William A. Schabas

Genocide in International Law

The Crime of Crimes

SECOND EDITION

CAMBRIDGE

GENOCIDE IN INTERNATIONAL LAW

Second Edition

The 1948 Genocide Convention has become a vital legal tool in the international campaign against impunity. Its provisions, including its enigmatic definition of the crime and its pledge both to punish and prevent the 'crime of crimes', have now been interpreted in important judgments by the International Court of Justice, the *ad hoc* Tribunals for the former Yugoslavia and Rwanda and various domestic courts.

The second edition of this definitive work focuses on the judicial interpretation of the Convention, relying on debates in the International Law Commission, political statements in bodies like the General Assembly of the United Nations and the growing body of case law. Attention is given to the concept of protected groups, to problems of criminal prosecution and to issues of international judicial cooperation, such as extradition. The duty to prevent genocide and its relationship with the emerging doctrine of the 'responsibility to protect' are also explored.

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To my parents, Ann and Ezra

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PREFACE TO THE FIRST EDITION

The legal questions involved in studying genocide draw on three areas of law: human rights law, international law and criminal law. These are all subjects that I have both taught and practised. This alone ought to be sufficient to explain my interest in the subject. But there is more. Of the three great genocides in the twentieth century, those of the Armenians, the Jews and Gypsies, and the Tutsi, my life has been touched by two of them.

My grandparents on my father's side, and my ancestors before them for generations, came from Kosowa and Brzezany, towns in what was once called Eastern Galicia. Located in the general vicinity of the city of Lvov, they are now part of Ukraine. Essentially nothing remains, however, of the Jewish communities where my grandparents were born and raised. In the months that followed the Nazi invasion of the Soviet Union, the Einsatzgruppen murdered as many as two million Jews who were caught behind the lines in the occupied territories. On 16–17 October 1941, in a German Aktion, 2,200 Jews, representing about half the community of Kosowa, were taken to the hill behind the Moskalowka bridge and executed. Parts of the population of both towns, Brzezany and Kosowa, were deported to the Belzec extermination camp. As the Germans were retreating, after their disastrous defeat at Stalingrad in January 1943, the executioners ensured they would leave no trace of Jewish life behind. It is reported that more Jews were killed in Brzezany on 2 June 1943, and in Kosowa on 4 June 1943, a 'final solution' carried out while the Soviet forces were still 500 km away. The victims were marched to nearby forests, gravel pits and even Jewish cemeteries where, according to Martin Gilbert, 'executions were carried out with savagery and sadism, a crying child often being seized from its mother's arms and shot in front of her, or having its head crushed by a single blow from a rifle butt. Hundreds of children were thrown alive

into pits, and died in fear and agony under the weight of bodies thrown on top of them.'[1]

Although my grandparents had immigrated to North America many years before the Holocaust, some of my more distant relatives were surely among those victims. Several of the leaders of the Einsatzgruppen were successfully tried after the war for their role in the atrocities in Brzezany, Kosowa and in thousands of other European Jewish communities of which barely a trace now remains. The prosecutor in the Einsatzgruppen case, Benjamin Ferencz, a man I have had the honour to befriend, used the neologism 'genocide' in the indictment and succeeded in convincing the court to do the same in its judgment.[2]

Exactly fifty years after the genocide in my grandparents' towns, I participated in a human rights fact-finding mission to a small and what was then obscure country in central Africa, Rwanda. I was asked by Ed Broadbent and Iris Almeida to represent the International Centre for Human Rights and Democratic Development as part of a coalition of international non-governmental organizations interested in the Great Lakes region of Africa. The mission visited Rwanda in January 1993, mandated to assess the credibility and the accuracy of a multitude of reports of politically and ethnically based crimes, including mass murder, that had taken place under the regime of president Juvénal Habyarimana since the outbreak of civil war in that country in October 1990. At the time, a terrifying cloud hung over Rwanda, the consequence of a speech by a Habyarimana henchman a few weeks earlier that was widely interpreted within the country as an incitement to genocide. We interviewed many eyewitnesses but our fact-finding went further. In an effort to obtain material evidence, we excavated mass graves, thus confirming reports of massacres we had learned of from friends or relatives of the victims.

At the time, none of us, including myself, had devoted much study if any to the complicated legal questions involved in the definition of genocide. Indeed, our knowledge of the law of genocide rather faithfully reflected the neglect into which the norm had fallen within the human rights community. Yet faced with convincing evidence of mass killings

[1] Martin Gilbert, *Atlas of the Holocaust*, Oxford: Pergamon Press, 1988, p. 160. See also Israel Gutman, *Encyclopedia of the Holocaust*, Vol. I, New York: Macmillan, 1990, pp. 184–5.

[2] *United States of America* v. *Ohlendorf et al.* ('Einsatzgruppen trial'), (1948) 3 LRTWC 470 (United States Military Tribunal).

of Tutsis, accompanied by public incitement whose source could be traced to the highest levels of the ruling oligarchy, the word 'genocide' sprung inexorably to our lips. Rereading the definition in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide helped confirm our conclusion. In a press release issued the day after our departure from Rwanda, we spoke of genocide and warned of the abyss into which the country was heading. The term seemed to fit. Our choice of terminology may have been more intuitive than reasoned, but history has shown how closely we came to the truth. Three months after our mission, Special Rapporteur Bacre Waly Ndiaye visited Rwanda and essentially endorsed our conclusions. He too noted that the attacks had been directed against an ethnic group, and that article II of the Genocide Convention 'might therefore be considered to apply'.[3] In his 1996 review of the history of the Rwandan genocide, Secretary-General Boutros Boutros-Ghali took note of the significance of our report.[4]

Four months after the Rwandan genocide, I returned to Rwanda as part of an assistance mission to assess the needs of the legal system, and more specifically the requirements for prompt and effective prosecution of those responsible for the crimes. Over the past five years, much of my professional activity has been focused on how to bring the génocidaires to book. I have been back to Rwanda many times since 1994, and participated, as a consultant, in the drafting of legislation intended to facilitate genocide prosecutions. The International Secretariat of Amnesty International sent me to Rwanda in early 1997 to observe the *Karamira* trial, the first major genocide prosecution under national law in that country, or, for that matter, in any country, with the exception of the *Eichmann* case. I have since attended many other trials of those charged with genocide, both within Rwanda and before the International Criminal Tribunal for Rwanda, in Arusha, Tanzania, including the *Akayesu* trial, the first international prosecution pursuant to the Genocide Convention. I have also devoted much time to training a new generation of Rwandan jurists, lecturing regularly on criminal law and on the specific problems involved in genocide prosecutions as a visiting professor at the law faculty of the Rwandan National University. On 2 September 1998, I took a break from teaching the introductory criminal law class

[3] 'Report by the Special Rapporteur on Extrajudicial, Summary Arbitrary Executions on His Mission to Rwanda, 8–17 April 1993', UN Doc. E/CN.4/1994/7/Add.1, at para. 79.

