The Historical Origins, Convergence and Interrelationship of International Human Rights Law, International Humanitarian Law, International Criminal Law and Public International Law and their Application from at least the Nineteenth Century

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1. Introduction

The origins and applicability of international law is being examined more and more by those who seek redress for historic human rights violations committed in the colonial era, and as the number of such cases increases, various courts around the world are being asked to apply international law to these matters to determine whether reparations are due for atrocities committed long ago. International law is being used by claimants in these court applications, partly for political reasons, partly because it is at times easier to use international law when trying to comply with the jurisdictional requirements of certain courts and partly because various alternative and novel routes are being sought to achieve success in such cases.

International law in its infancy is deemed by many to have failed in providing protections to individuals. However, it did provide such protections more than a hundred years ago, when international protection for individuals and groups was found not only in international humanitarian law, but also in other branches of the law, such as the international structure providing protection in areas as diverse as minorities, slavery and piracy. Such was the case that humanitarian intervention took place where human rights violations were occurring against minorities within other states during the 1800s. Accordingly, there is considerable acceptance today that a number of historical occurrences are actionable as gross human rights and/or humanitarian law violations for what has happened in the past, even back at that time.

This article examines the origins, interrelationship, and dimensions of international law, the law of armed conflict, international human rights law, and international criminal law. It explores the time when these legal regimes came into being and when the protections accorded by them against various types of conduct became available. It is submitted that by the turn of the twentieth century many of these laws were already available and in force. Moreover, historical human rights violations that were perpetrated in the nineteenth and twentieth centuries can be used by claimants today. While it is commonly held that international protections against human rights violations were activated in the post-World War II era, they actually were accessible much earlier. Without having to resort to natural law or other schools of thought that see such protection as having been available from ancient times, it can be shown that a system to protect groups and individuals had been available from at least the nineteenth century. While it could be argued that individuals were unable to access this system to protect their rights at the time, there were indeed measures protecting minorities, protecting people against slavery and the slave trade and protecting people against certain types of warfare long before the 1940s. In fact, international law originated centuries before the 1800s, with various authors noting that international law dates back to times before the Peace of Westphalia of 1648.[1] International law certainly developed considerably in the nineteenth century in both the fields of humanitarian law

[1] G.C. Marks, Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de las Casas, 13 Australian Year Book of International Law 5 (1992).

as well as international human rights law, a topic that will be elaborated on in this article. The article will also show how the international system of rights protection, even outside the rules of war, was not only present in the nineteenth century, but was developing rapidly. It will therefore be proposed that there was an international system of human rights to protect people, although there was no real mechanism to enforce or realise those protections.

The early history of customary law and ways of interpreting it are examined to show that by the end of the nineteenth century, customary international law was indeed in force. More specifically, the history of genocide is assessed. Although it is generally accepted that genocide as a crime genre only came into being during World War II, it is shown in this article that it existed long before the actual term was born. It will be argued here that genocide has been classified as a crime for hundreds of years and has had multiple names in other languages — and was, in fact, known albeit by other terminology. Although some believe the historical origins of genocide as a crime go back even further, it dates back to the nineteenth century at least. This article will explore the link between genocide and crimes against humanity as well as their origins in codified law since 1899. However, it will be argued that they are also found independently of these treaties within customary international law.

A specific focus of this article is the Martens Clause adopted into the Hague Conventions of 1899 and 1907 by a unanimous vote.[2] The Conference was attended by 26 states, nineteen of which were European countries, namely Germany, Austria, Belgium, Denmark, Spain, France, the United Kingdom, Greece, Italy, Luxembourg, Montenegro, the Netherlands, Portugal, Romania, Russia, Serbia, Sweden, Norway, Switzerland and Bulgaria. The rest of the world was represented by only seven countries; the United States, the Ottoman Empire, Mexico, China, Japan, Persia, and Siam.[3] The Martens Clause constitutes an origin of international human rights law in the positivistic sense, and is considered applicable to the whole of international law,[4] and has indeed shaped the development of customary international law. It will be shown that the Martens Clause is a specific and recognised provision giving protection to groups and individuals during both war and peace time.

The Martens Clause, it is argued, "clearly indicates that, behind specific rules as had already been formulated, there lay a body of general principles sufficient to be applied to such situations as had not already been dealt with by a specific rule."[5] Professor Martens originally introduced this clause at the Hague Peace Conference of 1899 because the delegates could not agree on the status of civilians who took up arms against an occupying force.[6] Although the notion was specifically focused on protecting civilians, a much wider use was also intended and has become accepted by many. However, others have argued that it was

[2] See http://www.yale.edu/lawweb/avalon/lawofwar/hague02.htm Last visited 20 August 2006.
[3] C.P.R. Romano, International Justice and Developing Countries: A Quantitative Analysis, 1 The Law and Practice of International Courts and Tribunals 367 (2002).
[4] See C. Weeramantry, Universalising International Law 256 (Dordrecht: Martinus Nijhoff, 2004).
[5] C.G. Weeramantry, Universalising International Law 256 (Dordrecht: Martinus Nijhoff, 2004). Judge Weeramantry also notes that "The Martens Clause has thus become an established and integral part of the corpus of customary international law [under any definition, no matter how narrow]. International law has long passed the stage when it could be debated whether such principles had crystallized into customary international law. No State would today repudiate any one of these principles".
[6] A. Cassese, The Martens Clause: Half a Loaf or Simply Pie in the Sky? 11(1) European Journal of International Law 197–98 (2000).

merely a "diplomatic ploy to paper over strong disagreement between states by skilfully deferring the problem for a future discussion."[7] What is specifically clear and beyond debate is that the original intent in introducing the clause was to provide protections to civilians. The clause had, however, greater significance even then than simply providing protection for civilians during a war, recognising new codified principles of international law and applied protections to civilians in general.

Therefore, a much wider view of the Martens Clause and its significance is that it has allowed international law, particularly customary law, to continue to grow and develop progressively, and to deal with emergency situations and crises within the law (such as those arising from the current "war on terror") without having to wait for slow and sometimes fiercely resisted developments within the flawed world of state practice and treaty law. While it may be contended that the clause is only applicable to international armed conflict, it will be argued that it has relevance beyond that body of law and is in fact the recognition of principles of humanity and other notions found in international human rights law.

The wording of the Martens Clause is seen as the origin of the international legal concept of "crimes against humanity." In fact, Bassiouni asserts that the term "crime against humanity" originates in the preamble to the Hague Convention, and the Nuremberg Charter only brought it into positive international law,[8] arguing that what had become known as "crimes against humanity" was in fact part of the "general principles of law recognized by civilized nations" many years before 1945 and was placed first in the Preamble of the First Hague Convention of 1899.[9] Nelayeva similarly notes that the concept of humanity as victim is closely linked to the Martens Clause.[10] According to Jean Pictet the notion of humanity in this context means the following:

> "[C]apture is preferable to wounding an enemy, and wounding him better than killing him; that non-combatants shall be spared as far as possible; that wounds inflicted be as light as possible, so that the injured can be treated and cured; that wounds cause the least possible pain; that captivity be made as endurable as possible."[11]

In this regard Ticehurst argues that this did not add much to the laws of armed conflict that existed at the time, the safeguards that were provided from then on by the principles of humanity mirroring the protection already available by the doctrine of military necessity.[12] He thus believes these protections to have already been available, the clause merely codifying them. However, while the Martens Clause is specific about the issue of humanity, the law of war, since 1899 at

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[7] A. Cassese, The Martens Clause: Half a Loaf or Simply Pie in the Sky? 11(1) European Journal of International Law 197–98 (2000).

[8] M.C. Bassiouni, Crimes Against Humanity in International Criminal Law (2nd rev ed) 60–61 (Cambridge MA: Kluwer Law International, 1999).

[9] M.C. Bassiouni, Crimes Against Humanity in International Criminal Law (2nd rev ed) 60–61 (Cambridge MA: Kluwer Law International, 1999).

[10] G. Nelayeva, Development of Treaties Concerning Punishment of Individuals for Unlawful Acts of War Committed by Individuals in International Law Found at http://www.idebate.org/magazines/vol2issue3/058icc.pdf

[11] J. Pictet, Development and Principles of International Humanitarian Law 62 (Dordrecht/Geneva: Martinus Nijhoff & Henry Dunant Institute, 1985). Quoted in R. Ticehurst, The Martens Clause and the Laws of Armed Conflict, 317 International Review of the Red Cross 125, 127 (1997).

[12] R. Ticehurst, The Martens Clause and the Laws of Armed Conflict, 317 International Review of the Red Cross 125, 127 (1997).

least, has also considered the necessity of actions taken during a war and the effects of the war. In the preamble to the 1899 Hague Convention (II), State parties agreed that the purpose of the Convention was "to diminish the evils of war, as far as military requirements permit".[13] Fundamentally, these protections relate to crimes against humanity in that they limit the targeting of civilian groups and prohibit causing "widespread or systematic" harm. While these provisions were meant to apply in times of war, they are applicable in the sense that they reflect customary law (as will be discussed).

2. The origins of international law, including customary international law

While it has often been argued that international law originated fairly recently, it has actually existed since the time that organized communities started dealing with one another on a consistent basis. What has changed, however, is the definition and meaning of the concept "international". What the ancient Egyptians or Greeks would have considered "international," would have been very limited, reflecting the world as they knew it.[14] From a "western" perspective, the "world" only really consisted of what we know today as the Middle East, North Africa, and Europe. But as technology developed to enable people to travel more widely, and as they began trading with more or less formalised societies on different continents, the term "international" gradually acquired a global dimension, and international law came to govern many states and societies. At various times, different movements in philosophy and legal theory has interpreted international law to mean the law governing all members of humanity (natural law), different states and their governments (positivistic state law), or some combination thereof.[15] International law originally grew from relations between two or more societies or states and the basic societal norms that had emerged and been written down in the different communities. In other words, local customs gave rise to the rules that had governed trade and other interactions between states. When the customs of two states clashed, conflict ensued; alternatively the customs were adapted to smooth relationships. In many cases, societies found that their general practices and customs were sufficiently similar to be reconciled to the satisfaction of all parties involved. These practices slowly solidified into the fabric of what we now call international law. Nearly all of the great empires and societies have literature that sets down regulations for dealing with other states and visiting diplomats (although the terms utilised may be different than those used today).

The current "law of nations" owes its birth to Hugo Grotius, who, in the seventeenth century, in the aftermath of the Thirty Years War and the fall of the power of the church in favour of the nation-state, developed a theory of law, extending it beyond the individual state.[16] In other words, international law itself is not of recent vintage, its component parts being diverse and including customary law, a fact which is often overlooked in determining what international law was, at a particular time.

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[13] Hague Convention No. II of 1899, *Convention [No. II] with Respect to the Laws and Customs of War on Land, with annex of regulations*, July 29, 1899, 32 Stat. 1803, Reprinted in 1 C. Bevans, Treaties and Other International Agreements of the United States of America, 1776–1949 247 (1968).

[14] See C. Weeramantry, Universalising International Law 16 (Dordrecht: Martinus Nijhoff, 2004).

[15] See C. Weeramantry, Universalising International Law 18 (Dordrecht: Martinus Nijhoff, 2004).

[16] Sergio Moratiel Villa, The philosophy of international law: Suárez, Grotius and epigones, International Review of the Red Cross no 320, 539-552.

Customary law is a critical component of international law. Its role is also important in determining the role and impact of the Martens Clause that was found in both the 1899 and 1907 Hague Conventions. The Statute of the International Court of Justice describes "custom" as "evidence of a general practice accepted as law."[17] It should be noted that "general practice" does not specifically refer to state practice but could include religious, ethnic, cultural, or other practices that are commonly accepted as law. Furthermore, it is not specifically articulated who the practice(s) should be accepted from, implying that any of the following could be the ones to accept a practice as customary law: a small group of highly trained legal professionals and judges, the more powerful nations able to effect enforcement, a majority of state governments, or even a majority of humanity, arguments having been made in favour of each of these entities. In addition, one could take the position that through acquiescence by states, groups, or individuals, a practice itself could become part of customary law.

In fact, there are two main conflicting positions regarding the categorisation of what constitutes customary law. Roberts refers to these opposing stances as the "traditional" and "modern" positions of interpreting customary law. She also identifies the conflict between the scholars who support customary law as narrowly defined by general state practice (what she terms "action") and *opinio juris* (what she terms "statements").[18]

3. The inter-relationship of human rights law, humanitarian law and international criminal law

The general view is that international humanitarian law and international human rights law have been separate and independent of each other. According to this view, humanitarian law and human rights law (if it existed at all) were two distinct domains at the beginning of the twentieth century. The laws of war were only applied to the handling of combatants and non-combatants by their enemies in wartime, whereas international human rights law, in contrast, governed the relationship between states and their citizens in peacetime.[19] Moreover, many argue that the prohibitions articulated in the laws of war would only apply to the "enemy" and suggest that in peacetime a state had relative freedom regarding the treatment of its own people.

However, while humanitarian and human rights law have ostensibly been discrete, they do intersect to some degree,[20] sharing characteristics or convergences stretching back more than a hundred years and even further. It is easy to see in the natural law school, for example, that these concepts have a long and deep tradition within international as well as domestic law, and it is well know that the modern concept of individual rights is a product of Enlightenment theories on human dignity and freedom.[21] These theories have also featured in international law, where, Allen, Cherniack, and Andreopoulos have argued that differ-

[17] ICJ Statute Art. 38 (1) (b); this definition has also been articulated as "constant and uniform usage, accepted as law." ICJ Asylum Case 1950, *Columbia v. Peru*, ICJ Reports 266.
[18] See A. Roberts, Traditional and Modern Approaches to Customary International Law: A Reconciliation, 95 American Journal of International Law 757 (2001).
[19] R.G. Allen, M. Cherniack, and G.J. Andreopoulos, Refining War: Civil Wars and Humanitarian Controls, 18(4) Human Rights Quarterly 751 (1996).
[20] See N.S. Rodley, The Treatment of Prisoners under International Law (2nd ed) 57 (Oxford: Clarendon Press, 1999).
[21] L. Doswald-Beck, and S. Vite, International Humanitarian Law and Human Rights Law, 293 International Review of the Red Cross 102 (1993).

ent branches of international law have had mutual and fundamental concerns about human dignity and welfare.[22] Accordingly, it is recognized that human rights and humanitarian law coincide, regarding the notions of dignity, humanity and necessity, which were specifically brought into the laws of war, and elsewhere, not only by the Martens Clause, but also by other developments that occurred in the nineteenth century.

At this point in treaty law, but possibly earlier in customary law, these different bodies of law began to intersect, Josh Kastenberg noting that the developments post-World War II simply codified existing law.[23] Similarly, Best asserts that a large part of the modern law of war has developed simply as a codification and universalisation of the customs and conventions of vocational/professional soldiering.[24] Greppi has noted that the principle of humanity is at "the very heart of a legal system aimed at providing protection against criminal acts committed by individuals, both in war — whether internal or international — and in peace. This is not only a moral duty, but a basic obligation under international customary law."[25]

4. International humanitarian law today

International humanitarian law comprises two parts; the law of Geneva, which concerns the protection of those who are not part of or are no longer part of the war; and the law of The Hague, which deals with the way warfare is conducted., , When humanitarian law is discussed, however, it is often done so solely in the context of treaty law, and issues of civil liability are not mentioned. This is critical, as the crime committed could also be a tort or delict at the time of its commission, in addition to or independent of whether it is a crime or not. All too often there is a one dimensional view of the different types of law, seeing a particular branch of law as having a limited effect, yet it is clear that a law, or branch of law, often has a public law component as well as a private one.

