

THE CRIME OF ALL CRIMES:  
GENOCIDE'S PRIMACY IN INTERNATIONAL CRIMINAL LAW

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By

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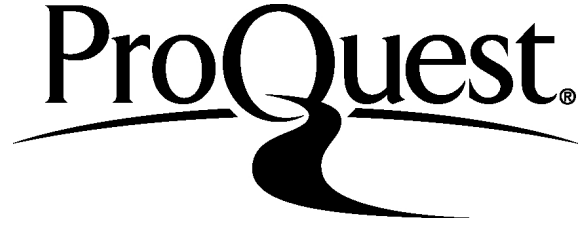
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ABSTRACT

In the International Criminal Tribunal for Rwanda's final judgment of *Prosecutor v. Akayesu*, genocide was declared to be "the crime of all crimes." Since Raphael Lemkin's conceptualization of the crime of genocide in *Axis Rule in Occupied Europe* (1944), the crime of genocide has gained primacy within international law. Taking into account the historical and political incentives of the creation of the United Nations Genocide Convention, the research conducted analyzes how genocide gained primacy in both international and national tribunals, and how this primacy impacts witnesses, victims, and defendants in genocide tribunals. Case studies examined include the ad hoc UN tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), as well as the national tribunals in Cambodia and Argentina. Using both statistical and qualitative analysis, the research strongly suggests that genocide's primacy is imbedded within international criminal law, and as such, is prosecuted with more fervor and seen to be of greater importance than other crimes. The impact of genocide's primacy on defendants include altered duration of trial proceedings and lengthened sentences. Additionally, civil societies seek prosecution of genocide rather than crimes against humanity or war crimes for their suffering to be validated. This paper ascertains that legally genocide has primacy over other crimes, but further explores if genocide *should* have primacy over crimes against humanity.

The research and writing of this thesis is dedicated to everyone who helped along the way. A special thanks to my thesis committee, Dr. Molly Inman, Dr. Douglas Irvin-Erickson, Brian Kritz, J.D., and Dr. Gregory Stanton, J.D., for shaping the creation of this thesis and inspiring me to pursue justice in the darkest of places.

Many thanks,  
Chloe R. Edmonds

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## INTRODUCTION

With the creation of the Genocide Convention of 1948 came a new phase of international law: a phase that protected the autonomy of group life and the right of individuals to exist and identify as a part of a group. As the crime of genocide was implemented into legal frameworks outside of the treaty into international and national tribunals, the original intent of the crime of genocide began to shift, prioritizing criminalizing genocide as the most heinous crime, rather than to expand international criminal law to protect the rights of group autonomy.

This research is not concerned with debating if there is a perception that genocide has primacy over other crimes; the international community at large has already accepted genocide to be what the International Criminal Tribunal of Rwanda (ICTR) calls “the crime of all crimes.” Rather, this paper seeks to question whether this primacy has embedded itself in international criminal law and case law through United Nations ad hoc tribunals and by the perceptions of civil society involved with national genocide tribunals. It equally seeks to explore if and how this primacy impacts witnesses, victims, and defendants in genocide trials.

A literature review will expand upon the origins of this perception and its implementation into international criminal law through case studies in both international and national tribunals. International tribunals essential to this study include the International Criminal Tribunal of the Former Yugoslavia (ICTY), where it is argued that genocide’s primacy among other international criminal laws began to present itself in trial and through sentence durations. The second is the ICTR, where Case No. ICTR-96-4-T, Prosecutor v. Akayesu included in its statements that genocide is the “crime of all crimes.” National tribunals for this study include both the tribunals in Cambodia and Argentina, and portray the impact of genocide’s primacy at a



national level. These national case studies both have a civil party presence in their court system, allowing this paper to explore the connotations of genocide's primacy and its impact of civil society.

Three key actors in the legal system will be addressed: witnesses, victims, and defendants. Explored in this research is the impact of genocide's primacy on parties directly affected by the violence and the retributive justice system. The perceived moral weight of genocide as opposed to crimes against humanity establishes its primacy in international criminal law extending the proceedings and significantly increasing sentence duration for any genocide conviction in comparison to individuals convicted of crimes against humanity. The research conducted strongly suggests that genocide's primacy is imbedded within international criminal law, and as such, is prosecuted with more fervor and seen to be of greater importance than other crimes.

### *LITERATURE REVIEW*

Raphael Lemkin's book *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, was published in 1944 at the same time as the liberation of many of the concentration and extermination camps in Poland. It was the first literature to introduce the term genocide as "an old practice in its modern development" (Lemkin 79). Using the Greek word *genos* meaning race or tribe and the Latin word *cide* for killing, Lemkin coined the term genocide. In his publication, he defines genocide as follows:

... a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political

and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups (Lemkin 79).

Genocide was created to protect against the destruction of group life, ensuring that all individuals have the right to belong to a group without fear of persecution and to provide space for cultural diversity and tolerance in international law (Irvin-Erickson 156). By doing so, Lemkin defined a crime that protected people within a group as well as the social fabric and culture of the group. Different from other international crimes, it “is organisation, training, practice, legitimation and consensus that distinguish genocide as a social practice from other more spontaneous or less intentional acts of killing and mass destruction” (Feierstein 14).

Lemkin was not the only one known to champion the fight against human rights abuses in international law. Herschel Lauterpacht, the Polish lawyer known for the creation of the concept of crimes against humanity, also sought to protect against similar forms of destruction. In fact, both Lemkin and Lauterpacht were Jewish Poles who graduated from Jan Kazimierz University Law School in Lwów, Poland (Sands). Lauterpacht defined crimes against humanity as, “namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian populations,” or “persecutions on political, racial or religious grounds” (Schabas 42). The primary difference between Lauterpacht’s definition and Lemkin’s was Lauterpacht’s focus on individuals rather than groups.

Lemkin originally thought of genocide as a crime against humanity. The Hague Regulations of 1907 was the first humanitarian law to provide a clause protecting certain civilian rights against occupying armies (Schabas 18), but they did not protect groups. Lemkin therefore

“urged their revision in order to incorporate a definition of genocide” (Schabas 29). To Lemkin, genocide took precedence because it was the only international crime that connected war crimes with human rights and went beyond an individualist approach to human rights law. In terms of suffering and human horror for genocide and crimes against humanity, they would be considered legally equivalent if The Hague Regulations of 1907 were to be expanded to include the definition of genocide. Lemkin highly regarded Lauterpacht’s work outlawing crimes against humanity. However, Lauterpacht believed Lemkin’s conceptualization of genocide to be useless. Lauterpacht believed that genocide was not necessary because there was no point in writing group rights into this law when his concept of crimes against humanity already made it criminal to persecute on the basis of group membership (Lauterpacht 744). As Lemkin continued to push for the creation of the genocide convention despite Lauterpacht’s disagreement, Lemkin perceived genocide to be at the pinnacle of international law because it was the only international law that took a group rights based approach.

The crime genocide was redefined through the United Nations Genocide Convention in 1948 and later adopted into the International Criminal Court’s Rome Statute. Since 1968, only two United Nations criminal tribunals have prosecuted genocide: cases in the former Yugoslavia and mass extermination of Tutsis in Rwanda in 1994. While other cases of genocide have occurred since, none have been tried in UN tribunals. Instead, they have been tried by hybrid national/UN tribunals. These include the Sierra Leone Tribunal, the East Timor Tribunal and the Extraordinary Chambers in the Courts of Cambodia, otherwise known as the Khmer Rouge Tribunal. Many cases of genocide have not been tried at all. Such cases include the genocide in Darfur, Sudan, which is still ongoing, and most recently, genocide against Christians, Yazidis,

and Shi'a Muslims in Syria and Iraq by ISIS, a terrorist organization primarily in the Middle East (Gjelten).

The International Criminal Court (ICC) has charged Omar al-Bashir, current President of Sudan (ICC-OTP-20080714-PR341) with genocide, but prosecution of this crime through the ICC and national tribunals has seldom occurred. The ICC has not convicted anyone of genocide. The ICC has handled 23 cases amongst 10 conflicts since the court was ratified in 2002. Charges of crimes against humanity for post-election violence in Kenya in 2007-2008 are no longer being pursued against Kenyatta and Ruto as a result of witness tampering. The only genocide indictment the ICC has issued was for President al-Bashir of Sudan and that case has been suspended until the United Nations Security Council (UNSC) requires all UN member states to arrest him.

Many scholars believe that the Genocide Convention of 1948 is a treaty that still holds great weight with scholars worldwide when defining genocide. It was founded on the UN delegates' moral outrage about the Holocaust (Falk). However, the history of the convention is more complex than this. The United Nations delegates writing the genocide convention discussed Nazi war crimes against civilians during the writing of the convention, but did not base the convention on the moral outrage of these acts alone. Lemkin's concept of genocide was inclusive; persecution against Jews was seen by Lemkin as part of the persecution occurring against other political parties that opposed the Nazi party and other national groups such as the Poles. The UN delegates did feel a moral obligation to outlaw genocide, but not in the way we do today. Dirk Moses argues that the term Holocaust was not used to describe the genocide of the Jewish population in Europe until the 1950s, which is one reason why Holocaust consciousness increased in the 60's and 70's (Levy and Sznajder). The delegates discussed the same events in

their creation of the convention, but there was a shift in how these crimes were thought about. At the time, they were considered Nazi war crimes - an inclusive expression of the atrocities being committed by the Nazi party. Over the next two decades, the definition of genocide contracted, becoming synonymous with the Holocaust (Hinton). At the same time, the rise of Holocaust memory in the 60's and 70's became a field of its own, while Holocaust memory became a symbol of human evils and the need for cosmopolitan values (Levy and Sznajder). As a result, the term genocide became infused with the moral weight of the Holocaust and conceptualized to be the apex of international criminal law (Schabas).

