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Forward: To Prevent and to Punish: An International Conference in Commemoration of the Sixtieth Anniversary of the Genocide Convention

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FOREWORD:
TO PREVENT AND TO PUNISH: AN INTERNATIONAL CONFERENCE
IN COMMEMORATION OF THE SIXTIETH ANNIVERSARY OF THE
GENOCIDE CONVENTION

Michael P. Scharf & Brianne M. Draffin†*

I. INTRODUCTION

Sixty years ago, on December 9, 1948, the United Nations adopted the Convention for the Prevention and Punishment of the Crime of Genocide. Today, the Genocide Convention has 137 parties and, after decades of dormancy, it has become an important legal tool in the international effort to end impunity for the worst crime known to humankind.

Both the term “genocide” and the Genocide Convention were prompted by the atrocities of Nazi Germany. When British Prime Minister Winston Churchill learned of Hitler’s “final solution” (resulting in the extermination of six million European Jews), Churchill called it “the crime without a name.” Shortly thereafter, Raphael Lemkin, a Jewish refugee from Poland teaching in the United States, coined the term “genocide” in his book *Axis Rule in Occupied Europe* by combining the Greek word “genos” (race) with the Latin word “cide” (killing).¹ This new word quickly gained currency and was included in the charges of the Nuremberg trial indict-

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¹ WILLIAM SCHABAS, UNITED STATES INSTITUTE OF PEACE SPECIAL REPORT, THE GENOCIDE CONVENTION AT FIFTY (1999), <http://www.usip.org/pubs/specialreports/sr990107.pdf>. Lemkin combined the Greek word “genos” (race) with the Latin word “cide” (killing) to arrive at Genocide.

ments, though the Tribunal did not use the term in its judgment. When the United Nations General Assembly adopted the Nuremberg Principles, it specifically declared Genocide to be an international crime and directed that a treaty aimed at its prevention and punishment be drafted.

Genocide is defined in the Genocide Convention as a series of enumerated acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such."² The Convention renders genocide (as well as conspiracy, incitement, and attempt to commit genocide) a crime under international law, requires States Parties to undertake to prevent genocide and to punish those accused of perpetrating such acts, and confirms that official position is not a defense to charges of genocide.³

Despite grand aspirations that the Genocide Convention would make good on the pledge of "Never Again," during its first fifty years the Convention proved to be utterly irrelevant when four million people were murdered in Stalin's purges (1937–1953), five million were annihilated in China's Cultural Revolution (1966–1976), two million were butchered in Cambodia's killing fields (1976–1979), 200,000 were massacred in East Timor (1975–1985), 750,000 were exterminated in Uganda (1971–1987), and 180,000 Kurds were gassed in Iraq (1987–1988).⁴ In none of those cases was there even an attempt to bring the perpetrators to justice, prompting the U.N. High Commissioner for Human Rights to decry: "A person stands a better chance of being tried and judged for killing one human being than for killing 100,000."⁵

Then, with the end of the Cold War and the return of genocide to Europe (in Bosnia) in 1992, the all but forgotten Convention was suddenly back in vogue. In 1993, the Convention's definition of the crime of genocide was inserted verbatim into the Statute of the Security Council-created International Tribunal for the Former Yugoslavia, which was established to hold perpetrators responsible for the extermination of over 250,000 Muslims in Bosnia. The next year, its provisions were introduced into the Statute of the International Criminal Tribunal for Rwanda, which was created to prosecute the massacre of 800,000 Tutsis from April–August 1994. In 1998, the Convention's language was similarly included in the Rome Statute establishing the International Criminal Court (ratified to date by 106 countries), and in 2004 it was inserted into the Statute for the Extraordinary

² Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 78 U.N.T.S. 277.

³ *Id.* at arts. I and IV.

⁴ MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG* xiii–xiv (1997).

⁵ *Id.* at xiv.

Chambers in the Courts of Cambodia, which is poised to begin prosecuting several former Khmer Rouge leaders in the summer of 2008.

The Rwanda Tribunal issued its first of several genocide convictions in 1998. The Yugoslavia Tribunal followed suit shortly thereafter. And in 2007, in the Anfal Campaign Trial Judgment, the Iraqi High Tribunal (IHT) issued the longest ever judicial opinion about the crime of Genocide, coming in at over 900 pages.⁶ The rulings of these tribunals have brought to life provisions of international law that had previously been relegated to the dusty pages of an ineffectual international instrument.