Human rights law, as Dugard observes, is primarily concerned with the relations between a state and its citizens in times of peace,[26] although with human rights protections not even automatically suspended during wartime human rights law equally applies in times of war.,. Furthermore, while human rights law is often primarily concerned with the relationship between states and individuals, this too can be challenged on the basis that human rights is now also concerned with relationships between individuals, and between individuals and other non-state actors. Dugard further maintains that treaties within the human rights domain are mostly designed to deal with individual violations and not systematic ones,[27] alhough again this cannot be supported, as human rights law is often

[22] R.G. Allen, M. Cherniack, and G.J. Andreopoulos, Refining War: Civil Wars and Humanitarian Controls, 18(4) Human Rights Quarterly 751 (1996).
[23] Kastenberg, J. (2003-2004). "The customary international law of war and combatant status: Does the current executive branch policy determination on unlawful combatant status for terrorists run afoul of international law, or is it just poor public relations?" *Gonzaga Law Review*, 495, 508.
[24] G. Best, Humanity in Warfare: The Modern History of the International Law of Armed Conflict 60 (New York: Columbia University Press, 1980).
[25] E. Greppi, The Evolution of Individual Criminal Responsibility Under International Law, 835 International Review of the Red Cross 531 (1999).
[26] J. Dugard, Bridging the Gap Between Human Rights and Humanitarian Law: The Punishment of Offenders, 324 International Review of the Red Cross 445 (1998).
[27] J. Dugard, Bridging the Gap Between Human Rights and Humanitarian Law: The Punishment of Offenders, 324 International Review of the Red Cross 445 (1998).

concerned with genocide and other types of systematic violations. These types of violations can, and often do occur outside of warfare, thus often falling under human rights law as well as criminal law., hence, there being much more overlap than is generally acknowledged. Critically, criminal law can be used to indicate wrongdoing in the civil arena and in fact can be the basis for a civil law suit. In the same way a human rights action can be brought about on the basis of the violation of criminal law or humanitarian law. What is important here is that this overlap is not recent, but goes back at least a hundred years. This ensures that there were actions for violations that could be brought about in either, or as well as criminal law, civil law, humanitarian law and human rights law. Various crimes that were determined to be criminal in the international domain long ago have had parallel actions in other branches of law which will be explored below.

5. International humanitarian law and international criminal law

The idea of "war crimes" has a long history.[28] International humanitarian law would apply generally through the various treaties if a conflict had been deemed an international armed conflict. However, non international armed conflict is also covered in various ways, such as that which falls under common article 3 of the Geneva Convention. Customary international law is also important, beyond what is contained in those various instruments. While customary law often mirrors what is contained within the treaties, there are certain actions that are actionable in terms of customary law that might not be covered by treaty law.

One of the debates within international law is whether individuals are subject to, and can legitimately claim rights under international law.[29] Until relatively recently, it was argued that individuals had no rights or could not bring any actions in international law, and that international law was accordingly no arena for individuals. Dugard, for example, has noted that international law is "a body of rules and principles which are binding upon states in their relations with one another."[30] Nevertheless, he concedes that although early international law was only concerned with states, this is no longer the case and now other actors fall within its purview.[31] Certainly, there is a commonly held view that when it comes to insurgents and belligerents, international law was seen to have been relevant a long time ago.[32] The question is rather: If the laws of war were the only body of law that existed then, did they only apply to international armed conflict or also to internal armed conflict? The general consensus is that none of the humanitarian law treaties before the 1949 Geneva Conventions had dealt with internal armed conflicts. This view was based on the idea that insurgents should only be entitled to the protection of law when in control of territory and when having sufficient support from the population, which would permit them to "exercise government-type functions".[33]

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[28] See M.C. Bassiouni, Crimes Against Humanity, in: M.C. Bassiouni, (ed.), International Criminal Law, Vol.1, Crimes of War (2nd ed.) 43 (Ardsley, New York: Transnational Publishers, 1999).

[29] See L.S. Sunga, Individual Responsibility in International Law for Serious Human Rights Violations (Dordrecht: Martinus Nijhoff, 1992). See also P.K. Menon, The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine, 1 Journal of Transnational Law and Policy 151 (1992).

[30] J. Dugard, International Law: A South African Perspective 1 (Kenwyn: Juta, 2000).

[31] *Id.*

[32] A. Cassese, International Law 67 (Oxford: Oxford University Press, 2001).

[33] See D. Plattner, Assistance to the Civilian Population: The Development and Present State of International Humanitarian Law, 288 International Review of the Red Cross 246–63 (1992).

Another heavily debated question is whether civilians were protected by humanitarian law before the Geneva Conventions of 1949. Many contend that before then, a member of the armed forces of one state could not commit a war crime against a civilian of another state in the context of an armed conflict.[34] In support of this view, it is argued that the 1907 Regulations did not even mention civilians at all.[35] However, as Plattner notes, "[c]uriously enough, the governments of that time were so sure that it was impossible to intern nationals of a belligerent State who were resident in the territory of the adverse party that they refused to include any such prohibition within those Regulations."[36] Thus, civilians had not been mentioned because it was deemed unnecessary, as the protections already existed.

Another argument justifying the notion that no protections for civilians existed at the time is that protection for civilians was so undeveloped by World War II, that there was no dissension in response to a call for an instrument to protect civilians in periods of war.[37] What is clear is that a body of law existed outside the treaty which included protection for individuals. While there were no specific protections spelled out in codified form, they can be found in the 1868 Declaration of St. Petersburg and the 1899 Hague Convention, these instruments manifestly embracing the idea that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy."[38] In addition, as noted above, customary law to this effect existed as well as *opinio juris*, therefore the only question that can legitimately affect the provisions of these two instruments is whether the norms of the 1864 Geneva and the 1899 Hague Convention applied to non-international conflicts.[39] Howver, it must be rembered that there were various initiatives undertaken during 1864 and 1899 in order to codify international legal principles, including the Brussels Declaration of 1874[40] as well as the Oxford Manual drafted by the Oxford Institute for International law in 1880. Although the Brussels Declaration was never ratified it can be viewed as an important expression of *opinion iuris* concerning the content of the rules of war.

Regarding permissible conduct during wartime, many argue that restrictions on types of warfare date back to the earliest of times and that these limitations were already found in ancient Greek, Roman, Indian, Chinese and other societies, as well as in religious texts.[41] Between 1581 and 1864, European governments signed

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[34] See D. Plattner, Assistance to the Civilian Population: The Development and Present State of International Humanitarian Law, 288 International Review of the Red Cross 246–63 (1992).
[35] See D. Plattner, Assistance to the Civilian Population: The Development and Present State of International Humanitarian Law, 288 International Review of the Red Cross 246–63 (1992).
[36] See D. Plattner, Assistance to the Civilian Population: The Development and Present State of International Humanitarian Law, 288 International Review of the Red Cross 246–63 (1992).
[37] See generally P. Abplanalp, The International Conferences of the Red Cross as a Factor for the Development of International Humanitarian Law and the Cohesion of the International Red Cross and Red Crescent Movement, 308 International Review of the Red Cross 520–49 (1995).
[38] *Declaration of St Petersburg of 1868* to the Effect of Prohibiting the Use of Certain Projectiles in Wartime.
[39] H.S. Levie (ed.), The Law of Non-International Armed Conflict, Protocol II to the 1949 Geneva Conventions (Dordrecht: Martinus Nijhoff, 1987).
[40] http://www.icrc.org/ihl.nsf/0/a59f58bbf95aca8bc125641e003232af?OpenDocument Lasted visited 25 October 2006.
[41] L. Green, International Regulations of Armed Conflicts, in: M.C. Bassiouni (ed.), International Criminal Law, Vol.1, Crimes of War (2nd ed.) 355 (Ardsley, New York: Transnational Publishers, 1999).

about 294 treaties regarding wounded soldiers.[42] An early non-war instrument was the *Paris Declaration Respecting Maritime Law* of 16 April 1856.[43] However, from 1864 at least, international law in its codified form made certain types of conduct illegal during wartime.[44] This was when the *Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field* entered into force.[45] Crucially, in the *Corfu Channel* case[46] of 1949, the ICJ found that Albania's obligation to notify others of the presence of mines was "based, not on the Hague Convention of 1907, No V111, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war".[47] This decision shows that the notion of humanity came not only from the Martens Clause, but also from customary law, which determines these principles to be equally applicable in times of peace. This has been confirmed by the ICTY, which in a *Tadic* ruling in 1995, held:

> "It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflicts. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law."[48]

Interestingly, Dugard notes that at the time of the Anglo-Boer War, which took place in South Africa between 1899 and 1901, humanitarian law was in its infancy, but was nevertheless applicable.[49] He further observes that both parties to the Anglo-Boer War were not parties to the 1864 Geneva Convention or the 1899 Hague Convention, with customary international law applying instead.[50] Humanitarian treaties have only been between states and have often contained *si omnes* clauses providing that only states party to such a treaty would be governed by that treaty, in other words, the treaty only being applied between those states that had agreed to the treaty. Thus, obligations were based on reciprocity; for such an instrument to apply to a particular conflict, all parties within the conflict

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[42] Y. Van Dongen, The Protection of Civilian Populations in Time of Armed Conflict 22 (Groningen: Rijksuniversiteit Groningen, 1991).
[43] www.icrc.org/ihl.nsf/INTRO/105?OpenDocument Lasted visited 25 October 2006.
[44] F. Bugnion, The Role of the Red Cross in the Development of International Humanitarian Law: The International Committee of the Red Cross and the Development of International Humanitarian Law, 5 Chicago Journal of International Law 191, 200 (2004).
[45] The first Geneva Convention was signed by Baden, Belgium, Denmark, France, Hesse, Italy, Netherlands, Portugal, Prussia, Switzerland and Wurtemberg. By 1906 it was signed and ratified by 48 states. G. Best, Humanity in Warfare: The Modern History of the International Law of Armed Conflict 345, fns 34, 36 (New York: Columbia University Press, 1980). See D. Schindler and J. Toman, The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents (4th ed) 205–06 (Leiden/Boston: Martinus Nijhoff, 2004).
[46] ICJ 1949, The Corfu Channel Case, ICJ Reports 4, 22.
[47] ICJ 1949, The Corfu Channel Case, ICJ Reports 4, 22.
[48] ICTY 2 October 1995, *Prosecutor v Tadic*, Appeal on Jurisdiction, 35 ILM 32 para. 141.
[49] J. Dugard, The Treatment of Rebels in Conflicts of a Disputed Character: The Anglo-Boer War and the ANC-Boer War Compared, in: A.J.M. Delissen and G.J. Tanja (eds.), Humanitarian Law of Armed Conflict: Challenges Ahead 447, 448 (Dordrecht: Martinus Nijhoff, 1991).
[50] J. Dugard, The Treatment of Rebels in Conflicts of a Disputed Character: The Anglo-Boer War and the ANC-Boer War Compared, in: A.J.M. Delissen and G.J. Tanja (eds.), Humanitarian Law of Armed Conflict: Challenges Ahead 447, 448 (Dordrecht: Martinus Nijhoff, 1991).

had to be state parties to that particular treaty.[51] Others argue, however, that while international law itself was based on these notions, human rights and humanitarian law "have been said largely to escape from reciprocity because both essentially aim to protect the interests of individuals rather than states".[52] Furthermore, Eide has suggested that because the laws of war are international in origin and human rights law had emerged in the domestic context and was then internationalised, the reciprocal obligations of international humanitarian law does not apply to human rights law.[53] International human rights law is rather about state obligations and does not rest on reciprocal duties. Nationality or national borders are not as relevant as in other branches of international law. A state owes obligations to individuals regardless of where they are. From the nineteenth century states recognised that individuals in other states had rights against their own sovereign and accepted an obligation, at times, to protect those individuals from the state they lived in. Thus, the reach of the *si omnes* clauses in general should not be overstated, as after 1907 these clauses were commonly rejected in treaties.[54] In addition, while *si omnes* clauses went out of favour in treaties after 1907, this is deemed to have occurred even earlier in customary law. However, while *si omnes* clauses were contained within many international treaties, certain commentators do not regard their provisions as applicable to human rights or humanitarian protections, and therefore do not see them as limiting the effect of the 1899 Hague Convention or other relevant treaties in terms of the protection they provide to those not party to these conventions. It is argued that human rights obligations contrarily guarantee individual rights and are not about the reciprocal relations between states.[55]

Crucially, customary international law also applied to the events of the time and there was certainly the notion that civilians were protected, regardless of the type of conflict. In fact, in 1900, Baty stated:

> "[T]he standard in customary law falls somewhat short of the provisions of the Conventions, otherwise no Conventions would have been needed; though it is probably true to say that since the date of the earlier agreements, and to a certain extent in consequence of it, the general law has been sensibly instigated."[56]

Baty's observation about the shortcomings of customary law came months after the drafting of the 1899 Convention, yet currently it is generally recognised that treaty law and customary law converge substantially and that customary law was more advanced, in certain respects. At the very least, as Shelton has stated, "it

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[51] G. Abi-Saab, The Specificities of Humanitarian Law, in: C. Swinarski (ed.), Studies and Essays on International Humanitarian Law and Red Cross Principles 266 (Dordrecht: Martinus Nijhoff, 1984).
[52] [52] R. Provost, International Human Rights and Humanitarian Law 121 (Cambridge: Cambridge University Press, 2002).
[52] A. Eide, The Laws of War and Human Rights—Differences and Convergences, in: C. Swinarski, Studies and Essays on International Humanitarian Law and Red Cross Principles 677 (Dordrecht: Martinus Nijhoff, 1984).
[54] R. Provost, International Human Rights and Humanitarian Law 137 (Cambridge: Cambridge University Press, 2002).
[54] D. Shelton, Remedies in International Human Rights Law (2nd ed.) 97 (Oxford: Oxford University Press, 2005).
[55] T. Baty, International Law in South Africa 79 (London: Stevens & Haynes, 1900).

should be noted that both Hague Conventions declared or stated principles and rules that, in essence, represented then existing customary international law".[57]

While many suggest that civilians, as a category of protected "victims" of armed conflict, were brought rather slowly into the ambit of modern international humanitarian law[58] and protecting civilians was generally kept off the agenda until the 1930s,[59] the origins of their protection can be found right back in at least the nineteenth century.

