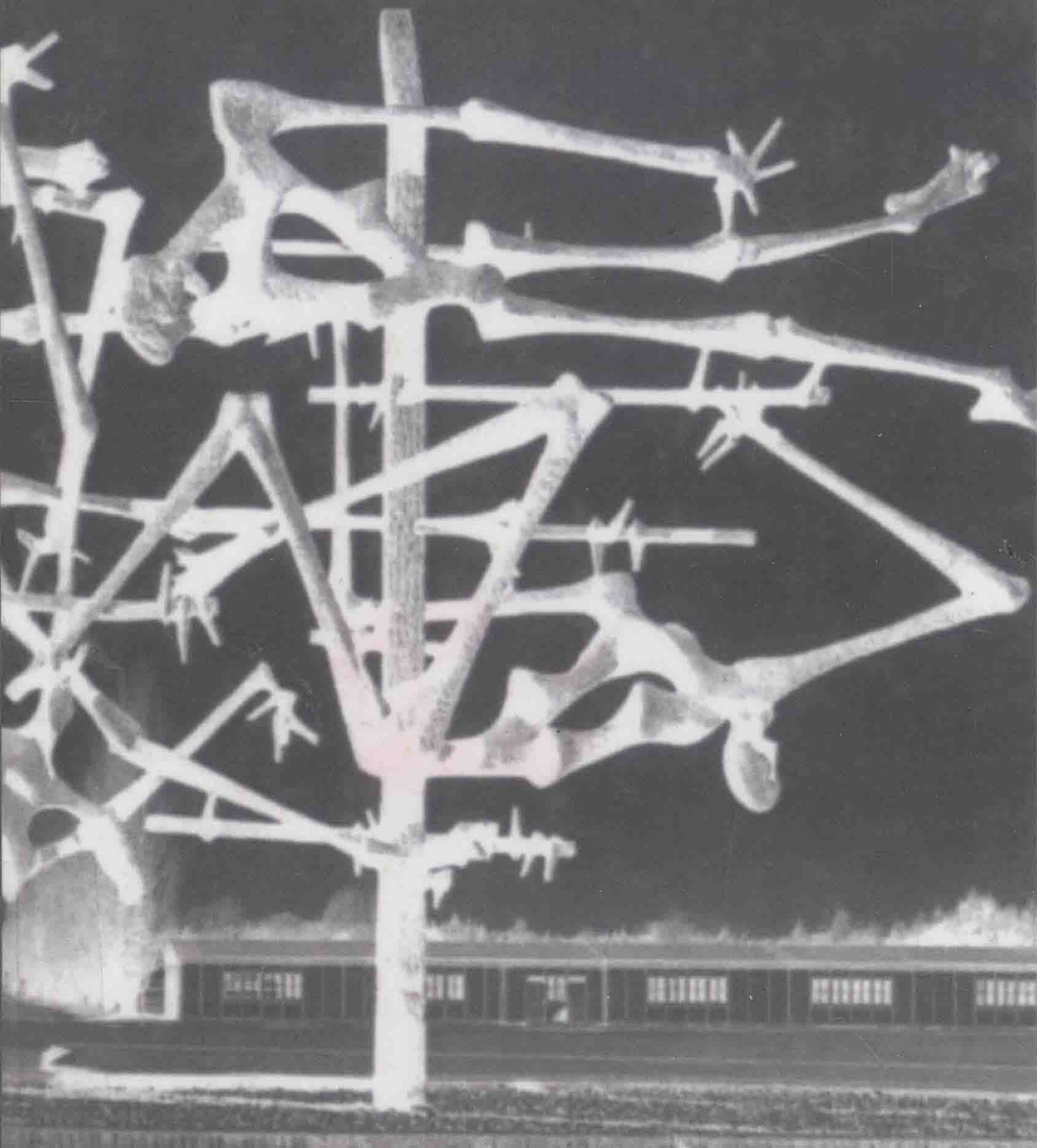
Genocide in International Law

William A. Schabas



Genocide in International Law

The Crimes of Crimes

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Preface

The legal questions involved in studying genocide draw on three areas of law: human rights law, international law and criminal law. These are all subjects that I have both taught and practised. This alone ought to be sufficient to explain my interest in the subject. But there is more. Of the three great genocides in the twentieth century, those of the Armenians, the Jews and Gypsies, and the Tutsi, my life has been touched by two of them.

