

# GENOCIDE AND CRIMES AGAINST HUMANITY

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## I. CURRENT TENSIONS

There are currently some troublesome issues about the overlaps and gaps between crimes against humanity and genocide as defined and enforced by international, hybrid and national courts.

Up front, of course, we must always keep in mind that the origin of international humanitarian law crimes is different from national crimes. International crimes derive mainly from international customary law and sometimes treaties. Not all treaties, however, qualify as expressions of customary law—especially if they have not been adopted or adhered to by a majority of civilized nations and not all customary law is incorporated in treaties.<sup>1</sup> So, for instance, like Topsy in Uncle Tom's Cabin, international crimes against humanity have 'Just grewed.' Genocide, however, encapsulated in the Genocide Convention of 1948,<sup>2</sup> and excruciatingly slowly ratified over the next 50 years, has remained textually static though interpretatively somewhat fluid. Unlike national criminal codes, international crimes do not lend themselves so easily to periodic reexamination and codification under the goal of establishing an integrated body of law. The several international and hybrid courts established over the past two decades have been the primary interpreters and enforcers of international criminal law, and I would add the prosecutors in those courts (perhaps to an even greater extent than the judges) have been the primary actors in that process. The drafters of the Rome Statute<sup>3</sup> and its Elements of Crime produced a written document in 2000 which incorporates the best of the ad hoc courts' interpretations of these two international crimes (but only up to that point in time) and there is a useful document attempting to set out principles of international customary law issued by the ICRC in 2005.<sup>4</sup> Customary law, however, keeps evolving largely through the

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1. See, e.g., George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541 (2005).

2. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

3. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

4. See W. Hays Parks, *The ICRC Customary Law Study: A Preliminary Assessment*, 99 AM. SOC'Y INT'L L. PROC. 208 (2005).

courts. Because the Rome drafters purported to keep within the bounds of customary law in defining the Elements of Crime, they did not try to do serious redrafting of the scope of the different categories of international crimes to avoid overlap or gaps. Unless and until an international convention on crimes against humanity reviews the state of the art and comes up with recommendations on the scope and definition of that crime, its evolutionary development will almost surely continue in its current judicial mode. Similarly, the definition of genocide in the Genocide Convention, repeated verbatim in the Charters of the international courts, and now recognized as customary law but which is, incidentally, the cause of some concern about its adaptability to post-World War II mass atrocities, is not likely to be altered, because there is fear that if the issue of its scope were opened and proposed amendments entertained either the core itself might be endangered, or it might result in a runaway expansion so as to make it indistinguishable from its country cousin, crimes against humanity. As a result some tension surfaces in international courts about the dividing line between crimes against humanity and genocide.

## II. ORIGINS

Given the focus of this Conference on the Nuremberg Tribunal, a word about when and how the two categories of international crimes came into being. The Nuremberg Tribunal, of course, featured the first appearance on the international court scene of crimes against humanity—a category that was designed to cover the Nazi atrocities perpetrated by the German government on its own citizens—Jews and other disfavored groups as well as crimes inflicted on the peoples of occupied countries. Some historians argue that its recognition in the Nuremberg Judgment as a crime under customary law was distinctly “problematic.”<sup>5</sup> In part, reacting to concerns of the Nuremberg Charter drafters that there was not a basis in customary law for setting up this new category,<sup>6</sup> Chief Nuremberg Prosecutor Justice Robert H. Jackson insisted that such internal crimes must be tied to other more traditional war crimes or to the newly-minted crime of aggressive war itself.<sup>7</sup> Thus only the Holocaust-related crimes committed after

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5. GUENAELE METTRAUX, *INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS* 16 (2005).

6. According to Telford Taylor, Jackson’s successor Chief Prosecutor, the French and Russians saw “little to distinguish crimes so charged from those already dealt with as crimes against military and civilian victims.” TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 317, 294 (1992).

