report

minority rights group international

Preventing Genocide and Mass Killing: The Challenge for the United Nations

By William A. Schabas

MRG would like to dedicate this report to the memory of Bernie Hamilton, formerly the head of our Washington office, who devoted his life to combating genocide and who sadly passed away on 24 December 2005.

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Minority Rights Group International
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For further information please contact MRG. A CIP catalogue record of this publication is available from the British Library **ISBN** 1 904584 37 3. **Published** January 2006. **Typeset** by Kavita Graphics. Printed in the UK on recycled paper. **Cover Photo** Kaibiles, a special counter-insurgency force of the Guatemalan Army responsible for human rights abuses, Guatemala City, 1988. Larry Towell/Magnum Photos. **Preventing Genocide and Mass Killing: The Challenge for the United Nations** is published by MRG as a contribution to public understanding of the issue which forms its subject. The text and views of the author do not necessarily represent in every detail and in all its aspects, the collective view of MRG.

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By William A. Schabas

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Summary

The prevention of genocide and mass killing is arguably the greatest moral imperative resting on the United Nations (UN). The Genocide Convention was one of the first human rights instruments to be adopted by the UN, along with the Universal Declaration on Human Rights. However, in the immediate post-Second World War climate, it was assumed that, at least in peacetime, what states did to their own peoples within their own frontiers was largely their own business.

There has been considerable progress since then. The *Outcome Document* adopted at the UN summit in September 2005 underlines the responsibility of the international community to protect threatened populations, a responsibility to be met through peaceful means but also, if these prove inadequate, by taking collective action through the UN Security Council. Further, it reaffirms the principle that protecting minority rights contributes to states' stability and cultural diversity.

In July 2004, the Secretary-General appointed Juan Mendez to be the first Special Adviser to the Secretary-General on the Prevention of Genocide (SAPG). Supported by a small but highly professional staff, the SAPG has already engaged actively on Darfur, among other situations. The mechanism may seem modest, and it is too early to give a judgment on its effectiveness.

In April 2005, the Commission on Human Rights established an Independent Expert on Minority Issues, Gay McDougall. While it is also premature to judge the effectiveness of this post, it is likely that it will complement the SAPG's role by focusing on violations of the rights of minorities which have not yet reached the stage of potential genocides.

The International Criminal Court (ICC) is another ground-breaking initiative. As a mechanism for prosecuting individuals accused of serious human rights violations, one of the key hopes of those who worked to establish it was that it would contribute to deterring would-be violators. International criminal law is often predicated on a preventive or deterrent function. One trial chamber of the International Criminal Tribunal for the former Yugoslavia has explained that in establishing the institution, the Security Council:

> *'intended to send the message to all persons that any violations of international humanitarian law – and particularly the practice of "ethnic cleansing" – would not be tolerated and must stop'.*

With its modest resources and limited jurisdictional reach, the ICC cannot fill the entire impunity gap. Ultimately, faith and intuition rather than any hard evidence support the claim that international criminal justice has a deterrent role in the prevention of genocide and mass killing. More importantly, perhaps, the ICC enables the prosecution of a wider range of violations than the Genocide Convention, which excluded crimes based on forms of discriminatory criteria other than nationality, race, ethnicity and religion, such as political groups, and was limited to the physical destruction of the group. The drafters of the Genocide Convention quite intentionally excluded a category of punishable act that would apply to our contemporary concept of 'ethnic cleansing'.

The ICC also illustrates another issue of concern. The prosecutions to date favour the prosecution of non-state actors – for example the Uganda case, which focuses on crimes committed by the Lord's Resistance Army. The Prosecutor understandably finds the prospect of investigating crimes in which states are complicit a daunting one. Without their benign assistance, investigation is difficult, nigh impossible, as he is learning in Sudan. However, it would seem that the ICC was created to deal with such state actors, who typically go unpunished, rather than non-state actors, who are exposed to the full force of the law if and when the government catches them.

The UN Committee on the Elimination of Racial Discrimination has signalled its intention to address genocide prevention more directly, with the adoption of new internal guidelines and indicators for genocide. While these developments are extremely welcome, this and the other UN treaty monitoring bodies, could be more creative with their mandates, for example, allowing them to convene in emergency session to consider potentially genocidal situations. Another important development would be to equip the Genocide Convention with its own treaty monitoring body, which could monitor the implementation of states parties' responsibilities in preventing and prosecuting genocide.

Another crucial recent development was the establishment of the International Commission of Inquiry on Darfur set up in accordance with a Security Council resolution. The Darfur Commission provides a model for future situations of genocide and mass killing. It marries the urgency and dynamism of an *ad hoc* commission with the resources and expertise of the Office of the High Commissioner for Human Rights. It has, in a sense,

proven that the 'system' of the Genocide Convention has the potential to work. As a result of the Commission's findings, a referral was made to the ICC. While the Commission did not uncover sufficient evidence to prove that genocide has taken place in Darfur, it shows that quarrels about whether specific atrocities 'rise to the level of genocide' or are 'merely' crimes against humanity are counterproductive. Although the term 'genocide' reserves its unique stigma, any distinction between the two concepts is now without significant legal consequences.

A further, little noticed element of the UN's tools to prevent large-scale violations is preventive diplomacy, as exercised through the good offices initiatives of the Secretary-General and the High Commissioner for Human Rights. These initiatives are necessarily low-profile. They offer great potential for simple initiatives to promote constructive solutions to situations of tension, and it is hoped that the UN will develop its capacity in this area.

More recently, the 2005 *Outcome Document* has called for further, far-reaching reform of the UN human rights machinery. It pledges to establish a Peacebuilding Commission, to lend coherence to post-conflict reconstruction initiatives and, in an attempt to place human rights more centrally in the UN system, to replace the discredited Commission on Human Rights with a new, more powerful Human Rights Council.

Glossary

AU	African Union
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
ECHR	European Court of Human Rights
ECOSOC	Economic and Social Council
EU	European Union
FARC	Revolutionary Armed Forces of Colombia
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
LRA	Lord's Resistance Army
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
OAS	Organization of American States
OHCHR	Office of the United Nations High Commissioner for Human Rights
OSCE	Organization for Security and Cooperation in Europe
SAPG	Special Adviser for the Prevention of Genocide
Sub-Commission	Sub-Commission for the Promotion and Protection of Human Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDM	Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities

Introduction

The *Outcome Document* adopted at the United Nations (UN) summit in September 2005 declares that 'each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity'. This responsibility is met through appropriate diplomatic, humanitarian and other peaceful means but also by taking collective action through the UN Security Council, 'in a timely and decisive manner', if peaceful means are inadequate.[1] The *Outcome Document* also pledges to establish a Peacebuilding Commission, in recognition of 'the need for a co-ordinated, coherent and integrated approach to post-conflict peace-building and reconciliation'.[2] In what is perhaps the most significant reform of the architecture of the UN since the adoption of the Charter of the United Nations, in June 1945, the *Outcome Document* resolves to replace the Commission on Human Rights with a new body, the Human Rights Council.

These important developments confirm the progress that has taken place in the protection and promotion of human rights, a process underway since the UN was established. As the High-level Panel observed, in December 2004, in the document *A More Secure World: Our Shared Responsibility*, that the UN's founders were preoccupied with state rather than human security.[3] One need only review the UN Charter to see the secondary position of human rights at the time of its adoption. Human rights is listed as one of the UN's purposes, but towards the end of a lengthy provision. Primary responsibility in the area was assigned to a specialized commission, one of several that might be created, rather than to a principal organ. And in one of international law's classic ambiguities, alongside the protection of human rights was the assurance that '[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state'.

The place of human rights within the UN's priorities evolved in fits and starts. Punctuated by the uncertainties of the cold war, human rights – sometimes, the concept is expressed rather more broadly as 'human security' – has become the UN's *raison d'être*. The proposals of the High-level Panel in December 2004, *In Larger Freedom: Towards Security, Development and Human Rights for All* presented by the Secretary-General in March 2005, and the *Outcome Document* of the September 2005 Summit, confirm this. These documents represent the principal contributions to the debate about UN reform. In affirming a responsibility to protect populations at risk of genocide, war crimes, ethnic cleansing and crimes against humanity, the *Outcome Document* effectively trumps the archaic language about non-intervention in matters essentially of domestic jurisdiction. And in agreeing to replace the Commission on Human Rights with a new Council, the UN's structure will be transformed to reflect the central position of the protection and promotion of human rights within the organization's mission.

Just as the place of human rights has evolved within the UN, so has the understanding of the priorities within human rights. In the early years, there was substantial equivocation about the place for the protection of ethnic minorities. Much of the human rights paradigm was focused upon the individual and his or her relationship with the state. This can be seen in one of the defining moments in the development of human rights law, the third session of the UN General Assembly, in late 1948. There, in the space of only a few hours, the General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), its first human rights treaty, and the Universal Declaration of Human Rights (UDHR), meant as a 'common standard of achievement', whose principles were intended to frame future standard-setting. The Genocide Convention proclaimed a duty to protect national, ethnic, racial and religious groups from physical destruction. Nervous about imposing treaty obligations that might be too far-reaching, its drafters decided that some of the broader issues involving the survival of minorities, such as protection of language and culture, were better placed within the UDHR. They voted to exclude what was then called 'cultural genocide' from the Genocide Convention. Yet those who drafted the UDHR rejected a draft provision on minority rights, and addressed issues of language, culture and other threats to the survival of ethnic groups entirely within the context of equality and non-discrimination. A mixed message was delivered. Although the mandate of the first human rights treaty was the protection of ethnic minorities from threats to their survival, the same issue was deliberately sidestepped in the UDHR.

Many attempts to explain the absence of minority rights in the UDHR focus on a perceived discontent with the minorities' treaties and declarations that had been adopted after the First World War. However, this was not the main factor. Resistance to a role for minority rights in

the UDHR came mainly from states of immigration in the 'new world'. The debates at the time demonstrate that the member states in the West, plus Australia and New Zealand, were concerned that settlers from Europe and elsewhere might resist assimilation and the assumption of a new identity (indigenous peoples had not yet become so important on the international stage, and did not figure significantly in the debates at the time).

It would be overstating the case to suggest that the UN had intentionally turned its back on a minority rights approach within the evolving scheme of universal human rights protection. After all, the Genocide Convention stood for the protection of minorities from the ultimate challenge to their existence. At about the same time it was being adopted, the UN also established the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which has tended to function as the 'think tank' for the Commission on Human Rights, to which it reports. Since its establishment, the Sub-Commission has broadened its activities to encompass a range of human rights-related matters, although it has also made important contributions in accordance with the mandate its name suggests, such as Ben Whitaker's 1985 study on genocide,[4] and the classic definitions of minorities prepared by Capotorti and Deschênes. Eventually, the name of the Sub-Commission was changed to better reflect the broad remit that it has assumed, and it is now called the Sub-Commission on the Promotion and Protection of Human Rights.[5]

Moreover, one of the subsequent treaties intended to give binding effect to the standards in the UDHR, the International Covenant on Civil and Political Rights (ICCPR), somewhat corrected the gap on minorities with a modest but significant contribution to the evolving law in this area. Article 27 of the ICCPR declares:

> *'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'*

Yet the omission of a minority rights provision from the UDHR was no oversight. In contrast with many other areas of human rights law, where consensus about general principles was not difficult even if the elaboration of specific norms proved challenging, the idea that minorities rather than individuals, who may or may not be associated with a minority, required specific protection by law has remained problematic. In the late 1960s, John Humphrey, the UN's most senior human rights official for its first two decades, wrote that '[i]n the higher bodies of the United Nations, at least, there has never been any serious intention of doing anything about minorities'.[6] Eventually, in 1992, the UN General Assembly adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (UNDM). In contrast with other declarations of the General Assembly, this was not the prelude to the preparation and adoption of a more substantive treaty. It has lingered as 'soft law', as a helpful but non-binding elaboration upon the rather modest rights set out in Article 27 of the ICCPR. The *Outcome Document* adopted in September 2005 again reiterates the general principle:

> *'We note that the promotion and protection of the rights of persons belonging to national or ethnic, religious, and linguistic minorities contributes to political and social stability and peace and enriches the cultural diversity and heritage of society.'*

The historical context assists in understanding the inadequacy of existing mechanisms to deal with human rights violations directed against minorities. Current systems – those of the UN as well as those of various regional bodies engaged in human rights monitoring or protection – are oriented towards individual dissidents and political opponents. Yet the mass violations almost invariably involve the targeting of racial, ethnic or religious groups. There are exceptions, such as the civil war in Sierra Leone during the 1990s, which did not have a predominant ethnic dimension, but they only tend to confirm the general pattern. The UN was born out of an armed conflict whose overarching theme, in terms of human rights violations, was genocidal attack on ethnic minorities. But while its human rights mechanisms and institutions have mushroomed since the 1940s, the focus on minorities is in many ways as blurred today as it was at the beginning.

The normative framework: what does international law require?

