Nuremberg After Seventy-Five Years: A Reflection and Assessment of its Influence on International Law

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SUMMARY

Seventy-five decades have elapsed since the conclusion of the International Military Tribunal at Nuremberg (IMT). Its influence on international law has been incalculable. Its two main contributions have been the concepts "crimes against humanity" and "crime of genocide". The former concept was owing to the influence on the proceedings of Hersch Lauterpacht, and the latter to that of Raphael Lemkin. Lauterpacht was an academic from Cambridge University, and Lemkin was an academic from Duke University. The concept "crimes against humanity" ultimately got a central role in the proceedings and, for the first time in history, was recognised to be an established part of international law. None of the IMT defendants were found guilty of genocide but the introduction of the concept during the proceedings led to the speedy adoption of the 1948 Genocide Convention.

1 INTRODUCTION

The trial of the major German war criminals seven-and-a-half decades ago at Nuremberg's Palace of Justice (known as the International Military Tribunal (IMT)) has had an incalculable influence on international law. The prosecution's case consisted of a catalogue of acts of aggression and criminality perpetrated during and prior to Hitler's "Thousand Year Reich". The first three days of the trial were consumed reading the indictment into the official record. The trial reached its conclusion on 1 October 1946.

Much has been written on the IMT[1] and its implications for international law. As seventy-five years have passed since the conclusion of the IMT, it is opportune to recall the IMT itself and its influence on international law, and to emphasise the lasting role played by two academics in the proceedings.

[1] There can be no substitute for reading the transcript of the proceedings, which are available in 42 volumes as *The Trial of the Major War Criminals Before the International Military Tribunal at Nuremberg, 20th November 1945 to 1 October 1946* (1946–1951). Further major sources are Gilbert *Nuremberg Diary* (1947)*;* Biddle *In Brief Authority* (1962); Woetzel *The Nurenberg Trial in International Law* (1962); Taylor *The Anatomy of the Nurenberg Trials* (1993); Perseco *Nuremberg: Infamy on Trial* (2000); Turley *From Nuremberg to Nineveh* (2008) and the monumental work by Sands *East West Street* (2016).

These two academics introduced the terms "crimes against humanity" and "crime of genocide" into the proceedings.

United States president Truman saw the precedent set by the IMT as the first international criminal assize in history and recognised that it would form the basis of international law in the future.[2] Warren R Austin, chief delegate of the United States to the United Nations expressed similar sentiments when, on 30 October 1946, he stated:

> "Besides being bound by the law of the United Nations Charter … members of the Assembly … are also bound by the law of the Charter of the Nuremberg Tribunal. That makes planning or waging a war of aggression a crime against humanity for which individuals as well as nations can be brought before the bar of international justice, tried and punished."[3]

Although history has shown that there are ultimately few limitations on how a victorious nation can treat a vanquished enemy in war, the Allies (Great Britain, France, United States and the USSR) sought to establish rational and just grounds for imposing liability on those responsible for the atrocities committed in World War II. When the decision was collectively made to pursue a legal rather than purely political means to accomplish this end – to subject the accused to a trial or a series of trials – consideration had to be given to the jurisdictional bases for such proceedings.

The Moscow Conference issued a declaration on 1 November 1943, which provided:

> "Those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the above atrocities, massacres and executions, will be sent back to the countries in which the abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein … without prejudice to the case of the major criminals, acting in the interests of the European Axis countries whether as individuals or as members of organisations whose offenses have no particular geographical localization and who will be punished by the joint decision of the Governments of the Allies."[4]

As a result of the Moscow Conference, the Allies concluded the London Agreement[5] on 8 August 1945[6] to establish the IMT to try the major war criminals. The British viewpoint initially was that a trial would be too slow and that the acts of the major Nazi war criminals should be addressed by

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2 US Dept of State Bulletin Vol 15, 775 (27 Oct 1946).

3 *New York Times* (1946-10-31) 31 as quoted by Wright "The Law of the Nuremberg Trial" 1947 41 *Amer J of Intl Law* 38. It must be noted here that at the time of this statement, the UN had already come into being, on 24 October 1945.

4 President Roosevelt, Mr Winston Churchill and Marshal Stalin *Moscow Declaration on Atrocities* Moscow Conference (1 November 1943).

5 United Kingdom of Great Britain and Northern Ireland, United States of America, France, and Union of Soviet Socialist Republics *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* 82 UNTC 280; EAS 472 (8 August 1945). Those war criminals who were not seen to be "major war criminals" were tried before 12 Nuremberg Military Trials (NMTs) following on the IMT. Details of the NMTs are chronicled in Heller *The Nuremberg Military Tribunals* (2012).

6 US Dept of State Bulletin Vol 9, 311 (6 Nov 1945).

summary executions. This led to extensive bureaucratic talks between the Allies with pro-trial views prevailing.

