

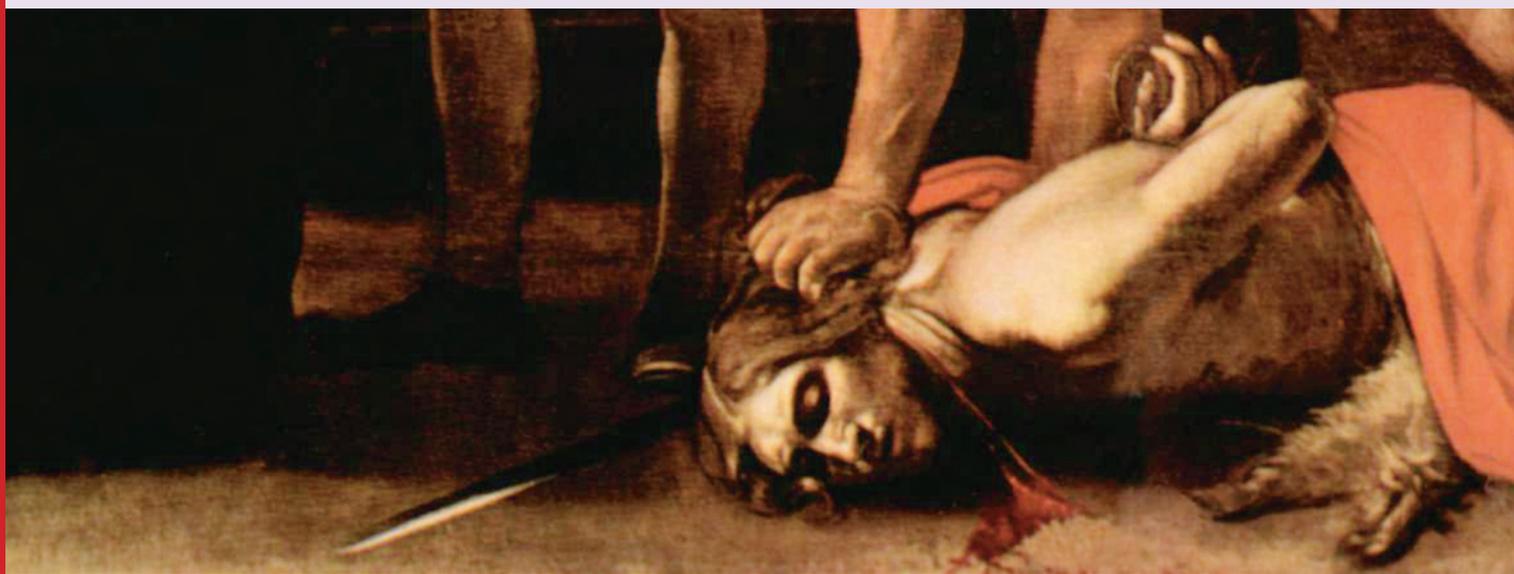
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Towards Greater Coherence in International Criminal Law: Comparing Protected Groups in Genocide and Crimes Against Humanity

Rhea Brathwaite*

8.1. Introduction

Raphael Lemkin, a preeminent jurist, tirelessly campaigned to bring awareness to a crime so heinous, he believed that a new word had to be created to define it. Genocide comes from the Greek *genus* which means race or kind and *-cide* which means killing.¹ Although its definition has since been moulded in international law, the kinds of groups envisaged by the 1948 Genocide Convention have remained static.² In contrast, the scope of groups protected against persecution in the definition of crimes against humanity has gradually evolved in the past decades. In early 1945, the creation of genocide and crimes against humanity were conceived to address crimes perpetrated by the Nazi regime. They were not identical in scope, but neatly overlapped, and could to some extent be used interchangeably. In the context of new situations, new judgments, and new formulations, both the definition of genocide and crimes against humanity

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¹ Douglas Harper Online Etymology Dictionary, available at <http://www.etymonline.com/index.php?search=genocide>.

² Convention on the Prevention and Punishment of the Crime of Genocide, adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948, entered into force on 12 January 1951 ('Genocide Convention').

have evolved. Expanding the protected groups of both crimes may help in strengthening the two layers of protection available for individuals belonging to groups. International law regarding crimes against humanity has reflected a movement away from the idea of a closed list of groups. The definition of genocide must do the same in order to better protect group members and avoid judicial inconsistencies.

This chapter will first compare the evolution of perceptions of groups in the definitions of crimes against humanity and genocide and the difference between the two (section 8.2.). In section 8.3., I compare the arguments for and against expanding the scope of protected groups regarding genocide. Possible solutions will be proposed that seek to reflect the evolution of international law. Following this section, the implications of a possible solution for the Genocide Convention will be discussed as it relates to the definition of crimes against humanity in the Proposed Crimes Against Humanity Convention (annexed to this volume), before concluding by reaffirming the importance of modifying the definition of genocide.

8.2. The Evolution of Protected Groups in International Law: Comparing Crimes Against Humanity and Genocide

As William A. Schabas has remarked, the “enumeration of the groups protected by the [Genocide] Convention’s definition of genocide is perhaps its most controversial aspect”.³ The definition of genocide as set out in the Genocide Convention is deemed by some as “exceedingly narrow”.⁴ Taking the U.N. Convention Relating to the Status of Refugees as an example, it has recognized the protection of many other groups beyond the four groups enumerated in the Genocide Convention.⁵ It protects members “of a particular social group and or political opinion”, producing the paradox that “people fleeing from genocide are recognized as refugees while those unable to flee from the same genocide are not acknowledged as being its

³ William A. Schabas, “Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda”, in *ILSA Journal of International and Comparative Law*, 2000, p. 375.

⁴ Kurt Jonassohn, “What is Genocide?”, in Helen Fein (ed.), *Genocide Watch*, Yale University Press, 1991, p. 1.

