Reconciling Crimes Against Humanity with the Laws of War

Human Rights, Armed Conflict, and the Limits of Progressive Jurisprudence

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Abstract

If conduct is consistent with the laws of war, may it nonetheless constitute crimes against humanity during an armed conflict? Crimes against humanity initially emerged during the World Wars, in order to extend the protection of the laws of war to a perpetrator's co-nationals. This new category initially required a nexus with international armed conflict, but is now an autonomous concept based on human rights law that criminalizes large-scale atrocities in both war and peacetime. Crimes against humanity committed in armed conflict continue to be shaped by the laws of war. There is substantial convergence between the normative core of 'non-derogable' human rights and the minimum humane treatment standards in the Geneva Law. However, there is considerable divergence with respect to combat operations where the Hague Law applies as lex specialis, *displacing certain human rights norms. ICTY jurisprudence demonstrates some of the instinctive tensions inherent in reconciling human rights with armed conflict. A notable instance is the* Gotovina *case, in which the Trial Chamber held that the laws of war do not apply to 'deportation'* qua *crimes against humanity such that there is no distinction between forcible displacement of civilians in occupied territories as opposed to combat operations. The temptation to dilute the laws of war through reclassification of conduct as crimes against humanity should be resisted because it does not necessarily result in increased protection for civilians in times of armed conflict. Utopian jurisprudence that*

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disregards humanitarian law's realistic code of conduct in the name of progress risks making the law irrelevant to military commanders.

1. Introduction

If conduct is consistent with the laws of war, may it nonetheless constitute crimes against humanity during an armed conflict? The relationship between these two categories of offences has far-reaching implications on the evolution and viability of international criminal law. Crimes against humanity initially emerged during the First World War because the laws of war extended protection only to the nationals of opposing belligerent states. The Allied Powers' abortive attempt to criminalize atrocities against Ottoman nationals of Armenian descent in the 1919 Treaty of Sèvres was based on the broad reference to the 'laws of humanity' contained in the Marten's clause of the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land. When it resurfaced in the Charter of the International Military Tribunal after the Second World War, crimes against humanity extended protection to civilian populations irrespective of nationality but still required a nexus with international armed conflict. The subsequent emergence and pervasive influence of human rights norms on contemporary international law ultimately expanded the criminalization of large-scale atrocities beyond war to peacetime situations.

Although now an autonomous concept based on human rights law, crimes against humanity committed in armed conflict continue to be shaped by the laws of war. Despite the significant conceptual differences between these two categories, there is substantial overlap between 'non-derogable' human rights (e.g. right to life, prohibition of torture, etc.) and the core humane treatment standards under the Geneva Law, applicable to persons *hors de combat* 'in the hands' of a party to the conflict. In contrast, the *lex specialis* relationship between human rights and the laws of war is starkly apparent with respect to the Hague Law, applicable to the means and methods of warfare. It is at this juncture that humanitarian considerations collide with the grim realities of military necessity. Even the sacrosanct right to life becomes circumscribed by the right of belligerents to use lethal force to weaken enemy forces, including not only the killing of combatants, but also incidental killing of civilians in limited circumstances.

ICTY jurisprudence demonstrates some of the instinctive tensions inherent in reconciling human rights with armed conflict. Recent decisions reveal a temptation to dilute the laws of war in order to criminalize civilian suffering by invoking the broader concept of crimes against humanity. A notable instance is the *Gotovina* case in which the Trial Chamber held that the distinction between the Geneva and Hague Law does not apply when deportation is charged as a crime against humanity. In other words, unlike the laws of war, when charged as an element of crimes against humanity, deportation is not

limited to civilians in occupied territories, but also applies to forced displacement resulting from the conduct of hostilities prior to occupation. Based on this view, a lawful attack that complies with Hague Law principles of distinction and proportionality may still qualify as deportation *qua* crimes against humanity if a military commander simply knew that it would result in displacement of civilians. Although ostensibly progressive, such expansive interpretations undermine the viability of this otherwise unimpeachable norm of international law by effectively criminalizing the unfortunate consequences of military operations. Disregarding the laws of war risks rendering crimes against humanity a legal utopia so divorced from reality that it becomes irrelevant to military commanders acting in good faith in combat situations.

2. Crimes Against Humanity: From the Laws of War to Human Rights

From its inception, crimes against humanity had an intimate but ambiguous relationship with the laws of war. This new concept emerged to criminalize large-scale atrocities not falling within the confines of war crimes but which, prior to the emergence of human rights law, had to be derived from the humanitarian principles inherent in the laws and customs of war. Egon Schwelb observed in 1946 that under the Charter of the International Military Tribunal at Nürnberg, 'notions of "war crimes" and "crimes against humanity" overlap and that most war crimes are also crimes against humanity, while many crimes against humanity are simultaneously war crimes'.[1] Crimes against humanity was distinguished from war crimes primarily by extending protection to civilian populations irrespective of nationality and the related requirement of a factor of scale or gravity that justified this unprecedented intrusion into state sovereignty.