Here in the United States, the “Genocide Accountability Act” was signed into law in December 2007. Enacted thirty years after the United States ratified the Genocide Convention, and sixty years after the Convention was adopted by the United Nations, the Act authorizes U.S. courts to try foreign perpetrators of genocide if they are brought to or found in the United States.⁷ Now instead of merely deporting such individuals, the United States joins a growing list of countries that will prosecute perpetrators of genocide under universal jurisdiction.

2007 also saw an important ruling of the International Court of Justice in the *Case Concerning Application of the Genocide Convention* between Bosnia and Serbia, which had been pending before the Court for over ten years. In its judgment of February 26, 2007, the World Court determined that acts of genocide had been committed by Bosnian Serbs in Srebrenica, Bosnia; but finding the evidence insufficient to conclude that Serbia was in effective control of the perpetrators, the Court cleared Serbia of direct involvement in the Bosnian genocide. Importantly, the Court clarified that the obligations of the Genocide Convention were not limited to a State’s own territory, but rather apply to a State wherever it may be acting. The Court observed that because the government of Serbia was in a position of influence over the Bosnian Serbs with respect to the Srebrenica massacre, Serbia was responsible under the Genocide Convention for its failure to prevent the genocidal attack on the Bosnian town. Moreover, the Court held that Serbia had violated its obligation under the Genocide Convention by failing to apprehend the architect of the Srebrenica massacre, General Radko Mladic, who is present in Serbia, and surrender him to the Yugoslavia Tribunal which had indicted him for acts of genocide.⁸

⁶ The Anfal Campaign Trial Judgment is available on our Grotian Moment Blog at <http://www.law.case.edu/saddamtrial/>.

⁷ Human Rights Watch, *US: New Law Extends Prosecutions for Genocide*, Dec. 24, 2007, <http://hrw.org/english/docs/2007/12/26/usint17650.htm>.

⁸ International Court of Justice, *Summary of the Judgment of 26 February 2007, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, <http://www.icj-cij.org/docket/index.php?sum=667&code=bhy&p1=3&p2=3&case=91&k=f4&p3=5>.

While there have been significant advances in prosecuting the crime of genocide in recent years, there has been much less progress on the Convention's other main goal—prevention. That may be about to change. In a major address on January 25, 2007, the Secretary-General of the United Nations, Ban Ki-Moon, declared that pursuant to the United Nation's newly adopted Responsibility to Protect (R2P) doctrine, the Organization should make genocide prevention the centerpiece of its reform agenda.⁹ To that end, the Council on Foreign Relations has argued that the R2P doctrine should require Security Council permanent members to forgo use of the veto when actions are proposed to halt genocide or bring perpetrators of genocide to justice.¹⁰

The R2P doctrine, however, failed in its first test case: enforcement of the ICJ's ruling in the *Crime of Genocide Case*. Serbia continues to permit Radko Mladic to enjoy de facto sanctuary in its territory, while Russia has used its veto power to prevent the U.N. Security Council from taking any action to induce Serbia to surrender Mladic to the Yugoslavia Tribunal. Similarly, China has used its veto power to frustrate the International Criminal Court's prosecution of those responsible for atrocities in the Darfur region of Sudan. After the United States determined that the situation in Darfur constituted an ongoing genocide, the U.N. Security Council referred the situation to the International Criminal Court (ICC), thereby empowering the Court to prosecute Sudanese perpetrators even though Sudan is not a party to the ICC Statute. When the ICC subsequently indicted Sudanese militia leader Ahmad Muhammad Harun for crimes against humanity, the government of Sudan refused to surrender him and instead appointed him Minister of Human Rights, thereby putting him in charge of the very refugees that troops under his command had attacked in the first place. This set up a perfect test for the new R2P doctrine. But after the Prosecutor of the International Criminal Court reported Sudan's actions to the Security Council, China blocked the Council from even issuing a Presidential Statement condemning Sudan's non-cooperation with the International Criminal Court. China has further made it clear that it would veto any attempt to have the Security Council impose an oil embargo on the Sudan, which most experts believe is the only thing that will halt the genocide.¹¹

Several other test cases are on the horizon, challenging the international community to fulfill the promise of the Genocide Convention. An NGO called Genocide Watch issues three levels of Genocide Alerts® to call

⁹ Council on Foreign Relations News Release, SUDAN TRIB., Jan. 25, 2007, http://www.cfr.org/publication/12458/priority_for_nwe_un_secretarygeneral.html.