However, the creation of the United Nations Genocide Convention was not limited to only a moral process. The genocide convention as a text is a result of political negotiations between actors that wanted a moral process, such as Raphael Lemkin, and those who did not. Some parties involved sought to prevent the convention from being endorsed or weaken its power to protect state sovereignty (Schabas 133). After Lemkin's tireless fight to criminalize genocide, the delegates had the power to ensure their governments would not be charged with genocide for current and retroactive abuses (Irvin-Erickson 23). This included the United States who feared retroactive prosecution for race crimes against African Americans, such as lynching. As genocide entered the consciousness of the international community, a second school of thought emerged, analyzing genocide as a moral argument rather than a legal definition (Todorov).

The politicization of the term in the 1990's used the memory of the Holocaust to appropriate a moral claim. Genocide has since developed a social understanding, where the term brings to mind a case of similar numerical magnitude to the Holocaust and subsequently, a call for intervention. The ruling of the ad hoc tribunals of Yugoslavia and particularly Rwanda

created the notion of genocide as “the crime of all crimes,” which established a moral responsibility stemming from the politicization of Holocaust memory (Linenthal). However, the courts did not initially use the term genocide for moral purposes, but rather because the Genocide Convention was the only international treaty establishing the authority of international criminal courts that was signed and ratified by member states of the United Nations (Schabas). Therefore, genocide was the only doctrine in international criminal law that compelled compliance by nation states in the international community (Schabas). Outside legal scholarship and academia, in the world of human rights movements and global civil society, the ICTY and ICTR use of the word genocide mobilized Holocaust memory and intertwined the conflicts into a movement against the worst crime in existence. While the international community has attributed this ascension to the moral outcry against the Holocaust and Rwanda that is supposedly implicit in the concept of genocide, genocide rose to the apex of international law for juridical purposes.

Incorporated into international law since its inception, genocide has gained primacy in international law by being portrayed as more heinous than crimes against humanity and war crimes. In Akhavan’s book, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime*, he analyzes international criminal law, concluding that genocide, crimes against humanity, and war crimes are of equal gravity, with only a sentence disparity showing any difference between the crimes (Akhavan 59). Policy makers, journalists, and human rights advocates however do see a disparity between the terms, as is expressed in the use of the term ‘ethnic cleansing’ to conceal genocide when it occurs (Blum, Stanton, Sagi, and Richter 5). This disparity is only the beginning impact of genocide’s primacy in international law. The ruling of the ad hoc tribunals of Yugoslavia and particularly Rwanda legitimized the notion of genocide’s primacy by enacting Holocaust memory’s call for moral responsibility (Linenthal). A dimension

of genocide's perceived primacy over crimes against humanity encompasses the moral argument that genocide makes the international community obligated to intervene.

Another important element to this perception is that the use of genocide is often used to force a military intervention. As Akhavan asks, "is it better to not call a genocide 'genocide' and do nothing, or is it better to call a genocide 'genocide' and still do nothing" (3). The failure of the international community to intervene during the months of genocide in Rwanda in 1994 brought this idea into international consciousness. With the failure of the international community, the United Nations, and the Clinton administration, a second legally defined genocide occurred, sending images of mass casualties streaming into the media and everyone's consciousness: The Rwandan Genocide.

After the slogan "never again" was adopted through the resurrection of Holocaust memory, Rwanda became a glaring example that military intervention is expected upon the use of the term genocide. In the book *Shake Hands with the Devil: the failure of humanity in Rwanda*, General Roméo Dallaire discusses the failure of international aid and response in Rwanda while he was stationed as the Force Commander of the United Nations Assistance Mission for Rwanda. During his peacekeeping mission, he acted as the ears on the ground during the one hundred days of genocide that led to the death of eight hundred thousand Tutsis (Dallaire). Requesting five thousand troops for his mission and multiple requests for additional supplies during the conflict, his pleas went unheard (Dallaire). As Warren Christopher, President Clinton's secretary of state said, "if there's any particular magic in calling it a genocide, I have no hesitancy in saying that" (Akhavan 139). Underlying this statement is the assumption that genocide is a trigger term, requiring military intervention. Had Rwanda been accepted as genocide in April 1994 at the outbreak of violence, it could be argued that aid and military

intervention would not have been withheld due to the moral obligation of intervention associated with genocide. Following this line of thinking, genocide has become a trigger word that seeks to mobilize political, military, and humanitarian responses.

The word genocide is similarly used as a trigger word to gain justice and acknowledgment for victims. The primacy of genocide is made clear by the ongoing push for President Barack Obama to use the term “genocide” to describe the death of 1.5 million Armenians at the hands of Ottoman Turks. The ongoing relationship between the United States and Turkey is put under pressure every year in April, when the president is asked to remember the genocide and is called upon by the Armenian community to call the conflict a genocide. Genocide primacy is evident in this case, as Turkey associates the use of the word with a need to not only accept responsibility and guilt for the deaths, but to pay reparations to victims’ families and return property gained at the time of the conflict (Martelle). While the United States and other countries continue to recount the suffering of Armenians at the hand of the Ottoman Turks, the relationship with Turkey will not be jeopardized unless the it is called a genocide. Herein lies genocide’s primacy in the political sphere.

The creation of the term genocide was written as a way to expand the still growing body of international law. As Raphael Lemkin noted in his studies of barbarism and vandalism, what genocide aims to protect was not covered by other laws and easily could go unpunished simply due to linguistic gaps in law. The overwhelming strength of this doctrine through its international acceptance, “mean[s] that what originated in ‘general principles’ ought now to be considered a part of customary law” (Schabas 4). Assuring the acceptance of this doctrine, the International Criminal Court adopted the convention into the Rome Statute as written by the UN delegates in



1948. While the definition remains constant, case law provides adequate evidence of the development of a hierarchy of crimes amongst international criminal law through its application.

Although this hierarchy in international criminal law is contemporary and apparent in today's international and domestic tribunals, the ICTY and ICTR established genocide to be of greater importance than other international crimes. These two tribunals enacted the deepest of universal moral wrongs with the ICTR explicitly classifying genocide as "the crime of crimes" above crimes against humanity and war crimes. Contemporary national tribunals like that of Cambodia and Argentina increasingly emphasize the growing primacy of genocide to gain justice for victims. Analyzing the creation of genocide as an international crime and its use in case law, the primacy of genocide can be seen developing since its creation.

Analyzing genocide through case law, genocide's primacy in international law significantly impacts the experiences of victims, witnesses, and defendants in trial. Looking primarily at the ICTY and ICTR, the primacy of genocide heightens the rights and protections of victims and witnesses, and adversely negates the rights and presumed innocence of defendants. This research suggests that genocide has gained primacy within international law and therefore asks us to further research and question the impact of genocide's primacy over other crimes, particularly crimes against humanity.

### *THEORY*

Drawing from the literature review, the argument made is that genocide has gained primacy within international criminal law in both international and national tribunals. Genocide has gained primacy since its creation, and with the rise of Holocaust memory in the 60s and 70s, the crime rose to be the height of criminal activity in international law. As society has

incrementally increased its perception of genocide's value and importance, this is also present and visible in international and national tribunals. By determining if a genocide conviction impacts court case proceedings and final judgments, genocide's primacy can be documented in international law cases and case law.

Using both a statistical analysis as well as qualitative methods, this research makes the case that tribunals are impacted by genocide charges. Furthermore, the argument is made that the perception that prosecuting genocide must be harsher than prosecuting other charges is no longer a perception, but a reality that is imbedded within genocide trial proceedings and sentence durations given at the final judgment. It is also maintained that the three main actors in tribunals are impacted by genocide's primacy: witnesses, victims, and defendants. Particularly, genocide has primacy amongst civil society, which is visible in the cases of both Cambodia and Argentina's national tribunals. Civil society, in these cases, seeks genocide convictions in order to regain agency after prosecution and have their suffering valued by international tribunals and the international community.

Rather than simply a misunderstanding of genocide or a perception amongst the average person, it is argued that genocide has legal primacy in today's world. Stemming from a historical overview of the creation of genocide, the crime has gained primacy to the extent that it is prosecuted more harshly and with more importance. Studying the development of how genocide is perceived is essential to understanding how international tribunals, especially genocide tribunals function. It is equally important to understanding genocide on a broader scheme - understanding where its origins are, where it legally stands today, and how it is perceived and used by civil society around the world.

## *METHODOLOGY*

In order to gain a holistic understanding of genocide's primacy in international law, this project will use mixed methodology to explore how genocide is prosecuted in international and national tribunals and how it impacts different actors in the legal process. The first group addressed in this study are defendants, which are collected from the ICTY and ICTR. Only completed cases in the ICTY and ICTR will be analyzed in order to help control the study. The second group or focus are victims and witnesses of the conflicts mentioned, particularly civil society in Cambodia and Argentina. The conflicts included in this study are the war in the former Yugoslavia, the 1994 genocide in Rwanda, the Cambodian genocide, and the "Dirty War" in Argentina, referring to state sponsored violence from 1974-1983 in Argentina perpetrated against guerrilla forces, political dissidents, and those associated with socialism.

The independent variable in this study are the types of verdicts in tribunals. The verdicts in the analyzed tribunals are as follows: acquitted, violations of war crimes law, crimes against humanity, breach of the Geneva Conventions, genocide, any conviction surrounding genocide such as aiding and abetting genocide, any conviction surrounding crimes against humanity, and another category<sup>1</sup>. Convictions such as aiding and abetting genocide and conspiracy to commit genocide have been categorized into a single conviction type in order to simplify the study; this does not imply that they are legally the same crime. The purpose of the categorization is to analyze the impact of a genocide conviction, as well as a conviction of those that partake in genocidal acts, but are not convicted of genocide themselves. Dependent variables impacted by the crime convicted include days from initial indictment to first appearance in court, days from

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<sup>1</sup> The other category for convictions refers to convictions including crimes against the court like contempt.

arrest to first appearance in court, number of trial days, sentence duration in years, and sentence after appeal.<sup>2</sup> Categorical variables are also documented for categorization purposes including case name, number, presiding judge, and whether the defendant appealed or died prior to completion of their trial.<sup>3</sup>

In order to calculate the quantitative impact of the primacy of genocide on international criminal law, a statistical analysis is conducted using a database that encompasses 187 data entries. This study takes multiple measures to provide an inclusive analysis of tribunals where genocide is tried, for this case in the ICTY and ICTR. The dataset used includes all completed cases in the ICTY and ICTR<sup>4</sup> and does not include ongoing cases due to lack of documentation and missing variables for the completion of the dataset.

