
Ndiva Kofele-Kale
ONLY FOOLS WHO SEND HYENAS TO ROAST MEAT FOR THEM: IN SEARCH OF THE
DOCTRINAL FOUNDATIONS OF THE NOT-SO-ORDINARY CRIME OF PATRIMONICIDE

Ndiva Kofele-Kale*

ABSTRACT

Crimes against humanity are generally considered crimes of such unimaginable horror that they shock the conscience of mankind. The Article challenges the international community to take a mental leap by recognizing that the contemporary version of official corruption is so fundamentally different from its historical antecedents that it deserves to (a) be called a different name: indigenous spoliation or patrimonicide; and (b), to be treated as an extraordinary crime that rises up to the level of a crime against humanity. Towards this end, the Article reviews the basic elements of a crime against humanity identified in various legal instruments, and in the law and practice of the three United Nations’ ad hoc criminal tribunals. On the basis of this analysis, the Article then proceeds to demonstrate the link between the

* PhD, JD (Northwestern); University Distinguished Professor & Professor of Law, Dedman School of Law, Southern Methodist University, (SMU), Dallas, Texas USA. Email Address: nkofele@smu.edu. An earlier and abbreviated version of this paper was presented as the keynote address under the title “SED QUIS CUSTODIET IPSOS CUSTODES?” (BUT WHO WILL GUARD THE GUARDIANS?) The Case for Elevating Official Corruption to the Status of a Crime in Positive International Law,” at the 22nd Annual Fulbright Symposium on International Legal Problems, Golden Gate University School of Law, San Francisco, California, April 6, 2012. I would like to thank President Dan Angel of Golden Gate University, Dean Drucilla Ramey and the Faculty of the Law School, and Associate Dean Jon Sylvester and the members of the Graduate Law Programs, for hosting this symposium to honor the memory of a great American and world statesman, the late Senator William J. Fulbright. I also extend warm and fraternal greetings to Professor Christian Nwachukwu Okeke who made my participation at this very important gathering of international law scholars from around the globe possible. Professor Okeke has for three decades provided inspiring leadership in legal education here in the United States and in Nigeria. He has also contributed immensely to the progressive development and advancement of international law. I salute him! This Article was supported by a summer research grant from the SMU Dedman School of Law, Julienne Gilmore, JD (2012), SMU Dedman School of Law, Brenda Cordoner, JD (2013) SMU Dedman School of Law, and Elizabeth Rukundo, LL.B. (Makerere), LL.M. (2013), SMU Dedman School of Law, provided valuable research assistance to this article, for which the author is grateful.
constituent elements of a crime against humanity and the new crime of indigenous spoliation.

INTRODUCTION

In the last two decades, my research and writings have sought to elevate indigenous spoliation or patrimonicide to the status of a crime against humanity that entails individual criminal responsibility.¹ A recurring criticism of this formulation has been that the phenomenon does not rise up to the level of jus cogens and therefore lacks the gravitas of crimes that traditionally meet this test. Most recently, in a keynote address delivered to a distinguished assemblage of international law scholars and jurists from around the globe,² the same criticism was raised. There is some reluctance to placing the spoliation of national wealth on the same moral plane as genocide, slavery, slave trade, and so on. There is merit to this criticism. Crimes against humanity are inhumane acts that attack, not just the individual, but, by their very nature, humanity itself. These are acts so grave, on a scale so large, that their very execution diminishes the human race as a whole. These are crimes that expose the barbaric depths to which humanity can descend; they are crimes that evoke moral outrage; these crimes are of such unimaginable horror that they shock the conscience of mankind. Comparing them to acts of indigenous spoliation requires a mental leap that most people find hard to make. But to the extent that the excessive and outrageous spoliation of the peoples’ wealth attacks and destroys the essential foundations of their society, then it should arouse the same kind of revulsion as, say, the Rwanda genocide or the depravity that symptomized the Cambodian “killing fields”.

It has been a little over sixty years since the Nuremberg trials of major Nazi war criminals took place, but its impact on the progressive development of international law continues to be felt. An African

1. I first used the term “patrimonicide” in a 1995 law review piece to describe the illegal act of depredation committed for private ends by high ranking public officials. The word was coined by combining the Latin words “patrimonium,” meaning “[t]he estate or property belonging by ancient right to an institution, corporation, or class; especially the ancient estate or endowment of a church or religious body” and “cide,” meaning killing. See Ndiva Kofele-Kale, Patrimonicide: The International Economic Crime of Indigenous Spoliation, 28 VAND. J. TRANSNAT’L L. 45, 56-58 (1995).

2. This issue was discussed during the Q & A session following my presentation at the 22nd Annual Fulbright Symposium on International Legal Problems at Golden Gate University School of Law, San Francisco, California, April 6, 2012. The symposium was co-sponsored by the ABA Section on International Law and Practice and Golden Gate University School of Law, Graduate Law Programs.
The proverb holds that only fools who send hyenas to roast meat for them. It can be said that one of the Nuremberg goals was to ensure that when someone is entrusted with the meat of others for barbecuing that he will not appropriate it to satisfy his own cravings. But more importantly, such unbridled greed is beyond the pale of civilized behavior and should not go unpunished. The affirmation of the principle that individuals can be held criminally responsible under international law remains one of the enduring legacies of Nuremberg. The second enduring legacy is the Tribunal’s recognition of a small category of crimes so heinous that they shock the conscience of mankind. Finally, also belonging to this group is Nuremberg’s rejection of the notion that States should not concern themselves with human rights violations occurring within the borders of another State.

To combat the growing threat of indigenous spoliation, the international community has engaged in a spate of international legislation producing a number of regional and global anti-corruption instruments. Despite these laudable initiatives, one senses some reluctance on the part of international policy makers to accord indigenous spoliation the status of a crime in positive international law in line with the Nuremberg legacy. This reluctance can be attributed either to a lack of will or a failure to focus the probing lights of international law in the right places when searching for an effective antidote to this insidious plague. This tendency to look at the wrong places for answers reminds one of the fascinating anecdote about a wise man who chose to search for the missing key to his wardrobe not in the bedroom, the most likely place to have misplaced the key, because it was too dark and he could not see. Rather, the sage chose to focus his search in the courtyard—the least likely place to look for a misplaced wardrobe key—where he could see better because of the sunlight! I believe the search for the missing wardrobe key is an appropriate metaphor for the misdirected energy expended in finding the solution to the problem of indigenous spoliation or “grand corruption”.

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4. These are by no means the only parts (or principles) of the Nuremberg legacy but only those that are of interest in this discussion. See notes 14, 19, 23-24 infra and accompanying discussion.
The current international anti-corruption regime\(^5\) has many flaws\(^6\) not the least of which is the tendency to reduce official corruption to the ordinary, common-place offense of bribery, embezzlement, misappropriation, fraudulent enrichment, or kleptocracy. This view of corruption describes only one aspect of this multifaceted phenomenon, that is, the raw act of taking. None of these terms, however, capture the lethal effects of corruption on the socio-economic life of modern society. It has been our contention that this modern version of corruption is so fundamentally different from what has traditionally passed for this activity that it is immune to the orthodox antidotes prescribed by the current international anti-corruption regime.\(^7\) Because this conceptual framework has failed to incorporate the post-Nuremberg developments in international criminal law, it is not surprising that the solutions it prescribes do not go far enough in curing the problem. It will be argued that the exceptional nature of modern corruption demands a complete overhaul of traditional prescriptions and the installation of novel and original solutions to combat this insidious plague. Accomplishing this feat will require linking both its definition and resolution to the aforementioned Nuremberg legacies such that a high ranking public servant accused of committing acts of indigenous spoliation should be relieved of any immunity stemming from his official position; making available the doctrine of universal jurisdiction to any State that seeks to assert jurisdiction over an accused without the need to show that it has any connection to the crime whatsoever; allowing for a liberal application of the rule of non-applicability of statutory limitations to acts of indigenous spoliation; imposing stiff criminal penalties including jail time for accused persons; and requiring the restitution of stolen assets.

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The goal of this Article is to establish the relationship between the crime of patrimonicide and crimes against humanity as defined in the International Law Commission’s (ILC) Draft Code of Crimes against the Peace and Security of Mankind ("Draft Code") and the Rome Statute of the International Criminal Court (ICC); and subsequently interpreted in the law and practice of the three United Nations ad hoc Tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL) and the ICC. It will be argued that patrimonicide and crimes against humanity share the same doctrinal genealogy and should be included among those international law crimes that shock the conscience of mankind. This analysis will be presented in four parts.

Part 1 briefly reviews the current international regime against corruption to underscore the concerted effort by the community of nations to rein in this scourge. It will be argued that this laudable campaign to bring official corruption under some form of international discipline has not posted any positive results in part because of a fundamental flaw in how the problem is framed, in particular how corruption is defined. The reliance by the extant global anti-corruption instruments on an outdated conceptualization of corruption ignores the significant mutations this concept has undergone in the last fifty years. The evidence is overwhelming that the modern version of corruption is qualitatively different from its historical predecessor, which continues to serve as a model for the contemporary global anti-corruption regime. This flaw must be overcome in order to make room for the emergence of a more effective and creative response that treats this global problem as a crime under international law. Part II sets up the foundation for this argument through its review of the basic elements of a crime under positive international law while isolating the factors that distinguish crimes against humanity from common crimes. Part III will examine the jurisprudence of various international ad hoc criminal tribunals, specifically the ICTY, ICTR, and SCSL with the goal of discovering what has been identified as the key elements common to all crimes against humanity. This review is necessary to confirm the thesis that acts of indigenous spoliation share the same doctrinal foundations as classical crimes against humanity. The framework developed in Parts II and III is then applied in Part IV. The objective here is twofold: first, to demonstrate the link between the constituent elements of a crime against humanity and the new crime of indigenous spoliation; and second, to then draw the inference that those involved in the spoliation of national wealth should be held accountable under
international criminal law as it has been shaped by the Nuremberg legacy.

I. THE CURRENT GLOBAL ANTI-CORRUPTION REGIME

The first comprehensive regional convention against official corruption was the Inter-American Convention against Corruption adopted by the Organization of American States (OAS) in March 19968. This was followed in 1999 by the European Union Criminal Law Convention against Corruption9 and its companion Civil Law Convention against Corruption, then in 2002 by the African Union Convention for Preventing and Combating Corruption10, adopted by the Assembly of the African Union. Two years later in 2004 the first global anti-corruption instrument, the United Nations Convention against Corruption, was adopted by the United Nations General Assembly.11

A cursory review of the preambles of these anti-corruption conventions capture the horror the international community attaches to crime of corruption. In the preamble to the Inter-American Convention, the leaders of the OAS acknowledge that corruption undermines the legitimacy of public institutions and strikes at society, moral order and justice, as well as at the comprehensive development of peoples. Further, they recognize that representative democracy an essential condition for stability, peace and development of the region, requires by its nature, the combating of every form of corruption in the performance of public functions, as well as acts of corruption specifically related to such performance. Moreover, these leaders are persuaded that fighting corruption strengthens democratic institutions and prevents distortions in the economy, improprieties in public administration, and damage to a society's moral fiber; they are concerned by the fact that corruption is often a tool used by organized crime for the accomplishment of its purposes; and, they recognize that to combat corruption effectively requires coordinated action by States.12

Both the European Union Criminal Law Convention and the Civil Law Convention like the Inter-American instrument underscore the importance of strengthening international co-operation in the fight

8. Inter-American Convention, supra note 5.
10. African Union Convention, supra note 5.
11. United Nations Convention, supra note 5.
12. Inter-American Convention, supra note 5.
against corruption because corruption threatens the rule of law, democracy and human rights; undermines good governance, fairness and social justice; endangers the stability of democratic institutions and the moral foundations of society; distorts competition; hinders economic development and endangers the proper and fair functioning of market economies; and, has adverse financial consequences to individuals, companies and States, as well as international institutions.

