

## ORIGINS OF THE GENOCIDE CONVENTION: FROM NUREMBERG TO PARIS

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In his remarks at the September 28, 2007 symposium commemorating the adoption of the Genocide Convention, held at Case Western Reserve University School of Law, former war crimes prosecutor Henry T. King, Jr. described meeting Raphael Lemkin in Nuremberg's Grand Hotel in 1946. Lemkin first proposed the term "genocide" in his 1944 book *Axis Rule in Occupied Europe*.<sup>1</sup> Professor King said he found Lemkin to be a "crank," adding that "[a]t that time, he was unshaven, his clothing was in tatters and he looked dishevelled." King continued:

Lemkin was very upset. He was concerned that the decision of the International Military Tribunal—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 focused 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.<sup>2</sup>

Lemkin was not the only person at the time to express displeasure with the Nuremberg Tribunal's decision to leave unpunished Nazi atrocities committed against Jews and other minorities within Germany prior to the outbreak of the war on September 1, 1939.

Within days of the Nuremberg judgment, issued on September 30 and October 1, 1946, three United Nations Member States—India, Cuba, and Panama—proposed a resolution along the lines of Lemkin's comments to Henry King at the General Assembly's first session. Cuban Delegate

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<sup>1</sup> See RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* 79 (1944).

<sup>2</sup> Henry T. King, Jr., Remarks at Case Western Reserve University School of Law Frederick K. Cox International Law Center Symposium: To Prevent and to Punish: An International Conference in Commemoration of the Sixtieth Anniversary of the Negotiation of the Genocide Convention (Sept. 27, 2007), reprinted in 40 CASE W. RES. J. INT'L L. 13–14, webcast available at <http://law.case.edu/centers/cox/webcast.asp?dt=20070928&type=wmv&a=3>.

Ernesto Dihigo explained that the resolution was necessary to address a shortcoming in the Nuremberg trial by which acts committed prior to the war were left unpunished.<sup>3</sup> 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 . . .<sup>4</sup>

This paragraph never made it into the final version of Resolution 96(I) because the majority of the General Assembly was not prepared to recognize universal jurisdiction for the crime of genocide.<sup>5</sup> Nevertheless, the resolution,



**Paying my respects to Raphael Lemkin at Mount Hebron Cemetery**

tion, somewhat toned down from the hopes of those who had proposed it, launched a process that concluded two years later with the adoption of the Convention for the Prevention and Punishment of the Crime of Genocide,<sup>6</sup> which met in Paris at the Palais de Chaillot in late 1948.

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 IMT's Nuremberg judgment. 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

<sup>3</sup> U.N. GAOR, 1st Sess., 2nd plen. Mtg., at 101, U.N. Doc. A/C.6/SR.22 (Nov. 22, 1946).

<sup>4</sup> U.N. GAOR, 1st Sess., U.N. Doc. A/BUR/50 (Nov. 2, 1946).

<sup>5</sup> See generally G.A. Res. 96 (I), at 188, U.N. Doc. A/64/Add.1 (Dec. 11, 1946).

<sup>6</sup> See generally Convention for the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III), U.N. Doc. A/810 (Dec. 9, 1948).

“Father of the Genocide Convention.”<sup>7</sup>

CRIMES AGAINST HUMANITY AND THE DRAFTING OF THE 1948 GENOCIDE  
CONVENTION

The remarks by Dihigo during the first session of the General Assembly were only the prelude to a protracted debate about the relationship between genocide and crimes against humanity. Controversy arose repeatedly on the subject in 1947 and 1948 as the Genocide Convention was being drafted. General Assembly Resolution 96(I) was adopted immediately after another resolution, Resolution 95(I), which called for the preparation of the “Nuremberg Principles.”<sup>8</sup> Reference to Nuremberg suggested crimes against humanity, rather than genocide. Although there were occasional references to the word “genocide” during the Nuremberg trial, the Tribunal’s Charter dealt with Nazi atrocities against Jews and other vulnerable minorities under the concept of crimes against humanity. Thus, the General Assembly was already making an implied distinction between crimes against humanity and genocide. Resolution 96(I) did not use the expression “crimes against humanity.”

General Assembly Resolution 96(I) assigned responsibility for preparation of the Convention to the Economic and Social Council (ECOSOC). The resolution requested the ECOSOC “to undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly.” ECOSOC rejected suggestions from the Secretary-General that the matter be referred to the Commission on Human Rights or to a special committee of the Council.<sup>9</sup> The Secretary-General turned to three experts, Raphael Lemkin, Henri Donnedieu de Vabres, a professor at the University of Paris Law Faculty and a former judge of the Nuremberg Tribunal, and Vespasian V. Pella, a Romanian law professor and President of the International Association for Penal Law. The Secretary-General felt that genocide should be defined so as not to encroach “on other notions, which logically are and should be distinct.”<sup>10</sup> This was an oblique reference to “crimes against humanity,” which had been defined in the Nuremberg Tribunal’s Charter and applied in its 1946 judgment.

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<sup>7</sup> These words are engraved on Mr. Lemkin’s tombstone in New York’s Mount Hebron Cemetery, which Don Ferencz and I visited to pay our respects a few days before the conference at Case Western Reserve University on September 28, 2007.

<sup>8</sup> G.A. Res. 95 (I), at 188, U.N. Doc. A/236 (Dec. 11, 1946).

