# A NEW ERA FOR INTERNATIONAL CRIMINAL LAW: RETHINKING THE DEFINITIONS OF CRIMES AGAINST HUMANITY AND GENOCIDE THROUGH THE SCOPE OF ITS EVOLUTION AS AN OUTGROWTH OF WAR CRIMES*

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## Abstract

*Genocide and crimes against humanity were at first considered an outgrowth of war crimes, the latter being the only category of crime accepted as having an international character before the twentieth century. The international community has for centuries been concerned with the outlawing of certain acts during armed conflict, and exhibited the intention to hold the perpetrators of these acts accountable. The establishment of genocide and crimes against humanity as independent international crimes was a gradual process that spread over several centuries, and history shows that war crimes formed the basis for both these crimes. All three international crimes overlap in many ways: certain acts that amount to crimes against humanity constitute war crimes, and certain war crimes are also crimes against humanity. By the same token, genocide can amount to a war crime, and certain war crimes may constitute genocide. Genocide was initially conceptualised as a crime against humanity, and persecution as a crime against humanity specifically belongs to the same genus as genocide. All three crimes therefore inform the others, with war crimes being pivotal to the gradual process during which genocide and crimes against humanity became autonomous international crimes. The following article will firstly furnish an historical background to the development of international criminal law in order to illustrate the fundamental role played by war crimes in the development of the international crimes of genocide and crimes against humanity. Secondly, the article will identify certain overlapping characteristics that the three crimes have. Finally, the historical origins of*

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*the crimes, together with the significant overlaps, will be used to further the argument that a new era has dawned in international criminal law which necessitates the rethinking and reinterpretation of existing law to suit the needs of current realities.*

**Keywords:** international criminal law; history; overlaps; core international crimes

## 1 Introduction

Modern international criminal law developed by leaps and bounds during the twentieth century,[1] one of the bloodiest and most brutal centuries. The most conspicuous slaughter of human beings manifested in the environment of armed conflict:[2] the Holocaust took place during the Second World War; the Cambodian genocide was committed during the armed conflict between the United States of America and Vietnam;[3] genocide and ethnic cleansing were committed in the Federal Republic of Yugoslavia during the dissolution of Yugoslavia and the resultant war; the Rwandan genocide took place during the non-international armed conflict, which raged inside the state; crimes against humanity were committed in Sierra Leone during the non-international armed conflict;[4] and the genocide in Darfur has been preceded by years of strife between the North[5] and South of the Sudan.[6]

As a result, both genocide and crimes against humanity were at first considered an expansion or *outgrowth* of war crimes.[7] The establishment of genocide and crimes against humanity as independent international crimes was a gradual process that spread over several centuries. The only category of crime that was accepted as having an international character before the twentieth century was that of war crimes.[8] Various ancient civilisations attempted, either through the scholarly efforts of

1 M Cherif Bassiouni 'Perspectives on international criminal justice' (2010) 50 *Virginia Journal of International Law* 269; Antonio Cassese 'Reflections on international criminal justice' (2011) 9 *Journal of International Criminal Justice* 271.

2 MN Shaw *War and Genocide* (2003) 1–9; 41–44.

3 Ibid 41–44.

4 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone.

5 The Republic of the Sudan.

6 The Republic of South Sudan seceded from the Sudan on 9 July 2011 after a referendum earlier that year. It was admitted as a member state by the United Nations General Assembly on 14 July 2011. See in this regard: GA Resolution 65/308, *Admission of the Republic of South Sudan to membership in the United Nations*, A/RES/65/308, 25 August 2011.

7 M Cherif Bassiouni *Crimes Against Humanity in International Criminal Law* (1999) 41–88.

8 A Cassese *International Criminal Law* (2008) 28–31.

warlords or through religious texts, to outlaw certain acts during armed conflict.[9] In certain instances, sanctions were attached for violations of these guidelines for the conduct of a just war.[10] However, the emergence of a more concrete international system of humanitarian law only started occurring between the seventeenth and nineteenth centuries with the adoption of a number of international instruments that regulated the laws of war.[11] Certain words and phrases were included in a few of these texts that indicated that drafters viewed some acts committed during armed conflict as falling outside the parameters of war crimes, and that an overarching principle or 'law of humanity' were to guide combatants during a time of war.[12] These acts carried out during armed conflict were described as an 'outrage', and a violation of the 'laws of humanity' that had to be punished.[13] There were even isolated attempts, although clearly clumsy to the modern observer, to hold perpetrators responsible for their acts.[14] It was, however, only with the advent of the twentieth century and its bloodshed that the most rapid development of firstly, crimes against humanity, and thereafter, genocide, took place.

The historic origins of the development of these international crimes illustrate that the international community has for centuries been concerned with the outlawing of certain acts during armed conflict, and exhibited the intention to hold the perpetrators of these acts accountable. History shows that war crimes formed the basis for both crimes against humanity and genocide, with all three crimes continuing to overlap in many ways.[15] Certain acts that amount to crimes against humanity constitute war crimes, and certain war crimes are also crimes against humanity. By the same token, as genocide can be committed both in a 'time of peace or in time of war'[16] genocide can also be a war

9 See part 2.1 below for a more in-depth discussion of examples of scholarly efforts of warlords and selected religious texts that illustrate this point.

10 LH McCormack 'From Sun Tzu to the Sixth Committee: the evolution of an international criminal law regime' in TLH McCormack & GJ Simpson (eds) *The Law of War Crimes: National and International Approaches* (1997) 35–36.

11 The Treaty of Westphalia, signed at Münster, and Osnabrück, http://www.pax-westphalica.de (accessed 2 August 2018); General Orders No 100, *Instructions for the Government of Armies of the United States in the Field*, promulgated on 24 April 1863; Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 1864 (1864 Geneva Convention); Hague Convention on the Laws and Customs of War on Land of 1899 (Second Hague Convention); Hague Convention on the Laws and Customs of War on Land of 1907 (Fourth Hague Convention).

12 Article 5 of the 1864 Geneva Convention; Preamble of the Second Hague Convention; Preamble of the Fourth Hague Convention.

13 Ibid.

14 See part 2.1 below.

15 See part 2 below.

16 Article I of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).

crime, and some war crimes constitute genocide. Genocide was initially conceptualised as a crime against humanity, and persecution as a crime against humanity specifically belongs to the same genus as genocide.[17] All three crimes therefore inform the others, with war crimes being pivotal to the gradual process during which genocide and crimes against humanity became autonomous international crimes.

However, the development of international criminal law did not end with the establishment of genocide and crimes against humanity as independent international crimes, and it continues to develop. The world we live in today is vastly different to the one that existed at the time when these international instruments were negotiated, adopted, and came into operation. Both the genocide in Rwanda and the gross human rights violations in the former Yugoslavia[18] in the 1990s engendered a sense of urgency within the international community, similar to that experienced shortly after the Second World War, to prevent and prosecute similar atrocities against civilians.[19] A comparable upsurge is gaining ground in the international community at present. Armed conflicts, whether international or national, are no longer only waged by state actors: support for terrorist organisations and religious extremist groups such as Boko Haram and the Islamic State in Iraq and the Levant ('ISIL' or 'Da'esh') is spreading like wildfire worldwide.[20] International criminal courts and tribunals have thus far focused efforts for criminal prosecution for genocide and crimes against humanity against senior government officials, not private actors.[21] The wave of recent attacks against civilians is evidence that the face of modern armed conflict has become

17 M Roux 'The *erga omnes* obligation to prevent and prosecute gross human rights violations with special emphasis upon genocide and prosecution as a crime against humanity' 2012 *African Yearbook on International Humanitarian Law* 100–101. See further para 2 below.

18 *Report of the Secretary-General: Prevention of Armed Conflict,* A/55/985-S/2001/574,7-06-2001 2, para 161 at 35.

19 Roux (n 17 above) 98.

20 In 2017 alone several attacks were carried out by individuals either claiming allegiance with Boko Haram or ISIS, or these groups claimed responsibility after the attack. The United Nations Security Council has also adopted several resolutions this year regarding terrorism and violent extremism, see for example in this regard: SC Resolution 2342 (2017), S/RES/2342 (2017), 23 February 2017; SC Resolution 2341 (2017), S/RES2341 (2017), 13 February 2017; SC Resolution 2349 (2017), S/RES/2349 (2017), 31 March 2017; SC Resolution 2354 (2017), S/RES/2354 (2017), 24 May 2017.

21 M Roux 'Early warning of gross human rights violations: an international law perspective' (2011) 4 *Tydskrif vir die Suid-Afrikaanse Reg* 660.

unrecognisable and is increasingly waged by private actors.[22] History has shown that outrageously evil acts are usually only outlawed once it is too late, and '[b]ecause modern specialists in violence constantly seek new and unexpected ways of defeating adversaries, the codified body of the law of armed conflict always lags at least a generation behind'.[23]

In light of the foregoing, the purpose of this article is threefold: firstly, to furnish an historical background to the development of international criminal law in order to illustrate the fundamental role played by war crimes in the development of the international crimes of genocide and crimes against humanity. Secondly, the article will identify certain overlapping characteristics that the three crimes have. Finally, the historical origins of the crimes, together with the significant overlaps, will be used to further the argument that a new era has dawned in international criminal law which necessitates the rethinking and reinterpretation of existing law to suit the needs of current realities.

The article will start off by setting out the historical background of the evolution of genocide and crimes against humanity as autonomous international crimes, whereafter arguments will be put forward explaining the necessity to rethink and reinterpret the existing law on genocide, crimes against humanity and war crimes. The historical background will comprise significant incidents which took place in ancient times, the time preceding the First World War, as well as notable events which took place during the First World War such as the Armenian genocide in Turkey[24] and the Leipzig trials to prosecute war criminals. The most momentous development of international criminal law took place during and after the Second World War. The discussion of this final period will explain the conclusive process during which genocide and crimes against humanity became autonomous international crimes.[25] Thereafter the article will turn

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22 P Grzebyk 'Crimes against civilians during armed conflicts' in B Krzan (ed) *Prosecuting International Crimes: A Multidisciplinary Approach* (2016) 99; AK Cronin 'What is really changing? Change and continuity in global terrorism' in H Strachan & S Scheipers *The Changing Character of War* (2014) 134; B Hoffman 'Who fights? A comparative demographic depiction of terrorists and insurgents in the twentieth and twenty-first centuries' in Strachan & Scheipers 283, 292–294; PW Singer 'Robots at war: the new battlefield' in Strachan & Scheipers 333.

23 WM Reisman '*Rasul v Bush:* a failure to apply international law' (2004) 2 *Journal of International Criminal Justice* 973. See also ET Jensen 'The future of the law of armed conflict: ostriches, butterflies and nanobots' (2014) 35 *Michigan Journal of International Law* 253.

24 Bassiouni (n 7 above) 62; A Jones *Genocide: A Comprehensive Introduction* (2006) 101–123; McCormack (n 10) 44–45; Shaw (n 2 above) 32–33; VN Dadrian 'Genocide as a problem of national and international law: the World War I Armenian case and its contemporary legal ramifications' 1989 *The Yale Journal of International Law* 221.

