

# THE 60<sup>TH</sup> ANNIVERSARY OF THE GENOCIDE CONVENTION

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*On 9 December 1948, the United Nations General Assembly adopted the Convention for the Prevention and Punishment of the Crime of Genocide. A symbolic response to the atrocities perpetrated by the Nazi regime during World War II, the Convention quickly succumbed to the politics of the Cold War. Its renaissance in the 1990s owes much to the thaw in East-West relations and the emergence of international criminal law and institutions in the aftermath of the events in Rwanda and the former Yugoslavia. As we celebrate the 60<sup>th</sup> anniversary of this venerable instrument, time is ripe for an assessment of the Convention, in particular the extent to which recent international developments have curbed genocide and other related acts. This article examines the backdrop against which the Convention was adopted, including the reasons explaining why genocide developed as a separate crime. It then looks at the definition that was eventually adopted, including the issues surrounding acts of genocide, protected groups and the requisite intent to prove genocide, and argues that political considerations have shorn the Convention of some important elements. The final part of the paper offers a few general reflections on post-Cold War developments aimed at eradicating genocide and other international crimes.*

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## **I INTRODUCTION**

Genocide. The word evokes ideas of absolute evil, negation of humanity. Its label fuels all sorts of sentiments and passions. By inserting itself into our contemporary vocabulary, genocide becomes the emblem of all indignations and galvanises the actions of governments and civil society actors. Despite the complex nature of most internal and international conflicts, claims of genocide typically simplify the relationships between the various parties involved, crystallising them into a dichotomy opposing perpetrators and victims. How can it be otherwise? Genocide, the crime of crimes, generally associated to the Holocaust, is a term charged with emotion, which conveys a strong symbolism. The qualification of an act as genocide is politically and morally charged and is influenced by multiple political and moral issues inextricably linked to genocide.

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First, genocide revolves around the idea of memory. The quest for recognition of an act as genocide has a cathartic effect and participates in the reconstruction of the identity of the victim community. It may also galvanise the latter's recriminations against a government. Secondly, genocide has a strong mobilising effect. It favours action in favour of a nation, a people or a particular group under threat, thus legitimising calls for international intervention to put an end to the atrocities and protect the victims. Thirdly, genocide raises legal issues. Considered by Winston Churchill as a crime without name, genocide was erected as a crime in its own name in the aftermath of World War II, enabling States, at least in theory, to prosecute individuals for attempting to wipe out whole groups, even in times of peace. It is easy to see that the term genocide can be manipulated and adapted to suit particular agendas. At the same time, the stigma that comes with allegations of genocide require that they be scrutinised carefully and, as the International Court of Justice recently reminded us, only the clearest of cases will be considered as genocide.

In 2008, the Genocide Convention celebrated its 60th anniversary, a momentous occasion for an instrument with a chequered history. Genocide has in recent years become central to international criminal law. The tragic events in Rwanda and the former Yugoslavia in the 1990s led to the creation of specialised *ad hoc* tribunals and paved the way to the creation of the International Criminal Court, with jurisdiction over genocide, crimes against humanity and war crimes. Genocide has also found its way into the jurisdiction of the Extraordinary Chambers in the Courts of Cambodia and in national statutes with universal jurisdiction. Yet, this very much looks like a pyrrhic victory. The Convention has failed to deter the perpetration of unimaginable atrocities in Cambodia, Rwanda and Darfur. Its provisions, adopted in the context of the Cold War, have hindered prosecutions and incited prosecutors to qualify acts of genocide as crimes against humanity to gain conviction of alleged *génocidaires*. The jurisprudence of international tribunals has even questioned the traditional denomination of genocide as the "crime of crimes" by putting all international crimes on the same level.

As part of a special issue devoted to Professor Anthony H Angelo, this article echoes two facets of the jurist that permeates his work: Tony *l'internationaliste* and Tony *l'humaniste*. His knowledge of international law has served him well in his professional capacity; his capacity to approach legal tasks with a genuine concern for the interests and welfare of people has well served many small island States. All this, with a degree of humility this writer has rarely witnessed. *En son honneur*, this paper simply offers a few reflections on the Genocide Convention,<sup>1</sup> with a particular focus on the legal issues surrounding the definition of genocide. Without any pretence to being exhaustive, the paper examines the background to the Convention, including the reasons explaining why genocide developed as a separate crime. It then looks at the definition that was eventually adopted, including the issues surrounding genocidal actions, protected groups and the requisite intent to prove genocide, and argues that political considerations have shorn the Convention of some

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1 Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 277.

important elements. A few general reflections on the contribution of the Convention to the development of international criminal law are offered as a conclusion.

## **II BACKGROUND TO THE CONVENTION**

Atrocities have been committed against civilian populations since times immemorial. Particular groups have been slaughtered and whole civilisations wiped out over history. Despite tales of chivalry in ancient times and the middle ages and nascent developments in the field of international humanitarian law since the 1860s, it took two major events in the first half of the 20<sup>th</sup> century to erect genocide into an international crime and crystallise its prohibition as a rule of *jus cogens*.

