

**Why the World Needs an International Convention
On Crimes Against Humanity¹
By Gregory H. Stanton²**

Until the nineteenth century, the map of international law looked much like the world maps of the Middle Ages. Those who used such maps sailed into oceans filled with sea monsters, with whole continents missing, and others labeled Terra Incognita. Slavery was accepted. No woman could own property, much less vote. Torture was normal in criminal investigations, and felonies were punishable by death. Mankind “lived on a darkling plain swept with confused alarms of struggle and flight, where ignorant armies clash by night.”³

The nineteenth century brought hope of human progress: the abolition of slavery in most of the world, the woman’s suffrage movement in Europe and America, and with the Red Cross, the beginning of humanitarian laws of war. But it also brought machine guns and colonial domination made more efficient by modern transportation and communication. The 1648 Treaty of Westphalia limited international law to relationships between states, and still allowed states to conduct their “internal” or “domestic” affairs without hindrance. States had licenses to hunt down their own citizens with impunity. With few exceptions, individuals were not the subjects of international law.

New monsters arose in the twentieth century. Nazi and Communist regimes murdered more people than all wars combined. Two World Wars threatened the very foundations of human civilization, and opened the era of Total War, when distinctions between combatants and civilians dissolved. On August 6 and 9, 1945, nuclear attacks on Hiroshima and Nagasaki incinerated 200,000 civilian lives in just three days. The Cold War began an ice age in international relations kept cold by the threat of mutual nuclear annihilation. Colonial wars to hold onto empires, and nationalist wars to break them up left a world filled with military dictators and warlords, where impunity reigned.

The United Nations and the human rights conventions

Yet on top of the rubble of the twentieth century stood visionary leaders determined to impose world order under law. They created the United Nations, passed the Genocide Convention, the Universal Declaration of Human Rights and the human rights Covenants. They adopted Conventions against War Crimes, Torture, Slavery, Apartheid, Discrimination, and for the Rights of Women, Children, and Refugees.

The United Nations left the Westphalian paradigm in place, because it is an organization of states, represented by governments, not an organization of nations or peoples. Many states are threatened by the claims of nations and peoples. It is little wonder that the United Nations is pro-state and anti-nation. As Leo Kuper, my mentor in genocide studies, observed in his classic book, *Genocide*, “the sovereign territorial state claims, as an integral part of its sovereignty, the right to commit genocide, or engage in genocidal massacres, against people under its rule, and the United Nations, for all practical purposes, defends this right.”⁴

To enforce the human rights conventions, the states that constitute the United Nations were unwilling to create the international institutions to enforce them. They ignored one of the four crucial attributes of law.

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³ Matthew Arnold, *Dover Beach* (1867), available at <http://www.victorianweb.org/authors/arnold/writings/doverbeach.html>

⁴ LEO KUPER, *GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY* 161 (1981).

The legal anthropologist Leo Pospíšil, who was my teacher at Yale Law School, wrote that for law to be law it must have four attributes. He defined law as institutionalized social control...

1. made by decision of a legitimate authority,
2. intended to be applied universally to similar situations in the future,
3. that is obligatory, and
4. that is enforced by physical or cultural sanctions.⁵

Skeptics about the reality of international criminal law such as John Bolton⁶ usually question whether there are any sanctions to enforce it. For many years, the only courts that could enforce the law of nations were national courts, and after 1922, (and then only for state versus state disputes), the Permanent Court of International Justice and its successor, the International Court of Justice in the Hague.

Nuremberg and Tokyo

The war crimes trials of the Young Turk triumvirate after World War I and the Nuremberg and Tokyo war crimes tribunals after World War II opened a new era in the enforcement of international criminal law. For the first time, international tribunals tried individuals for their crimes. And for the first time, in Article 6(c) of the Nuremberg Charter, crimes that had before only been tried by individual states, were called “crimes against humanity.” They were against humanity because they are threats to the common dignity of the human race. They are universal crimes, made universal not just by laws of individual states, but by the common conscience of mankind. They are *jus cogens*.

