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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

LARRY BOWOTO, et. al.,

Plaintiffs,

v.

CHEVRON CORPORATION, et. al.,

Defendants.

Case No. C 99-02506 SI

**DECLARATION OF NAOMI ROHT-ARRIAZA IN SUPPORT OF PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT RE: CLAIMS AGAINST HUMANITY**

Date: April 14, 2006
Time: 9:00 a.m.
Courtroom: 10, 19th floor
Judge: Honorable Susan Illston

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(continued from first page)

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## DECLARATION OF NAOMI ROHT-ARRIAZA

Naomi Roht-Arriaza declares as follows:

1. I have been asked to provide an expert opinion on the definition, nature and scope of the claim for crimes against humanity alleged by plaintiffs in this case. I set forth in this declaration the elements of crimes against humanity accepted as constituting customary international law.

## EXPERT QUALIFICATIONS

2. I have been a professor of law at Hastings College of the Law in San Francisco, CA since 1992 where I teach courses, inter alia, in international law and international human rights law. I have researched and published extensively in the areas of international law, human right law, and humanitarian law, including the following three books on human rights law and transitional justice: *Transitional Justice in the Twenty-First Century* (2006), *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (2005), and *Impunity and Human Rights in International Law and Practice* (1995). In addition, I am a member on the Project on Prosecutorial Projects of International Courts. Attached as Exhibit "1" is a reasonably current version of my *curriculum vitae*.

## A. THE DEFINITION OF CRIMES AGAINST HUMANITY

3. "Crimes against humanity" originated as an extension of war crimes but has subsequently emerged to become a "separate and distinct category of international crimes applicable in time of peace as well as in time of war irrespective of any connection to the regulation of armed conflicts."[1]

4. The seeds of what today are known as "crimes against humanity" were planted in the Preambles of Hague Convention II and Hague Convention IV, and in their annexed Regulations Respecting the Laws and Customs of War on Land.[2] In addition to specifying certain specific conduct deemed violative of the laws and customs of war, Hague Conventions II and IV were also"intended to provide an overarching concept to protect against unspecified violations whose identification in positive international law was left to future normative development."[3]

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[1] M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law 49, 53 (1999).

[2] *Id.* at 61.

[3] *Id.*

5. Accordingly, Hague Convention II stated that in cases not covered by specific regulations: Populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, *from the law of humanity*, and the requirements of public conscience.[4] (emphasis added).

The protection was reinforced in the Preamble to Hague Convention IV:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, *from the laws of humanity*, and the dictates of the public conscience.[5] (emphasis added).

6. "The origin of the term 'crimes against humanity' as the label for a category of international crimes goes back to 1915 when the governments of France, Great Britain, and Russia issued a joint declaration on May 28, 1915 denouncing the Ottoman government's massacre of the Armenian population in Turkey as 'constituting crimes against civilization and humanity' for which all members of the Turkish government would be held responsible together with its agents implicated in the massacres."[6]

7. Positive international criminal law has since defined "crimes against humanity" and rendered them subject to prosecution in the post-WWII period.

8. Although the precise contours of this category of crimes have varied within these manifestations, the core definition has not. The customary international law norm proscribing crimes against humanity condemns certain grievous crimes causing death, serious injury, or great suffering, when committed as part of a widespread or systematic attack on a civilian population.

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[4] *Id.* (quoting 1899 Hague Convention at § 9 of the Pmbl.).

[5] *Id.* at 61, 62 (quoting 1907 Hague Convention at § 8 of the Pmbl.).

[6] *Id.* at 62; France, Great Britain, and Russia, Joint Declaration, May 29, 1915, *available at* http://www.armenian-genocide.org/popup/affirmation_window.html?Affirmation=160. *See also* Darryl Robinson, *Developments in International Law: Defining "Crimes Against Humanity" at the Rome Conference,* 93 A.J.I.L. 43, n8 (1999).

