

# The Genocide Convention: An Increasingly Meaningless Document?

Written by Faye Shonfeld

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**David Chuter has Described the Genocide Convention as the ‘Nuclear Weapon of the Human Rights and International Humanitarian Law Lobbies’ and as an ‘Increasingly Meaningless Document’. Critically Assess These Claims with Reference to Cases of International Peace and Security with which You Are Familiar.**

### Introduction

These two statements suggest that the Genocide Convention has schizophrenic characteristics: powerful like a nuclear weapon, but weak in terms of being ‘meaningless’. [1] The contrast in polarity is made evident to the reader of ‘*War Crimes*’, as the claims are made on the same page and in the same paragraph.[2] David Chuter is being deliberately provocative with his language; stating his own view whilst sparking debate about the political and legal value of the Genocide Convention. Although the statements contain elements of truth, they are too broad, unfairly undermine the legal significance of the Convention, and fail to encapsulate the subtle nuances which describe where the Convention sits, in terms of international law and international politics, today. I will consider these two claims in terms of my understanding of what Chuter means, as well as incorporating other critiques of the Convention with reference to the cases of Rwanda in 1994, Bosnia in 1995, and Darfur in 2003.

### The ‘Nuclear Weapon of the Human Rights and International Humanitarian Law Lobbies’

There are several interesting parallels between nuclear weapons and the Genocide Convention. Like a nuclear weapon, the Convention has a symbolic status (all the P5 countries are declared nuclear weapon states), and is the United Nations’ (UN) first Human Rights treaty. Both were made in the 1940s and their uses were deemed necessary due to the events of World War II. There is no weapon more powerful than a nuclear weapon, and international criminal law reserves the position at the apex of the crime hierarchy to genocide. Nuclear weapons and the Convention were felt necessary, yet remained dormant and unused throughout the Cold War. The non-use of nuclear weapons and the prevention of the crime of genocide have recently been revitalised with the Non-Proliferation Treaty 2010 review conference, and with the ‘Responsibility to Protect’ (R2P) doctrine respectively. Some countries have deemed nuclear weapons the ultimate deterrent protection,[3] and the Convention has always had an obligation on parties to prevent; which has recently been given new life.[4] In these general respects therefore the comparison has a valid basis.

### *Political Rhetoric*

Chuter specifically uses the nuclear weapon analogy to refer to genocide as being useful politically in terms of rhetoric; a ‘term of abuse’ to thrust at someone when you want to decry their actions as evil and horrifying (perhaps similar to the use of the word ‘terrorist’).[5] Glanville is correct to state that genocide is still a powerful word.[6] The stitching together of the Greek ‘genos’ and the Latin ‘cide’ cleverly condenses the horror suffered by millions into one

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word, with greater eloquence than the more cumbersome 'crimes against humanity'. In the political sphere, strenuous efforts were made by the Clinton administration to avoid use of the word genocide with respect to the situation in Rwanda. There was fear that use of the term would open the door to a legal obligation and that they might have to 'do something'.<sup>[7]</sup> However, there has not been any form of accountability for the inaction. Similarly, when the Bush administration declared that there was genocide in Darfur, it led only to a referral to the UN Security Council (UNSC) and a commission of inquiry despite the hopes of campaigners.<sup>[8]</sup> This gives credence to fact that the label is more powerful political rhetoric, rather than legal obligation and accountability. However, since Chuter made this statement in 2003, there have been several developments which would suggest that the term genocide is more than mere rhetoric: the emergence of the 'R2P' doctrine and the establishment of monitoring mechanisms such as the Office of the UN Special Advisor on the Prevention of Genocide. On a domestic basis, there is the launch of the inter-agency Atrocities Prevention Board by the United States.<sup>[9]</sup>

## *Historical vs. Topical*

Nuclear weapons are considered by some to be only relevant to threats of the past, and not applicable to modern threats such as terrorism. Regarding the Convention, Chuter makes the point it is more about interpreting the past, rather than looking to the future.<sup>[10]</sup> Although genocide was formulated originally to be applicable to some of the heinous crimes committed by the Nazis in World War II, it is not only applicable to these crimes. Genocide has been found to occur in Rwanda and Bosnia. It may be claimed that the use of 'in part', to cover the killing of the male population in Srebrenica and deporting the women and children, is stretching the Convention too far.<sup>[11]</sup> However, there is a risk that if the Convention is interpreted too narrowly then it becomes devoid of all use.<sup>[12]</sup> Therefore, a broad interpretation of the definition of the Convention, which still enables the distinction between crimes against humanity, is to be welcomed.