However, the right of individuals to claim compensation for violations committed during wartime has been in existence for a long time. In 1796, for example, the United States Supreme Court found that private individuals had the right to compensation for acts that had occurred during war.[60] The Court reasoned that rights were "fully acquired by private persons during the war, especially if derived from the laws of war against the enemy alone, and in that case the individual might have been entitled to compensation from the public (…)."[61] In 1891, in the 6th edition of a treatise on international law, Theodore Woolsey stated that a right of redress and compensation for individuals that suffered injury existed.[62] Woolsey also noted a "duty to humanity" and his commentary recognized that cruelty "beyond the sphere of humanity" violated certain rights and demanded redress.[63]

The protection of the victims of war was the basis of the laws of Geneva and The Hague. While the Hague Conventions are primarily concerned with the way war is conducted and the methods of war, the distinctions between them and the laws of Geneva have become blurred, both having their origins in the protection of those involved in warfare and those considered victims from certain types of conduct.

The International Court of Justice has noted that these nineteenth century processes have developed and reflected the customary international law position, the *Advisory Opinion on the Legality of Nuclear Weapons* of July 8, 1996 finding:

> "A large number of customary rules have been developed by the practice of States and are an integral part of the international law relevant to the question posed. The "laws and customs of war" as they were traditionally called were the subject of efforts at codification undertaken in The Hague (including the Conventions of 1899 and 1907), and were based partly upon the St. Petersburg Declaration of 1868 as well as the results of the Brussels Conference of 1874."[64]

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[57] D. Shelton, The World of Atonement Reparations for Historical Injustices, 1(2) Miskolc Journal of International Law 290 (2004).
[57] H. McCoubrey, International Humanitarian Law (2nd ed) 26 (Vermont, USA: Ashgate, 1998).
[58] Y. Van Dongen, The Protection of Civilian Populations in Time of Armed Conflict 1 (Groningen: Rijksuniversiteit Groningen, 1991).
[60] *Ware v Hylton*, 3 U.S. (3 Dall.) 199 (1796). The court reports Dall are named for court reporter Alexander J. Dallas.
[61] *Ware v Hylton*, 3 U.S. (3 Dall.) 199, 279 (1796).
[62] Woolsey, T.S. (1891). *Introduction to the study of international law* (6th ed). New York: Charles Scribner's Sons, 17-8.
[63] Woolsey, T.S. (1891). *Introduction to the study of international law* (6th ed). New York: Charles Scribner's Sons, 17-8.
[64] ICJ 8 July 1996, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports, para. 75.

6. Which crimes were violations of international law in the nineteenth century?

It is clear that a whole range of crimes related to what could be done by warring parties were already violations of international law in the nineteenth century. In treaty law one finds many of these proscriptions from 1864, and one can argue that some rules outlawing certain types of conduct during wartime were found even earlier through the acceptance by states that certain types of conduct were unacceptable. One of the earliest prohibitions was that no quarter was to be given, its prohibition found in the United States of America's Lieber Code.[65] That in itself does not mean that it was a universal or widely accepted set of principles, but the fact that it was copied by many other countries, however, was very important[66] and thus is probably indicative of customary law at the time. That it was so widely accepted is reflected in the fact that the prohibition was also included in the Land Warfare Regulations annexed to the 1899 Hague Convention (Articles 4 - 20). [67] Now, while the 1899 Convention, which had been adopted unanimously[68] at the time, was replaced in 1907, its provisions were incorporated. and the 1907 Convention which supplanted remains very much part of international law today and is still often referred to. For example, UN Security Council Resolution 1483 called on States to observe their obligations under the four Geneva Conventions of 1949 and the Hague Regulations of 1907.[69] A number of provisions in the 1899 Convention had prescribed certain types of actions and activities,[70] article 3 of the Convention stating that the "armed forces of the belligerent parties may consist of combatants and non-combatants, where in the case of capture by the enemy both have a right to be treated as prisoners of war", article 4 stipulating that prisoners of war "are in the power of the hostile Government, but not in that of the individuals or corps who captured them. They must be humanely treated. All their personal belongings, except arms, horses, and military papers remain their property", article 6 holding that while prisoners of war could be made to work, the work could not be excessive and they had to be paid it and article 7 noting that the "Government into whose hands prisoners of war have fallen is bound to maintain them," and that "[f}ailing a special agreement between the belligerents, prisoners of war shall be treated as regards food, quarters, and clothing, on the same footing as the troops of the Government which has captured them."

It is clear that the conduct described in the various articles was already deemed to be criminal and proscribed by international agreement long before the treaties. The treaties were reflective of what customary law was, yet not entirely, as those treaties reflected the specific agreements that could be reached between states, and where there was no agreement the treaty remained silent on the point. This does not mean that international law was silent on these questions but sim-

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[65] Instruction for the Government of the United States in the Field by Order of the Secretary of War, Washington D.C., April 24 1863. See I Detter Delupis, (1988). *The law of war.* Cambridge: Cambridge University Press, 259.

[66] M.C. Bassiouni, Crimes Against Humanity in International Criminal Law (2nd rev ed) 64 (Cambridge MA: Kluwer Law International, 1999).

[67] *Law and Customs of War on Land* (Hague, II), July 29, 1899, 32 Stat. 1803, T.S. No. 403. Reprinted in 1 C. Bevans, Treaties and Other International Agreements of the United States of America, 1776–1949 247 (1968).

[68] V. Pustogarov, Fyodor Fyodorovich Martens (1845–1909): A Humanist of Modern Times, 312 International Review of the Red Cross 300, 310 (1996).

[69] U.N. Security Council, *Resolution 1483*, para. 5 (May 22, 2003).

[70] See further D. Schindler and J. Toman, The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents (Alphen aan den Rijn: Sijthoff & Noordhoff, 1981).

ply that it could not be agreed as to how the specific issue or rule ought to be codified. Regardless of whether treaty law contained provisions on the issues, international customary law recognized these violations as transgressions of international law.

7. International human rights law

It is often argued that international human rights law before the twentieth century did not appear as a distinct set of rules within the law of nations, and that it was not recognised as a branch of international law, although this is an extremely narrow view. Doswald-Beck and Vite have pointed out that international humanitarian law is progressively being perceived as a part of human rights law that is applicable in times of armed conflict.[71] Similarly, Bertrand Ramcharan, the former acting High Commissioner for Human Rights, has stated that international human rights law and international humanitarian law are parallel and complementary branches of international law.[72]

Certain commentators differ about when international human rights law and humanitarian law came to the fore, most agreeing that international humanitarian law came into being around the middle of the nineteenth century and that international human rights law was really a post-World War II development, but the fact is international human rights law considerably predates World War II; not only can it be found in various non-war agreements before World War II,[73] it can also be found in different societies in ancient times.

The clearest examples of international criminal law in the nineteenth century were the prohibitions against piracy and the slave trade[74] and the international protection for minorities.[75] There was an acceptance that piracy and the slave trade were prohibited and that punishment for such transgressions could and should, occur. There were a number of related treaties, in addition to the existence of these principles in customary law and it was also accepted that minorities, in other states, were protected, with possible penalties for violations committed against these groups. This will be discussed more fully below. These were no exceptions but an intrinsic development of international law that brought into clear focus protection for individuals and groups previously seen to be outside the purview of this body of law. In this regard, Bassiouni observes that the regulation of war since the end of the nineteenth century occurred through conventions, customs, and the affirmation of "general principles of law."[76] Bassiouni notes that the norms and standards that developed then served to protect prisoners of war, the sick, the injured, the shipwrecked, and crucially the civilian population, which

[71] L. Doswald-Beck, and S. Vite, International Humanitarian Law and Human Rights Law, 293 International Review of the Red Cross 94 (1993).
[72] B. Ramcharan, The United Nations High Commissioner for Human Rights and International Humanitarian Law, Program on Humanitarian Policy and Conflict Research, 3 Harvard University Occasional Paper Series 1 (2005, Spring).
[73] G.I.A.D. Draper, The Relationship Between the Human Rights Regime and the Law of the Armed Conflicts, Israel Yearbook on Human Rights 192 (1971).
[74] T.J. Farer, The Laws of War 25 Years after Nuremberg, 585 International Conciliation 9 (1971, May).
[75] W.A. Schabas, Genocide in International Law 15 (Cambridge: Cambridge University Press, 2000).
[76] M.C. Bassiouni, Enslavement as an International Crime, 23 New York University Journal of International Law and Politics 445–46 (1991, Winter)

was safeguarded from slave labour, forced labour, and civilian deportation.[77] It is clear that civilians were brought under the protection available at an international law level in the law of armed conflict, but also outside it. Standards and norms had developed before the end of the nineteenth century outside of the law of armed conflict to protect individuals a state was unwilling or unable to and treaties were adopted on a range of issues and various specific steps were taken to actually provide such protection. It was not simply the rhetoric of states but the actual practice itself.

Hence, international law at the beginning of the twentieth century applied to states as well as individuals or groups. Some argue that various treaties in the nineteenth century provided protection of human rights but did not create individual human rights enforcement provisions at an international level, the protection limited to the international obligations between states in respect of the treatment of individuals and groups. Judge Richard Goldstone, for instance, contends that before World War II "individuals had no standing in international law."[78] Again, this is a limited perspective, as at that time individuals could already approach certain international courts and certainly raise such issues before domestic courts (as is the case today). It does not take into account that individuals enjoyed certain rights at an international law level at the beginning of the twentieth century, many years prior to World War II, and before the establishment of international courts. The argument that, given the absence of the recognition of individual rights, human rights did not exist in international law before World War I does not hold.[79] There were protections available both in the theory and practise of international law at the time for individuals and groups, individuals already able to take steps to enforce these protections themselves and not obliged to rely on their own state to take steps or come to an agreement with a violator state for the individuals concerned.

One of the arguments commonly raised is that there was no enforcement mechanism to enable individuals to secure their rights in international law before the end of World War II. It is argued that the Hague Conventions of 1899 and 1907 had no specific or explicit provisions on punishing individuals who had violated their articles[80] and because there was no international criminal court system or procedure to hold individuals accountable, prosecutions before Nuremberg primarily took place at a domestic level. However, there were a few prosecutions at a domestic level of crimes deemed violations of both Conventions. This does not mean that international law on these issues did not exist, but rather that the prevalence of a strong philosophy of nation-state sovereignty meant that individual states were expected to deal with the crimes of their own nationals and those in their custody who had committed crimes against them. However, it must be remembered, as McCormack has noted, that by the end of the nineteenth century there was a "growing recognition and acceptance of the principle of individual culpability for violations of the international law of war crimes."[81]

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[77] M.C. Bassiouni, Enslavement as an International Crime, 23 New York University Journal of International Law and Politics 445–46 (1991, Winter)

[78] R.J. Goldstone, International Human Rights and Criminal Justice in the First Decade of the 21st Century 11 *Human* Rights Brief 3 (2004).

[79] P.N. Drost, Human Rights as Legal Rights 17 (Leiden: A.W. Sijthoff, 1965).

[80] E. Greppi, The Evolution of Individual Criminal Responsibility Under International Law, 835 International Review of the Red Cross 531–53 (1999).

[81] T.L.H. McCormack, Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law Albany Law Review 681, 682 (1997).

That there were no international prosecutions is due to the lack of an international mechanism for the enforcement of such crimes. While there was an attempt to prosecute the Kaiser after World War I and nearly 1000 others that were deemed to have committed violations of international law,[82] a court would have had to have been established, with the alternative being that the Kaiser and the others be tried before the domestic courts of one of the allied powers.

The 1918 Treaty of Versailles gave rights to individuals in international law to claim reparations. and established tribunals to which individuals had direct access to claim for reparations or restitution of property.[83]

The enforcement argument itself is a limited and self defeating one. While there was accountabilty to some degree for states at an international level in the civil sense before such courts as the Permanent Court of International Justice and the International Court of Justice, there had been no institution enforcing international law in the individual criminal sense for nearly the whole of the twentieth century, that is until relatively recently. While many argue that the post World War II trials were the beginning of international criminal legal enforcement, in reality the mechanism only lasted a few years, and was only directed at Germany and Japan,,international only in the sense that four countries had agreed to it and participated in it, these countries alone drafting and enforcing the law. However, from the 1950s to the mid 1990s there was no similar international criminal enforcement mechanism, and in fact it was only with the formation of the International Criminal Court and its coming into force in 2002, that there was a fully international mechanism at an international level to prosecute those accused of committing international crimes. It can be argued that there were enforcement mechanisms from 1993 with the International Criminal Tribunals for Yugoslavia and Rwanda, which convicted perpatrators for, inter alia, genocide, crimes against humanitya and war crimes, although these institutions had a very narrow focus in terms of time frame and geography. They were not institutions that could deal with such crimes from all around the world, and they only dealt with issues relating to a specific country and for very limited periods of time.

Thus, before and after Nuremberg, until at least the 1990s, there had been no international court system to prosecute those accused of the commission of such crimes as genocide and crimes against humanity, or to provide deterrence sufficient to stop their violation. This does not mean that the proscribed conduct was not criminal; it was, and what was outlawed in 1899, and at other times, is clear today because of the subsequent interpretations. Regardless of whether the 1899 Hague Conventions afforded rights to individuals, it does not obviate the fact that crimes were committed after these Conventions had come into force, and those states party to such instruments would be liable in terms of those Conventions, despite there being no mechanism to examine or adjudicate those matters.

The supposed absence of international enforcement machinery does not negate the existence of the law itself. Before the establishment of the ICTR, the ICTY, and more recently the ICC, the rules of customary international law and the Hague Conventions had been recognised and applied in domestic courts. The

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[82] See L.S. Sunga, Individual Responsibility in International Law for Serious Human Rights Violations (Dordrecht: Martinus Nijhoff, 1992), 23.

[83] Sohn, L.B. & Buergenthal, T. (1973). *International protection of human rights.* Indianapolis: Bobbs-Merrill, 9.

latter, at times, used these international standards in the same way as the majority of cases in which international law was applied., those standards applied to prosecuting prisoners of war responsible for committing violations during World War I, for example, with France and later Germany having already applied these standards during it.[84] Thus, international law and more specifically international criminal law relying on the Hague Convention, was applied shortly after the early Hague Conventions had come into being. That the Hague Convention contained no enforcement mechanism was not even deemed a hindrance to prosecuting or punishing those found guilty of crimes resorting under these bodies of law at the time.[85] That there was no enforcement mechanism limited international prosecutions, but this was true until 2002. In fact, as some countries have not signed or ratified the Rome Statute, most notably the United States of America, not every person who commits an international crime can be brought before the court. However, it does not mean that if a country has not become a party to the treaty, its citizens cannot be brought before the court, there being ways for citizens of a country that is not a party to be prosecuted before the court. What is interesting is that the debate on the enforcement issue is not used to debate the same questions in regard to humanitarian law, and indeed there had been no mechanism to enforce humanitarian law until the 1990s or 2002, although this fact is not used to argue that humanitarian law was not enforceable and thus of limited use.

