From the Holocaust to the Genocide Convention: A Human Rights Learning Process

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'The blackest day' of my life is how Rafał Lemkin described the delivery of the verdict in the Nuremberg trial.[1] War crimes prosecutor Henry T. King Jr., who met Lemkin in the lobby of Nuremberg's Grand Hotel at the beginning of October 1946, described him as 'very upset'.[2] 'At the time, Lemkin was unshaven, his clothing was in tatters, and he looked dishevelled.'[3] According to King:

> When I saw him at Nuremberg, Lemkin was very upset. He was concerned that the decision of the International Military Tribunal (IMT) – the Nuremberg Court – did not go far enough in dealing with genocidal actions. This was because the IMT limited its judgment to wartime genocide and did not include peacetime genocide. At that time, Lemkin was very focussed on pushing his points. After he had buttonholed me several times, I had to tell him that I was powerless to do anything about the limitation in the Court's judgment.[4]

Lemkin had recently learned that essentially his entire family had perished, victims of the crime to which he had given its name. He had been hospitalised in Paris,[5] and was evidently going through a period of great physical and emotional turmoil. According to biographer John Cooper, from his hospital bed 'he happened to hear on the radio about the forthcoming meeting of the General Assembly of the United Nations in New York' and was 'electrified by the new, believing that here at last was a forum which would listen to him'.[6] He organised a passage on a troop transport back to New

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1 William Korey, *An Epitaph for Raphael Lemkin*, New York: Jacob Blaustein Institute for the Advancement of Human Rights, 2001, p. 25.

2 Henry T. King Jr., 'Origins of the Genocide Convention', (2008) 40 *Case Western Reserve Journal of International Law* 13, at p. 13.

3 *Ibid.*

4 *Ibid.*, at pp. 13-14.

5 John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention*, Basingstoke, United Kingdom: Palgrave Macmillan, 2008, at p. 73.

6 *Ibid.*, at pp. 74-75.

York, and went immediately to the General Assembly, then meeting in a disused factory in Lake Success, on Long Island, in the suburbs of New York City.

Lemkin launched a campaign at what was the first session of the United Nations General Assembly that led to the adoption of a resolution to condemn genocide as an international crime.[7] Two years earlier, in his seminal book *Axis Rule in Occupied Europe*, he had lamented the shortcomings of existing international law, and called for the recognition of a new crime, to which he gave the name 'genocide'. 'New conceptions require new terms', explained Lemkin. 'Genocide' referred to the destruction of a nation or of an ethnic group, he explained, describing it as 'an old practice in its modern development'.[8] At the General Assembly, Lemkin quickly obtained the support of three delegations, India, Cuba and Panama, for a proposed resolution on genocide that he had drafted.[9] Explaining why the resolution was necessary, the Cuban delegate, Ernesto Dihigo, said it was to address a shortcoming in the Nuremberg trial by which acts committed prior to the war were left unpunished.[10] Nazi atrocities had been prosecuted at Nuremberg under the heading 'crimes against humanity', and this concept was applied by the International Military Tribunal so that it applied only to acts perpetrated subsequent to the outbreak of the conflict, in September 1939, in other words, to 'wartime genocide' but not 'peacetime genocide', as Henry King reported.

One of the preambular paragraphs in the draft resolution stated: '*Whereas* the punishment of the very serious crime of genocide when committed in time of peace lies within the exclusive territorial jurisdiction of the judiciary of every State concerned, while crimes of a relatively lesser importance such as piracy, trade in women, children, drugs, obscene publications are declared as international crimes and have been made matters of international concern…'[11] This paragraph never made it to the final version of Resolution 96(I) because the majority of the General Assembly

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7 GA Res. 96(I).

8 Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington: Carnegie Endowment for World Peace, 1944, at p. 79..

9 John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention*, Basingstoke, United Kingdom: Palgrave Macmillan, 2008, at pp. 76-87. For Lemkin's account, see: Raphael Lemkin, 'Totally Unofficial Man', in Samuel Totten and Steven Leonard Jacobs, eds., *Pioneers of Genocide* Studies, New Brunswick, NJ: Transaction Publishers, 2002, pp. 365-399, at pp. 384-387. Also: Samantha Power, '"A Problem from Hell": America and the Age of Genocide', New York: Basic Books, 2002, at pp. 51-54.

