CHAPTER 2

THE GENOCIDE CONVENTION

Background to the Convention

2.1 The term 'genocide', in the sense of a crime against humanity aimed at the extermination of any civil population, has only come into general use in the English language since the end of World War II. This new word, for an ancient crime, was coined by the Polish jurist, Raphael Lemkin. As early as in 1933 Lemkin had advocated that the destruction of racial, religious or social groups should be declared a crime under the law of nations. Lemkin's proposals seeking recognition of the concept were rejected at international conferences of the time.[1]

2.2 In 1944, Lemkin advocated the use of the term 'genocide' to describe the destruction of a nation or of an ethnic group. He noted the 'specific losses to civilisation in the form of cultural contributions which can be made only by groups of people united through national, racial or cultural characteristics', and characterised genocide as 'one of the most complete and glaring illustrations of the violation of international law and the laws of humanity.'[2]

2.3 Following World War II, the international community accepted the responsibility of constructing an international order aimed at avoiding the recurrence of state-sanctioned racist policies that are directed against specific groups. One of the first human rights treaties adopted by the newly established United Nations organisation was the international Convention on the Prevention and Punishment of the Crime of Genocide. On 11 December 1946, at its first session, the UN General Assembly adopted a resolution formally recognising genocide as a crime under international law. Resolution 96(I) affirmed that:

> Genocide is a crime under international law which the civilised world condemns, and for the commission of which principals and accomplices – whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable.[3]

2.4 Through this prohibition on genocide, the resolution established the crime as a component of customary international law that is binding on all states.

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1 For example, in 1933 in a special report to the Fifth International Conference on Penal Law, Lemkin proposed that certain acts aimed at destroying a racial, religious, or social group should be declared *delicta juris gentium*, distinguishing two separate crimes: 'barbarity', and 'vandalism'. See Patrick Thornberry, *International Law and the Rights of Minorities*, Clarendon Press, Oxford 1991, pp. 60-61

2 Patrick Thornberry, *International Law and the Rights of Minorities*, p. 64

3 *Year Book of the United Nations*, 1946-7, p. 255; Patrick Thornberry, *International Law and the Rights of Minorities*, p. 64

2.5 The Genocide Convention was approved by the General Assembly, in a unanimous vote[4], on 9 December 1948 and entered into force on 12 January 1951.[5] Over 100 States have ratified the Convention.

The Scope of the Convention

2.6 The Preamble to the Convention refers to the General Assembly Resolution of 11 December 1946, which is seen as broader than the scope of the Convention.[6]

2.7 Article I confirms that genocide, whether committed in time of peace or in time of war, is a crime under international law that States parties undertake to prevent and to punish.

2.8 Article II is of particular importance for the purpose of this inquiry. The article lists the acts to be defined as genocide, when "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".

2.9 The five acts constituting genocide are:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

2.10 The crime of genocide can be typified by the intent to destroy the *group*. This distinguishes genocide from the crime of homicide, the killing of an individual person. However, since a group consists of individuals, the group's destruction can only be

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4 The Resolution was passed by 55 votes to none with no abstentions. See Patrick Thornberry, *International Law and the Rights of Minorities*, p. 67. In a speech at the Stockholm International Forum on the Holocaust on 28 January 2000, Michael Naumann, Minister of State at the Chancellery of the Federal Republic of Germany, commented: "The fact that Lemkin's Genocide Convention was adopted by the United Nations unanimously … in 1948 had its price. Only 'national, ethnical, racial or religious groups' … are to be protected from killings. Political and economic groups are not mentioned. The millions of murdered owners of property, for example the so-called kulaks, in the Marxist-Leninist states of the 20th century, were obviously not meant to be the focus of attention." See *Submission No. 9A*, Executive Council of Australian Jewry, p. 111

5 Article XI of the Convention left it open for signature until 31 December 1949. Article XIII provided that the Convention would come into force on the "ninetieth day following the date of deposit of the twentieth instrument of ratification or accession"

6 The process of negotiating the Convention with states inevitably resulted in a narrower treaty than envisaged by the General Assembly Resolution. Although including national and ethnic groups that were not referred to in that Resolution, the Convention omits political as well as 'other' groups cited in the Resolution

achieved by steps taken against individuals. The object of the crime is the group; not every group, but only *national*, *ethnic*, *racial* or *religious* groups. The drafters of the Convention eventually disregarded proposals to also include 'political' groups, on the grounds that such groups were not permanent and their inclusion in the Convention might inhibit States from ratifying the Convention. 'Linguistic' and 'economic' groups were also excluded.[7]

