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# SPECIAL REPORT

1200 17th Street NW, Suite 200 • Washington, DC 20036-3011 • VOX 202.457.1700 • FAX 202.429.6063

## ABOUT THE REPORT

The Genocide Convention was the first modern human rights treaty. It was adopted only one day earlier than the Universal Declaration of Human Rights, which set the common standard of achievement for human civilization. This report—released in commemoration of the fiftieth anniversary of the adoption of the Convention for the Prevention and Punishment of the Crime of Genocide (December 9, 1948)—was authored by **Prof. William Schabas**, a senior fellow at the U. S. Institute of Peace. This report is the result of Schabas' work on his fellowship project, "The Law of Genocide," assessing major issues confronting the convention in the twenty-first century.

William Schabas is professor of law at the University of Quebec at Montreal, where he specializes in international human rights law, international criminal law, and minority rights.

He serves as an assessor with the Quebec Human Rights Tribunal and has participated in humanitarian fact-finding missions to Rwanda, Burundi, Sudan, South Africa, and Guyana on behalf of several international non-governmental organizations.

This report was prepared with the assistance of program officer John T. Crist.

**The views expressed in this report do not necessarily reflect those of the United States Institute of Peace, which does not advocate specific policies.**

January 7, 1999

*William Schabas*

## The Genocide Convention at Fifty

### Briefly...

On September 2, 1998, the International Criminal Tribunal for Rwanda issued its first conviction for genocide, condemning a Rwandan mayor, Jean-Paul Akayesu, for directing and inciting local mobs to the rape and murder of innocent Tutsi victims. The tribunal's companion, which deals with war crimes committed in the former Yugoslavia, is currently proceeding with its first indictment for genocide. In October 1998, a Spanish prosecutor sought the extradition of General Augusto Pinochet for charges of genocide. And Bosnia has challenged the International Court of Justice to construe the Convention for the Prevention and Punishment of the Crime of Genocide in a pending case it has filed against Belgrade. Ethnic conflict and atrocities committed within civil wars have thrust genocide to center stage.

Genocide is defined in the Convention for the Prevention and Punishment of the Crime of Genocide, adopted by the U.N. General Assembly fifty years ago, on December 9, 1948. For a time, it was the forgotten convention, drafted in the aftermath of the Holocaust but then relegated to obscurity as the human rights movement focused on more "modern" atrocities: apartheid, torture, disappearances. Events in Rwanda and Bosnia have rehabilitated the Convention, whose application and interpretation have become matters for urgent attention.

In the half-century since the convention's adoption, many of the difficult questions concerning genocide have remained unanswered. What groups are protected by the convention? Does it cover political, social and gender groups, as well as racial and ethnic groups? And just how are racial and ethnic groups defined, according to the precise legal requirements of criminal prosecutions? What are states required to do when genocide offenders are found on their territory? Does the obligation to prevent genocide include a duty to intervene, even militarily, if the crime is being committed?

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## "The Crime Without a Name"

The destruction of ethnic groups has marred the progress of human history almost from its beginnings. There are reports of genocide-like massacres in the writings of the ancient Greeks and in the history of the Middle Ages. Indigenous populations in the Western Hemisphere, Africa, and elsewhere were sometimes slated for elimination by their "discoverers" or their colonizers. But ethnic massacre truly seems to have flourished in the twentieth century. The first great genocide of the era dates to the First World War when hundreds of thousands of Armenians were

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destroyed despite the protests of Western diplomats who, possibly for the first time, called such killings a “crime against humanity.” In the Second World War, after nearly a decade of mounting anti-Semitism, Hitler undertook what he called the “final solution,” reminding his generals that “nobody remembers the Armenians.”

Churchill called it “the crime without a name,” and it was only in 1944 that a Jewish refugee from Poland teaching in the United States, Raphael Lemkin, coined the term genocide in his book *Axis Rule in Occupied Europe*. Lemkin’s neologism was rapidly accepted. In 1945, the Nuremberg prosecutors charged genocide in the indictment of Goering, Hess and the others, although the judges of the International Military Tribunal kept with the official terminology used in their statute and described the Nazi atrocities as “crimes against humanity.” After the Nuremberg judgment, the U.N. General Assembly declared genocide an international crime and directed that a treaty aimed at its prevention and punishment be drafted.