10 UN Doc. A/C.6/SR.22.

11 UN Doc. A/BUR/50.

was not prepared to recognise universal jurisdiction for the crime of genocide. Nevertheless, the resolution, somewhat toned down from the text that Lemkin had prepared, launched a process that concluded two years later with the adoption of the *Convention for the Prevention and Punishment of the Crime of Genocide*.[12]

Thus, the recognition of genocide as an international crime by the General Assembly of the United Nations, and its codification in the 1948 *Convention*, can be understood as a reaction to the Nuremberg judgment of the International Military Tribunal. It was Nuremberg's failure to recognize the international criminality of atrocities committed in peacetime that prompted the first initiatives at codifying the crime of genocide. Had Nuremberg recognized the reach of international criminal law into peacetime atrocities, we might never therefore have seen a *Genocide Convention*. Rafał Lemkin would probably be no more than an obscure and eccentric personality, as Henry King remembered him in the Grand Hotel in Nuremberg, rather than the distinguished 'Father of the Genocide Convention'.[13]

The *Convention* itself was adopted by the General Assembly on 9 December 1948. It can be described as the first human rights treaty of the modern area. A few hours later, the General Assembly adopted what is assuredly the centrepiece of modern international human rights law, the *Universal Declaration of Human Rights*.[14] Over the decades, the commemoration of the *Genocide Convention* has been overshadowed by that of the *Universal Declaration*. It is a bit like the child who has the misfortune to be born on 25 December, and who is forced to share his or her birthday with a much larger celebration. At the Palais de Chaillot in Paris, where the two instruments were adopted, there is a memorial plaque for the *Universal Declaration* but nothing for the *Genocide Convention.* That situation is being remedied in a few weeks, by French foreign minister Bernard Kouchner. Increasingly, the importance of the *Genocide Convention* is being acknowledged, not only in its own right as a source of important norms in international criminal law, but also as a defining text within the overall system of international human rights law. By insisting that 'peacetime genocide' be condemned as an international crime, the General Assembly took a giant step in the protection of human rights. It made the violation of

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12 *Convention for the Prevention and Punishment of the Crime of Genocide*, (1951) 78 UNTS 277.

13 The words are engraved on his tombstone in New York's Mount Hebron Cemetery.

14 Universal Declaration of Human Rights, GA Res. 217 A (III), UN Doc. A/810.

the right to life or to existence of a national, ethnic, racial or religious minority both an internationally unlawful act and an international crime. It also proposed, in article VI, the establishment of an international criminal court to ensure the enforcement of the *Convention.*

The *Convention* entered into force in 1951, but remained in obscurity for the next half-century. It may well have arrived ahead of its time, a vehicle for radical concepts in international law that the world could barely accept in the euphoria of the post- Second World War context, but that became unworkable during the Cold War. Only in the 1990s was there a renaissance in international criminal law. The result was a certain revival of the *Genocide Convention*, and a recognition of its role at the origins of the system. The ideas and concepts conveyed by the *Convention* became more fully developed in newer and more modern institutions and instruments, like the International Criminal Tribunal for the former Yugoslavia and the *Rome Statute of the International Criminal Court.*

Human rights, the United Nations and the drive for war crimes prosecutions

There are many possible starting points for a discussion of the origins of the *Universal Declaration of Human Rights* and the *Genocide Convention.* Each has its own ancestors, in such sources as the law of armed conflict, the international legal protection of refugees and national minorities, and the aborted efforts at international criminal justice in the aftermath of the First World War. They both share a common DNA that first becomes recognisable in the early years of the Second World War. Unlike the First World War, whose origins and whose *raison d'être* still remain clouded in the machiavellian wrangling, confusion and misunderstanding of aging empires still committed to colonialism, the Second World War was an international struggle against barbarism, genocide, totalitarianism and national oppression. Tens of millions were roused to enormous sacrifice by the urgency of defeating fascism coupled with the promise of a new world order. The Second World War was associated with a moral authority its predecessor had lacked.

The *Atlantic Charter*, signed by the United Kingdom and the United States only a few months before the latter's entry into the war, contained human rights

proclamations of a general nature.[15] It acknowledged the right of all peoples to choose the form of government under which they wished to live, called for 'improved labour standards, economic advancement, and social security', and declared that all states should abandon the use of force.[16] The *Atlantic Charter* was agreed to by Roosevelt and Churchill aboard the British battleship *Prince of Wales* in Placentia Bay, just off the coast of Newfoundland. Earlier that year, in his state of the union address, Roosevelt had proclaimed that the post-war system would be built upon 'four essential human freedoms':

> The first is freedom of speech and expression – everywhere in the world.
> The second is freedom of every person to worship God in his own way – everywhere in the world.
> The third is freedom from want – which, translated into world terms, means economic understandings which will secure to every nation everywhere a healthy peacetime life for its inhabitants everywhere in the world.
> The fourth is freedom from fear – which, translated into international terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbour – anywhere in the world.

Franklin D. Roosevelt's stirring and immortal words were reprised in the preamble of the *Universal Declaration of Human Rights*: 'Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.'[17]

As the war was drawing to a close, diplomats meeting in San Francisco adopted the *Charter of the United Nations*,[18] which placed unprecedented emphasis on human rights. The *Charter* provided several references to human rights, and declared that 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion' was among the purposes of the United Nations. To the dismay of many, however, the great powers reneged on earlier commitments to include a declaration of human rights within the *Charter* itself. Well before the San Francisco Conference in June 1945, at

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15 *Atlantic Charter*, [1942] CTS 1; signed on 14 August 1941 by Franklin D. Roosevelt and Winston Churchill (both signatures in the original are in Roosevelt's handwriting). No official version exists: *New Cambridge Modern History*, Vol. XII, Cambridge: Cambridge University Press, 1968, pp. 811-812.