[4] Boutros Boutros-Ghali, 'Introduction', in *The United Nations and Rwanda*, 1993–1996, New York: United Nations Department of Public Information, 1996, pp. 1–111 at p. 20.

to 140 eager young Rwandans and we all spent the morning listening attentively on the radio to Laïty Kama, president of the International Criminal Tribunal for Rwanda, as he read the first international judgment convicting an individual of the crime of genocide.

But I have also spent many hours with genocide survivors, and I have visited the melancholy memorials to the killings. The smell of the mass graves cannot be forgotten and, like the imagined recollections of my grandparents' birthplace, it has its own contribution to what sometimes may seem a rather dry and technical study of legal terms. There is more passion in this work than may initially be apparent.

William A. Schabas
Washington, 27 August 1999

PREFACE TO THE SECOND EDITION

There has probably been more legal development concerning the crime of genocide in the eight years since the first edition of this book was completed than in the five preceding decades. Where, in mid-1999, the *ad hoc* tribunals had only made a handful of judicial pronouncements interpreting the definition of genocide, there is now a rich body of jurisprudence, including several important rulings by the Appeals Chambers. At the time, there was a paucity of legal literature, with most scholarly writing dominated by historians and sociologists. Now, the legal bibliography on genocide is rich and extensive. Crowning this fertile period, in February 2007 the International Court of Justice issued its major ruling on the subject, a long-awaited conclusion to a case filed by Bosnia and Herzegovina against the Federal Republic of Yugoslavia in 1993.

Naturally, this second edition takes account of this, updating the scholarship and, where appropriate, revising certain assessments. The approach in the first edition to the interpretation of the terms of the 1948 Genocide Convention was relatively conservative. At the time, my mind was open to the prospect that the law would evolve in a different direction, driven by a certain logic that views progressive development as synonymous with constant expansion of definitions so as to encompass an increasingly broad range of acts. The case law has tended to confirm the former. For example, it has generally rejected the suggestion that 'ethnic cleansing' be merged with genocide. Along the same lines, it has resisted attempts to enlarge the categories of groups that are contemplated by the definition of genocide.

On some issues, my own thinking has evolved. Years of case law, discussion and reflection about the nature of genocide have generated what I think are new insights. No longer does the debate about the 'specific intent' of the crime, which has figured almost as a mantra in the case law, seem very helpful. When the recent judgment of the International Court of Justice considered whether the State of Serbia

had the 'specific intent' to commit genocide, the awkwardness of such an inquiry seemed evident. Unlike individuals, States do not have 'intent', they have *policy*. The Court was trying to transpose a concept of criminal law applicable to individuals to the field of State responsibility. Had it gone in the other direction, the result might have been more coherent. If we look for the State *policy* to commit genocide we can transfer the finding to the individual not by asking if he or she had the specific intent to perpetrate the crime, like some ordinary murderer, but rather whether he or she had knowledge of the policy and intended to contribute to its fulfilment. I develop this approach, which builds upon the thinking of scholars who have spoken of a 'knowledge-based' approach to the *mens rea* of genocide, in the second edition.

The first edition was principally a reference work on the 1948 Genocide Convention. It relied primarily on the *travaux préparatoires* of 1947 and 1948 not because these are decisive for its interpretation but simply because when I was writing the book there was little else to consult. That has all changed. Thus, the second edition incorporates relevant references to the abundant case law, adjusting observations of the first edition where this is appropriate, and confirming them in other respects.

William A. Schabas
Rome, 29 February 2008

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The second edition was completed in 2007–8, while on sabbatical leave from the National University of Ireland, Galway. I spent part of the year at Cardozo Law School of Yeshiva University in New York and part at LUISS Guido Carli University in Rome. Both institutions gave me the time and the appropriate intellectual environment to review developments over the nine years since the first edition.

Short excerpts from articles I have written since the first edition appeared have been incorporated into the text without substantial modification: 'Darfur and the "Odious Scourge": The Commission of Inquiry's Findings on Genocide', (2005) 18 *Leiden Journal of International Law*, p. 871; 'Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes', (2007) 2:2 *Genocide Studies and Prevention*, p. 101; 'Genocide Trials and *Gacaca* Courts', (2005) 3 *Journal of International Criminal Justice*, p. 879; 'Genocide, Crimes Against Humanity and Darfur: The Commission of Inquiry's Findings on Genocide', (2005) 27 *Cardozo Law Review*, p. 101; 'Has Genocide Been Committed in Darfur? The State Plan or Policy Element in the Crime of Genocide', in Ralph Henham and Paul Behrens, eds., *The*

Criminal Law of Genocide, International, Comparative and Contextual Aspects, Aldershot, UK: Ashgate, 2007, pp. 35–44; 'National Courts Finally Begin to Prosecute Genocide, the "Crime of Crimes" ', (2003) 1 *Journal of International Criminal Justice*, p. 89.

Besides providing time and travel funds, my various research grants also blessed me with several gifted assistants with whom it was always a pleasure to work: Véronique Brouillette, Sophie Dormeau, Geneviève Dufour, Niru Kumar, Véronique Robert-Blanchard and particularly Cecilie Lund. Many colleagues and friends encouraged and assisted me with various aspects of my research. Inevitably, my colleagues and I will disagree about some of the many difficult issues in this field. I have great respect for their views, and know that our debates will continue as the subject evolves. Of course, the views expressed here are my own. I wish to thank particularly Elizabeth Abi-Mershed, Howard Adelman, Anees Ahmed, Catarina Albuquerque, Jaye Alderson, Kai Ambos, Cécile Aptel, M. Cherif Bassiouni, Chaloka Beyani, the late Katia Boustany, Rowly Brucken, Christina Cerna, Frank Chalk, Roger Clark, Emmanuel Decaux, René Degni-Segui, Rokhaya Diarra, Fidelma Donlon, Norman Farrell, Don Ferencz, Jim Fussell, Meg de Guzman, the late Bernard Hamilton, Frederick Harhoff, Kristine Hermann, Martin Imbleau, Laïty Kama, Ben Kiernan, Anne-Marie La Rosa, Ben Majekodunmi, Linda Melvern, Miltos Miltiades, Faustin Ntezilyayo, John Packer, Zach Pall, Robert Petit, Wolfgang Schomburg, Dorothy Shea, Wibke Timmermann, Brenda Sue Thornton, Otto Triffterer, Daniel Turp, Nicolai Uscoi and Alfred de Zayas. Diplomatic personnel in embassies and governments around the world, too numerous to mention individually, also gave generously of their time in providing me with their domestic legislation on genocide. The reliable professionalism, confidence and support of the personnel of Cambridge University Press, and in particular of Finola O'Sullivan, is also gratefully acknowledged.