International human rights law, like international law in general, is often classified using two broad categories: treaty law and customary law. The treaty law analysis is quite technical, and involves precise examination, on a state-by-state basis, of dates of signature, ratification and accession, as well as unilateral acts such as reservation and objection. Customary law analysis is more nebulous, largely because human rights law is concerned with violations. It is hard to prove that states behave consistently and consider themselves to be bound by unwritten rules, when the main evidence being considered concerns the breach of such rules. Customary law is like the dog chasing its tail. We look for customary law rules in the treaties themselves, searching for patterns from which generalizations can be made that will be applicable even to those states that have not formally engaged with the treaties in question. Finally, there is the UN Charter, a treaty that is universally accepted without reservation. To the extent that human rights principles can be derived from its provisions, even if only implicitly, they apply to all. In effect, the Charter becomes an important vehicle which merges treaty and customary law.

The Charter leaves little room for argument as to what states can do to other states. The use of force to settle disputes is prohibited. At the moment the drafters of the Charter confirmed this prohibition on the use of force, subject to the two well-known and narrow exceptions – Security Council-authorized intervention to maintain or restore international peace and security, and self-defence against aggression – elsewhere in the world negotiators for the four major powers, the United States of America (USA), the United Kingdom (UK), France and the Soviet Union (USSR), were confirming the principle in another form, defining aggression as the international crime against peace. Less than a year after the Charter established the illegality of war, Nazis were convicted at Nuremberg for the 'supreme crime'. These principles remain unchanged six decades later. Yet in the late 1990s, many in the human rights field flirted with the idea of a humanitarian intervention exception. It was posited that the use of force without Security Council authorization could also be allowed where there were imperative humanitarian objectives. The case concerned the protection of a minority: ethnic cleansing of Kosovo Albanians. A few years later, many of those who had rallied to the claim that there was an implicit exception to the prohibition of the use of force[7] subsequently retreated from this position when the invasion of Iraq by the USA and UK demonstrated the perverse consequence of admitting any derogation from the provisions of the Charter.

The duties on states with respect to their use of force against their own populations are less clear. Aside from the nasty caveat in Article 2(7) of the Charter about domestic jurisdiction,[8] standard setting in the area of human rights was essentially postponed. The initial proposal from several states that the Charter include a declaration of rights, pursuing an analogy with most national Constitutions, was dropped under pressure from the major powers. This does not mean, however, that the Charter does not contain implicit standards for the protection and promotion of human rights, including the rights of minorities. Sixty years of practice within the UN, punctuated by the adoption of various declarations and resolutions spelling out its bodies' principles and policies, have helped clarify this normative content of the Charter.

The law applicable to the UN can also be usefully examined from another perspective. The declarations and resolutions adopted pursuant to the Charter frame the mandate of the bodies that make up the UN. There may be a gap between what the UN is supposed to do, and what it does. The *Outcome Document* highlighted this distinction between duties upon individual states, which are imposed by international treaties and customary law, and what it called the 'responsibility' of the 'international community, through the United Nations'.

The Genocide Convention deserves special attention here. Adopted on 9 December 1948 by the General Assembly, it was the first treaty in the UN system to address the prevention of genocide and mass killing. Its subject matter, therefore, is at the heart of this report. Although the Convention, or most of the substantive norms that it contains, has often been described as a codification of customary international law, it has a relatively low rate of ratification. As of writing, some 137 states were party to the Convention, compared with 140 for the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), more than 150 for the two Covenants, 170 for the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 180 for the Convention for the Elimination of Discrimination Against Women (CEDAW) and 192 for the Convention on the Rights of the Child (CRC).

The Convention requires that states 'prevent' and 'punish' the crime of genocide. Genocide is defined as any of five specific acts, such as killing, that are intended to destroy, in whole or in part, a national, ethnic, racial or religious group. States are required to enact legislation to enable the prosecution of genocide committed on their own territory, and to cooperate in extradition where this is necessary to ensure criminal accountability. That a person in authority was acting pursuant to state policy is no defence to the crime.

The states that proposed the recognition of genocide as an international crime – Cuba, India, Panama and Saudi Arabia – sought the adoption of a treaty that would correct what they viewed to be a major shortcoming in the law applied by the Nuremberg Tribunal. The attempted extermination of the Jews of Europe[9] had been prosecuted at Nuremberg under the rubric of 'crimes against humanity', and not genocide. The expression 'crimes against humanity' first appeared earlier in the century, three decades before the term 'genocide' was proposed by Raphael Lemkin. In May 1915, addressing one of the twentieth century's first great attacks on the existence of an ethnic minority, France, Great Britain and Russia declared that:

> *'[i]n the presence of these new crimes of Turkey against humanity and civilization, the allied Governments publicly inform the Sublime Porte that they will hold personally responsible for the said crimes all members of the Ottoman Government as well as those of its agents who are found to be involved in such massacres'.* [10]

To this day, Turkey rejects the charge of intentional destruction of the Armenians, a stubborn refusal to acknowledge an historical truth that may ultimately cost it membership in the European Union (EU).[11]

Incorporated in the London Charter[12] and prosecuted at Nuremberg, crimes against humanity were defined as a fairly broad range of inhumane acts of persecution, directed against a civilian population on political, racial or religious grounds. But out of concern that they might also be accused of crimes against humanity directed against minority populations within their own territories, or those of their colonies, the four great powers who created the Nuremberg Tribunal limited the scope of the crime to acts committed in association with the waging of an aggressive war. Known to specialists as the 'nexus', the practical consequence was that no Nazis were convicted at Nuremberg for acts perpetrated prior to the outbreak of the war, on 1 September 1939. The head of the US delegation at the drafting of the London Charter, Justice Robert Jackson, explained the matter this way during the negotiations:

> *'It has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the way Germany treats its inhabitants, or any other country treats its inhabitants is not our affair any more than it is the affair of some other government to interpose itself in our problems. The reason that this programme of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal war. Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities. They were a part of the preparation for war or for the conduct of the war in so far as they occurred inside of Germany and that makes them our concern.'* [13]

Jackson explained his position by acknowledging that:

> *'[w]e have some regrettable circumstances at times in our own country in which minorities are unfairly treated. We think it is justifiable that we interfere or attempt to bring retribution to individuals or to states only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved. We see no other basis on which we are justified in reaching the atrocities which were committed inside Germany, under German law, or even in violation of German law, by authorities of the German state.'* [14]

The final judgment of the International Military Tribunal confirmed the limited scope of crimes against humanity that had been intended by the four great powers. Although the judgment referred to Nazi atrocities in the 1930s, such as the *Kristallnacht* and the dissemination of the anti-Semitic *Der Sturmer*, as mentioned, no convictions were registered for acts committed prior to the formal outbreak of the war.[15]

In October 1946, only days after the judgment of the Nuremberg Tribunal, Cuba, India, Panama and Saudi Arabia demanded that the first session of the General Assembly correct the limitation on the concept of crimes against humanity that the four great powers had imposed. They proposed this be done not by redefining crimes against humanity in order to eliminate the nexus with armed conflict but by acknowledging the existence of a cognate concept, the international crime of genocide. There was a price to pay, however, to get the great powers to agree with liability for atrocities committed against their own populations in time of peace, some-

thing they had refused for crimes against humanity. The first was the narrowness of the definition of the crime of genocide. The categories contemplated for the crime of genocide were limited to 'national, ethnical, racial or religious' groups, whereas crimes against humanity covered other forms of discriminatory criteria, such as political groups. Further, and of more interest within the framework of the protection of national, ethnic, racial or religious minorities, which fall within the purview of both genocide and crimes against humanity, are the restrictions on the punishable acts. Crimes against humanity had encompassed a spectrum of acts of persecution. Genocide was limited to the physical destruction of the group. The drafters of the Genocide Convention quite intentionally excluded a category of punishable act that would apply to our contemporary concept of 'ethnic cleansing'.

Until the 1990s, the two concepts – crimes against humanity and genocide – had an uneasy coexistence. Human rights activists attempted to expand the definition of genocide, or to give the definition an expansive interpretation. This was because of the relative robustness of the implementation features of the Genocide Convention, which established binding legal obligations. On the other hand, there was no convention for the prevention and punishment of crimes against humanity, a fact easily explained by the still rather primitive state of human rights law and the anxiety of so many states about threats to their sovereignty, i.e. to their unfettered right to persecute minorities within their own territory, which they believed was confirmed by the UN Charter.

It was always easier, and still is, to describe an act as a crime against humanity rather than genocide. But as long as crimes against humanity required the nexus with aggressive war, which had been imposed by the major powers when they established the Nuremberg Tribunal, it was a sterile concept, of little practical use in dealing with many of the important human rights violations. This explains, for example, why the atrocities committed by the Khmer Rouge in Cambodia were labelled genocide, when such acts of mass killing largely lacked the ethnic dimension that is part of the essence of the crime. Crimes against humanity was a much better characterization, but it seemed to many observers that it probably was inapplicable to Cambodia during the late 1970s because this was a time of relative peace.

Today, international law has abandoned the nexus or link between crimes against humanity and armed conflict. In 1995, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia confirmed this development.[16] Three years later, its ruling on the subject was endorsed in the text of the Rome Statute of the International Criminal Court (ICC).[17] The historic distinctions between genocide and crimes against humanity are no longer of any great significance. From the standpoint of the protection of minorities, this means that a range of acts of persecution, and not simply acts of physical destruction, are addressed by international law. The Genocide Convention calls upon states to ensure that the crime of genocide is punished. The Rome Statute, now ratified by 100 states and signed by 139 – as many as there are states parties to the Genocide Convention – does the same with respect to crimes against humanity (in addition to genocide). In any event, few would argue with the claim that there is also an obligation to prosecute crimes against humanity as well as genocide pursuant to customary international law. As for the second prong of the Genocide Convention, the duty to prevent, this too is now admitted with respect to crimes against humanity. That states are required to prevent crimes against humanity is confirmed in the 2005 *Outcome Document*.[18]

Quarrels about whether specific atrocities 'rise to the level of genocide' or are 'merely' crimes against humanity are counterproductive. Although the term 'genocide' certainly reserves its unique stigma, any distinction between the two concepts is now without significant legal consequences. The Commission of Inquiry set up in accordance with Security Council Resolution 1564 recently confirmed this:

> *'The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken in any way as detracting from the gravity of the crimes perpetrated in that region. International offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide.'*[19]

International law, as it now stands, requires states to prevent and to punish genocide, other acts of mass killing, and serious acts of persecution directed against minority groups. These obligations can also be formulated as their 'responsibility to protect', a concept of recent origin that is endorsed by the *Outcome Document*. The parameters of these duties are not certain. For example, while a responsibility to prosecute genocide and crimes against humanity is recognized, the extent of the responsibility is debatable. It seems vulnerable to resource constraints, as the UN acknowledged in establishing an international tribunal of modest size to deal with the atrocities committed in Sierra Leone. It may also be subject to political compromise in certain situations, for example, when a form of amnesty constitutes a concession made for peaceful transi-

tion, as was the case in South Africa and Sierra Leone.[20] For the purpose of this report, these difficult questions need not be examined in further detail. To the extent that international law requires states to prevent and punish attacks on racial, ethnic and religious minorities, such obligations become part of the general principles of human rights law that underpin the activities of the UN and its organs, as well as that of other universal and regional organizations engaged in the promotion and protection of human rights.

Mechanisms of the United Nations system

According to Article 7 of the Charter, the UN is composed of six principal organs: the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice (ICJ), and the Secretariat. As the Secretary-General explained in *In Larger Freedom*, in March 2005, in addition to the General Assembly, the Secretariat and the ICJ, the founders endowed the UN with three Councils, each having major responsibilities in their own particular areas.

> *'Over time, the division of responsibilities between them has become less and less balanced: the Security Council has increasingly asserted its authority and, especially since the end of the cold war, has enjoyed greater unity of purpose among its permanent members but has seen that authority questioned on the grounds that its composition is anachronistic or insufficiently representative; the Economic and Social Council has been too often relegated to the margins of global economic and social governance; and the Trusteeship Council, having successfully carried out its functions, is now reduced to a purely formal existence.'* [21]

It was in this context that the Secretary-General proposed a rebalancing of the three councils: making the Security Council more representative by the addition of permanent members; energizing the Economic and Social Council (ECOSOC) by strengthening its mandate in the area of economic development; and the elimination of the Trusteeship Council, with the assignment of its position to the proposed Human Rights Council. The idea of a fundamental adjustment of the architecture of the UN was a wise one, and the Secretary-General showed considerably more creativity and originality in this respect than did the High-level Panel in its 2004 report.

Unfortunately, the Secretary-General's exciting proposal has not had much traction. Referring to the ECOSOC, the *Outcome Document*, in rather uninspiring and bureaucratic language:

> *'reaffirm[s] the role that the Charter and the General Assembly have vested in the Economic and Social Council and recognize the need for a more effective Economic and Social Council, as a principal body for coordination, policy review, policy dialogue and recommendations on issues of economic and social development, as well as for implementation of the international development goals agreed at the major UN summits and conferences, including the Millennium Development Goals'.* [22]

The Secretary-General might well have contemplated a somewhat different structure, abolishing the ECOSOC altogether, but he did not. For decades the ECOSOC has been a body without dynamism, whose main accomplishments were actually those of its commissions, especially the Commission on Human Rights. As for the Human Rights Council, which was the most exciting idea in the Secretary-General's proposals, although accepted in principle in the *Outcome Document*, its powers and jurisdiction have yet to be clarified, and it now seems doubtful that it will be anointed as a new principal organ of the UN even if it is eventually created, which seems likely.