⁵ The United Nations Convention Relating to the Status of Refugees, entered into force on 22 April 1954.

victims”.⁶ Not only is there inconsistency between the Genocide Convention and the U.N. Convention Relating to the Status of Refugees, there is also inconsistency if one compares the protected groups in the Genocide Convention with those in crimes against humanity. There is in this author’s opinion a need to broaden the kinds of groups protected by the Genocide Convention to avoid such inconsistencies. International law is moving away from strict categorizations of protected groups and the Genocide Convention would benefit from doing the same.

The definition of ‘crimes against humanity’ has evolved significantly during its history. The precise words ‘crimes against humanity’ were probably first coined in the Nuremberg Charter by Robert Jackson, a United States Supreme Court Justice after consultation with Sir Herbert Lauterpacht, an eminent international lawyer from the United Kingdom.⁷ Even prior to that, the idea of crimes against humanity was in use. In the 1899 Hague Convention, the expression ‘laws of humanity’ or the ‘Martens Clause’ was used, rather than ‘crimes against humanity’ as such.⁸ The Hague Convention does not define them, but simply states that civilians and belligerents are protected by these laws. An attempt was made to use the ‘laws of humanity’ against Turkish individuals for their 1915 slaughter of Armenians, but that proposal was not followed through.⁹ The United States objected that there were not at the time agreed-upon ‘laws of humanity’.¹⁰

We have since seen several definitions of crimes against humanity in international law. Article 6(c) of the Nuremberg Charter of 1945 states:

Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the juris-

⁶ Jonassohn, see *supra* note 4, p. 9.

⁷ David Luban, Julie R. O’Sullivan, David P. Stewart, *International and Transnational Criminal Law*, Aspen Publishers, 2010.

⁸ The Hague Convention of 1899(II) Respecting the Laws and Customs of War on Land, enacted on 29 July 1899.

⁹ Luban *et al.*, see *supra* note 7.

¹⁰ *Ibid.*

diction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.¹¹

Some aspects of this definition should be noted. First, the crimes are committed against any civilian population. Second, there are two kinds of crimes against humanity, the murder type, and the persecution type, based on group membership. Third, the acts are criminalized whether or not in violation of the domestic law of the country where perpetrated.

Control Council Law No. 10 ('CCL No. 10') enacted the offenses of the Nuremberg Charter in Germany. Crimes against humanity were defined in Article II (c):

Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.¹²

For purposes of this comparison, it is noteworthy that CCL No. 10 adds crimes to the murder type such as imprisonment, torture and rape. The groups enumerated of the persecution type do not change.

The International Criminal Tribunals for the Former Yugoslavia ('ICTY') and Rwanda ('ICTR') have different definitions of crimes against humanity. The ICTY Statute defines crimes against humanity as follows:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;

¹¹ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, enacted on 8 August 1945, London.

¹² Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, enacted on 20 December 1945.

- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.¹³

This definition copies that of CCL No. 10. It does not add anything in terms of protected groups. The ICTR Statute is similar to the ICTY Statute, but adds that the attack on the civilian population must be based on national, political, ethnic, racial or religious grounds, eliminating the war nexus. The ICTR's definition seems to say that even crimes of the murder type must be based on group discrimination.¹⁴ The requirement has been dropped in subsequent definitions of crimes against humanity. The persecution type crimes already had a discriminatory intent requirement.¹⁵ The Rome Statute of the International Criminal Court ('ICC Statute') defines crimes against humanity as follows:

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;

¹³ Article 5, Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, adopted on 25 May 1993 by Resolution 827 ('ICTY Statute').

¹⁴ Article 3, Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, adopted on 8 November 1994 by resolution 955 (1994) ('ICTR Statute').

¹⁵ Luban *et al.*, see *supra* note 7.

- (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.¹⁶

Finally, the United Nations International Law Commission ('ILC') voted on 30 July 2013 to add the elaboration of a treaty on 'crimes against humanity' to its long-term work programme.¹⁷ Chapter 2 above elaborates in some detail on the significance of the Commission's involvement with this issue. The definition set out in the Proposed Crimes Against Humanity Convention repeats the formulation of the ICC Statute.¹⁸

For our purposes, it is important to note that the definition of the ICC Statute and the Proposed Convention adopts additional crimes of the murder type such as forcible transfer of population, sexual slavery, forced prostitution or pregnancy, and forced sterilization, enforced disappearances and apartheid. The persecution type crimes have also expanded to include persecution on grounds of nationality, culture, gender, ethnicity, or "other grounds that are universally recognized as impermissible under international law". Gender means "the two sexes, male and female, within the context of society".¹⁹

¹⁶ Article 7, Rome Statute of the International Criminal Court, adopted on 17 July 1998.

¹⁷ For more information on the addition of 'crimes against humanity' to the work programme of the ILC at its sixty-fifth session in 2013, see the Report of the International Law Commission, available at http://legal.un.org/ilc/reports/2013/All_languages/A_68_10_E.pdf.

¹⁸ Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity, see Annex 1.

¹⁹ Article 7(3), ICC Statute.

Genocide's evolution differs from that of crimes against humanity. Lemkin, the Polish jurist who coined the word 'genocide', first conceived of it as:

a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups with the aim of annihilating the groups themselves [...] genocide is directed against the national group as an entity and the actions involved are against individuals, not in their individual capacity but as members of the national group.²⁰

Lemkin envisaged 'national' group not in relation to the nature of the group but rather he envisaged 'national' to be used in relation to the nature of the persecution.²¹ He therefore saw genocide as "a multi-faceted attack on the existence of a human group and identified eight features of the crime, including political, social, cultural, economic, biological, physical, religious and moral genocide", but noted that physical, biological and cultural genocide were its most accepted forms.²² However, although Lemkin had a broad conception of the forms the persecution may take, he had a narrow conception of the nature of the groups themselves which should be protected, which is similar to that of the Genocide Convention.²³

Genocide became part of international law shortly thereafter. It was not envisaged as a separate crime until the Genocide Convention, but rather it was thought of as a part of crimes against humanity.²⁴ The word 'genocide' was used in the Nuremberg trial, but instead of explicitly using this term to convict the perpetrators, the judges called the killing of the Jewish people a crime against humanity.²⁵ The Genocide Convention gives genocide a distinct status. The United Nations General Assembly passed a unanimous resolution which condemned genocide and confined itself to four enumerated groups, national, ethnic, racial and religious.²⁶

²⁰ David L. Nersessian, "The Razor's Edge: Defining and Protecting Human Groups under the Genocide Convention", in *Cornell International Law Journal*, 2003, p. 297.

