

1 *The norms against genocide*

‘Never again Auschwitz’ is a powerful, emotive cry, laden with the guilt of the past, but replete with the promise of redemption by taking action, this time, to stop the extermination of our fellow human beings. The promise was embedded in the very first United Nations human rights treaty, the Convention on the Prevention and Punishment of the Crime of Genocide in December 1948, concluded almost four years after the Auschwitz-Birkenau concentration camps were liberated. The speed with which this Convention was agreed reflected the deeply-felt need to reset the world’s moral bearings after the Nazis’ monstrous plans to wipe out entire populations had been revealed. This ‘odious scourge’ – in the words of the Convention’s preamble – had to be eliminated.

Over sixty years later, and ‘never again Auschwitz’ is more replete with irony than redemption. Again and again genocide has been carried out, and again and again, little has been done by the United Nations (UN) – and its member states – in response. And yet, again and again, the promise of ‘never again’ is repeated. This book asks why such a strong and apparently deeply-felt moral imperative remains, for the most part, rhetorical. It does so by concentrating on European governments’ response to genocide. Given the historical legacy of the Holocaust (or Shoah) in Europe, and the general importance given to international law and the protection of human rights by European states, it would be reasonable to assume that European states have similar views on how they should respond to a genocide being perpetrated in another country, and that their response would be a forceful one.

Very little has been written about the attitudes of European governments towards either the 1948 Genocide Convention or genocide in general. In fact, I could find only one article on the views of one European government, the United Kingdom (UK), on the

Genocide Convention,¹ and only indications of the views of some European governments regarding the negotiation of the Convention in William Schabas' seminal study of the Convention (*Genocide in International Law*).² There are no works that consider the attitude of European governments, other than the UK, to the Convention *after* it was signed – though there are comparisons of the legislation implementing the Convention in various European states.³ Moreover, while there is a growing body of literature on the attitudes of this or that European government towards this or that genocide, there is no work that considers European views on genocide in general.⁴ This contrasts with the extensive body of literature on the attitude of the US government regarding genocide. Samantha Power's book, *'A Problem from Hell': America and the Age of Genocide* won the Pulitzer Prize for non-fiction in 2003.⁵ The forty-year debate in the USA on whether to ratify the 1948 Genocide Convention has also been covered amply by historians, political scientists and legal scholars.⁶

Genocide and the Europeans aims to fill the gap in the literature on European responses to genocide. As it turns out, quite a few European governments were hostile to the Genocide Convention, and some took decades to ratify it. Furthermore, European governments are not keen on using the term to describe atrocities. This book considers why this is the case. It analyses how European governments have reacted to four cases of proven or purported

¹ A.W. Brian Simpson, 'Britain and the Genocide Convention', *British Yearbook of International Law*, vol. 73 (2003), 5–64.

² William A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd edition (Cambridge: Cambridge University Press, 2009). The first edition was published in 2000.

³ See the special issue of *International Criminal Law Review*, vol. 5, no. 3 (2005).

⁴ Of course a book entitled *Genocide and the Europeans* could also take as its starting point European perpetration of genocide, or complicity in its perpetration. For trenchant criticism of western involvement in genocide and war crimes, see Adam Jones, ed., *Genocide, War Crimes and the West: History and Complicity* (London: Zed Books, 2004).

⁵ Samantha Power, *'A Problem from Hell': America and the Age of Genocide* (New York: Perennial, 2002).

