
Are Crimes against Humanity More Serious than War Crimes?

Micaela Frulli*

Abstract

This paper addresses the question of the relative gravity of crimes against humanity vis-à-vis war crimes. The issue is tackled from a double perspective. First, the categories of genocide, crimes against humanity and war crimes are compared at the general or legislative level. The analysis is mainly based on international treaties and other instruments that consider these crimes from the viewpoint of their diverse nature. The author concludes that it seems possible to infer that genocide and crimes against humanity are considered more serious than war crimes. Secondly, the paper focuses on the judicial and sentencing implications of the determination of the degree of gravity of crimes. In this perspective, it examines Nuremberg and post-Second World War jurisprudence as well as case law of the International Criminal Tribunals for the former Yugoslavia and Rwanda. The issue of national regulations concerning penalties applicable to the different categories of crimes is then tackled. This section of the paper also confirms that there is room for concluding that crimes against humanity are considered more serious than war crimes. However, the author stresses that, at the present stage of evolution of international criminal law, any possible answer can only be tentative.

1 Introduction

The question of the relative seriousness of crimes against humanity and war crimes has divided the judges of the International Criminal Tribunal for the Former Yugoslavia (ICTY) on several occasions. Not long ago, the ICTY Appeals Chamber delivered a new Sentencing Judgment in the *Tadic* case;¹ Judge Mohamed Shahabuddeen and Judge Antonio Cassese attached their Separate Opinions thereto giving, respectively, negative and positive responses to the question raised above. These two

* Dr Iur., University Federico II of Naples. While writing this paper, the author participated in the negotiations of the 1999–2000 International Criminal Court Preparatory Commission, as a Legal Adviser to the Governments of Senegal and Sierra Leone within the ‘No Peace Without Justice’ Judicial Assistance Programme. The opinions expressed here do not necessarily reflect those of the Governments of Senegal and Sierra Leone, nor those of ‘No Peace Without Justice’.

¹ *Prosecutor v. Tadic*, 26 January 2000.

opposite opinions offer an ideal starting point for this article, which aims to examine closely the same matter.

The point at issue has both a general and a practical relevance. *In abstracto*, ‘all international crimes are serious offences and no hierarchy of gravity may *a priori* be established between them’.² However, it seems interesting to compare war crimes and crimes against humanity as classes of crimes (i.e. taking into consideration their diverse nature, the different elements characterizing them and the different interests and values they injure) to ascertain if the crimes belonging to one category, namely, crimes against humanity, are inherently more serious than those belonging to the other, that is to say war crimes.

The determination of their degree of relative gravity has extremely concrete implications: it is crucial for the application of penalties. If a conclusion is reached that, all else being equal, a crime against humanity is more serious than a war crime, then the same criminal conduct should entail a heavier penalty if characterized as a crime against humanity:³ this is precisely the sentencing issue that has divided — and still divides — ICTY judges.

The problem arose in the very same terms in the *Erdemovic* case.⁴ The defendant,

² Separate Opinion of Judge Cassese, *Prosecutor v. Tadic*, 26 January 2000, para. 7.

³ In the opinion of Judge Cassese, in most cases the problem is likely to be circumvented by the application of the *lex specialis derogat generali* principle: if the same fact is alleged as a war crime and as a crime against humanity, the latter qualification often prevails as being more specifically aimed at prohibiting that particular fact. In this sense, the ICTY Trial Chamber recently stated that ‘the relationship between the two provisions can be described as that between concentric circles, in that one has a broader scope and completely encompasses the other’: *Prosecutor v. Kupreskic*, 14 January 2000, para. 683. An analysis of the question of cumulative offences does not fall within the scope of this article, but it is necessary to make some references to summarize briefly the debate over this issue which is related to the one dealt with by this survey. Both ICTY and ICTR judges have tackled this issue in their respective judgments. ICTR jurisprudence is fixed in the sense of considering that cumulative charging in relation to the same set of facts is possible under certain given conditions. This practice is justifiable (1) when the offences alleged have different elements; (2) when the provisions creating the offences protect different interests; and (3) when it is necessary to record a conviction for both offences in order to describe fully what the accused did. As to the offences under the Statute, the judges concluded that genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II have different elements and are intended to protect different interests. Thus it is legitimate to charge these crimes in relation to the same criminal conduct. See *Prosecutor v. Akayesu*, 2 September 1998, paras 461–470; *Prosecutor v. Kayishema and Ruzindana*, 1 May 1999, paras 625–650; and the Separate and Dissenting Opinion of Judge Tafazzal Hossain Khan attached thereto, paras 8–25. ICTY jurisprudence is less fixed as the Tribunal recently changed orientation in the *Kupreskic* judgment mentioned above. Until then, it considered cumulative charging possible in cases where the Articles of the Statute at issue aim to protect different values and when each of these Articles requires proof of a legal element not required by the others. ICTY always made clear that the matter is relevant insofar as it might affect penalty and it can be best dealt with if and when matters of penalty fall under consideration, since what is to be punished by penalty is proven criminal conduct. See *Prosecutor v. Tadic* (Decision on Defence Challenge to the Form of the Indictment), 15 May 1998. Reaching the sentencing stage, the ICTY has delivered concurrent sentences for offences that were cumulatively charged in relation to the same set of facts. *Prosecutor v. Tadic*, 14 November 1995; *Prosecutor v. Delalic* (the *Celebici* case), 16 November 1998, *Prosecutor v. Furundzija*, 10 December 1998. In 2001 the ICTY pronounced again on the matter in *Prosecutor v. Delalic*, 20 February 2001, paras 400 *et seq.*; *Prosecutor v. Kunarac, Kovac and Vukovic*, 22 February 2001, paras 544 *et seq.* and *Prosecutor v. Kordic and Cerkez*, 26 February 2001, paras 810 *et seq.*

⁴ *Prosecutor v. Erdemovic*, 7 October 1997.

accused of participating in the killing of some 1,200 persons, pleaded guilty to the charge of murder as a crime against humanity, but dismissed the alternative charge alleging murder as a war crime. He was sentenced to 10 years' imprisonment and immediately afterwards decided to appeal on the ground that his guilty plea was not informed. The Appeals Chamber allowed the appeal and remitted the case to another Trial Chamber in order to enable the appellant to replead a second time being fully aware of the consequences of 'pleading guilty per se and of the *inherent difference between the alternative charges*'.⁵ He pleaded guilty to the charge of murder as a war crime and the sentence was reduced to five years' imprisonment.

From that case on, ICTY judges often confronted the same problem and they always dealt with it as a sentencing matter. The question of the relative gravity of crimes could also originate in different circumstances: for instance two or more persons might be indicted for the same criminal conduct classified both as a war crime and as a crime against humanity. In the event that the *mens rea* that characterizes the conduct as a crime against humanity — i.e. knowledge that the criminal conduct is part of a widespread or systematic attack directed against any civilian population — can only be proved for one of the accused, should he or she suffer heavier consequences in terms of the sentence to serve?⁶

Hence, there are two levels of analysis at which the issue needs to be addressed. From a general perspective, the analysis of the normative function of international criminal law holds a prominent position. Criminal law has two basic functions: it defines the elements of a criminal act (the normative aspect) and provides for an appropriate punishment (the punitive aspect). Although international criminal law is still at an embryonic stage and it is not yet capable of fully addressing both the normative and the punitive functions covered by national criminal systems, there are several customary and treaty rules defining war crimes, crimes against humanity and genocide (the problem here can rather be the degree of precision with which these crimes are defined): it seems therefore appropriate to ascertain whether these international norms offer some indications as to the ranking of the different classes of crimes.