In the process leading to adoption of the Nürnberg Charter, it had become apparent that the laws and customs of war did not cover atrocities where the victims and perpetrators possessed either the same nationality, or the respective nationalities of two or more states that were not belligerents, or if the victims were stateless. This included for instance, the persecution and extermination of Jews from the Axis countries. Egon Schwelb explained the impetus behind crimes against humanity:

> The unprecedented record of crimes committed by the Nazi régime and the other Axis Powers, not only against Allied combatants but also against the civilian populations of the occupied countries and of the Axis countries themselves, made it necessary to provide that these crimes also should not go unpunished.[2]

1 E. Schwelb, 'Crimes Against Humanity', 23 *British Year Book of International Law* (1946) 178–226, at 179–180.

2 *Ibid.*, at 185.

Initial proposals to deal with atrocities not within the purview of war crimes met with resistance. For instance, the British Government was of the view that the UN War Crimes Commission:

> should confine itself to collecting evidence of atrocities of this nature, e.g., those against Jews, only when perpetrated in occupied countries. . . . [a] clear distinction exists between offences in regard to which the United Nations have jurisdiction under International Law, i.e. war crimes, and those in regard to which they had not. Atrocities committed on racial, political or religious grounds in enemy territory fell within the latter category.[3]

In response to such misgivings, Justice Robert H. Jackson of the United States maintained that:

> These principles have been assimilated as a part of International Law at least since 1907. The Fourth Hague Convention provided that inhabitants and belligerents shall remain under the protection and the rule of 'the principles of the law of nations, as they result from the usage established among civilized peoples, from the laws of humanity and the dictates of the public conscience.'[4]

Ultimately, Article 6(c) of the Charter contained a requirement that crimes against humanity be committed 'in execution of or in connection with any crimes within the jurisdiction of the Tribunal', namely, war crimes or crimes against peace. Reflecting the misgivings surrounding this unprecedented intrusion into state sovereignty, Justice Jackson emphasized that:

> the way Germany treats its inhabitants . . . is not our affair any more than it is the affair of some other government to interpose itself in our problems. The reason that this program of extermination of Jews and destruction of the right of minorities becomes an international concern is this: it was part of a plan for making an illegal war.[5]

Thus, in the years immediately preceding the adoption of the 1948 Universal Declaration on Human Rights and the ensuing transformation of state sovereignty, the restriction of crimes against humanity to international armed conflict and its linkage with the established laws and customs of war made its inclusion more palatable to the drafters of the Nürnberg Charter.

Another dimension that distinguished crimes against humanity from war crimes was the requirement of a factor of scale or gravity. Notwithstanding its link with international armed conflict, the UN War Crimes Commission clarified that the underlying basis for inclusion of this crime in the Charter was an

3 Despatch from the British Ambassador (Halifax) to the (US) Secretary of State, 19 August 1944, in *Foreign Relations of the United States*, Diplomatic Papers 1944, Vol. I, General, at 1351, 1352; cited in R.S. Clark, 'Crimes Against Humanity', in G. Ginsburgs and V.N. Kudriavtsev (eds), *The Nuremburg Trial and International Law* (Dordrecht/Boston/London: Martinus Nijhoff, 1990), at 180.

4 Report of Justice Robert H. Jackson to the President of the United States (7 June 1945), reprinted in 39 *American Journal of International Law* (1945), Supplement, at 178.

5 Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials (1947), at 331.

exceptional degree of moral turpitude, justifying an international normative response:

> Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims.[6]

In later years, the ICTY Appeals Chamber in the *Erdemović* case confirmed this conception of the relationship between war crimes and crimes against humanity:

> Whilst rules proscribing war crimes address the criminal conduct of a perpetrator towards an immediate protected object, rules proscribing crimes against humanity address the perpetrator's conduct not only towards the immediate victim but also towards the whole of humankind. . . . Crimes against humanity are particularly odious forms of misbehaviour and in addition form part of a widespread and systematic practice or policy. Because of their heinousness and magnitude they constitute egregious attacks on human dignity, on the very notion of humaneness. They consequently affect, or should affect, each and every member of mankind, whatever his or her nationality, ethnic group and location.[7]

In this respect, crimes against humanity emerged from the humanitarian principles contained in the laws and customs of war, but presaged universal human rights principles that upheld human dignity irrespective of formal requirements, such as nationality or a state of war.