2 CHARTER

Attached to the London Agreement was the Charter of the IMT (Charter).[7] This Charter provided for a tribunal composed of one judge and one alternative judge from each of the four Allied Powers – for a procedure designed to produce a fair trial and to found jurisdiction to try and sentence persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the crimes defined in the Charter. The Charter also authorised a committee consisting of the chief prosecutors of each of the four Allied powers to prepare the indictment and to present evidence based on the law set out in the Charter. The Charter represented the law that the judges of the tribunal were to apply in the trial. According to article 13 of the Charter, the tribunal drew up its own rules.

3 THE INDICTMENTS AND SENTENCES: A SYNOPSIS

The trial commenced on 20 November 1945 and lasted until 1 October 1946. It was conducted in four languages by means of a simultaneous interpretation device. There were four counts. Count one alleged conspiracy to commit war crimes – on which all 22 defendants were indicted. Count two alleged planning, preparing, initialling or waging aggressive war – on which 16 defendants were indicted. Count three alleged violation of the laws and customs of war – on which 19 defendants were indicted. Count four alleged crimes against humanity – on which 19 defendants were indicted. The United States prosecuted count one, the British prosecuted count two, the French prosecuted counts three and four as they applied to deeds committed in the Western part of the theatre of war, and the Soviet prosecution prosecuted counts three and four as they applied to the Eastern part of the theatre of war. The defence was represented by German lawyers, calling many witnesses over a period of five months and concluding with legal arguments on behalf of each defendant.

Three defendants were found not guilty on any counts; seven were sentenced to prison terms varying from 10 years to life and 12 were sentenced to death by hanging. Fifty-two of the 76 counts on the indictment were sustained. All those sentenced to death were found guilty of crimes against humanity and executed, except for Goering, who committed suicide a few hours prior to the executions, and Bormann, who could not be found. Four defendants, despite being found guilty of crimes against humanity, were given prison sentences owing to mitigating circumstances. Those defendants found guilty of aggressive war or conspiracy to commit aggressive war were given life sentences, except in two instances where

[7] Supplement 1945 39 *Amer J of Intl Law* 259.

mitigating circumstances were found. Of the six organisations indicted, three were acquitted.

4 CRITICISM

With hindsight, it goes without saying that the aggressive war conducted by Germany, and the atrocities committed by its officials and soldiers during World War II, provided the necessary impetus for the creation of the IMT and was a logical culmination of the pre-World War II debate over an international court.[8] Inevitably, however, the fact that the tribunal was established by the victors to try the vanquished gave rise to much debate. Hermann Göring, one of the principal defendants, compared the crimes he was defending with those perpetrated in the empires of the victorious nations. He claimed, for example, that the British Empire had not been built with due respect for the principles of humanity. He referred to the ways in which the United States had treated its indigenous peoples in seeking its own *lebensraum.*[9] He emphasised the fact that the victorious Allied nations had reasons to close their eyes to the darkest aspects of their own colonial history.

The defence hotly contested the validity of the Charter of the IMT, submitting that it transgressed the fundamental principles of justice and applied *ex post facto* laws in a criminal trial.

The IMT rejected the argument that the defendants were being prosecuted for international crimes under rules of law *ex post facto* because prior to 1939–1940 such crimes as crimes against the peace had not been defined or made punishable under existing international law. It pointed out that the defendants must have known that their actions were illegal and wrong, and were in defiance of international law.[10] The defendants repeatedly claimed that, contrary to the principle of *nullum crimen sine lege*, they were being tried under law enacted after the commission of the imputed acts. In the verdict of the IMT, however, it was clearly explained that the acts of which the defendants were accused constituted violations of international treaties concluded with the participation of Germany *before* these acts were committed.

The IMT was criticised for being a derogation of Germany's sovereignty. This was a major criticism and deserves more than a passing mention. State sovereignty, also referred to as state immunity, is a rule of international law that serves to preclude a state or its representatives from being sued or prosecuted in a foreign court. This principle was aptly described by Nicolas J in the South African case *Liebowitz v Schwartz*,[11] where he held that the courts of a country will not by their process make a foreign state a party to

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8 Dugard, Du Plessis, Maluwa and Tladi *Dugard's International Law* (2018) 246.

9 IMT *Trial of the Major War Criminals* vol 9 (1945) 63. See Olusasoga and Erichsen *The Kaiser's Holocaust* (2011) 344. Criticism on the fairness of the IMT is made by Von Kneriem *The Nuremberg Trials* (1959).

10 *Trial of the Major War Criminals* vol 7 (1945) 219.

