មជ្ឈមណ្ឌលឯកសារកម្ពុជា

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What is Genocide? What are the Gaps in the Convention? How to Prevent Genocide?

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The Convention for the Prevention and Punishment of the Crime of Genocide was adopted in Paris, on 9 December 1948, at the third session of the United Nations General Assembly.[1] It entered into force slightly more than two years later, on 12 January 1951, after obtaining the requisite twenty ratifications. But despite its importance in the general scheme of international human rights treaties, and a willingness to accept many of its provisions as declaratory of customary international law, it still only has about 140 States parties, a comparatively low number. This event is one of several being held around the world to mark the sixtieth anniversary of the adoption of the *Convention*. A decade ago, there was scant attention for what was arguably a more significant commemoration. Interest in the *Convention* and in the legal aspects of genocide has grown dramatically in the past ten years, a part of the proliferation of activity in the field of international criminal law. There have been more important judicial pronouncements on genocide in the past five years than in the previous fifty-five.

At the same time, the legal significance of genocide has probably declined, a phenomenon related to the dramatic expansion of the related category of crimes against humanity. Today, there are few if any legal consequences to identifying an act as genocide as opposed to describing it with the somewhat broader and more flexible label of crimes against humanity. Yet for victims of atrocity, describing their persecution as genocide is viewed as a badge of honour, and denying this to them is

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[1] Convention on the Prevention and Punishment of the Crime of Genocide, (1951) 78 UNTS 277.

often treated as trivialisation. A contemporary manifestation of the phenomenon can be seen in the rather spectacular and extravagant charge levelled by the Prosecutor of the International Criminal Court against the sitting president of The Sudan,[2] a matter currently being examined by Pre-Trial Chamber I.

The conference organisers have asked that the issue of 'gaps' in the *Genocide Convention* be addressed. This is reminiscent of frequent calls in the academic literature over the past sixty years for amendment of the *Convention*, and of the persistent complaints of its 'blind spots' and shortcomings. Such discussion overlooks the historic context – and significance – of the *Genocide Convention*. It was the first human rights treaty of the modern system, codifying an international norm that protects the right to life and to existence of national, ethnic, racial and religious minorities. The *Convention* establishes important principles in the areas of prosecution and prevention that have since been amplified and developed in other instruments and institutions. Article VI constitutes the starting point of the *Rome Statute*. Questioning the 'gaps' in the *Genocide Convention* is like speculating on 'improvements' to Picasso's *Guernica* or Marc Anthony's eulogy or Seigfried's funeral music, or asking whether new ingredients should be added to a classic dry martini or whether one can make oysters Rockefeller using chicken. The *Genocide Convention* is what it is: a seminal development in international law, an affirmation of important principles, a reflection of the values and standards of its time but at the same time the clear inspiration of much that has followed. It has no gaps.

Genocide is, first and foremost, a legal concept. Like many other terms – murder, rape, theft – it is also used in other contexts and by other disciplines, where its meaning may vary. Many historians and sociologists employ the term genocide to describe a range of atrocities involving killing large numbers of people. But even in law, it is imprecise to speak of a single, universally recognized meaning of genocide. There is a widely accepted definition, first set out in article II of the 1948 *Convention for the Prevention and Punishment of the Crime of Genocide*. Like most legal definitions, its language is subject to various interpretations, and important controversies remain about the scope of the concept even within the framework of what is a concise and carefully-worded definition. The crime of genocide has been incorporated within the national legal systems of many countries, where domestic legislators have imposed their own views on the term, some of them varying slightly or even considerably from the established international definition. As a result, even in law, one can speak of many definitions or interpretations of the concept of genocide.

The term itself was invented by a lawyer, Rafał Lemkin. He intended to fill a gap in international law, as it then stood in the final days of the Second World War. For more than two decades, Lemkin had been engaged at an international level in

[2] *Situation in Darfur, The Sudan* (Case No. ICC-02/05), Summary of Prosecutor's Application under Article 58, 14 July 2008.

attempts to codify new categories of international crimes involving atrocities committed against vulnerable civilians. Even before Lemkin's time, international law recognized a limited number of so-called international crimes. As a general rule, they were so designated not because of their shocking scale and extent, but for more mundane reasons, namely because they escaped the territorial jurisdiction of states. Piracy is the classic example, a crime committed on the high seas. Lemkin and others argued from a different perspective, proposing the recognition of international crimes where these represented serious human rights violations.

The beginnings of this were already apparent at the time of the First World War, when Britain, France and Russia warned that they would hold perpetrators to account for 'these new crimes of Turkey against humanity and civilization'. But the idea that a state could be held accountable for atrocities committed against its own nationals remained extremely controversial, and it was this gap in the law that Lemkin worked to fill. His initial proposal evidenced a much broader concept of genocide than what was eventually agreed to in the 1948 Convention. Lemkin actively participated in the negotiations leading to the *Convention's* adoption, and while he would no doubt have hoped for a somewhat different result, he cannot be detached from the *Convention* definition. Indeed, following its adoption he campaigned aggressively for its ratification.

Lemkin's famous proposal, contained in a chapter entitled 'Genocide' in his book *Axis Rule in Occupied Europe*, called for the 'prohibition of genocide in war and peace'. Lemkin insisted upon the relationship between genocide and the growing interest in the protection of peoples and minorities that was manifested in several treaties and declarations adopted following the First World War. He noted the need to revisit international legal instruments, pointing out particularly the inadequacies of the Hague Convention of 1907, which he noted was 'silent regarding the preservation of the integrity of a people'. According to Lemkin, 'the definition of genocide in the Hague Regulations thus amended should consist of two essential parts: in the first should be included every action infringing upon the life, liberty, health, corporal integrity, economic existence, and the honour of the inhabitants when committed because they belong to a national, religious, or racial group; and in the second, every policy aiming at the destruction or the aggrandisement of one of such groups to the prejudice or detriment of another.[3]

Genocide and Crimes against Humanity

[3] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress,* Washington: Carnegie Endowment for World Peace, 1944, at pp. 90-93. On Lemkin, see: William Korey, *An Epitaph for Raphael Lemkin*, New York: Jacob Blaustein Institute for the Advancement of Human Rights, 2001; John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention*, Basingstoke, United Kingdom: Palgrave Macmillan, 2008.