7. Article 6(c) of the IMT (International Military Tribunal) Charter limited crimes against humanity, defined to include extermination, enslavement, deportation and subjection to inhumane

September 1, 1939, when World War II officially began were allowed to be prosecuted. There was, however, much evidence of earlier crimes against humanity allowed into evidence as background for these later prosecutable crimes. And indeed the link between crimes against humanity and war continued through to the enabling Charter of the International Criminal Tribunal for the former Yugoslavia (ICTY) (though not the International Criminal Tribunal for Rwanda (ICTR) nor the Rome Statute), although the ICTY link was interpreted to require only proof of the existence of an armed conflict when a crime against humanity was committed, not a nexus between them as in the case of war crimes. In Nuremberg what would now constitute genocide was then prosecuted as a crime against humanity.<sup>8</sup> After World War II, through the relentless efforts of Ralph Lemkin, the concept of genocide as a separate international crime emerged. The Genocide Convention of 1948 defined that new crime as requiring “an intent to destroy in whole or in part a religious, racial, national or ethnic[al] group as such” and the commission of at least one of five designated crimes to accomplish that purpose,<sup>9</sup> but dropping altogether any nexus with war. The precision of the Convention’s definitional requirements engendered much debate during the drafting of the Convention itself and subsequent ratifications by States.<sup>10</sup> (The U.S. only ratified, with reservations, in 1986.) It survives basically intact in all of the charters of the international and hybrid courts, though modified in some minor respects in the Rome Statute and its Elements of Crime.

The textual differences between the two crimes<sup>11</sup>—crimes against humanity and genocide—are the following: Crimes against humanity require that the acts prosecuted be part of a systematic or widespread attack against a civilian population (and the perpetrator know about the wider campaign). Genocide requires that the acts (which can only be the specific five listed) be committed against a racial, religious, national or ethnic group and be done with the specific intent of destroying the group in whole or in part “as such.” The genocidal acts themselves might be

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conditions, to those “in execution of a crime in connection with any crime under the jurisdiction of the tribunal.” Charter of the International Military Tribunal, Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280.

8. The term “genocide,” defined as “the extermination of social and national groups . . . particularly Jews and Poles and Cyprians and others” was used in the charging points of the indictment. TAYLOR, *supra* note 6, at 103.

9. The five genocidal acts are: killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about physical destruction, imposing measures designed to prevent births, and finally transferring children from a protected group to another group.

10. See generally WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW ch. 2 (2000).

11. The differences here set out are taken from the Charter of the International Criminal Tribunal for the former Yugoslavia (ICTY). S.C. Res. 827, arts. 4–5, U.N. Doc. S/RES/827 (May 25, 1993).

committed against only a few persons and do not have to be part of a widespread or systematic campaign against civilians,<sup>12</sup> though the Rome Statute in its Elements of Crime Addendum now requires that “the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.”<sup>13</sup> The tightly restricted definition in the Genocide Convention of “destroy” to rule out all but the physical or biological destruction of the group—cultural destruction is not enough—and the exclusion of targeted groups such as women, economic or social classes or political groups have evoked frustration on the part of many human rights groups. They are not entirely mollified by the fact that victims in the latter groups can be vindicated through prosecution of crimes against humanity. Other commentators, however, are grateful that genocide, which in the popular mind is the worst of all crimes, is definitively so limited and does not thereby lose its deterrent currency through too expansive application to every kind of massacre.<sup>14</sup>

Still it must not be forgotten that crimes against humanity were originally conceptualized as acts of so odious a nature that their commission was not just an assault on the victims involved, as with war crimes, but an offense against all humanity. Thus Hannah Arendt described the Holocaust as “a crime against humanity perpetrated upon the body of the Jewish people.”<sup>15</sup> And the Yugoslav Tribunal in its first judgment opined that “Crimes against humanity are crimes of a special nature to which a greater degree of moral turpitude attaches than to an ordinary crime.”<sup>16</sup> Indeed, in another early case the Appeals Chamber overturned the guilty plea of a foot soldier to crimes against humanity because he had not been adequately informed of the difference between pleading to a war crime and pleading to a crime against humanity, despite there being no difference in the penalty the court could impose for the two crimes.<sup>17</sup> “Because of their heinousness and magnitude they (crimes against humanity) constitute an egregious attack on human dignity, on the very notion of humaneness,” the court wrote. As a *jus cogens* crime, crimes against humanity carry an obligation under international law on the part of States to prosecute or extradite perpetrators found within their

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12. Prosecutor v. Jelusic, Case No. IT-95-10-A, Judgment (July 5, 2001).

13. Elements of Crime, art. 6.

14. SCHABAS, *supra* note 10, at 8–13.

15. Barry Gewen, *The Everyman of Genocide*, N.Y. TIMES, May 14, 2006, at 10 (reviewing David Cesarani, *Becoming Eichmann*).

