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## Introduction

*Problems of Genocide*

Genocide is defined in international law as the intent to destroy one of four protected groups: racial, national, ethnic, or religious. Genocide is considered morally unique as a wrong, and as the most serious of all international crimes. I will critically assess the conceptual and normative underpinnings of this “crime of crimes.” My view is that genocide should not be seen as morally unique and significantly worse legally than other serious international crimes. As genocide’s status changes, its scope should also be expanded, most especially to allow for cultural genocide and ethnic cleansing to be counted as crimes of genocide. And the list of protected groups should be expanded from the current group to include gender and even political groups. I will defend such a reconceptualization of genocide in international law, and will do so by focusing on actual legal cases of genocide, with special attention to the Rwandan genocide. But even if my modest changes are not accepted, my hope is that this volume will stir debate about how best to think of the crime of genocide. In one of my previous books, *Crimes Against Humanity: A Normative Account*,<sup>1</sup> I included a chapter on genocide. In the current volume I provide the full defense of the view that I had sketched, and I also explain why I think in the end that genocide should be thought of not as the crime of crimes but as one of, if not the most important, crimes against humanity.

This is the fourth volume of my long-term project on the normative, especially moral, foundations of international criminal law. The project was first conceived as a paper-length treatment of the subject, which then grew to a volume-length treatment, and then to a trilogy-length

<sup>1</sup> Larry May, *Crimes Against Humanity: A Normative Account*, New York: Cambridge University Press, 2005, ch. 9.

treatment. With the completion of the current volume, I have now provided a book-length treatment of the normative and conceptual issues that arise in each of the four crimes under the jurisdiction of the main court to prosecute international crimes today. The first three volumes concern crimes that were prosecuted in 1946 at Nuremberg: crimes against humanity, war crimes, and crimes against peace. In addition to the three Nuremberg crimes, the International Criminal Court's 1998 Rome Statute also lists a fourth crime under its jurisdiction, namely, genocide, the subject of the current volume.<sup>2</sup>

There has been much written about genocide over the last 60 years since the 1948 Genocide Convention brought the idea to the attention of the world community. I cannot possibly do justice to this extensive literature, but will instead comment on some of what I regard to be the most important contributions of this literature for the conceptual and normative issues I identify. My aim is for this genocide volume to be multidisciplinary, drawing from sources in philosophy, law, political science, sociology, and psychology. But I will probably not satisfy anyone working in any one of these areas. Instead, my hope is to provide a fresh perspective on the crime of genocide, especially on how best to think of crimes that involve groups as perpetrators and as victims.

In many ways, genocide in international law presents some of the most significant philosophical challenges of all of the areas of international criminal law. This is mainly due to the fact that genocide elicits some of the most passionate responses from people, and yet legally what is supposed to make genocide unique is a technical requirement, that the perpetrator's act manifest an intent to destroy a protected group. This fact calls into question decidedly nonemotional topics such as the ontological status and normative value of groups, topics that philosophers have worried about since at least the late Medieval period. In addition, even more than other international crimes, genocide raises significant questions of how to think about individual culpability because the crime of genocide is both in act and in intent a collective crime.

Legally, genocide concerns the intent to destroy a group. Groups are increasingly the focus of international law, especially international

<sup>2</sup> The other books that I have published in this area include *Crimes Against Humanity; War Crimes and Just War*, New York: Cambridge University Press, 2007; and *Aggression and Crimes Against Peace*, New York: Cambridge University Press, 2008.

criminal law. Yet no one has tried to craft a book-length treatment of the status and importance of groups in international law. One legal scholar devotes one long chapter of his seminal book to this topic.<sup>3</sup> Another author provides important documentation of the major genocides of the twentieth century,<sup>4</sup> but is not focused on the conceptual questions that I wish to answer. Other authors have done important work on conceptual issues in genocide, although not focused on international law.<sup>5</sup>