25 See art I of the Genocide Convention; arts 5, 6, 7, 8 and 9 of the Statute of the International Criminal Court (ICC Statute).

to overlapping characteristics and cross-fertilisation that have occurred between war crimes, crimes against humanity and genocide. Certain overlaps between the crimes, such as individual criminal responsibility and the question of non-state actors, the time when these crimes are committed, criminal acts, targeted groups, as well as the current impact of geopolitics surrounding the original drafting process will be used to argue for the necessity to rethink and reinterpret the application of the existing law to current realities.

## 2 Historic Origins of Genocide and Crimes against Humanity: The Influence of War Crimes

### *2.1 From Ancient Civilisations' Notion of War Crimes to International Humanitarian Instruments of the Nineteenth Century*

Wars have been fought since time immemorial. Armed conflict was perceived by the ancient world 'as the natural condition of mankind', in stark contrast to peacetime that was perceived 'as an artificial state secured by treaty or convention'.[26] Attempts were made constantly by various ancient civilisations and nations to make the conduct of war more humane and just by applying their own rules and regulations to warfare. These rules and regulations of warfare became known as *ius in bello*.[27] The notion of war crimes subsequently arose as a result of the need to outlaw certain conduct during armed conflict, and to hold individuals violating these laws accountable.[28]

Writings on the subject of humanitarian law in ancient civilisations were either the product of the scholarly efforts of warlords, or texts that based their rules and regulations on religious beliefs.[29] These texts by no means formed a codified international system of humanitarian rules and regulations with corresponding criminal sanctions that would be recognisable to the modern observer. At most these scholarly writings and religious texts illustrate that even during antiquity there was a type of 'universality of humanitarian principles governing the conduct of armed

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26 AS Hershey 'The history of international relations during Antiquity and the Middle Ages' (1911) 5 *American Journal of International Law* 902.

27 J Dugard *International Law: A South African Perspective* (2011) 519; M Sassòli, AA Bouvier & A Quintin *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law, Volume 1, Outline of International Humanitarian Law* (2011) 14–16.

28 Sassòli et al ibid 50–59.

29 The writings of Chinese warlord Sun Tzu, and Byzantine Emperor Maurice are mere examples illustrating efforts to regulate the conduct of war in ancient civilisations.

conflicts',[30] and that ancient civilisations were motivated to outlaw and punish certain conduct.

An early example of a scholarly text on the conduct during armed conflict is Chinese intellectual and warlord Sun Tzu's military treatise, *The Art of War*.[31] Tzu urges armed forces to treat captured enemy soldiers kindly,[32] also preferring to capture the enemy rather than annihilate them.[33] Another example can be found in Byzantine Emperor Maurice's *Strategica*, wherein 'humanitarian limitations on the conduct of war' are provided for, together with strict sanctions for violations of *ius in bello*.[34] Violating humanitarian rules and being guilty of insubordinate conduct were punishable by death, but this sanction was limited to the combatant- and soldier-classes.[35]

However, religious dogma dominated and influenced most ancient texts on the rules and regulations of warfare. The *ius in bello* of both the Roman Empire and the Ancient Greeks were largely motivated by religious duties towards enemies,[36] and their religious beliefs and principles were the driving factors during wartime.[37] Both Roman and Greek warfare was notorious for its brutality, despite the influence of their respective religions.[38] The *Manu Smriti*,[39] a Hindu text containing sacred laws dating to around 200 BC, stipulated various humanitarian principles which had to be applied by the king and his armed forces during a time of armed conflict. The use of certain weapons was forbidden,[40] and it was the 'duty of honourable warriors' to refrain from attacking specific combatants and non-combatants.[41] The king was also authorised to punish men who acted 'unjustly'.[42]

Principles of the laws of war and the punishment for their violation are also found in some of the texts of the Abrahamic-religions. Islamic

30 Bassiouni (n 7 above) 60.
31 Sun Tzu *The Art of War* trans J Clavell 1995.
32 Ibid 21.
33 Ibid 23. See also Bassiouni (n 7 above) 49; McCormack (n 24 above) 32–33.
34 McCormack (n 24 above) 35–36.
35 Ibid.
36 Hershey (n 26 above) 918–921.
37 Ibid 912–917.
38 Ibid 917.
39 *The Laws of Manu* ('*Manu Smriti*') G Bühler translation (2001). See also McCormack (n 24 above) 35; Hershey (n 26 above) 904–905. The *Manu Smriti* is also known as the '*Book of Manu*' or the '*Code of Manu*'.
40 *Manu Smriti* (n 39 above) ch VII 90. Examples of forbidden weaponry were those which were concealed, 'barbed' or poisoned.
41 Ibid ch VII 91–93. Protected persons included disarmed soldiers, a person who 'who looks on without taking part in the fight', a fleeing soldier, or one who has laid down his arms.
42 Ibid ch VII 14–31.

humanitarian law, with its ancient origins,[43] is still practiced today.[44] Humanitarian principles in Islam are based mainly on the Quran, and include limitations on the methods and means of combat, the protection and treatment of the wounded, prisoners of war as well as civilians, and prohibitions on attacks against places of worship and monasteries.[45] Jewish and early Christian authors based their views on the Bible.[46] In AD 75 the Jewish scholar Josephus, in his work *The Wars of the Jews*, described the Jewish revolt against Rome in AD 66–70.[47] In the early fifth century, St Augustine wrote *De Civitate Dei*,[48] in which the inhumane treatment of captives during warfare is discouraged. St Augustine also wrote at length on a 'just war' by describing its impiety and propagating a society at peace. Numerous parameters commanded the conduct of war in the Judaic and Christian Old Testament.[49] The role played by religion in regulating combatants' conduct during armed conflict was even more pronounced during the Middle Ages, especially in Western Europe, which was heavily dominated by the Roman Catholic Church's religious dogma and doctrines.[50]

The first time that scholarly writings and religious texts on the violations of *ius in bello* were put into effect by holding an individual criminally liable, was in the thirteenth century. Prince Conradin von Hohenstaufen was tried, convicted and executed in 1268 for instigating an 'unjust war'[51] and for committing crimes against civilians such as 'murder, rape,

43 A Van Engeland 'When two visions of a just world clash: international humanitarian law and Islamic humanitarian law' (2006) 3 *International Studies Journal* 1, 3.

44 O Yousaf 'IHL as Islamic humanitarian law: a comparative analysis of international humanitarian law and Islamic military jurisprudence amidst changing historical contexts' (2012) 24 *Florida Journal of International Law* 439; S Marsoof, 'Islam and international humanitarian law' (2003) 15 *Sri Lanka Journal of International Law* 23; A Zaki Yamani 'Humanitarian international law in Islam: a general outlook' (1985) 7 *Michigan Yearbook of International Legal Studies* 189;

45 F Bugnion 'Customary international humanitarian law' (2007) 7 *The Indian Society of International Law Yearbook of International Humanitarian and Refugee Law* 1, 3.

46 Persecutions of Christians in the centuries following the Crucifixion of Christ can be viewed as an early example of crimes against humanity. In *The History of the Church,* Eusebius documents such persecutions and martyrdoms of Christians from the Ascension of Christ in 30 AD, up to the early 4th century. See in this regard: Eusebius *The History of the Church: From Christ to Constantine* trans GA Williamson (1989).

47 F Josephus *The Wars of the Jews* Vol 1 trans W Whiston (1988).

48 Saint Augustine *The City of God* trans J Healey (1967).

49 Bassiouni (n 7 above) 52; R Cryer *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005) 11; Hershey (n 26 above) 907–911. See inter alia on this topic: Exodus 34: 10–15; Deuteronomy 7: 1–5, 22–25; Deuteronomy 20: 1–20; 2 Samuel 8; 2 Kings 6: 23.

50 Cryer (n 49 above) 13.

51 Bassiouni (n 7 above) 517; Cryer (n 49 above) 14; FF Martin, SJ Schnably, RJ Wilson, JS Simon & MV Tushnet *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis* (2006) 2; McCormack (n 24 above) 37.

perjury, and other crimes against the "laws of God and man"'.[52] Another example is the sentencing and execution of King Charles I of England in 1649 for being the instigator of the English Civil War, of committing acts of 'tyranny' against civilians,[53] as well as being a 'traitor, murderer and a public and implacable enemy to the Commonwealth of England'.[54] However, the status of both examples as 'international criminal trials' as it is understood today is debatable.[55] These criminal sanctions were either strongly motivated by religious dogma,[56] as in the case of Von Hohenstaufen, or by political instability,[57] as in the case of Charles I, rather than by a codified international system of humanitarian rules and regulations.

International humanitarian law developed further between the seventeenth and late nineteenth centuries with the introduction of various international instruments. Some of the instruments made provision for the punishment of violators of these rules of warfare, but more significantly, increasingly included the term 'humanity' as an overarching principle guiding combatants during armed conflict. The Treaty of Westphalia,[58] for instance, provided for the punishment of persons who violated the treaty or the 'publick peace' (*sic*).[59] The Lieber Code[60] made extensive provision for the conduct of members of armed forces during a time of conflict, notably making it

> incumbent upon those who administer (Martial Law) to be strictly guided by the principles of justice, honour, and *humanity* – virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed (emphasis added).[61]

The Code made it abundantly clear that not only was 'all cruelty and bad faith' rejected,[62] but that any violations of the laws of war would not be tolerated and 'shall be severely punished'.[63] Criminal sanctions were instituted for any violations, and the punishment imposed on

52 Bassiouni (n 7 above) 517.
53 G Robertson *Crimes Against Humanity: The Struggle for Global Justice* (2006) 3–8; 202; 249; 297; 342; 373; 411; 581; 594; 602; 607.
54 Ibid 5.
55 Cryer (n 49 above) 18–21; McCormack (n 24 above) 38.
56 McCormack (n 24 above) 38.
57 Robertson (n 53 above) 7.
58 Treaty of Westphalia (n 11 above). See further: Bassiouni (n 7 above) 54; A Cassese *International Law* (2005) 21.
59 Article CXXXII of the Treaty of Westphalia.
60 Lieber Code (n 11 above). See further: Bassiouni (n 7 above) 59; Cryer (n 49 above) 28–29; McCormack (n 24 above) 42.
61 Article 4 of the Lieber Code.
62 Ibid art 11.
63 Ibid art 16.

the offenders had to be in accordance with the character of the crime committed.[64] For example, the death penalty was imposed as a sanction if certain 'wanton violence' was committed against the civilians of an invaded country such as 'all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants'.[65]

The first sources of modern international humanitarian law,[66] the 1864 Geneva Convention[67] and the Peace Conferences held at The Hague in 1899 and 1907, were extremely significant for including the term *humanity*. The term *humanity* would eventually play a role in the development of crimes against humanity and genocide as independent international crimes.[68] *Humanity* was used in the 1864 Geneva Convention, with reference to the obligation of belligerents to inform inhabitants of enemy states 'of the appeal made to their humanity' and that they will receive 'neutrality' by giving wounded enemy combatants 'shelter and care in a house', which would be considered 'humane conduct'.[69] The Hague Conferences did not expressly provide for the criminal punishment of violations, but it was implicit that, in violating 'the laws of humanity',[70] war crimes would be committed.[71] The 'laws of humanity' in The Hague Conventions 'were used in a non-technical sense and certainly not with the intention of indicating a set of norms different from "the laws and customs of war", the violations of which constitute war crimes'.[72] In the Second Hague Convention on the Laws and Customs of War of 1899, the High Contracting Parties proclaimed their 'desire to serve', during a time of war, 'the interests of humanity'.[73] This Convention also contained the 'Martens Clause',[74] which stipulated that

64 Ibid arts 12; 37; 44; 46; 47; and 71.

65 Ibid art 44. The trial of Swiss Captain Wirz serves as an example of the implementation of the Lieber Code: Wirz was sentenced to death for crimes committed against prisoners of war in Camp Sumter at Andersonville, where he was the commander.