Furthermore, the problem must be considered from the viewpoint of its judicial and sentencing implications. At this level, since the punitive aspect is not yet developed in international criminal law and it is most often administered by reference to domestic law, it becomes important to examine national regulations and national case law concerning these crimes to see if they give some clues as to the problem of applicable penalties.⁷

⁵ *Prosecutor v. Erdemovic*, 7 October 1997, para. 91 (emphasis added). The accused was not considered informed that crimes against humanity imply graver consequences than war crimes.

⁶ See Separate Opinion of Judge Cassese, *supra* note 2, para. 8.

⁷ Judges Cassese and Shahabuddeen principally referred to Nuremberg and post-Second World War jurisprudence. However, neither of them gave sufficient attention to the jurisprudence of the other ad hoc court, the International Criminal Tribunal for Rwanda, nor dealt with national regulations concerning penalties to apply to the different categories of crimes, nor examined national case law dealing with this problem. It seems therefore appropriate to conduct at least a brief survey in these areas.

In drawing some conclusions as to the two aspects of the problem it must, however, be borne in mind that, at the present stage of evolution of international criminal law, any possible answer can only be tentative.

2 The General or Legislative Level

A *The Overall Framework*

As a first step, it is necessary to make a few points. War crimes and crimes against humanity are characterized by different elements and the norms proscribing them aim at protecting different interests and values. Many distinguished scholars have already described in detail both the different elements characterizing these categories of crimes and the diverse values and interests protected by the rules forbidding them. It is nonetheless important to recall them, mainly focusing on those aspects which seem to prove that crimes against humanity differ from war crimes not only in nature but also in gravity.

The crime of genocide belongs to the class of crimes against humanity,⁸ but may now also be considered as a separate crime — itself constituting a category — because of the specific intent it requires.

Another point helps to distinguish — and to keep separate — the two levels of analysis here considered. It has been said — by those who hold that there is no difference in gravity between crimes against humanity and war crimes — that if a comparison is made between murder as a crime against humanity and bombardment of an undefended town as a war crime, it is impossible to state that the latter is less serious than the former.⁹ With all due respect, this seems to be a misleading line of reasoning.

If the question is asked *in abstracto*, the different elements characterizing these crimes and the different interests and values protected by the norms forbidding them come into consideration, for they relate to every crime contained in each category and to the categories considered in their entirety.

On the other hand, if the question is put concretely, a problem only arises when, all else being equal, the very same fact is classed both as a war crime and as a crime against humanity, as clearly underlined by both Judge Cassese and Judge Shahabuddeen, albeit reaching opposite conclusions.

⁸ As it has been clearly stated: 'genocide is itself a specific form of crime against humanity': *Prosecutor v. Tadic*, 14 July 1997, para. 8.

⁹ This point has been raised by Judge Li who attached a Separate and Dissenting Opinion to *Prosecutor v. Erdemovic*, 7 October 1997. He said that the comparison between the crime against humanity for which the appellant was charged (murder of some 1,200 civilians) and a war crime consisting in the shelling of an undefended town (causing the death of one million civilians) clearly shows it is not appropriate to say that war crimes are lesser offences than crimes against humanity (para. 20). This argument was taken up by Judge Robinson who attached a Separate Opinion to *Prosecutor v. Tadic*, 11 November 1999.

At this level, an analysis can only be conducted by comparing a single act that may be legally classified either as a war crime or as a crime against humanity (and even as genocide, if the specific required intent is proven): the easiest example to give is that of murder. The factual or material element (*actus reus*) is the same — i.e. the killing of one or more persons — but both the contextual element and the mental element (*mens rea*) are different. If an act of murder is defined as a war crime it must be proved that it was committed in the context of an armed conflict, while it must have been perpetrated in the context of a widespread or systematic attack¹⁰ against any civilian population¹¹ — conducted either in time of war or peace¹² — to amount to a crime against humanity. As to the mental element of murder as a war crime, it consists in the intent to kill one or more persons, while the mental element of murder as a crime against humanity not only includes the intent to cause someone's death but also the knowledge of being part of a widespread or systematic attack against any civilian population.¹³ Murder can also amount to genocide. Here the mental element is even more specific: the will to kill implies the intent to destroy in whole or in part a group on discriminatory grounds.

B The Contextual Element

Several normative instruments dealing with the crimes concerned clearly state that the circumstances in which a crime is committed are crucial to determining the

¹⁰ 'Crimes against humanity are to be distinguished from war crimes against individuals. In particular they must be widespread or demonstrate a systematic character.' *Prosecutor v. Mrkšić, Radic and Šljivančanin (Vukovar Hospital Decision)*, 3 April 1996, para. 30. The ICTR has clearly described these two elements in *Akayesu*: 'The Chamber considers that it is a prerequisite that the act must be committed as part of a widespread or systematic attack and not just a random act of violence. The act can be part of a widespread or systematic attack and need not be part of both. The concept of "widespread" may be defined as massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of "systematic" may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a State. There must, however, be some kind of preconceived plan or policy.' *Prosecutor v. Akayesu*, 2 September 1998, paras 579–580.

¹¹ 'The Chamber considers that an act must be directed against the civilian population if it is to constitute a crime against humanity. Members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause. Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character.' *Prosecutor v. Akayesu*, 2 September 1998, para. 582.

¹² 'It is by now a settled rule of customary international law that crimes against humanity do not require a connection to 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.' *Prosecutor v. Tadić*, 2 October 1995, para. 141.

¹³ In their Joint Separate Opinion appended to *Prosecutor v. Erdemović*, 7 October 1997, Judges Vohra and McDonald stated that, in case of a count charging a given act as a crime against humanity, the prosecution has the onus of proving that the act of the accused was committed as part of a widespread or systematic perpetration of such acts and 'certainly . . . in the knowledge that the acts are being or have been committed in pursuance of an organized policy or as part of a widespread or systematic practice against a certain civilian group': *ibid.*, at paras 21–22.

gravity of the crime itself: it seems therefore convenient to begin this review with the contextual element.

The International Law Commission (ILC) Draft Code of Crimes Against the Peace and Security of Mankind, adopted in 1996,¹⁴ establishes some general provisions before defining the crimes within the scope of the Code itself. Article 3 provides that the punishment for individuals responsible of committing a crime against the peace and security of mankind must be commensurate with the character and gravity of the crime.¹⁵ How is it possible to define these components? The answer is found in the Commentary to the Draft Code prepared by the ILC where it is considered that 'the character of a crime is what distinguishes that crime from another crime. . . The gravity of a crime is inferred from *the circumstances in which it is committed* and the feelings which impelled the author.'¹⁶ The contextual element exactly corresponds to the circumstances in which a crime is committed. In the case of war crimes, the criminal conduct must be perpetrated in the context of an armed conflict while in the case of crimes against humanity, the same conduct can be committed either in time of war or peace, but always in the framework of a widespread or systematic attack against any civilian population. This last requirement means that crimes against humanity are never isolated and random acts of violence, as may happen with war crimes.¹⁷

Therefore, either the large scale or the systematic pattern in the context of which a given criminal conduct is committed are legal ingredients (or constitutive elements) of crimes against humanity while they are only additional elements of war crimes.¹⁸ A war crime may (but need not) be perpetrated in the framework of a widespread or systematic practice: when it so happens, the level of seriousness is higher, i.e. those

¹⁴ UN Doc. A/48/10 (1996).

¹⁵ 'An individual who is responsible for a crime against the peace and security of mankind shall be liable to punishment. The punishment shall be commensurate with the character and gravity of the crime.' In the same sense: 'the most important consideration, which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence.' *Prosecutor v. Delalic et al.* (the *Celebici* case), 16 November 1998, para. 1225.

¹⁶ Emphasis added.

