Jurisdiction of the ad hoc Tribunals for the former Yugoslavia and Rwanda over crimes against humanity and genocide

by Marie-Claude Roberge

The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were established on 11 February 1993 and 8 November 1994 respectively by the Security Council to prosecute persons responsible for flagrant violations of international humanitarian law. The aim of the Security Council was to put an end to such violations and to contribute to the restoration and maintenance of peace, and the establishment of the ad hoc tribunals undoubtedly represents a major step in that direction. Moreover, it sends a clear signal to the perpetrators and to the victims that such conduct will not be tolerated.

The ICTY has jurisdiction over the following crimes: 1. grave breaches of the Geneva Conventions of 1949; 2. violations of the laws or customs of war; 3. genocide; and 4. crimes against humanity. The ICTR has jurisdiction over 1. genocide; 2. crimes against humanity; and 3. violations of Article 3 common to the 1949 Geneva Conventions and of Additional Protocol II. This paper will focus on two of these categories of crime, namely genocide and crimes against humanity. The aim is to provide a better understanding of such crimes and to pinpoint some dif-

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ficulties they raise in criminal proceedings.[1] The first part will emphasize the inconsistent development of the definition of crimes against humanity. The second part will focus on the exact meaning of the crime of genocide when breaking the definition down into its component parts.

Crimes against humanity

When establishing the Yugoslav Tribunal, the view expressed by the Secretary General was that "the application of the principle *nullem crimen sine lege* required that the international tribunal apply rules of international humanitarian law which are beyond any doubt part of customary law."[2] Therefore, although the ICTY has jurisdiction to prosecute for crimes against humanity, which are generally recognized as being covered by customary international law, the question whether the definition adopted in the Statute of the ICTY — and in that of the Rwanda Tribunal (ICTR) — reflects customary international law.

Unlike grave breaches of the 1949 Geneva Conventions or genocide, crimes against humanity have not been defined in a treaty, and throughout the relatively short history of the use of the term "crimes against humanity", the definition has developed inconsistently. It is therefore difficult to substantiate any claim that the definition reflects customary international law. This will be illustrated by looking at the development of the concept, with particular emphasis on the Nuremberg Trials, Control Council Law No. 10 (CCL), the International Law Commission's attempts at codification, national decisions and the Statutes of the ICTR and ICTY.

Development of the definition of crimes against humanity in international law

Concept of crimes against humanity before World War II

The term "crimes against humanity" and cognate expressions received little attention prior to World War II. The 1868 *St. Petersburg Declaration*

[1] This article in no way claims to cover all aspects of these crimes or the decisions rendered on them. Only examples have been given in order to illustrate the difficulties that might be encountered in the prosecution for genocide and crimes against humanity.

[2] Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993), S/25704, para. 34. A more extensive approach to the choice of applicable law was, however, taken by the Security Council with regard to the ICTR. The ICTR included within its subject-matter jurisdiction international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime (see Report of the Secretary General pursuant to paragraph 5 of Security Council Resolution 955 (1994), S/1995/134).

limited the use in times of war of certain explosive or incendiary projectiles, since they were declared to be contrary to the laws of humanity. In 1907, the well-known *Martens clause* provided as follows: "until a more complete code of the laws of war has been issued, (...) the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages among civilized peoples, from the laws of humanity, and the dictates of the public conscience."[3]

The expression "crimes against humanity" was used in the *1915 Declaration by the governments of France, Great Britain and Russia* denouncing the massacre of Armenians taking place in Turkey: "crimes against humanity and civilisation for which the members of the Turkish Government will be held responsible together with the agents implicated in the massacres."[4] Moreover, in the *1919 Report of the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties for Violations of the Laws and Customs of War,*[5] the majority of the members concluded that the German Empire and its Allies carried out the war "by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary laws of humanity" and "all persons belonging to enemy countries ... who have been guilty of offences against the laws and customs of war *or* the laws of humanity are liable for criminal prosecution."[6]

Concept of crimes against humanity following World War II

The most important developments regarding the concept of crimes against humanity have taken place since World War II. A number of declarations were made during the war by several Allied governments expressing the desire to investigate, try and punish not only war criminals in the narrow sense, i.e. perpetrators of violations of the laws and customs of war on Allied territory or against Allied citizens, but also those responsible for the atrocities committed on Axis territory against nationals of non-Allied countries.[7]

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[3] Preamble, Hague Convention No. IV respecting the Laws and Customs of War on Land, 1907.

