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## Were the Offenses Described in Article 5 of the ECCC Statute Part of the Customary International Law in 1975? and What is the Evidentiary Threshold of the Discriminatory Intent for Crimes Against Humanity Described in the Chapeau of Article 5 of the ECCC Statute?

Geoffrey M. Dureska

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CASE WESTERN RESERVE UNIVERSITY  
SCHOOL OF LAW

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MEMORANDUM FOR THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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ISSUE: WERE THE OFFENSES DESCRIBED IN ARTICLE 5 OF THE ECCC STATUTE PART OF THE  
CUSTOMARY INTERNATIONAL LAW IN 1975?

and

WHAT IS THE EVIDENTIARY THRESHOLD OF THE DISCRIMINATORY INTENT FOR CRIMES AGAINST  
HUMANITY DESCRIBED IN THE CHAPEAU OF ARTICLE 5 OF THE ECCC STATUTE?

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Spring Semester, 2008**

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## **I. INTRODUCTION**

### **A. Scope<sup>1</sup>**

This memorandum focuses on two aspects of crimes against humanity in Article 5 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (the “ECCC Statute”): The status of the enumerated offenses as customary international law in 1975, and the evidentiary threshold of discriminatory intent for the chapeau of Article 5. The analysis begins with a historical look at the evolution of crimes against humanity from the 1907 Hague Convention through Nuremberg. The analysis uses the Charters of the International Military Tribunal (“IMT”) and the International Military Tribunal for the Far East (“IMTFE”) as well as other international documents to prove the enumerated offenses were part of customary international law in 1975.

To establish the evidentiary threshold of the discriminatory intent for the enumerated offenses, the analysis looks to the treatment of discriminatory intent in customary international law. Then, the analysis likens the ECCC Statute to close relatives such as the Statute of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the Statute of the International Criminal Tribunal for Rwanda (“ICTR”). The analysis concludes that there is no evidentiary threshold for discriminatory intent because discriminatory intent is a jurisdictional limitation to crimes against humanity, and that the proper mechanism for dealing with the jurisdictional limitation is through judicial notice.

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<sup>1</sup> Issue: Were the offences described in Article 5 of the ECCC Statute part of the customary international law in 1975? Alternatively, were they applicable in Cambodia in 1975? What is the evidentiary threshold of the discriminatory intent for Crimes Against Humanity described in the chapeau of Article 5 of the ECCC Statute?

B. **Summary of Conclusions**

1. **The offenses described in Article 5 of the ECCC Statute were part of customary international law in 1975 because:**

i. **There was a general articulation of crimes against humanity before the Nuremberg codification.**

The general offense of crimes against humanity was first articulated in the 1907 Hague Convention. This offense was reiterated in the 1919 Report of the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties for Violations of the Laws and Customs of War, and while left out of the 1919 Treaty of Versailles, it was included in the 1920 Treaty of Sèvres. The combination of these instruments shows a general articulation of crimes against humanity prior to Nuremberg.

ii. **The offenses of murder; extermination; enslavement; deportation; persecutions on political, racial, and religious grounds; and other inhumane acts were codified and recognized prior to 1975.**

The first codification of the enumerated offenses (excepting imprisonment, rape, and torture) was the prosecution of the major war criminals under Article 6(c) of the Charter of the IMT and Article 5(c) of the Charter IMTFE. Additionally the offenses were codified in Allied Control Council Law No. 10 (“CCL No. 10”), the Bangladesh Act No. XIX of 1973, and the 1954 United Nations Draft Code of Offenses Against the Peace and Security of Mankind.

iii. **The offenses of imprisonment; rape; and torture were codified and recognized prior to 1975.**

These offenses were explicitly enumerated in CCL No. 10 and Bangladesh Act No. XIX of 1973. Implicitly, the offenses were recognized under the ‘other inhumane acts’ provision of Article 6(c) of IMT Charter and Article 5(c) of the IMTFE Charter. Also, there was a prohibition of these crimes in the laws of many of the world’s countries in 1944, as well as several U.N.

resolutions prior to 1975 against torture, such as United Nations General Assembly Resolution 3059 (XXVIII) of 2 Nov. 1973, United Nations General Assembly Resolution 3218 (XXIX) of 6 Nov. 1974, and General Assembly Resolution 2200A (XXI) of 16 December 1966.

**iv. The historical connection between crimes against humanity and armed conflict ceased by 1975.**

Article 5 of the ECCC Statute omits armed conflict as a requirement for crimes against humanity. While Article 6(c) of the IMT and 5(c) of the IMTFE Charters required a connection to war, CCL No. 10, which ended its prosecutions by 1955, and Bangladesh Act No. XIX of 1973 did not require armed conflict for crimes against humanity. Although Article 5(c) of the ICTY Statute did include armed conflict, the commentary of the ICTY Appeals Chamber in *Tadić* and ICTY Trial Chamber in *Kupreškić*, and Article 3 of the ICTR Statute, suggest that the nexus between armed conflict and crimes against humanity was not required by customary international law in 1975.

**2. Discriminatory intent is not an element of all crimes against humanity (excepting persecution-type offenses), rather it is a jurisdictional limitation, and therefore has no evidentiary threshold.**

There was no requirement of discriminatory intent in the prosecution of criminals under 6(c) of the IMT Charter, 5(c) of the IMTFE Charter, or CCL No. 10 for non-persecution type offenses. The ICTY and ICTR, by using CCL No. 10, the IMT and IMTFE Charters as their legal basis for enactment, endorse this view. For persecution-type offenses, the evidentiary threshold is “beyond a reasonable doubt.”

3. **Discriminatory intent in the ECCC Statute should be handled by judicial notice.**

Although the ECCC internal rules do not contain an explicit judicial notice provision, Article 12(1) of the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea and ECCC Articles 20, 23, and 33 permit either the Co-Prosecutors, Co-Investigating Judges or the Chambers to look at international procedural rules for guidance. The ICTR, having a similar discriminatory intent limitation in its statute for crimes against humanity, used a judicial notice provision to satisfy jurisdiction. Since the ICTR and ECCC statutes are similar, and the ECCC Internal Rules permit consultation with international procedural rules, the ECCC should use judicial notice to handle discriminatory intent.

## II. **FACTUAL BACKGROUND**

### A. **Prior to Nuremberg**

The 1907 Hague Convention Preamble originated the term “crimes against humanity”<sup>2</sup>:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the *laws of humanity*, and the dictates of the public conscience.<sup>3</sup> (Emphasis added)

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<sup>2</sup> M. Cherif Bassiouni, *Crimes Against Humanity*, available at <http://www.crimesofwar.org/thebook/crimes-against-humanity.htm> (M. Cherif Bassiouni is a leading academic on Crimes Against Humanity, President of the International Human Rights Law Institute at DePaul University, and Professor of Law at DePaul University) [reproduced in accompanying notebook at Tab 38].