Much like their counterparts in the OAS, the heads of state and government of the African Union also express their concern about the negative effects of corruption and impunity on the political, economic, social, and cultural stability of African States and its devastating effects on the economic and social development of the African peoples. They acknowledge also that corruption undermines accountability and transparency in the management of public affairs, as well as socio-economic development on the continent and stress the need to address the root causes of corruption on the continent.\(^{13}\) Doing that imposes a need to formulate and pursue, as a matter of priority, a common penal policy aimed at protecting the society against corruption, including the adoption of appropriate legislative and adequate preventive measures. The preamble to the United Nations anti-corruption Convention expresses the international community’s concern about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice, and jeopardizing sustainable development and the rule of law. The drafters call attention to the links between corruption and other forms of crime- in particular organized crime and economic crime- including money-laundering, and cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States and that threaten the political stability and sustainable development of those States. The Convention also acknowledges that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential\(^ {14}\).

The current international anti-corruption regime represents a major advance in the global war against official corruption. The various treaties and conventions examined all start from the premise that corruption is a criminal activity and those who engage in it must be brought to account. Toward that end, they all treat corruption as an extraditable offense on the basis of a bilateral extradition treaty be-

\(^{13}\) African Union Convention, supra note 5.

\(^{14}\) United Nations Convention, supra note 5.
tween state parties or on the legal basis of the conventions themselves when there is no extradition treaty between the state parties. Emphasis is placed on the need for mutual assistance and cooperation among States, as an acknowledgment of the global reach of corruption. States are encouraged to afford each other the widest measure of mutual assistance by processing requests from authorities, investigating or prosecuting the acts of corruption as defined in these instruments, obtaining evidence and taking other necessary action to facilitate legal proceedings and measures regarding the investigation or prosecution of acts of corruption. States are also encouraged to provide each other with the widest measure of mutual technical cooperation on the most effective ways and means of preventing, detecting, investigating, and punishing acts of corruption.

It must be admitted that despite their promises, these anti-corruption instruments all fail to define official corruption as a crime under positive international law, which engages the responsibility of its authors qua individuals. None of the instruments stray from the traditional definition of corruption with its narrow focus on bribery involving public officials (either bribe-taking or bribe-giving). But even then the definition of bribery embraced excludes that class of officials who engage in outrageous acts of corruption outside the supply/demand framework. To make matters worse, not all the acts proscribed in these conventions are made mandatory on the States’ parties. Much is left to each State Party that has not yet done so to enact domestic

15. Art. 15, UN Convention against Corruption defines corruption as: “(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties; (b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.” See also Article VI of the Inter-American Convention (“This Convention is applicable to the following acts of corruption: a. The solicitation or acceptance, directly or indirectly, by a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions; b. The offering or granting, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions; c. Any act or omission in the discharge of his duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or for a third party”); and Article 4 of the African Union Convention.

legislation criminalizing acts of corruption as defined in these instruments.\textsuperscript{17} This is hardly an invitation to global consensus without which the problem of indigenous spoliation will evade international control.

\section*{II. Doctrinal Foundation of Crimes Under Positive International Law}

\subsection*{A. Characteristics of an International Crime}

What factors distinguish a crime under international law from an ordinary crime? Can indigenous spoliation meet the criteria that have been generally identified as characterizing crimes under international law? A good starting point for answers to these questions would be the International Law Commission's (ILC) formulation of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal.\textsuperscript{18} In 1947 the General Assembly of the United Nations requested the ILC to prepare a draft Code of offenses against the peace and security of mankind, indicating clearly the place to be accorded to the seven Nu-

\textsuperscript{17} See, e.g., Article 5 of the African Union Convention ("For the purposes set-forth in Article 2 of this Convention, State Parties undertake to: 1. Adopt legislative and other measures that are required to establish as offences, the acts mentioned in Article 4 paragraph 1 of the present Convention. 2. Strengthen national control measures to ensure that the setting up and operations of foreign companies in the territory of a State Party shall be subject to the respect of the national legislation in force. 3. Establish, maintain and strengthen independent national anticorruption authorities or agencies. 4. Adopt legislative and other measures to create, maintain and strengthen internal accounting, auditing and follow-up systems, in particular, in the public income, custom and tax receipts, expenditures and procedures for hiring, procurement and management of public goods and services. 5. Adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities. 6. Adopt measures that ensure citizens report instances of corruption without fear of consequent reprisals. 7. Adopt national legislative measures in order to punish those who make false and malicious reports against innocent persons in corruption and related offences. 8. Adopt and strengthen mechanisms for promoting the education of populations to respect the public good and public interest, and awareness in the fight against corruption and related offences, including school educational programmes and sensitization of the media, and the promotion of an enabling environment for the respect of ethics."); see also Article 15 of the United Nation Convention ([e]ach State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally");and Article VI of the Inter-American Convention ("[t]he States Parties that have not yet done so shall adopt the necessary legislative or other measures to establish as criminal offenses under their domestic law the acts of corruption described in Article VI(1) and to facilitate cooperation among themselves pursuant to this Convention").

remberg principles.19 To fulfill this mission the ILC had to provide a concise and comprehensive definition of the types of crimes which fall within the scope of the Nuremberg Principles. Faced with a choice between a conceptual definition establishing the essential elements of the concept of "crime against the peace and security of mankind" and a definition by enumeration referring to a list of crimes defined individually in the draft code, the ILC opted for the former.

The Commission explains its preference for an enumerative definition as a choice dictated by both theoretical and practical reasons:

[S]everal members of the Commission expressed the fear that a conceptual definition might lead to a wide and subjective interpretation of the list of crimes against humanity, contrary to the fundamental principle of criminal law that every offense must be precisely characterized as to all its constituent elements. Any danger of a characterization by analogy of a crime against the peace and security of mankind should be avoided. On the other hand, if this fundamental principle is observed and each crime against the peace and security of mankind is carefully defined as to each of its constituent elements, the practical value of a general definition that would be the common denominator of these crimes becomes doubtful. The enumeration of crimes in the present draft code could be supplemented at any time by new instruments of the same legal nature.20

However, and as the Commentary makes clear, the enumerated crimes do not cover exhaustively all crimes against the peace and security of mankind, but rather indicate the limited scope and application of the Code. The drafters also decided to leave it to state practice to define the exact contours for crimes against peace, war crimes, and crimes against humanity.21

The commentary to article 1 of the 1987 draft sets forth the Commission's understanding of the specific characteristics of a crime against the peace and security of mankind. The first of these is the

19. Although the ILC commenced its work in 1949, and submitted a Draft Code five years later, the General Assembly did not take any action on the Code until the end of 1981 when it invited the ILC to resume its work. In 1991, the ILC provisionally adopted the draft articles of the Code and transmitted them to governments for their observations. The adoption of the 1991 Draft Code was, however, complicated by the process of adopting a statute for a permanent criminal court, which the General Assembly had that same year invited the ILC to consider. Thus, the 1991 Draft Code was referred back to the Drafting Committee. Following this Committee's report, the ILC, at its forty-eighth session, held from 6 May to 26 July 1996, adopted the text of a set of twenty draft articles constituting the Code of Crimes against the Peace and Security of Mankind (hereinafter '1996 Draft Code', 'Draft Code of Crimes' or 'Draft Code').

criterion of seriousness, which underscores the fact that these crimes affect the very foundations of human society. As the commentary points out, seriousness can be deduced in one of three ways: (a) from the nature of the act in question (cruelty, monstrousness, barbarity, etc.), (b) from the extent, the magnitude of its effects (massiveness, the victims being peoples, populations or ethnic groups), or (c) from the motive of the perpetrator (such as in the case of genocide). Seriousness as understood in the Draft Code is a relative term to be measured within a specific context taking into account the protected object. This object, as the commentary explains, is the very foundation of human society, which the Draft Code seeks to shield from grave attacks. In addition to the seriousness of the act, there seemed to be agreement that such acts must be large scale or systematic to qualify as crimes against the peace and security of mankind. These conceptual considerations aside, there are five key elements that distinguish an international law crime from an ordinary crime. These elements have risen to the level of international customary law.

1. Individual Criminal Responsibility

Article 1 of the Draft Code of Crimes, which sets out the scope and application of the code, provides that it applies to those crimes set out in Part II and that those crimes are punishable under international law whether or not they are punishable under domestic law. The Commentary to article 2 of the Draft Code of Crimes establishes the principle of individual criminal responsibility for the commission of crimes against the peace and security of mankind notes that this principle is the enduring legacy of the Nuremberg Charter and Judgment: "[it was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals. . . . In the opinion of the Tribunal [this submission] must be rejected."

22. The Draft Code that was finally adopted by the United Nations General Assembly in 1996 draws a distinction between crimes against the peace and security of mankind, on the one hand, and other crimes under general international law such as genocide, war crimes, and crimes against humanity, on the other. [1954] 2 Y.B. Int’l Comm’n 159-52, U.N. Doc. A/2673 [hereinafter 1954 Yearbook. For a critique of this approach, see generally Jean Allain and John R. W. D. Jones, A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind, 8 EUROPEAN J. INT’L. L. 100 (1997).]

23. The principle of individual responsibility for crimes under international law was recognized in the Charter and the Judgment of the Nuremberg Tribunal as Principle I: Any person who commits an act which constitutes a crime under international law is responsible thereof and liable to punishment.

24. Id.
international law imposes duties and liabilities upon individuals as well as upon States has long been recognized. The principle of individual responsibility and punishment for international crimes is widely acknowledged as the cornerstone of international criminal law. It was most recently reaffirmed in the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 7, paragraph 1 and article 23, paragraph 1)\textsuperscript{25} and Rwanda (article 6, paragraph 1 and article 22, paragraph 1)\textsuperscript{26} and implicitly in the Rome Statute of the International Criminal Court.\textsuperscript{27} The recognition of this principle has made it possible to prosecute and punish individuals for serious violations of international law.\textsuperscript{28}

2. Punishment

Punishment is the other half of the doctrine of individual responsibility for crimes under international law. Punishment is essential as a deterrent against violations of international law. The Nuremberg Tribunal set the standard some sixty years ago by acknowledging that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."\textsuperscript{29} Article 3 of the Draft Code of Crimes codifies this principle by providing that “an individual who is responsible for a [crime under international law] shall be liable to punishment. The punishment shall be commensurate with the character and gravity of the crime.” As a universal crime, the penalty for acts of indigenous spoliation will de-


\textsuperscript{28} Principle VI: The crimes hereinafter set out are punishable as crimes under international law: (a) Crimes against peace [...]; (b) War crimes [...]; (c) Crimes against humanity [...].

pend on the jurisdiction, which in turn will determine the appropriate penalty and the severity. So, for instance, if a State were exercising jurisdictional competence over the accused, its national courts may decide on the applicable penalty and “may or may not admit extenuating or aggravating circumstances.” On the other hand, if jurisdiction is exercised by an international court, such as the newly-established International Criminal Court (ICC), the applicable punishment will be fixed by “an international convention, either in the statute of the international court or in another instrument if the statute of the international court does not so provide.”

