

# **The Evolution of the Prohibition of Genocide: From Natural Law Enthusiasm to Lackadaisical Judicial Perfunctoriness – And Back Again?**

Julia Klaus\*

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\* PhD Candidate and Research Associate at the International Criminal Law Research Unit of Friedrich-Alexander University Erlangen-Nuremberg, Germany. The author expresses her gratitude to Dr. Tassilo Singer, Dr. Gurgun Petrossian, LL.M., and the Journal's peer reviewers for their constructive comments on drafts of the article.

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## Abstract

International legal scholarship and practice have reached a point where it is undisputed that the prohibition of genocide has the status of *jus cogens* and entails *erga omnes* obligations. It is, however, astonishing how little academic focus has been dedicated to the normative development leading to this extraordinary rank. In a legal regime with as little hierarchical structure as public international law, examining the birth process of such a norm promises considerable insights into normative formation in general and may inform jurisprudential theories on the nature of international law. This article illustrates the evolution of the prohibition of genocide by outlining the way to the 1948 UN Genocide Convention and the later interpretations of the norm. It traces the origin of the genocide prohibition to naturalistic ideas of overarching *laws of humanity* in international law and follows its development into the early 21<sup>st</sup> century. An analysis of international jurisprudence reveals that, after the *jus cogens* status of the prohibition of genocide and its *erga omnes* dimension had been settled, international judges handled the norm in a surprisingly lackadaisical and perfunctory manner. The very recent ICJ order on provisional measures in the *Myanmar Genocide* case potentially marks a return towards a deeper focus on moral facts determining the prohibition that point to naturalistic theories persisting, notwithstanding the positivistic mainstream approaches to international law. The article contributes to a more accurate picture of and greater academic interest in these naturalistic undercurrents.

## A. Introduction

“There can be no more important issue, and no more binding obligation, than the prevention of genocide.”<sup>1</sup>

As of this writing, the prohibition of genocide has undoubtedly reached the status of a *jus cogens* norm and is an *erga omnes* obligation.<sup>2</sup> The best approach to analyze how it reached this extraordinary rank in public international law – a legal field with almost no hierarchy – is to scrutinize a two-step densification process. The first step therein is the general evolution of the genocide prohibition, while the second step is its attainment of the outstanding rank as *jus cogens* with *erga omnes* dimensions. The dynamics within public international law render fruitless any attempt to draw a clear line between these steps. Nevertheless, the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter *Genocide Convention* or *Convention*)<sup>3</sup> provides a suitable reference point with a panorama of the developments before and after its adoption in 1948.

On 9 December 1948, the United Nations (UN) General Assembly unanimously passed Resolution 260 (III) and, therein, the Genocide Convention. As the first-ever codification of the prohibition of genocide, the Convention marks the central milestone in the evolution of that international legal norm. According to its Article I, the contracting parties *confirmed* that genocide was a crime under international law. This terminology reflects the States’ opinion that

<sup>1</sup> K. Annan, *Address by Secretary-General Kofi Annan to the Stockholm International Forum*, UN Doc SG/SM/9126, 26 January 2004.

<sup>2</sup> *Prosecutor v. Kupreskić et al.*, Judgement, IT-95-16-T, 14 January 2000, 203-204, paras 519-520; J. Crawford, *Brownlie’s Principles of Public International Law*, 8th ed. (2012), 595-596; J. A. Frowein, ‘Genocide’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 3 (1991-2001), 65, 67; while *jus cogens* refers to the peremptory nature of a norm, the compliance with *erga omnes* norms is owed to the whole State community; see further *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgement, ICJ Reports 1970, 3, 32, paras 33-34 [Barcelona Traction Case]; *Prosecutor v. Furundžija*, Judgement, IT-95-17/1-T, 10 December 1998, 58-59, para. 153; M. Cherif Bassiouni, ‘International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*’, 59 *Law and Contemporary Problems* (1996) 4, 63, 66; M. Knorr, ‘The International Crime of Genocide: Obligations *Jus Cogens* and *Erga Omnes*, and their Impact on Universal Jurisdiction’, 7 *Essex Human Rights Review* (2011) 2, 32, 36; J. Wouters & S. Verhoeven, ‘The Prohibition of Genocide as a Norm of *Ius Cogens* and Its Implications for the Enforcement of the Law of Genocide’, 5 *International Criminal Law Review* (2005) 3, 401, 408.

<sup>3</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277.

genocide had been a crime and, as such, prohibited even before 1948.<sup>4</sup> But when had the prohibition then come into being?

The Genocide Convention protects groups that had already been protected to some extent as so-called *national minorities* prior to World War II.<sup>5</sup> It addresses not only States but also individuals – a dichotomy linking the Convention to the establishment of an international criminal justice system.<sup>6</sup> Both of these developments – national minorities protection and international criminal justice – were accompanied by the evolution of international humanitarian law, with which they stood in relationships of mutual influence.<sup>7</sup>

The first part of this article follows the interweaving threads of these three legal disciplines. The second part is a close-up of the discourse in the UN immediately preceding the adoption of the Genocide Convention. The third part moves beyond 1948, where international jurisprudence becomes the most instructive but not exclusive source for the subsequent career of the genocide prohibition. The fourth part is another close-up, this time on the International Court of Justice (ICJ) proceedings in the *Myanmar Genocide* case that attracts new attention for the ultimate determinants of the genocide prohibition.

Analytically, this article rests on the jurisprudential notion of legal facts and their ultimate determinants. Legal facts are facts about the existence or the content of a particular legal system.<sup>8</sup> It is, e.g., a legal fact about the content of international law that, today, the commission of genocide is prohibited, States are under an obligation to prevent and punish it, and perpetrators of genocide incur direct international criminal liability. Legal facts are never ultimate facts but always determined by other facts,<sup>9</sup> which is a crucial recognition for any study of the processes by which legal norms evolve. What other facts are there that *ultimately* determine legal facts?

Positivist and naturalistic approaches to law respond to that question differently. Legal positivism asserts that all legal facts are ultimately determined by social facts, at times also referred to as descriptive facts, alone. Different

<sup>4</sup> C. Tams, L. Berster & B. Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (2014), 39.

<sup>5</sup> The protection extends to national, ethnic, racial and religious groups; see *Prosecutor v. Krstić*, Judgement, IT-98-33-T, 2 August 2001, 195, para. 556.

<sup>6</sup> W. A. Schabas, 'Genocide in International Law and International Relations Prior to 1948', in C. Safferling & E. Conze (eds), *The Genocide Convention Sixty Years after its Adoption* (2010), 19, 22 [Schabas, Genocide Prior to 1948].

<sup>7</sup> *Ibid.*

<sup>8</sup> S. J. Shapiro, *Legality* (2011), 25.

<sup>9</sup> *Ibid.*, 26.

strands of positivist theories disagree on the nature of these social facts, but they can generally be characterized as non-normative, non-evaluative, and contingent. Legal positivism is not necessarily blind to morality and values but can only take them into account when intermediated by social facts. Naturalistic approaches to law hold that all legal facts are ultimately determined by social and moral facts, the latter also known as value facts, meaning that there are moral or value constraints on legality, i.e. the property of being law. Unsurprisingly, different strands of natural law theories disagree on the nature of these moral facts, but they can generally be characterized as normative or evaluative.<sup>10</sup>

This analytical jurisprudential basis clarifies that the answer to the question of how and when exactly the prohibition of genocide acquired its legality depends on whether one follows a positivistic or a naturalistic legal theory. The aim of this article is not to take sides by claiming to find anecdotal evidence for one or the other approach in the evolution of the genocide prohibition. Instead, it takes an observational point of view in retracing this evolutionary history and analyzing the theoretical assumptions that underlay the involvement of and contributions by various participants to the process. As such, the article is a pre-study for further research applying, for example, a jurisprudential anecdotal strategy,<sup>11</sup> and hopes to stir interest in international law theory.

## B. The Long Way to the Genocide Convention: Three International Law Disciplines on the Weaving Loom

The content of the prohibition of genocide as it is codified in the Genocide Convention finds its genealogy in three distinct disciplines of international law. Whereas minority protection and international humanitarian law will be examined from the 16<sup>th</sup> century until 1920 and 1914 respectively, the development of international criminal law relevant for the prohibition of genocide

<sup>10</sup> *Ibid*, 27; M. Greenberg, 'How Facts Make Law', 10 *Legal Theory* (2004) 3, 157; these different understandings are not only discernible in the developments leading to the establishment of the prohibition of genocide as an international legal rule. They also affect its interpretation: Positivists will make empirical enquiries into social facts, whereas naturalists will engage in moral and political philosophy to justify their position; see Shapiro, *supra* note 8, 29. The relevance of positivistic v. naturalistic approaches for interpretation will become particularly clear in the context of the ICJ *Myanmar Genocide Order*, see *infra* part E.

<sup>11</sup> An anecdotal strategy is a strategy of research imagination supposed to "[...] stimulate thought about law through the examination of anthropological and historical evidence about the formation and operation of legal systems [...]"; see Shapiro, *supra* note 8, 21-22.

began during the First World War and invited these disciplines' interweaving during the subsequent three decades leading up to the adoption of the Genocide Convention in 1948.

## I. Minority Protection and (Mostly) Social Facts

The earliest roots of minority protection that are of interest regarding the groups protected by the genocide prohibition lead back in history by almost 500 years. The struggle for minority protection for the coming centuries was a predominantly non-normative struggle for power. This section will move between reconstructing instances of such struggle in the internal or domestic as well as the external or non-domestic spheres of States.

After the turmoil of the Protestant Reformation since 1517, rulers in Central Europe were confronted with demands for assurances to protect religious minorities. In the 1552 Treaty of Passau and in the 1555 Religious Peace of Augsburg, the Holy Roman King and later Emperor Ferdinand I guaranteed to treat his Protestant subjects equal to the Catholic majority under his reign.<sup>12</sup> The prince-electors of Protestant faith had conducted a successful insurrection against Ferdinand's brother and predecessor, Karl V, after which the Catholic electors pressured Ferdinand to finally settle the religious dispute.<sup>13</sup> Both of these instruments were later confirmed in the 1648 Peace of Westphalia,<sup>14</sup> which brought an end to the Thirty Years' War (1618-48) by establishing the concept of State sovereignty that still dominates today's mainstream approaches to international law. Ferdinand's concession that had helped to hold the Holy Roman Empire together in the 16<sup>th</sup> century thus shaped the external equilibrium of the States in the new Westphalian system.

This dominance of minority protection being grounded in social facts becomes even clearer when moving forward beyond the end of the Holy Roman Empire in 1806 and to the reorganization of Europe at the 1815 Congress of Vienna, which expands the focus from religious minorities to ethnic and national ones. When Poland was apportioned among Prussia, Austria, and Russia, the

<sup>12</sup> *Treaty of Passau*, 2 August 1552, paras 6, 8, 9, 15, 16, 23, 25, 28, as reprinted in V. H. Drecol, *Der Passauer Vertrag (1552)* (2000), 95-134; 'Religious Peace of Augsburg' (1555), available at [https://www.lwl.org/westfaelische-geschichte/portal/Internet/finde/langDatensatz.php?urlID=739&curl\\_tabelle=tab\\_quelle](https://www.lwl.org/westfaelische-geschichte/portal/Internet/finde/langDatensatz.php?urlID=739&curl_tabelle=tab_quelle) (last visited 10 March 2021).

<sup>13</sup> W. Jones & W. Russell, *The History of Modern Europe* (1842), 639-642.

<sup>14</sup> *Treaty of Osnabrück*, 24 October 1648, Holy Roman Empire – Sweden, Art. 5(1)-(3), 1 ConTS 119; *Treaty of Münster*, 15 May 1648, Holy Roman Empire – France, para. 47, 1 ConTS 271.

Prussian emperor Friedrich Wilhelm III emphasized that the Poles under his reign would not have to repudiate their religion, language, and nationality.<sup>15</sup> Prussia enacted a language ordinance in 1823, acknowledging Polish as a sort of tribal language, while German had to be studied and used as a second language only. The responsible education minister explained that Prussia aimed not to *denationalize* or *Germanize* Poland.<sup>16</sup> What might appear to be a glance of normative reasoning was in fact mere compliance with the Final Act of the Vienna Congress that, as a last reminiscence of the Russian Tsar's idea of a reunified Poland, contained a clause on the respect for Polish national interests.<sup>17</sup> The seemingly moral-based German rescript rested on plain power politics. When Poland was to become formally independent sooner or later, it would still need the protection of a larger European power. The memory of good treatment under emperor Friedrich Wilhelm III would hopefully make Polish leaders turn to their Western neighbor then.

The second half of the 19<sup>th</sup> century was characterized by instability in the Balkans and in the Ottoman Empire, which largely originated in the 1856 Treaty of Paris concluded by the Ottoman Empire and Russia after their Crimean War.<sup>18</sup> The Ottoman Empire's enemies put peace negotiations under the condition that the Empire adopt national laws protecting its non-Muslim population.<sup>19</sup> Russia and its allies acted as protecting powers mostly for Christians, although religious considerations blurred with ideas of ethnic bonds. The Sublime Porte, the Ottoman government, relented by passing the Second Ottoman Reform Act – a law it never intended to implement internally. When the Christian Armenians requested that they be actually granted the rights guaranteed in the Act, they suffered a series of massacres.<sup>20</sup> The Sublime Porte did not show constraint by normative facts and simply shook off the negotiated social facts by which the other powers had sought to make minority protection a binding legal obligation.

<sup>15</sup> H. Delbrück, *Weltgeschichte*, Vol. 5 (1923-1928), 411.

<sup>16</sup> M. Broszat, *Zweihundert Jahre deutsche Polenpolitik*, 2nd ed. (1972), 90.

<sup>17</sup> J. A. R. Marriott & C. G. Robertson, *Evolution of Prussia: The Making of an Empire* (1937), 257-258.

<sup>18</sup> There are multiple bilateral and multilateral international treaties referred to as *Treaty of Paris*. The one referred to here was the *Peace Treaty of Paris*, 30 March 1856, Art. 9, 114 ConTS 409.

<sup>19</sup> V. N. Dadrian, 'Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications', 14 *Yale Journal of International Law* (1989) 2, 221, 234.

<sup>20</sup> *Ibid.*, 221, 234-235, 242, 318-319.



The Armenians were not the only minority group suffering in the Ottoman Empire. One particular massacre sparked the invocation of moral determinants of legal minority protection: In 1876 the Sublime Porte quelled the Bulgarian April Rebellion in a manner so gruesome that its graphic accounts in the emerging mass medium newspaper led to calls for consequences from all over Europe.<sup>21</sup> The English politician William Gladstone pressed for a suspension of any British assistance to the Ottoman government up until the individual perpetrators' punishment, as well as collective punishment in form of a complete Ottoman withdrawal from Bulgaria, Bosnia, and Hercegovina.<sup>22</sup> Victor Hugo, the French national poet and statesman, held an emotional speech in the National Assembly, based on which he published the discourse *Pour la Serbie*: "Crimes are crimes, and a government is no more allowed to become a murderer than any individual".<sup>23</sup> Hugo exchanged letters with the Italian freedom fighter and national hero Giuseppe Garibaldi, whose protest against the Bulgarian massacre sparked public demonstrations against the Sublime Porte in Italy.<sup>24</sup> Other famous Europeans without political mandate or mission also raised their voices to condemn the atrocities, e.g. Oscar Wilde and Leo Tolstoy.<sup>25</sup>

This European public discussion evidences a collective perception of the Bulgarian horrors as intolerably unjust and immoral. Such discourse and demands themselves are social facts but what is invoked in their content are moral facts, which leads to the analytical jurisprudential question of whether these moral facts are also ultimate determinants of legal facts or whether it is merely their invocation in a social act that renders them potential to determine legal facts. Both possible answers leave space to acknowledge that normative considerations have been a decisive factor for the initiation and fueling of legal norm-building processes far beyond the prohibition of genocide. Following the 1876 Bulgarian massacre, they had finally stepped on the scene of minority protection.

