The Crime of Genocide and International Law

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Introduction

War crimes, crimes against humanity, aggression and genocide — international law recognises many international crimes. None of these, however, attract the same attention as genocide does. When allegations of genocide are raised, the world pricks up its ears. Using the term genocide can have far-reaching implications.

1. The historical background

Genocide is not a new phenomenon. Even classical writings recount instances of mass killings, and the colonial era witnessed numerous cases of genocidal violence both in North and Latin America as well as in Africa. The Holocaust was neither the first nor the last genocide.

Nonetheless, it was the extermination of the European Jews that gave rise to international law defining and prohibiting the crime of genocide. In 1944, the Polish lawyer Raphael Lemkin created the very term ‘genocide’, joining the Greek word ‘genos’ (race, nation or tribe) and the Latin suffix ‘cide’ (from ‘caedere’, to kill). Lemkin had managed to escape the Holocaust via Sweden before reaching the United States where he published Axis Rule in Occupied Europe, a detailed account of the occupation regime imposed by Nazi Germany.

Genocide according to Lemkin

In this book, Axis Rule in Occupied Europe, Lemkin introduced the concept of genocide, defining it as: ‘the destruction of a nation or of an ethnic group […] a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.’
Lemkin’s work was clearly motivated by his personal experience of the war and the Holocaust, including the loss of dozens of family members. However, Lemkin also built on his earlier work concerning atrocities committed against the Armenians and in various European colonies.

**Nuremberg War Crime Trial**

In 1945 and 1946 the triumphant allied forces installed the International Military Tribunal at the German city of Nuremberg. Here some of the most important captured Nazi suspects were tried and in most cases convicted. Among them were Hermann Göring, Arthur Seyss-Inquart, Albert Speer and Joachim von Ribbentrop. Adolf Hitler, Joseph Goebbels and Heinrich Himmler were not tried because they had committed suicide at the end of the war.

At the Nuremberg trial, the new concept of genocide did not play any significant role. As a matter of fact, genocide was not incorporated into the rules establishing the Nuremberg Tribunal that was to hear the cases against the political and military leadership of Nazi Germany. This was in part due to the fact that Lemkin’s invention of the term ‘genocide’ did not yet exist under international law. Immediately after the war, the attention did not centre on the policy of extermination, but on Nazi Germany’s wars of aggression which were referred to as ‘the supreme crime’. Lemkin was not pleased with this. He had personally travelled to Nuremberg to lobby for the inclusion of genocide charges into the proceedings, but to no avail. Lemkin redirected his efforts towards lobbying the newly founded United Nations to adopt a legal
instrument prohibiting genocide — and so it did in 1948, just four years after Lemkin had published his first thoughts on genocide.

At the time, the UN Genocide Convention was considered a milestone. The euphoric assessment of the new genocide treaty was, however, not a sentiment shared by all observers. International law professor Georg Schwarzenberger commented that the ‘whole Convention is based on the assumption of virtuous governments and criminal individuals, a reversal of the truth (...) [T]he Convention is unnecessary where it can be applied and inapplicable where it may be necessary. It is an insult to intelligence and dangerous (...) [and will] prove on examination to mark no real advance.’

Today, we know that the critics were not totally wrong. The pledge given in the preamble of the Genocide Convention ‘to liberate mankind from such an odious scourge’ in order to avoid for the future such ‘great losses on humanity’, this pledge has not been realised. Instead the period after 1948 also saw numerous instances of genocidal violence, turning the 20th century
into what some have called the ‘century of genocide.’ The writer David Rieff therefore once quipped that the pledge of ‘never again’ only could be understood to mean ‘never again will Germans kill Jews in Europe’.

2. The UN Genocide Convention on the Prevention and Punishment of the Crime of Genocide

The UN Genocide Convention was adopted by the UN General Assembly on 9 December 1948, one day after the Universal Declaration of Human Rights was passed by the same forum. The treaty was drafted and negotiated under the auspices of the United Nations — therefore the reference to the UN in the title of the instrument — but is otherwise an independent international treaty among states and not linked to the United Nations as such. As with all international treaties, the Genocide Convention only became a binding legal instrument once a sufficient number of states had formally agreed to be bound by this new treaty. This was the case on 12 January 1951 and since then, the Genocide Convention has been in force and applies to its member states. This means that crimes committed prior to 1951 cannot be legally prosecuted under the Genocide Convention. This is true, for example, for both the Armenian mass killings, the murderous persecution of the Sinti and Roma and the Holocaust. That being said, one can of course still apply the label ‘genocide’ to these and other crimes outside the courtroom.

