# Introduction

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

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

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

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

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

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

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

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

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

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

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

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

[4] (1951) 78 UNTS 277.

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

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

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

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

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

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

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

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

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

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

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

[10] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 161.
[11] GA Res. 96 (I).
[12] 'Statute of the International Criminal Tribunal for the Former Yugoslavia', UN Doc. S/RES/827 (1993), annex, art. 4; 'Statute of the International Criminal Tribunal for Rwanda', UN Doc. S/RES/955 (1994), annex, art. 2.
[13] Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, art. 6.
[14] Genocide Convention Implementation Act of 1987 (the Proxmire Act), S. 1851, § 1091(a).

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

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

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

[15] Penal Code (France), *Journal officiel*, 23 July 1992, art. 211–1.
[16] Crimes Against Humanity and War Crimes Act, 48–49 Elizabeth II, 1999–2000, C-19, s. 4.
[17] See the comments of *ad hoc* judge Milenko Kreca in *Legality of Use of Force* (*Yugoslavia* v. *Belgium et al.*), Request for the Indication of Provisional Measures, Order, 2 June 1999, Dissenting Opinion of Judge Kreca, para. 21: 'A certain confusion is also created by the term "humanitarian law" referred to in paragraphs 19 and 48 of the Order. The reasons for the confusion are dual: on the one hand, the Court has not shown great consistency in using this term. In the *Genocide* case the Court qualified the Genocide Convention as a part of humanitarian law, although it is obvious that, by its nature, the Genocide Convention falls within the field of international criminal law.'

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[26] UN Doc. S/RES/771 (1992); 'The Situation in Bosnia and Herzegovina', GA Res. 46/242.
[27] 'The Situation in Bosnia and Herzegovina', GA Res. 47/121.
[28] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Requests for the Indication of Provisional Measures, 8 April 1993, [1993] ICJ Reports 16; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Further Requests for the Indication of Provisional Measures, [1993] ICJ Reports 325. In 1973, Pakistan invoked the Convention against India, but discontinued its application before the Court made an order: *Trial of Pakistani Prisoners of War (Pakistan* v. *India)*, Interim Protection Order of 13 July 1973, [1973] ICJ Reports 328.
[29] UN Doc. S/RES/827.
[30] 'Report by the Special Rapporteur on Extrajudicial, Summary Arbitrary Executions on His Mission to Rwanda, 8–17 April 1993', UN Doc. E/CN.4/1994/7/Add.1.
[31] UN Doc. S/RES/955.

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

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

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