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Piercing the Colonial Veil?

Colonial Crimes as Crimes against Humanity

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ABSTRACT

Crimes against humanity have a longer grounding in colonial history than publicly acknowledged. The crimes against children of mixed European and African ancestry (*Métis*) throughout Belgian colonial rule in the Congo are a paradigm example. In the aftermath of the 1884–1885 Berlin Conference, historian George Washington Williams called for the prosecution of the mistreatment and discrimination of such children under King Leopold's rule in the Free State of Congo. He branded Leopold's atrocities as crimes against humanity. However, throughout much of the 19th and 20th centuries, colonial crimes have been covered by a veil of silence. The concept of crimes against humanity has largely been interpreted through developments after World War II, including the Holocaust. More than 120 years after Williams' call, the Brussels Court of Appeal has closed a historical cycle and qualified colonial crimes against *Métis* children, born under Belgian colonial rule between 1948 and 1952, as crimes against humanity. This contribution relies on this ruling to analyse the historical marginalization and blindness towards colonial crimes in international criminal justice and ways to confront them. It shows how major legal instruments governing international crimes (crimes against peace, war crimes, crimes against humanity, genocide or apartheid) have rendered colonial crimes distant and invisible. The article then examines contemporary techniques to engage with colonial wrong (new semantic recognition, state responsibility), as well as the merits and shortcomings of the *Métis* Appeal decision. It argues that the decision carries historical significance and expressive force since it challenges the idea of the 'colonial veil' and highlights the potential of the concept of crimes against humanity to capture historical crimes. It concludes that the concept of crimes against humanity should not be read through the prism of the Holocaust, but in a more multi-directional way, in terms of past legalities, inter-temporal dimensions and colonial continuities, and highlights implications for ongoing discussions on the development of crimes against humanity (e.g. ILC Draft Articles on Prevention and Punishment of Crimes Against Humanity).

> 'What am I driving at? At this idea: that no one colonizes innocently, that no one colonizes with impunity either; that a nation which colonizes … is already a sick civilization, a civilization which … calls for its punishment.'
>
> Aimé Césaire, *Discourse on Colonialism* (1950)

1. INTRODUCTION

In 1890, more than half a century before Nuremberg, American historian and Baptist minister George Washington Williams (1849–1891) wrote an open letter to Belgian King Leopold II, in which he criticized colonial practices in the Congo.[1] He openly addressed the mistreatment and discrimination of 'bi-racial' children born in mixed relations (hereafter: '*Métis*'). He wrote:

> Not long ago a Belgian trader had a child by a slave-woman of the State, and he tried to secure possession of it that he might educate it, but the Chief of the Station where he resided, refused to be moved by his entreaties. At length he appealed to the Governor-General, and he gave him the woman and thus the trader obtained the child also. This was, however, an unusual case of generosity and clemency; and there is only one post that I know of where there is not to be found children of the civil and military officers of your Majesty's Government abandoned to degradation.[2]

This account foreshadows the cruelty and racist foundations of Belgian colonial policies in the Congo in the aftermath of Leopold's rule. Métis children were regarded as a threat to social Darwinist ideas of white superiority and as the living embodiment of the failure of colonial order. The Belgian state instructed colonial officials to remove children before the age of 7 years from their mothers, in order to place them in state or religious institutions. The policy of abduction and confinement was carried out between 1948 and 1961. The name of the child was changed in order to conceal their identity, preserve the father's reputation, and prevent family reunion. Many of them were sent to orphanages, religious institutions or adoptive parents in Belgium. The children were not given access to their birth records and were unable to find their parents. In Belgium, they were treated as second-class citizens, based on their mixed heritage and/or were denied Belgian nationality. Some became stateless. The policy was only abandoned when Congo approached independence.

In his 1890 letter to Leopold, Williams called on the Powers of the Berlin Conference to prosecute 'the murder, slave-raiding, and general policy of cruelty' in the Congo Free State as a crime in 'the name of humanity'.[3] He stated:

> All the crimes perpetrated in the Congo have been done in your name, and you must answer at the bar of Public Sentiment for the misgovernment of a people, whose lives and fortunes were entrusted to you by the august Conference of Berlin, 1884–1885. I now appeal to the Powers which committed this infant State to your Majesty's charge, and to the great States which gave it international being … to call and create an International Commission to investigate the charges herein preferred in the name of Humanity.[4]

[1] George Washington Williams was a veteran of the American civil war. He published volumes on the *History of the Negro Race in America, from 1619 to 1880* (1883) and the *History of the Negro Troops in the War of the Rebellion, 1861–1865* (1888). He was initially supportive of Leopold's rule and saw the Free State of the Congo as a potential space for African–American settlement. He changed his opinion when he visited the Congo as a journalist in 1890. See J.H. Franklin, *George Washington Williams: A Biography* (Duke University Press, 1998). Together with Joseph Conrad's *Heart of Darkness* (1899), his account marks one of the first critical examinations of atrocities in the Congo Free State.

[2] G.W. Williams, 'An Open Letter to His Serene Majesty Leopold II, King of the Belgians and Sovereign of the Independent State of Congo By Colonel, The Honorable Geo. W. Williams, of the United States of America, 1890', in Franklin, *supra* note 1, 242–254, 250.

[3] *Ibid*., at 253.

[4] *Ibid*., at 253.

The letter counts as an early, lesser-known, invocation of the idea of crimes against humanity at the height of European colonialism. Williams had used the notion in his earlier writings in relation to the enslavement of children in Dutch colonial practice and repeated the term in a letter dated 15 September 1890 to USA Secretary of State James Gillespie Blaine (1830–1893), in which he stated the Free State of Congo 'is actively engaged in the slave trade and is guilty of many crimes against humanity'.[5] The call caused outcry against Leopold's rule and gave some attention to the term 'crimes against humanity' in the writings of the time, ahead of its popularization after Nuremberg.[6] However, the concept remained contested in 19th-century international law and was invoked in conflicting ways. For instance, in the context of the slave trade, the concept was used both as a means of resistance against colonial oppression and as an instrument to uphold imperial dominance.[7] In Imperial China, Western powers invoked the notion to characterize attacks against their own envoys.[8] The 'crimes against humanity' frame thereby encountered resistance from multiple fronts. In the legal universe of the 20th century, colonial criminality has largely fallen between the cracks of recognized categories of international crimes: crimes against peace, war crimes, genocide or crimes against humanity.[9]

This picture is only changing slowly and incrementally.[10] The *Métis* decision of the Brussels Court of Appeal,[11] as also discussed by Jérôme de Hemptinne,[12] marks a modest yet important step towards challenging historical silences. The ruling closes a historical cycle, set off by William's invocation of crimes against humanity more than a century ago. It frames Belgium's policy of racial segregation and abduction of children of mixed heritage as persecution and as another inhumane act, based on a decolonial reading of the nexus requirement of crimes against humanity set by the Nuremberg Charter. This recognition echoes

[5] On the letter to Blaine, see F. Bontinck, *Aux Origines de l'Etat Indépendant du Congo: Documents Tirés d'Archives Americaines* (Nauwelaerts, 1966), at 449. Williams protested against the enslavement of children of 'free Negroes', born by a Christian mother in his *History of the Negro Race in America, from 1619 to 1880*, Vol. 1 (Putnam's Sons, 1883), 136. On the colonial origins of crimes against humanity, see S. Graf, *The Humanity of Universal Crime: Inclusion, Inequality, and Intervention in International Political Thought* (Oxford University Press, 2021); F. Klose, *Human Rights in the Shadow of Colonial Violence: The Wars of Independence in Kenya and Algeria* (University of Pennsylvania Press, 2013); K. von Lingen, 'Fulfilling the Martens Clause: Debating 'Crimes Against Humanity', 1899–1945', in F. Klose and M. Thulin (eds), *Humanity: A History of European Concepts in Practice from the Sixteenth Century to the Present* (Vandenhoeck and Ruprecht, 2016) 187–208; N. Geras, *Crimes Against Humanity: Birth of a Concept* (Manchester University Press, 2011), 4–8.

[6] Adam Hochschild traced the origins of 'crimes against humanity' in the writings of George Washington Williams. See A. Hochschild, *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa* (Mariner Books, 1999), at 112. On the role of Hersch Lauterpacht in the framing of crimes against humanity at Nuremberg, see P. Sands, *East West Street: On the Origins of Genocide and Crimes Against Humanity* (Weidenfeld & Nicolson, 2016).

[7] In 1836, Henry Wheaton wrote: 'The African Slave trade, once considered not only a lawful, but desirable branch of commerce … is now denounced as an odious crime by the almost universal consent of nations.' See H. Wheaton, *Elements of International Law: With a Sketch of the History of the Science* (B. Fellowes, 1836), 165–166. In 1906, US Secretary of State Robert Lansing described the slave trade as a crime against humanity. See R. Lansing, 'Notes on World Sovereignty', 15 *American Journal of International Law* (*AJIL*) (2021) 13–27, 25. However, anti-slavery discourse was actively used to justify colonial oppression. See C. Gevers, 'Slavery and International Law', 117 *AJIL Unbound* (2023) 71–76, at 74–75; F. Klose, '"A War of Justice and Humanity": Abolition and Establishing Humanity as an International Norm', in Klose and Thulin, *supra* note 5, at 169–186; E. Haslam, *The Slave Trade, Abolition and the Long History of International Criminal Law: The Recaptive and the Victim* (Routledge, 2020).

[8] In the context of the Boxer Rebellion in 1900, Allied states sought to prosecute attacks against their envoys and missionaries in imperial China as 'crimes against the law of nations, against the laws of humanity, and against civilization'. See B. Brockman-Hawe, 'Accountability for "Crimes Against the Laws of Humanity" in Boxer China: An Experiment with International Justice at Paoting-Fu', 38 *University of Pennsylvania Journal of International Law* (2017) 627–713, at 661–662.

[9] On the schizophrenic role of international criminal law in relation to colonial injustice, see also C. Stahn, 'Reckoning with Colonial Injustice: International Law as Culprit and as Remedy?' 33 *Leiden Journal of International Law* (*LJIL*) (2020) 823–835.

[10] W. Veraart, 'The Most Salient Legal Hurdle: Countering the Refusal to Legally Recognise Colonial Slavery as a Crime against Humanity', 52 *Netherlands Journal of Legal Philosophy* (2023) 211–226.

[11] Court of Appeal of Brussels, 1st Civil Chamber, Final Decision, 2022/AR/26, 2 December 2024.

[12] J. de Hemptinne, 'Historic Ruling: Brussels Court of Appeal Declares Colonial Forced Removal and Segregation of Mixed-Race Children Crimes Against Humanity', 23 *Journal of International Criminal Justice* (*JICJ*) (2025), https://doi.org/10.1093/jicj/mqaf009 (visited June 2025).

long-standing calls by anti-colonial scholars, such as Aimé Césaire (1913–2008),[13] William Edward Burghardt Du Bois,[14] or Frantz Fanon (1925–1961),[15] who have criticized the double standards between post-World War II accountability and colonial oppression. It openly exposes the logic of White supremacy and systemic racism, inherent in Belgium's colonial policy. It confirms that the passage of time does not erase responsibility for colonial crimes that violated general principles of law, embodied by the 1946 Nuremberg principles.[16] However, the decision demonstrates at the same time the struggle of international criminal law to deal with the complexity of colonial wrongdoing. It remains entrenched in a Eurocentric vision of international law.