<sup>3</sup> The Hague Convention IV, 18 October 1907, available at <http://net.lib.byu.edu/~rdh7/wwi/hague/hague5.html> [reproduced in accompanying notebook at Tab 10].

But crimes against humanity were not described as a category of international crime until the 1915 denunciation of the Ottoman massacre of the Armenians in Turkey (by France, Great Britain, and Russia).<sup>4</sup> This category was, however, included in the 1919 Report of the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties for Violations of the Laws and Customs of War, yet it was left out of the 1919 Treaty of Versailles.<sup>5</sup> Still, the 1920 Treaty of Sèvres between the Allies and Turkey permitted punishment of those who committed “crimes against humanity.”<sup>6</sup> This treaty, however, was never ratified and was replaced with the 1923 Treaty of Lausanne, which was silent on the punishment of crimes against humanity.<sup>7</sup> Despite the silence, M. Cherif Bassiouni argues that crimes against humanity were at that time already recognized as an international crime, even if the actors responsible for the Armenian massacre went unpunished.<sup>8</sup> Caroline Fournet agrees with Bassiouni on the recognition, arguing that the Treaty of Sèvres was “clear proof that states condemned [] crimes against humanity and that there existed some general principles applicable to all states.”<sup>9</sup>

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<sup>4</sup> M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* (Kluwer Academic Publishers, 1992) at 168 [reproduced in accompanying notebook at Tab 34].

<sup>5</sup> *Id.* at 169.

<sup>6</sup> *Id.* at 175.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> CAROLINE FOURNET, *INTERNATIONAL CRIMES: THEORIES, PRACTICE AND EVOLUTION* (Cameron May, 2006) at 30 (Dr. Caroline Fournet is a lecturer at Exeter University’s School of Law) [reproduced in accompanying notebook at Tab 31].

B. **Nuremberg**

Crimes against humanity lacked definition as category of crime until the codification of Article 6(c) of the IMT Charter pursuant to the London Agreement of 8 August 1945.<sup>10</sup> This codification was the first time that the prohibition of crimes against humanity was positively stated in international law.<sup>11,12</sup> They were also codified in Article II(c) of CCL No. 10 which was enacted pursuant to both the London Agreement and the October 1943 Moscow Conference.<sup>13</sup> Although the tribunals conducting trials pursuant to CCL No. 10 were not “international in their composition,” CCL No. 10 was international law.<sup>14</sup> Crimes against humanity were also codified in Article 5(c) of the IMTFE Charter. But, after the IMT, IMTFE, and CCL No. 10, there were no other significant changes in the codification of crimes against humanity for a long time. By 1955, the trials under CCL No. 10 had ended, and there was a period of silence until 1992,

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<sup>10</sup> See Bassiouni, *supra* note 2 [reproduced in accompanying notebook at Tab 38].

<sup>11</sup> *Id.*

<sup>12</sup> GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW (T·M·C·Asser Press, 2005) at 216 (Gerhard Werle is a Professor of German and International Criminal Law at Humboldt-Universität zu Berlin) [reproduced in accompanying notebook at Tab 32].

<sup>13</sup> The Moscow Conference, October 1943, *available at* <http://www.yale.edu/lawweb/avalon/wwii/moscow.htm> [reproduced in accompanying notebook at Tab 13].

<sup>14</sup> RICHARD MAY, INTERNATIONAL CRIMINAL EVIDENCE (Transnational Publishers, 2002) at 5 [reproduced in accompanying notebook at Tab 36].

except for a few national prosecutions of World War II crimes.<sup>15</sup> There were “[n]o trials before international criminal courts [] held subsequent to the Nuremberg trials until the early 1990s.”<sup>16</sup>

### III. LEGAL DISCUSSION

#### A. The Offenses Described in Article 5 of the ECCC Statute were Part of Customary International Law in 1975

##### 1. Murder; Extermination; Enslavement; Deportation; Persecutions on Political, Racial, and Religious Grounds; and Other Inhumane Acts

Article 5 of the ECCC Statute reads:

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed crimes against humanity during the period 17 April 1975 to 6 January 1979.

Crimes Against Humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as:

- murder;
- extermination;
- enslavement;
- deportation;
- imprisonment;
- torture;
- rape;
- persecutions on political, racial, and religious grounds;
- other inhumane acts.<sup>17</sup>

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<sup>15</sup> M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11 (1997) at 10 [reproduced in accompanying notebook at Tab 39].

<sup>16</sup> WERLE, *supra* note, at 218 [reproduced in accompanying notebook at Tab 32].

<sup>17</sup> LAW ON THE ESTABLISHMENT OF EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA, Article 5, available at <http://www.eccc.gov.kh/english/law.list.aspx> [hereinafter LAW ON THE ESTABLISHMENT OF EXTRAORDINARY CHAMBERS] [reproduced in accompanying notebook at Tab 12].

Except for imprisonment, torture, and rape, every offense here enumerated is present in

Article 6(c) of the IMT Charter:

CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated.<sup>18</sup>

Similarly, the same offenses are present in Article 5(c) of the IMTFE Charter, but with a minor variation in that persecutions are listed in the disjunctive and racial grounds are removed<sup>19</sup>:

*Crimes against Humanity*: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds.<sup>20</sup>

The same offenses are also enumerated in the 1954 International Law Commission Draft Code of Offenses:

Inhumane acts such as murder, extermination, enslavement, deportation or persecutions, 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.<sup>21</sup>

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<sup>18</sup> CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, Article 6(c), 8 August 1945 [reproduced in accompanying notebook at Tab 5].

<sup>19</sup> FOURNET, *supra* note 9, at 33 [reproduced in accompanying notebook at Tab 31].

<sup>20</sup> CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, Article 5(c), 19 January 1946, available at <http://www.yale.edu/lawweb/avalon/imtfec.htm> [reproduced in accompanying notebook at Tab 6].

<sup>21</sup> 1954 DRAFT CODE OF OFFENSES AGAINST THE PEACE AND SECURITY OF MANKIND, available at [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7\\_3\\_1954.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_3_1954.pdf) [reproduced in accompanying notebook at Tab 1].