<sup>21</sup> Compare the renowned letters by the Daily News correspondent: J. A. MacGahan, *The Turkish Atrocities in Bulgaria* (1876), available at <https://archive.org/details/MacGahanTurkishAtrocitiesInBulgaria/page/n9/mode/2up> (last visited 10 March 2021); see also A. Skordas, 'Mass Media, Influence on International Relations' (2014), in A. Peters & R. Wolfrum (eds), *Max Planck Encyclopedia of Public International Law*, paras 46-47.

<sup>22</sup> W. E. Gladstone, *Bulgarian Horrors and the Question of the East* (1876), 38.

<sup>23</sup> V. Hugo, *Actes et Paroles IV: Depuis l'Exile* (1880-1926), 6 (translation by author).

<sup>24</sup> J. A. Frey, *A Victor Hugo Encyclopedia* (1999), 104.

<sup>25</sup> R. Jackson & I. Small (eds), *The Complete Works of Oscar Wilde*, Vol. 1 (2000), 237-238; W. Geier, *Bulgarien zwischen West und Ost vom 7. bis 20. Jahrhundert* (2001), 10.

The Russian Empire considered that it had sufficiently strong ethnic links to the Bulgarians to justify another war against the Ottoman Empire in 1877. The Russian campaign, an early form of humanitarian intervention in light of the previous year's massacre, ended with a devastating defeat of the Ottomans within a year.<sup>26</sup> In its aftermath, the European powers made new social facts by forcing the independence of the Christian nations of Montenegro, Serbia, and Romania in the 1878 Treaty of Berlin,<sup>27</sup> while Bulgaria became an autonomous region under Ottoman suzerainty.<sup>28</sup> That very Treaty of Berlin was the predecessor of the later minority protection treaties under the aegis of the League of Nations,<sup>29</sup> but also intensified internal tensions between the Sublime Porte and its non-Muslim subjects.<sup>30</sup>

These minority protection treaties were a result of World War I and a turn to preventative approaches. When the States assembled at the Paris Peace Conference, US President Woodrow Wilson declared that nothing endangered world peace as much as startlingly bad treatment of minorities.<sup>31</sup> The Romanian delegate Bratiano added that not a single nation questioned the need for stronger minority rights.<sup>32</sup> To assure more robust protection, the Allied and Associated Powers obliged the new nation-States forming after World War I to accept the following provision in their respective peace treaties:

“[The State] undertakes to assure full and complete protection of life and liberty to all inhabitants of [the State] without distinction of *birth, nationality, language, race or religion*.

<sup>26</sup> Dadrian, ‘Genocide as a Problem of National and International Law’, *supra* note 19, 239-240.

<sup>27</sup> *Treaty of Berlin for the Settlement of Affairs in the East*, 13 July 1878, Art. 26, 34, 43, 153 ConTS 171.

<sup>28</sup> *Ibid.*, Art. 1-12.

<sup>29</sup> W. A. Schabas, *Genocide in International Law: The Crime of Crimes* (2009), 18 [Schabas, Genocide: Crime of Crimes].

<sup>30</sup> Dadrian, ‘Genocide as a Problem of National and International Law’, *supra* note 19, 240-242, 318-319.

<sup>31</sup> Office of the Historian, United States Department of State, *Foreign Relations of the United States: The Paris Peace Conference, 1919*, Vol. 3 (1943), 406.

<sup>32</sup> *Ibid.*, 409.

All inhabitants of [the State] shall be entitled to the free exercise, whether public or private, of any creed, religion or belief, whose practices are not inconsistent with public order or public morals.<sup>33</sup>

These positive legal provisions, for the first time, precisely listed criteria of discrimination, foreshadowing what would coagulate in the Genocide Convention almost three decades later. Another result of the Paris Peace Conference was the foundation of the League of Nations in the Treaty of Versailles.<sup>34</sup> A precondition for the membership of Albania, Lithuania, Latvia, Bulgaria, and Greece was that they each provided a unilateral declaration on minority protection reflecting the above-cited clause in the peace treaties.<sup>35</sup>

Overall, minority protection had long been mostly a question of protecting religious minorities that were majorities in other States and could therefore gain militarily powerful protectors willing to intervene on their behalf. The undisturbed dominance of social facts lasted well into the second half of the 19<sup>th</sup> century until widely accessible media reports of atrocities spurred public debate that entailed recourse to moral facts. After World War I, the victorious States assembled at the Paris Peace Conference and achieved at least a formal transition from protective power patterns to guardianship of the new League of Nations, but this essentially rested on the social fact of their prevailing position and ability to dictate terms of minority protection. To not much surprise, once such social facts change due to shifting positions of power or willingness to enforce it, legal facts not determined by persisting moral facts may lose their legality. This has to be borne in mind throughout the next section as it offers an explanation of the striking difference between the development of minority protection and

<sup>33</sup> *Treaty between the Principal Allied and Associated Powers and Poland*, 28 June 1919, Art. 2, 225 ConTS 412 (emphasis added); *Treaty between the Principal Allied and Associated Powers and Czechoslovakia*, 10 September 1919, Art. 2, 226 ConTS 170; *Treaty between the Principal Allied and Associated Powers and the Kingdom of the Serbs, Croats and Slovenes*, 10 September 1919, Art. 2, 226 ConTS 182; *Treaty between the Allied and Associated Powers and Greece*, 10 August 1920, Art. 2, 28 LNTS 243.

<sup>34</sup> *Treaty of Versailles*, 28 June 1919, Art. 1-26, 225 ConTS 188.

<sup>35</sup> *Minority Schools in Albania*, Advisory Opinion, PCIJ Series A/B, No. 64, 7 (1935); the League of Nations' minority protection system was as ineffective as the piecemeal approach taken in the peace treaties since 1850. While the German National Socialists protracted applying the Nuremberg Racial Laws in Upper Silesia because these laws violated a minority protection treaty between Germany and Poland, that treaty expired in 1937 and could not prevent any World War II atrocities; see Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 24.

that of international humanitarian law – law for contexts of immediate physical power struggle.

## II. International Humanitarian Law and Moral Facts

International humanitarian law likewise played a key role in the development of the prohibition of genocide. Unlike for minority protection, however, moral facts took center stage from the outset and often so explicitly as the ultimate determinants of legal facts. This section first focuses on just war theory or *jus ad bellum* before moving on to *jus in bello*.

Francisco de Vitoria, a Spanish natural law scholar, claimed as early as 1539 that religion cannot be a reason for just war. He referred to Thomas Aquinas, the 13<sup>th</sup>-century Italian philosopher and natural law theorist, according to whom *barbarians* may not alone be battled to put the victorious power in a position of either baptizing or killing them.<sup>36</sup> The Dominican friar de Vitoria emphasized that these were not merely abstract questions of law but of Christian conscience.<sup>37</sup> Religion reappears, now driving humanitarian considerations of restraint in warfare.

A non-religious philosophical turn came in 1762 when Jean-Jacques Rousseau argued that war was an affair between States and not between their subjects.<sup>38</sup> The humans facing each other in combat were nothing but incidental enemies and a State may only antagonize another State, not its population as such.<sup>39</sup> Rousseau based this thesis on the right of citizens to have their lives and property left untouched by the State, contending that these private rights were the very basis on which every nation was founded.<sup>40</sup> He dressed the doctrine as part of his social contract philosophy, and it was the French statesman Charles-Maurice de Talleyrand-Périgord who, in a letter to Napoleon I in 1806, eventually rephrased it as a legal norm addressed to the sovereign.<sup>41</sup> The idea that

<sup>36</sup> U. Horst, H.-G. Justenhoven & J. Stüben (eds), *Francisco De Vitoria, Vorlesungen II* (1997), 556-557.

<sup>37</sup> D. Zacharias, 'Missionaries' (2008), in Peters & Wolfrum, *supra* note 21, para. 4.

<sup>38</sup> J.-J. Rousseau, *Du Contrat Social ou Principes du droit politique* (1762), 13.

<sup>39</sup> *Ibid.*, 14.

<sup>40</sup> E. Benvenisti, 'The Origins of the Concept of Belligerent Occupation', 26 *Law and History Review* (2008) 3, 621, 626.

<sup>41</sup> *Ibid.*; in 1877, the year of the Russian war against the Ottoman Empire following the Bulgarian horrors, the Swiss legal scholar Johann Caspar Bluntschli classified the so-called Rousseau Portalis Doctrine as part of the legal advancement from barbarism to humanity; see J. C. Bluntschli, 'Du Droit de Butin en General et Specialement du Droit de Prise Maritime', 9 *Revue de droit international* (1877), 508, 512-514.

States were founded on a pre-existing basis that limited the sovereign entails the idea of moral facts that, as ultimate determinants, curtail what social facts may determine.

The field of just war theory contains at least two understandings of moral facts as the law's ultimate determinants: de Vitoria advocated Christian conscience and, by that, reason. Rousseau, on the other hand, drafted his new State theory in rejection of the classic Christian natural law. Instead, his idea of the normative determinants of law was a constructivist moral philosophical one resting on pre-State basic principles.<sup>42</sup> The paradigm shifted, but both scholars were mainly concerned with moral facts.

Moving to *jus in bello* brings us to further contributions to the evolution of the genocide prohibition. In 1899 and 1907, The Hague was the venue of two peace conferences which ultimately led to the conclusion of several multilateral treaties on the laws of war. All of the 1899 and 1907 Hague Conventions' preambles contain the so-called Martens Clause:

“Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, 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*.”<sup>43</sup>

This explicit reference to the laws of humanity and the dictates of public conscience transfers the Vitorian and Rousseauian ideas of ultimately determining moral facts from just war theory to regulating the means and methods of warfare. The scope of the substantive provisions, e.g., of the Hague Regulations on Land Warfare (Hague Regulations)<sup>44</sup> was so limited that the Martens Clause evolved

<sup>42</sup> It would go far beyond the scope this article to provide a thorough analysis of Rousseau's position to natural law as it was understood in his times, his alternative concept of a social contract theory and in how far it was a new naturalistic approach to international law. An apt analysis with further references is provided by K. R. Westphal, 'Natural Law, Social Contract and Moral Objectivity: Rousseau's Natural Law Constructivism', 4 *Jurisprudence* (2013) 1, 48.

<sup>43</sup> See e.g. *Convention (IV) Respecting the Laws and Customs of War on Land*, 18 October 1907, Preamble, 205 ConTS 227 (emphasis added).

<sup>44</sup> See e.g. provisions aimed at protecting the civilian population from attacks or detrimental treatment for religious reasons in *ibid.*, Annex, 'Regulations Concerning the Laws and

into a general clause called on to assess certain massacres as prohibited by the laws of war and hence criminally punishable. The Commission to Inquire Into the Causes and Conduct of the Balkan Wars (Balkan Commission) did so in its 1914 report on the 1912-1913 Balkan Wars. The Balkan Commission assessed that the atrocities of which it had gathered evidence – and which would mostly be characterized as genocide today<sup>45</sup> – violated the Hague Regulations although hardly any articles therein were neatly applicable.<sup>46</sup>

Despite only being part of the preambles of the Hague Conventions, the Martens Clause's idea of a basic standard of laws of humanity and the public conscience informing and shaping the law of armed conflict was sufficiently persuasive to substantially promote this legal regime. Although grounding *jus in bello* in moral facts and the Balkan Commission practically applying it in its report did not prevent the atrocities of World War I, the subsequent development of international criminal law as a response thereto cannot be imagined without these naturalistic ideas.

### III. International Criminal Law Between Moral and Social Facts

International criminal law is the third and youngest legal regime that joined the weaving process towards the genocide prohibition becoming a legal fact. Itself drawing strongly on minority protection and international humanitarian law, its emergence as a discrete regime with its birth moment at the Nuremberg and Tokyo major war crimes trials after World War II is inextricably linked to the evolution of the prohibition of genocide. The State-addressed genocide prohibition is unthinkable without the crime of genocide. It, therefore, deserves a more detailed study than minority protection. Strikingly, this study reveals that, although there was a display of natural law enthusiasm, the actions propelling the emergence of international criminal law were not dominated by naturalistic claims to moral facts.

#### 1. The Armenian Genocide

The study ties to the previous sections by returning to the Ottoman Empire where, in 1908, the nationalist Ittihad Party had risen to power and the situation for non-Muslims deteriorated drastically. State-sanctioned persecution

Customs of War on Land', Art. 2, 46, 56.

<sup>45</sup> Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 16, note 12.

<sup>46</sup> Carnegie Endowment for International Peace, *Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars* (1914), 230-231.

particularly targeted the Armenians. Arrests of Armenian intelligentsia began on 24 April 1915 under the pretext of the Armenians allegedly siding with the Russian war opponents; large scale deportations of the rural population were initiated shortly thereafter.<sup>47</sup> France, Great Britain, and Russia issued a joint declaration as early as 24 May 1915:

“For about a month the Kurd and Turkish populations of Armenia has been massacring Armenians with the connivance and often assistance of Ottoman authorities. Such massacres took place in middle April (new style) at Erzerum, Dertchun, Eguine, Akn, Bitlis, Mush, Sassun, Zeitun, and throughout Cilicia. Inhabitants of about one hundred villages near Van were all murdered. In that city Armenian quarter is besieged by Kurds. At the same time in Constantinople Ottoman Government ill-treats inoffensive Armenian population. In view of those 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.”<sup>48</sup>

The declaration evidences how genocide entered international law as part of the still very unspecific category of crimes against humanity, the concept of humanity being joined by civilization. Against the background that no written law criminalizing such massacres existed at the time, the recourse to humanity and civilization follows the patterns of thought established by de Vitoria, Rousseau, and associated thinkers by purporting the decisiveness of moral facts to inform the law. However, in stark contrast to the tensions of the 19<sup>th</sup> century, the declaration did not cause foreign humanitarian intervention.

The Ottoman Prince Salid Halim asserted that any intervention would violate the sovereign rights of Turkey over her Armenian subjects,<sup>49</sup> contesting the ability of normative facts curtailing internal sovereignty. It took until 1918 for the French Prime Minister Georges Clemenceau to formulate a naturalistic

<sup>47</sup> Dadrian, ‘Genocide as a Problem of National and International Law’, *supra* note 19, 262; B. Barth, *Genozid: Völkermord im 20. Jahrhundert* (2006), 69.

<sup>48</sup> France, Great Britain & Russia, ‘Joint Declaration’ (1915), available at Armenian National Institute, [https://www.armenian-genocide.org/popup/affirmation\\_window.html?Affirmation=160](https://www.armenian-genocide.org/popup/affirmation_window.html?Affirmation=160) (last visited 12 March 2021).