The rights of individuals in international law and their right to claim compensation or reparation had however received recognition in 1907, when individuals were even given standing before the International Prize Court in terms of the Convention on an International Prize Court of October 18, 1907, where individuals were to be able to approach the court in relation to property. However, insufficient ratifications occurred and the treaty did not come into effect. In 1907, a Central American Court of Justice was also established by Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua. The Court operated from 1908 to 1918 and permitted a range of actors, including individuals, to bring complaints against states other than their own country.[86] This was no aberration in granting rights and providing procedures to individuals to claim reparations from states in international law. In 1928 an international court accepted that international rights and duties could be conferred or imposed on individuals by treaty, this occurring when the Permanent Court of International Justice handed down its ruling *Opinion on the Jurisdiction of the Courts of Danzig*.[87] The decision recognised that individuals were within the ambit of international law,[88] thus while there is the general belief that international law had not dealt with individuals, until relatively recently the situation had been quite different and international law and international

[84] T.J. Farer, The Laws of War 25 Years after Nuremberg, 585 International Conciliation 10 (1971, May).
[85] G.I.A.D. Draper, The Relationship Between the Human Rights Regime and the Law of the Armed Conflicts, Israel Yearbook on Human Rights 191 (1971).
[86] Randelzhofer, A. (1999). "The legal position of the individual under present international law". In Randelzhofer, A. & Tomuschat, C. (eds), *State responsibility and the individual: Reparations in instances of grave violations of human Rights*. The Hague: Martinus Nijhoff, 231, 238-39.
[87] P.C.I.J. (1928) Series B, No 15, at 16-24.
[88] Sohn, L.B. & Buergenthal, T. (1973). *International protection of human rights*. Indianapolis: Bobbs-Merrill, 10.

institutions had given recognition to individuals and their rights at least one hundred years ago.

Critically, while some doubt the connection between humanitarian law, human rights law and criminal law, it is clear that the humanitarian consideration that infused the law of war contains the "parentage" of human rights law.[89]

8. The responsibility of states under specific treaties to uphold human rights

The argument that international human rights law did not exist in the nineteenth century rests on the notion that states by then had not accepted that they were under the obligation to protect individuals, and that the protection in place was not widely acknowledged. However, besides the protection that had already existed in customary law there had been a whole host of treaties which had already prohibited violations against individuals and groups at that time. It has been noted that a study of the historical sources of customary international law indicates that European states, from 1884 to 1915, already had duties to protect colonised peoples under rules of natural law, as well as under treaties such as the Berlin West Africa Convention, the Anti-Slavery Convention and the Hague Convention on the Laws and Customs of War on Land.[90] There is also evidence that wars of annihilation were violations of international law as early as 1878.[91]

An important treaty was the 1878 Treaty of Berlin, which provided rights for indigenous peoples. The Treaty has been hailed as the "most important international body concerned with minority rights prior to 1919."[92] It was particularly important from a human rights standpoint, as it permitted states to intervene where there was non-compliance.[93] The acceptance of minority rights at this time is also seen to have coincided with the evolving notion of sovereignty, which, while having been vested in the ruler, was shifting towards the people.[94] Thus, the conceptutalisation and belief in the notions of protection that international law was providing to groups and individuals at this time was on the rise.

A significant treaty was the Berlin Conference Treaty of 1885, where not only the rights of individuals and groups came to the fore, but protection was also being extended to those outside Europe.. Various obligations flowed from the General Act, the most important provision with regard to local inhabitants being Article 6, which ran as follows:

> "*Provisions Relative to the Protection of the Natives, of Missionaries and Travellers, as well as to Religious Liberty.*
>
> All the Powers exercising sovereign rights or influence in the aforesaid territories bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being, and to help in suppressing slavery, and especially the Slave

[89] L. Doswald-Beck, and S.Vite, International Humanitarian Law and Human Rights Law, 293 International Review of the Red Cross 99 (1993).
[90] R. Anderson, Redressing Colonial Genocide Under International Law: The Hereros' Cause of Action Against Germany, California Law Review 1155, 1169 (2005, July).
[91] R. Anderson, Redressing Colonial Genocide Under International Law: The Hereros' Cause of Action Against Germany, California Law Review 1155, 1169 (2005, July).
[92] C. A. Macartney, *National States and National Minorities*. New York: Russell & Russell, 1968 166.
[93] I Claude, I. (1955), National Minorities: An International Problem. Cambridge: Harvard University. Press. 8-9.
[94] Jennifer Jackson Preece, Minority Rights in Europe: from Westphalia to Helsinki, 23 Review of International Studies (1997), 75-95.

> Trade. They shall, without distinction of creed or nation, protect and favour all religions, scientific or charitable institutions, and undertakings created and organized for the above ends, or with aim at instructing the natives and bringing home to them the blessings of civilisation . . . Freedom of conscience and religious toleration are expressly guaranteed to the natives, no less than to subjects and to foreigners."

The 1885 Berlin Act therefore promised to "watch over the preservation of the native tribes, and to care for the improvement of their moral and material well-being, and to help in suppressing slavery."[95] The agreement contained in the Berlin Treaty was not the only one; the 1890 Anti-Slavery Convention, also known as the Brussels Act of 1890, also noted these concerns and committed 17 nations to "efficiently protecting the aboriginal population of Africa."[96] The fact that so many states at the time signed these treaties indicates that many states shared the conviction that slavery, as well as other human rights violations, were prohibited under international law.

Although indigenous groups were not signatories to these treaties, they were seen to have been protected by them, Anderson, for example, contending that the various Conventions conferred rights on groups because of the third-party beneficiary doctrine,[97] argues that the parties to these treaties intended to grant specific protections to the African populations. While Anderson does not deal with the questions of reciprocity or *si omnes* clauses (which determine that such treaties are only applicable to the state signatories), the understanding that human rights clauses would not be limited by such questions seems to be implicit. If that is the case, then the notion of a third-party beneficiary doctrine could certainly be relevant, if the notion of a third party beneficiary was known at the time. However, Anderson's argument that the signatories of these treaties specifically intended to protect the local population and to provide a means for redress, is more relevant. She shows that the drafting process of the 1885 Convention clearly confirmed that the intention of the drafters was to create "a duty of protection under international law that *de facto* criminalizes the intentional annihilation of indigenous peoples of Africa."[98]

9. The origins of crimes against humanity

Although many argue that crimes against humanity entered international jurisprudence as a result of the Nuremburg Charter, its origins can be found much earlier. In fact the origins of such a crime, and it being a human rights violation, go back in treaty law at least until 1899, and if not further back in customary law. This is what Justice Robert H. Jackson, the Chief Prosecutor at Nuremburg, argued in 1945. While it could be said that he did this to justify the proscription of such events at the time, and so as not to fall foul of the general prohibition against retrospective penal legislation, it is clear that it was not his opinion alone. Arguing that the "crimes against humanity" were proscribed long before Nuremburg, Jackson noted that "atrocities and persecutions on racial or religious grounds" were already outlawed under general principles of domestic law of civilized states and that "[t]hese principles [had] been assimilated as a part of International Law since at least 1907."[99] According to Paust,

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[95] *General Act of the Conference of Berlin*, February 26, 1885.
[96] *General Act of the Brussels Conference*, July 2, 1890.
[97] *General Act of the Brussels Conference*, July 2, 1890.
[98] *General Act of the Brussels Conference*, July 2, 1890.
[99] Quoted in T.J. Farer, Restraining the Barbarians: Can International Criminal Law Help? 22(1) Human Rights Quarterly 90–117 (2000, February).

Jackson relied on the Martens Clause for this assertion.[100] The ICTR, too, has noted that "the concept of crimes against humanity had been recognised long before Nuremberg."[101]

The roots of crimes against humanity and the protection of individual rights in general have been traced to the teachings of Socrates, Plato, and Aristotle and to the notion of natural law,[102] the origins certainly dating back further than 1864 and 1899. In the Middle Ages, and certainly by the nineteenth century, international law was developing a doctrine of the legitimacy of "humanitarian intervention" in cases in which a State committed atrocities against its own subjects that "shocked the conscience of mankind."[103] Jorgensen notes that from the Enlightenment on, the principles protecting "humanity began to seep into the international system."[104] In the sixteenth century, it was stated:

> "[Taking prisoners] is permissible. This fact is evident by the *jus gentium*. No (authority) censures this practice, nor does any condemn the captor to make restitution, on the contrary, such captors may retain these men until the latter are ransomed. Secondly (…) it is no longer permissible to slay them, for they are captives; nor is slaughter needful to the attainment of victory."[105]

This is not an isolated example — there is evidence aplenty of generally accepted and respected codes regarding the way war should be conducted and who could be attacked. The same is true for conduct outside what is considered 'classical war'.

Linked to this is the fact that the prosecution of those accused of international crimes has occurred for hundreds of years. One example is that of William Wallace, who was tried and convicted in 1305 by an English court for "crimes offending humanity" and "excesses in war, sparing neither age nor sex, monk or nun."[106] However, the trial of Peter von Hagenbach in 1474 is generally regarded as the earliest known international trial for war crimes or crimes against humanity,[107] Von Hagenbach being prosecuted before judges from various countries for having "trampled underfoot the laws of God and man."[108] Ögren sees the Articles

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[100] J. Paust, Threats to Accountability After Nuremberg: Crimes Against Humanity, Leader Responsibility and National Fora, 12 New York Law School Journal of Human Rights 545 (1995).
[101] ICTR 2 September 1998, *Prosecutor v Jean-Paul Akayesu*, Judgment, Trial Chamber 1, para. 565.
[102] O. Swaak-Goldman, Crimes Against Humanity, in: G.K. McDonald and O. Swaak-Goldman (eds.), Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts, Vol. I. 143–168 (The Hague/London/Boston: Kluwer Law International, 2000).
[103] P. Sieghart, The International Law of Human Rights 13 (Oxford: Clarendon Press, 1983).
[104] N.H.B. Jorgensen, The Responsibility of the States for International Crime 123 (Oxford: Oxford University Press, 2000). See further L. Gross, The Peace of Westphalia, 1648–1948, 42 American Journal of International Law 20 (1948).
[105] J.B. Scott, The Spanish Origin of International Law—Francisco de Vitoria and His Law of Nations App. F, cxxiv (London: Humphrey Milford, 1934). Quoted in L.C. Green, Cicero and Clausewitz or Quincy Wright: The Interplay of Law and War, 9 United States Air Force Academy Journal of Legal Studies 60 (1998/1999). Green cites many examples indicating the origins and situations in which these norms were stated and upheld.
[106] G. Schwarzenberger, The Judgment of Nuremberg, 21 Tulane Law Review 330 (1947). Also in T.L.H. McCormack, Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law, Albany Law Review 681 (1997).
[107] See further M.C. Bassiouni, The Time Has Come for an International Criminal Court, 1 Indiana International & Comparative Law Review 1 (1991). See also G. Schwarzenberger, International Law as Applied by International Courts and Tribunals, Vol. II: The Law of Armed Conflict 15 (London: Stevens, 1968).
[108] E. Greppi, The Evolution of Individual Criminal Responsibility Under International Law, 835 International Review of the Red Cross 531–53 (1999).

of War decreed in 1621 by King Gustavus II Adolphus of Sweden as giving us "an idea of what existed in the way of humanitarian law before the publication of Grotius' *De Jure Belli ac Pacis* in 1625 and appear to have been inspired by Gentili's 1612 *De Jure Belli*."[109] The Peace of Westphalia, which ended the Thirty Years' War in 1648, also represents one of the origins of the international community's censure for such persecution as well as the origins of international protections for minorities living in other countries.[110] While these events can be seen to fall generally within the boundaries of humanitarian law, there is much which overlaps with human rights law, including specific protection for minority groups. As will be seen, crimes against humanity had already existed inside as well as outside of treaty law, the fact that it had already existed outside meaning it must be located in criminal and human rights law.

That international law already contained human rights as a component part in the sixteenth and seventeenth centuries can be seen by the fact that various treaties had been entered into among European nations agreeing to the protection of the rights of various peoples, including the Treaty of Ausburg of 1555, the Treaty of Olivia of 1660, the Treaty of Nymegen in 1678, the Treaty of Ryswyck in 1697 and the Vienna Congress in 1815. Other similar agreements included the Treaty of Paris of 1856, creating obligations to the people of Walachia, Moldavia, and Serbia, and the Treaty of Berlin in 1878, which included a guarantee by Turkey to protect Armenians and defend religious liberties. The Treaty of Paris of 1898, which ceded Puerto Rico and the Philippines from Spain to the United States, also provided protection to minority groups.

The nineteenth century saw the notion of the protection of humanity contained in the St. Petersburg Declaration of 1868, the Brussels Conference of 1874 subsequently adopting a protocol which repeated and expanded the principles of the Declaration.

Even before 1899, the expressions "crimes against humanity" or "laws of humanity" were used in various other contexts, for example in 1775, when in similar wording to the Martens Clause, the Declaration by the Representatives of the United Colonies of North America, Now Meeting in General Congress at Philadelphia, Setting Forth the Causes and Necessity of Their Taking Up Arms declared:

> "[A] reverence for our great Creator, principles of humanity, and the dictates of common sense, must convince all those who reflect upon the subject, that government was instituted to promote the welfare of mankind, and ought to be administered for the attainment of that end."[111]

Similar language was used in various other contexts in the United States, including in a number of court cases.[112]

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[109] K. Ögren, Humanitarian Law in the Articles of War Decreed in 1621 by King Gustavus II Adolphus of Sweden, 313 International Review of the Red Cross 438 (1996).

[110] L. Glauner, The Need for Accountability and Reparation: 1830–1976. The United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans, 51 Depaul Law Review 911, 919 (2002, Spring). See Also L. Gross, The Peace of Westphalia, 1648–1948, 42 American. Journal of International Law 20, 20 (1948).

[111] Journals of the Continental Congress—*Declaration by the Representative of the United Colonies of North America, Now Meeting in General Congress at Philadelphia, Setting Forth the Causes and Necessity of Their Taking Up Arms* (July 6, 1775).

[112] See President James Monroe Eighth State of Nation, Washington, DC, 7 December 1824; President Martin Van Buren Inaugural Address Washington, DC Monday, March 4, 1837 . Bram v. United States, 168 U.S. 532 (1897); Weeks v. U.S., 232 U.S. 383 (1914)

The British Secretary of State, John Thossell, explaining the reasons for the intervention in 1860, noted: "It is hoped that the measures now taken may vindicate the rights of humanity."[113] In 1874, George Curtis likewise referred to the "the laws of humanity" with respect to slavery in the United States.[114] When revolts against misrule and persecution in the Ottoman Empire in the late 1870s were met with killings, looting, rapes, burning, pillaging and torture, it was noted that these were the "most heinous crimes that had stained the history of the present century."[115] William Gladstone, the future British Prime Minister, condemned these actions and used the term "humanity."[116]

At least some recognised and accepted crimes against humanity as crimes at the beginning of the twentieth century. In 1901, the NGO the *Ligue des Droits de l'Homme* published its first document for "all humanity."[117]

Thus, it is clear that there were accepted and state practised protections available in international law for groups and individuals, which were widespread rather than aberrations. The practises indicate that these protections were not a new phenomenon. Again with "crimes against humanity", it seems that there were prohibitions long before the twentieth century, and the language in use by states and others incorporated the usage of principles of humanity and accepted that what was done in violation of this principle was a transgression of the law.

