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## Book Review

*Genocide in International Law: The Crime of Crimes*, by W. A. Schabas. Cambridge: Cambridge University Press, 2<sup>nd</sup> Ed., 2009. xviii, Pp. 741.

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## GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES

William A. Schabas, the Director of the Irish Centre for Human Rights and Professor of human rights law at the National University of Ireland, Galway, offers a meticulous analysis of the history and application of the UN Convention on the Prevention and Punishment of Genocide. In 1948, the then 56 member states of the United Nations that adopted the Convention, tried to outlaw forever what Winston Churchill once called “a crime without a name.” These states were reacting to the atrocities of World War II and to jurist Raphael Lemkin, who coined the term genocide and vigorously urged that the United Nations to legally prohibit and punish it. Article 1 of the Convention states that “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. Article II defines “genocide” as a series of actions undertaken “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such,” whether by killing, inflicting serious bodily or mental harm, destroying group conditions of life, preventing births, or transferring children to another group. Although only 140 states out of over 190 have formally ratified or acceded to the Convention, those that have not are still obligated under international customary law not to engage in, conspire to commit, or promote genocide.

Schabas goes through the Convention almost word by word, explaining the legal meaning of each on the basis of the Convention’s drafting history (*travaux préparatoires*), judicial interpretations, and statements by authoritative legal bodies. He notes that the Convention rested practically dormant until the UN Security Council, acting under Chapter VII of the UN Charter,

created the International Criminal Tribunals for the former Yugoslavia and Rwanda in 1993 and 1994 respectively. Each of these Tribunals, as well as the more recently created International Criminal Court, has incorporated the Genocide Convention into its statute.

In addition to prohibiting genocide, the Convention requires countries to prevent it. Many criticized the U.S., France and other European states for not acting to prevent the 1994 genocide in Rwanda. What exactly is this state obligation? For an answer, Schabas turns to the International Criminal Court's 2007 judgment in the case involving *Bosnia and Herzegovina v. Serbia and Montenegro*. There the ICJ stated that a state's duty to act to prevent arises when it learns of a risk of genocide and has the means to deter it. The obligation varies with the capacity of a state to act effectively. This may differ with a state's geographical location and the strength of its political influence over the parties involved in the potential genocide.

Schabas notes that universal jurisdiction applies to the crime of genocide, because many states, including the U.S., regard the crime as one against all of humankind. They have passed the necessary legislation enabling their courts to prosecute suspected perpetrators regardless of where or against whom the crime was committed. A number of Western European countries have tried suspects involved in mass killings in the former Yugoslavia and Rwanda.

Schabas refers frequently to the case law of the International Criminal Tribunal for Rwanda (ICTR) to interpret parts of the Convention. One of the major difficulties is determining who fits into the four named, protected groups. In the *Jean-Paul Akayesu* case (1998), the ICTR had to determine whether genocide as defined in the Convention and ICTR Statute had occurred in Rwanda. Since genocide involves the intent to destroy, in whole or in part, a national, ethnical, racial or social group, it was necessary to determine the meaning of these four social categories. Because neither the Genocide Convention nor the ICTR Statute had defined them, the task fell upon the ICTR Trial Chamber itself. Based on its reading of the *travaux préparatoires*, the Chamber concluded that the drafters perceived the crime of genocide as targeting only stable, permanent groups, whose membership is determined by birth. The drafters excluded political and economic groups that one joins voluntarily. The Chamber then defined a national group "as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties." An ethnic group is "a group whose members share a common language or culture." A racial group is "based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors." A "religious group is one whose members share the same religion, denomination or mode of worship."

Significantly, the Tutsi-Hutu distinction in Rwanda did not fit into any of the above categories. The Tutsi belong to the same religious groups and national group as do the Hutu. Tutsi and Hutu share a common language and culture. And any hereditary physical traits formerly distinguishing Hutu from Tutsi have become largely obliterated through generations of intermarriage and a Belgian classification scheme based on cattle ownership. Consequently, had the ICTR justices stopped here, they would have been forced to conclude that genocide, as legally defined in the Convention and Statute, had not occurred in Rwanda.

The Chamber next asked whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention, if the said group, although stable and membership is by birth, does not meet the definition of any one of the four protected groups. The justices concluded that the answer is “no,” because the intention of the Convention’s drafters was patently to ensure the protection of any stable and permanent group. Based on the case testimony, the Court concluded that the Tutsi did indeed constitute a stable and permanent group and were therefore protected by the Genocide Convention and Article 2 of the ICTR Statute.

By adding “stable and permanent group, whose membership is largely determined by birth,” to the four existing social categories, the Chamber significantly expanded the kinds of populations that could be protected by the Convention. One might wonder whether unisexual groups, homosexuals, or persons mentally or physically impaired permanently at birth might constitute protected groups under the Tribunal’s expanded definition. Schabas is clearly opposed to the expansive “permanent” and “stable” approach employed by the Tribunal, despite the fact that the Darfur Commission of Inquiry claimed in its 1995 report that the ICTR conceptualization has become part and parcel of international law.

Intentionality is a constitutive element of genocide. Intent is a mental factor that is difficult to determine with precision in the absence of a sincere confession by the accused. Again, the ICTR provided a jurisprudential roadway by reasoning that it is possible to deduce the genocidal intent inherent in a particular act from the general context of other culpable acts systematically directed against the same protected group, whether these acts were committed by the same offender or by others. Specific factors to be considered include the scale of atrocities committed and the deliberate and systematic targeting of people because of their membership in a particular group, while excluding members of other groups. Hence, an individual, who attacks only one person and never explains why, can be convicted of genocide as long as his one attack fits into an overall pattern of genocidal acts by others against members of the same protected group.

The ICTR Trial Chamber also made a major contribution to the progressive development of genocide law by addressing sexual violence in the *Akayesu* case. It noted that the Genocide Convention and Article 2(2) of the ICTR Statute offer as one of the acts of genocide the “causing [of] serious bodily or mental harm to members of a group.” The Justices maintained that acts of sexual violence constituted genocide provided they were committed with the specific intent to destroy, in whole or in part, a particular group, because sexual violence certainly constitutes inflictions of “serious bodily and mental harm” on victims.

Schabas’ treatment of the crime of genocide is very comprehensive and authoritative. In his discussion of the death penalty, however, it is surprising that he classifies Israel as an abolition state, since it has a well-known policy and practice of assassinations and extra-judicial killings of Palestinians. The author covers many more important issues than could be discussed in this review. This work is indispensable to anyone concerned with humanitarian and public international law.