

Genocide and the International Convention on the Elimination of All Forms of Racial Discrimination

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Although there is no reference to genocide in the International Convention on the Elimination of All Forms of Racial Discrimination, the Committee on the Elimination of All Forms of Racial Discrimination has shown a special interest in the subject. Ironically, the Committee examined the periodic report of Rwanda in March 1994, only a few weeks before the outbreak of the worst episode of genocide since the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948. On 17 March 1994, the Committee adopted concluding observations that addressed problems of impunity with respect to ethnic violence in the country, requesting that Rwanda provide further information by the end of June 1994.¹ Alas, there was no such follow-up. By the end of June 1994, hundreds of thousands of Tutsi had perished. In mid-August 1994, the Committee adopted a Decision '[e]xpressing its deep concern and grave alarm over the tragic loss of life of genocidal dimensions in Rwanda'.²

Reporting to the Secretary-General of the United Nations, the Committee explained that in reviewing Rwanda's periodic report, it had taken note of the findings of a Commission composed of non-governmental organisations published in early 1993 that had warned of genocide. 'Subsequent events have proved the accuracy of that report's diagnosis of the threats to peace in Rwanda', said the Committee. It added that The Commission's recommendations were 'well judged, but they received too little support from the international community – with results that have been only too tragic'. The Committee said that procedures for early warning and urgent action

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¹ UN Doc. A/49/18, paras. 61-71.

² Decision 1 (45). The human rights situation in Rwanda, UN Doc. A/49/18, Annex III.

‘desperately need improvement’.³

Declaration on the Prevention of Genocide

The Committee returned to the subject in 2005. Following a thematic dialogue on the subject of genocide with NGOs and other relevant actors within the United Nations and other international organisations, including the Special Adviser on Genocide, on 11 March 2005 the Committee adopted a Declaration on the Prevention of Genocide.⁴ The document was directly inspired by proposals in the Secretary-General’s presentation at the Stockholm International Forum in January 2004.⁵ The preamble to the Declaration noted that ‘genocide is often facilitated and supported by discriminatory laws and practices or lack of effective enforcement of the principle of equality of persons’. It said that ‘the international community had failed to prevent the genocides in Rwanda and Srebrenica because of lack of will’. The Declaration placed strong emphasis on the use of force to prevent genocide, the responsibility of developed countries to contribute to peace operations in order to facilitate rapid deployment. At the same time as it adopted the Declaration, the Committee considered the specific case of Darfur. Records of the Committee suggest it was divided about the legal description of the atrocities.⁶ Its decision on Darfur, adopted only weeks after presentation of the report of the United Nations Commission of Inquiry commissioned by the Security Council,⁷ spoke of ‘war crimes, crimes against humanity and the risk of genocide’.⁸

Following the Declaration, the Committee prepared a list of indicators relevant to the prevention of genocide, although it entitled them ‘indicators of patterns of systematic and massive racial discrimination’. These include: lack of a legislative framework and institutions to prevent racial discrimination; systematic official denial of the existence of particular distinct groups; systematic exclusion – in law or in fact – of groups from positions of power, employment in State institutions and key

³ Letter of transmittal, Report of the Committee on the Elimination of Racial Discrimination, Forty-ninth Session, UN Doc. A/49/18, p. vii.

⁴ UN Doc. CERD/C/66/1; also UN Doc. A/60/18, para. 459. For the debates, see: UN Doc. CERD/C/SR.1700/Add.1; UN Doc. CERD/C/SR.1701.

⁵ UN Doc. CERD/C/SR.1700/Add.1, para. 1.

⁶ E.g. UN Doc. CERD/C/SR.1701, paras. 18–40; UN Doc. CERD/C/SR.1714, paras. 31–46.

⁷ Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur, 25 January 2005, UN Doc. S/2005/60.