When crimes against humanity resurfaced in Article 5 of the ICTY Statute in 1993, almost 50 years after the Nürnberg Charter, its definition still required a nexus with armed conflict 'whether internal or international in character'. The Statute, drafted by the Secretary-General and adopted by the UN Security Council, reflected a cautious approach that extended the reach of crimes against humanity to non-international armed conflicts, but without altogether severing the link with war. However, the corresponding Article 3 of the ICTR Statute, adopted by the Security Council the following year in 1994, did not contain a similar requirement. The Council's Member States appeared less reticent than the UN Secretariat in dropping this requirement. In reconciling this difference, the ICTY Appeals Chamber in the *Tadić* case remarked that:

> customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law.[8]

During negotiations on the ICC Statute, delegates pointed out that the 'precedent of the statute of ad hoc Tribunal for Rwanda and the recent decision

6 United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the development of the laws of war* (London: H.M.S.O., 1948), at 179.

7 Joint Separate Opinion of Judge McDonald and Judge Vohrah, *Erdemović* (IT-96-22-A), Appeals Chamber, 7 October 1997, § 21.

8 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1-A), Appeals Chamber, 2 October 1995, § 141.

of the ad hoc Tribunal for the former Yugoslavia in the *Tadic* case' were among the post-Nürnberg developments 'which militated in favour of the exclusion of any requirement of an armed conflict'.[9] Thus, Article 7 of the ICC Statute definitively divorced crimes against humanity from armed conflict, enshrining its autonomy as a concept rooted in human rights.

It is now widely recognized that 'crimes against humanity are no longer linked to the laws of war but rather to human rights law'.[10] ICTY jurisprudence reflects this contemporary incarnation of the Nürnberg Law. In the *Blaskić* case, for instance, the Appeals Chamber considered 'charges of killing and causing serious injury' as persecutions in light of 'the inherent right to life and to be free from cruel, inhuman or degrading treatment or punishment . . . recognized in customary international law and . . . embodied in Articles 6 and 7 of the ICCPR, and Articles 2 and 3 of the ECHR'.[11]

Without a link to armed conflict, crimes against humanity are tantamount to the categorical criminalization of massive human rights violations. This new characterization, however, does not render the laws of war irrelevant. On the contrary, the autonomy of crimes against humanity as a broad concept linked with human rights provides a clearer comparative vantage point from which the co-existence and interrelationship between the norms applicable in peacetime and wartime can be assessed.

3. Laws of War as *Lex Specialis*

The relationship between international human rights and humanitarian law is an important point of departure in assessing the contours of crimes against humanity during armed conflict. Leading commentators point to the convergence of these two bodies of law, but also recognize their fundamental conceptual differences. Louise Doswald-Beck and Sylvain Vité observe that: 'International humanitarian law is increasingly perceived as part of human rights law applicable in armed conflict'.[12] They suggest that: 'The major legal difference is that humanitarian law is not formulated as a series of rights, but rather as a series of duties that combatants have to obey'.[13] René Provost similarly maintains that: 'Because the substantive norms they contain are in many ways similar or related — for example both provide a protection against torture — there seems to be fertile ground for comparison and perhaps cross-pollination between the two systems'.[14] He concludes, however, that

9 Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995), at § 79.

10 K. Ambos and S. Wirth, 'The Current Law of Crimes Against Humanity: An analysis of UNTAET Regulation 15/2000', 13 *Criminal Law Forum* (2002) 1–90, at 24.

11 Judgment, *Blaskić* (IT-95-14-A), Appeals Chamber, 29 July 2004, § 143.

12 L. Doswald-Beck and S. Vité, 'International Humanitarian Law and Human Rights Law', 293 *International Review of the Red Cross* (1993) 94–119, at 94.

13 *Ibid.*, at 104.

14 R. Provost, *International Human Rights and Humanitarian Law* (Cambridge: Cambridge University Press, 2002), at 9.

'there exists a real and meaningful difference between the normative frameworks of human rights law and humanitarian law. This difference rests on the fact that human rights law is centred, indeed built, on the granting of rights to the individual, while humanitarian law is focused on the direct imposition of obligations on the individual.'[15] Hans-Joachim Heintze also writes that 'there is a convergence between the protection offered by human rights law and that of international humanitarian law. Both bodies of law can be applied in armed conflicts, in order to achieve the greatest possible protection in the sense of the Martens Clause.'[16]

Commentators rightfully explain that 'human rights law is not entirely displaced and can at times be directly applied in situations of armed conflict'.[17] There is support for this proposition in the *Construction of a Wall Advisory Opinion*, where the International Court of Justice held that:

> the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.[18]

This opinion has led some commentators to conclude that:

> la Cour ne privilégie plus le recours exclusive au droit humanitaire par rapport aux droits de l'homme. Elle examine les dispositions des deux corps de normes de manière égale . . . . On assiste ainsi à un glissement de la théorie complémentariste à la théorie intégrationniste: la Cour insiste plutôt sur l'existence d'un noyau dur commun au droit humanitaire et aux droits de l'homme.[19]

While an exhaustive assessment of all situations is beyond the scope of the present discussion, it is sufficient to emphasize that the convergence between the normative core of human rights and humanitarian law is greatest with respect to the fundamental protections enshrined respectively in the minimum humane treatment standards of Article 3 common to the 1949 Geneva Conventions and the non-derogable rights under Article 4 of the ICCPR. These non-derogable rights include the right to life, the prohibition of torture and slavery, the *nullum crimen sine lege* principle, and freedom of conscience.

