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Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (editors)

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Examining the Origins of Crimes against Humanity and Genocide

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Genocide and crimes against humanity, as we know them today, are two legal concepts that overlap in significant ways. However, they have assumed clear independence as separate crimes under international criminal law. For instance, one may be convicted for both genocide and crimes against humanity cumulatively for the same set of facts. Unlike certain specified crimes against humanity that have been determined by international criminal tribunals to be incapable of cumulative convictions (such as murder being subsumed by extermination), neither genocide nor any crime against humanity may subsume one another.

There is some debate as to whether such divergence was, at the origin of the creation of both terms, intentional. Both terms came into existence to describe similar mass atrocities: the Ottoman government's systematic extermination of its minority Armenian subjects from their histor-

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ic homeland within the territory constituting the present-day Republic of Turkey from 1915 to 1918; and the systematic extermination of six million Jews by the Nazi regime and its collaborators, which took place throughout Nazi Germany and German-occupied territories in Europe between 1941 and 1945.

That these two legal terms emerged in the twentieth century should not be taken to correlate with the historical emergence of the underlying acts of genocide or crimes against humanity. Indeed, accounts of genocide and crimes against humanity may be traced as far back as antiquity, even arising out of Greek mythology; Homer quotes King Agamemnon's quintessential pronouncement of root-and-branch genocide:

We are not going to leave a single one of them alive, down to the babies in their mothers' wombs – not even they must live. The whole people must be wiped out of existence, and none be left to think of them and shed a tear.¹

While it is unclear whether this pronouncement had any basis in fact, there are more factually reliable, and widely known, cases that might fall under the modern definition of genocide and crimes against humanity. These include the destruction of Carthage, the destruction of the Albigenes and Waldenses, the Crusades, the march of the Teutonic Knights, the destruction of the Christians under the Ottoman Empire, the massacres of the Herreros in southern Africa, the 1894–1896 massacres of the Armenians, followed by their extermination in 1915–1918, the slaughter of Christian Assyrians in 1933, the destruction of the Maronites, and the pogroms against the Jews in Czarist Russia and Romania. Indeed, as the world's most famous genocide scholar, Raphael Lemkin, stated: "By destroying six million Jews, several million Slavs, and almost all the Gypsies of Europe, the Nazis have focused our attention more sharply on this phenomenon, which was not new in itself".²

It can thus be said that, irrespective of a variety of root causes and rationalisations, humanity has always nurtured conceptions of social difference that generate a sense of group belonging and group exclusion. Being a member of a group may enable a person to cope with a threatened

¹ Quoted in Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies*, Yale University Press, New Haven, NJ, 1990, p. 58.

² See Raphael Lemkin, "Genocide as a Crime under International Law", in *United Nations Bulletin*, 15 January 1948, vol. 4, p. 70.

identity and serve the need for connectedness to other human beings. Within a group, shared enmity towards another group may intensify feelings of belonging and strengthen group identity.³ Such sentiment and antagonism, in turn, may often lead to violent action towards the other group. In this way, the origins of crimes against humanity and genocide, historically or anthropologically speaking, can be traced back for centuries.

Nonetheless, despite the long-standing existence of the acts predicated crimes against humanity and genocide, efforts to prohibit such acts as international crimes did not arise until after the First and Second World Wars. The origins of the criminal prosecution of genocide and crimes against humanity began with the recognition at the beginning of the twentieth century that the persecution of certain groups was not only morally reprehensible but should also incur legal responsibility.

13.1. Influence of the First World War

On 24 May 1915 the allied governments of France, Britain and Russia made a joint declaration denouncing a series of massacres against Armenians in the Ottoman Empire, which had begun to occur in the context of the First World War ('1915 Declaration'). This marked the most notorious instance in recorded history of the use of a phrase that was to become one of the most powerful concepts of international law – “crimes against humanity”.⁴ The 1915 Declaration reads as follows:

For about a month the Kurd and Turkish populations of Armenia has been massacring Armenians with the connivance and often assistance of Ottoman authorities. Such massacres took place in middle April at Erzerum, Dertchun, Eguine, Bitlis, Mouch, Sassoun, Zeitoun, and through Cilici[a]. Inhabitants of about one hundred villages near Van were all murdered. In that city, [the] Armenian quarter is besieged by Kurds. At the same time in Constantinople [the] government ill-treats inoffensive Armenian population. *In view of these new crimes of Turkey against humanity and civilization* the Allied governments announce publicly to the Sublime Porte that they will hold personally responsible [for] these crimes

³ Ervin Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence*, Cambridge University Press, Cambridge, 1989, p. 49.

⁴ William A. Schabas, *Genocide in International Law*, Cambridge University Press, Cambridge, 2000, pp. 16–17.

all members of the Ottoman government and those of their agents who are implicated in such massacres.⁵

Such a pronouncement differed drastically from any previously made in the international legal or political arena. Instead of conforming to the status quo and religiously observing state sovereignty and immunity of heads of state, the pronouncement made a specific threat of individualised sanctions and accountability for government officials involved in atrocities against their own citizens. The language of the pronouncement has been traced to the so-called Martens Clause, which was first inserted, at the suggestion of the Russian delegate at the Hague Peace Conference of 1899, in the preamble of the 1899 Hague Convention II with respect to the Laws and Customs of War on Land, and then restated (in a slightly modified form) in the preamble of the 1907 Hague Convention IV on the same matter. It reads as follows:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, *from the laws of humanity, and the dictates of the public conscience*.⁶

Since 1907 the Martens Clause has been hailed as a significant turning point in the history of international humanitarian law. It arguably represents the first recognition of the existence of international legal rules embodying humanitarian considerations, and the notion that these rules are no less binding than those motivated by military or political concerns. Before the Martens Clause, international treaties and declarations had

⁵ Dispatch sent on 29 May 1915 by US Secretary of State, William Jennings Bryan, to the US Embassy in Constantinople (now Istanbul), Turkey to be forwarded to the Turkish government. Document No. RG 59, 867.4016/67, US National Archives (emphasis added).

⁶ Convention Respecting the Laws and Customs of War by Land (Hague IV), 18 October 1907, [1910] United Kingdom Treaty Series 9, preamble (emphasis added). See also Convention with Respect to the Laws and Customs of War on Land (Hague II), 29 July 1899, 32 Stat. 1803, Treaty Series 403, preamble: “Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience”.

simply proclaimed the importance of humanitarian considerations, leaving each belligerent to decide for itself whether its acts were humane and calling upon states to uphold moral principles.⁷ By contrast, the Martens Clause proclaimed the existence of principles or rules of customary international law arising not only from state practice, but also from humanity and the public conscience.⁸

The Armenian genocide is conventionally held to have started on 24 April 1915, the day Ottoman authorities rounded up and arrested some 250 Armenian intellectuals and community leaders in Constantinople (now Istanbul). Armenians of the Ottoman Empire had already been subjected to massacres in the mid-1890s, with estimates of the dead ranging from 80,000 to 300,000.⁹ The massacres were carried out during the reign of Abdul Hamid (Abdulhamit) II (1876–1909), the last Sultan effectively to rule over the Ottoman Empire, and accordingly are commonly known as the Hamidian massacres. The origins of the massacres and hostility to the Armenians lay in the gradual – and eventually, by the First World War, sudden and final – decline of the Ottoman Empire in the last quarter of the nineteenth century. This coincided with Armenians of the empire, long considered second-class citizens, calling for civil reforms and better treatment from their government from the mid-1860s onwards.¹⁰ Their success in gaining promise of reform through international pressure – for example, through European intervention during the 1878 Congress of Berlin culminating in the 1878 Treaty of Berlin, Article 61 of which provided for reforms – was not met with action or implementation, but rather violent reprisals from the Sultan who was not prepared to relinquish any power. He began to express the belief that the woes of the Ottoman Empire stemmed from “the endless persecutions and hostilities of the Christian world”.¹¹

The massacres marked a new threshold of violence in the Ottoman Empire, particularly because they occurred in peacetime with none of the exigencies of war normally invoked as a legal justification for such action. They would, however, fall short of ‘genocide’ in the modern sense.