16 On the role of the *Atlantic Charter* in the development of international human rights, see Elizabeth Borgwardt, *A New Deal for the World, America's Vision for Human Rights*, Cambridge and London: Harvard University Press, 2005, pp. 14-45.

17 *Universal Declaration of Human Rights*, GA Res. 217 A (III) UN Doc. A/810.

18 *Charter of the United Nations*, (1946) Cmd. 7015, P. (1946-7) XXV 1, 145 BSP 805.

which the *United Nations Charter* was adopted, foreign ministries, academics and non-governmental organizations were at work preparing draft declarations of human rights designed to form part of the post-war legal regime and, ideally, to be contained within the constitutive document of the new organization.[19] The compromise at San Francisco was to make perfunctory references to human rights in the *Charter* but to postpone adoption of anything substantive. Moreover, a poisonous exception was also incorporated: in pursuit of the principles of the United Nations, nothing contained in the Charter authorised the United Nations 'to intervene in matters which are essentially within the domestic jurisdiction of any state'.[20] Three years later, a few hours after endorsing the text of the *Genocide Convention*, the United Nations General Assembly adopted the *Universal Declaration on Human Rights*, in effect completing the work it had left unfinished at San Francisco. During its third session, which was held in Paris from October to December 1948, distinct subsidiary bodies of the General Assembly had laboured over the two texts, the Third Committee crafting the *Universal Declaration* while the Sixth Committee prepared the *Genocide Convention.* Both instruments were focused, in different and complementary ways, on the prevention of atrocities committed by a State against its own civilian population.

Crimes against humanity and the drafting of the 1948 *Genocide Convention*

When the text of the *Genocide Convention* was being negotiated in the Sixth Committee of the General Assembly, there was frequent controversy about the relationship between genocide and crimes against humanity, an issue provoked by the judgment of the International Military Tribunal at Nuremberg. The United Nations Secretariat had prepared a note addressing the relationship between genocide and crimes against humanity that insisted upon the utility of a distinct crime of genocide principally because it would enable avoidance of the *nexus* with armed conflict that

19 Louis B. Sohn, 'How American International Lawyers Prepared for the San Francisco Bill of Rights', (1995) 89 *American Journal of International Law* 540; Johannes Morsink, 'World War Two and the Universal Declaration', (1993) 15 *Human Rights Quarterly* 357; Hersh Lauterpacht, *An International Bill of the Rights of Man*, New York: Columbia University Press, 1945.

20 *Charter of the United Nations*, art. 2(7).

had featured at Nuremberg.[21] There was considerable discussion as to whether genocide was an autonomous infraction or a form of crime against humanity. France put forward a rival draft convention. Article I of its text began by affirming that '[t]he crime against humanity known as genocide is an attack on the life of a human group or of an individual as a member of such group, particularly by reason of his nationality, race, religion or opinions'.[22] This was, of course, connected with the idea, included in the final version of article I, that genocide was a crime that could be committed in time of peace or of war.[23] Brazil's representative to the Sixth Committee said that crimes against humanity, as defined in the Nuremberg *Charter*, did encompass genocide, but only to the extent they were committed during or in connection with the preparation of war. Genocide, however, had to be defined as a crime that could also be committed in time of peace.[24] The Brazilian delegate noted the confusion at Nuremberg about the scope of the term 'crimes against humanity' and said: 'In view of the vagueness about the concept of crimes against humanity, it would be well to define genocide as a separate crime committed against certain groups of human beings as such.'[25] The debate also arose in the context of the preamble. Venezuela submitted a draft preamble that it explained had omitted any reference to the Nuremberg Tribunal, as genocide was distinct from crimes against humanity.[26] France had its own proposals for the preamble, of which the most significant was addition of a reference to the Nuremberg judgment.[27] Ultimately, of course, no allusion either to Nuremberg or to crimes against humanity was

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21 'Relations Between the Convention on Genocide on the one hand and the Formulation of the Nurnberg Principles and the Preparation of a Draft Code of Offences Against Peace and Security on the other, Note by the Secretariat', UN Doc. E/AC.25/3.

22 UN Doc. A/C.6/211, art. I. See also UN Doc. A/C.6/SR.67 (Chaumont, France). France had been concerned that its own proposal would be forgotten if the Committee studied the Ad Hoc Committee draft. The chair assured the French representative that this was not the case: UN Doc. A/C.6/SR.66 (Alfaro (chair)).