11 1974 (2) 661(T). See Barrie "Sovereign Immunity of States: Acts *iure imperii* and Acts *iure gestionis* – What is the Distinction" 2001 26 *SA Yearbook Intl Law* 156.

legal proceedings against its will and that this principle was founded on grave and weighty considerations of public policy, international law and comity. It can however be submitted that the IMT's derogation from German sovereignty was based on exceptional circumstances. The Nazi government in Germany had disappeared with the unconditional surrender of Germany, and in 1945 the Allied powers were in complete control of Germany. In 1945, in the Declaration of Berlin, the four Allied powers as the Control Council of Germany (consisting of the Supreme Commanders of the Allied armed forces)

> "assumed supreme authority with respect to Germany including all powers possessed by the German Government, the High Command and any state, municipal or local government or authority in order to make provision for the cessation of any further hostilities on the part of the German armed forces, for the maintenance of order in Germany, and for the administration of the country with no intention of effecting the annexation of Germany".[12]

This declaration was recognised by all states of the United Nations, which had come into existence on 24 October 1945.

5 DUE PROCESS

Was the trial procedurally fair? In the judgment, the tribunal emphasised that the defendants had received a fair trial on the facts and on the law, to which they were entitled.[13] It would appear that the tribunal provided a suitable procedure to comply with the international-law principle that any state or group of states when exercising criminal jurisdiction over aliens shall not deny justice.[14] Article 13 of the Charter of the IMT assured each individual defendant of a period of 30 days before their trial to study the indictment and prepare their case – ample opportunity to obtain counsel of their choice; to obtain witnesses and documents; to examine all documents submitted by the prosecution; to address motions; to make applications and to make special requests to the tribunal. This also applied to members of accused organisations. Articles 17 and 18 of the Charter further required that proceedings be fair, expeditious, without unreasonable delay and that irrelevant issues and statements be ruled out. At the request of defence counsel, in addition to the 19 defendants who were prepared to give testimony: 61 witnesses gave testimony for the defence; a further 143 witnesses for the defence gave testimony in the form of written answers to interrogatories; 101 witnesses for the defence gave testimony to officers designated by the tribunal; and written depositions were received from more than 300 000 people related to criminal organisations. Two defendants, Hank and Frank, refused to testify.

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12 See Kelsen "The Legal Status of Germany According to the Declaration of Berlin" 1945 39 *Amer J Intl Law* 518; Von Laun "The Legal Status of Germany" 1951 45 *Amer J of Intl Law* 267.

13 Sands, who has made the most incisive study of the IMT, is of the opinion that due process was followed (*East West Street* 330–375).

14 For the minimum standards for the treatment of aliens, see Barrie "Reaction of USA Courts to the *Avena* judgement" 2006 31 *SA Yearbook Intl Law* 287.

The doors of the tribunal's proceedings were never shut. Representatives of the press, radio and newsreels from many countries attended the proceedings. The testimony of witnesses, the defendants, documents made public in court and statements made by the prosecutors and defence counsel soon became known to the whole world. A paradoxical feature of the trial was that there was a surfeit of information, unlike the usual situation when investigating premeditated crimes where there is difficulty owing to a shortage of information and evidence. This was owing in no small measure to the German bureaucratic machine's carefully kept archives. Thanks to the swift advance of the Allied forces, the transportation of these documents from their place of discovery to temporary army depositaries was accomplished in hundreds of truckloads. The use of such documents was expressly stipulated in article 21 of the Charter of the tribunal. The Charter also empowered the tribunal to take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investigation of war crimes. These damning documents were supplemented by accounts of eyewitnesses and victims of the atrocities and high-ranking officials of the SS, who may have been moved by a sense of belated repentance. Added to this was eyewitnesses' evidence of the conditions in the concentration camps, of people who were forced to live in ghettoes, of executors of criminal orders such as generals and field-marshals, and of the screening of German and Soviet documentary films.

The tribunal treated the issues put before it as being issues of substantive law. It saw aggressive war as an international crime, as had been formally accepted by all states who had ratified the Pact of Paris on 27 August 1928.[15] This Pact condemned recourse to war for the solution of international controversies, and renounced recourse to war as a national policy. The IMT consequently saw resort to a war of aggression as illegal and a supreme international crime.[16] It emphasised that Germany had ratified the Pact of Paris, and referred to the analogous situation with the Hague Conventions of 1899, as revised in 1907,[17] which determined the rights and duties of belligerents in the conduct of their military operations, and which limited the means of doing harm, attempting to strike a balance between military necessity and humanitarian considerations.

We are still left without any clear or convincing answers as to why the IMT judges failed to address the subject of their jurisdiction more fully than they did in the tribunal's judgment. They merely asserted the broadest of

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15 League of Nations *General Treaty for Renunciation of War as an Instrument of National Policy* 94 LNTS 57 (27 August 1928) (also known as the Kellogg-Briand Pact).

16 On 14 December 2017, the ICC's jurisdiction over the crime of aggression was activated as of 17 July 2018 for ICC member states that have ratified or accepted the amendment to the Rome Statute. Lord Bingham, in *R v Jones* [2006] UKHL 16 par 16, held that in order to qualify as a crime of aggression, an act of aggression must be performed by a person in a position effectively to exercise control or to direct the political or military action of the state. This approach retains the notion raised at the IMT that aggression is a "leadership crime" that cannot in the words of Lord Bingham be committed by minions and foot soldiers.

