

NUREMBERG AND THE DRAFTING OF THE GENOCIDE CONVENTION

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FOREWORD

Since early in her career as an international legal scholar, Leila Sadat has been studying crimes against humanity. In the 1980s and 90s, she introduced English-language academic literature to the French Holocaust trials through publications about the cases of Klaus Barbie, Paul Touvier, and Maurice Papon.¹ Along with the Eichmann case in Israel and the Finta case in Canada, these were very much the pioneering judicial determinations of international criminal justice in the post-Nuremberg era. Today, this body of jurisprudence is little more than a historical footnote given the rich material generated since then by the international criminal tribunals, whose emergence began with the establishment of the International Criminal Tribunal for the former Yugoslavia in 1993.

The French cases dealt directly or indirectly with the Holocaust—the attempted extermination of the Jews of Europe perpetrated by the Nazi regime and its accomplices in the countries it occupied. These cases were the continuation of the tremendous international trial at Nuremberg in 1945 and 1946, and of the subsequent proceedings held by the United States in that same courtroom. In these judgments, the legal characterization of the Nazi atrocities was “crimes against humanity.” Today, the Holocaust is generally referred to with another term: genocide. In 2005, when the United Nations General Assembly adopted a resolution on Holocaust remembrance, it referred to “genocide” and made no mention of the fact that the perpetrators had been convicted of an offence with a different label, “crimes against humanity.”² These days universities host research centers and programs devoted to Holocaust and Genocide Studies; legislatures

¹ See generally Leila Sadat Wexler, *Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back again*, 32 COLUM. J. TRANSNAT'L L. 289 (1994); Leila Sadat Wexler, *Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes against Humanity in France*, 20 LAW & SOC. INQUIRY 191 (1995); Leila Nadya Sadat, *Prosecutions for Crimes Against Humanity in French Municipal Law: International Implications*, 91 PROC. OF THE ASIL ANN. MEETING 270 (1997); Leila Nadya Sadat, *The French Experience*, in INT'L CRIM. L: VOL. 3, INT'L ENF'T 329-358 (M. Cherif Bassiouni ed., 2d rev. ed. 1999); Leila Nadya Sadat, *The Legal Legacy of Maurice Papon*, in THE PAPON AFFAIR: MEMORY AND JUSTICE ON TRIAL 131-160 (Richard J. Golsan, ed., 2000).

² G.A. Res. 60/7, Holocaust remembrance, ¶ 2, 6 (Nov. 21, 2005).

adopt resolutions and statutes recognizing historical events as genocide. The same cannot be said of crimes against humanity

When mass atrocities other than the Holocaust are discussed by human rights organizations, scholars, and international law experts, there is often a sense that “crimes against humanity” is an inadequate label—the second-best (or rather, second worst) characterization—and that nothing less than describing them as genocide will suffice. Those who question the appropriateness of the term genocide and suggest that crimes against humanity is a more fitting identifier are sometimes denounced as deniers, even if they have no quarrel with the factual description of such atrocities. What seems so striking in returning to Leila’s writings of the 1990s on the French trials is that, at the time, nobody seemed troubled with prosecuting the Holocaust within the framework of crimes against humanity. Indeed, there were no complaints that the French had somehow depreciated the Holocaust by prosecuting only crimes against humanity rather than genocide.

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I. LEMKIN IN NUREMBERG, 1946

Leila may remember a 2007 conference on the Genocide Convention at Case Western Reserve University in Cleveland, organized by our friend and colleague Michael Scharf, in which we both participated. One of the very special guest speakers was Henry King, who shared a panel with two other icons: Benjamin Ferencz and Whitney Harris. The three had all been prosecutors at Nuremberg.

I have a vivid recollection of Henry, who passed away a few years later, describing his encounter with Raphael Lemkin in the lobby of Nuremberg's Grand Hotel after the issuance of the judgment of the International Military Tribunal on October 1, 1946. Not quite two years earlier, Lemkin had published the book *Axis Rule in Occupied Europe*, in which he proposed a new word, "genocide."³ Henry said that Lemkin seemed distraught; he was troubled and poorly groomed. Biographers of Lemkin have said he was under immense strain, having recently learned that his entire family in Poland had been murdered. Here is the written account of Henry's remarks:

At that time, he was unshaven, his clothing was in tatters, and he looked disheveled. 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 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.⁴

It is often thought that Lemkin was obsessed with the use of the word he had devised and that he was frustrated that the judges of the Tribunal did not employ it in their final judgment. That idea may have a grain of truth in it, but Henry's remarks in Cleveland suggest something different: Lemkin's objection was not about the nomenclature but rather about the scope of the crime. Lemkin was angry that the judgment at Nuremberg did not condemn Nazi atrocities perpetrated *prior* to the war, which would have required the judges to adopt a more expansive interpretation of crimes against humanity than they ultimately did. The selection of the label of genocide or crimes

3 RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* 79-95, 79 (Carnegie Endowment for World Peace 1944).

4 Henry T. King Jr., *Origins of the Genocide Convention*, 40 CASE W. RES. J. INT'L L. 13, 13-14 (2007).

against humanity seems quite irrelevant to Lemkin's dissatisfaction. If the Tribunal had convicted some of the Nazi leaders for adopting racist laws in 1935 and inciting the Kristallnacht pogrom in 1938, Lemkin would probably have been satisfied.