### **A From Armenia to Nuremberg**

The first half of the 20<sup>th</sup> century saw the international community facing a major new threat: authoritarian ruthlessness combined with modern technology and organisation leading to unprecedented levels of bloodshed in short timeframes.<sup>2</sup> Atrocities committed by the Ottoman Empire against the Armenian people in the late 1890s and especially from 1915-17 brought this new reality into the public arena. The Treaty of Sèvres, the peace treaty between the Allies and the Ottoman Empire after World War I, required determination of those responsible for the "barbarous and illegitimate methods of warfare... [including] offenses against the laws and customs of war and the principles of humanity".<sup>3</sup> Although France, Russia and Great Britain jointly declared that they would ensure those responsible were brought to justice, political considerations and evidentiary difficulties meant that by late 1921, the alleged perpetrators held by the British in Malta were released.<sup>4</sup> The Treaty of Sèvres was annulled in the course of the Turkish War of Independence and the parties signed and ratified the superseding Treaty of Lausanne in 1923.<sup>5</sup> The Inter-Allied tribunal attempt demanded by the Treaty of Sèvres had now been relegated to history. Political considerations had prevailed.

So, it was not until the so-called "Armenian solution" was supplanted in the consciousness of world leaders by the "Final Solution" during World War II that jurists and governments alike were

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2 Arnold J Toynbee *Experiences* (Oxford University Press, London, 1969) 242.

3 Treaty of Peace Between the Allied Powers and Turkey (Treaty of Sèvres) (10 July 1920), reproduced in *The Treaties of Peace 1919-1923* (Vol II, Carnegie Endowment for International Peace, New York, 1924). Article 230 requested that the Ottoman Empire "hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Ottoman Empire on August 1, 1914."

4 William A Schabas *Genocide in International Law* (Cambridge University Press, Cambridge, 2000) 16. However, several were found guilty of "massacre" *in absentia* before Turkish courts or assassinated by survivors of the Armenian genocide.

5 Treaty of Lausanne (24 July 1923) 8 LNTS 1133. The Treaty of Lausanne, which did not include any provisions for criminal prosecutions, replaced the Treaty of Sèvres, which never went into effect.

forced into action, in order to punish those involved in atrocities that had been unthinkable just a few short years before. At the forefront of this movement was Raphael Lemkin, who coined the term "genocide" in 1944, to describe the:<sup>6</sup>

... destruction of a nation or of an ethnic group...Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of a national group.

Lemkin's previous efforts to argue for a separate crime along these lines had failed, but the events of World War II brought a new sense of urgency. Up until this point, what is now known as "genocide" was included within the category of "crimes against humanity."<sup>7</sup> The term "genocide" was used (albeit informally) during the trials at Nuremberg. Although it did not find its way into the final judgment, there was no doubt that a separate crime began to develop from the traumatic events of World War II. The absence of direct charges of genocide at Nuremberg shocked Lemkin. The requirement by the Tribunal of a link between crimes against humanity and armed conflict opened an important gap in the pursuit of those who commit genocide during peace time.

### ***B United Nations Involvement***

The first session of the United Nations General Assembly was in progress when this new term was being raised at Nuremberg. Cuba, India and Panama asked that the issue of genocide be put on the agenda. The result was resolution 96(I): the General Assembly *affirmed* that genocide was a crime at international law, and requested the Economic and Social Council (ECOSOC) to study the issue, with a view to producing a draft convention.<sup>8</sup> Resolution 96(I) has often been cited since as codifying the prohibition of genocide at customary international law, thanks to its unanimous acceptance by the members of the United Nations.<sup>9</sup> The International Court of Justice, in its *Reservations* advisory opinion, held that the principles underlying the Genocide Convention were in fact principles of customary international law, holding up this resolution as at least evidence of international consensus.<sup>10</sup>

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6 Raphael Lemkin *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace, Washington, DC, 1944) 79.

7 Schabas, above n 4, 36. This included murder, extermination, deportation and enslavement.

8 UNGA Resolution 96(I) (11 December 1946).

9 Schabas, above, n 4, 46. However, caution is required – there was little debate at the time, and much work has since been undertaken in such areas.

10 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 16, para 23. See also *The Prosecutor v Clément Kayishema and Obed Ruzindana* (Judgment) (21 May 1999) ICTR-95-1-T para 88 (Trial Chamber, ICTR), where it is stated that the "crime of genocide is considered part of international customary law and, moreover, a norm of jus cogens."

Resolution 96(I) also broke from the explicit Nuremberg requirement that the crime that came to be known as genocide required a link to an armed conflict.<sup>11</sup> This requirement had been criticised, as it prevented prosecutions for actions that pre-dated World War II, but were nonetheless, arguably, part of the same chain of events.<sup>12</sup>

Once genocide as a crime began to enter the legal consciousness, it gained more and more impetus. For example, the trial of Rudolf Hoess in Poland recognised that medical research taking place at Auschwitz was part of the larger picture, and a preparatory stage of one of the forms of genocide.<sup>13</sup> Hence, national trials began to look at establishing some responsibility for such acts.

Thus, the attention paid to genocide from 1944 onwards, by both States and jurists, increased dramatically. The Secretary-General of the United Nations, aided by a panel of experts, prepared a draft convention that passed through the Sixth Committee of the United Nations, and, after alterations, was unanimously adopted by the General Assembly on 9 December 1948.<sup>14</sup> The Convention aimed to be an authoritative codification of the basic legal principles surrounding genocide. However, once again, political considerations entered the frame. Compromise was the key to the success of the Convention in gaining ratifications, and also a major hindrance to achieving the lofty goals of such a treaty.

### **C *Compromise and Agreement***

From the very first draft of the Convention, the need for a narrow definition of genocide was stressed by the negotiating parties.<sup>15</sup> This was to ensure that it was not confused with elements of other crimes, and to ensure the greatest level of ratification possible. A number of States played a significant role in shaping the final version of the Convention, in particular three of the five permanent members of the Security Council.