⁷ Antonio Cassese, “The Martens Clause: Half a Loaf or Simply Pie in the Sky?”, in *European Journal of International Law*, 2000, vol. 11, no. 1, p. 188.

⁸ *Ibid.*, pp. 188–89.

⁹ Taner Akçam, *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility*, Metropolitan Books, New York, 2006, p. 42.

¹⁰ *Ibid.*, p. 36.

¹¹ *Ibid.*, p. 43.

The Sultan's intention was not to destroy of the Armenian group *per se*, but rather to dissuade the Armenians from entertaining any notions of seeing reforms introduced under Western pressure. By undermining their expectations and the sense of self-reliance they hoped to develop in order to cope with the aggravated disorder and misrule in the empire's eastern provinces, the Sultan sought to strike a severe blow to Armenian efforts to organise politically. The impunity with which the Hamidian massacres were carried out exposed the serious vulnerability of the Armenian population as the Ottoman Empire went into further decline. The Hamidian massacres had set a precedent. All of its elements would be reproduced during the Armenian genocide.¹²

Significant as it was as an expression of *opinio juris*, the 1915 Declaration did little more than appease the conscience of Europe. The 1915 Declaration was neither followed by any action nor did it stop the atrocities. It did, however, render the Ottoman government determined to "keep the news [of the annihilation of the Armenians], as long as possible, from the outside world".¹³ Following the arrests on 24 April 1915, the Armenian genocide was then carried out over the next four years and implemented in two phases: the wholesale killing of the able-bodied male population through massacre and subjection of army conscripts to forced labour, followed by the deportation of women, children, the elderly and infirm on death marches leading to the Syrian desert.¹⁴ Driven forward by military escorts, the deportees were deprived of food and water and subjected to systematic robbery, rape and massacre. The intent to destroy the Armenian group in whole had by then reached its zenith. Even loyal Armenians were categorised as disloyal and treated as such.¹⁵ In his memoirs, the

¹² Rouben Paul Adalian, "Hamidian (Armenian) Massacres", in Israel W. Charny (ed.), *Encyclopedia of Genocide*, vol. 1, ABC-CLIO, Santa Barbara, CA, 1999, pp. 287–88.

¹³ Henry Morgenthau, *Ambassador Morgenthau's Story*, Wayne State University Press, Detroit, 2003, p. 224 (originally published by Doubleday, Garden City, NY, 1918).

¹⁴ Arnold Toynbee, "A Summary of Armenian History up to and Including the Year 1915", *The Treatment of Armenians in the Ottoman Empire 1915-16: Documents Presented to Viscount Grey of Fallodon, Secretary of State for Foreign Affairs*, G.P. Putnam's Sons, for His Majesty's Stationery Office, New York and London, 1916, pp. 637–53.

¹⁵ Ugur Ümit Üngör, *The Making of Modern Turkey: Nation and State in Eastern Anatolia, 1913–1950*, Oxford University Press, Oxford, 2011, pp. 67–68: "The Armenian Catholic Bishop Ignatius Maloyan had become anxious about the worsening situation and seems to have written a letter to his co-religionists, in case something happened to him. Maloyan urged his parish to remain calm and loyal to the government [...]. On 5 May 1915 Talaat authorized the Third Army to disarm all Armenian gendarmes in Diyarbakir province. This

American Ambassador to Constantinople at the time, Henry Morgenthau, recounts one of several conversations with Mehmet Talaat (one of the triumviri of the Committee of Union and Progress that *de facto* ruled the declining Ottoman Empire during the First World War, and widely considered to be the main mastermind and perpetrator of the Armenian genocide)¹⁶ to try to convince him to end the Armenian massacres:

“It is no use for you to argue,” Talaat answered, “we have already disposed of three quarters of the Armenians; there are none at all left in Bitlis, Van, and Erzeroum. The hatred between the Turks and the Armenians is now so intense that we have got to finish with them. If we don’t, they will plan their revenge. [...] We will not have the Armenians anywhere in Anatolia. They can live in the desert but nowhere else.” I still attempted to persuade Talaat that the treatment of the Armenians was destroying Turkey in the eyes of the world, and that his country would never be able to recover from this infamy. [...] I had many talks with Talaat on the Armenians, but I never succeeded in moving him to the slightest degree. [...] He seemed to me always to have the deepest personal feeling in this matter, and his antagonism to the Armenians seemed to increase as their sufferings increased. One day, discussing a particular Armenian, I told Talaat that he was mistaken in regarding this man as an enemy of the Turks; that in reality he was their friend. “No Armenian,” replied Talaat, “can be our friend after what we have done to them”.¹⁷

The total number of Armenians killed as a result has been estimated at between 1 and 1.5 million (out of a population of approximately 2 million). This death toll does not take into account the large numbers of Armenians, especially women and children, who were forced to convert to Islam as a structural element of the annihilation of the Armenian people.¹⁸

way, even loyal Armenians were categorized as disloyal and treated as such” (internal citations omitted).

¹⁶ See, *inter alia*, Akçam, 2006, pp. 165, 186–87, *supra* note 9.

¹⁷ Morgenthau, 2003, pp. 232–33, see *supra* note 13.

¹⁸ See Ara Sarafian, “The Absorption of Armenian Women and Children Into Muslim Households as a Structural Component of the Armenian Genocide”, in Omar Bartov and Phyllis Mack (eds.), *In God’s Name: Genocide and Religion in the Twentieth Century*, Berghahn Books, Oxford, 2001, pp. 209–17. See also Norman M. Naimark, *Fires of Hatred: Ethnic Cleansing in Twentieth-Century Europe*, Harvard University Press, Cambridge, MA, 2002, p. 42.

Following the Armenian genocide, Britain, Italy and France signed the 1920 Treaty of Sèvres on the part of the victorious Allies¹⁹ – their peace treaty with Turkey – envisaging both the establishment of military tribunals to prosecute war crimes and international trials to prosecute the massacres. In particular, Article 226 of the Treaty of Sèvres provided as follows:

The Turkish Government recognizes the right of the Allied Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by the law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Turkey or in the territory of her allies.²⁰

By contrast, Article 230 of the Treaty of Sèvres provided that:

The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914.

The Allied Powers reserve to themselves the right to designate the tribunal which shall try the persons so accused, and the Turkish Government undertakes to recognise such tribunal.

In the event of the League of Nations having created in sufficient time a tribunal competent to deal with the said massacres, the Allied Powers reserve to themselves the right to bring the accused persons mentioned above before such tribunal, and the Turkish Government undertakes equally to recognise such tribunal.²¹

By providing for separate modes of punishment for the massacres and for the war crimes, the Treaty of Sèvres demonstrated that the massacres – that is, “these new crimes of Turkey against humanity and civilization” – were viewed as distinct from war crimes. The Treaty also provided for the restitution of all properties stolen from “Turkish subjects of non-

¹⁹ The Treaty of Peace between the Allied and Associated Powers and Turkey, 10 August 1920 (‘Treaty of Sèvres’), reprinted in *American Journal of International Law*, 1921, vol. 15, supp., pp. 179 ff.