In this introductory chapter, I will first provide a discussion of the general idea of genocide, focusing on some of the differences between the specialized way that genocide is understood in international law and contrasting it with the way that genocide is often understood in nonlegal contexts, especially contexts of moral appraisal. Second, I will explain what is especially problematic about seeing genocide as primarily a crime that is perpetrated by groups against other groups. Third, I will discuss the various ways that genocide is of concern to the international community. Fourth, I will discuss why it is thought to be significant that individuals are prosecuted for international crimes such as genocide. Fifth, I will discuss in a preliminary way the special problems of intent that characterize the crime of genocide. Finally, I will end this chapter with a summary of the main arguments advanced in the book.

Throughout this introductory chapter, I will try to whet the reader's appetite for thinking critically about a subject that in many ways is the hardest for humans to conceive, that is, where a plan is hatched not only to kill or harm individuals because of their group membership, but also ultimately to destroy the group itself, to wipe it off the face of the map. More than 60 years after the Holocaust, this subject is still hard for people to fathom, and yet it continues to be of the utmost importance today, especially in various corners of Africa, but also relatively recently also in parts of Europe. Even in Australia and the United States, it is arguable that genocide occurred in the not too distant past concerning the way native peoples were treated.

<sup>3</sup> William Schabas, *Genocide in International Law*, New York: Cambridge University Press, 2000, 2nd edition 2009.

<sup>4</sup> Samantha Power, *A Problem from Hell*, New York: Harper and Row, 2002.

<sup>5</sup> Berel Lang, *Act and Idea in the Nazi Genocide*, Chicago: University of Chicago Press, 1990; Claudia Card, *The Atrocity Paradigm*, New York: Oxford University Press, 2002.

## I. The Idea of Genocide

Raphael Lemkin coined the term “genocide” when he forced together a Greek term for people and a Latin term for killing.<sup>6</sup> In this way genocide was coined to mean the killing of a group. In international law, genocide has a specialized meaning that is not necessarily consonant with that of the public’s understanding of genocide, because it includes acts that do not involve mass killing. Article II of the Convention on Genocide says genocide is:

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.<sup>7</sup>

Article III of the Convention on Genocide lists five acts punishable by the Convention: “(a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.”<sup>8</sup> I will focus on the legal definition and elements of genocide throughout this book. By focusing on this specialized meaning of genocide I will occasionally say something about the broader idea of genocide, but this will be rare. This is because I think that it is a mistake to let our legal thinking be overly influenced by considerations that properly should be kept separate, at least in part, because they risk emotionalizing an issue that is best understood as involving the treatment of defendants who are on trial for very specific acts, not for more generalized horrors. Many good books have tackled the latter nonlegal topic of genocide, but few look at the legal issues in the appropriately dispassionate manner that the subject requires.

In the nonlegal context, genocide has come to be thought of as the epitome of “evil.” And when one considers seemingly the paradigm case of genocide, the Holocaust, such an assessment is hard to dispute.

<sup>6</sup> Raphael Lemkin, *Axis Rule in Occupied Europe, Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington, DC: Carnegie Endowment for World Peace, 1944.

<sup>7</sup> Convention on the Prevention and Punishment of Genocide, adopted December 9, 1948; entered into force January 12, 1951, 78 U.N.T.S. 277.

<sup>8</sup> *Ibid.*, Article 6.

Indeed, some authors have argued that we should regard genocide as merely a plain fact<sup>9</sup> that should not be further investigated lest we risk that our explanations and conceptual inquiries will be mistakenly seen as forgiveness for the horror of what genocide is.<sup>10</sup> I do not think that explanation or understanding of the horror of genocide leads to forgiveness or exoneration of the perpetrators. But I am aware that the dispassionate writing style I will adopt might risk insulting those who are the victims, or the family members of the victims, of genocide. So let me begin this book with a heartfelt acknowledgment that we should always keep in mind that the crime of genocide begins with a perpetration of terrible acts. To give the phenomenon its due, I hereby quote from the preliminary accounts of the Rwandan genocide, the first major international trial for genocide to occur since the Holocaust, and the main example that I will refer to in this book.