There was a great deal of disagreement over what should be included in the definition of "genocide", and what was unnecessary. The head of the United Kingdom delegation, Sir Hartley Shawcross, believed that it was not necessary to create a new treaty, as genocide was already illegal at international law, as evidenced by the reality of Nuremberg (where individuals were essentially being tried for genocide in all but name). The Soviet Union, on the other hand, was strongly in favour of explicitly outlawing genocide against racial, national and religious groups. Its delegation pushed for incitement to racial hatred, and preparatory acts, such as research aimed at development

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11 Schabas, above, n 4, 46.

12 Donald Bloxhan *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford University Press, Oxford, 2001) 63.

13 *Poland v Hoess* (1948) 7 LRTWC 11, 24-26 (Supreme National Tribunal of Poland).

14 UNGA Resolution 260 (III) (9 December 1948).

15 Schabas, above, n 4, 53.

of genocidal techniques, to be included, as well as "cultural genocide", such as the banning of languages.<sup>16</sup> The Soviet Union was, however, opposed to the United States' position that political groups should be a protected group under the Convention.

In the end, a great deal of bargaining took place before the text of the Convention was finalised. Needless to say, this had some positive, and some negative, effects, not least on the definition of genocide itself.

### **III DEFINING GENOCIDE**

The key provision in the Genocide Convention for the definition of the crime of genocide is Article II:

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.

There are three main elements to the definition: the list of prohibited acts that can qualify as genocide (the *actus reus* element); a list of protected groups; and, finally, a special intent requirement (the *mens rea* element). Due to the nature of the crime, the cryptic wording of the Convention and the dormant nature of the document until the 1990s, there is limited judicial authority clarifying these three elements, especially the element of intention.

#### **A Acts of Genocide**

Five acts fall within the definition of genocide under Article II. The most obvious of these is the killing of members of a protected group. Some of the other acts are not as clear. For example, Article II(b) lists "causing serious bodily or mental harm to members of the group" as one such act. Although this is not defined in the Convention, it has been held by the International Criminal Tribunal for Rwanda (ICTR) to include torture (both physical and mental), mutilation, persecution and degrading or inhumane acts.<sup>17</sup> In *Kayishema and Ruzindana*, the ICTR set out a test involving

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<sup>16</sup> Schabas, above, n 4, 80.

<sup>17</sup> *The Prosecutor v Jean-Paul Akayesu* (Judgment) (2 September 1998) ICTR-96-4-T para 504 (Trial Chamber, ICTR).

harm that "seriously injures the health, causes disfigurement, or causes any serious injury to the external, internal organs, or senses."<sup>18</sup> This potentially widens the definition of genocide. The Trial Chamber of the ICTR in *Rutaganda* held that the injury does not have to be permanent and irremediable.<sup>19</sup> Rape has also been said, at times, to come within the ambit of Article II(b). The Trial Chamber of the ICTR held that "sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole"<sup>20</sup> and as such manifested the specific intent required for those acts to constitute genocide. The United Nations General Assembly passed a resolution that, in the context of the conflict in the former Yugoslavia, rape could fulfil this, under certain circumstances.<sup>21</sup> In the famous trial of Adolf Eichmann in Jerusalem, the former Head of the Gestapo in Budapest, who was abducted from Argentina by Israeli agents in 1960, the District Court gave a broad definition of Article II(b), including enslavement, starvation, deportation, persecution, and detention, in conditions designed to cause deprivation and degradation.<sup>22</sup> Thus, a wide variety of acts can, arguably, come within the scope of Article II(b), provided that the other requirements are fulfilled, namely intent, and victimisation of a protected group.

The third act mentioned in Article II is the "deliberate infliction of conditions of life calculated to destroy the [protected] group". *Eichmann* confirmed that this does not have to necessarily succeed, in order to qualify.<sup>23</sup> It has been argued that the intentional deprivation of proper housing, minimum standards of medical care, hygiene, and excessive (forced) work, where the effects are likely to be debilitating, may fall within this definition. In *Akayesu*, the trial chamber accepted that this meant methods which do not immediately kill the victim, but which are ultimately aimed at this.<sup>24</sup>

The fourth and fifth categories are linked, to some extent. The fourth involves measures intended to restrict reproduction within a group, such as forced sterilisation and abortion. The fifth is the forcible transfer of children from one group to another. These could both have potentially disastrous effects on the population of a threatened group. However, the prohibition on transferring

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18 *The Prosecutor v Clément Kayishema and Obed Ruzindana*, above n 10, para 109.

19 *Ibid*, paras 108-110; *The Prosecutor v Georges Anderson Nderubumwe Rutaganda* (Judgment) (6 December 1999) ICTR-96-3 paras 69-70 (Trial Chamber, ICTR).

20 *The Prosecutor v Jean-Paul Akayesu*, above n 17, para 731.

21 UNGA Resolution 50/192 (22 December 1995) A/50/192, para 3.

22 *Attorney-General of the Government of Israel v Adolf Eichmann* (1961) 36 ILR 5, para 238 (DC Jerusalem).

23 *Ibid*, para 196.