Legal positivists objected because they saw no place where such laws had been promulgated to warn those who might break them. They violated the principle of ‘legality’. Constitutionalists like Senator Robert Taft objected because they were, he said, the application of *ex post facto* law. The best answer was offered by Justice Jackson in his opening statement at the Nuremberg trials:

It is true, of course, that we have no judicial precedent for the Charter. But International Law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties and agreements between nations and of accepted customs....International Law is not capable of development by the normal process of legislation for there is no continuing international legislative authority. Innovations and revisions in International Law are brought about by the action of governments....⁷

The Nuremberg Charter outlined the blueprint for the law of crimes against humanity, and the Nuremberg tribunal laid the foundations for the building of the international institutions to enforce that law. But Nuremberg left completion of the blueprints and construction of the rest of the cathedral for future generations.

The Genocide Convention

The normative blueprints were drawn as the United Nations drafted international conventions. First and foremost, the International Convention for the Prevention and Punishment of the Crime of Genocide, was adopted by the United Nations in 1948 and entered into force in 1951. Its drafters considered genocide to be the ultimate crime against humanity because the intention of genocide is to eliminate an irreplaceable part of the human race – a national, ethnical, racial, or religious group.

Lemkin considered genocide to be the crime of crimes because it impoverishes every human being by eliminating part of the diversity that enriches the entire human race. Genocide is like

⁵ LEO POSPIŠIL, *ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY* 95 (1974).

⁶ Bolton was the U.S. Ambassador to the United Nations during the George W. Bush administration, and Assistant Secretary of State for International Organization Affairs during the George H.W. Bush administration.

⁷ Transcript of Record at 147, *The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics v. Hermann Wilhelm Göring, et al.*, Case No. 1, IMT, (Nov. 21, 1945).

extinction of a species. It reduces that creativity that results when cultures and peoples interact. It is no accident that the Enlightenment began in Northern Europe when people speaking different languages from many traditions could challenge the orthodoxies of the day. It is no accident that the greatest sources of the world's music have been where cultures meet – in Europe, America, Brazil, South Africa, the Congo.

Raphael Lemkin's original intent for the convention is often lost in analysis of the *travaux* left by the drafters of the Convention. The Convention left out much that Lemkin originally proposed, including the many early warning signs of genocide included in his own definition of the crime, in which by "nation" he meant also an ethnicity, society, and polity:

Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify 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.⁸

The international lawyers and diplomats who actually drafted the Genocide Convention fell short of Lemkin's definition and of Lemkin's dream. They narrowed the concept to omit cultural, political, and economic destruction of groups, and destruction of personal security, liberty, health, and dignity of individuals belonging to those groups. So they eliminated the early stages of the genocidal process, significantly weakening the Convention as an instrument for prevention. As I have outlined elsewhere, genocide develops in predictable, logical stages.⁹ The eight stages of genocide are not linear, but each stage is logically necessary for subsequent stages. Every genocide that I have studied has included each of the stages, which are:

Classification – groups are defined as "us" versus "them;"

Symbolization – the target group is named, and identified by symbols such as language and dress, sometimes even forced to wear symbols like the yellow star;

Dehumanization – the victim group is vilified as subhuman "rats", "cockroaches," "cancer" or "disease," or "filth," deserving eradication to purify the society;

Organization – hate groups form, train, and arm for killing;

Polarization – the hate groups drive moderates out of the political arena through assassination, imprisonment, and terror;

Preparation – plans are made for a "final solution," militias are trained and mobilized, victims are driven into concentration camps or ghettos, trial massacres test the response of other states;

Extermination – mass killing begins and continues until it is stopped by force;

Denial – from the beginning, the perpetrators deny they are persecuting or killing the victims, and continue their denials for many years after the genocide.

Lemkin understood that the deprivations of fundamental human rights in the early stages of genocide – systematic discrimination and persecution – are early warning signs of the genocidal process. The relationship between the crime against humanity of persecution and the crime of genocide is direct, as the Article 6(c) judgments at Nuremberg show. But this connection, so well understood by Lemkin, was omitted from the Genocide Convention.

⁸ RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 79 (1944).

⁹ Gregory Stanton, *The Eight Stages of Genocide*, in *THE GENOCIDE STUDIES READER* 127 (Samuel Totten and Paul Bartrop, eds., 2009), available at <http://www.genocidewatch.org/aboutgenocide/8stagesofgenocide.html>.

The framers of the Genocide Convention were unable to establish new institutions to enforce it. Although they referred to an international court to try perpetrators, it was not established until the International Criminal Court came into being in 2002. They also established no international monitoring institution to prevent genocide.