3. Head of State Immunity and Defense of “Obedience to Superior Orders”

The Nuremberg precedent also established a number of other important related principles aimed at ensuring individual accountability for crimes under international law, such as the non-applicability of statutes of limitations for such crimes, the supremacy of international law over domestic law, the exclusion of the official position of an individual, including a Head of State or other high-level official, or the mere existence of superior orders, as valid grounds for relieving an individual of responsibility for such crimes. These principles were incorporated into the Draft Code, as the autonomy of international law in the criminal characterization of the kinds of behavior which constitute crimes against the peace and security of mankind is expressed in the concluding paragraph of article 1 of the Code “crimes under international law [are] . . . punishable as such whether or not they are punishable under national law;” the non-applicability of the defense of “obedience of superior orders” (save as mitigation of sentence) and the non-applicability of immunities up to and including heads of state

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31. *Id.*

32. *Principle II: The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.*


who commit a crime against the peace and security of mankind are covered, respectively, in articles 5 and 7 of the Code.35

4. Universal Jurisdiction: Duty to Prosecute or Extradite

Nuremberg also recognized that certain crimes under positive international law should be treated as crimes of universal concern,36 understood as the worst crimes which affect the foundations of human society. These crimes have attained *jus cogens* status37 imposing an *obligatio erga omnes*38 on all States towards the international community as a whole. As a consequence, any State may fulfill that obligation by exercising universal jurisdiction over persons suspected of committing such crimes, even though the prohibited acts were not committed

35. *Id.* at 2-3.

36. Principle II, supra note 27. See also Ndiva Kofele Kale, *Economic Crimes and International Justice: Elevating Corruption to the Status of a Crime in Positive International Law, Centre for Human Rights and Democracy in Africa* (June 25, 2009), http://www.chrda.org/articles4.html “An essential characteristic of universal crimes is that a state may participate in their repression even though they were not committed in its territory, were not committed by one of its nationals, or were not otherwise within its jurisdiction to prescribe and enforce. A crime of universal interest, that is, a crime under international law, can be characterized as such irrespective of its designation under domestic law. This is what is meant by the principle of the supremacy of international law over national law; reaffirmed in the Draft Code of Crimes in Article 1. Additionally, crimes of universal interest must come with adequate safeguards to protect the rights of the accused, for instance, the prohibition against double jeopardy (*non bis in idem*) and non-retroactivity. The former protects an individual accused of committing an international crime from being prosecuted or punished more than once for the same act or the same crime. It guards against multiple trials conducted in different national courts for the same offense. Where the principle of *non bis in idem* seeks to safeguard the accused from capricious judicial treatment from the criminal justice process, the doctrine of retroactivity seeks to uphold the fundamental objectives of criminal law which is to prohibit, to punish and to deter conduct which is considered sufficiently serious in nature to justify characterizing it a crime. Satisfying this principle requires that the standard of conduct that differentiates between permissible and prohibited conduct be defined *a priori*. The Commentary to the Draft Code of Crimes makes the point that the prosecution and punishment of an individual for an act or omission that was not prohibited when the individual decided to act or to refrain from acting would be manifestly unjust. This provision is without prejudice to the prosecution and punishment of an accused for a crime under pre-existing national law, provided the national law in question is applied in conformity with international law.” Ndiva Kofele Kale, *Economic Crimes and International Justice: Elevating Corruption to the Status of a Crime in Positive International Law, Centre for Human Rights and Democracy in Africa* (June 25, 2009), http://www.chrda.org/articles4.html.


in its territory, were not committed by one of its nationals, or were not otherwise within its jurisdiction to prescribe and enforce.\(^{39}\) An \textit{obligatio erga omnes} also confers on any State a duty to prosecute or extradite under the \textit{aut dedere aut judicare} principle.\(^{40}\)

5. Non-applicability of Statutory Limitations

Statutory limitations are not mentioned in the Nuremberg Principles, and the Draft Code of Crimes is silent on the matter.\(^{41}\)

\(^{39}\) Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 1, Aug. 8, 1945.

\(^{40}\) See Draft Code, supra note 34, at art. 9. As far back as 1971, the General Assembly urged all states "to take measures in accordance with international law to put an end to and prevent war crimes and crimes against humanity and to ensure the punishment of all persons guilty of such crimes, including their extradition to those countries where they have committed such crimes." G.A. Res. 2840 (XXVI), U.N. Doc. A/RES/2840 (Dec. 18, 1971). The General Assembly also affirmed that "refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law." \textit{Id.} Two years later in 1973 the United Nations General Assembly declared that "crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment." G.A. Res. 3074 (XXVIII), U.N. Doc. A/RES/3074 (Dec. 3, 1973).

\(^{41}\) Actually article 5 of the 1987 draft and article 7 of the 1991 version of the Draft Code states that "[n]o statutory limitation shall apply to crimes against the peace and security of mankind." \textit{Text of the Draft Articles Provisionally Adopted by the Commission on First Reading, \[1991\] 2, pt. 2 Y.B. Int'l Comm'n 94, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2) \[hereinafter \[1991\] Yearbook Part 2\]}; \textit{Draft Articles on the Draft Code of Crimes Against the Peace and Security of Mankind and Commentaries thereto, Provisionally Adopted by the Commission at its thirty-ninth session, \[1987\] 2, pt. 2 Y.B. Int'l Comm'n 15, U.N. Doc. A/CN.4/SER.A/1987/Add.1/\[Part 2\] \[hereinafter \[1987\] Yearbook Part 2\]. However, this language was omitted from the 1996 Draft Code out of concern that the non-applicability of statutory limitations was a principle which could be applied only to the 'core crimes' (such as genocide and crimes against humanity) but not all international crimes." \textit{See} Bruce Broomhall, \textit{Statutory Limitations, Encyclopedia of Genocide and Crimes Against Humanity} (Dinah L. Shelton, ed., 2005). This flip flopping can be blamed on two factors that influenced the Commission's thinking: first, the fact that, in internal law, statutory limitations for crimes is neither a general rule nor an absolute. Furthermore, as the Commission noted in the Commentary to article 5 of the 1987 draft, the rule of prescription is recognized in certain systems of law but not in others (e.g. the Anglo-American). In the French criminal code, for instance, the rule of prescription does not apply to serious military offenses or to offenses against the security of the French state. A second reason for the lukewarm attitude toward statutory limitation is the absence of doctrinal consensus on the nature or scope of the rule, especially on the question whether it is a rule of substantive or procedural law. 1987 Yearbook Part 2 supra. The Commission was equally influenced by a lacuna in international law relating to crimes against the peace and security of mankind which took no account of statutory limitations for crimes. \textit{Id.} For instance, the 1945 London Agreement establishing the International Military Tribunal made no mention of this rule neither did the St. James Declaration nor the Moscow Declaration. \textit{Id.}
However, consistent with the evolution of international law and in a bid to address the concern that statutes of limitations might forever block the possibility of holding the perpetrators of World War II crimes accountable, the United Nations General Assembly adopted the Convention on the Non-Applicability of Statutory Limitations on War Crimes and Crimes against Humanity in 1968. The Convention’s preamble expresses the conviction that the potential application of statutory limitation to these crimes is “a matter of serious concern to world public opinion” and their effective punishment “is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms . . . and the promotion of international peace and security.” Article 1 declares that “[n]o statutory limitation shall apply [to these crimes] . . . irrespective of the date of their commission.

Article 4 provides that States ratifying the Convention “undertake to adopt, in accordance with their respective constitutional processes, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of crimes referred to . . . and that, where they exist, such limitations shall be abolished.” The principle of prescription was eventually included in the Rome Statute which declares in its article 29 that “crimes within the jurisdiction of the Court shall not be subject to any statutes of limitations.” In the view of one commentator, given the clear wording of this article “any statutory limitations in national law will have no bearing on the ICC’s investigation and prosecution of genocide, crimes against humanity, and war crimes . . . . States that ratify the Rome Statute are obliged to cooperate with the Court, including the arrest and transfer of suspects sought by it . . . regardless of whether a statutory limitation has expired under national law.”

42. According to one publicist “[t]he high-profile trials at Nuremberg and subsequent proceedings following World War II did not lead to the widespread prosecution that some sought of the many suspected Nazi and other war criminals who lived either openly or in hiding around the world.” See Broomhall, supra note 32.
44. Id.
45. Id.
46. Id. at 41.
international law norm on the non-applicability of statute of limitations to crimes against humanity among other core crimes under international law.\textsuperscript{49}

B. The Distinguishing Features of a Crime Against Humanity

1. Early Attempts at Defining Crimes against Humanity

Although the five factors enumerated above are common to all crimes under international law, however, among the core group of serious crimes of concern to the international community (aggression, genocide, apartheid, etc.), crimes against humanity are treated differently. The definition of crimes against humanity usually consists of identifying a list of inhumane acts such as murder, rape, torture, deportation, and so on. However, the definition does not usually attempt to distinguish between murder, kidnapping, and rape that form part of crimes against humanity from everyday murders, rapes, and kidnappings. There is, therefore, need to first identify the essential characteristics of a crime against humanity, i.e., the specific features that distinguish crimes against humanity from ordinary crimes. Three comments are in order.

First, as Dixon and Hall observe in their commentary on article 7 of the Rome Statute, “there has been little agreement for nearly a century on what are the internationalizing factors that distinguish crimes against humanity from ordinary crimes, such as murder, kidnapping, assault, rape and false imprisonment.”\textsuperscript{50} Early attempts at defining crimes under international law, focused more on identifying jurisdictional thresholds only and not internationalizing factors distinguishing crimes against humanity from ordinary crimes.\textsuperscript{51} Second, the Nuremberg Principles re-introduced the concept of crimes against humanity but without providing a clear and concise definition other than that they consist of a small group of crimes of exceptional gravity that engage individual responsibility.\textsuperscript{52} The Nuremberg Principles defined crimes punishable as crimes against humanity certain acts, \textit{when such acts are done or such persecutions are carried on “in execution of or in

\textsuperscript{49} See Rome Statute, supra note 47.


\textsuperscript{51} Id.

\textsuperscript{52} Principle VI: The crimes hereinafter set out are punishable as crimes under international law: (a) Crimes against peace [. . . ]; (b) War crimes [. . . ]; (c) Crimes against humanity [. . . ]. Nuremberg Report supra note 33, at 13.
connexion with any crime against peace or any war crime". The link to crimes against peace or war crimes as part of the definition of crimes against humanity was dropped in subsequent attempts by the International Law Commission (ILC) to define the scope of this crime.