This contribution examines this tension. It first illustrates historical silences in 20th-century legal frameworks. It shows how colonial powers actively created a colonial veil and spaces of impunity for colonial crimes through international legal instruments.[17] The article then analyses contemporary efforts to break historical silences and situates the decision in this broader context. It then discusses innovations and shortcomings of the ruling. It calls for a decolonial reading of the decision and a more multi-directional approach towards the application of crimes against humanity to colonial contexts in terms of past legalities, inter-temporal connections and colonial continuities. It points out implications for contemporary efforts to revisit the definition and legal frame of crimes against humanity (e.g. International Law Commission's Draft Articles on Prevention and Punishment of Crimes Against Humanity[18]).

2. HISTORICAL SILENCING AND BLINDNESS TOWARDS COLONIAL CRIME

In legal terms, colonization has for a long time been a crime without a name.[19] Colonial crimes have been marginalized in the history of international criminal law.[20] In his book 'Silencing the Past', Haitian anthropologist Michel-Rolph Trouillot (1949–2012) has shown how historical events, such as the slave revolution in Haiti, can be actively silenced or turned

[13] A. Césaire, *Discourse on Colonialism* (Joan Pinkham trans, Monthly Review Press, 1972), at 14. He drew parallels between Nazism and the 'colonialist procedures which until then had been reserved exclusively for the Arabs of Algeria, the "coolies" of India, and the "niggers" of Africa').

[14] Du Bois witnessed Nazi crimes in Germany in 1936. He saw these crimes as an extension of racism in earlier forms of colonialism. He wrote: 'There was no Nazi atrocity–concentration camps, wholesale maiming and murder, defilement of women or ghastly blasphemy of childhood–which the Christian civilization of Europe had not long been practicing against colored folk in all parts of the world in the name of and for the defense of a Superior Race born to rule the world'. See W.E.B. Du Bois, *The World and Africa* (Oxford University Press, 2007), at 15.

[15] In his *Wretched of the Earth* (1961), Frantz Fanon criticized the double standards between reparation for Nazi crimes, which has 'transformed the whole of Europe into a veritable colony', and the lack of reparation for colonial wrongdoing. See F. Fanon, *The Wretched of the Earth* (Grove Press, 1963), at 101–103.

[16] GA resolution 95 (I) of 11 December 1946.

[17] On international law as source of structural inequality, see A. Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities', 27 *Third World Quarterly* (2006) 739–753, A. Gurmendi Dunkelberg, 'How to Hide a Genocide: Modern/Colonial International Law and the Construction of Impunity', *Journal of Genocide Research* (2025), DOI: 10.1080/14623528.2025.2454739.

[18] ILC, *Draft articles on Prevention and Punishment of Crimes Against Humanity, adopted by the ILC at its 71st session in 2019*, available online at https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf (visited 11 April 2025).

[19] See R. Evans, '"Crime Without a Name": Colonialism and the Case for "Indigenocide"', in D. Moses (ed.), *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History* (Berghahn Books, 2010), 133–147; J. Castellino, *Calibrating Colonial Crime: Reparations and the Crime of Unjust Enrichment* (Bristol University Press, 2024).

[20] A. Anghie and B. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts', 2 *Chinese Journal of International Law* (2003) 77–102; C. Nielsen, 'From Nuremberg to the Hague: The Civilizing Mission of International Criminal Law', 14 *Auckland University Law Review* (2008) 81–114; R. DeFalco, *Invisible Atrocities: The Aesthetic Biases of International Criminal Justice* (Cambridge University Press, 2022), at 185ff; M. Bergsmo, W. Kaleck and K. Yin Hlaing (eds), *Colonial Wrongs and Access to International Law* (Torkel Opsahl Academic EPublisher, 2020); J. Balint et al., *Keeping Hold of Justice: Encounters Between Law and Colonialism* (University of Michigan Press, 2020); P. Harris Masake and F. Jeßberger, *International Criminal Law and the Legacy of Colonialism: An African Perspective* (Humboldt University Berlin, 2024); A.B.M. Marong, 'The ILC Draft Articles on Crimes Against Humanity: An African Perspective', 6 *African Journal of International Criminal Justice* (2020) 93–124.

into non-events through Western historiography.[21] The same is true in relation to colonial atrocity. It has been actively blended out in legal documents and treaty provisions, through the definition of core crimes, non-retroactivity of legal frameworks, and colonial clauses. This obfuscation has created a legal fog, that is a colonial veil, which has rendered colonial criminality invisible in legal terms and silenced its histories and memory.[22] The distancing and marginalization of colonial crimes are reflected in the accountability framework of Versailles and the post-World War II architecture.

A. Versailles — Shared Silence to Safeguard Imperial Identity

The legal framework of the Peace Treaties after World War I established new accountability structures regarding individual criminal responsibility for international crimes (Articles 227–229 Treaty of Versailles, Articles 226–230 Treaty of Sèvres), but largely upheld colonial structures and sidelined colonial atrocities.[23] Colonial crimes were both 'present' and 'absent' at the time of the Paris Peace Conference. During World War I, the Triple Entente (Russia, France and the UK) had qualified the massacre of the Armenians in the Ottoman Empire as 'crimes … against humanity and civilization'.[24] In 1919, the Commission on the Responsibility for the Authors of the War and on Enforcement of Penalties was mandated to examine violations of the 'laws and customs of war and the elementary laws of humanity' during World War I by the German Empire and its Allies (Turkey, Bulgaria) on land, on sea, and in the air. Technically, the territorial and temporal scope of the mandate was broad enough to cover crimes against colonized subjects in Africa.[25] However, the Commission centred its analysis on crimes committed by Germany and her Allies against the population of belligerent states and the 'peace of Europe'. It found that '[a]ll persons belonging to enemy countries, however high their position may have been … who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution'.[26] It recommended the establishment of a high tribunal to try violations based on 'the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience'[27] and set out 'principles' to 'determine inhuman and improper acts of war'.[28] But it failed to engage with crimes against colonized subjects, although they had become apparent in the context of the negotiations of Versailles.

The British Colonial Office had listed German atrocities in East Africa and South West Africa, including the extermination of the Herero, in two books, published in 1916[29] and 1918,[30] in order to demonstrate the barbarism of German colonialism. Germany

[21] M-R. Trouillot, *Silencing the Past: Power and the Production of History* (Beacon, 1995).

[22] See also C. Stahn, 'Confronting Colonial Amnesia: Towards New Relational Engagement with Colonial Injustice and Cultural Colonial Objects', 18 *JICJ* (2020) 793–824.

[23] C. Gevers, 'The "Africa Blue Books" at Versailles: World War I, Narrative and Unthinkable Histories of International Criminal Law', in I. Tallgren and T. Skouteris (eds), *The New Histories of International Criminal Law: Retrials* (OUP, 2019) 145–166.

[24] France, Great Britain, and Russia Joint Declaration, 24 May 1915, in Papers Relating to the Foreign Relations of the United States 1915, Suppl. World War (Washington 1928), at 981 ('In view of these new crimes of Turkey against humanity and civilization, the Allied governments announce publicly to the Sublime Porte that they will hold personally responsible [for] these crimes all members of the Ottoman government and those of their agents who are implicated in such massacres').

[25] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 14 *AJIL* (1920) 95–154, at 95. See also Gevers, *supra* note 23.

[26] *Ibid*., at 117.

[27] *Ibid*., at 122.

[28] *Ibid*., at 150.

[29] UK, Colonial Office, *Papers Relating to German Atrocities, and Breaches of the Rules of War, in Africa* (His Majesty's Stationery Office, 1916).

[30] UK, Colonial Office, *Report on the natives of South-west Africa and their Treatment by Germany* (His Majesty's Stationery Office, 1918) in J. Silvester and J.B. Gewald (eds), *Words Cannot Be Found: German Colonial Rule in Namibia: An Annotated Reprint of the 1918 Blue Book* (Brill, 2003).

responded to these Blue Books with a 'White Book', in order to showcase British violence and maladministration.[31] These accounts were produced by both sides for strategic purposes, namely to create a favourable image in public opinion about their colonial governance and to influence the allocation of colonies in the settlement at Versailles. They were largely disregarded in the mapping of criminal responsibility, partly out of fear that such accountability could backfire and expose future colonial rulers to critical scrutiny. European colonial powers had 'little or no interest' at Versailles to reprimand 'colonial excesses or 'stories of [colonial] exploitation', since they were eager to retain their power in the colonies.[32] It was far more convenient to limit the scope of criminal responsibility to violations committed by enemy countries against Allied and Associated States and maintain shared silence regarding colonial atrocities for purposes of imperial identity. Any crimes committed against Africans were kept invisible as part of criminal responsibility, and at best used to support war damage claims by European powers against Germany in arbitral proceedings.[33]

These double standards were criticized by William Edward Burghardt Du Bois (1868–1963) in his essay on the 'Souls of White Folk' (1920). He contrasted the 'awful cataclysm of World War'[34] with the harm inflicted through colonial 'aggrandizement'.[35] He wrote: 'Has the world forgotten Congo? What Belgium now suffers is not half, not even a tenth, of what she has done to black Congo since Stanley's great dream of 1880.'[36]

B. Silencing in Post-World War II Legal Architecture

In the aftermath of World War II, Western powers remained reluctant to extend the scope of international criminal law to colonial atrocities. Although scholars, such as Césaire, Du Bois, or Lemkin, have drawn attention to parallelisms between colonial atrocity and the ideology of Nazi crimes,[37] legal instruments avoided to draw any explicit connection. The new vocabulary of international criminal law developed after World War II created a 'cloak of invisibility' regarding the early-modern European colonial project. This is reflected in the framing and limitations of different categories of international crimes: The conception of crimes against peace at Nuremberg and Tokyo, the nexus element of crimes against humanity, the regime of individual responsibility for war crimes, the narrow legal construction of genocide and apartheid, or the failure to brand colonization as crime.

[31] German Colonial Office, *The Treatment of Native and other Populations in the Colonial Possessions of Germany and England: an answer to the English Blue Book of August 1918* (Berlin, 1919).

[32] M. Bomholt Nielsen, '"As Bad as the Congo"? British Perceptions of Colonial Rule and Violence in Anglo-German Southern Africa, 1896-1918' (PhD thesis on file at King's College London, 2018), at 46. Art. 230 of the Treaty of Sèvres addressed crimes committed against Armenians. It required the Turkish government to hand over persons 'responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914'.

