Genocide in International Law: the Crime of Crimes by William A Schabas [2000, Cambridge University Press, Cambridge, xvi + 624 pages, ISBN 0-521-78262-7]

Although "the fact of genocide is as old as humanity",[1] it is not merely an historical phenomenon ending with the Second World War. Genocide has been committed quite recently and possibly in Australia.[2] However, despite the universal condemnation of genocide, there is a noticeable paucity of recent legal literature on this 'crime of crimes'.[3] Indeed, Professor William A Schabas observes in his book, *Genocide in International Law: the Crime of Crimes,* that there are no legal monographs on the subject of the Convention for the Prevention and Punishment of the Crime of Genocide 1948 (Genocide Convention)[4] or the legal aspects of the prosecution of genocide since the 1970s.[5] Without this book, most lawyers dealing with genocide have to resort to the Genocide Convention, its *travaux prépatoires* and a sparse array of dated legal literature.[6] However, much of that material does not analyse genocide with the degree of specificity that common lawyers are prone to insist upon.

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[1] Sartre, "On genocide", in Falk R and ors (editors), Crimes of War (1971, Random House, New York) 534: at 1.

[2] See Wilson R, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families: Bringing Them Home (1997, Human Rights and Equal Opportunity Commission, Sydney) 274-275.

[3] Prosecutor v Kambanda (Case No ICT-R 99-23-S), Judgment and Sentence, 4 September 1998, para 16.

[4] [1951] United Nations Treaty Series 277, adopted by the United Nations General Assembly on 9 October 1948; entered into force generally and for Australia in January 1951.

[5] At 7.

[6] The lacuna was highlighted in a recent application to the High Court of Australia for special leave to appeal against the decision in Nulyarimma v Thompson (1999) 96 Federal Court Reports 153. The Applicants in this case argued that genocide "[wa]s a growing organic thing" even though they could not cite any decision or scholarly writing to support their argument that the impugned acts fell within an accepted definition of genocide: per Gummow, Kirby and Hayne JJ, High Court Transcripts, C18/1999, 4 August 2000 at 7-9. See also Volume 23 of the Fordham International Law Journal that is devoted entirely to "Genocide, War Crimes and Crimes Against Humanity", especially Van der Vyver, "Prosecution and punishment of the crime of genocide" at 286 et seq.

This informative book fills an embarrassing void. Professor Schabas surveys the history and the progressive development of international criminal law on genocide and recent state practice on the prevention and punishment of this crime. This comprehensive volume undoubtedly is essential reading for students of international criminal law and those involved in the prevention and punishment of genocide.

The Preface confirms that Professor Schabas is well qualified to present this seminal work on genocide.[7] Most notably, he participated in the 1993 mission visiting Rwanda with a mandate to assess reports that numerous politically and ethnically based crimes had been committed in President Habyarimma's regime. The term 'genocide' then sprang to Professor Schabas 's mind inexorably and he has closely studied the prosecution Rwandan *genocidiares* ever since. It should be noted here that the trial of Jean-Paul Akayesu by the International Criminal Tribunal for Rwanda (ICTR)[8] was the first truly international prosecution for genocide pursuant to the Genocide Convention. Thus, the judgments of the ICTR Trial Chamber are an important addition to the limited cache of judicial dicta on genocide.

A crisp introductory chapter puts the substantive chapters in their proper context.[9] Professor Schabas flags important distinctions and inter-relations between genocide on the one hand, and war crimes, crimes against humanity and international human rights law on the other hand. He notes that the principles of 'equality of sovereign states' and the 'reserved domain of domestic jurisdiction' have been invoked by several States to impede the evolution of international criminal law on genocide,[10] stating:[11]

> The inertia of the legal systems where the crimes actually occurred did little to inspire other jurisdictions to intervene, although they had begun to do so with respect to certain other 'international crimes' such as piracy and the slave trade, where the offenders were by and large individual villains rather than governments.

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[7] At x.
[8] Prosecutor v Akayesu (Case No ICT-R 96-4-T), Judgment, 2 September 1998 (Akayesu).
[9] At 1-13.
[10] At 2.
[11] Ibid.

Professor Schabas then offers the following view:[12]

> Refusal to exercise universal jurisdiction over these offences against humanitarian principles was defended in the name of respect for State sovereignty. But it had a more sinister aspect, for this complacency was to some extent a form of *quid pro quo* by which States agreed, in effect, to mind their own business. What went on within the borders of a State was a matter that concerned nobody but the State concerned.

The book has eleven substantive chapters that progress from general to specific, consistently with the European method of legal analysis. Although Professor Schabas uses the Genocide Convention as the centrepiece for discussion, he also examines the customary international law on genocide. Three principal drafts of the Convention are included in an appendix[13] and there is an extensive bibliography that cites the historical and current literature on the subject.[14]

Chapter 1, *Origins of the Legal Prohibition of Genocide,* traces the historical path leading to the formal articulation of this crime in international law.[15] Professor Schabas proceeds on the basis that genocide is an outgrowth from 'crimes against humanity'[16] that emerged earlier from the law and customs of war and humanitarian law governing armed conflict.[17] While accepting that Polish scholar Raphael Lemkin had coined the lexicon term 'genocide' in his 1944 work, *Axis Rule in Occupied Europe,*[18] Professor Schabas suggests that