Third, the may have unwittingly contributed to this definitional morass. In incorporating the Nuremberg Principles into the Draft Code, the ILC did two things that may have held back the emergence of a consensus around the elements of a crime against humanity. First, it chose not to draw up a draft article specifying the particular characteristics of crimes against humanity. Second, it maintained an artificial distinction between crimes against peace, war crimes, and crimes against humanity. They were not accorded the same doctrinal parentage as result the constituent elements that defined each of these crimes were different. However, in the 1987 draft code the Commission identified two of the essential features that an act or activity must fulfill in order to qualify as a crime against the peace and security of mankind: first, the seriousness of the crime, and second, the scale. Because the Commission treated crimes against peace, war crimes, and crimes against humanity as different in kind, if not substance, it chose not to draw up a draft article specifying the particular characteristics of crimes against humanity. This choice may have contributed to the lack of consensus around the elements that constitute a crime against humanity. However, in the 1991 draft code, the Commission dropped its long standing distinction between crimes against peace, war crimes and crimes against humanity, opening the door for the application of the same constituent elements in that separate these crimes from other crimes.

Two years later in its Seventh Report on the Draft Code, the ILC, through its Rapporteur, introduced three factors that it thought

53. Id.

54. See Draft Code of Offences Against the Peace and Security of Mankind, Int'l Law Comm'n, 6th Sess., June 30- July 28, 1954, U.N. Doc. A/CN.4/85 (Apr. 30, 1954). The decision to drop this link to other crimes was in order "to make the punishment of the acts enumerated in the paragraph independent of whether or not they are committed in connection with other offenses defined in the draft Code. On the other hand, in order not to characterize any inhuman act committed by a private individual as an international crime, it was found necessary to provide that such an act constitutes an international crime only if committed by the private individual at the instigation or with the toleration of the authorities of a State." See also S.C. Res. 808, ¶ 2, U.N. Doc. S/Res./808 (Feb. 22, 1993). ("crimes against humanity are aimed at any civilian population and are prohibited regardless whether they are committed in an armed conflict, international or internal in character."). U.N. Secretary-General, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 13 U.N. Doc. S/25704 (May 3, 1993) [hereinafter ICTY Statute].
distinguished crimes against humanity from common crimes: first, the particular infamy and horror that characterizes the crime; second, committed on discriminatory grounds "[t]he thing that distinguishes inhuman acts from common crimes is motive. They are acts that are promoted by ideological, political, racial, religious or cultural intolerance and strike at a person's innermost being, e.g., his convictions, beliefs or dignity;" third, the mass or systematic nature of the crimes. In the 1991 Draft Code, the ILC introduced the concept of systematic or mass violations to replace the terms "inhuman acts" and "persecutions" found in article 21 of the 1954 Draft Code. The Commentary to article 21 of the 1991 draft notes that the common factor in all the acts constituting crimes against humanity are, first, a serious violation of certain fundamental human rights; second, the systematic nature or scale of the act. The former relates to a constant practice or to a methodical plan to carry out such violations while the latter, i.e., the mass scale element, relates to the number of people affected by such violations or the entity that has been affected. The drafters wanted it understood that either of these elements—systematic or mass scale—in the definition of a crime against humanity is enough to trigger the offense. However, the emphasis on the systematic nature of the act is intended to exclude isolated acts, which are not systematic or on a mass scale, "no matter how reprehensible."

The concept of "systematic or mass" violations is retained in the final version of the Draft Code adopted in 1996. Article 18 of this version lists a total of eleven inhumane acts as constituting crimes against humanity. These are: murder; extermination; torture; enslavement, persecution; institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population; arbitrary deportation or forcible transfer of population; arbitrary imprisonment; forced disappearance of persons; rape, enforced prostitution and other forms of sexual abuse; and other inhumane acts which severely damage physical or mental integrity, health or human

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56. Id. at 87.
57. Id. at 88.
59. But the crime of "systematic or mass violations of human rights" is replaced with "crimes against humanity." See Draft Code supra note 34, at art. 18.
dignity, such as mutilation and severe bodily harm. These crimes are now codified in numerous international instruments.6061626364

The commentary to article 18 recognizes “two general conditions which must be met for a prohibited activity to qualify as a crime against humanity within the meaning of that provision. The first condition consists of two alternative requirements. The first alternative requires that the inhumane acts be ‘committed in a systematic manner’

60. The Rome Statute specifies that “. . .any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” Rome Statute, supra note 38, at art. 7.

61. See also The Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), Article 5 which describes: “. . .the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts;” ICTY Statute, supra note 54.

62. The Statute of the International Criminal Tribunal for Rwanda (ICTR), Article 3 holds “. . .the following crimes as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; (i) Other inhumane acts.” S.C. Res. 955, 4, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

63. The Statute of the Special Court for Sierra Leone (SCSL), Article 2 holds “. . .the following crimes as part of a widespread or systematic attack against any civilian population: a. Murder; b. Extermination; c. Enslavement; d. Deportation; e. Imprisonment; f. Torture; g. Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; h. Persecution on political, racial, ethnic or religious grounds; i. Other inhumane acts.” Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone, Sierra Leone-U.N., Jan. 16, 2002, 2178 U.N.T.S. 137 [hereinafter SCSL Statute].

64. The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC), Article 5 prohibits “. . .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.” 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, Cambodia-U.N., June 6, 2003, 2329 U.N.T.S. 117.
meaning pursuant to a preconceived plan or policy." The second alternative requires that the inhumane acts be committed ‘on a large scale’ meaning that the acts be directed against a multiplicity of victims. This requirement excludes an isolated inhumane act committed by a perpetrator acting on his own initiative.” The term “large scale” is preferred over “mass scale”, a term which appeared in an earlier text of the draft code, because it is sufficiently broad to cover various situations involving a multiplicity of victims.

The second condition, which must be met before a prohibited act rises to the level of a crime against humanity, requires that the act was ‘instigated or directed by a Government or by any organization or group.’ 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 in the absence of any encouragement or directed from either a Government or group or organization. This hair splitting continued for a while with the inclusion in the UN Secretary-General’s report to the Security Council that led to the adoption of the Statute of the International Criminal Tribunal for Yugoslavia language to the effect that crimes against humanity are “inhumane acts of a very serious nature . . . committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.”

However, after a long history of repeatedly changing views, there now appears to be an emerging consensus of some of the internationalizing components of the definition of crimes against humanity which distinguish these crimes from ordinary crimes that may be committed as part of a widespread or systematic attack against any civilian population and, possibly, with knowledge of the attack. The following section examines these requirements in the context of the case law of international criminal tribunals.

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66. *Id.*

67. *Id.*

68. ICTY Statute *supra* note 54.

69. Dixon & Hall *supra* note 41.
III. THE JURISPRUDENCE OF INTERNATIONAL TRIBUNALS

A. Legal Instruments Share Common Ground

The legal instruments establishing the International Criminal Tribunal for the former Yugoslavia ("ICTY Statute")\textsuperscript{70} the International Criminal Tribunal for Rwanda ("ICTR Statute")\textsuperscript{71} and the Special Court of Sierra Leone ("SCSL Statute")\textsuperscript{72}, all define a crime against humanity as consisting of a category of egregious acts\textsuperscript{73} committed as part of a widespread or systematic attack against any civilian population. In sharp contrast to the SCSL and ICTR Statutes, the ICTY Statute much like the Rome Statute, limits the commission of this set of crimes during armed conflict. In its definition of a crime against humanity, the Rwanda Statute adds the additional requirement that the attack against a civilian population must be motivated by "national, political, ethnic, racial or religious grounds."\textsuperscript{74}

The Statutes for the three \textit{ad hoc} tribunals share a common list of crimes that constitute crimes against humanity which include murder, extermination; enslavement, deportation, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, any other form of sexual violence, persecution on political, racial, ethnic, or religious grounds, and other inhumane acts.\textsuperscript{75} The three Statutes are also agreed on the key elements which must be proved to show the commission of a crime against humanity. These are 1) an attack; 2) that is widespread or systematic; 3) directed against any civilian population; 4) the acts of the accused must be part of the attack; and 5) the accused knew or had reason to know that his or her acts constitute part of a widespread or systematic attack directed against any civilian population.\textsuperscript{76}

\textsuperscript{70} ICTY Statute \textit{supra} note 54.
\textsuperscript{71} ICTR Statute \textit{supra} note 60.
\textsuperscript{72} SCSL Statute \textit{supra} note 60.
\textsuperscript{73} See \textit{supra} note 54.
\textsuperscript{74} Compare SCSL Statute \textit{supra} note 60 (eliminating need for armed conflict) and ICTR Statute \textit{supra} note 60 (eliminating need for armed conflict) \textit{with} ICTY Statute \textit{supra} note 54 (requiring armed conflict); Rome Statute \textit{supra} note 47 (requiring armed conflict).
\textsuperscript{75} SCSL Statute \textit{supra} note 60; ICTR Statute \textit{supra} note 60; ICTY Statute \textit{supra} note 54.
\textsuperscript{76} \textit{Prosecutor v. Fofana}, Case No. SCSL-04-14-A, Trial Judgment, ¶ 110 (May 28, 2008) [hereinafter Fofana Trial Judgment].
1. There must be an Attack

The first element in the commission of a crime against humanity is the existence of an attack understood as "an unlawful act, event, or series of events of the kinds" listed in the crimes against humanity article. The jurisprudence of the ICTY has tried to clarify the "armed attack" element in the definition of a crime that constitutes a crime against humanity contained in the ICTY Statute. In a number of cases, the ICTY has indicated that an attack in the context of a crime against humanity is not limited to the use of armed force but may also include any "mistreatment of the civilian population" such as murder, torture, beatings, rape, plunder, looting, and destruction of property directed against civilians. The actions of the defendants in Fofana were found to amount to mistreatment of an untold number of civilians during the civil war in Sierra Leone. As part of their campaign to terrorize the civilian population in a number of villages, Samuel Norman and the other leaders of the Civil Defense Force (CDF) engaged in looting, destruction of private as well as business property, infliction of serious bodily harm and serious physical suffering on civilians, and the extorting of money from them as well.

The distinction between an attack and an armed conflict "reflects the position in customary international law that crimes against humanity may be committed in peace time and independent of an armed conflict." As the ICTY Trial Chamber in Kunarac pointed out, the requirement of an armed attack is a purely jurisdictional prereq-

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78. ICTY Statute, supra note 49, at art. 5.


80. The CDF, comprising of variously tribally-based hunters, was one of the organized armed factions in the Sierra Leone civil war that fought against the combined forces of the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC).