17 For a list of the Hague Conventions to which South Africa is bound, see Smart "The Municipal Effectiveness of Treaties Relevant to the Executive's Exercise of Belligerent Powers" 1987–8 13 *SA Yearbook of Intl* L 23.

jurisdictional bases, referring to a) the Moscow Conference Declaration of 1 November 1943, b) the London Agreement of 8 August 1945, and c) the Charter of the IMT attached to the London Agreement, "which was proclaimed in the interests of the United Nations". Contained in this tacit approval of the world community was an implied grant of authority conferring jurisdiction upon the IMT to determine individual responsibility and to mete out punishment for the commission of those crimes alleged in the IMT indictment. With jurisdiction being established in this manner, it was possible for the four Allied powers to avoid the necessity of reconciling varying and conflicting notions as to the jurisdiction of the IMT.

With hindsight, the verdict of the IMT meets the tests of objectiveness, persuasiveness and the principles of morality and law. To safeguard the rights of the defendants to contest their culpability or invoke extenuating circumstances owing to the gravity of the charges, the IMT questioned twice as many witnesses for the defence as witnesses for the prosecution. All documents that were submitted as evidence for the prosecution – amounting to several thousand – were submitted to the defence in the form of copies (photostats) or in translations into German. The IMT sought to draw its conclusions from irrefutable evidence. The latter consisted mainly of documents of the defendants' own making, the authenticity of which was not seriously challenged. In the expository portion of the verdict, the investigated events were invariably confirmed, and the main defendants were found guilty. Kaltenbrunner and Frank were found not guilty on the first count but guilty on the third and fourth counts. Frick and Funk were also acquitted on the first count but convicted on the second, third and fourth counts (crimes against the peace, war crimes and crimes against humanity). Neurath was found guilty on all four counts of the indictment, but extenuating circumstances were found on all four counts.

The IMT entered its verdict on 1 October 1946 as the sole and supreme court over the major war criminals. No court was legally competent to review and repeat the verdict that existed. Consequently, the verdict of the tribunal entered into legal force from the moment it was pronounced. The Charter of the IMT declared that, in the case of guilt, sentences shall be carried out in accordance with the powers of the Control Council of Germany, which may at any time or otherwise alter the sentences but may not reduce the severity thereof. This Control Council (consisting of the Supreme Commanders of the armed forces of the Allies as the seat of supreme authority) could grant pardons and, as an administrative function, implement the verdicts.

6 THE IMMEDIATE CONTRIBUTION OF THE IMT TO INTERNATIONAL LAW

The immediate contribution of the IMT to international law was immense. Two weeks after its conclusion, the United Nations had on its agenda for 11 December 1946 a draft of resolutions with a view to creating a new world

order. In creating the Universal Declaration of Human Rights (UDHR)[18] on 10 December 1948, the General Assembly affirmed the principles of international law recognised by the Charter of Nuremberg trial. On 9 December 1948, the General Assembly adopted the Genocide Convention.[19] Shortly after the Nuremberg Tribunal, a Tokyo War Crimes Trial commenced in respect of crimes against the peace, war crimes and crimes against humanity committed by the principal leaders of the Japanese regime during World War II.

The IMT proved the practicality of a fair trial for war crimes by an international tribunal and laid the basis for future similar tribunals. The International Criminal Tribunal for Former Yugoslavia (ICTY) was established by the UN Security Council in 1993,[20] and in 1994 the UN Security Council created the International Criminal Tribunal for Rwanda (ICTR).[21] The former was mandated to prosecute persons responsible for serious violations of international humanitarian law, and the latter to prosecute persons for violations of humanitarian law and genocide. The Statute for the International Criminal Court (ICC)[22] was adopted on 17 July 1998 by an overwhelming majority of states attending the Rome Conference. The ICC has jurisdiction over the most serious crimes concerning the international community, such as war crimes, crimes against humanity and genocide, all of which are defined in its statute. The ICC's exercise of jurisdiction may be triggered in three ways. First, a State Party may refer it to a situation where one or more crimes within the court's jurisdiction appear to have been committed. Secondly, the Security Council acting under Chapter VII may refer a situation to the prosecutor. Finally, the prosecutor may independently initiate an investigation. Some States Parties, such as South Africa with Act 27 of 2002, have enacted legislation allowing national courts to exercise jurisdiction over ICC crimes.

The major contribution of the IMT to international law, however, has been the introduction of the concepts "crimes against humanity" and "crime of genocide". This can be illustrated by the introduction of two tribunals this century. The first is the Special Court for Sierra Leone (SCSL) constituted in 2002. The SCSL is best known for the trial of Charles Taylor, who was

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18 UNGA *Universal Declaration of Human* Rights A/RES217(III) (10 December 1948). See Lauterpacht "The Universal Declaration of Human Rights" 1948 25 *British Yearbook Intl L* 354.

19 UNGA *Convention on the Prevention and Punishment of the Crime of Genocide* 78 UNTS 277. Adopted: 09/12/1948; EIF: 12/01/1951.