66 McCormack (n 24 above) 43; WH von Heinegg 'Criminal international law and customary international law' in A Zimmermann *International Criminal Law and the Current Development of Public International Law: Proceedings of an International Symposium of the Kiel Walther Schücking Institute of International Law, May 30 – June 2, 2002* (2003) 27, 29.

67 See (n 11 above).

68 Bassiouni (n 7 above) 60.

69 Article 5 of the 1864 Geneva Convention.

70 Preamble of the Second Hague Convention; Preamble of the Fourth Hague Convention.

71 Bassiouni (n 7 above) 42–43 and 60–63; Cryer (n 49 above) 26–27 and 30; E Schwelb 'Crimes against humanity' 1946 *British Yearbook on International Law* 178.

72 Schwelb (n 71 above) 180.

73 Preamble of the Second Hague Convention of 1899.

74 R Ticehurst 'The Martens Clause and the laws of armed conflict' (1997) 317 *International Review of the Red Cross* 125 https://www.icrc.org/eng/resources/documents/article/other/57jnhy.htm (accessed 2 August 2018).

> populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity, and the requirement of the public conscience.[75]

The Martens Clause was also included in the Fourth Hague Convention,[76] all four of the 1949 Geneva Conventions,[77] as well as the 1977 Additional Protocols to the Geneva Conventions.[78]

The significance of including the phrase 'laws of humanity' in these pre-twentieth century international humanitarian law treaties was that it signified at most a 'best practice' principle to belligerents. It was only towards the middle of the twentieth century that this phrase started to hold true consequences for persons acting in contravention to it. Two incidents in the early twentieth century further influenced the development of international criminal law, and specifically the evolution of crimes against humanity and genocide as independent international crimes. The first incident was the Armenian genocide committed by the Turkish government between 1915 and 1918. Despite the fact that these atrocities were committed during the First World War, they were not described as 'war crimes', as such a mass killing was called before; instead, they were called crimes committed 'against civilization' or the 'dictates' and 'laws' of 'humanity'.[79] The term *humanity*, in conjunction with *crimes*, *dictates* and *laws*, was used for the first time to describe the outrage that states felt about a government committing atrocious mass killings against its own citizens during a war. The second incident is seen in the offences committed by Germany and her allies[80] during the

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75 Preamble of the Second Hague Convention of 1899.

76 Preamble of the Fourth Hague Convention.

77 Article 63 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Convention); art 62 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Convention); art 142 of the Geneva Convention Relative to the Treatment of Prisoners of War (Third Convention); art 158 of the Geneva Convention Relative to the Protection of Civilians in Times of War (Fourth Convention).

78 Article 1(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I); preamble of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

79 Chapter II of the *Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties* ('Report of the Commission of Fifteen'), 29 March 1919, reprinted in (1920) 14 *American Journal of International Law* 95, 104; FZ Ntoubandi *Amnesty for Crimes Against Humanity under International Law* (2007) 43–44.

80 Chapter I of the Report of the Commission of Fifteen 98–112, states that Germany's allies during the War were Austria, Turkey and Bulgaria.

First World War. These offences were described along similar lines as the genocide committed by the Turkish government, namely 'outrages' which went 'against the clear dictates of humanity', as well as the 'elementary laws of humanity'.[81] The discussion that follows will illustrate the significance of these two events for the development of international criminal law.

## *2.2 The First Genocide of the Twentieth Century and War Crimes of the First World War*

The first genocide of the twentieth century left in its wake a massacre of over one million Armenians, yet it has gained the disconcerting label of 'the forgotten genocide'.[82] Whether these mass killings would qualify as genocide as it is understood today, is still highly controversial. [83] Turkey

[81] Ibid Ch II 112–115.

[82] Adolf Hitler 'Oberzalzburg Speech', http://www.fordham.edu/halsall/mod/hitler-obersalzberg.html (accessed 2 August 2018); ML Anderson 'Who still talked about the extermination of the Armenians? German talk and German silences' in RG Suny, FM Göçek & NM Naimark *A Question of Genocide: Armenians and Turks at the End of the Ottoman Empire* (2011) 199; VN Dadrian *The History of the Armenian Genocide: Ethnic Conflict from the Balkans to Anatolia to the Caucasus* (1995) 403–409; FM Göçek 'Reading genocide: Turkish historiography on 1915' in Suny et al 42; MM Gunter *Armenian History and the Question of Genocide* (2011) 28; VN Dadrian 'Genocide as a problem of national and international law' (n 24 above) 224–225; VN Dadrian 'The Armenian genocide and the legal and political issues in the failure to prevent or punish the crime' (1998) 29 *University of West Los Angeles Law Review* 46–47; RW Smith, E Makhusen & RL Lifton 'Professional ethics and the denial of the Armenian genocide' (1995) 9 *Holocaust and Genocide Studies* 1.

[83] RG Hovannisian *Denial of the Armenian Genocide in Comparison with Holocaust Denial* (2004) 5; VN Dadrian 'The Turkish Military Tribunal's prosecution of the authors of the Armenian genocide: four major court-martial series' (1997) 11 *Holocaust and Genocide Studies* 28; C Fournet *The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory* (2007) 83–97; T Schirrmacher 'The Armenian question in Turkey's domestic and international policy' (2014) 7 *International Institute for Religious Freedom* 187; RH Kahn 'Does it matter *how* one opposes memory bans? A commentary on *liberte pour l'histoire*' (2016) 15 *Washington University Global Studies Law Review* 55; GS Gordon 'The propaganda prosecutions at Nuremberg: the origin of atrocity speech law and the touchstone for normative evolution' (2016–2017) 39 *Loyola Los Angeles International and Comparative Law Review* 209; MJ Bazyler & RL Shah 'The unfinished business of the Armenian genocide: Armenian property restitution in American courts' (2017) 23 *Southwestern Journal of International Law* 223; A Clooney & P Webb 'The right to insult in international law' (2016–2017) 48 *Columbia Human Rights Law Review* 1.

denies that the atrocities were genocide[84] whereas other states[85] as well as regional[86] and international organisations[87] largely support the recognition thereof as genocide. It has been said that the denial of the Armenian genocide is 'institutionalised by [the Turkish] government, its

[84] The website of the Republic of Turkey's Ministry of Foreign Affairs refers extensively to the 'Controversy between Turkey and Armenia about the events of 1915' http://www.mfa.gov.tr/controversy-between-turkey-and-armenia-about-the-events-of-1915.en.mfa (accessed 2 August 2018). See further in this regard: 'The events of 1915 and the Turkish-Armenian controversy over history', Center for Eurasian Studies http://www.mfa.gov.tr/data/DISPOLITIKA/the-events-of-1915-and-the-turkish_armenian-controversy-over-history-br.pdf (accessed 2 August 2018); 'The Armenian "genocide"? Facts and figures' by the Centre for Strategic Research http://www.mfa.gov.tr/data/DISPOLITIKA/ErmeniIddialari/ArmenianGenocideFactsandFiguresRevised.pdf (accessed 2 August 2018).

[85] VN Dadrian 'The Turkish Military Tribunal's Prosecution of the Authors of the Armenian Genocide: Four Major Court-Martial Series' (1997) 11 *Holocaust and Genocide Studies* 28; Fournet (n 83 above) 83–97. Several states have issued official statements recognising that the gross human rights violations occurring in Turkey from 1915 fall within the definition of genocide in article 2 of the 1948 Convention on the Prevention and Prosecution of the Crime of Genocide. See in this regard: 'Countries that recognise the Armenian genocide' http://www.armenian-genocide.org/recognition_countries.html (accessed 2 August 2018).

[86] The European Parliament has adopted several resolutions wherein the events between 1915 and 1917 in Turkey against Armenians are not only acknowledged as genocide, but the Republic of Turkey is urged to acknowledge it as such as well. See in this regard: *European Parliament Resolution on a political solution to the Armenian question*, Doc A2-33/87, 18 June 1987, http://www.europarl.europa.eu/intcoop/euro/pcc/aag/pcc_meeting/resolutions/1987_07_20.pdf (accessed 2 August 2018); *European Parliament resolution on the 1999 Regular Report from the Commission on Turkey's progress towards accession*, COM (1999) 513 – C5-0036/2000 - 2000/2014(COS) 15 November 2000 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2000-0511+0+DOC+XML+V0//EN (accessed 2 August 2018); *European Parliament resolution on the communication from the Commission to the Council and the European Parliament on the European Union's relations with the South Caucasus, under the partnership and cooperation agreements* (COM(1999) 272 – C5-0116/1999 – 1999/2119(COS)), 28 February 2002 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2002-0085+0+DOC+XML+V0//EN (accessed 2 August 2018); *European Parliament resolution on the opening of negotiations with Turkey,* P6_TA(2005)0350, 28 September 2005 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2005-0350+0+DOC+XML+V0//EN&language=EN (accessed 2 August 2018); *European Parliament resolution on the centenary of the Armenian Genocide*, P8_TA(2015)0094, 15 April 2015 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0094+0+DOC+XML+V0//EN (accessed 2 August 2018).

[87] The United Nations has been very careful of framing atrocities committed against Armenians in Turkey between 1915 and 1917 as genocide. On the centenary of the Armenian genocide, the spokesman for former Secretary-General Ban Ki-moon described the genocide as 'tragic events' and 'atrocity crimes'. See in this regard: Daily Press Briefing by the Office of the Spokesperson for the Secretary-General 15 April 2015 https://www.un.org/press/en/2015/db150415.doc.htm (accessed 2 August 2018).

supportive agencies, its influential political and academic collaborators, and by extension, its powerful military allies and trading partners'.[88]

The Great Powers at the time, the United States of America, the British Empire, France, Italy, Japan and Russia, condemned the Turkish government for the atrocities it committed against the Armenians, but neglected to take active steps to prevent the commission of the genocide.[89] On 24 May 1915, France, Great Britain and Russia jointly condemned the persecutions occurring in Turkey against the Armenian population 'as crimes against humanity and civilisation for which all the members of the Turkish Government will be held responsible together with its agents implicated in the massacres'.[90] The declaration continued that

> in view of these new crimes of Turkey against humanity and civilisation, the Allied governments announce publicly ... that they will hold personally responsible ... all members of the Ottoman government and those of their agents who are implicated in such massacres.[91]

However, during the commission of the Armenian genocide, the Allies did little to act on this threat.[92] After the War in 1919, the Great Powers established a 'Commission of Fifteen' at the Preliminary Peace Conference. The Commission's main purpose was to scrutinise the liability of the main instigators of the First World War, to examine offences committed during the war, as well as to investigate the possibility of setting up a tribunal for prosecuting the offenders of such crimes.[93]

The Report of the Commission of Fifteen was issued on 29 March 1919. Responsibility for the War and offences committed during it was placed on the shoulders of Germany and her allies, namely Turkey, Austria and Bulgaria. The crimes committed by these states were described as 'outrages of every description': '[I]n spite of the explicit regulations, of established customs, and of the clear dictates of humanity, Germany and her allies have piled outrage upon outrage'.[94] These 'outrages' were divided into two classes of crimes: firstly, offences which resulted directly in the outbreak of the War, and, secondly, 'violations of the laws and

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88 RG Hovannisian *Denial of the Armenian Genocide in Comparison with Holocaust Denial* (2004) 5.