## *Enforcement*

Chuter believes that the existence of genocide is irrelevant, as the Convention cannot override customary international law or the UN Charter, and any action would have to be agreed by the UNSC under chapter VII procedures.<sup>[13]</sup> However, this criticism appears to ignore the fact that much of the Convention is customary international law. The UN Charter does appear to have a constitutional nature,<sup>[14]</sup> but the failure to act is due to the dominance of short term political interests over long term humanitarian needs, rather than constitutional constraints. The prevention of genocide is a work in progress,<sup>[15]</sup> but the real killer is not the Convention,<sup>[16]</sup> it is the lack of political will to intervene.<sup>[17]</sup>

## **An 'Increasingly Meaningless Document'**

The Genocide Convention as an 'increasingly meaningless document' refers to Chuter's claim that the legal definition of genocide bears less and less relation to the facts of prosecution cases, which then requires what amounts to interpretative contortion of the wording of the Convention to fit the facts. Chuter points to the definition of genocide being problematic on the basis of it being 'complex' and 'technical'.<sup>[18]</sup> This is a strong criticism, because it is important for the law to accurately reflect reality to ensure its relevance and practical use for society. The crime of genocide needs to avoid being 'unnecessary when applicable and inapplicable when necessary'.<sup>[19]</sup>

## *Deficiencies of Definition: Ethnical Groups, Mission Creep & Threshold*

The Convention's technicality can be illustrated by Chuter's criticism that the groups in the genocide definition include 'ethnical' groups. Chuter rightly recognises that it is problematic for the Genocide Convention to be based on a series of outdated racial and sociological assumptions.<sup>[20]</sup> Law is a product of its time, and science has moved on a great deal since 1948. Ethnicity appears to be less about objective facts of race, and more about subjective identity, culture, and perhaps, politics. Cultural and political groups were specifically rejected from the treaty, as states did not want the potential for interventions in internal conflicts.<sup>[21]</sup> The International Criminal Tribunal for Rwanda determined that the Hutus and Tutsis were separate 'ethnic groups', despite speaking the same language, practicing the same religion, living in the same regions, inter-marrying frequently, and essentially being groups economically

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and socially engineered by Belgian colonialists.[22] However, although not ideal, this is not necessarily a cause for concern. Perhaps, like other Human Rights treaties,[23] the Genocide Convention can be seen as a living document capable of interpretation in the light of changing attitudes and values. The court has interpreted ethnicity in terms of a cultural and political meaning, and this better reflects reality. As Eng notes, political groups and the protected groups are already closely connected.[24]

Some commentators believe that an expansive genocide definition risks assimilation with crimes against humanity.[25] However, this danger is averted by the *mens rea* of genocide.[26] Genocide is defined in Article II of the Genocide Convention, where the *mens rea* is 'intent to destroy, in whole or in part, a national, ethnical, racial or religious groups, as such'. Crimes against humanity only require 'knowledge of the attack'.[27] Part of the technicality of genocide that Chuter decries is actually one of its strengths; it is part of its distinctive nature, separating it from crimes against humanity, making it the 'crime of crimes'. The situation in Darfur was not considered to be a genocide due to the lack of intention.[28] This should not undermine the suffering in Darfur, but be illustrative of how crimes against humanity are more widely applicable than genocide, and fill the gaps left by the Convention.

A further technical criticism that Chuter makes is the lack of a threshold provision in the Convention, being incongruous with what the public may understand genocide to entail. He contrasts the killing of thousands of members of a political group with the outlawing of a minority language, and a campaign of forced sterilisations.[29] Although the latter would not result in any deaths, births would be prevented, resulting in the destruction of the group. It would be rather unsavoury to have a set number of people who would have to die before genocide was a crime, and this definition would fail to encapsulate the fact that actions other than killing amounts to genocide, such as rape. The fact that a layman may not comprehend the full scope of genocide does not mean that the definition is obsolete. Many people do not realise the technical difference in English criminal law between assault and battery, but this does not undermine their worth in distinguishing between two related but distinguishable crimes.

## Prevention

The Convention is particularly weak in its lack of operational detail regarding the prevention of genocide. [30] Article I is vague, and while domestic legislation is required in Article V, the only other article which concerns prevention is Article VIII; this arguably only states the already existing action of alerting the UN General Assembly or UNSC. However, the International Court of Justice (ICJ) has put flesh on the bones of the treaty, describing a breach in the duty when a state is aware of a risk of genocide. Notably, referral to the UNSC is not sufficient.[31] The duty is dependent on state capacity, based on: geographic distance of the state and events; the strength of political, and other, links between the state and main actors in the events; and the legal restrictions of action imposed on the state regarding the genocide. Chuter believes that there can never be any kind of effective operational arrangements for preventing genocide, because genocide is an interpretation of an action; decided after the event by a court.[32] However, the Court has held that the duty commences when the state is aware of a *risk* of genocide, and such risk does not necessitate that genocide has actually started. This avoids the semantic argument that it is illogical to prevent something that is already underway. It will be interesting to see whether in future, any states will make a claim against another state for a failure to carry out their duty to prevent genocide. It is notable that Bosnia probably had a good case against the UK regarding this significant question.[33]