23 See, *e.g.*, the following comments: UN Doc. A/C.6/SR.67 (Morozov, Soviet Union); and UN Doc. A/C.6/SR.68 (de Beus, Netherlands).

24 UN Doc. A/C.6/SR.63 (Amado, Brazil).

25 *Ibid.*

26 UN Doc. A/C.6/SR.109

27 UN Doc. A/C.6/267. '3. Substitute the following for the third sub-paragraph: "Having taken note of the legal precedent established by the judgment of the International Military Tribunal at Nürnberg of 30 September-1 October 1946".' The Soviet preamble, UN Doc. A/C.6/215/Rev.1, included a similar paragraph: 'Having taken note of the fact that the International Military Tribunal at Nuernberg in its judgments of 30 September-1 October 1946 has punished under a different legal description certain persons who have committed acts similar to those which the present Convention aims at punishing.'

incorporated in the final text of the *Convention*, which was adopted by the General Assembly on 9 December 1948.

The *Genocide Convention* represents an attempt to provide a prospective definition of the crimes addressed at Nuremberg, but using different terminology. Necessarily, it is the result of compromises. The Nuremberg precedent, by which crimes against humanity did not apply to peacetime atrocities, was no aberration or oversight. Rather, it was a carefully conceived legal formulation aimed at addressing Nazi atrocities that were previously beyond the pale of international law, without at the same time threatening those who established the Tribunal. These same great powers were prepared to agree to prosecution of peacetime atrocities only if they were defined much more narrowly than in the *Charter of the International Military Tribunal.* In other words, the Nuremberg definition of crimes against humanity covers a relatively broad range of acts but only to the extent they are associated with aggressive war, while the *Genocide Convention* covers a much narrower set of acts, although these may take place in peacetime.

In the beginning, however, it seems that the terms genocide and crimes against humanity were used as if they were synonyms. Within months of publication of *Axis Rule in Occupied Europe* in November 1944, Lemkin's neologism was being widely used to refer to Nazi atrocities. There are several references to it in the record of the London Conference and the proceedings. In his 'Planning Memorandum distributed to Delegations at Beginning of London Conference, June 1945', Justice Robert Jackson outlined the evidence he planned to adduce in the trial. Referring to 'Proof of the defendant's atrocities and other crimes', he included: 'Genocide or destruction of racial minorities and subjugated populations by such means and methods as (1) underfeeding; (2) sterilization and castration; (3) depriving them of clothing, shelter, fuel, sanitation, medical care; (4) deporting them for forced labour; (5) working them in inhumane conditions.'[28] The indictment of the International Military Tribunal charged the Nazi defendants with 'deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people, and national, racial or religious groups, particularly Jews, Poles, and Gypsies'.[29] The

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28 *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, Washington: US Government Printing Office, 1949, at p. 6.

29 *France* et al. v. *Goering* et al., (1946) 22 IMT 203, pp. 45-6

United Nations War Crimes Commission later observed that '[b]y inclusion of this specific charge the Prosecution attempted to introduce and to establish a new type of international crime'.[30] During the trial, Sir David Maxwell-Fyfe, the British prosecutor, reminded one of the accused, Von Neurath, that he had been charged with genocide, 'which we say is the extermination of racial and national groups, or, as it has been put in the well-known book of Professor Lemkin, "a co-ordinated 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".'[31] In his closing argument, the French prosecutor, Champetier de Ribes, stated: 'This is a crime so monstrous, so undreamt of in history through the Christian era up to the birth of Hitlerism, that the term "genocide" had to be coined to define it.'[32] He spoke of 'the greatest crime of all, genocide'.[33] The British prosecutor, Sir Hartley Shawcross, also used the term in his summation: 'Genocide was not restricted to extermination of the Jewish people or of the gypsies. It was applied in different forms to Yugoslavia, to the non-German inhabitants of Alsace-Lorraine, to the people of the Low Countries and of Norway.'[34] Shawcross referred to how '[t]he aims of genocide were formulated by Hitler'.[35] He went on to explain: 'The Nazis also used various biological devices, as they have been called, to achieve genocide. They deliberately decreased the birth rate in the occupied countries by sterilization, castration, and abortion, by separating husband from wife and men from women and obstructing marriage.'[36] Although the final judgment in the Trial of the Major War Criminals, issued 30 September-1 October 1946, never used the term, it described at some length what was in fact the crime of genocide. Lemkin later wrote that '[t]he evidence produced at the Nuremberg trial gave full support to the concept of genocide'.[37]

But genocide was not, in fact, a crime under the *Charter of the International Military Tribunal*. Instead, what must at the time have been viewed as a cognate

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30 United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London: His Majesty's Stationery Office, 1948, at p. 197.

31 (1947) 17 IMT, p. 61.

32 (1947) 19 IMT, p. 531.

33 *Ibid.*.

34 *Ibid.*, pp. 497.

35 (1947) 19 IMT, p. 496.