⁸ Decision 2 (66), Situation in Darfur, UN Doc. CERD/C/DEC/SDN/1.

professions; compulsory identification against the will of members of particular groups, including the use of identity cards indicating ethnicity; grossly biased versions of historical events in school textbooks and other educational materials as well as celebration of historical events that exacerbate tensions between groups and peoples. Many of the factors feature in all discussions about racial discrimination. To an extent, one or more of them is present in most countries. The Committee cautioned that ‘as these indicators may be present in States not moving towards violence or genocide, the assessment of their significance for the purpose of predicting genocide or violence against identifiable racial, ethnic or religious groups should be supplemented’ by consideration of other indicators, including a prior history of genocide or violence against a group, a policy or practice of impunity, and the ‘existence of proactive communities abroad fostering extremism and/or providing arms’.⁹

However, since that flurry of activity, the Committee has not devoted much attention to issues that concern genocide specifically. In 2007, it adopted new Guidelines for the Early Warning and Urgent Action Procedure in which it takes note of the earlier work of the Committee on genocide prevention.¹⁰ It also refers to the Declaration and Decision on Follow-up in a General Recommendation on the Durban Review Conference.¹¹ In 2013, the Committee issued its General Recommendation entitled ‘Combating racist hate speech’. It mentions genocide in four places, but generally as part of an enumeration including terms like ‘human rights’ and ‘crimes against humanity’.¹² In one paragraph, the Recommendation states: ‘Discourses which in one context are innocuous or neutral may take on a dangerous significance in another: in its indicators on genocide the Committee emphasized the relevance of locality in appraising the meaning and potential effects of racist hate speech...’¹³

Exceptionally, in August 2014 the Committee invoked its Early Warning and Urgent Action Procedures as well as its Declaration on Genocide, issuing a Decision with respect to activities of ‘Islamic State’ in Iraq that included the following

⁹ Decision on Follow-up to the Declaration on the Prevention of Genocide: Indicators of Patterns of Systematic and Massive Racial Discrimination, UN Doc. CERD/C/67/1; UN Doc. A/60/18, para. 20.

¹⁰ UN Doc. A/62/18, Annex III, para. 10.

¹¹ General recommendation No. 33 (2009), Follow-up to the Durban Review Conference, UN Doc. CERD/C/GC/33, PP 7.

¹² General recommendation No. 35 (2013), Combating racist hate speech, UN Doc. A/69/18, Annex VIII, paras. 3, 6, 14.

¹³ *Ibid.*, para. 15.

paragraph: ‘Deeply concerned by the mass killings, the ethnic cleansing, the massive forced displacement of populations, the violence against women and children and the other crimes against humanity, which constitute blatant violations of the ICERD and increase the risk of genocide...’¹⁴

Obviously, the promise of much greater attention to genocide by the Committee, that seemed to emerge in 2005, has not been borne out. One explanation may be that responsibility for genocide-related issues within the United Nations system as a whole has been taken up by the Special Adviser to the Secretary-General on the Prevention of Genocide.

Defining genocide and racial discrimination

The relationship between racial discrimination, which is at the heart of the mandate of the Committee on the Elimination of All Forms of Racial Discrimination, and genocide, defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide as the intentional destruction a national, ethnical racial or religious group, may seem so obvious as to deserve no further comment or examination. Yet the debate continues, in case law, at the political level, and in the academy, about whether the objective in preventing genocide is to protect racial groups and their cognates from what Theo van Boven has described as the ‘ultimate and most evil corollary of racial and religious discrimination’.¹⁵

Before proceeding, a comment on terminology is required. Article 2 of the 1948 Genocide Convention refers to ‘national, ethnical, racial or religious’ groups. It is remarkably similar to the definition of ‘racial discrimination’ in article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination: ‘based on race, colour, descent, or national or ethnic origin’. The Genocide Convention includes ‘religious’ groups whereas the term is not used in the Convention on Racial Discrimination. Probably the drafters of the Genocide Convention understood the notion of ‘religious group’ to overlap with the other three categories. It also seems likely that religious groups were not included in the

¹⁴ Decision 1(85). Prevention of Racial Discrimination, Including Early Warning and Urgent Action Procedures, , 2313th meeting, 22 August 2014.

¹⁵ Theo van Boven, ‘Racial and Religious Discrimination’, in Rüdiger Wolfrum, ed., *The Max Planck Encyclopedia of Public International Law*, Vol. VIII, Oxford: Oxford University Press, 2012, pp. 608-617, at p. 609.

Convention on Racial Discrimination because at the time a separate convention on religious discrimination was contemplated. For the purposes of this chapter, it is assumed that the meaning of the term ‘racial’ in article 2 of the Genocide Convention and article 1(1) of the Convention on Racial Discrimination is very similar if not entirely identical.

