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Does International Criminal Law Still Require a 'Crime of Crimes'? A Comparative Review of Genocide and Crimes against Humanity

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Abstract

This article argues that the crime of genocide is now a redundant crime in international law given the advances that have been made in the case law and application of crimes against humanity. It does this by providing an historical analysis of the two crimes before going on to consider four separate crimes against humanity and corresponding acts of genocide. The primary argument leveled against genocide is the difficulties that stem from proving the intent in the mind of the perpetrator to destroy a particular group in contrast to the less demanding category of crimes against humanity. It argues for a pragmatic rather than philosophical approach to international justice for the benefit of the victims and the prevention of criminal acts in the future.

A. Introduction

It has been said that genocide is the 'crime of crimes'[1] and consequently it occupies the apex of international criminal law.Critics of the international community's refusal to label atrocities genocide are themselves guilty of downplaying the significance of crimes against humanity which in turn leads to an undermining of its status in international politics and thus international law. This article seeks to redress this imbalance by examining several crimes against humanity which correspond to acts of genocide, thereby demonstrating that genocide is not only a special category of crimes against humanity but also that, as a result, it is largely a redundant crime. It focuses on the substantive elements of international criminal law and argues for a pragmatic rather than philosophical approach to international justice for the benefit of the victims and the prevention of criminal acts in the future.

Genocide is defined in the Convention on the Prevention and Punishment of the Crime of Genocide 1948 (hereafter referred to as the Genocide Convention) as being the commission of specific acts "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The specified acts can be killing members of the group; inflicting bodily or mental harm on members of the group; inflicting conditions of life

[1] *Kambanda*, ICTR Trial Chamber, Judgment, ICTR-97-23, 4 September 1998, para. 16.

calculated to bring about the group's destruction; forcible birth control; and the forcible transferal of children.[2] In addition to acts of genocide the Genocide Convention sets out inchoate offences and complicity in genocide as crimes against the Convention.[3] Genocide depends on the existence in the perpetrator's mind of a specific intent to destroy in whole or in part a Convention group by one of the specified methods, alongside the intent to commit the specified act. So for example, for an individual to be found guilty of genocidal killing it must be proven that he intended to kill his victim and that by so doing it was his intent to destroy in whole or in part that person's national, ethnical, racial or religious group.

Crimes against humanity present a broader range of offences and there is no requirement for a specific group to be targeted; it is sufficient for there to be a widespread or systematic attack committed against a civilian population. The offences that can constitute a crime against humanity include murder, extermination, and enslavement;[4] the Statute of the International Criminal Court (ICC) adds, *inter alia*, apartheid, enforced disappearance, and sexual slavery.[5] Crimes against humanity, therefore, cover a broad range of offences and require only that the criminal act was part of a widespread or systematic attack against a civilian population.

Broadly stated, in a comparative study of genocide and crimes against humanity such as this article presents, the latter offence appears to have very few drawbacks. Indeed, Schabas has noted that there "have been no convictions for genocide where a conviction for crimes against humanity could not also have been sustained"[6]. This is borne out by examining the indictments from the ICTR where crimes against humanity feature alongside genocide. However, if one believes in a hierarchy of international crimes with genocide as the 'crime of crimes' at the zenith of international criminal law then crimes against humanity forms a lower category of offences. In some minds this might mean that a prosecution for crimes against humanity fails to confront the seriousness of the crime of genocide. However, as this article will demonstrate below the two offences are technically different yet substantially the same.

2 *Convention on the Prevention and Punishment of the Crime of Genocide*, 12 January 1951, Art. 2, 78 U.N.T.S. 277.
3 *Id.*, Art. 3, 78 U.N.T.S. 277.
4 Art. 5 Statute of the ICTY, Art.3 Statute of the ICTR.
5 Art. 7(1)(a-k) Statute of the ICC.
6 W. Schabas, *The UN International Criminal Tribunals* (2006), 185.

Further confusion is generated by genocide's status as an element both of international criminal law and of international law. This is starkly illustrated in the *Genocide*[7] case at the International Court of Justice (ICJ), established to resolve disputes between states, and not to hold individuals to account. Indeed, Turns comments that some people "might consider that the ICJ was not the right forum for such a case"[8]. The case before the ICJ was brought by Bosnia and Herzegovina against Serbia and Montenegro. The Court was asked to consider Serbia's liability for acts of genocide committed by Bosnian Serbs. In its judgment the Court concluded that Serbia was not directly liable for the Srebrenica massacre[9] but that it was liable under the Genocide Convention for failing to cooperate with the ICTY.[10] However, give this article's focus on genocide as part of international criminal law and not international law, the ICJ ruling, which is solely focused on state and not individual liability, is of only limited concern to the ideas advanced herein.

In a recent paper in this journal, Bernhard Kuschnik tackled the thorny problem of defining humanity and argued international criminal law requires a concrete notion of the term to aid our understanding of 'crimes against humanity'.[11] He finishes his analysis by noting that 'crimes against humanity should be considered as crimes both against humaneness and humankind.'[12] Ultimately, his examination of crimes against humanity leads him to conclude that the ICC should take a more expansive understanding of the term 'humanity' than is set down in the ICC Statute. He believes that the 'legal framework of crimes against humanity, as well as its legal history, would call for the latter.'[13] Such a position echoes the calls to expand the term of genocide beyond its legal definition, perhaps with recourse to customary international law. However, this article is largely concerned with the drawbacks of genocide as an international crime, while it does stress the

7 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43.

8 D. Turns, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide Bosnia and Herzegovina v. Serbia and Montenegro', 22 *Melbourne Journal of International Law* (2007) (8) 2, 398, 399.

9 ICJ, *supra* note 7, para. 413.

10 *Id.,* para. 449.

11 B. Kuschnik, 'Humaneness, Humankind and Crimes Against Humanity', 2 *Goettingen Journal of International Law* (2010) 2, 501.

12 *Id.*, 529-530.

13 *Id.*, 530.

significant advantages of individual crimes against humanity over specific, comparable, acts of genocide, its primary purpose is to examine substantive aspects of international criminal law, not to engage in a philosophical exercise.

This article will examine three crimes against humanity – persecution, extermination, and torture – and compare each with a corresponding act of genocide. Persecution will be examined in conjunction with the *mens rea* of genocide, extermination compared with genocidal killing, and torture with serious bodily or mental harm. This will be followed by an examination of the crime of deportation, a crime against humanity, which in the case of Nazi atrocities and the massacres in the former Yugoslavia acted as a prelude to genocide, despite not in itself being considered an act of genocide. Prior to any detailed examination it is first however necessary to consider the historical position of genocide and crimes against humanity in international law. This will provide the foundation on which the arguments of this article will be based.