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[12] Ibid.
[13] At 553-568.
[14] At 569-607.
[15] At 14-50.
[16] Generally see Bassiouni MC, Crimes Against Humanity in International Criminal Law (1999, 2nd Revised Edition, Kluwer Law International, The Hague).
[17] See the 'Martens Clause' in the preamble to Convention II with Respect to the Laws and Customs of War on Land 1899, 32 Stat 1803. Professor Schabas identifies the joint declaration of France, Great Britain and Russia dated 15 May 1915 notifying their intent to punish members of the Ottoman government who had persecuted the Armenian population as the first significant development in the prosecution of genocide: at 16.
[18] Lemkin R, Axis Rule in Occupied Europe (1944, Carnegie Endowment for World Peace, Washington).

the gestation of international law on genocide began much earlier.[19] Indeed, he points out that 'international concern'[20] for the protection of national, racial, ethnic and religious groups may be traced to the Peace of Westphalia[21] of 1648 that had "evolved into a doctrine of humanitarian intervention which was invoked to justify military intervention on some occasions during the nineteenth century".[22]

Professor Schabas observes that the United States was largely responsible for the awkward development of international law in relation to crimes against humanity and genocide.[23] In this context, he discusses the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis,[24] the Agreement Establishing the Charter of the International Military Tribunal (IMT),[25] the IMT's judgment in the Trial of Major German War Criminals,[26] and 'subsequent proceedings' pursuant to Control Council Law No 10.[27] He also observes that the United States had consistently rejected the notion that international law might innovate to hold its government officials responsible for mistreating subjects in the United States.[28]

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[19] At 14.
[20] At 15.
[21] Ibid. The Peace of Westphalia ended two devastating wars in Europe, namely, the Eighty Years War between Spain and the Netherlands and the Thirty Years War between many Protestant and Catholic nations. The Peace of Westphalia provided guarantees for religious minorities while affirming the principles of territorial sovereignty and the sovereign equality of States, inter alia: Bewes, "Gathered notes on the Peace of Westphalia of 1648" (1933) XIX Grotius Society Transactions 61.
[22] At 15.
[23] At 35-37.
[24] The Agreement and IMT Charter were formally adopted by the representatives of the four major Allied powers (United States, United Kingdom, Soviet Union and France) on 8 August 1945. Australia and 18 other countries expressed their support by adhering to this Agreement.
[25] (1951) 82 United Nations Treaty Series 279 (Nuremberg Charter).
[26] Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg (1946) Misc No 12, (1946, HM Stationery Office, London).
[26] (1968) 36 International Law Reports 5, 281-283.
[27] Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945: Official Gazette of the Control Council for Germany, No 3, 31 January 1946, Berlin (CCL 10).
[28] At 32-35. At 35, Professor Schabas cites Justice Robert H Jackson, "Minutes of Conference Session of 23 July 1945", in Report of Robert H Jackson, United States Representative to the International Conference on Military Trials (1949, United States Government Printing Office, Washington) 331-333. Compare the counter

Nevertheless, the insistence upon having a 'war nexus' in order to 'reach' extra-territorial crimes against humanity led to the rapid promulgation and adoption of General Assembly Resolution 96(I)[29] that, in its final text, omitted the requirement of a war nexus.

Chapter 2, *Drafting of the Convention and Subsequent Normative Developments,* skilfully navigates a direct course through the three principal drafts of the Genocide Convention and General Assembly Resolution 96(I) without any noticeable sacrifice of detail.[30] Professor Schabas confirms that "[t]here was no real disagreement with the historical basis of the crime of genocide, and recognition that it had existed long before the adoption of the Convention or of the General Assembly Resolution 96(I)"[31] and he identifies three major points of contention among States by asking:[32]

1. Protected groups – are they political groups?
2. Prohibited 'modalities' of genocide – is this cultural genocide?
3. Should the convention affirm the right of individual States to exercise extra-territorial jurisdiction over non-nationals who commit genocide (namely, universal jurisdiction)?

The above differences among States were ultimately resolved by a series of compromises in order to settle the final text of the Genocide Convention. The most striking compromise is reflected in Article VI affirming that international tribunals are permitted to exercise 'universal jurisdiction' over genocide and yet individual States are simply obliged to prosecute and punish persons who commit genocide within their own territory.[33]

The review of subsequent normative developments focuses upon the Draft Code of Crimes Against the Peace and Security of Mankind[34] where the drafters have tinkered with the Article II definition of

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argument of Professor Gross (France): "Minutes of Conference Session of 23 July 1945" at 360, ibid.

[29] UN Document A/64/Add 1, adopted unanimously and without debate by the United Nations General Assembly on 11 December 1946.

[30] At 51-101.

[31] At 77.

[32] At 63-68.

[33] Jurisdiction is discussed more extensively in Chapter 8.

[34] (1951) II Yearbook of the International Law Commission 136 (9).

genocide from time to time. In this respect, Professor Schabas notes that the word 'including' was added at the end of the *chapeau*, just prior to the enumeration of the prohibited acts of genocide.[35] He also observes that the version approved by the International Law Commission (ILC) in 1996 starting with the words, "A crime of genocide means",[36] suggests that there are "other types of crime of genocide."[37] This suggestion is compelling because the prefatory words in the *chapeau* of Article II ("In the present Convention") indicate that the list was intended to cover the field within the Genocide Convention and not otherwise.