[33] See W. Schabas, *The International Legal Order's Colour Line: Racism, Racial Discrimination and the Making of International Law* (OUP 2023), at 39–40. Portugal requested reparation for a German attack on Angola, which facilitated colonial resistance against Portuguese authority. See Reports of International Arbitral Awards, Portugal v. Germany, *Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique (sentence sur le principe de la responsabilité)*, 31 July 1928, Vol. II, 1011–1033, available online at https://legal.un.org/riaa/cases/vol_II/1011-1033.pdf (visited 11 April 2025).

[34] W.E.B. Du Bois, 'Souls of White Folk', in idem, *Writings* (Library of America, 1987) 923–938, at 927.

[35] *Ibid.*, at 927.

[36] *Ibid.*, at 929.

[37] On Césaire and Du Bois, see *supra* notes 13 and 14. When developing his conception of genocide, Raphael Lemkin drew 'on a tradition of anti-colonial writings that had Vitoria … at its foundations'. See A. Fitzmaurice, 'Anticolonialism in Western Political Thought: The Colonial Origins of the Concept of Genocide', in Moses, *Empire, Colony, Genocide*, *supra* note 18, 55–80, at 74. Colonial murders provided a 'conceptual framework for analyzing the German policy of occupation and extermination in Eastern Europe', which had colonizing features. See D.J. Schaller, 'Raphael Lemkin's view of European Colonial Rule in Africa: Between Condemnation and Admiration', 7 *Journal of Genocide Researc*h (2005) 531–538, at 531.

1. Crimes against Peace

The legal framework of the Nuremberg and Tokyo trials upheld, rather than challenged, colonial blindness in the law. It was focused on World War II atrocities and largely continued to exclude colonial crimes from the ambit of international criminal law. The definition of crimes against peace criminalized wars of aggression in classical inter-state relations, but did not capture uses of force by colonial powers against non-sovereign, colonial entities, which were often qualified as 'measures short of war'.[38] The criminalization of crimes against peace thereby maintained the colonial *status quo*. Past colonial subjugation remained untouched, whereas anti-colonial struggle against sovereign colonial powers became potentially open to criminalization.[39] This discrepancy was criticized by Justice Radhabinod Pal (1886–1967), who noted that this extension of individual criminal responsibility targeted the 'menace of totalitarianism', rather than the 'plague of imperialism'.[40] The framing was convenient from the perspective of major powers, since it consolidated the existing world order, including the sovereignty relations of colonial powers.

2. Crimes against Humanity

The emergence of the concept of crimes against humanity was marked by double standards. The idea may be traced back to the terror regime of Peter von Hagenbach in pre-Westphalian Europe, which was qualified as a crime against the 'laws of God and Men' by prosecutors in the Breisach trial.[41] Its link to colonial violence goes back to the 19th century. In 1842, US jurist Henry Wheaton (1785–1848) qualified the slave trade as a crime against humanity, namely as 'traffic so justly stigmatized by every civilized and Christian power as a crime against humanity'.[42] Jennifer Martinez has qualified the slave trade as the original 'crime against humanity'.[43] However, anti-slavery discourse continued to be used for imperial purposes, that is to justify colonial expansion under the umbrella of the abolition of slavery.[44]

The Hague Conventions addressed the concept vaguely in their preambles through the reference to the 'laws of humanity'. The qualification of Ottoman mass killings of Armenians as 'crimes against humanity and civilization' in the 1915 Joint Declaration by Great Britain, France, and Russia[45] was closely entangled with discriminatory 19th-century understandings of international law.[46] An early proposal, drafted by Russia, branded the crimes against Armenians as 'crimes against Christianity and civilization'.[47] France and Britain pushed to

[38] L. Benton, 'Protection Emergencies: Justifying Measures Short of War in the British Empire', in L. Brock and H. Simon (eds), *The Justification of War and International Order: From Past to Present* (OUP, 2021) 167–182. Interventions and colonial expansions were justified as 'order-related interventions', 'punitive expeditions' or policing and enforcement measures. See J. von Bernstorff, 'The Use of Force in International Law before World War I: On Imperial Ordering and the Ontology of the Nation-State', 29 *European Journal of International Law* (*EJIL*) (2018) 233–260, 249.

[39] D. Luban, 'The Legacies of Nuremberg', 54 *Social Research* (1987) 779–829, 786.

[40] R. Pal, *International Military Tribunal for the Far East: Dissentient Judgment* (Sanyal, 1953), at 114–115.

[41] G. Schwarzenberger, 'A Forerunner of Nuremberg: The Breisach War Crime Trial of 1474', *The Manchester Guardian*, 28 September 1946, at 4. See G. Gordon, 'The Trial of Peter von Hagenbach: Reconciling History, Historiography and International Criminal Law', in K.J. Heller and G. Simpson, *The Hidden Histories of War Crimes Trials* (OUP, 2013) 13–49.

[42] H. Wheaton, *Enquiry into the Validity of the British Claim to a Right of Visitation and Search of American Vessel Suspected to be Engaged in the Slave Trade* (John Miller, 1842) at 3.

[43] J. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (OUP, 2012), at 6.

[44] This is visibly reflected in Art. I of the Brussels Conference Act of 2 July 1890 (Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spiritous Liquors). It stated that 'the most effective means of counteracting the slave-trade in the interior of Africa' is the '[p]rogressive organization of the administrative, judicial, religious, and military services in the African territories placed under the sovereignty or protectorate of civilized nations'. See also *supra* note 7.

[45] See *supra* note 24.

[46] M. Tusan, '"Crimes Against Humanity": Human Rights, the British Empire and the Origins of the Response to the Armenian Genocide', 119 *American Historical Review* (2014) 47–77.

[47] P.J. Houlihan, *Religious Humanitarianism during the World Wars (1914-1945)* (CUP, 2024), at 47.

change the notion from 'Christianity' to 'humanity', in order to limit the imperial connotations ('Civilization, Christianity, and Commerce') for Muslim populations in British India and French colonies and give it broader application.[48]

The codification of crimes against humanity at Nuremberg reinvigorated the idea that atrocities committed within a state may be criminalized under international law. However, the insertion of the war nexus requirement through a change in punctuation in Article 6 (c) of the Nuremberg Charter linked crimes against humanity to the 'execution' or 'connection with any crime within the jurisdiction of the Tribunal'.[49] This limitation was introduced for a number of reasons: to safeguard the legality principle, prevent an overly broad interpretation of crimes against humanity, and maintain domestic sovereignty over internal affairs.[50] It came to distinguish the treatment of Nazi violence from violations committed by Great powers against some their own population, such as ongoing racial discrimination in the USA[51] or persecution of minorities in Russia on political and ethnic grounds. It shifted the focus away from the crimes of European colonial powers in their colonies. For instance, it silenced French atrocities, such as the Sétif and Guelma massacre by the French army and Pied-Noir settlers in Algeria on 8 May 1945,[52] which was committed only a few months before the start of the Nuremberg trial and paved the way for Algeria's war of liberation. This construction of crimes against humanity allowed powerful states to present themselves as guardians of 'civilization' in relation to the barbarism of Nazi crimes, but to shield themselves from scrutiny regarding violations in their own domestic systems or crimes committed in the colonies under the guise of 'civilization'.

The nexus requirement embraced the idea that crimes against humanity are merely a by-product of war. It was broadly interpreted in relation to Nazi criminality. Formally, no conviction was entered for crimes against humanity without any nexus to crimes against peace or war crimes.[53] However, the link was tenuous at times. The International Military Tribunal (IMT) did not require a link between the defendant and the nexus crimes. In the *Streicher* case, the tribunal based its ruling partly on conduct and articles published by Streicher before 1939 and related his conviction for persecution as a crime against humanity broadly to the fact that 'Jews in the East were being killed under the most horrible conditions'.[54] Later, the nexus requirement was gradually removed in jurisprudence under

[48] C. Halsall, *Glanced out of the Window and Saw the Edge of the World* (Wipf & Stock, 2020), at 90–91; S. Graf, '"A Wrong Done to Mankind". Colonial Perspectives on the Notion of Universal Crime', 31 *International Relations* (2017) 299–321, at 303.

[49] France and the UK originally proposed to define crimes against humanity under Art. 6 (c) of the Nuremberg Charter as follows: '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'. Russia insisted to replace the semi-colon between the phrases 'during the war' and 'or persecutions' by a comma. The insertion of the comma established the 'war nexus', implying that crime against humanity can only be committed 'in execution of or in connection with any crime within the jurisdiction of the Tribunal'.

[50] H. Brady and R. Liss, 'The Evolution of Persecution as a Crime Against Humanity', in M. Bergsmo, W. Ling Cheah, T. Song and P. Yi (eds), *Historical Origins of International Criminal Law: Volume 3* (Torkel Opsahl Academic EPublisher, 2015) 429–556, 478–479. For instance, Justice Jackson argued that the extermination of Jews and the destruction of the rights of minorities become a matter of 'international concern' when they are 'part of a plan for making an illegal war'. *Ibid.*, at 454.

[51] See W.A. Schabas, 'Origins of the Genocide Convention: From Nuremberg to Paris', 40 *Case Western Reserve Journal of International Law* (2008) 35–55, at 45. Justice Jackson recognized this contradiction when he drew attention to the 'regrettable circumstances' in the United States 'in which minorities are unfairly treated'. See International Conference on Military Trials: London, 1945, Minutes of Conference Session of 23 July 1945, available online at https://avalon.law.yale.edu/imt/jack44.asp (visited 11 April 2025).

[52] See e.g. M. Thomas, 'Colonial Violence in Algeria and the Distorted Logic of State Retribution: The Sétif Uprising of 1945', 75 *Journal of Military History* (2011) 125–158; J-L. Planche, *Sétif 1945: Chronique d'un massacre annoncé* (Perrin, 2006); J-P. Peyroulou, *Guelma, 1945: Une subversion française dans l'Algérie colonial* (La Découverte, 2009).

[53] K.J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (OUP, 2011), 231–250.

[54] IMT, Judgment, 1 October 1946, in *Trial of the Major War Criminals Before the International Military Tribunal*, 1947, Vol. I, at 291, § 304. Julius Streicher was convicted for persecution as crimes against humanity, in connection with war crimes, for his role in inciting the persecution and murder of Jews on political and racial grounds.

Control Council Law No. 10.[55] In the Einsatzgruppen Trial (*re Ohlendorf and Others*), the US Military Tribunal openly argued that the law 'is not restricted to events of war', but 'envisages the protection of humanity at all times'.[56] This reading marked a conceptual opening of the concept of crimes against humanity. But it was not directly applied to colonial or other internal contexts. For example, Telford Taylor still noted in his final report to the army in 1949 that the Nuremberg jurisprudence would not interfere with racial discrimination in the USA, since '[n]one of the Nuremberg judgments squarely passed on the question whether mass atrocities committed by or with the approval of a government against a racial or religious group of its own inhabitants in peacetime constitute crimes under international law'.[57]

3. War Crimes Law

The same tendency, namely the desire to avoid the criminalization of violence by colonial powers, is visible in the development of war crimes law.[58] It has been shaped by a dynamic of difference.[59] The 1899 and 1907 Hague Conventions, which were established at the height of colonial warfare, contained a double limitation. They regulated warfare between contracting parties, leaving space for the invocation of different standards in armed hostilities with 'non-civilized' entities.[60] In addition, they lacked provisions on the punishment of violations.