Today the UN Genocide Convention counts 142 member states. This means that more than 50 states have not yet ratified the Genocide Convention, including states such as Somalia and Japan. This does not mean, however, that these states can commit genocide without violating international law. Instead these states are bound by what is called customary international law, building on the long-standing general practice and legal opinion of the international community of states pursuant to which genocide is a crime under international law. This has been confirmed in numerous international judgements. Indeed, the prohibition of genocide is said to enjoy *jus cogens* status.

**Jus cogens**

This is a Latin term meaning ‘compelling law’. It refers to a special category of international law norms which are considered to be peremptory so that no state can legally deviate from them. Other norms with a *jus cogens* status include the prohibition of slavery and the prohibition of torture. International law does not explicitly regulate, however, what the consequences of a violation of a *jus cogens* norm are.

2.1 Provisions

The UN Genocide Convention consists of nineteen provisions. The Convention outlines how member states are to deal with the crime of genocide and puts great emphasis on how to punish it, including several provisions that refer to criminal law and the accountability of individuals. At the same time the Genocide Convention could be characterised as a human rights
instrument, as it sets out to protect the right of existence of certain groups listed in the treaty. Finally, the Genocide Convention also deals with states and their responsibilities, as it concerns their options and duties as regards the prevention and punishment of the crime of genocide. The UN Genocide Convention is thus an international treaty that both deals with human rights issues, questions of criminal law and state responsibility.

Turning to specific provisions of the Genocide Convention, Article 1 stipulates that member states ‘undertake to prevent and punish the crime of genocide’. In Article 2 the treaty defines the crime of genocide. Remarkably, the Genocide Convention does not establish any specific institutions such as a court or a committee to supervise the implementation of the aforementioned duties. Article 6 refers to an international penal tribunal, but the treaty stops short of establishing it — reflecting the lack of political will to do so at the time of the treaty’s drafting. In Article 9 the Genocide Convention refers to an actual tool to address genocide: state parties to the treaty can take disputes with other member states concerning the Convention to the International Court of Justice (ICJ). This court does not deal with questions of individual criminal accountability, but settles inter-state disputes. In practice, however, this reference to the ICJ has not resulted into very many cases.

3. The definition of genocide under international law

The body of scholarly literature on genocide contains an abundance of definitions of genocide. Many genocide scholars present their own, personal definition of genocide, and that leads to different cases being included in the discussion. In international law, things are in a sense more simple as regards what is genocide: there is only one definition and that has been the same ever since the UN Genocide Convention was adopted in 1948. Governments have had numerous opportunities to amend the original definition to address any shortcomings or new developments — but never have done so. As late as in 1998, on the 50th anniversary of the Genocide Convention, states decided to use the original definition word by word when drafting the treaty establishing the new International Criminal Court. This is interesting to note because one of the reasons that genocide scholars keep on designing new definitions is that the legal definition has been widely criticised ever since its adoption.

<table>
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<th>Definition</th>
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<td>In the present Convention, genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:</td>
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<td>(a) Killing members of the group;</td>
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<td>(b) Causing serious bodily or mental harm to members of the group;</td>
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<tr>
<td>(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;</td>
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3.1 Intent

A first reading of the definition allows us to make several important observations. First, the definition is composed of two equally important parts describing respectively the perpetrator's intent and then the actions (in letters a–e) that can constitute genocide. Concerning the perpetrator’s intent, the definition requires a very specific intent, i.e. the intent to focus on destroying one of the protected groups and not merely the intent to commit one of the genocidal acts. The question is thus not only whether the perpetrator wanted to kill an individual person — but whether he or she did so intending to destroy the group the victims belonged to.