The word ‘genocide’, as conceived by Raphael Lemkin in 1944, was clearly directed at ‘racial groups’ as this term is later understood in the 1948 Genocide Convention and the 1965 Convention on Racial Discrimination. Lemkin saw his proposal as an attempt to reinforce the legal regime of protection of national minorities that had emerged in the treaties and declarations adopted following the First World War.¹⁶ The chapter in his book *Axis Rule in Occupied Europe* where the term ‘genocide’ made its debut referred to ‘political’ genocide and ‘economic’ genocide, but by that Lemkin meant the attempted destruction of a racial (or national, ethnic or religious) group by means of destroying the political and economic institutions of the group.¹⁷

In 1946, largely due to the personal campaign of Raphael Lemkin, the United Nations General Assembly adopted a resolution recognizing genocide as a crime in international law.¹⁸ Lemkin’s initial draft,¹⁹ presented to the Assembly by Cuba, Panama and India, referred to ‘national, racial, ethnical or religious groups’.²⁰ There was a substantial debate in the Sixth Committee of the General Assembly but without any suggestion that the enumeration of groups be amended. A sub-committee was assigned to finalise the drafting of the resolution. Then there was a mysterious change, whereby the final text of the Resolution referred to ‘racial, religious, political and other groups’ and to a crime ‘committed on religious, racial, political or any other grounds’. Nothing in the official records of the Sixth Committee or the General Assembly sheds any light on the origin of this change, the reasons for it and the identity of the government or governments who were responsible. A biographer of Lemkin suggests it was ‘an intervention “by the British delegation at a very late hour

¹⁶ *Prosecutor v. Krstić* (IT-98-33-T), Judgment, 2 August 2001, para. 554-560.

¹⁷ Raphael Lemkin, *Axis Rule in Occupied Europe*, New York: Carnegie Endowment for World Peace, 1944, pp. 79-97.

¹⁸ The Crime of Genocide, GA Res. 96(I).

¹⁹ Donna-Lee Frieze, ed., *Totally Unofficial, The Autobiography of Raphael Lemkin*, New Haven, CT and London: Yale University Press, 2013, pp. 118-132.

²⁰ Draft resolution relating to the crime of genocide, proposed by the delegations of Cuba, India and Panama, UN Doc. A/BUR/50

of a tiresome genocide meeting in Lake Success” although the origin of the reference is unclear.²¹

Two years later, the reference to ‘political’ was removed in the Convention whose preparation was mandated by the 1946 General Assembly Resolution. The debates are part of the public record although they have been somewhat misrepresented in some of the academic accounts. The Soviet Union opposed the inclusion of political groups, as all of the writers point out, but it was hardly alone in taking this position. Lemkin himself as well as Jewish organisations interested in the text of the Convention also favoured the omission of political groups. Moreover, archival materials suggest that the United States, which initially took a public position supporting inclusion of political groups in the Convention, was itself more than agreeable to dropping the term.²²

Criticism of the definition

One of the earliest academic writers on the Genocide Convention, Pieter Drost, discussed what he called the ‘Deficient Definition in Article II’. He said that ‘[b]y leaving political and other groups beyond the purported protection the authors of the Convention also left a wide and dangerous loophole for any government to escape the human duties under the Convention by putting genocide into practice under the cover of executive measures against political or other groups for reasons of security, public order or any other reason of state’.²³ Drost said that ‘in order to achieve its purpose such convention must extend its protection to all groups of human beings’. He linked his approach to the central non-discrimination clause in the Universal Declaration of Human Rights: ‘When including all human groups a genocide convention would in effect provide international criminal protection of human rights and freedoms without distinction of any kind such as mentioned in Article 2 of the

²¹ John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention*, Basingstoke: Palgrave MacMillan, 2008, p. 86.

²² Letter, 14 July 1948, Acting Legal Adviser to James Rosenberg, National Archives, United States of America, 501.BD-Genocide, 1945–9; Memorandum of Conversation, 16 July 1948, Between John Maktos and Raphael Lemkin, National Archives, United States of America, 501.BD-Genocide, 1945–9; Minutes of the Ninth Meeting of the United States Delegation, Paris, Hotel d’Iéna, 30 September 1948, in *Foreign Relations of the United States, 1948*, Vol. I, Washington: United States Government Printing Office, 1975, pp. 295–7 at p. 296.

²³ Pieter N. Drost, *Genocide, United Nations Legislation on International Criminal Law*, Leiden: A.W. Sythoff, 1959, p. 123.