89 Schwelb (n 71 above) 181.

90 Quoted in the Armenian Memorandum, which the Greek Delegation presented on 14 March 1919 to the Commission of Fifteen, reproduced in Schwelb (n 71 above) 181. See also Bassiouni (n 7 above) 62.

91 Quoted in Dadrian 'Genocide as a problem of national and international law' (n 24 above) 262.

92 Dadrian 'Failure to Prevent or Punish' (n 82 above) 47–49, 57–58.

93 Preamble of the Report of the Commission of Fifteen 95.

94 Id Ch II 113.

customs of war and the laws of humanity'.[95] The second class of crime is of particular importance,[96] for the Commission recommended that each combatant who took part in the war 'has, or has power to set up, pursuant to its own legislation, an appropriate tribunal, military or civil, for the trial of such cases'.[97] The law, which the intended Tribunal was to apply, was 'the principles of the law of nations as they result from the usages established among civilised peoples, from the laws of humanity and from the dictates of public conscience'.[98]

As a result of the Commission's recommendation to establish a tribunal, the Peace Treaty of Sevrès, which was signed on 10 August 1920, made provision for international prosecution for the 'massacres committed during the continuance of the state of war[99] by the Turkish government against the Armenian population. 'Crimes against humanity' were not included as a separate crime in this Treaty.[100] However, the Treaty of Sevrès never moved beyond empty paper threats, and was replaced in July 1923 by the Treaty of Lausanne, which stated that amnesty was to be granted for all the atrocities committed in the years 1914 to 1922.[101] The perpetrators of the Armenian genocide were therefore never tried or held criminally accountable at an international criminal tribunal.[102]

Turkish efforts at prosecuting the Armenian genocide were as unsuccessful as those by their Allied counterparts.[103] Dadrian provides an illuminating explanation for the reason behind the failure of Turkish prosecution of the massacre committed by the Turkish government:

> Generally, no nation can adjudge impartially and condemn itself, directly or indirectly, on charges of complicity in atrocities unless it is strictly constrained to adhere to the law and the facts of the case.[104]

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95 Id Ch IV 118–124.

96 Id 121. The Commission did not recommend that a Tribunal be established to try the offenders of the first class of crime.

97 Id Ch IV 121.

98 Id 122.

99 Quoted in Dadrian 'Genocide as a problem of national and international law' (n 24 above) 281.

100 Dadrian 'Failure to prevent or punish' (n 82 above) 61–62.

101 Ntoubandi (n 79 above) 44.

102 Dadrian *The History of the Armenian Genocide* (n 82 above) 303–316. Dadrian 'Failure to prevent or to punish' (n 82 above) 74–75 describes how Britain released several Turkish alleged perpetrators of the Armenian genocide in an '"all for all" exchange agreement' where the Turkish prisoners were released from British custody in exchange of the release of several British prisoners who were hostages. This event marked the end of the attempted prosecution of the commission of the Armenian genocide.

103 Dadrian *The History of the Armenian Genocide* (n 82 above) 317–343.

104 Dadrian 'Genocide as a problem of national and international law' (n 24 above) 313.

This self-adjudication, combined with Turkish denial that the Armenian genocide ever occurred, contributed to its status as the forgotten genocide.

The offences committed by Germany and her allies during the First World War, as well as the reaction of the Great Powers to them, are the second set of events which significantly impacted on the development of the conceptualisation of crimes against humanity. Serious war crimes were committed by German armed forces against French, Belgian, British, American and other citizens of states taking part in the War.[105] As a result, the Great Powers resolved to hold Germany and her allies responsible for instigating and controlling the War, as well as for committing brutal offences. As illustrated above, the Commission of Fifteen compiled two classes of offences committed by Germany and her allies, the second being 'violations of the laws and customs of war and the laws of humanity'.[106] On 28 June 1919, three months after the Commission recommended the establishment of a tribunal to prosecute these crimes, the Treaty of Versailles was signed.[107] The majority of the provisions of this Treaty were aimed at punishing Germany for being the main instigator of the First World War. Extensive provision was also made for the establishment of a special tribunal to hold Kaiser Wilhelm II, the former German Emperor, responsible for 'a supreme offence against international morality',[108] as well as the establishment of a military tribunal to prosecute 'persons accused of having committed acts in violation of the laws and customs of war'.[109] The Netherlands and Germany were respectively requested to surrender the Kaiser[110] and any other person accused of war crimes to the Allied Powers,[111] and to cooperate with the allies to 'furnish documents and information of every kind', which would have assisted the Allies in successfully prosecuting the war crimes.[112]

However, it soon became evident that neither the recommendation of the Commission of Fifteen to establish a war-crimes tribunal nor the strongly worded Treaty-intention to establish one was more than a mere paper threat. The German government made it clear from the beginning that it was not planning to comply with its obligations, especially with regard to the Versailles Treaty.[113] Instead, it established a national

105 Ntoubandi (n 79 above) 44.
106 Chapter IV of the Report of the Commission of Fifteen 118–124.
107 Treaty of Versailles 28 June 1919.
108 Id art 227.
109 Id art 228 and 229.
110 Id art 227.
111 Id art 228 and 229.
112 Id art 230.
113 GG Battle 'The trials before the Leipzig Supreme Court of Germans accused of war crimes' (1921–1922) 8 *Virginia Law Review* 1, 3.

tribunal for war crimes,[114] omitting to surrender alleged German war criminals to the Great Powers for prosecution. In July 1919, Matthias Erzberger, a German statesman, suggested to the country's Constituent Assembly that a national tribunal be established, which was subsequently done.[115] Hearings were held in the autumn of 1919, but they 'came to an inconclusive and inglorious end'.[116]

Despite this, the Allies still hoped to prosecute war criminals and started officially demanding in January 1920 that the Netherlands surrender Kaiser Wilhelm II for prosecution.[117] By March 1920, the Allies had accepted the Netherlands' refusal to surrender the Kaiser, and instead started compiling their own lists of suspected war criminals.[118] At this time, another of Erzberger's suggestions was accepted by the German government: this time to prosecute suspected war criminals before the Leipzig Supreme Court.[119] The German government also requested the Allies not to implement the Treaty provisions dealing with the surrender of war criminals, as they would be tried by a national court.[120] By February 1920, the Allies had accepted the German request that the war criminals be tried nationally at the Leipzig Court, but 'reserved the right to pass upon the decision of that Court and the right to withdraw their approval, if not satisfied with the action of the Court', yet another threat that never came to realisation.[121]

The first trial at Leipzig was heard only on 23 May 1921.[122] The judgments at Leipzig amounted to an atrocious miscarriage of justice with most of the accused found not guilty and subsequently acquitted, and with the rare few who were found guilty having extremely lenient sentences imposed on them.[123] The Chief Justice of the Leipzig Court, Dr Schmidt, stated at the beginning of the trials that 'the only duty of the Court [is] to arrive at a decision as to the guilt or innocence of the accused, uninfluenced by political considerations or national feelings'.[124]

The time-period following the First World War was characterised by attempts on the international stage through the League of Nations to outlaw the waging of war. For example, the Kellogg-Briand Pact of 1928

114 Chapter IV of the Report of the Commission of Fifteen 121.
115 Battle (n 113 above) 3.
116 Id 4.
117 Ibid. This was done in terms of art 227 of the Treaty of Versailles.
118 Battle (n 113 above) 5–6.
119 Id 4.
120 Id 5.
121 Ibid.
122 Id 7.
123 Id 7–26.
124 Id 7.

abolished the right to wage war among the treaty parties[125] by providing that 'recourse to war for the solution of international controversies' was condemned and denounced 'as an instrument of national policy in their relations with one another'.[126] Unfortunately, the post-World War I peace envisioned by the Treaty of Versailles and the Kellogg-Briand Pact was shattered by the outbreak of the Second World War on 1 September 1939 with the invasion of Poland by the German army.[127] This invasion 'was to develop in due course into a war which embraced almost the whole world, and resulted in the commission of countless crimes, both against the laws and customs of war, and against humanity'.[128]

The turning point in the development of international criminal law was the Second World War.[129] It was during this period that the progressive inclusion over the centuries of phrases such as 'the elementary laws of humanity', 'the dictates of humanity', 'the dictates of public conscience', and crimes 'against humanity and mankind' in some international instruments resulted in the establishment of crimes against humanity and genocide as autonomous international crimes. Further, it may be argued that the fact that Turkish perpetrators and German war criminals alike were left unpunished for their misdeeds after the First World War served as encouragement to Hitler and the Nazi party to expect the same impunity,[130] and in turn, cemented the resolve of the international community to hold war criminals criminally accountable for their misdeeds. It certainly holds true that, 'when there is no real sanction, the impunity of the perpetrators is nothing but an incitement to repeat the crimes, against the same victim group or against another one'.[131]

### *2.3 The Establishment of 'Crimes against Humanity' and 'Genocide' as International Crimes Autonomous to War Crimes*

The persecutions which would later escalate into the Holocaust started long before 1939: the first Nazi concentration camp, Dachau, began

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125 H Neuhold 'Human rights and the use of force' in SN Breitenmoser, B Ehrenzeller, M Sassòli, W Stoffel & BWR Pfeifer (eds) *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (2007) 479, 481.

126 Article 1 of the Kellogg-Briand Pact (1928).

127 *Judicial Decisions: International Military Tribunal (Nuremberg*), Judgment and Sentences reprinted in (1947) 41 *American Journal of International Law* 203.

128 Ibid 203.

129 Roux (n 17 above) 98.

130 P Gaeta 'The history and the evolution of the notion of international crimes' in R Bellelli *International Criminal Justice: Law and Practice from the Rome Statute to Its Review* (2010) 169.

131 Fournet (n 83 above) 84.

functioning on 22 March 1933.[132] The concentration camps were initially established for political opponents of the Nazi party, or for anyone who was 'in any way obnoxious to German authority', and later they 'became places of organised and systematic murder, where millions of people were destroyed'.[133] However, it was not until the end of the Second World War when British soldiers liberated the Bergen-Belsen and Buchenwald concentration camps, and later during the trials held at Nuremberg, that the full extent of the atrocities committed by Nazi Germany first became evident. It soon became clear that brutalities committed by the Nazis far surpassed any previous atrocities.