83. An example of an armed attack within the meaning of article 5 of the ICTY Statute was the conflict between the Government of the Republic of Bosnia and Herzegovina and Bosnian Croat forces supported by the Government of Croatia as well as that between the Government of the Republic of Bosnia and Herzegovina, on the one hand, and, on the other hand, the Bosnian Serb forces. Based on the above, the Trial Chamber concluded that there was an armed conflict. See Tudia Trial Judgment, ¶ 566.
uisite" which is satisfied by proof that there was an armed conflict and that objectively the acts of the accused are linked geographically as well as temporally with the armed conflict.\textsuperscript{84} The "armed conflict" requirement is distinct from the "attack" requirement, and under customary international law, "the attack could precede, outlast, or continue during the armed conflict, but it need not be a part of it."\textsuperscript{85}

In a similar vein, both the Rwanda tribunal and the Special Court for Sierra Leone have also tried to clarify the doctrinal confusion in the distinction between an "attack" and an "armed attack." For the latter court "[a]n attack constitutes a course of conduct involving the commission of acts, and need not be a military attack."\textsuperscript{86} In Prosecutor \textit{v. Kayishema and Ruzindana}, the ICTR acknowledged that "[c]rimes against humanity can be committed inside or outside the context of an armed conflict."\textsuperscript{87} In Kayishema thousands of unarmed men, women and children from various locations who sought refuge in "The Complex", which was the Home St. Jean Complex located in Kibuye town, were massacred on orders by the defendant, Kayishema. Even though there was no armed conflict in the Kibuye Prefecture,\textsuperscript{88} the defendant was found guilty of crimes against humanity. While it is generally understood that an armed conflict exists "whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state,"\textsuperscript{89} this clearly was not the case in Kibuye.

It can be inferred from the case law of these tribunals that the attack element is not \textit{per se} a distinguishing characteristic of a crime against humanity. Rather, it is an element shared with ordinary crimes in that there must be a commission of acts that constitute the commission of a crime. For example, while analyzing the legal elements of murder as a crime against humanity and murder as a war crime, the SCSL in the \textit{Fofana} case held that both charges share the required element of "the death of one or more persons."\textsuperscript{90} The death of one or more persons is equivalent to the attack element necessary for the crime of murder and regardless of whether the defendants are

\begin{itemize}
\item \textsuperscript{84} \textit{Id.} at ¶ 413.
\item \textsuperscript{85} \textit{Prosecution v. Tadic}, Case No. IT-94-1-A. Appeals Judgment, ¶ 251 (July 15, 1999) [hereinafter Tadic Appeals Judgment].
\item \textsuperscript{86} Norman and ors., \textit{supra} note 81.
\item \textsuperscript{87} \textit{Prosecutor v. Kayishema and Ruzindana}, Case No. ICTR-95-1-T, ¶ 127 (May 21, 1999) [hereinafter \textit{Kayishema and Ruzindana} Trial Judgment].
\item \textsuperscript{88} \textit{Id.}
\item \textsuperscript{89} \textit{Prosecutor v. Kunarac}, Case No. IT-96-23-T, Trial Judgment, ¶ 412 (Feb. 22, 2001) [hereinafter \textit{Kunarac} Trial Judgment].
\item \textsuperscript{90} \textit{Fofana} Trial Judgment, \textit{supra} note 55, at ¶¶ 143, 146.
\end{itemize}
charged with murder as a violation of the Geneva Convention on war crimes or murder as a crime against humanity, a murder must have occurred.

2. The Attack must be Widespread or Systematic

There has been some debate on the proper construction of the “widespread or systematic” attack requirement. It has been urged on some tribunals, as the defense did in the Blaškija case, that the phrase can only be read to mean “widespread and systematic.” The Trial Chamber, on the other hand, appeared to have been persuaded by the prosecution’s argument that that the two characteristics “widespread in nature” or “systematic in nature” of the element of “widespread or systematic attack against a civilian population” were not cumulative. The term “widespread” has been interpreted by the various Tribunals to refer to both the scale of the acts and the quantum of victims involved. The concept of “widespread” also refers to the geographical scope of the events or activities. In the Fofana case, the SCSL Trial Chamber found that the events surrounding the conflict in question constituted “part of a widespread attack” due to the “broad geographical area over which these attacks occurred.” The evidence demonstrated that several towns and villages were attacked. In Prosecutor v. Bagosora, the ICTR Trial Chamber found that the fact that the accused ordered and had knowledge of attacks against civilians who were singled out and killed at roadblocks and various sites because of their ethnicity and political leanings demonstrated that the attacks were widespread and systematic.

The “systematic” face of the Janus-like “widespread and systematic” requirement refers to the framework within which the crimes were committed, more precisely “the organized nature of the acts of violence and the improbability of their random occurrence.” The presence of a plan can be inferred from the factual circumstances. The ICTY Appeals Chamber has identified a number of factors to consider when determining whether an attack is indeed widespread or systematic because it revolves around a pre-determined plan. These factors

92. Id. at ¶ 190.
94. Id. at ¶ 691.
96. Kunarac Appeals Judgment, supra note 58, at ¶ 94.
include the population being attacked and the means, methods, resources and result of the attack. In addition, “patterns of crimes,” or “the non-accidental repetition of similar criminal conduct on a regular basis,” are “a common expression of such systematic occurrence.”

Moreover, the tribunals have explained that the “concept of ‘systematic’ attack refers to a deliberate pattern of conduct, but does not necessarily include the idea of a plan.” This position was reiterated by the ICTR Trial Chamber in *Prosecutor v. Muhimana* where it held that “[t]he existence of a policy or plan may be relevant in establishing if an attack was directed at a civilian population or was widespread or systematic, but its existence was not a distinct legal element of a crime against humanity.”

As the ICTY has explained the desire to exclude isolated or random acts from the notion of crimes against humanity is what led to the inclusion of the requirement that the acts must be accompanied by “either a finding of widespreadness or systematicity.” The Appeals Chamber in the *Tadić* has identified four factors to consider in establishing the systematic nature or character of an attack. First, the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community. Second, the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another. A third factor relates to the preparation and use of significant public or private resources, whether military or other, in furthering the plan. And the fourth factor is the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.

These factors have been examined in a number of cases. In *Kunarac* the ICTY found that the involvement of the defendants in the “systematic attack against Muslim civilians” satisfied the political ob-

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97. *Id.*, at ¶ 430.

98. *Id.*


102. *Id.*

103. *Blaškić supra* note 70, at ¶ 203.
jective element. The defendants knew of the military conflict in the region, had participated in it as soldiers, knew that one of the main purposes of that campaign was to drive the Muslims out of the region, and knew that one way to achieve that goal was to "terrorize the Muslim civilian population."104 In addition, the defendants knew of the "general pattern of crimes, especially of detaining women and girls in different locations where they would be raped."105 Likewise, the defendant in Prosecutor v. Blaškiač106 was found guilty of crimes against humanity for his participation in a plan to destroy Bosnian Muslims in the Lašva Valley region of central Bosnia. The plan involved the killing of civilians regardless of age or gender, the destruction of private property, and damage to mosques. General Blaškiač knowingly took part in the implementation of the ideology, policy or plan. In order to achieve his political objectives, Blaškiač used all the military forces he could enlist. Even knowing that some of the forces had committed crimes, he still redeployed them for other attacks.107 Through these methods, he forced the departure of the majority of the Muslim population in Lašva. To the defense argument that a crime against humanity must be committed as part of an official State policy and the accused must intend to implement the official State policy,108 the Trial Chamber offered two comments. First, an accused need not be identified with the ideology, policy, or plan in whose name mass crimes were committed, nor even that he or she supports it. It is enough that he has knowledge of a plan even though he may not even support it. What is critical is his willing performance and participation in the execution of the plan. Second, that the plan can be implemented from any level within the State and the Trial Chamber does not presume only the highest level of State leaders can implement these plans.109

3. The Attack must be Directed Against a Civilian Population

For an attack to rise to the level of a crime against humanity, it must be directed against a civilian population 110 and, in the specific

105. Id.
106. Blaškiač supra note 70, at ¶ 203.
107. Id. at ¶ 753.
108. Id. at ¶ 197.
109. Id. at ¶ 205.
110. Factors to consider when determining whether the attack may have been directed against civilians include:
  a) the means and method used in the course of the attack;
  b) the status of the victims, their number;
  c) the discriminatory nature of the attack;
context of the Rwanda Statute, the attack must have been carried out with a discriminatory intent. However, the requirement that the attack must be directed against a “civilian population” does not “mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack.” In Prosecutor v. Tadié, the ICTY Trial Chamber further clarified the meaning of an attack against a civilian population. It observed that the meaning of civilian population is not altered by those actively involved in a resistance movement nor of those that are not considered civilians. Patients in a hospital for example, either civilians or resistance fighters who have laid down their arms, are considered victims of crimes against humanity. The reference in Article 5 of the ICTY Statute to ‘population’ is not interpreted as meaning that the act must have been directed against the entire population of a given State or territory, but implied that the acts are of a collective nature. This has been interpreted to mean that the acts must occur on a widespread or systematic basis. Systematic basis is described as being committed through a preconceived plan or policy. Widespread requires that the acts be committed on a large scale directed towards a multiplicity of victims. A single, isolated act can constitute a crime against humanity if it was the product of a political system based on terror or persecution.

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d) the nature of the crimes committed in its course;

e) the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war. See Kunarac Appeals Judgment, supra n. 7 at para. 91.

111. See ICTR Statute, art. 3. In Prosecutor v. Muhimana the Trial Chamber found the defendant guilty of crimes against humanity, specifically for having committed acts of genocide and rape against Tutsi refugees. While this group of refugees was singled out for genocidal attacks, the accused took pains to instruct Hutu refugees to separate from the Tutsi in order to escape from those attacks. See Muhimana, Trial Judgment, ¶ 524-530. The requirement of discriminatory intent has also found its way into the jurisprudence of the ICTY even though it is not specifically mentioned in article 5 of the ICTY Statute. For instance, the Trial Chamber in Prosecutor v. Tadié adopted the requirement of discriminatory intent based on the conclusions in the Report of the Secretary-General, and the Security Council's interpretation of Article 5 as referring to acts taken on a discriminatory basis. See Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993) and Annex thereto, U.N. Doc. S/25704, ¶ 48.

112. Kunarac Appeals Judgment, supra note 58 at ¶ 90.

113. Prosecutor v. Tadié, Case No IT-94-1-T, Opinion and Judgment (May 7, 1997) (MacDonald, J., dissenting) [hereinafter Tadié Trial Judgment].

114. Id. at ¶ 643.

115. Id. at ¶ 644.

116. Id. at ¶ 648.

117. Id. at ¶ 649.
There is unanimity among the ad hoc international criminal tribunals that in order to satisfy the requirement of targeting the civilian population, the evidence must show that the attack was directed at more than "a limited and randomly selected number of individuals."\textsuperscript{118} For example, in the Fofana case, the SCSL Trial Chamber declared that the targeting of a select group of civilians, such as the targeted killing of a number of political opponents, does not meet the definition of population.\textsuperscript{119} The ICTY Appeals Chamber declared that "the expression 'directed against' is an expression which 'specifies that in the context of a crime against humanity the civilian population is the primary object of the attack.'"\textsuperscript{120} Factors to consider when determining whether the attack may have been directed against civilians include, "the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war."\textsuperscript{121}

Furthermore, the attack must not simply be directed against a civilian population but that population must be the primary object of the attack. In the Fofana case, the SCSL Trial Chamber found the defendants not guilty of any crimes against humanity because the prosecution had failed to prove beyond a reasonable doubt that the civilian population was the primary object of the attack.\textsuperscript{122} Instead, the evidence before the Trial Chamber showed that the attacks were directed against the rebels that controlled villages and communities throughout Sierra Leone.\textsuperscript{123} However, the SCSL Appeals Chamber reversed the Trial Chamber's ruling but not without providing some guidelines for determining when the principal target of an attack is the civilian population.