2.11 The crime of genocide exists when there is an intent to destroy the group 'as such'. The history of the Convention shows that the words 'as such' aimed at avoiding the possibility of the perpetrators claiming that the crime had not been committed out of hatred towards the group itself, but for other reasons, such as destruction during war, robbery, profiteering, or the like. Therefore, the Convention does not require proof of further reasons or 'motives' for genocidal actions.[8]

2.12 The intent requirement has proved a significant hurdle for groups seeking to pursue genocide claims, with governments defending claims brought by their indigenous populations invariably invoking the absence of intent in order to deny the existence of genocide.[9]

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7 The drafters of the Convention generally avoided inclusion of groups with no stable, immutable characteristics. A 'political group', for instance, was an 'optional' rather than an 'inevitable' grouping, based on the will of its members and not on factors independent of that will. 'Economic groups' were excluded for similar reasons. 'Linguistic groups' were rejected as Governments viewed language as nearly always an element of national collective identity and did not believe that genocide would be committed because of language as distinct from race, nationality, or religion. Patrick Thornberry, *International Law and the Rights of Minorities*, pp. 68-69

8 Patrick Thornberry, *International Law and the Rights of Minorities*, pp. 74-75. states: '[T]he words 'as such' were inserted by the Venezuelan Representative in the Sixth Committee in substitution for 'on grounds of the national or racial origin, religious belief or political opinion of its [the group] members' in the Ad Hoc Committee's Draft. A difference of opinion ensued in the Sixth Committee on the precise effect of the substitution. In view of this, a statement was included in the report of the Sixth Committee that the Committee, in taking a decision on any proposal, did not necessarily adopt the interpretation of its author'. Thus, according to Drost [P. Drost, *The Crime of State*, 1959]: "In the absence of any words to the contrary, the text offers no pretext to presume the presence of an unwritten, additional element in the definition of the crime. Whatever the ultimate purpose of the deed, whatever the reasons for the perpetration of the crime, whatever the open or secret motives for the acts or measures directed against the life of the protected group, wherever the destruction of human life of members of the group as such takes place, the crime of genocide is fully committed".'

9 See *Submission No. 26*, Law Council of Australia, p. 343. Footnote 16 states that, in response to charges of genocide against the Guyaki and Yanomami Indians, for example, the governments of Brazil and Paraguay have denied intent. The submission cites L. Kuper, *International Action Against Genocide*, Report 53, p.5. The Centre for Comparative Genocide Studies comments: 'The worst-case scenario about the two words 'as such' occurred somewhere around the 1960s when Paraguay was brought before the [United Nations] General Assembly on the charge of genocide of the Ache Indians of that country. The Ambassador got up and explained that, yes, certainly Ache Indians had been killed; they had been killed by bulldozers and Western progress towards uranium mining or forest clearing, or whatever the case may be, and certainly there had been mass killings, but they had not been killed because they were Ache Indians; they happened to be killed because they happened to be in the way of the bulldozers, metaphorically speaking. And they were able to get off the hook because the 'as such' was not sustainable. That leaves me, and I am sure it would leave you, very troubled.' See *Transcript of evidence*, Centre for Comparative Genocide Studies, p. 14

2.13 It is not necessary to intend to achieve the destruction of the entire group for the crime of genocide to have taken place. For this reason, the words 'in part' were introduced to eliminate any doubt.[10]

2.14 There has been some debate among international lawyers in recent years as to whether the intent requirement of the Convention refers to 'general intent' or 'specific intent'.[11] The general intent requirement is easier to establish, requiring only proof that the foreseeable consequences of an act are, or seem likely to be, the destruction of the group. For example, taking a 'general intent' approach, the Human Rights and Equal Opportunity Commission argues that the destruction of Aboriginal groups is the foreseeable consequence of the dispossession of the Aboriginal population from its lands.[12]

2.15 However, current authority, based largely on jurisprudence arising from recent ad hoc International War Crimes Tribunals,[13] suggests that the specific or particular intent (*dolus specialis*) requirement must be fulfilled. 'Specific intent' requires that

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10 There is general consensus that the phrase 'in part' requires the intention to destroy a 'considerable' number of individuals or a 'reasonably significant number, relative to the total of the group as a whole'. The intention to destroy a 'substantial part' of a particular group may relate to a significant section of the group such as its leadership'. See *Submission No.17*, Stephen Tully, p.200. Tully cites as authorities the International Criminal Tribunal for Rwanda, the International Law Commission and the Special Rapporteur of the Sub-Commission on Genocide. There are different views as to the extent of the requisite partial destruction. According to Y. Dinstein in 'International Criminal Law', *Israel Yearbook on Human Rights* 55, (5:1975) p. 55: 'The murder of a single individual may be characterised as genocide if it constitutes a part of a series of acts designed to attain the destruction of the group to which the victim belongs.' Cited in *Submission No. 4* , Human Rights and Equal Opportunity Commission, p. 36