The collected data have different information available between the ICTY and the ICTR. The ICTY has completed cover sheets including all information needed for the dataset, including trial days and the amount of witnesses and exhibits used by the prosecution and the defense. The ICTR has not published similar cover sheets, and in order to find similar information, it was necessary to manually extract this data from court records and verdicts. Information such as the number of trial days were not included in the final judgment. In order to find similar information to the ICTY, the data collection includes a calculation of the number of days between the initial

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<sup>2</sup> The provided data is an estimate as there is room for human error on the part of the author and on the ICTY and ICTR documents. There are cases where the ICTY dates were documented incorrectly, and the ICTR has yet to complete cover sheets about cases, meaning information analyzed was drawn directly from court documents, which often do not include trial day numbers as ICTY cover pages do.

<sup>3</sup> A full list of variables included in data analysis are as follows: court, presiding judge, name, case number, date of initial indictment, date of arrest, date of final judgment, initial appearance in court, days from indictment to appearance in court, days from arrest to appearance in court, the eight possible convictions, initial sentence, appealed sentence, early release, trial days, witnesses called by prosecution, witnesses called by defense, prosecution exhibits, defense exhibits, whether defendant appealed, whether a plea agreement was reached, deceased before conclusion of trial, days from initial indictment to final judgment, and days from initial court appearance to final judgment.

<sup>4</sup> The dataset excludes the conviction of Radovan Karadzic, the former President of the Republic of Srpska, since his conviction was completed after the compilation and analysis of the dataset.

day in court to the final judgment in order to produce a number similar to the amount of trial days. Some information was not able to be collected for the ICTR, such as the specific number of witnesses and exhibits for the defense and the prosecution. With further research, these figures may be retrievable and able to be used for further analysis.

The statistical analysis was used primarily to conduct a difference in mean tests for trial days and sentences and to establish statistical significance. The primary goal of the data analysis is to compare the changes to the dependent variables (ex. trial days) when a defendant is convicted with one of the listed crimes. All data were extracted from provided materials and case statements on websites by the ICTY and ICTR. All crimes charged in indictments are not documented due to the time allocated to this project. However, charges in the indictment versus charges in convictions at the end of trial have the potential to provide an interesting analysis for future work to expand on the performed analysis.

The qualitative methods of this project are largely used to analyze the impact of genocide's primacy on victims and witnesses. Since they are not on trial, it is difficult to quantify the impact they experience from tribunals established for mass atrocities. A primary component of this qualitative study is the legal jargon and definition tribunals use for victim, as well as the rights and protections they are afforded within each tribunal's statute. Legal rights afforded to victims and witnesses will be explored in the ICTY, ICTR, and ICC. The project then shifts to take on a process tracing approach, looking at national tribunals that have civil society participating. Due to lack of access to documentation from these courts, this analysis will seek to explore the impacts of tribunals on victims and witnesses through secondary sources and research on the importance of genocide convictions for civil society to regain autonomy and justice in the aftermath of conflict. The national tribunals in Cambodia and Argentina are used as

the primary case studies to analyze the impact of a hierarchy in international criminal law on civil parties and whether the civil parties believe the tribunal delivered justice for victims.

### *ANALYSIS*

In an effort to analyze the degree to which genocide's primacy impacts court cases, this paper divides the argument into three distinct sections. The first section, or chapter two, addresses the immediate impact of a hierarchy of international crimes on defendants. This chapter delves into the complexities of the data analysis collected from the ICTY and ICTR and the direct impacts on the criminal case process and verdict. When and how this assumption began to impact international criminal law and tribunals will also be addressed; analyzing the ICTY and ICTR allows for an inspection of how precedents for genocide convictions develop over time and how genocide's primacy embeds itself into the legal system.

The third chapter switches focus to victims and witnesses and the impact this assumption has on their perception of justice. While the ICTY and ICTR will be addressed due to their ample literature and available resources on victim and witness protection protocol, national tribunals in Cambodia and Argentina will be analyzed in order to assess justice for witnesses and victims. Rather than a quantitative look at the legal system, this chapter will address the question of justice on a more personal level, asking whether it is easier as a victim or witness to gain justice through legal means if a conviction is for genocide versus crimes against humanity or war crimes.

The final chapter looks towards future action, reflecting on how genocide's primacy impacts ongoing conflicts in 2016. With cases of genocide, crimes against humanity, war crimes, acts of terrorism, and others occurring simultaneously, which takes precedence? This chapter is

approached to provide policy recommendations and future avenues for research, exploring the repercussions of genocide's primacy in international law. The section will discuss what the conclusions of this study mean for those imbedded in conflict and seeking international intervention and justice. Analyzing the current state of conflict, it must be asked which conflicts take precedence when it comes to both humanitarian and military intervention. The previous chapters strongly suggest that in a court setting, human suffering during genocide is prioritized over that of others. While the current assumption is that genocide is of greater moral weight than other international crimes, what does this say about the current hierarchy particularly between genocide and crimes against humanity in today's world and the international community's understanding of who is in need of protection?

## *RESULTS*

This study breaks new ground, confronting the assumption that genocide is in fact the "crime of all crimes." Genocide was not meant to be a trigger word used to signal military intervention; it simply was a crime legislated to fill a gap in international criminal law, and to protect group autonomy. The analysis conducted strongly suggests that the genocide has primacy and that this primacy has been expressed in decisions by both international and national tribunals. However, genocide's primacy has significant impacts on the rights and protections of victims, witnesses, and defendants, which must be further explored.

Conducting a statistical analysis on ICTY and ICTR final judgments, results show that defendants in genocide trials are on average prosecuted more seriously than for other crimes. Trial days were increased during genocide cases in the ICTY, extending the process. But they were significantly shortened in the ICTR to prosecute the most heinous criminals as fast as

possible. Sentence durations are impacted by genocide convictions and show statistical significance. Genocide in both the ICTY and ICTR are given the longest sentences by a significant number of years. The analysis in its completion, suggests that the international community views genocide to be a worse crime than crimes against humanity and war crimes, and that justice for a genocide conviction is more important than gaining justice in the face of other mass atrocities.

Furthermore, this study suggests that victims and witnesses are impacted by genocide's primacy within tribunals. Civil societies seek prosecution of genocide rather than crimes against humanity or war crimes for their suffering to be validated. As such, tribunals are conducted in a manner that upholds the primacy of genocide, and in Argentina, prosecutes for the purpose of delivering genocide convictions. Genocide seeks to protect the right of individuals to identify with their chosen group; in international criminal law, the powerful nature of how genocide is perceived impacts witnesses, victims, and defendants, results in harsher sentencing, and has become imbedded into how justice is perceived in trial by civil society.



## THE EFFECT OF GENOCIDE'S PRIMACY ON DEFENDANTS

The legal definition incorporated into the fabric of international law holds great importance as a living convention to inspire action and give hope to international law's enforcement. However, the portrayal of genocide as the ultimate crime has been adopted into the international community's perception of genocide through its use in ad hoc tribunals, specifically written into case law in the ICTR. The ICTY was the first international war crimes tribunal since the Nuremberg and Tokyo trials when genocide was not yet a crime. However, some of the post-Nuremberg national trials of Nazis charged them with genocide the Convention entered into force. The ICTY was the first international tribunal with the jurisdiction to charge defendants with genocide (ICTY). As such, the ICTY was also one of the first to create case law regarding sentence durations, allowing for comparison of sentence durations based on crimes (Henham 208). However, the landmark case that established the hierarchical nature of crimes in international law was Prosecutor v. Kambanda (Case No. ICTR-97-23-S). The trial was the first to have a defendant plead guilty to genocide and defined genocide as the "crime of crimes" in its final statements, establishing genocide's primacy over other crimes in international criminal law (ICTR). As a result of this perceived hierarchy, cases in both the ICTY and ICTR reflect the impact of genocide's primacy. This perception of genocide has impacted the way international criminal tribunals sentence defendants based on the charge for which they are tried.

Table 1: Conviction Frequency in the ICTY and ICTR

Conviction Frequency		
Charge	Frequency	Percent
Acquitted	34	10.27
Violations of the laws of war	60	18.13
Crimes against humanity	118	35.65
Grave breach of the Geneva Conventions	31	9.37
Genocide	54	16.31
Conspiracy to commit genocide	29	8.76
Conspiracy to commit crimes against humanity	3	0.91
Other	2	0.60
Total	331	100

Compiling information from both the ICTY and ICTR, this study stands on a database which includes all completed trials in the ICTY and ICTR. The database shows that genocide does in fact have primacy over other international crimes in the ICTY and ICTR. This primacy is visible in the substantively and statistically significant increase in trial days for genocide convictions over other crimes and the increase of sentence durations for genocide versus other crimes.

The dataset used in this analysis looks at trends following seven different charges: violations of the laws of war, crimes against humanity, grave breach of the Geneva Conventions, genocide, crimes similar to aiding and abetting genocide or aiding and abetting crimes against humanity, and an “other” category. The frequency and percentage of each conviction within the ICTY and ICTR are represented in the table 1. Note that the dataset includes 187 defendants and the total shown in the table below is representative of the amount of charges convicted amongst the 187 defendants. Crimes against humanity is the most frequent conviction at approximately 36%, followed by violations of the laws of war at 18%, and genocide at 16%.