24 *The Prosecutor v Jean-Paul Akayesu*, above, n 17, para 505.

children by force is not, it seems, an attempt to pull "cultural genocide" into the Convention; this was clearly rejected during the drafting process.<sup>25</sup>

Thus, the acts that are covered in Article II potentially represent a large spectrum of actions. However, the lack of clarity regarding the definition of each of these actions makes it difficult to label many acts as genocidal until after the event, when it comes to punish the perpetrators. This is a result of the competing tensions between States and differing viewpoints during the drafting of the Convention. As the Convention was intended to be an authoritative codification (at least to the extent that was possible given the relatively recent acknowledgement of genocide as a separate crime), some States were unwilling to define the actions too closely, for fear of making the Convention unworkably narrow. The trade-off for taking a broad approach is the lack of clarity that inevitably follows. For instance, there are a number of acts that seem to be on the border line of the Convention. As is mentioned above, "cultural genocide" was rejected in the final draft, but that concept certainly has some relevance to the issue of children taken from their parents. "Ethnic cleansing" is another similar issue.

The definition of ethnic cleansing, itself, can be enigmatic. The term came into common usage in the 1990s, during the tragic events in the former Yugoslavia. It involves forcefully removing groups of people from an area, to create an ethnically homogenous zone.<sup>26</sup> This can involve considerable force and terror tactics that, *prima facie*, could provide a basis for a finding of genocide. However, this is not universally accepted. Several States have repeatedly equated genocide and ethnic cleansing. However, the majority in the *Bosnia and Herzegovina* case before the International Court of Justice was unable to declare "ethnic cleansing" illegal with regard to the Genocide Convention.<sup>27</sup> The drafters of the Convention were careful not to specifically include ethnic cleansing, and a Syrian amendment that would have *prima facie* achieved this was defeated.

Accordingly, an assessment of each situation on its merits is required to determine whether an example of ethnic cleansing crosses the line to become genocide. If any of the other acts are involved, and the intent is genocidal, this should qualify as genocide. The lack of a definitive answer, however, represents a serious issue for those seeking to set boundaries for behaviour that falls within the Convention.

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25 Schabas, above, n 4, 175.

26 Schabas, above, n 4, 190.

27 *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) [2007] ICJ Rep 1, para 190.

## **B Protected Groups**

### *1 Notion of group*

Article II names four groups that are protected under the Convention: national, ethnical, racial, and religious groups. For genocide to occur, under the Convention, the actions must be aimed at such a group and the list is considered to be exhaustive.<sup>28</sup> Neither the Convention nor its commentaries offer any clarification of the law, thus potentially causing major controversies, as these are complex issues. There are considerable overlaps between the various groups, and where one begins and another ends is not clear.

Where ethnic or racial boundaries are unclear, this provision is problematic. There is a wide divergence among States as to the definition of such terms as "ethnic".<sup>29</sup> The trial chamber in *Akayesu* attempted to define the drafters' intent as to include all permanent and stable groups, but this approach was not followed in later cases.<sup>30</sup> It has been suggested that the perception of the perpetrator may be a better test to determine whether an individual falls within the definition, although there are clearly pitfalls in using a completely subjective test, such as where an individual is mistaken.<sup>31</sup>

Early drafts of the Convention also included political and other groups within this list.<sup>32</sup> However, there were fears that ratification levels would be low unless the definition was considerably narrowed down. In particular, States such as the Soviet Union were far more focused on the racial element, and were not inclined to allow political groups to fall within the definition. The Soviet delegation argued that there would be no logical place to draw the line, if voluntary and less permanent groups were covered by the Convention. However, this means that groups that could potentially be expected to be at a high level of risk will not be covered. Yet, political and economic groups may just as likely be the targets of particular actions in some parts of the world as racial groups may be in others. This severely limits the operation of the Convention, and, potentially, leaves a large number of people without even the most basic legal protection that the Convention

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28 Claus Kreß "The Crime of Genocide under International Law" (2006) 6 ICLR 461, 473.

29 Geert-Jan Alexander Knoops *An Introduction to the Law of International Criminal Tribunals: A Comparative Study* (Transnational Publishers Inc, Ardsley, New York, 2003) 24.

30 *The Prosecutor v Jean-Paul Akayesu*, above n 17, para 516.

31 Steven R Ratner and Jason S Abrams *Accountability for Human Rights Atrocities in International Law* (2ed, Oxford University Press, Oxford, 2001) 35.

32 *Ibid*, 34.

should provide. It has been argued occasionally that this situation needs to be rectified, and the scope of actions that can incur genocidal culpability expanded, but this has been rejected.<sup>33</sup>

## 2 *In whole or in part*

The other element of the "protected group" requirement is the number of people that must be affected for the Convention to apply. Again, this is not entirely clear. Article II only needs the action to be directed against a part of the affected group. The logic of the drafters in including "in part" was to remove the requirement that defendants had to have the intention to destroy whole groups. However, this has created confusion as there is no reference of a lower limit in the debates amongst the drafters.<sup>34</sup> Generally, this is accepted as implying a reasonably significant number of people, given the total size of the group, but it may be enough for the leadership of a group only to be targeted, if that will have serious consequences for the rest of the group.<sup>35</sup> Thus, once again, there is no clear rule, but rather a requirement to investigate each situation as it occurs and one commentator has argued that the confusion over the meaning of "in part" has led to the emergence of geographic, quantitative and qualitative requirements that victims of genocide must fulfil in order for the crime committed against them to be qualified as such.<sup>36</sup>

The geographical criterion is arguably the least controversial. A Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) found that intent to eradicate a group within a limited geographical area could be considered to be intent to destroy a group in whole or in part.<sup>37</sup> The Appeal Chamber confirmed this point, mentioning that when determining whether or not a targeted part of a group is substantial, "the area of the perpetrators' activity and control, as well as the possible extent of their reach, should be considered."<sup>38</sup> This logic is based on past cases of genocide where perpetrators have generally targeted members of groups that are in their sphere of power, such as Adolf Hitler's plan to exterminate the Jewish population of Germany, as any bigger goal would have been unrealistic. Furthermore, the ICTY stated that intent to destroy

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33 Benjamin Whitaker, Special Rapporteur on Genocide, United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities "Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned. Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, Prepared by Mr. B. Whitaker" (2 July 1985) E/CN.4/sub.2/1985/6.

