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## Genesis

Spring 1915. World War I has degenerated into a grim war of attrition. Millions of soldiers are stuck fast in a trench system that snakes from the Belgian coast to the Swiss border.

In an attempt to break the deadlock, the British, French, and Anzac (Australia/New Zealand) forces launched an attack on the Dardanelles straits, seeking to force a way through to Constantinople and to neutralize the Ottoman Empire, a key German and Austrian ally. Partly in response to the crisis, the Ottoman authorities in Constantinople clamped down – not in the Dardanelles, but against the Christian minority populations of the empire: the Armenians, the Assyrians, the Anatolian and Pontian Greeks. What became known as ‘the Armenian genocide’ began with the arrest and eventual execution of hundreds of Armenian notables in the Ottoman capital and elsewhere. Brazen massacres of Armenians, Greeks, and Assyrians erupted across the realm, peaking between 1915 and 1917.

Seeking to assert its historic self-image as protector of Christian minorities in its sphere of influence, Russia called for a declaration by the countries of the Triple Entente alliance stating that the atrocities unleashed against the Armenians and others would be punished after an Entente victory. Great Britain and France were concerned that the Russian declaration, which referred to ‘crimes . . . against Christianity and civilization’, would only provoke further anti-Christian persecution, when the Allies could do nothing practical to assist the targeted populations. Accordingly, they pushed for a revision of the text. Sergei Sazonov, the Russian foreign minister, agreed to change the reference to crimes against *Christianity* to denounce instead

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### **'HOLD PERSONALLY RESPONSIBLE': THE ALLIED DECLARATION OF MAY 1915**

For about a month the Kurd and Turkish population of Armenia has been massacring Armenians with the connivance and often assistance of Ottoman authorities. Such massacres took place in middle April . . . at Erzerum, Dertchun, Eguine, Van, Bitlis, Mush, Sassun, Zeitun, and through Cilicia. Inhabitants of about one hundred villages near Van were all murdered. In that city [the] Armenian quarter is besieged by Kurds. At the same time in Constantinople [the] Ottoman Government ill-treats [the] inoffensive Armenian population. In view of these new crimes of Turkey against humanity and civilization, the Allied governments announce publicly to the Sublime Porte [Ottoman authorities] 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.

Quoted in Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Tribunals* (Princeton, NJ: Princeton University Press, 2000), p. 117.

crimes '*against humanity and civilization*'. Thus, the drafters invented a phrase that 'was to become a powerful concept of international law – the "crime against humanity"'.

It would be easy to dismiss the Allies' declaration as merely wartime propaganda – or shameless hypocrisy. After all, as the leading colonial powers of the age, Britain and France had repeatedly slaughtered 'rebellious' civilian populations. Russia's treatment of its Caucasian Muslim population in the latter half of the nineteenth century was little less brutal and destructive than the Ottomans' campaign against their Christian subjects. It must also be acknowledged that the will to hold perpetrators accountable evaporated after a few trials were held in Constantinople in 1919–20. Nevertheless, the declaration built on centuries of evolving concepts of human rights – a growing

sense of what would be called in the contemporary period ‘the responsibility to protect’.

## ‘Offend against all humankind’

Discussions of crimes against humanity draw on both senses of the word ‘humanity’ – humanity as humanness and humanity as humankind. The central questions for any theory of crimes against humanity are how these deeds violate humanness and why they offend against all humankind.

David Luban

Human beings have a highly developed capacity for *empathy*: the power to apprehend and commingle emotionally with another. This tends to be strongly focused at the epicenter of social organization, however – family, tribe, now extended to nation-state – and weaker with regard to those more remote or alien from the individual or subgroup. Our finely tuned sense of boundaries and territoriality makes us highly prone to intraspecies *alienation*, as evidenced by our ability to inflict campaigns of barbarism and extermination upon out-group populations.