²⁰ *Ibid.*, Art. 226.

²¹ *Ibid.*, Art. 230.

Turkish race who have been forcibly driven from their homes by fear of massacre or any other form of pressure since January 1, 1914”.²²

However, the Treaty of Sèvres was never ratified, as it was seen to be very harsh in its terms, similarly to the 1919 Treaty of Versailles ending the war between the Allies and Germany.²³ Among other things, though recognising the inability of Turkey to make “complete reparation” for its responsibility for the First World War,²⁴ the Treaty of Sèvres imposed on Turkey the obligation to pay “for all loss or damage [...] suffered by civilian nationals of the Allied Powers, in respect of their persons or property, through the action or negligence of the Turkish authorities during the war and up to the coming into force of the present Treaty”.²⁵

These and other crippling terms – such as carving up the remaining territories of the Ottoman Empire among the Allies, gaining control over Turkey’s finances, and turning the Dardanelles Strait into international waters – angered and embittered many Turks, including Mustafa Kemal Atatürk. Atatürk, a military officer and leader of the Turkish national movement, insisted on safeguarding Turkey’s interests and independence and would subsequently successfully lead the 1919–1922 Turkish War of Independence, thereby defeating the Allies and forcing them back to the negotiating table.²⁶ This culminated in replacing the Treaty of Sèvres with the 1923 Treaty of Lausanne, which restored large territories to the Turks, and omitted not only any provision on punishment equivalent to Articles 226 or 230 of the Treaty of Sèvres but also any mention of the Armenians. The Treaty of Lausanne was instead accompanied by a declaration of amnesty for all offences committed from 1 August 1914 to 20 November

²² *Ibid.*, Art. 144.

²³ The Treaty of Peace between the Allied and Associated Powers and Germany, 28 June 1919 (‘Versailles Treaty’) (<https://www.legal-tools.org/doc/a64206/>).

²⁴ See Treaty of Sèvres, Art. 231, *supra* note 19: “Turkey recognizes that by joining the war of aggression which Germany and Austria-Hungary waged against the Allied Powers she has caused the latter losses and sacrifices of all kinds for which she ought to make complete reparation. On the other hand, the Allied Powers recognize that the resources of Turkey are not sufficient to enable her to make complete reparation”.

²⁵ *Ibid.*, Art. 235.

²⁶ Donald Bloxham, *The Great Game of Genocide: Imperialism, Nationalism, and the Destruction of the Ottoman Armenians*, Oxford University Press, Oxford, 2005, pp. 101–2, 147.

1922.²⁷ The former British Prime Minister David Lloyd George called it an “abject, cowardly, and infamous surrender”.²⁸

As a result, no international prosecution of the perpetrators of the Armenian genocide ever occurred. At the national level, a series of courts martial were held in 1919–20 in Constantinople at which the leadership of the Committee of Union and Progress and selected former officials were court martialled for, *inter alia*, subversion of the constitution, wartime profiteering and the massacres of both Armenians and Greeks.²⁹ They were, however, disingenuous, only serving as a stage for political battles to help the Liberal Union Party root out the Committee of Union and Progress from the political arena.³⁰ Some Ottoman officials were held as prisoners of war on Malta to be tried in the international tribunal envisaged by the Treaty of Sèvres. However, as indicated above, those trials never took place, instead an exchange for British prisoners of war was done as a result of Article 119 of the Treaty of Lausanne. The British Foreign Secretary Lord Curzon said the subsequent release of many of the Turkish prisoners was “a great mistake”.³¹ Nevertheless, despite efforts to avoid criminal or pecuniary responsibility for the massacres and mass theft of Armenian properties – culminating in full-blown denial of the Armenian genocide today³² – Atatürk publicly acknowledged that the atrocities committed against the Armenians were “a shameful act”.³³

²⁷ The Treaty of Peace with Turkey Signed at Lausanne, 24 July 1923, *The Treaties of Peace, 1919–1923*, vol. 2, Carnegie Endowment for International Peace, New York, 1924. See also *ibid.*, pp. 166–69.

²⁸ David Lloyd George, *The Truth about Peace Treaties*, Gollancz, London, 1938, p. 1351.

²⁹ Taner Akçam, *Armenien und der Völkermord: Die Istanbul Prozesse und die Türkische Nationalbewegung*, Hamburger Edition, Hamburg, 1996, p. 185.

³⁰ Klaus Detlev Grothusen, *Die Türkei in Europa*, Beiträge des Südosteuropa-arbeitskreises der Deutschen Forschungsgemeinschaft zum IV. Internationalen Südosteuropa-Kongreß der Association Internationale d'Études du Sud-East Européen, Ankara, 13–18 August 1979, p. 35.

³¹ FO 371/7882/E4425, folio 182, The National Archives, UK: “The less we say about these people [the Turks detained at Malta] the better. [...] I had to explain why we released the Turkish deportees from Malta skating over thin ice as quickly as I could. There would have been a row I think. [...] The staunch belief among members [of Parliament is] that one British prisoner is worth a shipload of Turks, and so the exchange was excused”.

³² The topic of the Turkish government's denial of the Armenian Genocide falls outside the scope of the present chapter. For more on the subject, see, *inter alia*, Yair Auron, *The Banality of Denial: Israel and the Armenian Genocide*, Transaction Publishers, Piscataway, 2004; Richard G. Hovannisian (ed.), *Remembrance and Denial: The Case of the Armenian Genocide*, Wayne State University Press, Detroit, 1999; Vahakn Dadrian, *Key Elements in*

The story of the Leipzig trials is not entirely dissimilar, with initial plans being set out in the Treaty of Versailles, though some important differences arise. For instance, Article 227 of the Treaty of Versailles provided that the ex-Kaiser was to be “publicly arraigned” for “a supreme offence against international morality and the sanctity of treaties” before an international tribunal. As such, the proceedings were not intended to be criminal in the municipal sense, but rather of a moral character, because aggression was not seen to be an international crime at the time. Nevertheless, similarly to the failed promise of international prosecution in the 1915 Declaration and the Treaty of Sèvres, Article 227 of the Treaty of Versailles was never implemented as the Netherlands refused to extradite the ex-Kaiser and hand him over to the Allies.³⁴

The absence of an effective international penal response to those “crimes of Turkey against humanity and civilization” thus limited the significance of the phrase to an acknowledgement that customary international law arguably recognised certain crimes against humanity, though not explicitly called as such. The absence of an actual prosecution of crimes against humanity also left the substantive content of the crime unclear.³⁵ Nonetheless, the Treaty of Sèvres became an important precedent for the international community when formulating its response to atrocities committed by Axis countries during the 1930s and 1940s. Indeed, over the next two decades after the First World War, criminal law specialists began considering and drawing up proposals for prosecution and representation of international crimes. For instance, the International Law Association and the International Association for Penal Law studied the possibility of establishing an international criminal jurisdiction.³⁶

the Turkish Denial of the Armenian Genocide: A Case Study of Distortion and Falsification, Zoryan Institute, Arlington, 1999.

³³ Akçam, 2006, pp. 12–13, 335–36, 348, see *supra* note 9.

³⁴ See Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge University Press, Cambridge, 2005, pp. 33–34.

³⁵ Charles Chernor Jalloh, “What Makes a Crime Against Humanity a Crime Against Humanity”, in *American University International Law Review*, 2013, vol. 28, no. 2, p. 392.