15 *Ibid.*, at 13.

16 H.-J. Heintze, 'On the relationship between human rights law protection and international humanitarian law', 86 *International Review of the Red Cross* (2004) 789–814, at 812.

17 N. Lubell, 'Challenges in applying human rights law to armed conflict', 87 *International Review of the Red Cross* (2005) 737–754, at 737.

18 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, International Court of Justice, 9 July 2004, available online at http://www.icj-cij.org/docket/files/131/1671.pdf (visited 9 November 2007), § 106.

19 A. Guellali, 'Lex specialis: Droit international humanitaire et droits de l'homme: leur interaction dans les nouveaux conflits armés,' 111 *Revue Générale de Droit International Public* (2007) 539–574, at 546.

There is substantial convergence between these core rights and the broad minimum humane treatment standards contained in the Geneva Law. It cannot be overlooked however, that there is considerable divergence once we move away from the humane treatment of persons *hors de combat* who are 'in the hands of' a party to the conflict, and enter the more volatile domain of combat operations. It is here that the relationship of the laws of war as *lex specialis* displacing certain human rights norms becomes forcefully apparent.

It bears emphasizing that despite the desirability of convergence between human rights and humanitarian law, the classical concept of military necessity is still at the foundation of the laws of war. Doswald-Beck and Vité point out that despite the important contribution of Protocol I of 1977 to 'the careful delimitation of what can be done during hostilities in order to spare civilians as much as possible . . . [t]he balance between military necessities and humanitarian needs that was explained in the [1863] Lieber Code continues to be at the basis of this law, and the States that negotiated this treaty had this firmly in mind so as to codify a law that was acceptable to their military staff'.[20]

The application of crimes against humanity in peacetime as distinct from wartime mirrors some of the tensions between human rights and humanitarian law. The enumerated acts or *actus reus* of crimes against humanity (e.g. murder, torture, etc.) are largely defined by reference to human rights law. In armed conflict, however, the laws of war apply as *lex specialis*. For instance, if civilians under the control of a party to the conflict are arbitrarily killed, there is substantial convergence between the applicable human rights and humanitarian law norms. However, the situation is considerably different if civilians are killed in a military attack. In the *Nuclear Weapons Advisory Opinion* the International Court of Justice explained that although:

> . . . the right not arbitrarily to be deprived of one's life applies also in hostilities . . . [t]he test of what is an arbitrary deprivation of life . . . then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant [on Civil and Political Rights], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[21]

Similarly, in order to determine whether civilian deaths in hostilities constitute the *actus reus* of 'murder' as an element of crimes against humanity, the applicable *lex specialis* would be the laws of war. In other words, if civilian deaths were incidental to a military attack that was neither indiscriminate nor disproportionate contrary to the laws of war, the constituent elements of 'murder' would not be satisfied and the corresponding crime against humanity would not be consummated.

20 Doswald-Beck and Vité, *supra* note 12, at 105.

21 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, International Court of Justice, 8 July 1996, available online at http://www.icj-cij.org/docket/files/95/7495.pdf (last visited 9 November 2007), § 25.

It should be noted that despite its human rights pedigree, the relationship between crimes against humanity and the laws of war is somewhat more complex than that pertaining to human rights and humanitarian law. Although the enumerated *actus reus* of murder, torture, etc., can be assimilated to particular human rights norms, the distinguishing feature of crimes against humanity is the *chapeau* requirement that such acts be committed as part of a 'widespread or systematic attack directed against a civilian population' as stipulated under Article 7 of the ICC Statute. As the International Law Commission states:

> The hallmarks of such crimes lie in their large-scale and systematic nature [and the] particular forms of unlawful acts (murder, enslavement, deportation, torture, rape, imprisonment, etc.) are less crucial to the definition [than] the factors of scale and deliberate policy.[22]

Thus, although the 'material element' or *actus reus* of crimes against humanity is murder, torture, etc., ICTY jurisprudence indicates a requirement of two distinct mental elements:

> The requisite *mens rea* for crimes against humanity appears to be comprised by: (1) the *intent* to commit the underlying offence [e.g., murder, etc.], combined with (2) knowledge of the broader context in which that offence occurs.[23]