It is too soon to say how the UN will look when the dust thrown up by the reform process finally settles. From the standpoint of human rights, and the protection of vulnerable minorities from persecution, including genocide and mass killing, the most desirable outcome is a Human Rights Council having the status of a principal UN organ. This proposal has yet to garner the momentum it requires for success. Those within the UN's human rights units have greeted the idea with too much caution. Perhaps concerns about their own established positions have hindered the ability to imagine the future. Non-governmental organizations (NGOs) have been more supportive of the Secretary-General, although they have not managed to generate the energy that characterized their involvement in other projects, such as the establishment of the ICC. If the same momentum, from civil society and from various middle powers within the international community, that drove the ICC process could be injected into the proposed Human Rights Council, the outcome of the UN summit might have been dramatically different. Perhaps it is not too late.

The other important proposal within the Secretary-General's *In Larger Freedom* document, whose viability was also recognized in the *Outcome Document*, is the Peacebuilding Commission. Establishment of this new organ was originally mooted in the 2004 report of the High-level Panel. Premised on the existence of an 'institutional gap' in the UN, the mandate of the new body will be to provide a coordinated, coherent and integrated approach to post-conflict peacebuilding and reconciliation, with a view to achieving sustainable peace. It is

focused on countries emerging from conflict, which are on the road towards recovery, reintegration and reconstruction. This important initiative may have the side effect of preventing genocide and mass killing, but it is not conceived of with that objective. The Peacebuilding Commission arrives after the massacres, not before (although there is some support for giving it a more proactive role). It only has a preventative mission in a very broad sense, in that peacebuilding initiatives will prevent recurrence of conflict over the long term.

For the time being, however, we must take the UN as we find it. An analysis of the existing mechanisms is helpful for a number of reasons, not least because it points towards reform along the broad lines proposed by the Secretary-General in *In Larger Freedom*.

Security Council

The Security Council is the only organ of the UN with the authority to issue binding or mandatory orders to member states. It is composed of 15 members, 10 of whom are elected for two-year mandates, while the five permanent members have a veto on all decisions and resolutions. The *Outcome Document* recognizes the importance of 'early reform' of the Security Council 'to make it more broadly representative' but also indicates that there is still no consensus on how this should be done. When the UN was being created, President Roosevelt famously said that the Security Council was where the real decisions would be taken, and that the much more representative General Assembly, where all states participate, was a place for 'small countries to let off steam'.

The Security Council has primary responsibility for the maintenance of peace and security. For the first several decades of its existence the robust powers of the Council lay largely dormant, paralysed by the tensions of the cold war. Following the dramatic changes at the end of the 1980s and the beginning of the 1990s, it entered a period of much greater dynamism, characterized by a willingness to engage in issues involving the promotion of human rights and, especially, the protection of ethnic minorities. The defining moment was the adoption, on 4 April 1991, of Resolution 688, by which the Security Council authorized various forcible measures to protect ethnic minorities in northern and southern Iraq. The Resolution read, in part:

> *'The Security Council,*
> ***Mindful** of its duties and its responsibilities under the Charter of the United Nations for the maintenance of international peace and security,*
> ***Recalling** the provisions of Article 2, paragraph 7, of the Charter,*
>
> ***Greatly concerned** by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions which threaten international peace and security in the region, […]*
>
> *1. **Condemns** the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, the consequences of which threaten international peace and security in the region;*
> *2. **Demands** that Iraq, as a contribution to removing the threat to international peace and security in the region, immediately end this repression, and in the same context expresses the hope that an open dialogue will take place to ensure that the human and political rights of all Iraqi citizens are respected'.*

As a precedent, Resolution 688 signalled a new dimension to Security Council action. There were other subsequent manifestations of the Security Council's willingness to intervene when ethnic minorities were at risk, even when conflict had no international dimension. This involved stretching the concept of the maintenance of international peace and security. It also set aside the caveat in the UN Charter warning the organization away from action in areas that were 'essentially within domestic jurisdiction'. To be fair, there had been some earlier examples, dating to the 1960s, but they addressed the unique case of *apartheid*-era South Africa.

By 1993, the Security Council entered yet another field of action, establishing the International Criminal Tribunal for the former Yugoslavia (ICTY). The model was the International Military Tribunal, but the Nuremberg court had been created by the victorious powers following the war and was focused entirely on past atrocities. The ICTY was aimed at an ongoing armed conflict, which was both internal and international, and whose central theme was 'ethnic cleansing', with threats to the survival of entire populations. Security Council Resolution 827 justified the establishment of the ICTY by noting that it 'would contribute to the restoration and maintenance of peace'. In other words, the ICTY was predicated on a hypothesis of deterrence, a debatable proposition to which we will return in the discussion of the ICC.

But if these developments, and others, suggested that the Security Council had been energized to address attacks on human rights and especially on ethnic minorities, the UN failed tragically in 1994 when the worst mass ethnically-driven killing since the Holocaust took the lives of 800,000 Tutsis in Rwanda. The UN had been warned

of the coming inferno: by its own military representative in Kigali, General Dallaire, in January 1994, and even earlier, by NGOs and a Special Rapporteur.[23] Dallaire's concerns may never have reached the Security Council. They were apparently smothered within the New York bureaucracy, which took them as an overreaction by a zealous and inexperienced soldier.

In a document known as the 'genocide fax', Dallaire told of an informant, a former member of the security staff of President Juvénal Habyarimana, who had been 'ordered to register all Tutsi in Kigali'. Dallaire wrote:

> *'He suspects it was for their extermination. [The] example he gave was that in twenty minutes his personnel could kill up to a thousand Tutsis.'*

In a reply the same day, signed by Kofi Annan, who was then the Head of Peacekeeping Operations, Dallaire was instructed that if he was 'convinced that the information provided by [the] informant is absolutely reliable', he should share it with the Rwandan President Habyarimana, telling him the activities 'represent a clear threat to the peace process' and a 'clear violation' of the 'Kigali weapons secure area'. He was also instructed to share his information with the ambassadors to Rwanda from Belgium, France and the USA.[24] Years later, Iqbal Riza, who was Assistant Secretary-General for peacekeeping at the time, said: 'We did not give that information the importance and the correct interpretation that is deserved. We realized that only in hindsight.'[25] Riza said he eventually accepted the fact that this mistake had led to loss of life. Dallaire had asked for permission to raid arms caches that had been identified by the informer, but Riza, acting on behalf of Annan, denied such authority.[26]

Not that the signals about the impending genocide were as easy to read as some observers have suggested. In early 1994, neighbouring Burundi was in political turmoil following ethnic massacres the year before, and to many specialists in the region it looked far more prone to disaster than Rwanda. Even if the events of April 1994 could not have been predicted with certainty, there was enough to put the international community, including the Security Council, on a high state of alert. Between the astute and almost intuitive perceptions of General Dallaire and the assessments of the Special Representative of the Secretary-General, the UN must have been alive to the threat of a future conflict of major proportions. In other words, the real failure of the Security Council in Rwanda was not a lack of 'early warning'.

Rather, once the full horror of the genocidal conspiracy had become apparent, by mid-April 1994, the Security Council sat on its hands. At the end of April, a Presidential Statement that condemned the massacres used the text of the definition of genocide from the 1948 Convention but stopped short of employing the actual word.[27] It was not for several more weeks, when most of the massacres had been carried out, that a resolution of the Security Council noted:

> *'with the gravest concern the reports indicating that acts of genocide have occurred in Rwanda and recall[ed] in this context that genocide constitutes a crime punishable under international law'.*[28]

Of course, the debate was more than semantic. While the worst ethnic massacres since the Second World War were being committed, the Security Council dawdled and, at one point, decided to substantially reduce the size of its mission that had been present in Rwanda since late 1993. The report of the inquiry commissioned by the Secretary-General concluded:

> *'The delay in identifying the events in Rwanda as a genocide was a failure by the Security Council. The reluctance by some States to use the term genocide was motivated by a lack of will to act, which is deplorable.'*[29]

The failure to act to prevent genocide in Rwanda has conditioned all subsequent debate on the prevention of genocide and other forms of mass killing. As previously mentioned, the theory that it was a failure of early warning is not particularly helpful. The problem was not a poorly informed Security Council awaiting a clear picture so that it could take action. Rather, for various reasons the members of the Security Council lacked the will to authorize and organize intervention at a time when they were perfectly aware of the unfolding tragedy.

The precedent for Security Council intervention in what might previously have been termed internal conflict outside the body's remit had been set with Resolution 688, and there was no serious debate in 1994 about whether it had the authority to intervene. But the strategic interests of permanent members of the Security Council had driven intervention in Iraq in 1990 and 1991, and Rwanda offered little in the way of strategic interest to anybody. Only France, which still considers Francophone Africa to be within its sphere, was interested in any form of engagement. In late June 1994, when it appeared that the Rwandan Patriotic Front was on the way to military victory, the French announced they were sending soldiers. The Security Council authorized *Opération Turquoise*,[30] but after France had made clear it was going ahead one way or the other. French troops helped stabilize the situation, but the ambiguous mission also facilitated the retreat of the *génocidaires*.

Failure in Rwanda also nourished the arguments that the Security Council should be bypassed altogether. This was dressed up in sophisticated legal reasoning about rules of international law that override the UN Charter. A rhetorical fog created by diplomats and academics helped soften resistance to the North Atlantic Treaty Organization (NATO) intervention in Kosovo, which took place without Security Council authorization. This was allegedly the third exception to the use of force, a response to overwhelming humanitarian necessity, but it was not listed in the UN Charter. A blue-ribbon panel of eminent international personalities enlisted by the Canadian government attempted to reconcile all of this by proclaiming a 'responsibility to protect'. It flirted with the idea of exceptions to the prohibition of the use of force when states failed in their 'responsibility to protect', although it did caution that: '[t]he task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has'.[31] Any enthusiasm for such exceptions to the Charter's prohibition on the use of force declined dramatically in 2003, when the arguments resurfaced as an attempt to justify aggression in Iraq.

The *Outcome Document* does not countenance any implicit acknowledgment of a third exception to the use of force.[32] This would have been the place for any confirmation of a development in international law authorizing states to take the law into their own hands, and to intervene militarily in the absence of Security Council authorization. Rather, the *Outcome Document* declares that: '[e]ach individual State has the responsibility to protect *its* populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.[33] Note the word 'its', which I have italicized. As for the prevention of genocide, war crimes, ethnic cleansing and crimes against humanity in *other* states, the *Outcome Document* confirms first that this is the responsibility of:

> *'[t]he international community, through the United Nations … in accordance with Chapter VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.*

It continues:

> *'In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the UN Charter, including Chapter VII, on a case by case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly failing [sic] to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.'*[34]

It is clear that the endorsement of the concept of a 'responsibility to protect' in the *Outcome Document* is in no way a confirmation of the use of force to protect human security in the absence of Security Council authorization. Nevertheless, the pledge, in the *Outcome Document*, is an important reminder to the Security Council of its responsibility to intervene in appropriate cases, where minorities are at great risk and human dignity is in jeopardy.

General Assembly

The General Assembly is the UN's most representative organ. Every member state may participate and vote. Non-member states may sit as observers (there are now only a handful of non-member states, such as the Holy See, Cook Islands). The General Assembly meets in an annual session, beginning in September, but may also convene occasionally in special sessions throughout the year. Its principal output consists of resolutions on a range of subjects, which may address specific situations. They may also deal with the broader themes of international life, and in some circumstances assist in developing international law and even in its codification. The General Assembly is also central to the UN's treaty-making functions. The texts of most of the modern human rights treaties generated by the UN were drafted and adopted by the General Assembly prior to being opened for signature, ratification and accession.

For this report, the most important of the treaties is the Genocide Convention, adopted by the General Assembly at its third session, in 1948. The ICERD built on and developed norms regarding anti-discrimination in 1965; and the 1966 ICCPR ensures the sanctity of the right to life, obliges states to repress forms of hate propaganda and makes some provision for the cultural, religious and linguistic rights of minorities. In 1992, the minority rights guarantees in the ICCPR were developed in the General Assembly's UNDM.[35] The latter emphasizes the close relationship between the prohibition of genocide and the protection of minorities. In addition to a preambular reference to the Genocide Convention, Article 1(1) of the UNDM begins: 'States shall protect the existence … of minorities …'.