²¹ Schabas, 2000, see *supra* note 3, p. 376.

²² Nersessian, 2003, see *supra* note 20, p. 297.

²³ For example, Lemkin opposed the addition of political groups to the four groups enumerated in the Convention. Schabas, 2000, see *supra* note 3, p. 377.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ General Assembly Resolution 96, The crime of genocide, A/RES/96(I), 11 December 1946.

Subsequently, the sub-committee of the Sixth Committee explicitly made mention of “racial, religious, political and other groups”.²⁷ There is no explanation why “political and other groups” were added in the beginning, in any case these conditions were debated and omitted in the ultimate text of the Genocide Convention.²⁸ An exhaustive list of the four groups, national, ethnic, racial and religious was included, and in 1948, the Genocide Convention was adopted unanimously.²⁹ Article II of this Convention defines the crime as such:

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.³⁰

The Genocide Convention protects groups and individuals in so far as they are group members but “the real object of protection is the group itself”.³¹ For that reason an individual must be part of a protected group in order to claim protection under the Genocide Convention, even if the actor’s intention is to destroy this individual in relation to the destruction of a protected group.³² This means that, if we take the Rwandan genocide as an example, Hutus who are killed, when the ultimate intention was to kill

²⁷ Report of the Sixth Committee of the General Assembly of the United Nations, A/231 – 10, December 1946.

²⁸ *Ibid.* For the debates, see *infra* section 8.2.

²⁹ “Developments in the Law – International Criminal Law”, in *Harvard Law Review*, 2001, vol. 114, p. 2010.

³⁰ Genocide Convention, see *supra* note 2.

³¹ Nersessian, 2003, p. 298, see *supra* note 20.

³² *Ibid.*, p. 299.

Tutsis, cannot claim that there was genocidal intent directed towards them.³³

The drafters oscillated between narrowing the definition in order to reprimand the actors of the holocaust and broadening it in order to fit future situations. This tension may have led to the narrowing of protected groups, as one commentator has said, “what was left out of the convention is as important as what was included”.³⁴ As will be seen below, the omission of certain groups, such as tribal groups, has led to problems in its application. Since the Genocide Convention has been enacted the International Law Commission has sought to enlarge the enumerated groups and make the number of protected groups non-exhaustive.³⁵ It has since abandoned this project. The ICC Statute could have also been an excellent vehicle for enlarging the number of protected groups, but the final version simply repeats the groups enumerated in the Genocide Convention.³⁶

If we compare these two crimes, it is easy to see that crimes against humanity have evolved in a different direction in comparison to genocide. The kinds of acts of the murder type have evolved and so have the protected groups in the crime of persecution. The disparities between the two are most noticeable in relation to the ICC Statute. For persecution as a crime against humanity defined under Article 7, the all-encompassing group based on “other grounds that are universally recognized as impermissible under international law” allows for the future evolution of persecution to include groups that international law may one day deem acceptable for protection. The emphasis on ‘universality’ allows for a certain measure of consensus amongst States on future protected groups. It is uncertain what the threshold for universality may be, but the fact that the

³³ *Ibid.*

³⁴ Developments in International Criminal Law, 2001, see *supra* note 29, p. 2011.

³⁵ Yearbook 1951, Vol. I, 90th meeting, pp. 66–68; Yearbook 1951, Vol. II, p. 136; “Fourth report on the draft Code of Offences against the Peace and Security of Mankind”, by Doudou Thiam, Special Rapporteur, U.N. Doc. A/CN.4/398 (1986), Article 12(1); Yearbook 1989, Vol. 1, 2099th meeting, p. 25, para. 42; Yearbook 1989, Vol. 1, 2100th meeting, p. 27; Yearbook 1989, Vol. 1, 2102nd meeting, p. 41; “Report of the Commission to the General Assembly on the work of its forty-first session”, U.N. Doc. A/CN.4/SER.A/1989/Add.1 (Part 2), p. 59; Yearbook 1991, Vol. 1, 2239th meeting, p. 214; Yearbook 1991, Vol. 1, 2251st meeting, pp. 292–293; “Report of the Commission to the General Assembly on the work of its forty-third session”, U.N. Doc. A/CN.4/SER.A/1991/Add. I (Part 2), p. 102.

³⁶ Article 6, ICC Statute.

definition of crimes against humanity allows for changing circumstances is progressive.

The same cannot be said for the Genocide Convention which has actually decreased the coverage it allots to protect victim groups. The desire to address the perpetrators of the holocaust is admirable, but the narrow restrictions have required judges to stretch definitions or invent new interpretations in order to accommodate unforeseen victim groups. The judicial gymnastics that judges are bound to participate in have led to inconsistencies amongst tribunals and may have also handicapped the utility of genocide. The hesitation to add more groups to the kinds of groups protected by the Genocide Convention stems from various arguments which will be addressed below.

8.3. The Need for Change

There are several arguments raised by those who believe that the protection of groups in the Genocide Convention and other international law instruments dealing with genocide is sufficient. First of all, there is the argument that changing the definition of genocide may be politically impossible. Second, there is fear that changing the definition of genocide may lead to spurious claims due to the indeterminacy of some kinds of groups. Third, it has been argued that situations envisaged by the expanded definition of genocide are already covered by crimes against humanity. Finally, reluctance also comes from the belief that so far, the expansive interpretation of protected groups by international criminal tribunals has proved to be satisfactory.

