat to the goal of creating a new society was killed, even members of its own ranks.[186] Tuol Sleng, or S-21 as it was also known, was a school turned prison and interrogation center and acted as one of the central torture and extermination centers for the Khmer Rouge.[187] Documents obtained from Tuol Sleng show that all entering "prisoners" were numbered, photographed, and forced to sign confessions before being killed.[188] The confessions signed by prisoners show they were targeted for political reasons.[189] Interrogation manuals instructing guards on the use of torture were also found at Tuol Sleng.[190] Between 16,000 and 20,000 prisoners were interrogated and executed at Tuol Sleng.[191] Furthermore, the documents portray a state policy of widespread and systematic attack against civilians. Not only were political enemies of the state brought to the prison, but Tuol Sleng's large size and location in the capital city demonstrate the central government's creation and

[186] Klein, supra note 16, at 553.
[187] Gray, *supra* note 20, at 680.
[188] *Id.*
[189] Bunyanunda, *supra* note 3, at 1594.
[190] Gray, *supra* note 20, at 680.
[191] Bunyanunda, *supra* note 3, at 1594. Only seven prisoners survived Tuol Sleng. *Id.*

knowledge of the political prison.[192] Thus, the documents found at Tuol Sleng present a compelling case of crimes against humanity based on political grounds by the Khmer Rouge in Cambodia.

Further evidence of state action and knowledge of the actions taking place at Tuol Sleng by the various Khmer Rouge leadership is evident with the subsequent admissions of certain Khmer Rouge leaders. Statements by Kang Kek Ieu, alias Duch, link the highest members of the Khmer Rouge to the political killings at Tuol Sleng.[193] Duch served as the chief of the national security apparatus during the Khmer Rouge rule and was the on-site supervisor at Tuol Sleng.[194] While hiding in Cambodian jungles after the demise of the Khmer Rouge, a western journalist interviewed Duch about the role of top Khmer Rouge leaders and their knowledge of the acts at Tuol Sleng.[195] Duch's testimony clarifies the role of key figures in ordering the interrogations, torture, and executions at Tuol Sleng. He identified three individuals responsible for the orders: Pol Pot, Nuon Chea, and Ta Mok, and said that Khieu Samphan knew of the killings.[196] Duch further said that Ieng Sary knew little of the internal workings of Cambodia because he worked outside of Cambodia, as the foreign minister.[197] After his interview, Duch was arrested among U.N. fears for his safety. Thus, he is available to testify in upcoming trials against the Khmer Rouge leaders and their roles in the acts at Tuol Sleng. Of course his credibility and motives are likely to be called into question because of his role at Tuol Sleng.[198] However, witnesses, including Duch, in combination with Khmer Rouge documents, are likely to provide the

[192] *Id*. at 1594.
[193] *Id.* at 1598.
[194] *Id.* at 1598-1599.
[195] *Id*. at 1599.
[196] *Id*. Both Nuon Chea, Ta Mok, and Khieu Samphan currently await trial with the ECCC.
[197] *Id.* at 1599.
[198] *Id*.

evidence necessary to demonstrate a state policy of attacks against civilians on political grounds and specific individuals' knowledge of the policy.

Evidence to demonstrate discriminatory intent on the basis of ethnic or religious grounds also exists, although arguably to a lesser extent. The policy of the Khmer Rouge to create a purely Khmer nation at "Year Zero" is evident. Khmer Rouge decrees "banning" all minorities, or requiring the extermination or forced assimilation of all non-Khmer ethnic groups[199] begins to demonstrate the existence of a state policy with a discriminatory intent on the basis of ethnicity and religion. Although evidence to establish a genocidal intent to destroy in whole or in part various ethnic and religious groups is difficult in the Cambodian context, the lesser intent required by crimes against humanity makes it more likely. The Khmer Rouge had the goal of exterminating any group that was inconsistent with their vision for a pure Khmer nation.[200] The Muslim Chams, Vietnamese, Chinese, and Thai communities faced ethnical discrimination, forced assimilation, and death.[201] As part of Khmer Rouge's effort to eliminate the influence of religion, the Khmer Rouge drove Buddhist priests and monks from their religious practice and into the working fields, killing any who resisted.[202] Public statements, efforts to destroy the distinctive traits of the various ethnic and religious groups, and the number of dead from those groups provide evidence of the intent to commit crimes against humanity on ethnic and religious grounds.[203]

The knowledge requirement in the Cambodia context may be more difficult to prove than the discriminatory intent on political, ethnic, or religious grounds. One reason for the difficulty

[199] Van Schaack, *supra* note 17, at 2270.
[200] Abrams, *supra* note 22, at 305.
[201] *Id.* at 305-306.
[202] *Id.* at 306.
[203] *See Id.*

is that a fundamental principles underlying Pol Pot's regime was secrecy.[204] The Khmer Rouge leadership, or the Standing Committee, evidenced distrust for outsiders and did not issue official orders.[205] Even the identities of the Standing Committee or Khmer Rouge leaders were cloaked in secrecy.[206] However, over the years, the Khmer Rouge leadership structure has been pieced together, identifying the leading officials and their positions and responsibilities.[207] Furthermore, a report from the War Crimes Research Office (WCRO) at American University has concluded that archival documents from Cambodia demonstrate the knowledge of former Khmer Rouge leaders, despite their public statements of ignorance to the remote site political killings in Cambodia.[208]