³⁶ Report on the Question of International Criminal Jurisdiction by Ricardo J. Alfaro, Special Rapporteur, 1950, UN doc. A/CN.4/15, paras. 18–25. These efforts resulted in the adoption of a convention in 1937 by the League of Nations contemplating the creation of an international criminal court to prosecute persons accused of offences under the Convention for the Prevention and Punishment of Terrorism. See Convention for the Creation of an International Criminal Court, League of Nations OJ spec. supp. no. 156 (1936), LN doc.

13.2. Developments Between the Wars

The interwar period was thus marked with mostly a lull or reluctance to follow through on promises of sanctions and actually implement ideas of criminalising state behaviour that, although clearly reprehensible, infringed the general and cardinal rule against violating state sovereignty.³⁷ Indeed, most views on the abortive response to the Armenian genocide are based on what geopolitical interests were at the time. Donald Bloxham describes the interwar period in relation to genocide and crimes against humanity aptly as follows:

Britain was the only one of the [Allied] powers that showed any sign of taking seriously the 1915 declaration, the subsequent provisions for trial of the Paris Peace Conference, and then articles 226–30 of Sèvres. France and Italy simply used the question as another bargaining counter. Yet British progress was impeded by the desire to amend relations with the nationalists and the fact that the [Turkish] nationalists themselves held a number of British armistice control officers as hostages. As far as prosecution of the murderers of the Armenians was concerned, there was also a legal problem. While crimes against POWs were indictable under the traditional rubric of the “laws and customs of war”, the prosecution of a state’s mass murder of its own civilians had not yet found a legal name or been framed in appropriate legislation, and was arguably not subject to the jurisdiction of external powers. Sèvres was vague about both the law and the forum that would be used for such a trial, and the British law officers had always been reluctant to experiment, an approach that would be precisely duplicated in debates from 1944 about trying Germans for crimes against German Jews. *Legally speaking, in the inter-war world, genocide, as long as*

C.547(I).M.384(I).1937.V (1938). However, an insufficient number of states ratified the convention, and so it never came into force.

³⁷ In his memoirs recounting his diplomatic efforts to convince Talaat to stop the Armenian massacres, Morgenthau wrote: “Technically, of course, I had no right to interfere. According to the cold-blooded legalities of the situation, the treatment of Turkish subjects by the Turkish Government was purely a domestic affair; unless it directly affected American lives and American interests, it was outside the concern of the American Government. When I first approached Talaat on the subject, he called my attention to this fact in no uncertain terms”, see Morgenthau, 2003, p. 226, see *supra* note 13.

*it affected only the citizens of the perpetrator state, was simply seen as that state's "internal affair".*³⁸

The moral imperative to the international community's reaction to the Armenian genocide should not be underestimated; however, the very horrors that prompted action in the first place may have caused a distancing from those horrors which dissuaded further action in the aftermath. The world stood by helplessly, never having witnessed such enormous crimes in modern times³⁹ and perhaps unable to grasp the scope of the atrocities, even after the end of the First World War. Global media coverage missed an opportunity for reflection at the time of the Armenian genocide by depicting the Turk as the barbarous "other", bloodthirsty and sadistic, and allowing for Western- or European-centric constructions justifying war and intervention. In this way, it is argued that Europeans never imagined themselves capable of perpetrating such atrocities against their own people, and therefore deemed it unnecessary to legislate against such crimes for future purposes.

Failure to actually institute the prosecution at either the international and national levels marks the culture of impunity that would rear its ugly head in the Second World War, starting with Hitler's August 1939 address to his military commanders at the Obersalzberg on the need for ruthlessness in the coming invasion of Poland. In his address, Hitler assured the audience that they would not be held to account since no one now remembered the annihilation of the Armenians.⁴⁰ Raphael Lemkin, who coined the term "genocide", has stated that he did so with the fate of the Armenians in mind,⁴¹ explaining in an interview televised in 1949 that "it happened so many times. First to the Armenians, then after the Armenians, Hitler took action".⁴²

³⁸ Bloxham, 2005, p. 163, see *supra* note 26 (emphasis added).

³⁹ The Armenian genocide is widely acknowledged by genocide scholars to have been one of the first modern, systematic genocides. See, *inter alia*, Niall Ferguson, *The War of the World: Twentieth-Century Conflict and the Descent of the West*, Penguin, New York, 2006, p. 177.

⁴⁰ Bloxham, 2005, p. 217, see *supra* note 26.

⁴¹ See, *inter alia*, Auran, 2004, p. 9, *supra* note 32: "when Raphael Lemkin coined the word genocide in 1944 he cited the 1915 annihilation of Armenians as a seminal example of genocide"; Schabas, 2000, p. 25, see *supra* note 4: "Lemkin's interest in the subject dates to his days as a student at Lvov University, when he intently followed attempts to prosecute the perpetration of the massacres of the Armenians".

⁴² Alessandra Stanley, "A PBS Documentary Makes Its Case for the Armenian Genocide, With or Without a Debate", in *New York Times*, 17 April 2006.

Lemkin became interested in the subject while a student of linguistics at the University of Lwów (since 1945, Lviv, Ukraine), when he learned of Soghomon Tehlirian's assassination of Mehmet Talaat in 1921 in Berlin. Tehlirian was a survivor of the Armenian genocide who lost his entire family. When Atatürk put an end to the promise of an international tribunal, a Boston-based Armenian plot called Operation Nemesis formed in response to seek vigilante justice against those most responsible for the Armenian genocide. Tehlirian took part in the plot, and was assigned to assassinate Talaat, who had been living peacefully as a private citizen in Germany after fleeing Turkey with his co-conspirators in 1918. Tehlirian successfully assassinated Talaat in broad daylight, and his subsequent trial came to the attention of Lemkin, who queried one of his professors as to why Talaat was not tried but Tehlirian was. The professor answered: "Consider the case of a farmer who owns a flock of chickens. He kills them and this is his business. If you interfere, you are trespassing". Lemkin, struck by the answer, retorted: "It is a crime for Tehlirian to kill a man, but it is not a crime for his oppressor to kill more than a million men? This is most inconsistent".⁴³

The Second World War and the atrocities brought by the Nazis made it apparent and imperative that such deeds no longer go ignored or unpunished. Similarly to the 1915 Declaration, the United States, Britain and the Soviet Union – that is, the new Allied powers of the Second World War – issued a declaration on 17 December 1942 officially noting the mass murder of European Jewry and resolving to prosecute those responsible for violence against civilian population.⁴⁴ On 20 October 1943 a United Nations War Crimes Commission was established to investigate war crimes committed by Nazi Germany and its allies. On 1 November 1943 the Allied powers issued another joint declaration that the German war criminals should be judged and punished in the countries in which their crimes were committed, but that "the major criminals, whose offenc-

⁴³ Samantha Power, *"A Problem From Hell": America and the Age of Genocide*, HarperCollins, New York, 2003, p. 17.

