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World War I and the Armenian Genocide: Laying the Groundwork for Crimes Against Humanity

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WORLD WAR I AND THE ARMENIAN GENOCIDE: LAYING THE GROUNDWORK FOR CRIMES AGAINST HUMANITY

Julia Koch*

ABSTRACT

For all of its advancements in international law, including delivering justice to the war criminals of the Second World War, the International Military Tribunal in Nuremberg has long been tainted with accusations of victors' justice and criticized for violating the principle of *nullem crimen sine lege*. Such is the case for crimes against humanity, a crime that did not exist in positive international law until the 1945-46 legal proceedings in Nuremberg. But the historiography of the First World War—an era where punishment for war crimes is generally viewed as a wholesale failure—provides an additional, indeed novel, basis for understanding the Tribunal's 1946 convictions for crimes against humanity as legitimate and not marred by accusations of victors' justice. In particular, the 1915 declaration issued by the Allied powers in response to the Armenian genocide and the 1919 peace process, including the post-war report on war crimes, reveal that the convictions in Nuremberg for crimes against humanity were not the hollow farce that some suggest they were. Although the manner in which war crimes were dealt with following World War I is most commonly viewed as a failed effort, “crimes against humanity” was first coined as a term in

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international law during this period, and this essential linguistic thread not only connects the world wars but provides critical support for the International Military Tribunal's later convictions.

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I. INTRODUCTION

"It was when the Nazi regime declared that the German people not only were unwilling to have any Jews in Germany but wished to make the entire Jewish people disappear from the face of the earth that the new crime, the crime against humanity [...] appeared."¹ Hannah Arendt wrote this in 1963, shortly after the trial, conviction, and execution of Adolph Eichmann, the man often referred to as the architect of the Holocaust.² It was the Holocaust, she noted, that gave occasion to the creation of crimes against humanity, a charge for offenses "against the human status, or against the very nature of mankind."³

Crimes against humanity were written into international law for the first time during the 1945 peace talks in London ("London Conference") following World War II.⁴ As part of the post-war processes, the Allies formed the International Military Tribunal ("IMT" or "Tribunal") and drafted its Charter, which established the terms for the prosecution and punishment of the "Major War Criminals of the European Axis" ("Charter").⁵ Indeed, until 1945, "the words used in the Preambles of the [First and Fourth Hague Conventions, dated 1899 and 1907 ("1899 Hague Convention" and "1907 Hague Convention," respectively)] were the only references in conventional international law from which to draw on in formulating the term 'crimes against humanity.'"⁶ The IMT and its Charter marked an important development in international law, imposing, for the first time, criminal responsibility on individuals for

¹ HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 268 (Penguin Books 2006).

² See *id.* at xi–xiv.

³ *Id.* at 268.

⁴ See M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY 92–95 (2011) (describing the inclusion of "crimes against humanity" in the Charter and noting, "[t]he London Charter [...] was the first international instrument to define [crimes against humanity] in positive international law") [hereinafter CRIMES AGAINST HUMANITY].

⁵ Egon Schwelb, *Crimes Against Humanity*, in PERSPECTIVES ON THE NUREMBERG TRIAL 120, 120–21 (Guénaél Mettraux ed., 2008); see CRIMES AGAINST HUMANITY, *supra* note 4, at 95, 127.

⁶ CRIMES AGAINST HUMANITY, *supra* note 4, at 86–87; see Convention Respecting the Laws and Customs of War on Land, pmbl., Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter 1907 Hague Convention]; Convention with Respect to the Laws and Customs of War on Land, pmbl., July 29, 1899, 32 Stat. 1803, 1 Bevans 247 [hereinafter 1899 Hague Convention].

violations of international law as committed against “any civilian population,” including their own.⁷ The Charter and IMT would mark the creation of new international law and the codification of the legal and universal protection of human rights in a way that had never been done before.⁸

However, charging and convicting individuals of new crimes has long invited accusations that such crimes are nothing more than *ex post facto* law or, in the context of war, victors’ justice.⁹ *Nullem crimen sine lege*, the principle that a law must exist in order to impose corresponding punishment, calls into question the legality of new law that exacts retroactive punishment for prior acts and casts a long shadow on much of international criminal law.¹⁰ Beyond these concerns for legality and whether such a crime is indeed a crime “in the legal sense of the word,” victors’ justice presents additional challenges to the fairness of post-war prosecutions due to the victors’ treatment of the vanquished.¹¹ Victors’ justice assumes that the victors will act

⁷ WILLIAM SCHABAS, UNIMAGINABLE ATROCITIES 31–32 (2012); see Michael J. Kelly & Timothy L.H. McCormack, *Contributions of the Nuremberg Trial to the Subsequent Development of International Law*, in THE LEGACY OF NUREMBERG: CIVILISING INFLUENCE OF INSTITUTIONALISED VENGEANCE? 102–03 (David A. Blumenthal & Timothy L.H. McCormack eds., 2008) (explaining that the Charter codified, for the first time, crimes against the peace, which are often referred to as crimes of aggression or waging an aggressive war); Quincy Wright, *The Law of the Nuremberg Trial*, in PERSPECTIVES ON THE NUREMBERG TRIAL 320, 340–41 (Guénaél Mettraux ed., 2008).

⁸ See Kelly & McCormack, *supra* note 7, at 101, 104–05; TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 4–5 (2013); Lawrence Douglas, *The Memory of Judgment: The Law, the Holocaust, and Denial*, 7 HIST. & MEMORY 100, 104–05 (2001).

⁹ See SCHABAS, *supra* note 7, at 47; see also Kelly & McCormack, *supra* note 7, at 105–06 (“The Defence at Nuremburg argued strenuously against criminalisation of aggression on the basis that [the Charter] amounted to the creation of law *ex post facto* in violation of the fundamental principle *nullem crimen sine lege* [...] Others since Nuremberg have adopted and reiterated the Defence argument as a major criticism of both the Nuremburg and the Tokyo trials.”); DOUGLAS, *supra* note 8, at 50 (explaining that the sitting United States Supreme Court Chief Justice Harlan Fiske Stone declined to administer the oath to the American prosecutors at the IMT and described the tribunal as little more than a “high-grade lynching affair”).

¹⁰ See SCHABAS, *supra* note 7, at 47–50 (Such “arguments about retroactive prosecution persist at both the judicial and political levels. The development of international criminal law is accompanied by constant attempts to reassess the past.”).

¹¹ See *id.* at 47–50, 73–74 (describing concerns about victors’ justice falling into three distinct categories: (i) application of legal norms; (ii) fairness of legal proceedings; and (iii) identification of defendants).

out of vengeance, retaliation, and selfishness, and that the victors will exercise—or abuse—their newfound power over the vanquished simply because of their status as the victors.¹² All of these issues pose problems for the creation of legitimate international law: law established *ex post facto* or out of vengeance and retaliation lacks validity, yet unprecedented acts of violence, especially those attendant to war, demand punishment.¹³

Indeed, there has been a variety of criticisms levied against the IMT and Charter. Many of these challenges focus on the lack of legality for the charge of crimes against humanity, arguing that, without precedent, the Charter and entire IMT process were mere products of victors' justice.¹⁴ Admittedly, "[c]rimes

¹² See, e.g., GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE* 8–9, 11 (2000) [hereinafter *STAY THE HAND OF VENGEANCE*] (collecting examples and quotations of historical instances of victors' justice) ("To [legal] realists, a war crimes tribunal is simply something that the countries that decisively win a war inflict on the helpless country that loses it. It is punishment, revenge, spectacle—anything but justice."); SCHABAS, *supra* note 7, at 74–75 (noting that certain of the acts over which the Tribunal established jurisdiction were perpetrated by Allied powers, including the Soviets' role in the Katyn massacre) ("The jurisdiction of the Nuremberg tribunals was defined in such a way as to make the prosecution of any military or political leaders of the Allies a legal impossibility.").

¹³ See, e.g., *STAY THE HAND OF VENGEANCE*, *supra* note 12, at 11 (admitting that it is "hard not to be impressed with the force of much of the realist line of argument" and listing historical examples of punishment imposed on a losing nation); SCHABAS, *supra* note 7, at 47–49; *but see* *CRIMES AGAINST HUMANITY*, *supra* note 4, at 303 (discussing the notion that although the principle of *nullem crimen sine lege* may be accepted in some national legal systems, it is not directly applicable in this same sense to international law, and that one reason for this divergence may be the differences in the legal systems' goals and techniques).

¹⁴ See, e.g., Hans-Heinrich Jescheck, *The Development of International Criminal Law After Nuremberg*, in *PERSPECTIVES ON THE NUREMBERG TRIAL* 409–10 (Guénaél Mettraux ed., 2008) (characterizing the London Charter as a "legal source[], whereby no general international law could be created with regard to Germany, but only occupation law . . ."); Kelly & McCormack, *supra* note 7, at 102 (noting that the criticisms of the IMT's application of crimes against humanity with respect to "retrospectivity" were "even more pronounced" than those critics relating to the IMT's application of crimes against the peace); DOUGLAS *supra* note 8, at 50 (noting the challenges posed by critics to both the conception of crimes against humanity, as well as the crime of waging an aggressive war, and observing that United States Supreme Court Justice Robert Jackson, Chief American Prosecutor before the Tribunal, "failed to quiet the charges of victors' justice"). Other criticisms of the Tribunal dealt with the concept of holding individuals responsible under international law and with the validity of other crimes articulated in the

against humanity did not exist as a category of international crime” at the end of World War I, or for that matter, at the time of Germany’s surrender to the Allies in the spring of 1945.¹⁵ And, it is true that there was “no unambiguous criminalisation of a category of crimes known as crimes against humanity prior to the drafting” of the Charter.¹⁶ These arguments were presented contemporaneously by counsel for the German defendants, and they forced the leaders of the Tribunal and authors of the Charter to grapple with difficult yet, as we will see, familiar concerns.¹⁷

One way in which the IMT responded to cries of victors’ justice was by limiting its findings of crimes against humanity to acts that occurred only after the commencement of the war in 1939.¹⁸ The IMT found evidence of crimes against humanity only in furtherance of the illegal aggressive war and not in connection with conduct occurring prior to Germany’s invasion of Poland in September 1939.¹⁹ In so doing, the Charter defined crimes against humanity in a way that could be “construed as a mere extension of war crimes,” the prohibition of which was already included in positive international law.²⁰ An additional retort to the Charter’s critics asserts that humanitarian and moral principles, including those codified in international law predating WWII, were sufficient to give notice that any conduct that inflicted harm, loss, and pain on the masses in the form of

Charter, including crimes against the peace. *See, e.g.,* Kelly & McCormack, *supra* note 7, at 102, 104 (articulating the concern regarding the Tribunal’s ability to treat “individuals as subjects of the international legal system” and similarly, “the notion of trying alleged war criminals for their violations of international law”); TAYLOR, *supra* note 8, at 51 (discussing the legal difficulties posed by charging defendants with crimes against peace).