<sup>9</sup> The Secretary-General, *Note by the Secretary-General on the Crime of Genocide*, U.N. Doc. E/330 (Mar. 12, 1947).

<sup>10</sup> The Secretary-General, *Draft Convention on the Crime of Genocide*, 15, delivered to the Economic and Social Council, U.N. Doc. E/447 (June 26, 1947).

The Secretariat prepared a draft convention, which was accompanied by the three experts' comments.<sup>11</sup> On June 13, 1947, it was sent to the Committee on the Progressive Development of International Law and Its Codification—the forerunner of the International Law Commission—for comments.<sup>12</sup> France circulated a memorandum “on the subject of genocide and crimes against humanity” which challenged the use of the term “genocide,” calling it “a useless and even dangerous neologism.” France preferred to approach the problem of extermination of racial, social, political or religious groups from the standpoint of crimes against humanity.<sup>13</sup> Somewhat later, France insisted that the proposed convention should affirm its relationship with the principles of the Nuremberg Tribunal, and explain that genocide was merely one aspect of crimes against humanity.<sup>14</sup> The French position did not find widespread support. But it highlights the nature of the debate at the time. France viewed genocide as synonymous with crimes against humanity. It insisted upon the principles that were established at Nuremberg, including the rejection of “peacetime genocide.” Others, of course, saw the evolving law on genocide as a way to set aside the Nuremberg precedent.

Later in 1947, the fate of the draft convention was considered by the General Assembly at its second session. The United Kingdom, which had been hostile to the whole idea of a convention, proposed that the matter be assigned to the International Law Commission, given its ongoing work concerning the Nuremberg Principles, and what was described as a close relationship between genocide and crimes against humanity.<sup>15</sup> This would have had the practical consequence of blurring the line between General Assembly Resolution 95(I), concerning the Nuremberg Principles, and 96(I), mandating the preparation of a convention on genocide. It was the “third world” countries of Panama, Cuba, and India that had launched Resolution 96(I) in 1946. As negotiation of the convention itself proceeded, once again “third world” countries led the battle for the autonomy of the concept of genocide. When the United Kingdom and others tried to sidetrack the convention by referring it to the International Law Commission, and muddying the entire concept by linking it to the Nuremberg Principles, Panama's Ricardo J. Alfaro protested that “what was yesterday a conviction or a decision that a

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<sup>11</sup> The Secretary-General, *Report and the Draft Convention of the General Secretariat*, U.N. Doc. A/AC.10/41 (June 26, 1947).

<sup>12</sup> The Secretary-General, *Draft Convention on the Crime of Genocide*, U.N. Doc. A/AC.10/42/Add.1 (June 10, 1947).

<sup>13</sup> U.N. Doc. A/AC.20/29.

<sup>14</sup> Communication from French Ministry of Foreign Affairs, *Draft Convention on the Crime of Genocide*, para. 2, delivered to the General Assembly, U.N. Doc. A/401/Add.3 (Oct. 31, 1947).

<sup>15</sup> U.N. Doc. A/PV.123 (Davies, United Kingdom).

certain thing had to be done, appears today beclouded by doubts and is a subject of consultation.”<sup>16</sup> Panama, Cuba, Egypt, and China took initiatives to put the convention back on the rails, all the time reinforcing the distinction between the Nuremberg Principles project and the Genocide Convention.<sup>17</sup> The heart of the issue was whether to consider genocide as a variety of crime against humanity, or to treat it as a distinct form of criminal behavior. A Chinese amendment implying the latter was adopted on a roll-call vote.<sup>18</sup>

The ECOSOC established an Ad Hoc Committee to review the Secretariat draft.<sup>19</sup> The Secretariat proposed that the Ad Hoc Committee consider various substantive questions, including the relationship between genocide and crimes against humanity.<sup>20</sup> In accordance with a suggestion from the Secretariat, the debate arose in the context of discussion of the preamble. Once again, France was insistent about the linkage between genocide and crimes against humanity, while others were equally firm in their view that the concepts had to be made distinct and separate. France had, in fact, urged that the preamble describe genocide as “a crime against humanity,”<sup>21</sup> but the Ad Hoc Committee rejected this, choosing instead to characterize it as “a crime against mankind.”<sup>22</sup> According to the Committee’s final report, its members “categorically opposed the expression ‘crimes against humanity’ because, in their opinion, it had acquired a well defined legal meaning in the Charter of the Nuremberg Tribunal.”<sup>23</sup> France had somewhat more success with its proposal that the preamble refer to the IMT.<sup>24</sup> Lebanon objected, saying that the Nuremberg trial dealt with crimes against humanity and not genocide.<sup>25</sup> Venezuela also opposed any reference to Nuremberg.<sup>26</sup> The reasons for the opposition stemmed from the same concern, namely that

<sup>16</sup> U.N. Doc. A/C.3/SR.59.

<sup>17</sup> *Draft Convention on the Crime of Genocide*, Cuba, Egypt and Panama: Amendment Proposal, U.N. Doc. A/512 (Nov. 21, 1947).

<sup>18</sup> U.N. Doc. A/PV.123, p. 241.

<sup>19</sup> S.C. Res. 117 (VI), at 19, U.N. Doc. E/734 (Mar. 3, 1948).

<sup>20</sup> Memorandum from the Secretariat, Ad Hoc Comm. on Genocide, *List of Substantive Items to be Discussed in the Remaining Stages of the Committee’s Sessions*, at 2, U.N. Doc. E/AC.25/11 (Apr. 21, 1948).