9. The first appearance of crimes against humanity in positive international law dates back to the Nuremberg Charter, appended to the London Agreement ratified by the victorious Allies on August 8, 1945. Section 6(c) of the Nuremberg Charter defined crimes against humanity as:

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[7]

10. Control Council Law No. 10, adopted by the Allies to provide for additional prosecutions in Europe following the end of WWII, again defined and provided for the prosecution of crimes against humanity. While the core definition remained essentially the same as in the Nuremberg Charter, Control Council Law No. 10 removed the requirement that there be a nexus between a crime against humanity and either a war crime or a crime against peace. Under Control Council Law No. 10, crimes against humanity were defined as:

> Atrocities and Offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population or persecution on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated.[8]

11. Since the adoption of the Nuremberg Charter, the prohibition against crimes against humanity has been firmly recognized in several international instruments. In 1946, for example, the United Nations General Assembly affirmed the principles set forth in the Nuremberg Charter and the subsequent decision of the International Military Tribunal. *See* G.A. Res. 95(I), 1 GAOR U.N. Doc. A/64/Add.1, at 188 (1946). These principles were reaffirmed in 1968 with the adoption of a treaty to prevent the application of statutory limits to crimes against humanity. *See* Convention on the Non-Applicability of Statutory Limits to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 660

[7] Charter for the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 6 (c), 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 288 [hereinafter Nuremberg Charter].

[8] Allied Control Council Law No. 10, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, January 31, 1946 [hereinafter Control Council Law 10].

U.N.T.S. 195, *reprinted in* 8 I.L.M. 68 (1969). *See also* Principles of International Co-Operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, G.A. Res. 3074(XXVIII), 28 GAOR Supp. (No. 30) at 78, U.N. Doc. A/9030/Add.1 (1973). These subsequent instruments did not require a nexus to armed conflict, and there is broad consensus among commentators that such a nexus is not part of the customary law definition of the offense.

12. In 1993 and 1994, the United Nations Security Council established two *ad hoc* international criminal tribunals to prosecute those accused of certain crimes under international law. The ICTY addressed international crimes growing out of the conflict in the former Yugoslavia, while the ICTR addressed crimes growing out of the conflict in Rwanda. The Statutes for each of these tribunals defined crimes against humanity in a manner that, despite some variations, maintained the same essential core.

13. The 1993 Statute for the ICTY defined "crimes against humanity" as certain crimes (including, *inter alia*, murder, torture, persecutions on political and other grounds, and other inhumane acts) "when committed in armed conflict, whether international or internal in character, and directed against any civilian population . . . ." While this requirement may have been applicable to the factual and historical situation inside the former Yugoslavia, numerous commentators, as well as the ICTY itself, have acknowledged that this nexus requirement did not reflect customary international law and was intended to set the jurisdictional limits of the Court's action.[9] What did reflect customary international law was the core concept that the non-isolated commission of certain grievous crimes "directed against any civilian population"[10] constitutes a crime against humanity.

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[9] *Prosecutor v. Tadic*, No. IT-94-1-A, ¶ 249 (Appeals Chamber, July 15, 1999). In *Tadic,* the Appeals Chamber found that under customary law there is no requirement that crimes against humanity have a connection to an international armed conflict, or indeed to any conflict at all. Article 5 of the ICTY statute "requires the existence of an armed conflict at the relevant time and place for the International Tribunal to have jurisdiction." *Prosecutor v. Kordic/Cerkez*, No. IT-95-14/2-T, ¶ 23 (Trial Chamber, Feb. 26, 2001). *See also Prosecutor v. Krnojelac*, IT-97-25, ¶ 53 (Trial Chamber, Mar. 15, 2002) (in addition to elements of crime, "the Statute of the ICTY imposes a jurisdictional requirement that the crimes be 'committed in armed conflict.'"); *Prosecutor v. Krajisnik*, No. IT-00-39-T, ¶ 704 (Trial Chamber, Sept. 27, 2006) ("Committed in armed conflict. This is a jurisdictional limitation on the Tribunal which is not part of the customary law definition of crimes against humanity.").