Human beings have instituted norms and rules from the earliest period of recorded history to govern interactions among this peculiarly sociable, particularly volatile species. A broad conception of solidarity has governed intragroup (familial/tribal) organization. A vision of universal solidarity also came into being at a fairly early point. It usually took religious form: a concept of universal fraternity within a community of worship. In Greco-Roman and other traditions one may also discern the seed of a secular conception of individual rights – for example, citizenship and property rights. This mix of religious and civic values, in the Western tradition at least, provided the foundation

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for whatever more extensive concept of solidarity could be established when circumstances permitted.

The story of the modern era – from approximately the fifteenth century on – is in great part one of circumstances permitting. The growing *extensiveness* of human communication occurred in the context of what we know today as *globalization*. Western explorers charted the world, and Western imperial authorities followed in their train. The result was destruction on an unprecedented scale, beginning with the mass death of indigenous peoples across huge swaths of the Americas and Australasia, and the imposition on survivors of Western systems of philosophy, religion, and socioeconomic organization. However, the modern period also marks the onset and development of a genuinely *cosmopolitan* vision of international affairs: one that took the old Greco-Roman model of citizenship and extended it to a supra-national or even global scale. (Immanuel Kant's *Towards Perpetual Peace*, written in 1795, is generally considered the foundational text.) In the last century or two, 'the notion that the individual is a citizen of the world and, indeed, that the world might become his or her *polis*', or primary political unit, has 'materialized into reality' with the growing number of people 'able to travel and find out about the world' combined with 'the economic expansion and the assertiveness of mass society' (Daniele Archibugi).

Lest this paint an overly rosy portrait of travelers and wayfarers spreading cosmopolitan norms worldwide, we must again stress that norms and international 'regimes' have usually been established as part and parcel of imperial expansion and hegemonic imposition. The nineteenth-century superpower, Great Britain, engineered the abolition of international slavery by devoting the resources to its suppression that Britain, and only Britain, could supply. United States sponsorship was essential in both the post-World War I and post-World War II periods to the formation of key international regimes, including the League of Nations and United Nations systems.

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However, ideas and norms are not established in international society *merely* as projections of hegemonic power. First, they often result from actions taken in opposition to prevailing authority. Intraelite conflict – the rebellion of aristocrats against the King – produced the Magna Carta in the thirteenth century. The workers’ and women’s movements of the nineteenth and twentieth centuries established important benefits and protections for ordinary people in the Western world and beyond. And the twentieth century’s greatest social movement – for decolonization and national liberation – entrenched the much-proclaimed, hitherto little-practiced norm of self-determination, along with prohibitions against colonial domination and forced racial segregation that are today among the most forceful of global prohibition regimes.

The movements that advanced these regimes were driven predominantly by nongovernmental actors, and in both the global South and the global North, such actors have sought to deepen and diversify bonds of human solidarity (and sometimes to undermine them through campaigns of hatred and political extremism). Nongovernmental organizations (NGOs) lobby, persuade, and shame states and other actors (e.g. multinational corporations) into compliance. They have also provided the expertise, especially scientific and legal, that underpins most of the international regimes currently extant.

Contemporary conceptions of human rights and ‘crimes against humanity’ center on the physical integrity of the individual. Violations of that integrity, particularly violent assaults, often evoke visceral empathy. Prohibition regimes against certain violations of rights are more likely to be sponsored and effectively regulated where they arouse widespread revulsion among publics and policymakers. When norm entrepreneurs can persuasively establish a connection between the practice and a serious physical violation, the requisite revulsion is most likely to be generated. This is the historical function of the diagram of the

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slave ship *Brookes* (chapter 4) or film footage of the Nazi concentration camps. In both cases, national and international opinion was shocked into institutional innovation in the field of human rights and (in the latter instance) 'crimes against humanity'.

In today's world, globalized communications are combined with a rich tapestry of international networks and institutions (both governmental and nongovernmental), and with an ever more cosmopolitan framing of human rights and physical integrity. Yet despite clear victories, many prohibition regimes to suppress particular crimes against humanity remain rudimentary at best. This is especially true when the cases are geographically and culturally distant from the Westernized center of the global order. The international community fiddles while genocide and ethnic cleansing sweep Darfur. One of the most vicious and systematic campaigns of mass rape ever recorded rages in Congo, provoking little more than occasional press reports and half-hearted peacekeeper interventions. Torture, established as an unusually potent prohibition regime by Western states in the nineteenth century, resurges in the 'war on terror', and the regime erodes.