Although, this draft code was intended to be a codification of the international law principles at Nuremberg,<sup>22</sup> it has never been definitively accepted by the U.N. General Assembly or by any state.<sup>23</sup> The reason the 1954 Draft Code was never definitively accepted, however, does not appear to stem from a disagreement about the definition of crimes against humanity, but because the crime of aggression was undefined.<sup>24</sup> Allied Control Council Law No. 10 also contains all of the enumerated offenses, but, as in Article 5(c) of the IMTFE Charter, the persecutions are listed in the disjunctive:

**Crimes against Humanity.** Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.<sup>25</sup>

Despite the minor difference, CCL No. 10 was patterned after Article 6(c) of the IMT Charter.<sup>26</sup>

After CCL No. 10, there was one other formulation of crimes against humanity prior to 1975.<sup>27</sup>

This was Bangladesh Act No. XIX of 1973, which prohibited:

Crimes against Humanity: namely, murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhumane acts committed against any civilian population or persecutions on

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<sup>22</sup> Bassiouni, *supra* note 15, at 14 [reproduced in accompanying notebook at Tab 39].

<sup>23</sup> M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW VOLUME I CRIMES (Transnational Publishers, Inc. 1986) at 85 [reproduced in accompanying notebook at Tab 35].

<sup>24</sup> Bassiouni, *supra* note 15, at 15 [reproduced in accompanying notebook at Tab 39].

<sup>25</sup> ALLIED CONTROL COUNCIL LAW No. 10: PUNISHMENT OF PERSONS GUILTY OF WAR CRIMES, CRIMES AGAINST PEACE AND AGAINST HUMANITY, Article II(c), 20 December 1945 [reproduced in accompanying notebook at Tab 3].

<sup>26</sup> Bassiouni, *supra* note 15, at 7 [reproduced in accompanying notebook at Tab 39].

<sup>27</sup> BASSIOUNI, *supra* note 4, at 228 [reproduced in accompanying notebook at Tab 34].

political, racial, ethnic or religious grounds, whether or not in violation of the domestic law of the country where perpetrated.<sup>28</sup>

The Bangladesh Act contained all of the enumerated offenses found in Article 5 of the ECCC Statute. Bassiouni points out that the language of the Bangladesh Act, like that of CCL No. 10, follows the language of Article 6(c) of the IMT Charter.<sup>29</sup>

If the enumerated offenses in Article 5 of the ECCC Statute are prohibited by customary international law under Article 6(c) of the IMT Charter, Article 5(c) of the IMTFE Charter, CCL No. 10, and the Bangladesh Act No. XIX of 1973, then prohibition of those offenses was customary international law in 1975. This is because the IMT charter, IMTFE charter, CCL No. 10, and the Bangladesh Act all existed before 1975. The offenses of murder, extermination, enslavement, deportation, other inhumane acts, and persecutions on political, racial, or religious grounds appear as enumerated offenses of Article 6(c) of the IMT Charter and 5(c) of the IMTFE Charter (sans “religious grounds”). CCL No. 10, patterned after the IMT charter, also includes the offenses. Furthermore, Bangladesh Act No. XIX of 1973, an agreement not enacted pursuant to the London Agreement but arguably patterned after Article 6(c) of the IMT Charter language, includes all of the offenses.

## **2. Imprisonment; Rape; and Torture**

Imprisonment, rape, and torture, while not explicitly mentioned in Article 6(c) of the IMT charter, implicitly fall under ‘other inhumane acts.’<sup>30</sup> Explicitly, imprisonment, rape, and torture

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<sup>28</sup> Bangladesh Act No. XIX of 1973, available at <http://www.icrc.org/ihl-nat.nsf/0/8F90915528D9B814C125727900353282> [reproduced in accompanying notebook at Tab 4].

<sup>29</sup> BASSIOUNI, *supra* note 4, at 229 [reproduced in accompanying notebook at Tab 34].

<sup>30</sup> FOURNET, *supra* note 9, at 32 [reproduced in accompanying notebook at Tab 31].

were included in Article II(c) of CCL No. 10,<sup>31</sup> and Bangladesh Act No. XIX of 1973.<sup>32</sup> Even though imprisonment, rape, and torture were not explicitly defined in Article 6(c) of the IMT charter, Bassiouni argues that ‘other inhumane acts’ from the charter could include rape or imprisonment (as forcible confinement).<sup>33</sup> Fournet agrees with Bassiouni that rape and imprisonment “were supposedly included in the expression ‘other inhumane acts.’”<sup>34</sup>

As for torture, it was banned under the 1899 and 1907 Hague Conventions and in the Geneva Conventions of 1949.<sup>35</sup> Torture made another appearance in the 1966 International Covenant on Civil and Political Rights:<sup>36</sup> “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”<sup>37</sup> It was also the subject of General Assembly Resolutions 3059<sup>38</sup> and 3218.<sup>39</sup> Bassiouni also, in a survey of the 1944 laws of the

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<sup>31</sup> ALLIED CONTROL COUNCIL LAW No. 10: PUNISHMENT OF PERSONS GUILTY OF WAR CRIMES, CRIMES AGAINST PEACE AND AGAINST HUMANITY, Article II(c), 20 December 1945 [reproduced in accompanying notebook at Tab 3].

<sup>32</sup> Bangladesh Act No. XIX of 1973, available at <http://www.icrc.org/ihl-nat.nsf/0/8F90915528D9B814C125727900353282> [reproduced in accompanying notebook at Tab 4].

<sup>33</sup> BASSIOUNI, *supra* note 4, at 282 [reproduced in accompanying notebook at Tab 34].

<sup>34</sup> FOURNET, *supra* note 9, at 32 [reproduced in accompanying notebook at Tab 31].

<sup>35</sup> BASSIOUNI, *supra* note 4, at 323 [reproduced in accompanying notebook at Tab 34].

<sup>36</sup> *Id.* at 324.

<sup>37</sup> G.A. Res. 2200A, Art. 7, U.N. GAOR, 21<sup>st</sup> Sess. (Dec. 16, 1966), available at [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm) [reproduced in accompanying notebook at Tab 7].

<sup>38</sup> G.A. Res. 3059, U.N. GAOR, 28<sup>th</sup> Sess. (Nov. 2, 1973) (rejection of torture) [reproduced in accompanying notebook at Tab 8].

world's countries, found that 39 of 74 countries existing in 1944 had laws against either torture, or torture subsumed under crimes against physical integrity such as assault/battery.<sup>40</sup> France - significant because Cambodia was under French rule until 1953 - had a law against torture.<sup>41</sup>

Article 5 of the ECCC Statute includes imprisonment, rape, and torture – three offenses not banned in 6(c) of the IMT Charter. One could argue that because the offenses are missing from Article 6(c) of the IMT Charter that they were not customary international law in 1975. But, this argument cannot be sustained because the offenses are explicitly banned in CCL No. 10 and Bangladesh Act No. XIX of 1973. Furthermore, since those two documents are patterned after the language of Article 6(c) of the IMT Charter, it follows that rape, imprisonment, and torture are somehow included in the language of Article 6(c) of the IMT Charter. The most likely operative section, as suggested by Fournet<sup>42</sup> and Bassiouni<sup>43</sup>, is the 'other inhumane acts' provision. Torture has even more support as an offense against customary international law because of its pedigree of being banned: the 1899 and 1907 Hague Conventions, 1949 Geneva Convention, and U.N. Resolutions.

