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## GENOCIDE POLITICS AND POLICY: CONFERENCE REMARKS

*Madeline Morris*<sup>†</sup>

The conduct constituting genocide is repugnant, reprehensible in the highest degree, and, obviously, needs to be prevented or punished. Proceeding from that premise, we may now ask whether the specification of genocide as a separate crime – a crime *distinct* from other crimes against humanity – is good law or good policy. My conclusion is that it is neither good law nor good policy – that, in fact, more is lost than is gained by emphasizing the distinction between genocide and crimes against humanity of other types.

I come to this conclusion for two reasons. First, there is simply a lack of compelling moral or normative reasons to set genocide apart from other crimes against humanity. And second, there are substantial costs entailed in maintaining that legal distinction. After first situating genocide as a *type* of crime against humanity, I will then lay out the theoretical and practical reasons that cause me to conclude that it is not desirable to place genocide in a class by itself.

Genocide is defined in the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”) as:

Any of the following acts, when committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; or, forcibly transferring children of the group to another group.<sup>1</sup>

That definition has been incorporated into the statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda<sup>2</sup>

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<sup>1</sup> Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, art. 2, 78 U.N.T.S. 277.

<sup>2</sup> Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, in *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, Annex, art. 4(2), U.N. Doc. S/25704 (1993) [hereinafter *ICTY Statute*]; Statute of the International Tribunal for the Prosecution of persons

and, most recently, into the statute of the International Criminal Court (“ICC”).<sup>3</sup>

The term “genocide” was coined by Raphael Lemkin in his 1944 book “Axis Rule in Occupied Europe.”<sup>4</sup> Lemkin intended the term to capture the character of the crimes of the Holocaust. While the prosecutor before the Nuremberg tribunal did use the term “genocide” in proceedings before the court<sup>5</sup> and in the indictment of October 8, 1945<sup>6</sup>, the charters of the International Military Tribunals at Nuremberg and Tokyo did not contain the word “genocide”<sup>7</sup>, and the judgments of the two tribunals contained no reference to the term.<sup>8</sup> For conduct that comprised the elements now considered to constitute genocide, defendants at the post-war international tribunals were convicted of war crimes or crimes against humanity. It was after those post-war prosecutions that the Genocide Convention was negotiated, under UN auspices, during 1947-48, entering into force in 1951.

Looking at the relevant conventions and statutes, from the Genocide Convention through the ICC Statute, we can see that genocide is a type or subcategory of crime against humanity. Crimes against humanity are defined as a set of acts, similar to – though somewhat broader than – the acts listed in the definition of genocide, *when* those acts are “committed as

Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other Such Violations Committed in the territory of Neighboring States, S.C. Res. 955, U.N. SCOR, 49th Sess., 4353d mtg., Annex, at art.(2)(2), U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

<sup>3</sup> Rome Statute of the International Criminal Court, July 17, 1998, art.6, U.N. DOC. A/CONF. 183/9 (1998) [hereinafter ICC Statute].

<sup>4</sup> See RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAW OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* 79 (1944).

<sup>5</sup> See, e.g., *NUREMBERG TRIAL PROCEEDINGS, ONE HUNDRED AND EIGHTY-NINTH DAY*, July 29, 1946, *reprinted in* THE AVALON PROJECT AT YALE LAW SCHOOL, VOL. 19, *NUREMBERG TRIAL PROCEEDINGS*, <http://www.yale.edu/lawweb/avalon/imt/proc/v19menu.htm> (last visited Feb. 13, 2004).

<sup>6</sup> *Indictment*, International Military Tribunal v. Hermann W. Goering. Count 3, Sec. VIII, para. (a), *reprinted in* THE AVALON PROJECT AT YALE LAW SCHOOL, VOL. 1, *NUREMBERG TRIAL PROCEEDINGS*, available at <http://www.yale.edu/lawweb/avalon/imt/proc/count3.htm> (last visited Feb. 13, 2004).

<sup>7</sup> See Charter of the International Military Tribunal, *in* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, annex, Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 279; Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. 1589, 4 Bevans 20 (amended Apr. 26, 1946, 4 Bevans 27).

<sup>8</sup> See Judgment of the International Military Tribunal, Sept. 30, 1946, *reprinted in* RICHARD A. FALK, *CRIMES OF WAR* 96 (1971); Judgment of the International Military Tribunal for the Far East, *reprinted in* THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, 26 APRIL 1946 – 12 NOVEMBER 1948 (B.V.A. Röling & C.F. Rüter eds. 1977).

part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>9</sup> Genocide thus is a *form* of crime against humanity: A crime against humanity constitutes genocide when the specified act is committed *with intent to destroy a national, ethnic, racial or religious group, as such*.<sup>10</sup>

That said, we may now consider what is to be gained and to be lost in distinguishing genocide as an offense separate from other crimes against humanity. I will argue that drawing that distinction is, on balance, neither warranted nor desirable.