[10] Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 5, May 25, 1993, 32 I.L.M. 1192 (1993) [hereinafter ICTY Statute]

14. The 1994 Statute of the ICTR defined crimes against humanity as the same grievous crimes itemized in the ICTY Statute, "when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds . . . ."[11] This Statute removed the armed conflict requirement of the ICTY, but added the requirement of a discriminatory intent. While this requirement of discriminatory intent was easily established in the Rwandan context of violence between Hutus and Tutsis, "this additional 'discriminatory intent element' under ICTR jurisdiction d[id] not reflect the state of customary international law" at the time of the statute's drafting.[12] Like the ICTY, the ICTR has itself recognized its Statute's divergence from customary international law and the jurisdictional nature of the added requirements.[13]

15. The ICTY has reiterated that the "discriminatory intent" requirement in international law applies only to the subsection of crimes against humanity involving "persecutions based on political, racial and religious grounds,"and not to crimes against humanity as a whole. *See Bagilishema*, ICTR-95-1-T, para. 81 (June 7, 2001) "The ICTY and the ICTR have both held that the perpetrator must be motivated by discriminatory animus only where the specific CAH charged is persecution." In the *Kordic/Cerkez, Simic*, *Sikirica*, and *Simic/Tadic/Zaric* cases, the ICTY rejects the view that to constitute a crime against humanity, the relevant acts must be undertaken by the perpetrator on discriminatory grounds. In these cases, the Tribunal makes clear that discriminatory intent is necessary to commit persecution, one of the predicate acts for a charge of crimes against humanity, but not for other such acts, including murder and inhumane treatment.[14]

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[11] Statue for the International Criminal Tribunal for Rwanda, art. 3, Nov. 8, 1994, 33 I.L.M. (1994) [hereinafter ICTR Statute].

[12] "The Tribunal is limited in its capacity to prosecute a narrow set of crimes, and not intended to alter the definition of Crimes Against Humanity in International Law." *Prosecutor v. Kamuhanda*, No. ICTR-95-54A-T, ¶ 671 (Trial Chamber, Jan. 22, 2004). The Chamber in *Kamuhanda* indicates that not all crimes against humanity require discriminatory intent, and that outside the context of the Tribunal, customary international law does not require discriminatory intent.

[13] *Prosecutor v. Kayishema/Ruzindana*, No. ICTR-95-1-T, ¶ 138 (Trial Chamber, May, 21 1999) ("[T]he ICTR and ICTY Statutes did not reflect customary international law at the time of drafting. This is evident by the inclusion of the need for an armed conflict in the ICTY Statute and the inclusion of the requirement that the crimes be committed with discriminatory intent in the ICTR Statute.").

[14] *Tadic*, No. IT-94-1-A at ¶ 305; *Kordic/Cerkez*, No. IT-95-14/2-T at ¶ 186; *Prosecutor v. Simic*, No. IT-95-9/2-S, ¶ 77 (Trial Chamber Oct. 17, 2002); *Prosecutor v. Sikirica*, No. IT-95-8-S, ¶ 232

16. "Persecutions based on political [] grounds," are widely recognized as one of the offenses underlying a violation of crimes against humanity.[15] Persecution based on political grounds presupposes that an individual holds opinions or has had opinions attributed to him or her, which are critical of the policies or methods of the authorities.[16]

17. Both the ICTY and ICTR have affirmed the status of crimes against humanity under international law. In *Prosecutor v. Tadic*, for example, the ICTY noted that "the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned."[17]

18. The 1998 Rome Statute of the ICC contains the most recent international codification of crimes against humanity. Under the Rome Statute, crimes against humanity include, *inter alia*, murder, torture, and "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health," which are committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[18] As with the ICTY and the ICTR, the Rome Statue contains a core definition of crimes against humanity –"part of a widespread or systematic attack directed against any civilian population"–that is consistent with customary international law. This definition is set out in Article 7(1). However, as with the ICTY and the ICTR, the Rome Statute also included elements that are not present in the customary international law definition of crimes against humanity, but instead, reflect compromises among the delegates to the Rome Conference. For instance,

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(Trial Chamber, Nov. 13, 2001); *Prosecutor v. Simic/Tadic/Zaric*, No. IT-95-9-T, ¶ 1063 (Trial Chamber, Oct. 17, 2003).