36 *Ibid.*, p. 498. Also, pp. 509, 514.

37 Raphael Lemkin, 'Genocide as a Crime in International Law', (1947) 41 *American Journal of International Law*. 145, at p. 147.

concept, crimes against humanity, formed the legal basis of prosecutions, along with 'crimes against peace' and 'war crimes'. After considerably debate, the drafters of the *Charter* had agreed to add crimes against humanity in order to fill an obvious gap in existing international law applicable to the Nazi atrocities, namely persecution of the civilian population *within* Germany. The efforts at definition of this new category of international crime reveal why the fabled *nexus* with armed conflict – limiting the Tribunal's jurisdiction to 'wartime genocide' - was inserted into the crimes against humanity provision used at the Nuremberg trial.

In the Legal Committee of the United Nations War Crimes Commission, which met in 1944 and 1945, the United States representative Herbert C. Pell had used the term 'crimes against humanity' to describe offences 'committed against stateless persons or against any persons because of their race or religion'.[38] More frequently, the concept was described using terms like 'atrocity' and 'persecution'. In May 1944, the Legal Committee submitted a draft resolution to the plenary Commission urging it to adopt a broad view of its mandate, and to address 'crimes committed against any persons without regard to nationality, stateless persons included, because of race, nationality, religious or political belief, irrespective of where they have been committed'.[39] Lord Simon, who was the British Lord Chancellor, explained the problem this might pose for his government:

> This would open a very wide field. No doubt you have in mind particularly the atrocities committed against the Jews. I assume there is no doubt that the massacres which have occurred in occupied territories would come within the category of war crimes and there would be no question as to their being within the Commission's terms of reference. No doubt they are part of a policy which the Nazi Government have adopted from the outset, and I can fully understand the Commission wishing to receive and consider and report on evidence which threw light on what one might describe as the extermination policy. I think I can probably express the view of His Majesty's Government by saying that it would not desire the Commission to place any unnecessary restriction on the evidence which may be tendered to it on this general subject. I feel I should warn you, however, that the question of acts of this kind committed in enemy territory raises serious difficulties.[40]

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38 'Resolution moved by Mr. Pell on 16th March 1944', United Nations War Crimes Commission, Committee II, Doc. III/1, 18 March 1944; United Nations War Crimes Commission, History, p. 175; Arieh J. Kochavi, *Prelude to Nuremberg, Allied War Crimes Policy and the Question of Punishment*, Chapel Hill, NC, and London: University of North Carolina Press, 1998, at p. 143.

39 United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London: His Majesty's Stationery Office, 1948, at p. 176.

40 'Correspondence Between the War Crimes Commission and HM Government in London Regarding the Punishment of Crimes Committed on Religious, Racial or Political Grounds', UNWCC Doc. C.78, 15 February 1945, National Archives of Canada RG-25, Vol. 3033, 4060-40C, Part Four.

The United States Department of State was decidedly lukewarm to the idea that war crimes prosecutions might innovate and hold Germans accountable for crimes committed against minority groups within their own borders.[41] This was reminiscent of the position taken in 1919 by Robert Lansing and James Brown Scott as representatives of the United States during attempts to prosecute atrocities perpetrated during the First World War.[42]

Later in 1944 and in early 1945, the position of the major powers, including the United States, evolved. A draft from the United States government dated 16 May 1945, and developed during the San Francisco conference, provided for a tribunal with jurisdiction to try '[a]trocities and offences committed since 1933 in violation of any applicable provision of the domestic law of any of the parties or of [*sic*] Axis Power or satellite, including atrocities and persecutions on racial or religious grounds'.[43] At the London Conference, which began on 26 June 1945, the United States submitted a text that drew upon the Martens clause of the Hague conventions of 1899 and 1907. But the reference to 'the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience' was linked to the crime of aggression.[44] The record of the meetings leaves no doubt that the four powers insisted upon a *nexus* between the war itself and the atrocities committed by the Nazis against their own Jewish populations. It was on this basis, and this basis alone, that they considered themselves entitled to proceed. The distinctions were set out by the head of the United States delegation, Robert Jackson, at a meeting on 23 July 1945:

It has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the way Germany

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41 Arieh J. Kochavi, *Prelude to Nuremberg, Allied War Crimes Policy and the Question of Punishment*, Chapel Hill, NC, and London: University of North Carolina Press, 1998, at p. 149. See also Shlomo Aronson, 'Preparations for the Nuremberg Trial: The OSS, Charles Dworak, and the Holocaust', (1998) 12 *Holocaust & Genocide Studies* 257.

42 *Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of America and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919*, Oxford: Clarendon Press, 1919.

43 'Executive Agreement, Draft No. 2', in Bradley F. Smith, The American Road to Nuremberg, The Documentary Record, 1944-1945, Stanford, CA: Hoover Institution Press, 1982, at p. 195.