8.3.1. Existing Political Will to Expand the Scope of Protected Groups

Many hold that changing the international instruments may be too difficult due to political considerations. The Genocide Convention was signed with unanimous consent. The political will to change the definition after so many years may lead to disagreement about its scope. The Genocide Convention was signed when there were fewer countries to deal with. In addition there are those who believe that opening up the Genocide Convention may deteriorate its scope and protection: although it may not be perfect, changing the convention may be worse than leaving it as it is.

Although it is a legitimate concern, countries are in effect broadening the protection they afford when enacting the Genocide Convention in their domestic law. The political will certainly exists to broaden the kinds of groups protected amongst those States that have ratified the convention. States have widened the scope of the convention, showing their willingness to go beyond the text to protect victims that the Genocide Convention may not have envisaged, and also reflecting their view that the Genocide Convention is inadequate in this particular area. Some of the countries with this view include France which has interpreted the enumerated groups as “national, ethnic, racial or religious group”, or a group determined by “any other arbitrary criterion”; Canada also has a broad definition which simply requires “an identifiable group of persons”; and Georgia’s statute contains the four enumerated groups and adds or any other group “united by any other mark”.³⁷

8.3.2. Selection of Enumerated Protected Groups

Inclusion of the notion of cultural genocide was rejected due to fears that it would lead to spurious claims, which would detract from the legitimacy of the convention’s goals, in particular, physical extermination of the groups.³⁸ The reason for the omission of cultural genocide is mostly the uncertainty that it engendered.³⁹ The scope of the Genocide Convention was confined to essentially physical acts.

Cultural genocide has been defined as such by UNESCO:

³⁷ France: Penal Code Journal Officiel, 6 August 2014, Article 211–1; Canada: An Act respecting the criminal law (R.S.C. 1985, c. C-46, as amended), Article 318 (2); Georgia: The Criminal Code of Georgia, Article 407.

³⁸ Developments in International Criminal Law, 2001, p. 2012, see *supra* note 29.

³⁹ This is because cultural genocide does not mean physical destruction of the group. For example, the Secretariat and Ad Hoc Committee Drafts of the Convention on the Prevention and Punishment of the Crime of Genocide considered that it included: “the systematic destruction of books printed in the national language or of religious works or prohibition of new publications”, the “systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship”, and also “prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group”. Convention on the Prevention and Punishment of the Crime of Genocide, the Secretariat and Ad Hoc Committee Drafts, available at <http://www.preventgenocide.org/law/convention/drafts/>.

An ethnic group is denied the right to enjoy, develop and transmit its own culture and its own language, whether individually or collectively [...] cultural genocide is a violation of international law equivalent to genocide which was condemned by the United Nations Convention on the Prevention and Punishment of the Crime of Genocide.⁴⁰

Even though the instrument states that cultural genocide is a violation of international law tantamount to genocide, the Genocide Convention has not been modified to include cultural genocide. It must be noted though that some commentators prefer to designate the suppression of culture accompanied by mass killings as cultural genocide, not the suppression of culture alone.⁴¹ This is because it would seem inappropriate to place on the same level the suppression of culture and physical exterminations. There is also a threshold that must be reached. Most suppression of culture probably would not fall under the realm of cultural genocide. Shaw admits that cultural genocide is often confused and many times superfluous because taken along with the physical element of genocide, it may simply be said to be the cultural dimension of genocide. It seems that any genocide would have some cultural element. He therefore divides the suppression of culture into three groups and states that,

it is better to refer to cultural suppression as it relates to pre-genocidal denial of culture, the cultural dimension of genocide [is] suppression that is part of a broader genocidal process, and unintentional group destruction for cases where groups are destroyed by disease and famine that are originally unintended.⁴²

Cultural genocide itself is hard to apply in concrete situations, thus the drafting members of the Genocide Convention were right to leave it out.

Political genocide was also left out of the convention, but it should have been included as it does not lead to spurious claims. Political genocide was omitted due to a compromise to accommodate the Soviet Union. Although it was debated extensively and agreed upon in the drafting stag-

⁴⁰ Declaration of San Jose, Meeting of Experts on Ethno-Development and Ethnocide in Latin America, UNESCO, San Jose, 11 December 1981, available at <http://unesdoc.unesco.org/images/0004/000499/049951eo.pdf>.

⁴¹ Shaw, 2007, p. 66, see *supra* note 4.

⁴² *Ibid.*

es, it was ultimately regarded to be too controversial by governments feeling vulnerable to claims of genocide. During the debates there were claims that political groups were not stable and permanent, and therefore their inclusion was anathema to their aims.⁴³ In addition, it was claimed that political groups were joined by choice and therefore were different from groups one simply belonged to. It did not fit in with the other enumerated groups in the convention. The Soviet delegate seized on the indeterminacy of political groups, calling them “not scientific”.⁴⁴

As will be seen below, the other groups of the Genocide Convention are neither stable nor permanent with the exception of race and possibly ethnicity. The political genocide in the draft Genocide Convention was discussed extensively due to its controversial nature and the reluctance of countries to be bound. Shaw states that the main difference between political groups and the other groups in the Genocide Convention is that political groups are associations, national, ethnical and racial groups are communities.⁴⁵ Political groups represent social groups and are power organizations which mobilize power to enter into conflict while communities focus on cohesiveness rather than conflict.⁴⁶ Shaw makes it clear though that these divisions are not rigid and political groups can become communities, yet they are simply unprotected in the Genocide Convention.⁴⁷

8.3.3. Insufficient Function of Crimes Against Humanity

Schabas claims that the four terms of the Genocide Convention “not only overlap, they also help to define each other, operating much as four corner posts that delimit an area in which a myriad of groups covered by the convention find protection”.⁴⁸ For those groups such as political groups that cannot fit within the ‘goal posts’ of the enumerated groups, Schabas in his book ‘Genocide: The Crime of Crimes’ claims that the *lacuna* can

⁴³ Summary Records of the meetings of the Sixth Committee of the General Assembly, 21 September –10 December 1948, Official Records of the General Assembly.