As always, words fail in expressing my love and thanks to my wife, Penelope Soteriou, and to my daughters, Marguerite and Louisa.

ABBREVIATIONS

AC	Appeal Cases
AI	Amnesty International
AIDI	Annuaire de l'Institut de Droit International
All ER	All England Reports
BFSP	British Foreign and State Papers
BFST	British Foreign and State Treaties
BYIL	British Yearbook of International Law
CERD	Committee for the Elimination of Racial Discrimination
CHR	Commission on Human Rights
CHRY	Canadian Human Rights Yearbook
CLR	Commonwealth Law Reports
Coll.	Collection of Decisions of the European Commission of Human Rights
Cr App R	Criminal Appeal Reports
Crim LR	Criminal Law Review
CSCE	Conference on Security and Co-operation in Europe
Doc.	Document
DR	Decisions and Reports of the European Commission of Human Rights
Dumont	Corps universel diplomatique du droit des gens
EC	European Communities
ECOSOC	Economic and Social Council
EHRR	European Human Rights Reports
ESC	Economic and Social Council
ETS	European Treaty Series
F.	Federal Reporter
FCA	Federal Court of Australia
GA	General Assembly
HRJ	Human Rights Journal
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission

ILDC	International Law in Domestic Courts
ILM	International Legal Materials
ILR	International Law Reports
IMT	Trial of the Major War Criminals before the International Military Tribunal
JCPC	Judicial Committee of the Privy Council
JDI	Journal de droit international
JICJ	Journal of International Criminal Justice
KB	King's Bench
L Ed	Lawyer's Edition
LNTS	League of Nations Treaty Series
LRC	Law Reports of the Commonwealth
LRTWC	Law Reports of the Trials of the War Criminals
Martens	Martens Treaty Series
NAC	National Archives of Canada
NILR	Netherlands International Law Review
OAS	Organization of American States
OASTS	Organization of American States Treaty Series
OAU	Organization of African Unity
Res.	Resolution
RGD	Revue générale de droit
RSC	Revised Statutes of Canada
SC	Supreme Court
SCHR	Sub-Commission on Prevention of Discrimination and Protection of Minorities
SCR	Supreme Court Reports (Canada)
SD	Selected Decisions of the Human Rights Committee
TLR	Times Law Reports
TS	Treaty Series
TWC	Trials of the War Criminals
UKTS	United Kingdom Treaty Series
UN	United Nations
UNAMIR	United Nations Assistance Mission in Rwanda
UNCIO	United Nations Conference on International Organization
UNTS	United Nations Treaty Series
UNWCC	United Nations War Crimes Commission
UNYB	United Nations Yearbook
US	United States
USNA	United States National Archives
WCR	War Crimes Reports
Yearbook	Yearbook of the International Law Commission
YECHR	Yearbook of the European Convention on Human Rights
YIHL	Yearbook of International Humanitarian Law

Introduction

'The fact of genocide is as old as humanity', wrote Jean-Paul Sartre.[1] The law, however, is considerably younger. This dialectic of the ancient fact yet the modern law of genocide follows from the observation that, historically, genocide has gone unpunished. Hitler's famous comment, 'who remembers the Armenians?', is often cited in this regard.[2] Yet the Nazis were only among the most recent to rely confidently on the reasonable presumption that an international culture of impunity would effectively shelter the most heinous perpetrators of crimes against humanity.

The explanation for this is straightforward: genocide was generally, although perhaps not exclusively, committed under the direction or, at the very least, with the benign complicity of the State where it took place. Usually, the crime was executed as a quite overt facet of State policy, particularly within the context of war or colonial conquest. Obviously, therefore, domestic prosecution was virtually unthinkable, even where the perpetrators did not in a technical sense benefit from some manner of legal immunity. Only in rare cases where the genocidal regime collapsed in its criminal frenzy, as in Germany or Rwanda, could accountability be considered.

[1] Jean-Paul Sartre, 'On Genocide', in Richard A. Falk, Gabriel Kolko and Robert Jay Lifton, eds., *Crimes of War*, New York: Random House, 1971, pp. 534–49 at p. 534.

[2] Hitler briefed his generals at Obersalzburg in 1939 on the eve of the Polish invasion: 'Genghis Khan had millions of women and men killed by his own will and with a gay heart. History sees him only as a great state-builder . . . I have sent my Death's Head units to the East with the order to kill without mercy men, women and children of the Polish race or language. Only in such a way will we win the lebensraum that we need. Who, after all, speaks today of the annihilation of the Armenians?' Quoted in Norman Davies, *Europe, A History*, London: Pimlico, 1997, p. 909. The account is taken from the notes of Admiral Canaris of 22 August 1939, quoted by L. P. Lochner, *What About Germany?*, New York: Dodd, Mead, 1942. During the Nuremberg trial of the major war criminals, there were attempts to introduce the statement in evidence, but the Tribunal did not allow it. For a review of the authorities, and a compelling case for the veracity of the statement, see Vahakn N. Dadrian, 'The Historical and Legal Interconnections Between the Armenian Genocide and the Jewish Holocaust: From Impunity to Retributive Justice', (1998) 23 *Yale Journal of International Law*, p. 504 at pp. 538–41.

The inertia of the legal systems where the crimes actually occurred did little to inspire other jurisdictions to intervene, although they had begun to do so with respect to certain other 'international crimes' such as piracy and the trafficking in persons, where the offenders were by and large individual villains rather than governments. Refusal to exercise universal jurisdiction over these offences against humanitarian principles was defended in the name of respect for State sovereignty. But it had a more sinister aspect, for this complacency was to some extent a form of *quid pro quo* by which States agreed, in effect, to mind their own business. What went on within the borders of a sovereign State was a matter that concerned nobody but the State itself.

This began to change at about the end of the First World War and is, indeed, very much the story of the development of human rights law, an ensemble of legal norms focused principally on protecting the individual against crimes committed by the State. It imposes obligations upon States and ensures rights to individuals. Because the obligations are contracted on an international level, they pierce the hitherto impenetrable wall of State sovereignty. There is also a second dimension to international human rights law, this one imposing obligations on the individual who, conceivably, can also violate the fundamental rights of his or her fellow citizens. Where these obligations are breached, the individual may be punished for such international crimes as a matter of international law, even if his or her own State, or the State where the crime was committed, refuses to do so. Almost inevitably, the criminal conduct of individuals blazes a trail leading to the highest levels of government, with the result that this aspect of human rights law has been difficult to promote. While increasingly willing to subscribe to human rights standards, States are terrified by the prospect of prosecution of their own leaders and military personnel, either by international courts or by the courts of other countries, for breaches of these very norms. To the extent that such prosecution is even contemplated, States insist upon the strictest of conditions and the narrowest of definitions of the subject matter of the crimes themselves.[3] The law of genocide is a paradigm for these developments in international human rights law. As the prohibition of the ultimate threat to the existence

[3] The duty to prosecute individuals for human rights abuses has been recognized by the major international treaty bodies and tribunals: *Velasquez Rodriguez* v. *Honduras*, Judgment of 29 July 1988, Series C, No. 4; *Bautista de Arellana* v. *Colombia* (No. 563/1993), UN Doc. CCPR/C/55/D/563/1993, paras. 8.3, 10; *Streletz, Kessler and Krenz* v. *Germany*, European Court of Human Rights, 22 March 2001, para. 86.

of ethnic groups, it is right at the core of the values protected by human rights instruments and customary norms.