<sup>21</sup> U.N. Econ. & Soc. Council [ECOSOC], Ad Hoc Comm. on Genocide, *Summary Record of the Twentieth Meeting*, at 7, U.N. Doc. E/AC.25/SR.20 (Apr. 21, 1948).

<sup>22</sup> U.N. Econ. & Soc. Council [ECOSOC], Ad Hoc Comm. on Genocide, *Report of the Committee and Draft Convention Drawn up by the Committee*, at 6, U.N. Doc. E/794 (May 24, 1948) (prepared by Karim Azkoul).

<sup>23</sup> *Id.* at 7.

<sup>24</sup> U.N. Econ. & Soc. Council [ECOSOC], Ad Hoc Comm. on Genocide, *Summary of the Record of the Twenty-Third Meeting*, at 3, U.N. Doc. E/AC.25/SR.23 (May 4, 1948).

<sup>25</sup> *Id.* at 4.

<sup>26</sup> *Id.* at 4–5.

the crime of genocide might be confused with the crimes against humanity that had been judged by the IMT.<sup>27</sup>

The final version of the Convention was drafted in the Sixth Committee of the General Assembly, which met in Paris in late 1948. The United Nations Secretariat prepared a note addressing the relationship between genocide and crimes against humanity, but insisted upon the utility of a distinct crime of genocide principally because it would enable avoidance of the *nexus* with armed conflict.<sup>28</sup> There was considerable discussion as to whether or not genocide was an autonomous infraction or in the form of a crime against humanity. France prepared 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.”<sup>29</sup> 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.<sup>30</sup> 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 a time of peace.<sup>31</sup> 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.”<sup>32</sup> The debate also arose in the context of the preamble. Venezuela submitted a draft preamble that it explained had omitted any

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<sup>27</sup> U.N. Econ. & Soc. Council [ECOSOC], Ad Hoc Comm. on Genocide, *Report of the Committee and Draft Convention Drawn up by the Committee*, at 9, U.N. Doc. E/794 (May 24, 1948) (prepared by Karim Azkoul).

<sup>28</sup> U.N. Econ. & Soc. Council [ECOSOC], Ad Hoc Comm. On Genocide, *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*, at 5–6, U.N. Doc. E/AC.25/3 (Apr. 2, 1948).

<sup>29</sup> France: Draft Convention on Genocide, *Draft Convention and Report of the Economic and Social Council*, art. 1, delivered to the General Assembly, U.N. Doc. A/C.6/211 (Oct. 1, 1948); U.N. Econ. & Soc. Council [ECOSOC], Sixth Comm., *Continuation of the Consideration of the Draft Convention on Genocide*, at 34, U.N. Doc. A/C.6/SR.67 (Oct. 5, 1948).

<sup>30</sup> See, e.g., U.N. Econ. & Soc. Council [ECOSOC], Sixth Comm., *Continuation of the Consideration of the Draft Convention on Genocide*, at 38, U.N. Doc. A/C.6/SR.67 (Oct. 5, 1948); U.N. Econ. & Soc. Council [ECOSOC], Sixth Comm., *Continuation of the Consideration of the Draft Convention on Genocide*, at 47, U.N. Doc. A/C.6/SR.68 (Oct. 6, 1948).

<sup>31</sup> U.N. Econ. & Soc. Council [ECOSOC], Sixth Comm., *Continuation of the Consideration of the Draft Convention on Genocide*, at 6, U.N. Doc. A/C.6/SR.63 (Sept. 30, 1948) (Amado, Brazil).

<sup>32</sup> *Id.* at 6–7.

reference to the Nuremberg Tribunal, because genocide was distinct from crimes against humanity.<sup>33</sup> France had its own proposals for the preamble, of which the most significant was addition of a reference to the Nuremberg judgment.<sup>34</sup> Ultimately, of course, no reference either to Nuremberg or to crimes against humanity was incorporated in the final text of the Convention adopted by the General Assembly on December 9, 1948.

#### GENOCIDE AT NUREMBERG

Yet, Nuremberg and genocide—not to mention crimes against humanity—were most certainly joined at the hip. Many who are unfamiliar with the text of the Nuremberg judgment are surprised to see the relatively small part played in it by the Holocaust. Certainly, in the popular perception of the Nuremberg trial, Nazi persecution of European Jews was the central issue.

The word itself was first proposed by Lemkin in his 1944 book *Axix Rule in Occupied Europe*.<sup>35</sup> Within months, it was being used widely to refer to Nazi atrocities. In his planning memorandum distributed to delegations at the beginning of London Conference in June 1945, Justice Robert Jackson had outlined the evidence he planned to adduce in the trial. Referring to “[p]roof of the defendant’s atrocities and other crimes,” he included, “[g]enocide 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 labor; (5) working them in inhumane conditions.”<sup>36</sup> The IMT’s indictment 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

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<sup>33</sup> U.N. Econ. & Social Council, Sixth Comm. [ECOSOC], *Continuation of the Consideration of the Draft Convention on Genocide*, at 489, U.N. Doc. A/C.6/SR.109 (Nov. 17, 1948).