This form of intent is difficult to prove; in court proceedings, judges often infer the intent from the actual events on the ground, for example from speeches or writings authored by the perpetrator. Only if both requirements, including the special intent, are met in a given situation, can one conclude genocide has been committed in terms of international law.

Secondly, and quite different from what one might expect, the legal definition of genocide includes under relevant acts not only ‘killing’, but also other forms of conduct including, for example, the forcible transfer of children. It is important to note that legally speaking genocide does not require mass killings or gas chambers, but can be committed in different ways — it all depends on whether the perpetrator has the requisite intent.

Thirdly, the legal definition of genocide only protects certain groups against destruction, i.e. national, religious, racial and ethnic groups. This listing is not open-ended or exemplary — there are these four groups, no more.

Fourthly, the legal definition does not define genocide as the total annihilation of a group, but makes it a crime to intend to destroy any of these groups in whole or in part. Thus even a brief first survey shows that genocide under international law is quite different from how the layman might define it.

4. Difficulties in practice

Two international tribunals have, in the cases concerning the war in the Former Yugoslavia and the Rwandan genocide, applied the legal definition of genocide and shed more light on its scope and meaning. There are two aspects which deserve our particular attention. As stated, the genocide definition provided by the UN Genocide Convention only protects four specified groups. This has been widely criticised as being too limited and arbitrary, but it can only be changed by those making international law, i.e. states. The work of the tribunals identified another issue: who exactly is protected as a ‘national, ethnic, racial and religious group’? Scrutinising the Rwandan genocide it all of a sudden appeared that the two prevalent groups — the Tutsi and the Hutu — spoke the same language, shared the same customs and were both Chris-
How could the victims then be a distinct ‘ethnic’ group? It took the judges of the relevant tribunal, the International Criminal Tribunal for Rwanda, several years to work out a convincing answer. Now it is generally accepted that the question is not whether the victim group lives up to some abstract definition for ethnic groups taken from an encyclopaedia, but whether the perpetrators have perceived the victims as members of a distinct ethnic, racial etc. group.

Another important question facing the international tribunals was what to make of the definition’s reference to destroying the group ‘in whole or in part.’ The legal definition of genocide is focused on the perpetrator’s intent, not on the success of his or her actions — in other words, for any determination of genocide it is not necessary that the whole victim group has been exterminated. As for the meaning of the ‘in part’ segment, the international case law found that there is no minimum number of victims. Instead, the phrase ‘in part’ involves two considerations, which might be seen as ‘qualitative’ and ‘quantitative’. As for the latter, the tribunals have held that the perpetrator must have aimed at a ‘substantial’ part of the victim group, i.e. a considerable number of individuals. As for ‘quality’, the question to ask is whether the perpetrator aimed at a ‘significant part’ of the group, such as for example its leadership or all the women. This intent can also be focused on a certain geographically limited area. How exactly to apply the ‘in part’ segment, however, remains under discussion.

There are more such difficult questions. For example, in one of the early judgements concerning the Rwandan genocide, the judges held that rape can form part of genocidal violence. This was a remarkable holding, as sexual violence hitherto had not been given much prominence in international criminal law. Consequently, the judgement was celebrated by many as an overdue recognition of the suffering of women during genocides. On first sight the decision makes immediate sense, as rape obviously causes the victim both mental and physical harm. On further thought, however, the question arises whether the perpetrator indeed commits the rape with the intent to destroy the relevant group as such — as required by the legal definition. It is notable that since the first seminal decision classifying rape as genocide there has been very little follow-up in subsequent judgements. Many genocide scholars include sexual violence into their discussions of genocide, but there is still significant room for clarification when applying the legal definition.

**Case No. ICTR-96-4-T, the prosecutor v. Jean-Paul Akayesu, Judgement on 2 September 1998:**

With regard, particularly, to the acts described in paragraphs 12(A) and 12(B) of the Indictment, that is, rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious physical and mental harm on the victims and are even, according to the Chamber,
one of the worst ways of inflicting harm on the victim as he or she suffers both physical and mental harm. In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.