B. The Historical Position of Genocide and Crimes Against Humanity

The prosecutions which took place in front of the Nuremberg International Military Tribunal (IMT) saw individual high-ranking Nazis indicted for war crimes and crimes against humanity in, respectively, counts III and IV of the Indictment.[14] These included the extermination of concentration camp prisoners, torture, medical experimentation, persecution on political, racial, and religious grounds, and deportation. While genocide was neither mentioned in the IMT Statute nor discussed at length by the IMT in its judgment, the atrocities committed by the Nazi regime can undoubtedly be classed as acts of genocide by modern standards. Instead, the IMT considered that deliberately persecuting Jews, Poles and other ethnic, racial, national or religious groups, alongside other categories of people, would constitute a crime against humanity.[15] The IMT took the view that crimes against humanity could only be committed in times of armed

[14] An excellent resource for the Nuremberg Trials can be found on the website of the Avalon Project at Yale University, available at http://avalon.law.yale.edu/subject_menus/imt.asp (last visited 16 August 2010).

[15] R. Overy, 'The Nuremberg trials: international law in the making', in P. Sands (ed.), *From Nuremberg to the Hague: The Future of International Criminal Justice* (2002), 21.

conflict and, despite the wording of Count IV of the Indictment, no convictions for acts committed before 1939 were secured. Following Nuremberg, international criminal justice was a largely vacant concept until the end of the Cold War and the conflict in what came to be the former Yugoslavia.

The creation, by UN Security Council Resolution 827 (1993), of the International Criminal Tribunal for the former-Yugoslavia (ICTY) in 1993 ushered in a new era of criminal responsibility for international crimes. The ICTY Statute provided that the Tribunal would have jurisdiction over genocide, crimes against humanity and war crimes. Given that very little had changed in the almost 50 years since Nuremberg, the Statute provided that the Tribunal had the power to prosecute individuals for crimes against humanity "when committed in armed conflict, whether international or internal in character and directed against any civilian population"[16]. At this stage genocide appeared to offer greater protection, at least in that it could be committed in times of peace. The position of crimes against humanity began to change in the first case prosecuted before the ICTY. In an interlocutory motion, the ICTY Appeals Chamber held that the necessity for the requirement that crimes against humanity be committed solely in an international armed conflict ran contrary to customary international law:

> "[it] is by now a settled rule of customary international law that crimes against humanity do not require a connection to an international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all"[17].

The Appeals Chamber continued that by requiring an armed conflict, international or otherwise, the Security Council 'may have defined the crime in Article 5 [crimes against humanity] more narrowly than necessary under customary international law.' The Statute for the International Criminal Tribunal for Rwanda (ICTR) on the other hand did not make reference to the need for the existence of any armed conflict for the commission of crimes against humanity. This is a position reflected in the Statute of the

16 Art. 5 Statute of the ICTY.

17 *Tadić*, ICTY Appeal Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, para. 141.

International Criminal Court (ICC) and must by now be considered part of customary international law.

It might seem that the codification of the law prohibiting genocide represents progress in the field of international criminal law, yet the target groups and acts are narrowly and strictly defined in the Genocide Convention and consequently its applicable scope is limited. Thus it excludes from its protection political and social groups, amongst others. This article does not subscribe to the view that genocide should be extended to encapsulate these groups because to do so would constitute a violation of international law and the intention of the drafters of the Genocide Convention; this point is explained in more depth below. Instead, it calls for greater respect from international tribunals and prosecutors for the seriousness of offences termed 'crimes against humanity' and a shift away from the label granted to genocide in the *Kambanda* judgment at the ICTR as the "crime of crimes"[18].

International criminal law is based, at the ICTY/R and ICC, on codified definitions of the law. Genocide is strictly defined under the Genocide Convention and in the respective statutes of the tribunals. It could be suggested that in customary international law there exists a conception of genocide, which includes socio-economic or political groups. However, this article considers genocide and crimes against humanity as concrete laws by which individuals are held to account and often sentenced to long periods of imprisonment. If this is the purpose of the law then justice demands that the laws by which such individuals are prosecuted are as certain as possible. Customary international law simply does not fulfill this requirement of certainty. The customary international law of genocide is weak because it has largely been supplanted by the Genocide Convention and the subsequent statutes of the ICTY/R and ICC. Indeed, the Commission of Experts in its report on the Rwandan crisis suggests that genocide as a peremptory norm simply reflects the content of the Genocide Convention and does not offer a more expansive definition of groups protected by the Genocide Convention.[19]

[18] ICTR, *supra* note 1.

[19] *Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994*, A/54/315, S/1999/943, 7 September 1999, para. 152.

Both genocide and crimes against humanity are offences listed in the ICC Statute, and neither requires the existence of an armed conflict for individuals to be indicted.[20] The current status of crimes against humanity in international law means that the protection afforded to individuals by the Genocide Convention is no longer unique to the crime of genocide. The international criminal tribunals have operated produced volumes of case law, which has strengthened and developed the concept of crimes against humanity to the extent that prosecuting individuals for genocide must at least be questioned.

C. Persecution and the *Mens Rea* of Genocide

The essential element of genocide is that the perpetrator intended, by his actions, to destroy in whole or in part a Convention group. Essentially, targeting individuals because of their group membership with a view to destroying that particular group is discriminatory and thus an act of persecution. A hierarchy of the *mens rea* for international crimes has been described by Clark.[21] In this hierarchy genocide is the crime which requires the highest level of proof of *mens rea* namely the specific intent, or *dolus specialis*, to destroy in whole or in part a Convention group. Crimes against humanity require proof that the individual possesses knowledge of the wider context of the crimes for a successful prosecution to result. War crimes require no such level of *mens rea* to be proven; it is enough that, for example, an accused intended to cause the death of a member of a protected group.[22] This hierarchy also applies to the contextual element, which requires that genocide possesses a manifest pattern of abuse, crimes against humanity need to be either widespread or systematic, while war crimes must take place within the context of an international armed conflict.[23]

As a crime against humanity persecution has three distinct elements. First, there is the occurrence of a discriminatory act; secondly, the occurrence of the act based on the group membership of the victims; and thirdly, 'the persecutory act must be intended to cause, and result in, an

20 Art. 7(1) Statute of the ICC makes no reference to the need for an armed conflict, nor does Art. 6, which concerns genocide.

21 R. S. Clark, 'The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences', 12 *Criminal Law Forum* (2001) 3, 291-334.

22 *Id.,* 316.