The framers made Article 1 of the convention so vague that States-Parties merely “undertake to prevent and to punish” genocide, without defining their legal obligation to do so. Although some claim that the decision of the International Court of Justice in *Bosnia and Herzegovina v. Serbia and Montenegro* declared a duty to prevent genocide, its decision restricted the duty to states with direct influence and means to prevent the genocide, as well as knowledge that the genocide would likely occur.¹⁰

The International Convention for the Prevention and Punishment of the Crime of Genocide was born without teeth to prevent genocide. Could the U.S., or U.K., or France, for example, have been charged with failure to prevent the genocide in Rwanda, though each of them had the means, influence, and knowledge that the genocide was likely to occur? For that matter, could they have been brought to the ICJ for failure to prevent the genocidal massacre at Srebrenica, though there is now evidence that their intelligence services knew in advance the killings were coming?

It should be clear by now that the Genocide Convention has failed to stop genocide. Genocide Watch counts fifty-five genocides and politicides since World War II,¹¹ with a death toll over seventy million, more deaths than from all wars combined.

The Ad Hoc Tribunals

On the punishment side, the picture is somewhat more hopeful. With the creation of the special international tribunals -- the ICTY, ICTR, Special Court for Sierra Leone, and tribunals for East

¹⁰ Although the International Court of Justice in *Bosnia and Herzegovina v. Serbia and Montenegro* held that Serbia violated the duty to prevent genocide at Srebrenica, the duty to prevent remains so narrow that it only applies to those with direct influence over those who might commit genocide.

In view of their undeniable influence and of the information, voicing serious concern, in their possession, the Yugoslav federal authorities should, in the view of the Court, have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised. The FRY leadership, and President Milošević above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region. Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed. It must therefore be concluded that the organs of the Respondent did nothing to prevent the Srebrenica massacres, claiming that they were powerless to do so, which hardly tallies with their known influence over the VRS. As indicated above, for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them.

Such is the case here. In view of the foregoing, the Court concludes that the Respondent violated its obligation to prevent the Srebrenica genocide in such a manner as to engage its international responsibility.

Bosnia and Herzegovina v. Serbia and Montenegro, 2007 I.C.J. 438 (Feb. 26, 2007), available at <http://www.icj-cij.org>.

¹¹ Genocide Watch, *Genocides, Politicides, and Other Mass Murder Since 1945, with Stages in 2008*, <http://www.genocidewatch.org/aboutgenocide/genocidespoliticides.html> (last visited Jan. 1, 2010).

Timor and Cambodia – the Genocide Convention has begun to cut some teeth. But they still bite only after a genocide is over.

The International Criminal Tribunal for the former Yugoslavia (ICTY) took Nuremberg's blueprint, and updated it, but still left major structural flaws. Crimes against humanity still had to be connected to international conflict. No provisions in the UN Security Council resolution creating the ICTY called upon UN member states to arrest the suspects. So the court first had to determine whether there was an international conflict, and in its first years had almost no defendants arrested and detained for trial.

I drafted UN Resolution 955,¹² which created the International Criminal Tribunal for Rwanda, and set forth its Statute. That Statute removed the nexus requirement to international conflict, and the tribunal's subject matter jurisdiction includes crimes committed by non-state actors in violation of Optional Protocol 2 and Common Article 3 of the Geneva Conventions. When State Department lawyers expressed misgivings because the US is not a party to Optional Protocol 2, I reminded them that the UN Security Council has the legitimate authority to pass such a resolution whether or not the US is a party to the Optional Protocol. Learning from the difficulty the ICTY was facing in arresting suspects, I also drafted UN Security Council Resolution 978,¹³ which urged UN member states to arrest and detain persons in their territory against whom there was sufficient evidence of participation in the Rwandan genocide, and to inform the ICTR of their arrest. The result was that most of the principal defendants were in custody within a year. Perhaps we have moved a step forward from the day when Justice Jackson said there is no continuing legislative authority to make international law.

The ICTR has built a much stronger jurisprudence of genocide than the ICTY, mainly because Rwanda so clearly suffered genocide. The ICTR's judgments have greatly strengthened the law of genocide. They have put the first sharp teeth into the Genocide Convention. The ICTR has resolved many issues, such as how to define a group (subjectively, from the point of view of the perpetrator),¹⁴ whether mass rape is an act of genocide (it is),¹⁵ and when hate speech is incitement to commit genocide.¹⁶ Beginning with its path-breaking Akayesu judgment¹⁷ and continuing through its far-reaching decision on incitement in the Media case, (Nahimana, et al.)¹⁸,

¹² S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

¹³ S.C. Res. 978, U.N. Doc. S/RES/978 (Feb. 27, 1995).

