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GENOCIDE
AND POLITICAL
GROUPS

David L. Nersessian

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Genocide and Political Groups

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OXFORD
UNIVERSITY PRESS

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Great Clarendon Street, Oxford OX2 6DP

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide in

Oxford New York

Auckland Cape Town Dar es Salaam Hong Kong Karachi
Kuala Lumpur Madrid Melbourne Mexico City Nairobi
New Delhi Shanghai Taipei Toronto

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Argentina Austria Brazil Chile Czech Republic France Greece
Guatemala Hungary Italy Japan Poland Portugal Singapore
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Published in the United States
by Oxford University Press Inc., New York

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First published 2010

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British Library Cataloguing in Publication Data
Data available

Library of Congress Cataloguing-in-Publication Data
Data available

Typeset by Newgen Imaging Systems (P) Ltd., Chennai, India
Printed in Great Britain
on acid-free paper by
CPI Antony Rowe, Chippenham, Wiltshire

ISBN 978-0-19-958890-9

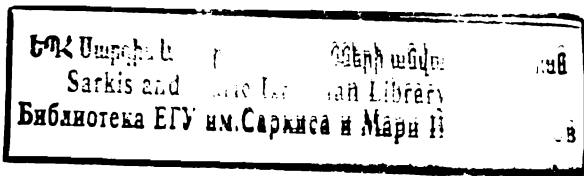
1 3 5 7 9 10 8 6 4 2

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SU0223379

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*For Suzanne
Always the brightest star in my universe.
DLN*

Foreword

The gravest crimes do not always elicit the deepest or clearest thinking. The enormity of the crime of genocide, magnified immeasurably by the fact that it is not an abstract conception but a bloody reality of contemporary life, has been met by an unusually robust response from the international community. More than 140 States have ratified the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, including some States that are generally averse to the kind of compulsory dispute settlement procedures for which that Convention provides. Yet, despite this rare demonstration of support for the aims of the Convention, the content and implications of its provisions are not often analysed in depth.

The Genocide Convention proceeds from the premise that the killing of individuals, motivated not by who they are or what they have done but rather by the accident of their membership of a group is a particularly gross violation of civilized standards, standing out even against the background of the brutality and crudeness of a body of law that is content to regard the killing of non-combatants as being (within limits) collateral damage. For the aim of killing a group is, by definition, an aim which not only fails to respect the objective of distinguishing between combatants and non-combatants but repudiates that distinction entirely. So it is that the Convention declares it a crime under international law to do certain acts, such as killing, or inflicting harsh conditions on a group, with the intention of bringing about the physical destruction of the group in whole or in part. And genocide is committed with the first bullet: the shooting of the first person in pursuit of a policy of genocide is enough to constitute the offence. The curiosity of the Convention is that it only protects certain groups, however. National, ethnical, racial and religious groups alone are singled out for protection, according to the definition of genocide in the Convention.

This produces paradoxical results. Stalin's use of the state apparatus to eliminate 20 million people in the great purges of Kulaks, intellectuals and others deemed unfit for the Soviet paradise; Mao's killings during the Great Leap Forward and the Cultural Revolution; and the killing fields of the Khmer Rouge in Cambodia: none of these counted as genocide, because the victims were defined not by nationality, ethnicity, race or religion, but by other elements of their background or allegiance. They were the victims of what might be called political genocide.

Dr Nersessian pursues two main themes in this study. The first is to ask why political genocide should be excluded from genocide, given that it is an outrage to moral decency which actually occurs—and on a massive scale—and is not obviously morally distinct from other forms of genocide that are forbidden under the 1948 Convention. The second is to analyse precisely what constitutes the crime

of genocide, in terms of the necessary acts and intentions which make up the crime, in order to pin down precisely what the law against genocide is seeking to prevent. From these two threads he weaves a thoughtful and valuable critique of the current law on genocide, arguing that it is no longer adequate to address the forms of mass killing from which the world now suffers.