4.1 Cultural genocide and international law

In the non-legal literature on genocide much has been written on how the forceful suppression of traditional languages and customs can lead to the extinction of a given culture — an experience shared by many indigenous people. Under international law, however, the prevalent view is that cultural genocide cannot be squared with the legal definition of genocide, as the phrase ‘intent to destroy’ is understood to focus on the physical destruction of a group, not its culture. Acts that could be considered ‘cultural genocide’ are therefore only included in the legal proceedings when they can help to establish the intent of the perpetrator to physically destroy a group. It could, however, be asked whether this indeed is the only possible reading of the Genocide Convention — perhaps the phrase ‘intent to destroy’ could also accommodate cultural genocide, as the definition itself does not explicitly refer to physical destruction.

5. Genocide scholars and the legal definition of genocide

Overall, the legal definition has shown that it is far more flexible and open for new interpretations than many of its critics had believed. This notwithstanding, many genocide scholars remain critical of the legal definition of genocide. While some of their long-standing criticisms have been addressed in the case law, certain issues remain inherent in the legal definition as it stands.

First of all, many genocide scholars argue that the intent requirement sets too high a threshold, as it is difficult to prove whether, for example, a perpetrator by killing members of a group and persecuting others also intended to destroy the group as such. This issue often arises when discussing campaigns of what has been dubbed ‘ethnic cleansing’. This term describes scenarios where the perpetrator forces another ethnic group to leave their home territory by committing atrocities against members of the group without, though, exterminating the group as such. A relevant example is the war in the former Yugoslavia in the 1990s, when the Bosnian Muslims became the victims of large scale ‘ethnic cleansing’ — a series of crimes
which many victims as well as non-legal scholars described as genocide, while the majority of international lawyers and eventually international tribunals held that the requisite genocidal intent to destroy the group of Bosnian Muslims was lacking. This discussion touches on the essence of the question of what is genocide — and the legal definition gives a narrower answer to the question than may be agreeable to victims and scholars — but for lawyers, the definition has to be applied as it stands.

Another bone of contention is the number of groups protected under the UN Genocide Convention. The legal definition only protects four specific groups — no more. This is for historic reasons; at the time of the drafting there were also other versions on the table, including a definition that would have protected social and political groups. In the end, the Soviet Union and other states succeeded at removing political groups from the definition, a move consented to by the other governments in order to secure a final text acceptable to the largest number of states possible. As a result, a regime can turn against its political opposition and kill each single member of that group — without committing genocide. A relevant example can be seen in Cambodia where the crimes committed by the Khmer Rouge only in part meet the requirements of the legal definition: a minority of the victims was killed because of their membership of a specific ethnic or religious group; by far the largest group of victims belonged to a social segment of the society — but social groups are not protected by the Genocide Convention. Of course, such a policy could still be prosecuted under international law, for example as crimes against humanity, but for many observers there is no convincing argument why these killings should not be classified as genocide, as they concern the purposeful destruction of a group. States have decided not to act on this criticism; under international law only the four aforementioned groups remain protected against genocide.

6. To punish the crime of genocide

Notwithstanding all discussions on its exact scope and meaning, the legal definition of genocide first and foremost accomplishes one thing: it defines a crime and establishes the individual accountability of those breaching the prohibition of genocide. In fact, Article 1 of the UN Genocide Convention states that member states to the treaty ‘undertake to punish genocide’ — in other words, all states ratifying it are under a duty to punish genocide. The Genocide Convention does not set up an international tribunal to implement this duty — it only refers to the future creation of such body.

The Convention’s emphasis is rather on the member states and their national judicial systems. The Convention provides in Article 6 that ‘persons charged with genocide (...) shall be tried by a competent tribunal of the State in the territory of which the act was committed’. Notably, the Convention thus limits the aforementioned duty to punish to the home state of the perpetrators. By way of example this means that Rwanda as member state to the Genocide Convention is under an obligation to punish the perpetrators of the Rwandan genocide — but the Nether-
lands or France are not with regards to the Rwandan genocide. This limitation to some extent lessens the significance of the duty to punish genocide, as the home state most often also will be the one responsible for the mass atrocities to start with — which in turn reduces the likelihood of actual investigations. Only once there has been a shift of power can one expect domestic trials on genocide as, for example, in Bosnia and Rwanda.