In the Akayesu case, the decision of the trial chamber of the International Criminal Tribunal for Rwanda recites some salient facts:

Akayesu, in his capacity as bourgmestre was responsible for maintaining law and public order in the commune of Taba and that he had effective authority over the communal police. . . . It has also been proven that a very large number of Tutsis were killed in Taba between 7 April and the end of June 1994, while Akayesu was bourgmestre of the Commune. . . . [He] was present during the acts of violence and killings and sometimes even gave orders himself for bodily or mental harm to be caused to certain Tutsi, and endorsed and even ordered the killing of several Tutsi.

Between 7 April and the end of June 1994, numerous Tutsi who sought refuge at the Taba Bureau communal were frequently beaten by members of the Interahamwe on or near the premises of the Bureau communal. Some of them were killed. Numerous Tutsi women were forced to endure acts of sexual violence, mutilations and rape, often repeatedly, often publicly, and often by more than one assailant. Tutsi women were systematically raped, as one female victim testified to by saying that “each time that you met assailants, they raped you.” Numerous incidents of such rape and sexual violence against Tutsi women occurred inside or near the Bureau communal. It has been proven that some communal policemen armed with guns and the accused himself were present while some of these rapes and sexual violence were being committed. Furthermore it is proven that on

<sup>9</sup> See Warren K. Thompson, “Ethics, Evil, and the Final Solution,” in *Echoes from the Holocaust*, edited by Alan Rosenberg and Gerald E. Myers, Philadelphia: Temple University Press, 1988, pp. 181–97.

<sup>10</sup> See Arthur G. Miller, Amy M. Buddie, and Jeffrey Kretschmar, “Explaining the Holocaust: Does Social Psychology Exonerate the Perpetrators?” in *Understanding Genocide*, edited by Leonard S. Newman and Ralph Erber, New York: Oxford University Press, 2002, pp. 301–24.

several occasions, by his presence, his attitude, and his utterances, Akayesu encouraged such acts, one particular witness testifying that Akayesu addressed the Interahamwe who were committing the rapes and said that “never ask me again what a Tutsi woman tastes like.” In the opinion of the Chamber, this constitutes tacit encouragement to the rapes that were committed.<sup>11</sup>

Although the Trial Chamber’s description of the role that Akayesu played in the Rwandan genocide is not emotion laden, it is nonetheless highly effective at conveying the terror involved and in indicating how Akayesu’s individual acts connect to the crime of genocide for which he was ultimately found guilty.

Accounts such as the one just conveyed will probably still not satisfy some readers who look only to the victims for their own story of what transpired, and who look also only to the victims to decide what should be done to the perpetrators. Such an approach may seem uncontroversial when dealing with the moral judgment of the perpetrators. But when dealing with legal judgments, unless one supports a “show trial,” the judgment must include both the victim’s story and the alleged perpetrator’s story, all filtered through the lens of an impartial adjudicator. In this way the idea of genocide comes out most clearly, as was true, in my view, of the description above of the way that Akayesu’s acts linked him to the Rwandan genocide and supported the charge that he was not only morally responsible for what he did but also legally guilty of the crime of genocide. As we next see, constructing a description of what an individual did and connecting it to the larger collective crime is only the first of several conceptual and normative problems that arise in genocide cases.

## II. The Place of “Groups” in the Crime of Genocide

Genocide has popularly come to be seen as the “crime of crimes,” largely because of the scope of the harms. But keeping to the legal definition of genocide, it is unclear why it should matter that the acts of killing or harming were directed at the destruction of a group. If genocide is the crime of crimes because genocide is alone in requiring that it be proved that there was an intention to destroy a group, then there must be something especially wrong about aiming at the destruction of a group that

<sup>11</sup> *Prosecutor v. Jean-Paul Akayesu*, International Criminal Tribunal for Rwanda, case no. ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, paras. 704-7.

makes otherwise wrongful acts of killing, torturing, and raping even worse. Conceptually, destroying a group must be different from merely killing the group's members. And normatively, this difference must be significant if genocide is to be the crime of crimes.