⁶ See Lawrence J. LeBlanc, *The United States and the Genocide Convention* (Durham: Duke University Press, 1991). The issue has been debated or analysed in the pages of numerous journals including *The American Journal of International Law*, *Yale Law Journal*, and *Journal of Genocide Research*.

genocides in the post-Cold War era: Bosnia and Herzegovina (1992–95), Rwanda (1994), Kosovo (1998–99), and Darfur, Sudan (2003–). In two cases, Bosnia and Rwanda, genocide is now widely agreed to have taken place; in the other two, Kosovo and Darfur, this is a more controversial question. European governments have been heavily involved in debates and/or action in all four cases. The focus here is on three governments in particular: France and the UK, both permanent members of the Security Council (one of the UN's 'competent organs' that may take action to prevent and suppress acts of genocide under the 1948 Genocide Convention) and endowed with the most extensive diplomatic and military capabilities in Europe, and Germany, which, given its past as the country that carried out the Holocaust, considers itself to have a particular moral responsibility to ensure that such a man-made cataclysm never happens again. Where other European governments – such as Belgium and the Czech Republic (with respect to Rwanda) or the Netherlands (with respect particularly to Srebrenica, Bosnia) – have taken a notable position or played a significant role, then they are included in the analysis, but it is not possible to cover the debates in all European countries in one book.

Norms and their influence

This book gauges whether and how European governments have been affected by the international legal framework against genocide and in particular the 1948 Genocide Convention. It is contended first of all that this framework is a 'legal norm', in the sense that it codifies expectations for state behaviour, firstly not to commit genocide and secondly to prevent and punish genocide.

The study of norms in international relations has largely been undertaken within the framework of 'constructivism', and hence the starting point of this book is the constructivist work on international norms. Constructivism puts forward three propositions regarding international relations: (1) 'to the extent that structures shape the behaviour of states and other actors, normative and ideational structures are as important as material structures'; (2) the social identities of states condition state interests and actions; (3) normative and ideational structures exist because of the 'practices of knowledgeable social agents, which makes them human artefacts amenable to

transformation'.⁷ These three propositions differentiate constructivism from two other mainstream approaches to international relations. Realism stresses the influence of material structures, and particularly that of the distribution of power in an anarchical international system, on state behaviour and interactions between states, which produces latent or outright conflict between them; constructivists instead specify that 'anarchy is what states make of it' and that cooperation rather than conflict can be an outcome of such interactions.⁸ Liberal (or rational) institutionalism posits that security and the pursuit of power may not necessarily top a hierarchy of individual state interests (so economic wealth and other interests may be more important), but does not draw the connection between interests and the identity of states that constructivism does.

The role of international law is interpreted quite differently in the three approaches. Realism is the most dismissive: norms, legal rules, institutions are merely masks for state power, and states comply with them only insofar as they do not damage national interests. In liberal institutionalism, law, norms and institutions are very important – they are created by states to help foster or 'lock in' cooperation, by reducing transaction costs and enabling reciprocity. But rules and institutions operate in areas of 'low politics'; when it comes to 'high politics' (issues of security) they are much less likely to constrain states. In constructivism, international law is part of the social structure of the international system. Furthermore, international law affects state identity and interests: states begin to see themselves as compliers with international law, and interpret their interests accordingly. However, states may interpret law and its 'power' differently, and have different views on the legitimacy of different rules, an issue that has not been dealt with at length by constructivists.⁹

In neither liberal institutionalism nor constructivism has much work been done on the potential impact of different types of rules or

⁷ Christian Reus-Smit, 'The Politics of International Law', in Christian Reus-Smit, ed., *The Politics of International Law* (Cambridge: Cambridge University Press, 2004), pp. 21–22.

⁸ Alexander Wendt, 'Anarchy is What States Make of It: The Social Construction of Power Politics', *International Organization*, vol. 46, no. 2 (1992).