The law is posited from a criminal justice perspective, aimed at individuals yet focused on their role as agents of the State. The crime is defined narrowly, a consequence of the extraordinary obligations that States are expected to assume in its prevention and punishment. The centrepiece in any discussion of the law of genocide is the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948.[4] The Convention came into force in January 1951, three months after the deposit of the twentieth instrument of ratification or accession.

Fifty years after its adoption, it had slightly fewer than 130 States parties, a rather unimpressive statistic when compared with the other major human rights treaties of the United Nations system which, while considerably younger, have managed to approach a more general degree of support by the nations of the world.[5] In the decade that followed, barely another dozen joined the treaty. The reason cannot be the existence of any doubt about the universal condemnation of genocide. Rather, it testifies to unease among some States with the onerous obligations that the treaty imposes, such as prosecution or extradition of individuals, including heads of State.

In its advisory opinion on reservations to the Genocide Convention, the International Court of Justice wrote that:

> The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations. The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.[6]

[4] (1951) 78 UNTS 277.

[5] For the purposes of comparison, see Convention on the Rights of the Child, GA Res. 44/25, annex, 192 States parties; International Convention for the Elimination of All Forms of Racial Discrimination, (1969) 660 UNTS 195, 173 States parties; Convention for the Elimination of Discrimination Against Women, (1981) 1249 UNTS 13, 185 States parties. See also the Geneva Convention of 12 August 1949 Relative to the Protection of Civilians, (1950) 75 UNTS 135, 194 States parties.

[6] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, [1951] ICJ Reports 16, p. 23. Quoted in *Legality of the Threat or Use*

This important statement is often cited as the judicial recognition of the prohibition of genocide as a customary legal norm, although the Court does not refer to it expressly in this way. The Statute of the International Court of Justice recognizes two non-conventional sources of international law: international custom and general principles.[7] International custom is established by 'evidence of a general practice accepted as law', while general principles are those 'recognized by civilized nations'.

Reference by the Court to such notions as 'moral law' as well as the quite clear allusion to 'civilized nations' suggest that it may be more appropriate to refer to the prohibition of genocide as a norm derived from general principles of law rather than a component of customary international law. On the other hand, the universal acceptance by the international community of the norms set out in the Convention since its adoption in 1948 means that what originated in 'general principles' ought now to be considered a part of customary law.[8] In 2006, the International Court of Justice said that the prohibition of genocide was 'assuredly' a peremptory norm (*jus cogens*) of public international law, the first time it has ever made such a declaration about any legal rule.[9] A year later, it said that the affirmation in article I of the Convention that genocide is a crime under international law means it sets out 'the

of Nuclear Weapons (Advisory Opinion), [1996] ICJ Reports 226, para. 31; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 161. See also 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)', UN Doc. S/25704, para. 45.

[7] Statute of the International Court of Justice, art. 38(1)(b) and (c).

[8] For a brief demonstration of relevant practice and *opinio juris*, see Bruno Simma and Andreas L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View', (1999) 93 *American Journal of International Law*, p. 302 at pp. 308–9. According to a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, 'the 1948 Genocide Convention reflects customary international law': *Prosecutor* v. *Sikirica et al.* (Case No. IT-95-8-I), Judgment on Defence Motions to Acquit, 3 September 2001, para. 55. Also: *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment, 27 January 2000, para. 151; *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, para. 54. The Australian High Court wrote that '[g]enocide was not [recognized as a crime under customary international law] until 1948, *Polyukhovich* v. *Commonwealth of Australia*, (1991) 101 ALR 545, at p. 598 (*per* Brennan J).

[9] *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, 3 February 2006, para. 64.

existing requirements of customary international law, a matter emphasized by the Court in 1951'.[10]

Besides the Genocide Convention itself, there are other important positive sources of the law of genocide. The Convention was preceded, in 1946, by a resolution of the General Assembly of the United Nations recognizing genocide as an international crime, putting individuals on notice that they would be subject to prosecution and could not invoke their own domestic laws in defence to a charge.[11] Since 1948, elements of the Convention, and specifically its definition of the crime of genocide, have been incorporated in the statutes of the two *ad hoc* tribunals created by the Security Council to judge those accused of genocide and other crimes in the former Yugoslavia and Rwanda.[12] Affirming its enduring authority, the Convention definition was included without any modification in the Rome Statute of the International Criminal Court, which was adopted on 17 July 1998 and entered into force on 1 July 2002.[13] There have been frequent references to genocide within the resolutions, declarations and statements of United Nations organs, including particularly the work of expert bodies and special rapporteurs. In 2004, the Secretary-General of the United Nations established a Special Adviser on the Prevention of Genocide, a senior position within the Secretariat with responsibility for warning the institution of threatened catastrophes.

A large number of States have enacted legislation concerning the prosecution and repression of genocide, most by amending their penal or criminal codes in order to add a distinct offence. Usually they have borrowed the Convention definition, as set out in articles II and III, but occasionally they have contributed their own innovations. Sometimes these changes to the text of articles II and III have been aimed at clarifying the scope of the definition, for both internal and international purposes. For example, the United States of America's legislation specifies that destruction 'in whole or in part' of a group, as stated in the Convention, must actually represent destruction 'in whole or in substantial part'.[14]

[10] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 161.

[11] GA Res. 96 (I).

[12] 'Statute of the International Criminal Tribunal for the Former Yugoslavia', UN Doc. S/RES/827 (1993), annex, art. 4; 'Statute of the International Criminal Tribunal for Rwanda', UN Doc. S/RES/955 (1994), annex, art. 2.

[13] Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, art. 6.

[14] Genocide Convention Implementation Act of 1987 (the Proxmire Act), S. 1851, § 1091(a).

Others have attempted to enlarge the definition, by appending new entities to the groups already protected by the Convention. Examples include political, economic and social groups. Going even further, France's Code pénal defines genocide as the destruction of any group whose identification is based on arbitrary criteria.[15] The Canadian implementing legislation for the Rome Statute states that '"genocide" means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that, at the time and in the place of its commission, constitutes genocide according to customary international law', adding that the definition in the Rome Statute, which is identical to that of the Convention, is deemed a crime according to customary international law. The legislation adds, in anticipation: 'This does not limit or prejudice in any way the application of existing or developing rules of international law.'[16]

The variations in national practice contribute to an understanding of the meaning of the Convention but also, and perhaps more importantly, of the ambit of the customary legal definition of the crime of genocide. Yet, rather than imply some larger approach to genocide than that of the Convention, the vast majority of domestic texts concerning genocide repeat the Convention definition and tend to confirm its authoritative status.