On the simplest conceptual level, one could say that individual human persons are the constituents of a group. The immediate question follows: Is there any other constituent of a group, or is a group nothing but its individual human persons as members? Even the phrase "as members" should make us wonder whether a group is nothing but individual human persons. If for no other reason, we should wonder whether every time individual human persons gather together we necessarily also have a group. Are the five people who read this paragraph the "members of" a group? And does the group matter more than the individuals who compose it? Or is there more to a group than merely its members only concerning certain types of groups?

In an earlier work, I argued that groups "exist" when a collection of persons displays either the capacity for joint action or common interest.<sup>12</sup> I then gave a wide reading of common interest to include the capacity to be harmed as a group. In the current book, I wish to explore this topic in much greater depth than I did before. Along the way, my earlier view will have to be revised in various ways, although the core idea just expressed will remain mostly the same. I will confront the topic of groups in the context of one of the newest areas of law, international criminal law, which concerns the prosecution of individuals for what are primarily collective crimes.

The general view I defend in subsequent chapters is that groups do not have value in themselves; the harm to groups is in terms of how individuals are affected. The destruction of a group, where most of the members are also killed, is a truly terrible crime. But this seems to be primarily because of the widespread killing of individuals involved. The destruction of a group, where individuals are not killed, is harder to see as a great crime. Groups are an important resource for sustaining relationships and forming identity of individuals. When a group is destroyed something is lost for the individuals who are its members. In this book I will try to make sense of the harm of genocide by considering how the destruction of groups might harm individual humans who are members. Genocide may not be the worst of crimes, but it is still a

<sup>12</sup> See Larry May, *The Morality of Groups*, Notre Dame, IN: University of Notre Dame Press, 1987.

very serious crime that should be prosecuted in international criminal tribunals, as it was (under a different name) at Nuremberg, as it is in the ad hoc Rwanda tribunal, and as it will be in the International Criminal Court. A theoretical inquiry into the nature of harm to groups will be the centerpiece of this book.

The formulation of genocide in the Genocide Convention provides many puzzles, both conceptual and normative, that will be the focus of this volume. How are groups to be identified, and why are only four groups subject to genocide? What is the harm of destroying a social group, and why is this harm thought to be independent of killing lots of people? What should be the act and intent elements of a mass crime like genocide, and how can an individual person in the dock satisfy these elements and hence, as an individual, be responsible for a collective crime like genocide? How should we understand the specific crimes associated with genocide, especially instigation, incitement, and complicity? And is it the case that holding criminal trials in the aftermath of genocide, instead of truth and reconciliation commissions, is indeed the best strategy for achieving reconciliation and the return to the rule of law?

In discussing each of the above-mentioned issues, in this book I will focus on the case of the Rwandan genocide. I do this because there are especially intriguing conceptual and normative questions here. Concerning the identification of social groups, the Tutsis who were the victims of the genocide did not have their own language or culture, and although people in the villages were by and large able to distinguish Tutsis from Hutus, across the country it required government-issued identity cards to distinguish the two dominant groups from one another. Concerning the harm of genocide, it is undeniable that nearly 1 million people were killed, and the vast majority were Tutsis. Given that the groups in Rwanda had become so intermingled in Rwandan society, what precisely was the harm of targeting Tutsis to the point where the continued existence of Tutsis was threatened?