The legal concept of genocide was forged in the crucible of post-Second World War efforts to prosecute Nazi atrocities. Its development took place in conjunction with that of other international crimes, especially crimes against humanity, with which it bears a close but complex and difficult relationship. The development and history of genocide as a legal concept cannot be properly understood without considering the parallel existence of crimes against humanity. Although the participants in the United Nations War Crimes Commission, established in November 1943, and in the London Conference, which met from late June to early August 1945 to prepare the Nuremberg trial of the major war criminals, opted to use the term crimes against humanity in the prosecutions, they also employed the word genocide as if it was more or less synonymous. In his 'Planning Memorandum distributed to Delegations at Beginning of London Conference, June 1945', where Justice Robert Jackson outlined the evidence to be adduced in the Nuremberg trial, he spoke of '[g]enocide or destruction of racial minorities and subjugated populations by such means and methods as (1) underfeeding; (2) sterilization and castration; (3) depriving them of clothing, shelter, fuel, sanitation, medical care; (4) deporting them for forced labour; (5) working them in inhumane conditions.[4] The indictment of the International Military Tribunal charged the Nazi defendants with 'deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people, and national, racial or religious groups, particularly Jews, Poles, and Gypsies.[5] The term 'genocide' was also used on several occasions by the prosecutors during the trial itself. Sir David Maxwell-Fyfe, the British prosecutor, reminded one of the accused, Von Neurath, that he had been charged with genocide, 'which we say is the extermination of racial and national groups, or, as it has been put in the well-known book of Professor Lemkin, "a co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups with the aim of annihilating the groups themselves."'[6] Lemkin later wrote that '[t]he evidence produced at the Nuremberg trial gave full support to the concept of genocide.[7]

Nevertheless, the *Charter of the International Military Tribunal* did not use the word genocide, nor does it appear in the final judgment issued on 30 September and 1 October 1946. The legal concept of crimes against humanity, as defined at Nuremberg, suffered from a very serious limitation, in that it was confined to atrocities committed in association with an aggressive war. This was quite intentional on the part of those who drafted the legal provisions governing prosecutions, especially the four great powers, the United States, the United Kingdom, France and the Soviet Union. Indeed, extending international law from classic war crimes

[4] Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, Washington: US Government Printing Office, 1949, at p. 6.
[5] *France* et al. v. *Goering* et al., (1946) 22 IMT 45-6.
[6] (1947) 17 IMT, p. 61. See also: (1947) 19 IMT 497, 498, 509, 514, 531.
[7] Raphael Lemkin, 'Genocide as a Crime in International Law', (1947).41 *American Journal of International Law* 145, at p. 147.

involving battlefield offences and various forms of persecution of civilians in an occupied territory so that it would also cover atrocities committed by a government against its own civilian population was not only novel and unprecedented, it was also threatening to the very states who were organizing the prosecution. The distinctions were set out quite candidly by the head of the United States delegation, Robert Jackson, at a meeting of the London Conference on 23 July 1945:

It has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the way Germany treats its inhabitants, or any other country treats its inhabitants is not our affair any more than it is the affair of some other government to interpose itself in our problems. The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal war. Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities. They were a part of the preparation for war or for the conduct of the war in so far as they occurred inside of Germany and that makes them our concern.[8]

Speaking of the proposed crime of 'atrocities, persecutions, and deportations on political, racial or religious grounds', which would shortly be renamed 'crimes against humanity', Justice Jackson indicated the source of the lingering concerns of his government:

[O]rdinarily we do not consider that the acts of a government toward its own citizens warrant our interference. *We have some regrettable circumstances at times in our own country in which minorities are unfairly treated*. We think it is justifiable that we interfere or attempt to bring retribution to individuals or to states only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved. We see no other basis on which we are justified in reaching the atrocities which were committed inside Germany, under German law, or even in violation of German law, by authorities of the German state.[9]

There is little doubt that the British, the French and the Soviets had reasons of their own to share these concerns. As a result, the definition of crimes against humanity in article VI(c) of the Nuremberg *Charter* requires that atrocities be committed 'in furtherance of or in connection with any crime within the jurisdiction of the

[8] 'Minutes of Conference Session of 23 July 1945', in *Report of Robert H. Jackson, United States Representative to the International Conference on Military* Trials, Washington: US Government Printing Office, 1949, at p. 331.
[9] *Ibid.*, p. 333.

International Tribunal.'[10] In its final judgment, the International Military Tribunal made a distinction between pre-war persecution of German Jews, which it characterized as 'severe and repressive', and German policy during the war in the occupied territories. Although the judgment frequently referred to events during the 1930s, none of the accused was found guilty of an act perpetrated prior to 1 September 1939, the day the war broke out.