Looking at the percentage of convictions that include crimes against humanity, it is important to understand that convictions of genocide are often paired with a conviction of crimes against humanity. Table 2 represents a tabulation of genocide and crimes against humanity. The analysis was conducted in order to

interpret the difference between when genocide versus crimes against humanity is convicted. Out of 54 convictions of genocide, 49 were also tried with crimes against humanity, approximately 91%. However out of 118 convictions of crimes against humanity only 49 were also convicted with genocide, approximately 42% of crimes against humanity convictions. Crimes against humanity and

Table 2: Frequency of Conviction Comparison

Genocide vs. Crimes Against Humanity Convictions			
	Crimes against humanity		
Genocide	Not convicted	Convicted	Total
Not convicted	60	69	129
Convicted	5	49	54
Total	65	118	183

genocide's legal language overlaps greatly, with the main difference between them being that genocide needs a proven intent to destroy a group, and those targeted for elimination must be one of the listed groups in the legal definition: nationality, ethnicity, race, and religion. The provided statistics suggest that genocide has a narrower definition than crimes against humanity. It applies to a smaller number of cases based on the listed groups that can legally experience genocide, but also that conviction for genocide rarely occurs without also convicting for crimes against humanity. The opposite is not the case, as convictions for crimes against humanity is often occur without a simultaneous conviction for genocide.

Additionally, it is important to look at the frequency of convictions between the ICTY and ICTR. It can be expected that the ICTY does not convict genocide as often as the ICTR, the first reason being that the ICTY dealt with a conflict where there were fewer acts of genocide, rather than the ICTR, which was created to deal with a conflict that as a whole was a planned genocide. Qualitative evidence may be taken into account as well. The database created includes presiding judges of all cases analyzed. Time and research were not able to assess a trend amongst judges. However, it is said that as long as Judge Antonio Cassese, the first President of the ICTY, was president, his narrow view of "intent" resulted in all charged with genocide being acquitted. This is substantiated by the date of the first genocide conviction in the ICTY, Radislav Krstic, who was sentenced to 46 years' imprisonment for genocide in the Trial Chamber I's

Judgement on 2 August 2001 (“Radislav Krstic”). It is equally important to acknowledge that

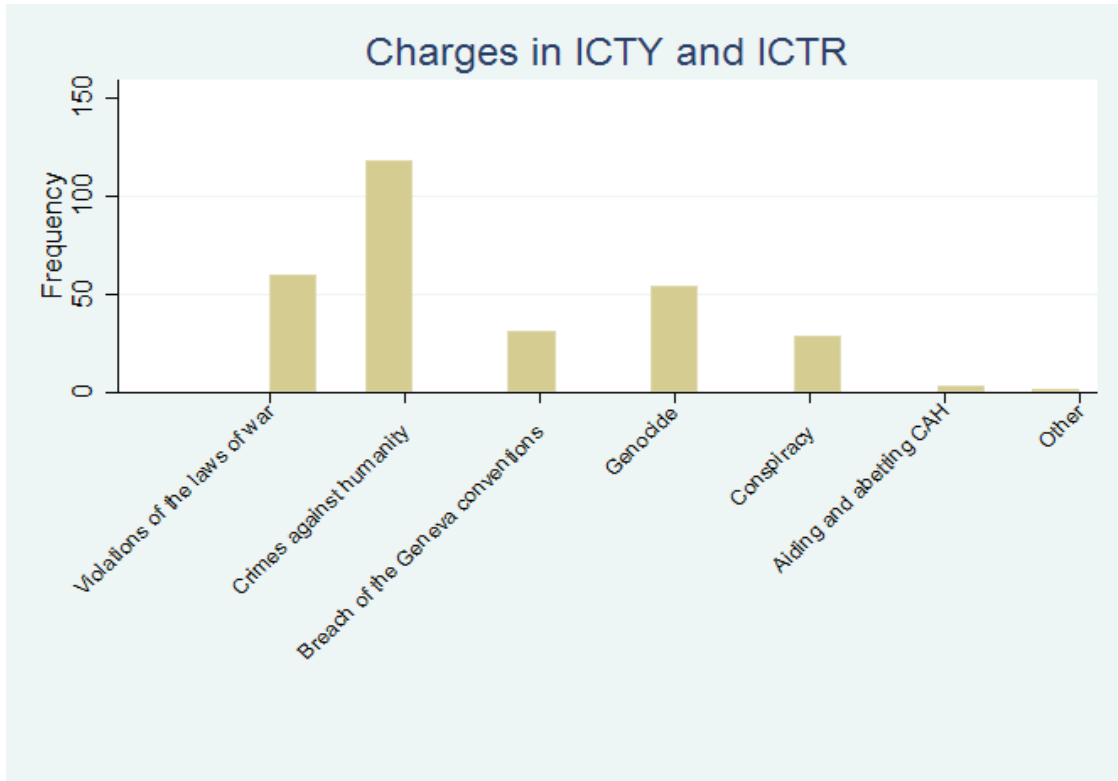


Figure 1: Frequency of Charges in the ICTY and ICTR

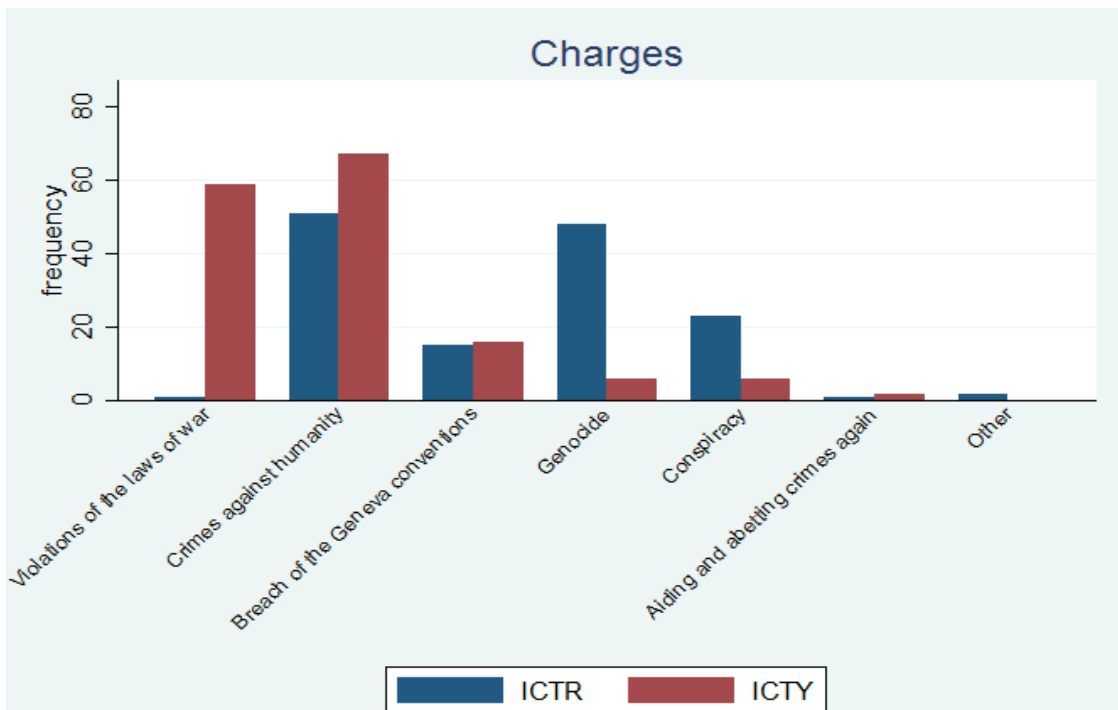


Figure 2: Frequency of Charges between ICTY and ICTR

even though the ICTY was created before the ICTR, the ICTR was largely blazing new territory and setting new precedents for genocide charges, leaving the ICTY relying on case law from the ICTR for genocide trials. Figure 1 is a visual representation of the frequency of different convictions in all cases in the

data set, versus Figure 2, which shows the difference in conviction frequency between the two courts. As shown, crimes against humanity is convicted the most frequently in both representation,

however, the ICTR provides more cases of genocide to analyze.

In order to see how a genocide conviction affects the process of trials, the duration of a genocide trial process was compared to that of crimes against humanity trials.

Representative of information extracted from

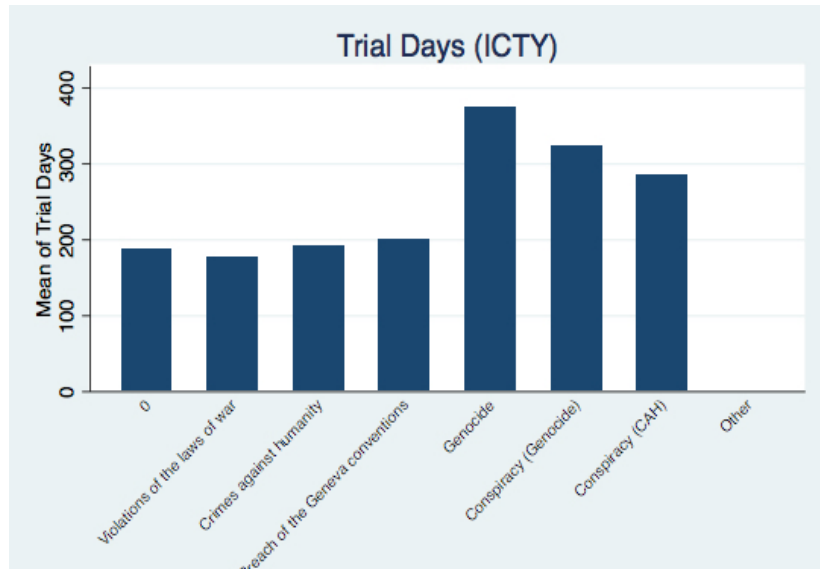


Figure 3: Difference in Means Test for Trial Days (ICTY)

