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# What is Genocide? What are the Gaps in the Convention? How to Prevent Genocide?

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Genocide is, first and foremost, a legal concept. Like many other terms—murder, rape, theft—it is also used in other contexts and by other disciplines, where its meaning may vary. Many historians and sociologists employ the term genocide to describe a range of atrocities involving killing large numbers of people. But even in law, it is imprecise to speak of a single, universally recognized meaning of genocide. There is a widely accepted definition, first set out in article II of the 1948 *Convention for the Prevention and Punishment of the Crime of Genocide*. Like most legal definitions, its language is subject to various interpretations, and important controversies remain about the scope of the concept even within the framework of what is a concise and carefully-worded definition.

The term itself was invented by a lawyer, Rafał Lemkin. He intended to fill a gap in international law, as it then stood in the final days of the Second World War. For more than two decades, Lemkin had been engaged at an international level in attempts to codify new categories of international crimes involving atrocities committed against vulnerable civilians. Even before Lemkin's time, international law recognized a limited number of so-called international crimes. As a general rule, they were so designated not because of their shocking scale and extent, but for more mundane reasons, namely because they escaped the territorial jurisdiction of states. Piracy is the classic example, a crime committed on the high seas. Lemkin and others argued from a different

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perspective, proposing the recognition of international crimes where these represented serious human rights violations.

The beginnings of this were already apparent at the time of the First World War, when Britain, France and Russia warned that they would hold perpetrators to account for 'these new crimes of Turkey against humanity and civilization'. But the idea that a state could be held accountable for atrocities committed against its own nationals remained extremely controversial, and it was this gap in the law that Lemkin worked to fill.

**Genocide and Crimes against Humanity**

The legal concept of genocide was forged in the crucible of post-Second World War efforts to prosecute Nazi atrocities. Its development took place in conjunction with that of other international crimes, especially crimes against humanity, with which it bears a close but complex and difficult relationship. The development and history of genocide as a legal concept cannot be properly understood without considering the parallel existence of crimes against humanity.

Although the participants in the United Nations War Crimes Commission, established in November 1943, and in the London Conference, which met from late June to early August 1945 to prepare the Nuremberg trial of the major war criminals, opted to use the term crimes against humanity in the prosecutions, they also employed the word genocide as if it was more or less synonymous. The indictment of the International Military Tribunal charged the Nazi defendants with 'deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people, and national, racial or religious groups, particularly Jews, Poles, and Gypsies.'[1] The term 'genocide' was also used on several occasions by the prosecutors during the trial itself. Lemkin later wrote that '[t]he evidence produced at the Nuremberg trial gave full support to the concept of genocide.'[2]

Nevertheless, the *Charter of the International Military Tribunal* did not use the word genocide, nor does it appear in the final judgment issued on 30 September and 1 October 1946. The legal concept of crimes against humanity, as defined at Nuremberg, suffered from a very serious limitation, in that it was confined to atrocities committed in association with an aggressive war. This was quite intentional on the part of those who

[1] *France* et al. v. *Goering* et al., (1946) 22 IMT 45-6.
[2] Raphael Lemkin, 'Genocide as a Crime in International Law', (1947).41 *American Journal of International Law* 145, at p. 147.

drafted the legal provisions governing prosecutions, especially the four great powers, the United States, the United Kingdom, France and the Soviet Union. Indeed, extending international law from classic war crimes involving battlefield offences and various forms of persecution of civilians in an occupied territory so that it would also cover atrocities committed by a government against its own civilian population was not only novel and unprecedented, it was also threatening to the very states who were organizing the prosecution.

Speaking of the proposed crime of 'atrocities, persecutions, and deportations on political, racial or religious grounds', which would shortly be renamed 'crimes against humanity', Justice Jackson indicated the source of the lingering concerns of his government:

> [O]rdinarily we do not consider that the acts of a government toward its own citizens warrant our interference. *We have some regrettable circumstances at times in our own country in which minorities are unfairly treated.* We think it is justifiable that we interfere or attempt to bring retribution to individuals or to states only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved. We see no other basis on which we are justified in reaching the atrocities which were committed inside Germany, under German law, or even in violation of German law, by authorities of the German state.[3]

There is little doubt that the British, the French and the Soviets had reasons of their own to share these concerns. As a result, the definition of crimes against humanity in article VI(c) of the Nuremberg *Charter* requires that atrocities be committed 'in furtherance of or in connection with any crime within the jurisdiction of the International Tribunal.'[4] In its final judgment, the International Military Tribunal made a distinction between pre-war persecution of German Jews, which it characterized as 'severe and repressive', and German policy during the war in the occupied territories. Although the judgment frequently referred to events during the 1930s, none of the accused was found guilty of an act perpetrated prior to 1 September 1939, the day the war broke out.

Following the judgment, there was considerable outrage about the severe restriction upon the concept of crimes against humanity. The disappointment soon

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[3] 'Minutes of Conference Session of 23 July 1945', in *Report of Robert H. Jackson, United States Representative to the International Conference on Military* Trials, Washington: US Government Printing Office, 1949, at p. 333.

[4] *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.

manifested itself in the United Nations General Assembly, which was meeting in London at the time. India, Cuba and Panama proposed a resolution that they said would address a shortcoming in the Nuremberg trial by which acts committed prior to the war were left unpunished.[5] The resolution, somewhat toned down from the hopes of those who had launched it, launched a process that concluded two years later with the adoption of the *Convention for the Prevention and Punishment of the Crime of Genocide*.[6] Proposals that the *Genocide Convention* make reference to crimes against humanity as a related concept, or as some kind of broader umbrella under which the crime of genocide was situated, were rejected by the drafters so as not to create any confusion about the fact that genocide could be committed in time of peace as well as in wartime. This could not be said with any certainty about crimes against humanity at the time, precisely because of the Nuremberg precedent.

