ROBERT I. ROTBERG, Editor

MASS ATROCITY CRIMES

PREVENTING FUTURE OUTRAGES

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Brookings Institution Press
Washington, D.C.

Mass Atrocity Crimes: Preventing Future Outrages may be ordered from:
Brookings Institution Press, 1775 Massachusetts Avenue, N.W., Washington, D.C. 20036
Telephone: 1-800/537-5487 or 410/516-6956
E-mail: hfscustserv@press.jhu.edu; www.brookings.edu

Library of Congress Cataloging-in-Publication data

Mass atrocity crimes : preventing future outrages / Robert I. Rotberg, editor.
p. cm.
Sponsored by the World Peace Foundation and the Harvard Kennedy School Program on Intrastate Conflict.
Includes bibliographical references and index.
ISBN 978-0-8157-0471-3
1. Genocide—Prevention. 2. Crimes against humanity—Prevention. I. Rotberg, Robert I. II. World Peace Foundation. III. John F. Kennedy School of Government. Program on Intrastate Conflict. IV. Title.
HV6322.7.M374 2010
364.4—dc22 2010013690

9 8 7 6 5 4 3 2 1

Printed on acid-free paper

Typeset in Minion

Composition by Cynthia Stock
Silver Spring, Maryland

Printed by R. R. Donnelley
Harrisonburg, Virginia

Preface

Two broad-ranging conferences at Harvard Kennedy School on how best to end the scourge of crimes against humanity—from the Cambodian and Rwandan genocides to ethnic cleansing in Bosnia, Croatia, and Kosovo, and on to another genocidal crisis in Darfur and thence to the brutal wars of the Congo—preceded and fueled this volume of fresh essays on how best to deter renewed mass atrocity crimes. This book thus examines the emerging norm: "responsibility to protect" (R2P), the use of international humanitarian law to prevent all manner of war crimes, the role and efficacy of the International Criminal Court and special judicial tribunals, and new approaches to amassing information about anticipating zones of catastrophic risk.

Both conferences, in 2008, were jointly organized and sponsored by the Kennedy School's Program on Intrastate Conflict, the Mass Atrocity Response Operations (MARO) project of the Kennedy School's Carr Center for Human Rights Policy, and the World Peace Foundation. Sarah Sewall, then Acting Director of the Carr Center, also supervised the MARO project. Her collaboration made a difficult epistemological journey much easier and more successful than expected.

In addition to the chapter authors of this book, participants in the two meetings contributed tellingly to the eventual shape and contents of this book. Those participants included Patrick Ball, Rachel Davis, Gareth Evans, Helen Fein, Ben Heineman, Diane Orentlicher, John Packer, Sheri Rosenberg, Andrea Rossi, David Scheffer, Taylor Seybolt, John Shattuck, Scott Straus, Horacio Trujillo, Lawrence Woocher, and Micah Zenko. Evans provided a keynote address on R2P at the second meeting.

This volume's various parts could not have been assembled coherently without the dedicated editorial oversight of Emily Wood. The contributors

and I remain truly grateful for her imaginative and thorough editing and for her coordinating of a long and taxing process. I am also very appreciative of the research assistance of Emily Turner and Julia Mensah.

The support of the World Peace Foundation, chaired by Philip Khoury, was once again essential to the completion and publication of this volume. I remain grateful for the Foundation's backing.

ROBERT I. ROTBERG
March 2010

Contents

ROBERT I. ROTBERG

1 *Deterring Mass Atrocity Crimes: The Cause of Our Era*

Nation-states persist in killing their own citizens. In 2010, Congolese in their millions were still facing death in the cross-fire of continuing civil warfare between the national army and diverse rebel militias, from starvation and disease, and because of violence against women and children. Zimbabwe's ruling Zimbabwe African National Union–Patriotic Front (ZANU-PF) Party and the military and police apparatus of the state were continuing to attack, maim, and kill, in hundreds, members of the Movement for Democratic Change (MDC), their supposed partners in a year-old joint government. The strong arm of the Sudanese state continued to foster inter-ethnic violence in its western (Darfur) and southern reaches, and even in supposedly autonomous South Sudan. Yemenis still kill Yemenis, Thai kill Muslim Thai, Colombians kill Colombians, and throughout the ungoverned space of Somalia clans seek to extirpate each other and Islamist movements seek hegemony through aggression. Innocent civilians and non-combatants are no less at risk than they were in previous years and decades. For them, danger is the default setting.[1]