Many General Assembly resolutions have addressed issues of genocide and mass killing. The first allegations of genocide, apparently provoked by a report from the International Commission of Jurists, were made by several states in the Assembly's 1959 debate on Tibet, although they are not reflected in any resolution.[36] In June 1963,

the Mongolian People's Republic requested the Assembly to include in its provisional agenda the item: 'The policy of genocide carried out by the government of the Republic of Iraq Against the Kurdish People'.[37] In 1982, the General Assembly described the massacres at the Sabra and Shatila refugee camps in Beirut as genocide, acting mainly on the initiative of the Soviet bloc.[38] All of these debates manifested the cold war tensions. Like the Security Council, in the 1990s the General Assembly became more conducive to constructive debate and, potentially, appropriate action. At the height of the wars in the former Yugoslavia, many resolutions were adopted condemning ethnic cleansing, and some even described it as genocide.[39] But the General Assembly was essentially silent with respect to the Rwandan genocide, which was perpetrated in May, June and July, outside its regular annual sessions.[40]

While its broad representation enhances the credibility and authority of the General Assembly, the UN Charter does not give it any substantial powers in terms of potential response to situations of mass killing. In the early years of the cold war, a General Assembly resolution known as 'Uniting for Peace' seemed to allow it more muscle when the Security Council was deadlocked.[41] Although occasionally revived in discussions as an option for intervention to address humanitarian crises, it seems preferable to treat 'Uniting for Peace' as an historical curiosity, at least as far as the protection of minorities is concerned.

The *Outcome Document* makes several references to the role of the General Assembly, but they are perfunctory, couched in declarations of fealty to the primacy of the Security Council.[42]

The *Outcome Document* states, for example:

> *'We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity and its implications, bearing in mind the principles of the Charter of the United Nations and international law.'*[43]

Although its standard-setting function remains important, the General Assembly is unlikely to make a meaningful contribution to the prevention of specific situations of genocide and other forms of mass killing.

Secretariat

The Secretariat is responsible for carrying out the decisions of the other organs of the UN. The Secretary-General is described in the Charter as the 'chief administrative officer' of the UN. In practice, of course, he or she has an enormously important role in directing the UN's affair. The Secretary-General is entitled to credit for the UN's successes, but also blame for its failures, and also deserves recognition for much quiet behind-the-scenes diplomacy, in the exercise of a 'good offices' function.

To return to the 1994 genocide in Rwanda, the Secretary-General's personal role was no different, in substance, than that of the Security Council. Indeed, the two were locked together, with the Secretary-General feeding information to the Security Council that had the ultimate consequence of justifying its inertia. Since then, two important units with major responsibilities in the area have begun to function under the overall authority of the Secretary-General, the Office of the High Commissioner for Human Rights (OHCHR) and the Special Adviser to the Secretary-General on the Prevention of Genocide (SAPG).

The OHCHR was established in accordance with a General Assembly resolution, adopted in late 1993 pursuant to the Vienna Declaration and Programme of Action.[44] The first High Commissioner, José Ayala-Lasso, began work the week that the Rwandan genocide began. It was a brilliant opportunity for a dynamic High Commissioner to prove his mettle. Unfortunately, he responded slowly, like the rest of the UN. Since then, however, the OHCHR has been blessed with highly effective, even charismatic, High Commissioners, who have taken prominent and quite public measures to focus international attention on atrocities involving the threat of genocide and mass killing, in the Balkans, in Burundi, in eastern Congo, in East Timor, Darfur and elsewhere. Mary Robinson, who held the position of High Commissioner from 1997 to 2002, was effective and outspoken enough that there was little enthusiasm among some member states, including certain permanent members of the Security Council, for her renewal. Of course, the mandate of the High Commissioner on Human Rights should not be viewed as a stepping-stone to yet higher office, or to reappointment. If the job is done properly, Beijing, Moscow and Washington can be confidently expected to veto any renewal of the mandate. And it is for the Secretary-General to make sure that the person appointed is up to the task.

There are different theories about how the High Commissioner can be most effective. Mary Robinson had a very public profile, operating through declarations, statements and press conferences. But the position can also be conceived of as one requiring quiet diplomacy, rather like the model followed by the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe (OSCE) and the Commissioner for Human Rights of the Council of Europe. It may also be possible for the OHCHR to promote a 'good offices' role, perhaps by using trusted low-profile representatives

who operate under the radar to attempt to make progress and even resolve issues, with the threat of public denunciation by the High Commissioner, where quiet diplomacy fails, ever present.

The OHCHR proved its ability to respond quickly and effectively by providing all of the administrative back-up to the Commission of Inquiry on Darfur, whose creation was mandated by the Security Council in September 2004. The Secretary-General was given the task of implementing the Security Council decision, and he in effect turned to the OHCHR. It was able to respond immediately, devoting highly-skilled personnel who were either part of the permanent staff of the OHCHR or readily available as part of its networks. The Commission of Inquiry worked quickly and, apparently, with a minimum of the bureaucratic hindrance that can characterize UN activities. Within weeks, its team had been assembled and it was soon on the ground, in Darfur and the sub-region. The Commission presented its report in mid-January 2005, a comprehensive and thoughtful document, combining detailed factual reporting with legal analysis, barely four months after its establishment.

In a sense, the Commission was not an innovation. Analogous bodies, charged with investigating atrocities and making recommendations on the feasibility of prosecutions, can be traced back as far as the Commission on Responsibilities that was set up at the Paris Peace Conference in 1919, and the UN War Crimes Commission, established in late 1943. The UN has undertaken international fact-finding since the 1960s, with initial efforts directed to South Africa, the Occupied Palestinian Territories and Chile. More recently UN fact-finding has been conducted to deal with the wars in the former Yugoslavia, the Rwandan genocide, Burundi, the post-ballot violence in East Timor, Palestine and Côte d'Ivoire. These recent UN Commissions were under-staffed and under-funded, and tended to produce rather summary reports. An exception is the Yugoslavia Commission, but it owes its success to the dynamic leadership of Cherif Bassiouni, who found funding from private sources and set up the body's secretariat within his own university, somewhat to the annoyance of lawyers on the UN staff.

The Darfur Commission provides a great model for future situations of genocide and mass killing.[45] It marries the urgency and dynamism of an *ad hoc* commission with the resources and expertise of the OHCHR. It has, in a sense, proven that the 'system' of the Genocide Convention has the potential to work. The Commission was launched following a US initiative in the Security Council. Secretary of State Colin Powell said he was acting pursuant to Article VIII of the Convention, which authorizes states to:

> *'call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide'.*[46]

The Commission of Inquiry was the result, and it, in turn, proposed the prosecution of international crimes by the ICC.

In July 2004, the Secretary-General appointed a highly distinguished human rights advocate and expert, Juan Mendez, to be the first SAPG. Annan had pledged to create the position at a conference held earlier in the year, in Stockholm, to commemorate the tenth anniversary of the Rwandan genocide. At the time Annan said it would be necessary to designate an official to collect data and monitor any serious violations of human rights or international law that have a racial or ethnic dimension and could lead to genocide. The position was established under the
Secretary-General's authority, although he set out the details of the mandate in a letter to the President of the Security Council, and linked its authorization to a Resolution of the Council.[47] The SAPG is given the rank of Under Secretary-General of the UN. He has a small but highly professional staff to assist him. In some ways, the position resembles that of a Special Rapporteur or a Special Representative, but it carries considerably more gravitas, both because of the way the Secretary-General has configured and presented the position, and because of the subject matter.

The SAPG's mandate requires both early warning and early action. The SAPG has described his office as a 'focal point' for early warning information coming from inside and outside the UN system. He has wisely resisted indulging in technical debates about the components of the crime of genocide, as defined in the 1948 Convention. Instead, he has interpreted his remit as a fairly broad mandate concerning crimes against humanity and episodes of mass killing, even if these may not, strictly speaking, correspond to the terms of Article 2 of the Convention. The *Outcome Document* is enthusiastic on the subject: 'We fully support the mission of the UN Special Adviser for the Prevention of Genocide.'[48]

To some, the position of Special Adviser may seem a modest and inadequate mechanism for a challenge of such magnitude. Yet such a mandate provides great flexibility when entrusted to a credible and dynamic advocate, which is unquestionably the case. It is too early to attempt anything like a definitive judgment on the effectiveness of the SAPG mandate. One of the challenges of the job is to resist shrill calls for action and intervention at every human rights violation with an ethnic dimension. There are other institutions and

Outline of the mandate for the Special Adviser on the Prevention of Genocide

The source of the mandate is Security Council Resolution 1366 (2001), in particular the following paragraphs:

(a) the eighteenth preambular paragraph, in which the Council acknowledged the lessons to be learned for all concerned from the failure of preventive efforts that preceded such tragedies as the genocide in Rwanda and resolved to take appropriate action within its competence to prevent the recurrence of such tragedies;

(b) paragraph 5, in which the Council expressed its willingness to give prompt consideration to early warning or prevention cases brought to its attention by the Secretary-General;

(c) paragraph 10, in which the Council invited the Secretary-General to refer to the Council information and analyses from within the UN system on cases of serious violations of international law, including international humanitarian law and human rights law and on potential conflict situations arising, inter alia, from ethnic, religious and territorial disputes, poverty and lack of development, and expressed its determination to give serious consideration to such information and analyses regarding situations which it deems to represent a threat to international peace and security.

The Special Adviser will (a) collect existing information, in particular from within the UN system, on massive and serious violations of human rights and international humanitarian law of ethnic and racial origin that, if not prevented or halted, might lead to genocide; (b) act as a mechanism of early warning to the Secretary-General, and through him or her to the Security Council, by bringing to their attention potential situations that could result in genocide; (c) make recommendations to the Security Council, through the Secretary-General, on actions to prevent or halt genocide; (d) liaise with the UN system on activities for the prevention of genocide and work to enhance the UN's capacity to analyse and manage information relating to genocide or related crimes. The methods employed would entail a careful verification of facts and serious political analyses and consultations, without excessive publicity. This would help the Secretary-General define the steps necessary to prevent the deterioration of existing situations into genocide. The Special Adviser would not make a determination on whether genocide within the meaning of the Convention had occurred. The purpose of his or her activities, rather, would be practical and intended to enable the UN to act in a timely fashion.

mechanisms for such cases. So as to act with authority at the right time, the SAPG needs to keep his powder dry.

Little over a year into the mandate, the SAPG has already engaged actively on Darfur. He has helpfully declined to engage in the debate about whether or not a specific crisis meets the definition of genocide. The SAPG has taken an appropriately broad approach to the mandate, in understanding his concerns to include all cases where large-scale loss of life is threatened by ethnic conflict or persecution.

Commission on Human Rights

The drafters of the UN Charter contemplated a Commission on Human Rights, providing specifically for its creation in Article 68. This provision has often been pointed to as evidence of some special attention to human rights issues within the authority of the ECOSOC; the drafters allowed other commissions to be established, but did not identify any of them specifically. Nevertheless, they almost certainly conceived of a body with little real authority, one whose main task would be to set standards rather than monitor abuses. Over time, the remit of the Commission evolved from that of a cautious institution dutifully respectful of state sovereignty to a more robust and aggressive one, willing to condemn specific violations, and to single out the more egregious abusers. It seems likely that the Commission's next session, scheduled for March and April 2006, will be its last, and that it will be replaced by the Human Rights Council called for in the 2005 *Outcome Document.*

Since the earliest years, when the Commission met twice a year, it has limited its activities to one annual session, a human rights *mardi gras* with plenty of political chicanery, ugly lobbying and some resolutions that condemn specific abuses while other atrocities are unmentioned. The High-level Panel described the Commission as having been 'undermined by eroding credibility and professionalism',[49] but this may have been an understatement. At the 2005 Commission, its important five-member Working Group on Situations, to which detailed examination of human rights petitions under the '1503 procedure' is delegated by the Commission, had a counter-productive composition. The membership – one member is elected from each regional group – consisted of Cuba, Hungary, the Netherlands, Saudi Arabia and Zimbabwe. The High Commissioner for Human Rights, Louise Arbour, in her remarks at the conclusion of the Commission's session in April 2005, described the findings of the Working Group as a 'discredit to this Commission'. Speaking of the Secretary-General's proposals, which were issued on 21 March 2005 in his paper *In Larger Freedom* while the Commission's annual session was underway, Arbour said 'the status quo on this issue is not a credible option'.[50]

Still, the Commission has responded with some effectiveness in situations of genocide and mass killing by convening in special session. It did this for the first time in 1992, as war raged in Bosnia and Herzegovina, meeting in special session on two occasions that year. The Commission reconvened in the same manner in 1994 at the height of the Rwandan genocide. This was a welcome initiative, a counterweight to the inertia in the Security Council. The special session led to the appointment of a special rapporteur, and an urgent mission on the ground.

