

Genocide in International Law

The Crimes of Crimes

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1 Origins of the legal prohibition of genocide

Winston Churchill called genocide ‘the crime without a name’.¹ A few years later, the term ‘genocide’ was coined by Raphael Lemkin in his 1944 work, *Axis Rule in Occupied Europe*.² Rarely has a neologism had such rapid success.³ Within little more than a year of its introduction to the English language,⁴ it was being used in the indictment of the International Military Tribunal, and within two, it was the subject of a United Nations General Assembly resolution. But the resolution spoke in the past tense, describing genocide as crimes which ‘have occurred’. By the time the General Assembly completed its standard setting, with the 1948 adoption of the Convention on the Prevention and Punishment of the Crime of Genocide, ‘genocide’ had a detailed and quite technical definition as a crime against the law of nations. Yet the preamble of that instrument recognizes ‘that at all periods of history genocide has inflicted great losses on humanity’.

This study is principally concerned with genocide as a legal norm. The origins of criminal prosecution of genocide begin with the recognition that persecution of ethnic, national and religious minorities was not only morally outrageous, it might also incur legal liability. As a general rule, genocide involves violent crimes against the person, including murder. Because these crimes have been deemed anti-social since time immemorial, in a sense there is nothing new in prosecution of genocide to the extent that it overlaps with the crimes of homicide and assault. Yet genocide almost invariably escaped prosecution because it was virtually

¹ Leo Kuper, *Genocide, Its Political Use in the Twentieth Century*, New Haven: Yale University Press, 1981, p. 12.

² Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington: Carnegie Endowment for World Peace, 1944.

³ Lemkin later wrote that ‘[a]n important factor in the comparatively quick reception of the concept of genocide in international law was the understanding and support of this idea by the press of the United States and other countries’: Raphael Lemkin, ‘Genocide as a Crime in International Law’, (1947) 41 AJIL 145, p. 149, n. 9.

⁴ And French as well: Raphael Lemkin, ‘Le crime de génocide’, [1946] *Rev. dr. int.* 213.

always committed at the behest and with the complicity of those in power. Historically, its perpetrators were above the law, at least within their own countries, except in rare cases involving a change in regime. In human history, the concept of international legal norms from which no State may derogate has emerged only relatively recently. This is, of course, the story of the international protection of human rights. The prohibition of persecution of ethnic groups runs like a golden thread through the defining moments of the history of human rights.

International law's role in the protection of national, racial, ethnic and religious groups from persecution can be traced to the Peace of Westphalia of 1648, which provided certain guarantees for religious minorities.⁵ Other early treaties contemplated the protection of Christian minorities within the Ottoman empire⁶ and of francophone Roman Catholics within British North America.⁷ These concerns with the rights of national, ethnic and religious groups evolved into a doctrine of humanitarian intervention which was invoked to justify military activity on some occasions during the nineteenth century.⁸

International human rights law can also trace its origins to the law of armed conflict, or international humanitarian law. Codification of the law of armed conflict began in the nineteenth century. In its early years, this was oriented to the protection of medical personnel and the prohibition of certain types of weapons. The Hague Regulations of 1907 reflect the focus on combatants but include a section concerning the treatment of civilian populations in occupied territories. In particular, article 46 requires an occupying belligerent to respect '[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice'.⁹ Moreover, the preamble to the Hague Regulations contains the promising 'Martens clause', which states that 'the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages

⁵ Treaty of Peace between Sweden and the Empire, signed at Osnabruck, 14(24) October 1648; Dumont VI, Part 1, p. 469, arts. 28–30; Treaty of Peace between France and the Empires, signed at Münster, 14(24) October 1648, Dumont VI, Part 1, p. 450, art. 28.

⁶ For example, Treaty of Peace between Russia and Turkey, signed at Adrianople, 14 September 1829, BFSP XVI, p. 647, arts. V and VII.

⁷ Treaty of Peace and Friendship between France and Great Britain, signed at Utrecht, 11 April 1713, Dumont VIII, Part 1, p. 339, art. 14; Definitive Treaty of Peace between France, Great Britain and Spain, signed at Paris, 10 February 1763, BFSP I, pp. 422 and 645, art. IV.

⁸ See Michael Reisman, 'Humanitarian Intervention to Protect the Ibos', in Richard B. Lillich, ed., *Humanitarian Intervention and the United Nations*, Charlottesville, VA: University Press of Virginia, 1973, pp. 178–83.

⁹ Convention (IV) Respecting the Laws and Customs of War by Land, [1910] UKTS 9, annex, art. 46. See *Prosecutor v. Tadic* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 56.

established among civilized peoples, from the laws of humanity, and the dictates of the public conscience'.¹⁰ But aside from sparse references to cultural and religious institutions,¹¹ nothing in the Regulations suggests any particular focus on vulnerable national or ethnic minorities.¹²

Early developments in the prosecution of 'genocide'

The new world order that emerged in the aftermath of the First World War, and that to some extent was reflected in the 1919 peace treaties, manifested a growing role for the international protection of human rights. Two aspects of the post-war regime are of particular relevance to the study of genocide. First, the need for special protection of national minorities was recognized. This took the form of a web of treaties, bilateral and multilateral, as well as unilateral declarations. The world also saw the first attempt to establish an international criminal court, accompanied by the suggestion that massacres of ethnic minorities within a State's own borders might give rise to both State and individual responsibility.

The wartime atrocities committed against the Armenian population in the Ottoman Empire¹³ had been met with a joint declaration from the governments of France, Great Britain and Russia, dated 24 May 1915, asserting that '[i]n the presence of these new crimes of Turkey against humanity and civilization, the allied Governments publicly inform the Sublime Porte that they will hold personally responsible for the said crimes all members of the Ottoman Government as well as those of its agents who are found to be involved in such massacres'.¹⁴ It has been suggested that this constitutes the first use, at least within an inter-

¹⁰ *Ibid.*, preamble. The Martens clause first appeared in 1899 in Convention (II) with respect to the Laws and Customs of War on Land, 32 Stat. 1803, 1 Bevans 247, 91 BFST 988.

¹¹ *Ibid.*, art. 56.

¹² In 1914, an international commission of inquiry considered atrocities committed against national minorities during the Balkan wars to be violations of the 1907 Hague Regulations: Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars, Washington: Carnegie Endowment for International Peace, 1914, pp. 230–4. The section entitled 'Extermination, Emigration, Assimilation', pp. 148–58, documents acts that we would now characterize as genocide or crimes against humanity.