23 *Id.,* 324.

infringement on an individual's enjoyment of a basic or fundamental [right].'[24] Count 4(B) of the Nuremberg Indictment specified persecution on 'political, racial, or religious grounds' as a crime against humanity. In addition to listing persecutory acts against the Jews, the indictment also specified acts committed against political and religious figures such as Chancellor Schuschnigg and Pastor Niemoeller.[25] It stands to reason that in the context of widespread persecution, the targeting of those best able to offer opposition should be considered an additional aggravating factor. Once a community's ability to organize resistance to oppression is removed it is a much easier target, and that is undoubtedly why such references were made in the Nuremberg indictments.

Persecution is a broad crime which "encompasses a variety of acts, including, *inter alia*, those of a physical, economic or judicial nature, that violate an individual's right to the equal enjoyment of his basic rights"[26]. These acts need not in themselves be inhumane as the ICTY noted in Kupreškić:

> "[a]lthough individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may be termed 'inhumane'"[27].

Furthermore, it is not necessary to identify which rights constitute "fundamental rights for the purpose of persecution"[28]. The ICTR has said that the basic or fundamental right can be laid down either in international customary or in treaty law.[29] This leaves open the possibility that an individual could be prosecuted for acts, which violate international human rights instruments, provided the necessary discriminatory intent is proven.

In order for an individual to be successfully prosecuted for genocide it must, first, be proved that the individual possessed the *mens rea* to commit the underlying offence (those listed in Article 2 of the Genocide Convention). Secondly, it must be proved that the accused possessed the

24 *Tadić*, ICTY Trial Chamber Judgment, IT-94-1, 7 May 1995, para. 715.
25 Count 4 (B), IMT Indictment, in *International Military Tribunal (Nuremberg), Trial of the Major War Criminals Before the International Military Tribunal – 14 November 1945 – 1 October 1946* (1947) Vol. 1, 66.
26 ICTY, *supra* note 24, para. 710.
27 *Kupreškić*, ICTY Trial Chamber Judgment, IT-95-16, 14 January 2000, para. 622.
28 *Stakić*, ICTY Trial Chamber Judgment, IT-97-24, 31 July 2003, para. 773.
29 *Nahimana*, ICTR Trial Chamber Judgment, ICTR-96-11, 3 December 2003, para. 986.

intent to destroy in whole, or in part, a Convention group as such. If the intent to destroy a Convention group is not proven, any prosecution for genocide is more likely to become a prosecution for crimes against humanity, an issue which will be examined in more detail below. In the *Jelišić* judgment the ICTY noted that it is "in fact the *mens rea* which gives genocide its speciality and distinguishes it from an ordinary crime and other crimes against international humanitarian law"[30]. The following section will, first, examine in more depth the position set out above regarding the *dolus specialis* of genocide. Secondly, the *mens rea* for the individual acts of genocide found in the Genocide Convention, and its progeny? at the UN international tribunals and the ICC will be considered, before evaluating how this poses difficulties in proving the crime of genocide.

Dolus specialis is a civil law term which the ICTR, in particular, has equated with the common law term of "specific intent"[31]. Essentially, it must be the specific intent of the perpetrator to destroy in whole or in part a racial, ethnical, national or religious group. Article 30 of the ICC Statute establishes the *mens rea* for the offences over which it has been granted jurisdiction. However, this only renders an individual criminally responsible if the *actus reus* is committed "with intent and knowledge"[32]. Consequently, it must be proven that the individual accused intended to engage in the criminal act, and meant to cause the consequences of his act.[33] Without both the first and second elements of genocide being proved beyond reasonable doubt any prosecution for genocide must, as a matter of law, fail.

For an individual to be found guilty of genocide it must be proved that the act in question was intended to destroy, in whole or in part, a Convention group. In *Akayesu* the Tribunal reasoned that the accused intended to destroy a Convention group because of the way in which members of the Tutsi group were targeted. This was through the way "members of the Tutsi population were sorted out" at roadblocks and checkpoints to be "apprehended and killed"[34]. In *Jelišić* the ICTY Trial Chamber stated that the "'special' intention which [...] characterises his intent to destroy the discriminated group as such, at least in part"[35] must be proved beyond reasonable doubt for a conviction for the crime of genocide

30 *Jelisić*, ICTY Trial Chamber Judgment, IT-95-10, 14 December 1999, para. 66.
31 *Akayesu*, ICTR Trial Chamber Judgment, ICTR-96-4, 2 September 1998, para. 122.
32 Art. 30(1) Statute of the ICC.
33 Art. 30(2)(a-b) Statute of the ICC.
34 ICTY, *Akayesu*, s*upra* note 31, paras 123-124.
35 Jelisić*, supra* note 30, para. 78.

to result. This corresponds to the above discussion of the *dolus specialis* of genocide. Proving that the accused intended, by his actions, to destroy in whole or in part a Convention group adds a further hurdle which must be crossed for a successful prosecution, yet this is crucial to proving that the accused had the requisite *mens rea*.[36] In *Akayesu*, the Trial Chamber noted the difficulties associated with proving the *mens rea* of genocide. It found "that intent is a mental factor which is difficult, even impossible, to determine"[37]. Consequently, "intent can be inferred from a certain number of presumptions of fact" including the "the scale of atrocities committed […] the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups"[38]. Aptel concludes on this subject that "circumstantial evidence may also be used to establish the requisite intent"[39].

Labeling genocide as the 'crime of crimes' but then lowering the burden of proof for the *mens rea* is unsatisfactory, and cannot contribute to a fair trial for an accused. This was recognized in *Bagilishema* where the Trial Chamber ruled that the "that the use of context to determine the intent of an accused must be counterbalanced with the actual conduct of the [accused]". The Court ruled that a defendant's "intent should be determined, above all, from his words and deeds, and should be evident from patterns of purposeful action"[40]. However, such a method poses problems in proving the *dolus specialis* of an accused. While it may be easy to prove that the defendant killed or deported a number of people of a given group, it must also be proved that the individual desired the destruction of that group. This sets it apart from crimes against humanity, and could be one reason why so few low-ranking soldiers and civilians have been convicted of genocide. While it would be naïve to state that a low ranking soldier *did not* wish to effect the destruction of a Convention group, from the *Bagilishema* ruling it is more difficult to prove that this was indeed the case when compared to a senior politician who urges the destruction of a group then produces detailed plans.

Due to its nature persecution is also an umbrella offence under which other crimes against humanity can be committed as noted in *Todorovic*:

36 C. Aptel, 'The Intent to Commit Genocide in the Case Law of the International Criminal Tribunal for Rwanda', 13 *Criminal Law Forum* (2002) 3, 273, 287.

37 *ICTY, Akayesu, supra* note 34, para. 523.

38 *Id*.