This understanding of Lemkin's attitude finds a degree of confirmation in the chapter on genocide in his famous book, which adopts a very broad approach to the notion of genocide that has many affinities with crimes against humanity.⁵ Advocates of an expansive interpretation of the definition of genocide in the 1948 Convention might argue that this is a way of keeping faith with the intent of the man who devised the term. But that would be to view Lemkin as if he was Moses descending from the mountain with the Ten Commandments. However, the intent of international lawmakers should not be confused with the dreams of scholars about the progressive development of the law.

Nazi anti-Semitism was discussed in some detail in the judgment of the International Military Tribunal. It referred to the 1935 Nuremberg laws and other discriminatory measures adopted in the years following the seizure of power. However, the judges rejected the prosecution's argument that anti-Semitism was in some way connected with preparations for aggressive war. "The Nazi persecution of Jews in Germany before the war, severe and repressive as it was, cannot compare, however, with the policy pursued during the war in the occupied territories," they wrote. The judgment explains that "[o]riginally the policy was similar to that which had been in force inside Germany. Jews were required to register, were forced to live in ghettos, to wear the yellow star, and were used as slave laborers."⁶

This changed in the summer of 1941 following the invasion of the Soviet Union, when the "final solution" emerged. "This 'final solution' meant the extermination of the Jews, which early in 1939 Hitler had threatened would be one of the consequences of an outbreak of war," according to the judgment.⁷ Nazi atrocities committed in Germany prior to the outbreak of the war might have fallen under the definition of crimes against humanity in the Charter of the International Military Tribunal but for a requirement, in the definition, that they be "in execution of or in connection with any crime within the jurisdiction of the Tribunal."⁸

⁵ See generally LEMKIN, *supra* note 3, at 79-95.

⁶ Trial of the Major War Criminals Before the International Military Tribunal (France et al. v. Göring et al.), Judgment, 1 IMT 171, 249-250 (1947).

⁷ *Id.*, at 250.

⁸ Agreement for the Prosecution & Punishment of the Major War Crim. of the Eur. Axis art. VI(c), Aug. 8, 1945, 82 U.N.T.S. 279, 288. [Hereinafter Charter of the International Military Tribunal ("IMT")]

The *raison d'être* for the nexus with armed conflict imposed upon crimes against humanity was bluntly explained by Robert Jackson at the London Conference, where the Charter was drafted:

[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.⁹

As Jackson's remarks confirm, the exclusion of "peacetime genocide" was quite deliberate. Judges don't always faithfully respect the intent of those who draft legislation, but this time they did.

II. THE GENERAL ASSEMBLY RESOLUTION ON GENOCIDE IN 1946

Following the judgment, Lemkin hurried back to New York City and began his campaign for a General Assembly resolution on genocide. Driven by his anger at the exclusion of "peacetime genocide" from the Nuremberg judgment, Lemkin quickly persuaded three delegations—Cuba, Panama, and India—to be the sponsors. The draft resolution he prepared noted that "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."¹⁰

Cuba's ambassador, Ernesto Dihigo, took the floor in the Sixth Committee of the General Assembly on November 22, 1946 to present the resolution, explaining that "[a]t the Nürnberg trials, it had not been possible to punish certain cases of genocide because they had been committed before the beginning of the war."¹¹ Expressing concern "that such crimes might remain unpunished owing to the principle of *nullum crimen sine lege*," the

⁹ Minutes of Conference Sess. (July 23, 1945), in REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 348, 333.

¹⁰ G.A. Draft Res. A/BUR/50, ¶2 (Nov. 2, 1946).

¹¹ U.N. GAOR, 1st Sess., Sixth Ctte., 22nd mtg., U.N. Doc. A/C.6/SR.22 at 101 (Nov. 25, 1946).

representative of Cuba asked that genocide be declared an international crime. “This was the purpose of the resolution.”¹²

As amended, Resolution 96(I) adopted by the General Assembly on December 11, 1946, called for the preparation of a convention on the crime of genocide.¹³ Two years later, Article 1 of the Convention confirmed that “genocide, whether committed in time of peace or in time of war, is a crime under international law.”¹⁴ The 1946 resolution on the crime of genocide was adopted in the same breath as a resolution on the Nuremberg Principles. Resolution 95(I), entitled “Affirmation of the principles of International Law recognized by the Charter of the Nurnberg Tribunal,” was adopted only minutes after Resolution 96(I) on the crime of genocide. Both resolutions had unanimous support, without any debate or vote in the plenary General Assembly.¹⁵

Resolution 95(I) on the Nuremberg Principles had been proposed by the United States,¹⁶ apparently at the initiative of the American judge at the Tribunal, Francis Biddle, who suggested the idea to President Truman.¹⁷ The Sixth Committee of the General Assembly altered the text, replacing the word “codification” with “affirmation,” which is stronger and implies not only the identification of the principles but also their endorsement. Nevertheless, the text of Resolution 95(I) didn’t specify the contents of the Nuremberg Principles. Writing in 1947, Robert Jackson said that the General Assembly had given “general approval” to the principles of the trial.¹⁸ Only in 1950 did the International Law Commission agree upon a draft of the principles.¹⁹ Its text was not well received in the Sixth Committee,²⁰ and was never adopted by the General Assembly.²¹

12 *Id.*

13 G.A. Res. 96 (I), ¶ 4, (Dec. 11, 1946).

14 Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9, 1948, 78 U.N.T.S. 277, 280.

15 U.N. GAOR, 1st Sess., 55th plen. mtg. U.N. Doc. A/PV.55 at 1134, 1144 (11 Dec., 1946).

16 Delegation of the United States, [Draft] resolution relating to the codification of the principles of international law recognised by the Charter of the Nuremberg Tribunal, A/C.6/69 (Nov. 15, 1946).