Many of the contemporary intrastate conflicts that embroil the globe may not reach in common parlance the level of mass atrocity crimes. Only recent experiences in the Congo (5? million) and the Sudan (2 million north-south, .3 million in Darfur) fully echo the terrible genocidal losses in Rwanda (.8 million Tutsi) and Cambodia (2 million citizens), Turkey's wiping out of 1.5 million Armenians in 1915–1916, the depredations of Charles Taylor's regime in Liberia and Sierra Leone (1.3 million), Serbian attempts to ethnic cleanse Muslims in Bosnia and Kosovo (8,000 in just one calamitous incident and a total of 200,000 in both territories), the killing of 500,000, mostly Chinese, allegedly communist Indonesians during Sukarno's presidency,

Japan's extirpation of 300,000 Chinese in Nanking, Syria's elimination of 40,000 Sunni Muslims in Hama, the 40,000 "disappearances" in Argentina and Chile, the killing of 150,000 Mayans in Guatemala, or the massive losses during Nazi Germany's horrific Holocaust (6 million Jews).[2] Nevertheless, it is obvious that rulers or ruling groups in nation-states continue to prey upon inhabitants within their own borders. Globally, the era of ethnic cleansing is not over. Nor are genocide and genocidal-like affronts to human existence confined to twentieth century events, as the Darfurian experience shows and the massacres in the eastern Congo imply. Desperate or despotic rulers continue to kill their fellow countrymen, harm and destroy opponents, target less favored ethnic groups simply because of their ethnicity, attack persons from regions that are unpopular or threatening to the status quo (as in Côte d'Ivoire, Iraq, Syria, Tajikistan, and Uzbekistan), or arouse one kind or class of citizen to attack another for political or nationalistic gain.

These are not new arousals of enmity. Nor do they represent novel approaches to our shared humanity or advances in political and ruler avarice. Even in the pre-Westphalian world, and certainly in post-Westphalian times well before the twentieth century and since, rulers have targeted their enemies by religion, ethnicity, language, and race. Ethnic cleansing is a hoary phenomenon.

Crimes against Humanity Defined

What has and is occurring in the Congo and the Sudan, and what enormities transpired in Cambodia and Rwanda, and in dozens of other places, offends world order and is presumptively wrong according to the United Nations' (UN) Charter, international conventions, and current interpretations of crimes against humanity. But such enormities persist. Despite significant advances since the end of the Cold War, mass atrocity crimes are still not unthinkable; nor has world order created a legal architecture capable of deterring despots and other authoritarian leaders who are among the main perpetrators of contemporary crimes against humanity.

Politicians, diplomats, theologians, and lawyers have long tried to define how wars should be fought. Prohibitions against war-time atrocities can be found in most religious and political traditions. In the modern era the components of international humanitarian law have emerged from the elaborate conclusions of The Hague Conventions of 1899 and 1907, the statute of the Nuremburg Tribunal, the 1948 Genocide Convention, the Geneva Conventions of 1949, the additional protocols to the Geneva Conventions in

1977, the statutes of the International Tribunals for Former Yugoslavia and Rwanda, and, most recently, the Rome Statute of the International Criminal Court (ICC). These critical affirmations of the international regulation of human conduct during war forbid a range of odious behavior: genocide, ethnic cleansing, enumerated other crimes against humanity, and all manner of atrocity crimes, mass or otherwise. But their prohibitions are not necessarily precise, given different interpretive traditions. Collectively, as the contributors to this book attest, they compose an overarching norm that should be sufficient to prevent renewed attacks on civilians or particularized groups. But converting that norm into a series of effective preventive measures is still a work very much in progress, and tentative in its advances.