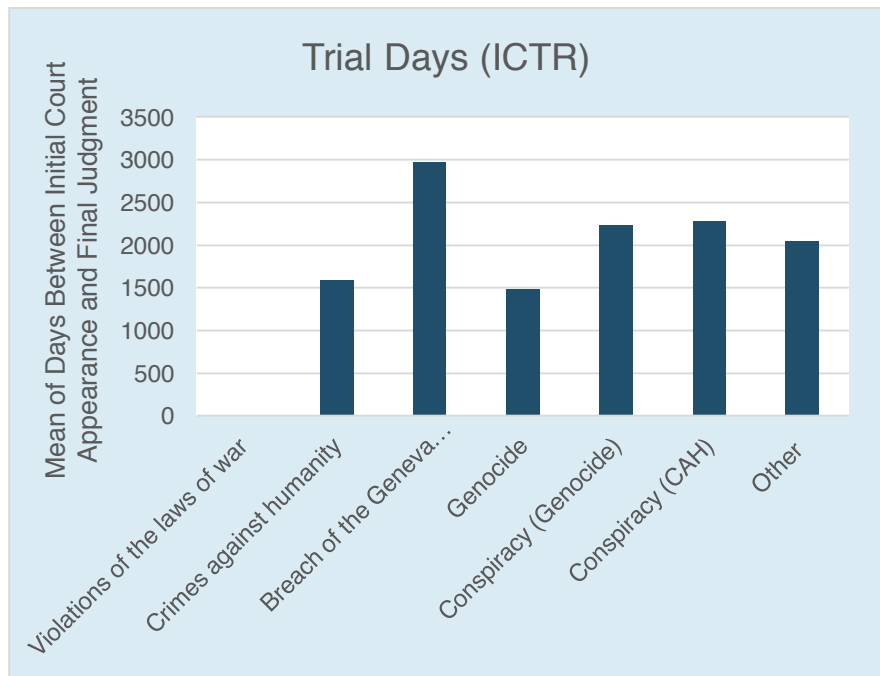


Figure 4: Difference in Means Test for Trial Days (ICTR)

ICTY cases, figure 3 shows the drastic increase in trial days between that of crimes against humanity and genocide; it also shows the increase in trial days when conspiracy to commit genocide is convicted. In comparison, figure 4 representative of information extracted from the ICTR shows the opposite effect, with genocide taking fewer days to between the initial court appearance and the final judgment. Both signify that a genocide conviction impacts trial proceedings. In the case of the ICTY, trials often came years after the conflict, meaning there was already a delayed response to convictions due

to an absence of defendants to try. The

opposite is true for the ICTR. The court, established in 1995, only a year after Rwanda's

genocide, genocide trials were quick

in an attempt to convict as many

heinous criminals as quickly as

possible. Due to the UNSC

Resolution 978, UN member states

were required to arrest and deliver

any person suspected of participating

in the 1994 genocide, leaving a

wealth of genocide cases to

prosecute.

A similar phenomenon

happens when analyzing the amount

of days between a defendant's arrest

until their initial appearance in court. As expressed in table 3, the ICTY takes a significantly

Table 3: Days Arrest to Appearance in Court (ICTY)

Days Arrest to Appearance in Court (ICTY)	
Genocide	Mean
Not convicted	115.93878
Convicted	273.83333

Table 4: Days Arrest to Appearance in Court (ICTR)

Days Arrest to Appearance in Court (ICTR)	
Genocide	Mean
Not convicted	156.46154
Convicted	124.73913

longer time to build their case against defendant's convicted for genocide than they do for others. On the other hand, the ICTR, represented in table 4, acts quicker in cases of genocide between arrest and the initial court appearance. In the ICTY, the average amount of days between arrest and initial appearance in court is increased by over 150 days when genocide is convicted. In the case of the ICTR, days from arrest to initial appearance in court are sped up by a month to address what were considered the most heinous violations of international law, which in the case of ICTR's speed of indictment, is significant.

In absolute numbers, the difference in trial days is drastic. The difference in means test

Table 5: Difference in Means Test (Trial Days for ICTY)

Difference in Means Test (Trial Days for ICTY)	
Trial Days	
Crimes against humanity not convicted	187.73***
Crimes against humanity convicted	192.85
Genocide not convicted	181.8118***
Genocide convicted	375**

\* = Significant at  $p=.05$ , \*\* = Significant at  $p<.05$ , \*\*\* = Significant at  $p<.01$ .

expressed in table 5 shows the average amount of trial days during the ICTY when crimes against humanity is not convicted, and the increase in number of trial days as the effect when crimes against humanity is convicted, meaning the amount of days increased by an average of 5.12 days when crimes against humanity was convicted over the average amount of trial days without the conviction. However,

the finding is not statistically

significant. The average trial days without a conviction of crimes against humanity is



approximately 187 days. When a defendant is convicted with crimes against humanity, the amount of trial days is increased by 5 days. On the other hand, the same difference in means comparison of trial days when it comes to genocide convictions is represented. The average trial days without a conviction for genocide is 182 days. When a defendant is convicted with genocide, the amount of trial days increases by 193 days. This strongly supports the claim that genocide's primacy over other crimes was

Table 6: Difference in Means Test for Initial Sentence in Years

Difference in Means Test (Initial Sentence)	
Initial Sentence (years)	
Crimes against humanity not convicted	9.39**
Crimes against humanity convicted	41.83***
Genocide not convicted	13.86***
Genocide convicted	69.22***

\* = Significant at  $p=.05$ , \*\* = Significant at  $p<.05$ , \*\*\* = Significant at  $p<.01$ .

evident in the ICTY, as its conviction more than doubles the length of genocide trials versus trials where genocide is not convicted.

The second important distinction that strongly supports genocide's primacy over crimes against humanity and other crimes is the impact a genocide conviction has on sentence duration. The dataset analyzed includes both the original sentence and appealed sentences if the defendant appealed the decision. The following regressions express the difference in years between the average sentence and when crimes against humanity is convicted, as well as the difference genocide is convicted. Table 6 expresses the regression around initial years. When crimes against

Table 7: Difference in Means Test for Appealed Sentence in Years

Difference in Means Test (Appealed Sentence)	
Appealed Sentence (years)	Coefficient
Crimes against humanity not convicted	8.11
Crimes against humanity convicted	41.93***
Genocide not convicted	14.66***
Genocide convicted	57.16***

\* = Significant at  $p=.05$ , \*\* = Significant at  $p<.05$ , \*\*\* = Significant at  $p<.01$ .

humanity is not convicted, the average sentence is 9 years, and increases by 32 years when crimes against humanity is convicted. On the other hand, when genocide is not convicted, the average initial sentence is 14 years and increases by 55 years.<sup>5</sup> A similar pattern is present in cases that are appealed. Table 7 expresses that appealed sentences convicting crimes against humanity increase by 34 years from 8 years in appealed cases, and cases of genocide increase by 43 years from 15

years. Throughout analysis of ICTY and

ICTR cases, these numbers support strongly that genocide has primacy over crimes against humanity and similarly with other crimes charged in the tribunals.

The importance of this analysis is that most find it reasonable that someone should be given a harsher sentence for genocide. However, this is the inner workings of Holocaust memory at play. When people think genocide, they relate the word to numbers and severity. Legally, there is no difference in severity between genocide and crimes against humanity; the difference lies in the identity of the abused, and the intentionality of the act. When comparing two

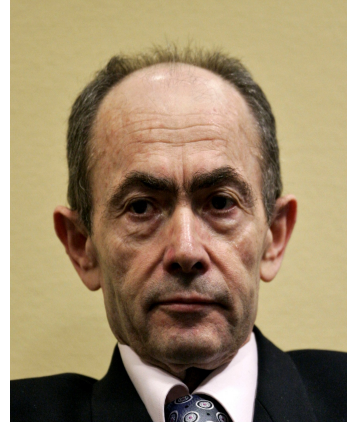
<sup>5</sup> The data analysis uses 100 to represent a life sentence. The increase in sentence is therefore not an absolute figure, but representative of the drastic increase due to a significant amount of life sentences given for genocide convictions. These numbers should not be accepted as absolute, but rather seen as representing the trend seen that genocide sentences are harsher than those sentenced for other crimes.

defendants who committed the same abusive acts that fall under different laws, it hardly seems right that one receives a harsher punishment than another.

Take for example the case of Momir Nikolic. Nikolic, the assistant commander for security and intelligence of the Bratunac Brigade of the Bosnian Serb Army, was charged with crimes against humanity in the ICTY after committing the following crimes:



*Figure 5: Momir Nikolic, ICTY*



*Figure 6: Zdravko Tolimir, ICTY*

Nikolić participated in the murder of thousands of Bosnian Muslim civilians, including men, women, children and elderly persons. He participated in the cruel and inhumane treatment of Bosnian Muslim civilians, including severe beatings at Potočari and in detention facilities in Bratunac and Zvornik. He terrorised Bosnian Muslim civilians in Srebrenica and Potočari. He destroyed personal property and effects belonging to the Bosnian Muslims. He forcibly transferred Bosnian Muslims from the Srebrenica enclave (“Momir Nikolic”).

His conviction for persecutions on political, racial and religious grounds was classified as crimes against humanity rather than genocide, despite his targeted attacks on the Bosnian Muslim population. Nikolic was sentenced with 27 years and upon appeal, had his sentence reduced to 20 years. Other defendants who committed similar crimes but were charged with genocide, received

life sentences. A comparison case study is that of Zdravko Tolimir, the Assistant Commander for Intelligence and Security of the Bosnian Serb Army (VRS) Main Staff. Tolimir was sentenced to life imprisonment through joint criminal enterprise (JCE) for the murders of three Bosnian Muslim men from Žepa, and knowledge of a genocidal intent by JCE members and a shared genocidal intent himself. The key difference between Nikolic and Tolimir are twofold: Nikolic actively committed genocide while being convicted with crimes against humanity, while Tolimir was convicted of genocide through JCE.