17 *Text of Biddle’s Report on Nuremberg and Truman’s Reply*, NEW YORK TIMES, Nov. 13, 1946; United States Delegation Working Paper, Proposal regarding draft resolution on codification of international law US/A/C.6/25, in FOREIGN RELATIONS OF THE UNITED STATES, VOL. I, 539-541 (Nov. 14, 1946).

18 REPORT OF ROBERT H. JACKSON, *supra* note 9 at viii.

19 Int’l Law Comm’n, Rep. on the Work of Its Second Session (5 June - 29 July 1950), U.N. Doc. A/1316, at ¶ 95-127 (1950).

20 Sixth Committee of the General Assembly, Report of the International Law Commission on the work of its 2nd session, U.N. Doc. A/1639, at ¶ 21-34 (1950).

21 G.A. Res. 488 (V), Formulation of the Nürnberg principles (Dec. 12, 1950).

III. THE 'SECRETARIAT DRAFT' OF THE GENOCIDE CONVENTION

At first blush, the two 1946 resolutions on international criminal justice seem closely related, almost siblings. But Lemkin's temper tantrum in the Grand Hotel and Dihigo's speech in the Sixth Committee suggest dissatisfaction with one of the Nuremberg Principles, namely the imposition of a nexus or condition on crimes against humanity denying them application to atrocities perpetrated in peacetime. The apparent tension between the two resolutions adopted by the General Assembly was soon addressed in a memorandum by France, submitted in May 1947, at a time when the Secretariat was, in the midst of preparing a draft genocide convention in accordance with a mandate given by the Economic and Social Council.

Referring to the two resolutions, France noted that the General Assembly "appears to desire to introduce important innovations" to the Charter of the International Military Tribunal and the judgment of the International Military Tribunal. "Not only is the hitherto admitted expression 'crime against humanity' replaced by a neologism, the term genocide, but the conception of the infringement is broadened," said France. It explained that Article 6(c) of the Charter provided a "restrictive enumeration of acts constituting crimes against humanity". In contrast, Resolution 96(I) of the General Assembly set out "an extremely general and vague formula" for the crime of genocide. France warned of such an "excessively broad" understanding of crimes against humanity or genocide, noting that "[t]he destruction of a human group can be brought about by other methods than homicide: thus, the Charter mentions 'enslavement, deportation and other inhumane acts committed against any civilian population ... or persecutions on political, racial or religious grounds ...'"

France returned to the drafting of the Charter of the International Military Tribunal, asking rhetorically whether the "drawbacks of an excessively broad conception" of crimes against humanity had been apparent. "It is possible. But it is a fact that between the one and the other the conception was gradually narrowed," it said, pointing to the limitation upon crimes against humanity by which they must be "in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." The Tribunal, in interpreting this formula, said France, considered that all inhuman acts attributable to national socialism but prior to the outbreak of hostilities were outside its competence. France spoke of the "assiduity which

the International Military Tribunal appears to have displayed in order to restrict if it did not exclude, the indictment of crimes against humanity.” The solution France proposed was a narrow definition of genocide, confined to “all extermination of individuals as members of a racial, social, political or religious group,” consisting of assassination by State action or toleration, and which may be perpetrated in time of peace as in time of war. Other issues relating to protection of minorities were to be left to the human rights organs of the United Nations.²²

It is difficult to assess the impact of France’s memorandum on the Secretariat. The Secretariat’s work was the responsibility of John Humphrey, who was assisted by three experts, Raphael Lemkin, Vespasian V. Pella, and Henri Donnedieu de Vabres. According to Humphrey’s memoirs, Donnedieu de Vabres, who had served as the French judge at Nuremberg, never actually attended the meetings where the Secretariat draft was discussed, and was instead represented by a member of the French delegation to the United Nations.²³ Neither the text nor the accompanying commentary of the Secretariat draft made any reference to crimes against humanity.²⁴ However, the Secretariat draft was not intended to be a definitive text; rather, in the words of Donnedieu de Vabres, it was more of a “maximum programme,” leaving the General Assembly to select the elements that it preferred.²⁵

Later in 1947, France made a submission to the General Assembly expressing its regret that the Secretariat did not consider the question of genocide “in correlation with the principles affirmed in the statute and sentences of the Nürnberg Tribunal, and as a parallel to the conception of crime against humanity, of which genocide is merely one of the aspects.”²⁶ France urged that any definition of genocide be “[l]imited to physical and biological genocide, for to include cultural genocide invites the risk of political interference in the domestic affairs of States, and in respect of

²² Memorandum on the Subject of Genocide and Crimes Against Humanity submitted by the Representative of France, A/AC.10/29 (May 19, 1947).

²³ JOHN P. HUMPHREY, *HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE* 54 (Dobbs Ferry, 1984).

²⁴ *See generally* *Projet de Convention concernant la prévention et la répression du génocide et commentaires y relatifs* (Préparé par le Secrétariat), A/AC.10/41 (June 6, 1947); *Convention on the Prevention and Punishment of the Crime of Genocide* (Prepared by the Secretariat), A/AC.10/42 (June 6, 1947); *Draft Convention on the Crime of Genocide, Commentary*, U.N. Doc. E/447 (June 26, 1947).

²⁵ Committee on the Progressive Development of International Law and its Codification, 28th mtg., A/AC.10/SR.28 (13 June 1947); Committee on the Progressive Development of International Law and its Codification, 30th mtg., A/AC.10/SR.30 (17 June 1947).