It is in this respect that the relationship between crimes against humanity and the laws of war is more complex than that pertaining to human rights law. Since there is a broader *chapeau* requirement, '[t]he prohibition of murder as a crime against humanity is *lex specialis* in relation to the prohibition of murder as a war crime [because] murder as a crime against humanity requires proof of elements that murder as a war crime does not require (the offence must be part of a systematic or widespread attack on the civilian population)'.[24] Conversely, the laws of war is *lex specialis* in relation to the *actus reus* of 'murder' *qua* crimes against humanity under Article 5 of the ICTY Statute in so far as an accused may be convicted 'of violating the prohibition of murder as a crime against humanity only if it finds that the requirements of murder under both Article 3 [laws and customs of war] and under Article 5 are proved'.[25]

In this respect, the laws of war also profoundly shape the *chapeau* requirement of crimes against humanity. In the *Krnojelac* case, for instance, the Trial Chamber emphasized that while the general requirement of an 'attack' under Article 5 of the ICTY Statute is distinct from the concept of 'armed conflict':

> [t]hat is not to say that, in the context of an armed conflict, the laws of war play no role in the Tribunal's determination as to whether the attack was, or was not, 'directed against any

22 See Report of the International Law Commission on the work of its forty-third session (1991), GAOR, 46th Sess., Supp. No. 10, UN doc. A/46/10, at 265.

23 Judgment, *Kupreskić et al.* (IT-95-16), Trial Chamber, 14 January 2000, § 556 (emphasis in original).

24 *Ibid.*, § 701.

25 *Ibid.*, § 704.

> civilian population'. On the contrary, that body of law plays an important part in the assessment of the legality of the acts committed in the course of an armed conflict and whether a civilian population may be said to have been targeted as such.[26]

Similarly, in the *Galić* case, the Trial Chamber concluded that 'when considering the general requirements of Article 5, the body of laws of war plays an important part in the assessment of the legality of the acts committed in the course of an armed conflict and whether the population may be said to have been targeted as such.'[27] The ICTY Appeals Chamber further confirmed in the *Kunarac* case that '[t]o the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst.'[28] These precedents reflect a recognition that in situations of armed conflict, crimes against humanity are defined in significant measure by the laws of war.

While crimes against humanity in peacetime constitute massive human rights violations, in armed conflict they constitute massive violations of the laws of war. In the *Tadić* case, the ICTY Appeals Chamber recognized that by including both classes of crimes, the drafters of the Statute were 'illustrating their intention that those *war crimes* which, in addition to targeting civilians as victims, present special features such as the fact of being part of a widespread or systematic practice, must be classified as crimes against humanity and deserve to be punished accordingly'.[29] In other words, since 'crimes against humanity fall within the [ICTY] Tribunal's jurisdiction only when committed in armed conflict, the difference between the values protected by Article 3 and Article 5 would seem to be inconsequential'.[30]

4. Divorcing Deportation from the Laws of War in the *Gotovina* Case

ICTY jurisprudence is not entirely consistent on the relationship between crimes against humanity and the laws of war. There is an occasional tendency to consider these two categories as wholly separate and independent categories and to thereby justify expansive interpretations of crimes against humanity irrespective of the requirements of humanitarian law. Perhaps the most graphic illustration is the *Gotovina* case. In that case, the Trial Chamber held that: 'The inclusion of separate Articles covering crimes against humanity and war crimes [under the ICTY Statute] is clearly not a matter of coincidence,

26 Judgment, *Krnojelac* (IT-97-25), Trial Chamber, 15 March 2002, § 54.
27 Judgment, *Galić* (IT-98-29), Trial Chamber, 5 December 2003, § 144.
28 Judgment, *Kunarac* (IT-96-23), Appeals Chamber, 12 June 2002, § 91.
29 Judgment, *Tadić* (IT-94-1), Appeals Chamber, 15 July 1999, § 286 (emphasis added).
30 *Kupreskić*, *supra* note 23, § 703.

but indicates that these two regimes exist separately and independently.'[31] It concluded that while:

> it is well established in public international law that rules of international humanitarian law serve, in times of armed conflict, as a *lex specialis* in respect of the interpretation of the limits of prohibitions contained in instruments safeguarding the respect for human beings. . . . [A]ny reference to the *lex specialis* principle with regard to war crimes and crimes against humanity in the context of the jurisdiction of the Tribunal, necessarily differs from this situation.[32]