6.1 Universal jurisdiction

A more far-reaching duty to punish genocide — one that would apply regardless of the perpetrator’s nationality and the site of the crime — was not agreeable in 1948 and is not included under the Convention. Today, customary international law allows states to prosecute *genocidaires* even when they stem from other countries and have committed the crime elsewhere. While there is still no duty to do so, several countries such as the Netherlands or Germany have enabled their own domestic courts to punish genocide regardless of where it has been committed. This type of prosecution is called universal jurisdiction, as the state’s claim of competence to investigate is not based on the perpetrator’s nationality (nationality principle) or the crime site (territorial principle), but the specific universal condemnation of the crime as shocking to all mankind (universality principle). Universal jurisdiction cases are not without their critics, as they are sometimes portrayed as Western meddling with the domestic affairs of other countries. Universal jurisdiction cases also entail numerous practical challenges. With regards to the Rwandan genocide for example, a Dutch prosecutor would have to investigate crimes that were committed in a country far away, protect witnesses that are not in the Netherlands and organise translation from the local language Kinyarwanda into Dutch. Proponents of universal jurisdiction cases do acknowledge the difficulties, but respond that under some circumstances these outside interventions are all that is available and thus necessary to overcome impunity.
and provide justice to the victims of these crimes. This is particularly true if the genocidal regime has remained in power or is protected against investigations in the relevant state by means of an amnesty.

6.2 State responsibility — The International Court of Justice

At the international level, two different systems have to be distinguished: one to hold individuals accountable, and one to focus on the responsibility of states. State responsibility is incurred when a state violates a norm of international law — such as the prohibition of genocide. The Genocide Convention allows for such matters to be heard before the International Court of Justice (ICJ). This court is the highest judicial organ of the United Nations and is situated in The Hague, the Netherlands. It cannot hear cases concerning individual human rights nor respond to individual complaints, but only serves as a forum for states to settle inter-state disputes. The ICJ does not conclude a case by punishing a state, but makes a finding on whether a state has violated a given rule of international law and whether it should compensate the ‘victim’ state for that violation. In regard to genocide there has only been one ICJ case where the court rendered a judgement on the substance of the matter. This was on 26 February 2007 in a case initiated by Bosnia and Herzegovina against Serbia. Bosnia won the case in that Serbia was held to have violated both the duty to punish and to prevent genocide — but the Court also ruled that Serbia had not herself committed genocide in Bosnia and would not need to compensate Bosnia. Thus, despite Serbia becoming the very first state since the adoption of the Genocide Convention to be held in violation of the treaty, the judgement was not received well in Bosnia.
6.3 Individual responsibility — international criminal tribunals

There is by now a whole range of international and semi-international tribunals where individuals can be prosecuted for violating the prohibition of genocide. To appreciate today's variety of options, it needs to be recalled that it took the international community of states almost half a century from the adoption of the Genocide Convention before it mustered the political will to establish the first tribunal to prosecute individuals guilty of genocide. This happened in 1993 when the UN Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) to hold those accountable that were deemed responsible for the massive human rights violations during the then ongoing conflict in the former Yugoslavia. A year later, the Security Council established another tribunal, the International Criminal Tribunal for Rwanda (ICTR), to prosecuted those with the greatest responsibility for the Rwandan genocide.

Both tribunals were thus created by the UN Security Council, focused on one certain conflict and were designed to be only temporary in their tasks. The ICTR became the institution to issue the first genocide judgement of any international court when, in 1998, it convicted a Rwandan major by the name of Jean Paul Akayesu for genocide. The ICTR has since heard some 60 additional genocide cases and will have to finish its work by 2013 or 14 because the Security Council has decided so. Conversely, the ICTY has only produced a handful of genocide convictions and all of them concern the mass executions in July 1995, when Bosnian Serbs murdered more than 8,000 Bosnian Muslim boys and men at the town of Srebrenica. The ICTY will also soon have to conclude its work.