34 John Quigley *The Genocide Convention: An International Law Analysis* (Ashgate, Aldershot, England, 2006) 144.

35 *The Prosecutor v Goran Jelic* (Judgment) (14 December 1999) ICTY-95-10 para 82 (Trial Chamber, ICTY).

36 Caroline Fournet *The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory* (Ashgate, Aldershot, England, 2007) 69.

37 *The Prosecutor v Radislav Kristic* (Judgment) (2 August 2001) IT-98-33 para 589 (Trial Chamber, ICTY).

38 *The Prosecutor v Radislav Kristic* (Appeal) (19 April 2004) IT-98-33-A para 13 (Appeals Chamber, ICTY).

part of a group living in a precise geographical area could be sufficient for genocide if the part of the group had been perceived as a distinct entity to be targeted.<sup>39</sup>

There have been many attempts at clarifying the quantitative approach. In *Prosecutor v Kayishema*, the ICTR held "that 'in part' requires the intention to destroy a considerable number of individuals."<sup>40</sup> In *Prosecutor v Jelešić*, the ICTY stated that genocide required the intent to destroy a "substantial" part of the group.<sup>41</sup> In *Prosecutor v Sikirica*, the ICTY concluded that substantiality should be determined by taking the number of victims as a percentage of the whole group of which they are members.<sup>42</sup> Similarly, the approach taken by United States legislation on genocide requires intent to destroy a group as a viable entity, effectively meaning a sufficient proportion of the group must be affected so as to threaten its existence. These two approaches are clearly insufficient as they require that the actor's destructive intent run to nearly the totality of the group. Furthermore, the approach is inconsistent with Article II; the phrase "in part" establishes no minimum number, since a part of a whole, of any size, is still a part.<sup>43</sup>

In *Prosecutor v Krstić*, the Trial Chamber of the ICTY was of the opinion "that the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it."<sup>44</sup> The Chamber continued this point, stating that killings in different places spread over a broad area of a finite number of members of a group might not qualify as genocide, despite the high number of casualties, because it would not show intent to target the very existence of the group.<sup>45</sup> This was in reference to Bosnian Serb forces targeting all military-aged Bosnian Muslim men, which was held to show intent to destroy the group, as it must have been known that this would effectively destroy the community.<sup>46</sup> However, the Trial Chamber failed to settle the law on this issue.<sup>47</sup> Subsequently, Trial Chamber III of the ICTY in *Prosecutor v Sikirica* took a mathematical approach, and concluded that genocidal intent to destroy Bosnian Croats or Bosnian Muslims could not be inferred from the number of victims.<sup>48</sup>

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39 *The Prosecutor v Dusko Sikirica* (Judgment on Defence Motions to Acquit) (3 September 2001) IT-95-8 para 68 (Trial Chamber, ICTY).

40 *The Prosecutor v Clément Kayishema and Obed Ruzindana*, above n 10, para 97.

41 *The Prosecutor v Goran Jelešić*, above n 35, paras 81-82.

42 *The Prosecutor v Dusko Sikirica*, above n 39, para 65.

43 Quigley, above n 34, 143.

44 *The Prosecutor v Radislav Krstić*, above n 37, para 590.

45 *Ibid.*

46 *Ibid.*, 595-597.

47 Fournet, above n 36, 72.

48 *The Prosecutor v Dusko Sikirica*, above n 39, paras 76-77.

The Appeals Chamber in *Kristic* did, however, uphold the Trial Chamber's approach in determining a substantial part of the protected group.<sup>49</sup>

Finally, the qualitative approach involves deciding whether there was intent to destroy a group "in part" by evaluating the significance of the section of the group targeted.<sup>50</sup> However, this criterion cannot be legitimately distinguished from the quantitative criterion. It is effectively the same approach that was taken in *Prosecutor v Kristic*, except that this time the significant part of the group that is being targeted was the leadership. The effect and logic are the same, an intention to destroy a more limited number of persons who are selected for the impact that their disappearance would have on the group.<sup>51</sup> Caroline Fournet argues this logic is unacceptable as it is not morally acceptable to rely on the social status of the victims to qualify the crime.<sup>52</sup> Israel Charney made a similar point in arguing that the quest for discriminatory definitions leads to assigning hierarchal value to different kinds of mass death.<sup>53</sup> However, this view fails to recognise that the intention of the accused to destroy a group "in whole or in part" is being inferred from the acts. It may well be that an individual has the intention to destroy a group whilst indiscriminately killing a limited number of its members, but this cannot be evidenced from the act as it is conceivably possible that the individual was acting recklessly. However, if the perpetrator targets specific members for the desired effect that this will have on the group as a whole, then the specific intent to destroy the group "in whole or in part" can be inferred. This is the minimum amount of evidence that can indicate this intention.

Claus Kreß has argued that the extension of the word "destroy" to cover this type of genocide goes against the intention of the drafters who expressly excluded reference to cultural genocide. In his view, intention to kill a number of members of a group based on the specific effect that it will have on the group as a whole is a backhanded way of allowing the Convention to cover cultural genocide.<sup>54</sup> In *Prosecutor v Kristic*, Judge Shahabuddeen's dissenting opinion gave authority to this point in stating that a distinction should be made between the nature of "listed" acts and the "intent" with which they are committed.<sup>55</sup>

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49 *The Prosecutor v Radislav Kristic*, above n 38, para 12.