20 UNSC *Security Council Resolution* 808 (1993) [International Criminal Tribunal for the former Yugoslavia (ICTY)] SRES/808 (1993) (22 February 1993). See De Waynecourt-Steele "The Contribution of the International Court of Justice to the Enforcement of International Law in the Light of Experiences of the ICTY" 2002 27 *SA Yearbook Intl L* 1.

21 UNSC *Security Council Resolution* 995 (1994) [Establishment of an International Tribunal and Adoption of the Statute of the Tribunal] SRES/955 (1994) (8 November 1994).

22 UNGA *Rome Statute of the International Criminal Court* 2187 UNTS 90 (1998). Adopted: 17/07/1998; EIF: 01/07/2002. See Schabas *The International Criminal Court: A Commentary on the Rome Statute* (2010). South Africa, by adopting the Rome Statute of the International Criminal Court Act 27 of 2002, provided for the prosecution of Rome Statute crimes in South Africa. See *Minister of Justice and Constitutional Development v South African Litigation Centre* 2016 (3) SA 317 (SCA) 70–84.

convicted for war crimes and crimes against humanity and sentenced to a term of 50 years. The second is the Extraordinary Chambers of the Courts of Cambodia (ECCC), which commenced operations in 2006. Kaing Guek Eav, chairman of the Khmer Rouge Security Centre, was convicted for crimes against humanity in 2014. Nuon Chea and Khieu Samphan were found guilty of genocide and crimes against humanity in 2018.

7 CRIMES AGAINST HUMANITY

The individual who proposed including the term "crimes against humanity" in the IMT indictments was Hersch Lauterpacht, professor of international law at Cambridge University. He had a great influence on the British IMT-prosecution team. He is regarded as the father of the modern human-rights movement. He prepared the draft for the closing address of Lord Shawcross, the chief British prosecutor at the IMT. The gist of this draft was that the community of nations had in the past successfully asserted the right to intercede on behalf of violated rights of man that have been trampled upon by the State in a manner calculated to shock the moral conscience of mankind. At the time this submission was made, it was ambitious as it invited the tribunal to rule that the Allies were entitled to use force to protect the "rights of man". Lord Shawcross based his main argument on the thesis of Hersch Lauterpacht, arguing that the tribunal should sweep aside the tradition that sovereigns could act as they wish, free to kill, maim and torture. Shawcross further emphasised an argument put forward by Lauterpacht that the State is not an abstract entity, that its rights and duties are the rights and duties of men, and that politicians should not be able to seek immunity behind the intangible personality of the State. Lauterpacht's contribution to Shawcross's closing address consisted of 15 pages. The proposition put forward by Lauterpacht was radical at the time, as it placed "fundamental human rights" and "fundamental human duties" at the forefront of a new international legal system. Shawcross conceded that this proposition was innovative but submitted that it was one that could be defended. He concluded by repeating that those who helped a state commit a "crime against humanity" should not be immune by sheltering behind the State and he emphasised Lauterpacht's view that the individual must transcend the State.

Shawcross's closing argument represented the essence of Lauterpacht's approach. This approach had virtually no appreciation of the concept of genocide. This is because Lauterpacht saw the individual as the ultimate unit of all law, as is illustrated in his work *An International Bill of Rights of Man.*[23] This work was ultimately the inspiration for the UDHR, which heavily influenced further similar and regional human-rights instruments. At

[23] Lauterpacht *An International Bill of Rights of Man* (1944). An overview of Hersch Lauterpacht's life is given by Elihu Lauterpacht *The Life of Hersch Lauterpacht* (2010). The development of the concept "crimes against humanity" is set out by Donnelly (*Universal Human Rights in Theory and Practice* (2003)) and Luban ("A Theory of Crimes Against Humanity" 2004 29 *Yale Journal of International Law* 35). For the practical application of crimes against humanity, see Bassiouni *Crimes Against Humanity in International Law* (2012); May *Crimes Against Humanity* (2005).

Nuremberg, the notion "crimes against humanity" – so enthusiastically propagated – by Lauterpacht was limited *only* to those attacks that occurred during an *international armed conflict*. The reason was that the Allied powers were concerned about drawing attention to the treatment of minorities in their own colonies. It was consequently submitted that a crime against humanity could only be committed if associated or linked with other crimes under the IMT's jurisdiction – that is, acts that occurred *during* an international armed conflict – such as war crimes, or acts against the peace such as aggression. That is why the Nuremberg trials are sometimes referred to as the "war crimes trials".

Resolutions of the UN General Assembly have broadened the notion of crimes against humanity to include the practices of racial discrimination; in article I of the Convention on the Suppression of the Crime of Apartheid,[24] the States Parties declare apartheid to be a crime against humanity.