¹³ Richard G. Hovannisian, ed., *The Armenian Genocide, History, Politics, Ethics*, New York: St Martin's Press, 1991; R. Melson, *Revolution and Genocide: On the Origin of the Armenian Genocide and of the Holocaust*, Chicago: University of Chicago Press, 1992.

¹⁴ English translation quoted in United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London: His Majesty's Stationery Office, 1948, p. 35.

national law context, of the term 'crimes against humanity'.¹⁵ At the time, United States Secretary of State Robert Lansing admitted what he called the 'more or less justifiable' right of the Turkish government to deport the Armenians to the extent that they lived 'within the zone of military operations'. But, he said, '[i]t was not to my mind the deportation which was objectionable but the horrible brutality which attended its execution. It is one of the blackest pages in the history of this war, and I think we were fully justified in intervening as we did on behalf of the wretched people, even though they were Turkish subjects.'¹⁶

Versailles and the Leipzig trials

The idea of an international war crimes trial had been proposed by Lord Curzon at a meeting of the Imperial War Cabinet on 20 November 1918.¹⁷ The British emphasized trying the Kaiser and other leading Germans, and there was little or no interest in accountability for the persecution of innocent minorities such as the Armenians in Turkey.¹⁸ The objective was to punish 'those who were responsible for the War or for atrocious offences against the laws of war'.¹⁹ As Lloyd George explained, '[t]here was also a growing feeling that war itself was a crime against humanity'.²⁰ At the second plenary session of the Paris Peace Conference, on 25 January 1919, a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties was created.²¹ Composed of fifteen representatives of the victorious powers, the Commission was mandated to inquire into and to report upon the

¹⁵ The concept, however, had been in existence for many years. During debates in the National Assembly, French revolutionary Robespierre described the King, Louis XVI, as a '[c]riminal against humanity': Maximilien Robespierre, *Œuvres*, IX, Paris: Presses universitaires de France, 1952, p. 130. In 1890, an American observer, George Washington Williams, wrote to the United States Secretary of State that King Leopold's regime in Congo was responsible for 'crimes against humanity': Adam Hochschild, *King Leopold's Ghost*, Boston and New York: Houghton Mifflin, 1998, p. 112.

¹⁶ Quoted in Vahakn N. Dadrian, 'Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications', (1989) 14 *Yale Journal of International Law*, p. 221 at p. 228.

¹⁷ David Lloyd George, *The Truth About the Peace Treaties*, Vol. I, London: Victor Gollancz, 1938, pp. 93–114. For a discussion of the project, see 'Question of International Criminal Jurisdiction', UN Doc. A/CN.4/15, paras. 6–13; Howard S. Levie, *Terrorism in War, The Law of War Crimes*, New York: Oceana, 1992, pp. 18–36; 'First Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', UN Doc. A/CN.4/364, paras. 7–23.

¹⁸ Lloyd George, *Truth About Peace Treaties*, pp. 93–114.

¹⁹ *Ibid.*, p. 93.

²⁰ *Ibid.*, p. 96.

²¹ Seth P. Tillman, *Anglo-American Relations at the Paris Peace Conference of 1919*, Princeton: Princeton University Press, 1961, p. 312.

violations of international law committed by Germany and its allies during the course of the war.

The Commission's report used the expression 'Violations of the Laws and Customs of War and of the Laws of Humanity'.²² Some of these breaches came close to the criminal behaviour now defined as genocide or crimes against humanity and involved the persecution of ethnic minorities or groups. Under the rubric of 'attempts to denationalize the inhabitants of occupied territory', the Commission cited many offences in Serbia committed by Bulgarian, German and Austrian authorities, including prohibition of the Serb language, '[p]eople beaten for saying "good morning" in Serbian', destruction of archives of churches and law courts, and the closing of schools.²³ As for 'wanton destruction of religious, charitable, educational and historic buildings and monuments', there were examples from Serbia and Macedonia of attacks on schools, monasteries, churches and ancient inscriptions by the Bulgarian authorities.²⁴

The legal basis for qualifying these acts as war crimes was not explained, although the Report might have referred to Chapter III of the 1907 Hague Regulations, which codified rules applicable to the occupied territory of an enemy.²⁵ But nothing in the Hague Regulations suggested their application to anything but the territory of an occupied belligerent. Indeed, there was no indication in the Commission's report that the Armenian genocide fell within the scope of its mandate.²⁶ The Commission proposed the establishment of an international 'High Tribunal', and urged 'that all enemy persons alleged to have been guilty of offences against the laws and customs of war and the laws of humanity' be excluded from any amnesty and be brought before either national tribunals or the High Tribunal.²⁷

A 'Memorandum of Reservations' submitted by the United States challenged many of the legal premises of the Commission, including the entire notion of crimes against the 'Laws of Humanity'. The American submission stated that '[t]he laws and principles of humanity vary with the individual, which, if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law'.²⁸ The United States also took issue with

²² *Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of America and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919*, Oxford: Clarendon Press, 1919, p. 23.

²³ *Ibid.*, p. 39 ²⁴ *Ibid.*, p. 48.

²⁵ Convention (IV) Respecting the Laws and Customs of War by Land, note 9 above.

²⁶ However, see Dadrian, 'Genocide as a Problem', p. 279, n. 210.

²⁷ *Violations of the Laws and Customs of War*, note 22 above, p. 25.

²⁸ *Ibid.*, p. 64. See also p. 73.

the suggestion that heads of State be tried for 'acts of state',²⁹ and that leaders be deemed liable for the acts of their subordinates.³⁰ But while clearly lukewarm to the idea, the American delegation did not totally oppose the convening of war crimes trials. However, it said efforts should be confined to matters undoubtedly within the scope of the term 'laws and customs of war', which provided 'a standard certain, to be found in books of authority and in the practice of nations'.³¹ The Japanese members also submitted dissenting comments, but these were considerably more succinct, and did not focus on the issue of crimes against humanity.

At the Peace Conference itself, Nicolas Politis, Greek Foreign Minister and a member of the Commission of Fifteen, proposed creating a new category of war crimes, designated 'crimes against the laws of humanity', intended to cover the massacres of the Armenians.³² Woodrow Wilson protested a measure he considered to be *ex post facto* law.³³ Wilson eventually withdrew his opposition, but he felt that in any case such efforts would be ineffectual.³⁴ At the meeting of the Council of Four on 2 April 1919, Lloyd George said it was important to judge those responsible 'for acts against individuals, atrocities of all sorts committed under orders'.³⁵

Although article 227 of the Treaty of Versailles stipulated that Kaiser Wilhelm II was to be tried, this never took place because of the refusal of the Netherlands to extradite him. Articles 228 to 230 allowed for the creation of international war crimes tribunals, the first in history.³⁶ They were to try persons accused of violating the laws and customs of war, yet in deference to the American objections the Treaty of Versailles did not

²⁹ Citing *Schooner Exchange v. McFaddon et al.*, 7 Cranch 116, in support.