⁹ See the discussion in Anthony Clark Arend, 'Do Legal Rules Matter? International Law and International Politics', *Virginia Journal of International Law*, vol. 38, no. 2 (1998).

norms. Norms are ‘collective expectations about proper behavior for a given identity’.¹⁰ But, as Martha Finnemore notes, there are different types of norms and they may have different influences on states. She points to professional, moral, and cultural norms, as well as legal norms, and suggests that legal norms could have distinctive effects. This could be because states use their coercive powers when norms have a legal status; or because many foreign policy-makers have legal training; or because western, bureaucratic culture invests particular authority in law. She then suggests a research question: ‘Do legal norms, in fact, receive more deference and command more compliance than other kinds of norms independent of state enforcement?’¹¹ Christian Reus-Smit notes that many constructivists argue that since legal norms are more codified than social norms, ‘they more powerfully constitute actors’ identities, interests and actions’. However, he argues that ‘the distinction constructivists draw between social and legal norms is inconsistent and underdeveloped’, with some denying a distinction and others emphasising it.¹²

In this study, norms are seen as having three possible impacts on states: requiring action (to comply with the norm), constraining action (again, to comply with the norm), and enabling action (which could be justified as in compliance with the norm). The last two impacts follow Nicholas Wheeler’s argument that norms can both constrain *and* enable actors. That is, ‘decision-makers are inhibited by legitimisation concerns’, which constrain action that cannot be legitimised as conforming with a norm; norms can also provide actors ‘with public legitimating reasons to justify actions, but they do not determine that an action will take place.’¹³ In addition, there can be obligations to take action to comply with a norm (to change domestic legislation, for example). In other words, there are things states must do, cannot do, and could justify doing, in accordance with the norm.

¹⁰ Ronald L. Jepperson, Alexander Wendt and Peter J. Katzenstein, ‘Norms, Identity, and Culture in National Security’, in Peter J. Katzenstein, ed., *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996), p. 54.

¹¹ Martha Finnemore, ‘Are Legal Norms Distinctive?’, *New York University Journal of International Law and Politics*, vol. 32, no.3 (Spring 2000), quote on p. 704.

¹² Reus-Smit, ‘The Politics of International Law’, pp. 3–4.

¹³ Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000), p. 9.

This book argues that there are actually two norms against genocide: a legal one and a social one. In the case of the Genocide Convention, we have the legal norm: that is, we have a definition of genocide and a set of rules by which states are to punish and prevent genocide which have been codified in a treaty. The legal norm can evolve (and has, to a limited extent), but is defined by the text of the convention and the various interpretations of that text provided in the case law developed in national and international tribunals.

We also have a social norm – with a wider definition of genocide, and a different, more demanding, conception of what states should do in the case of genocide, which goes beyond what is codified in the Genocide Convention. The social norm is consistent with a cosmopolitan moral perspective, and is espoused by cosmopolitan theorists, but is also widely shared by commentators, journalists, NGOs, and the like – which is why the term ‘social norm’ is used here rather than ‘moral norm’. To some extent, the Genocide Convention (the legal norm) codifies the social norm – the Convention would not have come into being were it not for the widely-felt imperative to ensure the Holocaust never again happened. But the social norm is broader than the legal norm, and in some uses, reflects subsequent disappointment with the Genocide Convention’s limited provisions to ‘prevent and punish’ genocide. A brief illustration of the differences between the legal and social norms is given here; the differences are expanded upon further below.

The first difference is the definition of genocide. As Martin Shaw notes, there is much ‘theoretical confusion surrounding the concept.’¹⁴ The definition in the Genocide Convention is widely taken as the authoritative definition (especially by policy-makers) but it has been harshly criticised by many as being so narrow and constricting as to exclude most atrocities. Application of the Convention’s definition is also not always a straightforward matter when it comes to concrete cases. However, the theoretical confusion derives also from the fact that there is wider definition of genocide common in public parlance, which is broader than that of the Convention. For example, it is common to refer to the ‘Cambodian genocide’, which took place under the Khmer Rouge between 1975 and 1979, but the use of the term genocide is contested in policy-making and academic circles on the

¹⁴ Martin Shaw, *What is Genocide?* (Cambridge: Polity Press, 2007), p. 37.

grounds that the killing of the Cambodian people does not properly fit the definition in the 1948 Convention.