My grandparents on my father's side, and my ancestors before them for generations, came from Kosowa and Brzezany, towns in what was once called Eastern Galicia. Located in the general vicinity of the city of Lvov, they are now part of Ukraine. Essentially nothing remains, however, of the Jewish communities where my grandparents were born and raised. In the months that followed the Nazi invasion of the Soviet Union, the *Einsatzgruppen* murdered as many as two million Jews who were caught behind the lines in the occupied territories. On 16–17 October 1941, in a German *Aktion*, 2,200 Jews, representing about half the community of Kosowa, were taken to the hill behind the Moskalowka bridge and executed. Parts of the population of both towns, Brzezany and Kosowa, were deported to the Belzec extermination camp. As the Germans were retreating, after their disastrous defeat at Stalingrad in January 1943, the executioners ensured they would leave no trace of Jewish life behind. It is reported that more Jews were killed in Brzezany on 2 June 1943, and in Kosowa on 4 June 1943, a 'final solution' carried out while the Soviet forces were still 500 km away. The victims were marched to nearby forests, gravel pits and even Jewish cemeteries where, according to Martin Gilbert, 'executions were carried out with savagery and sadism, a crying child often being seized from its mother's arms and shot in front of her, or having its head crushed by a single blow from a rifle butt. Hundreds of children were thrown alive into pits, and died in fear and agony under the weight of bodies thrown on top of them.'[1]

[1] Martin Gilbert, *Atlas of the Holocaust*, Oxford: Pergamon Press, 1988, p. 160. See also Israel Gutman, *Encyclopedia of the Holocaust*, Vol. I, New York: Macmillan, 1990, pp. 184–5.

Although my grandparents had immigrated to North America many years before the Holocaust, some of my more distant relatives were surely among those victims. Several of the leaders of the *Einsatzgruppen* were successfully tried after the war for their role in the atrocities in Brzezany, Kosowa and in thousands of other European Jewish communities of which barely a trace now remains. The prosecutor in the *Einsatzgruppen* case, Benjamin Ferencz, a man I have had the honour to befriend, used the neologism 'genocide' in the indictment and succeeded in convincing the court to do the same in its judgment.[2]

Exactly fifty years after the genocide in my grandparents' towns, I participated in a human rights fact-finding mission to a small and what was then obscure country in central Africa, Rwanda. I was asked by Ed Broadbent and Iris Almeida to represent the International Centre for Human Rights and Democratic Development as part of a coalition of international non-governmental organizations interested in the Great Lakes region of Africa. The mission visited Rwanda in January 1993, mandated to assess the credibility and the accuracy of a multitude of reports of politically and ethnically based crimes, including mass murder, that had taken place under the regime of president Juvénal Habyarimana since the outbreak of civil war in that country in October 1990. At the time, a terrifying cloud hung over Rwanda, the consequence of a speech by a Habyarimana henchman a few weeks earlier that was widely interpreted within the country as an incitement to genocide. We interviewed many eyewitnesses but our fact-finding went further. In an effort to obtain material evidence, we excavated mass graves, thus confirming reports of massacres we had learned of from friends or relatives of the victims.