16. Prosecutor v. Duko Tadic, Case No. IT-94-1-A, Judgment, para. 271 (July 15, 1999).

17. Prosecutor v. Erdemovic, Case No. IT-96-22-A Judgment (Oct. 7, 1997).

borders regardless of where the crime was committed or who the immediate victims were.<sup>18</sup>

The expansion of the list of recognized crimes against humanity law since Nuremberg—all adopted through court interpretation of customary law—is noteworthy. Prosecutions under Control Council #10, following the principal Nuremberg prosecution, included rape as a crime against humanity in its own right. Nuremberg had prosecuted it only under the rubric of outrages against dignity. The most recent list of crimes against humanity in the Rome Statute includes murder, extermination, deportation (all derived from Nuremberg), but also forcible transfer of population (internal to a country), imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity, persecution against any identifiable group on political, racial, national, ethnic, cultural, religious, gender or other grounds universally recognized as impermissible under international law, in connection with any act referred to in the same paragraph or any crime within the jurisdiction of the court; enforced disappearance of persons or the crime of apartheid, also other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or mental health. Some commentators say that the Rome Statute went beyond customary law in recognizing in the crime of persecution discrimination against cultural and gender groups but cut back on customary law in requiring for persecution that the discrimination be in connection with another crime in the court's jurisdiction.<sup>19</sup> In any case, crimes against humanity is a big tent set up on ground that overlaps both war crimes and genocide. According to William Fenrick, one of the original and still active prosecutors at the ad hoc tribunals: "Just as genocide has become the offense which represents what happened in Germany during 1944, so the crime against humanity of persecution has come to typify what happened in the territory of the former Yugoslavia."<sup>20</sup> Because of its breadth of coverage, crimes against humanity had become the growth stock of Tribunal jurisprudence. Except for the ICTY, crimes

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18. M. Charif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 *TRANSNAT'L L. & CONTEMP. PROBS.* 199, 201–02 (1998).

19. LEILA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW* 151 (2001).

20. William J. Fenrick, *The Crime Against Humanity of Persecution in the Jurisprudence of the ICTY*, in 32 *NETHERLANDS YEARBOOK OF INTERNATIONAL LAW* 2001 89 (2002). Typical of ICTY indictments of high-level officials for ethnic cleansing are charges that the accused participated in a joint criminal enterprise whose purpose was the permanent forcible removal of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state, including a campaign of persecution through the commission of the crimes alleged in the indictment. *Id.*

against humanity no longer requires any nexus with armed conflict, it encompasses discriminatory acts against a much wider range of groups than genocide, and many more kinds of acts than the five listed in the Genocide Convention and charters, and it carries with it still a heavier component of international shame than war crimes.<sup>21</sup>

### III. THE PRACTICE

But are there drawbacks to the overlap and gaps between the three types of crimes? Do the current technical requirements for each make sense so far as their original concepts and continuing functionality are concerned? And are they relevant so far as the way armies, paramilitaries and terrorists operate in the real world? Before looking for answers let me reiterate that within evidentiary restraints the choice between genocide, crimes against humanity and war crimes will initially and often ultimately be the prosecutors' in the charging instrument. This choice I might add does not always sit well with the judges; for instance, at the ICTY the prosecutors brought genocide charges against a single camp commandant against whom there was ample evidence of his hatred of and intent to destroy Bosnian Muslims. He likened himself to Adolph Hitler and repeatedly swore his intention to kill or reduce to slavery all Bosnian Muslims. Indeed he pleaded guilty to several counts of crimes against humanity involving personal killings and torture of camp inmates. There was, however, no evidence that he was acting pursuant to any broader plan of the Bosnia Serb military or civilian authorities to engage in an organized slaughter of Muslims. The trial court *sua sponte* dismissed the genocide charge but the Appeals Chamber ruled that although the prosecutor had made out a *prima facie* case of genocide, it would not remand for a trial since the defendant's punishment for the other non genocidal crimes to which he had pled was sufficient. They did so over two dissents (mine was one) and the somewhat dubious authority of court-made Rule 117, which, according to the majority, gave the Appeals Chamber discretion whether to remand for retrial in the event of a serious error by the Trial Chamber. Though not explicitly articulated as a reason for not letting the genocide trial go forward, there was speculation that the majority simply did not think the first genocide trial at the ICTY should involve a loner zealot regardless of the fact that the definition of genocide