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<sup>39</sup> G.A. Res. 3218, U.N. GAOR, 29<sup>th</sup> Sess. (Nov. 6, 1974) (reaffirming rejection of torture) [reproduced in accompanying notebook at Tab 9].

<sup>40</sup> BASSIOUNI, *supra* note 4, at 285-286 [reproduced in accompanying notebook at Tab 34].

<sup>41</sup> *Id.*

<sup>42</sup> FOURNET, *supra* note 9, at 32 [reproduced in accompanying notebook at Tab 31].

<sup>43</sup> BASSIOUNI, *supra* note 4, at 282 [reproduced in accompanying notebook at Tab 34].

### 3. Crimes Against Humanity and Armed Conflict

Article 5 of the ECCC statute does not contain a requirement that crimes against humanity be committed in connection with armed conflict.<sup>44</sup> Historically, the IMT and IMTFE Charters included the requirement that crimes against humanity be committed in connection with war.<sup>45, 46, 47</sup> But, Bassiouni argues that the connection with war was merely to “strengthen [the] legality [of crimes against humanity] by connecting it to the more established notion of war crimes.”<sup>48</sup> Crimes against humanity under CCL No. 10 dropped the link between the offense and armed conflict.<sup>49</sup>

The ICTY Appeals Chamber in *Tadić* commented on the status of the connection with armed conflict: “It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict . . . customary international law may not require a connection between crimes against humanity and any conflict at all.”<sup>50</sup> Although Article 5 of the ICTY Statute requires the enumerated acts be committed during armed

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<sup>44</sup> See LAW ON THE ESTABLISHMENT OF EXTRAORDINARY CHAMBERS, Article 5 [reproduced in accompanying notebook at Tab 12].

<sup>45</sup> BASSIOUNI, *supra* note 4, at 191 [reproduced in accompanying notebook at Tab 34].

<sup>46</sup> See CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, Article 6(c), 8 August 1945 [reproduced in accompanying notebook at Tab 5].

<sup>47</sup> See CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, Article 5(c), 19 January 1946, available at <http://www.yale.edu/lawweb/avalon/imtfech.htm> [reproduced in accompanying notebook at Tab 6].

<sup>48</sup> *Id.* at 186.

<sup>49</sup> The Prosecutor v. Dusko Tadić, IT-94-1, Judgment of 7 May 1997 (Trial Chamber) at ¶627 [reproduced in accompanying notebook at Tab 29].

<sup>50</sup> The Prosecutor v. Dusko Tadić, IT-94-1, Decision of 2 October 1995 (Appeals Chamber) at ¶141 [reproduced in accompanying notebook at Tab 28].

conflict, “customary international law no longer requires any nexus between crimes against humanity and armed conflict” and the statutory armed conflict requirement was merely “reintroduced [] for the purposes of [the ICTY].”<sup>51</sup> The Trial Chamber in *Tadić* also noted that the crimes against humanity provision in the ICTR Statute did not require armed conflict.<sup>52</sup>

The omission of armed conflict in the ICTR Statute, combined with the finding of the ICTY Appeals Chamber that there is no armed conflict requirement, suggests that customary international law does not require armed conflict as an element of crimes against humanity. Although crimes against humanity were originally an outgrowth of war crimes and required a connection to war under the IMT and IMTFE Charters<sup>53</sup>, CCL No. 10 severed the connection. But if the ICTY and ICTR Statutes are codifications of customary international law in regard to crimes against humanity, the difference in opinion on the requirement of armed conflict is curious. The ICTY Appeals Chamber in *Tadić*, however, cleared up any confusion when it stated that crimes against humanity no longer require a nexus with armed conflict. The ICTY Trial Chamber in *Kupreškić* suggested the armed conflict requirement resulted in a definition of crimes against humanity “more narrow[] than is necessary under customary international law.”<sup>54</sup> If the Trial Chamber in *Kupreškić* believed the armed conflict requirement made the ICTY Statute’s definition of crimes against humanity too narrow and the Appeals Chamber in *Tadić* felt that crimes against humanity did not need an armed conflict, then it seems that the ICTY

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<sup>51</sup> *Id.* at ¶78.

<sup>52</sup> The Prosecutor v. Dusko Tadić, IT-94-1, Judgment of 7 May 1997 (Trial Chamber) at ¶627 [reproduced in accompanying notebook at Tab 29].

<sup>53</sup> See Bassiouni, *supra* note 15, at 6 [reproduced in accompanying notebook at Tab 39].

<sup>54</sup> The Prosecutor v. Kupreškić et al., IT-95-16-T, Judgment of 14 January 2000 (Trial Chamber) at ¶545 [reproduced in accompanying notebook at Tab 25].

endorses the ICTR Statute's definition of crimes against humanity to the extent that it does not require armed conflict. Since there were no prosecuted formulations of crimes against humanity from CCL No. 10, until the ICTY and ICTR, then the Statutes of the ICTY and ICTR and interpretations of those statutes about the status of customary international law are valid interpretations of customary international law in 1975. Therefore, because the ICTR Statute's omission of armed conflict is a valid statement of customary international law in 1975 with regard to crimes against humanity, the ECCC statute, which also omits armed conflict, is also a valid statement of customary international law in 1975.

**B. Discriminatory Intent as a Jurisdictional Limitation for Crimes Against Humanity (Except Persecution-type Offenses)**

**1. Non-Persecution-type Offenses**

“[T]he legal basis for the inclusion of crimes against humanity in the [ICTY and ICTR] was the Nuremberg Charter, Judgment of the Nuremberg Tribunal, and the CCL No. 10 for Germany.”<sup>55</sup> The “ICTY and ICTR Statutes . . . follow[] the Second World War war crimes trials.”<sup>56</sup> The IMT Charter, IMTFE Charter, and CCL No. 10 required discriminatory intent only for persecution-type crimes against humanity.<sup>57</sup> True to Nuremberg, the ICTY Statute requires discriminatory intent only for persecution-type crimes under Article 3(h), but the ICTR Statute

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<sup>55</sup> YUSUF AKSAR, IMPLEMENTING INTERNATIONAL HUMANITARIAN LAW: FROM THE *AD HOC* TRIBUNALS TO A PERMANENT INTERNATIONAL CRIMINAL COURT (Routledge 2004) at 241 (Dr. Yusuf Aksar is an Assistant Professor of Public International Law at Karadeniz Technical University) [reproduced in accompanying notebook at Tab 37].