¹⁵ Kelly & McCormack, *supra* note 7, at 107.

¹⁶ *Id.*

¹⁷ *Id.* at 105–07; SCHABAS, *supra* note 7, at 49.

¹⁸ M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 26 (1997) [hereinafter *From Versailles to Rwanda*]; Kelly & McCormack, *supra* note 7, at 107–08.

¹⁹ *From Versailles to Rwanda*, *supra* note 18, at 26; Kelly & McCormack, *supra* note 7, at 107–08; *see also* SCHABAS, *supra* note 7, at 50–51 (“Absent such a nexus with war, the Allied lawmakers said there could be no criminal liability for the acts directed by a state against its own nationals.”).

²⁰ Kelly & McCormack, *supra* note 7, at 107; *see also* *From Versailles to Rwanda*, *supra* note 18, at 26 (“War crimes in [the Charter] included customary law as identified, *inter alia*, by reference to the 1907 Hague Convention.”).

crimes against humanity carried with it the risk of criminal punishment.²¹ A further position posits that although crimes against humanity may be a new “innovation” in international law, such innovation must be immediately accepted in light of the “outraged conscience of the world” and the “enlightened conception of the true purposes of the law of nations.”²²

A historical and linguistic analysis of events from World War I provides yet another basis on which to rebut accusations that the IMT and its Charter are mere products of victors’ justice.²³ Specifically, the massacre of the Armenians by the Turks in 1915 marked the first genocide of the twentieth century, and the Allies’ 1915 declaration to Turkey, which threatened criminal punishment for the killings (“Declaration”), was the first time the term “crimes against humanity” was used in the context of international law.²⁴ The Allies’ immediate, mid-war reaction to the massacre and the identity of the victims—being nationals of non-Allied powers—suggest that recourse by the Allies against the Turks was not a function of victors’ justice.²⁵ Several years later, in 1919, an Allied post-war report on the responsibility and criminality of the war (“Commission Report”) drew on these same ideals and language.²⁶ Along with the Declaration, the Commission Report, which was intended to complement the 1919 peace discussions in Paris (“Paris Peace Conference”), would later influence the delegates at the London

²¹ SCHABAS, *supra* note 7, at 49–50 (explaining that with respect to crimes against peace, the Tribunal had concluded that “there was a retroactive dimension to prosecution for crimes against the peace, but [...] leaving such wrongs unpunished would be unjust”); TAYLOR, *supra* note 8, at 51 (defending the prosecution’s position with respect to crimes against the peace in opining, “[o]nly the most incorrigible legalists can pretend to be shocked by the conclusion that the perpetrator of an aggressive war acts at peril of being punished for his perpetration, even if no tribunal has ever previously decided that perpetration of an aggressive war is a crime.”).

²² SCHABAS, *supra* note 7, at 57.

²³ *Id.* at 73.

²⁴ See CRIMES AGAINST HUMANITY, *supra* note 4, at 458–59 (illustrating how the conflict in the former Yugoslavia prompted usage of “crimes against humanity” in international law).

²⁵ See Gary Bass, *Victor’s Justice, Selfish Justice*, 69 SOC. RSCH. 1035, 1042 (2002) [hereinafter *Victor’s Justice, Selfish Justice*] (arguing that, within the context of victors’ justice, even liberal states tend to disproportionately fight for justice for their own citizens, rather than for citizens of other nations).

²⁶ See CRIMES AGAINST HUMANITY, *supra* note 4, at 465 (showing how the 1919 Commission also favored prosecuting “crimes against humanity”).

Conference.²⁷ Particularly notable were the Commission Report's invocation of the 1907 Hague Convention, which referred to the "laws of humanity," and its enumeration of war crimes, which included reference to "[m]assacres of Armenians by the Turks."²⁸ Indeed, "when casting about for a precedent for the Nuremberg category of crimes against humanity, the Allies did not remember that they had used that precise term as early as 1915."²⁹

Although experts have already offered a chronology of key events in the development of crimes against humanity as international positive law, a closer look at the historiography surrounding the First World War sheds light on the evolution of the charge as a legitimate tool at the IMT's disposal.³⁰ This historiography provides the Charter and IMT with the legitimacy necessary to affect a powerful and meaningful protection of human rights following Nazi atrocities. Although the WWI era attempts to address wartime criminality—including the Declaration, Commission Report, and Paris Peace Conference³¹—have largely been seen as unsuccessful, they nevertheless contributed to the development of post-WWII international law and are instrumental in combating concerns that the IMT was nothing more than victors' justice.

²⁷ See M. Cherif Bassiouni, *World War I: The War to End All Wars and the Birth of a Handicapped International Criminal Justice System*, 30 DENV. J. INT'L L. & POL'Y 239, 254, 260 (2002) [hereinafter *WWI & the Handicapped System*] (explaining how the delegates of the London Conference referenced the war crimes in 1918 to reach their conclusion); JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 68 (Greenwood Press ed., 1982).

²⁸ CRIMES AGAINST HUMANITY, *supra* note 4, at 262; *WWI & the Handicapped System*, *supra* note 27, at 576; see, e.g., *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference*, 14 AM. J. INT'L L. 95, 113–15 (1920) (outlining crimes addressed by the Commission) [hereinafter *Commission Report*].

²⁹ STAY THE HAND OF VENGEANCE, *supra* note 12, at 144.

³⁰ Norman J.W. Goda, *Crimes Against Humanity and the Development of International Law*, NAT'L WORLD WAR II MUSEUM (Sept. 15, 2021), <https://www.nationalww2museum.org/war/articles/crimes-against-humanity-international-law>.

³¹ See, e.g., *World War I*, HISTORY.COM, <https://www.history.com/topics/world-war-i/world-war-i-history#treaty-of-versailles> (Mar. 15, 2022) (summarizing the events of World War I, including the Paris Peace Conference's Treaty of Versailles, a treaty whose "lofty goals" were not met).

II. THE OTTOMAN EMPIRE IN THE TWENTIETH CENTURY

A. *The Faltering Empire and the Rise of the Young Turks*

The Ottoman Empire, founded in the fourteenth century, developed, expanded, and flourished for hundreds of years.³² In the seventeenth century, however, the empire began to feel a variety of internal and external pressures, which combined to trigger its gradual decline.³³ Sultans' leadership abilities and loss of power, systemic corruption, economic challenges, social unrest, and a significantly weakened army all contributed to this decline.³⁴ Despite developing the nickname the Sick Man of Europe, Turkey remained relevant in international affairs due in large part to its highly coveted geography.³⁵ In particular, the Ottoman capital of Constantinople lay between the Dardanelles and Bosphorus straits, linking Europe to Asia and Russia to the Mediterranean.³⁶ After Britain rejected a permanent offer of alliance from Turkey—in response to reports of Ottoman incompetence and corruption—Germany established a military alliance with Turkey on August 3, 1914, just over a month after the Archduke of Austria was assassinated.³⁷

³² See DOUGLAS A. HOWARD, A HISTORY OF THE OTTOMAN EMPIRE 8–9 (Cambridge Univ. Press ed., 2017) (providing history of the Ottoman Empire, including its origins in the fourteenth century and governing sultans).

³³ RONALD GRIGOR SUNY, A HISTORY OF THE ARMENIAN GENOCIDE 25 (Eric D. Weitz, ed., 2015); ULRICH TRUMPENER, GERMANY AND THE OTTOMAN EMPIRE 3 (1968).

³⁴ TRUMPENER, *supra* note 33, at 3.

³⁵ SUNY, *supra* note 33, at 25; BARBARA W. TUCHMAN, THE GUNS OF AUGUST 161, 163 (Random House Publ'g Grp. ed., 2009).

³⁶ See TUCHMAN, *supra* note 35, at 162–63.

³⁷ TUCHMAN, *supra* note 35, at 163, 165; see ADAM HOCHSCHILD, TO END ALL WARS: A STORY OF LOYALTY AND REBELLION, 1914–1918 79–81, 85, 92–93 (Houghton Mifflin Harcourt ed., 2011) (stating that Austro-Hungarian Archduke Franz Ferdinand was shot on June 28, 1914, which led Austria to declare war on Serbia that same day. And depicting a map of the “The Path to War,” which describes the course of events: Germany declared war on Russia while France mobilized against Germany, Germany declared war on France, and Britain declared war on Germany several days later after Germany invaded neutral Belgium); see TUCHMAN, *supra* note 35, at 85 (describing how Austria’s decision to declare war was done with Germany’s “faithful support” and ultimately set off a domino reaction: Russia mobilized against Austria and Germany, and Austria countered and mobilized against Russia); see also *WWI & the Handicapped System*, *supra* note 27, at 245 (detailing the escalation from a local Balkan conflict to a continental one, involving major Allied and Associated Powers).