[15] Control Council Law No. 10, art. II (1) (c); Nuremberg Charter, art. 6 (c); ICTY Statute, art. 5; Rome Statue of the International Criminal Court, July 17, 1988, art. 7(1), U.N. Doc. A/Conf. 183/9 (2002), 37 I.L.M. 999 [hereinafter Rome Statute].

[16] *See* United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for the Determination of Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees ¶ 80 (1967).

[17] *Prosecutor v. Tadic*, No. IT-94-1, ¶ 623 (Trial Chamber, May 7, 1997); *See also Prosecutor v. Akayesu*, No. ICTR-96-4-T (Trial Chamber, Sept. 2, 1998).

[18] Rome Statute, art. 7.

although Article 7 (2) (a) of the Rome Statue references a policy requirement, there is no such requirement in customary international law.

19. The definition of crimes against humanity in the Rome Statute does not include those aspects of the ICTY and ICTR definitions that were not, as explained above, in conformity with customary international law. Hence, the Rome Statute definition requires neither a nexus with armed conflict nor a discriminatory motive. What it does require are the core elements of crimes against humanity: the commission of a heinous crime as part of a widespread or systematic attack on a civilian population.

20. U.S. courts have recognized the prohibition of crimes against humanity as well-defined and widely accepted norm. Thus, for example, in *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003), the court analogizes crimes against humanity to piracy and indicates that crimes against humanity are among the crimes that "now have fairly precise definitions" and "have achieved universal condemnation," *id.* at 106, and are "uniformly recognized by the 'civilized world' as an offense against the 'Law of Nations,'" *id.* at 103-106. *See also*, *Sarei et al. v. Rio Tinto, Plc.*, 456 F.3d 1069 (9th Cir. 2006) (permitting the plaintiffs to proceed with crimes against humanity claims); *Estate of Winston Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005 ) ("Crimes against humanity . . . have been a part of the United States and international law long before [the defendant's] alleged actions."); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1154 (E.D. Cal. 2004) ("The prohibition against crimes against humanity constitutes . . . a specific, universal, and obligatory norm."); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1180 (C.D. Cal. 2005) ("There is a customary international law norm against crimes against humanity."); *Presbyterian Church of Sudan v. Talisman*, 374 F. Supp. 2d 331, 339 (S.D.N.Y. 2005) (finding that crimes against humanity is a *jus cogens* violation of international law actionable under the ATS); *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 25 (D.D.C. 2005) ("[C]rimes against humanity are generally actionable under the Alien Tort Statute as international law violations."); *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 151 (2d Cir. 2003) ("Customary international law rules proscribing crimes against humanity, including genocide, and war crimes, have been enforceable against individuals since World War II."); *Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1299 (S.D. Fl. 2003) ("Crimes against humanity have been recognized as violation of customary international law since the Nuremberg Trials in 1944."); *Sarei et al.*

*v. Rio Tinto Plc.*, 221 F. Supp. 2d 1116, 1150 (C.D. Cal. 2002) ("It is well-settled that a party who commits a crime against humanity violates international law and may be held liable under the ATCA."); *Mehinovic v. Vuckovic,* 198 F.Supp.2d 1322, 1344, 1352-54 (N.D. Ga. 2002) (the district court held that crimes against humanity were a "specific, universal and obligatory" norm which were actionable under the ATCA.); *Wiwa v. Royal Dutch Petroleum Company*, 2002 U.S. Dist. LEXIS 3293, *27-32 (S.D.N.Y. 2002) (the court held that the prohibition of crimes against humanity was "a norm that is customary, obligatory, and well-defined in international jurisprudence."); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 440 (D. N.J. 1999) (acknowledging crimes against humanity as a violation of international law); *Quinn v. Robinson*, 783 F.2d 776, 799 (9th Cir.1986) ("crimes against humanity, such as genocide, violate international law"). *See also, Sosa v. Alvarez*, 542 U.S. 692, 762 (Breyer, J., concurring) (recognizing that international law views crimes against humanity as universally condemned behavior that is subject to prosecution).