¹⁷ 'It is therefore the desire to exclude isolated or random acts from the notion of crimes against humanity that led to the inclusion of the requirement that acts must be directed against a civilian "population", and either a finding of widespreadness, which refers to the number of victims, or systematicity, indicating that a pattern or methodical plan is evident, fulfils this requirement'. *Prosecutor v. Tadic*, 15 July 1999, para. 648.

¹⁸ For a detailed explanation of the criteria to be used to distinguish between constitutive elements, that characterize a criminal conduct as deserving per se a given punishment (*meritevole di pena perché sufficientemente offensivo*) and additional elements, that render the same criminal conduct more serious thus leading to an aggravation of the penalty imposed, see F. Mantovani, *Diritto Penale* (3rd ed., 1999) 815–817. Some authors have stressed the difficulty of actualizing a distinction between legal ingredients and aggravating elements of a crime, but nonetheless say that: 'un même fait . . . peut constituer l'élément constitutif d'une infraction autonome et la circonstance aggravante d'une autre. La circonstance aggravante se distingue toutefois de l'élément constitutif en ce que son absence diminue la peine sans faire disparaître l'infraction.' F. Desportes and F. Le Guhenec, *Le Nouveau Droit Pénal*, vol. I (1994) 627.

circumstances can be considered as aggravating circumstances for war crimes. This can be unambiguously drawn from the text of the ILC Draft Code itself, which includes war crimes among the crimes within its scope:¹⁹ according to Article 20 a war crime amounts to a crime against the peace and security of mankind only when committed in a systematic manner or on a large scale. The large scale or the existence of a systematic pattern are evidently considered as elements of gravity.

The ILC Commentary is also unequivocal in this respect. It reads:

Based on the view that crimes against the peace and security of mankind are the most serious on the scale of international offences and that, in order for an offence to be regarded as a crime against the peace and security of mankind, it must meet certain additional criteria which raise the level of seriousness. These general criteria are provided for in the *chapeau* of the article (20): the crimes in question must have been committed in a systematic manner or on a large scale.²⁰

The ILC thus establishes a hierarchy of gravity between ordinary war crimes and war crimes committed in a systematic manner or on a large scale: only the latter are serious enough to be considered crimes within the scope of the Code itself. *A contrario*, since the systematic policy or the large scale are constitutive elements of crimes against humanity, this category of offences always includes an inherent element of gravity.²¹ Hence, in principle, crimes against humanity may be deemed as graver offences than war crimes.

The Rome Statute establishing an International Criminal Court (ICC) seems to head in the same direction. The Court, given its complementary role to national criminal jurisdictions, shall have jurisdiction in particular over the most serious crimes of concern to the international community (or 'core crimes' as they have been labelled).

As to war crimes, Article 8 reads: 'the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as a part of a large-scale commission of such crimes'. Again, it is undisputed that plan, policy or scale are not inherent elements of war crimes, but they are 'factors which should be taken into account by the Prosecutor in determining whether or not to commence investigations against particular potential accused'.²² The large-scale character or the systematic nature of war crimes render them grave enough to be prosecuted under the

¹⁹ The ILC Draft Code lists the crime of genocide (Article 17), crimes against humanity (Article 18) and war crimes (Article 20). It also includes the crime of aggression (Article 16) and crimes against United Nations and associated personnel (Article 19).

²⁰ ILC Commentary on Article 20, para. 5.

²¹ 'The quantity of the crimes having a qualitative impact on the nature of the offence which is seen as a crime against more than just the victims themselves but against humanity as a whole.' *Prosecutor v. Tadic*, 11 November 1999, para. 28.

²² Fenrick, 'Article 8, War Crimes. Paragraph 1. "Jurisdiction in Respect of War Crimes"', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observer's Note. Article by Article* (1999) 181.

ICC Statute: these elements represent, in other words, a manifest index of seriousness.²³

C *The Mental Element*

The second element which has to be considered as influencing the gravity of a criminal act is the mental one. The *dolus* required for crimes against humanity includes the knowledge of being part of a widespread or systematic attack against civilians:²⁴ i.e. it is more specific than that characterizing war crimes. In the case of genocide the *mens rea* is even more specific, since it requires the intent to destroy in whole or in part a group on discriminatory grounds.

In the case of crimes against humanity and genocide, the mental element includes the knowledge of a large-scale or systematic plan of violence, which — as explained just above — can be considered intrinsic elements of gravity. It follows that the *dolus* is not only more specific if compared to that necessary for war crimes, but also graver.²⁵

The 1996 ILC Draft Code proves useful, once again, to explain better what was just said. It provides that, together with the circumstances in which the crime was committed, the gravity of a crime may be inferred from the feelings which impelled the author. The mental element or *mens rea* is without any doubt part of these feelings: in the case of crimes against humanity the perpetrator not only intends to commit a crime, but he or she is also aware of being part of a systematic and massive plan of violence which, in the case of genocide, becomes a plan to destroy in whole or in part a group on discriminatory grounds.

²³ In this respect, it is worth recalling that, during the Preparatory Commission which led to the drafting of the ICC Statute, there was an explicit debate over the thresholds of seriousness to be satisfied before the Court can exercise its concurrent jurisdiction over war crimes. The International Committee of the Red Cross (ICRC), for instance, made clear that it opposed restricting the scope of the Court's jurisdiction to war crimes only when committed as part of a plan or policy or as part of a large-scale commission of such crimes because this option would have raised the threshold of seriousness too high. See Hall, 'The Jurisdiction of the Permanent International Criminal Court over Violations of Humanitarian Law', in F. Lattanzi (ed.), *The International Criminal Court. Comments on the Draft Statute* (1998) 20–21.

²⁴ 'The perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act . . . actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread and systematic attack on a civilian population and pursuant to some sort of policy plan, is necessary to satisfy the requisite *mens rea* element of the accused.' ICTR, *Prosecutor v. Kayishema*, 21 May 1999, paras 133–134. Also: 'the requisite *mens rea* for crimes against humanity appears to be comprised by (1) the *intent* to commit the underlying offence, combined with (2) the *knowledge* of the broader context in which the offence occurs.' ICTY, *Prosecutor v. Kupreškic*, 14 January 2000, para. 556.

²⁵ It is widely recognized that premeditation aggravates the seriousness of a crime. One can argue that the awareness of a systematic or large-scale plan of violence can be assimilated to some form of premeditation. Ashworth says: 'Elements of planning or organisation may also be present in crimes committed by individuals. A person who plans or organises a crime is generally more culpable, because the offence is premeditated and the offender is therefore more fully confirmed in his antisocial motivation than someone who acts on impulse.' The threat a premeditated crime poses to society is great because 'it betokens a considered attack on social values with greater commitment and perhaps continuity than a spontaneous crime'. A. Ashworth, *Sentencing and Criminal Justice* (1995) 130. Several Penal Codes provide for premeditation as aggravating the seriousness of a crime. For instance, Article 137-72 of the French Penal Code refers to 'le dessein formé avant l'action'.

On this reasoning, if the large scale or the systematic nature characterizing crimes against humanity are to be considered as elements of seriousness, it automatically ensues that the awareness of a massive plan or of a systematic pattern of violence also means knowledge that committing that given crime transcends that isolated situation and/or that particular victim. Therefore the *dolus* is different not only in nature (more specific) but also in gravity (more serious). In the same sense it must be noted that in some penal systems knowledge of the degree of unlawfulness of a given conduct is one of the factors to be taken into consideration when evaluating the intensity (and accordingly the gravity) of the *mens rea* element.²⁶ National criminal systems also tend, in certain cases, to punish particular intents as graver than others,²⁷ aiming at protecting specific societal values.²⁸

As to the specificity of the intent required for genocide, it also may be considered to amount to greater seriousness: it is often the case that a greater degree of gravity is attached to offences involving a discriminatory element.²⁹

²⁶ Mantovani affirms that the gravity of the crime is inferred also by the intensity of the *dolus*. The intensity can be measured by the degree of awareness of the negative value attached to that crime, the negativeness to be considered both from the juridical and the social perspectives. See Mantovani, *supra* note 18, at 333–334.

