ANNEX 9

para. 2 of the *Statute* nevertheless requires strict construction of a definition of a crime and prohibits extending a definition of a crime by analogy[368]. To what extent the wording in paragraph (k), as well as in open-ended formulations in other paragraphs, could be regarded as allowing for such a prohibited interpretation, see article 22 para. 2 margin Nos. 41 *et seq.*

II. Paragraph 2: Definitions of crimes or their elements

(a) "Attack" (*Rodney Dixon revised by Christopher K. Hall*)

87 The delegates at the Rome Conference decided to include this definition of "attack", which had not been proposed in any of the options during the drafting process. Its incorporation signifies that the delegates wished to further specify the scope of application for article 7. The attack, which according to the *chapeau* can be either widespread *or* systematic, has to at least involve *multiple acts* and emanate from or contribute to a State or organizational *policy*.

By "multiple acts" is meant more than a single, isolated act. The use of the phrase "acts referred to in paragraph 1" may lead to some confusion as it could refer to the generic acts listed in paragraph 1, for example, murder, rape, and torture; or to specific incidents, such as, a particular murder or rape, which are incorporated in each specific generic act. This phrase must logically encapsulate both meanings, providing that it does not require more than one enumerated generic act (such as murder *and* torture) to be committed to qualify as crimes against humanity. It would be inconsistent with the *chapeau* to read in such an additional element[369]. "Multiple acts", thus, refers either to more than one generic act, even though this is not required, or more than a few isolated incidents that would fit under one or more of the enumerated acts[370].

88 Such an interpretation is compatible with the requirement of that the attack be widespread or systematic. Even a systematic attack has to involve more than a few incidents. Similarly, a widespread attack should, and by its very nature is likely to, be based upon or carry forward a policy[371]. A widespread attack need not, however, be systematic and *vice versa*. As described above, each term has distinct and different qualities, which if satisfied render the offences a crime against humanity.

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there can be no excuse, no attenuating circumstances. Items (a) and (c) concern acts which world public opinion finds particularly revolting – acts which were committed frequently during the Second World War. One may ask if the list is a complete one. At one stage of the discussions, additions were considered – with particular reference to the biological "experiments" of evil memory, practised on inmates of concentration camps. The idea was rightly abandoned, since biological experiments are among the acts covered by (a). Besides, it is always dangerous to try to go into too much detail – especially in this domain. However much care were taken in establishing a list of all the various forms of infliction, one would never be able to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes. The form of wording adopted is flexible and, at the same time, precise. The same is true of item (c). Items (b) (taking of hostages) and (d) (sentences and executions without a proper trial) prohibit practices which are fairly general in wartime".

International Committee of the Red Cross, COMMENTARY ON GENEVA CONVENTION FOR THEAMELIORATION OF THE CONDITION OT THE WOUNDED AND SICK IN ARMED FORCES OF THE FIELD 53-54 (1952).

368 "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted".

369 The *chapeau* provides that "any" of the "acts" listed may qualify as a crime against humanity.

370 As stated earlier, an accused can be held criminally responsible for crimes against humanity for committing a single act, such as a single rape, within a context of a widespread or systematic attack which may involve the commission of various of the enumerated acts.

371 See the discussion below on the definition of the "policy" element, which notes that this element is not part of customary international law and that its existence can be demonstrated by the widespread or systematic nature of the attack (margin No. 91).

α) "conduct involving the multiple commission of acts"

The phrase "course of conduct" has widespread or systematic connotations. In general, a "course of conduct" could not only involve isolated and random acts[372]. However, this phrase is qualified by two specific conditions, the "multiple commission of acts" and "a State or organizational policy". The latter is discussed below, the former requires that more than a few isolated incidents or acts occur. 89

β) "against any civilian population"

This term clearly has the same meaning as "any civilian population" used in the *chapeau*, which has been discussed above. 90

γ) Connection with State or organizational policy

There is no requirement in customary international law that a crime against humanity be committed pursuant to or in furtherance of a plan or policy. Some writers have contended otherwise[373]. However, no international instrument adopted before or after the Rome Statute has included such a requirement[374]. At one time, a number of international criminal court judgments 91

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372 *Supra* note 15, *Tadic* (Trial Chamber Judgment), para. 644, which held that the requirement of the acts being directed against any civilian population "ensures that what is to be alleged will not be one particular act, but, instead, a course of conduct".