The second chapter also discusses the persistent efforts to establish an international criminal court having permanent jurisdiction over genocide and the interim use of *ad hoc* international criminal tribunals to deal with the genocide in Rwanda and the former Yugoslavia in the meantime. Professor Schabas also predicts the recent objection raised by President Slobodan Milosovic, namely, that Yugoslavia had not accepted the jurisdiction of the *ad hoc* international criminal tribunal (ICT-Y) pursuant to Article VI of the Genocide Convention.[38]

Chapter 3, *Groups Protected by the Convention,* analyses three concepts: (1) group; (2) groups listed in Article II; and (3) other groups.[39] Professor Schabas suggests that the word 'group' is non-problematic, meaning, simply, "an entity composed of more than one individual".[40] This accords with Benjamin Whitaker's point that a targeted group may constitute a minority or a majority of the total population, South Africa being an example of the latter.[41] Professor Schabas also observes that the word 'group' was preferred over 'minorities' because the former avoided limitations in the post-World War I European treaties dealing with 'national minorities'.[42]

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[35] At 82.
[36] Report of the International Law Commission on the Work, 48th Session, 6 May-26 July 1996, UN Doc A/51/10 at 85.
[37] At 87.
[38] At 100.
[39] At 102-150.
[40] At 107.
[41] Whitaker B, "Revised and updated report on the question of the prevention and punishment of the crime of genocide", UN Doc E/CN4/Sub 2/1985/6 at 16.
[42] At 107.

Professor Schabas suggests that "the four groups listed in Article II resist efforts at precise definition because the concepts of race, ethnic and national group are *a priori* imprecise".[43] However, he observes that the courts have tended to avoid the difficulties inherent in these archaic terms by taking a subjective approach.[44] He also recognises that the definitions have fading significance because groups not mentioned in Article II, such as political groups, are now covered by other legal norms including the prohibition of crimes against humanity.[45]

Chapter 4, *Physical Element or* Actus Reus *of Genocide,* discusses 'acts of genocide'.[46] Professor Schabas notes that the consensus reflected in Article II is narrower than Raphael Lemkin's proposal.[47] He points out that three of the five acts of genocide (namely, killing members of a group; causing serious physical or mental harm to members of the group; forcibly transferring children of the group to another group) require proof of the act and a result. The other two acts (namely, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; or imposing measures intended to prevent births within the group) do not demand such proof, but they require proof of a further specific intent.[48] Professor Schabas also argues that an act of genocide may be either an act of commission or an act of omission.[49]

In relation to the prohibited 'modalities' of genocide, Professor Schabas notes that causing serious mental harm was tendentious and its scope is still problematic.[50] Some States[51] and academic writers[52] have argued

[43] At 109.
[44] Prosecutor v Kayishema and Ruzindana (Case No ICT-R 95-1-T) Judgment, 21 May 1999, para 98.
[45] At 150.
[46] At 151-205.
[47] At 152.
[48] At 155.
[49] At 156. See Prosecutor v Kambanda (Case No ICT-R 97-23-S) Judgment and Sentence, 4 September 1998, para 39(ix); Lachs M, War Crimes – An Attempt to Define the Issues (1945, Stevens & Sons, London) 21.
[50] At 161.
[51] For example, Professor Schabas cites the 'understanding' formulated by the United States: "the term 'mental harm' in Article II(b) means permanent impairment of mental facilities through drugs, torture or similar techniques."
[52] See for example Robinson N, The Genocide Convention: A Commentary (1960, Institute of Jewish Affairs, New York) ix.

that the mental harm in Article II can only be caused by narcotic drugs or similar measures, although this is counter-indicated by the text and the *travaux prépatoires.* Indeed, Professor Schabas notes that China's proposal was defeated, whereas India's proposal was accepted and it made no reference to drugs.[53] Further, the ICTR affirmed recently in *Akayesu* that sexual violence may cause serious physical and mental harm.[54]

While the omission of 'cultural genocide' has been criticised, Professor Schabas indicates that many of the objections are exaggerated.[55] The ILC has confirmed that the Genocide Convention prohibits "the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group."[56] Even so, the destruction of cultural sites may inflict conditions of life calculated to destroy the group, or it may be intended to destroy the group by causing serious mental harm to its members. Similarly, forcibly transferring children from the group or preventing births within the group may be done to destroy the group, since the remainder may be unable to 'pass on' their culture. In both instances, Article II prohibits the material or biological destruction of the group, though not the destruction of culture because that is dealt with under the rubric of human rights law.

In relation to 'forcibly transferring children', Professor Schabas records an unfortunate comment by the Russian delegate, Paton Marozov, that "no one had been able to quote any historical case of the destruction of a group through the transfer of children".[57] The recent *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families: Bringing Them Home,*[58] authored by Sir Ronald Wilson, should go a long way towards filling the perceived void.

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[53] At 161.
[54] Refer to the Judgment para 731.
[55] At 188-189.
[56] Report of the International Law Commission on the Work of its 48th Session, 6 May-26 July 1996, UN Doc A/51/10 at 90-91.
[57] UN Doc E/AC.6/SR.82 at 175.
[58] 1997, Human Rights and Equal Opportunity Commission, Sydney (the Wilson Report).