¹⁴ See Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1, Judgment, ¶¶ 97-98 (May 21, 1999).

¹⁵ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).

¹⁶ "The *mens rea* required for the crime of direct and public incitement to commit genocide lies in the intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must have himself the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." *Akayesu*, Judgment, at ¶ 559.

¹⁷ *Akayesu*, Judgment.

¹⁸ Prosecutor v. Nahimana, Barayagwiza & Ngeze, ICTR-99-52-T, Judgment (Dec. 3, 2003). The Nahimana trial court's decision is especially important because it finally defines the distinction between hate speech and incitement to commit genocide. This issue had never before been resolved in international criminal law. Judge Pillay's brilliant opinion noted the importance of incitement in the planning and execution of genocide. Judge Pillay cited the careful planning and financing that Nahimana and his co-defendants marshaled as heads of Radio Television Libre de Milles Collines, the infamous hate radio station that literally gave coordinates to killing squads. Ngeze's *Kangura*, the Hutu Power newspaper that helped create the culture of dehumanization and hatred crucial to the genocide, was found to be causally connected to whipping the Hutu militias into a killing frenzy. Barayagwiza's distribution of weapons and Ngeze's incitement by megaphone to the killers were also found to causally contribute to the genocide. Judge Pillay cut

the ICTR has provided the legal basis for reclaiming much of what Lemkin lost to the Stalinists at the drafting of the Genocide Convention. The ICTR's judgments are not favored by scholars with a narrow view of the Genocide Convention,¹⁹ but they are restoring Lemkin's original intent to the Convention.

Legally, the framers bound the definition of genocide in the strait-jacket of "specific or special intent" (*dolus specialis*) of German-Roman law, so that proving genocide becomes difficult after the fact, and nearly impossible while genocide is being committed. Short of interception of written orders, the intent of the perpetrator is extremely hard to prove during the chaos and secrecy of war. As Melson and others have shown, most genocides occur during civil or international wars.²⁰ The fatal consequences of the special intent requirement have been evident in the refusal to name the killing in Rwanda and Darfur "genocide" until the killing is finished. While action was needed, lawyers argued interminably over whether the events constituted "genocide." Such "definitionalism" has rendered the Genocide Convention a playground for lawyers, but a killing field for victims.

Restrictive definitions of the special intent requirement by Judge Cassese and others on the ICTY (following Professor William Schabas's influential treatise²¹), prevented it from finding anyone guilty of genocide until the historic Krstic judgment of 2004.²² Finally, in the Krstic trial judgment, the ICTY explicitly relied on the jurisprudence developed by the ICTR and found General Krstic guilty of genocide and conspiracy to commit genocide. In the trial court's outstanding legal analysis, it discussed the specific intent requirement in terms of the Genocide Convention's fundamental purpose evidenced in the Convention's *travaux*, and relied on the ICTR's *Akayesu*²³ and *Kayishema & Ruzindana*²⁴ judgments, where specific intent to commit genocide was held not to require a premeditated plan, not to require acts intended to destroy the whole group, and not to require direct participation by the defendants. But the stranglehold of the "special intent" doctrine was again applied by the Krstic Appeals Chamber, which effectively retried the case and overturned the Trial Chamber's findings of fact and the Trial Chamber's judgment, absolving Krstic of guilt for genocide but finding him guilty of aiding and abetting genocide. The Appeals Chamber explicitly referred to German law on "specific intent" in its ruling.²⁵

The International Criminal Court

Now we finally have an International Criminal Court. Luis Moreno-Ocampo has proven to be an aggressive prosecutor, and we can hope that the court will adopt the ICTR's jurisprudence of genocide, not the ICTY's. We already have one indicator: He has brought charges against three of the top leaders of the genocide and crimes against humanity in Darfur, including President Omar al-Bashir. He has taken up the gauntlet thrown down by the UN Commission of Inquiry, which found that certain individuals may have committed genocide in Darfur, to be determined later by a court, but the Commission could not find genocidal intent by the government of Sudan.

through the arguments on genocidal intent by citing the defendants' numerous public statements: "Let's exterminate them;" "Exterminate the cockroaches (Tutsis)." Judge Pillay noted that the Streicher case at Nuremberg did not require a direct effect to prove incitement, and noted that incitement to violent crime is not protected speech even in the most liberal countries, such as the United States.