By contemporary standards, the work of preparing the legal instrument went rather quickly. The final text of the convention was adopted at the 1948 General Assembly, held in Paris at the Palais de Chaillot. Within a few years it had been ratified by more than one-third of the United Nations membership, enough for it to enter into force. As of 1998, it has been ratified by two-thirds of the member states, a relatively paltry number when compared with the number that have ratified the major human rights treaties. Africa, in particular, stands out for its low rate of acceptance. The United States signed on only ten years ago, after decades of sporadic and sometimes protracted debates.

As its title suggests, the Genocide Convention is concerned with both prevention and punishment. It is the second prong of its mission—punishment—that has received the most attention. The convention itself provides a detailed definition of the crime of genocide, declares that there can be no defence of sovereign immunity, requires states to adopt appropriate legislation so that genocide will be punished by their own courts, and obliges them to extradite genocide suspects. What the convention means by preventing genocide remains enigmatic, but defining it is an urgent priority, given the recent failure to stop genocide in Rwanda.

### What is “Genocide”?

Raphael Lemkin defined genocide as “a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.” He said that the objective of such a plan would be disintegration of the political and social institutions of culture, language, national feelings, religion, and the economic existence of national groups and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. For Lemkin, “[g]enocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.”

But it is easier for an academic to draft a definition than for a United Nations committee to do so, even at a time when there were only fifty-eight member states. For nearly two years the delegates quarreled, finally agreeing that genocide consisted of killing, serious assault, starvation, and measures aimed at children “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” The definition has stood the test of time, despite arguments that it omits political and social groups and fails to contemplate persecution based on gender. At least on an international level, the 1948 convention’s defini-

tion has become a kind of international law boilerplate, appearing in the statutes of the ad hoc tribunals for the former Yugoslavia and for Rwanda, and in the recently adopted text of the International Criminal Court.

National lawmakers have felt less constrained by the strict terms of the international instrument, and domestic laws aimed at giving effect to the convention often provide a broader scope for the term, encompassing political groups or for that matter any group with a degree of permanence. In October 1998, some observers were surprised when a Spanish prosecutor charged Chile's Augusto Pinochet with genocide for crimes committed during the 1970s. Certainly the case seems difficult to make under the convention definition, because the victims were Chilean political activists, not an identifiable ethnic group. But Spain has opted for a broader definition than the one that is internationally recognized, one that comprises political and other groups. Ethiopian law is similar in this respect, and trials have been under way for several years against members of the former Derg regime who are charged with genocide.

In its groundbreaking decision of September 2, 1998, the International Criminal Tribunal for Rwanda was vexed by the problem of classifying Rwanda's Tutsis as a race or an ethnic group. Ultimately, it concluded that the convention definition is meant to protect all "stable" groups, "constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups." But even this definition is unsatisfactory, because a person's membership in religious and national groups may certainly change over a lifetime, and new groups may come into existence.

At the heart of the definition, it would seem, is the fact that it is the perpetrator who has defined or identified the group for destruction. It was Hitler's view of Jewishness that prevailed at Auschwitz, not some neutral rule or one adopted by the victims themselves. In other words, the test is subjective, not objective. Similarly, in Rwanda, the Belgian colonizers had defined ethnic Tutsis as those possessing a certain number of cattle. The determinations were made sixty or seventy years ago, then inscribed on identity cards, and passed from parents to children according to customary rules. In 1994, individuals were Tutsis if the Interahamwe militia said they were. Surely an individual who sought to destroy the "Negroid" or "Mongoloid" race or part of it would be committing genocide under the terms of the convention, even though modern science disputes the validity of such designations from an objective standpoint.

The convention definition specifies that genocide must aim at the destruction of the group "in whole or in part." Obviously, there is a quantitative threshold. The term "genocide" would be trivialized if it were extended to cover isolated hate crimes and racially motivated violence. In 1982, the General Assembly denounced the massacres of hundreds at the Palestinian refugee camps of Sabra and Shatilla as genocide. But there was significant, vocal opposition, and there can be no doubt that the term was stretched in order to wound Israel's Jewish population, the crime's great historic victims, by suggesting that they had become its perpetrators. The quantitative test is more than a mere numbers game. Because genocide is a crime of intent, the real question is what is the purpose of the offender, not what is the result. Even if only a few are killed or injured, the crime is genocide if the intent is to destroy the group "in whole or in part." Where there are large numbers of victims, such an intent is relatively easy to prove and is little more than a logical deduction from the facts. Where the numbers are low, some other elements will be necessary, such as evidence of genocidal speeches and declarations, destruction of cultural and religious symbols accompanying acts of violence, and so on.