Genocide and Ethnic Cleansing

Genocide should be the most heinous of war crimes, and the easiest to prevent and prosecute. But whether acts are classified and persecuted as genocidal depends upon a careful parsing of Articles II and III of the 1948 Convention on the Prevention and Punishment of Genocide. Article II describes two elements of the crime of genocide: 1) the *mental element*, meaning the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such," and 2) the *physical element*, including killing members of a group, causing serious bodily or mental harm to members of a group, deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or part, imposing measures intended to prevent births within a group, and forcibly transferring children of one group to another.

A war crime must include both 1 and 2 to be called "genocide." Article III of the Genocide Convention describes five punishable forms of the crime of genocide: genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; any attempt to commit the act; and complicity in genocidal acts. The Genocide Convention protects national, ethnical, racial, and religious groups, with each group being listed in the Convention. Intent to engage in genocidal acts may be inferred from a pattern of coordinated acts, however difficult to prove. Moreover, intent is construed as being not necessarily the same as motivation. It is the *intent* to commit the acts and the *commission* of the acts that are critical.[3]

Admittedly, "intent" is difficult to prove. Indeed, the UN's International Commission of Inquiry on Darfur found it taxing, unlike the lawyers of the Bush administration and the U.S. Congress, to demonstrate "intent" in

Darfur and thus to sustain a probable indictment of genocide. Likewise, if Pol Pot were merely killing fellow Cambodians with little interest in their ancestries, perhaps the horrific killing fields there technically did not breach the Genocide Convention because no specific internal group was being targeted for destruction.

Although the Genocide Convention imposes no right of or duty for nation-states to intervene to end genocidal acts, it does obligate those same nation-states and, by extension, world order (the UN), to take action "to prevent and to suppress acts of genocide." It is that obligation, Dan Kuwali contends in his chapter, in this volume, that compelled many nation-states to "play down" the scale of the Rwandan killings and to dither over Darfur. Admittedly, he agrees, it can be hard to demonstrate that victims in situations such as in Darfur constitute the cohesive group(s) that the Genocide Convention protects. He urges an evolution of domestic law to expand the terms of the Convention, particularly to include groups defined by political views and economic and social status and not only by ethnicity, etc. "The mass destruction of any human collective . . ." ought to be sufficient, he says.[4] Because time is always of the essence in cases of unfolding genocide and other mass atrocities, if world order cannot respond effectively and if there is no effective Responsibility to Protect mechanism, Kuwali advocates shifting potential African cases to the African Court of Human and Peoples' Rights, where a more rapid adjudication of gross human rights violations might be possible.

Ethnic cleansing (as commonly believed to have been perpetrated in Bosnia, Croatia, and Kosovo; in Darfur; and in the Congo) has no accepted legal definition but is widely regarded both as a war crime and a crime against humanity. Large-scale massacres of a group or a classification of individuals constitute ethnic cleansing. So do acts of terror intended to encourage flight, rape when systematically engaged in to alter the ethnic makeup of a group, outright expulsions and even agreed upon population exchanges (as in post-World War I Greece, Turkey, and Bulgaria).[5] Ethnic cleansing is the elimination of an unwanted group from a society, the use of force to remove people of a certain ethnic or religious group from a section of a territory, and the rendering of an area to be ethnically homogeneous by force or intimidation. Whereas genocide is a legally defined criminal offence, ethnic cleansing is not a self-standing crime, but an expression describing events that might be criminal. Whereas the intent of genocide is to destroy a group, the purpose of ethnic cleansing is to rid an area of a group that is being discriminated against by the state or powerful elements within the state.[6] In practice,

however, ethnic cleansing efforts may well be or become genocidal or crimes against humanity.

The Rome Statute

The 1998 Rome Statute of the ICC further defines war crimes and crimes against humanity. The Statute says that a "crime against humanity" is any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population: murder; extermination; enslavement; deportation or forcible transfer of a population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape; and sexual slavery. The term "crimes against humanity" has also come to encompass any atrocious war crimes that are committed on a large scale. This is not, however, the original meaning nor the technical one. The term originated in the preamble to the 1907 Hague Convention, which codified the customary law of interstate armed conflict.[7] This codification was based on existing state practices that derived from those values and principles deemed to constitute the "laws of humanity," as reflected throughout history in different cultures. Today the ICC, as per the Statute, is interested in war crimes, such as murder, torture, and attacking civilians, "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."[8] Indeed, Kuwali suggests that war crimes must be premeditated and be a result of willful intent, high thresholds when taken together with the requirement to establish their "widespread" and "systematic" nature, as well as the large-scale character of attacks.