The book grew out of an Oxford doctoral thesis which we supervised jointly, from our respective viewpoints as a criminal lawyer and an international lawyer. It is a great pleasure to see the text escape the confines of the university library, and be brought before a wider audience.

Andrew Ashworth
Vaughan Lowe
Oxford
January 2010

Acknowledgements

I feel privileged to have had the opportunity to write this book. Over ten years in the making, the journey that led to this publication began when I stumbled across a copy of the Genocide Convention early in my time at Oxford and became fascinated with the short international treaty whose content has so much to say about humanity itself. That chance occurrence—if there is such a thing—marked the beginning of a journey for me not only into a new and exciting area of law, but also into a broad range of interpersonal connections with a great many people on both sides of the Atlantic. In a book that seeks to contribute to our understanding of the fundamental value of human existence in concert with others, I would be remiss not to publicly thank the many individuals who influenced, taught, supported, challenged, and brought out the best in me—both personally and professionally—and thereby enabled this writing to come into existence.

I owe a large debt to my doctoral supervisors, Professors Vaughan Lowe (Chichele Professor of International Law) and Andrew Ashworth (Vinerian Professor of English Law), both fellows of All Souls College at Oxford University. I was fortunate indeed to have had the opportunity to work with two scholars at the top of their fields whose tremendous intellectual capabilities were matched evenly by their genuine commitment to teaching and personal warm-heartedness. I feel truly privileged—twice over—to have worked with them, and their example inspires me even today.

I am grateful to St Catherine's College for providing me with a 'home away from home' for several years and for being everything one could hope for from an Oxford college (and more). The College's Master, Roger Ainsworth, and Emeritus Fellow Wilfrid Knapp in particular have become great friends over the years. I also was the recipient of much sage counsel from my former College advisor, Michael Spence (now Vice-Chancellor and Principal of the University of Sydney). Many thanks as well to Craig Klafter, a fellow Catz alumnus who believed in me from the start and first encouraged me to apply to Oxford while he was Assistant to the President at Boston University. Craig (who now is Pro Vice-Chancellor—External at Oxford Brookes University) has been a great friend and supporter over the years.

I have been fortunate to work with great people in the United States as well. I spent time at Harvard Law School as a Visiting Researcher in the International Legal Studies program, which provided not only the opportunity to work in one of the finest law libraries in the world, but also to become part of a whole new community of students, researchers, and academics. Detlev Vagts (Bemis Professor of International Law, Emeritus) was particularly generous, not only in

sponsoring my time at Harvard, but also in sharing his encyclopaedic knowledge of international law and fifty-plus years of experience in the HLS faculty. More recently, my colleagues at Boston University School of Law provided many helpful refinements as this writing progressed through its final stages.

Last, but hardly least, I want to thank my family for their support, sacrifices, and love. My children, Zach and Nikki, have never known a time where their father was not working, in one form or another, on the research and writing that became this book. My kids are remarkable, delightful, and full of all that is best in life, and I cherish their many teachings about enjoyment, wonder, enthusiasm, and the other important qualities of a life lived well.

There is one person, however, to whom I am grateful above all others: my wife, Suzanne. For many years now, she has been my travelling companion on the road that led to this publication. She has put up with innumerable long days and nights, lost weekends and vacation time, the existential angst that can only strike a doctoral candidate in his early 30s, relocating five times in nearly as many years, solo parenting for weeks on end while I was out of the country researching and teaching, a grumpy husband's 'occasional' bouts of ill temper, and a plethora of other spousal indignities. And yet there she remains, at my side, leaving me at a loss for words to convey how much she enriches my life, how truly inspiring I find her to be, and how grateful I am for her companionship on our journeys together, both past and future.

It is to Suzanne that this book is dedicated.

David Nersessian
Boston
January 2010

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To provide less cumbersome internal citations, books are referenced by author, page and year—eg, Drost 100 (1959). For authors of multiple works, the italicized abbreviation preceding the bibliography description further identifies the volume—eg, *Ashworth, Principles* 100 (1999).

