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978-0-521-88397-9 - Genocide in International Law: The Crime of Crimes, Second Edition

William A. Schabas

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GENOCIDE IN INTERNATIONAL LAW

Second Edition

The 1948 Genocide Convention has become a vital legal tool in the international campaign against impunity. Its provisions, including its enigmatic definition of the crime and its pledge both to punish and prevent the 'crime of crimes', have now been interpreted in important judgments by the International Court of Justice, the *ad hoc* Tribunals for the former Yugoslavia and Rwanda and various domestic courts.

The second edition of this definitive work focuses on the judicial interpretation of the Convention, relying on debates in the International Law Commission, political statements in bodies like the General Assembly of the United Nations and the growing body of case law. Attention is given to the concept of protected groups, to problems of criminal prosecution and to issues of international judicial cooperation, such as extradition. The duty to prevent genocide and its relationship with the emerging doctrine of the 'responsibility to protect' are also explored.

WILLIAM A. SCHABAS OC MRIA is Director of the Irish Centre for Human Rights and professor of human rights law at the National University of Ireland, Galway. The author of many books and journal articles on the subject of international human rights law, Professor Schabas has served as an international member of the Sierra Leone Truth and Reconciliation Commission (2002 to 2004). He is also a member of the Board of Trustees of the United Nations Voluntary Fund for Technical Assistance in the Field of Human Rights, an Officer of the Order of Canada and a Member of the Royal Irish Academy.

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The Crime of Crimes

SECOND EDITION

WILLIAM A. SCHABAS OC MRIA

National University of Ireland, Galway



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CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, Delhi

Cambridge University Press

The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org

Information on this title: www.cambridge.org/9780521719001

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First published 2009

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data

Schabas, William, 1950–

Genocide in international law : the crime of crimes / William A. Schabas. – 2nd ed.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-521-88397-9 (hardback)

1. Genocide. 2. Convention on the Prevention and Punishment of the Crime of Genocide (1948) I. Title.

K5302.S32 2009

345/.0251–dc22

2008053261

ISBN 978-0-521-88397-9 hardback

ISBN 978-0-521-71900-1 paperback

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To my parents, Ann and Ezra

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PREFACE TO THE FIRST EDITION

The legal questions involved in studying genocide draw on three areas of law: human rights law, international law and criminal law. These are all subjects that I have both taught and practised. This alone ought to be sufficient to explain my interest in the subject. But there is more. Of the three great genocides in the twentieth century, those of the Armenians, the Jews and Gypsies, and the Tutsi, my life has been touched by two of them.

My grandparents on my father's side, and my ancestors before them for generations, came from Kosowa and Brzezany, towns in what was once called Eastern Galicia. Located in the general vicinity of the city of Lvov, they are now part of Ukraine. Essentially nothing remains, however, of the Jewish communities where my grandparents were born and raised. In the months that followed the Nazi invasion of the Soviet Union, the Einsatzgruppen murdered as many as two million Jews who were caught behind the lines in the occupied territories. On 16–17 October 1941, in a German Aktion, 2,200 Jews, representing about half the community of Kosowa, were taken to the hill behind the Moskalowka bridge and executed. Parts of the population of both towns, Brzezany and Kosowa, were deported to the Belzec extermination camp. As the Germans were retreating, after their disastrous defeat at Stalingrad in January 1943, the executioners ensured they would leave no trace of Jewish life behind. It is reported that more Jews were killed in Brzezany on 2 June 1943, and in Kosowa on 4 June 1943, a 'final solution' carried out while the Soviet forces were still 500 km away. The victims were marched to nearby forests, gravel pits and even Jewish cemeteries where, according to Martin Gilbert, 'executions were carried out with savagery and sadism, a crying child often being seized from its mother's arms and shot in front of her, or having its head crushed by a single blow from a rifle butt. Hundreds of children were thrown alive

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into pits, and died in fear and agony under the weight of bodies thrown on top of them.¹

Although my grandparents had immigrated to North America many years before the Holocaust, some of my more distant relatives were surely among those victims. Several of the leaders of the Einsatzgruppen were successfully tried after the war for their role in the atrocities in Brzezany, Kosowa and in thousands of other European Jewish communities of which barely a trace now remains. The prosecutor in the Einsatzgruppen case, Benjamin Ferencz, a man I have had the honour to befriend, used the neologism 'genocide' in the indictment and succeeded in convincing the court to do the same in its judgment.²