During the War, the Allied Powers issued statements periodically in which they proclaimed their desire to hold the Nazi Axis powers liable for committing crimes against humanity. At an Inter-Allied Meeting, held on 12 June 1941 in London at St James's Palace, the Powers resolved that they would continue the fight against German 'oppression until victory is won'.[134] Subsequently, they adopted the St James Declaration of 13 January 1942, in which it was declared that the protection of human rights was a war aim.[135]

The groundwork for the Nuremberg Tribunal was laid at the Moscow Conference during October 1943. The Moscow Declaration on German Atrocities in Occupied Europe stated that

> [t]he United Kingdom, the United States and the Soviet Union have received from many quarters evidence of atrocities, massacres and cold-blooded mass executions which are being perpetrated by Hitlerite forces in many of the countries they have overrun and from which they are now being steadily expelled. The brutalities of Nazi domination are no new thing, and all peoples or territories in their grip have suffered from the worst form of government by terror.[136]

The three Allied Powers made a solemn declaration and 'full warning' that any German officials and members of the Nazi Party who had committed or consented to the commission of these 'atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished'.[137] The powers went further by declaring that they would 'most assuredly ...

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132 Ntoubandi (n 79) 48.
133 *Nuremberg Judgment* (n 127 above) 231.
134 St James Agreement of 12 June 1941.
135 NHB Jørgensen *The Responsibility of States for International Crimes* (2003) 15.
136 Paragraph 1 of the Moscow Declaration, 1 November 1943.
137 Ibid para 3.

pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done'.[138]

It was not only the Allied Powers that described the atrocities and recognised the importance of holding the perpetrators liable. Raphaël Lemkin, a Polish-Jewish lawyer, formulated the term 'genocide' to describe his disgust at the barbarity he had witnessed in Nazi-occupied Europe.[139] He campaigned for a number of years for the creation of genocide as an international crime totally independent of both war crimes and crimes against humanity. In his monumental treatise, *Axis Rule in Occupied Europe*, he described the term as follows:

> By 'genocide' we mean the destruction of a nation or of an ethnic group. This new word, coined by the author to denote an old practice in its modern development, is made from the Greek word *genos* (race, tribe) and the Latin *cide* (killing) ... genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.[140]

However, the term *genocide* was not generally in use at this time to describe the massacres committed by the Nazis. Instead, the atrocities were described as 'crimes against humanity', which were committed during a time of war. On 30 April 1945, a prosecutor representing the United States government, Robert H Jackson, submitted a report entitled 'Memorandum of Proposals for the Prosecution and Punishment of

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138 Ibid para 5.

139 R Lemkin 'Genocide as a crime under international law' (1947) 41(1) *American Journal of International Law* 145.

140 R Lemkin *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals of Redress* (1944) 79. See also Jones (n 24 above) 10; SR Ratner, JS Abrams & JL Bischoff *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (2009) 28; M Shaw *What is Genocide?* (2007) 19.

Certain War Criminals and Other Offenders'.[141] Jackson's report reiterated the Moscow Declaration's objective to prosecute the Axis powers for their crimes. He also recommended that the major Nazi war criminals had to be tried for 'war crimes and atrocities which have characterized the Nazi regime since 1933'.[142] Persecution-type crimes committed by the Nazis against minority groups in Europe are specifically mentioned, along with the idea of not allowing the perpetrators of these crimes to enjoy impunity.[143] Although Jackson discussed the option of sentencing the highest-ranking Nazi criminals to death without giving them a trial, he rejected it outright as 'distasteful and inappropriate'.[144] The decision to prosecute the Axis powers fairly would in itself be left 'to the judgement of history', and the prosecutions' purpose was to show future generations 'that a government of laws and not of men has begun'.[145]

The London Agreement was signed on 8 August 1945,[146] four months after Robert Jackson presented his report suggesting the establishment of an international tribunal to try the major Nazi war criminals. This would be the first time that the newly established international crime of 'crimes against humanity' would find legal application in an international setting. The Agreement stated that an International Military Tribunal was to be established for the war criminals,[147] and that the annexed Charter would set out the jurisdiction of such a Tribunal.[148] Article 6(c) of the London Charter of the International Military Tribunal[149] of 1945 defined the atrocities committed by the Nazi Powers as

> crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within

141 Report of RH Jackson, 'Memorandum of proposals for the prosecution and punishment of certain war criminals and other offenders' ('Jackson Report') 30 April 1945, United States Representative to the International Conference on Military Trials, London 1945. See also Bassiouni (n 7 above) 13.

142 Paragraph II of Jackson Report (n 141 above).

143 Ibid.

144 Ibid para III.

145 Ibid para IV.

146 The Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945 ('London Agreement').

147 Ibid art 1.

148 Ibid art 2.

149 'London Charter'.

> the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[150]

The General Assembly later recognised crimes against humanity in its Resolution 95(1),[151] entitled 'Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal'. The International Law Commission also adopted a text in 1950, entitled 'Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal', that recognised the Nuremberg principles.[152]

It is important to note that crimes against humanity at this time still had a definite link to war crimes, as they were drafted with specific reference to the crimes committed by the Nazis during the Second World War.[153] It was decided, in the *Nuremberg Judgment,* that the Tribunal would have jurisdiction over only those crimes against humanity which were committed after 1939, as it was not proven that the crimes committed before the outbreak of the War were committed 'in execution of or in connection with' war crimes, and further that 'war crimes were committed on a vast scale, which were also crimes against humanity'.[154] At the time of the Nuremberg Tribunal, the principle of sovereignty made it necessary to link crimes violating human rights to war crimes, an international crime that was already in existence.[155]

The process of the removal of the link between war crimes and crimes against humanity was launched with the passing of Allied Control Council Law No 10 in Germany on 20 December 1945.[156] This law was aimed at realising the objectives, in both the Moscow Declaration and the London Agreement and its Charter, to establish a tribunal to try the Nazi war criminals, other than those prosecuted and punished by the International Military Tribunal at Nuremberg.[157] Crimes against

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150 In the indictment for the IMT at Nuremberg, the defendants were charged with crimes against the peace, war crimes and crimes against humanity, as well as having a common plan or conspiracy to commit those crimes.

151 GA res 95(1), *Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal,* 11 December 1946.

152 Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, *Report of the International Law Commission, Yearbook of the International Law Commission, Volume II, Second Session,* 1950.

153 First Report on Crimes Against Humanity, SD Murphy (Special Rapporteur), *Report of the International Law Commission, Official Records of the General Assembly, Sixty-seventh Session,* 4 May – 5 June and 6 July – 7 August 2015, (A/CN.4/680) 17 February 2015, paras 32–35 (Murphy's First Report).

154 *Nuremberg Judgment* (n 127 above) 249.

155 Ntoubandi (n 79 above) 65.

156 Murphy's First Report (n 153 above) para 33.

157 Preamble of Control Council Law No 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945.

humanity were defined for the first time in this law with absolutely no link to war crimes whatsoever: no mention is made of the time when crimes against humanity were to be committed in order to fall under German jurisdiction;[158] war crimes are listed as a separate, independent crime.[159] In the 1960s, another international instrument did not require a link to armed conflict, namely the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[160] Article I(b) states that it is irrelevant for purposes of the Convention when crimes against humanity are committed, be it 'in time of war or in time of peace'.

The link between war crimes and crimes against humanity once again emerged in 1993 in the Statute of the International Criminal Tribunal for the former Yugoslavia, where crimes against humanity were those 'committed in armed conflict, whether international or internal in character'.[161] The ICTY Trials Chamber stated in *Tadić* that the war-requirement of the ICTY Statute was a

> [deviation] from the development of the doctrine after the Nuremberg Charter, beginning with Control Council Law No 10, which no longer links the concept of crimes against humanity with an armed conflict. As the Secretary-General stated: 'Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.'[162]

The requirement that crimes against humanity were to be committed during a time of armed conflict was not included in either the Statute of the International Criminal Tribunal for Rwanda[163] the International Law Commission's Draft Code of Crimes against the Peace and Security of

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158 Ibid art II(1)(c). 'Crimes against humanity' are defined as follows by Control Council Law No 10: 'Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.'

159 Ibid art II(1)(b). 'War crimes' are defined as follows by Control Council Law No 10: 'Atrocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.'

160 Statutory Limitations Convention, 26 November 1968.

161 Article 5 of the Statute for the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute).

162 *The Prosecutor v Duško Tadić* 7 May 1997 ICTY IT-94-1-T (Opinions and Judgment) para 627 226.

163 Article 3 of the Statute of the International Criminal Tribunal for Rwanda (ICTR Statute).

Mankind,[164] or in the Statute of the Special Court for Sierra Leone.[165] None of these international instruments mention the context within which crimes against humanity were to be committed. The decisive omission of the link between war crimes and crimes against humanity came with the adoption of the Statute of the International Criminal Court,[166] specifically since article 7 makes no mention of armed conflict, therefore by implication it can be committed during war or peacetime.[167] Article 7(1) contains the most extensive definition of crimes against humanity, defining it as

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

[164] Article 18 of the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind (ILC Draft Code).
[165] Article 2 of the Statute of the Special Court for Sierra Leone (SCSL Statute).
[166] Article 7 of the ICC Statute.
[167] Ibid. See also O Triffterer & K Ambos (es) *Rome Statute of the International Court: A Commentary* 3 ed (2016) 155.

In 2013, the International Law Commission decided to include 'crimes against humanity' as part of its long-term programme of its work,[168] and Sean Murphy was subsequently appointed as Special Rapporteur for the topic.[169] The general purpose of ILC's work was 'to draft articles for what could become a convention on the prevention and punishment of crimes against humanity',[170] specifically because no such a treaty exists, in contrast to genocide and war crimes.[171] Between 2015 and 2017 the International Law Commission provisionally adopted the resultant draft articles on crimes against humanity.[172] The definition in draft article 3 of crimes against humanity mirrors article 7 of the ICC Statute,[173] except for three non-substantive amendments relating to the context of the articles.[174] Rather significantly for the purpose of this article, draft article 2 provides for a 'general obligation' to 'prevent and punish' crimes against humanity, 'whether or not committed in time of armed conflict'.[175] Murphy's in-depth discussion of the removal of the link between war crimes and crimes against humanity[176] was subsequently endorsed by the International Law Commission in its commentary to the draft articles in its Annual Report, by confirming that the

> connection (requiring that crimes against humanity be committed during armed conflict) has disappeared from the statutes of contemporary international criminal courts and tribunals, including the Rome Statute. In its place … are the 'chapeau' requirements that the crime be committed within the context of a widespread or systematic attack directed against a civilian population in furtherance of a State or organizational policy to commit such an attack.[177]

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168 Report of the International Law Commission, 65th Session, 6 May – 7 June and 8 July – 9 August 2013, *Official Records of the General Assembly, Sixty-eight Session, Supplement No 10,* (A/68/10) para 170.

169 Report of the International Law Commission, 66th Session, 5 May – 6 June and 7 July – 8 August 2014, *Official Records of the General Assembly, Sixty-ninth Session, Supplement No 10,* (A/69/10) para 266.

170 Murphy's First Report (n 153 above) para 13 and section II in general.

171 Ibid para 10.

172 Report of the International Law Commission, 67th Session, 4 May – 5 June and 6 July – 7 August 2015, *Official Records of the General Assembly, Seventieth Session, Supplement No 10,* (A/70/10) (2015 ILC Report) Chapter VII; Report of the International Law Commission, 68th Session, 2 May – 10 June and 4 July – 12 August 2016, *Official Records of the General Assembly, Seventy-first Session, Supplement No 10,* (A/71/10) Chapter VII; Report of the International Law Commission, 69th Session, 1 May – 2 June and 3 July – 4 August 2017, *Official Records of the General Assembly, Seventy-second Session, Supplement No 10,* (A/72/10) Chapter IV.