Chapter 5, *The Mental Element or* Mens Rea *of Genocide,* discusses the 'psychological' component of genocide in light of recent jurisprudence and the preparatory work.[59] This chapter has five logical parts: (1) knowledge; (2) intent; (3) components of the specific intent to commit genocide; (4) *mens rea* of the punishable acts; and (5) motive.

Professor Schabas points out that the *mens rea* of genocide has two components, knowledge and intent.[60] With regard to 'knowledge', he confirms that the accused must know of the plan or circumstances of genocide, even if they are not aware that it met the legal definition of genocide.[61] He also notes the general consensus that knowledge may be actual or 'constructive',[62] explained in the following passage:[63]

> The law does not permit an individual to shield himself from criminal responsibility by ignoring the obvious. For example, a soldier who is ordered to go from house to house and kill only members of a particular group cannot be unaware of the irrelevance of the identity of the victims and the significance of their membership in a particular group. He cannot be unaware of the destructive effect of this criminal conduct upon the group itself. Thus, the necessary degree of knowledge and intent may be inferred from the nature of the order to commit the prohibited acts of destruction against individuals who belong to a particular group and are therefore singled out as the immediate victims of the massive criminal conduct.

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[59] At 206-256.

[60] At 207; see Article 30 of the Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9.

[61] At 209-211. Professor Schabas observes at 209 that there is no explicit requirement of a genocide plan and it is sufficient "that the accused knew...that the conduct was part of a similar conduct directed against that group": Discussion Paper Proposed by the Co-ordinator, Article 6: The Crime of Genocide, UN Doc PCNICC/ 1999/WGEC/ RT.1 (ICC Statute).

[62] At 212-213.

[63] Report of the International Law Commission on the Work of its 48th Session, 6 May-26 July 1996, UN Doc A/51/10 at 90. Professor Schabas also cites the jurisprudence of the ICTR in Akayesu para 475 and the International Criminal Tribunal for the Former Yugoslavia (ICTY) in Prosecutor v Tadic (Case No IT 94-1-T) Opinion and Judgment, 7 May 1997, para 659.

On the subject of 'specific intent', *dolus specialis* in the Roman-continental systems, Professor Schabas draws on the definition of *mens rea* in Article 30(2) of the ICC Statute. This provision states that a person has intent where; in relation to conduct, that person means to engage in the conduct; in relation to a consequence, that person means to cause the consequence or is aware that it will occur in the ordinary course of events.[64]

Professor Schabas remarks that "[t]he specific intent required for a conviction of genocide is even more demanding than that required for murder."[65] Indeed, in *Nulyarimma v Thompson*[66] recently, Wilcox J said:[67]

> In the case of dispossession of land and destruction of peoples that occurred gradually over several generations and stemmed from many causes, *it is impossible to fix any particular person or institution with an intention to destroy the Aboriginal people as a whole.*[68]

Given this culture of 'judicial inertia',[69] it may be impossible to persuade some municipal courts that a person had acted with the specific intent necessary to sustain a conviction of genocide.[70] However, Professor Schabas confirms that the *ad hoc* international criminal courts have not been so reluctant,[71] as indicated by the following passage from *Akayesu:*[72]

> [I]n the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent

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[64] Note that Article 30(2) does not say "the accused is aware that the consequence possibly or probably will occur in the ordinary course." See also R v Crabbe (1985) 156 Commonwealth Law Reports 464, dealing with constructive murder.
[65] At 222.
[66] (1999) 96 Federal Court Reports 153.
[67] Ibid at 160-161.
[68] Emphasis added.
[69] See Cubillo and Gunner v Commonwealth (2000) 103 Federal Court Reports 1.
[70] Compare Attorney-General (Israel) v Eichmann (1951) 36 International Law Reports 277 (Eichmann).
[71] At 222-223.
[72] Refer to the Judgment para 477.

> inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, *while excluding the members of other groups*, can enable the Chamber to infer the genocidal intent of a particular act.[73]

After examining the components of the specific intent to commit genocide ('to destroy', 'in whole or in part', 'groups') and the *mens rea* within the enumerated modalities of genocide, Professor Schabas turns to the vexing issue of 'motive'. He leads with the following observation:[74]

> There is no explicit reference to motive in Article II of the Genocide Convention, and the casual reader will be excused for failing to guess that the words 'as such' are meant to express the concept.

Professor Schabas surveys the divergent views on the meaning of the phrase 'as such' in Article II. He concludes that the academic opinion on this matter is "rarely very compelling" and the case law of the *ad hoc* tribunals is "hardly enlightening".[75] Consequently, he ultimately resorts to academic studies of the *travaux prépatoires,* which tend to accept that 'as such' connotes a motive requirement.[76] This tendency accords with the United States submission that "genocide is committed against a person in a national, ethnical, racial or religious group, *because* of that person's membership in that group".[77]

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[73] Emphasis added.
[74] At 245.
[75] At 252.
[76] For instance, see Lippmanm M, "The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-five years later" (1994) 8 Temple International and Comparative Law Journal 1, 22-24.
[77] United States, "Annex on Definitional Elements", UN Doc A/CONF. 183/C.1/L.10 at 1 (emphasis added).