6.4 The International Criminal Court

The ICTY and ICTR were ground-breaking and standard-setting with their work and thus paved the way for the realisation of a historic project, the establishment of a permanent and universal institution to prosecute international crimes. In 1998, after lengthy and controversial negotiations, the drafting of the founding treaty for the International Criminal Court (ICC) was concluded. Surprisingly, only four years later, this treaty had already gained the support of more than 60 states which committed to the goal of ending impunity for genocide and other international crimes, which in turn meant that the Court could become active and start its work on 1 July 2002. Today the court has 120 member states, including all EU members, most Latin American states, more than 30 African states, but not the United States, Russia, China, India or Israel. It also is situated in The Hague, but because of the separate treaty is not a UN organ, but an independent international organisation. The ICC has no police force and thus depends on the political support of its members and can only hear cases against individuals believed to be responsible for genocide or other international crimes if the relevant home state is not able or willing to carry out the investigation or prosecution (the so-called principle of complementarity). The ICC rendered its very first judgement on 14 March 2012. Thomas Lubanga, a rebel leader from the Democratic Republic of Congo, was found guilty of enlisting and using child soldiers.
In addition, the Court has issued a number of arrest warrants, including one against the sitting president of Sudan, Omar Al Bashir. The ICC Prosecutor views the ongoing violence in the Darfur province of Sudan as genocide and asserts that Bashir is guilty of genocide. So far Sudan has rejected any cooperation with the Court — but the difference between the ICC and all other international institutions dealing with international crimes is that the ICC is a permanent institution. It can wait. This may not be enough at the time for the victims of genocide — but it keeps genocide and the international promise to punish genocide on the agenda.

6.5 The hybrid tribunal — the ECCC

There is one last mechanism of international justice to be mentioned here and these are the so-called semi-international or hybrid tribunals. Such a tribunal exists for example to look into the crimes committed by the Khmer Rouge in Cambodia in 1975-1979 and is called the Extraordinary Chambers in the Courts of Cambodia (ECCC). In contrast to the ICC, the ECCC is not a purely international, independent organisation, but is placed within the domestic system and in part also staffed by nationals of the relevant state. The potential benefit of this construction was that unlike the ICC, such a hybrid tribunal would be placed close to the victims and the sites where the crimes were committed. This would both be cheaper and more effective. In addition the involvement of domestic staff would allow for the transfer of knowledge and capacity building. The reality of the Cambodian example, however, is that the hybrid tribunal is very vulnerable to political pressure and interference from the home state government, jeopardising the whole effort to hold genocidaires accountable.

7. Punishing genocidaires

The Genocide Convention focuses on punishing the crime of genocide — but the question is whether the punishment of the perpetrators indeed always is an option, or even the appropri-
ate, most promising answer. Reading this in the context of the Holocaust, even asking the very question may seem frivolous. Of course genocidaires should be punished before a court of law. According to this opinion the question rather ought to be whether any form of punishment ever could be appropriate to respond to the horrors of genocide.

But then there is the case of the Rwandan genocide. In little more than 100 days, in a country of some 8 million people, more than 800,000 Tutsi were slaughtered — almost three quarters of the country’s total Tutsi population. This genocide was not committed by means of gas chambers or mass executions; instead most of the killings were done by clubbing, stabbing, and so on. It is believed that several hundred thousand individuals took part in the killings. After the genocide there were only some 40 lawyers left in Rwanda to deal with this — the rest had either been killed or fled the country. To prosecute the perpetrators of the genocide before regular courts in Rwanda would have been an impossible task and literally have taken hundreds of years. At the same time, many Rwandans also questioned whether an exclusive focus on punishment would allow the country to achieve any meaningful reconciliation. After all, the genocide stemmed from an internal struggle for power among the two groups — Tutsi and Hutu — living side by side in the same communities, both prior to and after the genocide.

The complex situation in post-genocide Rwanda resulted into a whole variety of different mechanisms being used to address the crimes. There was the aforementioned International Criminal Tribunal for Rwanda to prosecute the main and top level perpetrators of the genocide; there were the domestic courts of Rwanda to address the perpetrators one level below; and then there were traditional courts, called gacaca, to hold accountable the low-level perpetrators at the village level. Here a group of villagers without legal education would hear both the accused and the other members of the local community before either acquitting or sentencing the accused to community work or time in prison. Altogether more than one million Rwandans were processed through the gacaca system. Some observers consider this a valuable and meaningful recycling of a traditional justice mechanism; others, especially international human rights organisations, were rather critical, as gacaca did not live up to universal human rights standards, as for example the accused were not provided with defence lawyers. Also the victims of the genocide were divided; some would have preferred proper trials leading to serious prison sentences.