⁴⁴ The statement was read to British House of Commons in a floor speech by the Foreign Secretary Anthony Eden, and published on the front page of the *New York Times* and many other newspapers. See "Allies Condemn Nazi War on Jews", in *New York Times*, 18 December 1942.

es have no particular geographical localization”, would be punished “by the joint decision of the governments of the Allies”.⁴⁵

By April 1945 the Allied powers had thus finally agreed on the principle of prosecuting Nazi war criminals. Nonetheless, there remained much work ahead in setting up the trials.⁴⁶ Though some political leaders advocated summary executions instead of trials, the Allied powers agreed to set up an International Military Tribunal (‘IMT’) to be held in Nuremberg.⁴⁷ The Charter of the IMT (‘IMT Charter’) was issued on 8 August 1945 and set down the laws and procedures by which the Nuremberg trials were to be conducted.⁴⁸ Lemkin was involved in the process, becoming one of the legal advisors to US Supreme Court Justice Robert Jackson, the chief American prosecutor at Nuremberg and the head of the American delegation to the London Conference that framed the IMT Charter.⁴⁹ Although the word “genocide” appears in the drafting history of the IMT Charter, its final text used the term “crimes against humanity” to deal with the persecution and physical extermination of national, ethnic, racial and religious minorities.⁵⁰ In particular, Article 6 of the IMT Charter established the jurisdiction of the Tribunal over three crimes, provided as follows:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) *Crimes against Peace*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or

⁴⁵ Moscow Conference of Foreign Secretaries, Secret Protocol, Annex 10, Declaration of German Atrocities (Signed by Roosevelt, Churchill and Stalin), 1 November 1943 (‘Moscow Declaration’), *A Decade of American Foreign Policy: Basic Documents, 1941–49*, Government Printing Office, Washington, DC, 1950.

⁴⁶ Daniel Marc Segesser and Myriam Gessler, “Raphael Lemkin and the International Debate on the Punishment of War Crimes (1919–1948)”, in Dominik J. Schaller and Jürgen Zimmerer (eds.), *The Origins of Genocide: Raphael Lemkin as a Historian of Mass Violence*, Routledge, London, 2009, p. 19.

⁴⁷ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 UNTS 279 (‘London Agreement’) (<https://www.legal-tools.org/doc/844f64/>).

⁴⁸ Charter of the International Military Tribunal, Annex to the London Agreement, 8 August 1945 (‘IMT Charter’) (<https://www.legal-tools.org/doc/64ffdd/>).

⁴⁹ Segesser and Gessler, 2009, p. 19, see *supra* note 46.

⁵⁰ William Schabas, “Origins of the Genocide Convention: From Nuremberg to Paris”, in *Case Western Reserve Journal of International Law*, 2008, vol. 40, nos. 1/2, p. 42.

participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) *War Crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) *Crimes against Humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Crimes against humanity were subsequently included in the 1945 Control Council Law No. 10,⁵¹ the 1946 Charter of the International Military Tribunal for the Far East ('IMTFE Charter')⁵² and the Nuremberg Principles, which states unanimously affirmed by UN General Assembly resolution 95 (I) on 11 December 1946,⁵³ and which were later formulated by the International Law Commission pursuant to UN General Assembly resolution 177 (II) (a) in 1950.⁵⁴

⁵¹ Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, 3 Official Gazette Control Council for Germany 50–55, 1946, Article II(1)(c) (<https://www.legal-tools.org/doc/ffda62/>).

⁵² Charter of the International Military Tribunal for the Far East, 19 January 1946, Art. 5(c) ('IMTFE Charter') (<https://www.legal-tools.org/doc/a3c41c/>).

⁵³ Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, UNGA res. 95 (I), 11 December 1946.

⁵⁴ Report of the International Law Commission on its Second Session, 5 June–29 July 1950, to the General Assembly, Fifth Session, Supplement No. 12, Doc. A/1316, reprinted in

The evolution of the term “genocide”, however, as cognate to “crimes against humanity” as it may be, took a different path. While prosecutors used the term occasionally in their submissions to the Nuremberg Tribunal, “genocide” did not appear in the final judgment, issued on 1 October 1946.⁵⁵ The Tribunal also limited its judgment to wartime crimes against humanity, given that Article 6(c) of the IMT Charter required a nexus with other crimes under the jurisdiction of the Tribunal.⁵⁶ There are no documents explaining the rationale for adding this requirement at the last moment in the London Agreement. However, it served to restrain the jurisdiction of the IMT.

The failure or omission of the IMT to prosecute or condemn peacetime genocide or crimes against humanity proved to be a great disappointment for Lemkin, who is described as having suffered tremendous concern that the Tribunal did not go far enough in dealing with genocidal actions. Lemkin was not alone in expressing displeasure with the decision to leave unpunished Nazi atrocities committed before the outbreak of the war.⁵⁷ The overall discontent with the decision created enough momentum to cause the United Nations General Assembly to adopt resolution 96 (I) on 11 December 1946, which affirmed “that genocide is a crime under international law which the civilized world condemns”, and mandated the preparation of a draft convention on the crime of genocide. Although describing genocide as a crime of “international concern”, resolution 96 (I) was silent as to whether genocide could be committed in peacetime or in war.⁵⁸ This was because the majority of the General Assembly was not prepared to recognise universal jurisdiction for the crime of genocide.⁵⁹ Nevertheless, the stage was set to begin a process that ended with the

Yearbook of the International Law Commission 1950, vol. 2, United Nations, New York, 1957, pp. 374–78 (‘Report of the International Law Commission’).

⁵⁵ IMT, *International Military Tribunal v. Martin Borman et al.*, Judgment, 1 October 1946 (<https://www.legal-tools.org/doc/45f18e/>).

⁵⁶ A reading of Article 6 of the IMT Charter, as transcribed in the text of this article above, shows that the crimes against humanity, as defined at Article 6(c), needed to be committed “before or during the war [...] in execution of or in connection with any crime within the jurisdiction of the Tribunal”, that is, crimes against peace or war crimes, as defined by Article 6(a) and (b), respectively, which in turn were linked to an armed conflict. The same applies to Article 5(c) of the IMTFE Charter.

⁵⁷ Schabas, 2008, p. 35, see *supra* note 50.

⁵⁸ UN General Assembly resolution 96 (I), The Crime of Genocide, 11 December 1946, UN doc. A/231 (‘Resolution on the Crime of Genocide’).

⁵⁹ Schabas, 2008, p. 36, see *supra* note 50.

adoption on 9 December 1948 of the Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention').⁶⁰ Entering into force on 12 January 1951, namely 90 days after the 20th ratification,⁶¹ the Genocide Convention is one of the most widely ratified international instruments today,⁶² and forms part of customary international law.

Lemkin was one of three experts selected by the United Nations Secretary-General Trygve Lie to assist in the preparation of the draft convention, but once the official UN process began Lemkin stepped aside, having the sharp political foresight that he could be more valuable on the outside and proceeding to lobby each UN member state involved.⁶³ Although his dreams of the creation of such an instrument may be said to have come true – he is indeed reported to have been brought to tears on the day that the Convention was adopted⁶⁴ – the final version of the legal definition of genocide is a watered down form of the definition Lemkin propounded during the drafting of the Genocide Convention, originally proposed in his book *Axis Rule*. It provides as follows:

Article II: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a. Killing members of the group;
- b. Causing serious bodily or mental harm to members of the group;
- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d. Imposing measures intended to prevent births within the group;
- e. Forcibly transferring children of the group to another group.

Article III: The following acts shall be punishable:

⁶⁰ UN General Assembly, Prevention and Punishment of the Crime of Genocide, 9 December 1948, A/RES/3/260 ('Genocide Convention') (<https://www.legal-tools.org/doc/498c38/>).

⁶¹ *Ibid.*, art. 13.

⁶² At the time of writing, the Genocide Convention had 146 Parties and 41 Signatories.

⁶³ Power, 2003, pp. 54–55, see *supra* note 43.

⁶⁴ Segesser and Gessler, 2009, p. 20, see *supra* note 46.

- a. Genocide;
- b. Conspiracy to commit genocide;
- c. Direct and public incitement to commit genocide;
- d. Attempt to commit genocide;
- e. Complicity in genocide.