<sup>49</sup> J. F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (1982), 27.



response to the Prince's positivistic statement by reiterating, in a letter to the Armenian people's representative, the punishment of the perpetrators "according to the supreme laws of humanity and justice".<sup>50</sup> At the 1919-1920 Paris Peace Conference, the State leaders and diplomats attempted to fulfill their promise and established a special commission to evaluate wartime atrocities.<sup>51</sup> At one of its meetings, the Greek Foreign Minister Nikolaos Politis argued that the Armenian massacre technically did not fall under any criminal provision, but still constituted a grave violation of the *laws of humanity*.<sup>52</sup> The commission eventually found that all enemy subjects who had committed crimes against the laws of war or the *laws of humanity* ought to face prosecution.<sup>53</sup> The United States and Great Britain went beyond that proposal by advocating, at the main conference table, collective punishment of the Ottoman Empire through segmenting it into new microstates and mandated territories.<sup>54</sup>

On 10 August 1920, the Allied and Associated Powers and the Ottoman Empire signed the Peace Treaty of Sèvres.<sup>55</sup> Article 226 of the Treaty contained a provision in which Turkey accepted the Powers' authority to court-martial Ottoman nationals for war crimes. Article 230 was identically structured for massacres committed in the course of the war. The articles illustrate not only the crystallization of morally informed *laws of humanity* into two discrete criminal provisions, but also genocide emerging as a separate crime. Yet, for political reasons, the Treaty of Sèvres was never ratified and instead replaced by the Treaty of Lausanne containing a full amnesty.<sup>56</sup>

Just as political opportunism had fueled the first agreements on minority protection in the 16<sup>th</sup> century, it reappeared as a rather obstructive element in the interwar years almost four centuries later. It is often overseen, however, that the granting of an amnesty presupposes that otherwise punishable crimes had been committed. It was insofar a conscious overriding of legal facts that may be

<sup>50</sup> Dadrian, 'Genocide as a Problem of National and International Law', *supra* note 19, 290, note 252 (translation by author).

<sup>51</sup> Carnegie Endowment for International Peace, *Violations of the Laws and Customs of War – Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission on Responsibilities, Conference of Paris (1919)* [Carnegie Endowment, *Violations of Laws and Customs of War*].

<sup>52</sup> Willis, *supra* note 49, 157.

<sup>53</sup> Carnegie Endowment, *Violations of Laws and Customs of War*, *supra* note 51, 20.

<sup>54</sup> D. Lloyd George, *The Truth About the Peace Treaties*, Vol. 2 (1938), 62, 189, 288-290, 539-540; note how this idea revived Gladstone's suggestion after the Bulgarian horrors.

<sup>55</sup> *Treaty of Sèvres*, 10 August 1922, Art. 88, 140-51, 113 BFSP 652 (not ratified).

<sup>56</sup> *Treaty of Lausanne*, 24 July 1923, Art. 138, 28 LNTS 11.



morally informed, but not a categorical denial of normative determinants of the law.

Notwithstanding the amnesty, a military tribunal subsequently established in the Ottoman Empire conducted several trials relating to the Armenian genocide. Whereas the tribunal applied national criminal law, the prosecutor spoke of the judges' duty to punish *crimes against humanity*.<sup>57</sup> The trials resulted in 17 death sentences, only three of which could be executed due to the escape of the most prominent accused.<sup>58</sup> Further trials became impossible after a new nationalist government had been formed by the Kemalists.<sup>59</sup> The tribunal's imperfectness resulted in an astonishing twist of history: the Armenian Soghomon Tehlirian decided to take the escaped perpetrators' punishment into his own hands. He traveled to Germany and fatally shot Talaat Pasha, the former Ottoman Minister for the Interior and Grand Vizier, in 1921.<sup>60</sup> The young law student Raphael Lemkin followed Tehlirian's trial by a Berlin court intensely. Lemkin wondered why it was a crime to murder one person, but not that the victim had murdered almost one million of his subjects.<sup>61</sup>

Overall, the Armenian genocide solidified the approach that *humanity* and *civilization* were the moral facts in which a crime of genocide was grounded. They were, however, overridden both internationally and nationally – in the Ottoman Empire – by social facts. The naturalistic proponents of moral facts being the ultimate determinants did not prevail.

## 2. Allocating War Guilt

A similar appraisal has to be made about high-level criminal liability for World War I as such and the atrocities committed in its course. In Paris, the

<sup>57</sup> V. N. Dadrian, 'The Turkish Military Tribunal's Prosecution of the Authors of the Armenian Genocide: Four Major Court-Martial Series', 28 *Holocaust and Genocide Studies* (1997) 28, 34, 39.

<sup>58</sup> Barth, *supra* note 47, 75.

<sup>59</sup> Despite its limited success in investigating high-ranking Ittihad functionaries, the tribunal set an early example of local ownership over international crimes. Such proceedings and the reference to *humanity* therein can be assessed in light of Rousseau's social contract theory: the very people whose *humanity* had been violated by their sovereign sit in judgement and, by that, restore their own state's legitimacy.

<sup>60</sup> Barth, *supra* note 47, 75.

<sup>61</sup> J. Vervliet, 'Raphael Lemkin (1900-1959) and the Genocide Convention of 1948', in H. van der Wilt et al. (eds), *The Genocide Convention: The Legacy of 60 Years* (2012), xii; notably, Pasha had been convicted by the Turkish military tribunal, although his sentence could not be executed due to his escape, and Tehlirian was eventually acquitted.

abovementioned Allied commission tasked with evaluating wartime atrocities accused German Emperor Wilhelm II and Crown Prince Wilhelm of war crimes and crimes against the *law of humanity*, for which they should be prosecuted before an international tribunal.<sup>62</sup> They should face charges of, *inter alia*, “[a]ttempts to denationalise the inhabitants of occupied territory”<sup>63</sup> for acts that were at least close to falling under the later definition of genocide.<sup>64</sup> The commission failed to name a distinct legal rule violated by these examples – a problematic omission when it comes to criminal punishment, but a hint of its strong theoretical reliance on moral facts.

Another obstacle was that the conference parties had originally assigned the commission to examine the “[...] responsibility of the authors of the war [...]” and “[...] breaches of the laws and customs of war [...]”.<sup>65</sup> Two US delegates disagreed with transgressing the commission’s competences by also covering the *law of humanity*, arguing that there was no universal understanding of and approach to *humanity*, the term hence being too vague for legal usage.<sup>66</sup> The US delegates’ alternative suggestions were “[...] act[s] of cruelty [...]”, i.e. “[a] wanton act which causes needless suffering (and this includes such causes of suffering as destruction of property, deprivation of necessities of life, enforced labour, &c.) [...]”.<sup>67</sup> They collectively called these misdeeds “[...] crime[s] against civilization [...]”,<sup>68</sup> a barely less ambiguous proposal. The disagreement between the majority and the US delegates nevertheless shows the minimum consensus on a normative basic standard that only needed to be identified and labeled correctly.

Due to persistent US opposition, the Treaty of Versailles eventually contained no reference to *humanity* or *civilization*. Instead, Emperor Wilhelm II was accused of “[...] a supreme offence against international morality and the sanctity of treaties [...]”,<sup>69</sup> which, again, merely replaced one ambiguous

<sup>62</sup> Carnegie Endowment, *Violations of Laws and Customs of War*, *supra* note 51, 20, 23.

<sup>63</sup> *Ibid.*, 18.

<sup>64</sup> Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 18; the facts listed by the commissioners include, *inter alia*, the prohibition of the Serbian language and books written therein, the substitution of Serbian schools with Bulgarian ones, and the deportation of the clergy to suffocate the communities’ religious traditions, see Carnegie Endowment, *Violations of Laws and Customs of War*, *supra* note 51, 39.

<sup>65</sup> Carnegie Endowment, *Violations of Laws and Customs of War*, *supra* note 51, 1.

<sup>66</sup> *Ibid.*, 64.

<sup>67</sup> *Ibid.*, 79.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Treaty of Versailles*, *supra* note 34, Art. 227; Art. 228 of the Treaty of Versailles envisaged charging other individuals with *acts in violation of the laws and customs of war*, but the

term with another. Still, *international morals*, which from here on joined the debate, is more transparent in identifying the value-laden facts in which the prohibition of genocide is grounded. The Emperor's timely escape to the Netherlands prevented his trial because the Dutch government did not share a naturalistic understanding of *international morals* that would have obliged it, under international law, to extradite Wilhelm II.<sup>70</sup>

### 3. New Courts for New Laws

If a new regime of international criminal law was to emerge, it would need courts to adjudicate and enforce its substantive rules. The efforts to establish such an international criminal judiciary after World War I resulted from disenchantment as to moral facts' capability to inspire ad hoc action after the fact. Resigning themselves to the force of social facts, international lawyers attempted to erect an international criminal court through codified law.

One product of the Paris Peace Conference was the Statute of the League of Nations that further envisaged an international court of justice, the later Permanent Court of International Justice (PCIJ), to control legal obligations like those in the abovementioned minority treaties.<sup>71</sup> A jurists' committee established to draft the Court's statute<sup>72</sup> proposed, upon the initiative of its Belgian president Baron Descamps, the creation of yet another international court with jurisdiction over individuals. That court should adjudicate on "[...] crimes against *international public order*, and against the *universal law of nations* [...]"<sup>73</sup>. The proposal, the wording and function of which resemble the Martens Clause, was opposed by the American delegation and stalled.<sup>74</sup> The Council of the League of Nations nonetheless explicitly reserved the right to establish a department for international criminal matters at the PCIJ if needed.<sup>75</sup>

Allied and Associated Powers never set up military tribunals for such prosecutions. The Leipzig Trials conducted by the young German Republic did not address genocidal atrocities either, see Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 19.

<sup>70</sup> Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 19.

<sup>71</sup> *Treaty of Versailles*, *supra* note 34, Art 14.

<sup>72</sup> Advisory Committee of Jurists, League of Nations, *Procès-verbaux of the Proceedings of the Committee, June 16th-July 24th, 1920, with Annexes* (1920), III.

<sup>73</sup> *Historical Survey of the Question of International Criminal Jurisdiction – Memorandum submitted by the Secretary-General*, UN Doc A/CN.4/7/Rev.1, 1 January 1949, 3 (emphasis added) [Historical Survey].

<sup>74</sup> Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 23.

<sup>75</sup> *Historical Survey*, *supra* note 73, 4.

The same jurists' committee suggested that organizations and jurists specialized in public international law continue to work on a new international criminal jurisdiction.<sup>76</sup> The South African representative Lord Robert Cecil objected to this idea at the First Assembly of the League of Nations, displaying his positivistic persuasion by contending that it would be a “[...] very dangerous project at this stage in the world’s history”.<sup>77</sup> Eventually, the committee’s proposal was rejected by the Assembly,<sup>78</sup> but this did not prevent qualified jurists from independently taking up their work and developing progressive proposals.

#### 4. Individual Publications and International Conferences

Although the debate had been canceled at the League of Nations, the League could not hinder new arguments and theories developing outside of its institutional context both in individual publications and at other international conferences.

As early as 1922, the English law professor Hugh Bellot presented a statute for a permanent international criminal court at the 31<sup>st</sup> conference of the International Law Association. This first draft only covered war crimes,<sup>79</sup> but Bellot continued to rework it after a positive vote at the conference and inspired others. Two years later, the French law professor Henri Donnedieu de Vabres published an article on activating international criminal jurisdiction at the PCIJ. He named “[...] attacks on humanity, committed [...] due to racial hatred [...]”<sup>80</sup> as one of the crimes over which the Court should have jurisdiction *ratione materiae*.

Closely linked to Donnedieu de Vabres – through common activities in the then still young Association Internationale de Droit Pénal (AIDP) – was Vespasian V. Pella. Pella pleaded for creating an international criminal court at a meeting of the Union Interparlementaire the same year.<sup>81</sup> He considered internal sovereignty, i.e. how a State treats its citizens, which he had previously

<sup>76</sup> *Ibid.*, 10.

<sup>77</sup> World Peace Foundation, *The First Assembly of the League of Nations* (1921), 114.

<sup>78</sup> *Ibid.*

<sup>79</sup> H. H. L. Bellot, ‘A Permanent International Criminal Court’, in International Law Association, *Report on the Thirty-First Conference Held at the Palace of Justice, Buenos Aires, 24th August – 30th August, 1922* (1923), 63, 73.

<sup>80</sup> H. Donnedieu de Vabres, ‘La Cour Permanente De Justice Internationale et sa vocation en matière criminelle’, 1 *Revue Internationale de Droit Pénal* (1924) 1, 175, 186.

<sup>81</sup> V. V. Pella, ‘L’Union Interparlementaire – Compte - rendue de la XXII conférence tenue à Berne et à Genève en 1924’, 86 *Revue Internationale de Droit Pénal* (2015) 3/4, 841.

classified as generally inviolable, to be restricted when it came to crimes like the Armenian massacre. Due to the strong global repercussions of such incidents, international repression thereof had to be permissible and accepted by all States independent of any prior conclusion of treaties.<sup>82</sup> Without naming the crime, Pella essentially demanded a universally applicable genocide prohibition of *jus cogens* character. Such a peremptory character able to resist social facts to the contrary, particularly the golden calf of sovereignty in the Westphalian system, implies that Pella adopted a naturalistic approach.

Pella's ideas inspired a new member of the AIDP, Raphael Lemkin, who had become a young prosecutor in Poland by then.<sup>83</sup> At the April 1933 AIDP conference in Palermo, lawyers had reviewed whether universal jurisdiction was adequate for certain crimes.<sup>84</sup> Upon Pella's initiative, *acts of barbarity and vandalism resulting in general danger* had been included on the list besides piracy and slavery.<sup>85</sup> Lemkin tied to that debate in a memo on behalf of Poland for a conference on the unification of criminal law in Madrid later the same year.<sup>86</sup> He proposed two criminal provisions of barbarism and vandalism for inclusion in an international convention.<sup>87</sup> While Lemkin defined vandalism as the destruction of certain groups' cultural property, he understood barbarism as violence directed against "[...] racial, confessional or social communities [...]"<sup>88</sup>. Barbarism was the more direct predecessor to the definition in the Genocide

<sup>82</sup> V. V. Pella, 'La Criminalité de la Guerre d'Aggression et l'Organisation d'une Repression Internationale', 3/4 *Revue Internationale de Droit Pénal* (2015), Vol. 86, 851, 861.

<sup>83</sup> Lemkin had been introduced to the AIDP by his mentor, the assistant professor and judge Emil Stanislaus Rappaport, see D. M. Segesser & M. Gessler, 'Lemkin and the International Debate on the Punishment of War Crimes', in D. J. Schaller & J. Zimmerer (eds), *The Origins of Genocide: Raphael Lemkin as a Historian of Mass Violence* (2009), 12; Lemkin's connection to Rappaport will become more important for the subsequent war crimes trials after the Second World War, see *infra* B.III.7.

<sup>84</sup> N. N., 'IIIe Congrès international de droit pénal (Palèrme 3-8 avril 1933)', 1/2 *Revue Internationale de Droit Pénal* (2015), Vol. 86, 37.

<sup>85</sup> *Ibid.*

<sup>86</sup> V. Chanethom, 'International Conference on the Unification of Penal Law, Madrid, October 1933 – Special Report Presented by M. Raphael Lemkin' (2014), 14, available at <http://watchersofthesky.com/wp-content/uploads/2014/10/lemkins-madrid-report-in-1933.pdf> (last visited 9 September 2020); R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (1944), 55 [Lemkin, Axis Rule].

<sup>87</sup> R. Lemkin, *Les actes constituant un danger général (interétatique) considérés comme délits de droit des gens* (1933), 8.

<sup>88</sup> R. Lemkin, 'Akte der Barbarei und des Vandalismus als *delicta juris gentium*', 19 *Internationales Anwaltsblatt* (1933) 6, 117 (translation by author).