[4] Cited in E. Schwelb, "Crimes against humanity", *British Year Book of International Law*, vol. 23, no. 8, 1949, p. 181.

[5] The Commission was established to inquire into the responsibilities of the German Empire and its Allies under international law for acts committed during World War I.

[6] However, as a result of certain objections, no mention of the laws of humanity was made in the Peace Treaties of Versailles, St-Germain-en-Laye, Trianon and Neuilly-sur-Seine; only acts committed in violation of the laws and customs of war were referred to.

[7] E. Schwelb, *op. cit.* (note 4), p. 183.

On 8 August 1945, the four Allied Powers (France, Great Britain, the USSR and the United States) concluded the London Agreement. Annexed to it was the Charter of the International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis. Article 6 of which provided that the Tribunal had the power

> "... to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes:
> (...)
> b) *War Crimes*: namely, violations of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
> c) *Crimes against humanity*: namely, murder, extermination, enslavement, deportation or other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

As a result, convictions were pronounced by the Nuremberg Tribunal on charges of crimes against humanity. Nonetheless the concept of crimes against humanity remained vague, often overlapping with that of war crimes. The former was used as an accessory crime and almost exclusively to protect inhabitants of a foreign country from the authorities of the occupying Power. The Tribunal interpreted Article 6(c) in such a way that these crimes fell under the definition of crimes against humanity only when committed in execution of, or in connection with, a crime against peace or a war crime.[8] This does not mean that any crime committed before 1939 could not come under the category of crimes against humanity, but rather that a link (*causal nexus*) had to be found between one of

[8] Soon after the signature of the London Charter, an agreement was concluded by the four Governments in Berlin to clarify the text of Article 6(c) and resolve the discrepancies found between the equally authentic Russian, English and French texts. Accordingly, alterations were made to the two former texts, to clarify the intention of these Governments to the effect that the meaning of crimes against humanity in the Charter was limited to such crimes committed in connection with any crimes within the jurisdiction of the Tribunal.

the acts enumerated in Article 6(c) and the war. Thus, the Tribunal considered not only the nationality of the victims and the country where the crimes were perpetrated, but also the connection with crimes against peace or traditional war crimes, to be essential elements.

Control Council Law No. 10

Control Council Law No. 10 (CCL) was enacted on 10 December 1945 by the acting legislative body for all Germany (the Allied Control Council for Germany) consisting of the commanders of the four Zones.[9] The Law was created for the punishment of persons guilty of war crimes, crimes against peace and crimes against humanity. Each Zone commander was responsible for its implementation. Although the London Charter was made an integral part of the CCL, the definition of crimes against humanity is different from that found in Article 6. Under Article II(c) of the CCL, crimes against humanity are defined in the following terms:

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

The differences from Article 6(c) of the London Charter are noticeable: (1) the expression "atrocities and offences, including but not limited to": under the CCL the list of atrocities and offences is inclusive rather than exclusive as it was under Article 6(c); (2) the addition to the list of offences and atrocities of "imprisonment," "torture" and "rape";[10] (3) the removal of the necessary connection between the specific crimes listed in Article II(c) and crimes against peace and war crimes; and (4) the CCL does not include the words "before or during the war".

Accordingly, in interpreting the CCL, the Tribunals were not restricted to the narrow interpretation which evolved from the jurisprudence of the Nuremberg proceedings. For example, in the *Einsatzgruppen* case the Tribunal specifically declared that it was no longer limited by the *nexus*

[9] No further trials were to be conducted by the International Military Tribunal and the task of prosecuting and punishing the remaining suspected war criminals was left to each occupying power. Howard S. Levie, *Terrorism in war: The law of war crimes*, Oceana Publications, New York, 1993, p. 71.