⁴⁴ *Ibid.*

⁴⁵ Shaw, 2007, p. 70, see *supra* note 4.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Schabas, 2000, p. 385, see *supra* note 3.

be filled by crimes against humanity in the Rome Statute of the International Criminal Court and other international human rights instruments.⁴⁹

David Nersessian has stated that using persecution to criminalize political genocide (for example) is first of all, not possible because genocide and persecution are cumulative offenses.⁵⁰ In order to be cumulative, the ICTY Appeals Chamber states in *Krstić* case that “there must be separate conduct satisfying a distinct element”.⁵¹ Nersessian argues that there are five different elements between these two offenses: (a) the *actus reus* of the chapeau; (b) the *mens rea* of the chapeau; (c) victim classifications; (d) ‘policy’ element of the offenses; and (e) the requirement that persecution be committed in conjunction with some other international crime. The differences between the two crimes preclude using persecution instead of genocide in practice. Crimes against humanity cannot be an alternative to genocide because they “cover different legal ground”.⁵²

Second of all, using persecution instead of the concept of political genocide is against the principle of fair-labelling of criminal offenses.⁵³ The crime of persecution “is not sufficient to respond to the criminality inherent in destroying a political group as such”.⁵⁴ The principle of fair-labelling is the aim to ensure that “widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking”.⁵⁵ This argument is premised upon the assumption that genocide is a more serious crime than crimes against humanity. Even Schabas, who calls genocide “the crime of crimes”, would agree that genocide is a more serious crime, and therefore, treating actions that should be labelled as genocide as crimes against hu-

⁴⁹ William A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2000, pp. 103–104.

⁵⁰ See generally, David L. Nersessian, “Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes Against Humanity”, in *Stanford Journal International Law*, 2007, vol. 43, pp. 249–251.

⁵¹ ICTY, *Prosecutor v. Krstić*, Appeal Judgment, 19 April 2004, Case No. ICTY-98-33-A, para. 217.

⁵² See generally, Nersessian, 2007, p. 255, see *supra* note 50. Nersessian’s treatise need not be covered in depth for the purposes of this argument.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ James Chalmers and Fiona Leverick, “Fair labelling in criminal law”, in *The Modern Law Review*, 2008, vol. 71, no. 2.

manity is unfair to the victims.⁵⁶ It also attaches a lighter moral burden on the perpetrator due to the significantly lower social stigmatization of persons who have committed crimes against humanity compared to those who have committed genocide.

8.3.4. Problematic Judicial Interpretations of the Enumerated Groups

Kurt Jonassohn remarked that, it is amazing that in practice, “none of the victim groups of those genocides that have occurred since its adoption falls within its restrictive specifications”.⁵⁷ This statement may still hold some truth today. Creative judicial interpretation has stepped in to fill the gap between the restrictions on the kinds of groups that may be protected and has helped to give the impression of diminishing the inadequacy of the Genocide Convention’s definition. Those that believe that judicial interpretation of the Genocide Convention is adequate point to the advent of subjective and objective interpretations of each of the protected groups and the criteria of stability and permanence.

The *Akayesu* case was the first genocide trial before an international criminal tribunal after the adoption of the Genocide Convention. There the ICTR was challenged by the definition of ‘ethnic group’, which means having different culture and language.⁵⁸ The groups in question, Tutsis and Hutus, share the same language and the same culture. In order to accommodate the specificity of the situation, an ICTR Trial Chamber found that the intention of the drafters of the Genocide Convention “was patently to ensure the protection of any stable and permanent group”, and therefore its application was not limited to the four enumerated groups. It found that there were a number of objective factors which distinguished the Tutsis as a distinct stable and permanent group.⁵⁹ In effect, it ignored

⁵⁶ Schabas, 2000, see *supra* note 49.

⁵⁷ Jonassohn, 1991, see *supra* note 4; Kurt Jonassohn, Karin Solveig Bjornson, *Genocide and Gross Human Rights Violations: In Comparative Perspective*, Transaction Publishers, 1998, p. 9.

⁵⁸ ICTR, *Prosecutor v. Akayesu*, Appeal Judgment, 1 June 2001, Case No. ICTR-96-4-A, para. 702.

⁵⁹ ICTR, *Prosecutor v. Akayesu*, Trial Judgment, 2 September 1998, Case No. ICTR-96-4-T, para. 511. It stated:

On reading through the travaux préparatoires of the Genocide Convention (Summary Records of the meetings of the Sixth

the four enumerated groups, and went beyond the unambiguous language of the Genocide Convention, because it saw a need for a broader definition which would encompass the situation at hand.

In the *Kayishema* case, the ICTR used the aforementioned definition of an ethnic group and stated that the Tutsis did not comply with the objective definition of an ethnic group enunciated by the *Akayesu* Trial Chamber, but rather, they complied with a purely subjective definition, because they were viewed as having a distinct ethnicity by the Rwandan government.⁶⁰ The judges in the *Rutaganda* case admitted there was a lack of “generally and internationally accepted precise definitions” of the protected groups, and therefore each group could only be defined according to their political, social and cultural context.⁶¹ In addition, the ICTR admitted that defining the protected groups was essentially a subjective exercise rather than an objective one. The subjective definition was not enough though, it also had to be accompanied by objective factors and the stability and permanence requirement. It concluded the Tutsis complied with all the requirements, after examining the relevant evidence.⁶²

The ICTY first dealt with the definition of protected groups in the *Jelisić* case.⁶³ It found that using objective criteria to define the protected groups may not comport with those affected by the classification, and in addition there were not any appropriate objective criteria. It also stated that the criteria of stability and permanence, or at least groups which “in-

Committee of the General Assembly, 21 September–10 December 1948, Official Records of the General Assembly), it appears that the crime of genocide was allegedly perceived as targeting only “stable” groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more “mobile” groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.