39 Aptel, *supra* note 36, 288.

40 *Bagilishema*, ICTR Trial Chamber Judgment, ICTR-95-1, 7 June 2001, para. 63.

"persecution is the only crime enumerated in Article 5 of the [ICTY] Statute which […] by its nature…may incorporate other crimes"[41]. As such it is possible to combine persecution with, for example, extermination or deportation to provide for an effective prosecution of crimes against humanity which takes into account not only the 'substantive' crime of extermination, but also the persecutory intent of the crime. In this way persecution operates as a standalone crime, which in effect equates to the special intent of genocide, yet the prosecution, as a whole, need not in itself fail if the crime of persecution cannot be proven. This contrasts with the crime of genocide whereby if the special intent is not proven then the defendant would be found not guilty not only of discriminatory acts but also the underlying act such as killing.

Under the ICC Statute, persecution is a crime against humanity that can be readily applied to crimes that target individuals because of their group identity, be it because of their membership of a Convention group or another group. The crime of persecution can encompass, *inter alia*, acts of extermination and deportation, which are committed on the basis of group membership. In addition, crimes against humanity are easier to prove because of the lower *mens rea* threshold. While this view may appear to condone a less thorough judicial process, it does the opposite. Proving the *dolus specialis* of genocide is difficult, therefore it may lead those embarking on genocidal programs to believe that they may act with impunity. By using the lower threshold of crimes against humanity it is possible to challenge this impunity.

D. Extermination and Genocidal Killing

The two crimes of extermination and genocidal killing are closely linked. While it is true that genocide could be committed by targeting only a handful of individuals, such a scenario is merely hypothetical if one looks at the history of genocidal acts. It is the contention of this article that the two offences of genocidal killing and crimes against humanity are on close inspection the same in terms of the consequences. It is true that genocide has a different *mens rea* but its weaknesses were highlighted above. Should the acts not meet the threshold for extermination then murder is also a crime against humanity which would fill in any lacunae generated by the threshold not being met. Essentially, extermination (and murder) provides a better

41 *Todorović*, ICTY Trial Chamber Judgment, IT-95-9/1, 31 July 2001, para. 32.

basis for the prosecution of those who commit atrocities when compared to genocide.

In *Stakić* extermination was described as "the annihilation of a mass of people"[42], and just after Nuremberg it was described by Egon Schwelb as "murder on a large scale"[43]. As with other crimes against humanity, the act of extermination lacks the specific intent required for genocide, but must take place within the context of widespread or systematic attacks. What distinguishes extermination from genocidal killing is that the former targets not a group but a large number of people. This can be comprised of one act or a number of acts "which contributes to the killing of a large number of individuals"[44], a position supported in *Vasiljević*[45] and further supported in *Niyitegeka* at the ICTR.[46] In *Kayishema and Ruzindana* the ICTR held that an individual may be prosecuted for the crime of extermination for "a single killing" if that "killing form[s] part of a mass killing event" and that the murder took place in the context of mass killing.[47] In contrast, the ICTY in *Vasiljević* found that "[r]esponsibility for one or for a limited number of such killings is insufficient"[48] for a successful prosecution for the crime of extermination. The "scale of the killing required for extermination must be substantial"[49] yet it is possible that a limited group may be targeted and this group may be "made up of only a relatively small number of people". It is enough that a "numerically significant part of the population" is targeted.[50] A quantifiable threshold by which to judge whether the crime has been committed has not been set. This position is in accordance with the principle of judicial interpretation and the discretion afforded to the court to arrive at a judgment in particular cases. Of course, the crime against humanity of murder provides cover for any acts which would not make the threshold of extermination because "apart from the question of scale, the essence of the

42 *Stakić*, ICTY Trial Chamber Judgment, IT-97-24, 31 July 2003, para.641.
43 E. Schwelb, 'Crimes Against Humanity', in H. Lauterpacht (ed.), 23 *British Yearbook of International Law* (1946), 178, 192.
44 G. Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005), 176.
45 *Vasiljević*, ICTY Trial Chamber Judgment, IT-98-32, 25 February 2004, para. 229.
46 *Niyitegeka*, ICTR Trial Chamber Judgment, ICTR-96-14, 13 May 2003, para. 450.
47 *Kayishema and Ruzindana*, ICTR Trial Chamber Judgment, ICTR-95-1, 1 June 2001, para. 147.
48 ICTY, *supra* note 45, para. 227.
49 *Semanza*, ICTR Trial Chamber Judgment, ICTR-97-20, 15 May 2003, para. 340.
50 *Krstić*, ICTY Trial Appeals Chamber Judgment, IT-98-33, 19 April 2004, para. 503.

crimes of murder as a crime against humanity and extermination as a crime against humanity is the same"[51].

The *Vasiljević* judgment found that in order for an accused to be convicted of extermination he must have intended "to kill [...] or otherwise [intended] to participate in the elimination of a number of individuals". Furthermore, the individual must participate with "the knowledge that his action is part of a vast murderous enterprise in which a large number of individuals are systematically marked for killing"[52]. Unlike the crime of genocide there is no requirement that the accused acted with discriminatory intent towards his victims. The *Stakić* judgment confirmed the victims of the perpetrator may be negatively defined meaning that the targeted individuals are seen "as not belonging to, not being affiliated with or not loyal to the perpetrator or the group to which the perpetrator belongs"[53]. This is in sharp contrast to the strong positive identity required by the Genocide Convention. Again, in contrast to the Genocide Convention there is no requirement that the perpetrator be motivated by a hatred or destructive intent for his victims, as was found in *Vasiljević* where the ICTY concluded that "the ultimate reason or motives – political or ideological – for which the offender carried out the acts are not part of the required *mens rea* and are, therefore, legally irrelevant"[54]. This clearly lends itself more to securing a sound conviction than relying on tenuous evidence concerning either group identity or on proving that the individual had the *dolus specialis* of genocide.

Extermination may be committed through omission,[55] meaning that the perpetrator may inflict conditions of life calculated to bring about the destruction of those he targets. In *Kayishema and Ruzindana* the ICTR provided the following as examples of such a method of extermination:

> "[i]mprisoning a large number of people and withholding the necessities of life which results in mass death [or] introducing a

51 *Kamuhanda*, ICTR Trial Chamber Judgment, ICTR-99-54, 22 January 2004, para. 686.

52 Vasiljević, *supra* note 45, para. 229.

53 *Stakić*, ICTY Trial Chamber Judgment, IT-97-24, 31 July 2003, para. 639; see also Vasiljević, *supra* note 45, para. 228.

54 Vasiljević, *supra* note 45, para. 228.

55 Kayishema and Ruzindana, *supra* note 47, para. 144.

> deadly virus into a population and preventing medical care which results in mass death"[56].