21. Based on these and other authorities and on the overwhelming weight of scholarly opinion and national and international courts, I have no doubt in affirming that the customary international law norm prohibiting crimes against humanity is as well-defined and as widely accepted as were the 18th century norms against piracy, affronts to ambassadors, and violations of safe passage.

## B. THE DEFINITION OF CRIMES AGAINST HUMANITY AS A WIDESPREAD OR SYSTEMATIC ATTACK DIRECTED AGAINST A CIVILIAN POPULATION ENCOMPASSES THE CONDUCT ALLEGED IN THE COMPLAINT.

22. As discussed above, to be a crime against humanity, five main elements must be satisfied: there must be an attack; the acts of the perpetrator must be part of the attack; the attack must be directed against any civilian population; the attack must be widespread or systematic; and the perpetrator must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his acts fit into such a pattern.[19] These elements are interconnected.

[19] *Prosecutor v. Kunarac/Kovac/Vukovic*, No. IT-96-23-A, ¶ 85 (Appeals Chamber, June 12, 2002).

23. To amount to an attack, the relevant conduct need not amount to a military assault or forceful takeover; the evidence need only demonstrate a "course of conduct" directed against a civilian population that indicates a widespread or systematic reach.[20] The ICTR designates an attack as an "unlawful act" such as those enumerated in the ICTR statute (murder, extermination, etc.), or an unlawful act, event, or series of events.[21]

24. The attack must be against a civilian population. The purpose of requiring that the attack be committed against a civilian population is to ensure the attack is not a limited and random occurrence. To the extent that one is able to establish that an attack is widespread or systematic, this will automatically satisfy the "population" requirement, since an attack that is "widespread or systematic" will, in turn, establish that the attack was directed at the civilian population, and not "against a limited and randomly selected number of individuals." *See Prosecutor v Kunarac*, No. IT-96-23-A, ¶ 90 (Appeals Chamber, June 12, 2002).

25. The civilian population must be the primary object of the attack.[22] Members of a resistance movement as well as former combatants may be considered part of a civilian population, so long as they are not taking active part in armed hostilities.

26. The attack must be either widespread or systematic. The requirement is disjunctive. A crime may be widespread or committed on a large scale by the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude. The phrase systematic refers to the organized nature of the acts of violence and the improbability of their random occurrence.[23] Patterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a

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[20] *Prosecutor v. Limaj, et al*, IT-03-66-T (Trial Chamber, Nov. 30, 2005).

[21] *Akayesu*, No. ICTR-96-4-T at ¶ 581; *Kamuhanda*, No. ICTR-95-54A-T ¶ 660-661.

[22] *See Kordic/Cerkez*, ICTY-95-14/2-T at ¶ 97 (the manner in which the population was targeted is an indication that a "population," and not simply a limited, random selected number of individuals was the target of the attack).

[23] *Prosecutor v. Kordic*, IT-95-14/2-A, ¶ 94 (Appeals Chamber Dec. 17, 2004).

common expression of such systematic occurrence. Thus, a cumulation of "smaller" crimes can be sufficient to constitute a widespread or systematic attack.

27. Moreover, the case law of the ICTY makes clear that a single act may qualify as a crime against humanity as long as it is linked to a widespread and systematic attack:

> Crimes against humanity . . . must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognised as guilty of a crime against humanity if his acts were part of the specific context identified above.[24]

28. Thus, only the attack, not the individual acts of the accused, must be widespread or systematic. International tribunals have found the existence of a crime against humanity in cases involving a single rape, finding that the rape was consistent with the pattern of an attack and formed part of the attack.[25] In the *Akayesu* case, the defendant was found guilty of crimes against humanity for the murder of three brothers and six acts of torture against six individuals.[26] U.S. courts agree, finding that a crime against humanity took place with the assassination of El Salvador's Monsegnor Romero.[27]

29. The attack need not be directed against the civilian population of the entire area under consideration. Nor does the attack need to be against members of a single ethnic group. For example, in *Krajisnik*, the attack included a wide range of discriminatory measures against both Bosnian Muslims and

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[24] *Prosecutor v. Mrksic*, No. IT-95-13-R61, ¶ 30 (Apr. 3, 1996); *See also Prosecutor v. Tadic*, No. IT-94-1-T at ¶ 649.