²⁷ 'Dans la mesure où l'existence des mobiles particuliers aggrave la peine normalement encourue, la doctrine désigne souvent l'élément intellectuel des infractions concernées sous l'expression de *dol* aggravé.' Desportes and Le Guhenec, *supra* note 18, at 353–354.

²⁸ It is interesting to note the following comment on the adoption of the new French Penal Code: 'Cette multiplication des hypothèses de *dols* aggravés dans le nouveau Code Pénal correspond à l'un des objectifs recherchés par les auteurs de la réforme: édicter un code plus expressif des valeurs de notre société.' *Ibid.*, at 354.

²⁹ Ashworth underlines that elements of both greater harm and culpability can be found when a racial element is involved. He also quotes an attempt made in the United Kingdom in 1994 to enact a provision doubling the maximum penalty where the court deemed the offence was perpetrated on racial grounds. Ashworth, *supra* note 25, at 130–131. Desportes and Le Guhenec, *supra* note 18, think that the draughtsmen of the New French Penal Code intended to attach a specific gravity to specific intents ('tel ou tel mobile qui lui paraît particulièrement méprisable, par exemple le mobile raciste') to protect certain specific values. On the question of the interests and values protected, a few more observations can be added. It is widely accepted that crimes against humanity injure a broader interest than the one protected by the rules proscribing war crimes. As to the norms prohibiting crimes against humanity, it is held that they 'possess a broader humanitarian scope and purpose than those prohibiting war crimes' (ICTY, *Prosecutor v. Kupreškic*, 14 January 2000, para. 547). Referring again to the example of murder, the norm proscribing murder as a war crime protects the life of a given victim, the norm forbidding murder as a crime against humanity protects the life of that particular victim but also humanity as a whole. 'Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their lives, liberty, physical welfare, health and/or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because, when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterizes crimes against humanity' (ICTR, *Prosecutor v. Kambanda*, 4 September 1998, para. 15). Many scholars have discussed in length the notion of humanity reaching different conclusions, some of them saying it is related to mankind as a whole, others affirming it is related to human dignity and humaneness. As it has been recently noted by the ICTY Trial Chamber: 'Dans leurs opinions individuelles respectives dans les affaires Erdemovic et Tadic, le Juge Li et le Juge Robinson ont marqué leur désaccord sur ce point en notant que le crime contre l'humanité n'est pas un crime contre l'ensemble de l'espèce humaine mais un crime contre le "caractère humain,

Finally, some recent assertions made by ICTY Trial Chamber II regarding the *mens rea* of persecution are very useful to show how the mental element must be taken into consideration to determine the degree of gravity of a criminal act. While addressing this issue, the Trial Chamber has clearly drawn a hierarchy among crimes against humanity in order of gravity: (1) genocide; (2) crimes against humanity of a persecution-type; and (3) crimes against humanity of a murder-type. The mental element of persecution consists of a discriminatory intent and the Trial Chamber has considered it to be a higher requirement than for ordinary crimes against humanity, but a lower one than for genocide. Following this line of reasoning, it becomes possible to establish a hierarchy within the class of crimes against humanity based on the difference in nature and in gravity of the intent. The intent too is therefore an index of gravity.³⁰

3 International Instruments and National Criminal Systems

A International Instruments

It is now time to establish whether legal provisions embodied in international instruments provide a ranking in gravity for the different classes of crimes in question. Focusing on the Statutes of the International Tribunals, many authors have concluded that these documents do not give proof of a different degree of gravity attached to genocide, crimes against humanity and war crimes. The Charter of the Nuremberg Tribunal and the Charter of the Tokyo Tribunal do not offer any guidance to establishing such a hierarchy. The same can be said about the Allied Control Council Law No. 10. More recently, the relevant provisions of the ICTY and ICTR Statutes merit consideration: it must be underlined that — notwithstanding the significant differences between the two texts as to the subject-matter jurisdiction — neither Statute provides for an express ranking among different crimes.

une certaine qualité au plan du comportement". La Chambre note cependant que *si le deux acceptions sont envisageables, la seconde n'atténue en rien la gravité per se du crime contre l'humanité* (*Prosecutor v. Blaškić*, 3 March 2000, emphasis added). Whether one considers one possible interpretation or the other, does not change the fact that the target of crimes against humanity is wider than the one of war crimes because it is beyond the immediate victim. 'Il y a crime contre l'humanité parce que la victime est dépositaire de celle-ci en meme temps qu'elle en est membre' (R.J. Dupuy, *L'humanité dans l'imaginaire des Nations* (1991) 203).

³⁰ "The *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. . . Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus it can be said that, *from the view point of mens rea, genocide is an extreme and most inhuman form of persecution*. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.' *Prosecutor v. Kupreškić*, 14 January 2000, para. 636 (emphasis added).

This argument has been used to prove that there is no difference in seriousness between war crimes and crimes against humanity.³¹ However, things change slightly if one examines the ILC Draft Code Crimes Against the Peace and Security of Mankind (1996) and, in particular, the ICC Statute (1998). The elements of the ILC Draft Code leaving room to think that crimes against humanity are considered graver than war crimes were already discussed in detail in the general part above; here it is interesting to make some detailed comments on the ICC Statute.

In the Rome Statute there are at least three provisions showing a general persuasion that crimes against humanity are more serious than war crimes. The first provision is Article 31, which addresses grounds for excluding criminal responsibility. Article 31(1)(c) provides for the exception of self-defence and specifically affirms that a person cannot be held criminally responsible if:

The person acts reasonably to defend himself or herself or another person or, *in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission*, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.

It can be inferred that while the plea of self-defence can be urged to invoke the exclusion of criminal responsibility for all the categories of crimes when the person acts to defend himself or another person, in the case of war crimes it can also be invoked if the persons acts to defend a property essential either for the survival of the person or of another person or to accomplish a military mission. This seems to widen considerably the scope of self-defence for war crimes, for the protection of property can never be invoked as an excuse for crimes against humanity and genocide.

It has already been argued that this provision goes beyond *lex lata* and that the extension of the notion of self-defence especially to protect a 'property which is essential to accomplish a military mission' is highly questionable.³² Yet, with particular reference to the reasoning in this analysis, it could be argued that a general perception that crimes against humanity are more serious than war crimes underlies the Statute, for only someone accused of war crimes may adduce defence of property as an excuse.

The second interesting provision is Article 33, which deals with the plea of superior orders,³³ one of the most widely debated defences in international criminal law. The

³¹ See Separate and Dissenting Opinion of Judge Li in *Prosecutor v. Erdemovic*, 7 October 1997, paras 22–28. See Separate Opinion of Judge Robinson in *Prosecutor v. Tadic*, 11 November 1999, Part I.

³² Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 10 *EJIL* (1999) 154–155.

³³ Article 33 reads: '1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful. 2. For the purposes of this article, *orders to commit genocide or crimes against humanity are manifestly unlawful*.' (emphasis added).