It was against this backdrop that the Young Turks, an increasingly radical political party, came to power following a 1908 revolution.³⁸ This shift in power and the strains of looming war marked a change in the treatment of minorities in Turkey.³⁹ Previously, the predominately Muslim Ottomans lived in relative peace with the Christian minority; however, this “old easy tolerance” gave way to Christian reprisals, which would continue to escalate until the end of the First World War.⁴⁰ Then-United States Ambassador to Turkey, Henry Morgenthau, described the Young Turks as being sincere in their 1908 attempt to rid the country of the sultan—the “great assassin”—and establish a true democracy in his place.⁴¹ Soon, however, the dreams of equality dissolved, and, according to Morgenthau, a “wicked oligarchy” of men concerned with “personal power” and “materialism” came to define the Young Turks’ rule.⁴² In 1914, the Turkish government forcefully expelled Christian Greeks from its territory; its desire to homogenize the empire would have grave implications for the remaining Christians of Turkey.⁴³

³⁸ See SUNY, *supra* note 33, at 154–58, 174 (describing the 1908 revolution and Young Turks’ rise to power as well as summarizing the transformation of the Young Turks’ leadership towards authoritarianism and, ultimately, dictatorship).

³⁹ See *id.* at 4 (“Although the empire was by the nineteenth century most often ruled by ethnic Turks, it was not conceived as an ethnic Turkish state but as a multinational Islamic empire, which included [Christian] peoples.”); see *id.* at 187 (noting that a “casualty” of the Balkan wars that immediately preceded WWI, during which the Ottomans suffered a series of military defeats, was the “ecumenical vision of the Ottomanists, the idea of a multinational, religiously diverse empire of equal subjects”); see *id.* at 187–88 (“In 1913 [it was] proposed a Turkey for Turks [...] rejecting Ottomanist politics [...] as “Armenian politics.” [...] There was no place here for Armenians, Greeks, or even Kurds.”).

⁴⁰ MARGARET MACMILLAN, *PARIS 1919* 350 (2003); see SUNY, *supra* note 33, at 4; see also HENRY MORGENTHAU, *AMBASSADOR MORGENTHAU’S STORY* 12–13 (1918) (noting that, although Christian minorities in certain areas of the Ottoman Empire had experienced violence and persecution at the hands of the Turks for years, such oppression, comparatively speaking, rested upon the Armenians rather lightly); TRUMPENER, *supra* note 33, at 201 (“The overthrow of [the prior] despotic regime and the formal resurrection of a constitutional form of government by the Young Turks in 1908 was initially greeted by many Ottoman Armenians as the dawn of a new era, but their hopes were quickly quashed.”).

⁴¹ MORGENTHAU, *supra* note 40, at 12.

⁴² *Id.* at 13–14.

⁴³ See SUNY, *supra* note 33, at 193.

B. *The Armenian Massacres*

The machinery of the Armenian genocide was already in place by February 1915 as the Young Turks' security policies against their own countrymen grew increasingly radical.⁴⁴ Included among these policies was the disarmament of Armenian soldiers in the Ottoman army.⁴⁵ Instead of combatants, Armenians were forced to work as "road labourers and pack animals" and subject to beatings by whips and bayonets.⁴⁶ These soldiers, targeted because they were able-bodied men with access to weapons, were "not infrequently massacred" or "disposed of in even more summary fashion."⁴⁷ Similarly, by the spring of 1915, many of the Armenian intellectuals were exiled from their towns and often killed in the process, leaving Armenians with little intellectual or political leadership.⁴⁸ Then, in late April of 1915, the Turkish government began systematically deporting Armenians from Ottoman cities, and those that survived the deportation arrived in the Syrian desert.⁴⁹ Marking a distinct escalation in policy, the leader of the Young Turks ordered mass arrests of Armenians on April 24, 1915 in an effort to protect the empire from a supposed Armenian "revolt."⁵⁰ Among the justifications for the arrests and deportations, the Turks labeled the

⁴⁴ See MORGENTHAU, *supra* note 40, at 301–02; SUNY, *supra* note 33, at 248.

⁴⁵ See MORGENTHAU, *supra* note 40, at 302; SUNY, *supra* note 33, at 248; see also TANER AKÇAM, *THE YOUNG TURKS' CRIME AGAINST HUMANITY: THE ARMENIAN GENOCIDE AND ETHNIC CLEANSING IN THE OTTOMAN EMPIRE* 137 (Princeton Univ. Press ed., 2012) (describing, though not necessarily as part of a premeditated plan, the Young Turks' "disarming of Armenian recruits in the Ottoman Third Army and their transfer to labor battalions, the searching of Armenian villages for weapons, and the staging of raids against these villages to appropriate food and other necessities for the war effort").

⁴⁶ MORGENTHAU, *supra* note 40, at 302.

⁴⁷ *Id.* at 302–03 (explaining that in the city of Harpoot, for example, 2,000 Armenian soldiers were called away to help build roads and, upon learning that they were being called to be executed, the townspeople pleaded with the governor to protect the soldiers, however, despite the governor's promise, the Armenian soldiers were murdered and a few days later another 2,000 Armenian soldiers were sent away in the same manner).

⁴⁸ See SUNY, *supra* note 33, at 274 ("With the soldiers disarmed and the intellectuals and politicians under guard, the muscle and mind of the Ottoman Armenians had been effectively eliminated.").

⁴⁹ AKÇAM, *supra* note 45, at xvii, 184, 188; MORGENTHAU, *supra* note 40, at 314; SUNY, *supra* note 33, at 253.

⁵⁰ SUNY, *supra* note 33, at 272–73.

Armenians as a “threat to the empire’s national security and territorial integrity,” claiming that persecution was needed in the name of military necessity.⁵¹

Nearly two million Armenians were targeted for deportation, yet even before the caravans began moving south, many of the Armenian men were separated from the women and children, tied up together in small groups, and killed.⁵² In Angora, for example, nearly all Armenian men between the ages of fifteen and seventy were arrested and summarily executed.⁵³ During the deportation, the Armenians—now mostly women and children—were forced to travel on foot.⁵⁴ The vast majority of the Armenians—perhaps as many as 1.5 million—who were ultimately deported died of starvation, exhaustion, or dehydration before ever reaching Syria.⁵⁵ Additionally, the victims were subject to continuous beatings from the accompanying gendarmes as well as from the Kurds and Turks living in the mountains, and many were robbed and raped along the way.⁵⁶ One caravan walked for seventy days before arriving in Aleppo; although approximately 18,000 Armenians began the journey in this caravan, no more than 150 made it to the city.⁵⁷ Between the summary executions that occurred throughout the villages of the Ottoman Empire and the deportation of hundreds of thousands of remaining Armenians, estimates conclude that between 1 and 1.5 million Armenians perished during 1915.⁵⁸

⁵¹ AKÇAM, *supra* note 45, at 125–26, 135, 227; *see* SUNY, *supra* note 33, at 245, 248, 273–75 (describing the Turks citing the need to punish the Armenians and to protect their national ideals).

⁵² MORGENTHAU, *supra* note 40, at 302, 309, 311; *see* SUNY, *supra* note 33, at xviii, 257 (describing the systematic separation of men from women and children, the massacre of the former, and abduction of the latter).

⁵³ MORGENTHAU, *supra* note 40, at 314 (Angora is the present-day Turkish capital, Ankara).

⁵⁴ *Id.* at 312, 315; *see also* SUNY, *supra* note 33, at 301 (quoting a German diplomat’s description of the deadly conditions associated with the caravans to the desert).

⁵⁵ *See* MORGENTHAU, *supra* note 40, at 321; SUNY, *supra* note 33, at xx–xxi, 301, 345; John Kifner, *Armenian Genocide of 1915: An Overview*, N.Y. TIMES, http://www.nytimes.com/ref/timestopics/topics_armeniangenocide.html (last visited Apr. 18, 2022).

⁵⁶ *See* MORGENTHAU, *supra* note 40, at 315–17, 320; SUNY, *supra* note 33, at xx.

⁵⁷ *See* MORGENTHAU, *supra* note 40, at 315–18, 321 (describing the conditions faced by the caravans of refugees at the hands of the gendarmes).

⁵⁸ SUNY, *supra* note 33, at 354–55 (noting that one of the primary Ottoman leaders responsible for the massacre estimated fatalities to be

The first genocide of the twentieth century, although largely unpunished, would play a quiet yet important role in the development of international humanitarian law as the basis for crimes against humanity.⁵⁹

III. THE 1915 DECLARATION: A HISTORICAL ACCOUNT OF CRIMES AGAINST HUMANITY

A. *"New Crimes of Turkey Against Humanity and Civilization"*

Upon receiving notice of the ongoing deportation and massacre in April of 1915, Russia promptly sought the support of its allies in issuing a condemnation against Turkey.⁶⁰ France quickly agreed to issue a joint threat, while Britain stalled for several weeks, concerned about a lack of first-hand accounts and the limited efficacy of a written threat.⁶¹ Nevertheless, the Russian foreign minister offered a first draft to the French and British for approval, and after deliberation, the text of the final Declaration read in pertinent part "[i]n view of these new crimes of Turkey against humanity and civilization, the Allied governments announce publicly to the Sublime Porte that they will hold personally responsible [for] these crimes all members of the Ottoman Government and those of their agents who are implicated in such massacres."⁶² This was the first time that the concept of crimes against humanity had been articulated, and

about 1.5 million and recounting other scholars' estimates to reflect similar figures); Kifner, *supra* note 55; *see also* Q&A: *Armenian Genocide Dispute*, BBC (Apr. 13, 2015), <http://www.bbc.com/news/world-europe-16352745> (comparing Armenians' estimated calculation of victims—roughly 1.5 million—to Turkey's approximation—about 300,000).

⁵⁹ *See* WILLIS, *supra* note 27, at 69, 156 ("The Allies were even less successful than the sultan's government in trying Turkish war criminals [for the Armenian massacres]."); *see, e.g.*, STAY THE HAND OF VENGEANCE, *supra* note 12, at 106 ("Constantinople is the Nuremberg that failed."); CRIMES AGAINST HUMANITY, *supra* note 4, at 88 ("Nothing came out of [the 1915 Declaration]").

⁶⁰ STAY THE HAND OF VENGEANCE, *supra* note 12, at 114–15.

⁶¹ *Id.* at 115; WILLIS, *supra* note 27, at 26.