The best of the Commission has come from the special procedures, an increasingly varied mosaic of special rapporteurs, special experts, working groups and so on. Although their infrastructural support is woefully inadequate, the various positions have attracted many devoted and energetic experts, usually drawn from NGOs and academic institutions. On numerous occasions, the special rapporteurs have taken great initiative, often mobilizing resources from outside the system. Rwanda provides perhaps the best example. In March 1993, the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, Bacre Waly Ndaye, conducted a mission to Rwanda on the heels of a non-governmental initiative that had warned of an impending genocide. Ndaye endorsed the conclusions of the NGO commission, noting that violent attacks had been directed against an ethnic group, and that Article II of the Genocide Convention 'might therefore be considered to apply'.[51] In his 1996 review of the history of the Rwandan genocide, Secretary-General Boutros Boutros-Ghali took note of the significance of Ndaye's report, as well as of the work of the non-governmental commission that had inspired it.[52]

Since then, the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions has taken a particular interest in issues relating to genocide and mass killing. The annual reports to the Commission on Human Rights and the General Assembly feature the prevention of genocide and crimes against humanity as the first priority of the Special Rapporteur. In mid-2004, a few months prior to the Security Council initiative establishing the Commission of Inquiry, the Special Rapporteur, Asma Jahangir, visited Darfur. Her conclusions were an eerie prelude to those of the Commission of Inquiry, warning that:

> *'there are strong indications that the scale of violations of the right to life in Darfur could constitute crimes against humanity for which the Government of the Sudan must bear responsibility'.*[53]

The new Special Rapporteur, Philip Alston, in his first annual report, signalled the importance of the establishment of the position of Special Adviser on Genocide as well as the work of the Darfur Commission of Inquiry. He notes:

> *'The Special Rapporteur has already met with the Special Adviser on the Prevention of Genocide and the two experts have agreed that they will work closely together whenever the desired outcome would be facilitated thereby.'*[54]

Other special rapporteurs are also engaged in this area of work, including the Special Rapporteur on Torture, the Special Rapporteur on Violence against Women, and the geographic rapporteurs. At the 2005 session of the Commission, an Austrian-sponsored resolution called for the High Commissioner for Human Rights to designate an Independent Expert on Minority Issues whose mandate would be the promotion of the UNDM. The High Commissioner appointed Gay McDougall, a well-known North American human rights activist to the position for a two-year term.

The appointment of special rapporteurs and those who hold similar special procedures mandates is usually delegated to the President of the Commission on Human Rights. The President holds office for one year. Normally, he or she is the head of their own country's mission to the UN Office in Geneva. Appointments to the special procedures are generally the result of consultation, discussion and consensus building. Political considerations, including geographic representation, are always present. Such a system ought to produce mediocre results, but strangely, it seems to work. The impressive roster of international experts who have held the various special mandates proves this observation. It is intriguing to speculate on what might be the quality of the mandate-holders were they elected, as is the case with the treaty bodies and the Sub-Commission for the Promotion and Protection of Human Rights. Probably they would not be as good. Nobody is currently arguing that the system of appointment be changed. But with the abolition of the Commission on Human Rights a likelihood, there may be a temptation to make other changes, and it is important to preserve what really works in the system.

Another important body, the Sub-Commission, is also subordinate to the Commission on Human Rights. It has often been described as the human rights think tank of the UN. It will be important to ensure that when the Human Rights Council replaces the Commission on Human Rights, the Sub-Commission and its work on minority rights does not get lost in the shuffle. A subsidiary body to the Sub-Commission known as the Working Group on Minorities, meets annually. It plays an important role in proposing new guidelines and stan-

dards on minority issues, and acting as a forum for NGOs representing minorities to voice their concerns at the UN and engage in dialogue with their governments.

International Court of Justice

The ICJ has not been traditionally thought of as a particularly important piece of the UN machinery for the promotion of human rights, including the rights of minorities and their protection against genocide, mass killing and other threats to their existence. Nevertheless, it is one of the institutions specifically designated in the Genocide Convention. Article IX says that disputes about the interpretation, application or fulfilment of the Convention, including those relating to the responsibility of a state for genocide, may be submitted to the ICJ. The provision is menacing enough that many states parties have formulated reservations to Article IX. Of those that have not, several have been engaged in litigation before the ICJ pursuant to the Convention, particularly in the past decade.

The first case before the ICJ under the Genocide Convention was filed by Pakistan in 1972, and concerned the threat to prosecute prisoners of war taken by India when Bangladesh declared independence. The case was dropped following political negotiations, and is now little more than an historical curiosity. Not so, however, with the five cases filed during the 1990s, all of which involve important issues of the protection of minorities, and none of which has yet been resolved with a judgment on the merits. The first of these, and certainly the most significant, is the application by Bosnia and Herzegovina directed against Yugoslavia, which began in March 1993. Many expected it would be dropped as part of the Dayton Peace Agreement, but it has stumbled on, complicated by the power-sharing arrangements in the current government of Bosnia and Herzegovina which make it difficult to determine who is instructing counsel. This may change, as the Republika Srpska gradually accepts responsibility for many of the atrocities committed during the conflict, including the Srebrenica massacre of July 1995.

The Bosnia case has addressed a number of interesting legal issues, but its main significance, from the standpoint of the protection of minority rights, lies in the dramatic provisional measures orders that the ICJ issued while the war was raging, in 1993. In April 1993, and again in September 1993, the ICJ intervened based on preliminary submissions, making various orders with respect to the behaviour of the parties during the conflict.[55] Within a domestic context, an interim court order, enforceable by the authorities, might dramatically change a situation of political or labour turmoil. It would be naive to expect the same within the international context. Certainly, the ICJ's rulings in 1993 did not give much pause for reflection to the parties to the conflict. But they did alter the political debate, and were cited in Security Council resolutions and a variety of reports, both official and unofficial. The potential impact of such orders in the case of ethnic conflict should not be gainsaid.

The other recent ICJ cases filed pursuant to the Genocide Convention involve Croatia and Yugoslavia, Yugoslavia and the NATO powers, and the Democratic Republic of Congo (DRC) and Rwanda. Two other cases have involved prosecutions for genocide and crimes against humanity, although they do not rely upon the Genocide Convention: Democratic Republic of Congo v. Belgium, and Republic of Congo v. France. Some are less serious than others, in terms of the strength of the case, and one of them, filed by Yugoslavia against NATO countries over the 1999 bombing, has been dismissed on jurisdictional grounds.

This flurry of litigation shows the dynamism of the ICJ and its potential, in the right circumstances, to advance the protection of human rights when minorities are at risk. Subsequent rulings of the ICJ, whose echoes can also be seen in the case law of such bodies as the European Court of Human Rights and the UN Human Rights Committee, have confirmed the mandatory nature of provisional measures orders.[56] Although existing cases before the ICJ have all involved 'interested' states, the prevention of genocide can be described as one in which all states have an interest in its prevention. There is no legal reason why states without any direct involvement in a genocidal conflict could not bring the pressure of an ICJ provisional measures order to bear in an appropriate situation. Though perhaps not the most effective remedy, it ought not to be overlooked.

Treaty bodies

Each of the core UN human rights treaties is associated with a 'treaty body'. These are organizations comprised of experts – usually academics and diplomats – with responsibility for monitoring the implementation of the treaty. All of the treaties require states parties to submit reports of their compliance on a periodic basis, and the treaty body examines these publicly. In addition, several of the treaty bodies authorize individuals to submit petitions alleging a violation of their rights by the state in question. Where such mechanisms apply, the treaty body operates somewhat like an international human rights court.

There are now seven such treaties within the UN system; the text of an eighth, dealing with forced disappearance, was finalised in September 2005, and the instrument is now working its way through the system, while that of a ninth, concerning disability, is still being

negotiated. Those with particular relevance to issues of genocide and mass killing are the ICCPR, whose treaty body is the Human Rights Committee, and the ICERD, whose treaty body is the Committee for the Elimination of Racial Discrimination.

The ICCPR enshrines the right that is central to this report in Article 6(1):

> *'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his* [sic] *life.'*

Article 6 also cross-references the other important UN treaty protecting the right to life, the Genocide Convention. Article 20 of the ICCPR is also relevant:

> *'Any propaganda for war shall be prohibited by law. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'*

The Human Rights Committee has a certain effectiveness with respect to individual violations of these rights, in the context of its individual petition system, and also plays a role in monitoring state policy and legislation through its periodic reporting procedure. It has not, however, been particularly effective in the heat of battle, so to speak. The Committee moves at a relatively serene pace. During the wars in the former Yugoslavia, it did request that the government present a special report outside the ordinary cycle of reporting. But compared with other bodies, such as the Commission on Human Rights, which convened in extraordinary session on short notice, or the ICJ, which issued highly-publicized provisional orders, the Human Rights Committee did not demonstrate the kind of flexible and dynamic response that was required.

The Human Rights Committee should explore adjustments to its operations that might enable it to be more relevant and responsive when confronted with situations of genocide or mass killing. There is a common misconception that periodic reports are to be submitted every five years, while there is no such requirement in the Covenant. The Committee can set the frequency of reports (according to Article 40[1][b], 'whenever the Committee so requests'), and it can call upon states to present interim or issue-specific reports on a relatively urgent basis. The petition mechanism could also be made more robust and dynamic, in particular by a more aggressive use of the Committee's authority to issue interim or provisional orders. Perhaps most interesting of all is the inter-state petition mechanism set out in Article 40 of the ICCPR. It enables the Committee to examine complaints filed by one state party against another, to the extent that the states have accepted the inter-state petition procedure (more than 50 have done so). But the inter-state complaint mechanism has never been invoked. It remains therefore an unexplored approach with obvious potential, and in future crises greater attention should be given to its possible application.

The Committee for the Elimination of Racial Discrimination was the first of the treaty bodies to be established, operating since 1970. It examines periodic reports and, for a relatively limited number of states, is also in a position to receive individual petitions. The petition mechanism has been overshadowed by that of the Human Rights Committee, however, and has generated only a limited amount of jurisprudence. The Committee for the Elimination of Racial Discrimination can also exercise jurisdiction in the case of inter-state complaints. However, as with the Human Rights Committee, the relevant provision has never been invoked.

In recent years, the Committee for the Elimination of Racial Discrimination has shown a new vitality, characterized by a desire to make itself more relevant in situations involving genocide and mass killing. In early 2005, it adopted a Declaration on Prevention of Genocide in which it committed itself to developing a special set of indicators related to genocide, and strengthening and refining its early warning and urgent action, as well as follow-up procedures in all situations where indicators suggest the increased possibility of violent conflict and genocide. In its August 2005 meeting, the Committee adopted a 'follow-up procedure' designed to strengthen its capacity to detect and prevent, at the earliest possible stage, developments in racial discrimination that may lead to violent conflict and genocide. These included a list of indicators to be used by the Committee in acting upon situations where there is a potential for genocide and mass killing. Although specific to the Committee, they represent a very helpful set of guidelines that may be used by virtually all organizations engaged in the prevention of genocide (they are reproduced in full in the sidebar).

The Committee explains that the indicators may also be present in states that are not moving towards violence or genocide. For example, the USA might be considered to fulfil indicator no. 14 ('significant disparities in socio-economic indicators evidencing a pattern of serious racial discrimination'), but it would be exaggerated to suggest it is on the brink of genocide or mass killing. For this reason, the Committee proposed that its indicators be supplemented by some additional considerations: prior history of genocide or violence against a group; policy or practice of impunity; existence of proactive communities abroad fostering extremism and/or providing arms; presence of external mitigating factors such as the UN or other recognized invited third parties.

Indicators of systematic and massive patterns of racial discrimination proposed by the Committee for the Elimination of Racial Discrimination

1. Lack of a legislative framework and institutions to prevent racial discrimination and provide recourse to victims of discrimination;
2. Systematic official denial of the existence of particular distinct groups;
3. The systematic exclusion – in law or in fact – of groups from positions of power, employment in State institutions and key professions such teachers, judges and police;
4. Compulsory identification against the will of members of particular groups including the use of identity cards indicating ethnicity;
5. Grossly biased versions of historical events in school text books and other education materials as well as celebration of historical events which exacerbate tensions between groups and peoples;
6. Policies of forced removal of children belonging to ethnic minorities with the purpose of complete assimilation;
7. Policies of segregation, direct and indirect, for example separate schools and housing areas;
8. Systematic and widespread use and acceptance of speech or propaganda promoting hatred and/or inciting violence against minority groups, particularly in the media;
9. Grave statements by political leaders/prominent people that express support for affirmation of superiority of a race or an ethnic group, dehumanize and demonize minorities, or condone or justify violence against a minority.
10. Violence or severe restrictions targeting minority groups perceived to have traditionally maintained a prominent position, for example as business elites or in political life and State institutions;
11. Serious patterns of individual attacks on members of minorities by private citizens, which appear to be principally motivated by the victim's membership of that group;
12. Development and organization of militia groups and/or extreme political groups based on a racist platform;
13. Significant flows of refugees and internally displaced persons, especially when those concerned belong to specific ethnic or religious groups;
14. Significant disparities in socio-economic indicators evidencing a pattern of serious racial discrimination;
15. Policies aimed at the prevention of delivery of essential services or assistance including obstruction for aid delivery, access to food, water, sanitation or essential medical supplies in certain regions or targeting specific groups.