10. The Martens Clause – connecting war crimes and crimes against humanity

The legal origin of the concept of crimes against humanity in codified international law is the Martens Clause of the 1899 Hague Convention II and the 1907 Hague Convention IV. The fact that the clause was unanimously adopted indicates the agreement of participating states on the matter. The Clause runs as follows:

> "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience."

The 1907 version of the clause saw "populations" replaced by "inhabitants," "law of nations" replaced by "international law," and "requirements" changing to "dictates."[118] The "laws of humanity" referred to in earlier versions of the Martens Clause later became the "principles of humanity."[119] Some believe that these

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[113] P.G. Lauren, The Evolution of International Human Rights 66 (Philadelphia: University of Pennsylvania Press, 1998).
[114] J.R.W.D. Jones, The Practise of the International Criminal Tribunals for the Former Yugoslavia and Rwanda 49 (Irvington-on-Hudson, NY: Transnational Publishers, 1998).
[115] P.G. Lauren, The Evolution of International Human Rights 66 (Philadelphia: University of Pennsylvania Press, 1998).
[116] P.G. Lauren, The Evolution of International Human Rights 75 (Philadelphia: University of Pennsylvania Press, 1998).
[117] P.G. Lauren, The Evolution of International Human Rights 75 (Philadelphia: University of Pennsylvania Press, 1998).
[118] T. Meron, The Martens Clause, Principles of Humanity, and Dictates of Public Conscience, 94 American Journal of International Law 78, 79 (2000).
[119] E. Kwakwa, The International Law of Armed Conflict: Personal and Material Fields of Application 36 (Dordrecht: Kluwer Academic, 1992).

terms are not identical or interchangeable. However, De Guzman comments on the link between "laws of humanity" and "crimes against humanity,"[120] and Ticehurst, among others, has noted that "principles of humanity" is synonymous with "laws of humanity."[121] Orentlicher, too has noted that the clause is "the most important legal wellspring" of 'crimes against humanity.'[122] Cassese has argued that what the Martens Clause did was to ensure that the notion of laws of humanity was accepted in treaty law, noting that while international treaties and declarations had earlier proclaimed the role of such laws, the Martens Clause accepted that there were laws, principles or rules of customary international law in a specific treaty, that resulted not only from state practice, but also from laws of humanity and the dictates of public conscience.[123] Thus, the Martens Clause was not the origin of the principles of humanity but rather the specific acceptance by states in treaty form that these rules existed, and did so outside of treaty law. However, the role, meaning, and extent of the Martens Clause have been debated extensively, and it has been described as "ambiguous and evasive,"[124] with various meanings having been ascribed to the clause and its effects. Primarily due to the wording of the clause, many see the Martens Clause as the official originator in positive conventional or codified international law of the notion of "crimes against humanity." Before 1899, issues of morality had not been translated into international legal rules in the positivist tradition. This seems to have changed subsequently, with Meron, for instance, stating that the humanising strand within the law of war is epitomized by the Martens Clause,[125] with it having effect and relevance outside of the laws as well. The Clause was also about the international community's acceptance in treaty form that humanity was protected in different ways from different types of conduct within both treaty law as well as customary law.

The specific link between the Martens Clause, the notion of "crimes against humanity," and the development of human rights law is apparent from the events of World War I, the May 1915 declaration from Great Britain, France, and Russia about the occurrences in Armenia using the term "crimes against humanity",[126] and the joint declaration condemning the massacre of Armenians as "crimes against humanity and civilisation for which all members of the Turkish Government will be held responsible together with its agents implicated in the massacre."[127] The concept was also used by the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties for Violation of the

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[120] M.M. De Guzman, The Road from Rome: The Developing Law of Crimes Against Humanity, 22(2) Human Rights Quarterly 344 (2000).
[121] R. Ticehurst, The Martens Clause and the Laws of Armed Conflict, 317 International Review of the Red Cross 125, 127 (1997).
[122] D. Orentlicher, The Law of Universal Conscience: Genocide and Crimes Against Humanity (1998). Paper presented at the Committee on Conscience conference Genocide and Crimes Against Humanity: Early Warning and Prevention, at the United States Holocaust Memorial Museum, available at www.ushmm.org/conscience/events/conference_98/orentlicher.pdf. Last visited 20 August 2005.
[123] A. Cassese, The Martens Clause: Half a Loaf or Simply Pie in the Sky? 11(1) European Journal of International Law 188 (2000).
[124] R. Ticehurst, The Martens Clause and the Laws of Armed Conflict, 317 International Review of the Red Cross 125, 127 (1997).
[125] T. Meron, The Humanization of Humanitarian Law, American Journal of International Law 239, 245 (2000, April).
[126] J. Shamsey, Comment: 80 Years Too Late: The International Criminal Court and the 20th Century's First Genocide, 11 Journal of Transnational Law & Policy 327, 369 (2002, Spring).
[127] B. Cooper (ed.), War Crimes: The Legacy of Nuremberg 57 (New York: TV Books, 1999).

Laws and Customs of War, which also classified the impugned events as criminal, the Commission finding that "in spite of the explicit regulations, of established customs, and of the clear dictates of humanity, Germany and her Allies have piled outrage upon outrage."[128] Thus, it used the Hague Conventions, the Martens Clause, as well as customary law, as the basis for concluding that prosecutions would be justified. It also saw that violations could be prosecuted as "crimes" within the concept of the "laws of humanity".[129] Hill, in 1917, noted that "even in the efforts to overcome an armed foe the principles of humanity are considered by all civilised peoples to have a binding authority."[130]

The Versailles Treaty provided the prosecution of the Kaiser for these types of crimes, article 227 of the treaty providing the creation of a tribunal and establishing the individual responsibility of the Kaiser for "a supreme offence against international morality and the sanctity of treaties." Thus, the provision was not for war crimes, but other international crimes, which the Versailles Treaty did not specify in name. This was due to the opposition of the United States and Japan to the criminalisation of this type of conduct, believing that crimes against the laws of humanity were only violations of moral law and not contained in positive law — and therefore could not be legally defined. This does not mean that such laws did not exist and does not detract from their recognition by these states. In fact, it is clear from the Versailles Treaty that such crimes could, in the eyes of the international community, be prosecuted, although there was no agreement from where they specifically flowed. The only reason for not prosecuting the Kaiser was that the Netherlands, where he was in exile, refused to hand him over.

At a minimum the term "crimes against humanity" was in vogue in 1915 and was seen already then to emanate from the Martens Clause of 1899 and 1907. Hence, if the Martens Clause constituted the basis and was in force at the time, then the notion of these crimes in fact had become operative from 1899.[131]

The 1920 Treaty of Sèvres also indicates the acceptance of the notion of certain international crimes and the ability to prosecute those responsible for their commission. In Article 230, the Treaty provides the punishment of individuals who have committed crimes on Turkish territory against persons of Turkish citizenship (even if of Armenian or Greek origin). While the Treaty was not ratified, and thus did not enter into force, it was supplanted by the Treaty of Lausanne in 1923, which implicitly recognised these crimes, providing amnesty for offences committed between 1914 and 1922 (which would have been superfluous had these crimes not had been committed). Since the date recognised was 1922, many years after the conclusion of World War I, it also recognised that crimes could be committed outside of war.

Nonetheless, different views are held on the role of the Martens Clause within international law. The "narrow" view holds that it has merely "motivated

[128] Quoted in E. Schwelb, Crimes Against Humanity, 23 (8) British Yearbook of International Law 178, 180 (1946).
[129] L. Glauner, The Need for Accountability and Reparation: 1830–1976. The United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans, 51 Depaul Law Review 911, 920 (2002, Spring).
[130] D.J. Hill, The Rights of the Civil Population in Territory Occupied by a Belligerent, 11(1) American Journal of International Law 133 (1917, January).
[131] C.A. Allen, Civilian Starvation and Relief During Armed Conflict: The Modern Humanitarian Law, Georgia Journal of International and Comparative Law 1,16 (1989, Spring).

and inspired" the development of international law,[132] the broader view maintaining that the Martens Clause ensures that no argument can be made that anything that is not mentioned specifically in the 1899 Convention, regardless of how problematic it was, could be carried out during a war. As Judge Weeramantry stated in his dissent in the ICJ's *Legality of the Threat or Use of Nuclear Weapons* case: "The Martens clause clearly indicates that, behind such specific rules as had already been formulated, there lay a body of general principles sufficient to be applied to such situations as had not already been dealt with by a specific rule."[133] Cassese has criticised this view, arguing that it is meaningless, giving no value to the clause, because that principle had already existed when it was drafted and discounts the role of custom — therefore making the meaning of the clause redundant.[134]

Another view to which some authors subscribe is that of the clause as an interpretative tool. In their opinion, the Clause means that legal principles should be interpreted in the context of the principles of humanity and public conscience, whereas another comparable view suggests the value of the Clause lies in ensuring that humanitarian principles are taken into account when new rules of international law are considered, this being linked to the view that natural law ought to be considered more often as international law develops, because, as some have pointed out, the Martens Clause reflects the notion that humanitarian law is not only a "positive legal code (…) [but] also provide[s] a moral code," which guarantees that it is not only the view of the large military nations that determine the growth of the law. Thus, the point of view of other states and individuals would be allowed to have an impact on the development of international law to a significantly higher degree.[135] This affords the clause a vital role in the development of international law and ascribes to it new sources of international law, a moral code — that of the laws of humanity and the dictates of public conscience – a view various authors have endorsed this and which a number of cases have subscribed to.[136]

The Martens Clause has been discussed in several decisions emanating from Nuremberg[137] and the International Court of Justice. The Opinion of the International Court of Justice on the Legality of Nuclear Weapons mentions the Martens Clause a number of times in its decision,[138] in one instance noting that "[i]n particular, the Court recalls that all States are bound by those rules in Additional Protocol I which, when adopted, were merely the expression of the pre-existing customary law, such as the Martens Clause, reaffirmed in the first article of Additional Protocol I."[139] Commenting on the case, Cassese argues that the "reference to the clause is far from illuminating", and that the Court does not give

[132] A. Cassese, The Martens Clause: Half a Loaf or Simply Pie in the Sky? 11(1) European Journal of International Law 187–216 (2000).
[133] ICJ 8 July 1996, Legality of the Threat or Use of Nuclear Weapons (Weeramantry, J., dissenting), Advisory Opinion, ICJ Reports, 41.
[134] A. Cassese, The Martens Clause: Half a Loaf or Simply Pie in the Sky? 11(1) European Journal of International Law 192–93 (2000).
[135] R. Ticehurst, The Martens Clause and the Laws of Armed Conflict, 317 International Review of the Red Cross 125, 130 (1997).
[136] See the discussion later.
[137] See for example *United States of America v. Alfred Krupp von Bohlen und Halbach* (The Krupp Trial), 10 *Law Reports of the War Commission*, 69.
[138] Paragraphs 78, 84, and 87.
[139] Paragraph 84.

reasons for finding that the Martens Clause is part of customary law. Nonetheless he accepts by implication that this is the finding of the ICJ.[140] He examines and rejects the notion that the Martens Clause only applies to international armed conflict and not to internal armed conflict, yet it may be argued that although this distinction was applicable at the beginning of the twentieth century, the current views do not necessarily reflect the historical position regarding the Martens Clause. Even in the dissenting opinion in *Advisory Opinion on Nuclear Weapons* it was held that

> "[t]he Martens Clause provided authority for treating the principles of humanity and the dictates of public conscience as principles of international law, leaving the precise content of the standard implied by these principles of international law to be ascertained in the light of changing conditions, inclusive of changes in the means and methods of warfare and the outlook and tolerance levels of the international community. The principles would remain constant, but their practical effect would vary from time to time: they could justify a method of warfare in one age and prohibit it in another."[141]

The relevance and role of the clause is also found in the decisions of human rights bodies, as well as in many treaties, such as the 1949 Geneva Conventions, the 1977 Additional Protocols and the Preamble to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons. It also forms the basis, in paraphrased form, for Resolution XXIII of the Tehran Conference on Human Rights of 1968.[142] In fact, the Geneva Conventions of 1949 and the two Protocols additional thereto of 1977 reaffirmed the Martens Clause. In addition, the 1977 Diplomatic Conference that drafted Additional Protocol I emphasized the ongoing significance of the Martens Clause by shifting it from the preamble and making it a specific provision of the Protocol.[143] It is also significant that the ICTY in its decision in the *Kupreskic* trial referred to the Martens Clause and held:

> "[it] enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates.[144] In the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law."[145]

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[140] A. Cassese, The Martens Clause: Half a Loaf or Simply Pie in the Sky? 11(1) European Journal of International Law 206 (2000).

[141] ICJ 8 July 1996, Legality of the Threat or Use of Nuclear Weapons (Shahabuddeen, J., dissenting), Advisory Opinion, ICJ Reports, 226, 406.

[142] T. Meron, The Martens Clause, Principles of Humanity, and Dictates of Public Conscience, 94 American Journal of International Law 78 (2000).

[143] R. Ticehurst, The Martens Clause and the Laws of Armed Conflict, 317 International Review of the Red Cross 125, 126 (1997).

[144] Paragraph 525.

[145] Paragraph 527.

In the *Martic* case, the ICTY, in its ruling on procedural matters in 1996, found that "the prohibition against attacking the civilian population as such, as well as individual civilians, and the general principle limiting the means and methods of warfare also derive from the 'Martens clause'."[146] The tribunal went on to state that "these norms also emanate from the elementary considerations of humanity which constitute the foundation of the entire body of international humanitarian law applicable to all armed conflicts." Thus, the ICTY's view was clearly that the Martens Clause constituted a source of law, and that protection for civilians had existed since at least 1899. Although it may be disputed, international practice therefore seems to confirm that the Martens Clause is a part of customary international law and has been recognised as such for many years. The concept of crimes against humanity has also being acknowledged since at least 1899. Hence, even though the exact terms had not yet been used, the notions of crimes against humanity and genocide were recognised from the beginning of the twentieth century.

The Martens Clause has played and continues to play an important role. As Allen remarks, "[t]he crucial core of principles of civilian protection are often described as flowing directly from the principle of humanity."[147] One instance of the way the clause is seen to influence international law was noted by the International Military Tribunal after World War II in the *Krupp* decision, The Court stating:

> "The Preamble is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare."[148]

Thus, certain activities had already been regarded as objectionable to humanity, and crimes against humanity had emerged out of what were deemed unacceptable types of conduct during wartime. The issue here was whether this conduct was also unacceptable in the absence of war, which seems somewhat contradictory; it does not seem logical to argue that certain types of conduct were not accepted during war but were permitted during times of peace. If anything, one would expect there to be greater scope for harmful activities during wartime than during times of peace. In fact, in the *Corfu Channel* case, the ICJ ruled that certain principles existing in the Hague Conventions were also to be found in the general principles regarding humanity. The Court found that these were "based, not on the Hague Convention of 1907, No VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war."[149] Thus, while it is clear that the laws of war provided protection of various classes of persons, not everyone was covered by those provisions. However, it is clear it had already been accepted that for those not covered by those principles during wartime or times of peace, customary law already provided some measure of protection. This

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[146] ICTY 8 March, 1996, Prosecutor v Milan Martic.
[147] C.A. Allen, Civilian Starvation and Relief During Armed Conflict: The Modern Humanitarian Law, Georgia Journal of International and Comparative Law 1,19 (1989, Spring).
[148] *United States of America v. Alfred Krupp von Bohlen und Halbach* (The Krupp Trial), 10 *Law Reports of the War Commission*, 69.
[149] ICJ 1949, *The Corfu Channel Case*, ICJ Reports 4, 22.

was recognised by the ICJ,[150] crimes against humanity beginning as an extension of war crimes, according to Bassiouni. He thus recognises that these types of violations were initially seen as part of the law of war, but then became part of international law in general, through the Martens Clause and customary international law.[151] Bassiouni also notes that the Nuremburg Charter's crime against humanity articles come from the preambles to the 1899 and 1907 Hague Conventions and, thus, the Martens Clause is critical. It is, however, possible to argue legitimately that the origins of these crimes predate these conventions in the context of customary law. There is, therefore, a clear link between crimes committed during wartime and crimes against humanity committed in peacetime.