In reversing the Trial Chamber, the SCSL Appeals Chamber held that "the civilian population comprises all persons who are civilians and the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the popu-

\textsuperscript{118} Id. at ¶ 90.
\textsuperscript{119} Sesay Trial Judgment, supra note 61, at ¶ 85.
\textsuperscript{120} Kunarac Appeals Judgment, supra note 58, at ¶ 91.
\textsuperscript{121} Id.
\textsuperscript{122} Fofana Trial Judgment, supra note 55, at ¶ 693.
\textsuperscript{123} Id. at ¶ 694.
lation of its civilian character." Therefore, "the presence of rebels...within the victims does not deprive the population of its civilian character." However, when determining whether the civilian population was the primary attack, the SCSL Appeals Chamber emphasized that "what must be primary is the civilian population as a target and not the purpose or the objective of the attack." Thus, while the objectives of the attacks orchestrated by the defendants in the Fofana case might have been to target rebels and their supporters and regain lost territory and democracy, what matters is whether a civilian population was targeted in order to achieve these objectives. The facts demonstrate that the CDF was responsible for killings and other atrocities against unarmed civilians who they characterized and designated as "rebel collaborators" that occurred when activities and operations against the enemy forces were already over. The SCSL Appeals Chamber held that "perceived or suspected collaborators...are likewise part of a 'civilian population,'" and that the murdered civilians could not have been "collateral victims" of a "legitimate military attack" because of the lack of military operations between the CDF and the rebels at the time the attack was commissioned. Thus, in order for a prohibited act to rise to the level of a crime against humanity the civilian population must be specifically targeted and not be seen as mere collateral victims of a military attack. In addition, despite the fact that the evidence proved the commission of murder resulting from the intentional acts of the defendants, the SCSL Trial Chamber still issued a finding of not guilty for the charge of murder as a crime against humanity, because proof beyond a reasonable doubt that the attacks were primarily directed against civilians was lacking. The Fofana ruling demonstrates how the element, which requires that the attack be directed against a civilian population, distinguishes the violation of murder as a crime against humanity from other murder violations.

125. Id. at ¶ 299.
126. Prosecutor v. Fofana, Case No. SCSL-04-14-A, Sentencing Judgment, ¶ 305 (May 28, 2008) [hereinafter Fofana Sentencing Judgment]. The CDF Trial Judgment also reveals attacks were launched and carried out after the departure of the rebels. Fofana Trial Judgment, supra note 55, at ¶¶ 441, 449, 539, 570, and 582.
127. Fofana Appeals Judgment, supra note 103, at ¶ 264.
128. Id. at ¶ 306.
129. Fofana Trial Judgment, supra note 55, at ¶¶ 694, 752.
130. Id. at ¶ 693; Fofana Appeals Judgment, supra note 103, at ¶ 259.
Furthermore, in the Sesay case, the SCSL Trial Chamber elaborated that "persons accused of ‘collaborating’ with the government or armed forces would only become legitimate military targets if they were taking direct part in the hostilities." Additionally, "indirectly supporting or failing to resist an attacking force is insufficient to constitute" direct participation in the hostilities. As demonstrated by the case law of the ICTY, ICTR, and SCSL, a crime against humanity is distinguishable from an ordinary crime because the act must be part of a broader attack that is directed against a civilian population.

The Requisite Mental State

The jurisprudence of the international criminal tribunals has also addressed the requisite mental state for the commission of a crime against humanity: the applicable mens rea and actus rea and the concurrence between these two elements.

4. The Actions taken by the Accused must be Part of the Attack

The requirement that the act of the accused must be part of the attack is satisfied by the "commission of an act which, by its nature or consequences, is objectively part of the attack." According to Article 6 of the SCSL Statute, "a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime... shall be individually responsible for the crime." The acts of the accused need only be part of the attack and do not have to satisfy the "widespread or systematic" element. In addition, the acts of the accused "need not be committed in the midst of that attack," as "a crime which is committed before or after the main attack against the civilian population or away from it could still, if sufficiently connected, be part of that attack." However, the crime cannot be an “isolated act” that is so far removed from the attack that "it cannot reasonably be said to have been part of the attack."

This element of a crime against humanity is not distinguishable from ordinary crimes in that all crimes require this showing of actus reus. As mentioned above, the defendants in Fofana were indicted on

131. Sesay Trial Judgment, supra note 61, at ¶ 86.
132. Id.
133. Fofana Trial Judgment, supra note 55, at ¶ 120.
134. SCSL Statute, supra note 51, at art. 6(1).
135. Kunarac Appeals Judgment, supra note 58, at ¶ 96.
136. Id. at ¶ 100.
137. Id.
several counts, including Count 1, murder as a crime against humanity and Count 2, murder as a war crime prohibited by the Geneva Conventions. While the SCSL Trial Chamber separately analyzed the law with respect to both charges, the Chamber concluded that both charges shared certain elements, including the actus reus element that the death of the person was caused by an act or omission of the Accused. In addition, the crime of conspiracy to commit genocide also has an actus reus element, which is essentially the existence of an agreement between individuals to commit genocide.

5. The accused must have knowledge of the directed attack

What interpretation have international criminal tribunals given to the standard of mens rea required for crimes against humanity under their various legal instruments? Should the mens rea required of the accused be limited solely to an intention on his part to implement the official State policy? Or, is that element satisfied if the accused is aware of "the general context within which his act is framed at the instant that he commits the crime?" These questions were addressed by the ICTY in Prosecutor v. Blaškiać. The defendant in this case, General Tihomir Blaškiać, was indicted on three counts of crimes against humanity under Article 5 of the ICTY Statute. The prosecution alleged that he committed violations of international humanitarian law against Bosnian Muslims by members of the Croatian Defense Council ('HVO'), in the Lašva Valley of Central Bosnia, between May 1992 and January 1994. More importantly, as commander of the HVO forces during this period of time, Blaškiać was accused of having aided and abetted in the planning, preparation or execution of each of the alleged crimes. It was also alleged that he knew or had reason to know that his subordinates had committed or were going to commit those crimes and he willingly took no action to prevent their commission or to punish those responsible. In finding that General Tihomir Blaškiać's actions satisfied the mens rea element, the Trial Chamber explained thus: the mens rea to a crime against humanity requires that the individual knowingly take the risk of participating in the implementation of the ideology, policy, or plan. It does not require that the agent be

138. Fofana Trial Judgment, supra note 55, at ¶¶ 141, 145. See also SCSL Statute, supra note 51 at arts. 2(a), 3(a).
139. Fofana Trial Judgment, supra note 55, at ¶¶ 143, 146.
140. Bagosora Trial Judgment, supra note 74, at ¶ 2087.
141. Blaškiać Trial Judgment, ¶ 197.
142. Id.
143. Id. ¶ 257.
identified with the ideology, policy, or plan in whose name mass crimes were committed, nor even that he or she supports it. A person who has knowledge of a plan may not even support it, but through his willing performance and participation in the execution of the plan meets the \textit{mens rea} requirements nonetheless.

In \textit{Prosecutor v. Blaškiæ} the Tribunal found ample proof of the accused’s mental state as it was established that General Blaškiæ knew that his HVO forces were killing civilians helter-skelter, destroying private property, and damaging mosques in a planned campaign to eliminate the Muslim population. With his knowledge, the HOV forces also arrested civilians and transferred them to detention centers. General Blaškiæ himself confirmed that during this military operation over twenty villages were attacked according to a pattern that was not changed.\textsuperscript{144}

In a similar vein the ICTR Appeals Chamber tackled the requisite culpable state in a crime against humanity in \textit{Bagosora} where it observed that on the issue of the \textit{mens rea} element “the perpetrator must have acted with knowledge of the broader context of the attack, and with knowledge that his acts (or omissions) formed part of the widespread or systematic attack against the civilian population.”\textsuperscript{145} In language no different from that employed in \textit{Prosecutor v. Blaškiæ}, the \textit{Bagosora} Trial Chamber explained the level of knowledge the accused is held to: the accused must know, or have reason to know, that there is an attack on the civilian population and that his acts comprise part of that attack. It is irrelevant “whether the accused intended his acts to be directed against the targeted population or merely against his victim,” because “it is the attack, not the acts of the accused, which must be directed against the target population.”\textsuperscript{146} The accused only has to have knowledge that his acts were part of a widespread or systematic attack on a civilian population.\textsuperscript{147} Furthermore, the accused “needs to understand the overall context in which his acts took place, but need not know the details of the attack or share the purpose or goal behind the attack.”\textsuperscript{148} The SCSL Appeals Chamber in the \textit{Fofana} case found that the perpetrators did have knowledge that a widespread or systematic attack against the civilian population due to the evidence that the CDF constructed and issued orders to carry out a policy to kill per-

\ \textsuperscript{144} \textit{Id.} ¶ 750-51.
\textsuperscript{146} \textit{Kunarac Appeals Judgment, supra} note 58, at ¶ 103.
\textsuperscript{147} \textit{Id.} at ¶ 103.
\textsuperscript{148} \textit{Fofana Trial Judgment, supra} note 55, at ¶ 121.
ceived “collaborators” in order to “break any possible resistance or collaboration by the population.”

The Tribunals are split regarding whether the mens rea element must include a showing of discriminatory intent. In order to meet the definition of crimes against humanity, the ICTR requires the crime to have “been committed on national, political, ethical, racial or religious grounds.” Like the ICTY’s addition of the “armed conflict requirement,” this ICTR requirement “allows the Tribunal to exercise jurisdiction only over a restricted category of crimes.” The ICTY and SCSL on the other hand do not require a discriminatory intent in order to find that a crime against humanity has been committed. In Prosecution v. Tadic, the ICTY Appeals Chamber held that “the Trial Chamber erred in finding that all crimes against humanity require a discriminatory intent” and that “such an intent is an indispensable legal ingredient of the offence only with regard to those crimes for which this is expressly required.” The court further explains that the only crime against humanity charge that would require discriminatory intent is the crime of persecution. In the SCSL, one of the defendants in Fofana argued that to establish that an attack was directed against a civilian population, the prosecution carries the burden of establishing that the civilians were targeted because of one of their distinguishable characteristics. However, the SCSL Appeals Chamber rejected this argument, citing with approval the ruling of the ICTY in Tadic. The Fofana opinion further explained that while several cases involved groups of civilians being targeted based on their nationality, race, ethnicity, or political affiliation, such a discriminatory intent behind the attack is not a requirement for all crimes against humanity.