Convention and shows a significant evolution as to precision since earlier references to the vague basic standard of the laws of humanity. The Madrid conference, however, focused on *terrorism*<sup>89</sup> and the delegates did not even cast a vote on Lemkin's proposal.<sup>90</sup>

Hersch Lauterpacht is another key figure for the development of the genocide prohibition who showed a stronger focus on normative grounds of international law than it appears to have been the case for the codifying attempts of Lemkin. Lauterpacht had already emerged as a critic of absolute State sovereignty in the 1920s.<sup>91</sup> In 1933, the year of the Nazi seizure of power, he proposed a draft resolution to the League of Nations Council, condemning new German laws as violations of “[...] the principle of non-discrimination on account of race or religion [which was] part of the public law of Europe [...]”.<sup>92</sup> All members of the League of Nations ought to obey such a principle of non-discrimination towards all individuals within their territory.<sup>93</sup> It was not possible to find any related Council resolution, but the draft nevertheless indicates an almost constitutionalist understanding of normative basic principles that bind the members of the international community irrespective of their will and are capable of limiting their internal sovereignty.

Whereas the examples above reflect the problematic Eurocentrism in public international law, there is evidence of parallel developments on the other side of the globe. In 1938, the Eighth International Conference of American States met in Lima and obliged all member States to criminalize “[p]ersecution for racial or religious motives [...]”.<sup>94</sup> In sum, both legal scholarship and a remarkable number of sovereigns had come to the point where race and religion must not just be left unharmed but also actively be protected by States through the introduction of national criminal laws. In other words, an obligation to omit was joined by an obligation to perform.

Although the 1920s and 1930s saw the activism of many scholars and practitioners that appear to have been driven by individual naturalistic

<sup>89</sup> Chanethom, *supra* note 86, 2.

<sup>90</sup> Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 26 note 79; A. F. Vrdoljak, ‘Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law’, 20 *European Journal of International Law* (2009) 4, 1163, 1177 [Vrdoljak, Human Rights and Genocide].

<sup>91</sup> Vrdoljak, ‘Human Rights and Genocide’, *supra* note 90, 1168-1169.

<sup>92</sup> *Ibid.*, 1181.

<sup>93</sup> *Ibid.*

<sup>94</sup> J. B. Scott (ed.), *The International Conferences of the American States: First Supplement, 1933-1940* (1940), 260.

persuasions, the majority of them bowed to the *realpolitik* experiences in and after World War I. Even so, none of their codification attempts was able to prevent World War II.

## 5. Preparations for Punishment

While World War II was still raging, the Allies started to plan the punishment of those responsible for the massacres perpetrated in its course and Raphael Lemkin worked on the legal facts on which such punishment could be based. While there was some recourse to moral facts, they are not invoked as the ultimate determinants of the international (criminal) legal regime.

In 1942, delegates of the US, Britain, the Soviet Union, and China met in Moscow. They issued a joint declaration announcing the criminal prosecution of the Germans, especially for “atrocities, massacres and cold-blooded mass executions” committed in Poland and the Soviet Union.<sup>95</sup> Although the declaration itself and the consensual Allied action envisaged are but social facts, the strong term “cold-blooded” notably reflects the moral appeal of this dedication to not repeat what had happened almost three decades earlier.

One year later, the Allies established the United Nations War Crimes Commission (UNWCC) in London to implement the Moscow Declaration.<sup>96</sup> The UNWCC took up the materials of the 1919 Commission,<sup>97</sup> but also acknowledged the developments of the interwar years.<sup>98</sup> Just like after World War I, violations of “[t]he principles of the law of nations derived from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience [...]” should be prosecuted.<sup>99</sup> *Denationalization* as a specific crime was revived as well.<sup>100</sup> The legal concepts seem identical to the ones developed in The Hague and Paris. Concerning the names of those legal concepts, however, a new label appeared: the American commissioner Herbert Pell now addressed crimes “[...] committed against [...] any person due to her

<sup>95</sup> US Senate Committee on Foreign Relations & US Department of State, *A Decade of American Foreign Policy: Basic Documents 1941-49* (1950), 11, 13.

<sup>96</sup> *Historical Survey*, *supra* note 73, 20.

<sup>97</sup> Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 31.

<sup>98</sup> A. F. Vrdoljak, ‘Genocide and Restitution: Ensuring Each Group’s Contribution to Humanity’, 22 *European Journal of International Law* (2011) 17, 22 [Vrdoljak, *Genocide and Restitution*].

<sup>99</sup> *Historical Survey*, UN Doc A/CN.4/7/Rev.1, *supra* note 73, 21.

<sup>100</sup> Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 31.



race or religion [...]” as crimes against humanity,<sup>101</sup> invoking a moral fact to ground them so that they could be applied to World War II notwithstanding the lack of any codification.

US President Roosevelt was no less explicit in a speech, proclaiming that no individual involved in the systematic murder of the Jews would go unpunished.<sup>102</sup> The legal committee of the UNWCC subsequently tried to persuade the Commission of enlarging its mandate to also cover racially or religiously motivated crimes, advocating this proposal by pointing to the evolution of minority protection since 1918.<sup>103</sup> However, the general mandate of the UNWCC was limited to crimes in the context of war.<sup>104</sup> The Commission, therefore, decided to report crimes against Jews separately and leave it to the States to include them as war crimes or as a distinct category in any later agreement.<sup>105</sup> The social fact of a limited mandate prevailed.

Raphael Lemkin did not endorse this hesitant position. In 1944, he published *Axis Rule in Occupied Europe* and created a new name for the massacres of distinct groups: *genocide*, a neologism manufactured of *genos* (Greek for race, kin) and *cidere* (Latin for to kill).<sup>106</sup> Genocide was “[...] a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves”.<sup>107</sup> It was executed in two phases: first, the destruction of the attacked group’s national pattern, and second, the imposition of the oppressor’s national pattern.<sup>108</sup> For Lemkin, such conduct had previously been labeled as *denationalization*, but the term was not adequate for crimes in the course of which entire peoples were

<sup>101</sup> United Nations War Crimes Commission, *Resolution moved by Mr. Pell on 16th March 1944*, III/1, 18.3.44, 18 March 1944, cited in United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948), 175.

<sup>102</sup> Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 31-32.

<sup>103</sup> United Nations War Crimes Commission, *supra* note 101, 176; Vrdoljak, ‘Genocide and Restitution’, *supra* note 98, 23.

<sup>104</sup> Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 31.

<sup>105</sup> *Ibid.*, 33.

<sup>106</sup> Lemkin, *Axis Rule*, *supra* note 86, 76. Lemkin abandoned vandalism and barbarism because these terms were prone to colloquial usage for almost any atrocity crime, see S. Power, ‘A Problem from Hell’: *America and the Age of Genocide*, 3rd ed. (2013), 42; see also P. S. Bechky, ‘Lemkin’s Situation: Toward a Rhetorical Understanding of Genocide’, 77 *Brooklyn Law Review* (2012), 551, 559-560.

<sup>107</sup> Lemkin, *Axis Rule*, *supra* note 86, 79.

<sup>108</sup> *Ibid.*



destroyed biologically.<sup>109</sup> He, therefore, did not claim to invent something new, but overtly referred to pre-used concepts that were, in their original contexts, considered to be grounded in the *laws of humanity*.

Lemkin considered genocide to be antithetical to the Rousseau Portalis Doctrine, which he found implicitly included in the Hague Conventions.<sup>110</sup> Much to Lemkin's regret, the broad array of modes of criminal conduct had not been foreseen at the time of the Hague conferences,<sup>111</sup> hence the Conventions needed amendment.<sup>112</sup> But that alone was insufficient because genocide was also committed in times of peace – times during which the League of Nations' minority protection system had proven ineffective. Lemkin acknowledged the system's success in elevating the destruction of a whole nation to a matter shaking humanity's sense of justice just as much as the murder of a single person.<sup>113</sup> Still, what he strived for was a specific multilateral treaty obliging its State parties to penalize genocide in national law and elevating the crime to the ranks of *delicta juris gentium*.<sup>114</sup>

The term *jus gentium* had famously been coined by the late scholastic Francisco Suárez when reasoning that the normative force of international law could be derived from natural law,<sup>115</sup> i.e. that international law was ultimately grounded in moral facts. Lemkin's reasoning that genocide could only be elevated to a *delictum juris gentium* by way of a convention, i.e. a social fact, is either contradictory or presupposes a different understanding of *jus gentium*. His writings do not reveal whether he consciously referred to *delicta juris gentium* so as to build a more compelling normative force to trigger the social fact. He would repeat his call to action several times in scholarly articles until the international community finally agreed on the Genocide Convention.<sup>116</sup> Lemkin's persistence indicates that he could either not identify a universally applicable and peremptory prohibition of genocide or was a realistic naturalist

<sup>109</sup> *Ibid.*, 79-80.

<sup>110</sup> *Ibid.*, 80.

<sup>111</sup> These modes of criminal conduct are political, social, cultural, economic, biological, physical, religious, and moral, see *ibid.*, 82-90.

<sup>112</sup> *Ibid.*, 93.

<sup>113</sup> *Ibid.*, 91.

<sup>114</sup> *Ibid.*, 91, 93-94.

<sup>115</sup> W. Preiser, 'History of International Law, Ancient Times to 1648' (2008), in A. Peters & R. Wolfrum (eds), *Max Planck Encyclopedia of Public International Law*, para. 70.

<sup>116</sup> See R. Lemkin, 'Genocide: A Modern Crime', 4 *Free World* (1945) 39, 43; R. Lemkin, 'The Crime of Genocide', 15 *American Scholar* (1946) 2, 227, 230; R. Lemkin, 'Genocide as a Crime under International Law', 41 *American Journal of International Law* (1947) 1, 145, 150-151.

in an environment full of positivists. Such contradictions might be a necessary consequence of the interweaving threads of minority protection and international humanitarian law as illustrated earlier. Pushed by moral facts and pulled by the longing for social facts, international criminal law rapidly approached its *birth* in Nuremberg.

## 6. The Nuremberg Trial of the Major War Criminals

Subsequently hailed as the origin of international criminal law, the International Military Tribunal (IMT) at Nuremberg was an ambiguous experience for all proponents for a pre-existing prohibition of genocide ultimately and sufficiently grounded in moral facts.

In June 1945, the Allies began their final preparations for implementing the Moscow Declaration in London. Lemkin had contacted Robert Jackson, then the American delegate, while still in the US and called Jackson's attention to his publications on genocide.<sup>117</sup> This communication likely influenced the memorandum prepared by Jackson for the other delegations: he listed "[...] genocide, sterilization, castration, or destruction of racial minorities and subjugated populations [...]" as crimes to be included in the charges against high-ranking Germans.<sup>118</sup>

The other diplomats, however, insisted that their right to prosecute originated only in the criminal acts' connection to Germany's aggressive war against the Allied nations.<sup>119</sup> Put differently, the German Reich had made its affairs those of the other warring parties when it had commenced the conflict, and this alone allowed the Reich's opponents to penetrate its sovereignty by prosecutions. One of the few delegates arguing against such a rigorous nexus with war was the law professor André Gros, representing France at the London Conference. He referred to "[...] interventions for humanitarian reasons" conducted for the purpose of minority protection even during peacetime in the 19<sup>th</sup> century.<sup>120</sup> Still, the majority of represented States did not feel bound by their past actions and deemed sovereignty as too sacrosanct to agree on a universally applicable and enforceable prohibition of genocide.

<sup>117</sup> J. Q. Barrett, 'Raphael Lemkin and "Genocide" at Nuremberg, 1945-1946', in C. Safferling & E. Conze (eds), *The Genocide Convention Sixty Years after its Adoption* (2010), 35, 36.

<sup>118</sup> R. H. Jackson, 'Draft, 14 May 1945, Planning Memorandum', in R. H. Jackson Papers, Library of Congress, 9, cited in Barrett, *supra* note 117, 40.

<sup>119</sup> *Ibid.*, 41; Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 34-35.

<sup>120</sup> Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 35.

The London Agreement with the Statute of the IMT referred to genocide as being prohibited but neither included the term genocide nor provided for clear systematic classification of the crime. The crimes against humanity provision in Article 6(c) of the IMT Statute encompassed “[...] 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.”<sup>121</sup> Jackson understood this to include genocide, even if it was merely a subcategory of crimes against humanity.<sup>122</sup> The indictment drafted based on the IMT Statute, in contrast, mentioned genocide explicitly, but as a subset of war crimes:

“[The Accused] conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others.”<sup>123</sup>

This classification of genocide as a war crime and the reference to occupied territories evoke the times after World War I, when the Hague Regulations were called on to prosecute crimes against minorities. The placement of genocide under war crimes might, however, rather be owed to the fact that this part of the indictment was inserted by the Americans last-minute after they had overcome British opposition against Lemkin’s neologism.<sup>124</sup> Notwithstanding these ambiguities, the Nuremberg major war crimes trial had already fostered the establishment of the genocide prohibition before its first session in court by spurring debate over its definition and systematicity.

At the end of the trial hearings, the Allied chief prosecutors Sir Hartley Shawcross and Auguste Champetier de Ribes pleaded, appealing to values, that the indictment on the *monstrous* crime of genocide had been confirmed.<sup>125</sup> The judgment omitted to mention the term genocide. The four Allied judges from the US, Britain, France, and the Soviet Union could not find a sufficient nexus

<sup>121</sup> *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, Art. 6(c), 82 UNTS 279, 288.

<sup>122</sup> Barrett, *supra* note 117, 42.

<sup>123</sup> International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal*, Vol. I (1947), 43-44.

<sup>124</sup> Barrett, *supra* note 117, 45.

<sup>125</sup> International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal*, Vol. XIX (1948), 515, 531, 551.

between the pre-1939 persecution of the Jews and the war that would permit the Tribunal to exercise jurisdiction.<sup>126</sup> They hence rendered no abstract statement on the prohibition of State-organized genocide in times of peace,<sup>127</sup> but refused to go beyond the Charter and apply an uncodified crime of genocide based on ultimate moral facts. Still, the judges convicted the accused for the persecution of minorities during the war.<sup>128</sup> Lemkin, who monitored the developments at Nuremberg critically, considered the facts on which that conviction rested to fulfill his definition of genocide.<sup>129</sup>

The situation around the IMT was of high relevance for legal theory: a legislator hesitates to pass a certain law, anxious about causing political disapproval amongst the electorate or other powerful stakeholders. Instead, an inchoate regulation is adopted, explicitly or implicitly leaving the completion of its objective to the judiciary. In court, the positive law will run out and the judges are left with morality. The potential conflict with *nulla poena sine lege* in criminal matters is evident. The judges at Nuremberg refused to have recourse to morality and did not convict for genocide, passing the ball back to the State community with its legislative powers. While such judicial activism is, in national systems, often ineffective, it was surprisingly fruitful in the case of the IMT as it created momentum within the UN.

## 7. Subsequent War Crimes Trials

Before moving on to the codification of the genocide prohibition by the UN, it is worthwhile to analyze subsequent war crimes trials where the tribunals in charge took less reserved approaches to genocide than the IMT.

In December 1945, the Allied Control Council, the body governing Germany after its defeat in World War II, adopted Law No. 10 based on which twelve trials were conducted by the Nuremberg Military Tribunals (NMT).<sup>130</sup> Article 2(1)(c) of Law No. 10 contained the same crimes against humanity clause as the IMT Statute. The judges in the so-called Justice Trial held that this

<sup>126</sup> International Military Tribunal, *supra* note 125, Vol. XXII, 498.

<sup>127</sup> Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 40.

<sup>128</sup> International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal*, Vol. XIX (1948), 548.

<sup>129</sup> Lemkin, 'Genocide as a Crime under International Law', *supra* note 116, 147; see also Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 38; Barrett, *supra* note 117, 52.