As compared to the laws controlling behavior in interstate wars, the protocols of the Rome Statute as they apply strictly to intrastate conflicts are less extensive. They do not cover situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence, or other acts of a similar limited or sporadic nature. But when protracted armed conflicts take place in the territory of a state between governmental authorities and organized armed groups or between such groups, the provisions of the Statute and the jurisdiction of the ICC fully apply.[9]

At the heart of the concept of war crimes is the idea that an individual can be held responsible for the actions of a country or that nation's soldiers. Genocide, crimes against humanity, and the mistreatment of civilians or combatants during civil hostilities all fall under the category of war crimes. The body of laws that define war crimes are the Geneva Conventions, a

broader and older area of laws referred to as the Laws and Customs of War, and, in the case of the former Yugoslavia, the statutes of the International Criminal Tribunal in The Hague (ICTY). Article 147 of the Fourth Geneva Convention defines a war crime as "Willful killing, torture or inhuman treatment, including . . . willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile power, or willfully depriving a protected person of the rights of fair and regular trial . . . [and the] taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."[10]

These legal prohibitions are mostly clear, powerful, and capable theoretically of being employed to prevent or at least reduce state-organized intercommunal carnage. Yet, although these and other key international legal conventions outlaw crimes against humanity; mass atrocity crimes; genocide; and violations of the civil, political, and physical rights of citizens everywhere, few effective mechanisms have been devised to hinder, to prevent, or to halt conflicts within states that are—at the very minimum—atrocity crimes. There are no internationally accepted ways, for example, of enforcing the provisions of the Genocide Convention. The UN Security Council can in theory (but rarely does) authorize preemptive strikes or intervention to halt atrocity crimes under Chapter VII of the UN Charter. But even when it does, it must then wait at the best of times for member states to fund and then supply troops for any intervention—nowadays a laborious and prolonged process with less than invigorating results. So can regional organizations or coalitions of the willing, again in theory, send troops to halt atrocity crimes? The African Union physically intervened in the Comoros and threatened successfully to do so in Guinea, Mauritania, Niger, and Togo, but the larger country cases of Madagascar and Somalia have been and are apparently too tough or insufficiently malleable. The Economic Community of West African States (ECOWAS), led by the Nigerian military, effectively slowed warfare in Liberia and Sierra Leone in the 1990s, but has not otherwise intervened in places such as Côte d'Ivoire. Nor has it considered attempting to act forcibly to moderate the inhumane actions of despotisms such as in Equatorial Guinea.[11] The Southern African Development Community (SADC), led by South Africa, was able to enter tiny Lesotho, but SADC has refused in this century to intervene in Zimbabwe's mayhem even though Zimbabwe is, at the very least, in breach of rulings on land tenure cases by SADC's own regional court.

Even when it may be obvious to credible observers, local and distant, there are no internationally conclusive agreements on what constitutes an atrocity crime or a breach of international law. When, exactly, are national governments unable or unwilling to protect their citizens? That is, President Ian Khama of Botswana may declare (as he has on several occasions) that President Robert Mugabe's thugs are breaching the human rights of Zimbabwe's citizens in impermissible ways without being able to trigger even a sub-regional agreement that Mugabe's legions have been behaving illegally and need to be stopped.[12] Khama could point to international statutes and to evidence that Zimbabwean human rights organizations have compiled, or to the reports of international bodies such as Amnesty International. He could demonstrate the efficacy of his assertions. But in terms of removing the yoke of despotism from the heads of the people of Zimbabwe, nothing has occurred or will occur.