In *Gotovina*, the Trial Chamber was addressing the question of whether the elements of the *actus reus* of 'deportation' and 'forcible transfer' as a crime against humanity differed from the corresponding war crime. In particular, the indictment charged the defendant with deportation and forcible transfer as crimes against humanity (but not as war crimes) for the forced displacement through shelling *prior* to occupation of the territory in which such civilians were situated. Under the laws of war, the crime of deportation is part of the Geneva Law and thus only applies to civilians 'in the hands of' a party to the conflict. It does not apply to forced displacement of civilians during the conduct of hostilities prior to occupation, which falls within the Hague Law. Article 49 of Geneva Convention IV provides that: 'Individual or mass forcible transfers, as well as deportations of protected persons *from occupied territory* to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive'.[33] Similarly, Article 85(4)(a) of Protocol I prohibits 'deportation or transfer of all or parts of the population of *the occupied territory* within or outside this territory, in violation of Article 49 of the Geneva Convention'.[34] Rule 129 of the ICRC Study on Customary International Humanitarian Law[35] also contains a requirement that persons deported be situated in occupied territory. Under customary law, as reflected in Article 42 of the 1907 Hague Convention, '[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.' The question before the Trial Chamber in *Gotovina* was whether the elements of deportation or forcible transfer differed when charged as crimes against humanity rather than war crimes such that the Prosecutor need not establish that forcible displacement of civilians took place from occupied territory. This question was particularly important because the Indictment alleged that pre-occupation hostilities displaced all but 'a small fraction'[36] of the civilian population such that restriction of the crimes against humanity

31 Decision on Several Motions Challenging Jurisdiction, *Gotovina* (IT-06-90-PT), Trial Chamber, 19 March 2007, § 26.

32 *Ibid.*, § 24.

33 Emphasis added.

34 Emphasis added.

35 J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. I: Rules (Cambridge: Cambridge University Press, 2005).

36 Prosecution Pre-Trial Brief, *Gotovina* (IT-06-90-PT), 16 March 2007, § 11.

deportation charges to occupied territory would largely negate the prosecution's factual case.

The Trial Chamber ruled that 'the Gotovina Defence contention regarding war crimes as the *lex specialis* in relation to the elements of crimes against humanity is entirely unsupported and is based upon a misunderstanding of the co-existence of and relationship between war crimes and crimes against humanity in the jurisprudence of this Tribunal'.[37]

In holding specifically that deportation *qua* crimes against humanity is not restricted to occupied territory as required by the laws of war, the *Gotovina* Trial Chamber noted that 'nothing in the jurisprudence of the Tribunal supports the Defence contention that 'occupation' is an element of the crime of deportation.'[38] This was based on the Appeals Chamber holding in the *Stakić* case that the *actus reus* of the crime of deportation is 'the forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully present, across a *de jure* border or, in certain circumstances, a *de facto* border, without grounds permitted under international law'.[39] The ruling in the *Stakić* case was concerned with whether deportation under Article 5 of the ICTY Statute required displacement across an international boundary and did not address the question of occupation directly.[40] However, it did refer to the 'customary international law' on deportation as 'illustrated in Article 49 of Geneva Convention IV'.[41] Furthermore, ICTY jurisprudence provides unambiguous authority indicating that in armed conflict, the *actus reus* of deportation as a crime against humanity is based on Article 49(1) of Geneva Convention IV. In *Krnojelac*, the Trial Chamber held that:

> Deportation is clearly prohibited under international humanitarian law. While some instruments prohibit deportation as a war crime, it is also prohibited specifically as a crime against humanity, and it is enumerated as such under the [ICTY] Statute. [. . .] *The content of the underlying offence, however, does not differ whether perpetrated as a war crime or as a crime against humanity.*[42]

The Appeals Chamber in *Krnojelac* further confirmed the applicability of Article 49(1) to deportation *qua* crime against humanity:

> The Geneva Conventions are considered to be the expression of customary international law. Article 49 of the Fourth Geneva Convention prohibits displacement to another state, within or from occupied territory. It provides that: [i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motives.' Moreover, Article 85 of Additional Protocol I prohibits 'the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or part of the population of the occupied territory within

37 *Gotovina*, *supra* note 31, § 28.
38 *Ibid.*, § 55.
39 Judgment, *Stakić* (IT-97-24-A), Appeals Chamber, 22 March 2006, § 278.
40 *Ibid.*, §§ 265–321.
41 *Ibid.*, § 300.
42 *Krnojelac*, *supra* note 26, § 473 (emphasis added).

> or outside this territory in violation of Article 49 of the Fourth Convention.' Furthermore, Article 17 of Additional Protocol II to the Geneva Conventions explicitly prohibits the forced displacement of the population within or outside a country in which an internal armed conflict has broken out.[43]

Notwithstanding this contrary authority, the *Gotovina* Trial Chamber's decision is all the more problematic because of its reasoning as to why the laws of war do not apply to the *actus reus* of deportation under Article 5. The Chamber held that:

> as to the argument that the victims of deportation must be in the hands of a party to the conflict, the Trial Chamber recalls that crimes against humanity must be 'directed against any civilian population'. Article 5 of the Statute therefore applies to 'any' civilian population including one within the borders of the state of the perpetrator. There is no additional requirement in the jurisprudence that the civilian be in the power of the party to the conflict.[44]

The Chamber is clearly confusing the distinction between protection of civilians in occupied territory as distinct from combat situations, with the nationality of such civilians. The reference to 'any' civilian population is merely a relic of Article 6(c) of the Nürnberg Charter, which extended crimes against humanity to all victims irrespective of their nationality. It has no bearing whatsoever on the distinction between the Geneva Law and the Hague Law. Civilians in occupied territories and combat situations may possess the same nationality but be subject to different legal régimes within humanitarian law.