50 Fournet, above n 36, 72.

51 *The Prosecutor v Goran Jelešić*, above n 35, para 82.

52 Fournet, above n 36, 73.

53 Israel W Charney "Toward a General Definition of Genocide" in George J Andreopoulos (ed) *Genocide: Conceptual and Historical Dimensions* (University of Pennsylvania Press, Philadelphia, 1994) 64, 68.

54 Kreß, above n 28, 487-488.

55 *The Prosecutor v Radislav Kristic*, above n 39, paras 48-55.

Thus, the intent to destroy a group "in whole or in part" is fulfilled when a specific part of a group is targeted, for geographic reasons, for the impact that the absence of those targeted would have on the group as a whole, or when a reasonably substantial number of the group is targeted. Although, as stated, Article II contains no lower limit, the offence can only retain its power if the strictness of its definitional elements is retained.<sup>56</sup> To prove genocidal intent in future cases, it is likely that the murder of any large number of individuals, no matter their proportion to the whole group, would be sufficient<sup>57</sup> and the "number of the victims selected only because of their membership in a group would lead one to the conclusion that a intent to destroy the group, at least in part, was present."<sup>58</sup> Conversely, if an actor kills only a few members of a group, significant evidence will be needed to show intent to destroy the group.<sup>59</sup>

The intent requirement should not be confused with the scale of participation by an individual offender.<sup>60</sup> The accused is likely to be involved in a small number of punishable acts. The ICTY in *Prosecutor v Tadic* stated:<sup>61</sup>

[A] single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable.

### C Intent

The definition of the crime of genocide requires an extremely high standard of proof regarding the mental element of intent. Article II of the Convention contains a definition of the required intent: "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." The reference to "intent" in the text indicates that the prosecution must prove that the defendant had "specific intent" or *dolus specialis* to destroy one of the mentioned groups, in whole or in part.<sup>62</sup> As a result, if specific intent is not found, then the act will not be genocide. However, it still might be classified as a crime against humanity.

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56 Schabas, above n 4, 239.

57 Quigley, above n 34, 144.

58 *The Prosecutor v Radovan Karadzic and Ratko Mladic* (Review of Indictment Pursuant to Rule 61) (11 July 1996) IT-95-5-R61, IT-95-18-R61 para 94 (ICTY).

59 Quigley, above n 34, 145.

60 Schabas, above n 4, 239.

61 *The Prosecutor v Dusko Tadic* (Judgment) (7 May 1999) IT-94-1-T para 649 (Trial Chamber, ICTY).

62 *The Prosecutor v Akayesu*, above n 17, para 516. See also *The Prosecutor v Alfred Musema* (Judgment) (27 January 2000) ICTR-96-13 para 164 (Trial Chamber, ICTR).

This intent requirement excludes negligent genocide, where the accused lacks genuine intent, but acts with extreme carelessness. However, it is theoretically possible that an omission could come within the definition of genocide. This would occur when an individual intentionally omitted to perform an act that fell within the definition of acts contained in Article II (subsection (c) is a possibility).

Special intent does not simply mirror the *actus reus*. There are effectively two intents that must be separated: the *actus reus* is the realisation of the *mens rea*, whilst the special intent requires that the perpetrator must intend to achieve the result of destroying a group in whole or in part. It does not matter how successful this aim is in regard to fulfilling the special intent.<sup>63</sup>

The special intent requirement can be broken into three basic components.<sup>64</sup> The offender must intend to destroy a group, the intention must be to destroy that group in whole or in part, and the group must be one that is defined by reference to one of the four protected groups mentioned in Article II.<sup>65</sup> "Destroy" has been limited by the five subparagraphs of Article II to refer to only physical or biological genocide (as opposed to cultural and political). William Schabas raises the issue of whether the destruction mentioned in the first part of Article II must correspond to the destruction outlined in the subparagraphs.<sup>66</sup> He provides the example of a State that might intend to destroy the culture and economy of a group and in the course of doing so, members of the group were incidentally killed. Schabas contends that such an interpretation fits within the Convention. The ICTR suggested such an interpretation may be used when a State is involved in ethnic cleansing and an intent of physical destruction is not obvious.<sup>67</sup> However, the *travaux préparatoires* do not indicate that such an interpretation should be taken.<sup>68</sup> It is Schabas' view that a court seeking to adopt this broader interpretation could rely on the plain text of Article II, the objectives of the Convention<sup>69</sup> and the principle established in the Vienna Convention on the Law of Treaties which authorises resort to a convention's preparatory materials only when the meaning of the provision is "ambiguous or obscure".<sup>70</sup> For these reasons, and because the ICTR indicated that such an

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63 Otto Triffterer "Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such" (2001) 14 LJIL 399, 402.

64 Schabas, above n 4, 228.

65 Ibid, 228.

66 Ibid, 229.

67 *The Prosecutor v Clément Kayishema and Obed Ruzindana*, above n 10, paras 96-97.

68 Schabas, above n 4, 229.

69 Ibid, 230.

70 Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, art 32(a).

interpretation is possible, it is likely that future tribunals or courts will accept this view of intention to destroy if they feel it is required to achieve justice.