[10] However, these differences could arguably have been absorbed by the expression "or other inhumane acts" in the Charter.

requirement with, or link between, crimes against peace and war crimes, neither was it restricted by the nationality of the victim or of the accused, nor by the location where the crimes were committed.[11]

In the British Zone of Control in Germany, the German regular courts were given jurisdiction over crimes against humanity committed by persons of German nationality against persons of German nationality or stateless persons. In the French Zone of Control, crimes against humanity were defined as "crimes committed against any civilian population of whatever nationality, including persecutions on political, racial or religious grounds."

More comprehensive than Article 6, the CCL is of a different character than the Charter. The CCL is primarily a national instrument, with an internal scope. Thus, the binding nature of the definition and interpretation of crimes against humanity of the CCL is more limited.[12] Nevertheless, it certainly contributed to the subsequent expansion of the concept of crimes against humanity.

Important national decisions

a) Eichmann case[13]

This case was the first attempt by a non-World War II-belligerent State to exercise its universal jurisdiction to punish perpetrators of war crimes and crimes against humanity.

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[11] *United States v. Ohlendorf et al.*, Case No. 9, IV CCL Trials (1947), p. 49. Same decision in *United States v. Altstoelter et al.* (Justice Case), Case No. 3, III CCL Trials (1947), p. 974. However, such an interpretation was not unanimously applied: see findings in *United States v. von Weizsaecker et al.* (Ministries Case), Case No. 11, XIII CCL Trials (1948), p. 112, and in *United States v. Flick et al.* (Flick Case), Case No. 5, VI CCL Trials (1947), p. 1213.

[12] The legal status of the CCL, whether considered international, national, or even hybrid law, has been discussed by a number of authors as well as in the *Justice Case*. Bassiouni clearly expresses this ambiguity in the following terms: "The inconsistency is obvious, since it [the CCL] was purported to be a national law applicable only territorially but its source deriving from international law, and its formulation and enactment was by the victorious Allies acting pursuant to their supreme authority over Germany by virtue of that country's unconditional surrender." C. Bassiouni, *Crimes against humanity in international criminal law*, Martinus Nijhoff Publishers, Dordrecht, 1992, p. 36. See also Schwelb, *loc. cit.* (note 7), p. 218.

[13] District Court of Jerusalem, *Attorney General of the Government of Israel v. Eichmann*, in *Israel Law Review*, vol. 36, no. 5, 1961. For a more complete discussion of the Eichmann case, see Baade, "The Eichmann trial: Some legal aspects", *Duke Law Journal*, 1961, p. 400; Fawcett, "The Eichmann Case", *British Year Book of International Law*, vol. 38, 1962, p. 181; Schwarzenberger, "The Eichmann judgement", *Current Legal Problems*, vol. 15, 1962, p. 248.

Eichmann was charged under Israel's 1951 Nazi and Nazi Collaborators (Punishment) Law for the following offences: (1) Crimes against the Jewish people; (2) Crimes against humanity; (3) War crimes; and (4) Membership of hostile organizations. Crimes against humanity were punishable if "done during the period of the Nazi regime, in an enemy territory" and were defined as "any of the following acts: murder, ill-treatment, or the deportation to forced labour or for any other purpose, of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; and devastation not justified by military necessity."

Thus, the definition under Israeli law was also different from that of the Nuremberg Charter: no *nexus* was required between the commission of a crime against humanity and any of the other crimes (war crimes or crimes against peace). The definition only required the former to have been committed during the Nazi regime.

b) French trial of Klaus Barbie

In the case of Klaus Barbie, the German head of the Gestapo in Lyon, the French Court of Cassation ruled that crimes against humanity were imprescriptible and could be prosecuted in France "whatever the date and place of their commission":