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21. *But see* Prosecutor v. Tadic, Case No. IT-94-1-A, Sentencing Judgment, ¶ 69 (Jan. 26, 2000) (There is "in law no distinction between the seriousness of a crime against humanity and that of a war crime.").

permitted a single defendant to be convicted of genocide, absent the backup of a wider plan.<sup>22</sup> Note that the ICC Elements of Crime add an additional requirement that the genocidal acts be committed in the context of a manifest pattern of similar conduct directed against the group or conduct that can itself effect such destruction [of the group in whole or in part as such]. But despite such setbacks, in the prosecutor's world, genocide can and is used as a bargaining chip because of its super-stigma; it can be negotiated down to crimes against humanity in exchange for a guilty plea and the accuseds' help in prosecuting others.

Because of the peculiarities of definition, some of the worst crimes in history may not be brought as genocides but only as crimes against humanity. This may well turn out to be the case in Cambodia where mass atrocities against millions of city dwellers and upper social class Cambodians were committed during the Khmer Rouge regime. There is widespread agreement among commentators that such groups do not qualify for genocide treatment as "racial, religious, national or ethnical."<sup>23</sup> Similarly, the alleged Darfur atrocities in the Sudan—purposeful killings, rapes and relegation of villagers to a way of life almost certain to destroy them have been labeled by an expert UN Commission of Inquiry as likely crimes against humanity rather than genocide. These experts were not convinced that the special genocidal intent of destruction of a group as such could be shown as opposed to a relentless and barbarous campaign to ferret out rebels hidden among the villagers.<sup>24</sup>

One of the most controversial genocide/crime against humanity disputes has occurred over whether and when the ethnic cleansing campaign of Milosevic, Karadzic and Mladic in the former Yugoslavia spilled over into genocide. Slobodan Milosevic, the former President of Yugoslavia was in the midst of trial for genocide and crimes against humanity and war crimes when he died; Radovan Karadzic, the former President of the Autonomous Serb Republic, and Radko Mladic, the Bosnian Serb military leader have been indicted but not yet apprehended for genocide. In the meantime, General Radoslav Krstic, the head of the Drina Corp of Bosnian Serbs, on whose territory the infamous Srebrenica massacres were conducted, was found guilty of aiding and abetting genocide (as a perpetrator by the Trial Chamber, reduced to aiding and

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22. Prosecutor v. Jelusic, *supra* note 12, ¶¶ 73–77.

23. See Patricia M. Wald, *Judging Genocide*, JUSTICE INITIATIVES (A publication of the Open Society Justice Initiative, Spring 2006), April 2006, at 85.

24. See William A. Schabas, *Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry's Findings on Genocide*, 27 CARDOZO L. REV. 1703 (2006).

abetting by the Appeals Chamber), others serving under Mladic are currently being tried for both crimes on the basis of the same Srebrenica incident.<sup>25</sup> Still others have been acquitted of genocide on the basis of other ethnic cleansing incidents due to insufficient showing of intent to destroy a group, “as such.”<sup>26</sup> The trial court in Krstic decided and the Appeals Chamber affirmed that there had been a planned campaign spearheaded by Mladic to capture, execute and secretly mass bury between 7,000-8,000 young Bosnian Muslim men attempting to escape from Srebrenica—a UN safe enclave—after its capture by the Serbs in the summer of 1995.<sup>27</sup> Still, however, there are respected commentators who did not think it a true genocide but only an extreme example of ethnic cleansing since the massacres involved only the male population of one town, not enough in their view to meet the criteria of intent to destroy an ethnic or religious group as such.<sup>28</sup> Still it is one of only two genocide convictions handed down by the ICTY in over a decade. The International Court of Justice in the Hague had under consideration for 13 years a case filed by the State of Bosnia against the then-State of Yugoslavia for genocide based on a wider theory than the Srebrenica incident: its judges from 16 countries held 9 weeks of hearings on the case. Last year the Court found no wider genocide than Srebrenica and even there no Serbian responsibility except a limited one in failing to prevent Srebranica. Had the ICJ found in favor of a wider traceable to Serbia it is reported “hefty war reparations” might have been claimed for the 100,000 Bosnians killed and the innumerable villages destroyed. And since it was a civil action the levels of proof did not need to be as high as in the criminal prosecutions of individuals in the ad hoc tribunals.<sup>29</sup>

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25. For details on those prosecutions, see ICTY website: <http://www.un.org/icty>.