³⁰ 'It is one thing to punish a person who committed, or, possessing the authority, ordered others to commit an act constituting a crime; it is quite another thing to punish a person who failed to prevent, to put and end to, or to repress violations of the laws or customs of war', said the American dissent: *Violations of the Laws and Customs of War*, note 22 above, p. 72.

³¹ *Ibid.*, p. 64.

³² Dadrian, 'Genocide as a Problem', p. 278.

³³ George Goldberg, *The Peace to End Peace, The Paris Peace Conference of 1919*, New York: Harcourt, Brace & World, 1969, p. 151.

³⁴ Arthur Walworth, *Wilson and His Peacemakers, American Diplomacy at the Paris Peace Conference, 1919*, New York and London: W. W. Norton & Co., 1986, pp. 214–16 at p. 216. See also Tillman, *Anglo-American Relations*, p. 313.

³⁵ Arthur S. Link, ed., *The Papers of Woodrow Wilson*, Vol. 56, Princeton: Princeton University Press, 1987, p. 531.

³⁶ Treaty of Peace between the Allied and Associated Powers and Germany ('Treaty of Versailles'), [1919] TS 4, entered into force 28 June 1919. There were similar penal provisions in the related peace treaties: Treaty of St Germain-en-Laye, [1919] TS 11, art. 173; Treaty of Neuilly-sur-Seine, [1920] TS 5, art. 118; and Treaty of Trianon, (1919) 6 LNTS 187, art. 15.

refer to 'crimes against the laws of humanity'. The new German government voted to accept the treaty, but conditionally, and it refused the war criminals clauses, noting that its penal code prevented the surrender of Germans to a foreign government for prosecution and punishment.³⁷ A compromise was effected, deemed compatible with article 228 of the Versailles Treaty, whereby the Supreme Court of the Empire in Leipzig would judge those charged by the Allies. Germany opposed arraignment of most of those chosen for prosecution by the Allies, arguing that the trial of its military and naval elite could imperil the government's existence.³⁸ In the end, only a handful of German soldiers were tried, for atrocities in prisoner of war camps and sinking of hospital ships.³⁹ A Commission of Allied jurists set up to examine the results at Leipzig concluded 'that in the case of those condemned the sentences were not adequate'.⁴⁰

The Treaty of Sèvres and the Armenian genocide

With regard to Turkey, the Allies considered prosecution for mistreatment of prisoners, who were mostly British, but also for 'deportations and massacres', in other words, the persecution of the Armenian minority.⁴¹ The British High Commissioner, Admiral Calthorpe, informed the Turkish Foreign Minister on 18 January 1919 that 'His Majesty's Government are resolved to have proper punishment inflicted on those responsible for Armenian massacres'.⁴² Calthorpe's subsequent dispatch to London said he had informed the Turkish government that British statesmen 'had promised [the] civilized world that persons connected would be held personally responsible and that it was [the] firm intention of HM Government to fulfil [that] promise'.⁴³ Subsequently, the High Commission proposed the Turks be punished for the Armenian massacres by dismemberment of their Empire and the criminal trial of high officials to serve as an example.⁴⁴

London believed that prosecution could be based on 'the common

³⁷ Goldberg, *Peace to End Peace*, p. 151.

³⁸ *German War Trials, Report of Proceedings before the Supreme Court in Leipzig*, London: His Majesty's Stationery Office, 1921, p. 19. See also 'Question of International Criminal Jurisdiction, Report by Ricardo J. Alfaro, Special Rapporteur', UN Doc. A/CN.4/15 and Corr. 1, para. 9.

³⁹ James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War*, Westport, CT: Greenwood Press, 1982; Sheldon Glueck, *War Criminals. Their Prosecution and Punishment*, New York: Knopf, 1944.

⁴⁰ United Nations War Crimes Commission, *History*, p. 48.

⁴¹ Dadrian, 'Genocide as a Problem', p. 282.

⁴² FO 371/4174/118377 (folio 253), cited in *ibid.* ⁴³ *Ibid.*

⁴⁴ FO 371/4173/53352 (folios 192–3), cited in *ibid.*, pp. 282–3.

law of war', or 'the customs of war and rules of international law'.⁴⁵ Trials would be predicated on the concept that an occupying military regime is entitled to prosecute offenders on the territory where the crime has taken place because it is, in effect, exercising *de facto* authority in place of the former national regime. Jurisdiction would not, therefore, be based on broader notions rooted in the concept of universality.

Under pressure from Allied military rulers, the Turkish authorities arrested and detained scores of their leaders, later releasing many as a result of public demonstrations and other pressure.⁴⁶ In late May 1919, the British seized sixty-seven of the Turkish prisoners and spirited them away to more secure detention in Malta and elsewhere.⁴⁷ But the British found that political considerations, including the growth of Kemalism and competition for influence with other European powers, made insistence on prosecutions increasingly untenable.⁴⁸ In mid-1920, a political-legal officer at the British High Commission in Istanbul cautioned London of practical difficulties involved in prosecuting Turks for the Armenian massacres, including obtaining evidence.⁴⁹ By late 1921, the British had negotiated a prisoner exchange agreement with the Turks, and the genocide suspects held in Malta were released.⁵⁰

Attempts by Turkish jurists to press for trial before the national courts of those responsible for the atrocities were slightly more successful.⁵¹ Prosecuted on the basis of the domestic penal code, several ministers in the wartime cabinet and leaders of the Ittihad party were found guilty by a court martial, on 5 July 1919, of 'the organization and execution of crime of massacre' against the Armenian minority.⁵² The criminals were sentenced, *in absentia*, to capital punishment or lengthy terms of imprisonment.⁵³

According to the Treaty of Sèvres, signed on 10 August 1920, Turkey recognized the right of trial 'notwithstanding any proceedings or prosecution before a tribunal in Turkey' (art. 226), and was obliged to surrender 'all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by rank, office or employment which they held under Turkish authori-

⁴⁵ FO 371/4174/129560 (folios 430–1), cited in *ibid.*, p. 283.