<sup>56</sup> *Id.* at 244.

<sup>57</sup> *Id.* at 251-252.

requires it for all crimes against humanity.<sup>58</sup> However, despite the differences in the text of the ICTY and the ICTR Statutes, the differences “are not expressions of uncertainty about the scope of the crime; [but] explained by the situational nature of the statutes.”<sup>59</sup>

Article 2 of the Statute of the Special Court for Sierra Leone (“SCSL”) also addresses crimes against humanity.<sup>60</sup> Like the ICTY Statute, Article 2 of the SCSL Statute does not explicitly require that a “widespread or systematic attack against any civilian population” be committed on discriminatory grounds: “The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population.”<sup>61</sup> The omission of discriminatory grounds in Article 2 of the SCSL Statute might be considered a definitive choice by the United Nations on the proper scope of crimes against humanity because it was enacted subsequent to the ICTY and ICTR, but the fact that the SCSL Statute was agreed upon after ICTY and ICTR Statutes suggests that it might not be as reliable of an indicator of the status of customary international law in 1975 as the ICTY and ICTR Statutes are.

Despite the fact that the ICTY Statute requires discriminatory intent only for persecution-type crimes, the Report of the Secretary-General suggested otherwise.<sup>62</sup> This report, combined

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<sup>58</sup> *Id.* at 251.

<sup>59</sup> WERLE, *supra* note 12, at 219 [reproduced in accompanying notebook at Tab 32].

<sup>60</sup> STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE, Article 2, available at <http://www.sc-sl.org/Documents/scsl-statute.html> [reproduced in accompanying notebook at Tab 17].

<sup>61</sup> *Id.*

<sup>62</sup> AKSAR, *supra* note 52, at 252 (From Footnote 69: “The Report of the Secretary-General defines crimes against humanity as ‘. . . inhumane acts of a very serious nature, such as willful killing, torture or rape, committed as part of a widespread or systematic attack against any



with the interpretation of Article 5 by Security Council States (discriminatory intent is applicable to all crimes against humanity), was persuasive to the Trial Chamber in *Tadić*.<sup>63</sup> However, the Trial Chamber did note “that it was departing from customary law, which did not require such intent.”<sup>64</sup> Yasuf Aksar suggests that the approach of the ICTY Trial Chamber in this case can be criticized because it was required to apply customary international law instead of the Security Council States’ interpretation or the Report of the Secretary-General.<sup>65</sup> Instead, the Trial Chamber should have followed the customary international law as codified in the IMT and IMTFE Charters, CCL No. 10, and I.L.C. Draft Code which did not require discriminatory intent for all crimes against humanity.<sup>66</sup>

The *Tadić* requirement of discriminatory intent was followed in the ICTR Trial Chamber of the *Akayesu* case, holding “[t]he perpetrator must have the requisite intent for the commission of crimes against humanity.”<sup>67</sup> The evidentiary threshold applied by the ICTR for discriminatory intent was “beyond a reasonable doubt”: “The Chamber finds beyond a reasonable doubt that . . . the only reason they were killed is because they were Tutsi.”<sup>68</sup>

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civilian population on national, political, ethnic, racial or religious grounds.”) [reproduced in accompanying notebook at Tab 37].

<sup>63</sup> The Prosecutor v. Dusko Tadić, IT-94-1, Judgment of 7 May 1997 (Trial Chamber) at ¶652. [reproduced in accompanying notebook at Tab 29].

<sup>64</sup> FOURNET, *supra* note 9, at 54 [reproduced in accompanying notebook at Tab 31].

<sup>65</sup> AKSAR, *supra* note 52, at 252 [reproduced in accompanying notebook at Tab 37].

<sup>66</sup> The Prosecutor v. Dusko Tadić, IT-94-1, Judgment of 7 May 1997 (Trial Chamber) at ¶651, ¶652 [reproduced in accompanying notebook at Tab 29].

<sup>67</sup> The Prosecutor v. Jean-Paul Akayesu, ICTR-96-4, Decision 2 September 1998 at ¶¶583-584 [reproduced in accompanying notebook at Tab 18].

<sup>68</sup> *Id.* at ¶649, ¶658, ¶664, ¶667, ¶740.

The holding of the *Tadić* Trial Chamber, requiring discriminatory intent for all crimes against humanity, however, did not stand the test of time when it was appealed. The *Tadić* Appeals Chamber reversed the holding on four grounds.<sup>69</sup> First, with respect to statutory interpretation, the ordinary meaning of the ICTY Statute reveals that discriminatory intent does not apply to all crimes against humanity.<sup>70</sup> Also, a requirement of discriminatory intent would be “illogical and superfluous” in light of the persecutions crime.<sup>71</sup> Interestingly, the Appeals Chamber opined that if the discriminatory intent element was required, as suggested by the Report of the Secretary-General, “the deportation of the urban educated of Cambodia under the Khmer Rouge between 1975-1979 . . . would not fall under the ambit of crimes against humanity.”<sup>72</sup> Second, the requirement was inconsistent with customary international law.<sup>73</sup> Article 6(c) of the IMT Charter required discriminatory intent only for persecution-type offenses; “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population” did not require it.<sup>74</sup> CCL No. 10 and the Charter of the IMTFE had similar language.<sup>75</sup> Also, that there have been few national prosecutions requiring discriminatory

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<sup>69</sup> The Prosecutor v. Dusko Tadić, IT-94-1, Judgment of 15 July 1999 (Appeals Chamber) at ¶¶281-305 [reproduced in accompanying notebook at Tab 30].

<sup>70</sup> *Id.* at ¶283.

<sup>71</sup> *Id.* at ¶284.

<sup>72</sup> *Id.* at ¶285.

<sup>73</sup> *Id.* at ¶288.

<sup>74</sup> *Id.* at ¶289.

<sup>75</sup> *Id.*

intent.<sup>76</sup> Third, the Secretary-General's report lacked sufficient legal weight because it is not binding, and does not have the same authority as the ICTY Statute.<sup>77</sup> The report was also inconsistent with customary international law.<sup>78</sup> Lastly, the statements of Russia, France, and the United States were not "context" to be consulted because they were not part of any "agreement" on the statute.<sup>79</sup>

The *Tadić* Appeals Chamber was followed in the ICTY decisions of *Kupreškić*,<sup>80</sup> *Blaškić*,<sup>81</sup> and *Kordić and Čerkez*.<sup>82</sup> The ICTR Appeals Chamber in *Akayesu* agreed that discriminatory intent was not an element of all crimes against humanity. It noted that under ICTR Statute, the tribunal is given jurisdiction over crimes against humanity as known in

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<sup>76</sup> *Id.* at ¶290.

<sup>77</sup> *Id.* at ¶295.