With the passage of time, the UN General Assembly has become concerned that the operation of statutes of limitation would make it difficult for the further prosecution of persons accused of crimes against humanity and war crimes. The Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity was consequently adopted.[25] This Convention defines war crimes and crimes against humanity primarily by reference to the Charter of the IMT, but irrespective of the date of their commission. However, in addition to the crimes against humanity so defined, the crimes within the Convention (whether committed in time of war *or* peace) include eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid and the crime of genocide as defined in the Genocide Convention, even if such acts do not constitute a violation of the domestic law of the country in which they were committed. The Convention emphasises the individual responsibility of those involved in the commission of the crimes referred to and continues to provide that parties will adopt measures to ensure that statutory limitations shall not apply to the prosecution and punishment of the crimes referred to, and that existing limitations shall be abolished.

It is a moot point whether a general rule of positive international law can be asserted that gives states the right to punish foreign nationals for crimes against humanity in the same way as they are, for example, entitled to punish for acts of piracy. There may be a gradual evolution in this regard. This will however have to entail the applicability of the rule of universality of jurisdiction and the recognition of the supremacy of the "law of humanity" over the law of the sovereign state. There will also have to be a violation of elementary human rights in a manner that may justly be held to shock the conscience of mankind.

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[24] UNGA *International Convention on the Suppression and Punishment of the Crime of Apartheid* A/9030 (1974) 1015 UNTS 243; 13 *ILM* 50 (1974). Adopted: 30/11/1973; EIF: 18/07/1976.

[25] UNGA *Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity* 8 *ILM* 68 (1969). Adopted 26/11/1968; EIF: 11/11/1970

Crimes against humanity prohibited by article VII of the Rome Statute of the ICC cover: a) offences that are particularly egregious in that they constitute a serious "attack" on human dignity or are degrading or humiliating of one or more human beings; b) they form part of government policy, or of a widespread or systematic practice of atrocities tolerated, condoned or acquiesced in by a government or a *de facto* authority; and c) the victims of the crimes are civilians or, in the case of crimes committed during armed conflict, persons who do not take part (or no longer take part) in armed hostilities. Article VII paragraph 1 emphasises that the prohibited attack must be systematic and directed against a civilian population, with knowledge of the attack. Article VII paragraph 2 elucidates paragraph 1 when it states that such an attack means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population. The policy to commit such an attack requires the State or organisation actively to promote or encourage such an attack against a civilian population. The reference to "with knowledge of the attack" amounts to a form of specific intent. It can be submitted that each of the above underlying features (which must be present in terms of the attack) requires its own form of intent. It is each of these separate intents leading up to the main "attack" that gives the individual acts seen in totality the identity of a crime against humanity.

8 GENOCIDE

The individual responsible for introducing the concept of genocide to the IMT was Raphael Lemkin,[26] a professor at Duke University. He fled Poland in 1939 and worked with the American prosecution team during the IMT. He worked tirelessly to influence the prosecutors at the tribunal to introduce the concept of genocide during the trial, without any initial success. The French and Soviet prosecutors only made an initial passing reference to it, and the American and British prosecutors made no mention of the term. Thirty-one days of the trial passed without the term being referred to. The French judge at the trial, Donne Dieu de Vabres, was presented with a book written by Lemkin entitled *Axis Rule in Occupied Europe*. Shortly thereafter, Lemkin met with Robert Jackson, one of the chief prosecutors at the tribunal. Lemkin then sent a memorandum on the subject to Robert Kempner, his former colleague who had been expelled from the Reich in 1933. Kempner was attached to the United States War Crimes Office and was one of the prosecutors at the trial. This memorandum was entitled "Necessity to Develop the Concept of Genocide in the Proceedings". Lemkin had a second meeting with Jackson to persuade him to argue for genocide as a distinct crime. Four days after this meeting, the term "genocide" made its way back into the proceedings during the cross-examination of Hitler's foreign minister by the British prosecutor Sir Maxwell Fyfe. Fyfe used the concept freely thereafter, although without influencing the ultimate judgment. None of the defendants were found guilty of genocide. Successful prosecutions at the

[26] Lemkin *Axis Rule in Occupied Europe* (1944); Lemkin "Genocide, as a Crime Under International Law" 1947 41 *Amer J of Int l Law* 145; Sands *East West Street* 137–190. On the life of Lemkin, see Cooper *Raphael Lemkin and the Struggle for the Genocide Convention* (2008); Korey *Epitaph for Raphael Lemkin* (2001).