⁴⁶ Dadrian, 'Genocide as a Problem', p. 284. ⁴⁷ *Ibid.*, p. 285.

⁴⁸ FO 371/4174/156721 (folios 523–4), cited in *ibid.*, p. 286.

⁴⁹ FO 371/6500, W.2178, appendix A (folios 385–118 and 386–119), cited in *ibid.*, p. 287.

⁵⁰ Dadrian, 'Genocide as a Problem', pp. 288–9.

⁵¹ *Ibid.*, pp. 293–317; Vahakn N. Dadrian, 'The Turkish Military Tribunal's Prosecution of the Authors of the Armenian Genocide: Four Major Court-Martial Series', (1997) 11 *Holocaust & Genocide Studies*, p. 28.

⁵² Cited in Dadrian, 'Genocide as a Problem', p. 307.

⁵³ *Ibid.*, pp. 310–15.

ties'.⁵⁴ This formulation was similar to the war crimes clauses in the Treaty of Versailles. But the Treaty of Sèvres contained a major innovation, contemplating prosecution of what we now define as 'crimes against humanity'⁵⁵ as well as of war crimes. Pursuant to article 230:

The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on the 1st August, 1914. The Allied Powers reserve to themselves the right to designate the Tribunal which shall try the persons so accused, and the Turkish Government undertakes to recognise such Tribunal. In the event of the League of Nations having created in sufficient time a Tribunal competent to deal with the said massacres, the Allied Powers reserve to themselves the right to bring the accused persons mentioned above before the Tribunal, and the Turkish Government undertakes equally to recognise such Tribunal.⁵⁶

However, the Treaty of Sèvres was never ratified. As Kay Holloway wrote, the failure of the signatories to bring the treaty into force 'resulted in the abandonment of thousands of defenceless peoples – Armenians and Greeks – to the fury of their persecutors, by engendering subsequent holocausts in which the few survivors of the 1915 Armenian massacres perished'.⁵⁷ The Treaty of Sèvres was replaced by the Treaty of Lausanne of 24 July 1923⁵⁸ that included a 'Declaration of Amnesty' for all offences committed between 1 August 1914 and 20 November 1922.

Inter-war developments

The post-First World War efforts at international prosecution of war crimes and crimes against humanity were a failure. Nevertheless, the idea had been launched. Over the next two decades criminal law specialists turned their attention to a series of proposals for the repression of international crimes. The first emerged from the work of the Advisory Committee of Jurists, appointed by the Council of the League of Nations in 1920 and assigned to draw up plans for the international judicial institutions. One of the members, Baron Descamps of Belgium, proposed the establishment of a 'high court of international justice'.

⁵⁴ [1920] UKTS 11, Martens, *Recueil général des traités*, 99, 3e série, 12, 1924, p. 720 (French version).

⁵⁵ Egon Schwelb, 'Crimes Against Humanity', (1946) 23 BYIL, p. 178 at p. 182.

⁵⁶ *Ibid.*

⁵⁷ Kay Holloway, *Modern Trends in Treaty Law*, London: Stevens & Sons, 1967, pp. 60–1.

⁵⁸ Treaty of Lausanne Between Principal Allied and Associated Powers and Turkey, (1923) 28 LNTS 11.

Borrowing language from the Martens clause in the preamble to the Hague Convention, Descamps wrote that the jurisdiction of the court might include not only rules 'recognized by the civilized nations but also by the demands of public conscience [and] the dictates of the legal conscience of civilized nations'. However, as a result of American pressure, his formulation was later changed to 'general principles of law recognized by civilized nations'. In any case, the Third Committee of the Assembly of the League declared Descamps' ideas 'premature'.⁵⁹

The International Law Association and the International Association of Penal Law also studied the question of international criminal jurisdictions.⁶⁰ These efforts culminated, in 1937, in the adoption of a treaty by the League of Nations contemplating establishment of an international criminal court.⁶¹ A year later, the Eighth International Conference of American States, held in Lima, considered criminalizing '[p]ersecution for racial or religious motives'.⁶² Hitler was, tragically, one step ahead. Only after his genocidal policies were ineluctably underway did the law begin to assume its pivotal role in the repression of the crime of genocide.

Also in the aftermath of the First World War, the international community constructed a system of protection for national minorities that, *inter alia*, guaranteed to these groups the 'right to life'.⁶³ It is almost as if international lawmakers sensed the coming Holocaust. Their focus was on vulnerable groups identified by nationality, ethnicity and religion, the very groups that would bear the brunt of Nazi persecution and ultimately mandate development of the law of genocide. According to the Permanent Court of International Justice, the minorities treaties were intended to 'secure for certain elements incorporated in a State, the population of which differs from them in race, language

⁵⁹ 'Question of International Criminal Jurisdiction', UN Doc. A/CN.4/15 (1950), paras. 14–17.

⁶⁰ *Ibid.*, paras. 18–25.

⁶¹ Convention for the Creation of an International Criminal Court, League of Nations OJ Spec. Supp. No. 156 (1936), LN Doc. C.547(I).M.384(I).1937.V (1938). Failing a sufficient number of ratifying States, the treaty never came into force.

⁶² 'Final Act of the Eighth Interamerican Conference', in J. B. Scott, ed., *The International Conferences of the American States*, Washington: Carnegie Endowment for International Peace, 1940, p. 260.

⁶³ Treaty of Peace Between the United States of America, the British Empire, France, Italy and Japan, and Poland, [1919] TS 8, art. 2: 'Poland undertakes to assure full and complete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race or religion'. Similarly Treaty between the Principal Allied and Associated Powers and Roumania, (1921) 5 LNTS 336, art. 1; Treaty between the Principal Allied and Associated Powers and Czechoslovakia, [1919] TS 20, art. 1; Treaty between the Principal Allied and Associated Powers and the Serb-Croat-Slovene State, [1919] TS 17, art. 1.

or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs'.⁶⁴ According to Hersh Lauterpacht, 'the system of Minorities Treaties failed to afford protection in many cases of flagrant violation and although it acquired a reputation for impotence, with the result that after a time the minorities often refrained from resorting to petitions in cases where a stronger faith in the effectiveness of the system would have prompted them to seek a remedy'.⁶⁵ Yet to a certain and limited extent their provisions stalled the advance of Nazism. In Upper Silesia, for example, the Nazis delayed introduction of racist laws because this would have violated the applicable international norms. Jews in the region, protected by a bilateral treaty between Poland and Germany, were sheltered from the Nuremberg laws and continued to enjoy equal rights, at least until the convention's expiry in 1937.⁶⁶ The minorities treaties are one of the forerunners of the modern international human rights legal system. They contributed the context for the work of Raphael Lemkin, who viewed the lack of punishment for gross violations to be among their major flaws. Lemkin's pioneering work on genocide is to a large extent the direct descendant of the minorities treaties of the inter-war years.