[25] *Musema,* No. ICTR-96-13-A at ¶ ¶966-967. *See also Kunarac*, No. IT-96-23-A at ¶¶ 93-94 (accused found guilty of crimes against humanity for helping imprison four Muslim women and occasionally raping them).

[26] *Akayesu*, No. ICTR-96-4-T at ¶¶ 653, 683. The conviction for the killing of 2,000 people, mentioned in Defendant's MSJ at 10, was for violations of Common Article 3 of the Geneva Conventions (war crimes), not crimes against humanity. *Id.* at ¶ 638.

[27] *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1157 (E.D. Cal. 2004).

Bosnian Croats, such as the imposition of curfews, the setting up of barricades and checkpoints where members of these ethnic groups were regularly stopped and searched, and dismissals of Croats and Muslims from public and private employment.[28] Thus, acts committed against two different ethnic groups in two different areas could constitute part of a widespread or systematic attack.

30. The attack need not be narrowly circumscribed in time or place. In *Krajisnik*, crimes were committed in different municipalities. In *Stakic*, the crimes were carried out against non-Serbs as well as others not loyal to the Serb authorities in a variety of towns as well as in predominantly non-Serb areas. In *Krnojelac*, the Trial Chamber held that a crime committed several months after, or several kilometers away from, the main attack could still, if sufficiently connected, be part of an attack.[29]

31. As noted above, there is no requirement in international law that the acts of the accused be connected to a plan or policy. Such a plan or policy may be relevant or useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic, but it is not an element of the offense.[30] The International Criminal Tribunal for the Former Yugoslavia considers the lack of a requirement of a plan or policy to be "settled law."[31] This is why, in the Statute of the International Criminal Court, the reference to a plan or policy is not part of the definition of a crime against humanity.[32] Rather, in the subsequent sub-part interpreting various words for purposes of ICC jurisdiction, the Statute directs the ICC judges to interpret "attack on a civilian population" by considering whether the defendant is acting pursuant to or in furtherance of a state or organizational plan or policy. This, in essence, does no more than restate in different words the requirement of "widespread or systematic," since a defendant who is not acting

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[28] *Krajisnik*, No. IT-00-39-T at ¶ 708.

[29] *Prosecutor v. Stakic*, No. IT-97-24-T, ¶ 248 (Trial Chamber, July 31, 2003); *Krnojelac*, IT-97-25-T at ¶ 55.

[30] *Krajisnik*, No. IT-00-39-T at ¶ 706; *Krnojelac*, IT-97-25-T at ¶ 58; *Prosecutor v. Vasiljevic*, No. IT-98-32-T at ¶ 36 (Trial Chamber, Nov. 29, 2002).

[31] *Kordic/Cerkez*, Appeals Chamber judgment, Dec. 17 2004, para. 98, citing *Kunarac, et.al.*, No. IT-96-23-A at ¶ 98.

[32] Compare Rome Statute, art. 7(1) (definition) with art. 7(2) (explanatory notes).

at least in furtherance – whether conscious or not – of the policy of some organization or group will be unlikely to commit the non-random acts needed to satisfy the requirement.[33]

32. Although there is no policy requirement for crimes against humanity under customary international law, to the extent that a court does consider the existence of a policy, it is clear that any "such policy need not be formalized and can be deduced from the way in which the acts occur. Notably, if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not."[34]

**C. THE DEFENDANT DOES NOT NEED KNOWLEDGE OF SPECIFIC INCIDENTS OR ACTS TO HAVE THE REQUISITE KNOWLEDGE OF AN ATTACK ON A CIVILIAN POPULATION.**

33. The mental state associated with commission of a crime against humanity is that of "knowledge of the attack." This consists of two elements: the commission of an act which, by its nature or consequences, is objectively part of that attack, and knowledge on the part of the accused that there is an attack on the civilian population and that his or her act is part thereof.[35] The Tribunal in Limaj states that