⁶⁰ ICTR, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, paras. 34–35, 98.

⁶¹ ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-9 6-3-T, Trial Judgment, 6 December 1999, para. 55.

⁶² *Ibid.*, para. 56.

⁶³ ICTY, *Prosecutor v. Jelisić*, Case No. IT-95-10, Trial Judgment, 14 December 1999.

dividuals belong regardless of their own desires” should be used.⁶⁴ Therefore the *Jelisić* case embraced a purely subjective method of viewing the protected groups, which differs from that embraced by the ICTR in the *Rutaganda* case.

The inappropriateness of using the convention’s definition of genocide has been shown repeatedly in practice. Both the ICTY and the ICTR have struggled to interpret the protected groups in the Genocide Convention in a manner that provides protection to victims. The problem is that the drafters of the Genocide Convention may not have envisaged the kinds of groups that subsequently fell victim of these crimes. Already there are problems with interpreting the Genocide Convention. New situations may arise that are outside the present scope of the Genocide Convention, and a corresponding interpretation may not be readily available.

These findings add a new category to the enumerated groups in the Genocide Convention, as Paul Magnarella notes, by allowing stable and permanent groups which are not in the convention to be protected. The use of the *travaux préparatoires* is controversial in itself. It has been criticized for many reasons, including the fact that it is against “widely-accepted international authority”. Use of the *travaux préparatoires* is only available to rectify a manifestly absurd or conflicting treaty construction or for confirming a plain-text interpretation.⁶⁵ The judges go beyond this by simply applying the *travaux préparatoires*. It has also been condemned because the *travaux préparatoires* are a work of compromise amongst States and statements by States were not supposed to have binding effect.⁶⁶

Use of the criteria of stability and permanence to explain the existence of the four groups is also legally inconsistent. The *travaux préparatoires* included political groups, which are neither stable nor permanent. They were eliminated at the last minute as a compromise to ensure the maximum number of adherents possible. In addition, the criterion of stability simply does not apply to the groups enumerated in the convention. The Universal Declaration of Human Rights recognizes the right to

⁶⁴ *Ibid.*, para. 69.

⁶⁵ *Ibid.*, Nersessian.

⁶⁶ *Ibid.*

change one's nationality or religion.⁶⁷ These groups cannot be said to be stable and permanent.

The *Rutaganda* and *Kayishema* judgments use the ethnical protected group to justify protection of the Tutsis, even though admittedly the members of both groups speak the same language and have the same culture.⁶⁸ Since then, the debate has raged on whether objective criteria or subjective criteria are adequate for resolving whether or not a group is distinct. The International Commission for Darfur, for example, used a purely subjective approach in determining whether there was a separate group.⁶⁹ The *Krstić* case then states that the criterion that must be used is one that combines both subjective and objective approaches.⁷⁰

These contrasting approaches are not only unsatisfactory on their own, they have also led to a divergence amongst tribunals that has not been resolved. The differing interpretations of the Genocide Convention by the ICTY and the ICTR are a direct result of the lack of an expansive enumeration of protected groups which covers situations facing the tribunals. It has led to confusion and inconsistency amongst tribunals. Tribunals' attempts to interpret "may undermine the international community's confidence in the tribunals as competent bodies of criminal justice adjudication".⁷¹

Consistency amongst the differing tribunals is necessary, but that may be impossible since the differing tribunals are, by way of creative judicial law-making, attempting to respond to the demands before them, based on the political, social and cultural context of the situation; a task which they are ill-equipped to undertake due to the sparse language of the Genocide Convention. It may be easier to achieve consistency by simply enlarging the kinds of groups that may be protected in the Genocide Convention or the ICC Statute in order to ensure consistency and restore confidence in the tribunals' competence.

⁶⁷ Article 18, Universal Declaration of Human Rights, available at <http://www.legal-tools.org/doc/de5d83/>.

⁶⁸ See *supra* notes 60 and 61.

⁶⁹ 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.

⁷⁰ See *supra* note 51.

⁷¹ Developments in International Criminal Law, 2001, p. 2021, see *supra* note 29.

Not only are the decisions of the ICTY and ICTR inconsistent, they could also be amenable to political pressure. The resultant confusion due to the ambiguity of the Genocide Convention may mean that the United Nations and individual States may take advantage of the discretion of these international tribunals, especially since these international tribunals could be amenable to political pressure not only from the international organization that enacts them but also from the host country. The United Nations may exert pressure on tribunals, and tribunals may be tempted to bend the law as not doing so may defeat the whole purpose of the creation of the tribunals. If the tribunal could not find that genocide had occurred, it would put in jeopardy its existence. Another case illustrates the political pressure it is under from the host country. The ICTR attempted to release Jean-Bosco Barayagwiza, a suspect because of his excessive detention, but Rwanda threatened to not co-operate with the ICTR if that happened. It had to claim to have received “new facts” which shone a negative light on Barayagwiza and meant that he could not be released.⁷² It has been argued that,

the tribunals’ susceptibility to political pressure raises concerns about whether they are the institutions best equipped to define ‘ethnic groups’ [...] to reduce their susceptibility to external pressure and to enhance their credibility, it is crucial that the tribunals place an even higher priority on achieving consistency.⁷³

8.4. Viable Solutions

It has been suggested that making precedent binding would solve the problem of inconsistent judicial interpretation.⁷⁴ This is not enough. The best solution is to have a broader enumeration of groups that reflects the world we live in today, and that is able to adapt to future situations, but leaves little room for judicial interpretation. Certainty is desirable. Vagueness of international criminal offenses may contravene the principle of lenity. Unsatisfactory and controversial decisions cannot form the basis of accusing suspected criminals. A legislated solution that takes better

⁷² *Ibid.*, p. 2022–2023.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, p. 2024.

account of the conditions of the world we live in is the best solution to this problem.