Raphael Lemkin

Raphael Lemkin was born in eastern Poland, near the town of Bezwo-dene. He worked in his own country as a lawyer, prosecutor and university teacher. By the 1930s, internationally known as a scholar in the field of international criminal law, he participated as a rapporteur in such important meetings as the Conferences on the Unification of Criminal Law. A Jew, Lemkin fled Poland in 1939, making his way to Sweden and then to the United States, finding work at Duke University and later at Yale University.⁶⁷ He initiated the World Movement to Outlaw Genocide, working tirelessly to promote legal norms directed against the crime. Lemkin was present and actively involved, largely

⁶⁴ *Minority Schools in Albania*, Advisory Opinion, 6 April 1935, PCIJ Series A/B, No. 64, p. 17.

⁶⁵ Hersh Lauterpacht, *An International Bill of the Rights of Man*, New York: Columbia University Press, 1945, p. 219.

⁶⁶ Jacob Robinson, *And the Crooked Shall Be Made Straight*, New York: MacMillan, 1965, pp. 72–3.

⁶⁷ A. J. Hobbins, ed., *On the Edge of Greatness, The Diaries of John Humphrey, First Director of the United Nations Division of Human Rights*, Vol. I, 1948–9, Montreal: McGill University Libraries, 1994, p. 30.

behind the scenes but also as a consultant to the Secretary-General, throughout the drafting of the Genocide Convention. 'Never in the history of the United Nations has one private individual conducted such a lobby', wrote John P. Humphrey in his diaries.⁶⁸

Lemkin created the term 'genocide' from two words, *genos*, which means race, nation or tribe in ancient Greek,⁶⁹ and *caedere*, meaning to kill in Latin.⁷⁰ As an alternative, he considered the ancient Greek term *ethnos*, which denotes essentially the same concept as *genos*.⁷¹ Lemkin proposed the following definition of genocide:

[A] co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objective 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 the 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.⁷²

Lemkin's definition was narrow, in that it addressed crimes directed against 'national groups' rather than against 'groups' in general. At the same time, it was broad, to the extent that it contemplated not only physical genocide but also acts aimed at destroying the culture and livelihood of the group.

Lemkin's interest in the subject dated to his days as a student at Lvov University, when he intently followed attempts to prosecute the perpetrators of the massacres of the Armenians.⁷³ In 1933, he proposed the recognition of two new international crimes, 'vandalism' and 'barbarity'

⁶⁸ John P. Humphrey, *Human Rights and the United Nations: A Great Adventure*, Dobbs Ferry, NY: Transnational, 1984, p. 54.

⁶⁹ Henry George Liddell and Robert Scott, *A Greek-English Lexicon*, Oxford: Clarendon Press, 1996, p. 344; William F. Arndt and F. Wilbur Gingrich, *A Greek-English Lexicon of the New Testament and Other Early Christian Literature*, Chicago: University of Chicago Press, 1957, p. 155; Pierre Chantraine, *Dictionnaire étymologique de la langue grecque*, Paris, Editions Klincksieck, 1968, p. 222.

⁷⁰ During the drafting of the Convention, some pedants complained the term was an unfortunate mixture of Latin and Greek, and that it would be better to use the term 'generocide', with pure Latin roots: UN Doc. A/PV.123 (Henriquez Ureña, Dominican Republic).

⁷¹ Since Lemkin, the term 'ethnocide' has also entered the vocabulary, mainly in the French language, and is generally used to refer to cultural genocide, particularly with respect to indigenous peoples.

⁷² Raphael Lemkin, *Axis Rule*, p. 79.

⁷³ 'Totally Unofficial' (unpublished autobiography of Raphael Lemkin in the Raphael Lemkin Papers, New York Public Library), in United States of America, *Hearing Before the Committee on Foreign Relations, United States Senate, 5 March 1985*, Washington: US Government Printing Office, 1985, p. 204.

(*barbarie*), in a report to the Fifth International Conference for the Unification of Penal Law.⁷⁴ For Lemkin, ‘vandalism’ constituted a crime of destruction of art and culture in general, because these are the property of ‘l’humanité civilisée qui, liée par d’innombrables liens, tire toute entière les profits des efforts de ses fils, les plus géniaux, dont les oeuvres entrent en possession de tous et augmentent leur culture’. In other words, the cultural objects in question belonged to humanity as a whole, and consequently humanity as a whole had an interest in their protection.⁷⁵ As for the crime of *barbarie*, this comprised acts directed against a defenceless ‘racial, religious or social collectivity’, such as massacres, pogroms, collective cruelties directed against women and children and treatment of men that humiliates their dignity. Elements of the crime included violence associated with anti-social and cruel motives, systematic and organized acts, and measures directed not against individuals but against the population as a whole or a racial or religious group.⁷⁶ Lemkin credited the Romanian jurist Vespasien V. Pella with authorship of the concept, which appears in Pella’s report to the third International Congress on Penal Law, held at Palermo in 1933.⁷⁷

Axis Rule in Occupied Europe

A decade later, in his volume, *Axis Rule in Occupied Europe*, Lemkin affirmed that the crimes he had recommended in 1933 ‘would amount to the actual conception of genocide’.⁷⁸ But, as Sir Hartley Shawcross noted during the 1946 General Assembly debate, the 1933 conference rejected Lemkin’s proposal.⁷⁹ During the war, Lemkin lamented the fact that, had his initiative succeeded, prosecution of Nazi atrocities would have been possible.⁸⁰ But the Allies proceeded anyway, on the basis of a definition of ‘crimes against humanity’ that encompassed ‘extermination’ and ‘persecutions on political, racial or religious

⁷⁴ Lemkin, *Axis Rule*, p. 91.

⁷⁵ Luis Jimenez de Asua, Vespasien Pella and Manuel Lopez-Rey Arroyo, eds., *V^e Conférence internationale pour l’unification du droit pénal, Actes de la Conférence*, Paris: Pedone, 1935, pp. 54–5.

⁷⁶ *Ibid.*, p. 55. See also Raphael Lemkin, ‘Genocide as a Crime in International Law’, (1947) 41 AJIL, p. 145 at p. 146.