United Nations documents and other international materials are referenced by the underlined abbreviation accompanying the full document citation in the bibliography, together with the document's date and UN document number. Subsequent references to the same document within that chapter are cross-referenced to the footnote containing the initial appearance. Each chapter is self-contained. There are no cross-references to footnotes in preceding or later chapters.

Some parts of this work—later modified and substantially revised—appeared previously in the following journal publications by the author:

'The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals' (2002) 37 *Texas ILJ* 231

'The Razor's Edge: Defining and Protecting Human Groups Under the Genocide Convention' (2004) 36 *Cornell ILJ* 101

'Whoops—I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes' (2006) 30 *Fletcher Forum* 81

'Comparative Approaches to Punishing Hate—The Intersection of Genocide and Crimes Against Humanity' (2007) 43 *Stanford JIL* 221

The masculine pronoun is used herein for the sole reason that it corresponds to the gender of the author.

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Table of Common Abbreviations

Defendant / Accused / Alleged Perpetrator or Offender (in relation to a criminal offence)
United Nations Economic & Social Council
United Nations Human Rights Committee
International Criminal Court
International Court of Justice
International Criminal Tribunal for Rwanda
International Criminal Tribunal for the Former Yugoslavia
International Law Commission
International Legal Materials
International Military Tribunal at Nuremberg
International Military Tribunal for the Far East
Joint Criminal Enterprise
Permanent Court of International Justice
Special Court for Sierra Leone
United Nations
United Nations General Assembly
United Nations Security Council
Victim (in relation to a criminal offence)

Introduction

The Yugoslav diplomat and author Ivo Andrić captured a regrettable phenomenon of human nature in his compelling description of atrocities against Serbs at the start of World War I: 'That wild beast, which lives in man and does not dare to show itself until the barriers of law and custom have been removed, was now set free.'¹ Narratives of the wild beast abound: Turkish massacres of Armenians during World War I, the Holocaust during World War II, and more recent tragedies in Andrić's homeland, where more than 7,500 men and boys were massacred at Srebrenica.² Ten times that number died scarcely two years earlier in Rwanda.³ A decade into the new millennium, massacres and other violence against tribal peoples in Darfur continue to draw worldwide attention and condemnation.⁴

A common term ascribed to such atrocities is 'genocide.' Beginning with the Holocaust, the international community⁵ started treating genocide as fundamentally criminal under international law, rather than an unfortunate by-product of the shadow side of state sovereignty. The crime is defined through the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which specifies that certain enumerated acts against national, ethnic, racial or religious groups are criminal under international law. Participation is extensive: some 141 states have ratified the Genocide Convention and domesticated the offence.⁶ An additional 36 states are either signatories or parties to the ICC Statute, which mirrors the prohibition on genocide in the Genocide Convention.⁷

But a critical (and controversial) decision was made sixty years ago during the drafting process. The Genocide Convention excludes political groups, which limits its protections solely to national, ethnic, racial, and religious collectives. Acts intended to physically or biologically destroy the four enumerated collectives are condemned as 'genocide,' whereas identical criminal conduct—directed

¹ Andrić 282 (1945).

² *Krstić (AC)* [2004] ICTY ¶¶19–21; SR Ratner, 'The Genocide Convention After Fifty Years: Contemporary Strategies for Combating a Crime Against Humanity' (1998) 92 ASILPROC 1, 1 (nearly 100,000 killed throughout the conflict—mostly Bosnian Muslims).

³ C. Cisse, 'The End of a Culture of Impunity in Rwanda?' (1998) 1 YB-IHL 161, 162 (estimated killings of some 800,000 men, women, and children).

⁴ 'Documenting Atrocities in Darfur, Bureau of Democracy, Human Rights, and Labour and the Bureau of Intelligence and Research' (9 Sep 2004) US State Dept Pub No 11182; UNSC Res 1593 (31 Mar 2005) UN Doc S/Res/1593 (referring the Darfur crisis to the ICC).