26. See Emma Thomasson, *Bosnian Serb Given 27 years for War Crimes, Cleared of Genocide*, WASH. POST, Sept. 28, 2006, at A15 (Momocil Kryisnick, head of Bosnian Serb Parliament convicted of crimes against humanity, acquitted of genocide).

27. Prosecutor v. Krstic, Case No. IT-98-33-A, Judgment (Apr. 19, 2004).

28. Schabas, *supra* note 24, at 1708, 1716. But compare David Nubon, *Calling Genocide by Its Rightful Name*, 7 CHI. J. INT’L L. 1 (2006).

29. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro) (Feb. 26, 2007), <http://www.icjwww/ipress.com/ipress2007/summary.2007-2-bhv-20070226.html>; Marlise Simons, *Court Still Weighing Genocide Case from Milosevic Era*, N.Y. TIMES, June 18, 2006, International, at 6. Charles Taylor, the deposed leader of Liberia, will soon be tried by the Sierra Leone Special Chamber for crimes against humanity, not genocide. Even in Rwanda, where the archetype genocide has occurred, there was disagreement whether the Tutsis qualified as a religious, ethnic, racial group. It was decided in one case that any “stable and permanent group” could qualify but this is by no means an accepted position among international law experts or jurists. Now, however, the Appeals Chamber has held that the fact that there was a genocide against the Tutsis in 1994 is judicially noticeable as a fact of common knowledge. Prosecutor v. Karemera, Case No. ICTR-98-44-AR73(c), Decision on Prosecutor’s

Now, you might well ask. So what? Is there any real problem so long as atrocities can be punished under some category of international crime? As I mentioned, genocide—the “crime of crimes” does carry the heaviest stigma in the popular and in the diplomatic world—remember the internal State Department ban against using the “G word” in the mid-nineties while the U.S. was still reticent to intervene in the Balkan war. And though none of the international tribunals have sentencing tariffs which put different ranges on the two crimes, in my time there was a feeling among at least some judges that genocide lay at the apex and deserved the highest level of sanction—indeed there was a notion among some that some space would be left at that top level for as yet untried genocidieres. Such factors may enter into the prosecutors’ charging calculus along with the accessibility of evidence, the differences in definitions and levels of proof between genocide, crimes against humanity and war crimes.

Crimes against humanity do have some additional proof burdens over war crimes, but in tribunal jurisprudence they are not particularly onerous. Although in the early years there was a difference in interpretation between the ICTY and the ICTR as to whether there had to be a discriminatory intent shown for all crimes against humanity—a legacy of Nuremberg—the ICTY and later the ICTR decided that discriminatory intent applied only to persecution not to the other listed crimes against humanity.<sup>30</sup> For crimes against humanity the chapeau requirement that the charged acts be part of a “widespread or systematic attack on a civilian population” has been on the whole liberally interpreted to qualify a wide variety of acts of violence of different scopes that do not necessarily rise to the level of an armed conflict for this background predicate. For instance, the territory on which the attack is carried out need not be very large in order for it to be “widespread.” In one case the attack took place over an area of 20 kilometers; in others, three municipalities, three prefectures or two communes sufficed. Even a single prison camp qualified.<sup>31</sup> The Rome Statute defines a qualifying attack as “a course of conduct involving the multiple commission of [certain] acts against any civilian population pursuant to or in furtherance of a state or organized policy to commit such attack” (Art. 7(2)). Granted, a loner can’t commit a crime against humanity all by himself as in genocide, without a wider campaign against civilians in the background. Under the Rome definition there has to be more than one victim, and the attack has to be organized, though the State

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Interlocutory Appeal Against Trial Chamber III Decision (Dec. 19, 2003).