In practice, colonial warfare was distinguished from regular war between 'civilized nations' through doctrines on 'savage warfare',[61] which permitted greater brutality in combat against 'non-civilized' opponents, or the concept of 'small wars',[62] which justified more flexible means of warfare for specific types of colonial violence (e.g. suppression of insurrections, 'punitive expeditions'). The Nuremberg legacy strengthened the idea of individual criminal responsibility in international armed conflict, but failed to trigger a new momentum regarding accountability for war crimes in colonial warfare.[63] This became evident in the drafting of the Geneva Conventions in 1949.[64]

Colonial powers were eager to exclude colonial conflicts from the scope of application of both international and non-international armed conflict, and to avoid the risk of opening Pandora's box of individual criminal responsibility for atrocities during colonial warfare. They preferred to leave such conduct in legal grey zones of war and spheres of domestic jurisdiction and treat anti-colonial resistance under emergency clauses or penal legislation. Colonial wars were largely excluded from the realm of international armed conflict. From their perspective, colonial wars were closer to internal conflicts and had to bear features of

[55] In the *Ministries* case, judges qualified the confiscation of Jewish property prior to 1939 as a crime against humanity since it supported 'the program of rearmament and subsequent aggression'. See US Military Tribunal Nuremberg, *United States of America v. Ernst von Weizsäcker et al.*, Judgment of 11 April 1949, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10 (1949), Vol. XIV, at 557.

[56] US Military Tribunal Nuremberg, *United States of America v. Otto Ohlendorf et al.*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (1949), Vol. IV, at 497.

[57] Telford Taylor, *Final Report to Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10* (1949) (US Government Printing Office, 1951), at 224.

[58] T. Fabricius, *Die Aufarbeitung von in Kolonialkriegen begangenem Unrecht* (Duncker & Humblot, 2017).

[59] F. Mégret, 'From Savages to Unlawful Combatants: A Postcolonial Look at International Law's "Other"', in A. Orford (ed.), *International Law and Its Others* (CUP, 2005) 265–317.

[60] The different positions became apparent in the debate on the contested use of 'dum dum' bullets in colonial wars. See C. Stahn, *Confronting Colonial Objects* (OUP, 2023), at 309–314. For an illustration see E. Colby, 'How to Fight Savage Tribes', 21 *AJIL* (1927) 279–288.

[61] K. A. Wagner, 'Savage Warfare. Violence and the Rule of Colonial Difference in Early British Counterinsurgency', 85 *History Workshop Journal* (2018) 1–22.

[62] C. Callwell, *Small Wars. Their Principles and Practice* (Harrison and Sons, 1906).

[63] For a critique, see Anghie and Chimni, *supra* note 20, at 88.

[64] Only three African states (Ethiopia, Liberia and Egypt) participated in the negotiations.

classical inter-state wars in order to be fully internationalized.[65] Wars of national liberation were not accepted as international armed conflicts in 1949. This meant that they remained excluded from individual criminal responsibility under the Geneva Conventions.

The issue of what colonial conflicts come within the ambit of protection governing non-international armed conflict was vividly debated in the negotiation process of the Geneva Conventions. Common Article 3 became a main battleground in the negotiations. In an early draft ('the Stockholm Proposal'), the ICRC listed 'civil war, colonial conflicts, or wars of religion' expressly as examples of 'cases of armed conflict which are not of an international character'.[66] But this wording was not retained. The drafters of the 1949 Geneva Conventions remained reluctant to provide concrete examples, based on concerns regarding the applicability of Common Article 3 to colonial conflicts. The final wording secured the application of minimum standards in civil wars or colonial conflicts. Organizations, such as the Algerian Front de Libération Nationale (FLN), invoked the provision to qualify the French use of torture and summary executions in Algeria as a violation of the international law of war.[67] However, France and Great Britain remained keen to keep the protection as vague as possible and to retain discretion in the scope of application. Portugal made an express reservation to Common Article 3, in which it 'reserve[d] the right not to apply the provisions of Article 3, in so far as they may be contrary to … Portuguese law, in all territories subject to her sovereignty in any part of the world'.[68] The UK only ratified the four Geneva Conventions in 1957, based on fears that the new regime would limit its ability to combat insurgents in anti-colonial struggles. Most of all, the categorization of colonial conflicts as non-international conflicts had the important consequence that there was no individual criminal liability for violations of the Geneva Conventions in such conflicts.

The attempt to model protection after the ideal type of conventional warfare is further reflected in the framing of the Third Geneva Convention. Colonial powers sought to avoid overly strict regulations for the protection of irregular fighters.[69] Article 4A (2) GC III extended prisoner of war status only to 'organized resistance movements, belonging to a Party' of an international armed conflict.[70] This construction excluded most insurgent movements from protection at the hallmark of decolonization.

The correction came very late, in 1977, with Additional Protocol I, which was strongly pushed by the pressure of states from the Global South. The 1970 Friendly Relations Declaration acknowledged that colonies and non-self-governing territories have a distinct and separate status from their colonial rulers.[71] This understanding facilitated the adoption of Article 1(4) AP I, which recognizes that armed conflicts involving peoples 'fighting against colonial domination and alien occupation and against racist régimes in the exercise of their

[65] B. van Dijk, 'Internationalizing Colonial War: on the Unintended Consequences of the Interventions of the International Committee of the Red Cross in South-East Asia, 1945–1949', 250 *Past & Present* (2021) 243–283, at 249.

[66] It read: 'In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries'. See J. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary IV Geneva Convention relative to the Protection of Civilian Persons in Time of War* (ICRC, 1958), at 30; D. A. Elder, 'The Historical Background of Common Article 3 of the Geneva Convention of 1949', 11 *Case Western Reserve Journal of International Law* (1979) 37–69, at 42–43.

[67] The FLN argued in a White Paper that Common Article 3 applied to every internal armed conflict, including the work of 'bandits'. See Jabhat al-Taḥrīr al-Qawmī, *White Paper on the Application of the Geneva Conventions of 1949 to the French Algerian Conflict* (Algerian Office, 1960).

[68] A. de Baets, 'The view of the past in international humanitarian law (1860–2020)', 104 *International Review of the Red Cross* (2022)1586–1620, at 1614.

[69] See B. van Dijk, *Preparing for War. The Making of the Geneva Conventions* (OUP, 2022) at 149–50, 186–187, 192 et seq.

[70] Art. 4A (2) GC III.

[71] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970 ('The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it').

right of self-determination' fall within the scope of international conflicts. It extended legal protection and implied that individual criminal liability for war crimes can also exist in colonial liberation struggles. This provision would have made a significant difference in 1949, when many colonial conflicts were enduring. By 1977, however, the provision was only relevant to a few situations, such as Palestine, South Africa, or Western Sahara.[72]

4. Genocide

The ambiguities and silences of international criminal law regarding colonial criminality are further illustrated by the struggle over the definition of genocide.[73] Raphael Lemkin developed his understanding of genocide partly as a result of critiques of colonial violence[74] and settler colonialism. He regarded genocide as inherently colonial[75] and pointed to synergies between Nazi ideology and coloniality (e.g. asymmetrical relationships of dominance, racist ontology, tabula rasa conception of foreign territories). He had personally witnessed the links between cultural and physical destruction in Poland. He characterized Nazi oppression and Lebensraum policy as 'a system of colonization'.[76] However, this close connection between genocide and settler colonialism[77] was consciously silenced in the drafting of the Genocide Convention.[78] The drafters of the Convention were cautious 'not to criminalize their own behavior'.[79]

In his *Axis Rule in Occupied Europe*, Lemkin had qualified genocide as a multi-layered concept, involving multiple types of genocide (e.g. political, social, cultural, economic, biological, physical, religious genocide).[80] An early draft of the Convention partly reflected Lemkin's broad understanding. It contained different types of genocidal acts: physical genocide ('causing the death of members of a group or injuring their health or physical integrity'), biological genocide (e.g. 'restricting births'), and a wider form of genocide focused on the destruction of the group as social entity ('destroying the specific characteristics of the group').[81] However, the final text of the Convention has largely turned a blind eye on colonial genocide (i.e. colonial practices designed to eliminate native cultures), by failing to recognize 'political groups'[82] and 'cultural genocide'.[83] It modelled the concept of genocide after the experiences of the Holocaust, rather than earlier histories of colonial violence, including slower processes of eliminating indigenous populations, and centred discussions on questions of individual intent, rather than systemic destruction or erasure of group identity.[84]

[72] Baets, *supra* note 68, at 615.

[73] See also Gurmendi Dunkelberg, *supra* note 17.

[74] See e.g., Fitzmaurice, *supra* note 37, at 55; J. Docker, *Raphael Lemkin's History of Genocide and Colonialism* (US Holocaust Memorial Museum, 2004), available online at https://www.ushmm.org/m/pdfs/20040316-docker-lemkin.pdf (visited 11 April 2025).

[75] Lemkin stated in chapter IX of *Axis Rule in Occupied Europe*: 'Genocide has two phases: one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor. This imposition, in turn, may be made upon the oppressed population, which is allowed to remain, or upon the territory alone, after removal of the population and the colonization of the area by the oppressor's own nationals'. See R. Lemkin, *Axis Rule in Occupied Europe* [1944] (Clark, 2005), at 79.

[76] He wrote that the 'occupant has organized a system of colonization of these areas'. *Ibid*., at 83.

[77] M.A. McDonnell and D. Moses, 'Raphael Lemkin as Historian of Genocide in the Americas', 7 *Journal of Genocide Research* (2005) 501–529.

[78] Sixth Committee of the UN General Assembly, Paris, 25 October 1948, UN doc., A/C.6/SR.83.

[79] C. Powell, 'What Do Genocides Kill? A Relational Conception of Genocide' 9 *Journal of Genocide Research* (2007), 527–547, at 532.

[80] Lemkin, *supra* note 75, at 82–90.

[81] See UN document E/447 (1947), in C. J. Tams, L. Berster, and B. Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (C.H. Beck, 2014), Annex 2, 419–423.

[82] B. Van Schaack, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot', 106 *Yale Law Journal* (1997) 2259–2291, at 2268.

[83] E. Novic, *The Concept of Cultural Genocide: An International Law Perspective* (OUP, 2016).

[84] For a recent critique, see F. Albanese, 'Genocide as Colonial Erasure: Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967', UN Doc A/79/384, 1 October 2024.