Statute attempts to limit the circumstances allowing obedience to superior orders as a defence, by providing that it cannot be invoked as a defence unless three conditions are met: (1) the accused was under a legal obligation to obey orders of the Government or the superior in question; (2) he or she did not know that the order was unlawful; and (3) the order was not manifestly unlawful. What is interesting here is the second paragraph, establishing that orders to commit genocide or crimes against humanity are always manifestly unlawful. Since the three conditions must be cumulatively met to accept the plea of superior orders as a defence, it follows that superior orders can never be accepted as a defence for the charges of genocide and crimes against humanity, whereas they can be considered a valid ground to exclude responsibility in the case of war crimes.³⁴

This provision is not in line with customary international law, which seems to provide instead that obedience to superior orders is never a defence, not even for war crimes, but can be urged only as a mitigating factor.³⁵ Therefore, as it has been rightly stated, Article 33 marks a regression with respect to existing customary law. Nevertheless — besides the political reasons behind the adoption of this provision, which represents without any doubt a negotiated diplomatic solution — the fact that the rule of absolute liability for international crimes has been embodied in the ICC Statute only for genocide and crimes against humanity tips the scales in favour of a higher degree of gravity, in the common perception, of these two categories of crimes as compared to war crimes.

Finally, one should mention Article 124, included among the Final Clauses of the Statute. This transitional provision establishes that a state, on becoming a party to the Statute, may declare that it does not accept the jurisdiction of the Court over war crimes — when allegedly committed by its nationals or in its territory — for a period of seven years after the entry into force of the Statute. According to other previous proposals, an opting-out procedure should have been introduced both for war crimes and crimes against humanity, but it was eventually decided that any such declaration could bar the Court's jurisdiction only with regard to war crimes, evidently deemed less serious than crimes against humanity.³⁶

B National Criminal Systems

Many national criminal systems do not contain specific rules aimed at proscribing and punishing genocide, crimes against humanity and war crimes: there is undoubtedly a general delay in adapting internal legislation in this *domaine*. And there is no uniformity whatsoever: most national regulations do not contain detailed rules, but only a very general framework. In addition, several laws only deal with genocide while others cover war crimes and/or crimes against humanity. Since various national systems are in the process of being modified in order to allow the ratification

³⁴ See Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court Versus Customary International Law', 10 *EJIL* (1999) 172–191. For a general survey on superior orders, see also Y. Dinstein, *The Defense of 'Obedience to Superior Orders' in International Law* (1965).

³⁵ See Gaeta, *supra* note 34. See also Cassese, *supra* note 32, at 156.

³⁶ See Zimmermann, 'Article 124, Transitional Provision', in Trifflerer, *supra* note 22.

of the ICC Statute, it is premature to undertake a complete survey of national regulations dealing with this issue. I shall therefore confine myself to pointing out a number of penal codes or laws which specifically proscribe the crimes in question and which provide guidelines for their punishment. It is particularly interesting to consider those texts that have been lately modified, as they seem to indicate a tendency towards attaching a higher degree of gravity to crimes against humanity.

The Spanish Penal Code, adopted in 1995, explicitly punishes genocide (listing all the different acts that can amount to genocide) with penalties ranging between 15 and 20 years' imprisonment. It contains no provisions concerning crimes against humanity, although there are several norms concerning war crimes: the maximum penalty provided for a war crime is 15 years, i.e. the minimum applied to genocide.

A similar trend can be found in the Portuguese Penal Code: the penalties provided for acts of genocide range between 12 and 25 years' imprisonment, while penalties attached to war crimes against civilians range between 10 and 20 years' imprisonment.

Likewise, in the Criminal Code of Nicaragua the minimum penalty provided for genocide is 15 years' imprisonment, whereas the minimum penalty for war crimes can be as low as two years' imprisonment, if the specific conduct does not entail serious consequences.

It is also worth mentioning the Criminal Code adopted in Croatia in 1997 because it differs from the Criminal Code of the Socialist Federal Republic of Yugoslavia which is still in force in the Federal Republic of Yugoslavia (Serbia and Montenegro) and in the Republic of Bosnia and Herzegovina. While the latter does not provide for a differentiation in penalties attached to the crimes in question, the new Croatian Code adopted in 1997 makes some distinctions even if they are not spelled out in detail: for instance, genocide must not be punished by less than 10 years' imprisonment, while war crimes are not to be punished by less than five years' imprisonment.

C Statutory Limitations

The question of the passage of time seems to confirm that there is a difference in gravity among the crimes in question. At the international level it is not possible to identify a customary obligation establishing that crimes against humanity and war crimes are not subject to the rules on the passage of time. It is hardly possible to speak of a conventional rule as well; both the Convention on Statutory Limitations adopted in 1968³⁷ and the European Convention on Statutory Limitations adopted in 1974³⁸ contain a norm providing that war crimes and crimes against humanity are not subject to the rules concerning the passage of time, but the first has been ratified by a few states while the latter has not even entered into force. The ICC Statute contains the same provision in Article 29,³⁹ thus probably opening the way to the creation of a rule

³⁷ 'Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes', UN Doc. A/RES/2931 (XXIII), 26 November 1968, (1969) ILM 68.

³⁸ European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, adopted by the Council of Europe, Strasbourg, 25 January 1974, ETS 82.

³⁹ See Schabas, 'Non-Applicability of Statute of Limitations', in Triffterer, *supra* note 22, at 523–526.

on this subject, but, as things stand now, it cannot be considered a consolidated rule. The ILC made some interesting comments in this respect when the 1996 Draft Code on Crimes Against the Peace and Security of Mankind was adopted. The text does not contain any explicit reference to imprescriptibility or to the passage of time:⁴⁰ the ILC decided that it was not appropriate to introduce a rule of non-applicability of statutory limitations because such a rule could not apply to all crimes within the scope of the Code.⁴¹

At the national level, on the other hand, there are some civil law systems that provide for a differentiation concerning the application of the rules on passage of time (the rules on the passage of time do not have relevance in common law systems). As was clearly shown by the *Barbie* case (which will be described in detail in the next paragraph), French law considers that only crimes against humanity are *imprescriptibles* while war crimes can be punished only over a period of 20 years after they were committed: the rationale behind this rule is that a higher degree of gravity is attached to crimes belonging to the first category.

In the same sense the Spanish system — which was, as noted, totally reformed in 1995 — explicitly provides that only crimes against humanity must not be subject to the rules concerning the passage of time.⁴² Finally, the Ethiopian Constitution, adopted in 1994, establishes that crimes against humanity can never be amnestied since they are not *prescriptibles*.⁴³

4 International Case Law

Many authors have noted that international legal instruments establishing criminal courts⁴⁴ do not provide for a ranking of penalties to apply to the categories of crimes under discussion: as I have already noted, the punitive aspect is not yet adequately covered by international criminal law and that is precisely why it is essential to analyse how national courts have confronted this problem. Nonetheless, it seems interesting to see, in the first place, how the international tribunals have dealt with applicable penalties.

⁴⁰ The Draft Code adopted in 1991 (at first reading) provided that no statutory limitations should be applied to crimes against the peace and security of mankind.

⁴¹ *ILC Yearbook* (1994), vol. I, paras 125 and 130; and vol. II, Part 2, para. 80.

⁴² See P. Lamberti-Zanardi and G. Venturini (eds), *Crimini di guerra e competenza delle giurisdizioni nazionali* (1998).

⁴³ 'Quant au problème de la prescription, la Constitution éthiopienne adoptée en décembre 1994 a consacré l'imprescriptibilité des crimes contre l'humanité': De Gouttes, 'Un exemple de poursuite des crimes contre l'humanité devant les juridictions nationales: le procès des criminels de l'ancien régime du Colonel Menghistou en Ethiopie', *Revue de science criminelle et de droit pénal comparé* (1999) 702.

⁴⁴ The Charter of the Nuremberg International Military Tribunal, the ICTY Statute, the ICTR Statute and the ICC Statute do not establish a range of penalties to be applied to the different crimes under their jurisdictions.