The second difference is what action is required of states in the event of genocide. Under the Genocide Convention, states ‘undertake to prevent and punish’ genocide. What ‘prevent and punish’ means in practice is very much a matter for debate: the Convention itself does not mandate any *particular* action with respect to ‘prevention’, but it does set out certain requirements regarding the punishment of genocide. Thus the legal norm is clear only with respect to the obligation to punish, in a court of law, perpetrators of genocide. However, the social norm requires a response going beyond the legal norm: genocide is seen as raising ‘a legal, political and moral obligation, an irrevocable imperative that cannot be pushed aside but must be acted on ...’¹⁵ Particularly since the end of the Cold War, the social norm entails an expectation, if not an obligation, that states will take measures to *stop* genocide, measures which ultimately should include the use of coercive military force if that is what it takes to stop the killing. The social norm calls for whatever it takes to ensure ‘Never again Auschwitz’. In sum, the legal norm against genocide constrains action (the carrying out of genocide), enables it (to prevent genocide), and requires it (to punish genocide); the social norm goes further by requiring some sort of intervention to try to stop a genocide that is ongoing.

The questions at the heart of this book, then, are do the legal and social norms against genocide have an impact on European state behaviour, interests or even identity? Or do European states ignore them when it is in their interests to do so? And do the legal and social norms have different impacts on European states, with the legal norm ‘more powerfully constituting their identities, interests and actions’ (to use Reus-Smit’s phrase)? One possibility explored in this book is that governments avoid using the term genocide not because they wish to avoid the obligations arising under the Genocide Convention but because they wish to avoid the obligations arising from the social norm. While the obligations under the social norm may be indeterminate, certainly compared to the clarity of the obligation to punish genocide in the Genocide Convention, it is that indeterminacy that also frightens governments: they could be pushed into

¹⁵ Lene Hansen, *Security as Practice: Discourse Analysis and the Bosnian War* (London: Routledge, 2006), p. 140.

taking actions they do not wish to take. But if they must recognise genocide – because the facts simply cannot be ignored – then they could ‘take refuge’ under the legal norm and cite their compliance with the Genocide Convention, thus deflecting pressures to comply with the social norm.

Genocide and the Europeans seeks to unpack the influence of the two norms against genocide on European governments. It first reviews European attitudes towards the negotiation and ratification of the Genocide Convention and considers whether and how European states sought to ensure that they were in compliance with the Convention. Most of the book then focuses on the role the legal and social norms against genocide have played in the foreign policy of European states, that is, in their responses to possible genocides in other countries. In so doing, it first considers whether they have used the term genocide, and if so, does it fit the definition of the Genocide Convention, or the wider definition of the social norm? It then analyses the action taken by European governments in response to suspected or apparent acts of genocide. How have European governments justified their positions, and have they referred to the legal or the social norm? Have they argued that either norm enables (or requires) action to be taken to prevent or punish or stop genocide? Have they argued that the norm does not apply because the case is not one of genocide, and is that a justification for not taking action? Is the social norm used instrumentally, when governments want to justify intervention, or do governments perceive there to be an ‘irrevocable imperative’, so they must act in the event of genocide? Research on US policy has illustrated that in the 1990s, the reluctance to name the Rwandan genocide stemmed from a desire to avoid creating a moral imperative to act to stop it, but that under the Bush Administration, naming the Darfur genocide was seen as a substitute for coercive action.¹⁶ Have European governments followed similar reasoning? Is naming a genocide now seen as a substitute for action?

The emphasis is on the positions and arguments presented by governments publicly – to national audiences (including parliaments and the media) and international audiences (including the UN and the European Union). The research thus relies above all on primary

¹⁶ Eric A. Heinze, ‘The Rhetoric of Genocide in U.S. Foreign Policy: Rwanda and Darfur Compared’, *Political Science Quarterly*, vol. 122, no. 3 (2007).

sources such as official government papers, speeches and declarations by foreign policy-makers and diplomats.