Today, solidaristic/universalist/cosmopolitan perspectives contest the field with particularist/exclusivist conceptions. 'Crimes against humanity' is one of the most ringing expressions of the solidaristic view. There are grounds for believing that its progressive entrenching in international legal practice and public debate speaks to a relative increase in the human capacity for empathy and solidarity – though evidence for such general judgments is probably impossible to amass. Crimes against humanity are in essence crimes against one's fellows, viewed in a universal context. Human beings seem always to have been capable of feeling injury to one's fellow as an injury to oneself. We demonstrate a capacity to extend this empathy in communities of obligation that radiate outward from the self and core social unit, in circles of ever-greater inclusiveness. In their most

contemporary and cosmopolitan conception, they encompass all of humanity – a humanity apprehended through unprecedentedly extensive webs of contact and channels of communication. The concept of crimes against humanity can therefore be expected to wax or wane in close connection with the broader appeal of a solidaristic conception and organization of human affairs.

## **Crimes against humanity in international law**

By 1915, the notion of international human rights was well enough established that the Allies' declaration, however seriously intended, could land on receptive ears. The declaration at least serves as a marker of the evolution of 'human rights' from, and towards, a universal norm. In particular, it capped decades of mounting concern for the plight of religious and ethnic minorities in Ottoman-controlled south-eastern Europe.

The Martens Clause in the preamble of the 1899 Hague Conventions marked the first reference to '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*' (emphasis added). Elsewhere, the Hague Conventions of 1899 and 1907 prohibited acts 'that "shock" the conscience of mankind. Or they "outrage" or "offend" the conscience, or the moral judgment, of mankind. Or they are "repugnant in the public conscience" or "intolerable from the point of view of the entire international community"; or they represent a challenge to the "imperatives", or the "law", or the "code", of "universal conscience"'.

These groundbreaking agreements paved the way for an impressive expansion of a universal rights discourse in the twentieth and twenty-first centuries. Before they did, however,

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human rights would be flouted on an unprecedented scale. In World War II, tens of millions of people were obliterated – as many as 40 million in the Soviet Union alone. By contrast with World War I, where mass atrocities against civilians were the exception rather than the rule, World War II established (or re-established) the principle of targeting the civilian population as a means of annihilating an implacable enemy. The Nazis genocided Jews, Roma (Gypsies), and Polish and Soviet Slavs. At home, and even before the war started, they targeted individuals according to political belief, physical or mental disability, and homosexuality, to cite just a handful of victim categories. The Japanese dropped plague bacilli on Chinese cities, and perpetrated numerous direct massacres. The Allies committed their own range of mass crimes against civilians, notably their indiscriminate bombing of urban areas. Germany and Japan had pioneered the practice; but it was discreetly left off the charge-sheet of the postwar tribunals, since the Allies had responded in kind with a ferocity – including atomic bombing – that dwarfed the original Axis assaults.

Among the victor's spoils claimed by the Allies at the onset of the postwar era was the right to try Nazi and Japanese leaders for war crimes and crimes against humanity. The result was the Nuremberg and Tokyo tribunals of 1945–7. Each proceeding, but especially Nuremberg, was among the most famous trials in history, a watershed in international jurisprudence, and a landmark toward accountability for perpetrators of mass atrocity. It was also at these trials that the concept of 'crimes against humanity' first found formal expression and codification, in language that has shaped interpretations ever since.