The Convention on the Prevention and Punishment of the Crime of Genocide is, of course, an international treaty embraced by the realm of public international law. Within this general field, it draws on elements of international criminal law, international humanitarian law and international human rights law. By defining an international crime, and spelling out obligations upon States parties in terms of prosecution and extradition, the Convention falls under the rubric of international criminal law.[17] Its claim to status as an international humanitarian law treaty is supported by the inclusion of the crime within the subject

[15] Penal Code (France), *Journal officiel*, 23 July 1992, art. 211–1.

[16] Crimes Against Humanity and War Crimes Act, 48–49 Elizabeth II, 1999–2000, C-19, s. 4.

[17] See the comments of *ad hoc* judge Milenko Kreca in *Legality of Use of Force* (*Yugoslavia* v. *Belgium et al.*), Request for the Indication of Provisional Measures, Order, 2 June 1999, Dissenting Opinion of Judge Kreca, para. 21: 'A certain confusion is also created by the term "humanitarian law" referred to in paragraphs 19 and 48 of the Order. The reasons for the confusion are dual: on the one hand, the Court has not shown great consistency in using this term. In the *Genocide* case the Court qualified the Genocide Convention as a part of humanitarian law, although it is obvious that, by its nature, the Genocide Convention falls within the field of international criminal law.'

matter jurisdiction of the two *ad hoc* tribunals charged with prosecuting violations of humanitarian law.[18]

Genocide is routinely subsumed – erroneously – within the broad concept of 'war crimes'. Nevertheless, the scope of international humanitarian law is confined to international and non-international armed conflict, and the Convention clearly specifies that the crime of genocide can occur in peacetime.[19] Consequently, it may more properly be deemed an international human rights law instrument. Indeed, René Cassin once called the Genocide Convention a specific application of the Universal Declaration of Human Rights.[20] Alain Pellet has described the Convention as 'a quintessential human rights treaty'.[21] For Benjamin Whitaker, genocide is 'the ultimate human rights problem'.[22]

The prohibition of genocide is closely related to the right to life, one of the fundamental human rights defined in international declarations and conventions.[23] These instruments concern themselves with the

[18] 'Statute of the International Criminal Tribunal for the Former Yugoslavia', note 12 above; 'Statute of the International Criminal Tribunal for Rwanda', note 12 above.

[19] The International Court of Justice has described international humanitarian law as a *lex specialis* of international human rights law, applicable during armed conflict. See *Legality of the Threat or Use of Nuclear Weapons*, note 6 above, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, International Court of Justice, 9 July 2004, para. 106; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, International Court of Justice, 19 December 2005, para. 216. On this subject, see William A. Schabas, 'Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum', (2007) 40 *Israel Law Review*, p. 592.

[20] UN Doc. E/CN.4/SR.310, p. 5; UN Doc. E/CN.4/SR.311, p. 5. There is a cross-reference to the Genocide Convention in the right-to-life provision (art. 6(2) and (3)) of the International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, the result of an amendment from Peru and Brazil who were concerned about mass death sentences being carried out after a travesty of the judicial process. Because the Covenant admits to limited use of capital punishment, Peru and Brazil considered it important to establish the complementary relationship with the Genocide Convention: UN Doc. A/C.3/SR.813, para. 2. See also Manfred Nowak, *Covenant on Civil and Political Rights: CCPR Commentary*, 2nd edn, Kehl: Engel, 2005, pp. 120–56; William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd edn, Cambridge: Cambridge University Press, 2003.

[21] 'Report of the International Law Commission on the Work of its Forty-Ninth Session, 12 May–18 July 1997', UN Doc. A/52/10, para. 76. See also *Prosecutor* v. *Kayishema and Ruzindana* (Case No. ICTR-95-1-T), Judgment, 21 May 1999, para. 88.

[22] UN Doc. E/CN.4/Sub.2/1984/SR.3, para. 6.

[23] Universal Declaration of Human Rights, GA Res. 217 A (III), UN Doc. A/810, art. 3; International Covenant on Civil and Political Rights, note 20 above, art. 6; Convention for the Protection of Human Rights and Fundamental Freedoms, (1955) 213 UNTS 221,

individual's right to life, whereas the Genocide Convention is associated with the right to life of human groups, sometimes spoken of as the right to existence. General Assembly Resolution 96(I), adopted in December 1946, declares that '[g]enocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings'. States ensure the protection of the right to life of individuals within their jurisdiction by such measures as the prohibition of murder in criminal law. The repression of genocide proceeds somewhat differently, the crime being directed against the entire international community rather than the individual. As noted by Mordechai Kremnitzer, '[i]t is a frontal attack on the value of human life as an abstract protected value in a manner different from the crime of murder'.[24]

As the Genocide Convention marked its fiftieth birthday, in 1998, there had been no legal monographs on the subject of the Convention, or the legal aspects of prosecution of genocide, for more than two decades.[25] Most academic research on the Genocide Convention had been undertaken by historians and philosophers. They frequently ventured onto judicial terrain, not so much to interpret the instrument and to wrestle with the legal intricacies of the definition as to express frustration with its limitations. Even legal scholars tended to focus on what were widely perceived as the shortcomings of the Convention.

The Convention definition of genocide has seemed too restrictive, too narrow. It has failed to cover, in a clear and unambiguous manner, many of the major human rights violations and mass killings perpetrated by dictators and their accomplices. In the past, jurists often looked to the Genocide Convention in the hope it might apply, and either proposed exaggerated and unrealistic interpretations of its terms or else called for its amendment so as to make it more readily applicable. The principal deficiency, many argued, is that it applies only to 'national, racial, ethnical and religious groups'.

And that was how things stood until 1992. War broke out in Bosnia and Herzegovina in April. By August 1992, United Nations bodies, including the Security Council and the General Assembly, were accusing

ETS 5, art. 2; American Convention on Human Rights, (1979) 1144 UNTS 123, OASTS 36, art. 4.

[24] Mordechai Kremnitzer, 'The Demjanjuk Case', in Yoram Dinstein and Mala Tabory, eds., *War Crimes in International Law*, The Hague, Boston and London: Martinus Nijhoff, 1996, pp. 321–49 at p. 325.