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## **Is Ethnic Cleansing a Form of Genocide?**

The term "ethnic cleansing" entered the international vocabulary in 1992 with the war in the former Yugoslavia. It lacks the precise legal definition genocide has, although it has been widely used in General Assembly and Security Council resolutions, documents of special rapporteurs, and the pamphlets of nongovernmental organizations. Some suggest that it is merely a euphemism for the more scientific term, genocide. Yet when the convention was being drafted in 1948, there was a proposal to include "[i]mposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment" as a formal act of genocide. The delegates felt this proposal was too remote from the goals of the convention, and that such behavior might better be addressed as an issue of the human rights of minority groups.

There would seem to be a significant difference between ethnic cleansing and genocide. The former seeks to "cleanse" or "purify" a territory of one ethnic group by use of terror, rape, and murder in order to convince the inhabitants to leave. The latter seeks to destroy the group, closing the borders to ensure that none escape. This observation should not be taken to imply that ethnic cleansing is not a barbaric international crime. It is most certainly punishable as a crime against humanity. In fact, genocide is itself a subcategory of the more general term, crimes against humanity.

Why is the definition of genocide so important? Precisely because there is a convention. Bosnia has sued the former Yugoslavia before the International Court of Justice for breach of the Genocide Convention. It must show that the brutal ethnic cleansing carried out during the war amounted to genocide, or else the case will be dismissed. Modest and ambiguous as convention obligations may be, more than 120 states have accepted them, something they have refused to do, to date, in the case of the more broadly defined concept of crimes against humanity. Only since July 1998 can we speak of a treaty that includes comparable obligations with respect to crimes against humanity—the Rome Statute of the International Criminal Court. But as yet, no states have ratified the statute, and it will surely not come into force for several years.

## **Criminal Prosecution of Genocide**

The core of the Genocide Convention is the provisions dealing with obligations to punish the crime. The convention requires states to enact offences of genocide in their domestic criminal codes and to ensure that it is effectively punished. Although international law now rules out the death penalty, the International Criminal Tribunal for Rwanda has concluded that the severe penalty of life imprisonment is appropriate, even when there are compelling mitigating factors. The convention also excludes any defence based on official capacity, reaffirming a principle recognized at Nuremberg. Rulers and heads of state are liable for prosecution. They cannot rely on archaic claims of sovereign immunity. Indeed, as history has shown, the very nature of the crime implies the complicity of the state, of its organs and its representatives. And this fact begs the difficult question of who will try the perpetrators of genocide. If a country's rulers are behind the crime, can its courts seriously be expected to hand out justice? Where those responsible for genocide have been vanquished—Germany in 1945 or Rwanda in 1994—there may be modest hope of progress with prosecution. Where they have prevailed, impunity would seem to be the order of the day.

But those who drafted the convention in 1948 were awed at the prospect of creating an international system of criminal justice. The Cold War was beginning, and there were fears that an international court would inevitably lead to abuse, becoming a forum for politically motivated settling of scores between superpowers. Thus, the convention says that genocide will be tried either before the courts of the territory where the crime took place or by an international criminal court that was at the time little more than wishful thinking and that was not created, in a partial and incomplete form, until forty-five years after the convention's adoption.

In 1961, Israel's courts dismissed Adolph Eichmann's argument, based on these jurisdictional provisions of the convention, that he could be tried only in Europe. Eichmann reminded them that the 1948 convention said genocide was to be prosecuted by courts of the territory where the crime took place. The District Court of Jerusalem held that despite the terms of the convention, customary law entitled tribunals throughout the world to try those responsible for such a heinous crime. This is the principle of universal jurisdiction. But examples of successful application of universal jurisdiction are few—the Eichmann case remains the best example—and unless states have some special interest in prosecution, as was the case with Israel, they are loathe to involve themselves in crimes committed halfway around the world, no matter how horrible and tragic. The United States learned this lesson in March and April 1998, when it sought, unsuccessfully, to find a domestic justice system willing to try Pol Pot for crimes committed in Cambodia during the 1970s. Overtures were politely declined by Canada, Spain, and Israel, all of whose laws would technically have allowed them to bring Pol Pot to justice.