44 'Revised Draft of Agreement and Memorandum Submitted by American Delegation, 30 June 1945', in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, Washington: US Government Printing Office, 1949, at 121.

treats its inhabitants, or any other country treats its inhabitants is not our affair any more than it is the affair of some other government to interpose itself in our problems. The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal war. Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities. They were a part of the preparation for war or for the conduct of the war in so far as they occurred inside of Germany and that makes them our concern.[45]

Speaking of the proposed crime of 'atrocities, persecutions, and deportations on political, racial or religious grounds', Jackson indicated the source of the lingering concerns of his government:

[O]rdinarily we do not consider that the acts of a government toward its own citizens warrant our interference. *We have some regrettable circumstances at times in our own country in which minorities are unfairly treated.* We think it is justifiable that we interfere or attempt to bring retribution to individuals or to states only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved. We see no other basis on which we are justified in reaching the atrocities which were committed inside Germany, under German law, or even in violation of German law, by authorities of the German state.[46]

Jackson himself was surely not very proud of the 'regrettable circumstances' in the United States 'in which minorities are unfairly treated'. But as a representative of his government, he could not agree with anything by which international law would recognize as a crime acts of persecution based on racial origin, because this might, at least in theory, expose United States officials to prosecution. Jackson's views manifest a candour lacking among the delegations of the United Kingdom, France and the Soviet Union, but we can readily surmise that each had concerns about circumstances equivalent to or worse than the *apartheid* regime that then prevailed in parts of the United States. The result was an agreement by the four 'Great Powers' at the London Conference by which Nazi leaders could be prosecuted for such atrocities because they were committed in association with the war.

Article IV(c) of the *Charter of the International Military Tribunal* defines 'crimes against humanity' as 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 furtherance of or in connection with any crime within the jurisdiction of the International Tribunal,

45 'Minutes of Conference Session of 23 July 1945', in *ibid.*, p. 331.

46 *Ibid.*., p. 333.

whether or not in violation of the domestic law of the country where perpetrated'.[47] In the final judgment of the Nuremberg Tribunal, addressing implicitly the issue of the *nexus* between crimes against humanity and the war itself, something that appeared fundamental in order to comply with the *Charter* of the Tribunal, the judges noted that '[i]t was contended for the Prosecution that certain aspects of this anti Semitic policy were connected with the plans for aggressive war'.[48] The Tribunal made a distinction between pre-war persecution of German Jews, which it characterized as 'severe and repressive', and German policy during the war in the occupied territories. Although the judgment frequently referred to events during the 1930s, none of the accused was found guilty of an act perpetrated prior to 1 September 1939, the day the war broke out.

This was the situation about which Rafał Lemkin was so exorcised in October 1946 when he met Henry King in the lobby of Nuremberg's Grand Hotel. The issue is one manifestation of a broader debate about the extent to which international law might breach the wall of State sovereignty when serious violations of human rights are perpetrated. By 1944, reports of the Nazi atrocities made it virtually unthinkable that these go unpunished due to the rigorous application of a traditional view by which States had no business interfering in the treatment of a civilian population by another State. The architects of the Nuremberg Tribunal finessed this matter by declaring Nazi crimes to be punishable to the extent that there was a *nexus* with international armed conflict. Their hypocrisy was transparent enough to other States, many of whom had historically found themselves on the receiving end of the same victorious powers who were prepared to punish the Nazis yet ensure that the underlying principles not apply to their own acts. The *Genocide Convention* was the initial fruit of this dissatisfaction, just as the *Universal Declaration* was the first important result of the failure to incorporate substantive human rights norms in the *Charter of the United Nations.*

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47 *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT)*, annex, (1951) 82 UNTS 279.

48 *France* et al. v. *Goering* et al., (1946) 22 IMT 203, p. 492.

Closing the impunity gap

It is often said that crimes against humanity were recognised as part of customary international law prior to Nuremberg. This is one way of answering the charge that the International Military Tribunal breached the principle of legality (*nullum crimen sine lege*). Reference to the debates in the United Nations War Crimes Commission and the London Conference should be enough to show just how unclear the state of customary law actually was. Whether it was unfair to prosecute the Nazis for their atrocities is another matter altogether. The Nuremberg judges famously said that *nullum crimen* was a 'principle of justice': 'To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.'[49]

The principle of legality was most adequately addressed with respect to the crime of genocide through the adoption of General Assembly Resolution 96(I) in December 1946 and, two years later, the *Genocide Convention* itself. The legal certainty that this codification accomplished no doubt contributed to the stability of the definition over the ensuing six decades. Although academics and human rights activists frequently criticised the narrowness of the definition, States rarely showed any inclination to consider amendment. They were given a golden opportunity at the 1998 Rome Conference to fix any 'blind spots' in the definition of genocide set out in article II of the *Convention* but declined to do so. In debate in the Committee of the Whole at the Rome Conference, only Cuba argued again for amendment of the definition, so as to include social and political groups.[50] Otherwise, there was a chorus of support for the original text adopted by the General Assembly some fifty years earlier.[51]

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49 (1948) 22 IMT 461.