Following the judgment, there was considerable outrage about the severe restriction upon the concept of crimes against humanity. A member of the Nuremberg prosecution team, Henry King, has described meeting Raphael Lemkin in the lobby of the Grand Hotel in Nuremberg in October 1946, a few days after the International Military Tribunal completed its work:

When I saw him at Nuremberg, Lemkin was very upset. He was concerned that the decision of the International Military Tribunal (IMT) – the Nuremberg Court – did not go far enough in dealing with genocidal actions. This was because the IMT limited its judgment to wartime genocide and did not include peacetime genocide. At that time, Lemkin was very focussed on pushing his points. After he had buttonholed me several times, I had to tell him that I was powerless to do anything about the limitation in the Court's judgment.[11]

The disappointment soon manifested itself in the United Nations General Assembly, which was meeting in London at the time. India, Cuba and Panama proposed a resolution that they said would address a shortcoming in the Nuremberg trial by which acts committed prior to the war were left unpunished.[12] One of the preambular paragraphs in the draft resolution stated: '*Whereas* the punishment of the very serious crime of genocide when committed in time of peace lies within the exclusive territorial jurisdiction of the judiciary of every State concerned, while crimes of a relatively lesser importance such as piracy, trade in women, children, drugs, obscene publications are declared as international crimes and have been made matters of international concern…'[13] This paragraph never made it to the final version of Resolution 96(I), adopted in December 1946, because the majority of the General Assembly was not prepared to accept universal jurisdiction for the crime of genocide. Nevertheless, the resolution, somewhat toned down from the hopes of those who had launched it, launched a process that concluded two years later with the adoption of the *Convention for the Prevention and Punishment of the Crime of Genocide*.[14]

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[10] *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.

[11] Henry T. King Jr., 'Origins of the Genocide Convention', (2008) 40 *Case Western Reserve Journal of International Law* 13, at pp. 13.

[12] UN Doc. A/C.6/SR.22.

[13] UN Doc. A/BUR/50.

[14] *Convention for the Prevention and Punishment of the Crime of Genocide*, (1951) 78 UNTS 277.

Proposals that the *Genocide Convention* make reference to crimes against humanity as a related concept, or as some kind of broader umbrella under which the crime of genocide was situated, were rejected by the drafters so as not to create any confusion about the fact that genocide could be committed in time of peace as well as in wartime. This could not be said with any certainty about crimes against humanity at the time, precisely because of the Nuremberg precedent.

Thus, the recognition of genocide as an international crime by the General Assembly of the United Nations in 1946, and its codification in the 1948 *Convention*, can be understood as a reaction to the narrow approach to crimes against humanity in the Nuremberg judgment of the International Military Tribunal. It was Nuremberg's failure to recognize the international criminality of atrocities committed in peacetime that prompted the first initiatives at recognizing and defining the crime of genocide. Had Nuremberg affirmed the reach of international criminal law into peacetime atrocities, the *Genocide Convention* might never have been adopted. The term 'genocide' would probably have remained a popular or colloquial label used by journalists, historians and social scientists but one absent from legal discourse.

The 1948 *Genocide Convention*

The *Convention for the Prevention and Punishment of the Crime of Genocide* was adopted unanimously by the United Nations General Assembly on 9 December 1948. It provides the following definition of the crime of genocide:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

In one sense, the definition is considerably narrower than that of crimes against humanity, which can apply to a broad range of acts of persecution and other atrocities committed against 'any civilian population'. On the other hand, the definition is manifestly broader because of the absence of any requirement of a link with aggressive war.

Besides defining the crime, the *Convention* imposes several obligations upon States that ratify it. They are required to enact legislation to provide for punishment of persons guilty of genocide committed on their own territory. The legislation must not

allow offenders to invoke in defence that they were acting in an official capacity. States are also required to cooperate in extradition when persons suspected of committing genocide elsewhere find refuge on their territory. They may not treat genocide as a political crime, which is an historic bar to extradition. Disputes between States about genocide are automatically subject to the jurisdiction of the International Court of Justice.

The title of the *Convention* speaks of prevention, but aside from a perfunctory undertaking 'to prevent' genocide there is nothing to suggest the scope of this obligation. In 2007, in a case filed by Bosnia and Herzegovina against Serbia, the International Court of Justice said there had been a breach of the *Genocide Convention* because Serbia failed to intervene with its allies, the Bosnian Serbs, so as to prevent the Srebrenica massacre of July 1995. The Court said that in view of Serbia's 'undeniable influence', the authorities should have it should 'made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised.'[15] The judgment clarifies that the obligation to prevent extends beyond a country's own borders. The principle it establishes should apply to other States who take little or no action to respond when mass atrocity posing a risk of genocide is threatened. This pronouncement is in the same spirit as an emerging doctrine in international law expressed in a unanimous resolution of the United Nations General Assembly, adopted in 2005, declaring that States have a 'responsibility to protect' populations in cases of genocide, crimes against humanity, war crimes, and ethnic cleansing.[16]

The *Convention* specifies that genocide is to be prosecuted by the courts of the country where the crime took place or 'by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'. The original General Assembly resolution proposed by Cuba, India and Panama called for recognition of universal jurisdiction over genocide. This would mean that the courts of any state could punish the crime, no matter where it was committed. The idea was rejected by the General Assembly in favour of an approach combining territorial jurisdiction and an international institution. The promised international court was not established for more than half a century, when the *Rome Statute of the International Criminal Court* entered into force on 1 July 2002.[17] Despite the *Convention*'s rejection of universal jurisdiction, in the *Eichmann* prosecution the Israeli courts decided that it was accepted by customary international law.[18] Although no treaty authorizes universal jurisdiction over

[15] *Case concerning 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. 438.
[16] '2005 World Summit Outcome', UN Doc. A/RES/60/1, para. 138.
[17] *Rome Statute of the International Criminal Court*, (2002) 2187 UNTS 90.
[18] A-G Israel v. Eichmann, (1968) 36 ILR 5 (District Court, Jerusalem), paras. 20-22.

genocide, and there is as yet no determination of its legitimacy by the International Court of Justice, there now seems little doubt that it is permitted by international law. In 2006 and 2007, the International Criminal Tribunal for Rwanda authorized transfer of suspects for trial on the basis of universal jurisdiction with the approval of the United Nations Security Council, further evidence of the broad acceptance of universal jurisdiction over genocide.[19]