Professor Schabas also notes that the drafters failed to articulate two angles in the Genocide Convention, namely, collective motive and individual motive.[78] Thus, he argues:[79]

> Genocide is, by nature, a collective crime, committed with the co-operation of many participants. It is, moreover, an offence generally directed by the State. The organizers and planners must necessarily have a racist or discriminatory motive, that is, a genocidal motive, taken as a whole. Where this is lacking, the crime cannot be genocide. Evidence of hateful motive will constitute an integral part of the proof of the existence of a genocidal plan, and therefore of a genocidal intent. At the same time, individual participants may be motivated by a range of factors, including personal gain, jealousy and political ambition. ...Individual offenders should not be allowed to raise personal motives as a defence to genocide, arguing for instance that they participated in an act of collective hatred but were driven by other factors.

In Chapter 6, *Other Acts of Genocide,* Professor Schabas discusses the four participation crimes made punishable by Article III, which are conspiracy, direct and public incitement, attempts and complicity.[80] This chapter considers the drafting history, the 'Nuremberg legacy', judicial interpretation, especially the decision of the ICTR convicting Jean Kambanda of conspiracy to commit genocide, and contributions by the ILC.[81]

Professor Schabas focuses on complicity primarily due to the collective nature of genocide and identifies a crucial distinction between the Romano-Germanic conception of conspiracy and the common law concept. In the Romano-Germanic system, conspiracy *(complot)* is punishable only to the extent that the principal crime is also committed, whereas conspiracy at common law occurs when two or more persons

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[78] At 255.
[79] Ibid.
[80] At 257-313.
[81] Prosecutor v Kambanda (Case No ICT-R 97-23-S) Judgment and Sentence, 4 September 1998.

agree to commit the principal crime.[82] Thus, Professor Schabas suggests that the ICTR may follow the tradition of judicial conservatism and take the narrower continental approach.[83]

Professor Schabas differentiates between complicity and 'command responsibility'.[84] With the former, commanders intend for genocide to be committed by their subordinates, whereas the latter implicates commanders even without proof that they had ordered the commission of genocide and perhaps even without their knowledge of its commission. He perceives a "profound judicial malaise with the entire concept", particularly in the jurisprudence of the ICTR[85] and suggests that the punishment of military commanders and senior officials for "negligent execution of orders" is anomalous, especially since genocide is a crime of "specific intent".[86]

Chapter 7 presents *Defences to Genocide.*[87] Here, Professor Schabas shows that, strictly speaking, there are no special defences available to answer a charge of genocide as such. On the contrary, the recent jurisprudence confirms that 'defences' to genocide are available only if the mental element of the crime is eliminated.[88] On this basis, in showing a lack of 'specific intent' or the *mens rea* to commit genocide, the accused is not arguing a legal 'excuse' or 'justification' for the crime.

Professor Schabas focuses on two defences that may be available but for their deliberate renunciation: 'Head of State immunity' and 'obedience to superior orders'. First, consistently with the Treaty of Peace Between the Allied and Associated Powers and Germany (Treaty

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[82] At 261-262.
[83] At 265.
[84] At 304.
[85] At 309; Prosecutor v Serushago (Case No ICT-R 98-39-S) Sentence, 2 February 1999; Prosecutor v Kayishema and Ruzindana (Case No ICT-R 95-1-T) Judgment, 21 May 1999 (Kayishema only). See also Prosecutor v Karadzic and Mladic (Case Nos IT 95-5-R61, IT 95-18-R61), Consideration of the Indictment Within the Framework of Rule 61 of the Rules of Procedure and Evidence, 11 July 1996.
[86] At 312.
[87] At 314-344.
[88] See for example Article 33(2) Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9.

of Versailles)[89] and the Nuremberg Charter, Article IV of the Genocide Convention denies the availability of the 'Head of State immunity' defence, though it seems only in the context of criminal proceedings before an international tribunal.[90] Secondly, Professor Schabas notes that while the Genocide Convention does not expressly refer to "superior orders', it is usually accepted that general international law denies this defence.[91] He carefully distinguishes between duress and mere obedience to superior orders without compulsion and duress, citing *United States v Ohlendorf and others ('Einsatzgruppen):*[92]

> When the will doer merges with the will of the superior in the execution of an illegal act, the doer may not plead duress under superior orders.[93]

However, Professor Schabas also notes that the courts have tended to accept that the specific intent to commit genocide may be vitiated by duress, compulsion or coercion.[94]

In Chapter 8, *Prosecution of Genocide by International and Domestic Tribunals,* Pofessor Schabas discusses[95] the prosecution of genocide by international tribunals and domestic tribunals, particularly in light of

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[89] [1919] Treaty Series 4. Article 227 of this Treaty had contemplated the prosecution of Kaiser Wilhelm II.

[90] Articles IV and VI read together only confirm that international courts are permitted to prosecute Heads of State. They do not permit domestic courts to prosecute foreign Heads of State. See especially R v Bow Street Stipendiary Magistrate and ors, ex parte Pinochet Ugarte (No 1) [1998] 4 All England Reports 897, 912 per Lord Slynn of Hadley.

[91] At 325 et seq; see especially Eichmann para 15; Article 8 of the Nuremberg Charter; Polyukhovich v Commonwealth (1991) 172 Commonwealth Law Reports 501, 581-583 per Brennan J.

[92] (1948) 4 Law Reports of the Trials of the War Criminals 411, 480.