11 The drafters of the Convention appear to have regarded the crime of genocide as requiring specific intent. For example, UN Doc. A/AC 6/SR 72 (1948), page 87 (per Mr Armado of Brazil) states: 'Genocide was characterised by the factor of particular intent to destroy a group. In the absence of that factor, whatever the degree of atrocity of an act and however similar it might be to the acts described in the Convention, that act still could not be called genocide … it was important to retain the concept of *dolus specialis*.' The Human Rights and Equal Opportunity submission comments: 'On another view, it is sufficient to establish general rather than specific intent to destroy the group. This view, supported by a weight of authority, is consistent with the proposition of Anglo-American criminal law that an accused cannot avoid liability for the foreseeable consequences of a deliberate course of action. According to (L. Kuper in *The Prevention of Genocide*), intent is established if the foreseeable consequences are, or seem likely to be, the destruction of the group. The virtue of this approach is that it covers a situation in which intent has not been express.' See *Submission No. 4* , Human Rights and Equal Opportunity Commission, p. 38

12 The Human Rights and Equal Opportunity Commission argues that, in the case of forcible removal of Aboriginal children, there is considerable contemporary and official expression of destructive intent (with the inference that this satisfies a general, rather than specific, intent requirement). See *Submission No. 4*, Human Rights and Equal Opportunity Commission, p.28, footnote 28. Professor Colin Tatz appears to argue the same view in 'Genocide in Australia', Research Discussion Paper No. 8, *Australian Institute of Aboriginal and Torres Strait Islander Studies(*1999) pp. 32-33

13 For example, *Submission No. 26*, Law Council of Australia, p.437 quotes the International Criminal Tribunal for Rwanda in the *Rutaganda* judgment of 6 December 1999: 'Genocide is distinct from other crimes because it requires *dolus specialis*, a special intent. Special intent of a crime is the specific intention which, as an element of the crime, requires that the perpetrator clearly intended the result charged.'

the perpetrator clearly seeks to produce the act charged, and it is unique to the definition of genocide.[14]

2.16 Article III of the Convention, in addition to genocide, declares other acts punishable when these are related to genocide, such as conspiracy, direct and public incitement, attempt and complicity.

2.17 Article IV of the Convention lays down the principle of individual criminal responsibility:

> Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.[15]

2.18 This Article affirms a principle established by the post-War International Military Tribunal at Nuremberg, that individuals, and not states, are to be held accountable and punished for the commission of crimes against humanity.[16]

Laws in other jurisdictions

2.19 Implementation of the Genocide Convention has varied throughout the world. Many nation states have incorporated the Convention into domestic law without alteration. These include Western European countries such as the United Kingdom. States that have not adopted any specific implementing legislation include Russia, Finland, Poland, and Egypt.

2.20 Canada is an example of a state that has given limited effect to the Convention by incorporating the crime of genocide within its criminal law. This occurs only in the context of hate propaganda and public incitement to commit genocide. Section 318 of the *Canadian Criminal Code* states:

> Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.[17]

2.21 The Canadian Criminal Code defines genocide as the act of either killing members of a group or deliberately inflicting on the group conditions of life calculated

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14 Patrick Thornberry, *International Law and the Rights of Minorities,* pp. 73-74 states: 'It was pointed out in the Sixth Committee that the intention to destroy the group was what distinguished genocide from murder. Genocide was characterised by the factor of particular intent, *dolus specialis*, to destroy a group. In the absence of this factor, whatever the degree of atrocity of an act and however much it resembled acts described in the Convention, that act could not be called genocide.' Similarly, Stephen Tully, *Submission No. 17*, p.199, citing the International Tribunal for the Former Yugoslavia judgment in the *Jelisic Case* of 14 December 1999, states: 'The conscious intention to destroy a group as such is greater than the discriminatory intent required in the crime of persecution'

15 Patrick Thornberry, *International Law and the Rights of Minorities,* p. 75

16 See, for example, Werner Maser, *Nuremberg – A Nation on Trial*, London, 1979, p. 275

17 See *Submission No.17*, Stephen Tully, Annex 5, p. 241

to bring about its physical destruction with the intent to destroy in whole or in part any identifiable group.[18]

2.22 The USA, like Canada, has also incorporated genocide in its domestic criminal law. Section 1091 of *The Genocide Convention Implementation Act* 1988 provides that genocide is an offence under American law, but only where the offence has been committed either in the United States or where the alleged offender is a national of the United States.[19]