8. Transitional justice

Today all situations of genocide and mass atrocities raise the question of how crimes of the past can be addressed to achieve some form of justice, compensate victims and build a better future. Such efforts — whether trials, traditional forms of justice or truth and reconciliation commissions — belong to a field of research called transitional justice. The overall lesson from the Rwandan experience is that there is no one-size-fits-all solution to transitional justice situations — for each case of massive human rights violations, including genocide, the relevant society and the international community has to consider various factors in designing the ap-
appropriate response to the situation at hand. Punishment is what the Genocide Convention prescribes; punishment is what the victims may yearn for, but it might well be that punishment is only part of the answer when searching for truth, justice and reconciliation.

9. To prevent the crime of genocide

In addition to the duty to punish, the UN Genocide Convention stipulates one other obligation for all its member states: the duty to prevent genocide. The dual focus is already evident in the official title of the genocide treaty: the UN Convention on the Prevention and Punishment of the Crime of Genocide. There is also a substantial link between the two duties. Conflict researchers have shown that impunity — the lack of accountability for gross human rights violations — is one of the key factors facilitating the creation of a genocidal mentality. Conversely, if there is a credible threat of punishment, the potential perpetrator may reconsider whether to engage in a genocidal campaign. There is disagreement in the scholarly literature regarding how effective punishment as deterrence actually can be. Some writers suggest that a low-level perpetrator in the midst of a war might not respond to the vague threat of future prosecutions, but carry on with his orders. Concerning high-level perpetrators, sceptics put forward a different argument questioning the link between punishment and prosecutions. In this regard the question is not so much whether the threat of punishment can have any effect on the perpetrator or not — but rather whether this effect is detrimental to the solution of the conflict or the ending of the genocide. Some scholars argue that high-level perpetrators will continue with their crimes, as they have no incentive to enter into serious peace talks — if all that waits for them is a plane bringing them to the International Criminal Court in The Hague. Thus the threat of punishment could have unintended consequences and prolong the suffering of the victims. Other writers respond that eventually this configuration will work to strengthen the preventative effect of punishment, as in the future, once some high-level perpetrators indeed have been put in prison, political and military leaders will take the threat of an ICC indictment into their considerations before ordering massive human rights violations. This effect is undermined if perpetrators are offered an amnesty instead of continuing through the legal proceedings — not to speak of the victims’ hunger for justice.

9.1 The duty to prevent genocide

The duty to prevent genocide itself is not spelt out in much detail in the UN Convention. Article 8 contains a weak reminder that treaty states can refer matters concerning genocide to the appropriate organs of the United Nations — but this is of course an option open to all UN member states even without their becoming a member of the genocide treaty. The most important provision in regard to prevention is indeed Article 1 of the Convention, according to which member states ‘undertake to prevent’ genocide. Since the aforementioned judgement of the International Court of Justice in the case between Bosnia and Serbia in 2007, it is clear that
this brief statement actually entails a legal — not just a moral or political — duty to prevent genocide. The judges explained how this duty was to be effected. First of all it did not depend on whether a crisis was labelled genocide or not — a matter that often occupies much of the public debate, as shown most recently in the case of Darfur. Rather the duty to prevent genocide makes it necessary to act before one can determine that genocide has been committed, as that is the very idea of prevention. Therefore the duty to prevent is activated as soon as there is a serious threat of genocide. All member states of the UN Convention have to employ all means available to them in accordance with international law to prevent the situation from escalating into genocide. The closer a state is tied geographically, politically and economically to the state where genocide is about to be committed, the more comprehensive the duty to prevent genocide becomes. This was also what the Court pointed out vis-à-vis Serbia, indicating the strong ties Serbia had to the Bosnian Serbs in Bosnia and Herzegovina. The Court did not address the very controversial question under international law of whether states, even without a green light from the UN Security Council (the UN organ that is responsible for international peace and security) can send troops into a third state — without that state’s consent — to prevent an impeding or stop an ongoing genocide. The Court did not refer to such humanitarian interventions, so the debate on whether, for example, the United States or NATO member states have the right or in fact are under an obligation to prevent the next Rwanda. The Court did, however, leave no doubt that all member states of the UN Genocide Convention are under a legal obligation to prevent genocide and prevention, of course, can come in many ways short of an armed intervention, including political and economic pressure.