As the Box opposite outlines, ahead of crimes against humanity, Nuremberg's charter emphasized 'crimes against peace' – the wars of conquest that the Nazis waged – and the more widely accepted notion of 'war crimes'. This was typical of international legislation and covenant-framing to that point. By

### THE NUREMBERG CHARTER: GENERAL PRINCIPLES (8 AUGUST 1945): ARTICLE 6

[ . . . ] The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- (a) *Crimes against peace*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.
- (b) *War crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose, of civilian populations of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.
- (c) *Crimes against humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plans.

including crimes against humanity, however, the Charter's framers sought to fill a void in international law: the failure adequately to address atrocious policies 'which in many cases did not fit the technical definition of war crimes (for example, inhumane acts

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against civilians who were not enemy nationals) and yet were unquestionably contrary to the dictates of the public conscience and general principles of law recognized by the community of nations'. In doing so, the Charter supplied elements that have remained central to concepts of crimes against humanity:

- *The crimes must target civilians.* In modern times, a range of humanitarian obligations in war, encompassing both combatants and noncombatants, is outlined in the Geneva Conventions of 1949. The Conventions themselves, like the Universal Declaration of Human Rights and the Genocide Convention, are part of the great wave of postwar rights-framing and institution-building that also gave birth to Nuremberg. Crimes against humanity are distinct from other categories in that they exclusively target civilians. An important issue here is whether the category includes only non-combatants who have never had an active military role; or whether it should also include the recently disarmed and neutralized. A core transformation in war, since the French Revolution but particularly since World War I, has been the advent of 'total war', in which mass populations are mobilized and administered for war-related production. Under such circumstances, distinctions between combatant and civilian are blurred. Accordingly, the understanding of 'civilian' in contemporary framings of crimes against humanity focuses on whether individuals pose a meaningful military threat *at the time they are targeted*. To cite the 1998 judgment of the International Criminal Tribunal for Rwanda (ICTR) in the case of Jean-Paul Akayesu: 'Members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause.' Massacre and mistreatment of prisoners of war, such as those against

Soviet troops captured by the Nazis and Allied soldiers taken by the Japanese, may therefore constitute a crime against humanity, if they meet two further requirements:

- *The crimes must be widespread or systematic, and repeated.* By the time the Rome Statute of the International Criminal Court came into force in 1998, this had been codified in Article 7 (subparagraph 2(a)), which notes that an ‘attack directed against any civilian population’ must feature ‘a course of conduct involving the multiple commission of acts’ (emphasis added). The Rwanda tribunal (ICTR) has defined ‘systematic’ attacks as ‘thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources’. The systematic aspect also implies that crimes against humanity *are the product of a discernible policy* – a ‘course of conduct’ implemented by a state or quasi-state authority. In the Rome Statute, this finds expression with the reference to attacks ‘directed against’ civilian populations.
- In all of this, it is implied that *the crimes must be intentionally committed*. The *mens rea* (mental element) of crimes against humanity must be demonstrated. The perpetrator must be shown to have been aware that an attack was occurring, would occur, or was highly likely to occur, and also that it was linked to a wider, systematic campaign against a civilian population. This *mens rea* component directly reflects similar provisions in most domestic legal systems.

## International tribunals and the Rome Statute

The legal mechanisms developed to try accused perpetrators of crimes against humanity, genocide, and war crimes in the former Yugoslavia and Rwanda were ad hoc international tribunals. They were struck to deal with the events in question, and to

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look no further. A universal body did exist, the International Court of Justice (ICJ), established along with the League of Nations after World War I and incorporated into the United Nations structure after World War II. But the ICJ primarily adjudicated disputes between state parties, over boundaries, resource exploitation rights, and so on. It displayed a reluctance to intervene in the areas traditionally deemed under the 'sovereign' authority of the state. Not until February 2007 did the ICJ actually rule on a case involving alleged genocide and crimes against humanity – when Bosnia–Herzegovina accused Serbia, another state entity, of committing genocide against it during the war of Yugoslav succession (1992–5). While the ICJ established the significant precedent that states, not just individuals, can be authors of genocide, it rejected the Bosnian claim on the frankly dubious grounds that evidence did not demonstrate Yugoslavia's 'specific intent' to commit genocide.

What was needed was a systematization of the legal framework through a permanent institution which could issue indictments for genocide, crimes against humanity, war crimes, and crimes of aggression; supervise the detention and trial of accused perpetrators; and incarcerate those convicted of crimes. (The death penalty was ruled out from the start, an interesting demonstration of the way that a powerful prohibition regime against capital punishment has established itself globally, though still with notable holdouts such as China and the US.)