¹⁰ *Id.*

¹¹ Katy Glassborow, *China, Russia Quash ICC Efforts to Press Sudan Over Darfur Crimes*, Institute for War and Peace Reporting, Jan. 12, 2008, <http://www.sudantribune.com/spip.php?article25544>.

world attention to ongoing or imminent mass atrocities: (1) a “Genocide Watch” is declared when early warning signs indicate the danger of mass killing or genocide; (2) a “Genocide Warning” is called when genocide is imminent, often indicated by genocidal massacres; and (3) a “Genocide Emergency” is declared when genocide is actually underway. In addition to Darfur, current alerts have been issued for Chad, Kenya, Zimbabwe, Burma, and Uzbekistan.¹²

II. TO PREVENT AND TO PUNISH

Despite the recent spate of genocide jurisprudence at the national and international level, many difficult questions concerning the interpretation and application of the Genocide Convention remain unanswered: Can genocide prosecutions be bartered away for peace without violating international law? Does the obligation to prevent genocide include a license to intervene militarily if the crime is being committed in another country? Does it include a duty not to block international action to halt genocide or prosecute offenders? What are the definitions and contours of the groups that are covered by the Convention? Can there be command responsibility for failure to prevent or punish subordinates who commit genocidal acts, where the crime of genocide requires specific intent? How is conspiracy to be interpreted, since few countries other than the United States and United Kingdom recognize the concept? Can genocide prosecutions truly be fair?

To attempt to answer these and a host of other pressing questions, and to commemorate the Sixtieth anniversary of the negotiation and adoption of the Genocide Convention, the Frederick K. Cox International Law Center at Case Western Reserve University School of Law organized a year-long series of events, beginning with a major international symposium on September 28, 2007, featuring Juan Méndez, U.N. Special Adviser on the Prevention of Genocide; Robert Petit, International Co-Prosecutor of the Cambodia Tribunal; Ra’id Juhi al-Saedi, Chief Investigative Judge of the Iraqi High Tribunal; David Crane, former Chief Prosecutor of the Special Court for Sierra Leone; David Scheffer, former U.S. Ambassador-at-Large for War Crimes Issues; William Schabas, former member of the Truth Commission for Sierra Leone and Director of the Irish Centre for Human Rights; Mark Ellis, Executive Director of the International Bar Association; Roy Gutman, Pulitzer Prize-winning journalist and Foreign Editor, McClatchy Newspapers; and a dozen of the world’s leading war crimes trial practitioners and academic experts in the field. The Conference was made possible by a generous grant from the Wolf Family Foundation and was co-sponsored by the Inamouri International Center for Ethics and Excellence,

¹² Genocide Watch, *News Monitors*, <http://www.genocidewatch.org/resources/newsmonitors.html>.

the International Bar Association, the Robert H. Jackson Center, and the Irish Centre for Human Rights, and served as a Regional Meeting of the American Society of International Law, a Regional Conference of the International Law Association, and the Annual Meeting of the International Association of Penal Law's American National Section.

Our events commemorating the Genocide Convention's sixtieth birthday also included a lecture on October 16, 2007, by Luis Moreno-Ocampo, the Chief Prosecutor of the International Criminal Court, who was the recipient of the 2007 Cox International Humanitarian Award for Advancing Global Justice. Next, Yale Law Professor Michael Reisman delivered the Klatsky Endowed Lecture at Case on January 15, 2008, devoted to the theme of humanitarian intervention to prevent or halt genocide. Then, on January 28, 2008, the President of the Iraqi High Tribunal, the Chief Prosecutor of the Tribunal, and the five judges who presided over the Anfal Campaign Trial, made their first trip out of Baghdad to speak at Case for two hours about the challenges of prosecuting genocide before the IHT.¹³ Finally, on March 18, 2008, U.N. Deputy Legal Counsel, Larry Johnson, spoke at a Cox Center-sponsored speech at the Cleveland City Club about the controversial question of trading justice for peace, in the context of prosecutions before international tribunals.