<sup>130</sup> *United States v. Alstoeffer et al.* in Nuernberg Military Tribunals, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. III (1951), XVIII.

provision encompassed genocide as the “[...] prime illustration of a crime against humanity [...]”.<sup>131</sup> The judges cited Resolution 96 (I) and explained that the UN General Assembly was the “[...] most authoritative organ [...]” to examine *world opinion*.<sup>132</sup> This indicates that the judges did not feel comfortable relying solely on the IMT judgment or to invoke ultimate moral facts, but that they closely looked to social facts. In their opinion, genocide was a joint product of both “[...] statute [...]” and “[...] common international law [...]”,<sup>133</sup> the second term probably referring to customary international law. The Tribunal eventually pronounced two guilty verdicts for genocide.<sup>134</sup> In later NMT trials conducted under Control Council Law No. 10, the respective judges no longer discussed the legal grounds for their genocide convictions and, at times, returned to general terms like extermination to label the crime.<sup>135</sup>

Meanwhile, post-war Poland had set up the Supreme National Tribunal (SNT) to dispense with war criminals, and Lemkin’s mentor Emil-Stanislaus Rappaport was appointed as a judge.<sup>136</sup> The legal bases on which the SNT trials relied were both national and international law.<sup>137</sup> That dualism made it an early example for the national enforcement of international criminal law and, again, local ownership.

In 1946, the former Nazi governor Arthur Greiser was indicted before the SNT. The charges encompassed persecution and mass murder of Polish and Jewish people, but also the *Germanization*<sup>138</sup> of Polish culture – a term reminiscent of the Prussian Language Ordinance after the 1815 Congress of Vienna and the concept of denationalization around World War I. The prosecutors argued that these crimes followed a two-phase plan of the Nazis: first, the destruction of the

<sup>131</sup> *Ibid.*, 983.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*, 1128, 1156.

<sup>135</sup> See also *United States v. Greifelt et al.* in Nuernberg Military Tribunals, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. V (1950), 88; *United States v. Ohlendorf et al.* in Nuernberg Military Tribunals, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. IV (1949), 468; *United States v. Weizsaecker et al.* in Nuernberg Military Tribunals, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. XIV (1952), 467, 519, 620.

<sup>136</sup> Vrdoljak, ‘Human Rights and Genocide’, *supra* note 90, 1192.

<sup>137</sup> *Poland v. Goeth* in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. VII (1948), 4-5.

<sup>138</sup> *Poland v. Greiser* in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. XIII (1949), 70-117.

Polish nationality, society, economy, and culture, and second, the imposition of *Germanness*.<sup>139</sup> This prosecutorial approach precisely reflected the two phases Lemkin had described in *Axis Rule in Occupied Europe*. The judges found Greiser guilty of “[...] physical and spiritual genocide”, a crime both under national and international law.<sup>140</sup> By that verdict, they made Poland the first country where the term genocide appeared in a national criminal judgment.<sup>141</sup>

Both the NMT and the SNT trials show the importance of also looking to institutions that do not dominate the limelight like the IMT. They, too, are fora for debate, often more easily accessible to and receptive for new proposals, and eventually the sites from where theoretical test balloons are started.

### C. To Codify or Not to Codify: A Look Into the Labor Ward of the International Community

Proceeding to the UN activities that, in 1948, culminated in the adoption of the Genocide Convention means reconstructing and analyzing a major evolutionary turn for the prohibition of genocide. Whereas the development of minority protection had been grounded predominantly in social facts and international humanitarian law found its grounds in fully-fledged natural law theories, the emergence of international criminal law until after World War II had meandered between naturalistic enthusiasm and the acknowledgment that an effective genocide prohibition depended on the non-normative contingencies of the international community. Dissatisfaction with the social facts produced at Nuremberg caused a surge of claims that an ultimately value-grounded prohibition of genocide already existed. These naturalistic arguments created the codifying momentum which led to the Genocide Convention, a new social

<sup>139</sup> *Ibid.*, 113.

<sup>140</sup> *Ibid.*, 114.

<sup>141</sup> Vrdoljak, ‘Human Rights and Genocide’, *supra* note 90, 1163, 1193. Two more notable SNT trials involved the crime of genocide. Amon Goeth, the former commander of Płaszów concentration camp later made famous by the movie *Schindler’s List*, faced explicit genocide charges by prosecutors arguing that the offense was a *crimen laesae humanitatis*. The prosecution borrowed from Lemkin’s definition again and the SNT convicted Goeth of genocide and other crimes, see *Poland v. Goeth*, *supra* note 137, 7-9. Second, the commander of the notorious Auschwitz concentration camp, Rudolf Höß, was equally found guilty of genocide by the SNT in 1947. The judges were persuaded that he had committed biological and cultural genocide, while they considered the overarching German persecution of Jews and Slavic peoples as a violation of the right to life and the right to existence, see *Poland v. Hoess* in United Nations War Crimes Commission, *supra* note 138, 24.

fact that would gradually upstage the recourse to moral facts during the second half of the 20<sup>th</sup> century.

### I. UN General Assembly Resolution 96 (I)

On 11 December 1946, shortly after the Nuremberg judgment, the UN General Assembly unanimously adopted Resolution 96 (I) titled “The Crime of Genocide”.<sup>142</sup> The delegations of Cuba, India, and Panama had presented its first draft,<sup>143</sup> after Lemkin himself had persuaded the delegates of such a resolution’s necessity.<sup>144</sup> Ernesto Dihigo (Cuba) called the draft a response to the deficiencies of the IMT judgment; it ought not to happen again that only crimes committed during the war could be punished.<sup>145</sup> Dihigo convinced the General Assembly to refer the draft to the Sixth Committee for further refinement.<sup>146</sup>

In the Sixth Committee, Britain and France jointly suggested an alternative preamble, opening with “Declares that genocide *is* an international crime [...]”.<sup>147</sup> Saudi Arabia even presented a comprehensive alternative draft, the preamble calling genocide one of the most obvious violations of international law and the law of humanity.<sup>148</sup> Sir Hartley Shawcross, now representing Britain, argued that the Holocaust could have been charged as a separate crime at the IMT if the States had accepted Lemkin’s 1933 Madrid proposal.<sup>149</sup> This failure with far-reaching consequences was the reason why the matter could no longer be left at the discretion of States and their current leaders’ will to sign treaties or conventions. Independent of any contractual agreements, “[...] humanitarian

<sup>142</sup> GA Res. 96 (I), UN Doc A/RES/96(I), 11 December 1946.

<sup>143</sup> *The Crime of Genocide: Request from the Delegations of Cuba, India and Panama for the Inclusion of an Additional Item in the Agenda*, UN Doc A/C.6/SR.22, 22 November 1946, 101 [Cuba/India/Panama Request].

<sup>144</sup> Schabas, *Genocide Prior to 1948*, *supra* note 6, 20.

<sup>145</sup> *Cuba/India/Panama Request*, *supra* note 143, 101.

<sup>146</sup> P. H. Spaak, *Letter Dated 13 November 1946 from the President of the General Assembly to the Chairman of the Sixth Committee*, UN Doc A/C.6/64, 12 November 1946.

<sup>147</sup> Delegations of the United Kingdom, India, France and the Union of Soviet Socialist Republics, *Amendments to the Draft Resolution Relating to the Crime of Genocide*, UN Doc A/C.6/83, 22 November 1946 (emphasis added).

<sup>148</sup> Delegation of Saudi Arabia, *Draft Protocol for the Prevention and Punishment of the Crime of Genocide*, UN Doc A/C.6/86, 26 November 1946, 1.

<sup>149</sup> *Resolution on the Crime of Genocide (Document A/Bur/50)*, UN Doc A/C.6/84, 25 November 1946, 2.



intervention by international law [...]” now had to be permissible.<sup>150</sup> Shawcross essentially aimed for a prohibition of genocide with *jus cogens* status.

Other delegates likewise showed a keen interest in prohibiting genocide once and for all, but, in contrast, expressed more naturalistic views. Riad Bey (Saudi Arabia) elaborated that genocide already fulfilled all requirements for an international crime: it was committed on the territory of several States, it was morally and materially of international importance, and it was a serious offense against the principles of justice and respect for human dignity.<sup>151</sup> Manfred Lachs (Poland) similarly qualified genocide as “[...] *quasi delicta juris gentium* [...]” which merely had to be codified for the sake of legal certainty.<sup>152</sup> The debate had reached a stage where it was less about the existence of the prohibition and more about its precise status.

The preamble of Resolution 96 (I), as it was eventually adopted by the UN General Assembly, called genocide a matter of international concern. It further stated:

“The General Assembly, therefore, [a]ffirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices – whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable [...]”<sup>153</sup>

This wording is a clear positioning that genocide had already been prohibited as a universal crime before December 1946. Notwithstanding the merits of such a resolution, the State community did not want to leave it with a non-binding appeal and entrusted the Economic and Social Council (ECOSOC) with the drafting of a convention.<sup>154</sup> It aimed for new stabilized social facts.

<sup>150</sup> *Ibid.*

<sup>151</sup> *Resolution on the Crime of Genocide (Documents A/Bur/50, A/C.1/6/83 [sic], and A/C.6/86)*, UN Doc A/C.6/91, 30 November 1946, 2.

<sup>152</sup> *Continuation of the Discussion of the Resolution of the Crime of Genocide*, UN Doc A/C.6/96, 2 December 1946, 4 (emphasis in original).

<sup>153</sup> GA Res. 96 (I), UN Doc A/Res/96(I), 11 December 1946.

<sup>154</sup> *Ibid.* Resolution 96 (I) may still have its own normative value in public international law, going well beyond those UN internal effects. The Czech delegate Zourek explained in a later meeting that the General Assembly was not competent to establish new law by passing resolutions – it did, however, have the power to confirm existing law; see N. Robinson, *The Genocide Convention: A Commentary* (1960), 56. The ICJ, on the other hand, held in



## II. The *Travaux Préparatoires* of the Genocide Convention

The ECOSOC initiated the *travaux préparatoires* by passing the baton to the Secretary-General so that he may consult legal experts and work on a first draft.<sup>155</sup> These experts were Raphael Lemkin, Vespasian V. Pella, and Henri Donnedieu de Vabres, who mainly discussed the breadth of the definition, the scope of the convention, and whether the prohibition of genocide already existed.<sup>156</sup>

The resulting Secretariat Draft *inter alia* addressed the question of whether the convention's effects should be limited to the parties or whether they could apply universally.<sup>157</sup> The experts favored the first option, arguing that the second one would not distinguish between signatories and third States.<sup>158</sup> Signatories, however, should have universal jurisdiction over the crime of genocide.<sup>159</sup> The reasoning for the limitation of the convention's effects seems weak: the distinction between parties and third States is rather a result of the first option than a discrete reason why one should opt for it. What the experts really did was to prioritize the *pacta tertiis* principle above the objectives of the genocide prohibition and accord more weight to social facts than to moral grounding. As for universal jurisdiction, they relied on certain indications in Resolution 96 (I) and its being indispensable for an effective convention.<sup>160</sup> The US did not support universal jurisdiction, arguing that its effects on third States violated the consent principle in public international law.<sup>161</sup> This position reflects the still

its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons that such resolutions can be evidence for the development of a norm or specifically for the *opinio juris* needed to create customary international law; see *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 254-255 para. 70 [Nuclear Weapons Advisory Opinion]. Resolution 96 (I) was in fact repeatedly cited to identify the status of the prohibition of genocide since its adoption, starting with the NMT trials referred to above.

<sup>155</sup> Social Committee, *Resolutions on the Report of the Commission on Human Rights, on the Conference on Freedom of Information and on the Crime of Genocide*, UN Doc E/AC.7/15, 25 March 1947, 4; ECOSOC Res. 47 (IV), 28 March 1947, 5.

<sup>156</sup> Committee on the Progressive Development of International Law and Its Codification, *Draft Convention for the Prevention and Punishment of Genocide*, UN Doc A/AC.10/41, 6 June 1947, 16-17.

<sup>157</sup> ECOSOC, *Draft Convention on the Crime of Genocide*, UN Doc E/447, 26 June 1947, 17.

<sup>158</sup> *Ibid.*, 18.

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*

<sup>161</sup> Secretary of State, United States of America, *Draft Convention on Genocide, Communications Received by the Secretary-General*, UN Doc A/401/Add.2, 18 October 1947, 8-9.

significant hold of the 400-year-old idea of State sovereignty that underlies the *pacta tertiis* and consent principle, and a rejection of naturalistic approaches.

The debate of the Secretariat Draft in the ECOSOC revealed other diverging opinions on the pre-conventional legal status of the genocide prohibition. Finn Seyersted (Norway) pushed for a quick approval as international legislation was required for the future criminalization of genocide.<sup>162</sup> Charles Malik (Lebanon) thought, in contrast, that the only new matter regarding genocide was the wish for a convention, implying that the international community's task did not go beyond the mere codification of an existing rule.<sup>163</sup>

Shawcross also considered genocide as a crime previously prohibited by international law and found authority in the IMT judgment.<sup>164</sup> In his opinion, a convention might be detrimental because any negotiated treaty definition of genocide inevitably risked being too narrow.<sup>165</sup> Dihigo disagreed: the codification of international law was never useless and particularly wanted if criminal sanctions should apply.<sup>166</sup> Even if some States refused to sign the convention, they were still bound by the genocide-related UN resolutions and their strong moral impact.<sup>167</sup> Dihigo here adopted a positivistic view by putting the social fact of resolutions before the moral facts. Shawcross evidently mistrusted the clout of moral contentions in critical cases. He insisted on conventions being useful only in cases of legal uncertainty,<sup>168</sup> a situation which he could not discern in the case of genocide.

<sup>162</sup> Social Committee, *Summary Record of the Fifteenth Meeting*, UN Doc E/AC.7/SR.15, 2 August 1947, 2.

<sup>163</sup> *Ibid.*, 4.

<sup>164</sup> Sixth Committee, *Draft Convention on the Crime of Genocide (Document A/362 and A/C.6/149)*, UN Doc A/C.6/SR.39, 29 September 1947, 21.

<sup>165</sup> *Ibid.*

<sup>166</sup> Sixth Committee, *Continuation of the Discussion on the Draft Convention on the Crime of Genocide (Documents A/362, A/382, A/401, A/C.6/147, A/C.6/149 and A/C.6/151)*, UN Doc A/C.6/SR.40, 2 October 1947, 27-28.

<sup>167</sup> *Ibid.*, 28.

<sup>168</sup> Sixth Committee, *Discussion on the Draft Convention on the Crime of Genocide (Documents A/362, A/401, A/401/Add.1, A/C.6/147, A/C.6/149, A/C.6/151, A/C.6/155, A/C.6/159 and A/C.6/160)*, UN Doc A/C.6/SR.42, 6 October 1947, 34.

After further diverse submissions<sup>169</sup> and another General Assembly resolution once more confirming genocide as an international crime,<sup>170</sup> the ECOSOC produced its own draft in February 1948. The ad hoc committee established for that task<sup>171</sup> held that genocide was already prohibited by *international common law*, which would continue to bind all States not signing the convention.<sup>172</sup> The diverging attitudes towards the concept of the genocide prohibition previously illustrated continued in all UN organs and bodies that were entrusted with a role in the drafting process. The final draft submitted by the ad hoc committee reflects the compromises that therefore had to be taken: it stated that acts similar to genocide had been punished under a different label at Nuremberg,<sup>173</sup> but it did not contain the universality principle, which never reappeared despite further discussion.<sup>174</sup>

The draft was then sent from the ECOSOC to the General Assembly.<sup>175</sup> In one of the Sixth Committee's meetings, the Pakistani delegate Ikramullah accused India of currently committing genocide against Muslims.<sup>176</sup> Such an allegation presupposes that a legal rule prohibiting genocide existed. Ikramullah's Indian counterpart defended his State on a factual basis alone, denying the alleged acts

<sup>169</sup> Aside from those diplomats involved in the various UN fora, non-governmental organizations also submitted comments during the drafting procedure. The Jewish World Congress argued that genocide was not yet prohibited effectively. After all, the IMT had lacked jurisdiction over it and had been limited to adjudicate crimes with a war nexus. The UN should further implement adequate mechanisms to prevent and punish genocide in those States refusing to sign a convention; see Committee on Arrangements for Consultations with Non-Governmental Organizations, *List of Communications Received from Non-Governmental Organizations Granted Category (b) or (c) Consultative Status*, UN Doc E/C.2/52, 8 August 1947, 1.