30. GERHARD WERLE, *PRINCIPLES OF INTERNATIONAL CRIMINAL LAW* 671 (2005).

31. WERLE, *supra* note 30, at 654–57.

itself need not be involved. The perpetrator must know that his own acts are part of this widespread or systematic attack though he need not have the same intent as the participants in the broader attack. In practice, however, the “systematic or widespread” chapeau of crimes against humanity presents no great obstacle to prosecution. Indeed it is often stipulated or proven by “expert” evidence or reference to transcripts or testimony in earlier cases.<sup>32</sup> Under a recent Appeals Chamber case dealing with Rwanda, the existence of widespread and systematic attacks on civilians as well as an internal armed conflict were held to be “notorious facts not subject to reasonable debate” of which a Trial Chamber *must* take judicial notice.<sup>33</sup> Where as in the Balkans or Sierra Leone there is an ongoing armed conflict at the time of the charged acts, international or internal, it is almost inevitably accompanied by a pattern of civilian abuse widely known enough throughout the region to qualify as “common knowledge.” In the prosecution of guards at the infamous Omarska prison camp, the ICTY trial court found that the specific atrocities charged involving abuse of prisoners were part of a systematic attack on the civilians who were imprisoned there and this “would have had to be known to all who worked in or regularly visited the camp.”<sup>34</sup>

Persecution is perhaps the most widely charged crime against humanity. It does require that a discriminatory intent against a group be shown as motivating the forbidden actions but the protected groups are broader than those that qualify for genocide and the range of acts that may qualify for prosecution under the persecution umbrella is broader still, including any deprivation of a fundamental right. Exactly what must be shown for “persecution,” however, has had some rocky bumps along the interpretive route. In the Kupresic case, on which I sat, the Appeals Chamber reversed several convictions based on persecution because of a failure to identify the material facts underlying the charge of persecution in the indictment with any specificity and a subsequent weakness of eyewitness evidence at trial.<sup>35</sup> There is also an active debate about the IRTC trial court’s ruling in the media case that hate speech by itself can amount to persecution as a crime against humanity.<sup>36</sup> The Kupresic case warned that persecution should not be used as a “catch all charge,” but

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32. *See, e.g.*, Prosecutor v. Kvočka, Case No. IT-98-30/IT, Trial Chamber I Judgment, ¶ 129 (Nov. 2, 2001).

33. Prosecutor v. Karemera, *supra* note 29.

34. Prosecutor v. Kvočka, *supra* note 32, ¶ 129.

35. Prosecutor v. Kupresic, Case No. IT-95-16-A, Judgment (Oct. 23, 2001).

36. Diane Orlintlicher, *Criminalizing Hate Speech in the Crucible of Trial*, 21 AM. U. INT’L L. REV. 557 (2006).

unless carefully monitored, it does have that potential. As one leading ICTY prosecutor has said: “the Prosecution has used persecution as a kind of umbrella charge to cover ‘ethnic cleansing’ as no single crime really covers it.”<sup>37</sup>

What seems to be happening on the ground in the ad hoc tribunals is that because the same acts can so often be charged as either war crimes or crimes against humanity, they are charged as both. Within the crimes against humanity category itself, the same acts may be charged both as stand-alone murders or exterminations or inhumane treatment and as persecution, using the underlying murders as the deprivation of rights required for persecution. Thus a single act or set of actions such as inhumane treatment or rape can form the basis for charges of war crimes, and several separate crimes against humanity. Indictments as a result often have dozens of counts based on a single fact situation.<sup>38</sup> Tribunal jurisprudence, despite internal dissents, has settled on allowing cumulative charging and convictions for different crimes based on differences in their legal definitions rather than requiring any differences in their underlying facts. So long as both crimes have an independent element not found in the other they can support separate convictions. Thus murder and inhumane treatment can be charged as crimes against humanity and also as persecution (if the discriminatory intent is shown); persecution and genocide can be based on the same facts, so can genocide and extermination; beatings can be charged as war crimes and crimes against humanity; torture is a war crime, a crime against humanity and if discriminatory intent is shown also persecution.<sup>39</sup>

Given all this, prosecutors have much discretion in what and in how many ways to charge underlying conduct. They can “send a message” by the charges, and it is my impression that over the years ICTY prosecutors have limited themselves less and less to charging war crimes only and more and more have charged a combination of war crimes and crimes against humanity or crimes against humanity alone. The charge of a crime

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37. E-mail communication from David Tolbert, Deputy Chief Prosecutor of the ICTY, to author (Aug. 10, 2006) (on file with author).