Universal Declaration.’²⁴ Drost considered that genocide was ‘a violation of fundamental freedoms of human beings collectively considered’.²⁵

A similar view was taken up by Benjamin Whitaker, the special rapporteur designated by the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities. Whitaker pointed to a ‘considerable number of commentators’ who had criticised the Convention for ‘its omission to protect political, economic, sexual or social groups, despite the inclusion in the examples of genocide cited in resolution 96/1 of the destruction of “racial, religious, political and other groups”’.²⁶ Whitaker focused on the exclusion of political groups, which he seemed to blame on the Soviet Union, reprising the arguments that were made on both sides of the debate.²⁷ Whitaker wrote that ‘[o]ne possible solution to the problem of killings of political and other groups which would be considered in the absence of consensus, would be to include this provision in an additional optional protocol’.²⁸

The argument for enlargement of the definition of genocide continues to get a limited amount of traction among academic commentators. In a recent and quite exhaustive study of the issue of ‘groups’ protected by the Genocide Convention, David L. Nersessian has set out a case for recognising ‘a crime of political genocide’, noting that ‘[t]he reprehensible underlying violence involved in political genocide is identical to that of genocide against enumerated groups’.²⁹ Nersessian makes a persuasive plea for the international criminalisation of ‘political genocide’. However, that the intentional physical destruction of political groups should be punishable as an international crime is not really very controversial. It already is punishable, under one or more headings of crimes against humanity. In other words, the real argument should be not whether the extermination of political groups is a crime, subject to the jurisdiction of international tribunals like the International Criminal Court, but whether it should migrate from the category of crimes against humanity to that of genocide.

²⁴ *Ibid.*

²⁵ *Ibid.*, p. 124.

²⁶ Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, UN Doc. E/CN.4/Sub.2/1985/6, para. 34.

²⁷ *Ibid.* paras. 35-36.

²⁸ *Ibid.*, para. 37.

²⁹ David L. Nersessian, *Genocide and Political Groups*, Oxford: Oxford University Press, 2010, p. 182,

Another scholar, Larry May, has suggested modifying the Convention definition of genocide as part of ‘some proposed changes in international law’. He would change the wording of article 2 of the 1948 Convention as follows: “genocide” means any of the following acts committed with intent to destroy, in whole or in part, *a group, such as* a national, ethnical, racial or religious group, as such’. The modification is italicised. According to Professor May, ‘such a change will allow for other groups that are very much like the four originally listed types of groups also to be the object of genocidal harms that can be redressed in international law’. He proposes a further amendment in order to direct the interpretation of the words ‘such as’, adding the words ‘a group that is relatively stable and significant for the identity of its members’.³⁰

Resistance to amendment

However, despite these repeated appeals for a revision of the definition of genocide from what we might call the Lemkinian perspective – one that, by the way, coincides with article 1(1) of the Convention on Racial Discrimination – there has been little interest at the governmental level. Shortly after Whitaker’s report was issued, international criminal law entered its most dynamic phase, one characterised both by the creation of new institutions, like the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court, and the elaboration of new international norms, standards and crimes. In particular the definitions of international crimes derived from the post-Second World War period went through a virtual revolution, with war crimes being enlarged to encompass non-international armed conflict and crimes against humanity being extended to acts perpetrated in peacetime. The seminal moment was the October 1995 judgment of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia known as the *Tadić Jurisdictional Decision*.³¹ Three years later, this dramatic exercise in judicial law-making was confirmed in articles 7 and 8 of the Rome Statute of the International Criminal Court.

³⁰ Larry May, *Genocide, A Normative Account*, New York: Cambridge University Press, 2010, p. 57.