Lemkin had consistently envisioned genocide as being of tripartite character – physical, biological and cultural. By way of illustration, he published the following in the *United Nations Bulletin* in January 1948:

There are three basic phases of life in a human group: physical existence, biological continuity (through procreation), and spiritual or cultural expression. Accordingly, the attacks on these three basic phases of the life of a human group can be qualified as physical, biological, or cultural genocide. It is considered a criminal act to cause death to members of the above-mentioned groups directly or indirectly, to sterilize through compulsion, to steal children, or to break up families. Cultural genocide can be accomplished predominantly in the religious and cultural fields by destroying institutions and objects through which the spiritual life of a human group finds expression, such as houses of worship, objects of religious cult, schools, treasures of art, and culture. By destroying spiritual leadership and institutions, forces of spiritual cohesion within a group are removed and the group starts to disintegrate. This is especially significant for the existence of religious groups. Religion can be destroyed within a group even if the members continue to subsist physically.⁶⁵

Although he did not believe the world to be ready for a permanent international criminal court,⁶⁶ he did proclaim the necessity of rendering genocide subject to universal jurisdiction and immune from any requirement of a nexus with armed conflict:

International law is strictly divided into two bodies, the law of war and the law applicable in time of peace. Crimes under international law (*delicta juris gentium*) are a quite different matter from crimes connected with war. Within the first category come such crimes as piracy, trade in women and children, trade in slaves, the drug traffic, trading in obscene publications, and forgery of currency. These crimes are punished

⁶⁵ Lemkin, 1948, p. 71, see *supra* note 2.

⁶⁶ Power, 2003, pp. 55–56, see *supra* note 43.

according to the principle of ‘universal repression,’ meaning that a criminal can be validly punished by the court of the country where he is apprehended, irrespective of the place where the crime was committed. For example, an individual who has traded in women in Stockholm can be validly tried by a court in Paris. Such a criminal cannot claim any right to asylum. International law invokes the solidarity of the states in punishing such crimes and makes the soil burn under the feet of such offenders. [...]

Indeed, genocide must be treated as the most heinous of all crimes. It is the crime of crimes, one that not only shocks our conscience but affects deeply the best interests of mankind.⁶⁷

Lemkin thus seemed certain that the entirety of his propounded view of genocide would prevail. However, the inclusion of cultural genocide in the scope of the Convention was ultimately voted down by the UN General Assembly’s Sixth Committee, and universal jurisdiction was rejected during negotiations, with strong opposition by France, the Soviet Union and the United States.⁶⁸ Article 6 of the Genocide Convention only recognises territorial jurisdiction – “by a competent tribunal of the State in the territory of which the act was committed” – as well as the jurisdiction of an “international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”. Nevertheless, universal jurisdiction over genocide – as well as war crimes and crimes against humanity – has since come to be widely treated as an accepted feature of customary international law.⁶⁹

Lemkin might also have found some solace over his distress in the IMT Charter’s and Judgment’s lacuna when, despite the silence of resolution 96 (I) on the criminalisation of peacetime genocide, the nexus re-

⁶⁷ Lemkin, 1948, p. 70, see *supra* note 2.

⁶⁸ See Draft Convention on Genocide Submitted to the Sixth Committee by the French Delegation, *Historical Survey of the Question of International Criminal Jurisdiction*, appendix 15, United Nations General Assembly, International Law Commission, New York, 1949, pp. 144–45, Doc. A/CN.4/7/Rev.1. See also UN GOAR, Sixth Committee, 3rd session, pt. 1, Summary Records, 1948, pp. 394–406.

⁶⁹ See, *inter alia*, Madeleine H. Morris, “Universal Jurisdiction in a Divided World: Conference Remarks”, in *New England Law Review*, 2001, vol. 35, no. 2, p. 347.

quirement was not included in the Genocide Convention after all.⁷⁰ Concession was also made to allow “forcible transfer of children from one group to another” as a punishable act, as was the inclusion of “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”, both of which pay clear heed to the methods of destruction during the Armenian genocide.

13.3. Contemporary Developments

13.3.1. Crimes Against Humanity

Because of the Cold War that followed the Nuremberg and Tokyo trials, it was not until the early 1990s that the concepts of genocide and crimes against humanity were put to the test again in practice, in response to the imploding wars in Rwanda and (the former) Yugoslavia. In setting up the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’), it seemed at first that the nexus requirement between armed conflict and crimes against humanity in international law would remain. Article 5 of the 1993 ICTY Statute was indeed partly modelled on the IMT Charter, containing a definition of crimes against humanity that required them to be “committed in armed conflict, whether international or internal in character”.⁷¹ However, in late 1994 Article 3 of the Statute of the International Criminal Tribunal for Rwanda (‘ICTR’) was enacted with a definition of crimes against humanity that explicitly breaks the link with armed conflict by excluding it from the definition.⁷² Under Article 3 of the ICTR

⁷⁰ Genocide Convention, Article 1, see *supra* note 60: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish”.

⁷¹ Statute of the International Tribunal for the Former Yugoslavia, 25 May 1993, SC Res. 827, UN SCOR 48th sess., 3217th mtg., UN doc. S/RES/827, art. 5 (‘ICTY Statute’) (<https://www.legal-tools.org/doc/b4f63b/>). However, in the Secretary-General’s Report to the Security Council on the establishment of the ICTY, when commenting on the subject matter jurisdiction of the tribunal under Article 5, he noted that “[c]rimes against humanity [...] are prohibited regardless of whether they are committed in an armed conflict, international or internal in character”. UN Secretary-General, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, 3 May 1993, UN doc. S/1993/25704, para. 47.

⁷² Statute of the International Criminal Tribunal for Rwanda, 11 November 1994, SC Res. 955, UN SCOR 49th sess., 3453rd mtg., UN doc. S/Res/955, article 3 (‘ICTR Statute’) (<https://www.legal-tools.org/doc/8732d6/>). In the Secretary-General’s Report to the Security Council on the establishment of the ICTR, the Secretary-General noted that the “stat-

Statute, the requirement is that crimes such as murder, extermination, enslavement, rape and so on be “committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds”. In 1995 the ICTY Appeals Chamber followed suit by declaring that the requirement that crimes against humanity be associated with an armed conflict was inconsistent with customary law.⁷³ It explained that the Security Council had included the nexus in Article 5 of the ICTY Statute as a jurisdictional limit only.⁷⁴ According to William A. Schabas, the more plausible explanation is that the lawyers in the United Nations Secretariat who drafted the Statute believed the nexus to be part of customary law, and the Security Council did not disagree.⁷⁵

In any event, the following definition of crimes against humanity of the Rome Statute of the International Criminal Court (‘ICC Statute’) parts with the nexus requirement. Article 7(1) states:

For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- a. Murder;
- b. Extermination;

ute of the Rwanda Tribunal [...] was an adaptation of the statute of the Yugoslav Tribunal to the circumstances of Rwanda” and that there was “no reason to limit [Article 3’s] application” with reference to the “temporal scope of the crime” by including the language “when committed in armed conflict, whether international or internal in character” as was done in the ICTY Statute. UN Secretary General, Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955, 13 February 1995, UN doc. S/1995/134, p. 9, fn. 5.

⁷³ ICTY, *Prosecutor v. Duško Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, para. 141 (<https://www.legal-tools.org/doc/866e17/>). See also, for example, ICTY, *Prosecutor v. Duško Tadić*, Appeals Chamber, Judgment, IT-94-1, 15 July 1999, para. 251 (<https://www.legal-tools.org/doc/8efc3a/>).