A The Nuremberg International Military Tribunal and the Military Tribunals Under Control Council Law No. 10

The Nuremberg International Military Tribunal (IMT) jurisprudence and the sentences delivered by the military tribunals instituted on the basis on Control Council Law No. 10 shall not be reviewed here in detail.⁴⁵ Reference should be made instead to the relevant literature.⁴⁶

A general survey has recently been conducted concluding that ‘the joint charge of war crimes and crimes against humanity was frequently considered by the military tribunals in respect of one and the same act, and the majority of the decisions normally ended by imposing a joint penalty’.⁴⁷ This shows — according to the survey’s author — that the military tribunals did not seem to consider that crimes against humanity should be punished more severely than war crimes.⁴⁸ I do not share this view: the fact that the military tribunals provided for joint penalties may not prove that crimes against humanity were considered more serious than war crimes, but neither does it prove that crimes against humanity and war crimes share the same degree of gravity. In other words, their judgments have no bearing whatsoever on the degree of seriousness of the different categories of crimes.

However, there are a number of cases in which assumptions were made that crimes against humanity were to be regarded as more serious than war crimes. In the trial of Max Wielin and 17 others (the *Stalag Luft III* case)⁴⁹ the Judge Advocate clearly stated that the charge in question did not call for a punishment as a crime against humanity but ‘only as’ a crime against the rules and usages of war,⁵⁰ unambiguously reflecting the opinion that the latter crimes were to be considered, in principle, less serious than the former.

In the same sense it is worth quoting the words of the prosecutor while explaining the differences between war crimes and crimes against humanity in the trial of Otto Ohlendorf and others (the *Einsatzgruppen* case). As the same acts could be charged as separate offences, the prosecutor said that in that case ‘the killing of defenceless civilians during a war may be a war crime, but the same killings are part of another

⁴⁵ Legally speaking, they are not International Tribunals *stricto sensu* nor national ones, but for the purpose of this article it is useful to class them in this paragraph. For a summary on the debate over the legal nature and foundations of these tribunals, see Simma, ‘The Impact of Nuremberg and Tokyo: Attempts at a Comparison’, in N. Ando (ed.), *Japan and International Law. Past, Present and Future* (1999) 59–84.

⁴⁶ See Bing, ‘The Differing Concept of War Crimes and Crimes against Humanity in International Criminal law’, in G.S. Goodwin-Gill and S. Talmon (eds), *The Reality of International Law. Essays in Honour of Ian Brownlie* (1999) and the literature quoted therein.

⁴⁷ *Ibid.*, at 263.

⁴⁸ The same opinion was expressed by Judge Li in his Opinion appended to *Prosecutor v. Erdemovic* (para. 21) and by Judge Robinson in his Opinion appended to *Prosecutor v. Tadic* (Part I), *supra* note 7.

⁴⁹ This case was cited in the Joint Separate Opinion of Judges Vohra and McDonald in *Prosecutor v. Erdemovic*, 7 October 1997, para. 24.

⁵⁰ ‘The charge does not call, in this case, for a punishment of a crime against humanity but only — and that is already enough — a crime against the rules and the usages of war’: quoted *ibid.*, at para. 24.

crime, *a graver one* if you will, genocide — or a crime against humanity'.⁵¹ This self-explanatory assertion does not need any comment.

B ICTY Case Law

The ICTY jurisprudence on this matter is not well established, as the two separate opinions on which this article is based clearly show. However, until recently, the Tribunal has applied heavier penalties for the same facts when charged as crimes against humanity.

First, the *Tadic* case: the accused was found guilty of committing certain acts classified both as inhumane treatment (crimes against humanity) and as cruel treatment (violations of the laws or customs of war). He was consequently sentenced to 10 years' imprisonment for the first charge and to nine years for the second (counts 10, 11, 33 and 34); and again, respectively, to seven years' imprisonment and to six years' imprisonment (counts 13, 14, 16, 17, 22 and 23).

In *Erdemovic*,⁵² the Appeals Chamber found that the guilty plea entered by the appellant before Trial Chamber I was not informed and remitted the case to another Trial Chamber to give the appellant the opportunity to replead in full knowledge of the nature of the charges and the consequences of his plea. The question of the relative seriousness of war crimes and crimes against humanity is addressed at length in the Joint Separate Opinion of Judges Vohra and McDonald, who conclude that the misapprehension regarding the distinction in nature and gravity between the charge of murder as a crime against humanity and the charge of murder as a war crime led the accused to plead guilty to the more serious of the two charges.

In terms of sentencing, the distinction is reflected in the subsequent judgments. In its first Sentencing Judgment, Trial Chamber I sentenced *Erdemovic*, following his guilty plea for murder as a crime against humanity to 10 years' imprisonment. The case was subsequently remitted to another Trial Chamber that, following the accused's guilty plea for murder as a war crime,⁵³ reduced the penalty first imposed to five years' imprisonment.⁵⁴

In the opposite direction, the ICTY Appeals Chamber delivered a Judgment in Sentencing Appeals taking the view that there is in law no distinction between the seriousness of a crime against humanity and that of a war crime.⁵⁵ This is precisely the Judgment that led Judges Cassese and Shahabuddeen to deliver their respective Separate Opinions which inspired this paper. Finally, in one of its recent pronounce-

⁵¹ Quoted *ibid*, at para. 24.

⁵² The case is briefly summarized in the introduction above.

⁵³ 'The essential elements of the plea agreement were that: (a) The accused would plead guilty to count 2, a violation of the laws or customs of war, in full understanding of the distinction between that charge and the alternative charge of a crime against humanity, and the consequences of his plea.' *Prosecutor v. Erdemovic*, 5 March 1998, para. 18.

⁵⁴ 'Five (5) years' imprisonment for the violation of the laws or customs of war to which he pleaded guilty on 14 January 1998.' *Prosecutor v. Erdemovic*, 5 March 1998, para. 23.

⁵⁵ *Prosecutor v. Tadic*, 26 January 2000, paras 65–69. The Appeals Chamber upheld the fourth ground of appeal against the Sentencing Judgment of 11 November 1999: 'Error in the determination that crimes against humanity should attract a higher sentence than war crimes.'

ments (*Blaškić* case) on this issue the Tribunal stated: ‘la jurisprudence du Tribunal n’est pas fixée.’⁵⁶

C ICTR Case Law

The ICTR, on the contrary, has determined a precise hierarchy among crimes, identifying the crime of genocide as the most serious, followed by crimes against humanity and, lastly, by war crimes.⁵⁷

In the *Akayesu* Judgment,⁵⁸ Trial Chamber I held that genocide and crimes against humanity particularly shock the collective conscience. In *Kambanda*, the same Chamber held again that crimes against humanity are particularly shocking to the human conscience, stressing also that ‘precisely on account of their extreme gravity, genocide and crimes against humanity must be punished appropriately’.⁵⁹ The judges clearly affirmed that crimes against humanity are more serious than war crimes. While pointing out that the Statute does not rank the various crimes falling under the jurisdiction of the Tribunal (and that therefore, in theory, the penalties imposed should be the same for each of the three crimes) they noted that, according to Article 23(2) of the Statute, the Tribunal should take into account such factors as the gravity of the offence in determining the sentence. More specifically, they stated that ‘despite the gravity of the violations of Article 3 common to the Geneva Conventions and of the Additional Protocol II thereto, they are considered as lesser crimes than genocide or crimes against humanity’.⁶⁰ In explaining the legal reasoning underlying this belief, Trial Chamber I clearly stressed the inherent gravity of crimes against humanity and of the crime of genocide.⁶¹ Regarding genocide, in particular, the Chamber underlined

⁵⁶ *Prosecutor v. Blaškić*, 3 March 2000, para. 802. In *Prosecutor v. Furundžija*, 21 July 2000, paras 240–243, the Appeals Chamber affirmed again that there is no difference in gravity between crimes against humanity and war crimes. Yet this opinion is not unanimously shared: Judge Vohra stated that, all else being equal, a crime against humanity entails graver consequences than a war crime: see the Declaration of Judge Vohra, appended to the Judgment. In *Prosecutor v. Delalić*, 20 February 2001, para. 41, the Appeals Chamber stressed again that it is not possible to derive from the Statute a hierarchy of seriousness among the various offences. Immediately afterwards it was followed by one of the Trial Chambers in *Prosecutor v. Kunarac, Kovac and Vuković*, 22 February 2001, para. 891.