[25] David Kader, 'Law and Genocide: A Critical Annotated Bibliography', (1988) 11 *Hastings International and Comparative Law Review*, p. 381.

the parties to the conflict of responsibility for 'ethnic cleansing'.[26] In December 1992, the General Assembly adopted a resolution stating that 'ethnic cleansing' was a form of genocide.[27] In March 1993, Bosnia and Herzegovina invoked the Genocide Convention before the International Court of Justice in an application directed against Serbia and Montenegro. The Court issued two provisional orders on the basis of the Convention, the first time that it had applied the instrument in a contentious case.[28] A month later, the Security Council created an *ad hoc* tribunal for the former Yugoslavia with subject matter jurisdiction over the crime of genocide, as defined by the Convention.[29]

In April 1993, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions of the Commission on Human Rights warned of acts of genocide in Rwanda against the Tutsi minority, echoing the conclusions of an international fact-finding mission composed of non-governmental organizations that had visited the country some weeks earlier.[30] The warnings were ignored by the international community and, in April 1994, genocidal extremists within Rwanda put into effect their evil plan to exterminate the Tutsi. The Security Council visibly flinched at the word 'genocide' in its resolutions dealing with Rwanda, betraying the concerns of several members that use of the 'g word' might have onerous legal consequences in terms of their obligations under the Convention. Later, the Security Council set up a second *ad hoc* tribunal with jurisdiction over the Rwandan genocide of 1994.[31]

Some may have legitimately questioned, in the 1970s and 1980s, whether the Genocide Convention was no more than an historical curiosity, somewhat like the early treaties against the slave trade whose significance is now largely symbolic. The emergence of large-scale ethnic

[26] UN Doc. S/RES/771 (1992); 'The Situation in Bosnia and Herzegovina', GA Res. 46/242.

[27] 'The Situation in Bosnia and Herzegovina', GA Res. 47/121.

[28] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Requests for the Indication of Provisional Measures, 8 April 1993, [1993] ICJ Reports 16; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Further Requests for the Indication of Provisional Measures, [1993] ICJ Reports 325. In 1973, Pakistan invoked the Convention against India, but discontinued its application before the Court made an order: *Trial of Pakistani Prisoners of War (Pakistan* v. *India)*, Interim Protection Order of 13 July 1973, [1973] ICJ Reports 328.

[29] UN Doc. S/RES/827.

[30] 'Report by the Special Rapporteur on Extrajudicial, Summary Arbitrary Executions on His Mission to Rwanda, 8–17 April 1993', UN Doc. E/CN.4/1994/7/Add.1.

[31] UN Doc. S/RES/955.

conflicts in the final years of the millennium has proven such a hopeful assessment premature. The Genocide Convention remains a fundamental component of the contemporary legal protection of human rights. The issue is no longer one of stretching the Convention to apply to circumstances for which it may never have been meant, but rather one of implementing the Convention in the very cases contemplated by its drafters in 1948. The new challenges for the jurist presented by the application of the Convention are the substance of this study.

Thus, the focus here is on interpreting the definition and addressing the problems involved in both the prosecution and defence of charges of genocide when committed by individuals. The criticisms of lacunae or weaknesses in the Convention will be considered, but I understand the definition as it stands to be adequate and appropriate. While genocide is a crime that is, fortunately, rarely committed, it remains a feature of contemporary society. It has become apparent that there are undesirable consequences to enlarging or diluting the definition of genocide. This weakens the terrible stigma associated with the crime and demeans the suffering of its victims. It is also likely to enfeeble whatever commitment States may believe they have to prevent the crime. The broader and more uncertain the definition, the less responsibility States will be prepared to assume. This can hardly be consistent with the new orientation of human rights law, and of the human rights movement, which is aimed at the eradication of impunity and the assurance of human security.

Why is genocide so stigmatized? In my view, this is precisely due to the rigours of the definition and its clear focus on crimes aimed at the eradication of ethnic minorities or, to use the Convention terminology, 'national, racial, ethnical and religious groups'. Human rights law knows of many terrible offences: torture, disappearances, slavery, child labour, apartheid, and enforced prostitution, to name a few. For the victims, it may seem appalling to be told that, while these crimes are serious, others are still more serious. Yet, since the beginnings of criminal law society has made such distinctions, establishing degrees of crime and imposing a scale of sentences and other sanctions in proportion to the social denunciation of the offence. Even homicide knows degrees, from manslaughter to premeditated murder and, in some legal systems, patricide or regicide. The reasons society qualifies one crime as being more serious than another are not always clear and frequently obey a rationale that law alone cannot explain. Nor does the fact that a crime is considered less serious than another mean that it is in some way trivialized or overlooked. But, in any hierarchy, something must sit at the top. The crime of

genocide belongs at the apex of the pyramid. In imposing its first sentence in *Prosecutor* v. *Kambanda*, the International Criminal Tribunal for Rwanda described genocide as the 'crime of crimes'.[32]

For decades, the Genocide Convention has been asked to bear a burden for which it was never intended, essentially because of the relatively underdeveloped state of international law dealing with accountability for human rights violations. In cases of mass killings and other atrocities, attention turned inexorably to the Genocide Convention because there was little else to invoke. This has changed in recent years. The law applicable to atrocities that may not meet the strict definition of genocide but that cry out for punishment has been significantly strengthened. Such offences usually fit within the definition of 'crimes

[32] *Prosecutor* v. *Kambanda* (Case No. ICTR-97-23-S), Judgment and Sentence, 4 September 1998, para. 16. Also: *Prosecutor* v. *Serushago* (Case No. ICTR-98-39-S), Sentence, 2 February 1999, para. 15; *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 699; *Prosecutor* v. *Jelisić* (Case No. IT-95-10-A), Partial Dissenting Opinion of Judge Wald, 5 July 2001, para. 2; *Prosecutor* v. *Niyitegeka* (Case No. ICTR-96-14-A), Judgment, 9 July 2004, para. 53; *Armed Activities on the Territory of the Congo (New Application: 2000) (Democratic Republic of Congo* v. *Rwanda)*, Dissenting Opinion of Judge Koroma, 3 February 2006, para. 26. Raphael Lemkin himself used the expression 'crime of crimes': Broadcast on Genocide, Lake Success, 23 December 1947, in Lemkin Papers, American Jewish Archives, Box 5, Folder 5; Raphael Lemkin, 'Genocide as a Crime under International Law', *United Nations Bulletin*, Vol. IV, 15 January 1948, pp. 70–1. The expression was used by the Permanent Representative of Rwanda during debate in the Security Council on the establishment of the Tribunal: UN Doc. S/PV.3453 (8 November 1994). The expression 'crimes of crimes' appears in debates of the International Law Commission as early as 1994; its author is, apparently, Alain Pellet: UN Doc. A/CN.4/SER.A/1994, pp. 114, 119. The International Commission of Inquiry on Darfur said in its report that the Appeals Chamber agreed with an accused who argued that the characterization of genocide as 'the crime of crimes' was wrong (see 'Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur', UN Doc. S/2005/60, para. 506). This is probably a misreading of the Appeals Chamber judgment in *Prosecutor* v. *Kayishema et al.* (Case No. ICTR-95-1-A), Judgment (Reasons), 1 June 2001. It is certainly hard to reconcile with the use of the expression 'crime of crimes' to describe genocide by the Appeals Chamber three years after *Kayishema*: *Niyitegeka* v. *Prosecutor* (Case No. ICTR-96-14-A), Judgment, 9 July 2004, para. 49. As the Darfur Commission noted, the Appeals Chamber said that 'there is no hierarchy of crimes *under the Statute*, and that all of the crimes specified therein are "serious violations of international humanitarian law", capable of attracting the same sentence' (my italics). There is, it is true, nothing in the Statute of the International Criminal Tribunal for Rwanda to indicate a hierarchy. That does not mean there is no hierarchy under general international law. In any case, despite the professed opinion of the Appeals Chambers, sentencing decisions of the tribunals have tended to confirm that convictions for genocide attract the longest terms. Plea agreements systematically involve withdrawing charges of genocide in favour of conviction for crimes against humanity, which is not what would be expected if there was no hierarchy.