> ...the accused need not know the details of the attack or approve of the context in which his or her acts occur. The accused merely needs to understand the overall context in which his or her acts took place. The motives for the accused's participation in the attack are irrelevant as well as whether the accused intended his or her acts to be directed against the targeted population or merely against his or her

[33] Although a limited number of ICTR cases cite the need for a policy element, recall that the ICTR statute, unlike customary international law, requires that all crimes against humanity be committed with a discriminatory intent. Thus, for example, *Prosecutor v. Bagilishema*, ICTR-95-1A-T ¶ 78 (Trial Chamber, June 7, 2001) concludes "...the discriminatory element of the attack is, by its very nature, only possible as a consequence of a policy." Cf. *Prosecutor v. Semanza*, ICTR-97-20-T, ¶ 329 (Trial Chamber, May 15, 2003) (existence of a policy or plan is not a separate legal element of the crime).

[34] *Tadic*, No. IT-94-1-T at ¶ 653.

[35] *Limaj, et al.* No. IT-03-66-T at ¶ 188; *Prosecutor v. Kupreskic, et al*, IT-95-16, ¶ 556 (Trial Chamber, Oct. 23, 2001).

victim, as it is the attack, not the acts of the accused, which must be directed against the targeted population, and the accused need only know that his or her acts are parts thereof.[36]

34. Knowledge of the attack may be inferred from circumstantial evidence. The knowledge of the attack may be actual or constructive. It may be inferred from a concurrence of concrete facts, such as the historical and political circumstances in which the acts occurred, the scope and gravity of the acts perpetrated, or the nature of the crimes committed and the degree to which they were common knowledge.[37]

35. Thus, defendants need not have known about any specific shootings, or intent to shoot in any particular case, in order to commit a crime against humanity. They would merely need to know about the general context of a widespread or systematic attack and that the underlying actions objectively formed part of this attack. Such knowledge does not require any intent to violate laws, shared or otherwise, and may be inferred from circumstantial evidence.

[36] *Limaj, et al.*, No. IT-03-66-T at ¶ 190. *See also Prosecutor v. Brdjanin*, IT-99-36-T, ¶ 138 (Trial Chamber, Sept. 1, 2004) ("This requirement does not imply knowledge of the details of the attack. In addition, the accused need not share the ultimate purpose or goal underlying the attack: the motives for participation are irrelevant, and a crime against humanity may even be committed exclusively for personal reasons.").

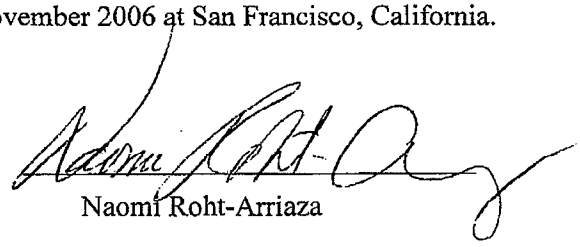
[37] *Kordic/Cerkez*, No. IT-95-14/2-T at ¶ 183. *See also Simic/Tadic/Zaric*, No. IT-95-9/2-S at ¶ 1063 (circumstantial evidence allowed on knowledge of attack); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1354, n. 50 ("Plaintiffs have shown that the 'ethnic cleansing' campaign necessarily was widespread and common knowledge to all persons in areas affected by it, such that [the defendnat] should have been aware that his actions would contribute to a widespread or systematic campaign or attack against a civilian population.").

## CONCLUSION

36. The preceding establishes that there exists in customary international law a specific, universal and obligatory norm prohibiting, as a crime against humanity, the commission of certain heinous crimes as part of a widespread or systematic attack upon a civilian population. Among the heinous crimes are murder, torture, and other comparably inhumane acts which cause great suffering or serious physical or mental injury. The defendant must have knowledge of the attack, that is, the general context, but need not have knowledge of the details nor share the motives or purpose underlying the attack. A widespread or systematic attack can consist of a few incidents, need not target the entire civilian population, and can be separated in time and space. A State or organizational policy is useful evidence of the existence of a widespread or systematic attack, but is not an element of the crime.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 29th day of November 2006 at San Francisco, California.