The definition of genocide set out in article II of the *Convention* has frequently been criticized for its narrowness. For example, it applies to a limited number of protected groups, and it requires an intent directed at physical destruction of the victimized group. There was disappointment when the International Court of Justice, in the *Bosnia and Herzegovina* case, dismissed attempts to broaden the definition by interpreting the words 'to destroy' so as to encompass the notion of 'ethnic cleansing'. The Court said that 'ethnic cleansing', which it described as the 'deportation or displacement of the members of a group, even if effected by force', was not necessarily equivalent to destruction of that group, and that destruction was not an automatic consequence of such displacement.[20] The relatively conservative approach to interpreting the definition, and a resistance to broadening the scope through judicial action rather than amendment of the *Convention*, is also reflected in judgments of the International Criminal Tribunal for the former Yugoslavia[21] and an authoritative report by a United Nations fact-finding commission.[22]

Nor has there been any serious effort at the political level to amend or modify the definition in Article II of the *Convention*. The ideal opportunity for such a development would have been the adoption of the *Rome Statute of the International Criminal Court*, when the definitions of the other core international crimes, crimes against humanity and war crimes, were quite dramatically modernized. But when it came to genocide, there were a few modest proposals, and these did not gain any traction during the negotiations.[23] At the Rome Conference, only Cuba argued for

[19] *Prosecutor* v. *Bagaragaza* (*Case No. ICTR-2005-86*-R11bis), Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands, 13 April 2007. For Security Council acquiescence, see: UN Doc. S/PV.5697.

[20] *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. 190.

[21] *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Judgment, 19 April 2004. Also: *Prosecutor* v. *Stakić* (Case No. IT-97-24-T), Judgment, 31 July 2003; *Prosecutor* v. *Brñanin* (Case No. IT-99-36-T), Judgment, 1 September 2004; *Prosecutor* v. *Blagojević* et al. (Case No. IT-02-60-A) Judgment, 9 May 2007.

[22] 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004', Geneva, 25 January 2005, UN Doc. S/2005/60.

[23] 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court', UN Doc. A/50/22; para. 61; UN Doc. A/AC.249/1998/CRP.8, p. 2.; Herman von Hebel and Darryl Robinson, 'Crimes Within the Jurisdiction of the Court', in Roy S. Lee, ed., *The International*

amendment of the definition, proposing it be expanded to include social and political groups.[24]

There is some evidence of innovation by national lawmakers when the provisions of the *Genocide Convention* are translated into domestic criminal legislation. The French *Code pénal*, for example, defines genocide as the destruction of any group whose identification is based on arbitrary criteria.[25] 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', explaining 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.'[26] Recently, the European Court of Human Rights acknowledged some of this variation at the national level, ruling an expansive interpretation of the definition of genocide by German courts not to be inconsistent with the prohibition of retroactive criminality.[27] Still, at the international level, a relatively strict reading of the *Convention* definition remains the rule.

Protected Groups

The definition in the 1948 *Convention* applies to 'national, ethnic, racial and religious groups'. The concept is broadly analogous to what, at the time the *Convention* was adopted, were considered as 'national minorities'. This was clearly the perspective of Raphael Lemkin and one of the other international experts who assisted the United Nations in preparing the first draft of the *Convention*, Vespasian Pella.[28] During the negotiations, there was an important debate about whether to include political groups within the definition. Persecution on the grounds of membership in a political group had been recognized at Nuremberg as a crime against humanity. But the drafters of the *Genocide Convention*, Lemkin among them, quite decisively rejected the inclusion of political groups. Some of the subsequent literature on the subject has suggested that exclusion of political groups was the result of pressure from the Soviet Union, but a careful reading of the drafting history shows that opposition on this point was widespread. The Appeals Chamber of the International Criminal

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Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results, The Hague, London and Boston: Kluwer Law, 1995, at pp. 79-128, 89, n. 37.

[24] UN Doc. A/CONF.183/C.1/SR.3, para. 100.

[25] *Code Pénal* (France), Journal officiel, 23 July 1992, art. 211-1.

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

[27] *Jorgić* v. *Germany* (Application no. 74613/01), Judgment, 12 July 2007.

[28] Vespasien V. Pella, *La guerre-crime et les criminels de guerre, Réflexions sur la justice pénale internationale, ce qu'elle est ce qu'elle devrait être*, Neuchatel: Éditions de la baconnière, 1964, at p. 80, fn. 1.

Tribunal for Rwanda has resisted subtle attempts to expand the definition of genocide in the direction of political groups.[29]

In the first prosecution using a text derived from Article II of the *Convention*, identification of the victim group did not raise any legal difficulties. Israeli law avoided any discussion about the nature of 'groups' by simply reformulating the definition of genocide so as to refer to 'crimes against the Jewish people',[30] and nothing in the trial record suggests that Eichmann ever challenged the fact that the victims of Nazi atrocities were the 'Jewish people.'[31] The issue does not appear to have been particularly controversial in litigation concerning the conflict in Bosnia and Herzegovina. A Trial Chamber of the International Criminal Tribunal for the former Yugoslavia concluded that 'Bosnian Muslims' were a 'national group',[32] a finding that was not challenged on appeal and that was accepted by the Appeals Chamber.[33] After some initial uncertainty, probably driven by discomfort with the contemporary legitimacy of the concept of 'racial groups', Trial Chambers of the International Criminal Tribunal for the former Yugoslavia have taken judicial notice of the fact that the Tutsi, as well as the Hutu and the Twa, were ethnic groups within Rwanda at the time of the 1994 genocide.[34] In an innovative interpretation, a Trial Chamber of the International Criminal Tribunal for Rwanda held that the all 'stable and permanent groups' were protected by the *Convention*,[35] but its theory has had little resonance in subsequent case law.[36]