against humanity', a broader concept that might be viewed as the second tier of the pyramid. According to the most recent definition, comprised within the Rome Statute of the International Criminal Court, crimes against humanity include persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law.[33] This contemporary approach to crimes against humanity is really no more than the 'expanded' definition of genocide that many have argued for over the years.

One of the main reasons why the international community felt compelled to draft the Genocide Convention in 1948 was the inadequate scope given to the notion of 'crimes against humanity' at the time. When the International Military Tribunal judged the Nazis at Nuremberg for the destruction of the European Jews, it convicted them of crimes against humanity, not genocide. But the Nuremberg Charter seemed to indicate that crimes against humanity could only be committed in time of war, not a critical obstacle to the Nazi prosecutions but a troubling precedent for the future protection of human rights.[34]

The *travaux préparatoires* of the Charter leave no doubt that the connection or nexus between war and crimes against humanity was a *sine qua non*, because the great powers that drafted it were loathe to admit the notion, as a general and universal principle, that the international community might legitimately interest itself in what a State did to its own minorities.[35]

Thus, the Genocide Convention, not the Nuremberg Charter, first recognized the idea that gross human rights violations committed in the absence of an armed conflict are nevertheless of international concern, and attract international prosecution. In order to avoid any ambiguity and acutely conscious of the limitations of the Nuremberg Charter, the drafters of the Convention decided not to describe genocide as a form of crime against humanity, although only after protracted debate.[36]

[33] Rome Statute of the International Criminal Court, note 13 above, art. 7(1)(h).

[34] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), annex, (1951) 82 UNTS 279, art. 6(c).

[35] The drafting of the 'crimes against humanity' provision of the Charter of the International Military Tribunal is discussed in chapter 1, at pp. 38–42 below.

[36] The original draft genocide convention, proposed by Saudi Arabia in 1946, described it as 'an international crime against humanity' (UN Doc. A/C.6/86). But GA Res. 96(I) avoided such a qualification (UN Doc. E/623/Add.1; UN Doc. E/AC.25/3) and the distinction was reinforced in GA Res. 180(II) of December 1947. At the time, France was one of the

Accordingly, article I of the Convention confirms that genocide may be committed in time of peace as well as in time of war.[37]

Nevertheless, the *ad hoc* tribunals have resisted the suggestion that genocide overlaps with crimes against humanity in an absolute sense.[38] The question has arisen in the context of multiple charges, and the permissibility of convicting where two offences contain essentially the same elements. According to the Appeals Chamber of the International Criminal Tribunal for Rwanda, it is acceptable to register a conviction for both genocide and the crime against humanity of extermination with regard to the same factual elements. Following the test developed by the tribunals, multiple convictions are allowed where there are materially distinct elements of each infraction:

> Genocide requires proof of an intent to destroy, in whole or in part, a national, ethnical, racial or religious group; this is not required by extermination as a crime against humanity. Extermination as a crime against humanity requires proof that the crime was committed as a part of a widespread or systematic attack against *a* civilian population, which proof is not required in the case of genocide.[39]

But there is much compelling support from other authorities for the view that the two categories are intimately related.[40] The judges of the

principal advocates of genocide being viewed as a crime against humanity (e.g. UN Doc. A/401/Add.3; UN Doc. A/AC.10/29). The final version eschewed any reference to crimes against humanity (for the debates in the Sixth Committee, see UN Doc. A/C.6/SR.67).

[37] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Preliminary Objections, [1996] ICJ Reports 595, para. 31.

[38] In *Prosecutor* v. *Kayishema et al.*, note 21 above, para. 89, a Trial Chamber of the Rwanda Tribunal observed that the correspondence between genocide and crimes against humanity is not perfect. Specifically, crimes against humanity must be directed against a 'civilian population', whereas genocide is directed against 'members of a group', without reference to civilian or military status (*ibid.*, para. 631). In *Prosecutor* v. *Sikirica et al.* (Case No. IT-95-8-I), Judgment on Defence Motions to Acquit, 3 September 2001, para. 58, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia said genocide was a crime against humanity and that it belonged to a 'genus' that included the crime against humanity of persecution.

[39] *Prosecutor* v. *Musema* (Case No. ICTR-96-13-A), Judgment, 16 November 2001, para. 363. Also: *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 751.

[40] Convention on the Nonapplicability of Statutory Limitations to War Crimes and Crimes Against Humanity, (1970) 754 UNTS 73, art. I; European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes of 25 January 1974, ETS 82, art. 1(1); 'Second Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', *Yearbook . . . 1984*, Vol. II, p. 93, paras. 28–9; 'Report of the International Law Commission

tribunals probably missed a good opportunity to rationalize the relationship between genocide and crimes against humanity, a mission they accomplished so well with respect to the disparate forms of war crimes recognized by treaty and custom, which they linked within an 'umbrella' category of 'serious violations of international humanitarian law'.[41] They might have done the same by situating genocide under the umbrella of crimes against humanity.