<sup>34</sup> France: Amendments to the Preamble to the Draft Convention, *Genocide: Draft Convention and Report of the Economic and Social Council*, U.N. Doc. A/C.6/267 (Nov. 15, 1948) (“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.’”); Union of Soviet Socialist Republics: Amendments to the Draft Convention (E/794), *Genocide: Draft Convention and Report of the Economic and Social Council*, 2, U.N. Doc. A/C.6/215/Rev.1 (Oct. 9, 1948) (“Having taken note of the fact that the International Military Tribunal at Nuremberg 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.”).

<sup>35</sup> See LEMKIN, *supra* note 1.

<sup>36</sup> ROBERT H. JACKSON, REPORT OF ROBERT H. JACKSON UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 68 (Dep’t of State Publication 1949) [hereinafter JACKSON REPORT].

or religious groups, particularly Jews, Poles, and Gypsies.”<sup>37</sup> The 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.”<sup>38</sup> 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.”<sup>39</sup>

In his closing argument, the French prosecutor, Champetier de Ribes, stated “[t]his 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.”<sup>40</sup> He spoke of “the greatest crime of all, genocide.”<sup>41</sup> 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.”<sup>42</sup> Shawcross referred to how “[t]he aims of genocide were formulated by Hitler.”<sup>43</sup> 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.”<sup>44</sup> Although the final judgment in the Trial of the Major War Criminals, issued September 30 and October 1, 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.”<sup>45</sup>

But genocide was not, in fact, a crime under the Charter of the In-

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<sup>37</sup> Trials of the Major War Criminals (*France v. Goering*), 22 IMT 43–44 (Oct. 1, 1946).

<sup>38</sup> UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 197 (1948).

<sup>39</sup> Trials of the Major War Criminals (*France v. Goering*), 17 IMT 61 (June 25, 1946).

<sup>40</sup> Trials of the Major War Criminals (*France v. Goering*), 19 IMT 531 (July 29, 1946).

<sup>41</sup> *Id.* at 562.

<sup>42</sup> *Id.* at 497.

<sup>43</sup> *Id.* at 494.

<sup>44</sup> *Id.* at 498.

<sup>45</sup> Raphael Lemkin, *Genocide as a Crime in International Law*, 41 AM. J. INT’L L. 145, 147 (1947).

ternational Military Tribunal. Instead, what must at the time have been viewed as a cognate concept, crimes against humanity, formed the legal basis of the prosecution. The efforts at definition of this new category of international crime reveal why the fabled *nexus* with armed conflict was inserted into the provision used at the Nuremberg trial.

In the Legal Committee of the United Nations War Crimes Commission, 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.”<sup>46</sup> But more frequently, the concept was described using terms like “atrocities” 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.”<sup>47</sup> Lord Simon, who was the British Lord Chancellor, responded:

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.<sup>48</sup>

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.<sup>49</sup>

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<sup>46</sup> ARIEH J. KOCHAVI, *PRELUDE TO NUREMBERG: ALLIED WAR CRIMES POLICY AND THE QUESTION OF PUNISHMENT* 146 (1998); THE UNITED NATIONS WAR CRIMES COMMISSION, *HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION* 175 (1948) (*quoting* Resolution moved by Mr. Pell, U.N. War Crimes Commission, Comm. II, U.N. Doc. III/I, 18.3.44 (Mar. 16, 1944)).

<sup>47</sup> UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 38, at 176.

<sup>48</sup> 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 (Feb. 15, 1945) (on file with the National Archives of Canada RG-25, Vol. 3033, 4060-40C, Part Four).

<sup>49</sup> See ARIEH J. KOCHAVI, *supra* note 46, at 149; see also Shlomo Aronson, *Preparations*

This was reminiscent of the position taken by Robert Lansing and James Brown Scott as representatives of the United States in 1919.<sup>50</sup>

But over the following months, the position of the major powers, including the United States, evolved. A May 16, 1945 draft from the United States government 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.”<sup>51</sup> At the London Conference, which began on June 26, 1945, the United States submitted a text that drew on the Martens clause of the Hague conventions. 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.<sup>52</sup> 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 contemplate prosecution. The distinctions were set out by the head of the United States delegation, Robert Jackson, at a meeting on July 23, 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 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.<sup>53</sup>

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*for the Nuremberg Trial: The O.S.S., Charles Dworak, and the Holocaust*, 12 HOLOCAUST & GENOCIDE STUD. 257, 259 (1998).

<sup>50</sup> 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 v–vi (1919).

<sup>51</sup> THE AMERICAN ROAD TO NUREMBERG, THE DOCUMENTARY RECORD 1944–1945 195 (Bradley F. Smith ed., 1982).

<sup>52</sup> Revised Draft of Agreement and Memorandum Submitted by American Delegation on June 30, 1945, in JACKSON REPORT, *supra* note 36, at 68–121.

<sup>53</sup> Minutes of the International Conference on Military Trials Session of July 23, 1945, in JACKSON REPORT, *supra* note 36, at 328–31.

Speaking of the proposed crime of “atrocities, persecutions, and deportations on political, racial or religious grounds,” Justice 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.<sup>54</sup>

There can be little doubt that Jackson was not 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. The result was an agreement by the four “Great Powers” at the London Conference under 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, whether or not in violation of the domestic law of the country where perpetrated.”<sup>55</sup> In the Nuremberg Tribunal’s final judgment—implicitly addressing 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.”<sup>56</sup> 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 judg-

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<sup>54</sup> *Id.* at 333.