⁷⁷ Lemkin cited the provisional proceedings of the 1933 meeting, *ibid.*, p. 55, n. 11.

⁷⁸ Lemkin, *Axis Rule*, p. 91.

⁷⁹ UN Doc. A/C.6/SR.22 (Shawcross, United Kingdom). The conference proceedings do not show that the proposal was defeated; it appears to have been quietly dropped by a drafting committee preparing a text for the Second Commission of the Conference: de Asua, Pella and Arroyo, *V^e Conférence*, p. 246.

⁸⁰ Lemkin, *Axis Rule*, p. 92.

grounds'.⁸¹ The International Military Tribunal and other post-war courts consistently dismissed arguments that this constituted *ex post facto* criminal law.⁸²

'New conceptions require new terms', explained Lemkin. Noting that 'genocide' referred to the destruction of a nation or of an ethnic group, he described it as 'an old practice in its modern development'. Genocide did not necessarily imply the immediate destruction of a national or ethnic group, but rather different actions aiming at the destruction of the essential foundations of the life of the group, with the aim of annihilating the group as such. '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 the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.'⁸³

The major part of *Axis Rule in Occupied Europe* consisted of laws and decrees of the Axis powers and of their puppet regimes for the government of occupied areas. These were analyzed in detailed commentaries. One chapter of the book was devoted to the subject of the new crime of genocide. Lemkin defined several categories of genocide. Basing his examples on the practice of the Nazis in occupied Europe, he wrote that genocide was effected:

through a synchronized attack on different aspects of life of the captive peoples: in the political field (by destroying institutions of self-government and imposing a German pattern of administration, and through colonization by Germans); the social field (by disrupting the social cohesion of the nation involved and killing or removing elements such as the intelligentsia, which provide spiritual leaderships – according to Hitler's statement in *Mein Kampf*, 'the greatest of spirits can be liquidated if its bearer is beaten to death with a rubber truncheon'); in the cultural field (by prohibiting or destroying cultural institutions and cultural activities; by substituting vocational education for education in the liberal arts, in order to prevent humanistic thinking, which the occupant considers dangerous because it promotes national thinking); in the economic field (by shifting the wealth to Germans and by prohibiting the exercise of trades and occupations by people who do not promote Germanism 'without reservations'); in the biological field (by a policy of depopulation and by promoting procreation by Germans in the occupied countries); in the field of physical

⁸¹ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), annex, (1951) 82 UNTS 279, art. 6(c).

⁸² *France et al. v. Goering et al.*, (1946) 22 IMT 203, pp. 497–8; *United States of America v. Alstötter et al.* ('Justice trial'), (1948) 6 LRTWC 1, 3 TWC 1, (United States Military Tribunal), pp. 41–3; *United States of America v. Flick et al.*, (1948) 9 LRTWC 1 (United States Military Tribunal), pp. 36–9; *United States of America v. Krupp et al.*, (1948) 10 LRTWC 69 (United States Military Tribunal), p. 147.

⁸³ Lemkin, *Axis Rule*, p. 79.

existence (by introducing a starvation rationing system for non-Germans and by mass killings, mainly of Jews, Poles, Slovenes, and Russians); in the religious field (by interfering with the activities of the Church, which in many countries provides not only spiritual but also national leadership); in the field of morality (by attempts to create an atmosphere of moral debasement through promoting pornographic publications and motion pictures, and the excessive consumption of alcohol).⁸⁴

Lemkin identified two phases in genocide, the first being the destruction of the national pattern of the oppressed group, and the second, the imposition of the national pattern of the oppressor.⁸⁵ He referred to the war crimes commission established in 1919, which had used the term 'denationalization' to describe the phenomenon.⁸⁶ Lemkin also cited remarks by Hitler, speaking to Rauschnig:

It will be one of the chief tasks of German statesmanship for all time to prevent, by every means in our power, the further increase of the Slav races. Natural instincts bid all living beings not merely conquer their enemies, but also destroy them. In former days, it was the victor's prerogative to destroy entire tribes, entire peoples. By doing this gradually and without bloodshed, we demonstrate our humanity. We should remember, too, that we are merely doing unto others as they would have done to us.⁸⁷

Yet Lemkin observed that while some groups were to be 'Germanized' (Dutch, Norwegians, Flemings, Luxemburgers), others did not figure in the Nazi plans (Poles, Slovenes, Serbs), and, as for the Jews, they were to be destroyed altogether.⁸⁸

Lemkin wrote of the existence of 'techniques of genocide in various fields' and then described them, including political, social, cultural, economic, biological, physical, religious and moral genocide. Political genocide – not to be confused with genocide of political groups, which Lemkin did not view as falling within the definition – entailed the destruction of a group's political institutions, including such matters as forced name changes and other types of 'Germanization'.⁸⁹ On the subject of physical destruction, Lemkin said it primarily transpired through racial discrimination in feeding, endangering of health, and outright mass killings.⁹⁰

⁸⁴ *Ibid.*, pp. xi–xii.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.* In a subsequent article, Lemkin suggest that 'denationalization' had been used in the past to describe genocide-like crimes: Lemkin, 'Le crime de génocide', p. 372. See the discussion on genocide-like war crimes in the note accompanying *United States of America v. Greifelt et al.*, (1948) 13 LRTWC 1 (United States Military Tribunal), p. 42. Specific cases of the war crime of 'denationalization' were also considered by the United Nations War Crimes Commission, *History*, p. 488.

⁸⁷ Lemkin, *Axis Rule*, p. 81, quoting Hermann Rauschnig, *The Voice of Destruction*, New York: G. P. Putman's Sons, 1940, p. 138.

⁸⁸ Lemkin, *Axis Rule*, p. 82.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*, pp. 87–9.

The chapter on genocide concluded with 'recommendations for the future', calling for the 'prohibition of genocide in war and peace'.⁹¹ Lemkin insisted upon the relationship between genocide and the growing interest in the protection of peoples and minorities by the post-First World War treaties. He noted the need to revisit international legal instruments, pointing out particularly the inadequacies of the Hague Regulations.⁹² For Lemkin, the Hague Regulations dealt with technical rules concerning occupation, 'but they are silent regarding the preservation of the integrity of a people'.⁹³ Lemkin urged their revision in order to incorporate a definition of genocide. '*De lege ferenda*, the definition of genocide in the Hague Regulations thus amended should consist of two essential parts: in the first should be included every action infringing upon the life, liberty, health, corporal integrity, economic existence, and the honour of the inhabitants when committed because they belong to a national, religious, or racial group; and in the second, every policy aiming at the destruction or the aggrandizement of one of such groups to the prejudice or detriment of another'.⁹⁴ Lemkin also said that the Hague Regulations should be modified 'to include an international controlling agency vested with specific powers, such as visiting the occupied countries and making inquiries as to the manner in which the occupant treats natives in prison'.⁹⁵ But he also signalled the great shortcoming of the Hague Regulations: their limited application to circumstances of international armed conflict.