173 Murphy's First Report (n 153 above) paras 8, 21–25, 122–124, and 176–177 in particular, and section VI in general.

174 Ibid paras 8 and 176.

175 2015 ILC Report (n 172 above) para 116.

176 Murphy's First Report (n 153 above) s III.

177 2015 ILC Report (n 172 above) Commentary to draft article 2, para 9.

The gradual removal of the link between war crimes and crimes against humanity paved the way for the creation of the separate international crime of genocide. Lemkin's campaigning to create a separate international crime of genocide, completely independent from war crimes and crimes against humanity, was thus finally crowned with success.[178] The first time that genocide was recognised as an international crime was in General Assembly Resolution 96(1) on 11 December 1946. This landmark Resolution described this new international crime as

> a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings, such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations … The General Assembly therefore affirms that genocide is a crime under international law which the civilised world condemns, and for the commission of which principals and accomplices – whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political, or any other grounds – are punishable.

Notably, the Resolution makes no mention of whether genocide is a crime that takes place during armed conflict, marking a definite shift towards the eventual removal of the war-nexus.[179] The UN Economic and Social Council (UNESCO) was requested to prepare a draft convention on genocide, and the Convention on the Prevention and Punishment of the Crime of Genocide was finally adopted on 9 December 1948.[180] Genocide was now an independent international crime, which could be 'committed in time of peace or in time of war'.[181] Article II of the Genocide Convention defines genocide as

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> a. Killing members of the group;
> b. Causing serious bodily or mental harm to members of the group;

[178] RS Clark 'The development of international criminal law' in C Eboe-Osuji (ed) *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay* (2010) 367, 373.

[179] CJ Tams, L Bester & Björn Schiffbauer *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (2014) 40.

[180] The Genocide Convention only entered into force on 12 January 1951.

[181] Article I of the Genocide Convention.

c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d. Imposing measures intended to prevent births within the group;
e. Forcibly transferring children of the group to another group.

Genocide has been defined in the exact same manner within all subsequent international criminal treaties prohibiting it,[182] and moreover, all these treaties included Article III of the Genocide Convention that provides for punishable, genocidal acts. Genocidal acts are not explicitly provided for as such in the ICC Statute; rather, it is dispersed throughout the text of the Statute: incitement,[183] attempt,[184] and complicity[185] in genocide are all provided for in Article 25. 'Conspiracy' as such is not provided for in Article 25, because drafters of the ICC Statute could not reach agreement as to its inclusion.[186] The implication hereof is that conspiracy to commit genocide is a crime in terms of the Genocide Convention, but not in terms of the ICC Statute.[187] The concept of conspiracy could arguably, by interpretation be included under the concept of co-perpetration,[188] specifically because perpetrators had to have reached an agreement to commit genocide, which is a requirement for conspiracy.[189]

Despite the fact that both crimes against humanity and genocide had developed into completely independent international crimes with no requirement to take place during armed conflict, the war-link remained in some way. Most ad hoc international criminal tribunals that prosecuted crimes against humanity and genocide also prosecuted war crimes,[190] and most cases at the International Criminal Court (ICC) involve war

182 Article 4 of the ICTY Statute; art 2 of the Statute; art 17 of the ILC Draft Code; art 6 of the ICC Statute; and art 4 of the ECCC Law.
183 Article 25(3)(e) of the ICC Statute.
184 Ibid art 25(3)(b)–(f).
185 Ibid art 25(a)–(f).
186 JD Ohlin 'Incitement and conspiracy to commit genocide' in P Gaeta *The UN Genocide Convention: A Commentary* (2009) 206, 221.
187 Ibid 222.
188 Triffterer & Ambos (n 167 above) 988–1001.
189 Tams *et al* (n 179) 159–160, 167–169.
190 In terms of the ECCC Law, the ECCC has jurisdiction over genocide (art 4), crimes against humanity (art 5) and war crimes (art 6); in terms of the ICTY Statute, the ICTY has jurisdiction over war crimes (arts 2 and 3), genocide (art 4), and crimes against humanity (art 5); in terms of the ICTR Statute, the ICTR has jurisdiction over genocide (art 2), crimes against humanity (art 3) and war crimes (art 4), and the SCSL Statute provides for crimes against humanity (art 2) and war crimes (arts 3 and 4).

crimes in addition to crimes against humanity,[191] and in the case of Darfur, crimes against humanity and genocide.[192] Only three cases at the ICC are focused solely on crimes against humanity: the situations in Libya,[193] the Republic of Kenya,[194] and the Republic of Côte d'Ivoire.[195] The impact hereof is that, in practice, the link between armed conflict and international crimes has remained. However, it must be emphasised that crimes against humanity and genocide are usually committed in the context of armed conflict, whether international or national.[196] War is a convenient 'shield' behind which perpetrators can hide their atrocities from the international community,[197] specifically because

> war and genocide have important shared properties – often virulent prejudice predisposes to civil war, revolution, or inter-state war. Under those conditions, the door is opened to genocide as the norms and institutions that restrain genocidal behaviour are badly eroded.[198]

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191 Investigations by the ICC into the situation in the Democratic Republic of the Congo have thus far focused on war crimes and crimes against humanity since 2002 https://www.icc-cpi.int/drc (accessed 2 August 2018). Crimes focused on by the ICC in its investigations into the Ugandan situation include war crimes and crimes against humanity, mainly in Northern Uganda since 2002 https://www.icc-cpi.int/uganda (accessed 2 August 2018). The ICC is investigating two cases into the situation in the Central African Republic, both focusing on war crimes and crimes against humanity. The first CAR case relates to crimes committed between 2002 and 2003 https://www.icc-cpi.int/car (accessed 2 August 2018), whereas CAR II relates to crimes committed from 2012 onwards https://www.icc-cpi.int/carII (accessed 2 August 2018). Alleged international crimes committed in Georgia include war crimes and crimes against humanity, that occurred against the backdrop of the international armed conflict between 1 July and 10 October 2008 in and around South Ossetia https://www.icc-cpi.int/georgia (accessed 2 August 2018).

192 Investigations by the ICC into the Darfur Region of the Republic of the Sudan are focused on war crimes, crimes against humanity and genocide from 2002 onwards https://www.icc-cpi.int/darfur (accessed 2 August 2018).

193 The ICC is investigating crimes against humanity in Libya since 15 February 2011 https://www.icc-cpi.int/libya (accessed 2 August 2018).

194 Crimes against humanity investigated by the ICC in Kenya relates to post-election violence between 2007 and 2008 https://www.icc-cpi.int/kenya (accessed 2 August 2018).

195 Crimes against humanity in Côte d'Ivoire also relates to post-election violence between 2010 and 2011, but also from 19 September 2002 to the present https://www.icc-cpi.int/cdi (accessed 2 August 2018).

196 Roux (n 21 above) 652.

197 Ibid.

198 DA Hamburg *Preventing Genocide: Practical Steps toward Early Detection and Effective Action* (2008) 17.

The fact that, historically, most genocides and crimes against humanity were committed during a time of armed conflict, in turn impacts on the overlapping characteristics between these two international crimes and war crimes. As the historical background above has shown, crimes against humanity developed from the gradual inclusion of the phrase 'laws/principles of humanity' in various international humanitarian law instruments.[199] Genocide in turn was at first considered a crime against humanity,[200] and was for instance described as '[t]he crime against humanity known as genocide'.[201]

Further, the definitions of genocide and crimes against humanity have enjoyed so much support in the international community throughout the years that these definitions have reached the status of customary international law.[202] Once the definition for the crime of genocide was agreed upon in the Genocide Convention, it stuck, as evidenced by its verbatim repetition in all international treaties establishing jurisdiction over this crime.[203] The definition for crimes against humanity is usually tailored according to a specific event, but its wording usually follows a very similar style.[204]

The impact of the repetition of the definitions of these crimes is that certain characteristics overlap between these crimes, and these characteristics have also been repeated in international conventional law. The next part of this article will engage with the extensive cross-fertilisation that has occurred between war crimes, crimes against humanity and genocide. It will be shown that all three crimes overlap in many ways, with war crimes lying at the core. For purposes of the discussion that follows, the definitions of crimes against humanity and war crimes as provided for in Articles 7(1) and 8, respectively, of the ICC Statute will be followed, as it is generally thought that the extensive definitions of this Statute serve as codifications of existing international criminal and humanitarian law.[205] The definition of genocide in terms of Articles II and III of the Genocide Convention will be followed.

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199 See part 2 above.

200 H Abtahi & P Webb *The Genocide Convention: the Travaux Préparatoires (Volume One and Volume 2)* (2008) 456, 461, 660–663, 1072.

201 Ibid 577–579.

202 Roux (n 17 above) 107–108.

203 See (n 182 above).

204 Article 6(c) of the London Charter; art 5 of the ICTY Statute; art 3 of the ICTR Statute; art 18 of the ILC Draft Code; art 7 of the ICC Statute; art 5 of the ECCC Law; and art 2 of the SCSL Statute.

205 Second Report on Crimes Against Humanity, SD Murphy (Special Rapporteur), *Report of the International Law Commission, Official Records of the General Assembly, Sixty-eight Session,* 2 May – 10 June and 4 July – 12 August 2016, (A/CN.4/690) 21 January 2016, para 4 (Murphy's Second Report); RS Clark 'History of efforts to codify crimes against humanity: from the Charter of Nuremberg to the Statute of

Overlapping characteristics derived from the above definitions include but are not limited to,[206] the intentional commission of the physical destruction of civilians on a large scale in terms of a plan or policy; the nature of these crimes as inhumane, degrading and humiliating; physical and mental harm inflicted on the victims; the forcible transfer or deportation of targeted civilians; sexual and gender-based violence; individual criminal responsibility of perpetrators; the time period when these international crimes are committed; certain criminal acts that would constitute international crimes; as well as the identification of groups targeted in terms of the plan or policy.

## 3 Overlapping Characteristics Between War Crimes, Crimes Against Humanity and Genocide

The most significant overlap between all three international crimes is firstly that these crimes are intentionally committed on a large scale against civilian groups in terms of a plan or policy.[207] In the case of crimes against humanity, it is 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack,'[208] and 'pursuant to or in furtherance of a state or organisational policy'.[209] War crimes must be 'committed as part of a plan or policy or as part of a large-scale commission',[210] and includes 'intentionally directing attacks against the civilian population.[211] Genocide is committed with the specific 'intent to destroy, in whole or in part', persons belonging to a 'national, ethnical, racial or religious group'.[212]

An identifiable overlapping characteristic of genocide[213] and crimes against humanity[214] is the specific aim to physically destroy civilians and members of various targeted groups, which inherently involves killing,[215] murder,[216] and imposing 'conditions of life' that will fulfil this aim. Further, crimes against humanity, war crimes and genocide will,

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Rome' in LN Sadat *Forging a Convention for Crimes Against Humanity* (2011) 8, 26; Triffterer & Ambos (n 167 above) 155–159, 308–311.

206 The author in no way wishes to purport that overlapping characteristics identified are the only ones: it is hoped that it would lead the way for further academic engagement with these issues, specifically to ensure its appropriate application to current realities that may amount to international crimes.