<sup>55</sup> Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis art. 6(c), Aug. 8, 1945, 59 Stat. 1544, 82 UNTS 279.

<sup>56</sup> Trials of the Major War Criminals (*France v. Goering*), 22 IMT 203, 492 (Oct. 1, 1946).

ment frequently referred to events during the 1930s, none of the accused was found guilty of an act perpetrated prior to September 1, 1939, the day the war broke out. This was the situation about which Raphael Lemkin was so agitated in October 1946 when he met Henry King in the lobby of Nuremberg's Grand Hotel.

#### CRIMES AGAINST HUMANITY AFTER NUREMBERG

It is often said that crimes against humanity were recognized as part of customary international law prior to Nuremberg. This is one way of answering the charge that the IMT 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.<sup>57</sup>

The principle of legality was most adequately addressed with respect to the crime of genocide, through the adoption of General Assembly Resolution 98(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 criticized 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 to include social and political groups.<sup>58</sup> Otherwise, there was a chorus of support for the original text adopted by the General Assembly some fifty years earlier.<sup>59</sup>

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<sup>57</sup> *Id.* at 462.

<sup>58</sup> 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*, para. 100, U.N. Doc. A/CONF.183/C.1/SR.3 (Nov. 20, 1998).

<sup>59</sup> *Id.* at paras. 2, 18, 20 (Germany), 22 (Syria), 24 (United Arab Emirates), 26 (Bahrain),

Crimes against humanity, on the other hand, lingered on after Nuremberg in a fog of uncertainty. In sharp contrast with genocide, the definition of which has remained unchanged for nearly six decades, it seems that the result is different each time crimes against humanity is defined. As its first projects, the 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 Nurnberg Tribunal and in the Judgment of the Tribunal,” adopted by the Commission in 1950,<sup>60</sup> concerned subject matter jurisdiction. Crimes against humanity were defined as “[m]urder, 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.”<sup>61</sup>

Critics of the *nexus* often point to Control Council: Law No. 10,<sup>62</sup> 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. 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

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

<sup>60</sup> *Formulation of the Nürnberg Principles*, [1950] 2 Y.B. Int’l L. Comm’n paras. 95–127, U.N. Doc. A/CN.4/SER.A/1950/Add.1.

<sup>61</sup> *Id.* at para. 123.

<sup>62</sup> Control Council Law No. 10 (1945). The document was enacted by the Commanders of the four zones of occupation in postwar Germany. It created a framework for the post-World War II trials of German military and civilian personnel. *Id.*

group of its own inhabitants in peacetime constitute crimes under international law.”<sup>63</sup> Taylor said that the practical significance of this problem could hardly be overstated, and cited the 1948 Genocide Convention, which had just been drafted when he penned these words, as a manifestation of the interest in this question.<sup>64</sup>

The International Law Commission returned to the debate about the *nexus* in the definition of crimes against humanity proposed in its first draft of the Code of Offences Against the Peace and Security of Mankind, adopted in 1951. Crime No. VIII consisted of two components, genocide and crimes against humanity. The provision was drawn from article II of the Genocide Convention and article VI(c) of the London Charter.<sup>65</sup> “That genocide cannot be omitted from the draft code should not be questioned,” wrote Special Rapporteur Jean Spiropoulos in his report.<sup>66</sup> But, he added, the distinction between genocide and crimes against humanity was “not easy to draw,” citing the commentary in the case reports of post-war trials, stating that “[w]hile the two concepts may overlap, genocide is different from crimes against humanity in that, to prove it, no connexion with war need be shown and, on the other hand, genocide is aimed against groups whereas crimes against humanity do not necessarily involve offences against or persecutions of groups.”<sup>67</sup> There was open disagreement among members of the Commission about the relationship between genocide and crimes against humanity. Chaumont of France insisted that the concept of crime against humanity had been incorporated in the Genocide Convention, and that it was therefore “contrary to existing international law to lay down as a principle that crimes against humanity were inseparably linked with crimes against peace or war crimes.”<sup>68</sup> Spiropoulos, on the other hand, considered that the Nuremberg Charter had exhaustively defined crimes against humanity. Spiropoulos believed

that crimes against humanity and the crime of genocide were two quite different things. Doubtless, the crime of genocide might constitute a crime against humanity, but only if it was perpetrated against a group of human beings either in wartime or in connexion with crimes against peace or war

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<sup>63</sup> TELFORD TAYLOR ET. AL., 1 FINAL REPORT TO SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 224 (1949).

<sup>64</sup> *Id.* at 226.

<sup>65</sup> *Draft Code of Offences Against the Peace and Security of Mankind*, [1950] 2 Y.B. Int'l L. Comm'n 65, U.N. Doc. A/CN.4/25.

<sup>66</sup> *Id.* at 263.