⁵ Professor Reisman's definition of 'international community' is useful: 'the broadest range of official and unofficial international and national decision makers. . .'. WM Reisman, 'Why Regime Change is (Almost Always) a Bad Idea' (2004) 98 AJIL 516, 520.

⁶ Appendix A, Table IV.

⁷ Appendix A, Table III.

instead at political groups—is not. This leads to anomalous results in international criminal law.

Consider a narrative. Two men lay dead on the floor of Mubuga Church in Rwanda in 1994. One is a ‘politically-moderate’ Hutu, the other an ‘ethnic’ Tutsi. They were massacred at the same time, in the same way, by the same villains and for the same underlying reason (to create a Tutsi-free Rwanda). But international law segregates the irrefutable commonalities of their deaths with legal terminology. One is a victim of genocide; the other is a victim of some other (lesser) crime. The factual reality of their destruction is divided in the courtroom through legal texts of inclusion and exclusion.

This book provides a comprehensive analysis of whether this state of affairs continues to make sense today, if indeed it ever did. It aims to ascertain whether, notwithstanding the decision in 1948, a stand-alone crime of political genocide should be recognized under international law. It critically assesses the legitimacy and wisdom of moving beyond the Genocide Convention’s present text and extending its protections to political groups under the same basic structure.⁸ It does so with a primary focus on individual criminal responsibility, although the related question of state responsibility⁹ also is addressed where appropriate.

The focus on political groups and individual criminal responsibility by no means suggests that the law on genocide is settled in other respects. Far from it. There is much controversy, for example, over the peculiar definition of genocide,¹⁰ other shortcomings of the Convention,¹¹ and the historic absence of international prosecution for the crime.¹² Issues such as the proper forum in which to prosecute

⁸ To provide less cumbersome terminology, conduct against political groups that would constitute genocide against racial, national, religious or ethnic groups is referenced herein as ‘political genocide.’

⁹ The Convention provides for the ‘responsibility’ of states under international law but does not specify whether this liability is civil or criminal in nature. Genocide Convention art IX. The ILC has studied state responsibility—including deeply complex issues of whether states themselves even can commit crimes—for over 50 years: Report of the International Law Commission on the Work of its 51st Session (3 May–23 Jul 1999) UN Doc A/54/10 ¶¶49–53. Ultimately, the ILC dropped the proposed criminal framework in favour of one more closely tied to *ius cogens* norms under the VCLT. Report of the International Law Commission on the Work of its Fifty-Third Session (23 Apr–1 Jun and 2 Jul–10 Aug 2001) UN Doc A/56/10 ¶¶45–49.

¹⁰ Bassiouni, CAH 204 (1999) (querying whether ‘it is logical to have a legal scheme whereby the intentional killing of a single person can be genocide and the killing of millions of persons without intent to destroy the protected group in whole or in part is not covered by the same convention, or at least by another one.’); D Luban, ‘Calling Genocide by its Rightful Name: Lemkin’s Word, Darfur, and the UN Report’ (2006) 7 Chicago JIL 303, 319–20 (advocating modification to include an express alternate reference to the crime against humanity of extermination, ostensibly ‘to bring [genocide] into line with its moral reality.’).

¹¹ *Cf* A Schlogel, ‘Genocide’ in 2 Bernhardt 541 (1993) (criticizing jurisdictional provisions). For an article by article critique, see Robinson 53–118 (1960).

¹² Only at the end of the 20th century did the UN seek direct enforcement of the Convention by including genocide in the mandates of the ICTY and ICTR. Both tribunals were created by the UN Security Council under its Chapter VII powers to address threats to international peace and security. For details on the legal basis for establishing the tribunals, see I Morris and Scharf, *The ICTY* 37–48 (1995) and I Morris and Scharf, *The ICTR* 75–109 (1998). The first criminal

offenders, the basis of asserting jurisdiction over both offender and offence, the role of human rights norms and fair trial procedures, and other similar questions certainly impact the way in which genocide is investigated and prosecuted on the world stage. Significant grey area also remains in matters such as the use of amnesties to end conflicts threatening international peace and security, international cooperation in investigations and evidence-gathering, extradition and rendition, and the enforcement of penalties issued by international tribunals.

