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

[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, reported by L. P. Lochner, *What About Germany?*, New York: Dodd, Mead, 1942. During the Nuremberg trial of the major war criminals, American prosecutors referred to Lochner's version of the speech. It was labelled as an exhibit but 'only for identification' and not 'for evidence', according to prosecutor Thomas Dodd (*France et al.* v. *Goering et al.* One hundred and thirty-first day, 16 May 1946 (1948) 14 IMT 64). 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* 504, at pp. 538–41.

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.

The inertia of the legal systems where the crimes actually occurred did little to inspire other jurisdictions to intervene, although they did 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 and where the crimes often took place outside the territorial jurisdiction of any State. 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, individuals may be punished for such international crimes as a matter of international law, even if their 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. 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 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.[3] The Convention came into force in January 1951, three months after the deposit of the twentieth instrument of ratification or accession.

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.[4]

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.[5] 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

[3] (1951) 78 UNTS 277.

[4] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, *I.C.J. Reports 1951*, p. 16, at p. 23. This paragraph has been frequently cited in the Court's case law. For example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, p. 3, para. 87.

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

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.[6] In 2006, the International Court of Justice held 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.[7] 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 existing requirements of customary international law, a matter emphasized by the Court in 1951'.[8]

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.[9] 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.[10] Affirming its enduring authority, the Convention definition was included without any significant modification in the Rome Statute of the International Criminal Court, which was adopted on 17 July 1998 and entered into force on

[6] According to a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, 'the 1948 Genocide Convention reflects customary international law': *Sikirica et al.* (IT-95-8-I), Judgment on Defence Motions to Acquit, 3 September 2001, para. 55. Also: *Musema* (ICTR-96-13-T), Judgment, 27 January 2000, para. 151; *Bagilishema* (ICTR-95-1A-T), Judgment, 7 June 2001, para. 54. The Australian High Court wrote that 'genocide 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).

[7] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, para. 64.

[8] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, para. 161.

[9] The crime of genocide, A/RES/96 (I).

[10] Statute of the International Criminal Tribunal for the former Yugoslavia, S/RES/827 (1993), annex, art. 4; Statute of the International Criminal Tribunal for Rwanda, S/RES/955 (1994), annex, art. 2.

1 July 2002.[11] A subsidiary document to the Rome Statute, the Elements of Crimes, provides additional contextual components for the interpretation of the definition. There have been frequent references to genocide within the resolutions, declarations and statements of United Nations organs, including particularly the work of expert bodies, special rapporteurs and fact-finding commissions.[12] 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. In the World Summit Outcome resolution of 2005, the General Assembly endorsed the Special Adviser.[13]

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 several 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]

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

[11] Rome Statute of the International Criminal Court (2002) 2187 UNTS 90, art. 6.
[12] For example, United Nations, Office of the High Commissioner for Human Rights, *Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003*, August 2010, paras. 500–24, 824–5; "They came to destroy": ISIS Crimes Against the Yazidis, A/HRC/32/CRP.2 (15 June 2016); Report of the independent international fact-finding mission on Myanmar, A/HRC/39/64 (12 September 2018), paras. 84–7; Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/CRP.2 (17 September 2018), paras. 1388–1441.
[13] 2005 World Summit Outcome, A/RES/60/1 (16 September 2005), para. 140.
[14] Genocide Convention Implementation Act of 1987 (the Proxmire Act), S. 1851, § 1091(a).
[15] Code pénal (France), *Journal officiel*, 23 July 1992, art. 211–1.

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 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 both in war and in peacetime. Consequently,

[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 Kreća in *Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 124, Dissenting Opinion of Judge Kreća, para. 21. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 595, para. 108.

[18] Statute of the International Criminal Tribunal for the former Yugoslavia, S/RES/827 (1993), annex, art. 4; Statute of the International Criminal Tribunal for Rwanda, S/RES/955 (1994), annex, art. 2.

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.[19] Alain Pellet described the Convention as 'a quintessential human rights treaty'.[20] For Benjamin Whitaker, genocide was 'the ultimate human rights problem'.[21] The Convention appears under the heading 'Human Rights' on the list of 'Multilateral Treaties Deposited with the Secretary-General' of the United Nations Treaty Collection website.