⁶² STAY THE HAND OF VENGEANCE, *supra* note 12, at 117 (quoting a letter from William G. Sharp to William J. Bryan on May 28, 1915, in PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: THE WORLD WAR 981 (1915 Supp. 1928)) (Sublime Porte was used in referencing the government of the Ottoman Empire).

even somewhat defined, in the context of international law.⁶³ On May 24, the joint Declaration was issued in London, Paris, and Petrograd, and it was delivered to the Ottoman leaders personally.⁶⁴ Unfortunately, the Declaration had no immediate or meaningful impact on the conduct of the Ottoman leaders, and notwithstanding additional commitments by the British Parliament to punish the Turks for their treatment of the Armenians, the Allies moved forward, focused on other aspects of the war.⁶⁵ Additionally, given that the Declaration was a legally non-binding document, the Allies' enforcement of the threat was essentially non-existent, as the Brits feared it might be; it was not until 1945–46 that crimes against humanity would carry meaningful criminal sanctions.⁶⁶

*B. Concern for the Armenians Transcended Nationality,
Wartime Alliances, and Religion*

The identity and relationship of the Armenian victims relative to the world's major powers is critical in understanding the impact that these WWI era events had in setting forth a foundation for the IMT decades later. Three key observations that contribute to this impact are: (i) the victims were not nationals of an Allied power or even a neutral state, but were instead citizens of a belligerent nation; (ii) objection and outrage came from Britain, France, and Russia, as well as Axis Germany and neutral United States; and (iii) the killings were depicted as atrocities against mankind, rather than more exclusively and narrowly against Christians.⁶⁷ Together, these three attributes provide a growing cache of evidence that, long before the horrors of World War II, the world was identifying, taking issue with, and developing an increasingly valid template to punish crimes against humanity—one that was not built on victors' justice.

A common theme in the prosecution of war crimes is the

⁶³ CRIMES AGAINST HUMANITY, *supra* note 4, at 88.

⁶⁴ STAY THE HAND OF VENGEANCE, *supra* note 12, at 116; MORGENTHAU, *supra* note 40, at 359; *WWI & the Handicapped System*, *supra* note 27, at 262.

⁶⁵ CRIMES AGAINST HUMANITY, *supra* note 4, at 88; WILLIS, *supra* note 26, at 27; *see also* STAY THE HAND OF VENGEANCE, *supra* note 12, at 144–46 (describing the 1919 Constantinople war crimes trials as forgotten and generally unsuccessful in their aims).

⁶⁶ *See* WILLIS, *supra* note 27, at 26–27.

⁶⁷ *See id.* at 24–27 (describing the Armenian genocide and the perspectives of the different nations involved in WWI).

nationality of the victims; this often dictates whether, and to what extent, the crimes will be punished.⁶⁸ A nation is more likely to seek the prosecution and punishment of war crimes when the victims are its own citizens, rather than foreigners.⁶⁹ Even the most liberal countries, typically advocates of universal human rights, nevertheless “put [their] own citizens first—to an amazing degree.”⁷⁰ Thus, the fact that the victims of the genocide were citizens of Turkey lends itself to establishing the legitimacy of the Allies’ response and the validity of the burgeoning positive law crime of crimes against humanity. The Armenians were not only citizens of a non-Allied nation, but they were citizens of a wartime enemy, some of whom also served in the Turkish army.⁷¹ With this in mind, the Allies’ Declaration marks a turning point in history towards a “truly universal conception of human rights,” a concept that would become the centerpiece for the war trials several decades later when defendants were convicted for the systematic massacre of Jews

⁶⁸ See, e.g., WILLIS, *supra* note 27, at 13, 19 (describing France’s desire to try German soldiers on the basis that “the Germans seemed to be continuing in France the deliberate use of terror that they had begun in Belgium”) (“[British diplomat] Lord Robert Cecil strongly pressed [British Prime Minister Herbert Henry] Asquith to threaten future prosecution of those who mistreated British prisoners of war, ‘whether he be Kaiser or any subordinate of his.’”).

⁶⁹ See STAY THE HAND OF VENGEANCE, *supra* note 12, at 8, 14 (describing the Allied effort to pursue justice for Armenian victims, “not citizens of the victor states,” as an anomaly); *Victor’s Justice, Selfish Justice*, *supra* note 25, at 14.

⁷⁰ STAY THE HAND OF VENGEANCE, *supra* note 12, at 8, 106 (“The Constantinople trials were driven at first by a striking display of British idealism and universalism. Even though the Armenian victims of the 1915 massacres were foreigners (albeit Christians), the British public and much of its elite were outraged.”).

⁷¹ MORGENTHAU, *supra* note 40, at 302; see SUNY, *supra* note 33, at 248–49 (explaining that in reality of course, the Allies were more than willing to advance its wartime agenda and take issue with the way in which a belligerent treated its own citizens); see STAY THE HAND OF VENGEANCE, *supra* note 12, at 107, 112 (characterizing Britain’s outrage at the Turkish atrocities as “self-serving” and arguing that its desire to pursue justice against the Ottoman government was highly motivated by a desire to mete out punishment for treatment of British prisoners of war, even more so than for the treatment of Armenian civilians. “[B]oth Russia and France saw the Armenians as potentially useful in the war against Turkey.”); see WILLIS, *supra* note 27, at 25 (“The Allies could respond without restraint [as compared to Germany], for they had decided to destroy the Ottoman Empire.” Noting that multiple German representatives were deeply concerned about the Young Turks’ behavior towards the Armenian population as well).

living in Allied, Axis, and neutral states.⁷²

Importantly, it was not only the Allied nations that issued the threat against Turkey, but condemnation for the Armenian massacres transcended wartime alliances.⁷³ When the German Ambassador to Turkey died suddenly in October 1915, Germany sought to name a replacement, but the Turkish government rejected the man Germany had proposed, indicating that he would not be welcome in Constantinople due to his position regarding the Turks' treatment of the Armenians.⁷⁴ The replacement on which the Germans and Turks ultimately settled was Paul von Wolff-Metternich, who became unpopular in Constantinople nearly overnight due to his own "outspoken criticism of [the Turks'] Armenian policy" and severe reproach towards the Turkish government "for its handling of the Armenian question."⁷⁵ As a result of von Wolff-Metternich's inability to "talk about anything but the Armenian persecutions" and "unceasing efforts to intercede on behalf of the Armenians," he was replaced as ambassador in just over a year.⁷⁶ Throughout 1915, the German government, through various representatives, issued a series of statements advising, requesting, and ultimately admonishing the Sublime Porte for its treatment of

⁷² See, e.g., William Maley, *The Atmospherics of the Nuremberg Trial*, in *THE LEGACY OF NUREMBERG: CIVILISING INFLUENCE OF INSTITUTIONALISED VENGEANCE?* 7 (David A. Blumenthal & Timothy L.H. McCormack ed., 2008) (quoting Justice Jackson's opening statement before the IMT, in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946* 99 (1971)) ("The real complaining party at your bar is Civilization. [Civilization] does expect that [the IMT's] juridical action will put the forces of international law, its precepts, its prohibitions and, most of all, its sanctions, on the side of peace, so that men and women of good will, in all countries, may have 'leave to live by no man's leave, underneath the law.'"); see also *STAY THE HAND OF VENGEANCE*, *supra* note 12, at 116 (describing Britain's move from "pan-Christian solidarity toward a truly universal conception of human rights" as a meaningful development resulting from the Declaration).

⁷³ See TRUMPENER, *supra* note 33, at 204 (noting that contrary to the "assertions of several recent authors, the wartime persecution of the Ottoman Armenians was neither instigated nor welcomed by the German government.").

⁷⁴ *Id.* at 125.

⁷⁵ *Id.* at 125–26.

⁷⁶ *Id.* at 126–27; Vahakn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications*, 14 YALE J. INT'L L. 221, 258 (1989).

the Armenians.⁷⁷ In particular, and following a memorandum from the German Ambassador critical of the Turks' conduct, an August 1915 memorandum to the Ottoman government stated that "by order of [the German] government, [the interim German Ambassador had to] remonstrate once again *against these acts of horror*" against the Armenian population.⁷⁸ To be sure, not all Germans opposed the Turkish massacres, and at the highest levels, it became evident that Germany as a whole would not intervene.⁷⁹ However, those that did object and seek action against the atrocities helped ensure that the emerging term "crimes against humanity" was not vengeful or retaliatory in nature, but that it was rooted in ideals of universal humanitarianism.

Additionally, the Americans, largely through Ambassador Morgenthau, were also appalled by the news of the Armenian genocide.⁸⁰ In 1915, the United States had not yet entered the war and was not formally a member of the Allied powers.⁸¹

⁷⁷ See TRUMPENER, *supra* note 33, at 213–19.

⁷⁸ *Id.* at 218; see also WILLIS, *supra* note 27, at 25 (discussing how, not dissimilarly, German general Otto Liman von Sanders leveraged his position in the military and personally intervened to prevent deportations in one Ottoman town); see also MORGENTHAU, *supra* note 40, at 372 (discussing how Paul Weitz, a correspondent for the *Frankfurter Zeitung*, urged the new German Ambassador in Constantinople to intervene) (stating "I remember that you told me at the beginning' [...] 'what a mistake Germany was making in the Armenian matters. I agreed with you perfectly. But when I urged this view upon [Ambassador] Wangenheim, he threw me twice out of the room!'").

⁷⁹ See, e.g., TRUMPENER, *supra* note 33, at 204, 208, 225–26, 231 (describing various German authorities' decisions not to act, intervene, or otherwise "strain Germany's political relationship" with Turkey) (noting that, in its refusal to act, the Central Powers were "guilty of extremely poor judgment, a considerable degree of moral callousness, and an altogether excess concern with what was or seemed to be politically expedient."); WILLIS, *supra* note 27, at 25 ("The German government, however, set first priority on preserving its military alliance with the Turks, and its efforts to encourage moderation were for the most part calculated not to offend the Young Turks.").