This comparison does not represent that Tolimir did not deserve a life sentence or a conviction for genocide; surely his acts were heinous and deserving of such a conviction. Rather, this comparison is meant to illuminate genocide's primacy over crimes against humanity, as Nikolic, who actively murdered Bosnian Muslim civilians was given a lighter sentence, which was further reduced upon appeal. The statistical analysis previously analyzed strongly suggests that conviction for genocide results in harsher sentences than other crimes. This comparison gives a face to the defendants who commit crimes of a similar nature, with lighter sentences. Here in lies the struggle for justice when crimes against humanity is not charged as harshly as genocide when deserving.

In the ICTR, the tribunal was created to prosecute genocide in Rwanda, making the case of genocide a source of common knowledge (Sluiter and Vriend 92). This works against the favor of the defendant, trying only Hutu members for genocide and not indicting any RPF members for similar crimes committed (Sluiter and Vriend 92). The RPF, or the Rwandan Patriotic Front, is the leading political party in Rwanda, led by current President Paul Kagame. The RPF in Rwanda is also attributed with ending the genocide in Rwanda by suppressing the military and civilians that were carrying out the genocide. The RPF is majority Tutsi; Tutsi were

the main target group during the genocide in 1994. Organizations such as Human Rights Watch have documented the violations of international law that the RPF committed, including murdering thousands to end the genocide and to establish their dominance in the aftermath through mass executions of civilians (“The Rwandan Patriotic Front”). The RPF are equally documented to have committed human rights abuses before and during the genocide. The Gersony report, documenting human rights abuses by the RPF, was given to the U.N. High Commissioner for Refugees; The U.N. decided not to release the report due to the unstable nature of the Rwandan government, with this decision supported by the US government (“The Rwandan Patriotic Front”). In this sense, the UN was operating under a political requirement for which human rights abuses would be exposed. As such, RPF members were protected by the political tensions between the Rwandan government, UN, and US and would not be tried at the UN ad hoc tribunal for Rwanda. While genocide’s primacy is legally present, political requirements also determine who is prosecuted.

The ICTR’s Kambanda case was also the first time that a head of government was convicted of genocide (“United Nations Mechanism”). As Schabas states, “genocide was generally... committed under the direction or, at the very least, with the benign complicity of the State where it took place” (1). Written as a doctrine to govern and enforce tolerance, it was one of few where heads of states were not only susceptible to retribution, but often the most likely to be indicted for the crime of genocide (Schabas). In Case no. ICTR 97-23-S, Prosecutor v. Kambanda, the prime minister of Rwanda in the ICTR was not only the first time a defendant plead guilty to committing genocide, but was also the first time a head of government was convicted of genocide, resulting in life imprisonment (“United Nations Mechanism”).

The first genocide trial by the ICTR on January 9, 1997, resulted in the interpretation of the 1948 Geneva Conventions, setting precedent in the trial of Jean-Paul Akayesu and stating that rape is considered a tool of genocide (“United Nations Mechanism”). Found guilty of genocide on September 2, 1998, he was the first to be convicted of genocide in an international court (“Rwanda: The First Conviction”). The trial was also a landmark case for international law due to the chamber’s judgment interpreting of the genocide convention. In the trial against Akayesu, the ICTR decided to adhere to the spirit of the drafters of the convention, saying that: “it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was patently to ensure the protection of any stable and permanent group” (“Chamber I: Judgment”). This definition of group is more expansive and inclusive, allowing groups that arguably do not fall under the four categories to gain protection under the Convention. The Chamber’s definition of group equally draws back to Lemkin’s perception, before specific groups were listed as part of the law and when the original intent was to protect any group that existed in both a physical, cultural, and social sense.

Cases such as the Prosecutor v. Akayesu provide reasoning for why genocide is often prosecuted more harshly. Genocide trials, often charging heads of state, set precedents in international criminal law. Jean Paul Akayesu, a former school teacher, was appointed bourgmestre, and therefore had control of his commune, the police, and the gendarmes at the disposal of the communes; as a leader during the genocide, he facilitated rape as a tool of genocide (“ICTR, The Prosecutor v. Jean-Paul Akayesu”). Such cases help explain the high severity of sentences for genocide. Often, the worst abusers of human rights are those with office jobs, facilitating torture, rape, and killings with a genocidal ideology. There are many such actors involved in the violence that led to the creation of the ICTY and ICTR, and as such, gives a

perspective as to why genocide is tried more harshly than crimes against humanity. Large scale actors are those prosecuted under joint criminal enterprise, and therefore responsible for genocidal actions of those they lead.

As discussed by Akhavan, the one clear sign that a hierarchy of international crimes exists is in sentence lengths (59). As shown in the previously given statistical analysis, both the ICTY and ICTR produce an average longer sentence for defendants charged with genocide than those charged with crimes against humanity. The ICTY, ICTR, and ICC all have different protocols written into their statutes to define sentence durations, expressing evidence of rule of law; despite the different statutes on sentence durations, the same trend is apparent in both the ICTY and ICTR. The ICTY and ICTR both include the statement that,

The penalty imposed ‘shall be limited to imprisonment’ (thereby excluding the death penalty, forced labor, and similar punishments). Although the ‘general practice regarding prison sentences’ in former Yugoslavia and Rwanda respectively shall be considered... [but] ‘is not bound by any maximum term of imprisonment applied in a national system’ (Akhavan 59).

The ICC on the other hand, limits sentences to a maximum of 30 years and bases term of life imprisonments on cases that can be “justified by the extreme gravity of the crime and the individual circumstances of the convicted person” (Akhavan 59). The ICTY and ICTR have constructed their own sentencing parameters based on the foundations presented (Henham 209).

In the Prosecutor v. Krstić (IT-98-33) in the ICTY it was stated that,

A high rank in the military or political field does not, in itself, lead to a harsher sentence. But a person who abuses or wrongly exercises power deserves a harsher sentence than an individual acting on his or her own. The consequences of a

person's acts are necessarily more serious if he is at the apex of a military or political hierarchy and uses his position to commit crimes (Henham 209-210).

International criminal law, uses this concept to subjectively impose sentences based on the status of the defendant. Rather than adhere to a concept of equal sentences for equal crimes, the position and class of the defendant greatly impacts their sentence duration. As a result, defendants of genocide statistically gain longer sentences than those tried for crimes against humanity or war crimes.

This analysis is not an absolute science and is not to be used to say that those tried with genocide have been unfairly charged. Those convicted of genocide are often the heads of state and military personnel who were in charge of overseeing the military or groups that committed genocide. Such leaders of mass murder typically make up the majority of those indicted for genocide in tribunals like the ICTY and ICTR. Life sentences are given far more frequently to those convicted of genocide than those convicted only with crimes against humanity. Life sentences are given primarily to those who “command responsibility, or exercis[e] greater levels of political and military power” (Henham 211). Those being tried for crimes against humanity are therefore, less likely to be sentenced to life imprisonment due to their lack of power during the time the crime was committed. Convicting the heads of states and organizations for genocide is representative of the overall destruction and is used as a means to gain justice for victims. Landmark cases such as that of Slobodan Milosevic, the president of Serbia at the time of the war, and Jean Paul Akayesu, Mayor of Taba during the genocide in Rwanda, were used to set precedent and gain justice for victims. Milosevic died in custody before the conclusion of his trial. The trial of Akayesu on the other hand, set a precedent that rape can specifically be used as a tool of genocide.



The practice of giving life sentences to large-scale architects of genocide rather than point and shoot killers who commit genocide reinforces the belief that genocide should be prosecuted more seriously than crimes against humanity. The sentence disparity present in the ICTY and ICTR support that genocide has primacy within international law. It is appropriate in many cases that high stake holders and politicians such as Milosevic and Akayesu are charged with life sentences, since they have not only power to prevent and stop genocide from occurring, but are criminally liable under joint criminal enterprise. However, defendants like Momir Nikolic who are charged with crimes against humanity should be sentenced with a similar harshness.

## THE EFFECT OF GENOCIDE'S PRIMACY ON VICTIMS AND WITNESSES

The perceived hierarchy within international law has altered the way victims seek justice. Contemporary tribunals in both the international and the national sphere advocate for a declaration that their experience is worthy of the title *genocide*. In this manner, genocide is used as a bargaining chip for victims of human rights abuses who seek justice and reparations. The hybrid tribunal in Cambodia and the domestic tribunal in Argentina can be seen as examples. These tribunals act as a mechanism for communities of survivors to regain subjectivity, meaning they regain their individuality and agency by having the victim group's suffering acknowledged by charging genocide (Sands). However, the conviction for genocide denounces perpetrators - rather than allowing these individuals to reclaim their subjectivity, they are associated with a group of perpetrators (Sands). As both international advocacy groups and victims seek the prosecution of genocide, the purpose of Lemkin's term is misconstrued in courts, leaving civil parties in tribunals devoid of justice through lofty expectations of genocide charges. The French civil law system, used in the Cambodia tribunals allows victims to participate during trial with a three-tiered legal system: prosecution, defense, and civil parties (Ciorciari & Heindel 8). Analyzing the use of genocide in national tribunals, specifically Cambodia and Argentina, genocide's primacy impacts civil society in very different ways.

Ciorciari and Heindel assert that in the Cambodia tribunal, the civil parties involved in the tribunal have heightened expectations for the court (56). In the national courts in Argentina, a similar mentality was adopted, saying that the court would bring forward and allow for "distinctive characteristics of the offenses prosecuted in this trial to contribute to a deeper understanding of the past" (Riveiro, Rosende, & Zylberman 60). In the case of Argentina, it was

described as the court's responsibility to declare genocide (Riveiro, Rosende, & Zylberman 60). Both tribunals effectively have upheld the notion that genocide is symbolically a hierarchical crime that holds both great magnitude and moral importance in comparison to other international crimes to both victims and subsequently, the prosecution of international law.