Intrinsic Sovereignty

Zimbabwe, and other contemporary tyrannies, is, except in very special cases, protected from UN or regional intervention by the Westphalian notion of intrinsic sovereignty. The sanctity of a nation-state's ability to do nearly whatever it wants within its own borders is generally well-accepted internationally.[13] Indeed, the UN Security Council is often powerless to mobilize any kind of intervening action, sometimes even a verbal one, against countries that harm their own citizens unless the violations of international norms are wildly egregious and (usually) when the state in question (like Guinea) is distinctly small and powerless. If Russia's or China's vote is required in the Security Council to sanction a possible miscreant—a gross violator of UN conventions, say—Russia and China worry about setting precedents. They fear that someday world order will overlook sovereignty and attempt to chasten Russia or China for breaches of international law.

When world order was a somewhat simpler proposition than it is in the twenty-first century—when the tentacles of empire stretched across the globe and public consciences and public opinion could be aroused in powerful capitals by supposed outrages in distant regions—sovereignty was indeed often overlooked or ignored. As Don Hubert reminds us, in his chapter, when the UN Charter was signed in 1945 intervention by one state in the affairs of another, whether for humanitarian reasons or not (and except in self-defense), was deemed illegal except in extraordinary circumstances under Article II. Despite breaches of this prohibition against intervention

by India in East Pakistan (Bangladesh) in 1971, by Vietnam in Cambodia in 1978, and by Tanzania in Uganda in 1979, there were no repercussions and few complaints. In each case the humanitarian justification for the intervention was well understood.

Those "successes" on behalf of world order, but not at the initiative of world order, were followed by the massacres at Srebrenica in Bosnia and the genocide in Rwanda, both testifying officially and dramatically to the failure of world order to respond in a timely and decisive manner to threats to peace within a territory. The UN then decided that it had an obligation to act to protect civilians, which superseded existing principles of peacekeeping and non-interference. There could be "no impartiality in the face of a campaign to exterminate part of a population."[14]

The International Criminal Court and the Tribunals

The Rome Statute of 1998 was a response to the events in Rwanda and Serbia, and an attempt to create a judicial mechanism that would be more enduring and more global in its jurisdiction than the two special *ad hoc* tribunals. As Richard J. Goldstone, distinguished jurist and the chief prosecutor for the Yugoslav special court, writes in his chapter in this volume, when the ICC was officially constituted in 2002 it transformed for all time the way in which perpetrators of war and atrocity crimes would be regarded by world order. (As of early 2010, only 110 nation-states have ratified the Statute and thus put themselves under the ICC.) Foremost, it ended impunity (hitherto almost guaranteed for most post-Nuremberg and post-Tokyo leaders) and provided a broad accountability globally. The ICC could now at least indict egregious offenders, such as Sudanese President Omar al-Bashir, even if it had no policing arm capable of bringing him and others to The Hague, where the ICC sits. Yet it successfully indicted Congolese miscreants and induced several to place themselves before the court. Its ability to indict has also put presumed war criminals such as President Mugabe on notice that they, too, could be indicted. Albeit the ICC has as of late June 2010 jailed no one after a successful prosecution, the court and prosecutorial team's mere existence has, as Goldstone suggests, significantly curtailed the prospect of impunity.

The ICC's presence has also enabled victims of atrocity crimes to obtain implicit acknowledgment of their suffering. Truth and Reconciliation commissions (nearly fifty have met or are meeting in a variety of countries), if they are run well and their proceedings are open, provide an even more pronounced capability to acknowledge the suffering of putative victims. But, if

its judgments are forceful and compassionate, the reach and moral authority of a global tribunal, such as the ICC, permits victims even more conclusive forms of psychological redress. "The common factor," as Goldstone writes, ". . . is to ensure that the truth be exposed for the benefit of the victims and to provide a basis for peace in the future."[15]

The establishment of the ICC can bring fabricated denials of the very existence of war crimes to a halt. Goldstone suggests that the testimony of innumerable witnesses before the Yugoslav tribunal banished the notion forever that war crimes had not proliferated in Bosnia, Croatia, and Kosovo between 1991 and 1994. The Arusha tribunal for Rwanda did the same for the history of genocide in that country. The piling up of details of complicity and atrocity ended forever claims that no genocide had been perpetrated.