[93] At 330-332;

[94] At 333 et seq. Professor Schabas also cites the Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg (1946) Misc No 12, (1946, HM Stationery Office, London). The Judgment states: "The true test, which is found in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible": ibid at 42.

[95] At 345-417.

Articles V[96] and VI[97] of the Genocide Convention, amnesty, reparation and statutory limitation. Professor Schabas makes two salient points in relation to Article V. First, the convention is not entirely self-executing since it does not provide any penalties for genocide. Secondly, States hold divergent views on the extent to which new legislation is needed to implement the Genocide Convention in their domestic law.[98]

Professor Schabas notes that Article VI reflects the principle of 'complementarity' whereby "courts with territorial jurisdiction would take precedence, an international court operating only when the former had failed to act."[99] He also makes the crucial point that Article VI does not permit individual States to exercise extra-territorial jurisdiction over non-nationals in the form of universal jurisdiction. Indeed, it appears to literally restrict the bases of jurisdiction exercisable by States *under the convention* to territorial jurisdiction.[100] Fortunately, there is a solid consensus of opinion that customary international law permits States to exercise universal jurisdiction over genocide.[101]

Professor Schabas reviews the activities of the two *ad hoc* international criminal tribunals (the ICTR and ICTY), their valuable additions to the

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[96] Article V states: "The Contracting Parties undertake to enact, in accordance with their 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 of any of the other acts enumerated in Article III."

[97] Article VI states: "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."

[98] See especially the examples cited at 352-353 and in notes 31-39.

[99] At 357.

[100] At 365. The Chair of the Ad Hoc Committee suggested that the text "did not at all imply that States could not punish their nationals for crimes of genocide committed abroad": UN Doc A/C.6/SR.100 (John Maktos, United States) (emphasis added).

[101] Examples include Eichmann paras 20, 24-25; (1951) 36 International Law Reports 277 (Supreme Court) para 12; Restatement (Third) of the Foreign Relations Law of the United States (1987) §§ 404, 702; Meron T, International Criminalization of Internal Atrocities (1995) 89 American Journal of International Law 554, 569; Nulyarimma v Thompson (1999) 96 Federal Court Reports 153. See, contra, R v Bow Street Stipendiary Magistrate and ors, ex parte Pinochet Ugarte (No 1) [1998] 4 All England Reports 897, 913 per Lord Slynn of Hadley.

limited corpus of jurisprudence on genocide, and the growing momentum for establishing a permanent international criminal court with general jurisdiction over genocide.[102] He also points out that there are few examples of genocide prosecutions by national courts, with *Eichmann* perhaps being the most notorious.[103] In this context, Professor Schabas discusses *inter alia* the acquittal of John Demjanjuk by Israel, attempts at prosecution by the ICTR,[104] Austria's response to the atrocities in Rwanda and the former Yugoslavia, and prosecutions with idiosyncratic definitions of genocide by Bangladesh, Cambodia, Romania, Ethiopia and Spain.[105]

Chapter 9, *State Responsibility and the Role of the International Court of Justice,* deals with the failure of the Genocide Convention to resolve the controversy over the scope of state responsibility for genocide.[106] Professor Schabas observes that while "it is difficult to conceive of genocide without some form of State complicity or involvement", the Genocide Convention is almost entirely devoted to the prosecution of individuals who perpetrate genocide.[107] He also observes that while Article XI provides for submission of disputes "relating to the responsibility of a State for genocide" to the International Court of Justice (ICJ), the court is yet to render a final judgment establishing the scope of State responsibility for genocide.[108]

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[102] At 368 et seq; On the subject of international criminal courts, see also Caloyanni, "The proposals of M Laval to the League of Nations for the establishment of an International Permanent Tribunal in criminal matters" (1936) XXI Grotius Society Transactions 77; Simonovic, "The role of the ICTY in the development of international criminal adjudication" (1999) 23 Fordham International Law Journal 440; Sinanyan, "The International Criminal Court: Why the United States should sign the Statute (but perhaps wait to ratify)" (2000) 73 Southern California Law Review 1171.

[103] At 386.

[104] Professor Schabas participated in the Kingali Conference and recommended a range of measures to deal with a large number of genocide cases: see Rwanda, "Genocide, Impunity, and Accountability: Dialogue for National and International Response", in Recommendations of the Conference, Kingali, 1-5 November 1995 (1995, Office of the President, Kingali).

[105] See especially Professor Schabas' discussion on 'show trials' concerning Pol Pot and Ieng Sary at 391-392. See also Marks, "Elusive justice for the victims of the Khmer Rouge" (1999) 52 Journal of International Affairs 691, 700.

[106] At 418-446.

[107] At 418.

[108] Ibid.

Further, although the ICJ has considered the issue in four cases,[109] Professor Schabas observes that the court's remarks were sufficiently ambiguous that the International Law Commission could not agree on whether the ICJ recognised this issue as falling within the ambit of the Genocide Convention.[110] Therefore, the vexing question is whether States have criminal or civil responsibility for (1) genocide committed in their territory or (2) genocide committed in another State's territory.