> "Whereas, what constitutes crimes imprescriptible against humanity, within the sense of Article 6(c) of the Charter of the International Military Tribunal of Nuremberg annexed to the London Accord of August 8, 1945 — even though they could also be characterised as war crimes according to Article 6(b) of the same text — are the inhumane acts and persecutions which, in the name of a State practising a hegemonic political ideology, have been committed in a systematic fashion, not only against persons because they belong to a racial or religious group, but also against the adversaries of this [State] policy, whatever the form of their opposition."[14]

The Court of Cassation adds here a new requirement for crimes against humanity: the perpetrator must carry out his crime on behalf of the "State

[14] Judgement of 20 December 1985, published in *Journal de droit international*, 1986, pp. 129-142, cited in L.S. Wexler, "The interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and back again", *Colombia Journal of International Law*, vol. 32, 1994, p. 342.

practising a hegemonic political ideology" and "in execution of a common plan". Any group or State not practising this hegemonic policy would therefore not be included in the definition.

c) Demjanjuk v. Petrovski

The case of *Demjanjuk v. Petrovski*[15] is interesting not so much for its contribution to the definition of crimes against humanity,[16] but rather for the recognition that crimes against humanity are offences for which there is universal jurisdiction. The US Circuit Court of Appeals ruled that, based on the right to exercise universal jurisdiction over offences against the law of nations and against humanity, the United States could extradite an alleged Nazi concentration camp guard to Israel or any other nation. The court recognized that the acts committed by Nazis and Nazi collaborators are "crimes universally recognised and condemned by the community of nations" and that these "crimes are offences against the law of nations and against humanity and the prosecuting nation is acting for all nations." The Court thereby recognized the principle of universality for crimes against humanity.

The work of the International Law Commission

In 1947, the International Law Commission (ILC) was given two tasks by the United Nations General Assembly: (a) to formulate the principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgement of the Tribunal; and (b) to prepare a Code of offences against peace and security of mankind. The ILC worked on the Draft Code up to 1996, although it had to suspend its work for many years owing to the problem of defining aggression. Accordingly, at its forty-eighth session (1996) it adopted the text of, and commentaries to, draft articles 1 to 20. As stated in its report, the Draft Code was adopted with a view to reaching consensus. Thus, the Commission has considerably reduced the scope of the last version of the Draft Code, in an effort to obtain the support

[15] *Demjanjuk v. Petrovsky*, 776 F. 2d 571 (6th Circ. 1985), *cert. denied*, 475 U.S. 1016 (1986).

[16] The Court of Appeals addressed the definition of crimes against humanity only as defined in the 1950 Israeli statute, the Nazis and Nazi Collaborators (Punishment) Act. This was done in order to satisfy the requirement of double criminality. The Court concluded that although the crime was not described in the same way in both countries — since in the US the act of unlawfully killing one or more persons with the requisite malice is punishable as murder, not as a crime against humanity or mass murder —, it was enough that the particular act for which extradition was sought be criminal in both.

of States. The definition here is noticeably different from the above definitions. Crimes against humanity are defined in the following terms:

> "A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group :
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> a) murder; b) extermination; c) torture; d) enslavement; e) persecutions on political, racial, religious or ethnic grounds; f) institutionalised discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population; g) arbitrary deportation or forcible transfer of population; h) arbitrary imprisonment; i) forced disappearance of persons; j) rape, enforced prostitution and other forms or sexual abuse; k) other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm."

The list of prohibited acts is more exhaustive than in other definitions we have looked at so far. In addition, we find the requirement that the acts be instigated or directed by a government or by any organization or group.

ICTY and ICTR's Statutes on crimes against humanity

Discrepancies in the definition of crimes against humanity can also be found between the Statutes of the Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR). Article 5 of the ICTY Statute provides as follows:

> "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts."

The ICTR Statute, on the other hand, provides the same list of crimes although the threshold is different. Whereas the ICTR Statute — unlike the ICTY Statute — does not require the crimes to be committed in an armed conflict, each of the crimes listed in the ICTR Statute must be committed "as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."