Crimes against humanity seem to have been recognised as such even before the 1899 Convention. In his treatise on international law in 1891, Woolsey included the duty of humanity. The treatise argued that individuals, "suffering nations or parts of nations may also call for its exercise," and that:

> "The awakened sentiment of humanity in modern times is manifested in a variety of ways, as by efforts to suppress the slave trade, by greater care for captives, by protection of the inhabitants of a country from invading armies, by the facility of removing into a new country, by the greater security of strangers. Formerly, the individual was treated as a part of the nation on whom its wrongs might be wreaked. Now this spirit of war against private individuals is passing away. In general any decided want of humanity arouses the indignation even of third parties, excites remonstrances, and may call for interposition. (…) But cruelty may also reach beyond the sphere of humanity; it may violate right, and justify self-protection and demand for redress."[152]

President Theodore Roosevelt in his 1904 State of the Union Address asserted:

> "[T]here are occasional crimes committed on a vast scale and of such peculiar horror as to make us doubt whether it is not our manifest duty to endeavour at the least to show our disapproval of the deed and our sympathy with those who have suffered by it (…)."[153]

In the same year, the United States reacted against the practise of crimes against humanity and genocide when the American Secretary of State complained to Romania – "in the name of humanity" – about Jewish persecutions that were happening there, arguing that the US government "would not be a tacit party to such international wrongs." [154] Thus, the concept of crimes against humanity had clearly formed part of the international vocabulary, even before World War I.[155] The activity that is currently regarded as genocide was specifically determined to be a crime in a report by an international commission of inquiry about atrocities committed against national

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[150] ICJ 1949, *The Corfu Channel Case*, ICJ Reports 4, 22.
[151] M.C. Bassiouni, Crimes Against Humanity in International Criminal Law (2nd rev ed) 48 (Cambridge MA: Kluwer Law International, 1999).
[152] Theodore D. Woolsey, Introduction to the Study of International Law 6th edition 23 (New York, Charles Scribner's sons 1891).
[153] T. Roosevelt, State of the Union Message, December 6, 1904 found at: http://www.theodore-roosevelt.com/sotu4.html Last visited 13 September 2006.
[154] L. Kuper, Genocide: It's Political Use in the Twentieth Century 20 (New Haven, CT: Yale University Press, 1981). Quoted in W. Churchill, Defining the Unthinkable: Towards a Viable Understanding of Genocide, Oregon Review of International Law 3, 8–9 (2000, Spring).
[155] W. J. Fenrick, Should Crimes Against Humanity Replace War Crimes? 37 Columbia Journal of Transnational Law 767 (1999).

minorities during the Balkan wars.[156] The report identifies these acts as violations, and Schabas points out that the section of the report entitled "Extermination, Emigration, Assimilation" indicates these acts would be categorized as genocide or crimes against humanity today.

The aforementioned 1915 declaration by the governments of France, Britain and Russia, condemning the Armenian atrocities as "crimes against humanity and civilization,"[157] shows that these powers recognised that international crimes were being committed, and that the individuals involved would be held accountable. As a result, some postulate that this declaration brought about the appearance of the category of "crimes against humanity" as separate from "war crimes", Bassouini stating that this declaration was "responsible for the origin of the term 'crimes against humanity' as the label for a category of international crimes."[158]

Despite the controversy regarding the interpretation of the Martens Clause and its relevance for international law, it is indisputable that the 1899 Convention took important steps in humanising the laws of war and extending the Geneva Convention of 1864, showing that the participating states were in agreement that further protection was needed during wartime.[159] As a result it has often been argued that "crimes against humanity"[160] unlike genocide, "must take place during an armed conflict in order to constitute prosecutable acts."[161] That certainly seems to have been the case in the past.

11. Defining genocide

It is usually argued that genocide as a crime did not exist until the adoption of the Genocide Convention by the United Nations in 1948. It is also argued that the word itself was only coined in the early 1940s, and as a result genocide as a concept has no relevance with regard to human rights violations perpetrated before World War II. However, it will be shown that the notion of genocide is a very old concept and that it has been a crime for a long time. It will also be indicated that while the word may be new, the concept has been known in various languages for more than two hundred years, and it's possible it can even be traced back to biblical times. It will also be indicated that genocide is closely connected to crimes against humanity, and flows from the origin of this concept in both international criminal law as well as international human rights law.

The definition of genocide is an intensely contested terrain, possibly with the exception of its legal content.[162] In a range of disciplines, authors have arrived at countless definitions of what genocide is or ought to be. As a result, "[t]he term and

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[156] *Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars* (1914).

[157] J. Shamsey, Comment: 80 Years Too Late: The International Criminal Court and the 20th Century's First Genocide, 11 Journal of Transnational Law & Policy 327, 369 (2002, Spring).

[158] M.C. Bassiouni, The Time Has Come for an International Criminal Court, 1 Indiana International and Comparative Law Review 1 (1991).

[159] M.E. Howard, The Armed Forces, in: F. Hinsley (ed.), The New Cambridge Modern History XI: Material Progress and Worldwide Problems 1870–1898 241–42 (Cambridge: Cambridge University Press, 1967).

[160] See further S. Chesterman, An Altogether Different Order: Defining the Elements of Crimes Against Humanity, 10 Duke Journal of Comparative & International Law, 307 (2000).

[161] M.C. Bassiouni, The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities, in: M.C. Bassiouni (ed.), International Criminal Law, Vol.1, Crimes of War (2nd ed.) 617, 622–23 (Ardsley, New York: Transnational Publishers, 1999).

[162] See for example G. Chigas, The Politics of Defining Justice After the Cambodian Genocide, 2 (2) Journal of Genocide Research 245–65 (2000).

its underlying concepts have been subject to a bewildering array of misrepresentations and distortions, both unintentional and deliberate."[163] What is indisputable is that war is not a precondition for genocide to be perpetrated. The legal definition of genocide can be found in international customary law,[164] the Genocide Convention and the Statute of the two international criminal tribunals (ICTR, ICTY), as well as in the Statute of the International Criminal Court (the Rome Statute).[165] While the legal definition of genocide is settled in treaty law, its definition in customary law is not, many regarding the treaty definitions as insufficient and in need of amendment due to the concept of genocide in the Genocide Convention being overly narrow (although expanded by the ICTR and ICTY statutes).[166] The legal definition is considered to be too limited because political groups are excluded and therefore remain outside the ambit of the Convention. The limited scope with regard to the groups that are included within the Genocide Convention has even been criticized by the ICTR, who, in examining the Tutsi group, found that they did not constitute a racial or ethnic group separate from the Hutu,[167] hence the ICTR argued that the definition of the term "group" includes "permanent and stable groups."[168] This view has been criticised by, among others, William Schabas,[169] who argues unconvincingly that it would amount to a watering down and overuse of the term genocide, thus leading to a trivialisation of the horror of actual genocide.[170]As a result of the above criticisms, numerous other definitions from a range of diverse scholars have been offered to overcome the perceived problems and limitations of the legal definition.[171]

12. Genocide as a species of crime against humanity

Crimes against humanity and genocide are part of the same "species" of crime. Genocide has been viewed as part of crimes against humanity, and a number of scholars have pointed out that it shares a source with crimes against humanity. Greenawalt observes that those who have analysed these questions have often viewed genocide as a special type of crime against humanity, and not as an entirely separate crime.[172] Fenrick notes that genocide is the "supreme crime against humanity", others similarly describing it as the gravest form of crime against humanity,[173] Lippman, for instance,

[163] W. Churchill, Defining the Unthinkable: Towards a Viable Understanding of Genocide, Oregon Review of International Law 3 (2000, Spring).
[164] See the ICJ 13 September 1993, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Yugoslavia* (Serbia and Montenegro), Further Requests for the Indication of Provisional Measures, ICJ Reports, 325. See also A. Cassese, International Criminal Law 98 (Oxford: Oxford University Press, 2003).
[165] U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Rome Statute of the International Criminal Court* (U.N. Doc. A/CONF. 183/9) (1998).
[166] See Ward Churchill Defining the Unthinkable: Towards a Viable Understanding of Genocide Oregon Review of International Law Spring 2000, 3, 3.
[167] *Prosecutor v Akayesu*, Judgment of the Trial Chamber, Case No ICTR-96-4-T, 2 September 1998.
[168] ICTR Trial Chamber, Judgement in *Prosecutor v. Akayesu*, 02/09/1998, paragraph 701.
[169] See for example G-J. Knoops, An Introduction to the Law of International Criminal Tribunals 24 (Ardsley: Transnational Publishers, 2003).
[170] W. Schabas, Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda, 6 ILSA Journal of International & Comparative Law 375, 386 (2000).
[171] See for example B. Van Schaack, The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot, 106 Yale Law Journal 2259–91 (1997).
[172] A.K.A. Greenawalt, Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation, 99(8) Columbia Law Review 2259, 2293 (1999).
[173] K. Kriangsak, International Criminal Law 68 (New York: Oxford University Press, 2001).

calling genocide "an aggravated crime against humanity,"[174] and according to Stoett "mass murder and/or genocide are, of course, the principal and most outrageous crimes against humanity .(…)."[175] Schabas also cites a whole host of authorities supporting the overlap between these crimes[176] and Theodor Meron, one of the most respected international criminal law academics and a member of the ICTY, has similarly written that "crimes against humanity overlap to a considerable extent with the crime of genocide."[177] Indeed, he notes that "the latter can be regarded as a species and particular progeny of the broader genus of crimes against humanity."[178] Likewise the ICTR noted in the *Kayishema* case:

> "The crime of genocide is a type of crime against humanity. Genocide, however, is different from other crimes against humanity. The essential difference is that genocide requires the aforementioned specific intent to exterminate a protected group (in whole or in part) while crimes against humanity require the civilian population to be targeted as part of a widespread or systematic attack. There are instances where the discriminatory grounds coincide and overlap."[179]

In the *Tadic* decision the ICTY found that "genocide is itself a specific form of crime against humanity".[180] In the *Sikirica* decision, the ICTY noted that "genocide is a crime against humanity, and it is easy to confuse it with other crimes against humanity, notably, persecution."[181] Thus, the ICTY clearly states that genocide is a crime against humanity, but also indicates that there is an affinity between genocide and persecution. Persecution is also a type of crime against humanity and can in fact amount to genocide (as shown in the *Kupreskic* citation above).

Schabas notes that "[f]or fifty years, crimes against humanity and genocide coexisted in parallel" and that "[m]ost authorities have treated genocide as a subcategory of crimes against humanity."[182] This can also be seen in various decisions of the international *ad hoc* tribunals, although Schabas points out that recent cases emerging from the tribunals have "tended to insist upon the distinctions rather than the affinities between the two categories."[183]

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[174] M. Lippman, The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-five years later, 8 Temple International & Comparative Law Journal 1, 11–13 (1994). See also Gellately and Kiernan who consider genocide an "aggravated crime against humanity." R. Gellately and B. Kiernan, The Study of Mass Murder and Genocide, in: R. Gellately and B. Kiernan (eds.), The Specter of Genocide Mass Murder in Historical Perspective 14 (Cambridge: Cambridge University Press, 2003).

[175] P. Stoett, Shades of Complicity: Towards a Typology of Transnational Crimes Against Humanity, in: A. Jones (ed.), Genocide, War Crimes, and the West 31 (London: Zed Books, 2004).

[176] W. A. Schabas, National Courts Finally Begin to Prosecute Genocide, the "Crime of Crimes," 1(1) Journal of International Criminal Justice fn 73 (2003, April).

[177] T. Meron, International Criminalization of Internal Atrocities, 89 American Journal of International Law 554, 558 (1995).

[178] T. Meron, International Criminalization of Internal Atrocities, 89 American Journal of International Law 554, 558 (1995).

[179] International Criminal Tribunal Rwanda, Trial Chamber II 21 May 1999, *Prosecutor v Kayishema*, Judgement, para. 89.

[180] ICTY Trial Chamber 7 May 1997, *Prosecutor v Dusko Tadic a.k.a. "Dule*" Case, para. 8.

[181] ICTY 3 September 2001, *Prosecutor v Dusko Sikirica, Damir Dosen and Dragan Kolundzija*, Judgement on Defence Motions to Acquit, para. 58.

[182] W.A. Schabas, Problems of International Codification—Were the Atrocities in Cambodia and Kosovo Genocide? 35(2) New England Law Review 299 (2001).

[183] W. A. Schabas, National Courts Finally Begin to Prosecute Genocide, the "Crime of Crimes," 1(1) Journal of International Criminal Justice 49 (2003, April).

Frulli notes that the "crime of genocide belongs to the class of crimes against humanity but may now also be considered as a separate crime."[184] Thus, she seems to argue that they have derived from the same origin, but due to developments over the last few years and their codifications in various instruments, they are now different crimes. Green, by contrast, has argued that the distinctions between genocide, "grave breaches" and war crimes ought to be abolished as they are all "but examples of the more generically termed 'crimes against humanity.'"[185] Thus, while distinctions between the crimes are made today, the international tribunals have recognised that in some cases they are interconnected and that they have the same roots, deriving from prohibitions about the ways in which to engage in war. It is, and will be, difficult to determine which specific act constitutes one of these crimes, The ICTR noting the close relationship and transposable nature of crimes against humanity and genocide. In the *Kayishema* case, for example, it made the following observation:

> "Indeed, the terms extermination and destroy are interchangeable in the context of these two crimes [genocide and crimes against humanity]. Thus, the element could be the same, given the right factual circumstances (…). [I]n some factual scenarios where the victims are members of the civilian population only, the element would be the same."[186]

13. Genocide: A new term for an old crime or a new concept?

Genocide is not a new concept or new crime. Jean-Paul Sartre noted that "the fact of genocide is as old as humanity."[187] Yet, importantly, it not just "the fact" of it having occurred for ages; it has also been recognised as a crime for centuries. Some arguments from Greek and Roman times still resonate today, namely that a universal law of nature exists by which individuals have to abide. The origins of specific international law here criminalising the persecution of individuals because of their ethnic, national, racial or religious origins certainly date back at least 350 years.[188]

While the word genocide is relatively new, the concept is not, neither is the fact that the conduct constitutes a crime. As the United Nations 1985 Whitaker report on genocide noted, the word "is a comparatively recent neologism for an old crime."[189] Raphael Lemkin, who coined the term, stated: "Deliberately wiping out whole peoples is not utterly new in the world. It is only new in the civilized world as we have come

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[184] M. Frulli, Are Crimes Against Humanity More Serious Than War Crimes? 12 European Journal of International Law 329 (2001, May).