In relation to the criminal responsibility of States for genocide, Professor Schabas observes that there is minimal support for the proposition that States can commit genocide or, indeed, any crimes.[111] This approach is consistent with Article IV that removes the defences of act of State and act of Head of State[112] and it accords with the now famous statement the IMT made at Nuremberg that "crimes are committed by men, not by abstract legal entities".[113] Thus, the remaining area of controversy is whether or not Article XI refers to civil responsibility for genocide. In addition, does it refer to the civil liability of States for genocide committed within their own territory? The following statement represents the view of the majority of States on the latter question:[114]

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[109] Pakistani Prisoners of War (Pakistan v India) [1973] International Court of Justice Reports 328; Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)) (Preliminary Objections) [1996] International Court of Justice Reports 595; Legality of the Use of Force (Yugoslavia v NATO Members), Request for the Indication of Provisional Measures, Order, 2 June 1999; Application by the Republic of Croatia Instituting Proceedings Against the Federal Republic of Yugoslavia, 2 July 1999.

[110] At 435. See the Report of the International Law Commission on the Work of its 50th Session, 20 April-12 June 1998, 27 July-14 August 1998, UN Doc A/53/10, paras 263-264.

[111] At 446. Professor Schabas cites the following statement of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia Prosecutor v Blaskic (Case No IT 95-14AR108bis) Objection to the Issue of Subpoenae Duces Tecum, 29 October 1997: "Under present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems": at 442.

[112] The defences are discussed in Chapter 7.

[113] Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg (1946) Misc No 12, (1946, HM Stationery Office, London) 41.

[114] UN Doc A/C.6/SR.133 per Ernest Gross (United States).

> If the words 'responsibility of a State' were taken in their traditional meaning of responsibility towards another State for damages inflicted, in violation of the principles of public international law, to the subjects of the plaintiff State...then those words would give rise to no objection. But if, on the other hand, the expression 'responsibility of a State' were not used in the traditional meaning, and if it signified that a State could be sued for damages in respect of injury inflicted by it on its own subjects, then there would be serious objections to that provision.

Professor Schabas suggests that the reluctance of States to admit to international responsibility for genocide against their own subjects is characteristic of "the tautology implicit in all human rights norms."[115] For illustrative purposes, he explains that "nobody but Turkey can invoke international law before the International Court of Justice in order to claim the right to compensation for the genocide of the Armenians, something it is hardly likely to do."[116] It should be noted, however, that a State's failure to prevent genocide in its territory conceivably could cause damage in neighbouring States, especially if the genocidal frenzy caused an influx of refugees.[117]

In the above context, Professor Schabas notes that although a State cannot commit the crime of genocide as such, the material acts that underlie genocide are nevertheless 'internationally wrongful acts' that may be imputed to the defendant State.[118] Thus, it may be argued that States may commit genocide in the civil sense. This means that a State may be liable on the international plane to make reparation if the genocide, be it territorial or extra-territorial, is (1) imputed to the State and (2) it causes damage in another State's territory.

Indeed, Kreca J *ad hoc* conceded this much in the ICJ case, *Application of the Convention on the Prevention and Punishment of the Crime of*

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[115] At 423.
[116] At 443.
[117] Lemkin mentioned the disruptive consequences of dislocation when arguing for a multilateral convention on genocide: Lemkin R, Axis Rule in Occupied Europe (1944, Carnegie Endowment for World Peace, Washington) 93-94.
[118] At 443. See "First Report on State Responsibility by Mr James Crawford, Special Rapporteur", UN Doc A/CN.4/490/Add.2, para 61.

Genocide.[119] Hence, there is no apparent reason why an injured State cannot successfully claim reparation for damage caused by a respondent State's delictual conduct.[120] This occurs when this State fails to prevent genocide contrary to Article I of the Genocide Convention or fails to prevent its territory from being used to cause damage in the territory of another State.[121]

In Chapter 10, *Prevention of Genocide,* Professor Schabas laments the failure of the Genocide Convention to provide new machinery for the effective prevention of genocide.[122] He observes that despite including the word 'prevention' in this title, the Genocide Convention is primarily concerned with the punishment of genocide.[123] Indeed, it focuses on prosecution and punishment by the State in whose territory this crime occurs. Undoubtedly, States are obliged to take appropriate steps to prevent genocide occurring in their own territory.[124] However, it remains uncertain whether the Genocide Convention or general international law (1) *obliges* States to prevent genocide occurring in the territory of other States and (2) *permits* States to intervene on 'humanitarian grounds' by military action or otherwise, in the territory of other States where genocide is committed.[125]

Professor Schabas explores the preventative measures excluded from the Convention and focuses on Article VIII of the *Genocide Convention*, which states:

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

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[119] Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro) (Preliminary Objections) [1996] International Court of Justice Reports 595, para 105.

[120] At 441, Professor Schabas distinguishes between mere 'delicts' and 'crimes'.

[121] See especially Trail Smelter Arbitration (1938-1941) 3 Reports of International Arbitral Awards 1905; Chorzów Factory (Indemnity) (Jurisdiction) [1927] Permanent Court of International Justice Reports, Series A, No 9, page 4.

[122] At 447-502.

[123] At 447.

[124] See Articles I, V and VI of the Genocide Convention.

[125] At 447, 491-502. Watson, "Armed conflict and humanitarian intervention: International standard rules of engagement" [2000] Australian International Law Journal 151, 155 et seq.