Modifying the Genocide Convention may be a possible solution to this international problem. Additionally, changing the ICC Statute is equally beneficial. The ICC Statute will be used in future International Criminal Court cases. Judges are obliged to apply it. It would eliminate the excessive exercise of judicial discretion which has led to divergent interpretations of the protected groups and once and for all provide them with more certainty.

The definition of genocide may also be altered by individual States. States have attempted to alter the scope of the Genocide Convention by widening the number of protected groups when introducing it into their domestic legislation, with the view to provide better protection to their population. In principle, going beyond the protection afforded by international law is not against international law.⁷⁵ Although this is commendable, it is still not a substitute for change on the international level.

Now that the medium to execute the necessary change has been discussed, the question remains, how should the definition of genocide be changed textually?

Adding specific types of groups may expand protection and strengthen certainty at the same time. Among others, it has been demonstrated that political genocide should be included in a possible definition of genocide. The downside of this approach is that it may not be enough to deal with future situations, and may be as restrictive as the Genocide Convention is in the future.

An all-encompassing approach may provide more comprehensive protection to victim groups. The French formulation which includes the enumerated groups in the Genocide Convention and adds to them an additional group determined by “any arbitrary criterion” may be used. It certainly would cover future situations where a group is targeted and the group is not specifically enumerated in a legislative document. At the same time, such an open formulation may be against the principle of leniency. The principle of leniency states that “a citizen is entitled to fair notice of what sort of conduct may give rise to punishment. Courts must strictly

⁷⁵ Luban *et al.*, see *supra* note 7.

construe penal statutes to avoid violating the rights of the accused”.⁷⁶ If an open group is used, it may contravene due process rights because it may be so broad and vague that the suspected perpetrator would not have been able to foresee the criminal liability.

A further formulation eliminating any modifiers on the word ‘group’ and only relying on defining a group based on the perpetrator’s perception should be dismissed.⁷⁷ Although this may be easier, there should still be some indication that this is how the group see themselves. For example, if one mistakenly kills someone that one thinks is one’s own father, one is not liable for patricide. In the same way that we cannot ascribe criminal liability purely based on the perpetrator’s mistaken perception in criminal law, we should not be able to ascribe liability based purely on the perpetrator’s perception in international criminal law.

A better approach is found in the ICC Statute in relation to crimes against humanity which criminalizes persecution of groups based on enumerated grounds and “other grounds that are universally recognized as impermissible under international law”. Accordingly, this chapter proposes the chapeau of the genocide definition be changed to:

Genocide means any of the following acts committed with intent to destroy, in whole or in part, any identifiable group on national, ethnical, racial, religious, political or other grounds that are universally recognized as impermissible under international law.

If this formulation is adopted on domestic and international levels, it would allow national and international courts to identify groups protected against genocide on the basis of applicable international law treaties and customary law. Since this formulation relies on international law it should not be against the principle of lenity and it also enables genocide to always be at the forefront of protecting new groups that international law deems deserving of protection. In addition, as discussed above, politi-

⁷⁶ *McNally v. United States*, 483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987). *McBoyle v. United States*, 283 U.S. 25, 27, 51 S.Ct. 340, 75 L.Ed. 816 (1931). See also *United States v. Santos*, 128 S. Ct. 2020, 553 U.S. 507, 170 L. Ed. 2d 912 (2008) which states “the rule of lenity [...] vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed”.

⁷⁷ Jonassohn, 1991, see *supra* note 4, p. 19. Jonassohn and Bjornson, 1998, see *supra* note 57.

cal groups should be added to the formulation, as the inclusion of this group does not lead to spurious claims.

8.5. Two Tiers of Protection: Towards Greater Coherence of Protected Groups for Crimes Against Humanity and Genocide

This chapter posits that the scope of groups protected against the crime of genocide should mirror that in the definition of crimes against humanity. If indeed the definition of genocide is widened to include “political groups or other grounds that are universally recognized as impermissible under international law”, how would it impact or change the protection afforded to victim groups in general? As stated above, the Proposed Crimes Against Humanity Convention incorporates the definition of crimes against humanity under Article 7 of the ICC Statute. The Proposed Convention, were it to come into force, will strengthen a universal definition for crimes against humanity and extend the reach of the rule of law on crimes against humanity beyond the ICC and international tribunals.⁷⁸ Such a legal framework establishing protection against crimes against humanity will be structurally parallel to that of genocide, which comprises the Genocide Convention and the ICC Statute. With the expanded definition of protected groups for genocide, these frameworks promise a two-tier protection for victim groups. As alluded to above, the two tiers of protection are not mutually replaceable; instead, together they will form a more comprehensive response to mass atrocities.

The protection afforded to groups under the framework of crimes against humanity differs from that of genocide, in two significant ways. First, the intent requirement for persecution as crimes against humanity differs from that of genocide. Second, the proposed formulation for genocide, while expanding the scope of groups in the current legal framework, still encompasses less groups than what is enumerated in Article 3 of the Proposed Convention and Article 7 of the ICC Statute. With regards to differences in intent, in the case of genocide, the intent required is the intent to destroy. Destroy in this case means “the material destruction of a group either by physical and biological means and not the destruction of the national, linguistic, religious, cultural or other identity of a particular

⁷⁸ Gregory H. Stanton, “Why the World Needs an International Convention”, in Leila Nadya Sadat (ed.), *Forging a convention for crimes against humanity*, Cambridge University Press, 2011.

group”, according to the ICTR.⁷⁹ Destroy is part of the mental element, thus genocide occurs if crimes are committed with the intent to destroy a group, even if the destruction does not materialize.