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# EXHIBIT A

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# CURRICULUM VITAE

## Positions Held

Professor, 1997-present; Associate Professor, 1995-1997; Assistant Professor, 1992-95, Hastings College of the Law, San Francisco, CA.

## Education

J.D. University of California, Boalt Hall, 1990; Thielen-Marin Prize for Best Academic Record; Note and Comment Editor, California Law Review.
Masters in Public Policy, University of California, Berkeley, 1990.

## Books

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"Current Developments in International Trade Cooperation and the Protection of the Environment and Human Rights," Regional Meeting of the American Society of International Law, Golden Gate University, S.F., March 1995.

"Eco-Auditing: International Developments," Public Interest Environmental Law Conference in Eugene, OR, 1995.

"Nuremberg, War Crimes and War Crimes Tribunals," Holocaust Studies Program at Sonoma State University, 1995.

"The Role of Special Courts," International Conference on Genocide, Impunity and Accountability, Kigali, Rwanda, Nov. 1995.

"Transparency, Accountability and Private Actors: The Case of the International Organization for Standardization," annual meeting, American Society of International Law, Washington, DC, 1996 (remarks published in Proceedings).

"ISO 14,000 and the Public Interest," Public Interest Environmental Law Conference, Eugene, OR, 1996.
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"Genocide and the Role of International Organizations," Institute of International and Area Studies, U.C. Berkeley, 1996.

"Trade and Environment Issues around ISO 14,000," Legal Issues Forum, TC 207, International Organization for Standardization, 1996.

"Compliance with Non-Binding Accords: the Case of Private Voluntary Environmental Standards," workshop on Compliance with Non-Binding Accords, American Society of International Law, Virginia, May 1996 (paper to be published in book).

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"Moving Forward on Issues of Amnesty and Impunity," U.S. Meeting of Experts on Reining in Impunity for International Crimes and Serious Violations of Human Rights, Washington, DC, April 13, 1997; Siracusa, Italy, September 1997.

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"The Pinochet Precedent and Universal Jurisdiction," New England School of Law, 2000.

"Effects of the Pinochet Case," University of London, 2001.

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"The International Criminal Court: Pro," Debate, World Affairs Council, San Francisco, CA, 2002; San Francisco Bar Association, 2003.

"Truth Commissions, Torture, Reparations and Prevention," Mexico City, 2002.

"Accountability for Past Human Rights Violations," Narvik, Norway, 2002.

"Legal Implications of the Pinochet Case," Santiago, Chile, 2003.

"Universal Jurisdiction and Accountability for International Crimes", Toronto, Canada, 2003.

Debate on the International Criminal Court, Bar Association of San Francisco, 2004.
Panelist, "The Cabello Case – A Bay Area Family's Fight for Justice," World Affairs Council, San Francisco, Jan. 2004.

"What Future for Universal Jurisdiction?" Cincinnati, Ohio, Feb. 2004.

"Reparative Justice and Development in Post-Conflict Situations," U.C. Davis Law School, March 2004.

"Multifaceted Transitional Justice," conference organizer, Notre Dame, IN, April, 2004.

Panelist, "Race and Reconciliation: The Potential for Innovative Remedies to Resolve Major National and International Human Rights Controversies," Ninth Circuit Judicial Conference, Monterey, CA, July 2004.

"Settling
Accounts? Truth, Justice, and Redress in Post-Conflict Societies," Harvard University November 1-3, 2004.

Prizes and Honors

Riesenfeld Fellow in International Law and Organization, Boalt Hall School of Law, University of California, Berkeley, 1991-92. Full-time research position; also co-taught seminar in Contemporary Issues in International Law (with David Caron).

Fulbright Senior European Community Research Scholar, Barcelona, Spain, Fall 1995.

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Co-Principal Investigator, Project on Creating an International Environmental Ombudsman, 1997-98: project resulted in creation of IUCN-based ombudsman project
Co-Principal Investigator, California Corporate Accountability Project, 1999-2001.
Fact-finding missions to El Salvador and Guatemala, 1989-present.
United States Institute of Peace grant, 2000-2001
Research and Writing Grant, Program in Global Security and Sustainability, MacArthur Foundation, 2001-2002.
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