The Committee has also developed a series of measures enabling it to act outside of its regular sessions. Like the Human Rights Committee, the Committee for the Elimination of Racial Discrimination only meets for several weeks each year. It has a small permanent staff, and is not really equipped to respond in an adequate manner to urgent developments. The recent proposals from the Committee authorize the Chair of its Working Group on Early Warning/Urgent Action, in consultation with the members of the group and with the follow-up Coordinator and Chair of the Committee, to request further urgent information from the state party, to forward the information to the Secretary-General and the SAPG, and to prepare a draft decision to be submitted for adoption by the Committee at its next session. These remain exceedingly modest measures. The mandate of the Committee, as set out in the Convention, is relatively vague, and there is plenty of room for imaginative interpretations. The worst that could happen would be a reaction from some states parties with respect to the activism of the Committee. That might have been a problem in the early days, when there were few ratifications. But with approximately 170 states parties, it would seem that the Committee could afford to be a bit more ambitious, even at the risk of provoking denunciations of the Convention.

For example, the Committee ought to authorize the convening of an urgent and unscheduled session in the event of a serious threat of genocide or mass killing. It should provide for this being done at the request of a reasonable quorum of its members, something that could surely be accomplished in a matter of hours, given modern communications. It should also require that the state concerned present its report on an urgent basis. Again, nothing in the Convention makes this impossible. Article 9(1) requires states parties to submit reports 'whenever the Committee so requests'. To set the clock back to 1993, when the Special Rapporteur warned of genocide in Rwanda, and when several of the indicators on the Committee's list were present, it might well have ordered Rwanda to appear before the Committee on very short notice, in public session. Defiance by Rwanda might have angered its treaty partners, who would then have taken more imperative action to respond to the descent into genocide. Such defiance might also provoke other states to take the unprecedented step of filing inter-state petitions. Finally, the Committee might also consider, in such cases, encouraging broader participation in its dis-

cussions and its actions, including engagement with the NGO sector. The only thing holding the Committee back is caution and conservatism. The recent proposals do not go far enough, and while they are a positive development, they fail to adequately reflect the heightened concern of the international community in this area. These observations are also valid with respect to the Human Rights Committee.

Greater innovation by the treaty bodies is all the more important given the potential consequences on their methods of work of the broader reform proposals within the UN. If the proposed Human Rights Council is established, with authority to conduct peer review of member states, the treaty bodies have to find original and expansive interpretations of their mandates. They may also usefully serve as a watchdog on the work of the Council. But as the UN changes, the treaty bodies are going to have to do a little more thinking outside the box.

The 1948 Genocide Convention did not create any institutional mechanism for its monitoring and implementation. The concept of a treaty body, like those for the main human rights conventions, had not yet emerged within the UN. Even had the idea been on the table, it would have been unlikely to succeed, given the conservatism of states at this early stage in the development of human rights law. The Convention confines itself to recognizing the jurisdiction of the ICJ, and 'authorizing' states to submit issues to the competent organs of the UN (as members of the UN, they can do this anyway, and need no acknowledgement of this possibility in a treaty distinct from the UN Charter). Since the Whitaker Report of the Sub-Commission on Human Rights, which was published in 1985, there have been recurring suggestions that a 'Genocide Committee' be established to monitor the Convention. There are reports that in 1998, on the fiftieth anniversary of the Convention, the USA considered calling for an international conference of states parties to the Convention at which the establishment of a Committee would be proposed. In his proposals to the Stockholm International Forum, in January 2004, the UN Secretary-General recommended the establishment of a Committee on the Prevention of Genocide. His proposal would transform the 1948 Genocide Convention making it resemble the other main human rights treaties, with an implementation body, and possibly an obligation upon states parties to submit periodic reports.

There can be no doubt that the prevention of genocide has suffered from the absence of some permanent mechanism, like a treaty body, for the implementation and monitoring of the Convention. While other human rights treaties were enriched by regular examination of their provisions, through the process of preparing and examining periodic reports, and the treatment of individual communications or petitions, the Genocide Convention lingered in a kind of judicial limbo. Aside from the Whitaker Report, with its often useful but sometimes ambitious proposals, there was little development in the interpretation and application of the Convention until events in Bosnia and Herzegovina and then Rwanda focused attention on the subject. But genocide prevention involves a long waiting period associated with what may seem an absurdly high state of readiness, followed by brief periods in which urgent action is dramatically needed. It is perhaps overstating the matter to suggest that the existence of a genocide monitoring body in 1994 would have prevented the Rwandan massacres. Yet the clearer perspective on a subject that comes from regular examination would surely have contributed to a more prompt and effective reaction when the killings began and perhaps even before.

Let us take a few small examples, yet ones that took on legal significance in the wake of the Rwandan genocide. Although Rwanda had ratified the Genocide Convention in the 1970s, it had not enacted any implementing legislation. Neighbouring Burundi had never ratified the Convention. Some relevant states, including Rwanda, had made reservations to Article IX, which gives jurisdiction to the ICJ. These technical issues might have been addressed earlier had a monitoring body existed to remind states of their obligations, and of problems in the application and interpretation of the Convention.

The Secretary-General's proposal for a treaty body associated with the Genocide Convention should be acted upon without delay. Its activities should include monitoring national legislation with respect to implementation of the Genocide Convention, and issues concerning treaty practice. A genocide treaty body might also assist non-states parties with technical advice so that they could overcome obstacles to ratification. It could urge states to withdraw existing reservations and, more generally, ensure that the Genocide Convention achieves its full legal potential. It could also monitor events and tendencies in states parties which indicate a possible build-up towards genocide.

International Criminal Court

The ICC has been operational since mid-2003. Its first arrest warrants were issued in October 2005. They are directed against leaders of the Lord's Resistance Army (LRA), one of the combatant groups in the civil war in northern Uganda.[57] There is evidence in that conflict of such international crimes as recruitment of child soldiers, and various forms of crimes against humanity, although it does not seem that genocide is characteristic of the violations. The Uganda case was referred to the ICC in

December 2003 by Uganda itself, pursuant to Article 14 of the Rome Statute. The ICC is also seriously examining two other conflicts, in the Ituri region of eastern Congo, also the result of a self-referral, and in the Darfur region of Sudan, pursuant to a resolution of the Security Council adopted in March 2005. One other case, referred by the Central African Republic against itself, sits on the back burner. Many other situations have been submitted to the ICC by individuals and NGOs, some of them glaringly significant and applicable, such as the conflict in Colombia and abuses committed by some of the military forces that occupy Iraq. However, the Prosecutor has thus far shown little inclination to develop cases in the exercise of his powers, by which he can initiate a prosecution on his own initiative and without a request from a state party or the Security Council.

In its contemporary conception, international criminal law has often been predicated on a preventive or deterrent function. One trial chamber of the ICTY has explained that in establishing the institution, the Security Council:

> *'intended to send the message to all persons that any violations of international humanitarian law – and particularly the practice of "ethnic cleansing" – would not be tolerated and must stop. It was further hoped that by highlighting breaches of obligations under international humanitarian law, and in particular the Geneva Conventions, that the parties to the conflict would recommit themselves to observing and adhering to those obligations, thereby preventing the commission of further crimes.'* [58]

Resolution 808, for example, which began the process of establishing the ICTY, expressed the conviction of the Security Council that the proposed institution would promote international peace.[59] In his report on the rule of law and transitional justice, the Secretary-General wrote that criminal justice:

> *'can help to de-legitimise extremist elements, ensure their removal from the national political process and contribute to the restoration of civility and peace and to deterrence'.*[60]

The report of the High-level Panel, presented in December 2004, recommended that:

> *'[i]n cases of mounting conflict, early indication by the Security Council that it is carefully monitoring the conflict in question and that it is willing to use its powers under the Rome Statute might deter parties from committing crimes against humanity and violating the laws of war'.* [61]

But deterrence has probably been of only limited importance in practice. In the case of Rwanda and Sierra Leone, the conflicts were largely over when the tribunals were established. As for the ICTY, the conflict in Bosnia and Herzegovina that it was intended to resolve raged on for two and a half years after its establishment. The war's worst massacre, at Srebrenica, took place a few days after an ICTY Trial Chamber held a public hearing confirming its indictments against Bosnia Serb leaders Radovan Karadžić and Ratko Mladić. And although the ICTY was fully operational and quite effective by 1999, it was manifestly incapable of preventing the persecution of Kosovo Albanians prior to and during the war, and of Kosovo Serbs after it.

These general doubts about the effectiveness of deterrence cannot really be resolved. The problem is a classic one in criminal justice generally. The fact that some individuals continue to commit crime does not in any way disprove the possibility that others, who remain unknown and uncounted, have been deterred. How can those who have been deterred be identified? Of course, many also argue that perpetrators must be held accountable because of a legal duty to do so, or out of the need to provide justice for victims, and these propositions do not depend for their validity on any evidence that criminal justice also deters future perpetrators or assists in bringing an end to conflict and atrocity. Ultimately, a deterrent role for international criminal justice in the prevention of genocide and mass killing will depend more on faith and intuition than on any hard evidence.

The ICC is still in its infancy. It is fragile and vulnerable. It must be protected and nurtured, but it also needs firm guidance. To the extent that the ICC may deter genocide and mass killing, the pace of its investigations is discouraging. With respect to the only situation that has led to charges to date, the arrest warrants were requested by the Prosecutor nearly two years after the case was triggered by Uganda's self-referral. The Security Council handed the Darfur situation to the ICC in March 2005. The report of the Commission of Inquiry had been available since January, and it included much valuable investigative material and even a list of suspects. At the time of writing, nine months later, there were no arrest warrants.

This does not compare very favourably with the precedents. We recall how the Nuremberg indictments were served on defendants in October 1945, shortly after the London Charter confirmed the definition of the crimes and the architecture of the International Military Tribunal. In more recent times, the first indictments of the ICTY were issued in November 1994, approximately five months after Prosecutor Richard Goldstone took office, and one year after the Tribunal's judges were elected. The

first indictments of the International Criminal Tribunal for Rwanda (ICTR) date from November 1995, 12 months after the Security Council resolution establishing the Tribunal. The first indictments (and arrests) of the Special Court for Sierra Leone were made in March 2003, about eight months after the election of the judges and the arrival of the Prosecutor in Freetown. In other words, the ICC has thus far moved at a glacial speed. If the Prosecutor really believed that the Court had a deterrent effect, one would expect him to move with greater urgency and determination. A partial explanation for the delay may lie in the Prosecutor's respectful consideration of entreaties from Ugandan civil society about the threat criminal proceedings might pose to the peace process.

The other area of great concern in the unfolding work of the Prosecutor is his emphasis on non-state rebel groups. Until the Security Council referred the Darfur situation to the Prosecutor, in late-March 2005 in accordance with Article 13 of the Rome Statute, investigations had been focused on what were in effect cooperative ventures with governments – Uganda, Congo – against rebel groups within their own borders. This is easily explained by pragmatic considerations. The Prosecutor understandably finds the prospect of investigating crimes in which states themselves are complicit to be a daunting one. Without their benign assistance, investigation is difficult, nigh impossible, as he is learning in Sudan. And so the Court develops along the line of least resistance, enticing governments to refer cases against themselves, with a tacit understanding that the efforts will be directed against rebel insurrectionists and not the government. When the ICC issued its first arrest warrants in October 2005, against members of the LRA in northern Uganda, some human rights organizations charged that the Prosecutor had neglected atrocities committed by the country's armed forces.

Prosecutor Ocampo in a 28 November 2005 speech to the Assembly of States Parties to the Rome Statute, attempted to justify his focus on the LRA rather than on the government troops. He explained that the rebels were responsible for the more serious violations of human rights, including killings and abductions. But this is not a good argument in defence of such a prosecutorial policy. To the extent that the ICC exists to deal with impunity, its attention must necessarily be directed to the government forces, who invariably go unpunished. The problem, though, is that the day Prosecutor Ocampo turns his sights on pro-government or government actors, the paradigm shifts dramatically, and he has thus far shown he is reluctant to go along that path. Perhaps the clearest example is Colombia, a party to the Rome Statute since mid-2002, and the locus of serious, ongoing violations of human rights that are attributable both to the rebel Revolutionary Armed Forces of Colombia (FARC) and to the pro-government paramilitaries. Complaints about Colombia have been submitted to the Prosecutor since the day he took office, without apparent result. Of course, he could count on Colombia's cooperation were he to focus on the rebels, as he has done in Uganda. But this would expose the fallacy of the approach. There is no problem of impunity for the FARC. Colombia is willing and able to prosecute its members. The same cannot be said of the pro-government paramilitaries, who murder and kidnap without threat of prosecution. And it would seem that the ICC was created to deal with such state actors, who typically go unpunished, rather than the non-state actors or rebels, who are exposed to the full force of the law if and when the government can catch them.