Clearly, this is very similar to Article 2(c) of the Genocide Convention which is concerned with the imposition of conditions calculated to bring about the destruction of a Convention group. As with the other crimes against humanity, however, no specific intent to destroy a Convention (or other) group is required; it is enough to seek to destroy the targeted individuals.

Genocide, as dealt with above, requires the individual to have the intent to destroy in whole or in part a Convention group. In *Akayesu* the ICTY dealt with the specific requirements of the crime of genocide. The Tribunal determined that in order for killing to occur an individual must be dead, that the death must have resulted from an illegal act or omission, and the accused must have had the requisite *mens rea* for the death.[57] In the popular consciousness, killing is the principal means by which genocide is committed. Examining killing as an act of genocide involves inspecting the two constituent components of *mens rea* namely the intention to kill, and the intention that this would in some way lead to the destruction in whole or in part of the targeted group. Such killing need not be carried by the accused; it is enough for him to have ordered the killings as was the case in *Rutaganda* where the accused, after distributing weapons, told the militia under his command to "get to work [because] there was a lot of dirt that needed to be cleaned up"[58]. Despite the absence of the individual's direct participation in the killing it was held that he still intended the deaths of several Tutsi. The ICTR held that the defendant's words were enough to constitute evidence of a genocidal *mens rea*.[59] If the accused had killed a number of individuals from a Convention group, and the *mens rea* for the underlying act was proven, difficulties would still lie in proving that he possessed the intent to destroy that group. This matter arose in *Jelišić* where, it was argued that the defendant took sadistic pleasure in killing for the sake of killing, rather than with genocidal intent.[60]

56 *Id.*, para. 146; and *Rutaganda*, ICTR Trial Chamber Judgment, ICTR-96-3, 6 December 1999, para. 84.
57 ICTY, *Akayesu*, *supra* note 31, para. 589.
58 Rutaganda, *supra* note 56, paras 385 and 389.
59 *Id.,* para. 389.
60 Jelisić, *supra* note 30, para. 130.

Extermination as an international crime fits easily into the popular conception of genocide. The massive scale of the killing evokes images of the Holocaust, and the crime lends its name to the extermination camps operated at Auschwitz-Birkenau and elsewhere. It was a crime punished at Nuremberg under Article 6(c) of the IMT Charter, and has been successfully prosecuted at the international tribunals.[61] Coupled with this demonstrated success is the lower mens rea required for a successful prosecution for the crime of extermination. This is in contrast to the crime of genocide which requires the specific intent to destroy in whole or in part a Convention group. It could be argued that genocide could take place on a scale small enough not to meet the threshold required for extermination. If this was the case the crime of murder (ICC Statute Article 7(1)(a)) would provide the necessary grounds for a prosecution as discussed above. The crime of extermination as a crime against humanity adequately dealt with the circumstances of the Holocaust which leaves the question: why does international criminal law require the crime of genocide? Extermination, when coupled with the crime of persecution, can provide an appropriate response in situations where acts of genocide take place without being subject to the same rigorous, and superfluous, requirements for the same conclusion.

E. Torture, Inhumane Treatment and Causing Serious Bodily or Mental Harm

Torture is considered one of the gravest contraventions of international law, as it is one of the few agreed peremptory norms of international law.[62] It is a component of crimes against humanity, and can be considered an act of genocide under the Genocide Convention. Acts of torture are also grave breaches of the Geneva Conventions and are prohibited by several international treaties including the Convention Against Torture[63] and the European Convention on Human Rights.[64] This section

61 See for example *Krstić*, ICTY Trial Appeals Chamber Judgment, IT-98-33, 19 April 2004 and *Semanza*, ICTR Trial Chamber Judgment, ICTR-97-20, 15 May 2003, n. 41.

62 See M. Shaw, *International Law* (2008), 326; *Regina v Bow Street Metropolitan Stipendiary Magistrate and others, Ex parte Pinochet Ugarte (No.3)* [2000] 1 A.C 147 per Browne-Wilkinson, 198. *Furundzija*, ICTY Trial Chamber Judgment, IT-95-17/1-T, 10 December 1998, para. 144.

63 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment*, 10 December 1984, Art. 1, 1465 U.N.T.S. 85.

will also consider other acts which are crimes against humanity, for example inhumane treatment and rape, and which have also been considered acts of genocide. This will further demonstrate that crimes against humanity have a wide enough scope to prosecute acts of genocide alongside crimes against humanity.

With regard to the definition of torture, there is a variation in its definition as a crime against humanity and as an act of genocide. There is extensive jurisprudence at the international tribunals as to what constitutes torture and this article will only briefly summarize the respective positions. As a crime against humanity, this article refers to the definition given in *Kunarac*. Here the Trial Chamber held that the elements of the offence are: the infliction, by act or omission, of severe pain or suffering, whether physical or mental; the act or omission is intentional; and the act or omission is aimed at obtaining information or a confession, or at punishing, intimidating or coercing the victim or third person, or at discriminating, on any grounds, against a person or third person.[65] This was approved by the Appeals Chamber.[66]

Genocide's approach to the issue of torture is slightly different in that the Genocide Convention refers to "causing serious bodily or mental harm" with the intention to destroy a Convention group. This is a broader approach to that taken by crimes against humanity. In *Akayesu*, the ICTR defined the term as meaning "acts of torture, be they bodily or mental, inhumane or degrading treatment [and] persecution"[67]. It also found that it could include rape as an act of genocide under this heading.[68] In *Krstić* this provision of the Genocide Convention was held to extend to acts of persecution.[69]

Given that genocide, on the definitions set out above, protects against acts of deportation and sexual violence, it might be thought that the level of protection it offers is comparable, if not more comprehensive, to that offered by crimes against humanity. However, the statutes of the international criminal tribunals and now the ICC criminalize several acts as crimes against humanity. For example, rape is a specific offence, as are deportation and persecution. In addition, they also make it a crime against humanity to

64 Art. 3 ECHR.
65 *Kunarac*, ICTY Trial Chamber Judgment, IT-96-23, 22 February 2001, para. 497.
66 *Kunarac*, ICTY Appeals Chamber Judgment, IT-96-23, 12 June 2002, para. 156.
67 ICTY, *Akayesu*, *supra* note 31, para. 504.
68 *Id.,* paras 731-733.
69 Krstić, *supra* note 50, para. 513.

commit 'other inhumane acts', which the statutes do not define or further elucidate.[70] The latter crime will be discussed in more detail below.