<sup>67</sup> *Id.*

<sup>68</sup> *Draft Code of Offences Against the Peace and Security of Mankind*, [1951] 2 Y.B. Int'l L. Comm'n 55, U.N. Doc. A/CN.4/SER.A/1951/Add. 1.

crimes.<sup>69</sup>

The Commission's 1951 draft was submitted to Member States for their comments. When the Commission returned to the code, in 1954, Spiropoulos said that the comments on the genocide provision were conflicting and he had therefore decided not to make any changes. Consequently, the International Law Commission in 1954 adopted the draft code's genocide provision, with only a slight departure from the text of article II of the Convention.<sup>70</sup> An important development in the 1954 draft concerned the "inhuman acts" paragraph (really, "crimes against humanity"), which had been coupled with the definition of genocide in the 1951 draft. The phrase "when such acts are committed in execution of or in connexion with other offences defined in this article" was eliminated, by a close vote of six to five, with one abstention.<sup>71</sup> This did not resolve the problem, however, as members of the Commission soon recognized, because absent the *nexus* with crimes against peace and war crimes, the Commission did not see how a distinction could be made between ordinary crimes and crimes against humanity. The Commission voted to replace the war *nexus* with a different contextual element, namely that crimes against humanity be committed "by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities."<sup>72</sup>

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.<sup>73</sup> It offered the rather unconvincing explanation that the

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<sup>69</sup> *Id.* at 56.

<sup>70</sup> See *Summary Record of the 267th Meeting*, [1954] I Y.B. Int'l Law Comm'n 131, U.N. Doc. A/CN.4/SR.267.

<sup>71</sup> *Id.* at 133. The difficult issue was revived, however, and the Commission agreed to reopen discussion, referring the matter to a sub-committee. See *Summary Record of the 268th Meeting*, [1954] I Y.B. Int'l Law Comm'n 135, U.N. Doc. A/CN.4/SR.268; *Summary Record of the 269th Meeting*, [1954] I Y.B. Int'l Law Comm'n 142, U.N. Doc. A/CN.4/SR.269; *Summary Record of the 270th Meeting*, [1954] I Y.B. Int'l Law Comm'n 148, U.N. Doc. A/CN.4/SR.270.

<sup>72</sup> *Draft Code of Offences Against the Peace and Security of Mankind*, [1954] 2 Y.B. Int'l L. Comm'n 150, U.N. Doc. A/CN.4/SER.A/1954/Add.1. Recently, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia declared that a State plan or policy is not an element of crimes against humanity under customary law. Prosecutor Kunarac, Case No. IT-96-23/1-A, Judgment, para. 98 (June 12, 2002); *accord* Prosecutor v. Blaskic, Case No. IT-95-14-A, Judgment, para. 120 (July 29, 2004); Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-A, Judgment, para. 98 (Dec. 17, 2004).

<sup>73</sup> Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 141 (Oct. 2, 1995), available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>. See also, e.g., Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, para. 251 (July 15, 1999), available at <http://www.un.org/icty/tadic/appeal/>

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.<sup>74</sup> 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.<sup>75</sup>

#### CONCLUSIONS

The concept of the “crime of genocide” emerged in the context of the Second World War prosecutions. Raphael Lemkin’s concept easily meshed with the agenda of the international prosecutors like Robert Jackson who prepared the Nuremberg trial, but anxiety of the major powers about the possible scope of crimes against humanity led them to impose a dramatic limitation. They were concerned that persecution committed against their own subject peoples might also become justiciable at an international level. Alongside Jackson’s worries about the *apartheid*-like treatment of African-Americans were the appalling situations in the far-flung colonial possessions of the United Kingdom and France, and a host of well-known problems within the Soviet Union. The result was that Nuremberg judged the Nazis for atrocities committed against their own nationals but only to the extent that those atrocities could be linked to the war of aggression and that the atrocities took place after September 1, 1939.

When all of this became perfectly clear, following the IMT’s judgment on September 30 and October 1, 1946, there was widespread dissatisfaction. Henry King encountered some of it in his meeting with Lemkin a few days after the judgment. At about the same time, several “third world” States in the General Assembly tried to fix the limitation upon international law imposed at Nuremberg by simply defining a different category of criminal offence, genocide. They were successful, although the price of consensus was a definition that was narrower in many respects than that of crimes against humanity. Nevertheless, as article I of the Genocide Convention makes perfectly clear, genocide can be committed in time of peace as well as in time of war.

Eventually, the *nexus* would disappear from the definition of crimes

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judgement/tad-aj990715e.pdf; Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-T, Judgment, para. 23 (Feb. 26, 2001), available at <http://www.un.org/icty/kordic/trialc/judgement/kor-tj010226e.pdf>.

<sup>74</sup> Prosecutor v. Seselj, Case No. IT-03-67-AR72.1, Decision on the Interlocutory Appeal Concerning Jurisdiction, para. 13 (Aug. 31, 2004), available at <http://www.un.org/icty/seselj/appeal/decision-e/040831.htm>.

<sup>75</sup> See The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph Two of the Security Council Resolution 808*, para. 47, delivered to the Security Council, U.N. Doc. S/25704 (May 3, 1993) (agreeing that “crimes against humanity were first recognized by the Charter”).

against humanity, but it would take half a century for the evolution to become evident. The pronouncement of the Appeals Chamber in 1995 was endorsed in article 7 of the *Rome Statute*.<sup>76</sup> But what remains uncertain 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 later than that. In 1954, the Commission experimented by removing the *nexus* but replacing it with another contextual element, the State plan or policy. There is something for everyone in the work of the International Law Commission, which continued to toy with the definition of crimes against humanity through the 1990s. Responsible judges will probably not want to place much reliance on the Commission's deliberations on crimes against humanity over the years as evidence of the customary law definition of crimes against humanity.