Since 1948, the law concerning crimes against humanity has evolved substantially. That crimes against humanity may be committed in time of peace as well as war has been recognized in the case law of the *ad hoc* international tribunals,[42] and codified in the Rome Statute.[43] Arguably, the obligations upon States found in the Genocide Convention now apply *mutatis mutandis*, on a customary basis, in the case of crimes against humanity. Therefore, the alleged gap between crimes against humanity and genocide has narrowed considerably. Speaking of the relative gravity of crimes against humanity, the International Commission of Inquiry on Darfur said: 'It is indisputable that genocide bears a special stigma, for it is aimed at the *physical obliteration* of human groups. However, one should not be blind to the fact that some

on the Work of its Forty-Eighth Session, 6 May–26 July 1996', UN Doc. A/51/10, p. 86; Stefan Glaser, *Droit international pénal conventionnel*, Brussels: Bruylant, 1970, p. 109; Yoram Dinstein, 'Crimes Against Humanity', in Jerzy Makarczyk, ed., *Theory of International Law at the Threshold of the 21st Century*, The Hague, London and Boston: Kluwer Law International, 1997, pp. 891–908 at p. 905; Theodor Meron, 'International Criminalization of Internal Atrocities', (1995) 89 *American Journal of International Law*, p. 554 at p. 557; *A-G Israel* v. *Eichmann*, (1968) 36 ILR 5 (District Court, Jerusalem), para. 26; *A-G Israel* v. *Eichmann*, (1968) 36 ILR 277 (Israel Supreme Court), para. 10; *Prosecutor* v. *Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 140; *Prosecutor* v. *Tadić* (Case No. IT-94-1-T), Opinion and Judgment, 7 May 1997, paras. 622 and 655; *Prosecutor* v. *Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999, para. 251; *Prosecutor* v. *Stakić* (Case No. IT-97-24-T), Decision on Rule 98*bis* Motion for Judgment of Acquittal, 31 October 2002, para. 26; 'Report on the Situation of Human Rights in Rwanda Submitted by Mr René Degni-Segui, Special Rapporteur, under Paragraph 20 of Resolution S-3/1 of 25 May 1994', UN Doc. E/CN.4/1996/7, para. 7; 'Report of the Committee on the Elimination of Racial Discrimination', UN Doc. A/52/18, para. 159. For a discussion of the issue at the time of the drafting of the Genocide Convention, see the annotation to *United States of America* v. *Greifelt et al.* ('RuSHA trial'), (1948) 13 LRTWC 1 (United States Military Tribunal), pp. 40–1.

[41] *Prosecutor* v. *Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 94.

[42] *Prosecutor* v. *Tadić* (Case No. IT-94-1-AR72), *ibid.*, paras. 78, 140, 141.

[43] Rome Statute, note 12 above, art. 7.

categories of crimes against humanity may be similarly heinous and carry an equally grave stigma.'[44]

Certainly the practical consequences in a legal sense of the distinction between genocide and crimes against humanity are now less important. Some have argued that we should eliminate the different categories altogether, in favour of an over-arching concept of 'atrocity crime'.[45] Perhaps reflecting a similar line of thought, in 2006 the Secretary-General proposed renaming the Special Adviser on the Prevention of Genocide, who had only been established two years earlier, as the Special Adviser on the Prevention of Genocide and Mass Atrocity, although he later retreated from this. But the interest in defining a separate offence of genocide persists. In the public debate, suggesting that atrocities are better described as crimes against humanity rather than genocide, as President Jimmy Carter did with reference to Darfur in October 2007, is condemned for trivialization of a humanitarian crisis. Carter was treated unfairly by his critics, who demagogically seized upon his insistence on accurate terminology. He had roundly denounced the ethnic cleansing in Darfur as a crime against humanity, and hardly deserved the charges that he was pandering to the Sudanese regime. International lawyers seem sometimes to insist in vain that the distinction between genocide and crimes against humanity is of little or no importance. The argument is not about the state of the law: it is one of symbolism and semantics.

If the result of the terminological quarrel is to insist upon the supreme heinousness of 'racial hatred', for want of a better term, and to reiterate society's condemnation of the mass killings of Jews, Tutsis and Armenians, to cite the primary historical examples of the past century, the distinction retains and deserves all of its significance. From this perspective, genocide stands to crimes against humanity as premeditated murder stands to intentional homicide. Genocide deserves its title as the 'crime of crimes'.

This study follows, in a general sense, the structure of the Convention itself, after an initial presentation of the origins of the norm. An inaugural chapter, with an historical focus, addresses the development of international legal efforts to prosecute genocide, up to and including

[44] 'Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur', UN Doc. S/2005/60, para. 506.

[45] E.g. David J. Scheffer, 'The Future of Atrocity Law', (2002) 25 *Suffolk Transnational Law Review*, p. 399; L. C. Green, '"Grave Breaches" or Crimes Against Humanity', (1997–8) 8 *USAF Academy Journal of Legal Studies*, p. 19.

the Nuremberg trial. The second chapter surveys the process of drafting the Convention, as well as subsequent normative activity within United Nations bodies such as the Security Council and the International Law Commission. Chapters 3 to 6 examine the definition of genocide set out in articles II and III, reviewing the groups protected by the Convention, the *mens rea* or mental element of the offence, the *actus reus* or physical element of the offence, and the punishable acts, including acts of participation such as conspiracy, complicity and attempt. Admissible defences to the crime of genocide are considered in chapter 7. Domestic and international prosecution of genocide, matters raised by articles V, VI and VII of the Convention, comprise chapter 8. Chapter 9 deals with State responsibility for genocide, an issue addressed indirectly by several provisions of the Convention, including article IX. Chapter 10 is devoted to the prevention of genocide, a question of vital importance but one considered only incompletely in the Convention, principally by articles I and VIII. A variety of treaty law matters addressed in articles X to XIX of the Convention are examined in chapter 11. The law is up to date as of 31 December 2007.

1

Origins of the legal prohibition of genocide

Winston Churchill called genocide 'the crime without a name'.[1] A few years later, the term 'genocide' was coined by Raphael Lemkin in his 1944 work, *Axis Rule in Occupied Europe.*[2] Rarely has a neologism had such rapid success.[3] Within little more than a year of its introduction to the English language,[4] it was being used in the indictment of the International Military Tribunal, and within two, it was the subject of a United Nations General Assembly resolution. But the resolution spoke in the past tense, describing genocide as crimes which 'have occurred'.

By the time the General Assembly completed its standard setting, with the 1948 adoption of the Convention on the Prevention and Punishment of the Crime of Genocide, 'genocide' had a detailed and quite technical definition as a crime against the law of nations. Yet the preamble to that instrument recognizes 'that at all periods of history genocide has inflicted great losses on humanity'. This study is principally concerned with genocide as a legal norm.

The origins of criminal prosecution of genocide begin with the recognition that persecution of ethnic, national and religious minorities was not only morally outrageous, it might also incur legal liability. As a general rule, genocide involves violent crimes against the person, including murder. Because these crimes have been deemed anti-social since time immemorial, in a sense there is nothing new in the prosecution of genocide to the extent that it overlaps with the crimes of homicide and assault. Yet genocide almost invariably escaped prosecution because

[1] Leo Kuper, *Genocide, Its Political Use in the Twentieth Century*, New Haven: Yale University Press, 1981, p. 12.

[2] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington: Carnegie Endowment for World Peace, 1944.

[3] Lemkin later wrote that '[a]n important factor in the comparatively quick reception of the concept of genocide in international law was the understanding and support of this idea by the press of the United States and other countries': Raphael Lemkin, 'Genocide as a Crime in International Law', (1947) 41 *American Journal of International Law* 145, p. 149, n. 9.

[4] And French as well: Raphael Lemkin, 'Le crime de génocide', [1946] *Rev. dr. int.* 213.