The battle over colonial genocide became visible in the debate on cultural genocide. The concept was mentioned as a separate article in an intergovernmental draft of the Convention. However, many Western capitals saw the express inclusion of cultural genocide as a potential floodgate for international discussions of their past histories. Decolonization was a divisive issue. Belarus associated the elimination of natives by US and UK policies with cultural genocide.[85] Settler states (USA, Canada, New Zealand, and Australia) and other Western delegations, such as Belgium, Denmark, Sweden, France, the Netherlands, or the UK, rejected the inclusion of cultural genocide in the Convention. Sweden raised the question whether 'the fact that Sweden had converted the Lapps to Christianity might not lay her open to the accusation that she had committed an act of cultural genocide'.[86] Canada had instructions not to vote for the Convention in case of the approval of cultural genocide.[87] France argued that cultural genocide should be protected under the umbrella of human rights law, rather than criminal law.[88] The reluctance of states to engage with cultural genocide was partly guided by the rationale not to open discussions about responsibility for colonial atrocity.

The final version of the Convention neither expressly mentions nor excludes cultural genocide. The crime of 'forcibly transferring children of the group to another group' shows that genocide can involve the destruction of the group as a cultural entity. However, it is the only explicit mention. As a result, the concept of cultural genocide played only a marginal role in international criminal law. It returned in the 1990s, but primarily in the area of human rights, namely Article 7 (2) of the UN Declaration on Indigenous Rights,[89] rather than in the context of the Genocide Convention.

Internationally, the Genocide Convention became the first treaty adopted by the General Assembly, which contained an express colonial clause (Article XII).[90] The clause was proposed by the UK. It provides that states 'may extend the application of the Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible'.[91] Ukraine challenged the inapplicability of the Convention to colonial territories, arguing that 'peoples of non-self-governing territories were most likely to become the victims of acts of genocide'.[92] Russia argued 'that it is not in agreement with Article XII of the Convention' and that it 'considers that all provisions of the Convention should extend to Non-Self-Governing Territories, including Trust Territories'.[93] It entered a reservation to that effect. However, ultimately, the clause was retained. It marginalized links between

[85] It stated that the 'North American Indian had almost ceased to exist in the United States' and that in 'colonial territories too there were no signs that indigenous culture was being developed and encouraged'. See J. Morsink, 'Cultural Genocide, the Universal Declaration, and Minority Rights', 21 *Human Rights Quarterly* (1999) 1009–1060, at 1048.

[86] Sixth Committee of the General Assembly, Summary Record of Eighty-Third Meeting, 3rd sess., UN Doc A/C.6/SR.83, 25 October 1948, 197 (Mr Petren, Sweden).

[87] P. Akhavan, 'Cultural Genocide: Legal Label or Mourning Metaphor?' 61 *McGill Law Journal* (2016) 243–270, at 260.

[88] Sixth Committee of the General Assembly, Summary Record of the Sixty-Third Meeting, 3rd sess., UN Doc A/C.6/SR.63, 30 September 1948, 8 (Mr Chaumont, France).

[89] An early draft of Article 7 stated that 'Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide'. See Report of the Working Group on Indigenous Populations on its Eleventh Session, UN Doc E/CN.4/Sub.2/1993/29, Annex 1, Art 7. Canada, Chile and the USA expressed reservations to the use of the concepts of 'ethnocide' and 'cultural genocide'. The formulation was softened in the final version, which is closer aligned to the Genocide Convention. It reads: 'Indigenous peoples […] shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group'. See S. Pruim, 'Ethnocide and Indigenous Peoples: Article 8 of the Declaration on the Rights of Indigenous Peoples' 35 *Adelaide Law Review* (2014) 269–308.

[90] J.S. Bachman, *Cultural Genocide* (Routledge, 2019), at 51–53.

[91] Art XII Genocide Convention.

[92] See H. Abtahi and P. Webb, *The Genocide Convention: The* Travaux Préparatoires (Martinus Nijhoff Publishers, 2008), at 1816.

[93] See Genocide Convention, Declarations and Reservations, Russian Federation ('The Union of Soviet Socialist Republics declares that it is not in agreement with article XII of the Convention and considers that all the provisions of the Convention should extend to Non-Self-Governing Territories, including Trust Territories').

colonialism and genocide. In post-World War II practice, the Convention was invoked as decolonial instrument in the context of racial oppression in the USA, such as the 1951 petition 'We Charge Genocide: The Crime of Government Against the Negro People'[94] or in the context of the French colonial crimes in Algeria (e.g. by Algerian jurist Mohammed Bedjaoui[95] or intellectuals like Jean-Paul Sartre[96]). However, it never gained the central role that it could have played in relation to colonial crimes.

5. Apartheid and Colonialism

The adoption of the crime of apartheid in the 1970s captured some of the features of systematic oppression and racial domination, which are characteristics of colonial injustice, particularly in settler colonial contexts. It essentially criminalized certain forms of the denial of self-determination, that is 'systemic and structural forms of discrimination that destroy equality and freedom'[97] under the label of apartheid. The crime was first listed in the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity[98] and then criminalized as a crime against humanity in the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid.[99] However, like genocide, it was largely dissociated from colonial contexts in practice.

Major Western powers, such as the USA, the UK, France, Germany, Canada, Australia, Italy, and Spain, failed to become parties to the Apartheid Convention. The specific intent requirement of the Convention sets a high threshold for prosecution.[100] Perpetrators are deemed to act with the specific purpose of maintaining the respective regime. This was done on purpose.[101] For instance, in the negotiations, the USA sought to exclude punishment of racist views or policies of radical private actors, such as white supremacist groups, from criminal responsibility.[102] In 1977, Australia opposed the inclusion of the 'practices of apartheid' into the list of grave breaches of Additional Protocol I, on the ground that it introduces 'political ideologies, hateful as they might be, into the system of grave breaches' and distorts humanitarian law.[103]

In practice, the crime remained a 'dead letter', despite its later inclusion into the Rome Statute.[104] Some argued that the concept of apartheid was specific to the South African context, that is a purely South African phenomenon, and that the crime had lost its relevance with the end of the South African apartheid regime. Calls to extend it to other contexts, such as Israeli settlement policies in Palestine, have historically witnessed fierce resistance. In the

[94] W.L. Patterson (ed.), *We Charge Genocide: The Historic Petition to the United Nations for Relief from a Crime of the United States Government against the Negro People* (Civil Rights Congress, 1951).

[95] See M. Bedjaoui, *Law and the Algerian Revolution* (International Association of Democratic Lawyers, 1961), at 207.

[96] J-P. Sartre, 'On Genocide', 48 *New Left Review* (1968) 11–21.

[97] K. Ambos, 'Criminal "Apartheid" in the Occupied Palestinian Territory?' 47 *Fordham International Law Journal* (2024) 485–545, at 506.

[98] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968, Art. 1.

[99] International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, Art. 1.

[100] *Ibid.*, Art. 2 ('for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them').

[101] Ambos, *supra* note 97, at 536.

[102] T. McCormack, 'Crimes Against Humanity', in D. McGoldrick, P. Rowe and E. Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart, 2004) 179–201, at199–200.

[103] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977), Official Records, Vol IX, CDDH/I/SR.64, at 307; Summary record of the 64th meeting, 7 June 1976, at 310, §28.

[104] Roger Clark argued that apartheid serves as 'affirmation, exclamation or denunciation rather than a string in the prosecutorial bow'. See *ibid.*; F. Pocar, 'Crimes against Humanity and the Rome Statute of the International Criminal Court', in M. Politi and G. Nesi (eds), *The Rome Statute of the International Criminal Court—A Challenge to Impunity* (Ashgate, 2001) 75–94, at 88.

legal arena, there was hardly any judicial practice, even in post-Apartheid South Africa itself. This has created 'an asymmetry' between the 'near universal condemnation of apartheid as a crime against humanity' and the 'lack of prosecutions of individuals'.[105]

Colonization itself was branded as a human rights violation in the UN context,[106] but not recognized as a crime. In the 1980s, ILC Special Rapporteur Doudou Thiam sought to define the subjection of a people to colonial domination as a crime in the Draft Code of Offences against the Peace and Security of Mankind.[107] However, this proposal was rejected by Western powers. For instance, the UK argued that 'colonial domination' and 'alien domination' do not possess the 'requisite legal content necessary' for inclusion in a code of crimes and present 'an outmoded concept redolent of the political attitudes of another era'.[108]

3. CONTEMPORARY LEGAL RUPTURES

Over the past two decades, some of these silences and structural obstacles have come under challenge. In legal practice, they have been addressed in different ways, namely through (i) the semantic recognition of colonial crimes as international crimes from a contemporary perspective and (ii) the establishment of state responsibility, based on recognition of past wrong.

A. Semantic Recognition as International Crime from a Contemporary Perspective

The first approach uses international criminal law as language, without necessarily conceding actual breaches of the law in the past. It is reflected in the Durban Declaration, which determined that the 'slave trade is a crime against humanity' and 'should always have been so'.[109] It recognized that past wrongs, such as transatlantic slavery,[110] constitute an international crime from a contemporary perspective, but left it open whether it was already criminalized according to the law of the time. It thereby acknowledged past wrong and deplored its lack of criminalization, but rendered it invisible in legal terms.[111]

This technique is also common in declaratory memory laws, such as the French Loi Taubira. It retroactively acknowledged the slave trade as a crime against humanity, without providing a basis for slavery reparation claims.[112] In May 2021, Germany and Namibia adopted a similar approach in their Joint Declaration regarding German colonial crimes

[105] G. Kemp and W. Nortje, 'Prosecuting the Crime against Humanity of Apartheid', 21 *JICJ* (2023) 405–430, at 429. In South Africa, apartheid was charged for the first time as a crime against humanity under customary international law against two defendants in the COSAS Four Case, brought more than four decades after the facts. See High Court of South Africa, *State v Mfalapitsa and Rorich*, Case No. SS70/2021, 14 April 2025, available online at https://groundup.org.za/media/uploads/documents/apartheid_crimes_against_humanity_judgment.pdf (visited 4 June 2025). See M. Jackson and H. Woolaver, 'Apartheid on Trial: The COSAS 4 Prosecution and the Direct Application of Customary International Law in South Africa', *EJIL: Talk!*, 1 May 2025, available online at https://www.ejiltalk.org/apartheid-on-trial-the-cosas-4-prosecution-and-the-direct-application-of-customary-international-law-in-south-africa/ (visited 4 June 2025).

[106] GA Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, 14 December 1960, § 1.

[107] See ILC, First Report on Draft Code of Offences Against the Peace and Security of Mankind, UN Doc A/CN.4/364, 18 March 1983, § 44.

[108] See ILC, Yearbook of the International Law Commission, 1993, Vol. II(1), Draft Code of Crimes Against the Peace and Security of Mankind, Comments and Observations received from Governments, A/CN.4/448 and Add. 1, at 101.

[109] Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Declaration, A/CONF.189/12 (2001), §13.

[110] E. Haslam, 'Writing More Inclusive Histories of International Criminal Law: Lessons from the Transatlantic Slave Trade', in Tallgren and Skouteris, *supra* note 23, 130–144.