⁸⁰ See THE ARMENIAN GENOCIDE AND AMERICA'S OUTCRY: A COMPILATION OF U.S. DOCUMENTS, 1890-1923 (1985) (including the following newspaper headlines from the fall of 1915: "U.S. Aid to Armenians: Ambassador Morgenthau Is Told to Protest Against Massacres," from *The Washington Post*; "Morgenthau Giving Relief: American Consuls Will Also Do What They Can to Aid Armenians," from *The New York Times*; "Tell Horrors Done In Armenia: Turkish Record Outdone: A Policy of Extermination Put in Effect Against a Helpless People," from *The New York Times*).

⁸¹ See HOCHSCHILD, *supra* note 37, at 267.

Although the country's firm isolationist policy and political concerns stymied its response to the massacres, the American Ambassador held extensive conversations, often peppered with arguments and political threats, with one of the foremost Ottoman leaders, Talaat Pasha ("Talaat Bey").⁸² However, despite public outrage, the Americans maintained that precedent did not support intervention or punishment of the Turkish leaders: as the victims were Turkish citizens and no Americans had been harmed, the massacres were considered a domestic matter, particularly since America never entered the war against Turkey.⁸³ Furthermore, the Americans took the position that the provisions of the 1907 Hague Convention did not apply since the convention proscribed rules for war between belligerent nations and their armies, rather than between a government and its citizens.⁸⁴ Although some of these concerns remained decades later during the IMT in Nuremberg, the events of the WWI era contributed to the development of the very positive international law that the Americans and others found lacking in 1915.⁸⁵

⁸² See STAY THE HAND OF VENGEANCE, *supra* note 12, at 110 (describing the American reaction to the Armenian massacres as stunted, due to the fact that any significant response would lead the United States to war with the Ottoman Empire, something that it had "struggled mightily to avoid"); MORGENTHAU, *supra* note 40, at 335 (recounting a conversation with Talaat Bey in which Morgenthau warned, "You will have to meet public opinion everywhere, especially in the United States. Our people will never forget these massacres. [...] You are defying all ideas of justice as we understand the term").

⁸³ See STAY THE HAND OF VENGEANCE, *supra* note 12, at 59, 102, 110 (reporting that, according to Robert Lansing, the United States did not have "jurisdiction to pass upon violations of the laws and customs of war, unless such violations were committed upon American persons"); MORGENTHAU, *supra* note 40, at 328–30 ("I had no right to interfere. According to the cold-blooded legalities of the situation, the treatment of Turkish subjects by the Turkish Government was purely a domestic affair; unless it directly affected American lives and American interests, it was outside the concern of the American Government."); See WILLIS, *supra* note 27, at 69–70 (noting that American post-war involvement was limited when it came to questions of punishing the Turks, punishing the Kaiser, holding war crimes trials, or establishing an international tribunal and the American delegation generally found no precedent supporting these actions while led by Lansing).

⁸⁴ TAYLOR, *supra* note 8, at 13; WILLIS, *supra* note 27, at 156–57; see also 1907 Hague Convention, *supra* note 6, art. 46 (dictating that when territory is occupied by a hostile state "the lives of persons, and private property" are to be respected, but not extending this requirement to states' treatment of civilians in their own, unoccupied territory).

⁸⁵ See WILLIS, *supra* note 27, at 157.

Besides nationality, the Allies also declined to view the atrocities exclusively through the lens of religion.⁸⁶ Initially, the proposed language offered by the Russian foreign minister catered to a more narrow, traditional perspective and read, “[i]n face of these fresh crimes committed by Turkey against Christianity and civilisation.”⁸⁷ Admittedly, the “overtly pan-Christian” wording was not out of place in this era, as Allied war propaganda often drew on bigoted religious distinctions to vilify the Ottoman Muslims.⁸⁸ Importantly, however, these sentiments were changing, and neither the British nor, to an extent, the French, were keen to position the Declaration as a religious duel between Christians and Muslims.⁸⁹ Britain pushed back and specifically opposed any mention of Christians or Muslims, and the French agreed.⁹⁰ Ultimately, the Russian foreign minister adjusted the language to its final text, and replaced “crimes against Christianity” with “crimes against humanity.”⁹¹ The American Ambassador similarly rejected religion as a basis for opposition to, and condemnation of, the Armenian massacres.⁹² In his memoir, Morgenthau recalled a discussion he had with Talaat Bey and noted, “the fact that [...] there are such things as humanity and civilization, never for a moment enters their mind.”⁹³ When questioned by Talaat Bey about why Morgenthau, as a Jew, cared about what happened to the Christians in Turkey, Morgenthau responded: “I am not here

⁸⁶ See *STAY THE HAND OF VENGEANCE*, *supra* note 12, at 116; see also SCHABAS, *supra* note 7, at 30 (“An early draft [of the Declaration] referred to ‘these new crimes of Turkey against Christianity and civilization.’ That was nothing particularly innovative, because the major European powers had long asserted their entitlement to intervene in Turkish affairs in order to protect Christian minorities. [...] When the authors of the [D]eclaration replaced the word ‘Christianity’ with ‘humanity’ they turned a corner.”).

⁸⁷ *STAY THE HAND OF VENGEANCE*, *supra* note 12, at 112, 115 (noting that again, with respect to the Allied war aims and motivations, it should be noted that many Armenians also lived in the Russian Caucasuses and, as Russian citizens, were drafted into the Russian army) (quoting letter from Sir George William Buchanan to Sir Edward Grey (May 11, 1915)); WILLIS, *supra* note 27, at 25 (showing that the Russian foreign minister cited a boost to the morale of the Armenian soldiers in his army as one motivation for issuing the Declaration).

⁸⁸ *STAY THE HAND OF VENGEANCE*, *supra* note 12, at 116.

⁸⁹ *Id.*; see WILLIS, *supra* note 27, at 26.

⁹⁰ *STAY THE HAND OF VENGEANCE*, *supra* note 12, at 116.

⁹¹ *Id.* at 116–17.

⁹² See MORGENTHAU, *supra* note 40, at 333–35.

⁹³ *Id.* at 334.

as a Jew, but as American Ambassador [...] I do not appeal to you in the name of any race or religion, but merely as a human being [...] You must base your principles on humanitarianism.”⁹⁴

Thus, the focus of the Allies’ Declaration was on neither the nationality or the religion of the Armenian victims and instead, the Allies emphasized a conception of *universal* human rights.⁹⁵ This concern for the citizens of other nations, even citizens of *belligerent* nations, became a fundamental focus of the IMT and subsequent WWII trials.⁹⁶

C. *The Declaration as a Contemporaneous Threat*

In April 1915, when news of the massacres and deportation spread internationally, the Allies promptly began discussing repercussions for Turkey’s conduct.⁹⁷ Although it would take about one month to agree upon the language and issue the Declaration,⁹⁸ the Allies’ immediate reaction to the massacre is of significant import. By spring 1915, less than one-quarter of the war had been fought, and the United States would not enter the hostilities for another two years.⁹⁹ Though scholars have remarked on the Allies’ political and wartime motives for delivering the Declaration,¹⁰⁰ the Allies’ mid-war threat, as

⁹⁴ *Id.*

⁹⁵ STAY THE HAND OF VENGEANCE, *supra* note 12, at 116 (“Britain preferred to see this as an issue of civilization versus barbarism, not Christians versus Muslims.”); MORGENTHAU, *supra* note 40, at 334 (“I do not appeal to you in the name of any race or religion, but merely as a human being.”).

⁹⁶ *From Versailles to Rwanda*, *supra* note 18, at 26 (describing the definition of “crimes against humanity,” as understood by the IMT to cover war crimes against “protected persons, namely civilians, in time of war between belligerent states”); STAY THE HAND OF VENGEANCE, *supra* note 12, at 31 (“Liberal states are more apt to pursue prosecution for war crimes committed against their own citizens; but because they are universalists, liberal states may also be outraged by crimes against humanity committed against noncitizens. Selfishness predominates, but not totally.”).

⁹⁷ STAY THE HAND OF VENGEANCE, *supra* note 12, at 115.

⁹⁸ *See id.* at 115–16 (explaining the process when determining the language to be used on Britain’s official announcement to the violence that happened in Turkey).

⁹⁹ *See* HOCHSCHILD, *supra* note 37, at 92–93 (showing the initial invasions and declarations of war in August 1914); MACMILLAN, *supra* note 40, at xxvi (indicating that WWI began in 1914 and concluded in November 1918).

¹⁰⁰ *See* STAY THE HAND OF VENGEANCE, *supra* note 12, at 115; WILLIS, *supra* note 27, at 25–26; *see also* WWI & the Handicapped System, *supra* note 27, at 249 (describing various political and other reasons the Allied attempt to prosecute Turks for the Armenian genocide following the war failed).

legally unenforceable as it may have been, rebuts critics' later challenges to the Nuremberg Charter's *ex post facto* laws and provides greater legitimacy to both the Charter and the IMT.

Perhaps most important is the fact that the Allies' Declaration came on the heels of a significant military failure at the Dardanelles. The Allies launched a naval offensive in February 1915 at the mouth of the Dardanelles strait, which runs to the east of Turkey's Gallipoli peninsula.¹⁰¹ The initial attack failed, and the Allies launched a second land offensive on the peninsula in April.¹⁰² The Allied military forces faced devastating losses and the conflict became known as the Battle of Gallipoli.¹⁰³ It was after the failed naval attack in February—and during the April offensive that would fail even more spectacularly—that the Allies issued the Declaration.¹⁰⁴ Thus, with victory far from secured, the Declaration could not have been built on victors' justice.

Additionally, the Allies' immediate reaction to the Armenian massacre contrasts in some respects with their response to German atrocities committed against Belgian and French civilians. By the time the Germans had conquered Belgium and northern France in the fall of 1914, some 5,500 Belgian and 900 French civilians had been killed.¹⁰⁵ In one instance, and in response to alleged civilian attacks on his

¹⁰¹ *A Short History Of The Dardanelles Campaign*, IMPERIAL WAR MUSEUMS, <https://www.iwm.org.uk/history/a-short-history-of-the-dardanelles-campaign> (last visited Apr. 18, 2022).