³¹ *Prosecutor v. Tadić* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

Seemingly, momentum to modify the definitions of war crimes and crimes against humanity had been building for many years, just as it had for genocide. But to the surprise – and dismay – of many, the attitude taken by international lawmakers to genocide did not benefit from the same spirit of change and innovation. The proposals of Drost, Whitaker and others were not followed. This was not for want of opportunity. Drafting of the Rome Statute provided the perfect occasion to revise and reform the outdated texts they had inherited from the 1940s. As has been mentioned, they embraced this with enthusiasm when it came to war crimes and crimes against humanity. With respect to genocide, however, as M. Cherif Bassiouni has explained, the delegates missed an ‘historic opportunity’ to expand the scope of the Convention.³² There were some rather isolated attempts to amend the definition of genocide in order to include political or economic and social groups.³³ A footnote to the final draft of the Preparatory Committee declares: ‘The Preparatory Committee took note of the suggestion to examine the possibility of addressing “social and political” groups in the context of crimes against humanity.’³⁴ At the Rome Conference, in 1998, Cuba argued for inclusion of social and political groups. Ireland answered stating ‘we could improve upon the definition if we were drafting a new genocide convention’, but explained that this was not the case, and that it was better to stick with the existing definition.³⁵ The Bureau of the Conference proposed that the definition be taken literally from the 1948 Convention³⁶ and there was virtually no objection.³⁷ Herman von Hebel and Daryl Robinson have observed that ‘[a]t the Rome Conference, the definition of the crime of genocide was not discussed in

³² M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text*, Vol. I, Ardsley, NY: Transnational, 2005, p. 92, fn. 208.

³³ Preparatory Committee 1996 Report, Vol. I, pp. 17–18, para. 60; Preparatory Committee 1996 Report, Vol. II, p. 57.

³⁴ Preparatory Committee 1996 Report, Vol. I, p. 11, fn. 2. See also: Decisions Taken by the Preparatory Committee at its Session Held from 11 to 21 February 1997, UN Doc. A/AC.249/1997/L.5, p. 3, fn. 2; Zutphen Report, p. 17, fn. 11.

³⁵ Author’s personal notes of debate, Committee of the Whole, 17 June 1998.

³⁶ Discussion Paper, Bureau, UN Doc. A/CONF.183/C.1/L.53, p. 1; also UN Doc. A/CONF.183/C.1/L.59, p. 2.

³⁷ UN Doc. A/CONF.183/C.1/SR.3, paras. 2, 18, 20 (Germany), 22 (Syria), 24 (United Arab Emirates), 26 (Bahrain), 28 (Jordan), 29 (Lebanon), 30 (Belgium), 31 (Saudi Arabia), 33 (Tunisia), 35 (Czech Republic), 38 (Morocco), 40 (Malta), 41 (Algeria), 44 (India), 49 (Brazil), 54 (Denmark), 57 (Lesotho), 59 (Greece), 64 (Malawi), 67 (Sudan), 72 (China), 76 (Republic of Korea), 80 (Poland), 84 (Trinidad and Tobago), 85 (Iraq), 107 (Thailand), 111 (Norway), 113 (Côte d’Ivoire), 116 (South Africa), 119 (Egypt), 122 (Pakistan), 123 (Mexico), 127 (Libya), 132 (Colombia), 135 (Iran), 137 (United States of America), 141 (Djibouti), 143 (Indonesia), 145 (Spain), 150 (Romania), 151 (Senegal), 153 (Sri Lanka), 157 (Venezuela), 161 (Italy), 166 (Ireland), 172 (Turkey), 174.

substance . . .'.³⁸ No proposals at the Conference were ever submitted concerning any substantive changes to the definition.

This reluctance to change or expand the definition of genocide is also manifested in judicial interpretation over the past two decades. With relatively rare exceptions, judges of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the International Criminal Court and the International Court of Justice have maintained a relatively strict construction of the crime of genocide. Occasional manifestations of creativity have focused on the material elements of the crime rather than on the protected groups. The great exception is the *Akayesu* judgment of a Trial Chamber of the International Criminal Tribunal for Rwanda. Because it was the first judgment of an international criminal tribunal on the interpretation of the definition of genocide drawn from the 1948 Convention, it has probably received an inordinate amount of attention from commentators. Considered from a contemporary perspective, nearly two decades after the decision was issued, and in light of an enormous volume of case law, the teachings of the *Akayesu* Trial Chamber cannot really be said to have stood the test of time.