"When law is not used," Goldstone declares, "it stagnates and does not develop."[16] He says that positive international humanitarian legal principles previously existed, as set out in The Hague and Geneva Conventions. However, those strictures were hardly ever applied before the Yugoslav and Rwandan courts were created and the Rome Statute drafted. The ICC now has the opportunity and the challenge of strengthening and deepening international law through its identification of atrocity crimes and its effective prosecution of war criminals. The Rome Statute has usefully eased prosecutorial limits by refusing to link a war crime necessarily to an "armed conflict." Severe deprivation of "physical liberty" becomes criminal, too. However, such crimes must be part of widespread and systematic attacks against civilians; further, the Rome Statute requires that "knowledge of the attack" must be present. More broadly, in the special realm of abusive gender crimes, such as rape, sexual assault, and forced prostitution, the ICC can expand international jurisprudence in this area even beyond the advances that the special tribunals have made. The Rome Statute, after all, has declared a host of gender offences, even forced pregnancy, one of the "crimes against humanity."

The Rome Statute and the functioning of the ICC, together with the acts of the special tribunals and the new "mixed" tribunals for Sierra Leone, Cambodia, Timor Leste, and Lebanon, are intended to deter renewed atrocity crimes globally. Neither Goldstone nor David M. Crane, chief prosecutor of the Sierra Leonean court and the author of another chapter in this book, are persuaded that the ICC and the special courts have as yet necessarily prevented atrocity crimes. Proving the negative is almost impossible.[17] Nevertheless, Goldstone suggests that the loss of impunity and the greater vigilance that has now been created "must" deter the commission of at least some crimes. He detects a moderation of the language of tyrants about prospective

war crimes, and attributes that alteration in the tenor of abuse to the new jurisprudential possibilities posed by the ICC's oversight. That may be so, but Mugabe's rhetoric and behavior has not altered. Nor has that of Presidents Muammar Qaddafi of Libya or Teodoro Obiang Nguema of Equatorial Guinea. Bashir continues as before, as well, albeit with his travels curtailed.

The Sierra Leonean Special Court was created in 2002 not by the UN, as were the Yugoslav and Rwandan special tribunals, but by a treaty agreement between the UN Security Council and the Government of Sierra Leone. It was the world's first hybrid international war crimes accountability mechanism, with jurisdiction over atrocities that were committed against Sierra Leoneans during the country's recently concluded ten-year civil war and with mixed local and international judges and prosecutors. Crane was responsible for prosecuting those who were most culpable for crimes against humanity, i.e., those who had attacked civilians in a widespread and systematic manner and knowingly understood the broader context in which their acts were committed. Systematic meant that the crime occurred as part of a "preconceived" plan or policy.

Before he could prosecute effectively, even in the aftermath of the clear carnage of the Sierra Leonean civil war, Crane believed that he could best discharge his duties if he took testimony informally on the ground from victims and witnesses. He toured towns and villages for four months, gathering a deep sense of Sierra Leone's trauma. Victims, in turn, obtained a sense that they would not be forgotten. Their suffering was acknowledged, even before the tribunal heard cases. Crane came away from his immersion in the countryside conversations with an appreciation of the magnitude of the overall atrocity and the anguish of the survivors. He touched, smelled, and tasted it all. "When drafting indictments, I only had to close my eyes to relive the perpetration of the crimes . . . ," he writes.[18]

Crane avers that prosecutors in situations similar to Sierra Leone must understand the political and diplomatic context in which their mixed courts operate. Whom to indict was a key question in Sierra Leone since not all offenders could be brought before a court, which had funding for only a few years. Thus, Crane chose to indict former President Charles Taylor of Liberia, who then hunkered down in eastern Nigeria, for his grand part in funding and sponsoring the Sierra Leonean mayhem, and chose not to indict similarly Presidents Blasé Compare of Burkina Faso and Muammar Qaddafi of Libya, whom Crane believed were equally culpable. He also brought the senior leaders of the warring factions to book. In early 2010, the Special Court largely has ended its work after a number of successful prosecutions