[185] L.C. Green, "Grave breaches" or Crimes Against Humanity? 8 U.S.A.F. Academic Journal of Legal Studies 19, 29 (1997–98). Quoted in W. A. Schabas, National Courts Finally Begin to Prosecute Genocide, the "Crime of Crimes," 1(1) Journal of International Criminal Justice Fn 73 (2003, April).

[186] International Criminal Tribunal Rwanda, Trial Chamber II 21 May 1999, *Prosecutor v Kayishema*, Judgement, para. 630-631.

[187] J-P Sartre, in: W.A. Schabas, Genocide in International Law 1 (Cambridge: Cambridge University Press, 2000).

[188] M. J. Kelly, Can Sovereigns be Brought to Justice? The Crime of Genocide's Evolution and the Meaning of the Milosevic Trial, Saint John's Law Review 257, 263 (2002, Spring). See also T. Meron, Shakespeare's Henry the Fifth and the Hundred Years War, 86 American Journal of International Law 1(1992).

[189] United Nations Economic and Social Council Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities Thirty-Eighth Session, *Item 4 of the Provisional Agenda* (E/Cn.4/Sub.2/1985/6)- (July 2, 1985) Review of Further Developments in Fields with which the Sub-Commission has Been Concerned. Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide Prepared by Mr. B. Whitaker. (E/CN.4/Sub.2/416).

to think of it."[190] Roger Smith agrees that the phenomenon is ancient, but disagrees that it was always a crime. He states that "[a] recent study of genocide begins with the statement 'The word is new, the crime ancient.' This should read 'The word is new, the phenomenon ancient'".[191] According to Smith, it is only in the last few centuries that genocide has produced a sense of "moral horror."[192] He continues to argue that there has certainly been an implicit admission of the criminality of the conduct in the twentieth century, because not one state engaged in such conduct has admitted to it.[193] Thus, even though Smith disagrees about how long ago genocide became a crime, his acknowledgment that it evoked "moral horror" over the last few centuries suggests that he recognises it as a crime within customary international law.

Many have argued that genocide only became a crime when Raphael Lemkin defined it in the 1940s. However, genocide was recognised as a crime long before Lemkin, the conduct proscribed by custom from the Middle Ages[194] and Lemkin merely giving it a name.[195] He coined the term "genocide" because he regarded the term "mass murder" (in use at the time) as insufficient. Lemkin felt the latter expression failed to account for the motive for the crime of genocide, which arose solely from racial, national, or religious considerations, and had nothing to do with the conduct of war. He believed that the crime of genocide required a separate definition, as this was "not only a crime against the rules of war, but a crime against humanity itself," affecting not just the individual or nation in question, but humanity as a whole.[196] Even he recognised that the atrocities constituting genocide that had been committed until then were indeed crimes, and a genus and part of crimes against humanity.[197] Thus, Lemkin had coined a new name for something that had been subsumed under the general mantle of "crimes against humanity" for many years. In fact, the Charter of the International Military Tribunal of Nuremberg in Article 6(c) described crimes against humanity as:

> "[m]urder, extermination, enslavement, deportation and other inhumane acts committed against any civilian populations, before or during the war; or persecutions on political, racial, or religious grounds in execution of or in con-

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[190] R. Lemkin, Genocide—A Modern Crime, Free World 39(April 4, 1945). Quoted in R. Cribb, Genocide in the Non-Western World: Implications for Holocaust Studies, in: S.L.B. Jensen, Genocide: Cases, Comparisons and Contemporary Debates 123 (Copenhagen: Danish Center for Holocaust and Genocide Studies, 2003). See further on Lemkin S.L. Jacobs, The Papers of Raphael Lemkin: A first Look, 1 Journal of Genocide Research 105–14 (1999).

[191] R.W. Smith, State Power and Genocidal Intent: On the Uses of Genocide in the Twentieth Century, in: L. Chorbajian, and G. Shirinian (eds.), Studies in Comparative Genocide 9 (New York: St Martin's Press, 1999).

[192] R.W. Smith, State Power and Genocidal Intent: On the Uses of Genocide in the Twentieth Century, in: L. Chorbajian, and G. Shirinian (eds.), Studies in Comparative Genocide 9–10 (New York: St Martin's Press, 1999).

[193] *Id.*

[194] M. J. Kelly, Can Sovereigns be Brought to Justice? The Crime of Genocide's Evolution and the Meaning of the Milosevic Trial, Saint John's Law Review 257, 264 (2002, Spring). See also M.H. Keen, The Laws of War in the Late Middle Ages (London: Routledge & Kegan Paul, 1965).

[195] See F. Chalk, and K. Jonassohn, The History and Sociology of Genocide: Analyses and Case Studies (New Haven: Yale University Press, 1990). See also F. Chalk, and K. Jonassohn, The History and Sociology of Genocidal Killings in: I.W. Charney (ed.), Genocide: A Critical Bibliographic Review 39 (London: Mansell, 1988).

[196] S. Ratner, and J. Abrahams, Accountability for Human Rights Atrocities in International Law 44 (Oxford: Oxford University Press, 1997).

[197] S. Ratner, and J. Abrahams, Accountability for Human Rights Atrocities in International Law 24–44 (Oxford: Oxford University Press, 1997).

nection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

Thus, the notion of genocide had already existed in codification form at the time of the Nuremberg trials, and was seen to have been part of crimes against humanity. In this regard, Nagan and Rodin have noted that "the Charter of Nuremberg defined crimes against humanity as covering many of the circumstances that today would fall under the legal label of genocide."[198]

Some Nazis, such as Herman Goering, were convicted[199] at Nuremburg for conduct aimed at exterminating Jewish people, which amounted to genocide.[200] The judgment in the *Justice* Case described genocide as "the prime illustration of a crime against humanity."[201] Schabas notes that while genocide was not charged at Nuremberg, since it was not enumerated in the Charter, it was dealt with indirectly as a crime against humanity.[202] In fact, at the time Winston Churchill called it "a crime without a name,"[203] recognising that although it was not specifically identified, it was indeed a crime.[204] At a domestic level some individuals were prosecuted and convicted for genocide even before the Genocide Convention came into force, Poland convicting Amon Goeth, Rudolf Hoess and Arthur Greiser for genocide under Polish law,[205] specifically using the term genocide.[206]

However, the question is whether there could be genocide if the word itself was only coined by Raphael Lemkin[207] in 1943 and was only legally defined by the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide.[208] Howard-Hassman and others have argued that there were no international legal rules prohibiting genocide and ethnic cleansing in "the early modern capitalist world".[209] It is maintained by at least some that, at a time when even in Europe very few people enjoyed human rights protections, there was little concern about what had happened in

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[198] W.P. Nagan, and V.F. Rodin, Racism, Genocide, and Mass Murder: Toward a Legal Theory About Group Deprivations, National Black Law Journal 133, 183(2003–2004).

[199] Although the convictions were not based on findings of genocide, various indictments used the term. See W. A. Schabas, National Courts Finally Begin to Prosecute Genocide, the "Crime of Crimes," 1(1) Journal of International Criminal Justice Fn 2 (2003, April).

[200] See further E. Davidson, The Trial of the Germans: An Account of the Twenty-Two Defendants Before the International Military Tribunal at Nuremberg (New York: Macmillan, 1966). See further R. Breitman, The Architect of Genocide: Himmler and the Final Solution (New York: Alfred Knopf, 1991).

[201] Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, IV (Washington, DC, 1949), II, 773, 797.

[202] W.A. Schabas, Conceptualizing Violence: Present and Future Developments in International Law, 60 Albany Law Review 733, 741 (1997).

[203] W. Churchill in: L. Kuper, Genocide: Its Political Use in the Twentieth Century 12 (New Haven, CT: Yale University Press, 1981).

[204] D.L. Nersessian, The Contours of Genocide Intent: Troubling Jurisprudence from the International Criminal Tribunals, 37 Texas International Law Journal 231, 236 (2002); and W.A. Schabas, The Genocide Convention at Fifty, United States Institute for Peace Report (1999). Available at http://63.104.169.22/pubs/Specialreports/sr990107.pdf Last visited 20 December 2005.

[205] D.L. Nersessian, The Contours of Genocide Intent: Troubling Jurisprudence from the International Criminal Tribunals, 37 Texas International Law Journal 254 (2002)

[206] W. A. Schabas, National Courts Finally Begin to Prosecute Genocide, the "Crime of Crimes," 1(1) Journal of International Criminal Justice Fn 2 (2003, April).

[207] See R. Lemkin, Axis Rule in Occupied Europe: Laws of Occupation—Analysis of Government—Proposals for Redress, Washington DC: Carnegie Endowment for International Peace (1944).

[208] See further S.L. Jacobs, The papers of Raphael Lemkin: A First Look, 1 Journal of Genocide Research 105–14 (1999).

[209] R.E. Howard-Hassman, The Second Great Transformation: Human Rights Leapfrogging in the Era of Globalisation, 27(1) Human Rights Quarterly, 33 (2005).

the colonies. While this is, true to some extent, the question arises of what is meant by the "early modern capitalist world," and whether the indifference of Europe towards the colonies meant that international law did not apply to the colonies. In fact, by the 1860s, the laws of war had been formulated within international law, and human rights issues from 1899 were incorporated into international law through the Martens Clause and in customary law through the acceptance by many states that such protections were available. Therefore, not only is the contention that international law solely applied to humanitarian law erroneous, it also represents a myopic view of treaty law and does not account for customary law, which was also well developed at the time.

There is additional evidence that genocide as a term existed before Lemkin defined the concept. In this regard, the debate about the origin of the word itself is problematic; the term genocide itself is certainly new, but the concept was well known in a multitude of languages. In English, there was the term "murder of a nation" that had been used since 1918;[210] in French, the term *populicides* or the killing of a population was coined by Gracchus Babeuf in 1795, describing the massacre of 117,000 farmers in the Vendée region during the French Revolution;[211] In German, the term *Völkermord* was used from 1831 to describe the killing of a people; in Polish, the term *ludobojstwo* means killing of a people; in Armenian, *tseghaspanutiun* means to kill a race; in Greek, *genoktonia* is an ancient term, denoting the killing or death of a nation,[212] the word even known in indigenous languages; and in the South African Zulu language the word *izwekufa* means "death of the nation",[213] a word known in the 1830s when there was huge turmoil in the region and hundreds of thousands fled because of the violence caused by Zulu leader Shaka. The word *izwekufa* comes from two words '*izwe*' (nation, people, polity) and '*ukufa*' (death, dying, to die). The term is thus identical to 'genocide' in both meaning and etymology."[214]

The word genocide comes from the Greek word *genos*, connoting race, tribe or species, and the Latin suffix *cide*, meaning killing.[215] Although the term 'Holocaust', which was used to describe the killing of Jewish people during the Nazi era, could have been used to denote the same notions that are incorporated into the concept of genocide, this would have been highly contentious. However, the word Holocaust stems from the Latin term *Holocaustrum*, used in biblical times to refer to the killing of Jew,[216] hence the word genocide is a new term but not a new concept or a new crime. The word itself only emerged in the 1940s because the widespread mass killings by states required new terminology to describe these occurrences,[217] thus while

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[210] H. Morgenthau, Ambassador Morgenthau's Story (New York: Double Day, 1918).
[211] The French word for killing in genocide cases is *meurte.* K. Kittichaisaree, International Criminal Law 17 (Oxford: Oxford University Press, 2002).
[212] K. Jonassohn, and S.K. Bjornson, Genocide and Gross Human Rights Violations 140 (New Brunswick: Transaction, 1998).
[213] R. Papini, The Stepped Diamond of Mid-Century Beadfabric: Aesthetic Assimilation Beyond the Second Izwekufa, in: E. Seinaert, N. Bell, and M. Lewis (eds), Oral Tradition and Its Transmission (Durban: University of Natal Press, 1994).
[214] M.R. Mahoney, The Zulu Kingdom as a Genocidal and Post-Genocidal Society, c. 1810 to the Present, 5(2) Journal of Genocide Research 263, 255 (2003).
[215] E. Markusen, in: I. Wallimann and M.N. Dobkowski (eds.), Genocide and the Modern Age: Etiology and Case Studies of Mass Death 100 (New York: Greenwoood Press, 1987).
[216] F.G. Dufour, Toward a Socio-Historical Theory of Persecution and an Analytical Concept of Genocide, Occasional Paper No. 67 2 (Toronto: York University Centre for German & European Studies, 2001, October)
[217] R. Gellately, and B. Kiernan, The Study of Mass Murder and Genocide in: R. Gellately and B. Kiernan (eds.), The Specter of Genocide Mass Murder in Historical Perspective 3 (Cambridge: Cambridge University Press, 2003).

the term is new, it is a new name for something that was very well known before, except not by that specific name.

As to the question of whether genocide was proscribed before the 1940s, it must be noted that genocide was subsumed within the notion of crimes against humanity, and within the protections available for civilians that were available from the 1860s. The ICTR recognises that the crime of genocide was inherent in the laws defining war crimes and crimes against humanity but had not been given a specific name before the 1940s.

There is ample evidence that in the nineteenth century at least the killing of peoples for their cultural makeup or religious preference was legally prohibited. Despite this, some still debate whether this applies only in the context of war, arguing that the prohibitions exist in laws governing the act of war and apply to those peoples outside the sovereign realm of a nation, or those actively joining in a rebellion. However, it is clear that genocide and crimes against humanity were accepted by the time of the Armenian genocide. That these types of activities had been prohibited was clear from the statements of many states that reacted with outrage to those events in 1915 and at other times.[218] These types of acts had probably been outlawed even earlier, however, if one examines the position of many states about what was occurring in the world in the nineteenth century.

14. Genocide before the Genocide Convention

Many debate the application of genocide to crimes before the 1940s, on the basis that there was no international law barring such conduct before the Genocide Convention of 1948. However, it is clear that the crime and its proscription in international human rights law and international criminal law can be found much further back. While it is true that the Genocide Convention had proscribed such conduct in that form in a treaty from 1948, it is clear that there was acceptance of its criminality before it came to be a violation of international law. Certainly, the laws of war made certain types of conduct illegal and it was known that individuals could be held accountable for these types of violations.

In 1946, before the Genocide Convention was even drafted[219] (or acceded to by any states), genocide had already been recognised as an international crime. This is clear from the text of the 1946 General Assembly resolution discussing the topic, which stated:

> "The General Assembly therefore: Affirms that genocide is a crime under international law which the civilised world condemns (…)."[220]

That the origins of the proscriptions against genocide predate the Convention can be seen in the preamble of the Genocide Convention. The preamble states that during "all periods of history genocide has inflicted great losses on humanity." Thus, in 1948, it was recognised that genocide was already a crime and had been a crime for a long time. During the drafting process of the Convention, many delegates from various states agreed that the Convention was merely codifying genocide and not drafting a

[218] These Great Britain, France, and Russia. J. Shamsey, Comment: 80 Years Too Late: The International Criminal Court and the 20th Century's First Genocide, 11 Journal of Transnational Law & Policy 327, 369 (2002, Spring).