However, the two national tribunals upheld the importance of genocide above crimes against humanity and war crimes in different ways. Between the years 1975-1979, the Communist Party of Kampuchea (CPK) commonly referred to as the Khmer Rouge, perpetrated genocide in Cambodia against the Cham Muslims and Vietnamese minorities. Today, civil society and victims in Cambodia are continuing to seek justice, as The Extraordinary Chambers in the Courts of Cambodia (ECCC), the national court considered a hybrid between Cambodia and the UN, has spent the past years prosecuting trials for crimes against humanity with only three convictions. Since the tribunal's creation in 2006, over \$200 million has been spent on the tribunal and only now are genocide trials beginning. As Kilong Ung, a victim of the conflict in Cambodia states, "they are never going to catch the guy who starved my parents to death..." (Campbell). The ECCC has sought justice for victims in what is commonly called the Cambodian genocide, but this justice has not come soon enough for the 1.7 million killed by the Khmer Rouge between 1975 and 1979. Without adequate retributive justice and no conviction for genocide, the case of Cambodia only legally can express that crimes against humanity have been charged. As such, the civil parties involved in the Cambodian trials continue to wait for the conviction for genocide as they seek justice.

In Argentina, a strong human rights social movement developed and sought genocide convictions similar to the Cambodian civil party. The social movement within Argentina created a narrative that allowed the victims of the conflict between 1976 and 1983 to be visible rather

than be seen as outsiders (Crenzel 156-160). In the case of Argentina, this social movement and the court ended the period of immunity in Argentina and led to the conviction of 81 people as of 2010 (“Atrocities in Argentina”). The Madrid Criminal Court was hesitant to define the Argentinian experience as genocide by identifying the victim group as “national”; however, convictions have overwhelmingly been charging genocide in the Federal Criminal Oral Court. The court determined that the military regime in Argentina had committed genocide against leftist political opponents and had victimized tens of thousands. The court rulings charged genocide even to the degree of rejecting the exclusion of a genocide charge due to “the principle of congruity” (Esparza, Huttenbach & Feierstein). Specifically, the court made a case for the Argentinian experience being in need of genocide convictions in the case of Etchecolatz (Esparza, Huttenbach & Feierstein). Contrary to the Cambodian trials, the Argentinian case upheld genocide’s primacy through its overwhelming use of the charge. A key reason for this is that Argentinian law defines genocide more broadly than the Genocide Convention. Similar to the ICTY and ICTR, different ways of prosecuting genocide represent genocide’s primacy in international law. In both cases of Cambodia and Argentina, genocide is seen as a way to regain autonomy and justice in the aftermath of conflict.

As genocide’s primacy in international criminal law developed, victim and witness rights and protections during trial began to shift. Each judicial body has defined victim differently, and has expanded protections to encompass different understandings of victim. The ICTY and ICTR for example, operated with the definition of a victim being “a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed” (Henham 228). When written into the Rome Statute for the ICC, the definition expanded, beginning with Rule 85 (a) declaring a victim to be,

natural persons who have suffered harm”, but following this clause with Rule 85 (b) dictating that “organisations and institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes (Henham 228).

The inclusion of statements defining the victim is reflective of the moral realm developed by Holocaust memory and consciousness. Addressing genocide and other crimes as examples of moral failings enables the use of law outside of its strictly retributive function.

Often witnesses in international criminal tribunals are victims of the crimes themselves. For this reason, both the ICTY and the ICTR incorporated legislation in their Statutes specifically protecting victims and witnesses. Article 22 of the ICTY and Article 21 of the ICTR state that: “the International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim’s identity” (Henham 229). Victim and witness rights and protections are allotted to cases of all international criminal trials, not genocide specifically. However, the mentality that precedes genocide cases provides more reason to protect victims and witnesses that are involved in the proceedings. These tribunals were perceived as a means to gain justice for victims. Protection of victims is an inherent part of international courts, unlike domestic courts (Henham 230).

Working to better conditions for victims and witnesses in international criminal tribunals, there is good cause to understand why the primacy of genocide would increase protection and rights. International and domestic courts have different models for how to use victims and witnesses during trial (Cockayne). For tribunals and international bodies of law, victims and

witnesses are central: “The Tribunal is, according to this method, there as a mouthpiece, a chance for their voices to be heard, for them to participate in the formation of the historical record and to ensure that these crimes are not forgotten” (Henham 230). The key word here is *forgotten*, which mentally directs many towards the motto “never again”. As a result of rise of holocaust memory, pedagogy has become essential to ending genocide, since the very threat of the crime is to eradicate the group life and culture and if successful, erasing the memory of the group’s suffering and existence. In words made famous by Hitler, he asked, “who remembers the Armenians?” referring to the international community’s ability to forget the intended extermination of the Armenian population (Schabas 1). The hierarchical understanding of genocide enacts the moral call to protect groups, leading to better protection of victims and witnesses in trial. In contrast, domestic courts use victims and witnesses as tools in the pursuit for a conviction of the defendant (Henham 230). While a hierarchy exists between genocide and other international crimes, a hierarchy between international and domestic crimes exists. As a result of these hierarchies based on moral claims, crimes that threaten the international order cause better protections for witnesses and victims.

Victim’s rights for reparations in the genocide convention is one of the benefits to genocide’s primacy in international criminal law. A draft of the convention included victim’s rights to reparations: “When genocide is committed in a country by the government... or by sections of the population... the state shall grant to the survivors... redress of a nature and in an amount to be determined by the United Nations” (Zegveld 97). The drafters removed this clause from the final draft, believing that individual courts should have jurisdiction over decisions regarding redress and reparations. Both the ICTY and ICTR do not allow victims and witnesses to seek reparations from the convicts (Zegveld 97-98).

Upon the creation of the International Criminal Court, victims and witnesses reached an apex in terms of rights and protections. According to article 75, paragraph 1 and 2, “the ICC may award reparations to the benefit of individual victims, and it may do so directly against a convicted person” (Zegveld 98). Being the first statute to include reparations for victims and witnesses, the Rome Statute embodies the impacts of hierarchical crimes. As international law has developed, new courts and legislation have focused on victims and especially victim groups in genocide. While the origin of this benefit was only considered at the creation of the genocide convention, by the implementation of the ICC, the court has written protection of victims and witnesses into its laws and jurisdiction.

However, there are significant drawbacks to being a victim or witness to the ultimate crime. While acting as a witness in court or even the act of reciting stories of victimization enables victims to regain their subjectivity (Akhavan 170), which is typically viewed to be positive. As with the success of the Truth and Reconciliation Commission in South Africa and the Gacaca courts in Rwanda, witnesses and victims have the opportunity to tell their stories. On the other hand, there are significant drawbacks to this concept of being a subject open for reevaluation. To begin, the victim is often revictimized, having to relive their experiences through telling their story. In cases of genocide specifically, they align themselves with a victim group that often is still in considerable danger during the time of the trials. If a victim is called in to be a witness in a trial for the count of genocide, they are put in harm’s way upon returning home, and equally, they become a figurehead for their entire persecuted group, which are still threatened by a group of perpetrators who may retaliate as a result of the testimony and trial. An additional consequence is becoming vulnerable by acting as a witness and recounting experiences with the possibility of the defendant being acquitted: this not only has potential for

future danger for the witness, but also continued suffering from telling their story only to be told their testimony wasn't enough to convict. While there is not significant literature proving this is the case, fear is a very powerful deterrent to becoming a witness. Since cases of genocide are often associated with some of the largest conflicts in terms of casualties like the Holocaust, these are conflicts where there is a large amount of fear still present.

As a result, this fear and inability to communicate experiences of genocide often lead to survivors choosing not to share their experiences in trial and in life generally. In a project called Forced Labour that recorded over eight hundred interviews, one of the interviewees stated,

People could not stand my story. I became aware of that very quickly; you had to keep your mouth shut. What are you imagining, they would ask, and I was stigmatized as a person with a wild imagination ... which fortunately I am. I am grateful for that; my imagination is so rich that I am forced to speak the truth. They didn't appreciate that, so I shut up. Why should I open up? Even now after sixty years I did not tell my story to my children (Leydesdorff 109).

A powerful deterrent factor, the fear of a survivor's story being denounced or misunderstood prevents them from speaking out about their experiences. In court cases that define genocide as the crime of all crimes, with high publicity, there is good cause to be fearful of publicly expressing stories of victimization of genocide.

In a similar manner, the conviction for genocide due to its moral weight in the international community is used to mold the experience of atrocity. Mark Osiel, a law professor at Iowa Law with a focus on law's response to mass atrocities has analyzed courts as a form of political commentary. In the case of Argentina's Dirty War, genocide was used abundantly to describe a majority of crimes committed at the time. According to Osiel, trials that prosecute



mass atrocities are responsible for the creation of a narrative that encompasses the entirety of the national experience (Osiel). In his opinion, using trials as a form of storytelling is not an incorrect use of law, but is something that should be capitalized upon as it is a “transformative opportunity in the lives of individuals and societies” (Osiel). International courts have a history of acting as show trials, with the Nuremberg trials being an exemplary case. The trials are created with the assumption that defendants are guilty, and with full intention to prosecute perpetrators as a means to dictate the country’s new narrative and seek justice for those persecuted.

Trials have a powerful impact on the historical narrative of mass atrocities. For example, the Nuremberg Trials played a role in the resurrection of Holocaust memory in the United States. However, the Argentinian case shows the intentional use of genocide to tell the story of mass atrocity during the Dirty War. These trials acted in a similar fashion to that of the Nuremberg trials - assuming guilt and passing judgments as a means to define the conflict in its entirety as genocide. Genocide’s developing primacy over crimes against humanity leads those seeking justice to believe that a conviction for genocide is the means to achieve justice for victims and the nation. International tribunals, while often setting precedent worldwide, are not the only courts aiding this perception of genocide. Rather than convicting criminals of crimes as their actions apply to legal definitions and prior case law, tribunals use the moral weight genocide now carries to define the conflict as genocide - a crime that has primacy over all other international crimes. Genocide’s growing primacy over crimes against humanity leads victims to seek genocide convictions as a hope to have their suffering heard and gain justice for victims.