The ICTY and ICTR have widened the scope of the term 'serious bodily or mental harm' to include the anguish suffered by victims immediately before their deaths. For example, the *Popović* judgment states that the "killing operation inflicted serious bodily and mental harm" in part due to the removal from the victims of their personal property. Further it held that "for all of them, any hope of survival was extinguished in the terrifying moments when they were brought to execution sites". Consequently, serious bodily and mental harm was inflicted on the victims.[71] While this is undeniable, the idea that these acts *in themselves* constituted an act of genocide is untenable. The acts of removing from an individual his personal property and transporting him to a site of execution are acts aimed at facilitating the killing of the individual in furtherance of the aim of destroying in whole or in part a Convention group; they are not acts which intrinsically fulfill the *mens rea* of genocide. The ICTY also held in *Popovic* that this category of crime could also include the suffering borne by those suffering distress due to the uncertainty over the fate of their male relatives. This is unsatisfactory. The idea that an act which causes distress in the minds of relatives constitutes an act of genocide is stretching the definition too far. It cannot be said on reading the Genocide Convention and the interpretative jurisprudence that causing distress in the minds of relatives is an act which evinces an intention to destroy in whole or in part a Convention group. It is a consequence but not a constituent act.

Crimes against humanity, on the other hand, specifically provide for the crime of disappearance and 'other inhumane acts' as noted above. Disappearance is now a recognized crime under the ICC statute which prohibits the "enforced disappearance of persons"[72]. The ICTY/R Statutes do not provide for a discrete offence relating to disappearance. However, it could be considered an 'inhumane act', as discussed below. It is notable that the ICC Statute includes the offence of 'disappearing' individuals, yet it merely reflects international indignation at the intentional act of causing individuals to disappear leaving their families with no closure. Such acts occurred under the Pinochet regime in Chile and have been documented

70 Art. 5 (i) Statute of the ICTY; Art. 3 (i) Statute of the ICTR; Art. 7 (1) (k) Statute of the ICC.

71 *Popović*, ICTY Trial Chamber Judgment, IT-05-88, 10 June 2010, para. 844.

72 Art. 7(1)(i) Statute of the ICC.

during Russia's fight against Chechnyen insurgents.[73] There is no doubt that such acts are considered atrocities in themselves, especially as most of the 'disappeared' never return and are to be presumed dead.

Other inhumane acts have been described as a "residual category"[74] of crimes which has been deliberately left broad. The ICTY Appeals Chamber has defined the crime as being the infliction of serious bodily or mental harm by an act or omission with the intent to inflict serious bodily or mental harm on the victim.[75] This category would include acts of mistreatment which are ostensibly acts of torture but fail to meet the requirements discussed above, and other acts which are clearly inhumane but do not constitute a defined crime against humanity. The effect of such a provision is to grant to the international judiciary the power to exercise their judgment when presiding over a case.

The strength of crimes against humanity comes from its lower *mens rea* requirement as well as the breadth of offences of which it is comprised. It was remarked earlier that persecution is an umbrella offence in that it can incorporate other crimes against humanity. It is possible to see crimes against humanity as an umbrella category of crimes which offers almost universal protection to civilian populations in times of conflict and times of peace. Indeed, there is one case at the ICTY, that of *Galic*,[76] where a Bosnian Serb general was convicted of crimes against humanity for acts which were ostensibly war crimes. Schabas remarks that the potential consequence of this ruling is to make all war crimes involving suffering and injury of civilians punishable as crimes against humanity"[77]. While this article does not agree with the total replacement of war crimes with crimes against humanity, on the grounds that they operate in two different but overlapping spheres, the simplification of international criminal trials can only lead to a stronger conception of international justice in the context of genocide and crimes against humanity.

73 See for example *Khatuyeva v. Russia,* ECHR Judgment (App no 12463/05), 22 April 2010.

74 *Naletilić and Martinović*, ICTY Trial Chamber Judgment, IT-98-34, 31 March 2003, para. 247; See also ICTY, *Akayesu*, *supra* note 31, para. 585.

75 *Kordić*, ICTY Appeal Chamber Judgment, IT-95-14/2, 17 December 2004, para. 117.

76 *Galić*, ICTY Trial Chamber Judgment, IT-98-29, 5 December 2003, para. 151.

77 Schabas, *supra* note 6, 225.

F. Deportation – a Prelude to Genocide

Deportation, forcible transfer and acts of 'ethnic cleansing' are persecutory acts in that they seek to remove persons from a given area for reasons based primarily on the identity of the individuals being removed. There is a distinction between the three which is to be discussed below, but in addition to constituting acts of persecution they are also discrete categories of crimes against humanity. They offer a greater level of protection because despite deportation being a component part of many acts of genocide, for example the Holocaust and the atrocities committed by Bosnian Serbs in the former-Yugoslavia where deportation and forcible transfer preceded further persecutory acts, the ICTY has held that forcible transfer, and by extension deportation, does not in itself constitute an act of genocide.[78] This raises questions as to the effectiveness of the protection offered by criminalizing acts of genocide and contributes to the argument that crimes against humanity could easily supplant the crime of genocide.

Article 7(2)(d) of the ICC Statute defines deportation and forcible transfer as the "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law". At Nuremberg, the IMT Statute granted the tribunal jurisdiction over acts of deportation as both a war crime[79] and as a crime against humanity. As a war crime, the IMT prosecuted defendants for the deportation of individuals for political and racial reasons.[80] Count 4 of the IMT indictment concerned deportation as a crime against humanity but does not specify the required elements for this crime.[81]

Prior to the establishment of the ICC, the ICTY dealt extensively with the crimes of deportation and forcible transfer. In *Naletilić* the Trial Chamber wrote that there exists a fundamental distinction between

78 *Popović,* ICTY Trial Chamber Judgment, IT-05-88, 10 June 2010, para. 843.

79 Article 6(b) Statute of the IMT, in *International Military Tribunal (Nuremberg), Trial of the Major War Criminals Before the International Military Tribunal – 14 November 1945 – 1 October 1946*, Vol. 1 (1947), 11.

80 Count 3(B)(1) of the IMT Indictment, in *International Military Tribunal (Nuremberg), Trial of the Major War Criminals Before the International Military Tribunal – 14 November 1945 – 1 October 1946,* Vol. 1, (1947), 51.