<sup>78</sup> *Id.* at ¶296.

<sup>79</sup> *Id.* at ¶300.

<sup>80</sup> The Prosecutor v. Kupreškić et al., IT-95-16-T, Judgment of 14 January 2000 (Trial Chamber) at ¶558 ("Subsequent to the Appeals Chamber's decision in *Prosecutor v. Tadić*, crimes against humanity need be committed with a discriminatory intent only with regard to the category of 'persecutions'") [reproduced in accompanying notebook at Tab 25].

<sup>81</sup> The Prosecutor v. Blaškić, IT-95-14-T, Judgment of 3 March 2000 (Trial Chamber) at ¶260 ("It ensues from the *Tadić* Appeal Judgement that for a widespread or systematic attack and the resultant crimes – murder, extermination, enslavement, deportation, imprisonment, torture, rape or other inhumane acts with the exception of persecution – to be characterised as crimes against humanity they need not have been perpetrated with the deliberate intent to cause injury to a civilian population on the basis of specific characteristics") [reproduced in accompanying notebook at Tab 20].

<sup>82</sup> The Prosecutor v. Kordić and Čerkez, IT-95-14/2-T, Judgment of 26 February 2001 (Trial Chamber) at ¶186 ("It rejected the view that to constitute a crime against humanity all relevant acts or omissions must be undertaken by the perpetrator on discriminatory grounds") [reproduced in accompanying notebook at Tab 24].

customary international law, subject to a further jurisdictional limitation.<sup>83</sup> The limitation of attacks on “certain discriminatory grounds” does not add a new substantive legal requirement for crimes against humanity.<sup>84</sup> The Trial Chamber in *Kajajeli* cited *Akayesu* and agreed:

Article 3 of the Statute provides that the attack against the civilian population be committed on “national, political, ethnical, racial or religious grounds”. This provision is jurisdictional in nature, limiting the jurisdiction of the Tribunal to a narrower category of Crimes, and not intended to alter the definition of Crimes Against Humanity in International Law.<sup>85</sup>

So, while there was once a “difference in interpretation between the ICTY and the ICTR as to . . . discriminatory intent [] for all crimes against humanity . . . the ICTY and later the ICTR decided that discriminatory intent applied only to persecution, not to the other listed crimes against humanity.”<sup>86</sup> The effect can be seen in the *Ntakirutimana* case wherein the court explicitly said discriminatory intent did not have to be proved beyond a reasonable doubt: “[t]he Accused need not have any discriminatory intent.”<sup>87</sup> The ICTR statutory requirement that “all crimes against humanity be committed ‘on national, political, ethnic, racial or religious

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<sup>83</sup> The Prosecutor v. Jean-Paul Akayesu, ICTR-96-4, Judgment of 1 June 2001 (Appeals Chamber) at ¶465 [reproduced in accompanying notebook at Tab 19].

<sup>84</sup> *Id.* at ¶466.

<sup>85</sup> The Prosecutor v. Juvénal Kajelijeli, ICTR-98-44A-T, Judgment of 1 December 2003 (Trial Chamber) at ¶877 [reproduced in accompanying notebook at Tab 22].

<sup>86</sup> Patricia M. Wald, *Genocide and Crimes Against Humanity*, available at [http://law.wustl.edu/WUGSLR/Issues/Volume6\\_3/wald.pdf](http://law.wustl.edu/WUGSLR/Issues/Volume6_3/wald.pdf) at 629 (Judge Wald was a Judge for the International Criminal Tribunal for the Former Yugoslavia from 1999-2001) [reproduced in accompanying notebook at Tab 40].

<sup>87</sup> The Prosecutor v. Elizaphan and Gérard Ntakirutimana, ICTR-96-10 & ICTR-96-17-T, Judgment of 21 February 2003 at ¶812, ¶816 [reproduced in accompanying notebook at Tab 21].

grounds” is not a “requirement that limits the definition of the crime, but [is] a means of restricting the Tribunal’s jurisdiction.”<sup>88</sup>

Yet, some advocate that discriminatory intent should be an element of all crimes against humanity and not only of persecution crimes. Larry May argues for the additional discriminatory intent element because he believes without it, there is not a “sufficient[] link [between] the collective activity [and] the individual actor’s behavior in order to justify prosecution.”<sup>89</sup> May suggested the Court in *R. v. Finta* recognized discriminatory intent as an element of crimes against humanity:<sup>90</sup> “[c]rimes against humanity [have] the additional element [] that the inhumane acts were based on discrimination against or the persecution of an identifiable group of people.”<sup>91, 92</sup> But, May does not include the later finding that “knowledge on the part of the accused is strictly irrelevant to his individual culpability.”<sup>93</sup> Instead of recognizing discriminatory intent as a substantive element of crimes against humanity, as May suggested, *Finta* seemed to suggest that discriminatory intent was a matter of jurisdiction.<sup>94</sup>

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<sup>88</sup> WERLE, *supra* note 12, at 219 [reproduced in accompanying notebook at Tab 32].

<sup>89</sup> LARRY MAY, *CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT* (Cambridge University Press 2005) at 137 (Larry May is a Professor of Philosophy at Washington University in St. Louis) [reproduced in accompanying notebook at Tab 33].

<sup>90</sup> *Id.* at 126.

<sup>91</sup> *Id.* at 126.

<sup>92</sup> *R. v. Finta*, [1994] 1 S.C.R. 701 at ¶76 (*R. v. Finta* was a Canadian prosecution of Imre Finta, a captain in the Royal Hungarian Gendarmerie, for war crimes and crimes against humanity committed during World War II) [reproduced in accompanying notebook at Tab 27].

<sup>93</sup> *Id.* at ¶296 (“To forcibly confine or kidnap 8,167 people is equally blameworthy whether [the accused] knew or did not know that they were Jews.”).

<sup>94</sup> *See Id.* at ¶¶296-299.

Since the legal basis for crimes against humanity in the ICTY and ICTR was the Nuremberg Charter, Judgment of the Nuremberg Tribunal, and CCL No. 10, and the differences between ICTY and ICTR are not differences in the scope of the crime, then it follows that the ICTY and ICTR Statutes embody their principles. If the language of Article 5 of the ECCC Statute resembles the language of either ICTR or the ICTY, then the language of Article 5 of the ECCC Statute should be interpreted similarly because of the resemblance. Article 5 of the ECCC Statute states:

Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds[.]<sup>95</sup>

Article 3 of the ICTR Statute bears a striking resemblance to ECCC Article 5 because both require the attack to occur on national, political, ethnic, racial or religious grounds:

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[.]<sup>96</sup>

Article 5 of the ICTY Statute does not bear so close a resemblance:

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[.]<sup>97</sup>

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<sup>95</sup> LAW ON THE ESTABLISHMENT OF EXTRAORDINARY CHAMBERS, Article 5 [reproduced in accompanying notebook at Tab 12].