[111] Barbados (also speaking on behalf of Belize, Cuba, Guyana, Haiti, Honduras, Jamaica, Saint Vincent and the Grenadines and Trinidad and Tobago) made a 'reservation' to the framing of para. 13 and declared 'that the transatlantic slave trade and the related system of racialized chattel slavery of Africans and people of African descent constitute crimes against humanity'. See Report, *supra* note 109, at 128.

[112] Cour de Cassation, Chambre civile (17 April 2019), ECLI: Fr : CCass: 2019 : C100376; Cour de cassation, Chambre civile (5 July 2023), ECLI : Fr : CCass : 2023: C100466.

against the Nama and OvaHerero peoples.[113] The German Government admitted that 'that the abominable atrocities committed during periods of the colonial war culminated in events that, from today's perspective, would be called genocide'.[114] But it then framed its responsibility for 'the genocidal conditions between 1904 and 1908' as a 'moral responsibility' that triggers a 'historical and political obligation to tender an apology' and 'provide the necessary means for reconciliation and reconstruction'.[115] The concept of 'historical genocide' thereby avoided the recognition of legal responsibility and created 'a temporal and normative distance' to the past.[116]

This strategy contrasts with the approach taken by the National Inquiry into Missing and Murdered Indigenous Women in Canada, which introduced a distinct concept of 'colonial genocide'[117] to qualify the violence against First Nations, Inuit and Metis women and children. It conceded that '[c]olonialism is a unique form of violence that does not fit easily in the international legal definition of the crime of genocide',[118] since it has 'taken place insidiously and over centuries'.[119] It then qualified colonial genocide as an unlawful 'composite act' of the state within the meaning of Article 15 of the Draft Articles on State Responsibility, which endured over decades and was 'composed of numerous distinct acts and omissions which, in aggregate, violate the international prohibition against genocide'.[120]

B. State Responsibility for Colonial Crimes through Civil Litigation

The second approach goes beyond a semantic recognition of colonial violations as crimes. It is a 'civil',[121] rather than a classical criminal type of responsibility. It recognizes legal responsibility in the present, based on the qualification of historical crimes as an international wrong. It relies on the premise that certain international crimes, which involve state behaviour, such as aggression, genocide, crimes against humanity, war crimes or torture, entail both state responsibility and individual responsibility.[122] Legally, the focus on state responsibility is often the only option for victims, survivors or their descendants to seek redress for colonial crimes, since it is no longer factually possible to prosecute individual perpetrators.[123] The recognition of past atrocities as legal crimes, coupled with a duty to provide reparation, is the closest approximation of the concept of 'state crime' which has gained

[113] Joint Declaration by the Federal Republic of Germany and the Republic of Namibia 'United in Remembrance of Our Colonial Past, United in Our Will to Reconcile, United in Our Vision of the Future', 15 May 2001.

[114] *Ibid.*, Art. 10.

[115] *Ibid.*, Art. 11.

[116] S. Graf, 'Law, Time, and (In)justice After Empire: Germany's Objection to Colonial Reparations and the Chronopolitics of Deflection', 28 *International Theory* 1 (2025)1–28, at 16.

[117] For a critique, see J. Zimmerer, 'Colonial Genocide? On the Use and Abuse of a Historical Category for Global History', in J. Zimmerer (ed.), *From Windhoek to Auschwitz?: Reflections on the Relationship between Colonialism and National Socialism* (De Gruyter, 2024), 175–198, at 196 ('The disadvantage of setting up colonial genocide as an independent category lies in the danger of semantically detaching cases of genocide that occurred in the colonial context from the history of intra-European genocide').

[118] National Inquiry into Missing and Murdered Indigenous Women in Canada, Supplementary Report, 'A Legal Analysis of Genocide (2019), 9.

[119] *Ibid.*, at 9.

[120] *Ibid.*, at 10.

[121] M. Loth, 'How does Tort Law deal with Historical Injustice? On Slavery Reparations, Post-Colonial Redress, and the Legitimations of Tort Law', 11 *Journal of European Tort Law* (2020) 181–207; N. Wentholt and N. Immler, 'How Tort Can Address Historical Injustice', 52 *Netherlands Journal of Legal Philosophy* (2023) 189–210.

[122] A. Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law', 52 *ICLQ* (2003) 615–640, at 618–619.

[123] The advantage of this approach is that it brings the collective dimensions of responsibility closer into the picture, rather than narrowing responsibility to the agency of individuals who carry out a state policy, as reflected in the Nuremberg dictum ('crimes are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'). See IMT, Judgment, *supra* note 54, Vol. 1, at 249.

attention in the sociological literature on colonial injustice,[124] but has failed to get recognition as a legal category.[125] It has been applied to specific episodes of colonial violence in the post-World War II era.

A key precedent is the Mau litigation (*Mutua et al. v. FCO*) regarding colonial torture before the British High Court.[126] It established liability for torture committed by British colonial officers in Kenyan detention camps between 1952 and 1961. Claimants relied on the prohibition of torture and violations of Common Article 3 of the Geneva Conventions in order to establish responsibility. In the judgment, Judge McCombe confirmed that 'torture and genocide are regarded with particular revulsion: crimes against international law which every state is obliged to punish wherever they may have been committed'.[127] He accepted the idea that the UK violated its duty of care, arising from 'a specific international duty' to protect against torture.[128] As a result of the litigation, the British government recognized that 'Kenyans were subject to torture and other forms of ill treatment at the hands of the colonial administration' and agreed to pay a settlement sum of £19.9 million in damages to 5228 claimants.[129]

The Dutch compensation cases (*Rawagade & South Sulawesi*) concerning crimes committed during the Indonesian war of independence (1945–1949) mark a second example.[130] The Dutch government initially denied the applicability of the 1949 Geneva Conventions. It treated the conflict as an internal matter and qualified crimes as police actions or 'excessive forms of violence'. In 1971, the state adopted legislation that limited the non-applicability of statutes for limitations for war crimes and crimes against humanity committed during World War II to crimes by enemies or Dutch nationals who entered the service of the enemy.[131] The Dutch government thereby enabled its own continued prosecution of World War II crimes, but excluded crimes committed by Dutch military forces in the period 1945–1949 from the general lifting of statutes of limitation.[132]

In an important judgment in 2019, the Hague Court of Appeal overturned this protection and awarded compensation for summary executions by Dutch military forces in South Sulawesi. The Court clarified that the summary executions constituted gross violations of human rights, which were unlawful according to the law applicable at the time. The Court held that nowadays there is a higher law, derived from principles in international instruments, which reflects a 'national and international consensus that the right to prosecute war crimes and crimes against humanity cannot prescribe'.[133] This reasoning points towards a

[124] M. Nielsen and L. Robyn, *Colonialism Is Crime* (Rutgers University Press, 2019), at1 ('[c]olonialism is a classic state crime that relies on violence and the threat of violence to achieve political and economics ends').

[125] Former Art. 19 of the ILC's Draft articles initially drew a distinction between crimes and delicts that was later abandoned.

[126] D. Hovell, 'The Gulf between Tortious and Torturous: UK Responsibility for Mistreatment of the Mau Mau in Colonial Kenya', 11 *JICJ* (2013) 223–245.

[127] High Court of Justice, *Mutua et al. v. FCO*, [2011] EWHC 1913 (QB), 21 July 2011, § 153.

[128] *Ibid*., §156, 159.

[129] Foreign and Commonwealth Office, 'Statement to Parliament on settlement of Mau Mau claims', 6 June 2013, available online at https://www.gov.uk/government/news/statement-to-parliament-on-settlement-of-mau-mau-claims (visited 11 April 2025).

[130] District Court of the Hague, *Wisah Binti Silan et al v. The State of The Netherlands*, Case no 354119/HA, ZA 09-4171, 14 September 2011. See L. van den Herik, 'Addressing 'Colonial Crimes' Through Reparations? Adjusting Dutch Atrocities Committed in Indonesia', 10 *JICJ* (2012) 693-705; C. Lorenz, 'Can a Criminal Event in the Past Disappear in a Garbage Bin in the Present?' in M. Tamm (ed.), *Afterlife of Events* (Palgrave Macmillan, 2015), 219–241.

[131] Lorenz, *supra* note 130, at 229.

[132] France adopted a similar approach, by limiting the inapplicability of statutes of limitations to crimes against humanity in Europe. Id., 229–230.

[133] Hague Court of Appeal, *Children of executed men in South-Sulawesi v The Netherlands*, Case No. 200.243.525/01, 1 October 2019, para. 15.2, fn 12. The Court referred to the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, UN General Assembly resolution 2391 (XXIII) of 26 November

general inapplicability of statutory limitations in the context of reparation claims concerning war crimes and crimes against humanity committed after World War II.

The Métis decision of the Brussels Court of Appeal decision stands in this line of cases, which have established state responsibility for colonial crimes committed in the post-World War II era through civil litigation. It makes important contributions to the development of responsibility for colonial crimes, but also contains weaknesses and contradictions.

4. MERITS AND LIMITATIONS OF THE *MÉTIS* DECISION

The Métis ruling is historic, since it clarifies the scope of responsibility for crimes against humanity, which has been left open by previous cases.[134] It challenges the traditional argument that colonial crimes do not qualify as international crimes, since they were committed in the grey zones of emerging human rights norms and newly developing criminal prohibitions after World War II.

The five plaintiffs, born between 1948 and 1952, initiated legal proceedings against the Belgian state before the Tribunal of first instance in Brussels, in order to seek redress. The Belgian state contested the qualification of the policy as a crime against humanity and argued that the claims were barred by statutes of limitation. On 8 December 2021, the Brussels Court of First Instance rejected the action.[135] It used the 'standard of the time' argument that has often been invoked to deny accountability.[136] It argued that the abduction of children would constitute a crime against humanity from today's perspective, but claimed that there was sufficient basis at the law of the time, since Belgium lacked domestic legislation for crimes against humanity.[137] It held that crimes against humanity lacked a clear customary prohibition, based on the absence of a treaty-based definition and their ambiguous and changing content in legal instruments.[138] The Appeals Court overturned the ruling and granted compensation to the plaintiffs. The decision has both innovative features and weaknesses.

A. Advances

The most important contribution of the ruling lies in the fact that it challenges the colonial veil of the past and confirms the applicability of crimes against humanity law to Belgian colonial policy. It openly recognizes that the Belgian state planned and implemented a criminal policy based on racist grounds[139]—which is in itself an important form of satisfaction.

Second, the decision deviates from the narrow, formalistic approach of the Tribunal of First Instance. The Appeals Court clarified that it is not sufficient to look only at treaty-based instruments in order to determine the legal foundations of responsibility for colonial crimes. Judges emphasized that it is necessary to take a holistic approach, namely to consider international law in its entirety,[140] including more flexible principles of international law—even if they are harder to determine. Based on this, they found that the abduction of

1968 and the European Convention on the non-applicability of statutory limitation to crimes against humanity and war crimes of 25 January 1974.

[134] For instance, Dutch Courts have failed to answer the question whether the Rawagade massacre qualifies as a crime against humanity. See Lorenz, *supra* note 130, at 230.