81 Count 4(A) of the IMT Indictment, in *International Military Tribunal (Nuremberg), Trial of the Major War Criminals Before the International Military Tribunal – 14 November 1945 – 1 October 1946,* Vol. 1 (1947), 66.

deportation and forcible transfer. The former must involve a transfer beyond state borders, while the latter "may take place within national borders"[82]. However, both share the same feature in that they "relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside"[83]. 'Transfer' must not be confused with evacuation which is permitted, in limited circumstances, by Article 49 of the Fourth Geneva Convention and Article 17 of Additional Protocol II. The ICTY examined this very point in *Krstić* and found that in Srebrenica the civilian population was forcibly expelled and that the "evacuation was itself the goal and neither the protection of the civilians nor imperative military necessity justified the action"[84]. Indeed, the Tribunal determined that while the safety of the civilians was used to justify the transfer, hostilities in the locale had ceased,[85] and therefore "the transfer was carried out in furtherance of a well organised policy whose purpose was to expel the Bosnian Muslim population from the enclave"[86]. The civilians of Srebrenica "were displaced within the borders of Bosnia-Herzegovina" and consequently "the forcible displacement may not be characterised as deportation in customary international law"[87]. Instead, the Court found that it amounted to forcible transfer, lacking the requirement for deportation that individuals are forcibly transported across a border into the territory of another state.

The distinction between the deportation and forcible transfer can be described thus: removing the individuals from the place where they are legally residing is forcible transfer, while removing them from the place in which they legally reside and removing individuals 'from the protection of the authority concerned' is deportation.[88] In essence the difference is that of moving victims from one place to another in a state or territory (forcible transfer), and removing the concerned victims from the territory to another territory or state (deportation). Additionally, the ICTY has found that expulsion can be "treated in the same way as deportation [but] it would need […] to meet the test of sufficient gravity in order to constitute

82 *Naletilić and Martinović*, ICTY Trial Chamber Judgment, IT-98-34, 31 March 2003, para. 670.
83 Krstić, *supra* note 50, para. 520.
84 *Id.,* para. 527.
85 *Id.,* para. 525.
86 *Id.,* para. 527.
87 *Id.,* para. 531.
88 Stakić, *supra* note 28, para. 674.

persecution"[89]. It must also be proved that individuals were deported or expelled. In *Krnojelac*, because those individuals alleged to have been deported or expelled were never seen or heard from again, the Trial Chamber was unable to determine that deportation or expulsion occurred.[90] A further problem in proving deportation over expulsion arose from the nature of the conflict in the former Yugoslavia which meant that, in places, the *de facto* boundaries of the states or territories concerned were contested and constantly changing. In *Stakić* the ICTY solved this problem by determining that the term 'boundary' could be taken to mean both internationally recognized *de jure* borders and *de facto* boundaries.[91] The pragmatic approach taken in *Stakić* recognized the challenges posed by the conflict in the former Yugoslavia and can be seen as wider acknowledgment that modern conflicts are frequently non-international in nature and involve conflicting claims to the control of territory.

Ethnic cleansing is often confused with genocide, or classed as an act of genocide. However, they are distinctly different crimes, with ethnic cleansing now falling into the category of crimes against humanity.[92] Ethnic cleansing has occurred in many conflicts most notably in Bosnia and, contentiously, in the Darfur region of Sudan. Firstly, it is necessary to examine the *actus reus* of ethnic cleansing and its development in the jurisprudence of the ICTY. While the term 'ethnic cleansing' started its life as a way of describing government policy rather than as a form of crime against humanity,[93] it is now indubitably in the latter camp through numerous pieces of ICTY jurisprudence. The crime itself has been variously defined. In the case of *Bosnia-Herzegovina v. Serbia and Montenegro* at the International Court of Justice, the Court quoted a report by the Commission of Experts for Security Council Resolution 780 which described ethnic cleansing as being the practice of "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area"[94]. In the case of *Stakić*, the ICTY determined that, in reference to the deportation of Bosnian Muslims, the "expulsion of a group

89 *Krnojelac*, ICTY Trial Chamber Judgment, IT-97-25, 15 March 2002, para. 476; and see also *Stakić*, supra note 28 para. 675.
90 *Krnojelac*, ICTY Trial Chamber Judgment, IT-97-25, 15 March 2002, para. 485.
91 Stakić, *supra* note 28, para. 679.
92 The ICC Statute prohibits forcible transfer and deportation.
93 W. Schabas, *Genocide in International Law* (2000), 190.
94 ICJ, *supra* note 7, 43, para. 190.

or part of a group does not in itself suffice for genocide"[95] because the aim of such action is to dissolve the group in a particular area rather than its physical destruction. This part of ethnic cleansing ties in with the section above on inflicting conditions calculated to bring about the destruction of a particular Convention group. The crime of ethnic cleansing, consequently, is intimately linked to the crime of genocide in that it targets individuals because of their specific group identity, whether real or perceived. Ethnic cleansing often involves the killing of a small proportion of the target group in order to coerce the remainder of that group to leave the region. However, its intention is clearly very different from genocide, an issue which shall be examined in the following chapters on the *mens rea* of genocide.

How do the acts of deportation and forcible transfer as crimes against humanity render genocide a redundant crime under international law? The crimes of deportation and ethnic cleansing could be considered to be 'intelligent acts of genocide' in that they aim to destroy a group in a particular area without committing any of the acts listed in the Genocide Convention. It is because of this link that crimes against humanity are better positioned to offer protection than that afforded by the Genocide Convention. Indeed, many modern atrocities have to some extent involved deportation or forcible transfer. Additionally, there is no requirement that the individuals targeted for expulsion, deportation or transfer belong to a Convention group. All that is required is that there has been a widespread or systematic attack against a civilian population, and *may* also occur under the umbrella of the crime of persecution. It is for this reason, and for those given above, that the crimes against humanity of deportation and forcible transfer of individuals offer far better protection than the non-existent protection offered by the Genocide Convention.

G. Reassessing the Role of Genocide

Throughout this article it has been argued that crimes against humanity are better positioned than the crime of genocide to prevent future atrocities. It has also been argued that genocide depersonalizes the violence, focusing on the violence of one group to another. It seemingly fails to take into account the impact such atrocities have on a personal level, with regard to both the perpetrator and the victim. Indeed the ICTY in *Popovic* has

95 Stakić, *supra* note 28, para. 519 [emphasis added].

stated that the "ultimate victim of the crime of genocide is the group"[96]. This is simply wrong in an era where international law is so concerned with the fundamental and inviolable rights of individuals. In contrast, it has been commented that as a crime against humanity, persecution "stops with the victim"[97]. This means that instead of targeting the group through its members, the crime targets individuals *because of* their group identity. This is a difference of fundamental importance. In this sense it reawakens the debate concerning human rights and whether groups can ever possess such rights. Obviously they cannot as human rights are so called and not 'group rights'. Essentially, crimes against humanity restore the link between humanitarian law and human rights, bringing the individual back into the focus of the law. As has been noted, genocide removes humanity from the crime. Crimes against humanity make the occurrences of such crimes more real in popular consciousness and thus more preventable by weakening the culture of impunity which is widespread in dictatorial regimes and the minds of warlords the world over.