¹⁰² *Id.*

¹⁰³ See HOCHSCHILD, *supra* note 37, at 156.

¹⁰⁴ Joshua Hammer, *A View of the Battle of Gallipoli, One of the Bloodiest Conflicts of World War I*, SMITHSONIAN MAG. (Feb., 2015), <https://www.smithsonianmag.com/history/new-view-battle-gallipoli-one-bloodiest-conflicts-world-war-i-180953975/> (highlighting that the Battle of Gallipoli was one of the bloodiest battles of the war because the Allies suffered about 180,000 casualties and when combined with the losses from the Central Powers, nearly half a million men died or were wounded); *but cf* WILLIS, *supra* note 27, at 25, 26 (supporting the argument that the Allies' "territorial ambitions" in the Balkans and their "policy of total victory" prompted the Declaration and indicating that the Allies began signing "secret treaties" in the spring of 1915 in order to divide up the Ottoman land after an Allied war victory).

¹⁰⁵ Sophie de Schaepdrijver, *The 'German Atrocities' of 1914*, BRIT. LIBR. (Jan. 29, 2014), <http://www.bl.uk/world-war-one/articles/civilian-atrocities-german-1914> (stating that many of these victims had been rounded up and shot by the invading German army on the suspicion of being civilian snipers).

troops, a German commander ordered his men to burn the villages and to shoot all the inhabitants; this order was expressly approved of by General Karl von Bülow, who would be later named as a war criminal by the French.¹⁰⁶ Significant public outcry over the atrocities demanded that the German troops be captured and tried for their crimes.¹⁰⁷ Although some mid-war trials convicted individual German soldiers, many of the French and Belgian legal maneuvers came after the war in an aggressive pursuit of naming, extraditing, and trying German war criminals.¹⁰⁸ These highly energized demands began to resemble the machinations of victors' justice: the "countries that suffered more pushed harder for prosecution" of the Germans.¹⁰⁹ To be sure, Germans had engaged in a range of egregious wartime conduct; however, other Allied leaders warned against the perception of victors' justice that would be created by these unprecedented and large-scale trials immediately following the war.¹¹⁰ British Prime Minister David Lloyd George noted that the Allies were

asking more than any Government could be expected to comply with [...] if in different circumstances, a demand had been made by a German Government on a British or French Government for the handing over of 800 officers, he did not believe [it was unlikely] that they would ever comply with it. No British or French Government could do so.¹¹¹

¹⁰⁶ See JOHN N. HORNE & ALAN KRAMER, *GERMAN ATROCITIES, 1914: A HISTORY OF DENIAL* 162 (2001); WILLIS, *supra* note 27, at 121.

¹⁰⁷ See WILLIS, *supra* note 27, at 13.

¹⁰⁸ See *id.* (stating that "long-established custom" allowed for warring countries to try captured enemy soldiers for war crimes during hostilities, and that France, as early as September 1914 began a series of military court trials to try German war criminals).

¹⁰⁹ See *STAY THE HAND OF VENGEANCE*, *supra* note 12, at 78 (stating that when the final list was reduced to 854 Germans, and the Belgian and the French accounted for nearly half of the names.); see also *id.* (stating the Allies' post-war list of German war criminals included 1,580 individuals, with Belgium and France naming approximately 1,400 of them).

¹¹⁰ *STAY THE HAND OF VENGEANCE*, *supra* note 12, at 99; *CRIMES AGAINST HUMANITY*, *supra* note 4, at 91; *WWI & the Handicapped System*, *supra* note 27, at 254–55; see also TAYLOR, *supra* note 8, at 15 (noting that, with respect to the findings of the Commission Report relating to the Kaiser and crimes against the peace, President Woodrow Wilson was "concerned about 'victors' justice'").

¹¹¹ *STAY THE HAND OF VENGEANCE*, *supra* note 12, at 79; see WILLIS, *supra* note 27, at 121 (highlighting that France's proposed list of war criminals included powerful German figures like the Crown Prince of Bavaria, Field

As a result, the Germans increasingly saw the post-war punishments as victors' justice and as a way for Allies to "justify the ambition to conquer Germany."¹¹² In this way, the Declaration was different.

Although historical, political, and legal complexities reign, a historiographical analysis of the 1915 Declaration unequivocally moves international law forward. Indeed, the identity of the Armenians as non-Allied citizens and the immediate Allied threat to the Ottoman leaders marked an important point in the evolution of international law: the concern for humanity transcended national boundaries as punishment was motivated by something more than vengeance and retaliation.¹¹³

IV. WWI'S IMPACT ON THE CHARTER AND IMT

A. *Post-War Efforts to Punish for Crimes Against Humanity*

After the war, the Turkish government established a courts-martial in Constantinople at the demand of the British ("Constantinople Courts-Martial") that, at the outset, had potential to drive unprecedented development in international law.¹¹⁴ Regrettably, the Constantinople Courts-Martial quickly collapsed and was ultimately added to the list of post-WWI failures.¹¹⁵ However, despite Britain forcing the hand of the

Marshal Paul von Hindenburg, General Karl von Bülow, and General Erich Ludendorff).

¹¹² WILLIS, *supra* note 27, at 29; *see discussion infra* sec. III (discussing Allied efforts to hold the Turks criminally and individually responsible for war crimes during the 1919 courts-martial in Constantinople stumbled through similar hurdles).

¹¹³ *See generally* WILLIS, *supra* note 27, at 25 (discussing the moral outrage felt by many Armenians as a result of the Allied threats in the Ottoman Empire).

¹¹⁴ STAY THE HAND OF VENGEANCE, *supra* note 12, at 108; *see generally* WILLIS, *supra* note 27, at 154 (discussing the unprecedented events that unfolded in Constantinople); *see also* STAY THE HAND OF VENGEANCE, *supra* note 12, at 106 ("The Constantinople [Courts-Martial], had they not fallen apart, would have been remembered as comparable only to Nuremberg and Tokyo.").

¹¹⁵ STAY THE HAND OF VENGEANCE, *supra* note 12, at 106; WILLIS, *supra* note

post-war Turkish government—in addition to civil unrest across the newly dissipated Ottoman Empire and other politicking, all of which cast a long shadow over the legal process¹¹⁶—the notion that the Turkish government, even in defeat, would try its own citizens for war crimes should not be overlooked. The local Turkish government arrested more than one hundred individuals, tried nine, and executed one for “acting against humanity and civilization.”¹¹⁷ For its part, the British, the driving force behind the trials, were initially compelled by a “striking display” of “idealism and universalism” to punish those responsible for the Armenian massacres.¹¹⁸ However, in time, the British interest shifted to punishing crimes committed against the *British*.¹¹⁹ This smacking of victors’ justice coupled with civil and political discord rendered the Constantinople Courts-Martial nearly meaningless.¹²⁰

In addition to the Constantinople Courts-Martial, the Treaty of Sèvres, signed by the Allies and Turkey in 1920,¹²¹ offered a novel, even if similarly fleeting, advancement in international humanitarian law. It included a unique provision in Article 230, according to which Turkey would turn over any

27, at 148.

¹¹⁶ See *STAY THE HAND OF VENGEANCE*, *supra* note 12, at 106, 118–20 (discussing Constantinople’s post-war trials and subsequent unrest); WILLIS, *supra* note 27, at 154.

¹¹⁷ *STAY THE HAND OF VENGEANCE*, *supra* note 12, at 125, 129 (internal quotation marks omitted) (explaining that of those charged, three defendants were acquitted and two more were sentenced but were never in custody. One defendant was ultimately hanged for his role in the deportations, while another defendant was sentenced to fifteen years’ hard labor. The trials fell apart soon after they began, primarily because of the high political tension in Turkey).

¹¹⁸ *STAY THE HAND OF VENGEANCE*, *supra* note 12, at 106.

¹¹⁹ *Id.* at 107; see also WILLIS, *supra* note 27, at 154 (stating that, “[The Brits’] greatest concern was to punish officials responsible for mistreating British prisoners of war”).

¹²⁰ See *STAY THE HAND OF VENGEANCE*, *supra* note 12, at 106–07 (describing that the political difficulties the British had in prosecuting foreign war criminals not only caused the tribunal to crumble, but lead to a stunningly embarrassing end); see also, WILLIS, *supra* note 27, at 148 (stating that Turkey court-martialed some individuals in order to appease the Allies, but due to legal and political reasons, never brought any of them to trial).

¹²¹ See *Treaty of Sèvres, 1920*, DIPUBLICO.ORG (Oct. 10, 2010), <https://www.dipublico.org/100760/the-treaty-of-sevres-1920-the-treaty-of-peace-between-the-allied-and-associated-powers-and-turkey-signed-at-sevres-august-10-1920/>; see CRIMES AGAINST HUMANITY, *supra* note 4, at 89 n.11; *From Versailles to Rwanda*, *supra* note 18, at 58.

individuals responsible for the massacres to be tried by a tribunal designated by the League of Nations or the Allies themselves.¹²² The terms, however, were never adopted by the Turkish government, and the Treaty of Sèvres was replaced in 1924 with the Treaty of Lausanne, which contained no mention of the Armenians, the massacres, or crimes against humanity.¹²³ Consequently, no Turkish war criminals were prosecuted before an international tribunal or pursuant to the Allies' treaty with Turkey.

The importance of the immediate post-war efforts to prosecute Turkish war criminals lies not so much in the overall success of the Constantinople Courts-Martial or post-war treaties—indeed, it would be hard to argue that there was any such success¹²⁴—rather, these mechanisms laid the groundwork for a more successful effort to articulate and punish for crimes committed against humanity several decades later.¹²⁵

B. Crimes Against Humanity in the Commission Report

Following the war, global leaders met in Paris over the course of a year to discuss and determine a new world order.¹²⁶

¹²² *Treaty of Sèvres, 1920*, *supra* note 121, art. 230; *see also* CRIMES AGAINST HUMANITY, *supra* note 4, at 89 n.11 (providing a description of the background, content, and outcome of the Treaty of Peace with Turkey at Sèvres).