¹⁹ See, e.g., WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* (2000), and Diane Orentlicher, *Criminalizing Hate Speech: A Comment on the ICTR's Judgment in The Prosecutor v. Nahimana, et al.* HUM. RTS. BR., Fall 2005, at 1.

²⁰ ROBERT MELSON, *REVOLUTION AND GENOCIDE* (1992).

²¹ SCHABAS, *supra* note 18.

²² Prosecutor v. Krstic, Case No. IT-98-33, Judgment (Apr. 19, 2004), available at <http://www.un.org/icty/krstic/TrialC1/judgement/index.htm>.

²³ *Akayesu*, Judgment..

²⁴ *Kayishema & Ruzindana*, Judgment.

²⁵ Prosecutor v. Krstic, Case No. IT-98-33-A, Appeal Judgment, ¶ 141 (Apr. 19, 2004), available at www.un.org/icty/krstic/Appeal/judgement/krs-aj040419e.pdf.

²⁶ The specific intent requirement imposed such high standards of proof that even after over 100,000 violent deaths in Darfur and systematic bombing of Darfuri villages by the Sudanese Air Force, the International Commission of Inquiry on Darfur (the Cassese Commission) could not find specific intent by the Sudanese government to commit genocide in Darfur.²⁷ It should be apparent by now that invocation of the specific intent requirement has emasculated the preventive muscle of the Genocide Convention.

The ICC Prosecutor's failure to obtain an arrest warrant for genocide against al-Bashir from the ICC's Pre-Trial Chamber demonstrates the continuing limits of the Genocide Convention, and the concomitant need for an International Convention on Crimes Against Humanity to deal with the precursors to genocide evident in murder, torture, mass rape, and other forms of persecution of a group.

The statute of the Special Court for Sierra Leone and of the Extraordinary Chambers in the Courts of Cambodia (the Khmer Rouge Tribunal), also include genocide, war crimes, and crimes against humanity in their jurisdiction, without the nexus requirement to conflict. I have personally been deeply involved in the 28 year campaign to establish the Khmer Rouge Tribunal, having founded the Cambodian Genocide Project in 1981, and having written the first drafts of its internal rules of procedure. In that tribunal, the need for clear definition of crimes against humanity is especially important, because due to the restricted nature of the Genocide Convention, most of the crimes committed by the Khmer Rouge were against political and economic groups, and therefore do not fit the conventional definition of genocide.

Besides the Genocide Convention, several other international conventions have been especially important in defining crimes against humanity. The *Apartheid* convention²⁸ outlaws the most extreme forms of racial discrimination. But it stops short of outlawing discrimination based on religion, nationality, and even ethnicity. The Convention Against Torture²⁹ comes closest to making a crime against humanity subject to universal jurisdiction, which must not be confused with extra-territorial reach for domestic law. Modern states have recently seemed reluctant to treat even piracy as a crime of universal jurisdiction, though it is often cited as the classic case of such a crime.

The most important codification of Crimes Against Humanity is, of course, Article 7 of the Rome Statute of the International Criminal Court³⁰ with its related elements of crimes³¹. The Rome Statute of the ICC codifies crimes against humanity that are subject to its jurisdiction. But it has three major weaknesses.

1. The ICC Statute does not impose any obligation on state-parties to the ICC to outlaw these crimes under their own national law. Given the resource limitations of the ICC, the result is that

²⁶ International Commission of Inquiry on Darfur, *Report to the United Nations Secretary-General*, ¶ 520, U.N. Doc. S/2005/60 (Jan. 25, 2005), available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf [hereinafter *Commission of Inquiry Report*]. The Commission was chaired by Judge Cassese.

²⁷ *Commission of Inquiry Report*.

²⁸ International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243, available at <http://www.unhcr.org/refworld/docid/3ae6b3c0.html>.

²⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Dec. 10, 1984, Doc. No. A/RES/39/46, available at <http://www.unhcr.org/refworld/docid/3b00f2224.html>.

³⁰ Rome Statute of the International Criminal Court (last amended Jan. 2002), July 17, 1998, Doc. No. A/CONF. 183/9, available at http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf [hereinafter *Rome Statute*].