It should be noted that this deviation towards non-state actors in international criminal justice is also reflected in the evolving definitions of crimes. At Nuremberg, there was no need to declare that crimes against humanity were 'crimes of state',[62] because the International Military Tribunal was charged with prosecuting 'the major war criminals of the European Axis'. A connection with the state was implicit. It was similarly implied a few years later when the Genocide Convention was adopted. Yet lately, judges have enlarged these crimes so that they encompass non-state actors and even individuals. In one case, the ICTY said that a single person, acting alone, could commit genocide.[63] A few years later, it declared that crimes against humanity did not require any link to a state or state-like organization.[64] According to the prevailing interpretations at the ICTY, genocide and crimes against humanity can be committed, at least theoretically, by terrorist bands and serial killers. The law of the ICC may be more restrictive: it requires that crimes against humanity involve a 'State or organisational policy' and that genocide occurs 'in the context of a manifest pattern of similar conduct'. The trend towards diminishing or eliminating the role of the state is merely the counterpart of developments in the strategy of war crimes prosecutions, which are increasingly oriented to non-state actors, as discussed. Nobody welcomes these developments more than the states themselves. Yet history teaches that most genuine threats of genocide and mass killing come from states, not non-state actors. There is a danger that international criminal prosecution, which has shown so much potential in recent years to address impunity, may be losing the plot.

With its modest resources and limited jurisdictional reach, the ICC cannot be expected to fill the entire impunity gap. Here the welcome proliferation of international or internationalized criminal justice mechanisms makes a very important contribution. A

variety of useful experiments are underway in such places as Cambodia, East Timor, Kosovo and Sierra Leone, searching for effective ways of delivering high quality justice at reasonable cost. Answers to the challenges of reconciling the work of alternative mechanisms, such as truth commissions, with classic criminal justice are being found.[65] The exercise of universal jurisdiction has long been vaunted as the most productive response, but despite all of the noise it has not, so far, lived up to its promises. Only a handful of offenders have been convicted, and this does not compare very favourably with the record of the international tribunals. The trials make the headlines, but they do not deliver results. Moreover, few states have shown any real inclination to pursue the universal jurisdiction route, perhaps because of its high cost, and its political fallout. This may be changing, and there are new signs of willingness in several states to develop ambitious international justice prosecution programmes.[66]

International humanitarian law and the special problems of the law of armed conflict

Unlike the human rights treaty systems, which combine standard-setting with institution building, international humanitarian law is essentially declaratory in nature. The one great international humanitarian law institution, the International Committee of the Red Cross, partially derives its mandate from the 1949 Geneva Conventions. But it usually operates in the shadows in pursuit of its humanitarian objectives. It does not play an important visible role in the prevention of genocide and mass killing. Nor has it ever claimed this to be its objective.

There is one exception here, the International Fact-Finding Commission established in accordance with Article 90 of Protocol Additional I to the Geneva Conventions. The Commission is made up of 15 distinguished international personalities who meet once a year in Switzerland and lament the fact that they have never had any work since becoming operational in the early 1990s. Article 90 limits the work of the Commission to cases where the relevant state party has consented to its investigation in the case at hand. But it also authorizes the Commission to inquire into any facts alleged to be a grave breach or other serious violation of the Geneva Conventions and Protocol I. Moreover, it can also 'facilitate, through its good offices, the restoration of an attitude of respect' for the Conventions and Protocol I. Much of the blame for its inertia lies with states, but the Commission could have been bolder in promoting itself too. Here, then, is a mechanism with interesting potential, but one that needs encouragement from states.

At the time that the Security Council proposed the establishment of the Darfur Commission of Inquiry, in September 2004, some suggested this might be a good opportunity for the International Fact-Finding Commission to offer its services. It might be argued that its mandate does not extend beyond the Geneva Conventions and Protocol I, and that this is too narrow to cover an internal armed conflict featuring crimes against humanity. But because crimes against humanity largely overlap with grave breaches, the problem is illusory. In other words, the Fact-Finding Committee might well have volunteered for the task. But to make itself available in such circumstances, and to offer a serious alternative to the *ad hoc* commission that was eventually set up under the auspices of the High Commissioner for Human Rights, the Fact-Finding Commission would have to possess some standby capacity and existing expertise, which it does not have at the present time.

Outside the structure of Geneva law, there are some interesting and complementary initiatives. The Hague-based Institute for International Criminal Investigations provides training for fact-finders and investigators in international humanitarian law. It has developed sophisticated protocols for investigation. The Institute also looks to the possibility of providing teams of investigators on stand-by in urgent cases, as well as rosters of qualified investigators that would be made available to governments and international organizations. The Justice Rapid Response Teams Project, which originates with the German government and which has received funding from several other European states, is developing proposals along similar lines.

International humanitarian law does not directly address the source of armed conflict. It prides itself on being effectively neutral in this respect, something that enables it to address both sides in an armed conflict on an equal basis. This indifference to the cause of war is arguably the key to its success. Nevertheless, the unwillingness of international humanitarian law to speak to this issue constitutes a serious shortcoming in a comprehensive strategy to deal with genocide and mass killing. Atrocities do take place in the absence of full-blown civil or international war: the killing fields of the Khmer rouge are a good example. Still, the Khmer rouge regime was bookended by armed conflict, some of it international in scope. And with most cases of genocide and mass killing, the spectre of war is close at hand: Rwanda, Yugoslavia, etc.

If the waging of an illegal war is not a violation of international humanitarian law *per se*, does that mean that it is not a violation of international human rights law? After all, the ICCPR declares that: '[n]o one shall be arbitrarily deprived of his [*sic*] life'. Many of the recent authorities, including the ICJ, suggest that human rights law should defer to international humanitarian law in the event of armed conflict.[67] Obviously, it is desirable to attempt to reconcile these two bodies of law whose common mission is to protect the dignity of human beings. Yet implicitly, at least, the ICJ seems to be saying that 'collateral damage' in warfare is not a human rights violation,

because it is a regrettable but inevitable accoutrement of armed conflict. If human rights law and humanitarian law are joined in this manner, however, then human rights law is also required to adopt a position that is indifferent to the cause of the conflict. This is where the attempt at accommodation seems to breaks down.

Unlawful war results in unlawful killing, which is a violation of the human rights of the individual. This must surely be the underlying meaning of the protection against the arbitrary deprivation of life set out in Article 6(1) of the ICCPR. But human rights law, perhaps because it has been too influenced by the reluctance of international humanitarian law to engage in the unjust war debate, has been too cautious about entering this area. Why, for example, were there no resolutions at the Commission on Human Rights condemning the illegal invasion of Iraq by the UK and the USA? Why were the UK and the USA not convened, in emergency session, by the Human Rights Committee to answer charges that their aggression had resulted in the arbitrary deprivation of life of tens of thousands of residents of Iraq?

Freedom from fear – these seminal words of Franklin D. Roosevelt, first expressed in his 'Four Freedoms speech' to Congress in January 1941, appear in the preambles of the UDHR and the two international Covenants that succeeded it. Although there is little concrete echo of freedom from fear in the treaties, the fundamentally anti-war premise that underpins modern human rights law can be glimpsed in Article 20(1) of the ICCPR: 'Any propaganda for war shall be prohibited by law.' This may not be much to go on, but it is enough to glean the philosophical framework of the Covenant. It is also useful to recall the words of one of the first General Comments of the Human Rights Committee, adopted nearly a quarter of a century ago:

> *'The Committee observes that war and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year. Under the Charter of the United Nations the threat or use of force by any State against another State, except in exercise of the inherent right of self-defence, is already prohibited. The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life. Every effort they make to avert the danger of war, especially thermonuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life.'* [68]

Human rights institutions should be more forthright in condemning unlawful war. In the case of Iraq, they generally failed at the task. Perhaps their shortcomings can be traced to discomfort about the parallels with the unauthorized use of force in 1999 in Kosovo. If that is the case, they must move on.

Illegal war is prohibited by international law and is, indeed, a war crime. Even Lord Goldsmith, in his confidential advice to the UK Prime Minister Tony Blair prior to the attack on Iraq, warned:

> *'Aggression is a crime under customary international law which automatically forms part of domestic law. It might therefore be argued that international aggression is a crime recognised by the common law which can be prosecuted in the UK courts.'* [69]

Although prosecution is highly unlikely, in the UK or elsewhere, the opinion is a vivid reminder of the fact that one of the great gaps in the Rome Statute of the International Criminal Court, namely the failure to agree a provision covering the Court's jurisdiction over the crime of aggression,[70] does not in any way diminish the historic fact that aggression (or, 'crimes against peace') was judged a crime under customary law at Nuremberg and nothing has happened since to change that.

Conclusions

This report has examined the existing mechanisms that may be brought to bear in the event of genocide and mass killing. Its perspective is sharpened by a focus on issues of the rights of ethnic minorities. This is not the only approach to an analysis of issues of genocide and mass killing. Other observers might choose to put issues of gender or political violence, for example, at the heart of their study. The International Criminal Tribunal for Rwanda (ICTR), in its important judgment on the Akayesu case, offers yet another perspective, making a strong case for considering issues of gender and political violence together with, and not separately from, violations of the rights of ethnic minorities.

Other groups, for example homosexuals, have also been vulnerable to targeted destruction; and with individuals also being targeted due to overlapping identities (for example women belonging to minorities) there is a strong case for the UN to develop an expertise on multiple discrimination. But without wanting to diminish the importance of these other dimensions, that the persecution of ethnic or racial minorities is near the centre of gravity of human rights law and advocacy should not require much of a demonstration.

It is a commonplace to recall that the modern human rights system, beginning with the rather hesitant clauses of the UN Charter, springs from horror and outrage at the destruction of Europe's Jewish population. But it was also driven by some more protracted themes in human history: the slave trade and colonialism. Is it accidental that the initial UN treaty in the area of human rights dealt with the crime of genocide or that the first of the core UN human rights treaties to be adopted addressed racial discrimination? The adoption of these instruments did not follow any grand pattern. Rather, they seemed to obey some implicit logic in the UN system, by which issues of racial discrimination and the persecution of ethnic groups were at the core of human rights.

It would be far too ambitious to attempt here to set out any blueprint for the reform of international human rights institutions, in order to make them more effective at dealing with genocide and mass killing. In any event, the reform process is well underway. While some may fear change, anxious that it will only weaken existing institutions and mechanisms, such conservatism is unproductive. It fails to acknowledge that the UN must reflect the significance of human rights, and make visible progress in the protection of minorities and in the prevention of genocide and mass killing. There is a sense that the system can no longer continue as it has in the past. This realization alone is a significant 'tipping point'. The recommendations and proposals which follow are offered as a contribution to the unfolding debate.

Recommendations

Guiding principles

1. **Stop arguing about the distinction between genocide and crimes against humanity.** While the distinction between these two categories of international crime was of historical importance, the root of the problem has been eliminated with confirmation of the existence of crimes against humanity punishable in peacetime. International law now understands the consequences of a determination of crimes against humanity to be essentially the same as those for genocide.[71]
2. **Killing in unlawful war is a violation of the fundamental human right to life.** Efforts to reconcile human rights law and the law of armed conflict, known as international humanitarian law, so as to better protect the individual in wartime, have had one undesirable consequence. They tend to obscure the issue of the legality of the conflict, something that international humanitarian law has historically steered clear of in order to facilitate its application to all warring parties. But there is a component to human rights law that recognizes a right to peace, flowing from both the protection of the right to life and the preambular concept in human rights legislation of 'freedom from fear'.
3. **'Crimes of state' lie at the heart of international criminal law.** Recent legal developments have tended to eliminate any requirement that genocide, crimes against humanity and war crimes be committed by states, or rather by individuals acting as part of the activities of states or state-like entities. Substantively, the requirement of a state policy element in genocide or crimes against humanity has been discouraged in recent judgments. Procedurally, international criminal tribunals risk being deflected towards various forms of 'rebel' groups rather than to those crimes associated with the states themselves. But by and large, atrocities go unpunished because the states responsible for them continue to protect the perpetrators. The problem of impunity rests principally with state actors, not non-state actors, and we must beware of legal developments that seem to take us away from this fundamental truth.

Recommendations for strengthening genocide prevention at the UN

To UN member states

1. **Increase resources for the Special Adviser on the Prevention of Genocide.** The current allocation of two full-time staff to his office is manifestly inadequate. The post of the SAPG is a part-time one.
2. **Establish a Human Rights Council with genuine authority and credibility as a principal UN body.** The authority will come from its status as a principal body. The credibility will result partly from a role for independent human rights experts in its operations, so as to dissipate the politicization that is inherent in such structures. Possibly more importantly for the Human Rights Council's credibility, however, is that its members must be guided in their deliberations by a concern to promote and protect human rights, and not by political 'bargaining' and loyalty to regional groupings.
3. **Preserve the human rights special procedures and the Sub-Commission.** The web of special rapporteurs, special representatives and similar institutions, including the Sub-Commission, represents the best of the activities of the current Commission on Human Rights, and more resources should be devoted to them.
4. **Strengthen UN mechanisms for minority rights protection.** The new Independent Expert on Minority Issues should be lent all the necessary support and resources in the realization of her tasks. The UN Working Group on Minorities also plays a crucial and rather separate role as a forum for dialogue between minority representatives on governments, and therefore fulfils a conflict prevention role. It is also the only forum which enables members of minorities to have a say on minority issues within the UN. A voluntary fund to cover costs of participation of minority representatives in UN meetings, already agreed by a Commission on Human Rights resolution, should be confirmed by the General Assembly. During the reform process, member states should resist any temptation to consider these two mechanisms as duplicating each other. Minorities represent an enormously diverse and complex issue for the UN, as with

women's and children's rights, issues which are covered by a number of different mandates. Further, there is a strong case for the UN to develop an expertise on multiple discrimination, for example, women belonging to minorities.