In 1994, the United Nations drafted a charter for the International Criminal Court, a legal body that would resemble the Yugoslavia tribunal, but be permanent and exercise universal jurisdiction. In July 1998, the text of the charter was finalized at a gathering of sixty-six countries in Rome, and by late 2007, 105 countries had formally joined the Court by ratifying it in domestic legislation, with dozens more who had signed but not yet ratified. A small handful of states refused to come aboard, most notably the United States (which signed but did not ratify the

treaty), China, and Israel. These countries feared their national sovereignty would be undermined, though the ICC charter explicitly stated that the court would issue indictments only when national authorities manifestly failed, or were unable, to do so.

The Rome Statute's codification of 'crimes against humanity' is likely to serve as the legal benchmark for decades to come, and will be deployed frequently in these pages. The relevant section of the statute (see Box below) is more detailed than previous framings, but draws its scope and language largely from them. As Darryl Robinson observed, the ICC definition 'generally seems to reflect most of the positive developments identified in recent authorities. For example, the definition does not require any nexus to armed conflict, does not require proof of a discriminatory motive, and recognizes the crime of apartheid and forced disappearance as inhumane acts.'

### **CRIMES AGAINST HUMANITY: THE ROME STATUTE OF THE ICC**

For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are universally recognized as impermissible under international law . . . (i) Forced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

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The court formally began operations in 2005, issuing its first indictments for crimes against humanity. At first exclusively, and still overwhelmingly, its subjects for prosecution have been drawn from African conflicts such as those in Sierra Leone, Liberia, and Darfur (a region of Sudan). This parallels the broader trend in national and international law of targeting former leaders of countries beyond 'the West' – most famously Augusto Pinochet of Chile and Yugoslavia's Slobodan Milosevic. A conceptual and practical leap will occur when a Western leader, present or former, is indicted for genocide or crimes against humanity, if one ever is.

### Evolving understandings

If the core norms and framing of crimes against humanity were set down at Nuremberg in 1946–7, subsequent declarations – and legal proceedings, especially those of the 1990s-era international tribunals – have entrenched a number of other important aspects. Among those that will surface regularly in this book are:

- *Crimes against humanity are international in character, and subject to universal jurisdiction.* In the concise summary of the 'Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and Judgment of the Tribunal', a declaration issued by the UN General Assembly in 1950: 'The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.' The Rome Statute's 'Elements of Crimes' likewise stresses that 'crimes against humanity . . . are among the most serious crimes *of concern to the international community as a whole*' (emphasis added).

- *They may occur in war or peace* – or a context somewhere in between. The Nuremberg tribunal was preoccupied to the point of obsession with a need to frame Nazi atrocities as part of a campaign of ‘aggressive war’, designated as the highest crime under international law. This reflects the conviction of chief prosecutor Robert Jackson that ‘crimes against humanity [were] ancillary to aggression’. Jackson believed that, under existing international law, such crimes as the ‘program of extermination of Jews and destruction of the rights of minorities’ could only be construed as subjects of ‘international concern’ because of their connection to a war of aggression. ‘Unless we have a war connection as a basis’ for prosecuting such crimes, Jackson argued, ‘I would think we have no basis for dealing with atrocities.’ The result, according to Gary Jonathan Bass, was that ‘crimes against humanity got relatively short shrift’ at Nuremberg.

This understanding carried over to the UN’s 1950 declaration on ‘Principles of International Law’ derived from Nuremberg. It stressed that crimes against humanity – namely ‘murder, extermination, enslavement, deportation . . . or persecution’ – were necessarily ‘done or . . . carried on in execution of or in connection with any crime against peace or any war crime’. Crimes against peace, in turn, included first and foremost ‘planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties’.

Since the early postwar period, however, crimes against humanity have undergone a shift, reflecting at least some erosion of the state-sovereignty paradigm and the concept of ‘aggression’ that emerged from it. This seems traceable to the Universal Declaration of Human Rights (1948), and the assertion in the UN Genocide Convention of the same year that genocide could be committed ‘in time of peace or war’ (see chapter 2). The enormous humanitarian impetus

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established in the half-decade after World War II also gradually deepened, extending additional protections to vulnerable civilian populations, even when they were targeted domestically under claims of exercising legitimate state sovereignty. (See, for example, the discussions of torture in chapter 6 and apartheid in chapter 9.)