50 UN Doc. A/CONF.183/C.1/SR.3, para. 100.

51 *Ibid.*, paras. 2, 18, 20 (Germany), 22 (Syria), 24 (United Arab Emirates), 26 (Bahrain), 28 (Jordan), 29 (Lebanon), 30 (Belgium), 31 (Saudi Arabia), 33 (Tunisia), 35 (Czech Republic), 38 (Morocco), 40 (Malta), 41 (Algeria), 44 (India), 49 (Brazil), 54 (Denmark), 57 (Lesotho), 59 (Greece), 64 (Malawi), 67 (Sudan), 72 (China), 76 (Republic of Korea), 80 (Poland), 84 (Trinidad and Tobago), 85 (Iraq), 107 (Thailand), 111 (Norway), 113 (Côte d'Ivoire), 116 (South Africa), 119 (Egypt), 122 (Pakistan), 123 (Mexico), 127 (Libya), 132 (Colombia), 135 (Iran), 137 (United States of America), 141 (Djibouti), 143 (Indonesia), 145 (Spain), 150

Crimes against humanity, on the other hand, lingered on after Nuremberg in a fog of uncertainty. In sharp contrast with genocide, whose definition has remained unchanged for nearly six decades, it seems that each time crimes against humanity is defined the result is different. As one of its first projects, the United Nations International Law Commission had been given the task both of identifying the 'Nuremberg Principles' and developing a 'Code of Offences Against the Peace and Security of Mankind'. Principle VI of the 'Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal', adopted by the Commission in 1950,[52] concerned subject matter jurisdiction. Crimes against humanity were defined as 'Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime'. The wording was not identical to that of the *Charter of the International Military Tribunal*. But it actually clarified and entrenched the significance and scope of the *nexus*. The Commission said it did not exclude the possibility that crimes against humanity could be committed in time of peace, but only to the extent that they took place 'before a war in connexion with crimes against peace'.[53]

Critics of the *nexus* often point to Control Council Law No. 10,[54] which was adopted by the Allies for the purpose of prosecutions within Germany. The famous *nexus* had disappeared from the definition of crimes against humanity. But this can be easily explained by the fact that the Allies believed they were enacting national law applicable to Germany rather than international law with the potential to apply to themselves, which had been the case at Nuremberg. Speaking of the Control Council Law prosecutions by American military tribunals, United States prosecutor Telford Taylor observed in his final report to the Secretary of the Army that '[n]one of the Nuremberg judgments squarely passed on the question whether mass atrocities committed by or with the approval of a government against a racial or religious group of its own inhabitants in peacetime constitute crimes under international law'. Taylor

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(Romania), 151 (Senegal), 153 (Sri Lanka), 157 (Venezuela), 161 (Italy), 166 (Ireland), 172 (Turkey), 174.

52 *Yearbook…1951*, Vol. II, UN Doc. A/CN. 4/SER.A/1950/Add. 1, paras. 95-127.

53 *Ibid.*., para. 123.

54 Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 January 1946.

said that the practical significance of this problem could hardly be overstated, and cited the 1948 *Genocide Convention*, whose drafting had just been completed when he penned these words, as a manifestation of the interest in this question.[55]

Eventually, the *nexus* disappeared from the definition of crimes against humanity, but it would take half a century for the evolution to become evident. In 1995, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia declared that the requirement that crimes against humanity be associated with armed conflict was inconsistent with customary law.[56] It offered the rather unconvincing explanation that the Security Council had included the *nexus* in article 5 of the *Statute of the International Criminal Tribunal for the former Yugoslavia* as a jurisdictional limit only.[57] The more plausible explanation is that the lawyers in the United Nations Secretariat who drafted the *Charter* believed the *nexus* to be part of customary law, and the Council did not disagree.[58] Nevertheless, there can today be no doubt that the flaw in the Nuremberg concept of crimes against humanity, something that prompted Lemkin's genocide-related initiatives at the General Assembly, has been corrected. The authoritative definition appears in article 7 of the *Rome Statute*, which contains no reference to armed conflict as a contextual element. The only real remaining uncertainty is precisely when the *nexus* disappeared from the elements of crimes against humanity. As far as the International Law Commission was concerned, it was present as late as 1950, and perhaps after that. In 1954, the Commission experimented by removing the *nexus*, replacing it with another contextual element, the State plan or policy.[59] There is also some recent authority from the European Court of Human Rights supporting the view that the *nexus* was

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55 Telford Taylor, *Final Report to Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10*, Washington: US Government Printing Office, 1951, at pp. 224, 226.

56 *Prosecutor* v. *Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 141; *Prosecutor* v. *Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999, para. 251; *Prosecutor* v. *Kordić* et al. (Case No. IT-95-14/2-T), Judgment, 26 February 2001, para. 23.