³¹ Elements of Crimes (*Rome Statute*), Doc. No. ICC-ASP/1/3(part II-B), Sept. 9, 2002, available at <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Elements+of+Crimes.htm>.

although a few “big fish” may be prosecuted by the ICC if they are citizens of state-parties or commit their crimes in state-parties to the ICC, the “small fry” may commit such crimes with impunity unless they are prosecuted by national courts. If the crimes have not been outlawed by national law, and the national law is not enforced, they may literally get away with mass murder, mass rape, and the other crimes against humanity defined by the ICC Statute, because most will escape prosecution by the ICC.

The ICC will never be able to enforce the international law of crimes against humanity against most who violate it. It may try the worst offenders if they can be driven from power and brought before it. But the ICC was never meant to replace the national judicial systems of the world. It was meant to complement them. National courts will always be the primary place where international law is enforced. In doing so they fulfill the function that Myres McDougal, another of my Yale professors, called “*le dédoublement fonctionnel*”, the double function of national courts to enforce both national and international law.

2. Over half of the people in the world are citizens of countries that are not state-parties to the ICC. They remain unprotected by the Rome Statute even with regard to the national leaders and warlords who might be prosecuted by the ICC. Unless the crimes against humanity defined by that Statute have been enacted into national law, they even remain unprotected by their own national law. The Terra Incognita and the open seas uncharted by international criminal law are still inhabited by monsters of the deep.

3. For crimes against humanity to become customary international criminal law, as the Krstic trial judgment held the crime of genocide has become,³² they must be defined consistently in an international convention that is ratified by a large majority of the nation states of the world. An international convention would make that possible. Even states that do not wish to submit to the jurisdiction of the International Criminal Court could ratify such a convention, enact national laws against the crimes it defines, and by state practice render it *jus cogens*.

Crimes Against Humanity are rampant today.

Torture

Crimes against humanity continue unabated around the world. Although the United Nations passed the Torture Convention, torture remains widespread. Christopher J. Einolf’s statistical analysis shows a decline in the use of torture after it was legally prohibited by European governments in the nineteenth century. But torture made a dramatic comeback in the twentieth century. Einolf argues that torture is most commonly used against people who are marginalized members of society, such as slaves, foreigners, prisoners of war, members of racial, ethnic and religious outsider groups, and in wartime those suspected of treason. The twentieth century’s increase in the number and severity of wars and the breakdown of the distinction between combatants and civilians have all caused torture to become more common.³³

Rape

Rape remains a gigantic global problem. One out of three women worldwide has been raped or sexually assaulted.³⁴ A large number of victims are less than age 15.³⁵ The rate of mass rape has reached such terrible proportions in Eastern Congo that World Vision reports that two thirds of women in its relief camps have been raped³⁶ and The Journal of Humanitarian Relief reports

³² *Krstic*, Judgment, at ¶ 541.

³³ Christopher J. Einolf, *The Fall and Rise of Torture: A Comparative and Historical Analysis*, SOCIOLOGICAL THEORY, June 2007, at 101-121.

³⁴ George Mason University Sexual Assault Services, International Statistics, *citing* UNIFEM Fact Sheet on Gender Violence, www.sexualassault.virginia.edu/statistics_international.htm (last visited Jan. 6, 2010).

³⁵ Advocates for Human Rights: Stop Violence against Women, Prevalence of Sexual Assault, www.stopvaw.org/Prevalence_of_Sexual_Assault.html (last visited Jan. 6, 2010)

³⁶ World Vision, Congo: rape disturbingly common, Nov. 2008, <http://www.worldvision.org/news.nsf/news/congo-crisis-200811>.

that same figure for villages all over the Eastern Congo.³⁷ One result of gang rape is fistula, which causes women to become sterile and incontinent, and to be shunned by their communities. Many victims of gang rape are children. If they survive the rapes, they often remain traumatized for life. The same hordes who committed the Rwandan genocide still roam the forests of Eastern Congo, raping and killing. They have been joined by the Congolese Army and dozens of militias. Lately, they have also been raping men.³⁸ My wife, Mary Ellen Stanton, is the Senior Reproductive Health Adviser for the U.S. Agency for International Development. She has visited hospitals in the Congo where the rape victims are treated. Women have told her of having rifles thrust up their vaginas, of being forced to watch while gangs raped their daughters and then slit their throats, of their babies bleeding to death after gang rapes. Rape is a global problem, not just a problem of poor countries. Although rape is highest in certain countries such as South Africa, where the rate is forty percent, and domestic violence is highest in countries that accord women low status such as Peru, Ethiopia, and Bangladesh with rates of violence from an intimate partner over fifty percent during a woman's lifetime³⁹, it is not just a problem of the global south. One in six women in the United States have been sexually assaulted in their lifetimes.⁴⁰ According to the National Crime Victimization Survey, which includes crimes that were *not* reported to the police, 232,960 women in the U.S. were raped or sexually assaulted in 2006. That is more than 600 women every day.⁴¹