⁷⁴ ICTY, *Prosecutor v. Vojislav Šešelj*, Appeals Chamber, Decision on the Interlocutory Appeal Concerning Jurisdiction, IT-03-67, 31 August 2004, para. 13 (<https://www.legal-tools.org/doc/a64634/>).

⁷⁵ See Schabas, 2008, p. 50, *supra* note 50, referring to Secretary-General, Report of the Secretary-General Pursuant to Paragraph Two of the Security Council Resolution 808, 3 May 1993, delivered to the Security Council, UN doc. S/25704, para. 47, agreeing that “crimes against humanity were first recognized by the Charter”.

- c. Enslavement;
- d. Deportation or forcible transfer of population;
- e. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- f. Torture;
- g. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- h. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- i. Enforced disappearance of persons;
- j. The crime of apartheid;
- k. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.⁷⁶

The nexus has thus definitively disappeared from the definition of crimes against humanity as we know it today. Whereas the definition of genocide has not changed in the slightest since its inception in 1948, the definition of crimes against humanity has struggled to find solid footing, undergoing some form of change every time it is defined anew. If one takes the view that genocide is a subset, or an aggravated form, of the broader category of crimes against humanity, it seems conceptually illogical to dispense with the nexus requirement for one crime and not the other, even if one takes the view that genocide and crimes against humanity are wholly different in that the former protects groups whereas the latter protects the individual. The drive to create the Genocide Convention in the first place arose in large part out of the international community's concern that the Nuremberg Judgment was too limited in its jurisdiction by reason of the nexus requirement within the IMT Charter.

Crimes against humanity feature another element that is subject to development and judicial debate. At the time the concept was created un-

⁷⁶ Rome Statute of the International Criminal Court, 1 July 2002, Art. 7(1).

der international law, crimes against humanity required a contextual element whereby the relevant crime had to be committed pursuant to a state policy. This was initially a core part of the definition of crimes against humanity. After the Second World War, for example, the IMT Charter specified that crimes against humanity referred to state crimes – the perpetrators had to have committed crimes “acting in the interests of the European Axis countries”.⁷⁷ Similarly, national courts that implemented crimes against humanity in domestic jurisdictions emphasised the state contextual element.⁷⁸

Since Nuremberg, however, there has been a development towards a broader approach to the State contextual element, shifting the focus away from the requirement to have a State or State-like organisation responsible.⁷⁹ This is reflected in case law from the ICTY, the Special Court for Sierra Leone and the International Criminal Court (‘ICC’).⁸⁰ Article 7(2)(a) of the ICC Statute now explicitly states the widespread and systematic attack directed against the civilian population should be carried out “pursuant to or in furtherance of a State or organizational policy to commit such an attack”. This has been interpreted by the majority of the Pre-Trial Chambers of the ICC, applying a broad definition to the word “organizational” in the phrase “State or organizational policy”, finding that the key question is the capacity of the organisation to carry out crimes against humanity.⁸¹ Therefore “State or organizational policy” does not just refer to a *de jure* state but can be the policy of a non-state entity.⁸²

⁷⁷ William Schabas, “State Policy as an Element of International Crimes”, in *Journal of Criminal Law and Criminology*, 2008, vol. 98, no. 3, p. 954.

⁷⁸ Tilman Rodenhäuser, “Beyond State Crimes, Non-State Entities and Crimes against Humanity”, in *Leiden Journal of International Law*, 2014, vol. 27, no. 4, p. 918.

⁷⁹ *Ibid.*, pp. 918–20.

⁸⁰ See, for example, ICTY, *Prosecutor v. Limaj et al.*, Judgment, IT-03-66-T, 30 November 2005 (<https://www.legal-tools.org/doc/4e469a/>); Special Court for Sierra Leone, *Prosecutor v. Alex Tamba Brima et al.*, Judgment, SCSL-04-16-T, 20 June 2007 (<https://www.legal-tools.org/doc/87ef08/>); ICC, *Prosecutor v. Germain Katanga, Jugement rendu en application de l'article 74 du Statut*, ICC-01/04-01/07, 7 March 2014 (<https://www.legal-tools.org/doc/9813bb/>).

⁸¹ ICC, Situation in the Republic of Kenya, Pre-Trial Chamber, Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, 31 March 2010 (<https://www.legal-tools.org/doc/338a6f/>).

⁸² Rodenhäuser, 2014, p. 920, see *supra* note 78.

This may drag the scope of the crimes away from its original aim. Schabas reasons that “a principal rationale for prosecuting crimes against humanity as such has been the fact that such atrocities generally escape prosecution in the State that normally exercises jurisdiction”. He argues that a contextual state requirement (albeit defined broadly to incorporate state-like entities) is more in keeping with the historical aim of prosecuting such crimes under international law.⁸³ However, a broader approach to the definition of “organisation”, examining the capacity of the organisation rather than state-like characteristics, is supported by other contextual elements of crimes against humanity.⁸⁴ Tilman Rodenhäuser argues that the required degree of organisation can be deduced from other contextual elements, such as if the attack is “widespread and systematic”, “directed against any civilian population” and “pursuant to or in furtherance of a [...] policy”.⁸⁵

13.3.2. Genocide

On the other hand, the definition of genocide as it currently stands is also seen as too narrow, particularly with the special intent (*dolus specialis*) requirement “to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.⁸⁶ Not only does it seem conceivably impossible to prove intent to exterminate a group until at least a significant part of it has already been wiped out, but it would further be necessary to ensure that the group was targeted by virtue of its ‘group-hood’ (as opposed to a coincidence that the victims happened to belong to a group of national, ethnic, racial or religious character).

During the drafting work on the Genocide Convention, although debate raged about the specific groups to be included, protection to political, social, gender, or other such groups was excluded from the Convention. Critics have argued that the omission of political, economic, social, gender and other groups is illogical and incompatible with the Convention’s lofty mission.⁸⁷ The limitation of protected groups to just the de-

⁸³ Schabas, 2008, p. 978, see *supra* note 77.

⁸⁴ Rodenhäuser, 2014, pp. 922–23, see *supra* note 78.

⁸⁵ *Ibid.*, pp. 923–27.

⁸⁶ Genocide Convention, Art. 2, see *supra* note 60.

⁸⁷ William Schabas, “Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda”, in *ILSA Journal of International & Comparative Law*, 2000, vol. 6, no. 2, p. 376.

defined four has also been criticised by academics and human rights activists as narrowing the reach of genocide to near non-applicability.⁸⁸ Nonetheless, countervailing concerns about the “dilution” of the genocide definition have also been raised by academics like Schabas, who argues that recent history “has disproven the claim that the genocide definition was too restrictive to be of any practical application”.⁸⁹ Schabas argues that there is value in society defining a crime so heinous that it will occur only rarely, and that a formal amendment risks trivialising the horror of the real crime when it is committed.⁹⁰

Indeed, after its adoption in 1948 and entry into force in 1951, the Genocide Convention lay dormant for 50 years. The first time that the Genocide Convention was interpreted and applied by an international court was in the case of *The Prosecutor v. Jean-Paul Akayesu* before the ICTR,⁹¹ which adopted the definition of genocide as enunciated in the Convention verbatim in its constitutive statute.⁹² Akayesu was the former mayor (*bourgmestre*) of Taba commune in the Prefecture of Gitarama, Rwanda, and was convicted of genocide, direct and public incitement to commit genocide, and crimes against humanity.⁹³ The trial judgment, which was upheld on appeal,⁹⁴ was pivotal in many respects, two of which bear specific mention here. First, in convicting Akayesu for genocide, the ICTR Trial Chamber held that that rape and sexual violence could constitute acts of genocide insofar as they were committed with the intent to destroy, in whole or in part, a targeted group, as such.⁹⁵ The Trial Chamber reasoned that “[s]exual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole”.⁹⁶

⁸⁸ See Schabas, 2008, p. 46, *supra* note 50.