The essential feature distinguishing genocide from other crimes against humanity is the element of intent to destroy a group defined by one or more of the four specified criteria: race, ethnicity, nationality, or religion. It is not self-evident, from a moral or normative standpoint, that an atrocity committed with the intent to destroy a group defined by race, ethnicity, nationality or religion is *per se* more grave than an atrocity committed with intent to destroy a group defined by other characteristics, or even an atrocity committed against a random group of individuals.

Controversy has, for decades, surrounded the question whether the four criteria of race, ethnicity, nationality, and religion, should constitute

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<sup>9</sup> See, e.g., ICTR Statute, *supra* note 2, at art. 3; ICC Statute, *supra* note 3, at art. 7. The ICC Statute defines crimes against humanity as:

[A]ny of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. *Id.*

<sup>10</sup> The character of genocide as a *type* of crime against humanity is reflected particularly clearly in the ICC Elements of Crimes. *Report of the Preparatory Commission for the International Criminal Court Addendum: Finalized Draft Text of the Elements of Crimes*, U.N. Doc. PCNICC/2000/INF/3/Add.2 (2000) [hereinafter ICC Elements of Crimes]. The ICC elements of *genocide* require proof that “[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group *or* was conduct that could itself effect such destruction.” *Id.* at art. 6(a)(4), 6(b)(4), 6(c)(5), 6(d)(5), 6(e)(7) (emphasis added). That element, which is roughly analogous to the element in the definition of crimes against humanity requiring that the conduct was part of a “widespread or systematic attack,” further highlights the character of genocide as a *type* of crime against humanity.

the exhaustive list in the definition of genocide. In the negotiation of the Genocide Convention in 1947-48, the controversy centered primarily on whether political groups should be added to the list.<sup>11</sup> Those opposed to the inclusion of political groups, led by the Soviet Union, made a number of arguments. First, they argued, political groups should be excluded because, since political association is voluntary and not immutable, political groups are inherently impermanent and unstable.<sup>12</sup> Second, they argued, the inclusion of political groups in the coverage of the Genocide Convention would discourage states from participating in the Convention for fear of interference by international authorities in the internal political affairs of sovereign states.<sup>13</sup> Third, a slippery-slope argument was made to the effect that, if political groups were included, then the inclusion of economic, professional, and other groups would likely soon follow.<sup>14</sup> Ultimately, political groups were excluded from the definition of genocide in the Genocide Convention.

National law, developed during the same era, varied on this point. The penal code of Ethiopia, for example, explicitly includes political groups within the definition of genocide.<sup>15</sup> Romanian genocide law incorporates the broadest definition, referring simply to the destruction of "social groups."<sup>16</sup>

Not only is there continuing disagreement on this issue reflected at the level of national law, but the exclusion of political groups has also continued to be a source of contention internationally. In the negotiation of the ICC Statute – including even the negotiations at the final diplomatic conference at which the ICC Statute was adopted – attempts continued to include political groups within the definition of genocide in the ICC Statute.<sup>17</sup>

In addition to the controversy concerning the inclusion of *political* groups within the definition of genocide, there has also been sustained controversy over the inclusion of other social categories. In the early period of the ICC negotiations, recommendations were made to include

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<sup>11</sup> See WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 63 (2000).

<sup>12</sup> *Id.* at 134-137.

<sup>13</sup> *Id.* at 137.

<sup>14</sup> *Id.* at 113, 136.

<sup>15</sup> Penal Code of the Empire of Ethiopia of 1957 art. 281 (Eth.). Ethiopian law does not distinguish between genocide and crimes against humanity, but rather lists the two as a single offense ("Genocide; Crimes Against Humanity") within a single article of the penal code. *See id.*

<sup>16</sup> See Romanian Socialist Republic Penal Code art. 356 (Rom.), available at <http://www.preventgenocide.org/law/domestic/romania.htm> (last visited Sept. 22, 2003).

<sup>17</sup> See generally Phillipe Kirsch & John Holmes, *The Rome Conference of the International Criminal Court: The Negotiating Process*, 93 Am. J. Int'l L. 2 (1999).

other social groups such as groups based on gender or sexual orientation.<sup>18</sup> All of these suggestions ultimately were rejected; the final version of the ICC Statute incorporates the same “list of four” as was adopted in the Genocide Convention and later reiterated in the statutes of the *ad hoc* tribunals for the former Yugoslavia and Rwanda. Political and other social groups are thus excluded from the *international* definitions of genocide.

Perhaps that was the right outcome. Certainly, some commentators are of the view that the destruction of a racial, ethnic, national, or religious group is graver than the destruction of other social groups (that is, graver than the destruction of social groups defined by other criteria).<sup>19</sup> But that intuition eludes me. I *understand* the point, but am left unmoved by the contention that the four categories identified are the most significant social groups. In fact, it strikes me that positioning race, ethnicity, nationality and religion above – and as more fundamental than – other social categories fosters a world view that places special saliency on precisely those categories. In that way, singling out race, ethnicity, nationality, and religion as the categories of most special significance might even tend to foster the very sort of thinking that is at the heart of the genocidal project.