38. See, e.g., *Prosecutor v. Kvočka*, *supra* note 32, ¶¶ 751–64. A recent rule change allows the judge to order the prosecutor to limit the number of crimes that can be charged based on the same facts. *Id.*

39. See *Prosecutor v. Kvočka*, *supra* note 32, ¶¶ 212–39. Multiple convictions entered upon different statutory provisions but based on the same conduct are possible if each statutory provision has a materially distinct element not contained in the other. The elements in the chapeau as well as the underlying offense are taken into account in deciding if there are distinct elements. The duplication can be factored into the final sentence which is a unitary one for all convictions resulting from a single indictment. *Id.*

against humanity has a more serious “feel” about it and with the advent of plea bargaining can indeed leave room for bargaining down to a war crime if a plea appears likely.

Prosecutorial strategies thus clearly impact the choice of charges. In many cases in the Bosnian conflict the proof necessary for different categories of crimes was much the same, or if it differed, additional evidence was readily accessible to prove the higher level one, and the prosecutors had great discretion which category to choose. My impression, as I said, is that over the years they relied on war crimes less and less (though this could be a result of charging more serious offenders) and crimes against humanity more and more. Does it matter? Crimes against humanity were conceived to fill the gap in international humanitarian law for cases where a State abused its own people—at Nuremberg as part of a war strategy, later even in peacetime. It can, however, also apply to crimes committed during war and against an enemy civilian population; its increasing use in that way does run the risk of diluting its currency as a deterrent or stigmata to be applied to those crimes all humanity has singled out for special treatment, and conversely its overuse poses a danger of overstigmatizing what would more reasonably be viewed as war crimes.

One of my prosecutor friends raises another interesting nuance about the potential downsizing of crimes against humanity in Tribunal jurisprudence. He points out that the Appeals Chamber has, in several cases, treated the higher-ups in the crimes who did not dirty their hands but nonetheless knew about, acquiesced in, and affirmatively contributed to large-scale crimes against humanity or even genocide as “remote accessories to the crimes,” thus limiting their liability to aiding and abetting, rather than perpetrating the crimes. He calls this a “micro” approach which “relegates the concept of crimes against humanity to some kind of aggravation of individual murders or rapes rather than the massive crimes they are and . . . undermine[s] the importance of the concept [of crimes against humanity] in general.” The individual crimes committed by the men in the field became the focus not the acquiescing or contributing behavior of the generals who could have ended it all. It is an interesting observation on how practice can subtly mold theory and purpose. There is additionally something faintly troubling about using a crime against humanity charge as a bargaining chip in plea negotiations, abandoned in exchange for a plea or cooperation or as a means to accumulate convictions for a single act.<sup>40</sup>

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40. E-mail communications, *supra* note 37.

In the end I have to ask if we have reached a point where definitional niceties, important as they are in any criminal prosecution, have obscured what should be clearer demarcation lines between war crimes and crimes against humanity on the one hand, and on the other hand have required truly horrendous crimes against certain groups of people to be “dumbed down” from genocide to crimes against humanity because they don’t fit the tight genocidal definitional perimeters for targeted groups and destructive intent.

The answer to this dilemma may lie in more discrete use of the crimes against humanity tag by prosecutors or in greater guidance by the international law experts and judges as to the appropriate domain for crimes against humanity that will recapture its original conceptual role as a sanction for especially heinous atrocities committed by governments or organizations against collections of peoples, that transcend the kind of crimes that unfortunately characterize local war scenes. With respect to genocide, however, the opposite is true; genocide has taken on a life of its own in the popular mind; victims of almost all massacres feel cheated when a court or commission finds that their perpetrators have only committed a crime against humanity not a genocide. Eventually the popular will may have to be accommodated and some term found that will satisfy the understandable yearning for the ultimate condemnation of mass killings, regardless of the identity of their victims.

To finish on the brighter side, however, whatever the charges, the threat of prosecution has become a vital factor in international politics. African heads of state have themselves asked the new ICC to investigate actions of armed militias in their countries so that the time-honored impunity of African leaders is in greater peril today than ever before. The willingness of international courts to take on these cases has in turn spurred national courts into greater action in internal corruption cases. According to the *Washington Post*, “despite the political flavor of many of the cases . . . analysts, legal experts and human rights activists say the court’s actions mark a new era in which African disputes increasingly are being resolved by judges rather than soldiers. . . . The politics of the rule of law is having positive consequences for the cause of justice.”<sup>41</sup>

That is a good note to end on.

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41. Craig Timberg, *Impunity on Trial in Africa*, WASH. POST, May 2, 2006, at A16.