This special Symposium double issue, marking the fortieth volume of the *Case Western Journal of International Law*, contains the articles, essays, and text of remarks generated from these events. Also included as an Appendix to this volume is a historic document prepared in 1946 by Dr. Nehemiah Robinson that sheds new light on the negotiating history of the Genocide Convention. We believe these scholarly writings make a significant contribution to the literature on preventing, halting, and prosecuting Genocide. In addition, the archived webcasts of the Genocide Conference and lectures may be viewed at any time at <http://law.case.edu/lectures/>.

Following an Introduction by Case Western Reserve University President Barbara Snyder, the issue begins with contributions from the three surviving Nuremberg prosecutors—Benjamin B. Ferencz, Whitney R. Harris, and Case Western Reserve's own Professor Henry T. King, Jr. Professor King reflects on how genocidal crimes were prosecuted at Nuremberg; his first meeting with Raphael Lemkin, who coined the term "genocide"; and the road to the international codification of the crime of genocide. Mr. Ferencz describes his experiences as Chief Prosecutor in the trial of the Einsatzgruppen, during which he used the word "genocide" for the first time in a court of law. Finally, Mr. Harris discusses his experience prosecuting

¹³ The IHT Trial Judges presentation was not webcast for security reasons, but the transcript of the entire event is available on our Grotian Moment Blog, at <http://www.law.case.edu/saddamtrial>.

members of the Gestapo and other German security officers at Nuremberg and his interviews of Rudolf Hoess, the Commandant of Auschwitz.¹⁴ The submissions of the three Nuremberg prosecutors are followed by an article by Professor William A. Schabas, which discusses how the failure of the Nuremberg trials to reach beyond war crimes and address peacetime occurrences of genocide spurred the creation of the Genocide Convention.¹⁵

The next collection of submissions focuses on the challenge of preventing genocide throughout the world. First, Professor W. Michael Reisman observes that even while the mantra repeated after the conclusion of the Genocide Convention was “Never Again,” the international community’s primary mechanism for dealing with genocide remains *ex post facto* punishment, not prevention. Professor Reisman points out that because genocide takes time and large-scale organization, it is preventable, and he elucidates state responsibility to intervene, arrest perpetrators and protect people from genocide.¹⁶ Juan E. Méndez, in his keynote address at the 2007 Genocide symposium, discusses the necessity of fostering the political will to support early intervention into genocide and the implications of the Responsibility to Protect doctrine. Mr. Méndez argues that while justice and accountability should be international priorities, these aims should be used to demonstrate that *genocidaires* cannot commit atrocities unabatedly and later hide in impunity.¹⁷ In their article, Professor Paul R. Williams and Meghan E. Stewart proclaim that the international community has lost a key tool in preventing genocide and crimes against humanity by failing to define and establish a clear legal basis for humanitarian intervention.¹⁸ More optimistically, Ambassador David Scheffer examines where the line should be drawn between atrocity crimes that would trigger military intervention under the Responsibility to Protect doctrine and crimes that would lack justification for the use of force.¹⁹

The often controversial and political discussion of genocide identification is discussed in the next group of submissions. David M. Crane, former Chief Prosecutor of the Special Court for Sierra Leone, opines that

¹⁴ Henry T. King, Jr., Benjamin B. Ferencz, & Whitney R. Harris, *Origins of the Genocide Convention*, 40 CASE W. RES. J. INT’L L. 13 (2008).

¹⁵ William A. Schabas, *Origins of the Genocide Convention: From Nuremberg to Paris*, 40 CASE W. RES. J. INT’L L. 35 (2008).

¹⁶ W. Michael Reisman, *Acting Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 CASE W. RES. J. INT’L L. 57 (2008).

¹⁷ Juan E. Méndez, *Remarks on Intervention*, 40 CASE W. RES. J. INT’L L. 87 (2008).

¹⁸ Paul R. Williams and Meghan E. Stewart, *Humanitarian Intervention: The New Missing Link in the Fight to Prevent Crimes Against Humanity and Genocide?*, 40 CASE W. RES. J. INT’L L. 97 (2008).