[135] Tribunal of First Instance of Brussels, 4th Civil Chamber, Judgment, 2020/4655/A, 8 December 2021.

[136] Judges noted that 'the policy of placing children in religious institutions for racial reasons was not, between 1948 and 1961, considered by the community of states to be a crime against humanity and criminalized as such'. *Ibid.*, at 16.

[137] *Ibid.*, at 11.

[138] *Ibid.*, at 12.

[139] Court of Appeal of Brussels, *supra* note 11, § 44.

[140] *Ibid.*, § 34.

children below the age of 7 years was banned as a crime against humanity for all nations, at least as of 11 December 1946, when the General Assembly affirmed the Nuremberg principles, including crimes against humanity under Article 6(c) of the Nuremberg Charter.

Third, the ruling discards the logic that the nexus requirement of crimes against humanity at Nuremberg could be used as a shield by colonial powers to absolve themselves from responsibility under international law. By emancipating crimes against humanity from other crimes and reading the nexus as a Nuremberg-specific jurisdictional requirement, it challenges the idea that Western powers are enlightened human rights defenders who stand above the law and can adjust accountability to their own preferences. It explains the applicability of crimes against humanity in peacetime, which is crucial for colonial contexts, by an innovative argument, namely the idea that it would be contradictory to find that inhumane acts, which are prohibited in wartime, are permissible in peacetime.[141] Here, the reasoning borrows implicitly from the spirit of the 1995 *Tadić* Interlocutory Appeal.[142]

Fourth, the case illustrates that the category of crimes against humanity is a suitable frame to capture colonial violence. The concept criminalized 'politically organized persecution and slaughter of people under one's own political control'.[143] As Wouter Veraart has argued in the context of accountability for the transatlantic slave trade, the concept of crimes against humanity makes it easier to confront challenges of *nullum crimen sine lege* in relation to historical crimes, since it has

> from its inception been a concept designed to criminalize and disqualify precisely those acts, even if of a legal nature and perpetrated in accordance with domestic legalities, which are committed against a civilian population and violate fundamental legal principles, such as the freedom and equality before the law of every human being.[144]

A 'retroactive application' of the crime does therefore not turn it 'into a natural law concept', if it can be 'shown that the violated legal principles were already part of existing law (*lex lata*) at the time the atrocities were committed'.[145]

This has important repercussions for the treatment of colonial violence, which has been shaped by competition and mimicking each other's behaviour by colonial powers. It makes it hard to exclude responsibility through the argument that the relevant conduct did not constitute a crime under colonial law, or to point to the fact that similar policies and practices were carried out by other colonial powers. The Court made this point expressly in response to the Belgian argument that France applied similar policies towards Métis children.[146]

The decision further makes certain advances in the clarification of statutory limitations applicable to crimes against humanity, echoing in part the previous Dutch jurisprudence in relation to crimes in Indonesia. Existing treaty instruments, such as the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity or 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes, and even Draft Article 6 (6) of the Draft Articles on Prevention and Punishment of Crimes against Humanity[147] leave it open to what extent the

[141] Court of Appeal of Brussels, *supra* note 11, § 35.

[142] Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1-AR72), Appeals Chamber, 2 October 1995, § 119 ('What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife').

[143] D. Luban, 'A Theory of Crimes against Humanity', 29 *Yale Journal of International Law* (2004) 85–167, at 94.

[144] Veraat, *supra* note 10, at 224.

[145] *Ibid.*, at 224.

[146] Court of Appeal of Brussels, *supra* note 11, § 42.

[147] It reads 'Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall not be subject to any statute of limitations'.

non-applicability of statutes of limitations applies not only to criminal, but also to civil, administrative or other proceedings. In *Órdenes Guerra et al.*, the Inter-American Court of Human Rights held that there is no reason to apply a different standard for 'civil actions for damages for acts characterized as crimes against humanity' and that such 'actions should not be subject to the statute of limitations'.[148] The plaintiffs followed this line of argument. They claimed that their civil claim is not barred by statutory limitations since the underlying crime is imprescriptible.[149] The Brussels Court took this into account as one hypothesis.[150] It recalled that the rule that crimes against humanity 'cannot be time-barred' was laid down by 'the Charter of the Nuremberg International Tribunal'[151] and ultimately rejected the Belgian argument that the timeline for civil claims expired before the date of Congo's independence.[152]

B. Weaknesses and Blind Spots

The reasoning of the Court has, at the same time, inherent weaknesses. The ruling is not very clear in its articulation of the elements of crimes against humanity. The decision does not enter into a discussion of customary foundations of crimes against humanity. It remains superficial in its treatment of specific elements of persecution and other inhumane acts.[153] This may be explained by the fact that it is a civil, rather than a criminal case.

It is easy to establish that the involuntary separation of Métis children from their mothers, their confinement in religious institutions or shelter homes, and the erasure of their identity qualify as a form of persecution on racial grounds.[154] Persecution as a crime sanctions abhorrent forms of discrimination. The Nuremberg Charter was the first instrument that listed persecution expressly as a crime against humanity. Although the IMT judgment did not provide much guidance, in Nuremberg practice, acts of persecution against Jews were shown in different ways, namely through attacks on freedom and physical and mental integrity, such as extermination, deportations or forced transfer, confinement in ghettos or forced labour, and through violations of political, economic and social rights, such as public stigmatization, discriminatory laws excluding Jewish participation in public life (e.g. denial of professional and educational opportunities), restrictions of liberty and movement, property confiscations, and limitations of family rights.[155] Both elements are reflected in the Belgian Métis policies. They involved abduction and restrictions of liberty, as well as restrictions of social rights. The practice was widespread and systematic, carried out deliberately by the colonial administration on the basis of discriminatory legislation and motivated by discriminatory intent, namely to foster racial segregation and uphold the colonial narrative of White superiority.

It is less clear what elements led the Court to conclude that these practices also constituted 'other inhumane acts'. Perhaps the best explanation is that the colonial abductions involved a special type of identity-taking and attack on family rights, which bears resemblance with practices of forced disappearance, which involve two elements: abduction or deprivation of liberty by state agents and concealment of the fate or whereabouts of persons.[156] The involuntary removal of children not only split up families but also deprived children of their

[148] IACtHR, *Órdenes Guerra et al.*, Judgment of 29 November 2018, § 89.
[149] Court of Appeal of Brussels, *supra* note 11, § 70.
[150] *Ibid.*, § 71.
[151] *Ibid.*, § 69.
[152] *Ibid.*, § 72.
[153] *Ibid.*, § 47.
[154] J. Vervoort, 'La Belgique face à son passé colonial: l'affaire des enfants métis et la qualification de crime contre l'humanité', 23 *La Revue des droits de l'homme* (2023), at 48–50.
[155] Brady and Liss, *supra* note 50, at 464–465.
[156] See Art. 7(2)(i) ICCSt.

identity. They were declared orphans or children without known fathers. This concealed their whereabouts and social identity. Many children in care were denied access to personal documents, such as birth certificates. Their fate and treatment would have provided an incentive to engage more fully with the gendered dimensions of harm.

The judges also paid limited attention to the concept of continuing crimes.[157] This concept has been recognized in relation to specific categories of crime, such as enforced disappearance[158] or the recruitment and enlistment of children.[159] In practice, it has remained more ambiguous in relation to crimes with a colonial nexus (e.g. transfer of population,[160] enslavement).[161] The plaintiffs expressly relied on the continuing nature of violations in their argument. They argued that the Belgian crimes endured after Congo's access to independence, based on the 'lived deracination' of children and their lack of access to administrative documents.[162] The close parallels to enforced disappearance would have provided an opening for the Court to address the question of to what extent the Belgian Métis policy was a continuing crime, which endured from the time of the involuntary removal of children until the disclosure of their whereabouts and identity by state agents. The Court failed to engage sufficiently with the special nature of the crime, warranting its qualification as another inhumane act. It stated that the abduction and lack of access to administrative documents or Belgian nationality are distinct facts.[163] This is a missed opportunity.

Most fundamentally, the reasoning remained entrenched in a Eurocentric vision of international law. Through its strong focus on GA Resolution 95 (1) and its reaffirmation of the Nuremberg Principles, and by treating Nuremberg as a clear-cut legal turning point, the ruling essentially confirms the idea of a Eurocentric conception of international law that was part of the structural problem of coloniality. The decision did not engage with the structural connections between the Holocaust and colonial crimes that were emphasized by voices like Lemkin and central to recognition of new concepts such as genocide and crimes against humanity. It silences earlier recognitions of crimes against humanity and structural continuities between colonial crimes and Nazi criminality. This understanding is open to critique from decolonial perspective.

As historical scholarship has shown, the law of the past was more fluid and pluralistic than acknowledged in formal sources. International law itself was produced by a 'broader range of historical actors in places across the globe'.[164] Lauren Benton has used the notion of 'interpolity law' to recognize this historical diversity.[165] The decision fails to take into account a more polycentric reading of the law in the past. It equates the concept of general principles with the Nuremberg principles, without sufficiently engaging with earlier normative foundations of the concept of crimes against humanity. It does not mention Wheaton's branding of the slave trade as crime against humanity,[166] William's call for accountability of King Leopold, the impact of the Martens clause, which recognized the 'laws of humanity

[157] It requires an ongoing course of conduct that causes a harm and a protected legal interest that continues to be infringed over time. See U. Yasar Aysev, 'Continuing or Settled? Prosecution of Israeli Settlements under Art. 8(2)(b)(viii) of the Rome Statute', 20 *The Palestine Yearbook of International Law Online* (2020) 33–83, at 49–50.

[158] M. Neuner, 'The Notion of Continuous or Continuing Crimes in International Criminal Law', in Bergsmo, Kaleck and Hlaing (eds), *supra* note 20, 123–173, at 142–146.

[159] Judgment pursuant to Article 74 of the Statute, *Lubanga* (ICC-01/04-01/06), Trial Chamber I, 14 March 2012, § 618.

[160] Neuner, *supra* note 158, 164–166.

[161] A. Nissel, 'Continuing Crimes in the Rome Statute', 25 *Michigan Journal of International Law* (2004) 653–689.

[162] Court of Appeal of Brussels, *supra* note 11, § 73.

[163] *Ibid.*, § 74.

[164] L. Benton, 'Made in Empire: Finding the History of International Law in Imperial Locations: Introduction', 31 *LJIL* (2018) 473–478.

[165] L. Benton and A. Clulow, 'Empires and Protection: Making Interpolity Law in the Early Modern World', 12 *Journal of Global History* (2017) 74–92.

[166] See *supra* note 7 and *supra* note 40.

and the requirements of the public conscience of the Preamble as *lex non scripta*, i.e. as law'[167] or discussions on 'Offences against the laws of humanity' at the Paris Peace Conference.[168] It overlooks the fact that the underlying foundation of crimes against humanity, namely its protection of 'humanness', has a much longer origin. Many of the constituent acts of the crime have a basis in domestic laws or in non-Western practices and unwritten norms.[169] This pluralism and the universal foundations of the concept were concealed by the 'standard of civilization' and the discriminatory limitation of the notion of general principles of law to principles 'recognised by civilised nations' in 1920 by Article 38 (3) of the Statute of the Permanent Court of International Justice.[170] The ruling fails to disentangle this structural contradiction.