Hence the enduring interest in an international court. Although the Genocide Convention contemplated this as an alternative to the courts of the territorial state, there was only sporadic progress toward the creation of an international criminal court until the end of the Cold War. In May 1993, the first of the ad hoc tribunals was established by the Security Council, to address crimes in the former Yugoslavia. It was given jurisdiction to deal with genocide, crimes against humanity, and war crimes. Eighteen months later, the Rwanda tribunal was created and given essentially the same mandate. Prosecutor Louise Arbour has been extremely prudent in charging genocide before the Yugoslav tribunal, although the offence is set out in a few of the indictments, notably those of Karadzic and Mladic. The two remain at large, owing to a lack of political will that seems to characterize international enforcement of the law of genocide. Before the International Criminal Tribunal for Rwanda, the case for the crime of genocide is far more evident. Essentially all of the suspects are charged with genocide. There have already been two convictions, of former Prime Minister Jean Kambanda and of a local mayor, Jean-Paul Akayesu, and more should follow soon.

But the genuine and universal international criminal court promised by the 1948 convention was only created fifty years later, at the Rome Diplomatic Conference of June–July 1998. During the drafting of the Rome Statute for an International Criminal Court, the crime of genocide was the single offence on which there was virtually no serious argument; crimes against humanity and war crimes, particularly when committed in internal conflicts, proved to be more problematic. Sometime early in the next decade, it is to be hoped, when sixty states have ratified the Rome Statute, the court will begin to function. It is intriguing to note that had the 1948 convention actually created an international genocide court, instead of merely promising one, that tribunal would have exercised jurisdiction over Cambodia, Yugoslavia, Rwanda, and Congo, all of which were parties to the convention when their own

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particular waves of atrocities took place. This fact ought to be considered by those who claim that the court is doomed to impotence because those states most likely to harbor criminals are unlikely to ratify the statute.

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### **Prevention of Genocide: The Convention's Great Failure**

It cannot be gainsaid that there is now an international commitment to punish those responsible for what the International Criminal Tribunal for Rwanda recently called "the crime of crimes." Where the convention continues to fail is in its task of preventing genocide. Although the duty is set out in the convention, opinions differ about just how far it may extend. Put bluntly, are states required, as a legal obligation, to take action up to and including military intervention in order to prevent the crime from occurring?

In April and May 1994, as massacres of Rwandan Tutsis took place, the U.N. Security Council hesitated to use the "g word". Boutros Boutros-Ghali, then secretary-general, said that this hesitation was out of fear that if the council agreed that genocide was taking place, it would have no alternative but to intervene militarily. In his speech at Rwanda's Kigali airport, on March 25, 1998, President Clinton apologized for the tragic and unpardonable failure of the international community to react: "We did not immediately call these crimes by their rightful name: genocide." He stopped short, but not far short, of saying that the international community should have taken effective action.

Prompt intervention in 1994 would have prevented genocide. That there were United Nations peacekeeping forces on the ground in Rwanda when the genocide took place, and that they failed to take effective action against the massacres, is a disgraceful blemish on the international community as a whole. Canadian General Romeo Dallaire, who commanded the peacekeepers in Kigali at the time, has often said that with a force of 5,000 and an appropriate mandate, the massacres could have been stopped. Dallaire is now on indefinite sick leave from the Canadian forces, wrestling with his own personal demons from a genocide that he foretold but seemed helpless to prevent. As the genocide raged, Dallaire eventually told the Security Council that if an aggressive mandate was not forthcoming, then it would be better to withdraw. And that was the shameful course taken by the Security Council. The United States was unwilling to commit troops, and without its support, nothing could take place, at least in the short term. By June 1994, the council authorized an ambiguous French military presence in southwest Rwanda that was couched in humanitarian terms but had the effect of facilitating the retreat of those responsible for the crimes.

In August 1998, the Rwandan foreign minister, Athanase Gasana, claimed his country's armed forces would intervene in Congo in order to prevent genocide directed against the Tutsi minority and instigated by erstwhile ally Laurent Kabila. Surely any right to intervene unilaterally is subject to the United Nations Charter and requires Security Council approval. But who wanted to be the one to tell the Rwandans that they had to wait, again, while the matter was considered by a body that still was not sure that it was required to act?

That the Security Council is entitled to intervene, or to authorize intervention, in order to prevent persecution of ethnic minorities cannot, since the end of the Cold War, be seriously questioned. Here the starting point is Resolution 688, authorizing the use of force against Iraq in order to protect the Kurdish minority from atrocities.

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But the issue is not whether the international community *may* intervene but rather whether it *must* intervene when a group protected by the Genocide Convention is threatened with extermination. If Boutros-Ghali was right, then such an obligation exists. Indeed, the reluctance of the Security Council to use the term suggests that its members shared this view. If President Clinton's belated apology in Kigali means anything, surely it must imply that there will be prompt action to prevent a future genocide.