Cambodia also faces difficulties unique to its situation. Because the atrocities took place over 25 years ago, many of the responsible parties and witnesses are dead.[209] Furthermore, memories of the surviving witnesses have faded over the years, decreasing credibility of witness testimony.[210] Finding credible witnesses to establish the links of causation and intent or knowledge by the Khmer Rouge leaders may be difficult, as many of those still alive with incriminating evidence may themselves by prosecutable for crimes, reducing their likelihood to come forward.[211] Also, many documents have been either destroyed or lost over the years.[212] Thus, the ECCC prosecutors must be creative in presenting evidence to the tribunal. Evidence of a plan, policy or campaign against civilians on political, religious, or ethnical grounds can be

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[204] Luftglass, *supra* note 25, at 899. The supposed secrecy of the Khmer Rouge is likely to be used a s a defense by those prosecuted in the ECCC. For example, Khieu Samphan has already declared that the secrecy of the Khmer Rouge has kept him from any knowledge of the acts of others, as he was not a member of the Standing Committee. Provisional Detention Order of Khieu Samphan, No: 002/19-09-2007-ECCC/OCIJ [attached at Tab 19].
[205] Luftglass, *supra* note 25, at 899.
[206] Bunyanunda, *supra* note 3, at 1582.
[207] *Id*. at 1586.
[208] *Id.* at 1592-1593.
[209] Bowman, supra note 1, at 52.
[210] *Id*.
[211] Bunyanunda, *supra* note 3, at 1609.
[212] *Id*.

shown by examining the frequency, intensity, and geographical spread of attacks. Military orders, political documents, statements, or speeches by commanders can also demonstrate the discriminatory intent of the attacks. As for proving the knowledge of individual defendants of the wider context of the plan and their role in the plan, evidence to show knowledge of the crimes committed by subordinates can be used. The chain of command, control over military lower ranks, and reports via complaints by soldiers of attack or military follow through, all evidenced by testimony or military orders either written or oral, can demonstrate knowledge of crimes committed by subordinates. A commander's response to the knowledge of the attacks against civilians can also help demonstrate knowledge that his acts are part of the plan or policy. Whether a commander punishes disorderly soldiers, the types of punishment, or the failure to prevent further crimes can support a finding that a leader knew that his actions were part of the plan or policy. All of this evidence is necessary to prove the intent or mens rea elements of crimes against humanity, as defined in Article 5 of the ECCC statute.

IV. CONCLUSION

This memorandum examined two issues related to crimes against humanity, as defined in Article 5 of the ECCC Statute. The first issue is whether the offenses in Article 5's definition of crimes against humanity were part of international customary law in 1975. The second is what evidentiary threshold and types of evidence are required to demonstrate the discriminatory intent for crimes against humanity in the chapeau of Article 5.

All of the offenses under Article 5's definition of crimes against humanity, with the exception of rape, were part of international customary law and applicable to Cambodia in 1975. The Hague Conventions, state declarations, Nuremberg Tribunals, Geneva Conventions, and the

Universal Declaration of Human Rights occurred before 1975 and evidenced the formation of a customary international norm recognizing crimes against humanity as a punishable offense under customary international law. Thus, as customary international norms are binding on all states,[213] Cambodia was bound by the norm establishing crimes against humanity as a punishable offense. The offense of rape is less likely to be considered a crime under customary international law in 1975, as rape and sexual assault were largely unmentioned in international law until the Yugoslavian and Rwandan Tribunals in the 1990s.[214] Finally, in relation to crimes against humanity and customary international law in 1975, crimes against humanity did not include a nexus to armed conflict under customary international law even in 1975. The Nuremberg Principles, Control Council Law No. 10, and various soft law declarations demonstrate that even by 1975 such a nexus to armed conflict for crimes against humanity was not applicable in customary international law.[215]

The second issue relating to Article 5 of the ECCC Statute is what evidentiary threshold and types of evidence are available to establish the requisite discriminatory intent for the listed offenses of crimes against humanity. Both the discriminatory intent based on political, religious, and ethical grounds and the individual's knowledge of the wider context of civilian attacks and of his role in the attacks for prosecution of leaders are elements of crimes against humanity, as defined in Article 5. The evidentiary threshold to prove that the attacks were committed on the basis of national, political, racial, etc. grounds requires a lesser burden than that of the defendant's specific intent, as the discriminatory, governmental policy against civilians becomes well-known and proven.[216] Furthermore, a wide variety of evidence is available to prove the

[213] Schieder, *supra* note 4.
[214] Mitchell, *supra* note 6, at 223.
[215] *See* text accompanying *supra* notes 122-128.
[216] *See* text accompanying *supra* notes 157-160.

intent behind crimes against humanity, including witness testimony (both expert and lay witness), military documents, etc.[217] This evidence can show the means and methods used in the course of attack, the status of the victims, their numbers, the discriminatory nature of the attack, the command structure of the Khmer Rouge, etc. From these factual findings, ECCC judges are able to make the necessary inferences in determining the knowledge or mens rea of the accused, as well as the lesser burdensome discriminatory intent on the basis of political, religious, etc. grounds. However, due to the particular difficulties faced by the ECCC prosecutors, specifically the elapsed time between the committed atrocities and prosecution and the cloak of secrecy around the Khmer Rouge leadership,[218] Cambodian prosecutors must be creative in the presentation of evidence to the ECCC Tribunal. The existence of Khmer Rouge documents and witness testimony, such as Duch's,[219] can provide the prosecution with the evidence needed to demonstrate the individual knowledge and thus, liability of the defendants.

[217] This is especially true, as the Khmer Rouge created and retained significant documentation during the regime, especially in relation to the Tuol Sleng prison. *See* Gray, *supra* note 20, at 679-680.
[218] Bunyanunda, *supra* note 3, at 1582; Luftglass, *supra* note 25, at 899.
[219] *See* text accompanying *supra* notes 193-198.