[219] On the drafting process, see M. Lippman, The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 3 Boston University Journal of International Law 62 (1985).

[220] General Assembly Resolution 96 (I), (U.N. Doc. A/64/Add.1) (1946). See further P.C. Jessup, The Crime of Aggression and the Future of International Law, 62(1) Political Science Quarterly 1–10 (1947, March).

treaty that proscribed it for the first time. Thus, the delegate from Saudi Arabia described genocide as "an international crime against humanity."[221]

By 1946, it had already been accepted that genocide was a crime and was seen by some to be linked to crimes against humanity. The 1948 Convention did not "create" the crime, but merely codified and clarified this type of criminal conduct. According to Freeman, it was only with the adoption of the Genocide Convention that the crime had become dissociated with "its original military context."[222] In other words, genocide before the Convention had been linked to the issue of war, and its separation from the laws of war had only occurred from 1948. However, genocide and crimes against humanity were recognised, and there had been protection against such conduct outside the context of armed conflict from at least 1899, if not before (see supra).

Genocide as a crime pre-1948 is corroborated in Article 1 of the Genocide Convention, which states that "[t]he Contracting Parties confirm that genocide, whether committed in times of peace or in war, is a crime under international law (…)." The word "confirm" indicates that genocide was deemed to be a pre-existing crime, and putting it into the treaty merely formalised its prohibition. This was accepted by the many states that have ratified the Convention, and the fact that this was the case has also been recognised by the ICJ in the *Reservations to the Convention on the Protection and Punishment of the Crime of Genocide* case in 1951. The ICJ held that genocide was a crime beyond the Convention, and noted "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation."[223] In fact, as genocide was a crime in customary law, it could be argued that, the Convention has valid retrospective effect, because it simply restated that genocide was even a crime before the Convention, and it could therefore be applied to any events predating its coming into force.

However, the Convention does not need to have retrospective effect for genocide to be actionable before the Convention. Genocide exists in customary law and therefore the Convention does not have to apply to issues that had occurred before the Convention came into effect. Retrospectivity in itself is not unknown in either international or national law; whereas, generally speaking, it is frowned upon and seen to be in violation of the rights of an accused, in certain cases there are accepted exceptions to this position. In human rights law, retrospectivity is seen to be less of a problem with regard to international crimes such as crimes against humanity and genocide. ?????? While there has been no international court ruling on this matter, this position is widely accepted; courts in Australia[224] and Canada[225] have found that the prosecutions of such cases, even before legislation on these crimes had been adopted, are not retrospective as they were crimes in international law even before a new law had been adopted.[226]

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[221] W. A. Schabas, National Courts Finally Begin to Prosecute Genocide, the "Crime of Crimes," 1(1) Journal of International Criminal Justice Fn 73 (2003, April).
[222] M. Freeman, Genocide, Civilization and Modernity, 46(2) British Journal of Sociology 207–25 (1995, June).
[223] ICJ, 1951, *Reservations to the Convention on the Protection and Punishment of the Crime of Genocide* ICJ Reports, 23.
[224] *Polyukhovich v Commonwealth* (1991) 172, CLR 501.
[225] *R v Finta* (1989) 61 DLR (4th) 85.
[226] R. Clarke, Retrospectivity and the Constitutional Validity of the Bali Bombing and East Timor Trials, 5 Australian Journal of Asian Law 128, 140–41 (2002).

While retrospectivity is seen to have been controversially used in the London Agreement of August 8, 1945, which established the Charter of the Nuremberg Tribunal, the counter view of its use then was that no new crimes were enacted but the Charter merely codified existing international customary law. Notably, retrospectivity is contained today in modern international treaties, including the Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity of 1968 and the Vienna Convention on the Law of Treaties of 1969. While it could be argued that *nullum crimen sine lege, nulla poena sine lege praevia* (no crime without law, no penalty without previous law) is a basis for non-retrospectivity and a reason for not pursuing events that had occurred before the treaty came into force, this norm is not always applicable. For example, while this norm is contained in Article 15(1) of the International Covenant on Civil and Political Rights, it is limited in its operation by Article 15(2), which states:

> "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

In other words, if a crime was criminal in customary law, it is not limited by the retrospective nature of the operation of the treaty. The same limitation on the operation of *nullum crimen* is contained in Article 11(2) of the Universal Declaration of Human Rights, which provides that retrospective application of the criminal law is not prohibited if the event which is the basis of the prosecution was a crime in national or international law.[227] As regards the question of retrospectivity and the Genocide Convention, it has been noted that:

> "The language of the Genocide Convention neither excludes nor requires its retroactive application. In other words — there is nothing in the language of the Convention that would prohibit its retroactive application. By contrast, there are numerous international treaties that specifically state that they will not apply retroactively."[228]

It is precisely because some statutes stipulate that they are not retrospective that this possibility might not be excluded for others.

As noted above, it may not even be necessary to apply the Convention retrospectively. The *travaux preparatoires* of the Convention has numerous references to genocide as a crime before the Convention. In this respect it has been noted that many delegates argued that genocide was not a new crime during the drafting process.[229] Lyn Berat has written that "genocide always constituted an international crime."[230] In 1955 Professor Hersch Lauterpacht stated in his treatise that "[i]t is clear that as a matter of law the Genocide Convention cannot impair the effectiveness of existing international obligations."[231] In other words, genocide already existed outside the

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[227] A. De Zayas, Memorandum on the Genocide Against the Armenians 1915–1923 and the Application of the 1948 Genocide Convention, European Armenian Federation for Justice & Democracy (EAFJD) (ed.), at http://www16.brinkster.com/eafjd/en/bulletins/dezayas_report.pdf. Last visited 23 September 2004.

[228] A. De Zayas, Memorandum on the Genocide Against the Armenians 1915–1923 and the Application of the 1948 Genocide Convention, European Armenian Federation for Justice & Democracy (EAFJD) (ed.), at http://www16.brinkster.com/eafjd/en/bulletins/dezayas_report.pdf.

[229] ICTJ Legal Analysis on Applicability of UN Convention on Genocides prior to January 12, 1951

[230] L. Berat, Genocide: The Namibian Case Against Germany, 5 Pace International Law Review 165, 207(1993).

[231] H. Lauterpacht, in: H. Oppenheim, International Law: A treatise, vol.1: Peace (8th ed) 751 (New York: David Mackay, 1955).

Genocide Convention, a view that has been supported by the United Nations Commission on Human Rights, which, in 1969, stated as follows: "It is therefore taken for granted that as a codification of existing international law the Convention on the Prevention and Punishment of the Crime of Genocide did neither extend nor restrain the notion of genocide, but that it only defined it more precisely."[232] This should not be taken to imply that the Genocide Convention itself in its treaty form applies retrospectively – it probably does not - it simply codifies what was in existence before 1948. But genocide as a prohibited legal act had existed before 1948, even though there was no Convention. According to Steinmetz, it "remains to be seen whether courts and publics find the U.N. genocide convention to be retroactively applicable to various events (…)."[233] However, the Vienna Convention on the Law of Treaties states:

> "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."[234]

Though the Vienna Convention did not enter into force until 1980, it is accepted that its provisions mostly delineate what customary international law was and is, and that, unless the notion of genocide as a punishable crime before the entry into force of the Convention is read into it by a court, it will not apply retrospectively. Before the Vienna Convention came into force, the ICJ noted in the *Ambatielos* case:

> "To accept [the Greek Government's] theory would mean giving retroactive effect to Article 29 of the Treaty of 1926, whereas Article 32 of this Treaty states that the Treaty, which must mean all the provisions of the Treaty, shall come into force immediately upon ratification. Such a conclusion might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation. There is no such clause or object in the present case. It is therefore impossible to hold that any of its provisions must be deemed to have been in force earlier."[235]

However, while the Convention itself may not be retroactive in its effect, this does not mean that prohibitions of genocide did not apply before the Convention — they did, as the principles predate the Convention. As was found in the ICJ decision, the "principles underlying the Convention are principles which are recognised by civilised nations as binding on States, even without any conventional obligation".[236] While the ICJ decision is mostly read as viewing the Convention as a codification of customary norms, Schabas argues this not to be the case.[237] His point is that the Court does not say that the entire Genocide Convention codifies customary norms, but that the prohibition of genocide is a norm of customary law, also admitting that the Convention in-

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[232] *Report of the ad hoc working group of experts established under Resolution 2(XXIII) and 2(XXIV) of the Commission on Human Rights*, (Doc.E/CN.4/984/Add.18).

[233] G. Steinmetz, From "Native Policy" to Exterminationism: German Southwest Africa, 1904 in: Comparative Perspective, Theory and Research in Comparative Social Analysis, Paper 30, 1, 4–5 (Los Angeles: Department of Sociology, UCLA, 2005). Found at: http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1036&context=uclasoc Last visited 20 March 2006.

[234] *Vienna Convention on the Law of Treaties, Article 28* (U.N. Doc. A/CONF. 39/27) (1969),

[235] ICJ 1 July 1952, *Ambatielos* Case (Greece v U.K.), Preliminary Objections. Cited in ICTJ Legal Analysis on Applicability of UN Convention on Genocides prior to January 12, 1951.

[236] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J 23 (Advisory Opinion).

[237] W. A. Schabas, National Courts Finally Begin to Prosecute Genocide, the "Crime of Crimes," 1(1) Journal of International Criminal Justice 53 (2003, April).

dicates that genocide was a crime before the Convention was drafted or even before the General Assembly Resolution of 1946. Thus, it is clear that genocide was a crime before then, and the Convention recorded and clarified international opinion on it at that time.

However, the ICTR has gone further on this point and stated in its *Akayesu* decision that the "Genocide Convention is undeniably considered part of customary international law."[238] This was also the view of the United Nations' Secretary-General in his 1993 Report on the establishment of the International Criminal Tribunal for former Yugoslavia.[239]

This is important as the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity[240] plainly and consciously pronounces its retroactive application, article 1 stipulating: "No statutory limitation shall apply to the following crimes, *irrespective of the date of their commission* (…) the crime of genocide as defined in the 1948 Convention (…)." Thus, as has been shown, genocide was considered a crime before the Convention and can therefore even now form the basis of prosecution for events that were legally deemed to have been genocide in customary law when committed.

One of the real effects of the drafting of the Convention is that from the late 1940s crimes against humanity, war crimes and genocide were defined in distinctive ways because of the various instruments that had been drafted.[241] This is not to say that there was or remains any degree of overlap between some of these crimes in the sense that a person could be guilty of one or more of these different crimes for the same act.[242] There was overlap, and thus the roots of both must be found at least in the nineteenth century. De Guzman, for example, accepts that the foundations of crimes against humanity are found in the laws of war.[243] As a necessary extension of this the same is true of genocide.

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[238] ICTR 2 September 1998, *Prosecutor v Jean-Paul Akayesu*, para. 495.

[239] Secretary-General's Report pursuant to para. 2 of Resolution 808 (1993) of the Security Council, (S/25704) (May 3, 1993).

[240] Adopted November 26, 1968, and entered in force on November 11, 1970.

[241] The Whitaker report notes:

> In the wake of the Nazi atrocities, the Genocide Convention provided a permanent definition for part of the concept of 'crimes against humanity' contained in the Nuremberg principles, which themselves were an extension of international criminal jurisdiction regarding war crimes. The convention, which sought to codify a fundamental principle of civilization, in addition extended liability for such crimes to times of peace and not only to wartime.

United Nations Economic and Social Council Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities Thirty-eighth session, Item 4 of the provisional agenda, (E/CN.4/Sub.2/1985/6) (1985). Review of further developments in fields with which the sub-commission has been concerned. Revised and updated report on the question of the prevention and punishment of the crime of genocide, prepared by Mr. B. Whitaker, para. 25.

[242] It is for this reason that scholars are interested in the re-characterisation process in terms of which the same facts are characterised under different crimes or the same facts give rise to cumulative charges. As was noted by Judge Robinson at the ICTY in the *Tadic* decision:

> It is a fair comment that the Tribunal's approach to cumulative charging is relatively flexible and liberal. Trial Chambers have on several occasions dismissed preliminary objections to the form of an indictment on the ground of cumulative charging by holding that such objections would only be relevant at the sentencing stage. One way of dealing with this issue is by imposing concurrent sentences; another way is to impose the same sentence for two crimes when they are constituted by the same acts. The Tribunal, in the future, may yet have to confront at a preliminary stage, more squarely than it has in the past, the issue of cumulative charges.

See O. Olusanya, Double Jeopardy: Without Parameters 177 (Antwerp: Intersentia, 2004).

[243] M.M. De Guzman, The Road from Rome: The Developing Law of Crimes Against Humanity, 22(2) Human Rights Quarterly 342–43 (2000).

15. Conclusion

Many scholars argue that international law had not provided protection against human rights violations to individuals until World War II. However, this narrow view fails to take into account the protections provided by both customary international law and treaty law in the many years prior to the war, numerous situations indicating there was widespread international practice on a range of fronts before World War II, and in fact by the nineteenth century, which provided human rights protection. These were no exceptions, as has been stated by some, but rather a much wider and developed system of international human rights protection that existed within customary international law. The post-World War II era simply codified and defined the acts that had been occurring, and specifically proscribed them in written form.

International law in general can be traced back to ancient times and at least as far back as the nineteenth century, and international law norms based on humanity and dignity have guided the treatment of individuals during times of war and times of peace. In the nineteenth century, states began entering into countless treaties prohibiting crimes against humanity inflicted upon minority groups. For example, by the end of the nineteenth century, more than forty-five years before the conclusion of World War II, the Martens Clause of the 1899 Hague Convention II (later the 1907 Hague Convention IV) codified crimes against humanity as violations of international law, thereby providing protection to individuals during times of war. The *si omnes* clause may limit the protections of the Hague Convention to signatories; however, because the Martens Clause was a codification of already accepted customary international law, non-signatories are similarly protected. The Martens Clause stated what was already established as international law.

The prohibition of genocide provides an example of a customary law norm in place for centuries but not codified or defined until the middle of the 20th century. While the term did not exist until the World War II era, the act is ancient and has been proscribed for hundreds of years. Though not codified until the Genocide Convention, the act of genocide was long recognized and is a violation of international law even if it was committed prior to the Genocide Convention.

The emergence and scope of international law, whether in treaties or in customary international law, is especially relevant to those seeking reparations for atrocities committed against indigenous populations during colonization. More specifically, descendants of African communities brutalized by European settlers must show a violation of the law in order to command a remedy in court. Though this abuse occurred decades before World War II and the protections that followed the war, complainants can use customary international law norms and early treaty law to show that the crimes committed against their ancestors were just that — crimes in violation of international law. Using this as a foundation, the descendants of the indigenous peoples who were exploited, abused, and even murdered on the command of foreign governments can seek redress and request reparations in the courts today.