Generally, it is the perpetrator of genocide who defines the individual victim's status as a member of a group protected by the Convention. The Nazis, for example, had detailed rules establishing, according to objective criteria, who was Jewish and who was not. It made no difference if the individual, perhaps a non-observant Jew of mixed parentage, denied belonging to the group. As Jean-Paul Sartre wrote: 'Le juif est un homme que les autres hommes tiennent pour juif.'[37] With considerable frustration, lawyers and courts have searched for objective definitions of the protected groups. But most of the judgments treat the identification of the protected group as an essentially subjective matter. For example, Trial Chambers of the International Criminal Tribunal for Rwanda have concluded that the Tutsi were an ethnic group based on the existence of government-issued official identity cards

[29] *Nahimana et al. v. Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007, para. 496.
[30] *Nazi and Nazi Collaborators (Punishment) Law, 1950* (Law 5710/1950), s. I(a).
[31] *A-G Israel* v. *Eichmann*, (1968) 36 ILR 5 (District Court, Jerusalem); *A-G Israel* v. *Eichmann*, (1968) 36 ILR 277 (Supreme Court of Israel).
[32] *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, paras. 559-560.
[33] *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Judgment, 19 April 2004, para. 6.
[34] *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment, 1 December 2003, para. 241.
[35] *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 652.
[36] '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. 501.
[37] Jean-Paul Sartre, *Réflexions sur la question juive*, Paris: Gallimard, 1954, pp. 81-4.

describing them as such.[38] A Trial Chamber of the International Criminal Tribunal for the former Yugoslavia wrote that 'the relevant protected group may be identified by means of the subjective criterion of the stigmatization of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics. In some instances, the victim may perceive himself or herself to belong to the aforesaid group.'[39] The prevailing view is that determination of the relevant protected group should be made on a case-by-case, relying upon both objective and subjective criteria.[40]

Ethnic Cleansing and Cultural Genocide

The *Convention* definition of genocide refers to the 'intent to destroy' without further precision. The five punishable acts that follow consist of a combination of physical, biological and cultural attacks. For example, the fifth act of genocide in the definition, forcibly transferring children from one group to another, quite evidently does not involve their physical destruction. Rather, the elimination of a group is contemplated by destroying the cultural memory and the national language, through assimilation at a very young age. A literal reading of the definition can therefore support an interpretation whereby acts of 'ethnic cleansing' or of cultural genocide falling short of physical destruction would be punishable, a view that some judgments appear to support.[41]

When the *Convention* was being drafted, the punishable acts were divided into three categories, physical, biological and cultural genocide. The United Nations General Assembly voted quite deliberately to exclude cultural genocide from the *Convention*.[42] It also rejected an amendment from Syria to include as an act of genocide behaviour that today might be called 'ethnic cleansing'. The Syrian amendment read: 'Imposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment.'[43] When the General Assembly agreed to include forcible transfer of children, this was

[38] *Prosecutor* v. *Kayishema* et al. (Case No. ICTR-95-1-T), Judgment, 21 May 1999, para. 98.
[39] *Prosecutor* v. *Brñanin* (Case No. T-99-36-T), Judgment, 1 September 2004, para. 683 (references omitted).
[40] *Prosecutor* v. *Brñanin* (Case No. IT-99-36-T), Judgment, 1 September 2004, para. 684. Also: *Prosecutor* v. *Stakić* (Case No. IT-97-24-A), Judgment, 22 March 2006, para. 25; *Prosecutor* v. *Semanza* (Case No. ICTR-97-20-T), Judgment and Sentence, 15 May 2003, para. 317; *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 811; *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. 191.
[41] *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Partially Dissenting Opinion of Judge Shahabuddeen, 19 April 2004; *Prosecutor* v. *Blagojević* (IT-02-60-T) Judgment, 17 January 2005; *Jorgić* v. *Germany* (App. no. 74613/01), Judgment, 12 July 2007, para. 47.
[42] UN Doc. A/C.6/SR.83.
[43] UN Doc. A/C.6/234.

presented as an exception to the agreed upon exclusion of cultural genocide.[44] Consequently, a reading of the *Convention* definition that takes into account the intent of its drafters will tend to reject inclusion of cultural genocide and ethnic cleansing, and construe the words 'to destroy' as if they are modified by 'physically' and 'biologically.'

There are strong arguments for rejecting an approach to treaty interpretation that puts too much emphasis on legislative intent, particularly in the field of human rights law. Reliance upon the drafting history tends to freeze the provision, preventing it from evolving so as to take into account historical developments and changed attitudes. Be that as it may, courts to this day have shown great respect for the relatively narrow perspective adopted by the General Assembly in 1948. This is only partially explained by an inherent conservativism, however. Just as the crime of genocide emerged in international law as a reaction to the limitations on crimes against humanity, more recently the law on crimes against humanity has evolved to such an extent that it can now cover acts of ethnic cleansing and cultural genocide, even when committed in peacetime. As a result, there is no 'impunity gap', and there is little or no pressure in a legal sense for the expansion of the definition of genocide by interpretation. Of course, there are important political prerogatives and much symbolism associated with the label 'genocide', and many victims are deeply disappointed when their own suffering is acknowledged as 'mere' crimes against humanity. They do not fully appreciate the importance of the legal distinctions, which are the result of a complex historical debate. Thus, while the distinction between genocide and crimes against humanity no longer has significant legal consequences, it remains fundamental in other contexts.