At the time, none of us, including myself, had devoted much study if any to the complicated legal questions involved in the definition of genocide. Indeed, our knowledge of the law of genocide rather faithfully reflected the neglect into which the norm had fallen within the human rights community. Yet faced with convincing evidence of mass killings of Tutsis, accompanied by public incitement whose source could be traced to the highest levels of the ruling oligarchy, the word 'genocide' sprung inexorably to our lips. Rereading the definition in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide helped confirm our conclusion. In a press release issued the day after our departure from Rwanda, we spoke of genocide and warned of the abyss into which the country was heading. The term seemed to fit. Our choice of terminology may have been more intuitive than reasoned, but history has shown how closely we came to the truth. Three months after our

[2] *United States of America* v. *Ohlendorf et al.* ('Einsatzgruppen trial'), (1948) 3 LRTWC 470 (United States Military Tribunal).

mission, Special Rapporteur Bacre Waly Ndaiye visited Rwanda and essentially endorsed our conclusions. He too noted that the attacks had been directed against an ethnic group, and that article II of the Genocide Convention 'might therefore be considered to apply'.[3] In his 1996 review of the history of the Rwandan genocide, Secretary-General Boutros Boutros-Ghali took note of the significance of our report.[4]

Four months after the Rwandan genocide, I returned to Rwanda as part of an assistance mission to assess the needs of the legal system, and more specifically the requirements for prompt and effective prosecution of those responsible for the crimes. Over the past five years, much of my professional activity has been focused on how to bring the *genocidaires* to book. I have been back to Rwanda many times since 1994, and participated, as a consultant, in the drafting of legislation intended to facilitate genocide prosecutions. The International Secretariat of Amnesty International sent me to Rwanda in early 1997 to observe the *Karamira* trial, the first major genocide prosecution under national law in that country, or, for that matter, in any country, with the exception of the *Eichmann* case. I have since attended many other trials of those charged with genocide, both within Rwanda and before the International Criminal Tribunal for Rwanda, in Arusha, Tanzania, including the *Akayesu* trial, the first international prosecution pursuant to the Genocide Convention. I have also devoted much time to training a new generation of Rwandan jurists, lecturing regularly on criminal law and on the specific problems involved in genocide prosecutions as a visiting professor at the law faculty of the Rwandan National University. On 2 September 1998, I took a break from teaching the introductory criminal law class to 140 eager young Rwandans and we all spent the morning listening attentively on the radio to Laity Kama, president of the International Criminal Tribunal for Rwanda, as he read the first international judgment convicting an individual of the crime of genocide. But I have also spent many hours with genocide survivors, and I have visited the melancholy memorials to the killings. The smell of the mass graves cannot be forgotten and, like the imagined recollections of my grandparents' birthplace, it has its own contribution to what sometimes may seem a rather dry and technical study of legal terms. There is more passion in this work than may initially be apparent.

WILLIAM A. SCHABAS
Washington, 27 August 1999

[3] 'Report by the Special Rapporteur on Extrajudicial, Summary Arbitrary Executions on His Mission to Rwanda, 8–17 April 1993', UN Doc. E/CN.4/1994/7/Add.1, at para. 79.
[4] Boutros Boutros-Ghali, 'Introduction', in *The United Nations and Rwanda, 1993–1996*, New York: United Nations Department of Public Information, 1996, pp. 1–111 at p. 20.

Acknowledgments

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As always, words fail in expressing my love and thanks to my wife, Penelope Soteriou, and to my daughters, Marguerite and Louisa.

Abbreviations

AC	*Appeal Cases*
AFDI	*Annuaire français de droit international*
AIDI	*Annuaire de l'Institut de Droit International*
AJIL	*American Journal of International Law*
AI	Amnesty International
All ER	*All England Reports*
BFSP	*British Foreign and State Papers*
BFST	*British Foreign and State Treaties*
BYIL	*British Yearbook of International Law*
CHR	Commission on Human Rights
CHRY	*Canadian Human Rights Yearbook*
CLR	*Commonwealth Law Reports*
CERD	Committee for the Elimination of Racial Discrimination
Coll.	*Collection of Decisions of the European Commission of Human Rights*
Cr App R	*Criminal Appeal Reports*
Crim LR	*Criminal Law Review*
CSCE	Conference on Security and Co-operation in Europe
CYIL	*Canadian Yearbook of International Law*
DR	*Decisions and Reports of the European Commission of Human Rights*
Doc.	Document
Dumont	*Corps universel diplomatique du droit des gens*
EC	European Communities
EHRR	*European Human Rights Reports*
EJIL	*European Journal of International Law*
ESC	Economic and Social Council
ETS	*European Treaty Series*
F.	*Federal Reporter*
FCA	*Federal Court of Australia*
GA	General Assembly
HRJ	*Human Rights Journal*