Methodologically, it is impossible to provide a just account of the law of the past without engaging with the contested framing of international law in the colonial period and the voice of those affected by it. The decision omits this crucial perspective. It repeats anachronistic and discriminatory semantics, such as the notion of 'civilized nations',[171] without distancing itself from such vocabulary. It reads the applicable law through the perspective of a Belgian treatise from 1954 (Stefan Glaser's *Introduction à l'étude du droit international penal*).

Last but not least, the ruling does not address the 'Elephant in the room', namely, to what extent colonization itself qualifies as a structural form of injustice. Colonization is, in many respects, the 'root cause' that served as a cover to conceal atrocity violence. In the context of the holocaust, this structural nature of injustice was used to justify broader readings of intertemporality[172] when engaging with applicable law or even exceptions to intertemporal rule. For instance, Gustav Radbruch famously argued that the principle of legal certainty and non-retroactivity needs to be balanced against the principle of justice in the context of intolerably unjust laws, such as discriminatory Nazi laws.[173] As Tendayi Achiume has argued, a similar logic may be necessary to deal with colonial injustice,[174] in order to prevent lawyers from becoming complicit in 'the application of neocolonial law'[175] when they apply the intertemporal rule. This approach was partly reflected in the Dutch compensation decisions related to crimes in Indonesia, which argued that it would be contradictory to allow a state to rely on statutes of limitations in cases where the state prevented victims from bringing claims through its own legislation. Unfortunately, the Métis decision does not take up this fundamental issue in its discussion of the applicable law or statutes of limitation. This limits the value of the decision as precedent for colonial crimes committed prior to or during World War II.

[167] Bohuslav Ecer made this point in the context of the deliberations of the UN War Crimes Commission in 1944, see Additional Note, 12.05.1944, UNWCC III/4, p. 4, https://www.legal-tools.org/doc/6335bd (visited 11 April 2025). He regarded 'crimes against humanity committed because of race, religion and nationality … as the real cause of all the other crimes, as the source of the war, as the malum in se'. *Ibid*., at 7.

[168] Von Lingen, *supra* note 5, at 196.

[169] R. Atadjanov, *Humanness as a Protected Legal Interest of Crimes Against Humanity* (Springer, 2019).

[170] Art. 38(3) Statute of the Permanent Court of International Justice.

[171] Court of Appeal of Brussels, *supra* note 11, §§ 34–35.

[172] A. von Arnauld, 'How to Illegalize Past Injustice: Reinterpreting the Rules of Intertemporality', 32 *EJIL* (2021) 401–432.

[173] He stated: 'Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the law is not merely "flawed law", it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice'. See G. Radbruch, 'Statutory Lawlessness and Supra-Statutory Law (1946)', 26 *Oxford Journal of Legal Studies* (2006) 1–11, at 7.

[174] See Von Arnauld, *supra* note 172; Stahn, *supra* note 22.

[175] *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and racial intolerance*, A/74/321, 21 August 2019, §50.

5. NOT A CONCLUSION

The Métis judgment is imperfect in many ways. It treats colonial crimes as events, rather than as a structural problem. It confirms critiques that international criminal law provides only a limited and partly inadequate framework to address colonial wrongdoing. The reasoning would deserve to be rewritten from a decolonial or feminist perspective.[176] However, the ruling serves at the same time as a form of liminal justice, which can bring transformation, constitute new discourses and challenge the 'colonial veil'.

An important value of the decision lies in its communicative power.[177] As Michael Rothberg has shown, historical memory works in multi-directional ways.[178] This argument also carries value in the legal space. Legal memory travels in unforeseen and unexpected ways. It has the ability to form new connections that have previously been sidelined. In public opinion, the Métis decision is likely to be remembered for its general finding, namely the applicability of the concept of crimes against humanity to colonial crimes. The qualification of colonial crimes as crimes against humanity defies the often-repeated claim that it is anachronistic to apply the concept of crimes against humanity to colonial wrongs. It counters the myth of 'White innocence'.[179] It challenges the stereotype that colonies are law-free spaces, in which international laws and principles do not apply. It calls into question whether a state can hide from responsibility based on the claim that other colonial powers adopted similar practices. It challenges the particularization of colonial crimes. It raises the fundamental question, to what extent individual crimes can be discussed without critical engagement with the discriminatory macro structures of injustice that facilitated them, and the broader epistemic harms that colonization has created.

The message of the decision has many ramifications for contemporary contexts. It is a vivid reminder that the 'institutionalized' forms of 'systematic oppression and domination' on racial grounds, which have been criminalized in the 1970s under the umbrella of apartheid as a crime against humanity, are by no means unique to the South Africa, but part of a longer, structural pattern in colonial contexts, which continues to produce ongoing effects in the present.[180]

The violence and discrimination that Métis children had to endure illustrate that certain colonial crimes have a continuing character. The facts of the decision reinforce the argument that past conduct may qualify as continuing crime if it is part of an unlawful course of action and/or a condition that persists over time.[181] The interpretation of the conduct element and protected legal interest of crimes may accommodate inter-temporal dilemmas of colonial crimes. For instance, the crime of enforced disappearance provides a means to challenge the silence regarding the fate of 'anti-colonial resistance fighters' and others, who were unduly arrested and detained in colonial contexts and whose identities and whereabouts continue to be concealed.[182] Crimes, such as persecution, enslavement, unlawful imprisonment or apartheid, are not discreet acts, but are grounded in the creation of unlawful conditions. They

[176] M. Burgis-Kasthala and B. Sander, 'Contemporary International Criminal Law After Critique: Towards Decolonial and Abolitionist (Dis-)Engagement in an Era of Anti-Impunity', 22 *JICJ* (2024) 127–150.

[177] See generally C. Stahn, *Justice as Message: Expressivist Foundations of International Criminal Law* (OUP, 2020).

[178] M. Rothberg, *Multidirectional Memory: Remembering the Holocaust in the Age of Decolonization* (Stanford University Press, 2019).

[179] G. Wekker, *White Innocence: Paradoxes of Colonialism and Race* (Duke University Press, 2016).

[180] See Albanese, *supra* note 84.

[181] Crimes such as enslavement, persecution or apartheid are continuing crimes. See Corrigendum to 'Judge Fernández de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Art. 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire', *Situation in the Republic of Côte d'Ivoire* (ICC-02/11-15-Corr), Pre-Trial Chamber III, 5 October 2011, § 69.

[182] *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, A/76/180, 19 July 2021, § 30.

may endure as long as the underlying structural conditions are purposively upheld by state or organizational policy that actively 'promotes or encourages' such crimes in a widespread or systematic manner.[183]

This finding has relevance for ongoing contexts, including the effects of territorial displacements. For example, the ICC OTP has acknowledged in the context of deportation in Myanmar that the 'potential harms' resulting from the denial of a 'right to return' after deportation 'might, in appropriate circumstances, potentially be prosecuted as an aspect of persecution or other inhumane acts'.[184] In 2021, the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 endorsed the view that 'the Israeli settlements constitute a continuing crime'.[185]

From a multi-directional perspective, the ruling provides incentives to re-imagine crimes against humanity from a decolonial perspective or to close gaps in existing frameworks. The categories of persecution and other inhumane acts can be used to capture enduring discrimination or crimes that have lacked a label in the past. The decision reinforces the need to correct blind spots in contemporary legal frameworks, such as the clarification of the non-applicability of statutory limitations to civil proceedings in the ILC Articles on Crimes against Humanity, or the lack of express recognition of the slave trade as slavery crime in the definition of crimes against humanity.[186] For instance, in October 2024, the Permanent Mission of Nigeria to the UN argued in the 6th Committee of the UN General Assembly that the definition of crimes against humanity in the ILC draft should be extended to include 'slave trade, colonialism and the illegal exploitation of resources', since the 'history of over 400 years of slave raiding of strong men, women, including children depriving them of their human dignity, freedom and identity' is 'indeed the highest form of crimes against humanity'.[187] In its Policy on Slavery Crimes, the OTP has taken a first step in this direction by recognizing that it 'will investigate slavery crimes using anti-colonial, anti-racist, anti-ableist and anti-ageist approaches that do not replicate prejudice'.[188] On 16 April 2025, Sierra Leone communicated a draft amendment to the text of Article 7 of the Rome Statute, in order to recognize the 'crime against humanity of the slave trade' separately from enslavement.[189]

Most of all, the decision provides a new way to recognize colonial crimes as wrong within the vocabulary and procedures of contemporary international law, rather than as a distant, silent or unspeakable form of atrocity. This may open new pathways to acknowledge wrongs, address colonial harms and negotiate new forms of relational justice.

[183] See ICC Elements of Crimes, Art. 7, fn. 6.

[184] Prosecution Response to Observations by Intervening Participants, Request under Regulation 46(3) of the Regulations of the Court (ICC-RoC46(3)-01/18), Pre-Trial Chamber I, 11 July 2018, § 30.

[185] *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, A/HRC/47/57, 8 July 2021, § 76.

[186] In the ICC definition of enslavement, the slave trade, that is the intent to bring a person into — or maintain them in — a situation of slavery, is not expressly covered. It could be prosecuted as deprivation of a fundamental right under persecution. In 2023, Sierra Leone proposed to amend the Rome Statute to include 'the slave trade' in crimes against humanity in Art. 7 of the Rome Statute. See Permanent Mission of the Republic of Sierra Leone to the United Nations, Statement by H.E. Mr Amara Sowa at the 6th Committee, 12 October 2023, available online at https://www.un.org/en/ga/sixth/78/pdfs/statements/cah/11mtg_sierraleone.pdf (visited 11 April 2025). See also P. Viseur Sellers and J. Getgen Kestenbaum, 'Missing in Action: The International Crime of the Slave Trade', 18 *JICJ* (2020) 517–542.

[187] Statement by Gloria L. Dakwak, Minister, Permanent Mission of Nigeria to the United Nations, on Crimes Against Humanity, 10 October 2024, §§ 4–5, available online at https://www.un.org/en/ga/sixth/79/pdfs/statements/cah/09mtg_nigeria.pdf (visited 11 April 2025).

[188] OTP, Policy on Slavery Crimes, December 2024, § 96.

[189] See Sierra Leone, Proposal of Amendments, UN Doc C.N.175.2025.TREATIES-XVIII.10, 16 April 2025, available online at https://treaties.un.org/doc/Publication/CN/2025/CN.175.2025-Eng.pdf (visited 4 June 2025). The proposal defined slave trade as 'all acts involved in the capture, acquisition or disposal of a person with intent or knowledge to reduce that person to slavery; all acts involved in the acquisition of an enslaved person with a view to selling or exchanging that person; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged, and, in general, every act of trade or transport of an enslaved person by whatever means of conveyance'.

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