IMT were for crimes against humanity, war crimes and crimes against the peace. However, the important point is that Lemkin introduced the concept of genocide to the IMT, and there is no doubt that the Genocide Convention[27] would not have been adopted (9 December 1948) so soon after the conclusion of the IMT were it not for Lemkin's persistent efforts during the trial. Genocide has subsequently developed into a crime of customary international law and is defined in article VI of the Rome Statute of the ICC, which is based on article II of the Genocide Convention. Genocide can be committed during times of war and peace. The requirement of a nexus with armed conflict was done away with by the ICTY in *Prosecutor v Tadić*.[28]

Article II of the Genocide Convention defines genocide as acts committed with *intent* to destroy, in whole or in part, a national, ethnic, racial or religious group as such. This encompasses killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group. Article III of the Convention lists the five acts punishable by the Convention as: a) genocide; b) conspiracy to commit genocide; c) direct and public incitement to commit genocide; d) attempt to commit genocide; and e) complicity in genocide. Genocide, as stated by Larry May,[29] presents one of the most significant philosophical challenges in all the areas of international criminal law. More than 80 years after the Holocaust, it conceives the idea of killing or harming individuals because of their group membership, or to ultimately destroy the group itself by wiping it off the face of the earth. The subject continues to be of great relevance.[30] The modern understanding of the crime of genocide can be gleaned from examples emanating from the ICTR and the ICTY. In *Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*,[31] Nahimana, a founder of the newspaper *Kanguar,* and the editor Ngeze were prosecuted for incitement to genocide by allowing images of a machete to be published on the cover of their newspaper. They did not write or design the cover. Barayagwiza, who headed a programme on the radio station RTLM, allowed inciting broadcasts to go over the RTLM airways. He did not broadcast himself but allowed such broadcasts. In *Prosecutor v Jean-Paul Akayesu*,[32] a mayor of a commune was more directly involved by leading a meeting at which he sanctioned the death of one Karera and urged the population to eliminate Tutsis. Shortly after this, the killing of Tutsis commenced. In these cases, the ICTR grappled with the problem of complicity as opposed to

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27 See Robinson "The Genocide Convention: Its Origins and Interpretation" 2007–8 40 *Case Western Reserve Journal of* International Law 1.

28 Appeals Chamber Decision IT-94-1-AR72 ICTY; 105 ILR 453; 35 *ILM* 32 (1996).

29 May *Genocide: A Normative Account* (2010) 2; Card *The Atrocity Paradigm* (2002); Lang *Act and Idea in the Nazi Genocide* (1990); Power *A Problem from Hell* (2002).

30 Schabas *Genocide in International Law* (2009); Chalk and Jonassohn *The History and Sociology of Genocide* (1990).

31 Judgment and Sentence ICTR-99-52-T ICTR (3 December 2003).

32 *Akayesu* (Judgment) ICTR-96-4-Y TCH 1 (2 Sept 1998).

being a principal perpetrator. In *Prosecutor v Tadić*,[33] the ICTY held that there is no difference between the moral gravity and guilt of an aider and abettor and that of one actually carrying out the acts. Put succinctly, the crux of the crime of genocide is the specific intent – *dolus specialis* – to destroy, in whole or in part, a national, ethnic, racial or religious group. In *Prosecutor v Jelisić (Appeal)*,[34] the ICTY emphasised that it is the *mens rea* that gives genocide its special character. In the *Akayesu* judgment,[35] this was reiterated, and this significant case represented the first conviction by an international tribunal for genocide, as well as the first time that rape in war was held to constitute genocide. In the influential ICTY Appeals Chamber case of *Prosecutor v Radislaw Krstić*,[36] the conviction for genocide was thrown out because of a *lack* of intent.

Milošević became the first former head of state to be charged with genocide when, in 2001 after he had left office, genocide charges relating to Bosnia and Srebrenica were added to his indictment for crimes against humanity before the ICTY.[37]

In 2007, the International Court of Justice ruled that Serbia had violated its obligations to Bosnia and Herzegovina by failing to prevent a genocide in Srebrenica.[38] On the facts, units of the Bosnian Serb army launched an attack on military-aged Muslim men from Srebrenica, took prisoners, detained them in brutal conditions, and executed them. More than 7 000 people were never seen again. Judge Lauterpacht held in par 100:

> "The prohibition of genocide … has generally been accepted as having the status not of an ordinary rule of international law but of *ius cogens*. Indeed, the prohibition of genocide has long been regarded as one of the few undoubted examples of *ius cogens.* Even in 1951, in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, [ICJ Reports 1951, 22] the Court affirmed that genocide was contrary to moral law and to the spirit and aims of the United Nations (a view repeated by the Court in paragraph 51 of today's Order) and that the principles underlying the Convention are provisions recognized by civilized nations as binding on States even without any conventional obligation."[39]

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33 See Straub "The Psychology of Bystanders, Perpetrators and Heroic Helpers" in Newman and Erber (eds) *Understanding* Genocide (2002) 1; Syse and Gregory *Genocide* (2002) 11; Reichberg (ed) *Ethics, Nationalism and Just War* (2007) 352.

34 IT-95-10-A (2001); 40 *ILM* 1295 (2001).

35 *Supra*.

36 Appeal Judgment IT-98-33-T; 40 *ILM* 1346 (2001).

37 *Prosecution v Slobodan Milošević (Decision on Review of Indictment)* IT-01-51-I.

38 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* 2007 ICJ 43.