It would appear that the mens rea element is not a distinguishing element just as the actus reus element, since ordinary crimes also require a certain level of knowledge or intent on the part of the accused in order to be found guilty of a crime. For example, while analyzing the legal elements of murder as a crime against humanity and murder as a war crime, the SCSL in the Fofana case held that both require an element of intent to kill or cause serious bodily harm, or reasonably

149. Fofana Appeals Judgment, supra note 103, at ¶¶ 318-19.
150. ICTR Statute, supra note 51, at art. 3.
151. Gacumbitsi Trial Judgment, supra note 56, at ¶ 301.
152. Tadic Appeals Judgment, supra note 64, at ¶ 305.
153. Id. at ¶ 305.
154. Fofana Appeals Judgment, supra note 103, at ¶ 262.
155. Id. at ¶ 263.
156. Id.
knowing such would be the result. While the *mens rea* of an accused charged with a war crime must encompass "the fact that the victim was a person not taking direct part in the hostilities," both war crimes and crimes against humanity share the requisite knowledge that the accused must possess when committing the crime. In the section that follows, it will be argued that the elements described as the requisite mental state in the commission of a crime against humanity are also present in the crime of indigenous spoliation.

IV. **Indigenous Spoliation: A Crime against Humanity?**

A. **Indigenous Spoliation: A New Form of Corruption**

Corruption is No Synonym for Indigenous Spoliation

Textbook writers treat the spoliation of national wealth as something akin to aggravated bribery. This, however, is not the case with the modern version of corruption which is fundamentally different from its historical antecedents as I have tried to argue in my previous writings. First, unlike past depredations where the wealth remained in the territory for recycling, the modern context of state theft is characterized by "great mobility of wealth and the capacity to hide and disguise it." Most analysts agree that the outflows of illicit wealth originating from Africa tend to be permanent, between 80-90 per cent of which remain outside the Continent. The bulk of the estimated $10-$30 billion fortune of the late President of the Philippines, Ferdinand Marcos, was stashed in about 7,270 gold accounts under different names scattered across several Swiss banks. Over 100 banks around

the world were involved in the handling of General Abacha's\textsuperscript{162} stolen wealth including Citigroup, HSBC, BNP Paribas, Credit Suisse, Standard Chartered and Deutsche Morgan Grenfell.\textsuperscript{163} With so many numbered and unnumbered accounts, efforts at detecting and tracing the whereabouts of stolen national assets usually end up becoming a game of hide-and-seek! Where these assets can be traced, the sheer volume of transactions can seriously impede the degree to which the majority of victim States can aggressively mount successful recovery and repatriation efforts.\textsuperscript{164}

Second, the evidence is overwhelming that the bulk of stolen national assets are never reinvested in productive enterprises in their countries of origin. Predators prefer to invest their stolen wealth in other places to avoid detection and subsequent recovery. For instance, the late President Omar Bongo's preferred investment havens appear to have been Senegal and Morocco: he held shares (ranging between 5 and 30 per cent) in 20 companies based in that country; he owned over 5,270 hectares of prime real estate in various regions of Senegal; a 90-bed hotel in Casablanca and another in Marrakesh (60-bed), a 48-bed Parisian hotel and a 50-bed hotel in Switzerland; he also owned buildings in France and the United States in addition to those in Senegal.

\textsuperscript{162} The late Sani Abacha was military ruler of Nigeria from 1993 to 1998. On his death in 1998 Abacha left behind a fortune estimated anywhere between $2 and $5 billion, all of which fleeced from the Nigerian people! \textit{See} Transparency International, "Where did the money go?—The top 10," www.transparency.org/pressreleasesarchive/20004Available Available at www.transparency.org/pressreleasesarchive/20004 (last viewed June 13, 2009). During the period he was Head of State, the Nigerian Central Bank had a standing order instruction to transfer $15 million to Abacha's Swiss bank accounts every day. \textit{See} RAYMOND BAKER, CAPITALISM'S ACHILLE'S HEEL 170, 172 (2005) (hereinafter "Baker").

\textsuperscript{163} Baker, supra note 148.

\textsuperscript{164} As the U.K. Financial Services Authority discovered in the course of its investigations in tracking stolen assets, it takes longer to launch an investigation and track assets in order to be at the stage of freezing those assets than it does for an accountant or banker to move those assets elsewhere. \textit{See} U.K. AFRICA ALL PARTY PARLIAMENTARY GROUP, THE OTHER SIDE OF THE COIN: THE U.K. AND CORRUPTION IN AFRICA 45 (2008). After years of litigation and with the cooperation of several foreign governments, the Nigerian Government was able to recover part of the $3-$5 billion General Abacha, his family and close associates, stole from the Nigerian people. Much of the $2.2 billion the Government attempted to recover has been frozen or repatriated to Nigeria:

- Voluntary returns made by the Abacha family: $750 million
- Funds paid in settlement of claims against Bagadu, Abacha's "right hand man": $150 million
- Repatriated from Switzerland, following supreme court proceedings: $600 million
- Monies frozen in Lichtenstein, Luxembourg and Jersey: $750 million
- Further monies to be remitted from Switzerland, pending outcome of court cases: $70 million
- Sums frozen in British banks: $40 million.

\textit{See} Letter from Kendall Freeman Solicitors dated 10/02/06 to the All Africa Parliamentary Group quoted in The Other Side of the Coin, \textit{id}.
A third feature of the modern indigenous spoliation is the quantum of assets involved. It is estimated that Africa’s political elite hold somewhere between $700 and $800 billion in offshore accounts outside the Continent, an amount which dwarfs the $54 billion World Bank aid flows to Africa over the past four decades. Most decent people would find these excesses not only revolting but as one commentator was moved to admit, going beyond shame and almost beyond imagination.

These private portfolios of looted assets stashed abroad are usually so large in relation to the total external debts of the countries from which the funds were stolen. In some cases private wealth even exceeds a country’s total foreign debt. For instance, capital flight from Sub-Saharan Africa, estimated at $274 billion (including interest earnings), was equivalent to 145 per cent of the total debt owed by these countries in the mid-1990s. By the Nigerian Government’s own account, that nation’s total external indebtedness in 2004 stood at $28 billion which is approximately 28 per cent of the $100 billion of national funds in private hands. Africa loses an estimated $148 billion annually through acts of corruption, an amount which represents 25 per cent of the continent’s Gross Domestic Product!

Worse yet, some of these looted funds account for a significant share of the victim country’s annual GDP; Ferdinand Marcos of the

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169. See Press Release GA/EF/3002, Fifty-seventh General Assembly Second Committee 10th Meeting (AM)/(Statement by O.A. Ashiru, Nigeria’s Permanent Representative to the Second Committee (Economic and Financial) of the United Nations General Assembly. In the same vein, the National Economic and Financial Crimes Commission estimates that between 1960, when Nigeria obtained its independence from Britain, and 1999, as much as $440 billion was stolen or misused by the country’s past rulers. This figure is equivalent to the amount of international aid given to the entire African continent in four decades. See David Blair, £220bn stolen by Nigeria’s corrupt rulers, DAILY TELEGRAPH, June 25, 2005, http://news.telegraph.co.uk/news (last accessed on 09.08.05 at http://news.telegraph.co.uk/news) cited in The Other Side of the Coin, supra note 142, at 14 (last viewed on Sept. 8, 2002).
170. Id.; see also Princewill Ekwujuru, Corruption Is Bleeding Africa Dry!, available at www.asconline.org (last viewed June 13, 2009).
Philippines is alleged to have stolen between 1.5 and 4.5 percent of his nation's annual GDP, while General Abacha's estimated net worth represented between 1.5 and 3.7 percent of Nigeria's GDP.  

Fourth, those most implicated in the systematic plunder of national wealth come from a particular class of people who hold public trust: heads of state and government as well as other high ranking constitutionally elected and appointed leaders; their families and closest friends (see Boxes 1 and 2). Thanks to revelations following the Arab Spring, we are now learn that the recently ousted Egyptian dictator, Hosni Mubarak, may be richer than Bill Gates, founder of Microsoft or the Mexican business tycoon, Carlos Slim, who with a net worth of $54 billion is reputed to be the world's richest man! Reliable sources place the wealth of Mubarak and his family at somewhere between $40 and $70 billion. How did a former military officer, turned civilian President, whose official monthly salary as head of state, counting benefits, totaled 4,750 Egyptian £($808) in 2007 and 2008, amass so much wealth?

a. Prise de Conscience

The realization that the leaders of the developing world were fully implicated in the theft of their national wealth came rather late for many Third World scholars, especially those who had been spoon-fed the dependencia menu on the causes of Third World underdevelopment. Many believed that giant multinational companies like Shell-
BP, Firestone, and Del Monte were responsible for the theft of enormous wealth and resources found in the developing world, siphoning its scarce capital for transfer to Europe and America. Thanks to the unrestrained flight of capital while the West advanced economically, most of the developing countries found themselves sliding backwards decades after achieving sovereignty. Rather simplistically, it was thought that in order to escape from their ‘underdevelopment’ all that was needed was for these states to take control of their natural resources and wealth. To do that, would require ‘taming’ the multinationals, so to speak, through outright expropriation, nationalization, joint ventures, and other forms of partnerships permitting locals to gain a significant foothold in these enterprises. Help came from the United Nations General Assembly in the form of the now famous Resolution 1803, proclaiming the inalienable right of all people and nations to exercise permanent sovereignty over their natural resources and wealth.\textsuperscript{173} This Resolution was followed twelve years later with the adoption of the Declaration on the Establishment of a New Economic Order\textsuperscript{174} (NIEO) and the Charter of Economic Rights and Duties of States.\textsuperscript{175}

However, as the euphoria that initially greeted the arrival of these NIEO instruments began to wane, the balance sheet continued to show that nothing much had changed in the nature of Third World underdevelopment: the financial hemorrhage continued unabated as huge amounts of capital continued to flee its shores for more salubrious safe havens in Europe and North America. As we have already pointed out, Africa loses, conservatively, $148 billion annually, roughly 25 per cent of the continent’s GDP, through licit and illicit capital flight. Clearly we had missed something and had to go back to the drawing board. It would appear that in our singular focus on exogenous spoliation we had completely ignored a far more insidious form of illegal appropriation of the wealth and resources of developing countries, one


organized and meticulously executed by Third World leaders themselves!

b. The Nexus Between Acts of Indigenous Spoliation and Acts Constituting Crimes Against Humanity

Can a reasonable case be made that acts of indigenous spoliation satisfy the criteria generally identified as characterizing crimes under international law, i.e., acts of such serious nature that are widespread or systematic, directed against the civilian population with effects that strike at the very foundations of the victim states? It is to this question that we now turn our attention. There are three bases under which indigenous spoliation can be treated as a crime under positive international law. First, it is important to point out that the list of crimes recognized in the Draft Code of Crimes, and, in particular, those prohibited acts identified as constituting crimes against humanity, were never intended to be exhaustive. The ILC acknowledged that the enumeration of crimes in the draft code could subsequently be supplemented by new instruments of the same legal nature. This has left open the possibility that with the progressive evolution of international law other crimes could be added to this list.\(^{176}\) In line with this thinking, a cursory review of the drafting history of the Draft Code of Crimes reveals that the list of crimes has expanded and collapsed with different versions of the draft code. The 1991 version included inter alia terrorism, mercenarism, environmental pollution as possible crimes against humanity. They were subsequently dropped in the final version that was adopted by the United Nations in 1996. The list of crimes against humanity is a work in progress, constantly adapting to a changing international landscape. As world conscience evolves other inhumane acts that meet the general definition of crimes against humanity will surely be added to this list.