The prohibition of genocide is closely related to the right to life, one of the fundamental human rights defined in international declarations and conventions. These instruments concern themselves with the 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 'genocide 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, 'it is a frontal attack on the value of human life as an abstract protected value in a manner different from the crime of murder'.[22]

In the half-century following its adoption, there was little attention, scholarly or judicial, to the legal aspects of the Genocide Convention. 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 seemed too restrictive, too narrow. It had failed to

[19] E/CN.4/SR.310 (26 May 1952), p. 5.
[20] Report of the International Law Commission on the Work of its Forty-Ninth Session, 12 May–18 July 1997, A/52/10, para. 76. See also *Kayishema et al.* (ICTR-95-1-T), Judgment, 21 May 1999, para. 88.
[21] E/CN.4/Sub.2/1984/SR.3 (19 August 1984), para. 6.
[22] 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.

cover, in a clear and unambiguous manner, many of the major human rights violations and mass killings perpetrated by dictators and their accomplices. 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, was that it applied only to 'national, racial, ethnical and religious groups'.

The third quarter-century since adoption of the Convention has brought unprecedented attention to the international legal issues it raises. Whereas only two contentious cases based upon the Convention were filed at the International Court of Justice prior to 1998, since then there have been fifteen applications as well as two counter-claims and two major judgments. Numerous decisions have been issued on the subject by international and internationalised tribunals, including the International Criminal Court, the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia, the International Residual Mechanism for Courts and Tribunals, the European Court of Human Rights and the Extraordinary Chambers of the Courts of Cambodia. National legislatures and political personalities regularly invoke the term 'genocide' in order to characterize a range of atrocity crimes, both present and historic.[23] Many perpetrators of the crime are now in prison, convicted of genocide by the international criminal tribunals for Rwanda and the former Yugoslavia. Thousands have been prosecuted at the national level, notably in Rwanda itself.

This intense legal activity relating to the crime of genocide is part of the much broader phenomenon of the development of contemporary international criminal justice. It has been characterized by a huge enlargement of the subject matter. Until the 1990s, the prevailing view failed to recognize 'war crimes' in non-international armed conflict. Furthermore, the Nuremberg precedent appeared to exclude 'crimes

[23] There are many examples: Declaration of the Verkhovna Rada of Ukraine on the Genocide Committed by the Russian Federation in Ukraine, A/76/812 - S/2022/337 (20 April 2022), annex; Résolution, adoptée, par l'Assemblée nationale, portant sur la reconnaissance et la condamnation du caractère génocidaire des violences politiques systématiques ainsi que des crimes contre l'humanité actuellement perpétrés par la République populaire de Chine à l'égard des Ouïghours le 20 janvier 2022, T.A. n° 758 ; An Act to establish a Ukrainian Famine and Genocide ('Holodomor') Memorial Day and to recognize the Ukrainian Famine of 1932–33 as an act of genocide, S.C. 2008, c. 19; Uganda Embargo Act, Public Law 95-435 of 10 October 1978, United States Statutes at Large 1978, vol. 92, part 1.

against humanity' committed in peacetime. The Rome Statute of the International Criminal Court, adopted in 1998, confirmed a radical expansion of the scope of international criminal justice by modifications to both of these categories. Paradoxically, the crime of genocide has resisted any expansion. There were only a few perfunctory attempts to amend it during the drafting of the Rome Statute and there have been no serious proposals of amendment since then. Moreover, judges of the international tribunals have generally resisted encouragement to extend the application of the crime through judicial activism. This may be explained by the legal development of war crimes and crimes against humanity. In expanding war crimes and crimes against humanity to fill gaping impunity gaps, pressure to do the same with genocide was reduced. The perceived shortcomings of the narrow definition of genocide in the 1948 Convention were very thoroughly addressed by amendments to the other international crimes. Yet the obsession with genocide has remained. It is a label that many consider to be the only adequate way to describe severe acts of persecution, of massacre and of atrocity. Raphael Lemkin, who proposed the term 'genocide' and who devoted his life to the campaign for its recognition, spoke of it as the 'crime of crimes'.[24]