¹⁹ David Scheffer, *Atrocity Crimes Framing the Responsibility to Protect*, 40 CASE W. RES. J. INT’L L. 111 (2008).

the semantics of atrocity crimes should not matter; heinous crimes should be prosecuted with vigor, regardless of what they are called.²⁰ On the other hand, Professor Michael Kelly explores both why and how leaders and lawyers agonize over the genocide "label."²¹ Finally, in the article written by Robert Petit, the International Co-Prosecutor of the Extraordinary Chambers in the Courts of Cambodia, Stuart Ford and Neha Jain, the authors identify and discuss the key elements of a particular kind of genocide, that of religious genocide, through case studies of Tibet, Iraq, and the Indian state of Gujarat.²²

The next set of submissions examines the hurdles in bringing *genocidaires* to justice. Luis Moreno-Ocampo, the Prosecutor of the International Criminal Court, discusses the various roles of states, international organizations, academic writers, and the ICC Prosecutor himself in prosecuting and punishing genocide, crimes against humanity, and war crimes.²³ Christine Chung, who served as the lead trial lawyer in the ICC's first case, presents a critique of the ability of the International Criminal Court to function as a tool for attaining the objectives of the Genocide Convention.²⁴ Professor John Quigley, who was Bosnia's Counsel in the *Crime of Genocide Case*, turns to the International Court of Justice and examines its limited jurisdiction and ability to hold states accountable for genocide, or for failing to prevent or punish the perpetrators of genocide within their borders.²⁵ Ra'id Juhi al-Saedi, the former Chief Investigative Judge of the Iraqi High Tribunal, discusses the challenges, procedures and implications related to the investigation and punishment of atrocity crimes committed in Iraq.²⁶ Crossing to the other side of the courtroom, Dutch criminal defense attorney Mikhail Wladimiroff, who served as Amicus Counsel during the Slobodan

²⁰ David M. Crane, "Boxed In:" *Semantic Indifference to Atrocity*, 40 CASE W. RES. J. INT'L L. 137 (2008).

²¹ Michael J. Kelly, "Genocide"—*The Power of a Label*, 40 CASE W. RES. J. INT'L L. 147 (2008).

²² Robert Petit, Stuart Ford & Neha Jain, *Exploring Critical Issues in Religious Genocide: Case Studies of Violence in Tibet, Iraq and Gujarat*, 40 CASE W. RES. J. INT'L L. 163 (2008).

²³ Luis Moreno-Ocampo, *The International Criminal Court: Seeking Global Justice*, 40 CASE W. RES. J. INT'L L. 215 (2008).

²⁴ Christine H. Chung, *The Punishment and Prevention of Genocide: The International Criminal Court as a Benchmark of Progress and Need*, 40 CASE W. RES. J. INT'L L. 227 (2008).

²⁵ John Quigley, *International Court of Justice as a Forum for Genocide Cases*, 40 CASE W. RES. J. INT'L L. 243 (2008).

²⁶ Ra'id Juhi al-Saedi, *Investigative Integration of the Code of the Higher Iraqi Penal Court and the General Principles of the Iraqi Penal Code: Basic Outcomes*, 40 CASE W. RES. J. INT'L L. 265 (2008).

Milosevic trial, identifies and addresses the unique challenges facing counsel defending individuals in a genocide trial.²⁷

Finally, we are privileged to reprint Dr. Nehemiah Robinson's 1949 commentary, entitled *The Genocide Convention: Its Origins and Interpretation*, as an appendix, with a special introduction by Donald Ferencz, Director of the Planethood Foundation.²⁸ Dr. Robinson's work provides a unique insider's perspective on the drafting history of the Genocide Convention and an insightful analysis of each of the Convention's provisions.²⁹

While some of the authors herein espoused very different views regarding the prevention and punishment of genocide, a consistent theme emerged that one cannot be pursued without the other. The punishment of *genocidaires* cannot be successful without mechanisms to prevent future genocide, and the international community cannot successfully prevent genocide while the perpetrators of past genocides live in impunity.

We are extremely grateful to our distinguished panelists and speakers for their contributions to this Symposium issue, to the student editors of this volume, especially the Editor-in-Chief Adam F. Kinney, who worked diligently on the preparation of this publication, and for the generosity of the Wolf Family Foundation, which made this all possible.

²⁷ Mikhail Wladimiroff, *Defending Individuals Accused of Genocide*, 40 CASE W. RES. J. INT'L L. 271 (2008).

²⁸ Donald M. Ferencz, *Commentaries on the Genocide Convention: A Reintroduction to Nehemiah Robinson*, 40 CASE W. RES. J. INT'L L. 311 (2008).

²⁹ NEHEMIAH ROBINSON, *THE GENOCIDE CONVENTION: ITS ORIGINS AND INTERPRETATION* (World Jewish Congress, 1949), reprinted in 40 CASE W. RES. J. INT'L L. 315 (2008).