39 Separate Opinion of Judge ad hoc Lauterpacht in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures* (Order of 13 September 1993) 1993 ICJ Rep 325 par 100. The ICJ held further (2007 ICJ Rep 43 par 191–6) that for genocide to have occurred there must have been a collection of people who have a particular identity with specific distinguishing well-established characteristics. In addition, when part of the group is targeted, that part must be significant enough for its destruction to have an impact on the group as a whole. On how to identify groups, see *Report of the International Commission of Inquiry for Darfur to the United Nations Secretary-General: Security Council Resolution 1564* (25 January 2005) par 499.

This was the first occasion on which a state had been condemned by an international tribunal for violating the Genocide Convention.

In 2010, President Omar al-Bashir of Sudan became the first serving head of state to be indicted for war crimes, crimes against humanity and genocide by the ICC.[40]

9 UNIVERSAL JURISDICTION

For the sake of completeness, it is necessary to refer briefly to the issue of universal jurisdiction in relation to crimes against humanity and genocide. True universal jurisdiction applies to crimes under customary international law in respect of which all states have the right to prosecute. The original crime to which universal jurisdiction was attached was that of the act of piracy, which was in turn followed by slavery. In modern times, it has been extended to the so-called "core crimes" of customary international law, – namely, genocide, crimes against humanity, breaches of the laws of war, especially of the Hague Convention of 1907, and grave breaches of the Geneva Conventions of 1949. In recent years, numerous international crimes have been created by multilateral treaties, which confer wide jurisdictional powers on States Parties. Universal jurisdiction as a concept in international law applies to crimes that may be punished by any state having custody of the offender, irrespective of the place where the offence was committed. The criterion for the application of the principle of universal jurisdiction must be sought in the heinous nature of the crime.

What is the situation regarding universal jurisdiction in South Africa? South Africa is under an obligation to bring to justice persons who find themselves within its jurisdiction and who are suspected of crimes against humanity or genocide – irrespective of where these crimes were committed. These crimes are not only subject to universal jurisdiction but are further referred to in the ICC statute to which South Africa is party. These crimes are also part of customary international law and, in terms of section 232 of the Constitution of the Republic of South Africa, 1996, are consequently part of the law of the Republic unless inconsistent with the Constitution or an Act of Parliament. Despite section 232 of the Constitution, section 4(1) of the ICC Act 27 of 2002 creates added jurisdiction for a South African court over ICC crimes by providing: "despite anything to the contrary in any other law of the Republic, any person who commits [an ICC] crime is guilty of an offence and liable on conviction to a fine or imprisonment." Part 3 section 2 of the ICC Act 2002 states that applicable law for any South African court hearing any matter under the Act "includes conventional international law, and in particular the [Rome] Statute".

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[40] *Prosecutor v Amar Hassan Al-Bashir* ICC 02/05-01/09-94. In May 2012, Charles Taylor became the first head of state to be convicted for crimes against humanity and sentenced to 50 years in prison. See *Prosecutor v Charles Chankay Taylor* SCSL-03-O1-A.

10 CONCLUSION

The two concepts “crimes against humanity” and “crime of genocide” have developed side by side and can be linked with the atrocities committed in the former Yugoslavia and Rwanda, which were a catalyst for a meeting in Rome where more than 150 states agreed to a statute for an International Criminal Court (ICC). The ICC can take up only the most serious crimes of concern to the international community as a whole – genocide, crimes against humanity and war crimes. Genocide is understood as involving the international mass destruction of entire groups or members of that group. Crimes against humanity are prohibited under article VII of the Rome Statute and make up those crimes commonly associated with egregious abuses of human rights. Article VIII of the Rome Statute generally sees war crimes as crimes committed in violation of international humanitarian law during armed conflicts.

It would appear that in practice, genocide has gained greater traction than crimes against humanity and the latter has come to be seen as a lesser evil. This is an unfortunate unintended consequence of Lauterpacht’s emphasis on the individual at the Nuremberg trial and Lemkin’s insistence that genocide be recognised. An obvious question is whether the difference between crimes against humanity and genocide is important. For Lauterpacht, the killing of individuals as part of a systematic plan, would be a crime against humanity. For Lemkin, the focus was on genocide, the killing of many with the intention of destroying the group of which they were part. Does the difference matter? Does it matter whether the law seeks to protect you because you are an individual or because of the group of which you happen to be a member?

Both Lauterpacht and Lemkin shared the belief in the power of law to do good and protect people and the need to change the law to achieve this objective. Both agreed on the value of a single human life and on the importance of being part of a community. They fundamentally disagreed, however, on the most effective way of protecting these values – that is, on whether to focus on the individual or the group.

The IMT and its offspring helped to restore the confidence of the world that international law embodies justice – that crimes against international law are committed by human beings, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

The IMT’s impact continues today. On 12 April 2022, the Central African Republic’s (CAR) long-awaited Special Criminal Court began its first trial. This hybrid court was created in 2015 to try war crimes and crimes against humanity perpetrated in the CAR since 2003.