Beyond the abstract relationship between crimes against humanity and humanitarian law, the significance of divorcing deportation from the laws of war in the *Gotovina* case becomes starkly apparent by revisiting the distinction between the Geneva and Hague Law, briefly discussed above. The International Court of Justice has explained that the Hague Law 'fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict', whereas Geneva Law 'protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities'.[45] The Court recognizes that 'provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law'.[46] Nonetheless, the distinction between these two legal regimes within a unified body of humanitarian law reflects the very real and substantial difference between the contexts of occupation and combat, respectively. The minimum Geneva Law standards applicable to the humane treatment of persons in occupied territory or otherwise in the power of a party to a conflict are absolute and admit of no exceptions. As discussed earlier, they are in this respect highly

43 Judgment, *Krnojelac* (IT-97-25-A), Appeals Chamber, 17 September 2003, § 220.
44 *Gotovina*, *supra* note 31, § 56.
45 *Nuclear Weapons*, *supra* note 21, § 75.
46 *Ibid*.

similar to the core 'non-derogable' human rights under the ICCPR. In contrast, the principles of distinction and proportionality under the Hague Law apply to combat situations where there is considerable complexity and ambiguity.

As previously mentioned, the implications of the distinction between the Geneva and Hague Law are forcefully demonstrated with respect to the right to life. The International Court of Justice recognized in the *Nuclear Weapons Advisory Opinion* that this fundamental human right is qualified by the laws of war in a situation of hostilities. Consider for instance, that the ICTY Prosecutor decided not to initiate an investigation concerning alleged humanitarian law violations by NATO forces during the 1999 Kosovo aerial bombardment campaign despite the killing of 495 civilians and the wounding of 820.[47] Had those civilians been 'in the hands of' NATO forces within the meaning of the Geneva Law, such deaths and injuries would most certainly have given rise to prosecutions. Therein lies the significance of diluting the laws of war by considering crimes against humanity as a wholly separate and independent category, as suggested by the *Gotovina* case.

With respect to deportation, a useful illustration of the occupation/combat distinction is the ICRC Commentary to Article 51(2) of Protocol I prohibiting acts intended to spread terror among the civilian population. The Commentary recognizes the central role that military necessity plays in determining whether hostilities in the context of spreading terror are unlawful or not:

> there is no doubt that acts of violence related to a state of war almost always give rise to some degree of terror among the population . . .. It also happens that attacks on armed forces are purposely conducted brutally in order to intimidate the enemy soldiers and persuade them to surrender. This is not the sort of terror envisaged here. This provision is intended to prohibit acts of violence the primary purpose of which is to spread terror among the civilian population without offering substantial military advantage.[48]

In other words, if a brutal military attack is aimed primarily at intimidating enemy forces and offers substantial military advantage, it is deemed to be lawful even if it spreads terror among the civilian population. Similarly, civilians fleeing lawful bombardment by enemy forces attempting to conquer a territory may be said to have been forcibly displaced under coercive circumstances. But the Hague Law allows for such incidental displacement so long as the primary purpose is to gain a substantial military advantage in accordance with the principles of distinction and proportionality. It is for this reason that the Geneva Law crime of deportation is restricted to forced displacement from occupied territories where circumstances of combat do not apply.

47 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, available online at http://www.un.org/icty/pressreal/nato061300.htm (visited 9 November 2007), §§ 90–91.

48 International Committee of the Red Cross, Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, available at http://www.icrc.org/ihl.nsf/COM/470-750065?OpenDocument (last visited 9 November 2007), at § 1940.

