

On legal interpretation of intent in the Genocide Convention

by Prof. Gregory H. Stanton

Many differences in the definition of genocide are due to differences between historians, sociologists, and lawyers. I agree that intervention should come when gross crimes against humanity are committed, without waiting for a court to decide whether there is "specific intent" as Prof. Cassese demanded of the UN Commission of Inquiry for Darfur. (In fact, before the Commission even left for Darfur, when Prof. Cassese briefed his team members in Geneva, he reportedly told them that it would be unlikely that they would find the "specific intent" by the Sudanese government that he told them is required by the Genocide Convention.)

There are two reasons why I don't think my criticism of the UN COI on Darfur's report is "unfair" as Dr. Flores contends in a recent posting to the IAGS listserv.

The first is that the most recent scholarship by Kai Ambos and Katherine Goldsmith, published in the Journal of Genocide Studies and Prevention and elsewhere has found that "specific intent" or "special intent" is mentioned only twice in the *travaux* prior to final framing of the Genocide Convention, and in neither case was it mentioned as though it defined the term "intentional". Both scholars argue convincingly that both Lemkin and those who debated what intent should mean when framing the Genocide Convention meant the ordinary intent that exists in pre-meditated murder in common and civil law. The "Specific Intent" doctrine was later imported into interpretation of the Genocide Convention by Civil Law legal scholars like Prof. Cassese, and following them, by Prof. Schabas.

As Prof. Triffterer, Kai Ambos, Katherine Goldsmith and others point out, the problem with the "specific intent" interpretation of the intent requirement in the Genocide Convention is not only that it is not justified by the *travaux* of the convention, but that it makes the preventive purpose of the Genocide Convention nearly impossible to invoke, because proving "specific intent" requires proof of a plan or policy for which documentation is very difficult to obtain during a genocide. (However, I argue that 100,000 deaths should be proof enough of a systematic plan.) The specific intent doctrine turns the convention into a punishment mechanism that can only be applied after a genocide is over by an international tribunal.

The second reason why this definitional debate is not just one between historians and lawyers is the misperception that law is a fixed fact once it is codified. In the common law tradition, interpretation of the law in actual cases is rightly seen as a law-making activity. That is why the jurisprudence of the ICTR is so important in interpreting the Genocide Convention.

In the Statute of the International Court of Justice, scholarly opinion is specifically designated as a source of evidence of international law. So an influential treatise like the one by Prof. Schabas, written before decisions about most applications of the Genocide Convention by the ICTY, ICTR, and ICJ had a great impact on judicial decisions. In the ICTY in particular, even Prof. Schabas' mistakes, such as stating in his first edition that "ethnic cleansing" can never be genocide, prevented the ICTY from convicting most defendants of genocide in Bosnia. These mistakes, when converted into decisions by an international tribunal have been law-making in their importance. I only hope that interpretation of the Convention can reclaim some of Lemkin's original intent to prevent genocide, not just punish it after the fact.

I do not advocate amending the Genocide Convention. I agree with Prof. Schabas that we need an International Convention on Crimes Against Humanity. And I fully agree with Bob Melson and many others who consider Prof. Schabas a first rate scholar. I am also grateful for the great contributions he has made to the IAGS. And on a personal level, he is both a friend and an esteemed colleague. I look forward to our upcoming IAGS meeting in Buenos Aires, and the vigorous discussions and camaraderie that we will share there.

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