373 See, for example, *supra* note 117, M. C. Bassiouni, 240-250 (asserting that the international element of crimes against humanity generally is state action or policy); D. Robinson, *Defining "Crimes against Humanity" at the Rome Conference*, 93 AM. J. INT'L L. 43, 48-51 (1999). However, the International Law Commission, which studied the question for half a century did not include a policy requirement in any of its Draft Codes (see following *supra* notes), but only the less onerous threshold that crimes against humanity must be "instigated or directed by a Government or by any organization or group". *Supra* note 7, 1996 ILC Draft Code, article 18. The statement in *supra* note 15, *Tadic* (Trial Chamber Judgment),that the phrase "directed against any civilian population" in article 5 of the ICTY Statute confirmed that "there must be some form of a governmental, organizational or group policy to commit these acts", para. 644, has been squarely rejected by subsequent ICTY jurisprudence (see margin No. 91 below). National jurisprudence offers little support for a policy requirement in crimes against humanity. The statement by the Netherlands *Hoge Raad* (Supreme Court) in the 1980 *Menten* case, 75 INT'L L. REP. 362, 362-363 (1981), that "the concept of 'crimes against humanity' also requires ... that the crimes in question form part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of peoples", even if a generally accurate description of the crimes against humanity committed by the Nazis and their collaborators, is not a correct statement of international law with respect to either alternative. The requirement articulated by the French *Cour de Cassation* in the *Barbie*, Cass. Crim., 20 Dec. 1985, 1985 Bull. Crim., No. 407, at 1053, and *Touvier* cases, Cass. Crim., 27 Nov. 27, 1992, 1992 Bull. Crim. No. 394, at 1085, that acts must have been affiliated with or accomplished in the name of "a state practicing a policy of ideological hegemony" to constitute crimes against humanity is simply a restrictive interpretation of national legislation which had the result of excluding or minimizing criminal responsibility of Vichy French officials for crimes against humanity and it has been thoroughly discredited to the extent that it purports to state international law. See, for example, L. Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From* Touvier *to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289 (1994). Similarly, the statement by the Supreme Court of Canada in its widely criticized judgment in the *Finta* case that "[w]hat distinguishes a crime against humanity from any other criminal offence under the Canadian *Criminal Code* is that the cruel and terrible actions which are the essential elements of the offence were undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race", [1994] 1 Sup. Ct. Rep. 701, 814, is not only an interpretation of national legislation, but an incorrect statement of international law, which does not require that crimes against humanity be based on any discrimination, apart from the specific crime of persecution.

374 None of the instruments defining crimes against humanity adopted before 1998 include a plan or policy requirement. See *supra* note 7, article 6 (c) of the 1946 Nuremberg Charter; *supra* note 7, article II para. 1 (c) of 1946 Allied Control Council Law No. 10; article 5 (c) of the Tokyo Charter, principle VI (c) of *supra* note 7, the 1950 Nuremberg Principles; article 2 para. 10 (inhuman acts) of *supra* note 7, the 1954 ILC Draft Code; *supra* note 7, the 1968 Convention on the Non-Applicability of Statutory Limitations, article 1 (b); *supra* note 7, the 1973 Apartheid Convention; *supra* note 7, article 5 of the ICTY Statute; *supra* note 7, article 3 of the ICTR Statute; and *supra* note 7, article 18 of the 1996 ILC Draft Code. Similarly, since the Rome Statute was adopted, none of the instruments defining crimes against humanity have included such a requirement. See *supra* note 7, UNTAET Regulation 2000/15, article 5; *supra* note 7, Sierra Leone Statute, article 2; *supra* note 7, Cambodian Extraordinary Chambers Law, article 5. Indeed, there is no hint of such a

mistakenly read such a requirement into the definition based on examples of conduct prosecuted as crimes against humanity, but not on the basis of the wording of international instruments defining crimes against humanity[375]. However, more recent jurisprudence in the ICTY and ICTR has firmly rejected such a requirement. For example, in the *Kunarac* case, after an exhaustive review of the jurisprudence, the ICTY Appeals Chamber declared:

> "Contrary to the Appellants' submissions, neither the attack nor the acts of the accused needs to be supported by any form of "policy" or "plan". There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes. As indicated above, proof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime. But to prove these elements, it is not necessary to show that they were the result of the existence of a policy or plan. It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters. Thus, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime"[376].

The ICTY Appeals Chamber subsequently noted that "since the *Kunarac et al.* Appeal Judgement, the jurisprudence on this point is settled"[377]. Similarly, recent decisions by the ICTR Trial Chambers have rejected a policy or plan requirement[378]. In addition, many States have omitted such a requirement when enacting implementing legislation for the Rome Statute or preparing draft legislation.

Thus, the requirement in article 7 para. 2 (a) that the attack must occur pursuant to (*i.e.* following, complying with, or continuing from) or in furtherance of (*i.e.* promoting, supporting, aiding, or enhancing) a policy is not consistent with customary international law. However, this statutory requirement of a policy need not be formalised, and can be deduced from the manner and circumstances in which the acts occur[379]. Indeed, this statutory requirement as a practical matter may be redundant since "if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts"[380]. In essence, the policy element only requires that the acts of individuals alone, which are isolated, un-coordinated, and haphazard, be excluded[381].

92 Clearly, the policy need not be one of a State. It can also be an organizational policy. Non-state actors, or private individuals, who exercise *de facto* power can constitute the entity behind

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requirement in any of the instruments adopted prior to the Second World War concerning laws or principles of humanity of such a requirement. See, for example, *supra* note 1, 1868 Declaration of St. Petersburg; *supra* note 4, Declaration of France, Great Britain and Russia of 24 May 1915; and *supra* note 5, the 1919 Peace Conference Commission Report.

375 ICTR Trial Chamber judgments following this erroneous interpretation include, *supra* note 15, *Akayesu* (Trial Chamber Judgment), para. 580; *supra* note 46, *Rutaganda* (Trial Chamber Judgment), para. 69; *supra* note 46, *Musema* (Trial Chamber Judgment), para. 204.

376 *Supra* note 72, *Kunarac* (Appeals Chamber Judgment), para. 98 (footnote omitted). See also *Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, Judgment, Trial Chamber, 22 Jan. 2004, para. 665 ("The Chamber agrees with the reasoning followed in *Semanza* and finds that the existence of a plan is not independent legal element of Crimes against Humanity").

377 *Supra* note 72, *Kordic* (Appeals Chamber Judgment), para. 98: See also *supra* note 72, *Blaskic* (Appeals Chamber Judgment), para. 120.

378 See, for example, *supra* note 73, *Muvunyi* (Trial Chamber Judgment), para. 512; *supra* note 47, *Kajelijeli* (Trial Chamber Judgment), para. 872; *supra* note 47, *Semanza* (Trial Chamber Judgment), para. 329; *supra* note 73, *Muhimana* (Trial Chamber Judgement), para. 527; *supra* note 96, *Gacumbitsi* (Trial Chamber Judgment), para. 299; *supra* note 126, *Ntagerura* (Trial Chamber Judgment), para. 698.

379 *Supra* note 15, *Tadic* (Trial Chamber Judgment), para. 653: "a policy need not be formalized"; and *supra* note 15, *Akayesu* (Trial Chamber Judgment), para. 580.

380 *Supra* note 15, *Tadic* (Trial Chamber Judgment), para. 653.