57 *Prosecutor* v. *Šešelj* (Case No. IT-03-67-AR72.1), Decision on the Interlocutory Appeal Concerning Jurisdiction, 31 August 2004, para. 13.

58 See the Secretary-General's report: 'Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.' 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)', UN Doc. S/25704 (1993), para. 47; Larry D. Johnson, 'Ten Years Later: Reflections on the Drafting', (2004) 2 *Journal of International Criminal Justice* 368, at p. 372.

59 *Yearbook…1954*, Vol. II, UN Doc. A/CN.4/SER.A/1954/Add.l, p. 150.

absent as early as the 1950s.[60] In a September 2008 decision, a Grand Chamber of the Court said cautiously that a *nexus* with armed conflict 'may no longer have been relevant by 1956'.[61] The issue directly confronts the Extraordinary Chambers of the Courts of Cambodia in their current efforts to prosecute Khmer Rouge atrocities.

Conclusions

The horrors of Auschwitz, Dachau and Treblinka set the context for the development of human rights law in the years following the Second World War. Prosecution of war crimes perpetrated against civilians had hitherto been confined to cases where the victims resided in occupied territories. What a country did to its own citizens had been deemed a matter that did not concern international law and the international community. Nuremberg appeared to take this bold step forward, but strings were attached. Although the Nazi persecution of Jews, even those within the borders of Germany, was deemed an international crime, the drafters of the Nuremberg *Charter* insisted upon a *nexus* between the crime against humanity and the international conflict. In effect, they were holding the Germans accountable for atrocities committed against Germans but resisting a more general principle that might hold them responsible for atrocities perpetrated within their own borders or in their colonies. This imperfect criminalization of crimes against humanity mirrored the ambiguities of the *Charter of the United Nations*, adopted in June 1945, that pledged to promote and encourage respect for human rights yet at the same time promised that the United Nations would not intervene in matters which were 'essentially within the domestic jurisdiction of any state'.

The recognition of genocide as an international crime by the United Nations General Assembly in December 1946 and the adoption of the *Genocide Convention* two years later were a reaction to dissatisfaction with the restrictions on crimes against humanity imposed at Nuremberg. It is impossible to understand the codification of the crime of genocide, and the interest it created in international law, without appreciating this situation. If the law of Nuremberg had recognized what

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60 *Kolk* v. *Estonia* (App. no. 23052/04), *Kislyiy* v. *Estonia* (App. no. 24018/04), Admissibility Decision, 17 January 2006; *Penart* v. *Estonia* (App. No. 14685/04), Admissibility Decision, 24 January 2006;

61 *Korbely* v. *Hungary* (App. No. *9174/02*), Judgment, 19 September 2008, para. 82.

Lemkin called 'peacetime genocide', there would probably have been no General Assembly resolution and no Convention. Neither would have been necessary. There would have been no legal gap to fill.

Two streams converged in December 1948, at the General Assembly of the United Nations: the standard-setting of international human rights manifested in the Universal Declaration of Human Rights, and the individual accountability for violations of human rights, of which the Convention for the Prevention and Punishment of the Crime of Genocide was the modest beginning. The Genocide Convention established that in the case of a particular form of strictly defined atrocity there was no longer any nexus, and that the crime could be committed in time of peace as well as in wartime. The Universal Declaration laid the groundwork for steady progress in both standard setting and a growing recognition of the right of the international community in general and United Nations bodies such as the Commission on Human Rights in particular to breach the wall of the *domaine reservé* by which States historically sheltered atrocities from international scrutiny.

The legal significance of the *Genocide Convention* has declined over the past decade or so, but not because it is inapplicable to specific circumstances or out of a perceived conservativism of diplomats and judges. Rather, new instruments and new institutions have emerged. Foremost among them is the International Criminal Court. In a different way, it accomplishes much the same thing as the *Genocide Convention*, but in a manner applicable to crimes against humanity as well. Moreover, the recent 'responsibility to protect' doctrine extends the duty of prevention found in article I of the *Genocide Convention* to crimes against humanity. The only legal consequence of describing an atrocity as genocide rather than as crimes against humanity is the relatively easy access to the International Court of Justice offered by article IX of the 1948 *Convention.* But article IX has generated more heat than light, and the recent ruling of the Court in *Bosnia* v. *Serbia* should discourage resort to this remedy except in the very clearest of cases.[62] In a legal sense, there is now slight importance, if any, to the distinction between genocide and crimes against humanity. The importance of the *Genocide Convention* probably can be found not so much in it s contemporary

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62 *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007. On the judgment, see: William A. Schabas, 'Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes', (2007) 2 *Genocide Studies and Prevention* 101.

potential to address atrocities, something that is largely superseded by more modern texts, as its historic contribution to the struggle for accountability and the protection of human rights.