²⁶ Communication received from France, A/401/Add.3 at 1 (Oct. 31, 1947).

questions which, in fact, are connected with the protection of minorities.”²⁷ France seems to have been concerned that the General Assembly might indirectly modify the law of the Nuremberg tribunal so as to make crimes against humanity, including acts of persecution falling short of actual extermination, punishable when perpetrated in peacetime.

IV. GENERAL ASSEMBLY DIRECTIONS ON DRAFTING OF THE CONVENTION

At the midpoint in the process of drafting the Convention, in December 1947, the General Assembly adopted a resolution requesting the Economic and Social Council “to continue the work it has begun concerning the suppression of the crime of genocide, including the study of the draft convention prepared by the Secretariat, and to proceed with the completion of a convention, taking into account that the International Law Commission ... has been charged with the formulation of the principles recognised in the Charter of the Nürnberg Tribunal...”²⁸ The reference to the Nuremberg Principles was added in the course of negotiations, reflecting concerns from some States that the wisdom of adoption of a convention devoted to genocide alone should be reconsidered.²⁹

Resolution 180(II) originated in a text proposed by Venezuela that did not refer to the Nuremberg principles at all. Rather, the Venezuelan draft contemplated further study of the Secretariat draft genocide convention by the Committee on the Progressive Development of International Law and its Codification.³⁰ At its first session, in 1947, the Committee had not discussed the substance of the Secretariat draft, attributing this to lack of time and to the absence of comments by Member States.³¹ There was a certain frustration in the General Assembly with the inability of both the Committee on Progressive Development and the Commission on Human Rights to have made any headway on the draft genocide convention. It was apparent that the United Kingdom and some other Member States were opposed to further work on the drafting of a convention on genocide,

²⁷ *Id.* at 1-2.

²⁸ G.A. Res. 180 (II), Draft Convention on Genocide (Nov. 21, 1947).

²⁹ U.N. GAOR, 2nd Sess., Sixth Ctte., 59th mtg., U.N. Doc. A/C.6/SR.59 at 165-170 (Nov. 20, 1946).

³⁰ Draft Convention on Genocide, draft resolution proposed by the Delegation of Venezuela, A/C.6/149, (Sept. 29, 1947).

³¹ U.N. Secretary-General, Letter dated June 17, 1947 from the Chairman of the Committee to the Secretary-General, U.N. Doc. A/AC.10/55 (June 17, 1947).

viewing it as superfluous to the codification of the Nuremberg principles that had been requested in Resolution 95(I).³²

In the plenary General Assembly, Norway warned of delays in adoption of the genocide convention: “Why should we halt the work by connecting it with other subjects such as the question of the codification of the principles of the Nürnberg Charter and of the Nürnberg Tribunal? Why should we complicate genocide, on which there is such a positive unanimity, by linking it with other and more controversial subjects?”³³ Norway’s delegate noted that the Charter of the International Military Tribunal dealt only with questions of war, whereas “genocide is a problem of peace as well as of war.”³⁴ On the other hand, the United Kingdom insisted that “genocide is so closely analogous to the crimes against humanity covered by the Nürnberg judgment that the best thing to do would be to send it to the International Law Commission, who have to codify the Nürnberg Principles, and let them deal with genocide at the same time.”³⁵ The final paragraph in Resolution 180(II) referring to the Nuremberg Principles resulted from a Chinese proposal in the plenary General Assembly. Explaining the amendment, China’s Wellington Koo said it was necessary for the Economic and Social Council to bear in mind the fact that the International Law Commission had been assigned to deal with a “cognate subject” and that the Council should not do anything to prejudice that work.³⁶

Following the adoption of Resolution 180(II) in November 1947, the Secretariat prepared a detailed note on the genocide convention for the next session of the Economic and Social Council. The Secretariat addressed whether the Council, “in carrying out its task, [should] take into account the fact that ‘the International Law Commission . . . has been charged with the formulation of the principles . . . of the Nürnberg Tribunal as well as the preparation of a draft code of offences against peace and security.’”³⁷ The note reviewed the debate in the General Assembly, highlighting the divergence of views on this point but without providing any answer to the

32 U.N. GAOR, 2nd Sess., Sixth Ctte., 39th mtg., U.N. Doc. A/C.6/SR.39 (Sept. 29, 1946); U.N. GAOR, 2nd Sess., Sixth Ctte., 40th mtg., U.N. Doc. A/C.6/SR.40 (Oct. 2, 1946); U.N. GAOR, 2nd Sess., Sixth Ctte., 41st mtg., U.N. Doc. A/C.6/SR.41 (Oct. 3, 1946); U.N. GAOR, 2nd Sess., Sixth Ctte., 42nd mtg., U.N. Doc. A/C.6/SR.41 (Oct. 5, 1946).

33 U.N. GAOR, 2nd Sess., 123rd plen. mtg., U.N. Doc. A/PV.123 at 1294 (11 Nov., 1947).

34 *Id.*

35 *Id.* at 1299.

36 *Id.* at 1304.