⁵⁷ As it was noted also by ICTY Trial Chamber I in *Prosecutor v. Blaškić*, 3 March 2000, para. 800.

⁵⁸ *Prosecutor v. Akayesu*, 2 September 1998.

⁵⁹ *Prosecutor v. Kambanda*, 4 September 1998, para. 17. In a subsequent paragraph, it is again clearly stated that ‘the degree of magnitude of the crime is still an essential criterion for evaluation of sentence’: *ibid.*, at para. 57.

⁶⁰ *Prosecutor v. Kambanda*, 4 September 1998, para. 14.

⁶¹ Under the heading ‘Gravity of the crime’, the judges underlined that: ‘In the brief dated 10 August 1998 and in her closing argument at the hearing, the Prosecutor stressed the gravity of the crimes of genocide, and crimes against humanity. *The heinous nature of the crime of genocide and its absolute prohibition makes its commission inherently aggravating.* The magnitude of the crimes involving the killing of an estimated 500,000 civilians in Rwanda, in a short span of 100 days constitutes an aggravating fact. Crimes against humanity are as aforementioned conceived as offences of the gravest kind against the life and liberty of the human being.’ *Prosecutor v. Kambanda*, 4 September 1998, paras 42–43. And, later on, ‘the crimes for which Jean Kambanda is responsible carry *an intrinsic gravity*, and their widespread, atrocious and systematic character is particularly shocking to the human conscience’: *ibid.*, at para. 61 (emphasis

the unique character of this crime reflected in its element of *dolus specialis* and affirmed that genocide ‘constitutes the crime of crimes’.⁶²

5 National Case Law

At the domestic level too there has been judicial recognition that crimes against humanity are more serious than war crimes.

A *Albrecht*

The first case to mention is *Albrecht*, decided by the Dutch Court of Appeal in 1949.⁶³ *Albrecht* was sentenced to death by a Special Criminal Court in the Netherlands because he was found guilty of war crimes and crimes against humanity according to Article 6(b) and (c) of the Charter of the London Agreement instituting the Nuremberg IMT. According to what has been said in the previous section, the Dutch Court sentenced the accused without making any precise distinction between war crimes and crimes against humanity and applying a joint penalty — i.e. the death penalty — for both charges.

The Court of Appeal stressed instead the difference between the two categories of crimes making reference to the definition of crimes against humanity approved by the United Nations War Crimes Commission. After examining the specific case, the Dutch Court of Appeal found that the charges alleged to the appellant were *merely* war crimes and could not amount to crimes against humanity because the required elements characterizing this latter category were not present. Therefore the Appeals Judgment reduced the sentence to life imprisonment, as it did not consider ‘the criminality of the appellant’s behaviour great enough to demand that he suffer the death penalty’.

B *Barbie*

The second important case supporting the view propounded in this paper is *Fédération nationale des déportés et internés résistants et patriotes et autres v. Barbie*. Klaus Barbie was the head of the Gestapo in Lyons from November 1942 to August 1944, during the wartime German occupation of France. At the end of the war he left France and disappeared. He was later tried *in absentia* for war crimes and sentenced to death by a Permanent Tribunal of Armed Forces in Lyons.⁶⁴ In 1982, while French authorities were seeking to obtain Barbie’s extradition from Bolivia (where he had taken refuge

added). More recently, ICTR judges stated: ‘The seriousness of the crimes and the extent of the involvement of the accused in their commission are factors to be considered in assessing aggravating circumstances. Genocide and crimes against humanity are inherently aggravating offences because they are heinous in nature and shock the collective conscience of mankind.’ *Prosecutor v. Ruggiu*, 1 June 2000, para. 46.

⁶² *Prosecutor v. Kambanda*, 4 September 1998, para. 16.

⁶³ Case No. 425, *Nederlandse Jurisprudentie* (1949) 748–751.

⁶⁴ See Cassese, ‘Klaus Barbie: The Exemplary Life of an Executioner’, in A. Cassese, *Violence and Law in the Modern Age* (1988) 97–118.

some 30 years before), new proceedings relating to crimes against humanity were opened against him in Lyons. Barbie was finally expelled from Bolivia in 1983; he was then arrested and transferred to France where he was tried for his role in the deportation and extermination of hundreds of civilians.

The judgments rendered by the French Court of Cassation in this case are particularly important for the evolving concept of crimes against humanity.⁶⁵ The first problem the French judges had to face was the need to draw a clear distinction between war crimes and crimes against humanity, since a French Law of 1964 provided that only the latter type of crime was not subject to statutory limitations of prosecution.⁶⁶ The French Court gave a precise definition of what features identify crimes against humanity. Whilst defining these crimes, the French Court clearly recognized that the elements characterizing them carry an intrinsic gravity.⁶⁷

It is also important to mention the submissions made to the Court by Advocate-General Döntewille, who engaged in a detailed description of the concept of crimes against humanity, underlining at every step their greater seriousness compared to war crimes. In very clear terms he stated:

Crimes against humanity are to war crimes what assassination is to murder. The premeditation involved is simply of another order. On one hand stands not simply an individual but a State with all its resources. On the other side is not merely a single victim but humanity. The deliberate intention to destroy is also of this order. The act itself also involves the same degree of amplification. The criminal act, savage as it is, assumes an additional element in order to be designated as a crime against humanity. That element is the insertion of the act at issue into a method which has been systematically established and the use of means permitting not merely the suppression of a person but the denial of his very humanity.⁶⁸

⁶⁵ Respectively 78 ILR 128 *et seq* and 100 ILR 338 *et seq*.

⁶⁶ 'In contrast to crimes against humanity, war crimes are directly connected with the existence of a situation of hostilities declared between the respective States to which the perpetrators and the victims of the acts in question belong. Following the termination of hostilities, it is necessary that the passage of time should be allowed to blur acts of brutality which may have been committed in the course of armed conflict, even if those acts constituted violations of the laws and customs of war or were not justified by military necessity, *provided that those acts were not of such nature to deserve the qualification of crimes against humanity.*' Court of Cassation, Judgment of 20 December 1985, 78 ILR 136 (emphasis added).

⁶⁷ 'The fact that the accused, who had been found guilty of one of the crimes enumerated in Article 6(c) of the Charter of the Nuremberg Tribunal, in perpetrating that crime took part in the execution of a common plan to bring about the deportation or extermination of the civilian population during the war, or persecutions on political, racial or religious grounds, *constituted not a distinct offence or an aggravating circumstance but rather an essential element of the crime against humanity*, consisting of the fact that the acts charged were performed in a systematic manner in the name of a State practising by those means a policy of ideological supremacy.' *Ibid.* at 332 and 336 (emphasis added).

⁶⁸ *Ibid.* at 146. In the same sense, the words of the *Conseiller Rapporteur* Le Gunehec can be quoted: 'If it can be said there is a hierarchy of horror and cruelty, *then crimes against humanity stand high above war crimes*, because they not only violate the laws and customs of warfare laid down by men to save their consciences and "legitimize such use of force as is absolutely necessary"; above all these crimes offend the fundamental rights of mankind: the right to equality, without distinction of race, colour or nationality, and the right to hold one's own political and religious opinions. *Such crimes not only inflict wounds or death, but are aggravated by the voluntary, deliberate and gratuitous violation of the dignity of all men and women*: these are victimized only because they belong to a group other than that of their persecutors, or do not accept their dominions.' See Cassese, *supra* note 64, at 112 (emphasis added).