All of these issues—and many others—play an important role in the implementation of the prohibition on genocide under international law. But they are well covered elsewhere¹³ and will be put aside here to facilitate a deeper study of human groups, genocide, and political genocide. Background material is limited to what is necessary to underscore the nature of genocide as *sui generis* and to facilitate the application of this unique crime to political collectives.

Given the focus on individual criminal responsibility, the analysis also centres principally on only one of the Genocide Convention's twin aims: punishment. This is not to suggest that preventing genocide is not equally (if not more) important.¹⁴ Indeed, a robust critique has been the international community's historic lack of political will to prevent genocides from occurring in the first place.¹⁵ (The UN clearly held itself directly responsible for its failures to prevent the genocide in Rwanda, for example.¹⁶) But the question of prevention necessarily intertwines with broader questions of *jus ad bellum*, humanitarian intervention,¹⁷ and the

judgment on genocide in an international forum was not rendered until late 1998. *Akayesu (TC)* [1998] ICTR ¶1. Ongoing international enforcement is contemplated through the ICC. ICC Statute arts 5–6.

¹³ Cf Cassese, ICL (2003) and Mettraux (2005).

¹⁴ State responsibility for failing to prevent genocide was discussed extensively by the ICJ in its judgment in the 13-year legal dispute between Bosnia and Serbia. *Application of Genocide Convention—Merits* [2007] ICJ 1.

¹⁵ On the failure to intervene, see Fein (1993) (advocating humanitarian intervention as response to genocide) and IPEP Report (7 Jul 2000) 40 ILM 141, 157–61 (chastising non-intervention), 230–31 (calling for reform). Reform may soon become reality. The Secretary-General has unveiled an action plan to prevent future genocides, which includes the appointment of a Special Advisor for Genocide Prevention. The Special Advisor's tripartite responsibilities include: (i) working with the UN High Commissioner on Human Rights to collect information on existing or threatened genocides; (ii) acting as an early-warning mechanism for the Security Council and other parts of the UN system; and (iii) making recommendations to the UN Security Council on actions to prevent and halt genocide. "Risk of Genocide Remains Frighteningly Real," Secretary-General Tells Human Rights Commission as He Launches New Plan to Prevent Genocide' UN Press Release (7 Apr 2004) UN Doc SG/SM/9197.

¹⁶ Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda (16 Dec 1999) UN Doc S/1999/1257.

¹⁷ There has been some movement toward more precisely defining the grounds justifying the use of force on humanitarian grounds. '2005 World Summit Outcome' UNGA Res 60/1 (15 Sep 2005) UN Doc A/Res/60/1 ¶139 ('The international community, through the United Nations, also has the responsibility... to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter... should peaceful

authorization of force by the UN Security Council,¹⁸ all of which are beyond the scope of the present work.

The need to consider fully—and more importantly to act upon—these issues is great. World events continue to demonstrate that the capacity of human beings to draw upon the most base and violent aspects of their natures is equally potent today as it was when the Genocide Convention was first drafted in 1948. Genocide regrettably remains one of the most vexing social problems of our time. More regrettable still, its spectre looms to threaten our collective tomorrow as well. It is unlikely any time soon that genocide will be referenced as an historic problem for a world that has evolved beyond such violence.