37 Prevention and punishment of genocide, Historical summary (2 November 1946 – 20 January 1948), U.N. Doc. E/621 (Jan. 26, 1948).

question.³⁸ The annotated agenda for the Council prepared by the Secretariat also considered the paragraph in Resolution 180(II), requiring the Council to take account of the work of the International Law Commission on the Nuremberg principles. It explained that the International Law Commission would not be appointed in time for the Economic and Social Council to consider its views. “In requesting the Council to take into account the task entrusted to the International Law Commission, the General Assembly’s intention was to prevent overlapping and encroachments and thus to ensure that the convention on genocide will be in harmony with the proposed code of offences against peace and security,” said the annotated agenda.³⁹

V. THE ECOSOC AD HOC COMMITTEE

The Economic and Social Council decided to establish an ad hoc committee tasked with preparing a draft convention, to be composed of representatives of China, France, Lebanon, Poland, the United States, the Soviet Union, and Venezuela.⁴⁰ A note on the terms of reference of the ad hoc committee, prepared by the Secretariat, stated that the reference to the Nuremberg Principles in Resolution 180(II) should not be overlooked, explaining that the main issue here concerned crimes against humanity about which a study of the question had been prepared.⁴¹ The Secretariat study said that “[t]he crime of genocide, considered from the point of view of the actual facts which constitute it, is certainly included in the list contained in Article 6, paragraph (c) of the Charter of the International Military Tribunal,” that is, in the definition of crimes against humanity.⁴²

The Secretariat distinguished between genocide “in the most restricted sense” and genocide “in the widest sense.”⁴³ It said that, taken narrowly, genocide “consists in the physical destruction of the members of a human group with the purpose of destroying the whole or part of that human group.”⁴⁴ Defined in that way, it would constitute the crime against humanity of extermination. Even when construed broadly so as “to include

³⁸ *Id.*

³⁹ Terms of reference given to the Council by General Assembly resolution 180(II), Note by the Secretary-General, U.N. Doc. E/622 (Feb. 3, 1948).

⁴⁰ E.S.C. Res. 117 (VI), Genocide (Mar. 3, 1948).

⁴¹ Ad Hoc Comm. on Genocide, Ad hoc Committee’s terms of reference, Note by the Secretary-General, U.N. Doc. E/AC.25/2 (Apr. 1, 1948).

⁴² *Id.* at 4.5.

⁴³ *Id.*, at 5.

⁴⁴ *Id.* at 4.

the destruction by brutal means of the specific characteristics of a human group,” it was still covered by crimes against humanity, amounting to persecutions on political or racial or religious grounds.⁴⁵ However, noted the Secretariat, crimes against humanity perpetrated in peacetime were *definitely not* covered by the Charter of the International Military Tribunal. “In adopting Resolutions 96(I) and 180(II) the General Assembly had in mind a convention which would enable genocide to be punished in whatever circumstances it was committed”, said the Secretariat.⁴⁶ It did this because it “wished to give special treatment to the crime of genocide because of the particular gravity of that crime, which aims at the systematic extermination of human groups.”⁴⁷ The Secretariat described genocide as a “particular category” of crimes against humanity and a separate crime “within the same category of crimes against humanity.”⁴⁸ It confirmed that genocide was not subject to the limitation imposed by Article 6(c) of the Charter of the International Military Tribunal. According to the Secretariat, to comply with the reference to the Nuremberg Principles in Resolution 180(II), the draft convention would need to “give a sufficiently precise definition of genocide for it to be clearly distinguishable from other crimes against humanity.”⁴⁹

In the early stages of the ad hoc Committee’s work, there were only a few references to crimes against humanity and the Nuremberg Principles. The Soviet Union prepared a document for the ad hoc Committee entitled “Basic principles of a convention on genocide.”⁵⁰ It referred to genocide as “one of the gravest crimes against humanity” and “a most grievous crime against humanity.”⁵¹ Platon Morozov of the Soviet Union said genocide “should be declared the most serious crime against humanity.”⁵² China’s delegate referred to the relationship between the draft convention and the Nuremberg Principles, explaining that “the latter related solely to acts committed either during a war of aggression or in connexion with the

45 *Id.*

46 Ad Hoc Comm. on Genocide, Relations Between the Convention on Genocide on the one Hand and the Formulation of the Nürnberg Principles and the Preparation of a Draft Code of Offences Against Peace and Security on the Other, Note by the Secretariat, U.N. Doc. E/AC.25/3/Rev.1 at 6 (Apr. 12, 1948).

47 *Id.*

48 *Id.*

49 *Id.*

50 Basic Principles of a Convention on Genocide, U.N. Doc. E/AC.25/7 (Apr. 7, 1948).

51 *Id.*

52 Ad Hoc Comm. on Genocide, 7th mtg., U.N. Doc. E/AC.25/SR.7 (Apr. 12, 1948).

preparation of such a war. The Genocide Convention was to apply “at all times and at all places,” he said.⁵³ The French representative, Pierre Ordonneau, said that in drawing up a draft convention, the ad hoc Committee “should base its work on a broader idea, by placing it within the general framework of crimes against humanity.”⁵⁴ Victor Manuel Pérez Perozo of Venezuela thought that stating genocide was a crime under international law limited the scope of the convention. He considered that it was preferable to widen this “so as to include the concept of crime against humanity, or against the law of nations.”⁵⁵

When the work of the ad hoc Committee was well advanced, the Secretariat prepared a document reviewing some outstanding issues. One of these was “Relations between the crime of genocide and the [Nuremberg] Principles. The Secretariat noted that “the notion of crimes against humanity are also dealt with in Article 1 of the French draft (U.N. Doc. E/623/Add.1). The Committee may wish to deal with this problem in the preamble.”⁵⁶ France had described genocide as “merely one aspect” of “the concept of crimes against humanity,” proposing a draft convention that began: “The 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....”⁵⁷ But when the issue finally arose in the ad hoc Committee, France withdrew its insistence on an explicit mention of crimes against humanity. Poland’s delegate said that while it was true that genocide was a crime against humanity, stating this would “overreach” Resolution 180 (II).⁵⁸ He proposed the words “one of the gravest crimes against mankind,” adding that the phrase “in time of war and in time of peace” be added “to avoid the difficulty raised by the [Nuremberg] Charter.”⁵⁹