Forced deportation

Forced deportation has left the world strewn with refugee and displaced persons camps. The UNHCR estimates that there are currently 42 million people who have been uprooted from their homes.⁴² Over two million each have been displaced by the wars in Pakistan and Darfur, alone. In Darfur, the forcible transfer of the population from their villages, combined with attacks upon them has cost at least 300,000 lives, according to the UN Undersecretary for Humanitarian Affairs, John Holmes, who said his estimate was a conservative figure.⁴³

Persecution

The common element in most crimes against humanity is persecution. This is a return to Nuremberg, which tried genocide as a crime of persecution and murder. The Rome Statute of the ICC restores the criminality of persecution of groups excluded from protection by the Genocide Convention, including "any identifiable group or collectivity on political, racial, national,

³⁷ Relief Web, DR Congo: Hell on Earth – systematic rape in Eastern Congo, Aug. 6, 2007, <http://www.reliefweb.int/rwarchive/rwb.nsf/db900sid/AMMF-75XDCR?OpenDocument>.

³⁸ Jeffrey Gettleman, *Symbol of Unhealed Congo: Male Rape Victims*, N.Y. TIMES, Aug. 5, 2009, at A1.

³⁹ The World Health Organization, Violence against women by intimate partners, http://www.who.int/gender/violence/who_multicountry_study/summary_report/chapter2/en/index2.html

(last visited Aug. 11, 2009).

⁴⁰ PATRICIA TJADEN & NANCY THOENNES, PREVALENCE, INCIDENCE AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (1998), available at <http://www.ojp.usdoj.gov/nij/pubs-sum/172837.htm>. The most recent U.S. Justice Department surveys indicate a decline in sexual violence against women in the U.S. of seventy percent from 1993 to 2007, perhaps a result of campaigns for awareness of the problem combined with increased law enforcement. See, e.g., SHANNON CATALANO, ERICA SMITH, HOWARD SNYDER & MICHAEL RAND, BUREAU OF JUSTICE STATISTICS: FEMALE VICTIMS OF VIOLENCE (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fvv.pdf>.

⁴¹ BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2006 STATISTICAL TABLES 15, table 2 (2008), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1094>.

⁴² Tim Erwin, *UN refugee chief cites pressing needs as those uprooted tops 42 million*, UNHCR NEWS STORIES, June 16, 2009, available at <http://www.unhcr.org/4a37c9076.html>.

⁴³ *Darfur deaths 'could be 300,000'*, BBC NEWS, Apr. 23, 2008, available at <http://news.bbc.co.uk/2/hi/africa/7361979.stm>.

ethnic, cultural, religious, and gender... grounds.”⁴⁴ It also defines “extermination” to include “the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of the population.”⁴⁵ Deliberate starvation of people or creation of artificial famines is thus finally and clearly made an international crime against humanity. Since persecution was the theoretical origin of Lemkin’s definition of genocide, it is appropriate that intentional starvation, a common tactic of genocide, be made a crime.

Why the world needs an International Convention on Crimes Against Humanity

If crimes against humanity continue to be so widespread, why should we expect an international convention on crimes against humanity to be any use in preventing and prosecuting them? Why would such a convention not meet the same fate as the Genocide Convention, almost never invoked for prevention, seldom enforced by prosecution? What practical use would such a convention be?