381 *Supra* note 7, 1996 ILC Draft Code, 94: "This alternative is intended to exclude the situation in which an individual commits an inhumane act while acting on his own initiative pursuant to his own criminal plan ... This type of isolated criminal conduct on the part of a single individual would not constitute a crime against humanity". See also *supra* note 158, *Nikolic* (Trial Chamber Review of Indictment), para. 26.

the policy[382]. This provision in the article reflects the contemporary position that individuals not linked to a state or its authorities can commit crimes under international law[383].

δ) **Special Remarks**

It is worth noting that the same considerations applicable to proving the widespread or systematic character of the attack, as discussed above, will have to be taken into account when establishing the multiplicity and organisational components of the attack. As stated above, in proving either the widespread nature or systematic character of the attack, both the statutory requirements of multiplicity and policy will be confirmed. 93

(b) "Extermination" (*Christopher K. Hall*)

α) **main elements**

National and international jurisprudence concerning the crime against humanity of extermination provides some guidance concerning its definition under customary international law, but there a number of significant differences in detail, both between the ICTY and ICTR and among individual Trial Chambers most of which have yet to be resolved by the Appeals Chambers for either Tribunal[384]. The main non-contextual components or components that are not Tribunal-specific of the definition of extermination that emerge from the jurisprudence are the following: a large number of killings, the same elements as murder, the absence of a requirement that the perpetrator knew the identity of the victims, targeting of a group and the absence of a requirement that the members of the group have common characteristics. The main areas of difference relate to whether the crime must be intentional, as most ICTR Trial Chambers have held, or may include reckless or even negligent conduct, what constitutes a large number of persons and whether an accused must have been responsible for killing a large number of persons or could have killed only a few persons or only one person when part of a mass killing. Judgments since the adoption of the Elements of Crimes in June 2000 have noted that extermination can be carried out by infliction of conditions of life. 94

Although persons were convicted of the crime against humanity of extermination by the International Military Tribunal at Nuremberg and by national courts and international and national courts have referred to extermination in their judgments, these judgments have provided little guidance concerning the scope of the crime[385]. Therefore, the elements of the crime were

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382 *Supra* note 30, 1991 ILC Draft Code, p. 266.

383 *Supra* note 7, 1996 ILC Draft Code, 94; and *supra* note 15, *Tadic* (Trial Chamber Judgment), para. 654: "the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory". See also *Kadic* v. *Karadzic*, 70 F.3d 232 (2nd Cir. 1995), cert. denied, 64 U.S.L.W. 3832 (18 June 1996) in which it was held that non-state actors could be held liable for the commission of genocide, the most serious form of crimes against humanity.

384 With the exception of the 2002 ICTY Trial Chamber Judgment in the *Vasiljevic* case, which undertook a careful analytical review of prior judgments, the ICTY and ICTR jurisprudence on this question is generally contradictory, poorly reasoned and of limited guidance in determining the scope of the crime of extermination under customary international law. For a similar assessment, see *supra* note 46, G. Mettraux, INTERNATIONAL CRIMES 176, note 3 ("Where the *Vasiljevic* Trial Chamber appears to have undertaken an extensive review of state practice and other relevant precedents in relation to that offence, the definition of 'extermination' given in earlier cases often appears to be based on not much more than the Chamber's intuition as to the meaning of that expression and the almost complete absence of authority in support of the Chambers' findings") (citations omitted).

385 For brief overviews of some of this early jurisprudence, which includes judgments of the German Supreme Court in Leipzig, the International Military Tribunal at Nuremberg, US military courts established pursuant to Allied Control Council Law No. 10, the Supreme National Tribunal of Poland in the *Goeth* case, Israeli courts in the *Eichmann* case, French courts in the *Barbie* case, see the discussion in *supra* note 123, *Krstic* (Trial Chamber Judgement), para. 492; *Prosecutor v. Vasiljevic*, Judgment, Case No. IT-98-32-T, ICTY Trial Chamber, 29 Nov. 2002, paras. 216-224, *Prosecutor v. Vasiljevic, without addressing this issue*, Case No. IT-98-32-A, Judgment, Appeals Chamber, 25 Feb. 2004.