HRLJ	*Human Rights Law Journal*
HRQ	*Human Rights Quarterly*
ICC	International Criminal Court
ICJ	International Court of Justice
ICLQ	*International and Comparative Law Quarterly*
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
ILM	*International Legal Materials*
ILR	*International Law Reports*
IMT	Trial of the Major War Criminals before the International Military Tribunal
JCPC	Judicial Committee of the Privy Council
JDI	*Journal de droit international*
KB	King's Bench
L Ed	*Lawyer's Edition*
LNTS	*League of Nations Treaty Series*
LRC	*Law Reports of the Commonwealth*
LRTWC	*Law Reports of the Trials of the War Criminals*
Martens	*Martens Treaty Series*
NAC	National Archives of Canada
NILR	*Netherlands International Law Review*
NQHR	*Netherlands Quarterly of Human Rights*
OAS	Organization of American States
OASTS	*Organization of American States Treaty Series*
OAU	Organization of African Unity
RCADI	*Recueil de cours de l'Académie du droit international de la Haye*
RGD	*Revue générale de droit*
RGDIP	*Revue générale de droit international public*
RIDP	*Revue internationale de droit pénal*
RSC	*Revised Statutes of Canada*
RUDH	*Revue universelle des droits de l'homme*
Res.	Resolution
SCHR	Sub-Commission on Prevention of Discrimination and Protection of Minorities
SCR	*Supreme Court Reports* (Canada)
SC	Supreme Court
SD	*Selected Decisions of the Human Rights Committee*
TLR	*Times Law Reports*

TS	*Treaty Series*
TWC	Trials of the War Criminals
UKTS	*United Kingdom Treaty Series*
UNAMIR	United Nations Assistance Mission in Rwanda
UN	United Nations
UNCIO	United Nations Conference on International Organization
UNTS	*United Nations Treaty Series*
UNWCC	United Nations War Crimes Commission
UNYB	*United Nations Yearbook*
US	United States
USNA	United States National Archives
WCR	*War Crimes Reports*
Yearbook	*Yearbook of the International Law Commission*
YIHL	*Yearbook of International Humanitarian Law*
YECHR	*Yearbook of the European Convention on Human Rights*

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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 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.

[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, quoted by L. P. Lochner, *What About Germany?*, New York: Dodd, Mead, 1942. During the Nuremberg trial of the major war criminals, there were attempts to introduce the statement in evidence, but the Tribunal did not allow it. 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 inertia of the legal systems where the crimes actually occurred did little to inspire other jurisdictions to intervene, although they had begun to do so with respect to certain other 'international crimes' such as piracy and the slave trade, where the offenders were by and large individual villains rather than governments. 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, the individual may be punished for such international crimes as a matter of international law, even if his or her 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.[3]

The law of genocide is very much a paradigm for these developments in international human rights law. As the prohibition of the ultimate

[3] The duty to prosecute individuals for human rights abuses was recognized by the Inter-American Court of Human Rights in *Velasquez Rodriguez* v. *Honduras*, Judgment of 29 July 1988, Series C, No. 4. See Diane F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', (1991) 100 *Yale Law Journal*, p. 2537; Naomi Roht-Arriaza, ed., *Impunity and Human Rights in International Law and Practice*, New York and London: Oxford University Press, 1995; Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law*, Oxford: Clarendon Press, 1997.