The crime against humanity of deportation divorced from the laws of war has far-reaching implications on legal regulation of hostilities. The *Gotovina* Trial Chamber referred to the *Stakić* case definition of deportation as 'the forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully present'[49] and interpreted its silence on occupation as dispensing with this requirement, despite authority to the contrary. The implications of this interpretation can be illustrated by the *mens rea* standard enunciated in the *Milošević* case. In that case, the Trial Chamber held that 'in relation to forcible transfer or deportation there must be evidence of an intent to transfer the victim from his home or community; it must be established that the perpetrator either directly intended that the victim would leave *or that it was reasonably foreseeable that this would occur as a consequence of his action*'.[50] If this conception of forcible transfer or deportation does not rest on the laws of war, it could result in the effective criminalization of combat. Consider for instance, the case of a military commander embarking on a campaign of bombardment against enemy forces who issues an 'advance warning' to civilians that may be affected, consistent with the obligation to take precautions in attack under Article 57(2)(c) of Protocol I. Following this warning, the armed forces engage in intensive bombardment of enemy forces which offers substantial military advantage, while doing everything feasible to ensure that the objects attacked are neither civilians nor civilian objects. It may still be 'reasonably foreseeable' to the military commander that despite all precautions, both the advance warning and the terror that combat operations give rise to among the civilian population, including the prospect of incidental casualties, will result in widespread forcible displacement, possibly for a significant time period, depending on the outcome of the war. In *Stakić*, 'The Appeals Chamber considers that the *mens rea* of the offence does not require that the perpetrator intend to displace the individual across the border on a permanent basis'.[51] So even temporary forcible displacement may give rise to criminal liability. Under the laws of war, the military commander would be exonerated from liability because of compliance with the Hague Law. However, if the crime against humanity of deportation or forcible transfer disregards the humanitarian law applicable to the conduct of hostilities as suggested by *Gotovina*, that same military commander could be held criminally liable simply by re-categorization of his conduct. Such an outcome would be logically absurd not to mention the miscarriage of justice that it would occasion. Furthermore, such a utopian standard would undermine the viability of crimes against humanity by disregarding the central role that military necessity has played in making humanitarian law a realistic framework for regulating the unfortunate but inescapable violence of warfare.

49 *Stakić*, *supra* note 39, § 278.

50 Decision on Motion for Judgement of Acquittal, *Milošević* (IT-02-54-), Trial Chamber, 16 June 2004, § 78 (emphasis added).

51 *Stakić*, *supra* note 39, § 278.

5. Conclusions

ICTY jurisprudence indicates that whether or not victims are 'protected persons' under the Geneva Law depends on when 'they fell into the hands of the occupying forces. The exact moment when a person or area falls into the hands of a party to a conflict depends on whether that party has effective control over an area'.[52] The issue is not whether forced displacement takes place through shelling or more directly at gunpoint, but whether a belligerent has effective control over an area. Where a belligerent is engaged in combat and territory remains to be occupied, different considerations apply in determining whether forced displacement should be criminalized.

There is no suggestion that there should be a normative loophole that would justify forcible displacement of civilians in hostilities. The point is that such conduct must be assessed differently during occupation as distinct from combat. The ICRC Study on Customary International Humanitarian Law recognizes in relation to deportation that 'ethnic cleansing' aims at changing the demographic composition of a territory: 'In addition to displacement of the civilian population of a territory, this can be achieved *through other acts* which are prohibited in and of themselves *such as attacks against civilians*',[53] which is part of the Hague Law. Restricting the scope of deportation to protected persons in occupied territory does not create a normative lacuna that would leave forced displacement through shelling of civilians unpunished. It would merely assess criminal liability for such conduct based on Hague Law principles of distinction and proportionality rather than the more exacting standards applicable to civilians who are in the hands of a belligerent party in occupied territory.

The temptation to dilute the laws of war through reclassification of conduct as crimes against humanity should be resisted because it does not necessarily result in increased protection for civilians in times of armed conflict. The laws of war are the result of a venerable tradition of reconciling considerations of humanity with military necessity. They are considered as a realistic code of conduct for military commanders acting in good faith and inclined to sparing non-combatants to the extent possible from the inevitable horrors of war. A legal utopia that criminalizes incidental suffering in war undermines this normative edifice and risks making the law redundant to those confronting the grim reality of warfare. As the former Senior Legal Advisor to the ICTY Prosecutor's Office has recognized '[w]e do not contribute to the viability of IHL by indulging in creative reclassification so that an act which is regarded from one perspective as lawful can be regarded as unlawful because we changed the label' (i.e. from war crimes to crimes against humanity).[54] As the *Galić* court observed, if the Hague Law is disregarded in armed conflict, 'unintended

52 Opinion and Judgment, *Tadić* (IT-94-1), Trial Chamber II, 14 July 1997, § 580.

53 *Supra* note 35, at 461–462 (emphasis added).

54 W.J. Fenrick, 'Crimes in Combat: The Relationship between Crimes Against Humanity and War Crimes', available at: http://www.icc-cpi.int/library/organs/otp/Fenrick.pdf (last visited 9 November 2007).

civilian casualties resulting from a lawful attack on legitimate military objectives would amount to a crime against humanity under Article 5 and lawful combat would, in effect, become impossible.'[55]

A puritanical viewpoint would hold that war is itself a violation of human rights, and that crimes against humanity, being rooted in that body of law, should be a vehicle for gradual dilution of the exemptions and justifications for armed force long recognized by military necessity. Until the prohibition against war becomes a reality, however, utopian jurisprudence that disregards the imperatives of humanitarian law in the name of progress will only dissipate what remains of chivalry and professional pride among the world's armed forces.

55 *Galić, supra* note 27, § 144 (emphasis added).