5. **Proceed carefully with treaty body reform.** The cumbersome process of reporting to the treaty bodies has reached a point that cannot reasonably continue as it has in the past, but any new proposals should not jeopardize the strengths of the current system – in particular the specialist knowledge and experience of the different bodies and their ability to address a diverse range of issues. To the extent that the future Human Rights Council takes on a genuine monitoring role, it is unlikely to boast the same range of expertise, and there is no guarantee that it will be free from the political considerations and political bargaining that blight the current Commission on Human Rights. The treaty bodies should consider effective mechanisms for addressing situations of urgent mass violations, such as extraordinary sessions, possibly using phone conferencing or the internet.
6. **Establish a treaty monitoring body for the Genocide Convention.** This could be mandated to monitor the implementation of states parties' responsibilities in preventing and prosecuting genocide, both in their own territories and abroad.
7. **Strengthen the capacity of the United Nations for preventive diplomacy**. The UN should learn from the experience of the OSCE High Commissioner on National Minorities in this regard, as recommended by the High-level Panel on Threats, Challenges and Change. While the good offices interventions of the Secretary-General and the High Commissioner for Human Rights are of inestimable importance, the UN should consider establishing a dedicated preventive diplomacy mechanism for minority issues, which would be able to draw on specific minority rights expertise in making recommendations for constructive resolutions of situations of tension.

Relevant International Instruments

United Nations Convention on the Prevention and Punishment of the Crime of Genocide, 1948

Article I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(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.

Article III

The following acts shall be punishable:

(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

Article IV

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.

Article V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

Article VI

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article VII

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article VIII

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

Article IX

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Rome Statute Of The International Criminal Court, 1998

Article 7

Crimes against humanity

1. For the purpose of this Statute, 'crime against humanity' means any 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.

2. For the purpose of paragraph 1:

[…]

(b) 'Extermination' includes 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 a population;

[…]

(g) 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

United Nations, 2005 World Summit Outcome, 20 September 2005

Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity

[…]

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter of the United Nations, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

Notes

1 *Draft Outcome Document*, 13 September 2005, para. 138.
2 *Ibid.,* para. 97.
3 *A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change*, UN Doc. A/59/565, annex, p. 15.
4 *Revised and updated report on the question of the prevention and punishment of the crime of genocide,* UN Doc. E/CN.4/Sub.2/1985/6.
5 Referred to hereinafter as the Sub-Commission.
6 Humphrey, J., 'The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities', *American Journal of International Law* 869, no. 62, 1968, p. 872.
7 For example, the Independent International Commission on Kosovo concluded that: *'the NATO military intervention was illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council. However, the Commission considers that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule'.* See: *The Kosovo Report: Conflict, International Response, Lessons Learned,* Oxford, Oxford University Press, 2000. If the distinction between 'legality' and 'legitimacy' seems familiar, that is because it may be not much more than an elegant gloss on the old saying that the end justifies the means.
8 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state …'.
9 The Nazis also launched destruction attacks on Roma, homosexuals and other groups.
10 English translation quoted in: *United Nations War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War*, London, His Majesty's Stationery Office, 1948, p. 35.
11 The 1915 mass killings also targeted Syriac Christians.
12 The London Charter of the International Military Tribunal set down the laws and procedures by which the Nurembury trials were conducted.
13 'Minutes of Conference Session of July 23, 1945', in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials,* Washington, US Government Printing Office, 1949, pp. 328–47, p. 331.
14 *Ibid.,* p. 333.
15 *France et al. v. Göring et al.,* (1946) 22 IMT 203, 13 ILR 203, 41 *American Journal of International Law* 172.
16 *Prosecutor v. Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 141.
17 *Rome Statute of the International Criminal Court,* UN Doc. A/CONF.183/9, art. 7(1).
18 *Draft Outcome Document, op. cit.,* paras. 138–9.
19 *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004,* 25 January 2005, p. 4.
20 There is some incoherence in the behaviour of the UN in this respect. When peace was reached in Sierra Leone in July 1999, the Secretary-General instructed his Special Representative to declare that the UN could not accept a peace agreement that included amnesty for war crimes and crimes against humanity. But when it subsequently participated in establishing a court to bring perpetrators of these crimes to justice, only limited funding was provided, enough for a few essentially symbolic trials but in no way sufficient to deal adequately with impunity for such crimes.
21 *In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary-General,* UN Doc. A/59/2005, para. 165.
22 *Draft Outcome Document, op. cit.,* para. 155.
23 *Report by the Special Rapporteur on extrajudicial, summary arbitrary executions on his mission to Rwanda,* 8–17 April 1993, UN Doc. E/CN.4/1994/7/Add.1, para. 79.
24 Gourevitch, P., 'The Genocide Fax', *The New Yorker,* 11 May 1998, pp. 42–6. Also, Des Forges, A., *Leave None to Tell the Story, Genocide in Rwanda,* New York/Washington/ London/Brussels, Human Rights Watch, Paris, International Federation of Human Rights, 1999.
25 'UN erred in Rwanda, official says', *The Globe and Mail,* 8 December 1998, p. A15 (Reuters).
26 See interview with Iqbal Riza on the television documentary, *The Triumph of Evil,* on *Frontline,* Public Broadcasting Service, 26 January 1999.
27 *Statement by the President of the Security Council Condemning the Slaughter of Civilians in Kigali and Other Parts of Rwanda,* UN Doc. S/PRST/994/21, 30 April 1994.
28 UN Doc. S/RES/925 (1994), preamble.
29 *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda,* 15 December 1999, United Nations. The text emphasized the first sentence about the Security Council.
30 UN Doc. S/RES/929, 1994.
31 *The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty,* Ottawa, International Develoment Research Centre, 2001, pp. 53–5.
32 Proposals along these lines had come from the International Commission on Intervention and State Sovereignty: see *The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty, op. cit.*
33 *Draft Outcome Document, op. cit,* para. 138.
34 *Ibid.,* para. 139.
35 UN Doc. A/RES/48/138.
36 UN Doc. A/PV.812, para. 127 (El Salvador), UN Doc. A/PV.831, para. 13 (Malaya), para. 126 (Cuba), UN Doc. A/PV.833, para. 8 (El Salvador), para. 28 (the Netherlands). For the report in question: *The Question of Tibet and the Rule of Law,* Geneva, International Commission of Jurists, 1959, pp. 68–71.
37 UN Doc. A/5429, 1963.
38 General Assembly Res. 37/123 D.
39 For example, *The situation in Bosnia and Herzegovina,* UN Doc. A/RES/46/242; *Situation of human rights in the territory of the former Yugoslavia,* UN Doc. A/RES/47/147.
40 It did, of course, condemn the Rwandan genocide, but in December 1994, when the killing was mostly over: *Situation of human rights in Rwanda,* UN Doc. A/RES/49/206.
41 General Assembly Res. 377 (A), 1950.
42 For example, *Draft Outcome Document, op. cit,* paras. 80, 149–51.
43 *Ibid.,* para. 139.
44 *Vienna Declaration and Programme of Action,* UN Doc. A/CONF.157/24 (1993); UN Doc. A/RES/48/141, 1993.
45 Alston, P., 'The Darfur Commission as a model for future responses to crisis', *Journal of International Criminal Justice,* no. 3, p. 600, 2005.

46 Secretary Powell, C.L., *Testimony Before the Senate Foreign Relations Committee,* Washington, 9 September 2004.
47 UN Doc S/2004/567.
48 *Draft Outcome Document, op. cit,* para. 140.
49 *A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change, op. cit,* annex, para. 283.
50 'Statement by Ms. Louise Arbour, United Nations High Commissioner for Human Rights, On the closure of the 61st Session of the Commission on Human Rights (Geneva, 22 April 2005)'.
51 *Report by the Special Rapporteur on extrajudicial, summary arbitrary executions on his mission to Rwanda, op. cit.,* para. 79.
52 Boutros-Ghali, B., 'Introduction', in *The United Nations and Rwanda, 1993–1996,* New York, United Nations Department of Public Information, 1996, pp. 1–111, p. 20.
53 *Report of the Special Rapporteur, Ms. Asma Jahangir, Addendum, Mission to the Sudan,* UN Doc. E/CN.4/2005/7/Add.2, para. 57.
54 *Extrajudicial, summary or arbitrary executions, Report of the Special Rapporteur, Philip Alston,* UN Doc. EE/CN.4/2005/7, para. 40. Alston was appointed in July 2004.
55 *Application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Yugoslavia [Serbia and Montenegro]), Requests for the Indication of Provisional Measures,* 8 April 1993, [1993] ICJ Reports 16; *Application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Yugoslavia [Serbia and Montenegro]), Further requests for the Indication of Provisional Measures,* 13 September 1993, [1993] ICJ Reports 325.
56 *LaGrand (Germany v. United States of America),* 27 June 2001; *Mamatkulov and Abdurasulovic v. Turkey* (Nos. 46827/99 and 46951/99), 6 February 2003; *Kandu-Bo et al. v. Sierra Leone* (Nos. 839, 840 & 841/1998), UN Doc. CCPR/C/64/D/839, 840 & 841/1998, para. 1; *Piandiong et al. v. Philippines* (No. 869/1999), UN Doc. CCPR/C/70/D/869/1999, paras. 5.1–5.4
57 For example, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 17 September 2005, ICC-02/04-01/05, 27 September 2005.
58 *Prosecutor v. Momir Nikolić* (Case No. IT-02-60/1-S), Sentencing Judgment, 2 December 2003, para. 59.
59 UN Doc. S/RES/808, 1993. Similarly, see UN Doc. S/RES/955 , 1994 and UN Doc. S/RES/1315, 2000.
60 *The Rule of Law and Transitional Justice in Conflict Post-conflict Societies,* Report of the Secretary-General, UN Doc. S/2004/616, para. 39.
61 *A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change, op. cit.,* para. 90.
62 The expression is borrowed from an early monograph on genocide and other international crimes: Drost, P.N., *Genocide, United Nations Legislation on International Criminal Law,* Leyden, A.W. Sythoff, 1959. Drost considered state policy or participation in such crimes to be one of their invariable features.
63 *Prosecutor v. Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 100; *Prosecutor v. Jelisić* (Case No. IT-95-10-A), Judgment, 5 July 2001, para. 48.
64 *Prosecutor v. Kunarac et al.* (Case No. IT-96-23/1-A), Judgment, 12 June 2002, para. 98, fn. 114.
65 Schabas, W. A., 'A synergistic relationship: the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone', *Criminal Law Forum,* no. 3, 2004.
66 See, for example, the recent prosecution in Canada of a Rwandan under universal jurisdiction: Weber, T., 'Mounties charge Rwandan with war crimes', *The Globe and Mail,* 19 October 2005.
67 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* International Court of Justice, 8 July 1996, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* International Court of Justice, 9 July 2004, para. 106.
68 General Comment 6(16), UN Doc. HRI/GEN/1/Rev.6, para. 2.
69 *Opinion of the Attorney-General to Prime Minister Blair,* 7 March 2003, para 34.
70 Issues concerning aggression are being studied under the aegis of the Assembly of States Parties of the ICC. Amendments to the Rome Statute are to be made at the first Review Conference, in 2009, so that the Court will be in a position to exercise jurisdiction over the crime of aggression.
71 There is only one relatively minor exception, in the Genocide Convention's automatic conferral of jurisdiction on the ICJ, something that binds perhaps 100 States (many have made reservations on this point). There is no similar treaty provision with respect to crimes against humanity.

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Preventing Genocide and Mass Killing: The Challenge for the United Nations

If the recommendations from the United Nations (UN) summit 2005 *Outcome Document* are acted upon, significant positive benefits in the UN's ability to deal with genocide and mass killing could result.

The document says that each state has the responsibility to prevent genocide, whether this is through humanitarian or diplomatic action, or whether through recourse to the Security Council if peaceful means are inadequate.

The author, Prof. William A. Schabas, discusses the shifts that have already taken place in terms of the centrality or otherwise of human rights in the UN system. He argues that the UN used to be preoccupied with state rather than human security, and that while recent proposals within the UN are positive, that much remains to be done.

As the position of human rights has evolved within the UN so has the understanding of the strong links between the protection of minority rights and the prevention of conflict, mass killing and genocide.

The report looks at the protection afforded to minorities facing potential genocide by international law and UN mechanisms, how the understanding of genocide within the UN and international law has changed, and what has been learnt though international tribunals in the former Yugoslavia and Rwanda, and through cases coming to the International Criminal Court.

Preventing Genocide and Mass Killing: The Challenge for the United Nations states that the prevention of genocide is one of the most important roles for the UN. To this end, it offers a series of guiding principles in the understanding of genocide and mass killing, and a set of recommendations to strengthen genocide prevention within the UN, especially in light of the proposed changes to the UN system.

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