Numbers and Genocide

The 1948 definition of genocide speaks of destruction of a group 'in whole or in part'. It was a noble attempt by the drafters to reach consensus, but in reality the General Assembly used ambiguous terms and left their clarification to judges in subsequent prosecutions. Several theories have emerged with a view to circumscribing the notion of 'in part'. Because the terms appear in the preliminary paragraph of the definition, it is quite clear that they refer to the genocidal intent. As a result, the fundamental question is not how many victims were actually killed or injured, but rather how many victims the perpetrator intend to attack. Even where there is a small number of victims, or none at all – the *Convention* also criminalizes attempted genocide – the crime can be committed if the genocidal intent is present. The actual result, in terms of quantity, will nevertheless be relevant in that it assists in assessing the perpetrator's intent. The greater the number of actual victims, the more plausible becomes the deduction that the perpetrator intended to destroy the group, in whole or in part. But there are other issues involved in construing the meaning of

[44] UN Doc. A/C.6/SR.82.

the term 'in part.'. Could it be genocide to target only a few persons for murder because of their membership in a particular ethnic group? A literal reading of the definition seems to support such an interpretation. Nevertheless, this construction is rather too extreme, and inconsistent with the drafting history, as well as with the context and the object and purpose of the *Genocide Convention*. Two basic approaches to the scope of the term 'in part' have emerged, each adding a modifying adjective, 'substantial' or 'significant', to the word 'part'.

According to the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, '[i]t is well established that where a conviction for genocide relies on the intent to destroy a protected group "in part," the part must be a substantial part of that group.'[45] Noting that the Nazis did not realistically intend to destroy all Jews, but only those in Europe, and that the Hutu extremists in Rwanda sought to kill Tutsis within Rwanda, the Appeals Chamber said: 'The intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him. While this factor alone will not indicate whether the targeted group is substantial, it can - in combination with other factors - inform the analysis.'[46] In the factual context, the Appeals Chamber considered that the Bosnian Muslim community in Srebrenica constituted a 'substantial part' of the Bosnian Muslims as a whole, and that the attempt to destroy it amounted to genocide.[47]

Another approach takes more of a qualitative than a quantitative perspective, reading in the adjective 'significant'. There is nothing to support this in the drafting history of the *Convention*, and the idea seems to have been launched by Benjamin Whitaker in a 1985 report to the United Nations Sub-Commission for the Protection and Promotion of Human Rights. He wrote that the term 'in part' denotes 'a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership'.[48] Citing Whitaker's report, an expert body established by the United Nations Security Council in 1992 to investigate violations of international humanitarian law in the former Yugoslavia held that 'in part' had not only a quantitative but also a qualitative dimension. According to the Commission's chair, Professor M. Cherif Bassiouni, the definition in the *Genocide Convention* was deemed 'sufficiently pliable to encompass not only the targeting of an entire group, as stated in the convention, but also the targeting of certain segments of a given group, such as the Muslim elite or Muslim women'.[49] This approach was adopted by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, in some of the initial indictments,[50] and was subsequently

[45] *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Judgment, 18 August 2004, para. 8.
[46] *Ibid.*, para. 13.
[47] *Ibid.*, para 22.
[48] Benjamin Whitaker, `Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide', UN Doc. E/CN.4/Sub.2/1985/6, para. 29.
[49] 'Final Report of the Commission of Experts', UN Doc. S/1994/674, para. 94.
[50] *Prosecutor* v. *Karadžić* et al. (Case Nos. IT-95-18-R61, IT-95-5-R61), Transcript of hearing of 27

accepted by trial judges.[51] Although not explicitly endorsing the 'significant part' gloss on the *Convention*, the Appeals Chamber of the Tribunal considered the relevance to the Srebrenica Muslim community of the destruction of approximately 7,000 men. It referred to an observation of the Trial Chamber about the patriarchal character of Bosnian Muslim society in Srebrenica, and the consequent impact upon the future of the community that would result from the killing of its adult male population. 'Evidence introduced at trial supported this finding, by showing that, with the majority of the men killed officially listed as missing, their spouses are unable to remarry and, consequently, to have new children. The physical destruction of the men therefore had severe procreative implications for the Srebrenica Muslim community, potentially consigning the community to extinction'.[52] In other words, the adult males were a 'significant part' of a community, the Srebrenica Muslims, that was itself a 'substantial part' of the group as a whole, namely, Bosnian Muslims.

Genocidal Intent

In principle, what sets criminal law apart from other areas of legal liability is its insistence upon establishing that the punishable act was committed intentionally. At best, inadvertent or negligent behaviour lies at the fringes of criminal law, and will certainly not apply when the most serious crimes, including genocide, are concerned. As a rule, criminal legislation does not spell out a requirement of intent, as this is considered to be implicit. Exceptionally, the definition in the *Convention* refers to the intent of the perpetrator, which must be to destroy the protected group in whole or in part. There are actually two distinct intents involved, because the underlying genocidal act, for example killing or causing serious bodily or mental harm to a member of the group, must also be carried out intentionally.

Courts often refer to the 'specific intent' of genocide, or the *dolus specialis*, so as to distinguish it from non-genocidal killing. Application of this classic criminal law paradigm to genocide has resulted in what may be an exaggerated focus by some judges on the individual perpetrator, taken in isolation. The International Criminal Tribunal for the former Yugoslavia has adopted the view that an individual, acting alone, can commit genocide to the extent that he or she engages in killing with a genocidal intent.[53] The problem with such analysis is that it loses sight of the importance of the plan or policy of a State or analogous entity. In practice, genocide within the framework of international law is not the crime of a lone deviant but the act of a State. The importance of a State policy becomes more apparent when the

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June 1996, p. 15. Also: *Prosecutor* v. *Jelisić* et al. (Case No. IT-95-10-I), Indictment, 21 July 1995, para. 17.

[51] *Prosecutor* v. *Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, paras. 82, 93; *Prosecutor* v. *Sikirica* et al. (Case No. IT-95-8-T), Judgment on Defense Motions to Acquit, 3 September 2001, para. 80..

[52] *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Judgment, 18 August 2004, para. 28

[53] *Prosecutor* v. *Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 100.

context shifts from individual prosecution to a broader and more political determination.