Exactly fifty years after the genocide in my grandparents' towns, I participated in a human rights fact-finding mission to a small and what was then obscure country in central Africa, Rwanda. I was asked by Ed Broadbent and Iris Almeida to represent the International Centre for Human Rights and Democratic Development as part of a coalition of international non-governmental organizations interested in the Great Lakes region of Africa. The mission visited Rwanda in January 1993, mandated to assess the credibility and the accuracy of a multitude of reports of politically and ethnically based crimes, including mass murder, that had taken place under the regime of president Juvénal Habyarimana since the outbreak of civil war in that country in October 1990. At the time, a terrifying cloud hung over Rwanda, the consequence of a speech by a Habyarimana henchman a few weeks earlier that was widely interpreted within the country as an incitement to genocide. We interviewed many eyewitnesses but our fact-finding went further. In an effort to obtain material evidence, we excavated mass graves, thus confirming reports of massacres we had learned of from friends or relatives of the victims.

At the time, none of us, including myself, had devoted much study if any to the complicated legal questions involved in the definition of genocide. Indeed, our knowledge of the law of genocide rather faithfully reflected the neglect into which the norm had fallen within the human rights community. Yet faced with convincing evidence of mass killings

¹ Martin Gilbert, *Atlas of the Holocaust*, Oxford: Pergamon Press, 1988, p. 160. See also Israel Gutman, *Encyclopedia of the Holocaust*, Vol. I, New York: Macmillan, 1990, pp. 184–5.

² *United States of America v. Ohlendorf et al.* ('Einsatzgruppen trial'), (1948) 3 LRTWC 470 (United States Military Tribunal).

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of Tutsis, accompanied by public incitement whose source could be traced to the highest levels of the ruling oligarchy, the word 'genocide' sprung inexorably to our lips. Rereading the definition in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide helped confirm our conclusion. In a press release issued the day after our departure from Rwanda, we spoke of genocide and warned of the abyss into which the country was heading. The term seemed to fit. Our choice of terminology may have been more intuitive than reasoned, but history has shown how closely we came to the truth. Three months after our mission, Special Rapporteur Bacre Waly Ndiaye visited Rwanda and essentially endorsed our conclusions. He too noted that the attacks had been directed against an ethnic group, and that article II of the Genocide Convention 'might therefore be considered to apply'.³ In his 1996 review of the history of the Rwandan genocide, Secretary-General Boutros Boutros-Ghali took note of the significance of our report.⁴

Four months after the Rwandan genocide, I returned to Rwanda as part of an assistance mission to assess the needs of the legal system, and more specifically the requirements for prompt and effective prosecution of those responsible for the crimes. Over the past five years, much of my professional activity has been focused on how to bring the génocidaires to book. I have been back to Rwanda many times since 1994, and participated, as a consultant, in the drafting of legislation intended to facilitate genocide prosecutions. The International Secretariat of Amnesty International sent me to Rwanda in early 1997 to observe the *Karamira* trial, the first major genocide prosecution under national law in that country, or, for that matter, in any country, with the exception of the *Eichmann* case. I have since attended many other trials of those charged with genocide, both within Rwanda and before the International Criminal Tribunal for Rwanda, in Arusha, Tanzania, including the *Akayesu* trial, the first international prosecution pursuant to the Genocide Convention. I have also devoted much time to training a new generation of Rwandan jurists, lecturing regularly on criminal law and on the specific problems involved in genocide prosecutions as a visiting professor at the law faculty of the Rwandan National University. On 2 September 1998, I took a break from teaching the introductory criminal law class

³ '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, at para. 79.

⁴ Boutros Boutros-Ghali, 'Introduction', in *The United Nations and Rwanda, 1993–1996*, New York: United Nations Department of Public Information, 1996, pp. 1–111 at p. 20.

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to 140 eager young Rwandans and we all spent the morning listening attentively on the radio to Laïty Kama, president of the International Criminal Tribunal for Rwanda, as he read the first international judgment convicting an individual of the crime of genocide.

But I have also spent many hours with genocide survivors, and I have visited the melancholy memorials to the killings. The smell of the mass graves cannot be forgotten and, like the imagined recollections of my grandparents' birthplace, it has its own contribution to what sometimes may seem a rather dry and technical study of legal terms. There is more passion in this work than may initially be apparent.

William A. Schabas

Washington, 27 August 1999

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There has probably been more legal development concerning the crime of genocide in the eight years since the first edition of this book was completed than in the five preceding decades. Where, in mid-1999, the *ad hoc* tribunals had only made a handful of judicial pronouncements interpreting the definition of genocide, there is now a rich body of jurisprudence, including several important rulings by the Appeals Chambers. At the time, there was a paucity of legal literature, with most scholarly writing dominated by historians and sociologists. Now, the legal bibliography on genocide is rich and extensive. Crowning this fertile period, in February 2007 the International Court of Justice issued its major ruling on the subject, a long-awaited conclusion to a case filed by Bosnia and Herzegovina against the Federal Republic of Yugoslavia in 1993.