The interpretation of the ICTY Statute by the ICTY Appeals Chamber is, however, revealing. In the Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (*Tadic case*), the Appeals Chamber confirmed the findings of the Trial Chamber, and considered that by requiring proof of an armed conflict, the Statute had narrowed the customary concept of crimes against humanity.[17] Hence, it stated that since the judgement at Nuremberg, the concept of crimes against humanity needed no longer to establish a link with crimes against peace or war crimes.

In the light of the above definitions of crimes against humanity as developed in the Nuremberg Charter and Judgement, the CCL, subsequent attempts at codification by the ILC, key national decisions on crimes against humanity and the Statutes of the Tribunals for Rwanda and the former Yugoslavia, it is obvious that there is not yet a clear, substantive and uniform definition of crimes against humanity. There is undoubtedly a consensus that crimes against humanity are crimes under international law, recognized under the general principles of law, giving rise to universal jurisdiction. Yet the exact parameters of such crimes remain unclear.

Genocide

Unlike crimes against humanity, genocide has been codified and its definition is not generally subject to debate. The Statutes of the ad hoc Tribunals for the former Yugoslavia and for Rwanda adopted verbatim the definition of genocide found in Article 2 of the 1948 Convention on the prevention and punishment of the crime of genocide:

> "Genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
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> (a) killing members of the group;
> (b) causing serious bodily or mental harm to members of the group;
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) imposing measures intended to prevent births within the group;
> (e) forcibly transferring children of the group to another group.

[17] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, 2 October 1995, para. 141.

The following acts shall be punishable:

(a) genocide;
(b) conspiracy to commit genocide;
(c) direct and public incitement to commit genocide;
(d) attempt to commit genocide;
(e) complicity in genocide."

Historical background

The Genocide Convention was among the first conventions of the United Nations to address humanitarian issues. It was adopted in 1948 in response to the Nazi atrocities committed during World War II and following General Assembly Resolution 180 (II) of 21 December 1947, in which the UN recognized that "genocide is an international crime, which entails the national and international responsibility of individual persons and states." Under Article 1 "the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish."

The International Court of Justice (ICJ) noted in the *Reservations to the Convention on Genocide Case*:

> "The origins of the Convention show that it was the intention of the United Nations to condemn and punish Genocide as 'a crime under international law' ... involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96(I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the cooperation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)."[18]

[18] *Reservations to the Convention on Genocide Case (Advisory opinion)*, ICJ Reports, vol. 15, 1951, p. 23.

In the *Barcelona Traction Case* (second phase), the ICJ recognized the outlawing of acts of genocide as obligations *erga omnes* for which, due to the importance of the rights involved, all States can be held to have legal interest in their protection.[19]

Difficulties in prosecuting for genocide

When breaking down the definition of genocide, three essential elements are required: (1) an identifiable national, ethnical, racial or religious group; (2) the intent to destroy such a group in whole or in part (*mens rea*); and (3) the commission of any of the listed acts in conjunction with the identifiable group (*actus reus*).

The first requirement implies that acts of genocide can only be committed against the listed types of groups, i.e. an identifiable national, ethnical, racial or religious group. The intent to destroy, for example, a political or social group would therefore not fall under the definition of genocide. Political and cultural groups were excluded from the original General Assembly draft of the Convention because of strong opposition to their inclusion.

The second element of the definition of genocide certainly represents a challenge for the prosecutor, who will be obliged to establish the requisite state of mind (*mens rea*) of the accused, i.e. the specific criminal intent to destroy one of the enumerated groups. The ILC, in commenting on its draft Code of crimes against the Peace and Security of Mankind, stated in this regard:

> "... a general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide. The definition of this crime requires a specific intent with respect to the overall consequences of the prohibited acts."[20]

Therefore the killing of one individual with such intent is genocide, but the killing of a thousand without the intent would only be homicide.[21]

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[19] *Barcelona Traction Case (Belgium v. Spain)*, ICJ Reports, vol. 3, 1970, paras. 33 and 34.

[20] 1996 ILC Report, UN doc. A/51/10, p. 88.