With respect to the groups protected by the criminalisation of genocide, the Trial Chamber in *Akayesu* held that the drafters of the 1948 Convention had meant to encompass all 'stable' and 'permanent' groups.³⁹ It was a somewhat extravagant reading of the *travaux*, based on isolated comments by a few delegations and, moreover, it appeared to contradict a finding elsewhere in the judgment that the Tutsi were an ethnic group for the purposes of charges of crimes against humanity.⁴⁰ According to Guénaél Mettraux, '[a]lthough the meritorious agenda behind such a position is obvious, this proposition would appear to be, unfortunately, unsupported in law and at the time of its exposition in fact constitute purely judicial law-making'.⁴¹ The novel interpretation was repeated in two subsequent decisions of the same Trial Chamber, although in a rather more guarded fashion: 'It appears from a reading of the *travaux préparatoires* of the Genocide Convention that certain groups, such as

³⁸ Herman von Hebel and Darryl Robinson, 'Crimes Within the Jurisdiction of the Court', in Roy S. Lee, ed., *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results*, The Hague/London/Boston: Kluwer Law International, 1999, pp. 79–126, at p. 89.

³⁹ *Prosecutor v. Akayesu* (ICTR-96-4-T), Judgment, 2 September 1998, para. 515.

⁴⁰ *Ibid.*, para. 652.

⁴¹ Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals*, Oxford: Oxford University Press, 2005, at p. 230.

political and economic groups have been excluded from the protected groups, because they are considered to be “mobile groups” which one joins through individual, political commitment. That would seem to suggest a contrario that the Convention was presumably intended to cover relatively stable and permanent groups.’⁴²

The ‘stable and permanent’ theory put forward by Trial Chamber I of the International Criminal Tribunal for Rwanda was not subsequently following in any other decisions of the Tribunal itself⁴³ or those of its companion, the International Criminal Tribunal for the former Yugoslavia. Indeed, it had been effectively forgotten until the Darfur Commission of Inquiry revived the matter in its January 2005 report. According to the Commission, the ‘interpretative expansion’ effected by the Trial Chamber in *Akayesu* was ‘in line with the object and scope of the rules on genocide (to protect from deliberate annihilation essentially stable and permanent human groups, which can be differentiated on one of the grounds contemplated by the Convention and the corresponding customary rules)’. The Commission suggested that the theory had been generally accepted by both Tribunals, adding that ‘perhaps more importantly, this broad interpretation has not been challenged by States’. Therefore, ‘[i]t may . . . be safely held that that interpretation and expansion has become part and parcel of international customary law’.⁴⁴ But this analysis is clearly a misreading of the authorities.

By way of explanation

The purpose of this discussion has not been to examine in detail the notion of ‘groups’ within the definition of genocide. Its more modest ambition is a search for some common thread linking the 1948 Genocide Convention with the 1965 Convention on Racial Discrimination. The protected categories largely overlap. But whereas the scope of article 1(1) of the Convention on Racial Discrimination seems well-accepted, the same cannot necessarily be said of article 2 of the Genocide Convention. The debate actually began with the 1946 General Assembly Resolution,

⁴² *Prosecutor v. Rutaganda* (ICTR-96-3-T), Judgment and Sentence, 6 December 1999, para. 57; *Prosecutor v. Musema* (ICTR-96-13-T), Judgment and Sentence, 27 January 2000, para. 162 (reference omitted).

⁴³ George William Mugwanya, *The Crime of Genocide in International Law: Appraising the Contribution of the UN Tribunal for Rwanda*, London: Cameron May, 2007, p. 67.

⁴⁴ Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur, UN Doc. S/2005/60, para. 501.

even before the 1948 Convention, although virtually nothing is known about the discussions at the time in order to usefully inform our contemporary understanding. What emerges from the sources, however, is that the frequent complaints about the scope of article 2 of the Genocide Convention have, by and large, not led to concrete changes in the law. There is some evidence in national legislation for larger definitions of genocide. However, the thorough review of these definitions in the appendix to David Nersessian's study⁴⁵ tends to confirm that the addition of categories to the list in article 2 is very much the exception, and this therefore confirms the rule.

The Rome Conference should not be viewed a 'missed opportunity'. The drafters of the Rome Statute filled the gaps that had been left by the international legal framework of the 1940s that formed the starting point for their work. However, they just chose to fulfil this task by expanding the definitions of war crimes and crimes against humanity rather than that of genocide. The result is a seamless package of measures dealing with impunity for atrocity crimes. Unhappiness with the decision to leave the definition of genocide untouched cannot really be justified as a legal shortcoming. It merely manifests an obsession with semantics, with the demagogic magic of the 'g-word' rather than the legal reality. Early critics, like Drost and Whitaker, were concerned about legal loopholes left by the 1948 codification. With the adoption of the Rome Statute, that is no longer a serious objection. More modern critics, like Nersessian and May, do not have the same excuse.