Crimes against humanity and genocide certainly belong to the same *genus* of international crime.<sup>77</sup> The relationship was recognized in the very first prosecution for the crime of genocide. In *Eichmann*, the District Court of Jerusalem described genocide as 'the gravest type of "crime against humanity."<sup>78</sup> More recently, a Trial Chamber of the International Criminal Tribunal for Rwanda said:

The definition of the crime of genocide was based upon that of crimes against humanity, that is, a combination of 'extermination and persecutions on political, racial or religious grounds' and it was intended to cover '*the intentional destruction of groups in whole or in substantial part*' (emphasis added). The crime of genocide is a type of crime against humanity. Genocide, however, is different from other crimes against humanity. The essential difference is that genocide requires the aforementioned specific intent to exterminate a protected group (in whole or in part) while crimes against humanity require the civilian population to be targeted as part of a widespread or systematic attack. There are instances where the discriminatory grounds coincide and overlap.<sup>79</sup>

A Trial Chamber of the International Criminal Tribunal for the for-

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<sup>76</sup> Rome Statute of the International Criminal Court art. 21(d), July 17, 1998, 37 I.L.M. 999 [hereinafter ICC Statute], available at [http://www.icc-cpi.int/library/about/official\\_journal/Rome\\_Statute\\_120704-EN.pdf](http://www.icc-cpi.int/library/about/official_journal/Rome_Statute_120704-EN.pdf).

<sup>77</sup> Prosecutor v. Sikirica, Dosen & Kolundzija, Case No. IT-95-8-I, Judgement on Defence Motions to Acquit, para. 58 (Sept. 3, 2001), available at <http://www.un.org/icty/sikirica/judgement/010903r98bis-e.pdf>.

<sup>78</sup> Attorney-General of the Government of Israel v. Eichmann, 36 I.L.R. 5, 41 (District Court of Jerusalem); Eichmann v. Attorney-General of the Government of Israel, 36 I.L.R. 277, 288 (Supreme Ct. 1962).

<sup>79</sup> Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgement, para. 89 (May 21, 1999), available at <http://69.94.11.53/ENGLISH/cases/KayRuz/judgement/index.htm>.

mer Yugoslavia described genocide as one of the most 'egregious manifestations' of crimes against humanity.<sup>80</sup> Another Trial Chamber, in *Stakić*, said it was "a species of crimes against humanity in the broader sense."<sup>81</sup>

The view that genocide is an aggravated form of crimes against humanity also finds considerable support in academic writing<sup>82</sup> and in the work of the International Law Commission.<sup>83</sup> Yet during the Rome Conference, and in the work that preceded it, there was no serious suggestion that these two cognate concepts be consolidated into a single provision or category. Neither definition refers in any way to the other category. Moreover, there is also some authority for the existence of meaningful distinctions between genocide and crimes against humanity. In one case, a Trial Chamber of the International Criminal Tribunal for Rwanda observed that the correspondence between genocide and crimes against humanity is not perfect. Specifically, crimes against humanity must be directed against a "civilian population," whereas genocide is directed against "members of a group," without reference to civilian or military status.<sup>84</sup> In *Musema*, the Appeals Chamber of the International Criminal Tribunal for Rwanda concluded that the crime against humanity of extermination was not a lesser and included form of genocide, because the contextual elements of the two crimes differ.<sup>85</sup>

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<sup>80</sup> Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, paras. 622, 655 (May 7, 1997), available at <http://www.un.org/icty/tadic/trialc2/judgement/tad-ts70507JT2-e.pdf>; Kadic v. Karadzic, 70 F.3d 232, 4 U.S.L.W. 2231 (2d Cir. 1995), cert. denied, 64 U.S.L.W. 3832 (1996).

<sup>81</sup> Prosecutor v. Stakic, Case No. IT-97-24-T, Decision on Rule 98 Bis Motion for Judgment of Acquittal, para. 26 (Oct. 31, 2002).

<sup>82</sup> STEFAN GLASER, DROIT INTERNATIONAL PÉNAL CONVENTIONNEL 109 (1970); See also Yoram Dinstein, *Crimes Against Humanity*, in THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY 891, 905 (Jerzy Makarczyk ed., 1996) ("Genocide may be looked upon as the most paradigmatic crime against humanity."); Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 557 (1995) ("Genocide requires a particularly heavy burden of proof."); see also L.C. Green, 'Grave Breaches' or *Crimes Against Humanity*, 8 U.S. AIR FORCE ACADEMY J. LEGAL STUDIES 19, 29 (1998), available at <http://www.usafa.af.mil/df/dfi/documents/crimhum.doc> (stating that genocide is the "most extreme example" of a crime against humanity).

<sup>83</sup> See *Second report on the draft Code of Offences against the Peace and Security of Mankind*, [1984] 1 Y.B. Int'l L. Comm'n paras. 28–29, U.N. Doc. A/C4/377 and Corr.1 (Feb. 1, 1984); *Other Decisions and Conclusion of the Commission*, [1996] 2 Y.B. Int'l L. Comm'n 85, U.N. Doc. A/51/10.

<sup>84</sup> Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, paras. 89, 119 (May 21, 1999), available at <http://69.94.11.53/ENGLISH/cases/KayRuz/judgement/index.htm>; see also *Musema v. Prosecutor*, Case No. ICTR-96-13-A, Judgment, para. 366 (Nov. 16, 2001), available at <http://69.94.11.53/ENGLISH/cases/Musema/judgement/Arret/index.htm>.