For example, in September 2005 the United Nations Security Council commissioned a study to determine whether genocide was being committed in Darfur. The resulting expert report did not seriously attempt to determine whether any single individual within Sudan had killed with genocidal intent. Rather, it examined the policy of the Sudanese government, stating: 'The Commission concludes that the Government of Sudan has not pursued a policy of genocide.'[54] The Commission said that there was evidence of two elements of the crime of genocide. The first was the presence of material acts corresponding to paragraphs in the definition of the crime set out in article II of the 1948 *Convention for the Prevention and Punishment of the Crime of Genocide*. It observed that 'the gross violations of human rights perpetrated by Government forces and the militias under their control' included reports of killing, causing serious bodily or mental harm, and deliberate infliction of conditions of life likely to bring about physical destruction. The second was the subjective perception that the victims and perpetrators, African and Arab tribes respectively, made up two distinct ethnic groups. But, said the Commission, 'one central element appears to be missing, at least as far as the central Government authorities are concerned: genocidal intent. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds.'[55]

Article III of the *Genocide Convention* establishes that in addition to criminal liability for the actual perpetrators of the crime, accomplices are also punishable. The transposition of concepts of complicity drawn from ordinary criminal law to the international setting of mass atrocity lacks some precision. In reality, it is the organizers and instigators of genocide who bear the greatest responsibility; the physical acts themselves are committed by individuals who are low in the hierarchy, and who may well be ignorant of the genocidal intent.

The statutes of the international criminal tribunals make provision for prosecution of the commander or superior where the acts themselves are committed by subordinates, even in the absence of evidence that actual orders or directions were given. This approach to liability, drawn from a notorious post-Second World War case,[56] has proven to be of only theoretical interest. The scenario whereby a superior is convicted for failing to prevent subordinates from committing genocide is

[54] '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. 518.
[55] *Ibid*.
[56] *United States of America* v. *Yamashita*, (1948) 4 LRTWC 1, pp. 36-37; *In re* Yamashita, 327 U.S. 1 (1945).

implausible once it is understood that this is a crime that stems from a State or organizational plan or policy.

Many contemporary international criminal prosecutions are based upon a theory known as 'joint criminal enterprise'. It recognizes that atrocities that qualify as international crimes, including genocide, are committed by groups and organizations, acting with a common purpose. In practice, it means that the leaders or organizers will be held responsible for the crimes committed by their associates, even those that they did not specifically intend, to the extent that these were a reasonable and foreseeable outcome of the common purpose or joint enterprise.[57]

State responsibility

Although the definition of genocide is framed as a crime, implying that it applies only to individuals, the 1948 *Genocide Convention* imposes duties upon States to prevent genocide and clearly envisages their liability before the International Court of Justice. Any doubts on this point were resolved in the February 2007 judgment of the International Court. There remains an ongoing debate among international lawyers as to whether States actually commit crimes. The Court avoided the question when it ruled that Serbia was liable for failing to prevent genocide, whether qualified as a crime or as an internationally wrongful act.

The Court also held that where charges of genocide are made, they must be established by proof 'at a high level of certainty appropriate to the seriousness of the allegation'.[58] This is a considerably more demanding standard than what would normally be applied in ordinary cases involving State responsibility before the International Court of Justice, and it appears to approximate the norm applied in criminal prosecutions. For example, the Rome Statute of the International Criminal Court says that '[i]n order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.'[59] In adopting this approach, the International Court of Justice greatly reduced the likelihood of a result inconsistent from that of the international criminal tribunals. Its exigent standard of proof with respect to genocide virtually assured that the International Court of Justice, dealing with State responsibility, and the International Criminal Tribunal for the former Yugoslavia, dealing with individual responsibility, would remain very much on the same wavelength.

Conclusions

[57] *Prosecutor* v. *Brñanin* (Case No. IT-99-36-A), Judgment, 3 April 2007, paras. 420-425.
[58] *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina)*, *Judgment*, 26 February 2007, para. 210.
[59] *Rome Statute of the International Criminal Court*, (2002) 2187 UNTS 90, art. 66(3).

The *Genocide Convention* continues to fascinate jurists, politicians, journalists and human rights activists. For most of its first fifty years, it lived in a state of tension with crimes against humanity. There was much frustration with the narrowness of the definition of genocide. Schwarzenberger famously remarked that the *Genocide Convention* was 'unnecessary when applicable and inapplicable when necessary'.[60] Frank Chalk and Kurt Jonassohn wrote that 'the wording of the *Convention* is so restrictive that not one of the genocidal killings committed since its adoption is covered by it'.[61] Many, therefore, argued for a dynamic interpretation of the concept of genocide that would include a range of other protected groups, such as political and social groups, and that would apply to a broader range of acts.[62] But what they were proposing, in reality, was equivalent to crimes against humanity without the *nexus* to armed conflict.

In early 1945, genocide and crimes against humanity were cognates, terms devised to describe the barbarous acts of the Nazi regime. Though not identical in scope, they neatly overlapped and could be used more or less interchangeably to describe the great crime of the era, the attempted extermination of Europe's Jewish population. By late 1946 an important rift developed, and it was not healed until the end of the century. Eventually, the *nexus* disappeared from the definition of crimes against humanity, but it would take half a century for the evolution to become evident. In 1995, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia declared that the requirement that crimes against humanity be associated with armed conflict was inconsistent with customary law.[63] It offered the rather unconvincing explanation that the Security Council had included the *nexus* in article 5 of the *Statute of the International Criminal Tribunal for the former Yugoslavia* as a jurisdictional limit only.[64] The more plausible explanation is that the lawyers in the United Nations Secretariat who drafted the *Charter* believed the *nexus* to be part of customary law, and the Council did not disagree.[65]

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[60] Georg Schwarzenberger, International Law, Vol. I, 3rd ed., London: Stevens & Sons, 1957, at p. 143.