Thus, the recognition of genocide as an international crime by the General Assembly of the United Nations in 1946, and its codification in the 1948 *Convention*, can be understood as a reaction to the narrow approach to crimes against humanity in the Nuremberg judgment of the International Military Tribunal. It was Nuremberg's failure to recognize the international criminality of atrocities committed in peacetime that prompted the first initiatives at recognizing and defining the crime of genocide. Had Nuremberg affirmed the reach of international criminal law into peacetime atrocities, the *Genocide Convention* might never have been adopted. The term 'genocide' would probably have remained a popular or colloquial label used by journalists, historians and social scientists but one absent from legal discourse.

**The 1948 *Genocide Convention***

The *Convention for the Prevention and Punishment of the Crime of Genocide* was adopted unanimously by the United Nations General Assembly on 9 December 1948. It provides the following definition of the crime of genocide:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
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> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.

[5] UN Doc. A/C.6/SR.22

[6] *Convention for the Prevention and Punishment of the Crime of Genocide*, (1951) 78 UNTS 277.

**Protected Groups**

The definition in the 1948 *Convention* applies to 'national, ethnic, racial and religious groups'. The concept is broadly analogous to what, at the time the *Convention* was adopted, were considered as 'national minorities'. This was clearly the perspective of Raphael Lemkin and one of the other international experts who assisted the United Nations in preparing the first draft of the *Convention*, Vespasian Pella.[28] During the negotiations, there was an important debate about whether to include political groups within the definition. Persecution on the grounds of membership in a political group had been recognized at Nuremberg as a crime against humanity. But the drafters of the *Genocide Convention*, Lemkin among them, quite decisively rejected the inclusion of political groups. Some of the subsequent literature on the subject has suggested that exclusion of political groups was the result of pressure from the Soviet Union, but a careful reading of the drafting history shows that opposition on this point was widespread.

**Ethnic Cleansing and Cultural Genocide**

When the *Convention* was being drafted, the punishable acts were divided into three categories, physical, biological and cultural genocide. The United Nations General Assembly voted quite deliberately to exclude cultural genocide from the *Convention*.[7] It also rejected an amendment from Syria to include as an act of genocide behaviour that today might be called 'ethnic cleansing'. When the General Assembly agreed to include forcible transfer of children—whereby the elimination of a group is contemplated by destroying the cultural memory and the national language through assimilation at a very young age—this was presented as an exception to the agreed upon exclusion of cultural genocide.[8]

Reliance upon the drafting history tends to freeze the provision, preventing it from evolving so as to take into account historical developments and changed attitudes. Be that as it may, courts to this day have shown great respect for the relatively narrow perspective adopted by the General Assembly in 1948. This is only partially explained by an inherent conservativism, however. Just as the crime of genocide emerged in international law as a reaction to the limitations on crimes against humanity, more recently the law on crimes against humanity has evolved to such an extent that it can now cover acts of ethnic cleansing and cultural genocide, even when committed in peacetime. As a result, there is no 'impunity gap', and there is little or no pressure in a

[7] UN Doc. A/C.6/SR.83.
[8] UN Doc. A/C.6/SR.82.

legal sense for the expansion of the definition of genocide by interpretation. Of course, there are important political prerogatives and much symbolism associated with the label 'genocide', and many victims are deeply disappointed when their own suffering is acknowledged as 'mere' crimes against humanity. They do not fully appreciate the importance of the legal distinctions, which are the result of a complex historical debate. Thus, while the distinction between genocide and crimes against humanity no longer has significant legal consequences, it remains fundamental in other contexts.

**Conclusions**

The *Genocide Convention* continues to fascinate jurists, politicians, journalists and human rights activists. For most of its first fifty years, it lived in a state of tension with crimes against humanity. There was much frustration with the narrowness of the definition of genocide. Many, therefore, argued for a dynamic interpretation of the concept that would include a range of other protected groups, such as political and social groups, and that would apply to a broader range of acts.[9] But what they were proposing, in reality, was equivalent to crimes against humanity without the *nexus* to armed conflict.

In early 1945, genocide and crimes against humanity were cognates, terms devised to describe the barbarous acts of the Nazi regime. Though not identical in scope, they neatly overlapped and could be used more or less interchangeably to describe the great crime of the era, the attempted extermination of Europe's Jewish population. By late 1946 an important rift developed, and it was not healed until the end of the century. Eventually, the *nexus* disappeared from the definition of crimes against humanity, but it would take half a century for the evolution to become evident.

Today, we may once again speak of genocide and crimes against humanity as they were originally used. The distinction between genocide and crimes against humanity is still of great symbolic significance, of course. Many Bosnians were shattered that their suffering during the 1992-1995 war was not labeled genocide, save for the very specific case and ultimately anomalous case of the Srebrenica massacre. However, the conclusion that no genocidal policy has been pursued and implemented should not be taken in any way as detracting from the gravity of the crimes perpetrated. International offences such as the crimes against humanity and war crimes that have been committed may be no less serious and heinous than genocide.

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[9] *E.g.*, 'Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide', UN Doc. E/CN.4/Sub.2/1985/6.