¹²³ *Treaty of Peace with Turkey at Lausanne, July 24, 1923*, 128 L.N.T.S. 11; *Treaty of Sèvres, 1920*, *supra* note 121, art. 230; *see* CRIMES AGAINST HUMANITY, *supra* note 4, at 89 n.11; Dadrian, *supra* note 76, at 281 (explaining that paradoxically, as much as Article 230 could be seen as an advance in international law by holding individuals accountable for mass atrocities, Article 230 also arguably served as an example of victors' justice and a difficult demand for any nation to comply with).

¹²⁴ *See, e.g.*, STAY THE HAND OF VENGEANCE, *supra* note 12, at 106 ("Constantinople is the Nuremberg that failed. What Constantinople shows, most of all, is that the enormous political difficulties of mounting a prosecution against foreign war criminals can be so great that a tribunal can crumble."); *see also* CRIMES AGAINST HUMANITY, *supra* note 4, at 93 (recounting that the parties to the Treaty of Sèvres "intended to bring to justice those who committed 'crimes against civilization and humanity,'" but noting that the treaty was never ratified and in its place, the Treaty of Lausanne did not include analogous language).

¹²⁵ *See, e.g.*, WILLIS, *supra* note 27, at 157 (observing that the post-WWI efforts to hold the Turks criminally responsible for the Armenian massacres "foreshadowed" the charges before the IMT, but noting that "in 1919 such a new departure in international law proved impossible.").

¹²⁶ *See* MACMILLAN, *supra* note 40, at xxv.

Although the 1919 Paris Peace Conference is often most closely associated with the Treaty of Versailles, infamously signed between the Allies and Germany, the parties addressed numerous other issues at the peace conference, including the establishment of the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties (“Commission”).¹²⁷ The Commission was constructed to inquire into the various legal issues at the fore of the peace conference, primarily the “responsibility [and identity] of the authors of the war,” the “facts as to breaches of the laws and customs of war,” and the “degree of responsibility for these offences.”¹²⁸ The first of three Commission subcommittees took on the task of identifying and characterizing criminal conduct.¹²⁹ This investigation focused on traditional war crimes as well as crimes committed by governments against their own people.¹³⁰ On March 29, 1919, the Commission issued the Commission Report, which provided recommendations on war guilt, war crimes—including violations of the “elementary laws of humanity”—and the jurisdiction of an associated tribunal.¹³¹ The Commission Report is important because, echoing the terms of the 1915 Declaration, it invoked language contained in the Preamble to the 1907 Hague Convention (“Martens Clause”) as a basis for criminal responsibility for the violation of the laws of humanity, and it provided a list of crimes committed by the Central Powers (“Versailles List”) that helped to define the charge of “crimes against humanity.”

1. The Martens Clause

Under international law, precedent to adequately punish the Turks for the massacre of the Armenians was limited.¹³²

¹²⁷ *Id.* at xxv–xxvi; see WILLIS, *supra* note 27, at 68–71 (discussing the details of the Commission, its makeup, and purpose).

¹²⁸ *Commission Report*, *supra* note 28, at 95.

¹²⁹ WILLIS, *supra* note 27, at 71–72.

¹³⁰ See *WWI & the Handicapped System*, *supra* note 27, at 253–54; WILLIS, *supra* note 26, at 71–72.

¹³¹ *Commission Report*, *supra* note 28, at 95, 115; *WWI & the Handicapped System*, *supra* note 27, at 254.

¹³² See, e.g., CRIMES AGAINST HUMANITY, *supra* note 4, at 89 (describing the U.S. objection to the Commission Report regarding crimes against humanity as being based on the fact that such crimes were not part of then-operative international law); TAYLOR, *supra* note 8, at 13 (“The Armenians were citizens

Importantly, the 1907 Hague Convention only proscribed prohibitions on the conduct of one belligerent nation against another; it did not expressly contemplate the treatment by a country of its own people.¹³³ The authors of the Commission Report, however, found that the 1907 Hague Convention's Preamble might provide the basis necessary to criminalize the Young Turks' slaughter of fellow Turkish citizens.¹³⁴ The relevant portion of the Preamble, known as the Martens Clause, states:

Until a more complete code of the laws of war has been issued, [...] the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.¹³⁵

The authors of the Commission Report viewed the Martens Clause as a catch-all that enlarged the scope of the treaty's terms: where there was no express provision of codified international law applicable, the laws of humanity were to govern and fill in these gaps.¹³⁶ Along these lines, and mirroring the language of the Martens Clause, the Greek foreign minister suggested that a new category of war crime be established, since, "[t]echnically [the Armenian massacres] did not come within the

of the Ottoman Empire; there was no formal state of war between Armenians and Turks, and so the Hague Conventions were wholly inapplicable. In May 1915 a joint Allied declaration denounced the Turkish actions as "crimes against humanity and civilization," but that was a concept quite outside the scope of any treaties or recognized doctrine.").

¹³³ 1907 Hague Convention, *supra* note 6, art. 46; TAYLOR, *supra* note 8, at 13; WILLIS, *supra* note 27, at 157.

¹³⁴ See *WWI & the Handicapped System*, *supra* note 27, at 263–64; *From Versailles to Rwanda*, *supra* note 18, at 16–17; Dadrian, *supra* note 76, at 280; see also CRIMES AGAINST HUMANITY, *supra* note 4, at 87–91 (describing the chronology from the 1907 Hague Convention and Martens Clause to the Commission Report).

¹³⁵ 1907 Hague Convention, *supra* note 6, pmbl.; see *From Versailles to Rwanda*, *supra* note 18, at 16. The Preamble of the 1899 Hague Convention similarly contains reference, albeit broad, to principles of "the laws of humanity." 1899 Hague Convention, *supra* note 6, pmbl. ("[P]opulations and belligerents remain under the protections 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.").

¹³⁶ See *WWI & the Handicapped System*, *supra* note 27, at 263–64; *From Versailles to Rwanda*, *supra* note 18, at 16–17; Dadrian, *supra* note 76, at 279–80.

provisions of the penal code, but they constituted grave offenses against the law of humanity.”¹³⁷ Thus, a reliance on the Martens Clause language was “designed to enable the Allies to prosecute” the Turkish perpetrators, which was otherwise difficult to do, consistent with the concept of legality and under the substantive provisions of the 1907 Hague Convention.¹³⁸ The American representatives to the Commission, Robert Lansing and James Brown Scott, objected to the invocation of the Martens Clause and reliance on “laws of humanity” since these concepts offered arbitrary and undefined standards that varied “with the individual consciences” of the different countries.¹³⁹ The

¹³⁷ Dadrian, *supra* note 76, at 280 (internal quotation marks omitted).

¹³⁸ See *WWI & the Handicapped System*, *supra* note 27, at 263–64 (positing also that the Commission Report’s wording, inspired by the 1907 Hague Convention, was intended to allow for punishment of the Armenian massacre “perpetrated under the guise of wartime deportations”); see also Schwelb, *supra* note 5, at 124 (noting that the consistency of the language used in the 1915 Declaration and Article 230 of the Treaty of Sèvres was intended to “bring justice” to Turks who had massacred the Armenians).

¹³⁹ WILLIS, *supra* note 27, at 75; see *Commission Report*, *supra* note 28, at 33 (“[I]f political power is so evenly adjusted that no reliable estimate can be formed of the probable consequences of an upheaval, the intending law-breaker may... have sufficient self-confidence to tempt the issue”); see BASS, *supra* note 12, at 110 (discussing how “Lansing led the American delegation’s split from the Allied plans for war crimes tribunals [at the Paris Peace Conference]”); INTERNATIONAL CRIMINAL LAW DOCUMENTS 9 (Robert Cryer ed., Cambridge Univ. Press 2019) (explaining more precisely, how the Americans concurred with the Commission Report’s findings as to the “laws and customs of war,” which were “standard certain, to be found in books of authority and in the practice of nations,” but rejected the invocation of offenses against the “laws of humanity”); *Commission Report*, *supra* note 28, at 133–34 (explaining in its reservation to the Commission Report, the United States took the position that, “[T]he report of the Commission does not, as in the opinion of the American representatives it should, confine itself to the ascertainment of the facts and to their violation of the laws and customs of war, but, going beyond the terms of the mandate, declares that the facts found and acts committed were in violation of the laws and of the elementary principles of humanity. The laws and customs of war are a standard certain, to be found in books of authority and in the practice of nations. The laws and principles of humanity vary with the individual, which, if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law. The American representatives, therefore, objected to the references to the laws and principles of humanity, to be found in the report, in what they believed was meant to be a judicial proceeding, as, in their opinion, the facts found were to be violations or breaches of the laws and customs of war, and the persons singled out for trial and punishment for acts committed during the war were only to be those persons guilty of acts which should have been committed in violation of the laws and customs of war.”).

Americans' concern for strict legality and the lack of applicable precedent led them to submit formal reservations to the Commission Report's findings and to disagree with the European Allies on several other issues, like trying the Kaiser and creating an international tribunal.¹⁴⁰ Lansing and Scott's shared concern for a lack of precedent in 1919¹⁴¹ reflects a concern for legality and reluctance to engage in punishment suggestive of victors' justice. In this sense, it could be said that such opposition to the 1919 Commission Report served as a vetting process for the 1945 Charter several decades later: though "such a new departure from international law proved impossible" in 1919, the world would become better acquainted with the concept of crimes against humanity by 1945.¹⁴²

Ultimately, the Commission adopted the Martens Clause language in its report, identifying and recommending punishment for various "violations of the laws of humanity."¹⁴³ This conclusion created a link from the 1907 Hague Convention to the 1915 Declaration and 1919 Committee Report. Although these recommendations regarding the laws of humanity were not taken up in the Treaty of Versailles or the Treaty of Lausanne, the linguistic continuity and findings of the Commission Report nevertheless provide more legitimacy for crimes against humanity.¹⁴⁴

Several decades later, when the Allies met in post-WWII London, they were faced with similar but larger scale matters of genocide and mass atrocities.¹⁴⁵ The impact of the WWI era

¹⁴⁰ See Schwelb, *supra* note 5, at 123–24 (explaining that the dissenting report of American members Robert Lansing and James Scott objected "to the use of the term 'laws of humanity,' and ... mainly directed [their opposition] against the majority report [because] the words 'and the laws of humanity' had been improperly added."); TAYLOR, *supra* note 8, at 15–16 (discussing the American opposition against a "High Tribunal" and the "trial of the Kaiser" and the resulting lack of an "international war crimes court" and "trial to determine Kaiser's criminal guilt."); WILLIS, *supra* note 27, at 69 (explaining Lansing's emphasis on a "lack of precedent" in order to reject "virtually every important proposal offered by the Europeans.").