Lemkin observed that the system of minorities protection created following the First World War 'proved to be inadequate because not every European country had a sufficient judicial machinery for the enforcement of its constitution'.⁹⁶ He proposed the development of a new international multilateral treaty requiring States to provide for the introduction, in constitutions but also in domestic criminal codes, of norms protecting national, religious or racial minority groups from oppression and genocidal practices. Lemkin also had important recommendations with respect to criminal prosecution of perpetrators of genocide. 'In order to prevent the invocation of the plea of superior orders', argued Lemkin, 'the liability of persons who *order* genocidal practices, as well as of persons who *execute* such orders, should be

⁹¹ *Ibid.*, p. 90.

⁹² Convention (IV) Respecting the Laws and Customs of War by Land, note 9 above.

⁹³ Lemkin, *Axis Rule*, p. 90.

⁹⁴ *Ibid.*, p. 93.

⁹⁵ *Ibid.*, p. 94. Here Lemkin may be able to claim credit for conceiving of the fact-finding commission eventually provided for under article 90 of Protocol Additional I to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts, (1979) 1125 UNTS 3, that was created in 1991.

⁹⁶ Lemkin, *Axis Rule*, p. 93.

provided expressly by the criminal codes of the respective countries.' Finally, Lemkin urged that the principle of universal repression or universal jurisdiction be adopted for the crime of genocide. Lemkin made the analogy with other offences that are *delicta juris gentium* such as 'white slavery', trade in children and piracy, saying genocide should be added to the list of such crimes.⁹⁷

Prosecuting the Nazis

During the Second World War activity intensified with regard to the creation of an international criminal court and the international prosecution of war crimes and crimes against humanity. An unofficial body, the League of Nations Union, established what was known as the 'London International Assembly' to work on the problem. In October 1943, it proposed the establishment of an international criminal court whose jurisdiction was to encompass 'crimes in respect of which no national court had jurisdiction (e.g. crimes committed against Jews) . . . [T]his category was meant to include offences subsequently described as crimes against humanity.'⁹⁸ On 17 December 1942, British Foreign Secretary Anthony Eden declared in the House of Commons that reports had been received 'regarding the barbarous and inhuman treatment to which Jews are being subjected in German-occupied Poland', and that the Nazis were 'now carrying into effect Hitler's oft repeated intention to exterminate the Jewish people in Europe'. Eden affirmed his government's intention 'to ensure that those responsible for these crimes shall not escape retribution'.⁹⁹

The United Nations War Crimes Commission

The Moscow Declaration of 1 November 1943 is generally viewed as the seminal statement of the Allied powers on the subject of war crimes prosecutions. While referring to 'evidence of the atrocities, massacres and cold-blooded mass executions' being perpetrated by the Nazis, and warning those responsible that they would be brought to book for their crimes, there was no direct reference to the racist aspect of the offences or an indication that they involved specific national, ethnic and religious groups such as the Jews of Europe.¹⁰⁰ The United Nations Commission

⁹⁷ *Ibid.*, pp. 93–4 (italics in the original).

⁹⁸ Quoted in United Nations War Crimes Commission, *History*, p. 103; see also p. 101.

⁹⁹ Parliamentary Debates, House of Commons, Vol. 385, No. 17, cols. 2082–4.

¹⁰⁰ 'Declaration on German Atrocities', Department of State Publication 2298, Washington: Government Printing Office, 1945, pp. 7–8. See also (1944) 38 AJIL, p. 5.

for the Investigation of War Crimes, established immediately prior to the Moscow Declaration,¹⁰¹ was composed of representatives of most of the Allies and chaired by Sir Cecil Hurst of the United Kingdom. It initially agreed to use the list of offences that had been drafted by the Responsibilities Commission of the Paris Peace Conference in 1919 as the basis for its prosecutions. The enumeration was already recognized for the purposes of international prosecution. In addition, Italy and Japan had agreed to it, and Germany had never formally objected.¹⁰²

Although the 1919 list included the crime of 'denationalization' as well as murder and ill-treatment of civilians, the Commission did not initially consider that its mandate extended to prosecutions for the extermination of European Jews. The Commission's 'Draft Convention for the Establishment of a United Nations War Crimes Court', prepared in late 1944, was confined to 'the commission of an offence against the laws and customs of war'.¹⁰³ Nevertheless, from an early stage in its work, there were efforts to extend the jurisdiction of the Commission to civilian atrocities committed against ethnic groups not only within occupied territories but also those within Germany itself. In the Legal Committee of the Commission, the United States representative Herbert C. Pell used the term 'crimes against humanity' to describe offences 'committed against stateless persons or against any persons because of their race or religion'.¹⁰⁴ On 24 March 1944, President Roosevelt referred in a speech to 'the wholesale systematic murder of the Jews of Europe' and warned that 'none who participate in these acts

¹⁰¹ United Nations War Crimes Commission, *History*, p. 112; Arie J. Kochavi, *Prelude to Nuremberg, Allied War Crimes Policy and the Question of Punishment*, Chapel Hill, NC, and London: University of North Carolina Press, 1998; Arie J. Kochavi, 'The British Foreign Office Versus the United Nations War Crimes Commission During the Second World War', (1994) 8 *Holocaust & Genocide Studies*, p. 28.

¹⁰² 'Transmission of Particulars of War Crimes to the Secretariat of the United Nations War Crimes Commission, 13 December 1943', NAC RG-25, Vol. 3033, 4060-40C, Part Two.

¹⁰³ 'Draft Convention for the Establishment of a United Nations War Crimes Court', UN War Crimes Commission, Doc. C.50(1), 30 September 1944, NAC RG-25, Vol. 3033, 4060-40C, Part Four, art. 1(1).