A second basis for including indigenous spoliation as a crime under international law is provided for by the Statutes of the various United Nations ad hoc Tribunals as well as the Draft Code of Crimes. All these instruments seem to anticipate this eventuality by including in their definition of crimes against humanity, a category of “other humane acts” as a catchall for acts which cause the same harmful results as the acts listed in the main definition.\(^{177}\) Furthermore, the act of “ex-

176. Since these lists were only intended to be illustrative, not exclusionary, the expressio unius est exclusio alterius canon of construction does not apply to bar the addition of indigenous spoliation as a prohibited act.

177. See ICTY Statute, art. 5; ICTR Statute, art. 3; and SCSL Statute, art. 2.
termination” which is one of the acts that qualify as a crime against humanity includes in its definition the intentional infliction of conditions of life, inter alia, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population. It would be quite easy to expand the list of enumerated acts under “crimes against humanity” to include acts of indigenous spoliation which like extermination also bring about the destruction of a civilian population. Understandably, justifying this addition would require compelling evidence of how indigenous spoliation constitutes a serious violation of certain fundamental human rights.

Finally, the central test for a crime against humanity is that the acts are sufficiently serious, systematic or widespread, and directed against the civilian population. The review of the jurisprudence of the ad hoc international criminal tribunals strongly suggest that the “widespread or systematic” requirement is considered the most widely accepted international criterion for distinguishing crimes against humanity from common crimes, which do not rise to the level of crimes under international law. Much like the Draft Code, the most recent international instruments use the “widespread or systematic” formulation in defining crimes against humanity (the requirement is usually framed in the disjunctive). The formulation also reflects state practice as evidenced in judicial decisions. On the first prong, i.e., “widespread or systematic acts”, the jurisprudence of both the Yugoslavia and Rwanda Tribunals have adopted an expansive definition of “systematic” as referring to the organized nature of the acts and the improbability of their random occurrence. The jurisprudence of these courts also makes clear that patterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence. It remains

178. This international element has been traced to an analysis of the Legal Committee of the United Nations War Crimes Commission, which used the two alternatives both as a single cumulative internationalizing element and disjunctively: “ . . . . As a rule systematic mass action, particularly if it was authoritative, was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law. Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind warranted intervention by State other than on whose territory the crimes had been committed, or whose subjects had become their victims.” See History of the United Nations War Crimes Commission and the Development of the Laws of War, 179 (1948) cited in Dixon and Hall, supra note 34, at 177.

179. See Rome Statute, art. 5; Sierra Leone Statute, art. 2; Cambodia Extraordinary Chambers Law, art. 5.

unclear, however, when an act satisfies the *widespread* part of the requirement. It has been suggested that such a determination should be made on the basis of the *quantum of victims involved* and the *severity of the damage inflicted*. Although this requirement was not expressly included in article 5 of the Statute of the Yugoslavia Tribunal, it has nonetheless been incorporated in its jurisprudence.

In addition to the “widespread or systematic” requirement, the common factor in all the acts that constitute crimes against humanity is the serious violation of certain fundamental human rights. But seriousness, recognized as the basic concept underlying the entire draft code, does not necessarily mean harmful to human life in a direct sense as an attack on bodily integrity. Rather, an act may be—and has indeed been—characterized as sufficiently grave for the purposes of the Draft Code if its direct effect or its long-term repercussions undermine the substantive bases of life in conditions of good health and individual and collective dignity. Grave and severe damage to the foundations of the socio-economic foundations of the state meets these criteria. Although such damage, by definition, does not immediately and directly destroy human life, its long-term effects may lead to that result.

These elements make sense when it is understood that the target of a crime against humanity is the civilian population. It is against this group that the seriousness or the systematic effects of the crime can be measured. As explained by the ICTY Appeals Chamber in the *Kunarac* case:

*The use of the word “population” does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian “population”, rather than against a limited and randomly selected number of individuals.*

The examples of illegal acts of depredation detailed in Part IV of this Article illustrate the widespread and systemic damage to human society caused by acts of indigenous spoliation and the disastrous consequences this activity might entail for the civilian population of the victim State. These illegal acts are committed by individuals who

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have been placed in positions of trust as public official who instead use their knowledge and privileged access to state resources for personal gain or motive. The term “attack” as an element in the crime against humanity is generally understood as an unlawful act which is directed against a civilian population. Crimes against humanity do not require a specific mens rea as the case law of the international tribunals teaches. The mens rea to a crime against humanity only requires that the accused knowingly took the risk of participating in the implementation of a policy or plan and that he acted with full knowledge of the broader context within which his actions took place. There is no question that a public servant, like a head of state or a government minister who systematically siphons substantial amounts of funds from the public treasury for his private use, is fully aware of the wider ramifications of his actions on society and the civilian population he is called to serve. It is enough for a crime against humanity to have occurred if the prohibited acts were directed at just a fraction of the civilian population. Here, the acts of indigenous spoliation target the entire population of a given State since they attack the very foundations of the society. Few ever escape the effects of acts of indigenous spoliation inasmuch as they are committed on a large scale and directed towards a multiplicity of victims. Box 2 captures the widespread and systematic effects of acts of indigenous spoliation of a single public servant for a brief period in the life of a country. In a five year period, the Director-General of a state fund meant for local councils transferred anywhere between $57 million and $101 million to his or his close associates’ private accounts. It would be worthwhile to put this theft of public funds in its Cameroonian context.

>> The annual budget for the Douala City Council, one of the statutory beneficiaries of the local council funds, a city with a population of over two million people and Cameroon’s economic capital, is a paltry $18 million, about one fifth the amount stolen by this public servant.

>> For the 2006-2007 fiscal years, the budget for the Ministry of Public Health stood at 105 billion FCFA (about $210 million). The money embezzled from the state by this public official and his close associates could have covered about twenty per cent of the national health care bill for one year!

>> The Bertoua - Garoua-Boulai highway (248 km), a major highway linking two of Cameroon’s ten regions, was completed in 2002 at a cost of 2.5 billion FCFA. The 29 billion FCFA of state funds diverted into this public official’s private accounts were
more than enough to construct an additional 2,976 km network of roads.

During the period the local councils account was being fleeced by its Director-General, officials at the University of Buea, one of only two English-speaking universities in Cameroon, were unable to raise the 400 million FCFA (roughly $800,000) needed to effectively kick off the newly-created Faculty of Medicine. University authorities were forced to search for private donors to underwrite this project because the Government of Cameroon announced that it could not afford the cost at the time. However, funds just from the director-general’s fictitious “missions” could have constructed the basic infrastructure of at least three medical schools in the country.

Finally, it is important to not forget that the funds diverted into the personal accounts of these high ranking officials were tax payer contributions intended for their local municipal councils for the development of local infrastructure (farm-to-market roads, markets, etc.) and basic municipal services (waste disposal, street lighting, health and social services, literacy education and vocational training, etc.) that would serve millions of people!

CONCLUSION

An argument could be made that acts of indigenous spoliation as those described in this Article do not rise to the level of horrendousness as the other established prohibited acts that comprise the crime against humanity. That notwithstanding, it is submitted that the key elements identified in legal instruments amounting to the commission of a crime against humanity would be met based on the jurisprudence reviewed above.
Appendix

BOX 1: DISPATCH FROM U.S. AMBASSADOR TO CAMEROON AS DISCLOSED BY WIKILEAKS (UNEDITED)

C O N F I D E N T I A L SECTION 01 OF 02 YAOUNDE 000587

SIPDIS
STATE ALSO FOR INL/C AND AF/C DS/IP/AF
E.O. 12958: DECL: 06/05/2018
TAGS: KCOR EAIR CVIS CM

SUBJECT: ASTOUNDING CORRUPTION AT CAMEROON'S AIRPORT AGENCY

Classified By: Political Officer Tad Brown for reasons 1.4 b and d.

¶1. (U) This message contains an action request for INL/C.

¶2. (C) Summary: Roger Ntongo Onguene, the General Manager of Aeroports du Cameroun (ADC), the Cameroonian government agency charged with management of the nation's airports, has embezzled millions of dollars from the ADC's coffers, undercut the agency's effectiveness and engaged in ethnically-biased hiring practices, according to a document given to the Embassy by Amadou Ali, Cameroon's Vice Prime Minister and Minister of Justice. Ntongo has been rumored to be among the next tranche of public officials to be fired in the Government of Cameroon's (GRC) anti-corruption campaign dubbed "Operation Sparrowhawk" by the media, but has not yet been removed from his position. Even in the context of a government rife with malfeasance, Ntongo's corruption is breathtaking in its scope and brazenness. End summary.

Corruption: A Full-Time Job

¶3. (C) In a May meeting with Poloff, Vice Prime Minister and Minister for Justice Amadou Ali, who has been at the leading edge of the GRC's anti-corruption law enforcement efforts, shared a two page document, apparently the lead page of an audit report submitted by the General Controller of the GRC (GRC) for a review of ADC's handling that provided insight into Biya's management style and reason to question the rigor of his commitment to stamp out corruption in Cameroon.

The Costs of This Corruption

¶4. (SBU) Although Central African Economic Community (CEMAC) regulations that were incorporated into Cameroonian law through a Presidential Decree make it illegal for anybody to have a monopoly in the aviation sector, ADC has enjoyed a monopolistic position in Cameroon, where airlines are obliged to pay ADC fees even for services that are not needed or never provided. According to a well-placed industry source, the ADC's fees are among the highest in the world, second only to Tokyo's, and with no value added; airlines are forced to hire sub-contractors to do the handling that ADC is paid to do. These exorbitant fees were factors in the recent failure of domestic airlines NACAM and Elysian Airlines and national flag carrier CAMAIR. There is currently no domestic air service in Cameroon, with CAMAIR formally closed and undergoing liquidation.

Comment: What Does it Take to Get Fired?

¶5. (C) Even in the Cameroon context, where large-scale corruption is the norm, Ntongo's brazen fleecing of the ADC is startling. The ADC's effective monopoly has stunted the aviation sector in Cameroon and effectively killed Cameroon's domestic airlines. No amount of GRC investment or training from the USG or any other donor could possibly overcome the paralyzing effect of such intense corruption and mismanagement. Ntongo's case provides the evidence, if any more were needed, that corruption is inextricably linked to Cameroon's development challenges.

The emergence of this document provides reason to believe that Ntongo will face justice, but the GRC's decision to allow him to continue running the ADC provides insight into Biya's management style and reason to question the rigor of his commitment to stamp out corruption in Cameroon.

End comment.

Action Request for INL/C

¶6. (C) Post asks that INL/C place a p212f hit for Roger Ntongo Onguene (DOB 17-May-1959).