The case was then remitted to the Court of Appeal of Paris that considered which additional charges should be added to the indictments against Barbie in the light of the definition of crimes against humanity given by the Court of Cassation.⁶⁹ The Court of Appeal of Paris ordered that Barbie should be tried for some additional crimes against humanity and remitted the case to the *Cour d'Assise du Rhone*. The trial before the *Cour d'Assise* began in May 1987. The judgment was delivered on 4 July 1987: Barbie was found guilty on all 340 counts of the 17 crimes against humanity of which he was accused. He was sentenced to life imprisonment, the Court having found no extenuating circumstances.⁷⁰

C *Eichmann*

The trial of Adolf Eichmann is considered, for many reasons, one of the most important among those dealing with the international individual crimes. Eichmann has been the only Nazi official accused of international crimes related to the Second World War to be tried in Israel, a country that was not even in existence when the alleged crimes were committed.⁷¹

The District Court of Jerusalem considered the category of crimes against humanity as covering almost all the offences perpetrated by Eichmann.⁷² What clearly flows from this case is the fact that the judges acted on the belief that the category of crimes against humanity encompasses that of war crimes not only because of its greater breadth but also because of its greater seriousness. In the words of the Presiding Judge reading the sentence:

In the Judgment we described the crimes in which the Accused took part. They are of unparalleled horror in their nature and their scope. The objective of the crimes against the Jewish People of which the Accused was found guilty was to obliterate an entire people from the face of the earth. In this respect they differ from criminal acts perpetrated against persons as individuals. It may be said that such comprehensive crimes, as well as crimes against humanity which are directed against a group of persons as such, are even more heinous than the sum total of the criminal acts against individuals of which they consist.⁷³

⁶⁹ Initially Barbie was tried under the charge of crimes against humanity only for the facts which constituted persecution against innocent Jews and not those heinous acts committed against members of the French Resistance, the latter being considered as combatants and the crimes against them as war crimes. Later on, following the definition of crimes against humanity given by the Court of Cassation ('Crimes against humanity, within the meaning of Article 6(c) of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945, which were not subject to statutory limitation of the right of prosecution, even if they were crimes which could also be classified as war crimes within the meaning of Article 6(b) of the Charter, were *inhumane acts and persecution committed in a systematic manner in the name of a State practising a policy of ideological supremacy, not only against persons by reason of their membership of a racial or religious community, but also against the opponents of that policy, whatever the form of their opposition*', 78 ILR 137), the *Barbie* case was remitted for another trial since 'neither the driving force which motivated the victims, nor their possible membership of the Resistance, excludes the possibility that the accused acted with the element of intent necessary for the commission of crimes against humanity.' Judgment of 20 December 1985, Cassese, *supra* note 64, at 140.

⁷⁰ *Ibid.*, at 148.

⁷¹ See A. Wieworka, *Le procès Eichmann: 1961* (1989).

⁷² Case No. 40/61, *Attorney General v. Eichmann*, District Court of Jerusalem.

⁷³ *Ibid.*, Final Statement of the Presiding Judge.

The Israeli judges clearly stated that crimes against the Jewish people (constructed upon the crime of genocide as embodied in the 1948 Convention) are nothing but the gravest type of crime against humanity.⁷⁴

6 Concluding Remarks

Summing up, there are several factors that lead to the conclusion that crimes against humanity are to be considered as more serious than war crimes. In the first place, this conclusion follows from the analysis developed at the general or legislative level. As some important documents (in particular the 1996 ILC Draft Code on Crimes Against the Peace and Security of Mankind and the ICC Statute) clearly show, crimes against humanity always bear specific elements that render them different from war crimes not only in nature, but also in gravity. These unique legal requirements — that is to say the large-scale or systematic nature of crimes against humanity, and consistent knowledge or awareness — are inherently aggravating factors.

A difference in gravity between the two categories of crimes is also reflected in several domestic penal provisions and in some of the sentencing and determination of penalties procedures adopted by national and international courts. A number of national criminal codes contain provisions attaching heavier consequences to crimes against humanity than to war crimes, or establish that the rules on the passage of time only apply to war crimes while crimes against humanity are *imprescriptibles*.

The same result stems from ICTR jurisprudence and from a substantial part of ICTY case law. The latter has changed course on the matter: initially it delivered its judgments according to the policy of applying harsher consequences to a certain offence if classified as a crime against humanity; more recently, it has rendered its decisions according to the view that the same set of facts always deserve — all else being equal — the same punishment. The difference of opinion among the judges persists, as the Appeals Chamber Judgment in the *Furundzija* case has most recently shown.⁷⁵

Those who believe that there is no hierarchy of gravity among crimes say that what is to be punished is the fact or the act, regardless of its legal classification. This is one of

⁷⁴ 'It is hardly necessary to add that the "crime against the Jewish People", which constitutes the crime of "genocide" is nothing but the gravest type of "crime against humanity".' *Ibid*, at para. 26. The sentence was confirmed by appeal judgment, delivered by the Supreme Court of Israel (Case No. 336/61).

⁷⁵ As to this judgment, it is worth noting that the Chamber held that, as a general rule, crimes involving death are more serious than crimes not involving death: this hints that a greater value is attached to the protection of life compared to other values (mental health or dignity, for instance) and consequently that a crime resulting in someone's death should always entail a heavier punishment than a crime which does not result in some loss of life. I do not intend to enter into this subject now, since it is rather different from the one I have tried to deal with here. However, I definitely share the view of Judge Vohra that there is an irreconcilable contradiction in holding on the one hand that there is no hierarchy among genocide, war crimes and crimes against humanity, yet, on the other, that crimes causing death are more serious than crimes not causing death. 'It appears to be inherently incompatible for the Chamber to hold that as a general rule, crimes involving death are more serious than crimes not involving death, while at the same time holding there is no hierarchy of crimes all things being equal', Declaration of Judge Vohra in *Prosecutor v. Furundzija*, 21 July 2000, para. 7.

the points raised by Judge Shahabuddeen.⁷⁶ He argued that, for instance, the imposition of the maximum sentence for murder as a crime against humanity would necessarily call for a lower sentence for murder as a war crime, even if there are no mitigating factors in the latter case, thus leading to an artificiality in sentencing. I think instead that the discrepancy can be eliminated on a case-by-case basis: it is possible to apply the maximum penalty even to a war crime, if there are some aggravating factors like the large-scale context or the systematicity. One crucial point relates to how judges decide to use mitigation and aggravation, that respectively increase or diminish the seriousness of the punishment. In other words, the penalty imposed for the same fact alleged as a crime against humanity and as a war crime may eventually be the same, but its determination results from different processes. A certain conduct alleged as a crime against humanity can be punished according to its inherent gravity, whereas the same conduct charged as a war crime may attract the same punishment only when it bears certain aggravating factors.

I believe it is very important to maintain this distinction, since one of the factors to be taken into consideration in sentencing is retribution, as widely recognized also by the two ad hoc tribunals. 'This is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes.'⁷⁷

It has been rightly emphasized that: 'The maximum penalties attached to offences may also be taken to convey the relative seriousness of the types of offences: indeed, one of the main functions of criminal law is *to express the degree of wrongdoing*, not simply the fact of wrongdoing.'⁷⁸ This is also one of the main functions that international criminal law should become able to fulfil.

⁷⁶ See Separate Opinion of Judge Shahabuddeen in *Prosecutor v. Erdemovic*, 5 March 1998.

⁷⁷ ICTY, *Prosecutor v. Aleksovki*, 24 March 2000, para. 185.

⁷⁸ A. Ashworth, *Principles of Criminal Law* (1999) 37.