⁸⁹ Schabas, 2000, p. 386, see *supra* note 87.

⁹⁰ *Ibid.*, pp. 386–87.

⁹¹ ICTR, *Prosecutor v. Jean-Paul Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998 (<https://www.legal-tools.org/doc/b8d7bd/>) (‘Akayesu Trial Judgment’).

⁹² ICTR Statute, Art. 2, see *supra* note 72.

⁹³ Akayesu Trial Judgment, para. 1, 745, see *supra* note 91.

⁹⁴ ICTR, *Prosecutor v. Jean-Paul Akayesu*, Appeals Chamber, Judgment, ICTR-96-4-A, 1 June 2001 (<https://www.legal-tools.org/doc/c62d06/>).

⁹⁵ Akayesu Trial Judgment, paras. 731–33, see *supra* note 91.

⁹⁶ *Ibid.*, para. 731.

Second, the Trial Chamber had to determine whether the Tutsis fell under one of the protected groups outlined in the definition of genocide, because at no point did the Genocide Convention's drafters actually define "national, ethnical, racial or religious" groups, and these terms have been subject to considerable subsequent interpretation. The Trial Chamber categorised the Tutsis as an ethnic group,⁹⁷ which it defined as "a group whose members share a common language or culture".⁹⁸ A problem arises in that Rwanda's Hutus and Tutsis share the same language and culture. The Trial Chamber thus took the initiative of stretching the definition of genocide further, reasoning that the *travaux préparatoires* of the Genocide Convention showed an intention by the drafters to accord protection to "any stable and permanent group".⁹⁹

The decision of another Trial Chamber at the ICTR took an alternative approach to defining the Tutsis as a protected ethnic group. In the *Kayishema et al.* case, the Trial Chamber noted that an "ethnic group could be a group identified as such by others, including perpetrators of the crimes".¹⁰⁰ Since it is often the offender who defines the individual victim's status as a member of a group protected by the Genocide Convention,¹⁰¹ this subjective approach tends to align with the realities of a perpetrator's determination of group membership. The Nazis, for example, had detailed objective criteria establishing who was Jewish and who was not, and in Rwanda Tutsis were often betrayed by their identity cards when there was no other way to determine their status.¹⁰² Accordingly, the Trial Chamber concluded that the Tutsis were an ethnic group based on the existence of their government-issued official identity cards describing them as such.¹⁰³

In the ICC Statute, the ICTR's interpretation of the definition of genocide in *Akayesu* protecting "stable and permanent groups" was not similarly endorsed as the ICTY's interpretation of the nexus requirement (or lack thereof) was in the definition of crimes against humanity. Indeed, despite the above-mentioned criticism over the narrowness of the defini-

⁹⁷ *Ibid.*, para. 124.

⁹⁸ *Ibid.*, para. 513.

⁹⁹ *Ibid.*, paras. 511, 516.

¹⁰⁰ ICTR, *Prosecutor v. Clément Kayishema et al.*, Judgment, ICTR- 95-1-T, 21 May 1999 para. 36 ('Kayishema Trial Judgment') (<https://www.legal-tools.org/doc/0811c9/>).

¹⁰¹ Schabas, 2000, p. 386, see *supra* note 87.

¹⁰² *Ibid.*

¹⁰³ Kayishema Trial Judgment, paras. 522–30, see *supra* note 100.

tion of genocide as in the Genocide Convention, states have rarely showed any inclination to consider amendment. According to Schabas, they were given a golden opportunity at the 1998 Rome Conference to fix any gaps in Article 2 of the Genocide Convention, but declined to do so.¹⁰⁴ In debate in the Committee of the Whole at the Rome Conference, only Cuba argued for amendment of the definition to include social and political groups.¹⁰⁵ Otherwise, there was a chorus of support for the original text of the definition of genocide adopted by the General Assembly.¹⁰⁶

13.4. Conclusion

The world was confronted with not unprecedented, yet nevertheless shocking, demonstrations of human cruelty in the First and Second World Wars, most notably with the Armenian genocide and the Jewish Holocaust. Although the Armenian genocide led to the acknowledgement that crimes against humanity committed in peacetime violated customary international law, the complete absence of an international penal response rendered efforts to suppress and punish the Armenian genocide unsuccessful. Efforts to suppress the Jewish Holocaust were similarly unsuccessful, but by the end of the Jewish Holocaust efforts to punish could no longer be ignored.

In contrast to the shelving of the Armenian genocide, by the end of the twentieth century the international community appears to have shifted perspectives towards a willingness to end impunity for genocide and crimes against humanity with the establishment of such institutions as the *ad hoc* international criminal tribunals for Rwanda and the former Yugoslavia, the International Criminal Court, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia. The statutes and jurisprudence of these courts show that, despite the fate of the Armenians having gone unpunished, the concepts of genocide and crimes against humanity have nonetheless continued to evolve along the lines

¹⁰⁴ Schabas, 2008, p. 46, see *supra* note 50.

¹⁰⁵ Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Consideration of the Question Concerning the Finalization and Adoption of a Convention on the Establishment of an International Criminal Court in Accordance with General Assembly Resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997, 20 November 1998, UN doc. A/CONF.183/C.1/SR.3, para. 100.

¹⁰⁶ See Schabas, 2008, p. 46, *supra* note 50; Report of the International Law Commission, see *supra* note 54.

conceived in the 1915 Declaration and the Treaty of Sèvres, namely with a view to consolidating such crimes as a distinct and discrete legal category, increasingly distinguishable from war crimes.

However, this apparent shift in international efforts towards ending impunity did not arise from purely altruistic motives, and the decision to create legal crimes punishing mass atrocities amounting to genocide and crimes against humanity arose mainly out of geopolitical interests. The legal concepts of genocide and crimes against humanity have therefore also developed in accordance with reigning geopolitical interests of the time. The result is that the legal tools created have been rendered largely impotent in the face of actually preventing or consistently and exhaustively punishing the crimes of genocide and crimes against humanity. The Genocide Convention has imposed an obligation on state parties to not only punish, but to prevent, the occurrence of genocide. Yet, preventable and ongoing mass atrocities continue to occur and re-occur due to poor or lagging international decision-making, with the Rwandan genocide of 1994 being the most notorious case in point.

More recent efforts to address the lameness of the legal framework to address such crimes and fill critical gaps in the international system that allow such tragedies to go unchecked have been placed in diplomatic channels such as with the creation of the UN Office of the Special Adviser on the Prevention of Genocide, which also includes a Special Adviser on the Responsibility to Protect. The mandates of the two Special Advisers include alerting relevant actors to the risk of genocide, war crimes, ethnic cleansing and crimes against humanity, enhancing the capacity of the United Nations to prevent these crimes, including their incitement, and working with member states, regional and sub-regional arrangements, and civil society to develop more effective means of response when they do occur. A more robust and focused effort to strengthen and harmonise the current legal framework to prevent and punish such crimes independently of prevailing geopolitical interests would be a crucial component in achieving these goals.

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Historical Origins of International Criminal Law: Volume 3

Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (editors)

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