The rest of this chapter provides a brief historical account of the origins of the word ‘genocide’ and of the Genocide Convention – both of which can be attributed to one extraordinary individual, Raphael Lemkin. The chapter then elaborates on some of the key issues raised by the Convention and subsequent development of the legal framework, including the thorny issue of the definition of genocide and the obligations on states that arise from the Convention.

Raphael Lemkin and the push for an international convention on genocide

Rarely can we so clearly point to the pivotal role of one individual in developing an international norm as we can in the case of the prevention and punishment of genocide. Raphael Lemkin (1900–1959), a lawyer, linguist, and Polish-Jewish refugee in the United States, not only invented the term ‘genocide’, but was the driving force behind the approval of a United Nations General Assembly resolution on genocide as a crime in international law (on 11 December 1946), the drafting and approval of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948), and the subsequent attempts to have the convention ratified by as many states as possible. The inscription on Lemkin’s grave in Mount Hebron, New York City is succinct but entirely apt: ‘Dr Raphael Lemkin (1900–1959), the Father of the Genocide Convention’.¹⁷

¹⁷ Until the beginning of this decade, Lemkin’s role was only occasionally acknowledged – perhaps because the Genocide Convention was rarely invoked during the Cold War, perhaps because Lemkin was not the easiest individual to get along with, given his single-minded concentration (some would say obsession) on the issue of genocide. He was called a ‘crank’, ‘pest’, ‘nag’, ‘dreamer’, ‘fanatic’, and worse. In 2001, William Korey published an *Epitaph for Raphael Lemkin* (Jacob Blaustein Institute for the Advancement of Human Rights of the American Jewish Committee) which contains some biographical information (available at www.ajcarchives.org/main.php?GroupingId=3861 [last accessed 13 April 2010]). There is only one full-length biography of him: John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention* (Houndmills: Palgrave, 2008). Samantha Power devoted four chapters of her book, *A Problem from Hell* to Lemkin’s work. A previous biography, James J. Martin, *The Man Who Invented Genocide: The Public Career and Consequences of Raphael Lemkin*

The term ‘genocide’ was introduced in Lemkin’s book, *Axis Rule in Occupied Europe*, published in 1944.¹⁸ He invented it because he was not satisfied with any other term to describe the precise phenomenon: barbarity, race murder or mass murder didn’t capture the motivation for the crime, which is based on racial, ethnic, or religious considerations. The term more accurately described the ‘attempt to destroy a nation and obliterate its cultural personality.’¹⁹ He created the word from the Greek word *genos* (race, tribe) and the Latin *cide* (killing), to indicate the ‘destruction of a nation or of an ethnic group’. The term is thus similar to terms such as tyrannicide, infanticide, and homicide. Clearly mindful of the practices of the German occupiers in much of Europe (particularly Poland), he intended it

to signify a coordinated 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. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. 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 the national group.²⁰

(Torrance, CA: Institute for Historical Review, 1984), was written by a Holocaust denier, and cannot be taken as a serious piece of research: it is highly anti-Semitic and Martin consulted none of Lemkin’s papers (Cooper, *Raphael Lemkin*, 2008, pp. 2–3). There is some doubt about the year of Lemkin’s birth: his gravestone indicates 1900, but other sources state 1901. Lemkin’s papers are spread across three archives (though much material also appears to have been lost): the New York Public Library, the American Jewish Historical Society, and the American Jewish Archives. See Tanya Elder, ‘What You See Before Your Eyes; Documenting Raphael Lemkin’s Life by Exploring his Archival Papers, 1900–1959’, *Journal of Genocide Research*, vol. 7, no. 4 (2005).

¹⁸ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, DC: Carnegie Endowment for International Peace, 1944).

¹⁹ See the discussion in Korey, *Epitaph for Raphael Lemkin*, part 1, 2001, quote on p. 21.

²⁰ Lemkin, *Axis Rule*, p. 79. The book is almost entirely devoted to reproducing the various laws and decrees issued by the occupiers, analysis of which unveils their genocidal policies.