¹⁴¹ See WILLIS, *supra* note 27, at 69, 157.

¹⁴² *Id.* at 157.

¹⁴³ See, e.g., *Commission Report*, *supra* note 28, at 112–15, 121–24, 144 (discussing list of charges and outlined plans for trial against Germany because of its outrageous conduct during the war).

¹⁴⁴ See Theodor Meron, *The Marten Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM. J. INT'L L., 78, 87 (2000).

¹⁴⁵ See CRIMES AGAINST HUMANITY, *supra* note 4, at 457.

jurisprudence was subtle, but nevertheless guided the delegation's creation and definition of crimes against humanity in Article 6 of the Charter.¹⁴⁶ Article 6(c), the first binding codification of crimes against humanity, read:

Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.¹⁴⁷

A look at the deliberations leading up to the final draft of Article 6 shows the various ways that the WWI era work regarding crimes against humanity grounded and guided the Allied delegation. Notably, the drafted proposals from each of the four major Allied nations included language borrowed from the Martens Clause: “laws of humanity, and the dictates of the public conscience.”¹⁴⁸ Depending on the various drafts, the “laws of humanity” served different purposes, either to define the scope of the IMT’s jurisdiction or to define the law to be applied by the IMT.¹⁴⁹ For example, the French draft proposed to give the IMT jurisdiction over “atrocities and persecutions against civilian populations [and over those who were] responsible for the violations of international law, the laws of humanity, [and] dictates of the public conscience.”¹⁵⁰ A later British draft did not list crimes against humanity as a stand-alone crime over which the IMT would have jurisdiction, but it did note that the Tribunal would have jurisdiction over anyone “who is hereby declared therefore to be personally answerable for the violations of international law, of the laws of humanity, and of the dictates

¹⁴⁶ See *id.* at 466.

¹⁴⁷ Agreement for the Prosecution and Punishment of the major war criminals of the European Axis art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

¹⁴⁸ See 1907 Hague Convention, *supra* note 6, pmb.; U.S. Dep’t of State Pub. 3080, Division of Publications Office of Public Affairs, Intl. Org. and Conference Series 58, 87, 293, 373 (1949) [hereinafter Conference Series].

¹⁴⁹ See *id.* at 58 (defining international law as that which “include[s] treaties between nations and the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”).

¹⁵⁰ 1907 Hague Convention, *supra* note 6, at 293.

of the public conscience.”¹⁵¹ These drafts and the final language of Article 6 have clear ties to the text of the Martens Clause, Declaration, and Commission Report.¹⁵² Consequently, this historical and linguistic link gives greater weight and validity to the IMT’s convictions for crimes against humanity.

Besides the drafting process and operative language of Article 6, additional sentiments during the London Conference and IMT shaped the continued evolution of crimes against humanity. In a 1944 statement from President Roosevelt, the President drew on the language of the Declaration and lamented that “Hitler is committing these crimes against humanity in the name of the German people.”¹⁵³ Additionally, in a report to President Truman prior to the end of the war, Justice Jackson reflected on the need to side with humanity and to address these “deepest against that International Law [...] as including the laws of humanity.”¹⁵⁴ Similarly, in his closing remarks before the IMT, Chief British Prosecutor Sir Hartely Shawcross reminded the Tribunal that, “[t]he same view was acted upon by the European Powers which in time past intervened in order to protect the Christian subjects of Turkey against cruel persecution. The fact is that the right of humanitarian intervention by war is not a novelty in International Law.”¹⁵⁵ The historical and linguistic connections that extend from the 1907 Hague Convention to the Declaration, the Commission Report, and ultimately Article 6, are important in showing the growing recognition of crimes against humanity. This evolution depicts an international community that became increasingly aware of the violent totality of modern warfare and that endeavored, over decades, to broaden the traditional protections of civilians during wartime.

¹⁵¹ *Id.* at 312, 327 (showing that the Soviets also produced a draft that reflected the same general terms as those proposed by the British).

¹⁵² See CRIMES AGAINST HUMANITY, *supra* note 4, at 95; Roger S. Clark, *Crimes Against Humanity*, in THE NUREMBERG TRIAL AND INTERNATIONAL LAW 183–84 n.23 (George Ginsburgs & V.N. Kudriavtsev eds., 1990).

¹⁵³ Conference Series, *supra* note 148, at 58.

¹⁵⁴ *Id.* at 49, 439 (internal quotations omitted).

¹⁵⁵ Schwelb, *supra* note 5, at 198 (quoting SPEECHES OF THE CHIEF PROSECUTORS AT THE CLOSE OF THE CASE AGAINST THE INDIVIDUAL DEFENDANTS).

2. The Versailles List

Relying on a variety of documents, reports, and accounts from across Europe, the Commission subcommittee identified thirty-two crimes committed by the Central Powers, which were published as part of the Commission Report and collectively referred to as the Versailles List.¹⁵⁶ The first crime enumerated was “[m]urders and [m]assacres: [s]ystematic [t]errorism,” which was specifically described in the report’s annex as the “[m]assacres of Armenians by the Turks.”¹⁵⁷ Moreover, the Commission concluded that certain of the enumerated crimes amounted to the violation of the “elementary laws of humanity.”¹⁵⁸ The inclusion of this language is important because, more so than the 1915 Declaration, the Commission Report reflects a formal assessment of responsibility, which was reached after a fact-finding and investigatory process.¹⁵⁹ The language of the Commission Report is also important because it contains the thoughts and conclusions of ten nations, rather than only the three European Allies that issued the Declaration.¹⁶⁰

Additionally, the Versailles List guided the later-formed United Nations War Crimes Commission (“UNWCC”) in its recommendations regarding the prosecution of Axis WWII war crimes.¹⁶¹ The UNWCC, which was established in 1943 to provide support to national governments in prosecuting and convicting war criminals, looked to the Versailles List as the basis for the legal precedent utilized by the UNWCC as it pursued investigations and prosecutions.¹⁶² From the

¹⁵⁶ *Commission Report*, *supra* note 28, at 114–15.

¹⁵⁷ *Id.*; *WWI & the Handicapped System*, *supra* note 27, at 262.

¹⁵⁸ *Commission Report*, *supra* note 28, at 115.

¹⁵⁹ *See id.* at 114–15 (listing the factual sources that the Commission drew from in its evaluation of wartime criminality).

¹⁶⁰ *See id.* at 96–97, 125–26 (listing the fifteen Commission members from the ten Allied nations while also noting that of these ten nations, America and Japan submitted reservations to the Commission Report). The Americans’ reservation to the Commission Report underscores the essential, building block nature of the WWI era development in international law, making the “new departure from international law” in 1919 a more familiar concept by 1945. *See WILLIS*, *supra* note 27, at 157.

¹⁶¹ *See* Dan Plesch & Shanti Sattler, *Changing the Paradigm of International Criminal Law: Considering the Work of the United Nations War Crimes Commission of 1943-1948*, 15 INT’L CMTY. L. REV. 203, 220, 222 (2013).

¹⁶² *Id.* at 220; Dan Plesch & Shanti Sattler, *Before Nuremberg: Considering*

perspective of the UNWCC, the Versailles List was also valuable as a legal tool because Axis Powers Italy and Japan had “endorsed” the enumeration of crimes after WWI and Germany had not opposed it.¹⁶³

V. CONCLUSION

The 1919 Paris Peace Conference is often considered to have been a failure of international law: the representatives were unable to conclude fair and lasting treaties, successfully prosecute perpetrators for the commission of war crimes, and effect consequences for waging an aggressive war.¹⁶⁴ However, these post-war efforts helped lay foundations for the future development of international law, particularly with respect to crimes against humanity. Importantly, the Allies’ response to the Armenian genocide—the Declaration that was issued in defense of citizens of a non-Allied country and on the heels of a major Allied defeat—articulated “crimes against humanity” for the first time in history.¹⁶⁵ The Declaration, together with the Commission Report and the Martens Clause, provided the representatives at the 1945 London Conference with a basis on which to formulate and prosecute a new kind of war crime.¹⁶⁶ They brought precedential value to the Charter’s new charge of crimes against humanity and simultaneously helped to rebut claims that the IMT and its law was nothing more than victors’ justice.

the Work of the United Nations War Crimes Commission of 1943-1948 in 20 FICHL PUBL’N SERIES, HIST. ORIGINS OF INT’L CRIMINAL LAW: VOL. 1 437, 443 (Morten Bergsmo et al. eds., 2014).

¹⁶³ United Nations War Crimes Commission, *Notes of a Second Unofficial Meeting Held on 2nd December, 1943, at 3:00 p.m. at the Royal Courts of Justice, London*, ICC LEGAL TOOLS DATABASE (Dec. 2, 1943), <https://www.legal-tools.org/doc/3e7e05/>.

¹⁶⁴ Robert Gerwarth, *Paris Peace Treaties failed to create a secure, peaceful and lasting world order*, IRISH TIMES (Jan. 21, 2019), <https://www.irishtimes.com/culture/heritage/paris-peace-treaties-failed-to-create-a-secure-peaceful-and-lasting-world-order-1.3745849>.

¹⁶⁵ Rouben Paul Adalian, *International Recognition of the Armenian Genocide*, ARMENIAN NAT’L INST., <https://www.armenian-genocide.org/recognition.html> (last visited Apr. 19, 2022).

¹⁶⁶ See *WWI & the Handicapped System*, *supra* note 27, at 254, 260 (explaining how the delegates of the London Conference referenced the post-war efforts to reach their conclusion).