## CONCLUSION

*“Only man has law. Law must be built, do you understand me? You must build the law.”*

- Raphael Lemkin

Captured within this research is important insight into how international law works or does not work parallel to societal consciousness, but intersects with it. Genocide’s primacy, beginning with Lemkin’s moral battle to outlaw persecution of group life and intertwining within a political process and imbedding itself within society’s perception of the crime has equally impacted law. As seen in both tribunals for the former Yugoslavia and Rwanda, genocide directly impacts both the duration of trial proceedings and sentence durations. The majority of this research is statistically significant and highly suggests that genocide’s primacy alters international tribunals. In a similar way, the weight the crime holds in court further impacts civil society and victims who seek justice through a retributive method. When genocide convictions are not delivered in a timely and abundant fashion, victims and civil society continue to wait and push for a legal declaration that they were victims of genocide.

The provided analysis does not seek to claim that genocide in these cases should not be charged or that these are not cases of genocide, but rather to detail effects of genocide’s primacy within international and national tribunals. Both the ICTY and the ICTR have convicted defendants of genocide, and as such, have established that the event was a genocide. Such was especially the case with the 1994 genocide in Rwanda. For Bosnia, the ICTY has limited the finding of genocide to the Srebrenica massacre. The Cambodian Genocide is a commonly used term to describe the massacres in Cambodia at the hand of the Khmer Rouge. Genocide trials are

now underway, though there has not been a genocide conviction as of yet, due to the tribunal's stage by stage process of crimes. Argentina, while not commonly associated with genocide literature, has received numerous genocide convictions in its national tribunal. Scholars continue to express different views on whether genocide occurred in Argentina, or more specifically, which groups were targeted in the case of Cambodia. However, the research explored strongly suggests that genocide convictions are sentenced more harshly, and that they significantly impact all parties involved in the court process.

Not only does this primacy have legal implications, but political implications. As seen in political debates over the case of the Armenian genocide, the term holds weight in the political sphere. Genocide has the power to be used as a trigger word to give good cause for either military or humanitarian intervention, but equally has retroactive power that forces countries like Turkey to accept guilt and pay reparations to living family of genocide victims. The definition of genocide has contracted since its creation by Raphael Lemkin and now carries enough moral weight to impact change – through both the United Nations Genocide Convention and through the use of the term in politics.

Since it now is ascertained that legally genocide has primacy over other crimes, it must equally be explored if genocide *should* have primacy - particularly when comparing the similarities and differences of genocide and crimes against humanity. Exploring the history of the development of these two laws, Lemkin originally sought to include genocide amongst The Hague Regulations of 1907 (Schabas 29). As it was Lemkin's mission in life to criminalize genocide, this does not necessarily mean that he saw The Hague Regulations, which were the first document to include crimes against civilians, as equivalent to genocide, but perhaps a means to achieve an end in criminalizing the term he created for the unnamed crime. However, this

information asks us to question the differences between crimes against humanity and genocide, two crimes that were criminalized in the fight to protect noncombatants. In order to put into perspective genocide's growing primacy, we must explore why it equally has primacy over crimes against humanity in court.

As explored previously, the creation of crimes against humanity as a crime is attributed to Hersch Lauterpacht. As stated in 1946, "Lauterpacht later reiterated the significance of the recognition of crimes against humanity in international law as affirming 'the existence of fundamental human rights superior to the law of the State and protected by international criminal sanction even if violated in pursuance of the law of the State'" (Vrdoljak). His work in many ways spearheaded the fight for civilian rights outside the context of war, and similarly helped shape international law as Lemkin did. However, Lauterpacht did not see Lemkin's "genocide" to be useful when he was already working to outlaw violence against civilians in the name of their group membership.

On the other hand, Lemkin pursued many avenues to criminalize genocide, including incorporating genocide into already existing structures like The Hague Regulations to criminalize genocide. When Lemkin worked with Robert Jackson in London in the 1940s, the indictment issued on 6 October 1945 through the London Charter for Nazi crimes included genocide within crimes against humanity (Vrdoljak). As the two crimes are integral to the inclusion of human rights within international law, and historically were paired together in the fight to criminalize genocide, it is important to look at where the two diverged.

Unlike genocide, a convention for crimes against humanity has not yet been created. However, an eminent group of scholars has drafted and proposed such a convention. Crimes against humanity were defined in the Charter of the International Military Tribunal, also known

as the Nuremberg Charter (“Judgment: Law Relating to War Crimes”). Since, definitions differ slightly as it is used in different cases. For the purpose of comparison, the following definition of crimes against humanity draws from the International Criminal Court’s Rome Statute:

“Crimes against humanity” include any of the following acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- murder;
- extermination;
- enslavement;
- deportation or forcible transfer of population;
- imprisonment;
- torture;
- rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- persecution against an identifiable group on political, racial, national, ethnic, cultural, religious or gender grounds;
- enforced disappearance of persons;
- the crime of apartheid;
- other inhumane acts of a similar character intentionally causing great suffering or serious bodily or mental injury.

Key words and phrases within the definition set crimes against humanity apart from genocide.

To begin, crimes against humanity must prove that the enlisted actions are “widespread or systematic” meaning they transgress distance or occur seemingly multiple times to prove

systematic. Unlike genocide's terminology, which requires proven "intent," crimes against humanity does not look at the psychological process of the perpetrator, but rather only needs to prove the physical element of the perpetrator's actions. The second distinction is that crimes against humanity specifies that the target for persecution is "any civilian population", meaning that the persecution does not have to take place during a time of war to a combatant, which is similar to genocide. Unlike genocide, the victim does not have to be targeted due to their membership in a specified group other than citizen.

Once again, this is a significant difference between genocide and crimes against humanity. The definition of genocide provided by the International Criminal Court's Rome Statute is as follows:

According to the Rome Statute, "genocide" means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

- killing members of the group;
- causing serious bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group;
- forcibly transferring children of the group to another group.

By specifying that genocide occurs to one of these four groups, it must be proven that the persecution occurred due to the victim's membership in one of these four groups. Furthermore, it must be proven by arguing the definition of these groups, as these definitions are often debatable. Looking further into case law, this definition for group membership is expanded. In the case of

the ICTR v. Akayesu, the Chamber used the *travaux preparatoires*, or record of negotiation from the Genocide Convention and interpreted the listed membership to “cover any stable or permanent group” (“Genocide [Article 2]”). While the necessity to belong to a group marks a key difference between genocide and crimes against humanity, its use in the ICTR shows the malleability of this phrase.

There are reasons why genocide gains a harsher sentence than crimes against humanity, but it must be considered if crimes against humanity should not have equal status to genocide in international criminal law. Both crimes are concerned with the protection of non-combatants, however, crimes against humanity takes an individualist approach, while genocide takes a group based approach. Neither one comments on a numerical value associated with the legal definition – if anything, crimes against humanity legally expresses a potential numerical value by using the word “systematic”, which is proven through multiple actions. Genocide instead is more commonly associated with large scale mass atrocities, which tends to be necessary to prove intent.

Importantly, the association that the term genocide has with intervention and justice is what should be questioned – or why this is not associated with crimes against humanity? The statistical analysis conducted strongly suggests that genocide impacts the legal process and leads to harsher sentences, and similarly, harsher sentences are visible for being convicted of crimes against humanity, but not to the same extent as a genocide conviction. The longer trial process that occurred in the ICTY is not inherently bad. Longer trial proceedings can be a sign of thorough procedure, but in this case, why doesn't crimes against humanity enacting a similar trend?

To an even greater extent it must be questioned why genocide specifically impacts civil society's reclamation of autonomy and why courts like Argentina seek to over prosecute genocide rather than crimes against humanity? The conducted research shows that within international law today, genocide has primacy over crimes against humanity. However, they both stemmed from an effort to protect noncombatants and to protect human rights and infuse them into the legal system. Today, the media and policy makers toe the line of when to use the term genocide to enact a reaction for intervention.

The importance of this research is twofold: firstly, to determine how genocide's primacy developed and if it has embedded itself into law cases. Indeed, genocide has primacy in international law, but the second reason for importance is to question why conflicts in similar need of intervention and international attention, are not considered with as much importance or prosecuted as harshly. Lawyers such as Schabas and Akhavan do not see a legal difference between the two cases, and those in states of suffering will not necessarily differentiate between their suffering as a case of crimes against humanity or one of genocide. The difference is limited to a difference between protecting the individual and protecting the group or social fabric of a group of people.

Since the integration of human rights into international criminal law, headway has been made to protect people against mass atrocities or more largely, to seek justice through the legal system. Now it is clear that genocide has come to be the apex of international law and that its primacy over other crimes impacts witnesses, victims, and defendants. Further research must explore what the moral dimensions of these results are – whether this is a positive trend that has emerged in international law or one to be reconsidered. Furthermore, next steps must seek to understand why genocide and crimes against humanity, two crimes created to protect human



rights in the international sphere are being ranked against one another in the social sphere. When will it no longer be necessary to call a conflict genocide to see a response, but when saying that crimes against humanity are occurring will create a similar response to act?

In summation, genocide's primacy exists and is now embedded into international law. As such, it impacts all actors in the legal process, witnesses, victims, and defendants. Lemkin's legacy lives on as large strides have been taken to not only criminalize genocide, but to prevent and put an end to the crime. Genocide's primacy and the perception it has gained amongst the international community is largely a reason for this success. The international community's view of genocide has shifted over time and genocide now has primacy in both international and national tribunals. Now it is time to question which conflicts take precedent for intervention and protection of human rights. Genocide must be prevented, and scholars and practitioners have come together to increase the importance of this mission, but now it is time to question why genocide and crimes against humanity, crimes that are considered to be legally equivalent, are prosecuted with differing severities.

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