[61] The Conceptual Framework', in Frank Chalk and Kurt Jonassohn, eds., *The History and Sociology of Genocide*, New Haven and London: Yale University Press, 1990, pp. 3–43.

[62] *e.g.*, 'Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide', UN Doc. E/CN.4/Sub.2/1985/6.

[63] *Prosecutor* v. *Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 141; *Prosecutor* v. *Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999, para. 251; *Prosecutor* v. *Kordić* et al. (Case No. IT-95-14/2-T), Judgment, 26 February 2001, para. 23.

[64] *Prosecutor* v. *Šešelj* (Case No. IT-03-67-AR72.1), Decision on the Interlocutory Appeal Concerning Jurisdiction, 31 August 2004, para. 13.

[65] See the Secretary-General's report: 'Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.' 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)', UN Doc. S/25704 (1993), para. 47. See: Larry

Nevertheless, there can today be no doubt that the flaw in the Nuremberg concept of crimes against humanity, something that prompted Lemkin's genocide-related initiatives at the General Assembly, has been corrected. The authoritative definition appears in article 7 of the *Rome Statute*, which contains no reference to armed conflict as a contextual element. The only real remaining uncertainty is precisely when the *nexus* disappeared from the elements of crimes against humanity. As far as the International Law Commission was concerned, it was present as late as 1950, and perhaps after that. In 1954, the Commission experimented by removing the *nexus*, replacing it with another contextual element, the State plan or policy.[66] There is also some recent authority from the European Court of Human Rights supporting the view that the *nexus* was absent as early as the 1950s.[67] In a September 2008 decision, a Grand Chamber of the Court said cautiously that a *nexus* with armed conflict 'may no longer have been relevant by 1956'.[68] The issue directly confronts the Extraordinary Chambers of the Courts of Cambodia in their current efforts to prosecute Khmer Rouge atrocities.

Today, we may once again speak of genocide and crimes against humanity as they were originally used. The only legal consequence of describing an atrocity as genocide rather than as crimes against humanity is the relatively easy access to the International Court of Justice offered by article IX of the 1948 *Convention*. But article IX has generated more heat than light, and the recent ruling of the Court in *Bosnia* v. *Serbia* should discourage resort to this remedy except in the very clearest of cases.[69]

The distinction between genocide and crimes against humanity is still of great symbolic significance, of course. Many Bosnians were shattered that their suffering during the 1992-1995 war was not labelled genocide, save for the very specific case and ultimately anomalous case of the Srebrenica massacre. This was reflected in many negative comments from international lawyers about the judgment of the International Court of Justice.[70] Similarly, there was much disappointment when the Commission of Inquiry set up pursuant to a Security Council mandate determined

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D. Johnson, 'Ten Years Later: Reflections on the Drafting', (2004) 2 *Journal of International Criminal Justice* 368, at p. 372.

[66] *Yearbook…1954*, Vol. II, UN Doc. A/CN.4/SER.A/1954/Add.l, p. 150.

[67] *Kolk* v. *Estonia* (App. no. 23052/04), *Kislyiy* v. *Estonia* (App. no. 24018/04), Admissibility Decision, 17 January 2006; *Penart* v. *Estonia* (App. No. 14685/04), Admissibility Decision, 24 January 2006;

[68] *Korbely* v. *Hungary* (App. No. *9174/02*), Judgment, 19 September 2008, para. 82.

[69] *Case concerning 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. On the judgment, see: William A. Schabas, 'Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes', (2007) 2 *Genocide Studies and Prevention* 101.

[70] Antonio Cassese, 'A Judicial Massacre', *The Guardian*, 27 February 2007; Ruth Wedgwood, 'Bad Day for International Justice', *International Herald Tribune*, 8 March 2007.

that Sudan was not committing genocide in Darfur.[71] And yet the essence of the Bosnian war has been described on countless occasions in the case law of the International Criminal Tribunal for the former Yugoslavia as a crime against humanity, and the Darfur Commission did the same for the ethnic cleansing in Sudan, urging that the situation be referred to the International Criminal Court for prosecution: The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken in any way as detracting from the gravity of the crimes perpetrated in that region. International offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide.[72]

If their victimisation is acknowledged as crimes against humanity, the Bosnian Muslims and the Darfur tribes are in good company. After all, even though today we speak of the Armenian and Jewish genocides, at the time when they were committed crimes against humanity was the applicable terminology. Perhaps in the years to come, now that the legal difficulties distinguishing genocide and crimes against humanity have been resolved, the more popular connotation of these terms will tend to evolve in the same direction.

The legal significance of the *Genocide Convention* has declined over the past decade or so, but not because it is inapplicable to specific circumstances or out of a perceived conservativism of diplomats and judges. Rather, new instruments and new institutions have emerged. Foremost among them is the International Criminal Court. In a different way, it accomplishes much the same thing as the *Genocide Convention*, but in a manner applicable to crimes against humanity as well. Moreover, the recent 'responsibility to protect' doctrine extends the duty of prevention found in article I of the *Genocide Convention* to crimes against humanity. The only legal consequence of describing an atrocity as genocide rather than as crimes against humanity is the relatively easy access to the International Court of Justice offered by article IX of the 1948 *Convention*. But article IX has generated more heat than light, and the recent ruling of the Court in *Bosnia* v. *Serbia* should discourage resort to this remedy except in the very clearest of cases.[73] In a legal sense, there is now slight importance, if any, to the distinction between genocide and crimes against humanity. The importance of the *Genocide Convention* can probably be found not so much in its contemporary

[71] 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004', Geneva, 25 January 2005, UN Doc. S/2005/60.
[72] *Ibid.*, p. 4.
[73] *Case concerning 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. On the judgment, see: William A. Schabas, 'Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes', (2007) 2 *Genocide Studies and Prevention* 101.

potential to address atrocities, something that is largely superseded by more modern texts, as its historic contribution to the struggle for accountability and the protection of human rights.

End.