<sup>96</sup> STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, Article 3, *available at* <http://69.94.11.53/default.htm> [reproduced in accompanying notebook at Tab 15].

<sup>97</sup> STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL OF YUGOSLAVIA, Article 5, *available at* <http://www.un.org/icty/legaldoc-e/index.htm> [reproduced in accompanying notebook at Tab 16].

If the language of Article 5 of the ECCC Statute more closely resembles the language of ICTY Article 5, then it follows that the *Tadić* Appeals Chamber's decision would be particularly persuasive and there would be no argument that discriminatory intent applies to all crimes against humanity. But, Article 5 of the ECCC Statute more closely resembles the language of Article 3 of the ICTR Statute, which was used by the Trial Chamber of *Akayesu* to hold that all crimes against humanity require discriminatory intent. Thus, because the language of Article 5 of the ECCC Statute more closely resembles the ICTR Statute and not the ICTY Statute, the ruling of *Tadić* and other ICTY cases should have little influence over interpreting Article 5 of the ECCC Statute. But, the Appeals Chamber of *Akayesu* generally endorsed the Appeals Chamber in *Tadić* in the sense that the legal requirements of crimes against humanity under customary international law do not require discriminatory intent except for persecution-type crimes.<sup>98</sup> What the Security Council did with the ICTR Statute was "limit the jurisdiction of the Tribunal over crimes against humanity solely to cases where they were committed on discriminatory grounds."<sup>99</sup>

With the connection between the ICTY and ICTR Statutes clear, and the ICTR requirement of attacks "on national, political, ethnic, racial or religious grounds" meaning a jurisdictional limitation, the picture of Article 5 of the ECCC Statute becomes clear. The ECCC Statute's language requiring the attack be on "national, political, ethnical, racial or religious grounds" is also a jurisdictional limitation. If the limitation is one of jurisdiction, and not an

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<sup>98</sup> The Prosecutor v. Jean-Paul Akayesu, ICTR-96-4, Judgment of 1 June 2001 (Appeals Chamber) at ¶464 [reproduced in accompanying notebook at Tab 19].

<sup>99</sup> *Id.* at ¶465.

additional legal requirement, then there is no evidentiary threshold. There is either jurisdiction or there is not.

## **2. Use of Judicial Notice to Satisfy Jurisdictional Limitation of Discriminatory Intent**

The decision of whether the crimes against humanity are committed on discriminatory grounds should be dispatched of using judicial notice. In *Karemera*, the “Prosecution sought judicial notice of the following:”

The following state of affairs existed in Rwanda between 6 April 1994 to 17 July 1994: There were throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification. During the attacks, some Rwandan citizens killed or caused serious bodily or mental harm to person[s] perceived to be Tutsi. As a result of the attacks, there were a large number of deaths of persons of Tutsi ethnic identity.<sup>100</sup>

The Prosecution was denied judicial notice by the Trial Chamber on the grounds that the facts sought to be noticed were “legal finding[s] . . . [] constitut[ing] an element of a crime against humanity.”<sup>101</sup> The Appeals Chamber, citing *Semanza*, held that the notice should have been accepted by the Trial Chamber because the facts sought to be noticed by the Prosecution were “notorious facts not subject to reasonable dispute.”<sup>102</sup> Additionally, because the “notorious facts were not subject to reasonable dispute,” the Trial Chamber was required to notice them under

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<sup>100</sup> The Prosecutor v. Karemera et al., ICTR-98-44-AR73(C), Decision of 16 June 2006 (Appeals Chamber) at ¶26 [reproduced in accompanying notebook at Tab 23].

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at ¶¶28-29 (From *Semanza* Appeal Judgement, ¶192: “The Appeals Chamber finds that these judicially noted facts did not relieve the Prosecution of its burden of proof; they went only to the manner in which the Prosecution could discharge that burden in respect of the production of certain evidence which did not concern the acts done by the Appellant. When determining the Appellant’s personal responsibility, the Trial Chamber relied on the facts it found on the basis of the evidence adduced at trial.”)



Rule 94(A) of the ICTR Rules of Procedure and Evidence.<sup>103, 104</sup> The Appeals Chamber further commented that “the practice of judicial notice of facts of common knowledge is well established in international criminal law.”<sup>105</sup> Specifically:

there is no reasonable basis for disputing [that] during the 1994 attacks, “some Rwandan citizens killed or caused serious bodily or mental harm to person[s] perceived to be Tutsi. As a result of the attacks, there were a large number of deaths of persons of Tutsi ethnic identity.” These facts are not only consistent with every judgement so far issued by the Appeals and Trial Chambers of this Tribunal, but also with the essentially universal consensus of historical accounts included in sources such as encyclopaedias and history books. They are facts of common knowledge.<sup>106</sup>

Despite the procedural practice of the ICTR and customary international law, the ECCC Internal Rules (Rev. 1) do not explicitly contain a judicial notice provision.<sup>107</sup> However, Rule 2 of the ECCC Internal Rules (Rev. 1) provides a procedure for dealing with issues that do not arise under the Internal Rules:

Where in the course of ECCC proceedings, a question arises which is not addressed by these IRs, the Co-Prosecutors, Co-Investigating Judges or the Chambers shall decide in accordance with Article 12(1) of the Agreement and Articles 20 new, 23 new, 33 new or 37 new of the ECCC Law as applicable, having particular attention to the fundamental

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<sup>103</sup> *Id.* at ¶29.

<sup>104</sup> RULES OF PROCEDURE AND EVIDENCE FOR THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, 14 March 2008, Rule 94, *available at* <http://69.94.11.53/ENGLISH/rules/080314/080314.pdf> [reproduced in accompanying notebook at Tab 14].

<sup>105</sup> *Karemera*, at ¶30. (Footnote 46: “See Charter of the International Military Tribunal for Germany, art. 21; Rome Statute of the International Criminal Court, art. 69(6); Rules of Procedure and Evidence of the ICTY, Rule 94(A)”) [reproduced in accompanying notebook at Tab 23].

<sup>106</sup> *Id.* at ¶31.