My hope for this book is to make some meaningful contribution to the debate insofar as it relates to the application of the concept of genocide to one important collective—political groups. Whatever the justifications back in 1948, there is little reason to continue to deny the Convention's protections to political groups today. Continuing to do so denies the fundamental reality of the ongoing use of genocide as a barbaric tool to achieve political supremacy.¹⁹ Even as this book goes to press, the death toll of tribal peoples in Darfur continues to mount, even as questions loom about the prosecution of senior government officials for genocide in the International Criminal Court.²⁰

The analysis of genocide and political groups is set forth principally in eight parts. Chapter 1 details the rapid development of genocide from an academic concept to a substantive international crime. Chapter 2 focuses upon the *actus reus* of genocide, outlining both the conduct elements of the offence and the complexities of identifying the contours of protected groups. Chapter 3 addresses the *mens rea* of genocide. It discusses the crime's unique specific intent requirements and analyses the discriminatory targeting of protected groups for destruction.

Chapter 4 analyses whether political groups merit equal treatment to the four groups enumerated in the Genocide Convention. It discusses first what human 'groups' really are and the inherent difficulties of defining them for legal and social purposes. It then proposes a new understanding of groups for purposes of the crime of genocide. This theory links the legal protection of groups to certain

means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.').

¹⁸ G Verdirame, 'The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals' (2000) 49 ICLQ 578, 583 ('Ultimately, the question of an effective prevention of genocide cannot be separated from that of the legality of humanitarian intervention [T]he use of force—either by an individual state or a group of states, or by the Security Council using its Chapter VII powers—is often the only method that can effectively stop or limit the commission of genocidal acts.').

¹⁹ *Al Bashir—Request for Arrest Warrant* [2008] ICC 1, 3 (alleging that 'Al Bashir decided and set out to destroy in part the Fur, Masalit and Zaghawa groups, on account of their ethnicity. His motives were largely political. His pretext was a "counterinsurgency" His intent was genocide.'). (Emphasis added).

²⁰ *Al Bashir (Arrest Warrant—TC)* [2009] ICC 1 ¶¶147–223 (declining to issue arrest warrant on genocide charge); *Al Bashir (Leave to Appeal—TC)* [2009] ICC 1, 5–6 (prosecutor's appeal on genocide issue).

individual rights of a *collective nature* that give rise to the group's existence in this context. This sets the stage for a subsequent analysis that demonstrates that political collectives have many similar characteristics to the existing four groups, such that they likewise should be specifically protected from physical and biological destruction 'as such.'

Chapter 5 addresses the question of whether, as some suggest, political genocide is prohibited *already* by virtue of post-Convention developments in customary international law. It provides the most comprehensive empirical study of state practice and *opinio juris* on genocide and political genocide undertaken to date. This analysis demonstrates conclusively that, although some states criminalize political genocide as a matter of domestic province, there is no basis to conclude that the crime otherwise exists as a free-standing offence under customary international law.

Chapter 6 explores the relationship between genocide and other offences under international law, focusing on crimes against humanity (eg, extermination, torture, and other forms of group violence, as well as unlawful persecution on discriminatory grounds). In some circumstances, crimes against humanity cover similar ground because they outlaw large-scale violence and prohibit serious discrimination based upon membership in certain human groups. The availability of such offences is offered frequently as a sufficient justification not to include political groups within the concept of genocide. Chapter 6 demonstrates that, for a number of reasons, these other crimes are neither a workable nor a sufficient proxy for a separate international prohibition on political genocide.

Chapter 7 discusses why political genocide *should* be proscribed as a separate international crime. It evaluates political genocide in light of the underlying theoretical justifications for international criminal regulation as well as the overall goals of the international criminal justice system. Ultimately, it concludes that the international community should create a separate offence of political genocide to squarely address this conduct.

Chapter 8 explores the manner in which a crime of political genocide might be recognized. It suggests that the optimal way to proceed is through an optional protocol to the 1948 Genocide Convention paired with an amendment to the Statute of the International Criminal Court. It proposes draft treaty language to achieve this end and also explores the political realities and potential objections that must be addressed in order to make the proposed offence a reality.

International criminal law is a rapidly-evolving field, and any publication dealing with it in that sense is aiming at a moving target. My hope is that the state of international and domestic law reflected in this work is current as of early 2010.