Naturally, this second edition takes account of this, updating the scholarship and, where appropriate, revising certain assessments. The approach in the first edition to the interpretation of the terms of the 1948 Genocide Convention was relatively conservative. At the time, my mind was open to the prospect that the law would evolve in a different direction, driven by a certain logic that views progressive development as synonymous with constant expansion of definitions so as to encompass an increasingly broad range of acts. The case law has tended to confirm the former. For example, it has generally rejected the suggestion that 'ethnic cleansing' be merged with genocide. Along the same lines, it has resisted attempts to enlarge the categories of groups that are contemplated by the definition of genocide.

On some issues, my own thinking has evolved. Years of case law, discussion and reflection about the nature of genocide have generated what I think are new insights. No longer does the debate about the 'specific intent' of the crime, which has figured almost as a mantra in the case law, seem very helpful. When the recent judgment of the International Court of Justice considered whether the State of Serbia

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had the ‘specific intent’ to commit genocide, the awkwardness of such an inquiry seemed evident. Unlike individuals, States do not have ‘intent’, they have *policy*. The Court was trying to transpose a concept of criminal law applicable to individuals to the field of State responsibility. Had it gone in the other direction, the result might have been more coherent. If we look for the State *policy* to commit genocide we can transfer the finding to the individual not by asking if he or she had the specific intent to perpetrate the crime, like some ordinary murderer, but rather whether he or she had knowledge of the policy and intended to contribute to its fulfilment. I develop this approach, which builds upon the thinking of scholars who have spoken of a ‘knowledge-based’ approach to the *mens rea* of genocide, in the second edition.

The first edition was principally a reference work on the 1948 Genocide Convention. It relied primarily on the *travaux préparatoires* of 1947 and 1948 not because these are decisive for its interpretation but simply because when I was writing the book there was little else to consult. That has all changed. Thus, the second edition incorporates relevant references to the abundant case law, adjusting observations of the first edition where this is appropriate, and confirming them in other respects.

William A. Schabas
Rome, 29 February 2008

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ACKNOWLEDGMENTS

I wish to thank the Social Sciences and Humanities Research Council of Canada for a research grant and for the Bora Laskin Research Fellowship in Human Rights. The first edition of this work was completed while on sabbatical leave from the University of Quebec at Montreal, when I held a Jennings Randolph Senior Fellowship with the United States Institute of Peace in Washington. I hereby acknowledge my great appreciation for the Institute's support. The help and encouragement from my many colleagues at the United States Institute of Peace, but particularly Neil Kritz, Bill Stuebner, John Crist and Joe Klaitz, is fondly recalled. A term as visiting professor at the University of Montpellier in 1998, the guest of Frédéric Sudre and Michel Levinet, gave me the opportunity for an intensive period of writing on an early draft of a portion of the manuscript.

The second edition was completed in 2007–8, while on sabbatical leave from the National University of Ireland, Galway. I spent part of the year at Cardozo Law School of Yeshiva University in New York and part at LUISS Guido Carli University in Rome. Both institutions gave me the time and the appropriate intellectual environment to review developments over the nine years since the first edition.

Short excerpts from articles I have written since the first edition appeared have been incorporated into the text without substantial modification: 'Darfur and the "Odious Scourge": The Commission of Inquiry's Findings on Genocide', (2005) 18 *Leiden Journal of International Law*, p. 871; 'Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes', (2007) 2:2 *Genocide Studies and Prevention*, p. 101; 'Genocide Trials and Gacaca Courts', (2005) 3 *Journal of International Criminal Justice*, p. 879; 'Genocide, Crimes Against Humanity and Darfur: The Commission of Inquiry's Findings on Genocide', (2005) 27 *Cardozo Law Review*, p. 101; 'Has Genocide Been Committed in Darfur? The State Plan or Policy Element in the Crime of Genocide', in Ralph Henham and Paul Behrens, eds., *The*

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ACKNOWLEDGMENTS

Criminal Law of Genocide, International, Comparative and Contextual Aspects, Aldershot, UK: Ashgate, 2007, pp. 35–44; ‘National Courts Finally Begin to Prosecute Genocide, the “Crime of Crimes”’, (2003) 1 *Journal of International Criminal Justice*, p. 89.