As a practical matter, the atrocities that do not fit neatly within the parameters of genocide, as defined in the Convention, invariably fall under the broader concept of crimes against humanity. At the international criminal tribunals, where subject-matter jurisdiction extends to genocide, crimes against humanity and war crimes, acquittal on a genocide count is usually accompanied by conviction for one of the lesser and included charges. But this is not possible in litigation at the International

[24] Raphael Lemkin, 'Genocide as a Crime under International Law', *United Nations Bulletin*, vol. IV, 15 January 1948, pp. 70–1, at p. 70. The expression 'crime of crimes' was used by Alain Pellet in the International Law Commission in early 1994 (A/CN.4/SR.2345 [31 May 1994], paras. 7, 12) and later that year by the Permanent Representative of Rwanda during debate in the Security Council (S/PV.3453 [8 November 1994], p. 15). There have been many such references in international case law: *Kambanda* (ICTR-97-23-S), Judgment and Sentence, 4 September 1998, para. 16. Also: *Serushago* (ICTR-98-39-S), Sentence, 2 February 1999, para. 15; *Krstić* (IT-98-33-T), Judgment, 2 August 2001, para. 699; *Jelisić* (IT-95-10-A), Partial Dissenting Opinion of Judge Wald, 5 July 2001, para. 2; *Niyitegeka* (ICTR-96-14-A), Judgment, 9 July 2004, para. 53; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, Dissenting Opinion of Judge Koroma, para. 26.

Court of Justice premised on the Convention itself, because a failure to prove genocide has meant dismissal of the application altogether.

Sometimes judges have insisted on conceptual distinctions between the two categories on the ground that genocide is aimed at protection of national, ethnic, racial and religious groups whereas crimes against humanity applies to 'any civilian population'.[25] The question has arisen in the context of multiple charges, and the permissibility of convicting where two offences contain essentially the same elements. According to the Appeals Chamber of the International Criminal Tribunal for Rwanda, it is acceptable to register a conviction for both genocide and the crime against humanity of extermination with regard to the same factual elements. Following the test developed by the tribunals, multiple convictions are allowed where there are materially distinct elements of each infraction. Whereas genocide requires proof of an intent to destroy, in whole or in part, a national, ethnical, racial or religious group, 'this is not required by extermination as a crime against humanity. Extermination as a crime against humanity requires proof that the crime was committed as a part of a widespread or systematic attack against *a* civilian population, which proof is not required in the case of genocide'.[26]

But there is much compelling support from other authorities for the view that the two categories, genocide and crimes against humanity, are intimately related.[27] The judges of the tribunals probably missed a good

[25] *Kayishema et al.* (ICTR-95-1-T), Judgment, 21 May 1999, paras. 89, 631. In *Sikirica et al.* (IT-95-8-I), Judgment on Defence Motions to Acquit, 3 September 2001, para. 58, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia said genocide was a crime against humanity and that it belonged to a 'genus' that included the crime against humanity of persecution.

[26] *Musema* (ICTR-96-13-A), Judgment, 16 November 2001, para. 363. Also: *Kajelijeli* (ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 751.

[27] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1970) 754 UNTS 73, art. I; European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes of 25 January 1974, ETS 82, art. 1(1); Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May–26 July 1996, A/51/10, p. 86; Stefan Glaser, *Droit international pénal conventionnel*, Brussels: Bruylant, 1970, p. 109; Yoram Dinstein, 'Crimes Against Humanity', in Jerzy Makarczyk, ed., *Theory of International Law at the Threshold of the 21st Century*, The Hague, London and Boston: Kluwer Law International, 1997, pp. 891–908, at p. 905; Theodor Meron, 'International Criminalization of Internal Atrocities' (1995) 89 *American Journal of International Law* 554, at p. 557; *A-G Israel* v. *Eichmann*, Judgment, 11 December 1961 (1968) 36 ILR 5 (District Court, Jerusalem), para. 26; *A-G Israel* v. *Eichmann*, Judgment, 29 May 1962 (1968) 36 ILR 277 (Israel Supreme Court), para. 10; *Tadić* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 140;