#### ***IV A BRIEF ASSESSMENT OF THE CONVENTION 60 YEARS ON***

Overall, the Genocide Convention is a short, sparsely worded document that reflects the difficulties in gaining agreement during the drafting phase. In order to gain as many ratifications as possible, to make the Convention more likely to have some positive impact, many elements were brushed over in broad language, or left out entirely. The Convention is not as comprehensive, or as clear, as it could, and arguably should, be. While it is unlikely that a clearer formulation that covered *all* possible scenarios was attainable, the final version fails to cover a number of situations where "genocide" (in the colloquial use of the word) occurs. The lack of protection for political or other social groups keeps a large number of the people whom the Convention was designed to protect outside its ambit. Even the groups that are protected are not sufficiently defined. Terminology that was deemed sufficient in 1948 may not be so today, and the enigmatic definitions of terms such as "race" render clarity elusive.

Flexibility and broad application are useful to some extent, but a Convention that seeks to define what could be seen as the most serious of all international crimes fails to sufficiently define parameters that allow the punishment, and more importantly, *prevention* of genocide. In other words, the Convention gives States leverage to get around its provisions and avoid their obligations to help stamp out the crime that plagues our planet. Hence, the ghosts of human failures of the past continue to haunt the international community. Fortunately, international criminal law developments in the post-Cold War era have ensured that conduct that fails to meet the threshold of the definition of genocide still falls within the category of crimes against humanity.

##### ***A Developments since the 1990s: New Beginnings?***

As history goes, little followed the adoption of the Genocide Convention in 1948. Half a century later, William Schabas undertook a sobering assessment of the Genocide Convention at 50, concluding:<sup>71</sup>

The Genocide Convention was the first modern human rights treaty. It was adopted only one day earlier than the Universal Declaration of Human Rights, which set the common standard of achievement for human civilisation. Some must have believed, in 1948, that the unthinkable crime of genocide would never recur. Perhaps the gaps in the convention are only the oversights of optimistic negotiators, mistaken in the belief that they were erecting a monument to the past rather than a weapon to police the future. Their naiveté may be forgiven. A failure to learn the lessons of the fifty years since its adoption cannot.

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71 William Schabas "The Genocide Convention at Fifty" (Special Report, USIP, Washington, DC, 1999) 8.

No one would deny that the Convention has proved incapable of shielding the international community from forms of organised mass violence and attempts to annihilate groups of people on the basis of common characteristics ascribed to them, as illustrated by the mass atrocities committed in Cambodia, Rwanda and the former Yugoslavia, and more recently, in the Darfur region of the Sudan, just to name the most prominent examples of alleged or actual genocide. That being said, the renewal in the study of international criminal law in the post-Cold War era has enabled the development of a body of doctrine and jurisprudence that has clarified and expanded key elements of international crimes. For instance, despite the willingness of the Security Council, in setting up the *ad hoc* tribunals for Yugoslavia and Rwanda, to stick to traditional concepts and definitions that dated back to the 1940s, the Appeals Chamber declared that customary international law no longer imposed any link between crimes against humanity and armed conflict. Crimes against humanity being at the core of virtually all of the convictions by the *ad hoc* tribunals, this prompted William Schabas to ponder whether it is still necessary today to prosecute genocide, when it can be considered a crime against humanity.<sup>72</sup>

The establishment of a genuine and universal international criminal court in July 1998 at the Rome Diplomatic Conference, which adopted the definition of genocide in the Genocide Convention, is further evidence of the importance of the Convention.<sup>73</sup> Since then, the Court has become a reality, and with it the possibility that an incumbent head of State could be charged with the crime of genocide. A special rapporteur on the prevention of genocide was appointed for the first time by the United Nations Secretary-General in 2004. The Human Rights Council replaced the former Commission on Human Rights, with the intention to reinforce its mandate. The International Criminal Court as well as separate tribunals (for Rwanda and Yugoslavia) and hybrid national-international courts (in Sierra Leone and Cambodia) have taken action on genocide and brought perpetrators to trial.<sup>74</sup>

The concept of responsibility to protect was adopted as another normative parameter, which allows for preventative action. The concept calls for clear and unambiguous acceptance by all governments of the collective international responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, in a timely and decisive fashion, through the Security Council, when peaceful means prove inadequate and national authorities are manifestly failing to do it. The 2004 Report of the United Nations High Level Panel on Threats, Challenges and

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72 Ibid, 4-5.

73 Rome Statute of the International Criminal Court (Rome Statute) (17 July 1998) 2187 UNTS 3; 37 ILM 999, art 6.

74 See generally Alberto Costi "Hybrid Tribunals as a Viable Transitional Justice Mechanism to Combat Impunity in Post-conflict Situations" (2006) NZULR 213.

Change recommended acceptance of the responsibility to protect as an emerging norm.<sup>75</sup> The 2005 Report of the United Nations Secretary-General submitted to the World Summit session of the United Nations General Assembly recommended endorsement of the responsibility to protect principle as put forward by the United Nations High Level Panel.<sup>76</sup> The Summit subsequently endorsed the concept of responsibility to protect, albeit dropping the references to failure to protect citizens from avoidable catastrophes such as deliberate starvation and exposure to disease.<sup>77</sup> In 2004, a series of Security Council resolutions dealing with the events in Darfur reaffirmed the concept of responsibility to protect.<sup>78</sup> In August 2006, for the first time, the Security Council applied timidly this responsibility to protect in calling for the deployment of United Nations peacekeepers to Darfur.<sup>79</sup>

### ***B Beyond the Law***

Despite the progress made over the past 20 years, modern international criminal law has not yet acknowledged mass atrocities perpetrated for political ends. Such acts are susceptible of falling partially within one of the protected groups in the Convention on Genocide or of fulfilling the requirements of crime against humanity. Yet, the fact that none of these crimes addresses the specificity of political violence represents a serious gap in international law, failing to appreciate that violence most often is a key element of power tactics.