Professor Schabas suggests that the 'competent organs' that Article VIII contemplates are those mentioned in Article 7 of the Charter of the United Nations (Security Council, General Assembly, Economic and Social Council, Trusteeship Council, ICJ and the Secretariat).[126] He also reviews the General Assembly debates on genocide,[127] noting that it has consistently affirmed the importance of preventing genocide.[128]

Professor Schabas notes that while the Security Council has taken material steps to prevent genocide, its permanent members have been loathed to use the term 'genocide'[129] and they dawdled while hundreds of thousands were killed in Rwanda. This inertia is disturbing given the uncertainty as to "whether unilateral or even multilateral armed action to prevent genocide is legal in the absence of Security Council authorization."[130] Nevertheless, Professor Schabas commends the Security Council for creating Commissions of Experts to investigate atrocities in Rwanda and former Yugoslavia,[131] authorising 'Assistance Missions',[132] and creating the International Criminal Tribunals with subject matter jurisdiction over genocide.[133]

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[126] At 453. Here, Professor Schabas also rejects Nehemiah Robinson's view that the Security Council and the General Assembly are the only competent organs: Robinson N, The Genocide Convention: A Commentary (1960, Institute of Jewish Affairs, New York) 98.

[127] At 454-458.

[128] At 456.

[129] At 460-461; see "Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda" issued on 15 December 1999 by the United Nations: *"The delay in identifying the events in Rwanda as a genocide was a failure of 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". Also, Professor Schabas cites Christine Shelley, United States Department spokeswoman: "there are obligations which arise in connection with the use of the term": at 495 note 292.

[130] At 501. According to Lauterpacht J ad hoc, "[t]he limited reaction of the parties to the Genocide Convention may represent a practice suggesting the permissibility of inactivity": 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 Provisional Measures) 13 September 1993 [1993] International Court of Justice Reports 325, 445.

[131] At 459-461; see UN Doc S/RES/780 (Former Yugoslavia, 1992); S/RES/935 (Rwanda, 1994).

[132] UN Docs S/RES/912; S/RES/929 ('Operation Turquoise', Rwanda, 1994).

[133] Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc S/RES/827 (1993) Annex; Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc S/RES/995 (1994), Annex.

Professor Schabas also discusses the ancillary activities of the Sub-Commission on the Promotion and Protection of Human Rights, Commission on Human Rights, ICJ and Secretariat in the prevention of genocide.[134] He then reviews 'preventative measures' which are covered by 'human rights' instruments such as the Universal Declaration of Human Rights[135] and the International Convention for the Elimination of Racial Discrimination.[136]

Chapter 11, *Treaty Law Questions and the Convention,* discusses treaty law questions pertaining to the Genocide Convention.[137] It covers briefly a wide range of issues including official languages; signature, ratification and accession; succession; application to sovereign territories; coming into force; denunciation; revision; reservations and objections; and the Convention's temporal application. However, discussion is mostly devoted to the legality of reservations to the Convention, particularly the United States' reservation,[138] objections to such reservations, and relevant state practice.[139]

The discussion on the temporal application of the Genocide Convention is relatively straightforward.[140] Professor Schabas readily accepts that "the Genocide Convention is not applicable to acts committed before its effective date".[141] However, he then states:[142]

> This does not mean that genocide cannot have been committed prior to 12 December 1951, when the Convention came into force. The preamble of the Convention makes this quite clear when [it] declares that "at all periods of history genocide has inflicted great losses on humanity".

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[134] At 464-479.
[135] Article 7 of General Assembly Resolution 217A, UN Doc A/810.
[136] (1966) 60 United Nations Treaty Series 195. Generally, see discussion at 479-491.
[137] At 503-542.
[138] At 537-538.
[139] At 524 et seq, Professor Schabas refers extensively to Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) [1951] International Court of Justice Reports 16.
[140] At 541; see also Article 28 of the Vienna Convention on the Law of Treaties 1979, 1155 United Nations Treaty Series 331.
[141] At 542.
[142] Ibid.

Professor Schabas leaves this important question unanswered, namely, was genocide prohibited by non-conventional international law before 12 December 1951? The mere fact that genocide seems to have occurred throughout human history does not compel the conclusion that general international law has prohibited genocide since time immemorial. Indeed, there are many contrary opinions, such as in *Polyukhovich v Commonwealth*[143] where Brennan J stated:[144]

> The weight of opinion and international practice...show that genocide was not a crime under international law until after the Second World War.

This temporal question may be re-agitated in Australian courts in the context of the forcible removal of Aboriginal children (sometimes referred to as the Stolen Generations) during the 1930s and 1940s.[145]

In conclusion, this book is certainly an impressive study of genocide in international criminal law. It provides a refreshing account of the jurisprudence on genocide that has increased exponentially over the last decade. The most impressive quality of this work is its accuracy. Professor Schabas avoids making bald assertions without the support of reasons, he readily concedes that many issues are yet to be resolved, and he proffers a reasoned assessment of the existing opinions in order to fill apparent voids. Although the international law on genocide is multi-faceted, convoluted and somewhat nebulous, Professor Schabas provides a comprehensive and concise analysis of the many important issues. Given the enormity of this subject, the reviewer keenly awaits a second revised edition and, hopefully, the next edition will be expanded slightly.

Thomas Feerick*

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[143] (1991) 172 Commonwealth Law Reports 501.
[144] Ibid at 587.
[145] Refer generally to the Wilson Report.
* LLB (Hons).