<sup>85</sup> *Musema v. Prosecutor*, Case No. ICTR-96-13-A, Judgment, para. 366 (Nov. 16, 2001), available at <http://69.94.11.53/ENGLISH/cases/Musema/judgement/Arret/index.htm>. For a different approach that reconciles extermination and genocide, see Prosecutor v. Krstic, Case

To understand the distinctions, and the historic tension, between the two categories, we need to return to Nuremberg. Both genocide and crimes against humanity were being used to describe the Nazi atrocities directed against religious or racial groups, and especially those targeting the Jews. The London Conference opted to use the term crimes against humanity. The Nazi Holocaust, or Shoah, was addressed under the rubric of crimes against humanity.

Thus, crimes against humanity and genocide were forged in the same crucible and were used at Nuremberg almost as if they were synonyms. The distinction only emerged because of the *nexus* with armed conflict that Nuremberg had imposed upon crimes against humanity. Indeed, it seems likely that had there been no *nexus*, there would have been no need to define genocide as a distinct international crime. Over the decades that followed adoption of the Genocide Convention, the two concepts had an uneasy relationship. Although crimes against humanity had a broader reach, covering acts of persecution falling short of outright physical extermination, they were fatally limited by the contextual requirement of an armed conflict. Genocide, on the other hand, could be committed in time of peace, but was defined narrowly as acts of extermination directed at national, ethnic, racial, and religious groups. The Genocide Convention applied prospectively, whereas the only international codification of crimes against humanity, in the Nuremberg Charter, only applied to the crimes of the European Axis Powers.

There was much frustration with the narrowness of the definition of genocide. Schwarzenberger famously remarked that the Genocide Convention was “unnecessary when applicable and inapplicable when necessary.”<sup>86</sup> Frank Chalk and Kurt Jonassohn wrote that “the wording of the Convention is so restrictive that not one of the genocidal killings committed since its adoption is covered by it.”<sup>87</sup> Many, therefore, argued for a dynamic interpretation of the concept of genocide that would include a range of other protected groups, such as political and social groups, and that would apply to a broader range of acts.<sup>88</sup> But what they were proposing, in reality, was

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No. IT-98-33-T), Judgment, para. 685 (Aug. 2, 2001), *available at* <http://www.un.org/icty/krstic/TrialC1/judgements/krs-tj010802e.pdf> (stating that both extermination and genocide “require that the killings be part of an extensive plan to kill a substantial part of a civilian population.”).

<sup>86</sup> GEORG SCHWARZENBERGER, 1 INTERNATIONAL LAW 143 (3rd ed. 1957).

<sup>87</sup> FRANK CHALK & KURT JONASSOHN, THE HISTORY AND SOCIOLOGY OF GENOCIDE 11 (1990).

<sup>88</sup> *See, e.g.*, U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, Review of Further Developments in Fields with Which the Sub-Comm. has been Concerned, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, U.N. Doc. E/CN.4/Sub.2/1985/6 (July 2, 1985) (prepared by B. Whitaker).

equivalent to crimes against humanity without the *nexus*.

In early 1945, genocide and crimes against humanity were cognates, terms devised to describe the barbarous acts of the Nazi regime. Though not identical in scope, they neatly overlapped and could be used more or less interchangeably to describe the great crime of the era, the attempted extermination of Europe's Jewish population. By late 1946 an important rift developed that was not healed until the end of the century. Today, we may once again speak of genocide and crimes against humanity as they were originally used. 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.<sup>89</sup>

The distinction between genocide and crimes against humanity is still of great symbolic significance, of course. Many Bosnians were shattered that their suffering during the 1992–1995 war was not labelled genocide, save for the very specific case and ultimately anomalous case of the Srebrenica massacre. This was reflected in many negative comments from international lawyers about the judgment of the International Court of Justice.<sup>90</sup> Similarly, there was much disappointment when the Commission of Inquiry set up pursuant to a Security Council mandate determined that Sudan was not committing genocide in Darfur.<sup>91</sup> And yet the essence of the Bosnian war has been described on countless occasions in the case law of the International Criminal Tribunal for the former Yugoslavia as a crime against humanity, and the Darfur Commission did the same for the ethnic cleansing in Sudan, urging that the situation be referred to the International Criminal Court for prosecution:

The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken in any way as detracting from the gravity of the crimes perpetrated in that region. International offences such as the crimes against humanity and war crimes that have been

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<sup>89</sup> See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91 (Feb. 26); See William A. Schabas, *Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes*, 2 GENOCIDE STUDIES AND PREVENTION 101 (2007) (discussing the judgment).

<sup>90</sup> Antonio Cassese, *A Judicial Massacre*, GUARDIAN, Feb. 27, 2007; Ruth Wedgwood, *Bad Day for International Justice*, INT'L HERALD TRIB., Mar. 8, 2007.

<sup>91</sup> U.N. Sec. Council, Comm'n of Inquiry, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004*, § II, U.N. Doc. S/2005/60 (Feb. 1, 2005).

committed in Darfur may be no less serious and heinous than genocide.<sup>92</sup>

If their victimization is acknowledged as crimes against humanity, the Bosnian Muslims and the Darfur tribes are in good company. After all, even though today we speak of the Armenian and Jewish genocides, at the time when they were committed crimes against humanity was the applicable terminology. Perhaps in the years to come, now that the legal difficulties distinguishing genocide and crimes against humanity have been resolved, the more popular connotation of these terms will tend to evolve in the same direction.

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<sup>92</sup> *Id.*