In a similar vein, I disagree with Chuter when he states that it is impossible to ever be sure that genocide is under way or being planned.[34] In our technologically advanced, high communication age, it is rare for states to lack information that genocide may be occurring.[35] To prevent any breaks in the information chain after the Rwandan genocide, the UN established the first Special Advisor on the Prevention of Genocide in 2004. The Office of the UN Special Advisor has compiled an analysis framework comprising eight categories to determine the risk of genocide in a particular situation.[36] Globalisation has made the world a smaller place, and the UN Special Advisor's role will make it more difficult for a state to claim ignorance of the facts of genocide. The ICJ has held that a state's obligation exists even when it has the 'power to contribute to restraining in any degree the commission of genocide'.[37] At the very minimum, it would appear necessary for a state party to denounce the actions of the perpetrator state.

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## Original Sin

Stating that the Convention is '*increasingly* meaningless' also suggests meaningless from the outset, and has only become more so with time. With this description, Chuter downplays the legal significance of the UN's first-ever Human Rights treaty. The treaty, whose origins were in the horror of the holocaust, provided expression of the world's outrage at the atrocities by way of a penal codification of the crime of genocide. Schabas states that the Convention has 'no gaps', and compares it to a classic dry martini.[38] It may be true to suggest that the Convention has no gaps in the sense that a Model T Ford had no gaps when it was first produced in 1908 but, from the top speed of 45mph to the only colour being black, there are deficiencies for the modern driver. Without the Model T however, there would be no Ferraris. Similarly, without the Convention, it is unlikely that the International Criminal Tribunals for Yugoslavia and Rwanda, and the International Criminal Court would exist.[39] Rather than being increasing meaningless, I would argue that the Convention, in some ways, has become increasingly meaningful. It has provided the basis for a rich jurisprudence to interpret, expand and give meaning to the Convention's articles. Also, it provides a criterion, together with crimes against humanity, war crimes and ethnic cleansing, for the emerging protocol of R2P.

## Conclusion

The Genocide Convention is an iconic, foundational legal treaty that created a powerful word which is more than mere political rhetoric. Genocide retains its distinctive character from crimes against humanity, whose lower *mens rea* and wider applicability ensures that there are no legal lacunas to serve as a hiding place for criminals. More case law on genocide has been established in the last ten years than in the previous fifty-five, and the ICJ judgment is 'pregnant with potential for the promotion of human rights'.[40] This is not a Convention in a decline, but a Convention in renaissance.

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[1] Convention on the Prevention and Punishment of the Crime of Genocide 1948, hereon referred to as 'the Genocide Convention' or 'the Convention'

[2] Chuter (2003), p.88

[3] Notably Britain, see the SDSR (2010) p.37

[4] *Application of the Genocide Convention* ICJ 2007

[5] Chuter (2003) p.83

[6] Glanville (2009), p.481

[7] Strauss (2006), p. 50

[8] Ibid

[9] UN press release 24.4.2012

[10] Chuter (2003), p.82-3

[11] M.S. in the Economist 6.7.11

[12] Ibid

[13] Chuter (2003), p.83

[14] *Libyan Arab Jamahiriya v. United States (Provisional Measures)* ICJ 1992

[15] Schabas (2009b) p.533

[16] Quayle (2005), p.346

[17] Mayroz (2012), p.93

[18] Chuter (2003), p.82

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- [19] Schwarzenberger (1957), p.143
- [20] Chuter (2003), p.87
- [21] Eng [www.genocidewatch.org/redefininggenocide.html](http://www.genocidewatch.org/redefininggenocide.html)
- [22] Stauss (2006) p.46
- [23] E.g, the European Convention of Human Rights
- [24] Eng [www.genocidewatch.org/redefininggenocide.html](http://www.genocidewatch.org/redefininggenocide.html)
- [25] E.g. Chuter and Schabas
- [26] Ambos (2009), p.836
- [27] Rome Statute of the International Criminal Court 1998, article 7
- [28] Report of the ICID to the UNSG 25.1.2005
- [29] Chuter (2003), p.82
- [30] Mayroz (2012), p.81
- [31] Application of the Genocide Convention para. 427
- [32] Chuter (2003), p.83
- [33] Mayroz (2012), p.82
- [34] Chuter (2003), p.83
- [35] Power (2002), p.6
- [36] Available at [www.un.org](http://www.un.org)
- [37] Application of the Genocide Convention, para. 461
- [38] Schabas (2009a)
- [39] Power (2002), p.13
- [40] Schabas (2009b) p.17169 (kindle edition)

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