<sup>170</sup> GA Res. 180 (II), UN Doc A/RES/180(II), 21 November 1947, 129.

<sup>171</sup> ECOSOC Res. 117 (VI), 3 March 1948, 1.

<sup>172</sup> Ad Hoc Committee on Genocide, *Relations Between the Convention on Genocide on the One Hand and the Formulation of the Nurnberg Principles and the Preparation of a Draft Code of Offences Against Peace and Security on the Other*, Note by the Secretariat, UN Doc E/AC.25/3, 2 April 1948, 7-8.

<sup>173</sup> Ad Hoc Committee on Genocide, *Draft Convention on the Prevention and Punishment of the Crime of Genocide*, UN Doc E/AC.25/12, 19 May 1948, 1.

<sup>174</sup> Sixth Committee, *Continuation of the Consideration of the Draft Convention on Genocide [E/794]: Report of the Economic and Social Council [A/633]*, UN Doc A/C.6/SR.66, 4 October 1948, 31; Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 46.

<sup>175</sup> ECOSOC Res. 153 (VII), 26 August 1948, 27.

<sup>176</sup> Sixth Committee, *Consideration of the Draft Convention on Genocide [E/794]: Report of the Economic and Social Council [A/633]*, UN Doc A/C.6/SR.63, 30 September 1948, 10-11.

but not negating the legal rule.<sup>177</sup> By that, a State accused of genocide implicitly accepted its prohibition by law without ever having signed a convention. The legal weight of that episode is under-researched to date, but it must have left a strong impression on the other delegates: not much later, on 9 December 1948, the Genocide Convention was finally adopted as Resolution 260 (III).<sup>178</sup> After having obtained 20 ratifications, it entered into force on 12 January 1951.<sup>179</sup>

These previous paragraphs showed two matters. First, a majority of contributions in the UN expressed an understanding that genocide was universally prohibited and a crime under international law. These expressions as such are social facts. They largely contained the idea that moral facts determined the existence of that legal fact. Whether these moral facts must be, next to social facts, an ultimate determinant of the prohibition of genocide depends on whether one follows a positivistic or a naturalistic legal theory. Positivism should not be bothered that the social facts, to which alone it ultimately looks, encompassed claims to morality. Naturalistic theories may revert to the various understandings of moral rules displayed in the UN for the additional ultimate determinant they consider necessary. For both approaches, the contributions made in the UN between 1946 and 1948 provide ample ultimate grounding for an international legal rule prohibiting genocide. They may disagree as to the exact point in time at which that legal fact had sufficient ultimate grounding, with naturalistic approaches tending to point to an earlier date than positivistic approaches. This article limits itself to conclude that the independent prohibition of genocide existed at the latest in 1948.

Secondly, these contributors in the UN initiated, by adopting the Genocide Convention, a fission of the prohibition of genocide. It continued to exist independent of the Convention and within the Convention where it is joined by rules for its enforcement. Both grounded in (claims to) morality, they shared the fate of all universal values that had entered the stage after World War II. They were “[...] rationalized, legalized, institutionalized, bureaucratized, and made unfit for use”.<sup>180</sup> The codified prohibition became the preferred rule of reference and its property of being positive black-letter law was decisive for its fate between 1950 and 2020.

<sup>177</sup> Sixth Committee, *Continuation of the Consideration of the Draft Convention on Genocide [E/794]: Report of the Economic and Social Council [A/633]*, UN Doc A/C.6/SR.64, 1 October 1948, 15-16.

<sup>178</sup> GA Res. 260 (III), UN Doc A/RES/260(III), 9 December 1948, 174.

<sup>179</sup> Tams, Berster & Schiffbauer, *supra* note 4, 371.

<sup>180</sup> A. Bianchi, *International Law Theories* (2016), 256-257, ascribing this view to Philip Allott.

## D. Genocide After the Convention: Seven Decades of Demise into Legal Theoretical Neglect

Before the demise of the genocide prohibition into legal theoretical neglect began, the ICJ set out the markers in its 1951 *Reservations* Advisory Opinion. Due to the wide attention the Court enjoys as the principal judicial organ of the UN, its jurisprudence touching on the prohibition of genocide until 2020 will form the first section of this part. A second section will be concerned with other fora where the genocide prohibition's legal nature was addressed.

### I. ICJ Jurisprudence Sets the Tone

The ICJ, based on its designation to adjudicate disputes concerning the codified prohibition of genocide by Article IX of the Genocide Convention, made the first serve in 1951 with a sweeping invocation of morality. The judges adopted many of the arguments brought forward in the UN between 1946 and 1948. What followed, however, was a line of jurisprudence that, decision by decision, relied to an even greater degree on the text of the codified prohibition and quotations from the 1951 Advisory Opinion than on the social and moral facts which originally informed the legal nature of both rules.

#### 1. The 1951 *Reservations* Advisory Opinion

As early as 1950, the UN General Assembly requested the ICJ to render an Advisory Opinion on the Genocide Convention. Several States had declared reservations upon ratification, to which other States had objected. The question addressed to the ICJ was whether the former had nevertheless become contracting parties. The request also dealt with special features of the Genocide Convention.<sup>181</sup>

States and other stakeholders presented their legal opinions in written submissions to the ICJ, evidencing that not all ambiguities had yet been overcome. Britain argued that, as soon as a State became a treaty party, it owed the duty to prevent and punish genocide to the entire world. The decisive step triggering this obligation was still ratifying the Convention, but such ratification could not be accompanied by reservations because they would destroy the character of the

<sup>181</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, 15, 16-17 [Reservations Advisory Opinion].

universal obligations contained in the document.<sup>182</sup> The Israeli submissions were more resolute: the international criminal provisions codified in the Genocide Convention were binding for all States, no matter whether they had acceded to the Convention or not. As the obligations contained therein were not of a purely contractual character, it was neither permissible nor possible to effectively elude them through reservations.<sup>183</sup>

The majority of the ICJ judges rendered a slightly Solomonic Advisory Opinion, distinguishing the reservations' compatibility with the Convention's object and purpose. Only if reservations are compatible with the latter, the State declaring the reservation becomes a party irrespective of any objections.<sup>184</sup> Considering the special features of the Genocide Convention, the judges deduced from the preamble of Resolution 96 (I) firstly that "[...] the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation".<sup>185</sup> This secondly led to the universal character of both the condemnation of genocide and the duty to cooperate in its prevention. The states had not acted in their own interest, but in a common interest to implement the Convention's "[...] high purposes [...]".<sup>186</sup> These high purposes were sufficiently important to exclude the States' otherwise unlimited freedom to declare reservations, notwithstanding their sovereignty.<sup>187</sup>

Due to the moral facts in which the prohibition of genocide was grounded – although the reference to the civilized nations' recognition leaves it open whether ultimately so or merely by claims thereto –, it could curtail the principle of consensus in public international law, rooted in the 1648 Peace of Westphalia. Not only are all States bound by the genocide prohibition, but they are even barred from derogating or modifying it in the context of a treaty – a situation perfectly falling under the definition of *jus cogens*.<sup>188</sup>

<sup>182</sup> Written Statement of the Government of the United Kingdom, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Pleadings 1951, 48, 64-70.

<sup>183</sup> Written Statement of the Government of Israel, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Pleadings 1951, 195, 202-203.

<sup>184</sup> *Reservations Advisory Opinion*, *supra* note 181, 29.

<sup>185</sup> *Ibid.*, 23.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*, 24.

<sup>188</sup> See *supra* note 2.

Judges Guerrero, McNair, Read, and Hsu Mo jointly dissented, opining that any reservations were strictly prohibited.<sup>189</sup> They relied on the *travaux préparatoires* of the Genocide Convention according to which the treaty was not about the “[...] private interests of a State, but [about] the preservation of an element of international order”.<sup>190</sup> Judge Alvarez likewise flatly rejected the permissibility of reservations in his dissent, but his reasoning was more detailed. He explained that there were four types of special multilateral conventions: a) those creating international organizations on a global or regional level, b) those governing the territory of a State, c) those establishing new and important principles of international law, and d) those regulating issues of social or humanitarian interest in order to improve the status of individuals. For Judge Alvarez, the Genocide Convention fell under the last two categories.<sup>191</sup> Such special conventions were always drafted and developed in the UN General Assembly, where each and every State could present its opinion. In light of such an open and accessible procedure, sovereignty had to bow to majority decisions which, after all, represented common global interest.<sup>192</sup> Put differently, these conventions could bind States that had not acceded to them explicitly, meaning that the Genocide Convention established binding custom which had to be obeyed by all States. Therefore, reservations could not be allowed.<sup>193</sup> Like the majority, Judge Alvarez essentially considered the genocide prohibition to be of *jus cogens* character and, judging from his reliance on the nature of the Convention, that status would have been reached in 1948. He ultimately grounded it, as his focus on the UN General Assembly shows, in social facts alone.

## 2. The 1970 *Barcelona Traction* Judgement

After *jus cogens* comes *erga omnes*. In *Barcelona Traction*, the ICJ had to adjudicate on the nature of the laws that Spain had allegedly violated according to Belgium.<sup>194</sup> The Court distinguished obligations towards the

<sup>189</sup> Dissenting Opinion of Judges Guerrero, McNair, Read & Hsu Mo, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, 31, 47.

<sup>190</sup> UN Secretary General, *Draft Convention on the Crime of Genocide*, UN Doc E/447, 26 June 1947, 55, cited in Dissenting Opinion of Judges Guerrero, McNair, Read & Hsu Mo, *supra* note 189, 40.

<sup>191</sup> Dissenting Opinion of Judge Alvarez, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, 49, 51.

<sup>192</sup> *Ibid.*, 52.

<sup>193</sup> *Ibid.*, 52-54.

<sup>194</sup> *Barcelona Traction Case*, *supra* note 2, 6, para. 1.



entire international community from such vis-à-vis individual States. Only as to the former obligations, all States had a legal interest in their enforcement, resting on the importance of the rights concerned.<sup>195</sup> The judges called such obligations *erga omnes*,<sup>196</sup> and listed the prohibition of genocide as an example.<sup>197</sup> They made an even finer distinction: Some *erga omnes* obligations were part of *general international law*, for which the Court referred to the paragraph of its 1951 Advisory Opinion that had held the principles underlying the Convention to be recognized by civilized nations as binding on States, even without any conventional obligation.<sup>198</sup> Other obligations of such character could be found in (quasi-)universal treaties,<sup>199</sup> which would in fact also qualify the codified genocide prohibition for *erga omnes* dimensions.

The ICJ unambiguously attributed *erga omnes* character to the prohibition of genocide. Still, the majority judgment does not enlighten its readers as to the prohibition's customary or even peremptory status before 1948.<sup>200</sup> If one reads the referenced paragraph of the 1951 Advisory Opinion as expressing the *jus cogens* quality of the genocide prohibition and notes that Article 53 of the 1969 Vienna Convention on the Law of Treaties (VCLT) defines *jus cogens* as peremptory norms of *general international law*, then all *jus cogens* rules entail obligations *erga omnes*.

The *Barcelona Traction* Judgement was accompanied by as many as ten separate opinions and one dissent, but Judge Ammoun alone elaborated on the prohibition of genocide. He explained that the principles laid down in the preamble of the UN Charter were put into effect by *jus cogens*, and UN General Assembly resolutions were one instrument for such an implementation.<sup>201</sup> Put

<sup>195</sup> *Ibid.*, 32, para. 33.

<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.*, 32, para. 34.

<sup>198</sup> *Ibid.*

<sup>199</sup> *Ibid.*

<sup>200</sup> This omission is particularly regrettable as the judges' bench included Sir Gerald Fitzmaurice, Vladimir Koretsky, Manfred Lachs, and Sture Petré – men who had all been involved in the drafting and negotiating process of the Genocide Convention; compare *Barcelona Traction Case*, *supra* note 2, 4, with H. Abtahi & P. Webb, *The Genocide Convention: The Travaux Préparatoires*, Vol. II (2008), 2121-2131.

<sup>201</sup> Separate Opinion of Judge Ammoun, *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Judgement, ICJ Reports 1970, 286, 304, para. 11. Instead of drafting an own list of examples, Ammoun cited the catalogue included in the 1966 edition of *Brownlie's Principles of Public International Law*, which included the entire Genocide Convention, see *Ibid.*, 304, n. 35; see also V. Gowlland-Debbas, 'Judicial Insights into the Fundamental Values and Interests of the International



differently, the UN General Assembly was competent to establish *jus cogens*. The judge further argued that the Convention, through its object and purpose being one with the interests of mankind, justified individual States in taking action for the prevention and prohibition of genocide.<sup>202</sup> One of the authorities supporting this suggestion was the 1951 ICJ Advisory Opinion.<sup>203</sup> Although the recourse to UN General Assembly resolutions appeared positivistic, Judge Ammoun's argument was not devoid of recourse to morality in the form of the interests of mankind and can also be read as a naturalistic approach.

### 3. The 1996 *Nuclear Weapons* Advisory Opinion

While the 1951 *Reservations* Advisory Opinion and the 1970 *Barcelona Traction* Judgement were strong markers as to the concepts of *jus cogens* and *erga omnes* in abstracto and the genocide prohibition in concreto, the Court's later jurisprudence shows an irritating theoretical carelessness as to these and other concepts of international law.

In 1996, the ICJ had to answer the question of whether the threat with or use of nuclear weapons was prohibited by international law.<sup>204</sup> The majority cited a statement by the UN Secretary-General on the clearly established customary law to be applied by the International Criminal Tribunal for the Former Yugoslavia, encompassing the entire Genocide Convention.<sup>205</sup> It is unclear whether this was a merely inadvertent conflating of *jus cogens* and custom in face of a matter considered to have been settled long ago, and whether the UN Secretary-General and the ICJ judges deliberately extended the customary law qualification to the entire Convention. The majority opinion was, however, accompanied by several separate and dissenting opinions which included reasoning of higher instructive value.

Judge Ranjeva suggested that the State practice required for the formation of customary international law might simply lie in the repeated "[...] proclamation of principles, hitherto regarded as merely moral but of such importance that the irreversible nature of their acceptance appears definitive [...]".<sup>206</sup> One example of customary law having successfully been formed by such proclamations was the prohibition of genocide.<sup>207</sup> It is unclear which expressions of legal opinion

Community', in S. A. Muller, D. Raič & J. M. Thuránszky (eds), *The International Court of Justice: Its Future Role After Fifty Years* (1997), 327, 348.

<sup>202</sup> *Ibid.*, 326.

<sup>203</sup> *Ibid.*

<sup>204</sup> *Nuclear Weapons Advisory Opinion*, *supra* note 154, 227-228, para. 1.

<sup>205</sup> *Ibid.*, 258, para. 81.

<sup>206</sup> Separate Opinion of Judge Ranjeva, *Nuclear Weapons Advisory Opinion*, *supra* note 154, 294, 297.