¹⁰⁴ United Nations War Crimes Commission, *History*, p. 175; Kochavi, *Prelude*, pp. 143ff. In 1985, during debates about ratification of the Genocide Convention, United States Senator Claiborne Pell said 'this Convention has a very real personal meaning for me, because it was through my father's efforts as US Representative on the UN War Crimes Commission that genocide was initially considered a war crime': United States of America, *Hearing Before the Committee on Foreign Relations, United States Senate, 5 March 1985*, Washington: US Government Printing Office, 1985, p. 3. See also United States of America, *Hearing Before the Committee on Foreign Relations, United States Senate, 12 September 1984*, Washington: US Government Printing Office, 1984, p. 40.

of savagery shall go unpunished'.¹⁰⁵ Nevertheless, the State Department was decidedly lukewarm to the idea that war crimes prosecutions might innovate and hold Germans accountable for crimes committed against minority groups within their own borders.¹⁰⁶

In May 1944, the Legal Committee submitted a draft resolution to the plenary Commission urging it to adopt a broad view of its mandate, and to address 'crimes committed against any persons without regard to nationality, stateless persons included, because of race, nationality, religious or political belief, irrespective of where they have been committed'.¹⁰⁷ Studying what it called 'crimes for reasons of race, nationality, religious or political creed', the Commission considered that recommendations on 'this vital and most important question' should be sent to the Allied governments.¹⁰⁸ On 31 May 1944, Hurst wrote to Foreign Secretary Eden: 'A category of enemy atrocities which has deeply affected the public mind, but which does not fall strictly within the definition of war crimes, is undoubtedly the atrocities which have been committed on racial, political or religious grounds in enemy territory.'¹⁰⁹ The reply came from Lord Simon, the Lord Chancellor, on 23 August 1944:

This would open a very wide field. No doubt you have in mind particularly the atrocities committed against the Jews. I assume there is no doubt that the massacres which have occurred in occupied territories would come within the category of war crimes and there would be no question as to their being within the Commission's terms of reference. No doubt they are part of a policy which the Nazi Government have adopted from the outset, and I can fully understand the Commission wishing to receive and consider and report on evidence which threw light on what one might describe as the extermination policy. I think I can probably express the view of His Majesty's Government by saying that it would not desire the Commission to place any unnecessary restriction on the evidence which may be tendered to it on this general subject. I feel I should warn you, however, that the question of acts of this kind committed in enemy territory raises serious difficulties.¹¹⁰

¹⁰⁵ 'Statement of the Acting Secretary of State, 1 February 1945, on War Criminals', NAC RG-25, Vol. 3033, 4060–40C, Part Four.

¹⁰⁶ Kochavi, *Prelude*, p. 149. See also Shlomo Aronson, 'Preparations for the Nuremberg Trial: The OSS, Charles Dworak, and the Holocaust', (1998) 12 *Holocaust & Genocide Studies*, p. 257.

¹⁰⁷ United Nations War Crimes Commission, *History*, p. 176.

¹⁰⁸ 'Memorandum on the Present Position of the United Nations War Crimes Commission, the Work Already Done and its Future Tasks, by Dr B. Ecer', UNWCC Doc. C.76, 8 February 1945, NAC RG-25, Vol. 3033, 4060–40C, Part Four, p. 7.

¹⁰⁹ 'Correspondence Between the War Crimes Commission and HM Government in London Regarding the Punishment of Crimes Committed on Religious, Racial or Political Grounds', UNWCC Doc. C.78, 15 February 1945, NAC RG-25, Vol. 3033, 4060–40C, Part Four.

¹¹⁰ *Ibid.*

As a compromise, Hurst thought the Commission might issue reports dealing with 'special categories of the atrocities committed by the Axis Powers' and that '[o]ne of these reports might well deal with this campaign for the extermination of the Jews as a whole'.¹¹¹ Hurst also told the Commission that 'Lord Wright was of opinion that the persecution of the Jews in Germany was, logically, a war crime, and that the Commission might have to consider extending its definition of war crimes'.¹¹² Hurst presented his idea of preparing reports on 'special categories' and the Commission agreed with the approach.¹¹³ Hurst died in the midst of this work, but had already made preparations for the drafting of a report on 'atrocities committed against the Jews'.¹¹⁴

The London Conference

The United States became the first to alter its position, as Washington prepared for the meeting of the Big Three in Yalta. On 22 January 1945, the Secretary of State, the Secretary of War and the Attorney-General issued a memorandum entitled 'Trial and Punishment of War Criminals'.¹¹⁵ It called for prosecution of German leaders for pre-war atrocities and those committed against their own nationals:¹¹⁶

Many of these atrocities . . . were '*begun by the Nazis in the days of peace* and multiplied by them a hundred times in time of war.' These pre-war atrocities are neither 'war crimes' in the technical sense, nor offences against international law; and the extent to which they may have been in violation of German law, as changed by the Nazis, is doubtful. Nevertheless, the declared policy of the United Nations is that these crimes, too, shall be punished; and the interests of post-war security and a necessary rehabilitation of German peoples, as well as the demands of justice, require that this be done.¹¹⁷

¹¹¹ *Ibid.*, p. 3.

¹¹² 'Minutes of the Thirty-Third Meeting Held on 26 September 1944', UNWCC Doc. M.28, NAC RG-25, Vol. 3033, 4060-40C, Part Three, p. 3.

¹¹³ 'Minutes of the Twenty-Eighth Meeting Held on 22 August 1944', UNWCC Doc. M.28, NAC RG-25, Vol. 3033, 4060-40C, Part Three, pp. 3-4. See also 'Progress Report', UNWCC Doc. C.48(1), NAC RG-25, Vol. 3033, 4060-40C, Part Three; 'Minutes of the Thirty-Second Meeting Held on 19 September 1944', UNWCC Doc. M.32, p. 7, NAC RG-25, Vol. 3033, 4060-40C, Part Three; and 'Minutes of the Thirty-Eighth Meeting Held on 6 December 1944', UNWCC Doc. M.38, p. 3, NAC RG-25, Vol. 3033, 4060-40C, Part Four.

¹¹⁴ 'Reports on Special Classes of Axis War Crimes, Note by the Secretary General on the History of the Question', UNWCC Doc. C.72, 29 January 1945, NAC RG-25, Vol. 3033, 4060-40C, Part Four.

¹¹⁵ 'Memorandum for the President, Subject: Trial and Punishment of Nazi War Criminals', in Bradley F. Smith, *The American Road to Nuremberg, The Documentary Record, 1944-1945*, Stanford, CA: Hoover Institution Press, 1982, pp. 117-22.

¹¹⁶ Kochavi, *Prelude*, p. 160.

¹¹⁷ 'Memorandum for the President, Subject: Trial and Punishment of Nazi War Criminals', in Smith, *American Road*, pp. 117-22 at p. 119 (italics in the original).