Besides providing time and travel funds, my various research grants also blessed me with several gifted assistants with whom it was always a pleasure to work: Véronique Brouillette, Sophie Dormeau, Geneviève Dufour, Niru Kumar, Véronique Robert-Blanchard and particularly Cecilie Lund. Many colleagues and friends encouraged and assisted me with various aspects of my research. Inevitably, my colleagues and I will disagree about some of the many difficult issues in this field. I have great respect for their views, and know that our debates will continue as the subject evolves. Of course, the views expressed here are my own. I wish to thank particularly Elizabeth Abi-Mershed, Howard Adelman, Anees Ahmed, Catarina Albuquerque, Jaye Alderson, Kai Ambos, Cécile Aptel, M. Cherif Bassiouni, Chaloka Beyani, the late Katia Boustany, Rowly Brucken, Christina Cerna, Frank Chalk, Roger Clark, Emmanuel Decaux, René Degni-Segui, Rokhaya Diarra, Fidelma Donlon, Norman Farrell, Don Ferencz, Jim Fussell, Meg de Guzman, the late Bernard Hamilton, Frederick Harhoff, Kristine Hermann, Martin Imbleau, Laïty Kama, Ben Kiernan, Anne-Marie La Rosa, Ben Majekodunmi, Linda Melvern, Miltos Miltiades, Faustin Ntezilyayo, John Packer, Zach Pall, Robert Petit, Wolfgang Schomburg, Dorothy Shea, Wibke Timmermann, Brenda Sue Thornton, Otto Triffterer, Daniel Turp, Nicolai Uscoi and Alfred de Zayas. Diplomatic personnel in embassies and governments around the world, too numerous to mention individually, also gave generously of their time in providing me with their domestic legislation on genocide. The reliable professionalism, confidence and support of the personnel of Cambridge University Press, and in particular of Finola O’Sullivan, is also gratefully acknowledged.

As always, words fail in expressing my love and thanks to my wife, Penelope Soteriou, and to my daughters, Marguerite and Louisa.

ABBREVIATIONS

AC	Appeal Cases
AI	Amnesty International
AIDI	Annuaire de l'Institut de Droit International
All ER	All England Reports
BFSP	British Foreign and State Papers
BFST	British Foreign and State Treaties
BYIL	British Yearbook of International Law
CERD	Committee for the Elimination of Racial Discrimination
CHR	Commission on Human Rights
CHRY	Canadian Human Rights Yearbook
CLR	Commonwealth Law Reports
Coll.	Collection of Decisions of the European Commission of Human Rights
Cr App R	Criminal Appeal Reports
Crim LR	Criminal Law Review
CSCE	Conference on Security and Co-operation in Europe
Doc.	Document
DR	Decisions and Reports of the European Commission of Human Rights
Dumont	Corps universel diplomatique du droit des gens
EC	European Communities
ECOSOC	Economic and Social Council
EHRR	European Human Rights Reports
ESC	Economic and Social Council
ETS	European Treaty Series
F.	Federal Reporter
FCA	Federal Court of Australia
GA	General Assembly
HRJ	Human Rights Journal
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission

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ILDC	International Law in Domestic Courts
ILM	International Legal Materials
ILR	International Law Reports
IMT	Trial of the Major War Criminals before the International Military Tribunal
JCPC	Judicial Committee of the Privy Council
JDI	Journal de droit international
JICJ	Journal of International Criminal Justice
KB	King's Bench
L Ed	Lawyer's Edition
LNTS	League of Nations Treaty Series
LRC	Law Reports of the Commonwealth
LRTWC	Law Reports of the Trials of the War Criminals
Martens	Martens Treaty Series
NAC	National Archives of Canada
NILR	Netherlands International Law Review
OAS	Organization of American States
OASTS	Organization of American States Treaty Series
OAU	Organization of African Unity
Res.	Resolution
RGD	Revue générale de droit
RSC	Revised Statutes of Canada
SC	Supreme Court
SCHR	Sub-Commission on Prevention of Discrimination and Protection of Minorities
SCR	Supreme Court Reports (Canada)
SD	Selected Decisions of the Human Rights Committee
TLR	Times Law Reports
TS	Treaty Series
TWC	Trials of the War Criminals
UKTS	United Kingdom Treaty Series
UN	United Nations
UNAMIR	United Nations Assistance Mission in Rwanda
UNCIO	United Nations Conference on International Organization
UNTS	United Nations Treaty Series
UNWCC	United Nations War Crimes Commission
UNYB	United Nations Yearbook
US	United States
USNA	United States National Archives
WCR	War Crimes Reports
Yearbook	Yearbook of the International Law Commission
YECHR	Yearbook of the European Convention on Human Rights
YIHL	Yearbook of International Humanitarian Law