In the conclusion to his book *Genocide in International Law*, Schabas comments that the law of genocide can be developed in two ways. First, the definition of a Convention group can be broadened to include other groups. Secondly, he believes it necessary to extend the scope of "obligations assumed by States parties, notably in the direction of a duty to intervene in order to prevent genocide"[98]. Both of these proposals are problematic. Redefining a Convention group to include the likes of political and gender groups seriously weakens the true meaning of genocide, and suggests a reluctance to describe such serious violations of international law as crimes against humanity. Furthermore, he uses the term "victims of mass killing"[99]. It is as if Schabas, despite the contents of his book, has fallen victim to the belief that mass killing is a *sine qua non* of genocide, despite killing being only one of five acts of genocide enumerated by the Genocide Convention. It demonstrates the way in which the term has come to be abused. The second proposal, that of imposing obligations on States parties to intervene in genocide, is dangerous because it will lead to States parties denying the existence of genocide in a country when it could objectively be demonstrated that it is occurring. This poses a great risk to the security of individuals living within a genocidal state. A third proposal could be added

96 Popović, *supra* note 71, para. 821.
97 Mettraux, *supra* note 44, 334.
98 Schabas, *supra* note 93, 551.
99 *Id.,* 551.

to Schabas' two, that the Genocide Convention should be left as it is as a piece of historical international legislation and that for the vast majority of instances crimes against humanity should become the 'crime of crimes'.

While the Genocide Convention is often said to have been born out of the Nuremberg trials, legally speaking this is incorrect. Genocide as a concept existed before the IMT Statute was drawn up and could have been incorporated as a separate indictable offence. Crimes against humanity were the charges brought against the Nazi leadership even though they indubitably possessed the necessary *mens rea* for a successful prosecution for genocide. Genocide grew out of the law forbidding crimes against humanity, and the fact that genocide now has such a prominent place in international criminal law is a damning indictment of the international community's neglect of the 'lesser' crimes against humanity.

Furthermore, the idea that a law prohibiting genocide will prevent future occurrences of the Nazi genocide are ill-founded and dangerously naïve. The fact remains that while individuals are convinced of their own historic, social, political, racial, ethnic, or religious superiority, they will ignore laws, no matter how inviolable the international community holds them to be, and commit crimes because they *believe* that they are right. Crimes against humanity make a better choice for the international community, not just a fallback in case a prosecution for genocide fails but as a category of crimes which offers more flexibility and a sounder legal standing that genocide.

H. Concluding Remarks

This article has examined four crimes against humanity and compared them with crimes of genocide. It has been shown that, in each of the four offences, crimes against humanity offer a viable and adequate alternative to prosecuting individuals for acts of genocide. The lack of a discriminatory intent for the former is a significant boon, although should discrimination or persecution occur there is a separate crime for which individuals may be prosecuted. Extermination and murder as crimes against humanity provide better protection than that afforded by the Genocide Convention, and not only because of the lower *mens rea* threshold. Torture and inhumane acts as crimes against humanity between them offer coverage of a wide range of situations where torture or inhumane acts are committed. Lastly, the crimes of deportation and forcible transfer were examined beside acts of ethnic cleansing. It was shown that such acts, despite being as destructive as other offences against the Genocide Convention, are not considered acts of

genocide thereby leaving a huge hole in the protection granted by the Convention. It was demonstrated that in instances such as these crimes against humanity is the only category of crimes to protect individuals even if the perpetrators possess the *mens rea* required for genocide.

It remains to be seen how the ICC will approach cases concerning genocide although inevitably it will draw on the jurisprudence of the ICTY and the ICTR in particular. However, as this article has argued, is this necessary? It has been argued that the "paralysing obsession in finding a genocide […] is to misapply the Genocide Convention and misunderstand the legal alternatives"[100]. Crimes against humanity provide an overarching category of crimes. Indeed as Schabas has commented, there "have been no convictions for genocide where a conviction for crimes against humanity could not also have been sustained". He continues that the "real 'umbrella' rule of the tribunals is the prohibition of crimes against humanity"[101]. Consequently, given the difficulties posed by establishing the occurrence of genocide is it sensible to rely upon it as a basis for future prosecutions? Critics of this position will no doubt offer the impressive jurisprudence of the ICTR in answering this question, yet the ICTR trials leave a lot to be desired. For instance, there is a dispute as to whether the Hutu and Tutsi really are ethnically different, and they certainly are not to be considered 'stable and permanent groups' as the ICTR readily acknowledged. Instead of exploring the issue in detail, as a court of law should, the Tribunal 'fudged' the issue in *Akayesu*.[102] Subsequent cases have simply taken judicial notice of the fact that genocide occurred. Whether this approach is satisfactory to the interests and purposes of international criminal justice is a question that few are willing to consider.

Justice Birkett, the presiding British judge at Nuremberg, said that the "thing that sustains me is the knowledge that this trial can be a very great landmark in the history of International Law. There will be a precedent of the highest standing for all successive generations"[103]. It seems strange then that one of the greatest achievements of the International Military Tribunal was the successful prosecution of individuals for the commission of crimes against humanity, only for it now to be considered by many as a crime second to genocide in the international hierarchy of crimes.

100 P. Quayle, 'Unimaginable Evil: The Legislative Limits of the Genocide Convention', *International Criminal Law Review* (2005) 5, 372, 371.
101 Schabas, *supra* note 6.
102 ICTY, *Akayesu*, *supra* note 31, paras 112-129.
103 Cited in J. Owen, *Nuremberg: Evil on Trial* (2006), 98.

It is true that the past 20 years or so have been a period of great expansion and development for international criminal law. Writing in 1992, a year before the ICTY was established, Bassiouni commented forlornly that "expectations are bleak that a legally satisfactory codification of "crimes against humanity" will soon emerge"[104]. Yet, a few years later with the ICTY's ruling in *Tadić*, international criminal justice had a well-developed conception of crimes against humanity, one that has been developed subsequently both at the ICTY/R and at other international criminal tribunals, and also incorporated into the Statute of the ICC.

The coming years will mark another milestone in the development of international criminal law. Already the first indictments have been handed down by the ICC Prosecutor and the first trials getting underway. Omar Bashir, the Sudanese president, has been indicted for acts of alleged genocide in Darfur although he currently remains free. It will take some courage for the ICC to offer effective scrutiny of alleged offences at any trial concerning genocide. The Court must not repeat the mistakes of the ICTR by simply taking judicial notice of the existence of genocide. Lastly, it must remain aware of the heritage of international criminal law, and the significance and advantages that are offered by crimes against humanity.

[104] M. C. Bassiouni, *Crimes Against Humanity in International Law* (1992), 488.