207 Murphy's Second Report (n 205 above) paras 24, 26.

208 Article 7(1) of the ICC Statute.

209 Ibid art 7(2)(a).

210 Ibid art 8(1).

211 Ibid arts 8(2)(b)(i) and 8(2)(e)(i).

212 Article II of the Genocide Convention.

213 Article II(c) of the Genocide Convention.

214 Article 7(1)(b), 7(2)(b) of the ICC Statute.

215 Article II(a) of the Genocide Convention.

216 Article 7(1)(a) of the ICC Statute.

as a result of their inhumane, humiliating or degrading natures, cause its victims serious suffering, whether it is physical or mental.[217] All three crimes characteristically also involve the forcible transfer or deportation of targeted groups to other groups or to other territories.[218] Lastly, sexual and gender-based violence[219] may constitute war crimes,[220] crimes against humanity[221] and genocide.[222]

Flowing from this, all three crimes impose individual criminal responsibility[223] on its perpetrators,[224] that are, in general, natural persons.[225] Perpetrators of genocide may be 'public officials or private individuals',[226] whereas it is controversial whether crimes against humanity carried out 'pursuant to or in furtherance of a state or *organisational policy*' (emphasis added)[227] includes non-state or private actors.[228] In *Kunarac*, the Appeals Chamber of the ICTY held that 'neither the attack nor the acts of the accused needs to be supported by any form of "policy" or "plan"',[229] and instead focused on the requirement that the attacks had to be 'widespread or systematic'.[230] International criminal prosecutions in the past mostly focused on holding senior government officials accountable, whereas non-state actors are increasingly being

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217 Article II(b) of the Genocide Convention and arts 7(1)(k), 8(2)(a)(ii), 8(2)(b)(x) and (xxi), 8(2)(c)(i) and (ii), and 8(2)(e)(xi) of the ICC Statute.

218 Article II(e) of the Genocide Convention and arts 7(1)(d), 7(2)(d), 8(2)(a)(vii), 8(2)(b)(viii), and 8(2)(e)(viii) of the ICC Statute.

219 M Roux 'Sexual violence during armed conflict and reparation: paying due regard to a unique trauma' 2014 *African Yearbook on International Humanitarian Law* 90–94.

220 Articles 8(2)(c)(xxii) and 8(2)(e)(vi) of the ICC Statute.

221 Ibid arts 7(1)(g) and 7(2)(f). See further *The Prosecutor v Jean-Paul Akayesu* (Judgment of 2 September 1998) Case No ICTR-96-4-T para 598 149. It is interesting to note that the ICTR in *Akayesu* compared rape with torture (para 597 149), thereby following a similar interpretation as the Inter-American Court of Human Rights and the European Court of Human Rights. See further: *Raquel Martí de Mejía v. Perú* Case No 10.970 Report No 5/96 OEA/SerL/V/II.91 Doc 7, Judgment of the Inter-American Court of Human Rights, 1 March 1996, 24; *Aydin v Turkey*, Case No 57/1996/676/866, Judgment of the European Court of Human Rights, 25 September 1997, para 83 24.

222 Article II(d) of the Genocide Convention. See further *Akayesu* (n 221 above) para 731 176.

223 See in general Murphy's Second Report (n 205 above) paras 24–44.

224 See in general art IV of the Genocide Convention and art 25 of the ICC Statute.

225 Article 25(1) of the ICC Statute.

226 Article IV of the Genocide Convention.

227 Article 7(2)(a) of the ICC Statute (emphasis added).

228 M Cherif Bassiouni *Crimes Against Humanity: Historical Evolution and Contemporary Application* (2011) xxxii–xxxiii, 40–42, 724–726; M Cherif Bassiouni 'Revisiting the architecture of crimes against humanity: almost a century in the making, with gaps and ambiguities remaining – the need for a specialized Convention' in Sadat (n 205 above) 43, 54–55; G Mettraux 'The definition of crimes against humanity and the question of a "policy" element' in Sadat (n 205 above) 142.

229 *The Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* 12 June 2002 ICTY IT-96-23 and IT-96-23/1-A (Judgment) para 98.

230 Ibid paras 93–101.

held responsible for international crimes. The reason for the early focus on state actors most probably resulted from the perception that international crimes are committed mostly by 'totalitarian governments in power, government armed forces and other armed factions supporting the government's ideology'.[231]

A further overlapping characteristic concerns criminal acts that would amount to war crimes, crimes against humanity and war crimes. The actual commission,[232] attempts to commit,[233] participation in the abovementioned plan or policy,[234] and incitement to commit international crimes[235] will all entail individual criminal responsibility. The concept of superior or command responsibility[236] is also included under individual criminal responsibility, and perpetrators generally cannot invoke acting under instructions or orders of superiors as a defence to escape liability.[237]

One of the biggest overlaps between persecution as a crime against humanity[238] and genocide is that victims and groups targeted by the plan or policy are civilians.[239] Persecution as a crime against humanity and genocide belong to the same *genus* of international crimes, in that

> [b]oth persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of *mens rea,* genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to

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231 Roux (n 21 above) 660. See further K Masło 'The attribution of international criminal responsibility for serious violations of human rights and international humanitarian law to senior leaders' in Krzan (n 22 above) 82–83.

232 Article III(a) of the Genocide Convention; art 25(2) and (3)(a) and (c) of the ICC Statute.

233 Article III(d) of the Genocide Convention; art 25(3)(d) and (f) of the ICC Statute.

234 Article III(b) and (e) of the Genocide Convention; art 25(3)(a), (c) and (d) of the ICC Statute.

235 Article III(c) of the Genocide Convention; art 25(3)(e) of the ICC Statute.

236 Article IV of the Genocide Convention; art 28 of the ICC Statute. See further Murphy's Second Report (n 205 above) paras 45–54.

237 Article IV of the Genocide Convention; art 33 of the ICC Statute. See further Murphy's Second Report (n 205 above) paras 55–62.

238 Article 7(1)(h) of the ICC Statute.

239 Article 8(2)(b)(i), (viii) and (xxv), and 8(2)(e)(i) and (viii).

> destroy a group or part of a group, it can be held that such persecution amounts to genocide.[240]

The definition of persecution-type crimes against humanity is much broader than genocide, specifically because groups which can be targeted for the former include members of 'political, racial, national, ethnic, cultural, religious, gender' or 'any identifiable group or collectivity', as opposed to 'national, ethnical, racial or religious'[241] groups that could be victims of genocide.

The *travaux préparatoires* of the Genocide Convention reveal that a significant debate during the negotiations of the Convention concerned the question as to which groups were to be included for protection, with the greatest controversy concerning the inclusion of political,[242] cultural[243] and linguistic groups.[244] Drafters argued that the inclusion of political, cultural and linguistic groups would 'weaken' the concept of genocide,[245] and political groups were seen specifically as 'unstable' and lacking permanency as opposed to other groups.[246] It was further felt that keeping possible groups as narrow as possible would ensure near-universal support of the Convention,[247] and that other groups would find protection under other international crimes.[248] This last argument certainly still rings true today: minority groups not specifically provided for in either the Genocide Convention or the ICC Statute, would find protection under 'any identifiable group or collectivity' as a persecution-type crime against humanity.[249]

The concluding part of this article will engage with certain issues resulting from overlapping characteristics identified above between the crimes, in addition to the impact of the historic origins of the crimes, and the way in which all of these elements play a role on the application of the existing law to current, and perhaps future, realities.

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240 *The Prosecutor v Kupreškić et al* 14 January 2000 ICTY IT-95-16-T (Judgment) para 636 255.

241 Article 7(1)(h) of the ICC Statute. See also Ratner et al (n 140 above) 76–77.

242 GA res 96(1), *The Crime of Genocide*, 11 December 1946. See further in general DL Nersessian *Genocide and Political Groups* (2010).

243 Abtahi & Webb (n 200 above) 234, 1492–1493, 1502, 1507.

244 Ibid 1412–1413.

245 Ibid 223, 372, 383, 469, 582, 596, 686, 718, 865, 1016–1017, 1058, 1248, 1294, 1355–1360, 1391–1393.

246 Ibid 702, 717, 980, 1222, 1238, 1312.

247 Ibid.

248 Ibid 373, 1294, 1412,

249 Articles 7(1)(h) and 7(2)(g) of the ICC Statute.

## 4 A Time to Rethink and Reinterpret the Existing Law Prohibiting War Crimes, Crimes Against Humanity and Genocide

As illustrated above, the development of genocide and crimes against humanity into two autonomous crimes independent of war crimes has spanned many centuries. Support by the international community for the outlawing of acts that would fulfil the requirements of these international crimes grew over time, so much so that the prohibition thereof developed into a rule of customary international law.[250] The prohibition of the commission of genocide and crimes against humanity further developed into a *jus cogens* norm, therefore a norm from which no derogation by states would be permitted.[251] The obligations imposed on member states of the Genocide Convention in Article I 'to prevent and to punish' genocide have enjoyed such strong support that an *erga omnes* obligation has developed, in that the international community as a whole is obliged not only to prevent genocide and crimes against humanity, but also to ensure that their commission is prosecuted.[252] Support of this is not always universal,[253] despite the ultimate purpose of both *jus cogens* norms and *erga omnes* obligations to elevate certain international law rules above others in order to impose a stricter obligation on states not to act in violation of that rule, for the very simple reason that conduct contrary to the rule should never be tolerated. The higher status accorded to the prohibition is therefore justified by virtue of its moral and humanitarian nature.

As pointed out above, the impact of the repetition of the definitions of war crimes, crimes against humanity and genocide is that the overlaps between these crimes have also been repeated near verbatim. The definitions of these international crimes can, theoretically, be changed: article 16 of the Genocide Convention provides for 'revision', and Articles 121 and 122 of the ICC Statute make provision for 'amendments', including amendments to the definitions of the crimes.[254] However, the combination of the *jus cogens* and customary international law status of these international crimes would suggest that the definitions are practically cast in stone.[255]

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250 Roux (n 17 above) 107–108.

251 Ibid 102–108. See further in general in this regard: First Report on *Jus Cogens*, D Tladi, Special Rapporteur (A/CN.4/693) 8 March 2016, paras 46–47; Second Report on *Jus Cogens,* D Tladi, Special Rapporteur (A/CN.4/706) 16 March 2017.

252 Roux (n 17 above) 102–108.

253 MJ Glennon 'Peremptory nonsense' S Breitenmoser, B Ehrenzeller, M Sassòli, W Stoffel & BWPfeifer (Eds) *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (2007) 1265, 1266; G Schwarzenberger 'International *jus cogens*?' (1964–1965) 43 *Texas Law Review* 455; P Weil 'Towards relative normativity in international law?' (1983) *American Journal of International Law* 413.

254 Article 121(5) of the ICC Statute.

255 Nersessian (n 242 above) 206.

The existing law on war crimes, crimes against humanity and genocide will not change in the foreseeable future, therefore its application has to be reinterpreted in order to suit changing realities.