<sup>207</sup> *Ibid.*

the judge had in mind – such before 1945 denouncing acts of genocide, or such as made during the negotiations and noted in the *travaux préparatoires* of the Convention. Although Judge Ranjeva focused on a social fact, he also brought in moral facts without clarifying their relational standpoint.

The opinion of Judge Shahabuddeen contained a short but strong reference to the prohibition of genocide. He pointed to Resolution 96 (I) as evidence of genocide having been prohibited under international law even before 1946 and supporting the contention that the Genocide Convention had been nothing but a repetition, albeit a permissible one, of pre-existing law.<sup>208</sup> Although too brief for a serious evaluation, the first prong of his argument seems to tilt towards moral facts because, as the analysis in the first part of this article has shown, hardly any legality-creating social facts occurred before 1946.

Judge Weeramantry claimed that all rules of international humanitarian law were *jus cogens* because they were “[...] fundamental rules of humanitarian character from which no derogation is possible without negating the basic considerations of humanity which they are intended to protect”.<sup>209</sup> He considered the prohibition of genocide to be one of those fundamental rules. *Jus cogens* would hence be a morally determined quality of legal norms, the moral facts being basic considerations of humanity.

A different assessment of *jus cogens* is offered by Judge Koroma. He went so far as to write openly that it was the task of the ICJ to establish international legal standards for the entire State community. This bold statement was followed by a reference to the 1951 Advisory Opinion as being a textbook example for the exercise of such judicial legislating.<sup>210</sup> At first glance deeply positivistic, Judge Koroma’s view does not exclude that the ICJ fulfills its task by engaging in moral philosophical inquiries to tap moral facts that ultimately determine the law.

#### 4. *Bosnian Genocide* – the 1996 Preliminary Objections Judgement

The confusions continued when, in 1993, Bosnia and Herzegovina sued Serbia and Montenegro at the ICJ. In its 1996 judgment on preliminary objections, the Court cited its 1951 Advisory Opinion, namely the paragraph in which it had declared that all States were obliged by the genocide prohibition.

<sup>208</sup> Separate Opinion of Judge Shahabuddeen, *Nuclear Weapons Advisory Opinion*, *supra* note 154, 375, 390.

<sup>209</sup> Dissenting Opinion of Judge Weeramantry, *Nuclear Weapons Advisory Opinion*, *supra* note 154, 429, 496.

<sup>210</sup> Dissenting Opinion of Judge Koroma, *Nuclear Weapons Advisory Opinion*, *supra* note 154, 556, 573.

The judges deduced that the “[...] rights and obligations enshrined by the Convention are rights and obligations *erga omnes*”.<sup>211</sup> The subsequent deduction was that the duty to prevent and punish genocide was not limited to contracting parties but bound the entire State community irrespective of individual States’ express consent.<sup>212</sup>

If one takes the 1951 Advisory Opinion to have confirmed or established the *jus cogens* status of the prohibition, then the ICJ performed a formidable spin almost 50 years later: it went from the *jus cogens* status to the *erga omnes* effect and, from that, to the *jus cogens* status again. This train of thought raises doubts as to a clear dogmatic structure behind both concepts. One explanation could be that *jus cogens* and *erga omnes* dimensions are legal properties grounded ultimately in moral facts, for the relation of which dogmatic precision naturally runs out.

Judge Kreča criticized that ambiguity and insisted that the legal nature of a rule and its effects or enforceability had to be distinguished.<sup>213</sup> Judge Kreča himself found the *jus cogens* status of the genocide prohibition in the 1951 Advisory Opinion,<sup>214</sup> which also led him to classify it as an obligation owed to all States.<sup>215</sup> This is only one conclusory step, and it is in line with the *Barcelona Traction* decision. The judge continued by cautioning that only the *jus cogens* prohibition of genocide could lead to obligations *erga omnes*, not those parts of the Genocide Convention going beyond the codification of *jus cogens*.<sup>216</sup> This is a rare statement suggesting that the prohibition of genocide had reached not merely the status of customary law but even that of *jus cogens* before 1948.

A strong naturalistic approach was taken by Judge Weeramantry, according to whom the condemnation of genocide “[...] has its roots in the convictions of humanity, of which the legal rule is only a reflection”.<sup>217</sup> He grounded the universally binding nature of the genocide prohibition in its large-scale protection of the right to life, the most fundamental human right at the “[...] irreducible core of human rights”.<sup>218</sup> The judge used the *Bosnian Genocide*

<sup>211</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, ICJ Reports 1996, 595, 616, para. 31 [Bosnian Genocide].

<sup>212</sup> *Ibid.*

<sup>213</sup> Separate Opinion of Judge Kreča, *Bosnian Genocide*, *supra* note 211, 658, 765, para. 99.

<sup>214</sup> *Ibid.*, 783, para. 112.

<sup>215</sup> *Ibid.*, 765, para. 99.

<sup>216</sup> *Ibid.*, 766, para. 102, 783, paras 112-113.

<sup>217</sup> Separate Opinion of Judge Weeramantry, *Bosnian Genocide*, *supra* note 211, 640, 648.

<sup>218</sup> *Ibid.*, 651-652.

case to argue more broadly what he had already included in his dissent from the *Nuclear Weapons* Advisory Opinion delivered by the ICJ just three days earlier, clearly highlighting the values ultimately determining a legal rule.

## 5. Legal Theoretical Neglect

The Court's omission of thoroughly clarifying the legal nature of the genocide prohibition continued beyond the turn of the millennium. It extended the state of legal theoretical neglect into which the prohibition had slowly slid during the second half of the 20<sup>th</sup> century. In 2007, the ICJ pronounced its final judgment in the *Bosnian Genocide* case. The Court cited those parts of its 1951 Advisory Opinion in which it had elaborated on the high moral significance of the genocide prohibition, now explaining that this was a recognition of it being customary international law.<sup>219</sup> The following statement is as irritating as it is worthy of full quotation:

“The Court reaffirmed the 1951 and 1996 statements in its Judgment of 3 February 2006 in the case concerning *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda)*, paragraph 64, when it *added* that the norm prohibiting genocide was assuredly a peremptory norm of international law (*jus cogens*).”<sup>220</sup>

Taken in its context with the previous statement on the customary international law status of the genocide prohibition in 1951, the quotation seems to convey that the ICJ in its *Armed Activities* Judgment<sup>221</sup> made an innovative declaration of the *jus cogens* status of the prohibition. This holding would then have meant a remarkable deviation from ICJ jurisprudence since 1951. As it was not repeated in subsequent cases since 2007 and, with a view to the Court's previous inaccuracies as to custom, *jus cogens*, and obligations *erga omnes*, the historiography of the prohibition of genocide in the final judgment of *Bosnian Genocide* must have been yet another instance of lackadaisical perfunctoriness.

<sup>219</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43, 110-111, para. 161.

<sup>220</sup> *Ibid.*, 111, para. 161 (emphasis added).

<sup>221</sup> *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction, ICJ Reports 2006, 6.

In the 2012 *Prosecute or Extradite* Judgement, Judge Skotnikov ascribed the *erga omnes* dimension of the prohibition of genocide to the 1951 Advisory Opinion,<sup>222</sup> which is logical when one adds the *Barcelona Traction* holding that all *jus cogens* entails obligations *erga omnes*. While this was only a separate opinion, the majority in the 2015 *Croatian Genocide* Judgement explicitly confirmed the genocide prohibition's *jus cogens* character and *erga omnes* dimension by citing ICJ jurisprudence back to 1951.<sup>223</sup> Notwithstanding these retrospect attributions of the *erga omnes* concept that had its jurisprudential première only in 1970, there is hope that the Court might still find coherence.

## II. The (Lack of) Debate in Other Fora

The above analysis of the 1920s and 1930s, as well as the subsequent war crimes trials, gives reason to also have recourse to other fora than the ICJ for the second half of the 20<sup>th</sup> century. These fora include a national court, an international treaty conference, and two semi-scholarly reports. While the first and the last did not indulge in fundamental debates as to the legal nature of the genocide prohibition, the debate preceding the adoption of the VCLT should have been luminously fundamental but remained frustratingly inchoate.

### 1. The 1961 *Eichmann Case*

To bring one of the principal perpetrators of the Holocaust to justice, the Israeli secret service abducted the former high-level Nazi official Adolf Eichmann in Argentina in early 1960.<sup>224</sup> At the District Court of Jerusalem, Eichmann was charged with “[...] crimes against the Jewish People [...]”, essentially encompassing genocide.<sup>225</sup> The Court examined whether genocide had been a crime before 1945 and whether it could now be prosecuted based on the universality principle.

The judges acknowledged Lemkin's publications and cited Resolution 96 (I), the preamble and Article I of the Genocide Convention, as well as the 1951

<sup>222</sup> Separate Opinion of Judge Skotnikov, *Question Relating to Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgement, ICJ Reports 2012, 481, 483, paras 11-12.

<sup>223</sup> *Application of Convention on Prevention and Punishment of Crime of Genocide (Croatia v. Serbia)*, Judgement, ICJ Reports 2015, 3, 46-47, paras 87-88.

<sup>224</sup> See SC Res. 138, UN Doc S/RES/138 (1960), 23 June 1960.

<sup>225</sup> *Attorney General v. Eichmann*, Case No. 40/61, Judgement of 11 December 1960 (District Court of Jerusalem), 35 *International Law Reports* (1967) 5, para. 1, available at [https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Israel/Eichmann\\_Judgement\\_11-12-1961.pdf](https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Israel/Eichmann_Judgement_11-12-1961.pdf) (last visited 7 March 2021).

ICJ Advisory Opinion. Those sources led them to answer both questions in the affirmative, meaning that a conviction for Eichmann's participation in the Holocaust would not violate the principle *nullum crimen sine lege*.<sup>226</sup>

The judgment's part on universal jurisdiction contains another remarkable argument: the District Court recognized that Article VI of the Genocide Convention accorded the contracting States territorial jurisdiction alone. However, the Israeli judges interpreted the 1951 Advisory Opinion to mean that only the first part of the Convention was codified custom and the balance of the provisions, including Article VI, was new treaty law binding the parties *ex nunc*.<sup>227</sup> They referenced the Advisory Opinion's paragraph that would later be pointed to by the ICJ itself when contending the norm's *jus cogens* nature in 1951: "[...] 'recognized by civilized nations' [...] and [...] 'binding on States, even without any conventional obligation.' [...]"<sup>228</sup> In conclusion, the judges held the universality principle to still be applicable for genocide committed before 1945 and eventually found Eichmann guilty.<sup>229</sup>

Substantially, the District Court's consideration that a customary prohibition of genocide existed before 1945 is not based on any direct evidence of State practice and *opinio juris* before that date. The single social fact invoked preceding 1945 were the publications of an individual. Instead, the Court set aside the *pacta tertiis* concerns that very individual had brought forward when drafting the Genocide Convention. This reasoning implies that there are moral facts ultimately determining the law, of which the Convention falls short.

## 2. The 1969 Vienna Convention on the Law of Treaties

In 1969, the VCLT was adopted with its Article 53 confirming that treaties conflicting with a "[...] peremptory norm of general international law", so-called *jus cogens*, are void.<sup>230</sup> It defines *jus cogens* as being "[...] a norm accepted and recognized by the international community of States as a whole as a norm

<sup>226</sup> *Ibid.*, paras 17-19.

<sup>227</sup> *Ibid.*, paras 20-22.

<sup>228</sup> *Ibid.*, para. 21.

<sup>229</sup> *Ibid.*, para. 25. Upon appeal, the Supreme Court of Israel fully confirmed the legal reasoning of the District Court; see *Attorney General v. Eichmann*, Criminal Appeal No. 336/61, Judgement of 29 May 1962 (Supreme Court of Israel), 36 *International Law Reports* (1968) 277, para. 12(e), available at [https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Israel/Eichmann\\_Appeals\\_Judgement\\_29-5-1962.pdf](https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Israel/Eichmann_Appeals_Judgement_29-5-1962.pdf) (last visited 7 March 2021).

<sup>230</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 53, 1155 UNTS 331.



from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.<sup>231</sup> This definition rests on acceptance and recognition, i.e. social facts, but does not rule out that these social facts themselves find their grounding in morality. A look into the *travaux préparatoires* of the VCLT reveals that there was in fact no uniform understanding.

A 1966 draft of the International Law Commission (ILC) noted that no more than a few jurists and a single government still questioned the existence of *jus cogens* as such.<sup>232</sup> While the ILC experts eventually decided not to include any examples in Article 53 VCLT, they appear to have widely agreed on some discrete “[...] obvious and best settled [...]” rules of peremptory character.<sup>233</sup> The draft contains two potential explanations for the *jus cogens* status of the genocide prohibition: first, the act being criminal under international law, and second, it being an act “[...] in the suppression of which every State is called upon to cooperate”.<sup>234</sup>

Both grounds reflect formulations from the preamble of Resolution 96 (I), the Genocide Convention, and the 1951 *Reservations* Advisory Opinion. Logically, however, they do not hold as ultimate grounds of the legal rule prohibiting genocide. First, the international crime of genocide is itself a legal rule, not a social or moral fact. This aspect was either lackadaisically drafted or a straw man for morality which, in many societies, chimes with criminality. Second, the universal call to cooperate may just as well be a consequence of the *jus cogens* status and not a criterion for its legality. The passive phrasing employed by the ILC does not reveal who or what calls upon the States. The debate in the Commission was surprisingly inchoate.

The treaty conference in Vienna saw more definitive contributions. The delegates Mwendwa (Kenya) and Valencia-Rodriguez (Ecuador) simply shared the opinion that the ICJ meant *jus cogens* when writing that the prohibition of genocide was *binding law* in 1951.<sup>235</sup> Others like Fattal (Lebanon) suggested two groups of *jus cogens*, the norms of which “[...] had a long history but had crystallized

<sup>231</sup> *Ibid.*

<sup>232</sup> *ILC Draft Articles on the Law of Treaties, Yearbook of the International Law Commission* (1966), Vol. II, 187, 247.

<sup>233</sup> *Ibid.*, 247-248.

<sup>234</sup> *Ibid.*, 248.

<sup>235</sup> United Nations Conference on the Law of Treaties, *Official Records*, UN Doc A/CONF.39/11, 1969, 296 [UNCLT, Official Records – First Session]; United Nations Conference on the Law of Treaties, *Official Records*, UN Doc A/CONF.39/11/Add.1, 1970, 96 [UNCLT, Official Records – Second Session].



only after the Second World War”<sup>236</sup>: one group based on international morality, the other containing the most important rules of international constitutional law. The genocide prohibition belonged to the first group.<sup>237</sup> Fattal’s naturalistic approach to genocide was shared by other delegations.<sup>238</sup>

These concise statements indicate dissatisfaction with the ambiguity of the ILC draft. Nevertheless, the debate at Vienna, too, was insofar inchoate as it led to a wording of Article 53 VCLT that can be read as plain positivistic or as leaving leeway for recourse to moral facts as ultimate determinants.

### 3. The 1978 Ruhashyankiko Report and the 1985 Whitaker Report

During the 1970s and 1980s, a number of reports and analyses addressing the concepts of *jus cogens* and *erga omnes* were published, two of which are particularly noteworthy as they comment on genocide. The sub-commission for minority protection of the UN Commission on Human Rights tasked Nicodème Ruhashyankiko with a report on the prevention and punishment of genocide.<sup>239</sup> Ruhashyankiko interpreted the 1951 Advisory Opinion as having stated that the genocide prohibition had been universally binding even before the 1948 Convention.<sup>240</sup> The report also covered the *Eichmann* judgment in relation to which Ruhashyankiko cited the attorney who had observed the trial on behalf of the ICJ. According to the observer, the District Court of Jerusalem simply renewed an *ethical postulate* of the prohibition of genocide which had first been awakened in the peoples’ consciousness during World War II.<sup>241</sup> The wording once more indicates that the roots of the prohibition of genocide lie not in social facts alone.