Whatever our intuitions concerning the normative significance of particular social categories, there is an additional, *practical* difficulty that emerges from distinguishing genocide from other crimes against humanity. The distinction of genocide from other crimes against humanity tends to distract attention from the essential wrongdoing. Instead of focusing on the central problem – the systematic annihilation of civilian populations – attention becomes diverted to subsidiary issues concerning the content and application of the criteria distinguishing genocide from crimes against humanity. The distinction of genocide from other crimes against humanity leads, for example, to discussion of whether religious convictions are more immutable than political beliefs (in order to explain why destruction of religious groups but not political groups should come within the definition of genocide); or attention is focused on whether attacks based on social class are or are not as reprehensible as attacks based on nationality (and whether, therefore, the slaughter of Kulaks was *not* genocide while the slaughter of the Armenians *was*); and so on. The criteria distinguishing genocide from crimes against humanity also raise ambiguities in the characterization of perpetrators’ motives. There was, for example, discussion of whether the slaughter of Tutsi in Rwanda in 1994 could be characterized as the targeting of a political rather than ethnic group, and, if

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<sup>18</sup> See Rhonda Copelon, *International Conference: Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L.J. 217, 235-238 (2000).

<sup>19</sup> See, e.g., Schabas, *supra* note 11, at 113-114, 150.

so, whether perpetrators could thereby evade the characterization of their conduct as genocide.<sup>20</sup>

Along similar lines, I recall a rather bizarre discussion in Serbia in 2001. It was at a training session for Serbian judges, prosecutors, and defense counsel preparing for possible war-crimes trials at the national level in Serbia. The conversation lapsed into an almost surreal tangent about whether various horrific fact patterns would or would not constitute genocide – depending upon whether the targeted group was properly conceived of as an ethnicity; or depending upon whether the slaughter of some subset of the group (for instance, only the males) should count.<sup>21</sup> I was left quite certain that we were losing sight of the essentials because of the allure of a genocide conviction as compared with a “mere” conviction for crimes against humanity.

In addition to creating a distraction from the central problem, the identification of genocide as a distinct offense also leads to an unfortunate sort of competition for the use of the term. Genocide is frequently identified as the most serious of all international crimes. It is not infrequently referred to as “the crime of crimes.”<sup>22</sup> Because of this special and elevated status, there is a tendency, among advocates of various causes, to apply the label of “genocide” to an ever-broadening range of conduct in order to claim the rhetorical advantages that the term has to offer.<sup>23</sup> Perhaps partly in reaction to the tendency to use the term “genocide” promiscuously – as well as for other reasons – there are countervailing efforts, made by other groups, to claim that a very small set of events have actually constituted genocide, with the most extreme claim being that there has been only one true genocide, that being the Holocaust.<sup>24</sup> Again, this does not seem like a fruitful focus of the limited energies available for the prevention or punishment of the atrocities in question.

If there were something important to be gained by the distinction between genocide and other crimes against humanity, then we might be willing to countenance the associated drawbacks and pitfalls, both theoretical and practical. But it is not clear what the payoff of the

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<sup>20</sup> See, e.g., *Final Report of the Commission of Experts on Rwanda*, at ¶ 158, U.N. Doc. S/1994/1405 (1994).

<sup>21</sup> See author's notes from Specialized Training Seminar in International Humanitarian Law, Belgrade, Yugoslavia, convened by the Humanitarian Law Center, Belgrade and the International Bar Association, August 2001.

<sup>22</sup> See, e.g., *Prosecutor v. Kambanda, Judgement and Sentence, Trial Chamber, I.C.T.R.*, No. ICTR-97-23-S, ¶ 16(1998); See generally Schabas, *supra* note 11.

<sup>23</sup> See Schabas, *supra* note 11, at 102-105 (arguing political groups by their nature would benefit from being a protected group).

<sup>24</sup> See, e.g., Steven T. Katz, *The Uniqueness of the Holocaust: The Historical Dimension*, in *IS THE HOLOCAUST UNIQUE: PERSPECTIVES ON COMPARATIVE GENOCIDE* 19 (Alan S. Rosenbaum ed., 1996).

distinction really is. The category of “crimes against humanity” is sufficiently grave and condemnatory to serve the relevant purposes. It captures the appropriate meaning and opprobrium. To attempt to subdivide the category of crimes against humanity into a rank-ordered hierarchy of horrors only distracts from the magnitude of the atrocities in question and tends to diminish the gravity of crimes against humanity.

In my view, it would have been better if genocide had not emerged as a separate offense from crimes against humanity. But it has; that is a historical fact. At this stage, it would be politically impossible for a prosecutor prosecuting conduct with the elements of genocide to prosecute it not as genocide but “merely” as crimes against humanity. I consider that unfortunate. That being the case, I would want to cabin rather than to expand the “genocide” category – and would want to rely as much as possible on the charge of crimes against humanity – and to augment its impact and bite.

There is every reason to publicize and to act against crimes of this character – crimes against humanity of *all* types – and to attempt to mobilize governments and other actors to prevent and to punish the conduct. *That* should be the focus and the goal.