To illustrate, at the time of negotiating the provisions of the Genocide Convention, it was felt by drafters that the biggest threats facing civilians were extreme racism and racial superiority, specifically in light of the Holocaust that immediately preceded negotiations, and the ever-looming danger of the re-emergence of Nazism and fascism.[256] However, drafters not only wanted to protect civilians against these threats, but felt that civilians had to be protected against religious fanaticism and terrorism.[257] This is especially important in the current climate, as all these issues still pose significant threats to civilians worldwide. Therefore, extreme racism, racial superiority, religious fanaticism and terrorism must all be taken into consideration when war crimes, crimes against humanity and genocide are prosecuted to ensure that civilians are protected against such threats.

The purpose of protecting civilians against the aforementioned threats will also play a crucial role in ensuring that genocide and crimes against humanity are not only prosecuted when they are committed during armed conflict as it has been historically, but also when they take place during a time of peace. None of these threats need armed conflict as the enabler or decoy: currently a substantial number of possible international crimes are not taking place during recognised armed conflict. To clarify this point, attacks carried out against civilians worldwide by terrorist organisations such as Boko Haram and ISIS do not necessarily take place in situations of armed conflict, but are calculated to occur when it is least expected in everyday life, to cause severe injury and death, and generally to instil fear in civilians.[258] Time will tell whether these attacks would qualify as genocide during a time of peace, especially when taking into account that persons targeted for terrorist attacks by these religious extremist groups usually belong to distinctive religious groups, and in many instances women are targeted specifically for sexual violence and slavery. The possibility of attacks carried out by these religious extremist groups qualifying as crimes against humanity expands considerably in light of the wider protection that is afforded in terms of Article 7 of the ICC Statute.

Another result of overlaps between crimes against humanity and genocide, is that controversies faced by one of the crimes will be mirrored by the others. As illustrated above, genocide and crimes against humanity can theoretically be carried out by state and non-state actors alike.

256 Abtahi & Webb (n 200 above) 964, 971–973, 1323,
257 Ibid 1116.
258 See (n 20 above).

Yet, most prosecutions of perpetrators of genocide and crimes against humanity have historically focused on senior government officials of totalitarian governments, not on non-state actors or private individuals. In contrast to this, members of terrorist and religious extremist groups are typically non-state actors or private individuals that hail from a diversity of nationalities. The time has undoubtedly come to prosecute non-state actors for crimes against humanity, specifically because

> [t]he elimination of the state policy requirement would make it easier to reach non-state actors within a state who act pursuant to an internal organisational policy or plan, or who may even act without an organisation or plan but in a widespread or systematic basis that produces substantial harm against civilian populations. The elimination of this requirement broadens [crimes against humanity] to reach non-state actors in non-international and purely internal conflicts. This change would transform [crimes against humanity] from a crime that reflects the abuse of state power to an international category of crimes that is really nothing more than the international criminalisation of the contents of domestic criminal laws of almost all states on the basis that such conduct is widespread or systematic and causes substantial human harm. In other words, it would transform [crimes against humanity] from a crime punishing a state's abuse of power to the criminalisation of human rights abuses that constitute domestic crimes.[259]

An additional important controversy faced by genocide and persecution as a crime against humanity surrounds the groups identified in the Genocide Convention[260] and in the ICC Statute.[261] Genocide is considered the 'crime of crimes',[262] the most serious of the 'most serious crimes of concern to the international community as a whole'.[263] Even though members of groups falling outside the protected groups of the Genocide Convention will still be protected in terms of persecution as a crime against humanity, the latter has less of a stigma attached to it than the former. Genocide is taken more seriously than crimes against humanity.

Further, the argument in favour of including national groups instead of political groups stemming from its fluidity also seems arbitrary in today's context with the possibility of holding double and multiple nationalities,

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259 Bassiouni (n 228 above) xxxiv.

260 Article II of the Genocide Convention.

261 Article 7(1)(h) of the ICC Statute.

262 *The Prosecutor v Jean Kambanda* 4 September 1998 ICTR (Judgment) para 16; William A Schabas *Genocide in International Law: the Crime of Crimes* (2009); WA Schabas 'Genocide and the International Court of Justice: finally, a duty to prevent the crime of crimes' 4 *International Studies Journal* (2007–2008) 17.

263 Article 5(1) of the ICC Statute.

for example. It is also notable that no discussions were held, during the *travaux préparatoires* of the Genocide Convention, on whether to include persons suffering from mental or physical disability, or members of groups targeted on the basis of their sexual orientation, gender, or sex. It is difficult in the modern context to view a policy to destroy, in whole or in part, say, all women, as less serious than a policy to destroy members belonging to a religious group. The danger in this is that it becomes an arbitrary exercise to establish which members of which groups are more in need of protection against genocide than other groups.

As the historical background above has shown, the origins of war crimes, crimes against humanity and genocide were predominantly Eurocentric, in addition to being informed by religious dogma and doctrine.[264] The original sources of international humanitarian law were predominantly drafted by Western or European states, with no independent African states participating in the drafting processes,[265] resulting in 'the exclusion, due to colonialism, of African States in the formative years of modern conventional IHL'.[266] In the same way, African states were also excluded from the drafting process of the first sources of crimes against humanity and genocide, again as a result of colonial domination.[267] Ethiopia was the only independent African member state of the London Agreement, but was not involved in the actual drafting of the London Charter.[268] Only three African states participated in the drafting of the Genocide Convention: the Union of South Africa, Ethiopia and Liberia. South Africa was elected as 'representative' of the African continent,[269] ironically so considering that apartheid was in the process of becoming official state policy. States negotiating the ICC Statute were more representative of the international community of states, with African states making up a significant basis of support.[270] However, the fact that negotiating-states of the ICC Statute also included African states becomes irrelevant when considering that the definitions of war crimes, crimes against humanity and genocide enjoy *jus cogens* and customary

264 Bassiouni (n 228 above) xxviii.

265 G Waschefort 'Africa and international humanitarian law: The more things change, the more they stay the same' 2016 *International Review of the Red Cross* 594.

266 Ibid.

267 The question of whether international treaties bound colonised states was addressed in the drafting process by the incorporation of a provision that the treaty will find application in these states. See in this regard art XII of the Genocide Convention.

268 London Agreement (n 146 above).

269 Abtahi & Webb (n 200 above) 1285.

270 J Nyawo *Selective Enforcement and International Criminal Law: the International Criminal Court and Africa* (2017) 33–56. See further: ICC States parties: chronological list https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/states%20parties%20_%20chronological%20list.aspx (accessed 2 August 2018).

international law status. The implication hereof is that the core of war crimes, crimes against humanity and genocide are still Eurocentric and informed by religious dogma and doctrine, as African states were not involved in the original drafting process of these crimes.

The growing push-back on the African continent against the on-going relationship between African states with the ICC should therefore not come as too much of a surprise, despite the fact that originally the biggest support-base for the establishment of the ICC was African states. The push-back specifically surrounds the controversy regarding 'selective enforcement' of international criminal justice and claims of neo-colonialism.[271] For example, it is uncertain whether the South African government intends to remain a member state of the ICC;[272] considering that the International Crimes Bill has not been revoked,[273] despite the fact that South Africa withdrew its notice of withdrawal from ICC membership.[274] The African Union in turn has been outspoken on its opposition to the ICC,[275] and it is envisaged that the African Court of

[271] S Odero 'Politics of international criminal justice, the ICC's arrest warrant for Al Bashir and the African Union's neo-colonial conspirator thesis' in C Murungu & J Biegon (eds) *Prosecuting International Crimes in Africa* (2011) 145; Nyawo (n 270 above) 187–219; P Gaeta 'Does President Al Bashir enjoy immunity from arrest?' 7 (2009) *Journal of International Criminal Justice* 315; M Swart & K Krisch 'Irreconcilable differences? An analysis of the standoff between the African Union and the International Criminal Court' *African Journal of International Criminal Justice* 1 (2014) 38; Waschefort (n 265 above) 611–615.

[272] Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court, United Nations Treaty Collection, reference: CN786.2016.TREATIES-XVIII.10 (Depositary Notification), 19 October 2016; *Democratic Alliance v Minister of International Relations and Others (Council for the Advancement of the South African Constitution Intervening)* 2017 (3) SA 212 (GP); Implementation of the Rome Statute of the International Criminal Court Repeal Bill B 23 – 2016; South Africa: Withdrawal of Notification of Withdrawal, United Nations Treaty Collection, reference: CN121.2017.TREATIES-XVIII.10 (Depositary Notification), 7 March 2017; *The Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* 2015 (5) SA 1 (GP); *Cooperation Minister of Justice and Constitutional Development and Others v The Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA). See further M Roux 'Obstacles to the prevention of gross human rights violations' (2018) 1 *Tydskrif vir die Suid-Afrikaanse Reg* 106.

[273] International Crimes Bill [B 37 – 2017]. See further https://www.gov.za/documents/international-crimes-bill-b37-2017-12-dec-2017-0000 (accessed 2 August 2018).

[274] Withdrawal of Notification of Withdrawal (n 272 above).

[275] *Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270 (XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC),* Doc Assembly/AU/10 (XV), Assembly/AU/Dec.296 (XV), 27 July 2010, para 4 at 24; *Decision on the report of the peace and security council on its activities and the state of peace and security in Africa,* Assembly/AU/6(XV), Assembly/AU/Dec.294(XV).2, 27 July 2010, para 14–18, 16–17. See further Nyawo (n 270 above) 221–250.

Justice and Human Rights may in future also have criminal jurisdiction.[276] None of these bode well for the continuing relationship between African member states of the ICC.[277]

## 5 Conclusion

This article does not purport to hold all the answers as to how the existing law on war crimes, crimes against humanity, and genocide should be reinterpreted to find application to current realities. Instead, further analysis is undoubtedly called for, and this article has in fact raised more questions than it set out to answer. Questions that warrant further analysis include, but again are not limited to, the following: how do the existing definitions of the core international crimes apply to, say ISIS claiming responsibility for a car bomb in Paris, killing civilians with a multiplicity of nationalities, religions, genders, and linguistic groups; all in order to send a political message about Islam? Is the definition of genocide in terms of Articles II and III of the Genocide Convention applicable to Boko Haram for instance, who abducts girl-children for a variety of reasons, including sexual slavery or abuse? Can a private individual *really* be prosecuted for committing a crime against humanity or genocide when there is no on-going war? What about minority groups falling outside the listed groups? Why is it considered more serious to intend to destroy, even in part, members of one group because of possessing a certain characteristic than another group with different characteristics? Are all these reasons perhaps as to why it is so important that states establish national jurisdiction over international crimes?[278]

The rather wide definitions of these crimes allow for a strong argument that, at least on paper, these crimes would be applicable to current realities. The true test will however be in the successful implementation of the existing law. For this reason it is suggested that the most appropriate organ to start this further analysis is the ICC by exercising its jurisdiction over these crimes.[279] In this process, the ICC can legitimise itself by broadening its focus to the true extent of its parameters, in accordance with what is provided for in the existing definitions of war crimes, crimes against humanity, and genocide.

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[276] *Draft protocol on amendments to the protocol on the statute of the African Court of Justice and Human Rights*, Meeting of Government Experts and Ministers of Justice/ Attorneys General on Legal Matters, Exp/Min/IV/Rev.7, 7 to 11 and 14 to 15 May 2012.

[277] Roux (n 272 above) 113–116.

[278] See in this regard the Murphy's Second Report (n 205 above).

[279] Articles 13–15 of the ICC Statute.