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 law 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 October 1948.[4] The Convention came into force in January 1951, three months after the deposit of the twentieth instrument of ratification or accession. Fifty years after its adoption, it had slightly fewer than 130 States parties, a rather unimpressive statistic when compared with the other major human rights treaties of the United Nations system which, while considerably younger, have managed to approach a more general degree of support by the nations of the world.[5] The reason is not the existence of doubt about the universal condemnation of genocide, but unease among some States with the onerous obligations that the treaty imposes, such as prosecution or extradition of individuals, including heads of State.

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.[6]

This important statement is often cited as the judicial recognition of the prohibition of genocide as a customary legal norm, although the Court

[4] (1951) 78 UNTS 277.

[5] For the purposes of comparison, see Convention on the Rights of the Child, GA Res. 44/25, annex, 191 States parties; International Convention for the Elimination of All Forms of Racial Discrimination, (1969) 660 UNTS 195, 153 States parties; Convention for the Elimination of Discrimination Against Women, (1981) 1249 UNTS 13, 163 States parties. See also the Geneva Convention of 12 August 1949 Relative to the Protection of Civilians, (1950) 75 UNTS 135, 187 States parties.

[6] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, [1951] *ICJ Reports* 16, p. 23. Quoted in *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, [1996] *ICJ Reports* 226, para. 31. See also 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)', UN Doc. S/25704, para. 45.

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.[7] 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 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 mean that what originated in 'general principles' ought now to be considered a part of customary law.[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 modification in the Rome Statute of the International Criminal Court, adopted in July 1998.[11] There have been frequent references to genocide within the resolutions, declarations and statements of United Nations organs, including particularly the work of expert bodies and special rapporteurs.

A large number of States have enacted legislation concerning the

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

[8] For a brief demonstration of relevant practice and *opinio juris*, see Bruno Simma and Andreas L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View', (1999) 93 AJIL, p. 302 at pp. 308–9. But John Dugard has written that 'it is by no means certain that the Genocide Convention of 1948 has itself become part of customary international law': John Dugard, 'Retrospective Justice: Law and the South African Model', in A. James McAdams, *Transitional Justice and the Rule of Law in New Democracies*, Notre Dame and London: University of Notre Dame, 1997, pp. 269–90 at p. 273.

[9] GA Res. 96 (I).

[10] 'Statute of the International Criminal Tribunal for the Former Yugoslavia', UN Doc. S/RES/827 (1993), annex; 'Statute of the International Criminal Tribunal for Rwanda', UN Doc. S/RES/955 (1994), annex.

[11] 'Rome Statute of the International Criminal Court', UN Doc. A/CONF.183/9.

prosecution and repression of genocide, most by amending their penal or criminal codes in order to add a distinct offence. Often they have borrowed the Convention definition, as set out in articles II and III, but occasionally they 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'.[12] 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.[13] 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.[14] 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.[15] Genocide is routinely subsumed –

[12] Genocide Convention Implementation Act of 1987 (the Proxmire Act), S. 1851, § 1091(a).

[13] Penal Code (France), *Journal officiel*, 23 July 1992, art. 211–1.

[14] See the comments of *ad hoc* judge Milenko Kreca in *Legality of Use of Force* (*Yugoslavia* v. *Belgium et al.*), Request for the Indication of Provisional Measures, Order, 2 June 1999, Dissenting Opinion of Judge Kreca, para. 21: 'A certain confusion is also created by the term "humanitarian law" referred to in paragraphs 19 and 48 of the Order. The reasons for the confusion are dual: on the one hand, the Court has not shown great consistency in using this term. In the *Genocide* case the Court qualified the Genocide Convention as a part of humanitarian law, although it is obvious that, by its nature, the Genocide Convention falls within the field of international criminal law.'

[15] 'Statute of the International Criminal Tribunal for the Former Yugoslavia', note 10 above; 'Statute of the International Criminal Tribunal for Rwanda', note 10 above.