Concerning the elements of genocide, it is interesting that so many world leaders at the time were reluctant to say that the massacres in Rwanda constituted genocide. Aside from the politics of the matter, there was a serious question of whether there could be a genocide that so failed to resemble that of the seemingly paradigmatic genocide, the Holocaust. In particular, can there be genocide without a government having established a central plan for the elimination of a particular ethnic group? As I argue in Chapter 11, such a central plan seems to have been lacking in Rwanda. Concerning the forms of culpability in



the Rwandan genocide, if there was no master plan, should those who incited the genocide be considered the ones who are principally responsible? And how should complicity, a form of secondary responsibility, be understood when it is relatively unclear who the principal agents of the genocide were? Finally, is there reason to think that criminal trials are a better way to achieve reconciliation and security in Rwanda than truth and reconciliation commissions? In this respect, I will be especially concerned with *gacaca*, a unique form of trial occurring across Rwanda.

### III. Genocide and International Harm

Although it is not normally recognized, genocide is a security issue, not merely a human rights issue. And although I will address genocide, as is almost always done today, primarily as a human rights issue, perhaps it is worth saying just a few words about the security aspect of genocide before trying to explain why it might be the most important of human rights concerns. The right not to be persecuted or to be subject to genocide is one of the main bastions against infringements on the security of individuals and groups. When NATO decided to send troops into Kosovo it was because of a concern that the ethnic cleansing campaign in the Balkans had already risked spreading into a wider European problem. The current genocide in Sudan, if it is genocide, is not merely a horrific humanitarian crisis for the people who are being starved to death, it is also a major factor destabilizing the region. Genocide can be understood in terms of its effect on security: personal, collective, and national. For this reason, it could be argued that genocide should be taken seriously by the international society for self-interested, not merely for humanitarian, reasons.

In the Universal Declaration of Human Rights, Article 7 declares that “All are equal before the law and are entitled without any discrimination to equal protection of the law.” Article 14 declares that “Everyone has the right to seek and enjoy in other countries asylum from persecution.” It is clear that genocide harms the international community in that it destabilizes security for many of those who are affected, individuals and States alike. There is the significant risk that this international crime will spread across borders. This can happen either when the genocide itself extends to people who are its object, and who happen to live across the border from where the main genocide is occurring, or it can happen in an ancillary way when large numbers of refugees cross the border to seek asylum from the ravages of a genocidal campaign. Yet this kind of

harm is contingent, for there have been past genocides and certainly there can be future genocides that do not cross borders or risk doing so. The harm of genocide seems to be best understood not in this contingent way, if all genocide is to be condemned and condemned in the strongest of terms.

But there is another way that genocide causes harm to the international community as well, namely, by adversely affecting all of humanity or by adversely affecting the common identities of the people who are members of the group. As in the case of other international crimes, and perhaps even more so in the case of genocide, there is a sense in which humanity is harmed by each occurrence of international crimes, and especially in the case of all genocides. What exactly it is that adversely affects humanity, or enough of humanity to be considered of supreme importance, will require very careful conceptual and normative analysis. Ultimately, I will reject this understanding of the harm of genocide.

Claudia Card has argued that the harm of genocide is best understood in terms of the loss of significant aspects of one's identity.<sup>13</sup> I do not follow Card in thinking that this loss is equivalent to physical death, but I agree that it is a highly significant loss nonetheless. Loss of significant aspects of one's identity can occur across a wide range of differences depending on how much the individual in question identified with that aspect of his or her identity. My religion may have been quite significant to me as a youth and now may have very little importance to me as a middle-aged adult. On the other hand, my ethnic identity may have mattered little to me as a youth but may come to have more importance in my life the older I become. The relativity of the importance of identity means that its loss is not like death, or at least not for everyone who experiences this loss.

In subsequent chapters I will argue that genocide primarily involves a "status harm." Status harms are different from biological or even psychological harms. When a group is destroyed, the members of the group lose their group-based rights; indeed, vis-à-vis loss of membership they become rightless. And because groups are often the primary repositories of rights-protections, when a group is destroyed the individual members of the group are significantly harmed. There is a sense in which these individuals retain other rights, such as their human rights. But when the group to which they belong is destroyed, the individuals

<sup>13</sup> Claudia Card, "Genocide and Social Death," *Hypatia*, vol. 18, no. 1, Winter 2003, 63–79.