The Committee agreed, by six votes to one, to include the phrase “Genocide is a grave crime against mankind” in the preamble.⁶⁰ It also decided, by five to one with one abstention, that genocide constituted a

53 Ad Hoc Comm. on Genocide, 3rd mtg., U.N. Doc. E/AC.25/SR.3 (Apr. 6, 1948).

54 Ad Hoc Comm. on Genocide, 7th mtg., *supra* note 52.

55 Ad Hoc Comm. on Genocide, 10th mtg., U.N. Doc. E/AC.25/SR.10 (Apr. 16, 1948).

56 Ad Hoc Comm. on Genocide, List of Substantive Items to be Discussed in the Remaining Stages of the Comm. Session, U.N. Doc. E/AC.25/11 (Apr. 21, 1948).

57 France: Draft Convention on Genocide, U.N. Doc. E/623/Add.1 (Feb. 5, 1948).

58 Ad Hoc Comm. on Genocide, 20th mtg., U.N. Doc. E/AC.25/SR.20 (Apr. 12, 1948).

59 *Id.*

60 *Id.*

crime against international law.⁶¹ But the dispute resumed in a subsequent meeting when France proposed including in the preamble the phrase “that the international military tribunal at Nuremberg, in its judgment of 30 September and 1 October 1946, has punished certain persons who have committed these crimes....”⁶² Faced with objections to [France’s proposal?] from the Lebanese and Venezuelan members, the wording was changed from “these crimes” to “analogous acts.”⁶³ The vote was four in favor with three abstentions.⁶⁴

On second reading, Platon Morozov, the Soviet delegate, proposed replacing “crime under international law” in the preamble with “the crime of genocide was one of the worst forms of crimes against humanity.”⁶⁵ However, the majority never agreed to such a reference. The report adopted by the ad hoc Committee explains the controversy:

It will be noticed that genocide is called ‘a crime against mankind’. The representative of France had requested that it should be stated that genocide, while possessing specific characteristics, was a crime against humanity. He stated that it was for practical reasons that a Convention was being drawn up on the crime of genocide which, in his opinion, came within the general category of crimes against humanity. According to him it was desired to organize without delay the prevention and punishment of this particularly grave crime until such time as the International Law Commission in developing and going beyond the [Nuremberg] principles, should organize the punishment of all crimes against humanity and sever the link by which they were bound to crimes against the peace and to war crimes under the Charter of the International Military Tribunal of 8 August 1945. The unity of the principle regarding crimes against humanity should, in his opinion, however, be preserved.

Certain members of the Committee thought that it was not necessary to insert in the Preamble of the Convention doctrinal considerations of no practical utility. Other members of the Committee categorically opposed the expression ‘crime against humanity’ because, in their opinion, it had acquired a well-defined

61 *Id.*

62 Ad Hoc Comm. on Genocide, 23rd mtg., U.N. Doc. E/AC.25/SR.23 (Apr. 27, 1948).

63 *Id.*

64 *Id.*

65 Ad Hoc Comm. on Genocide, 24th mtg., U.N. Doc. E/AC.25/SR.24 at 16 (Apr. 28, 1948).

legal meaning in the Charter of the International Military Tribunal and in its judgment pronounced at Nürnberg. They added that by the terms of its Resolution 180(II), the General Assembly itself had clearly separated genocide from the other crimes which the International Law Commission would be called upon to codify. The formula of ‘a crime against mankind’ was therefore adopted to express a popular idea on which everyone was in complete agreement.⁶⁶

The Committee retained the preambular paragraph noting “the fact that the International Military Tribunal at Nürnberg in its judgment of 30 September – 1 October 1946 has punished under a different legal description certain persons who had committed acts similar to those which the present Convention aims at punishing.”⁶⁷ Article I of the Committee draft stated that “Genocide is a crime under international law whether committed in time of peace or in time of war.”⁶⁸ The Report notes that the French representative had stated that “genocide was the most typical of the crimes against humanity,” although it agreed not to press the point in order to facilitate speedy adoption of the draft.⁶⁹

VI. THE GENERAL ASSEMBLY PHASE

The draft Genocide Convention then moved to the Sixth Committee of the General Assembly. Brazil’s Gilberto Amado warned against “a confusion of terms.”⁷⁰ He referred to Resolution 180(II), adopted the previous year, saying that it “made a careful distinction between genocide and the crimes against humanity enumerated in Article 6(c) of the Charter of the International Military Tribunal.”⁷¹ Amado said this was the purpose of the reference to the Nuremberg principles. It was true, he acknowledged, that Article 6(c) enumerated acts that “by their nature, constituted genocide.” However, this only applied to the extent there was a connection with war, whereas genocide was an international crime that could also be committed in times of peace. “In view of the vagueness about the concept

⁶⁶ Ad Hoc Comm. on Genocide, Rep. of the Comm. & Draft Convention Drawn up by the Comm., E/794 at 7 (1948).

⁶⁷ *Id.* at 9.

⁶⁸ *Id.* at 11.

⁶⁹ *Id.* at 11-12.

⁷⁰ U.N. GAOR, 3rd Sess., Sixth Ctte., 63rd mtg., U.N. Doc. A/C.6/SR.63 at 6 (Sept. 30, 1948).