- *The crimes 'must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health'.* This is the language of the seminal Akayesu judgment issued by the Rwanda genocide tribunal (ICTR) in 1998. The gravity of the concept of crimes against humanity – their universal application, and the universal jurisdiction that states hold to prosecute them, or to arrest suspects for prosecution by an international body – requires that the acts committed be of a grave nature. A suggestion here is that the damage inflicted by crimes against humanity must be felt in the long term, if not permanently. When the effects of physical or psychological harm last for years or decades – when they may last for centuries, as with dispossession and forced population transfer (chapter 3) – then the framing of crimes against humanity is more strongly supported. Murder, of course, is the most final destruction of all.
- *Crimes against humanity are committed by individuals.* The 'Elements of Crimes' of the Rome Statute is emphatic in declaring that crimes committed against the largest collective – humanity – 'warrant and entail individual criminal responsibility'. This represents the culmination of an international trend that arguably began with the Allied declaration of 1915, and the subsequent (abortive) legal proceedings against individual Ottoman Turk perpetrators of the Armenian genocide. The Nuremberg and Tokyo tribunals emphatically denied accused Nazis the opportunity to displace blame onto a broader political regime. The Genocide Convention likewise assigned responsibility exclusively to individuals, and

all criminal prosecutions for genocide have been of individuals. Subsequent trials of Nazi war criminals – in the Soviet Union, France, Poland, Germany, Israel, and elsewhere – strengthened this trend, emphasizing perpetrators' individual responsibility and making it part of case law in many nations.

- *State agents are the primary, but not the only, perpetrators.* This is an especially important feature, given the shift away from conventional (international) wars of aggression toward *civil* wars, waged by opposed forces within a single state. Nonstate actors, such as guerrillas, paramilitaries, warlords, and ordinary individuals, may be key players. All of these contexts and actors are now bound by the strictures of 'crimes against humanity', and are equally liable to arrest and prosecution.

## **'Persecution' and 'other inhumane acts'**

This book does not deal at chapter length with the crime against humanity of 'persecution'. This category has a rather special and nebulous character: as M. Cherif Bassiouni notes, it 'is neither a crime in the world's major legal systems, nor an international crime . . . unless it is the basis for the commission of other crimes' (my emphasis). Accordingly, persecution acts as an adjunct to the crimes against humanity enumerated in this volume. It relates to the *discriminatory intent* with which crimes and violations of human rights may be perpetrated, to the *widespread or systematic character* of the attack, and to the *identities* of its victims. Specifically, like the Genocide Convention, it emphasizes the vulnerability of civilians to be targeted on the basis of a claimed or imputed collective identity: 'political, racial, national, ethnic, cultural, religious, gender . . . or any other grounds that are

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universally recognized as impermissible under international law' (Article 7(1)(h) of the Rome Statute). This echoes and expands upon the Genocide Convention's emphasis on the targeting of human beings on the basis of 'national, ethnical [*sic*], racial, and religious' identity. Specific strategies of persecution are not enumerated: what is important is that they are '*intentional* and *severe*', and result in a violation of 'fundamental rights' (the 'Elements of Crimes').

'Other inhumane acts' were likewise not defined beyond the reference to 'inflict[ion] of great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act'. The vagueness was deliberate, according to Amnesty International: designed to ensure 'that new forms of crime against humanity . . . will not escape international criminal responsibility' in the future. 'Inhumane acts' were outlawed as well by the 1949 Geneva Conventions. In their commentary on that instrument, the International Committee of the Red Cross (ICRC) stressed the importance of an open-ended definition:

It is always dangerous to try to go into too much detail – especially in this domain. However much care were taken in establishing a list of all the various forms of infliction, one would never be able to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes. The form of wording is flexible and, at the same time, precise.

This offers the opportunity to gradually expand the ambit of crimes against humanity, by designating more actions as 'inhumane'. I return briefly to this theme in the Conclusion.