First, it would define the crimes universally. It would solidify the definitions, providing a strong counter-force against erosion and watering down of the definitions by advocates of “national security,” “counter-insurgency,” and the “war on terror”, most recently seen in the contemptible redefinition of “torture” by Justice Department lawyers in the Bush administration. The progress of international criminal law has been through the development of emerging norms, formulated in treaties and conventions. These norms can then be enforced through the establishment of enforcement mechanisms.⁴⁶

Second, the convention would extend the reach of the rule of law on crimes against humanity beyond the International Criminal Court and international tribunals, and would implant uniform definitions of crimes against humanity into the law of states around the world. Gradually a global body of case law would develop that would define crimes against humanity in many countries. Today only ten countries have statutes outlawing crimes against humanity, though many of the crimes are covered by other parts of their criminal codes. To unify the law of crimes against humanity would have a similar effect to the unification of European law by the Napoleonic Code or of U.S. commercial law by the Uniform Commercial Code.

Third, an international convention would increase pressure on governments that commit crimes against humanity because they would be violating international law that will become *jus cogens*. The convention would develop into customary international law.

Fourth, an international convention will provide a common body of law that will facilitate international technical assistance to train law enforcement officers to enforce it. Special academies could be established for such training, and it could become part of the police training and legal training in police academies and law schools around the world.

Fifth, the convention will set forth provisions for interstate cooperation in enforcement, and by universalizing the law on crimes against humanity will facilitate extradition and international judicial assistance.

Sixth, the convention will provide a halfway house for states that are not yet members of the International Criminal Court to enact the law on crimes against humanity into their domestic law.

The Copernican Revolution in International Criminal Law

A Copernican Revolution is underway in International criminal law. In the Westphalian universe, individual rights revolved around the state, and were defined by states. States could literally get away with mass murder within their borders. In the world of the responsibility to protect, the responsibility of states revolves around universal human rights.

⁴⁴ *Rome Statute*, Art. 7(1)(h).

⁴⁵ *Id.* at Art. 7(2)(b).

⁴⁶ M. Cherif Bassiouni, *Revisiting the Architecture of Crimes Against Humanity: Almost a Century in the Making with Ambiguities Remaining*, (Apr. 13, 2009) (presented at the Whitney R. Harris World Law Institute, Washington University School of Law).

Today the Westphalian paradigm that permitted states to commit horrible crimes against their citizens has been stood on its head. The emerging norm of international law is “the responsibility to protect,” building on the work of Dr. Frances Deng,⁴⁷ which re-defines sovereignty as the duty of states to protect the rights of people in their territories, and even beyond. It is the logical extension of the concept of popular sovereignty expressed in the American Declaration of Independence⁴⁸ and the French Déclaration des droits de l'Homme et du citoyen.⁴⁹

Among the most visionary Copernicans who has led this revolution is Professor M. Cherif Bassiouni. Along with leaders like Bill Pace, Philippe Kirsch and others, Prof. Bassiouni has left us the lasting legacy of the International Criminal Court. In this project, we now meet to fulfill Professor Bassiouni’s lifetime vision of an International Convention on Crimes Against Humanity. It will obligate all state-parties to pass laws against the crimes defined in it.

This project will contribute to completion of the blueprints. After further deliberations by the best minds in the world, the Convention can then be submitted to process of adoption and ratification by governments of states.

When the first Gothic cathedrals were designed, skeptics said they could not be built – that their walls would crumble under their own weight. There was no reinforced concrete then and no steel beams had been invented to strengthen the structures. But medieval architects had studied the arches of the great mosques of Persia and Moorish Spain, and knew the skeptics were wrong. Notre Dame de Chartres began to rise in 1194. And its walls did not fall. They reached to the heavens. Its windows allowed light to penetrate into the deepest recesses of the church, just as the Enlightenment and the Reformation soon did in the world of ideas. Hundreds of cathedrals were built all over Europe and the world. Their magnificence is still an inspiration to us today. Law, like blueprints written on paper, must be built into the structures of human life. The nations of the world must enact the provisions of this International Convention into their national laws. Using national courts, the nave and the transept of the cathedral of international criminal law will be built, block by national block. And someday after our lifetimes, great windows will light it, not with the color of human blood, but with the green of the grass, the blue of the sky, and the gold of the sun.

⁴⁷ FRANCIS M. DENG ET AL., *SOVEREIGNTY AS RESPONSIBILITY* (1996).

⁴⁸ THE DECLARATION OF INDEPENDENCE (U.S. 1776), *available at* <http://www.ushistory.org/Declaration/document/index.htm>.

⁴⁹ DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN [Declaration of the rights of Man and citizens] (France 1789), *available at* <http://www.hrcr.org/docs/frenchdec.html>.