[21] "...thus, one has to ask whether it is logical to have a legal scheme whereby intentional killing of a single person can be genocide and the killing of millions of persons without intent to destroy the protected group in whole or in part is not an international crime? Yet, that is the present situation." C. Bassiouni, *loc. cit.* (note 12), p. 473.

The former type was, however, distinguished from the latter by the General Assembly in 1948 when it drafted the Convention: genocide is the "denial of the right of existence of entire human groups," homicide is the "denial of the right to live of individual human beings." The ultimate target is the group itself. Hence, "the *actus reus* [prohibited acts] may be restricted to one human being, but the *mens rea* or mental element must be directed against the life of the group."[22] In other words, "genocide occurs when the intent is to eradicate the individuals for no other reason than that they are a member of the specified group."[23]

Some light as to the specific intent required may also be found in the *Karadsic and Mladic case*, in which the ICTY suggested that the specific intent may also be inferred from the circumstances:

> "Genocide requires that acts be perpetrated against a group with an aggravated criminal intent, namely that of destroying the group in whole or in part. The degree to which the group was destroyed in whole or in part is not necessary to conclude that genocide has occurred. That one of the acts enumerated in the definition was perpetrated with a specific intent suffices. (...)
>
> The intent which is peculiar to the crime of genocide need not be clearly expressed. (...) The intent may be inferred from a certain number of facts such as the general political doctrine which gave rise to the acts possibly covered by the definition in Article 4 [of the Statute], or the repetition of destructive and discriminatory acts. The intent may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves consider to violate, the very foundation of the group — acts which are not in themselves covered in the list in Article 4(2) which are committed as part of the same pattern of conduct."[24]

The third element of the definition of genocide requires that the crime be among the listed acts. The exact scope of some of them remains however vague, i.e. "causing serious bodily or mental harm to members

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[22] C. Bassiouni, *International criminal law: A draft International Criminal Code*, Sijthoff and Noordhoff, Alphen aan den Rijn, 1980, p. 73.

[23] Webb, J., "Genocide Treaty — Ethnic cleansing: substantive and procedural hurdles in the application of the Genocide Convention to alleged crimes in the former Yugoslavia", *Georgia Journal of International & Comparative Law*, no. 377, 1993, p. 391.

[24] *Prosecutor v. Mladic and Karadsic*, Review of the indictments pursuant to Rule 61 of the Rules of procedure and evidence, Case No. IT-95-5-R61, 11 July 1996, paras. 92 and 94.

of the group" or "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." For the former, it is not clear what is covered by "mental harm". It has been described by commentators as a sort of psychological damage which would lead to the destruction of the group[25] or bodily harm "which involves some type of impairment of mental faculties."[26] Nor is it clear what is considered to be "calculated" to bring about the physical destruction in whole or in part of the group.

Conclusion

The above survey of the Nuremberg Judgement, the trials under the CCL, the work of the ILC, and the Statutes of the ad hoc Tribunals for the former Yugoslavia and Rwanda, confirm that the exact parameters of crimes against humanity — which are crucial in criminal proceedings — are unclear. Inconstancy in the definition seems to be the rule. As for the crime of genocide, the ambiguity does not rest so much in the exact parameters of the definition, since the 1948 Genocide Convention provides for it, but rather in the difficulty in criminal proceedings to prove the required elements of the crime.

In other words, international law is not yet fully equipped to answer clearly and precisely all questions relating to the prosecution and punishment of individuals for the commission of such atrocities. The tree is there and branches are slowly growing but it has not yet attained full maturity. Nonetheless, crimes against humanity and genocide are international crimes which entail individual criminal responsibility and give rise to universal jurisdiction.

What now needs to be worked at is the adoption of a more uniform, agreed definition of crimes against humanity and the interpretation of the meaning of all the elements of genocide. This is where an international criminal court would have a vital role to play in following the progress of international criminal law. In addition, a permanent court of this sort would have a contribution to make towards putting an end to impunity.

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[25] J. Webb, *loc. cit.* (note 23), p. 393.

[26] 1996 ILC Report, p. 91.