⁷¹ *Id.*

of crimes against humanity, it would be well to define genocide as a separate crime committed against certain groups of human beings as such,” he concluded.⁷²

Both France and the Soviet Union reiterated their preference for an explicit statement that genocide was subsumed within crimes against humanity.⁷³ The rapporteur of the Sixth Committee, Jean Spiropoulos, also insisted that “genocide belonged to the category of crimes against humanity.”⁷⁴ On the other hand, the United States spoke of “serious disadvantages” to any reference to crimes against humanity “in view of the technical meaning given to that expression” in the Charter of the International Military Tribunal.⁷⁵ Venezuela was opposed to any mention of the Nuremberg Tribunal in the preamble.⁷⁶ Both the United States and Venezuela highlighted the nexus of crimes against humanity with armed conflict as the reason for treating genocide as a separate crime. Similar views were expressed by Iran,⁷⁷ Lebanon,⁷⁸ and Pakistan.⁷⁹

France actually submitted a proposal for Article I that began: “The crime against humanity known as genocide is an attack on the life of a human group....”⁸⁰ However, it was never submitted to a vote because another text, using the phrase “crime under international law,” was adopted by 37 votes to three, with two abstentions.⁸¹ France also proposed replacing the words “grave crime against mankind” in the preamble with “crime against humanity.”⁸² It too never went to a vote given the adoption of another text.⁸³

The final text of the Convention, adopted on December 9, 1948, mentions neither crimes against humanity nor the principles of the Charter of the International Military Tribunal or the judgment at Nuremberg. Although there had been much controversy about this issue, the various

⁷² *Id.*

⁷³ U.N. GAOR, 3rd Sess., Sixth Ctte., 67th mtg., U.N. Doc. A/C.6/SR.67 at 37-39 (Oct. 5, 1948); *Id.* at 40.

⁷⁴ U.N. GAOR, 3rd Sess., Sixth Ctte., 109th mtg., U.N. Doc. A/C.6/SR.109 at 494 (Nov. 17, 1948).

⁷⁵ U.N. GAOR, 3rd Sess., Sixth Ctte., 67th mtg., *supra* note 73, at 39, U.N. GAOR, 3rd Sess., Sixth Ctte., 109th mtg., *supra* note 74, at 490.

⁷⁶ U.N. GAOR, 3rd Sess., Sixth Ctte., 109th mtg., *supra* note 74, at 489.

⁷⁷ *Id.* at 493; U.N. GAOR, 3rd Sess., Sixth Ctte., 110th mtg., U.N. Doc. A/C.6/SR.110 at 505 (Nov. 18, 1948).

⁷⁸ U.N. GAOR, 3rd Sess., Sixth Ctte., 109th mtg., *supra* note 74 at 495.

⁷⁹ U.N. GAOR, 3rd Sess., Sixth Ctte., 110th mtg., *supra* note 77 at 502-3.

⁸⁰ France: Draft Convention on Genocide, art. 1, U.N. Doc. A/C.6/211 (Oct. 1, 1948).

⁸¹ U.N. GAOR, 3rd Sess., Sixth Ctte., 68th mtg., U.N. Doc. A/C.6/SR.68 at 53 (Oct. 6, 1948).

⁸² France: Amendments to the Preamble to the Draft Convention on Genocide (E/794), U.N. Doc. E/794 (Nov. 15, 1948).

⁸³ U.N. GAOR, 3rd Sess., Sixth Ctte., 110th mtg., *supra* note 77 at 509.

sides in the debate agreed about some of the central points. For one thing, there was no dispute that genocide was truly a category of crime against humanity. There was also agreement about the need to set genocide apart from crimes against humanity given the nexus with armed conflict imposed at Nuremberg. The question was simply how best these distinctions should be made.

VII. AFTERMATH

And so began the curious relationship between genocide and crimes against humanity that continues to the present day. Genocide, as defined in the Convention, is punishable even if committed in time of peace. But it is defined much more narrowly than Lemkin's original conception, and the strict boundaries of the crime have generally been observed by judges. Crimes against humanity, on the other hand, cover a much broader range of atrocities. However, according to the Nuremberg judgment, they are not punishable absent an association with an armed conflict, as Lemkin lamented in his encounter with Henry King. With the adoption of the Genocide Convention in December 1948, most serious violations of human rights still escaped the purview of international criminal law. The relatively broad range of atrocities contemplated by crimes against humanity did not apply in peacetime, and although genocide was the exception, it was confined to the physical destruction of certain groups and not others.

In the early 1990s, international criminal law entered a phase of great dynamism after four decades of relative stagnation. Scholars and activists, including Leila and myself, found this enormously exciting. International lawmakers seemed intoxicated on pure oxygen as they remade the normative framework of international criminal law. The huge gaps described in the previous paragraph were effectively eliminated. The cynical restriction on crimes against humanity imposed at Nuremberg and justified, according to Robert Jackson, by sensitivity about "regrettable circumstances at times in our own country in which minorities are unfairly treated,"⁸⁴ was cast aside. Breath-taking law reform by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in October 1995 was confirmed when the Rome Statute was adopted in 1998. Henceforth crimes against humanity were punishable in times of peace as well as when there was a link to armed conflict. The law of war crimes was also transformed to apply during non-international armed conflicts. But in

84 REPORT OF ROBERT H. JACKSON, *supra* note 9 at 333.

this dynamic period of reform, one of the crimes was left behind, or rather left alone. Despite modest efforts by our friend and mentor, Cherif Bassiouni, the Rome Conference chose to leave intact the definition of genocide adopted by the General Assembly in 1948, as if it were a monument to be both honored and left untouched. Moreover, entreaties that the narrow scope of genocide be broadened by judicial activism have generally been fruitless.