Confronted by the limitations exposed by the legal definition of genocide, political scientists, sociologists and historians have tried to look beyond the law to focus on the observation of genocidal practices. Without necessarily reaching a consensus, they have drawn from those

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75 "A More Secure World: Our Shared Responsibility. Report of the Secretary-General's High-level Panel on Threats, Challenges and Change" (United Nations, 2004) paras 199-203.

76 United Nations Secretary-General "In Larger Freedom: Towards Development, Security and Human Rights for All" (21 March 2005) A/59/2005, paras 132, 135.

77 UNGA Resolution 60/1 (24 October 2005) A/RES/60/1. See in particular para 138:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

78 UNSC Resolution 1556 (30 July 2004) S/RES/1556/2004, preamble; UNSC Resolution 1564 (18 September 2004) S/RES/1564/2004, preamble; UNSC Resolution 1574 (19 November 2004) S/RES/1574/2004, preamble.

79 UNSC Resolution 1706 (31 August 2006) S/RES/1706/2006, arts 8(k), 9(b).

practices a variety of typologies.<sup>80</sup> The resulting studies are interesting. Some have stressed the fact that the selection of the targeted group by the *génocidaires* adheres to the subjective and artificial construction of the notion of group, no matter whether the group actually exists. While social scientists contributed to renew the study of genocides, lawyers have finally taken some interest in the subject, in response to the jurisprudence developed by the ICTR and ICTY. In effect, confronted by the inherent difficulties in an allegedly objective determination of concepts of race, ethnicity, religion and nationality, many judgments have espoused a criterion based on a subjective appreciation of the protected group by the *génocidaires*. Such a contextual approach thus enables us to reconcile the legal definition of 1948 with the reality, in line with recent sociological and historical studies.

It is unfortunate that the ICJ, in its judgment of 26 February 2007, curbed this modern interpretation.<sup>81</sup>

The drafting history of the Convention confirms that a positive definition must be used. Genocide as "the denial of the existence of entire human groups" was contrasted with homicide, "the denial of the right to live of individual human beings" by the General Assembly in its 1946 resolution 96 (I) cited in the Preamble to the Convention. The drafters of the Convention also gave close attention to the positive identification of groups with specific distinguishing characteristics in deciding which groups they would include and which (such as political groups) they would exclude. The Court spoke to the same effect in 1951 in declaring as an object of the Convention the safeguarding of "the very existence of certain human groups" (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23). Such an understanding of genocide requires a positive identification of the group. The rejection of proposals to include within the Convention political groups and cultural genocide also demonstrates that the drafters were giving close attention to the positive identification of groups with specific distinguishing well-established, some said immutable, characteristics. A negatively defined group cannot be seen in that way.

Such a literal and somewhat backward-looking reading of the Convention brings us back 60 years and the legal definition will continue to be continually one step – or one genocide – behind.

### **C Procrastination and Inaction**

Quarrels surrounding the determination that certain acts are genocide have in recent times subsumed all other considerations, even the most elementary ones, such as the security of individuals against want and fear. Passions and tergiversations regarding the qualification of the

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80 See, for instance, Frank Chalk and Kurt Jonassohn *The History and Sociology of Genocide. Analyses and Case Studies* (Yale University Press, New Haven, 1990); Jean-Michel Gaumont *La Concurrence des victimes : génocide, identité, reconnaissance* (La Découverte, Paris, 2002).

81 *Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide*, above n 27, para 194.

crimes committed in Darfur, for instance, are a sad illustration of the controversial semantics that mar discussions and contribute to the passivity of the United Nations, the European Union, the African Union and other organisations. Should we not simply follow our conscience and assist human beings in distress?

Conversely, perhaps *un signe des temps*, mass atrocities occupy so much space in electronic media and appear so remote that it becomes necessary to qualify them of genocide in order to sufficiently horrify public opinion and, accordingly, incite the international community to take action. To the media hype, NGO activism and State interests that contribute so much to a trivialisation of the use of the term succeeds an equally excessive reverse tendency, the *légalisme soupçonneux*. Sadly, formal qualification seems to have become more important than the actual assessment of the gravity of the situation in the field and the urgency of the measures to prevent and punish mass atrocities. There is little comfort for victims in the knowledge that their injuries amount to a *bona fide* genocide, rather than simply being a crime against humanity or a war crime.

This brings us back to Tony *l'humaniste*. It is important to distinguish the legal definition of the crime of genocide (the contours of which remain controversial to this day before international tribunals) and the actual acts themselves, which require measures suitable to protect victims. Philip Alston, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, warned against:<sup>82</sup>

... excessive legalism which manifests itself in definitional arguments over whether a chronic and desperate situation has risen to the level of genocide or not. In the meantime, while some insist that the term is clearly applicable and others vigorously deny that characterization, all too little is done to put an end to the ongoing Violations. At the end of the day the international community must be judged on the basis of its action, not on its choice of terminology.

In the end, consistent with Tony's approach to the study of law, genuine concern for the interests and welfare of people should be our only concern.

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82 Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions "Civil and Political Rights, Including the Questions of Disappearances and Summary Executions. Extrajudicial, Summary or Arbitrary Executions" (22 December 2004) E/CN.4/2005/7, para 36.