The doctrine of humanitarian intervention has suffered from its uneven application. Invoked with enthusiasm in Iraq and Somalia, it was brushed aside as genocide raged in Rwanda. Certainly, the idea that humanitarian intervention is a duty under all circumstances is a radical concept unlikely to gain any serious acceptance at this time. But the same concerns should be less significant in the case of genocide, given the narrowness and precision of its definition.

## Recommendations

The law and politics of genocide stagnated for several decades following the adoption of the convention in 1948. The thinking and writing about its scope since 1948 have been meagre and sometimes superficial, with a few notable exceptions. When the horrors of ethnic conflict became the scourge of the last decade of the millennium, the convention was, so to speak, hauled off the shelf and dusted off. Unlike other human rights treaties, there has been no "treaty body" or committee charged with ensuring the Genocide Convention's implementation and helping to define its content. The convention most certainly suffered from the absence of a monitoring organ similar to those that exist in the case of civil and political rights, women's rights, torture, and other important issues on the human rights agenda. A recent suggestion that this weakness be corrected was made by the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities but has not been taken up by bodies in a position to implement such a measure.

A Committee on Genocide would be the logical forum to provoke debate on and ultimately spell out the details of the obligation to prevent genocide. But even recommendations from such a treaty body would not bind states. What is really required is a formal recognition of the duty to intervene to prevent genocide. It could take a variety of forms, such as a resolution of the General Assembly or statements within the Security Council. Whatever the vehicle, if the message is clear it will be taken as authoritative interpretation of the convention's obligation to prevent genocide, and perhaps even a manifestation of customary law, binding on the 60-odd states that have yet to ratify the convention as well as on the 125 that have accepted its terms.

Other duties, too, remain vague and require clarification. For example, the convention says states must cooperate in the extradition of genocide suspects "in accordance with their laws and treaties in force." This statement falls far short of a firm requirement that they ensure offenders be brought to justice. The Geneva Conventions of 1949 go much further in dealing with war crimes, obliging states to investigate and then either try or extradite, so that no suspect goes untried.

Another matter is the prohibition of incitement to genocide, a difficult issue because it butts up against the need to ensure freedom of expression. In Rwanda, a contribution to the prevention of genocide might have been made by jamming the waves of Radio Mille Collines, which was responsible for promoting so much ethnic hatred. The Rwandan experience mandates some action to prevent hate speech that constitutes incitement to genocide. Besides the Genocide Convention, major international human rights instruments, including the Covenant on Civil and Political

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Rights and the International Convention for the Prevention of All Forms of Racial Discrimination, require the interdiction of racist propaganda. Both have been ratified by the United States, but with reservations on the hate speech provisions, inspired by concerns that ratifying them might conflict with constitutional principles of freedom of expression. Out of similar preoccupations, legislation adopted in European countries has met with an uneven reaction in bodies such as the European Court of Human Rights and the Human Rights Committee. Thus, the application of this important obligation to prevent incitement to genocide remains muddled by divergent practice and confused jurisprudence.

The Genocide Convention was the first modern human rights treaty. It was adopted only one day earlier than the Universal Declaration of Human Rights, which set the common standard of achievement for human civilization. Some must have believed, in 1948, that the unthinkable crime of genocide would never recur. Perhaps the gaps in the convention are only the oversights of optimistic negotiators, mistaken in the belief that they were erecting a monument to the past rather than a weapon to police the future. Their naiveté may be forgiven. A failure to learn the lessons of the fifty years since its adoption cannot.

### **Other Resources**

The full text of the genocide convention can be found on the Internet at: [http://www.unhcr.ch/html/menu3/b/p\\_genoci.htm](http://www.unhcr.ch/html/menu3/b/p_genoci.htm).

More internet resources relating to the convention can be found through the Institute's Jeanette Rankin library program at: <http://www.usip.org/library/topics/genocide.html>

#### **RELATED PROJECTS AT THE INSTITUTE**

Schabas' work complements a number of ongoing Institute projects about the relationship between conflict resolution, the reduction of political violence, and human rights concerns. The Institute's Rule of Law program has for many years examined the use of legal mechanisms for inducing compliance with international human rights norms, including those concerning genocide, and for ensuring just and fair resolutions to conflict in divided societies. The Religion, Ethics, and Human Rights initiative has focused extensively on the effects of human rights provisions that guarantee religious freedom and equal protection on the reduction of violence in ethnoreligious conflicts. Finally, the Research and Studies program recently established a new initiative on Human Rights Implementation, which will assess and analyze the effectiveness of human rights policies in order to suggest strategies for enhancing their implementation.