The *mens rea* specifically required for persecution as crimes against humanity is lower than that of genocide. In order to convict, there must be an intent to discriminate on prohibited grounds in conjunction with other acts which are also usually criminal. The intent to destroy is not necessary.⁸⁰

The ICTY Trial Chamber in the *Kupreškić* case (quoted by the ICJ in the *Bosnia-Herzegovina case*) highlights the similarities and differences between persecution and destruction:

persecution as a crime against humanity is an offence belonging to the same genus as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics [...] while in the case of persecution, the discriminatory intent may manifest itself in a plurality of actions including murder, in the case of genocide, that intent must be accompanied by the intent to destroy in whole or in part the group to which the victim belongs.⁸¹

The *Kupreskic* Trial Chamber saw genocide as an extreme and inhuman form of persecution. In other words, the protection afforded by the Proposed Convention and Article 7 of the ICC Statute as regards crimes

⁷⁹ ICTR, *Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, Trial Judgment, 22 January 2004, para. 627; ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Judgment, 15 May 2003, para. 315; ICTR, *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-T, Trial Judgment, 17 June 2004, para. 253; ICTR, *Prosecutor v. Muhimana*, Case No. ICTR-951B-T, Trial Judgment, 28 April 2005, para. 497; Van den Herik, Larissa, “The Meaning of the Word ‘Destroy’ and its Implications for the Wider Understanding of the Concept of Genocide”, in H. G. Van Der Wilt, Harmen van der Wilt, Jeroen Vervliet (eds.), *The Genocide Convention: The Legacy of 60 Years*, Martinus Nijhoff Publishers, 2012.

⁸⁰ M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*, Cambridge University Press, 2011, p. 401.

⁸¹ International Court of Justice, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, para. 188; ICTY, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Trial Judgment, 14 January 2000, para. 636.

against humanity is a lower form of protection. Genocide is a higher form of protection. Together they create two distinct levels of protection.

Regarding the number of enumerated groups, the crimes against humanity framework includes cultural and gender grounds, while the proposed formulation for genocide does not. However, the proposed incorporation of “other grounds that are universally recognized as impermissible under international law” means that in the future genocide could encompass these groups. In other words, under the proposed formulation, protection outside of the four groups plus political groups depends on the progress of international law. For example, although there have been some developments that point to acceptance of cultural or social genocide, an ICTY Trial Chamber has said that,

customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.⁸²

As stated above, not only is cultural genocide hard to apply in concrete situations, it is not a part of customary international law. However this does not mean that international law cannot evolve to encompass cultural genocide and other groups. Adding “other grounds that are universally recognized as impermissible under international law” allows for enough flexibility for the definition to evolve with the times. If in fact international law evolves to encompass the same groups as crimes against humanity, it would truly create two tiers of protection. However, it must be remembered that application of the definition of crimes against humanity still requires complying with its chapeau elements, in particular the existence of a widespread or systematic attack against a civilian population, which also limits its application.

8.6. Conclusion

This chapter has argued that there is a need for greater coherence in international criminal law, by broadening the protected groups for genocide so that it reflects those for crimes against humanity. It compared the differ-

⁸² ICTY, *Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, para. 580.

ences in the development of the definitions of crimes against humanity and genocide. It examined closely the arguments of the detractors and supporters of an expanded genocide definition. It also attempted to show why adding ‘political groups’ and ‘other grounds that are universally recognized as impermissible under international law’ is a satisfactory solution and viewed this solution in light of the emerging legal framework for crimes against humanity comprising the Proposed Crimes Against Humanity Convention and the ICC Statute. It underlined that together with the Proposed Convention, the new formulation for groups protected against genocide is conducive to a comprehensive, two-tier protection of groups under international criminal law.

As the United Nations International Law Commission considers the Proposed Crimes Against Humanity Convention, they will deliberate on whether the embodied definition of crimes against humanity is flexible enough to encompass situations not envisaged by the drafters without contravening the principle of lenity. This chapter argues that the wide protection afforded to groups by the crimes against humanity definition must be lauded.

Years after the Genocide Convention was enacted, the protection afforded to victim groups has not changed. Genocide must evolve in the same manner as the evolution of crimes against humanity or become limited in its usefulness. Judicial interpretation has not only led to inconsistent judgments but has undermined confidence in the international system. A legislative approach that allows for greater development, which protects victim groups, and which does not contravene the principle of lenity is needed.

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On the Proposed Crimes Against Humanity Convention

Morten Bergsmo and SONG Tianying (editors)

This anthology is about the need for and nature of a convention on crimes against humanity. It uses the Proposed Convention on the Prevention and Punishment of Crimes Against Humanity as an important reference point. 16 authors discuss how such a convention may consolidate the definition of crimes against humanity, and develop measures for their prevention and punishment, decades after the conclusion of the Genocide Convention and Geneva Conventions. The authors include Leila N. Sadat, Eleni Chaitidou, Darryl Robinson, María Luisa Piqué, Travis Weber, Julie Pasch, Rhea Brathwaite, Christen Price, Rita Maxwell, Mary Kate Whalen, Ian Kennedy, SHANG Weiwei, ZHANG Yueyao and Tessa Bolton. It contains a preface by late Judge Hans-Peter Kaul and a foreword by Hans Corell.

The book is inspired by the rationale of crimes against humanity to protect against the most serious violations of fundamental individual rights, and its realization especially through domestic mechanisms. Such consciousness calls upon appropriate definition and use of contextual elements of the crime, effective jurisdiction for prevention and prosecution, and robust inter-State co-operation. The book considers individual State experiences in combating crimes against humanity. It underlines the importance of avoiding that the process to develop a new convention waters down the law of crimes against humanity or causes further polarisation between States in the area of international criminal law. It suggests that the scope of the obligation to prevent crimes against humanity will become a decisive question.

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effective legislative, administrative, judicial and other measures in accordance with the Charter of the United Nations to prevent and punish the commission of crimes against humanity in any territory under its jurisdiction or control.

A. Crimes against humanity

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Each State Party shall adopt such legislative and other measures as may be necessary to establish crimes against humanity as serious offenses under its criminal law, as well as its military law, and make such offenses punishable by appropriate penalties which take into account the grave nature of those offenses, the harm committed, and the individual circumstances of the offender. In addition, such a person may be barred from holding public rank or office, be it military or