For political reasons, the ECOSOC demanded a revision of the Ruhashyankiko Report as early as 1983.<sup>242</sup> In the report presented by Benjamin Whitaker two years later, he joined the ranks of those assuming that genocide had been prohibited before 1948 by crisply noting that the Genocide Convention

<sup>236</sup> UNCLT, *Official Records – First Session*, *supra* note 235, 297.

<sup>237</sup> *Ibid.*

<sup>238</sup> *Ibid.*, 302-303; UNCLT, *Official Records – Second Session*, *supra* note 235, 99.

<sup>239</sup> J. Waller, *Confronting Evil: Engaging Our Responsibility to Prevent Genocide* (2016), 50.

<sup>240</sup> Special Rapporteur on Prevention and Punishment of the Crime of Genocide, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, UN Doc E/CN.4/Sub.2/416, 4 July 1978, 97.

<sup>241</sup> *Ibid.*, 163.

<sup>242</sup> Waller, *supra* note 239, 50.

merely codified a “[...] fundamental principle of civilization [...]”.<sup>243</sup> His appraisal that *genocide* was only a new word for an old crime added to building a historical record of its condemnation.<sup>244</sup>

Although much shorter than the Ruhashyankiko Report, the Whitaker Report was equally clear as to the existence of a prohibition of genocide before the codification efforts within the UN and equally grounded it in morality. This clarity makes the imprecisions and confusions in the ICJ decisions discussed above even more regrettable. However, the Court may just have commenced a turn towards deeper theoretical reflection.

### E. The 2020 ICJ *Myanmar Genocide* Case: Back to Natural Law Enthusiasm?

The latest case in the context of which the ICJ focuses on the prohibition of genocide is the ongoing proceedings instituted by The Gambia against Myanmar on 11 November 2019. The case so far contains three argumentative exchanges that may illuminate the facts in which the genocide prohibition is grounded.

The Gambia had requested provisional measures when instituting the proceedings, alleging that Myanmar had violated and continued to violate its obligations under the Genocide Convention in relation to the Rohingya group.<sup>245</sup> The applicant instituted the proceedings “[...] mindful of the *jus cogens* character of the prohibition of genocide and the *erga omnes* and *erga omnes partes* character of the obligations that are owed under the Genocide Convention [...]”.<sup>246</sup> The Gambia further referred to the paragraph of the 1951 Advisory Opinion addressing the objects of the Convention and the “[...] most elementary principles of morality” endorsed by it.<sup>247</sup> It added that the Court had acknowledged the *jus cogens* character and *erga omnes* dimension of the

<sup>243</sup> Special Rapporteur on Prevention and Punishment of the Crime of Genocide, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, UN Doc E/CN.4/Sub.2/1985/6, 2 July 1985, 11.

<sup>244</sup> *Ibid.*, 6.

<sup>245</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Application Instituting Proceedings and Request for Provisional Measures, ICJ General List No. 178, 11 November 2019, 1, para. 2 [Myanmar Genocide Application].

<sup>246</sup> *Ibid.*, 6, para. 15.

<sup>247</sup> *Ibid.*, 41, para. 122.

prohibition of genocide on multiple occasions, footnoting the decisions in *Bosnian Genocide*, *Armed Activities*, and *Croatian Genocide*.<sup>248</sup>

Despite the Genocide Convention providing a sufficient legal fact for the applicant's claim to rest on, The Gambia invoked the authority of morality as a determinant of the Convention. Beyond that, it relied on the independent *jus cogens* prohibition of genocide with its *erga omnes* obligations as an additional legal fact, determined even more clearly by moral facts.

The ICJ rendered its order on provisional measures on 23 January 2020.<sup>249</sup> As Article IX of the Genocide Convention provides the jurisdictional basis on which The Gambia aims to bring its claims before the Court,<sup>250</sup> it is Myanmar's obligations under the Convention that are in the judges' focus. Therefore, it is not surprising that the ICJ, when dealing with the standing of the applicant, quoted the part of the 1951 Advisory Opinion addressing the "[...] high purposes which are the *raison d'être* of the convention".<sup>251</sup> They added:

“In view of their *shared values*, all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention.”<sup>252</sup>

In interpreting the Genocide Convention, the Court grounded the *erga omnes partes* dimension of the conventional genocide prohibition in moral facts. This reasoning invoking “high purposes” and “shared values” arguably bears the potential of being scaled to the *jus cogens* prohibition existing independent of the treaty document and of clarifying the link between a norm's *jus cogens* status and its *erga omnes* dimensions. If the argument for a rule's *erga omnes (partes)* dimension relies on moral facts, and if every *jus cogens* rule is an obligation *erga omnes*, it has to be tested whether these moral facts and the ones determining a norm's *jus cogens* quality are identical. For genocide, the substantial intersection of the moral facts invoked for both points towards identity.

<sup>248</sup> *Ibid.*, 41-42, para. 122-123.

<sup>249</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Request for the indication of provisional measures, Order, ICJ General List No. 178, 23 January 2020, 1 [Myanmar Genocide Provisional Measures].

<sup>250</sup> *Myanmar Genocide Application*, *supra* note 245, 6-10, paras 16-24.

<sup>251</sup> *Myanmar Genocide Provisional Measures*, *supra* note 249, 13, para. 41.

<sup>252</sup> *Ibid.* (emphasis added).

More restrained than the majority, Vice-President Xue filed a separate opinion, arguing that, “[l]ofty as it is, the *raison d’être* of the Genocide Convention [...] does not, in and by itself, afford each State party a jurisdictional basis and the legal standing before the Court”.<sup>253</sup> However, she also put forward that even those States which have made reservations to Article IX of the Convention “[...] share the common interest in the accomplishment of [the Convention’s] high purposes”.<sup>254</sup> In the end, Vice-President Xue also found the Rohingya to be a group remaining vulnerable and concurred with the provisional measures.<sup>255</sup> Her positivistic restraint nevertheless remarkably contrasts with the majority’s reasoning.

The second matter of interest pertains to the peculiarities of a request for provisional measures. Although not mentioned in Article 41(1) of the ICJ Statute, the Court requires that the rights asserted by the requesting party be *plausible*<sup>256</sup> – an unwritten prerequisite the interpretation of which has not been settled yet, as the *Myanmar Genocide* Order shows. Myanmar advocated a high threshold for disputes where the alleged violations are of such *exceptional gravity* as for genocide.<sup>257</sup> The judges did not follow that argument,<sup>258</sup> and Judge ad hoc Kress, nominated to the bench by Myanmar, appended a declaration with more substantial remarks:

“[R]ather than saying [...] that a strict standard to be applied at the merits stage in case of exceptional grave allegations, must apply ‘a fortiori’ ‘at the provisional measures phase’ [...], one might wonder whether the distinct – that is, the protective – function of provisional measures does not point in the opposite direction, precisely because *fundamental values* are at stake.”<sup>259</sup>

<sup>253</sup> Separate Opinion of Vice-President Xue, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Request for the indication of provisional measures, Order, ICJ General List No. 178, 23 January 2020, 2, para. 6.

<sup>254</sup> *Ibid.*

<sup>255</sup> *Ibid.*, 3, paras 11-12.

<sup>256</sup> Compare *ibid.*, 14, para. 43.

<sup>257</sup> *Ibid.*, 15, para. 47.

<sup>258</sup> *Ibid.*, 18, para. 56.

<sup>259</sup> Declaration of Judge ad hoc Kress, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Request for the indication of provisional measures, Order, ICJ General List No. 178, 23 January 2020, 1, para. 4 (emphasis added).

Again, we find ourselves in an interpretive context. Yet, in contrast to the applicant's standing under the Genocide Convention, the prerequisites for provisional measures are part of the ICJ Statute and, as such, independent of and neutral towards the law on which an applicant's claim rests. This systematic difference could lead one to assume that such procedural rules rest primarily and predominantly on social facts with moral facts as determinants being hard to discern and seldomly decisive for a case's outcome. However, Myanmar's defensive argument and Judge ad hoc Kress' overt reference to *fundamental values* point to procedural rules being, when interpreted, porous and susceptible towards the moral values in which the law, decisive for the merits of the case, is grounded. While procedural rules may be neutral, they are not blind.

Judge Cançado Trindade went even further in a separate opinion guided by his understanding that "[...] human conscience stands above the will of States".<sup>260</sup> His rejection of *plausibility* as an unwritten prerequisite for provisional measures under Article 41(1) of the ICJ Statute and his concern for vulnerability are two major threads in Judge Cançado Trindade's work that unite in this separate opinion. He finds the increasing attention of the ICJ to "[...] extreme adversity or vulnerability of human beings [...]" symbolizing "[...] the new paradigm of the *humanized* international law, the new *jus gentium* of our times, sensitive and attentive to the needs of protection of the human person in any circumstances of vulnerability".<sup>261</sup> The judge acknowledges that such a turn towards human vulnerability "[...] 'requires the ICJ to go beyond the strict inter-State dimension [...]',<sup>262</sup> but he finds this unavoidable if the "[...] *raison d'humanité* [...]" is to prevail over the "[...] *raison d'État*".<sup>263</sup> In consequence, at least in situations of continuing vulnerability, orders of provisional measures should not depend on a plausibility standard but on whether fundamental rights and basic principles are to be safeguarded.<sup>264</sup> Judge Cançado Trindade moves on to allocate fundamental human rights in the domain of *jus cogens* and criticizes

<sup>260</sup> Separate Opinion of Judge Cançado Trindade, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Request for the indication of provisional measures, Order, ICJ General List No. 178, 23 January 2020, 2, para. 5.

<sup>261</sup> *Ibid.*, 14-5, para. 62 (emphasis in original). The term *jus gentium* reminds us of the abovementioned references to genocide as *delicta juris gentium* by Raphael Lemkin, *supra* note 88, 28, 53, and Manfred Lachs, *supra* note 152, 4.

<sup>262</sup> *Ibid.*, 15, para. 64.

<sup>263</sup> *Ibid.*, 17, para. 74.

<sup>264</sup> *Ibid.*, 17-8, para. 75, 19, para. 79-80.

that the *jus cogens* character of the genocide prohibition was not sufficiently addressed in the *Myanmar Genocide Order*.<sup>265</sup>

Grasping the judge's distinct naturalistic approach to international law would require a holistic analysis of his work going beyond this article. As it is often minorities that are extremely vulnerable, one may understand him as wishing that the ICJ became a new protective power for minorities continuing what individual States and the League of Nations had previously attempted. The Court's motivation, however, should be distanced from any power politics and rest solely on the most elementary content of international law. Judge Cançado Trindade adopts a modern natural law theory where *raison d'humanité* or human conscience is the major moral fact which informs general principles of law and fundamental rights. Against these general principles and fundamental rights, all international law must be tested. He identifies or at least very closely approximates *jus cogens* with general principles of law and, by that, with moral facts that ultimately determine the entire international legal system.

Moving on to the third interesting aspect of the *Myanmar Genocide Order* shows that, although Judge Cançado Trindade opined that the Order did not go far enough towards a naturalistic humanist approach to international law, it was not devoid of it either. Where the majority judges address the risk of irreparable prejudice and urgency – further requirements for a provisional order under Article 41(1) of the ICJ Statute – they again quote the 1951 Advisory Opinion, this time focusing on the “[...] conscience of mankind [...]” that is shocked by genocide as the “[...] denial of the right of existence of entire human groups [...]”.<sup>266</sup> The majority quoted that genocide is “[...] contrary to moral law and to the spirit and aims of the United Nations” and that the Genocide Convention “[...] confirm[s] and endorse[s] the most elementary principles of morality”.<sup>267</sup> In concluding, the Court States, “[i]n view of the *fundamental values* sought to be protected by the Genocide Convention [...]”, the rights relevant in the present proceedings “[...] are of such a nature that prejudice to them is capable of causing irreparable harm”.<sup>268</sup>

These extensive and repeated references to moral facts mark a new peak in the turn to such notions outside of positive law in post-1951 international jurisprudence on genocide. Even though the majority did not abandon the plausibility prerequisite for Judge Cançado Trindade's alternative proposals,

<sup>265</sup> *Ibid.*, 19, para. 81, and 20, para. 87.

<sup>266</sup> *Myanmar Genocide Provisional Measures*, *supra* note 249, 21, para. 69.

<sup>267</sup> *Ibid.*

<sup>268</sup> *Ibid.*, 21, para. 70 (emphasis added).

they embraced the fundamental nature of these moral values as a significant consideration in assessing the risk of irreparable prejudice, another criterion for protective measures. As for the plausibility requirement, these elements of a procedural rule are porous and open to embracing the moral facts on which the relevant substantive law of the claim may be founded. For the genocide prohibition specifically, the references to the conscience of mankind and human groups' right to existence arguably point towards the majority's idea of what these moral facts are. Assessing these principles of morality as *most elementary* opens the door to understanding them as *ultimately* determining the nature and content of the international legal system and, by that, the majority as taking a naturalistic approach to international law.

At this point, however, such a bold proposition based on a relatively short decision alone, heavily reliant on the 1951 Advisory Opinion, can be but a hypothesis to sharpen the observer's view on the further course of the proceedings. Although still in an early phase, the *Myanmar Genocide* case provides reasonable grounds to ask whether we witness a new turn to natural law or its revival in *new natural law* thinking.<sup>269</sup>

## F. Conclusion

The totality of sources analyzed reveals a widespread understanding that, first, a customary prohibition of genocide existed before the preparatory works for the Genocide Convention began in 1946. That prohibition is secondly understood to have reached its *jus cogens* status by 1951 at the latest, which thirdly concurrently equipped it with an *erga omnes* dimension.

Strikingly, the proponents of a customary prohibition before 1946 do not present empirical inquiries to bolster their thesis with evidence of State practice and *opinio juris*. Similarly, the accepted definition of *jus cogens* refers to the recognition of a norm as peremptory, but how such a recognition practically proceeded in specific cases remained unclear. Instead of subsuming empirical evidence under these requirements of social facts, the participants in the legal discourse invoked moral and evaluative considerations. Ostensibly positivistic, most *midwives* of the genocide prohibition gravitated around morality and values. Their invocation instead of empirical evidence points to an at least subconscious idea that this legal rule was ultimately grounded in moral facts.

Essentially, the evolution of the prohibition of genocide, which saw its major densification phase between 1946 and 1951, was propelled by naturalistic

<sup>269</sup> Compare J. Finnis, *Natural Law and Natural Rights*, 2<sup>nd</sup> ed. (2011).



approaches to international law. Even during that densification phase, many of these approaches were suppressed and masked behind a positivistic veil that this article has pierced.

Once the custom was codified, the *jus cogens* status was firmly settled, and it was winged by an *erga omnes* dimension, the ICJ banished its theoretical scrutiny and handled the genocide prohibition with lackadaisical judicial perfunctoriness. Other fora likewise showed a retreat to superficial reasoning, either putting forward blunt claims to morality without commenting on its relationship to social facts or making inchoate arguments by setting up other legal rules as straw men. By 2000, the genocide prohibition had slid into a disenchanted legal banality.

The recent *Myanmar Genocide* case at the ICJ has the potential of heralding a new enthusiasm for the prohibition's naturalistic flavor. It remains to be seen whether the proceedings will retrieve the moral grounding of the prohibition of genocide and spur the debate of new natural law theories, or whether the Court will discreetly sail around such shoals in today's positivistic mainstream approaches to international law.