Recently the Nuremberg period of international criminal law was the subject of a brilliantly accessible account by Philippe Sands.⁸⁵ In *East West Street*, he wove a compelling story built around two personalities, Raphael Lemkin and Hersch Lauterpacht, both of whom came from the same part of the world as his own ancestors. It was also the story of the parallel development of the two legal concepts, genocide, and crimes against humanity. Lemkin's claim to authorship of genocide is beyond question. The notion of crimes against humanity pre-dates Lauterpacht by many years – President Roosevelt had used the term in a statement he made in March 1944.⁸⁶ But it was Lauterpacht who suggested the terminology to Robert Jackson while the London Conference was underway, proposing it as a more eloquent formulation than “[a]trocities and persecutions and deportations on political, racial or religious grounds,” or “[a]trocities against civilian populations,” the nomenclature that had been used until that point during the Conference.⁸⁷ He said “crimes against humanity” was “a very convenient designation” which had been suggested to him by “an eminent scholar of international law,”⁸⁸ apparently forgetting to credit his own President.

Philippe Sands explains that crimes against humanity and genocide differ because the former is focused on the individual, whereas the latter addresses the protection of groups. Other writers, like Guénaél Mettraux, have said that “[w]hilst they started life as closely linked notions, crimes against humanity and genocide have grown apart and now constitute two separate categories of international core crimes.”⁸⁹ But to the extent that there is any divergence of the two, it appears attributable to the details resulting from codification in such lengthy texts as Article 7 of the Rome Statute and the provisions of the Elements of Crimes. The fundamental elements of genocide are encapsulated within crimes against humanity, and

85 PHILLIPE SANDS, *EAST WEST STREET* (London, Weidenfeld & Nicholson 2017).

86 ‘Statement by President Roosevelt, March 24, 1944’, FRUS 1944, Vol. I, pp. 1230-1231.

87 REPORT OF ROBERT H. JACKSON, *supra* note 9 at 57, 87, 99, 170, 205, 293 (1949).

88 *Id.* at 416.

89 GUÉNAËL METTRAUX, *GENOCIDE 400* (2019).

the history of the emergence of genocide as a distinct crime in 1946, 1947 and 1948 seems almost entirely attributable to the war nexus of crimes against humanity imposed at Nuremberg. Instead of viewing the two categories as being somewhat distinct in their underlying philosophies, it is probably better to see them as concepts designed to address the same reality, separated historically by a debate that no longer has any significance. That is why Raphael Lemkin was comfortable speaking of the Nuremberg judgment as having addressed “wartime genocide” even if it never used the term that he had invented.

Only because the General Assembly chose to adopt a narrow definition of genocide, notably excluding cultural genocide from its scope, was it able to agree upon a convention in 1948. During the drafting, the Secretariat had distinguished between a restricted approach to genocide, like the crime against humanity of extermination, and a wide approach, associated with the crime against humanity of persecution.⁹⁰ Clearly, the drafters of the Genocide Convention, in both the ad hoc Committee and the General Assembly, opted for the restricted approach. At the time, adoption of a convention on crimes against humanity would only have been possible if the nexus or connection with armed conflict were retained.

The International Law Commission struggled with the war nexus requirement of crimes against humanity for many years, retaining it in the Nuremberg principles adopted in 1950⁹¹ but removing it in the 1954 draft Code of Offences against the Peace and Security of Mankind.⁹² Antonio Cassese wrote that it was only in the late 1960s “that a general rule gradually began to evolve, prohibiting crimes against humanity even when committed in time of peace.”⁹³ When the law underwent great changes in the 1990s, the category of crimes against humanity was transformed so as unequivocally to be punishable in times of peace. Within the framework of the Rome Statute, there is very little if any significance to the distinction between genocide and crimes against humanity. Anything punishable as genocide will also be punishable as a crime against humanity.

90 Ad Hoc Comm. on Genocide, *Relations Between the Convention on Genocide on the one Hand and the Formulation of the Nürnberg Principles and the Preparation of a Draft Code of Offences Against Peace and Security on the Other*, Note by the Secretariat, *supra* note 46.

91 Int’l Law Comm’n, Rep. on the Work of Its Second Session (5 June - 29 July 1950), *supra* note 19.

92 Int’l L. Comm’n, Rep. Covering the Work of Its Sixth Session (3 June-28 July 1954), U.N. Doc. A/CN.4/SER.A/1954/Add.1, at 150 (1954).

93 Antonio Cassese, *Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law*, 4 J. INT’L CRIM. JUSTICE 410, 413 (2006).

However, there is currently no convention on crimes against humanity comparable to the Convention on the Prevention and Punishment of the Crime of Genocide. It is to that project that Leila Sadat has devoted so much of her attention over the past decade and a half, and success seems within reach.⁹⁴ Indeed, although the draft convention on crimes against humanity resembles the Genocide Convention in terms of its general function, juxtaposing the two is like comparing a 1948-era DC-3 passenger plane with a Boeing 787 or an Airbus 350 in terms of legal technique and normative scope. Perhaps the new convention on crimes against humanity will help to recalibrate the public understanding of the relationship between the two categories of crime and put an end to the complaints that labeling certain atrocities “crimes against humanity” rather than “genocide,” in some way, diminishes their importance.

⁹⁴ See G.A. Res. 75/136, Crimes against humanity (Dec. 22, 2020).