2.23 The US Act defines genocide as an action taken, whether in time of peace or war, which has the specific intent to destroy, in whole or in substantial part, a national, ethnical, racial or religious group. The legislation provides that the crime of genocide is punishable either by death or imprisonment for life and a fine of not more than $1,000,000 in the case of killing members of the group, or imprisonment and/or a fine of not more than $1,000,000 in any other case of genocide that does not lead to the death of members.[20]

2.24 United States' implementation of the Convention incorporates its definition and elaborates upon terms left undefined by the Convention, such as '*specific* intent'. The US genocide law also requires that there be more than one victim at any time for a charge of genocide to be entertained.

2.25 The *Genocide Act 1969* of the United Kingdom provides that a person shall, on conviction on indictment, be sentenced to imprisonment for life should the offence consist of killing any person or, in any other case (such as, for example, 'causing serious bodily or mental harm to members of the group'),[21] imprisonment for a term not exceeding 14 years. The Act provides that genocide is a crime for which extradition is permissible.[22]

2.26 Israel has adopted the Convention into its municipal law, in *Nazi and Nazi Collaborators (Punishment) Law* 1950, though only as a 'crime against the Jewish people' and thus not in strict conformity with the Convention.

2.27 Some states have not legislated any specific Convention-implementing laws. Russia, for example, has argued that the provisions of its constitution and existing criminal statutes are adequate for the prosecution and punishment of persons who

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18 In Section 318 (2). See *Submission No. 17*, Stephen Tully, p. 241

19 *Submission No. 17*, Stephen Tully , Annex 4, p. 239

20 For example, causing 'serious bodily injury to members of that group'; or causing 'permanent impairment of the mental faculties of members of the group through drugs, torture or similar techniques'

21 Unlike the US legislation, which elaborates upon the actions listed in Article III of the Convention, the UK Act imports the Convention wording *in toto*

22 *Submission No. 17*, Stephen Tully, Annex 3, p. 237. One submission notes that, as there have been no convictions under the UK *Genocide Act*, there is an absence of useful case law in the courts of common law countries. See *Submission No.28,* Alison Vivian and Manuel Calzada, p. 416

commit the acts described in Article III.[23] Alternatively, states such as Finland and Poland have implied that they have treated the Convention as a self-executing treaty and thus it has already become applicable.[24] Egypt, on the other hand, has maintained that 'since no national, ethnic, racial or religious group exists in the structure of Egyptian society', the government has not considered it useful to implement additional penal laws to supplement the existing law.[25]

2.28 The penalties that can be imposed under domestic law for the crime of genocide vary from state to state. In Romania the death penalty is mandatory in times of war and prospective in peace.[26] Rwanda's domestic law contains the death penalty though it is not imposed by the ad hoc International Criminal Tribunal for Rwanda. Many states apply penalties that discriminate on the basis of the seriousness of the offence.[27]

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23 See *Submission No. 17*, Stephen Tully, p. 217, citing UN ECOSOC, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, UN Doc E/CN.4/Sub.2/416 (1978) at pp. 141-53; 161

24 *Submission No. 17*, Stephen Tully, p. 217

25 *Submission No. 17*, Stephen Tully p. 217

26 *Submission No. 17*, Stephen Tully p. 218

27 In this context, some submissions have recommended that the Committee consider increasing the proposed penalty for incitement to commit genocide from 10 years to life imprisonment, while approving of life imprisonment for all other offences. See also discussion below in Chapter 4, 'Specific implementation issues: Penalties', Paragraphs 4.70-4.73. By contrast, the Centre for Comparative Genocide Studies proposes a system of differential sentences depending on which gradation or category the impugned act of genocide falls within. See *Submission No.18*, Centre for Comparative Genocide Studies, pp. 262-267. At least one submission suggests that Australia follow the example set by Canada in this regard. The Law Society of NSW states: 'The [Canadian] definition [of genocide] is far more restricted than the one proposed under the proposed Bill. … The [Law Society] feels that in the Bill, the definition of genocide is far too broad, considering the fact that there is a one and only punishment of life imprisonment. There is a danger that membership to a group alone would allow the Government to imprison a person for life.' The distinction provided by the Canadian example between 'advocating genocide' and 'public incitement of hatred' is an important dichotomy, particularly as it would allow people to avoid life imprisonment for what would be more accurately described as public incitement of hatred. The [Law Society] recommends that the Canadian experience be given consideration in the application of any proposed Bill'. See *Submission No. 30*, Law Society of NSW, pp. 462-463