One of the weak spots of this finding may be that there is no organ under the genocide treaty that can lobby states to meet this duty and later sanction them, if necessary, for non-compliance. It would take a new case before the International Court of Justice, with one state investing political will and courage in bringing another state to the Court, before the duty to prevent genocide would see legal enforcement. Another challenge to effective genocide prevention is that it took 14 years from when Bosnia and Herzegovina instituted proceedings against Serbia until the Court rendered its final judgement on the duty to prevent genocide.

9.2 ‘Responsibility to protect’

In light of these challenges, many observers place more hope on a parallel development at the United Nations. The new buzzword regarding genocide prevention is ‘responsibility to protect’ or in short ‘R2P’. In 2005, on the 60th anniversary of the United Nations, a summit of all state leaders proclaimed in a General Assembly resolution that each state has a responsibility to protect its population from war crimes, crimes against humanity, ethnic cleansing and genocide. On a second level, the international community of states has a responsibility to assist states in exercising R2P by means of capacity building and other means of aid. If a state manifestly fails its responsibility to protect its population, this responsibility passes on to the international
community, which has the responsibility to respond to the crisis through the United Nations and more specifically the UN Security Council. In a way, R2P did not add much to the existing landscape of genocide prevention and certainly no new legal obligations, as General Assembly resolutions are not legally binding — and yet, the introduction of R2P clearly has the potential to strengthen genocide prevention.

First of all, there is a new commitment from all UN member states to prevent the committing of large-scale atrocities and to respond to all the crimes listed in the definition of R2P, including genocide. Secondly, there is conceptual progress, as sovereignty is no longer accepted as the big stumbling block to genocide prevention. Sovereignty has been traditionally understood by many as not interfering with the internal affairs of a given state; R2P redefined sovereignty as a two-sided coin, which protected the sovereign state from outside intervention, but also entailed certain responsibilities so that a state could not invoke its sovereignty to shield itself from international scrutiny in the event of massive human rights violations being committed. As with genocide prevention, it is crucial to recall that responsibility to protect also has a much broader agenda than just armed intervention.

Since its introduction at the United Nations in 2005, R2P has scored mixed results. On the positive side it has found its way into a number of Security Council resolutions and also started to impact the mandates of UN peacekeeping operations. In addition, it has been the topic of annual and substantial debates in the UN General Assembly, pushing forward the discussion on how to implement R2P. For that purpose, the UN has also established an office headed by two high-level officials to advise the UN Secretary General on both genocide prevention and R2P. On the negative side, and not so surprisingly perhaps, it has shown that R2P is not immune against misuse. It was, for example, invoked unilaterally by Russia — and not through the United Nations — during the conflict with Georgia in 2008. It also is dependent on the political goodwill of states, as its mere invocation (as for example with regard to the Darfur crisis) does not suffice to prevent or even stop mass atrocities. A new chapter in the history of R2P was written by the recent UN-authorised NATO intervention in Libya during the spring of 2011, as this initially seemed to be a successful R2P operation to prevent massive crimes being committed in the Libyan town of Benghazi. Eventually, however, the NATO operation also involved giving strong support to the Libyan rebels and thus caused widespread international criticism. Only time will show whether Libya was the first of a series of successful R2P operations or whether now, more than ever, sceptics view R2P as no more than a tool for Western states to impose their political goals.
Major judgements concerning the crime of genocide


This was the first substantive genocide judgement issued by the UN’s highest judicial organ, the International Court of Justice (ICJ). The ICJ does not deal with the criminal accountability of individuals, but looks at the responsibility of states for violating international law. The Court held that Serbia did not commit genocide, but failed both to prevent the genocide committed by Bosnian Serbs at Srebrenica in July 1995 and to punish the perpetrators of this genocide.