The complaint that it is irrational, or unacceptable, to limit the scope of genocide to national, ethnical, racial and religious groups is one that might also be levelled at the Convention on Racial Discrimination. Just as Drost pointed to article 2 of the Universal Declaration of Human Rights as a rationale for enlarging the scope of article 2 of the Genocide Convention, one might similarly point to article 1(1) of the Convention on Racial Discrimination. Of the enumeration in article 2 of the Universal Declaration, the Convention addresses discrimination directed against only a few categories: race and colour, and perhaps language, religion and national origin. It ignores other terms in the list: sex, political or other opinion, social origin, property, birth or other status, as well as unenumerated categories such as disability, age and sexual orientation. This 'omission' has been only partially rectified with the United

⁴⁵ David L. Nersessian, *Genocide and Political Groups*, Oxford: Oxford University Press, 2010, pp. 267-272.

Nations treaty system, through the Convention on the Elimination of All Forms of Discrimination Against Women⁴⁶ and the Convention on the Rights of Persons with Disabilities.⁴⁷ In other words, critics of the limited scope of the definition of genocide in the 1948 Convention should, logically, favour an ‘International Convention for the Elimination of All Forms of Discrimination’. Why should racial discrimination be entitled to any special treatment?

Why indeed. In fact, there is a compelling case to be made that the limited scope of both treaties, the 1948 Genocide Convention and the 1965 Convention on Racial Discrimination, is to be understood as a logical and appropriate choice by international lawmakers. It should not be viewed as the result of irrational oversight and Machiavellian compromise. There is much wisdom in this common thread that links both treaties, namely the focus on racial groups, described as ‘national, ethnic racial and religious groups’, and on racial discrimination, explained as ‘race, colour, descent, or national or ethnic origin’.

It should be unnecessary to demonstrate the link between the fresh memories of the Nazi holocaust and the codification of the crime of genocide by the United Nations General Assembly in 1946 and 1948. Lemkin himself was a survivor, having fled Poland following the German invasion. Weeks before the final judgment in the Nuremberg trial, he learned that his entire family had perished at the hands of the Nazis.⁴⁸ As for the Convention on Racial Discrimination, reference is often made to reports of anti-Semitism that prompted the General Assembly to initiate work on a declaration and, subsequently, the Convention itself.⁴⁹ However, the General Assembly had been expressing concern about racial discrimination from its earliest sessions.⁵⁰ Racial discrimination has also featured in the work of subsidiary bodies, notably the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, and agencies, in particular UNESCO.

Built on the ashes of the most destructive war in history, the United Nations focused its attention on racial discrimination out of a common understanding that ideas of racial superiority and related practices were in some way responsible for the

⁴⁶ (1981) 1249 UNTS 13.

⁴⁷ (2008) 2515 UNTS 3.

⁴⁸ John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention*, Basingstoke: Palgrave MacMillan, 2008, pp. 72-73.

⁴⁹ Preparation of a draft declaration and a draft convention on the elimination of all forms of racial discrimination, GA Res. 1780(XVII).

⁵⁰ Persecution and discrimination, GA Res. 103(1).

devastation and misery that humanity had inflicted upon itself. The holocaust was only the most immediate manifestation of this. The root of the problem was more visceral and it could not be blamed on the Nazis alone. Its manifestations included the scourge of slavery and the slave trade, by then abolished but of recent and enduring memory, and colonialism, very much a reality as the United Nations addressed the corrupted mandate system it had been bequeathed by the League of Nations. Understood from this perspective, a focus on racial discrimination rather than on some broader and ultimately amorphous notions of inequality is entirely justifiable, as is a focus on national, ethnical, racial and religious groups, despite the very important issues confronting attacks on political groups.

If genocide is conceived of more broadly, as a crime contemplating the protection of groups in general, then it loses its proximate relationship with racial discrimination. To the extent that it retains its more narrow focus, the two concepts and the two Conventions are joined at the hip. This is even more justifiable today than it was some decades ago given the larger scope recognised for crimes against humanity in modern international criminal law. The criticism that the Genocide Convention leaves a big loophole or an impunity gap cannot now be sustained, even if this might once have been the case. The complementary nature of the Genocide Convention and the Convention on Racial Discrimination should not be understated. To the extent that the Convention on Racial Discrimination is close to ‘the soul of the United Nations’, the Genocide Convention cannot be very far away.