<sup>107</sup> INTERNAL RULES OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, 1 February 2008 Revision, *available at* [http://www.eccc.gov.kh/english/cabinet/fileUpload/27/Internal\\_Rules\\_Revision1\\_01-02-08\\_eng.pdf](http://www.eccc.gov.kh/english/cabinet/fileUpload/27/Internal_Rules_Revision1_01-02-08_eng.pdf) [reproduced in accompanying notebook at Tab 11].

principles set out in Rule 21 and the applicable criminal procedural laws. In such a case, a proposal for amendment of these IRs shall be submitted to the Rules and Procedure Committee as soon as possible.<sup>108</sup>

Article 12(1) of the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea and Articles 20, 23, and 33 of the ECCC Statute generally hold that while the procedure must be in accordance with Cambodian Law, international procedural rules may be consulted for guidance.<sup>109, 110</sup>

Since the Internal Rules for the ECCC do not appear to have an explicit judicial notice section, ECCC Internal Rule 2 allows one of the actors – either the Co-Prosecutors, Co-Investigative Judges, or the Chambers – the discretion to look at international procedural rules. The ICTR, an international tribunal, has a judicial notice rule. Furthermore, the ICTR Appeals Chamber held, in *Karemera*, that the practice of judicial notice is well established in international criminal law. While the Appeals Chamber in *Karemera* took judicial notice of the attacks on Tutsis as an attack on ethnical grounds, the ECCC could take judicial notice of the attacks on Cambodian civilians as an attack on political or national grounds. Following the procedure of the ICTR Appeals Chamber to dispatch of the jurisdictional limitation on

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<sup>108</sup> INTERNAL RULES, Rule 2 [reproduced in accompanying notebook at Tab 11].

<sup>109</sup> Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Article 12, 6 June 2003 *available at* [http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement\\_between\\_UN\\_and\\_RGC.pdf](http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGC.pdf) [reproduced in accompanying notebook at Tab 2].

<sup>110</sup> LAW ON THE ESTABLISHMENT OF EXTRAORDINARY CHAMBERS (ECCC Article 20, 23, and 33 are respectively directed to the actor seeking guidance: Co-Prosecutors, Co-Investigative Judges, and the Chambers. ECCC Article 37 is a *mutatis mutandis* provision.) [reproduced in accompanying notebook at Tab 12].

discriminatory grounds makes sense because of the similar discriminatory grounds requirements for crimes against humanity in both the ICTR and ECCC Statutes.

### 3. Persecution-type Offenses

“The crime of persecution differs [] from all other crimes against humanity [because it requires discriminatory intent].”<sup>111</sup> The ICTR Tribunal in *Semanza* agreed, “[u]nlike the other enumerated crimes against humanity, persecution requires a discriminatory intent.”<sup>112</sup> While, “the *actus reus* of persecution may be identical to other crimes against humanity, what distinguishes the crime of persecution is that it is committed on discriminatory grounds.”<sup>113</sup>

If persecution-type crimes against humanity do require discriminatory intent as one of the legal requirements, then there is an evidentiary threshold. With the similarities in language between Article 5 of the ECCC Statute and Article 3 of the ICTR Statute, it makes sense to look at the interpretation of discriminatory intent practice for persecutions under the ICTR. The Trial Chamber of *Akayesu* is particularly enlightening on this point as the Chamber applied the standard of “beyond a reasonable doubt” to determine discriminatory intent.

## IV. SUMMARY AND CONCLUSIONS

In summary, crimes against humanity enumerated in Article 5 of the ECCC Statute were well established in customary international law in 1975. The ECCC borrows language from Article 6(c) of the IMT Charter and Article 5(c) of the IMTFE Charter as well as from CCL No. 10, which was based on Article 6(c) of the IMT Charter. These international instruments

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<sup>111</sup> WERLE, *supra* note 12, at 257 [reproduced in accompanying notebook at Tab 32].

<sup>112</sup> The Prosecutor v. Laurent Semanza, ICTR-97-20, Judgment of 15 May 2003, at ¶350 [reproduced in accompanying notebook at Tab 26].

<sup>113</sup> The Prosecutor v. Kupreškić et al., IT-95-16-T, Judgment of 14 January 2000 (Trial Chamber) at ¶607 [reproduced in accompanying notebook at Tab 25].

codified customary international law and were consulted in formulating other laws on crimes against humanity, such as Bangladesh Act No. XIX of 1973 or the 1954 I.L.C. Draft Code of Offenses. The enumerated acts in Article 5 of the ECCC Statute not present in Article 6(c) of the IMT Charter or Article 5(c) of the IMTFE Charter are covered by CCL No. 10 and the Bangladesh Act. In addition, torture has specifically been the subject of numerous U.N. Resolutions, the 1899 and 1907 Hague Conventions, and the 1949 Geneva Convention.

Although crimes against humanity historically required a connection to armed conflict, Article 5 of the ECCC Statute does not contain a link to armed conflict. Despite the omission, Article 5 of the ECCC is still representative of customary international law in 1975 because CCL No. 10 and Bangladesh Act No. XIX of 1973 severed the link between crimes against humanity and armed conflict. The severing is evidenced by the omission of armed conflict in Article 3 of the ICTR Statute, and the commentary of ICTY *Tadić* Appeals Chamber and *Kupreškić* Trial Chamber in light of the presence of armed conflict in Article 5 of the ICTY Statute.

The chapeau of Article 5 of the ECCC Statute does not require a discriminatory intent for non-persecution-type acts and thus there is no evidentiary threshold. Customary international law, as reflected in language of the IMT and IMTFE Charters, and CCL No. 10, does not require discriminatory intent for non-persecution-type acts. While the early ICTY cases required an evidentiary showing of discriminatory intent, the ICTY Appeals Chamber subsequently overruled the requirement because it was not a requirement of the ICTY Statute, and it was not a requirement under customary international law. Early ICTR cases required discriminatory intent, but in light of the findings of the ICTY, decided that discriminatory intent was not a legal element of non-persecution-type offenses of crimes against humanity. For the ICTR,

discriminatory intent is merely a jurisdictional limitation to a particular subset of crimes against humanity: those committed on “national, political, ethnic, racial or religious grounds.”

Satisfying the jurisdictional limitation can be accomplished through judicial notice. Although the ECCC Internal Rules do not contain an explicit judicial notice provision, the Internal Rules, ECCC Statute, and Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea permit using international procedural rules for guidance. Since the ICTR contained a discriminatory intent jurisdictional limitation in Article 3 of its statute similar to Article 5 of the ECCC Statute, the ECCC should consult the ICTR for guidance on handling the jurisdictional limitation. The ICTR satisfies the discriminatory intent limitation through the use of judicial notice, which is not only a requirement in the ICTR Rules of Procedure and Evidence, but, as the *Karemera* Appeals Chamber remarked, “[a] well established [practice] in international criminal law.”<sup>114</sup>

For persecution-type crimes against humanity, it appears that discriminatory intent is another legal requirement, and must be proved by the evidentiary threshold of the underlying offense – generally, “beyond a reasonable doubt.”

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<sup>114</sup> *Karemera*, at ¶30 [reproduced in accompanying notebook at Tab 23].