

# Genocide. The Crime of Crimes

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# The Word 'Genocide'

- devised by Raphael Lemkin in 1944
- term used in the indictment of the International Military Tribunal, 1945
  - (but not the judgment)
- General Assembly Resolution 96(I) of 1946



*Lemkin's grave in New York City*

# Convention for the Prevention and Punishment of the Crime of Genocide

- first United Nations human rights treaty
- adopted on 9 December 1948 by United Nations General Assembly
- entry into force in 1951
- approximately 140 ratifications



# The Definition

'...any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.'



# The Definition Appears in...

- *Genocide Convention* 1948, art. II
- *Statute of the International Criminal Tribunal for the former Yugoslavia*, art. 4
- *Statute of the International Criminal Tribunal for Rwanda*, art. 2
- *Rome Statute of the International Criminal Court*, art. 6



# The Definition is Interpreted in...

- *Eichmann case*, 1961
- case law of United Nations *ad hoc* tribunals
  - *Akayesu*
  - *Jelisić*
  - *Krstić*
- Darfur Commission of Inquiry, 2005
- *Bosnia v. Serbia* at International Court of Justice, 2007



# Genocide at the International Court of Justice

- *Advisory Opinion*, 1951
  - clarifies reservations regime
  - recent suggestions it may be revisited
- *Bosnia v. Serbia*, 2007
  - genocide not characteristic of 1992-1995 war
  - with exception of Srebrenica massacre, July 1995
- several applications never get to merits stage
  - *Pakistani Prisoners case*, 1972
  - *Yugoslavia v. NATO*, 1999
  - *Congo v. Rwanda*, 2002
  - *Croatia v. Serbia*, 1999 (still pending)

# Crimes Against Humanity

- 1915 declaration of United Kingdom, France, Russia:
  - ‘new crimes of Turkey against humanity and civilisation’
- International Military Tribunal (Nuremberg)
  - Nazi atrocities against German Jews initially excluded from scope of prosecution
    - Robert Jackson: ‘We have some regrettable circumstances at times in our own country in which minorities are unfairly treated. We think it is justifiable that we interfere or attempt to bring retribution to individuals or to states only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved.’
  - Nuremberg *Charter* links crimes against humanity to war crimes, crimes against peace
    - crimes committed prior to September 1939 go unpunished



*Nuremberg  
prosecutor Robert  
Jackson*



# Codification of Genocide Born from Frustration with Nuremberg Judgment

- Lemkin complains that Nuremberg judgment excludes 'peacetime genocide'
- in 1946 General Assembly, India, Cuba and Panama propose a resolution on genocide
  - purpose is to 'correct' Nuremberg judgment
- leads to 1948 Genocide Convention
  - Article 1. The Contracting Parties confirm that genocide, whether committed **in time of peace or in time of war**, is a crime under international law which they undertake to prevent and to punish.



# Subsequent Tension Between Genocide, Crimes Against Humanity

- genocide defined more narrowly than crimes against humanity
  - physical destruction, as opposed to 'persecution'
  - racial, religious groups, not political, social groups
- but genocide applies in peacetime
- duty to prevent genocide
- and genocide has a Convention
  - Article IX jurisdiction to International Court of Justice



*Nuon Chea,  
'brother number 2'*



# Changing Relationship with 'Crimes Against Humanity'

- expansion of crimes against humanity in 1990s
  - applies in peacetime
- International criminal tribunals have jurisdiction over crimes against humanity and genocide, without distinction
- 'responsibility to protect' doctrine applies to genocide and crimes against humanity
- recourse to International Court of Justice not very productive



# 'with intent to destroy'

- intent
  - 'specific intent'
  - State policy ?
- destruction
  - physical, biological
  - cultural ?



# Protected groups

- national, ethnic, racial or religious
- political groups are excluded
- 'permanent and stable groups'
  - thesis advanced by Rwanda Tribunal
- subjective or objective analysis



# 'in whole or in part'

- geographic location of the group
- a substantial part
- a significant part



# Punishable acts

- killing
- causing serious bodily and mental harm
- conditions of life calculated to destroy the group
- preventing births
- forcibly transferring children



# Ethnic cleansing

- expulsion rather than physical extermination
  - closely related to ‘cultural genocide’
- clearly excluded by drafters of *Genocide Convention*
- some more modern interpretations expand the definition





# Other acts

- conspiracy
- attempt
- complicity
- direct and public incitement



# Universal jurisdiction

- excluded by the Convention
- but allowed by *Eichmann*
- recent endorsement of concept in practice of ad hoc tribunals
  - transfer decision in *Bagaragaza*
  - approval by Security Council



# Prevention: The Responsibility to Protect

- 2005 Outcome document
- International Court of Justice decision
  - duty to prevent extends beyond a State's borders
  - where it may influence events, it has a responsibility to act
  - who else might have acted in 1994 to prevent Rwandan genocide?



# Where Are We Now?

- definition of genocide will probably remain narrow
  - no momentum to amend it in *Rome Statute of International Criminal Court*
    - only Cuba argues it should be broadened
  - case law of International Criminal Tribunal for the former Yugoslavia
  - UN Darfur Commission
  - International Court of Justice
- evolving definition of crimes against humanity has filled the impunity gap



*Darfur*

# Symbolic importance of the 'g-word'

- little importance to legal significance of distinction between crimes against humanity and genocide
- but stigma of genocide still important to victims
- genocide is 'the crime of crimes'