

August 2009

## “Definitional Traps” and Misleading Titles

William A. Schabas

Follow this and additional works at: <https://scholarcommons.usf.edu/gsp>

---

### Recommended Citation

Schabas, William A. (2009) "“Definitional Traps” and Misleading Titles," *Genocide Studies and Prevention: An International Journal*: Vol. 4: Iss. 2: Article 8.

Available at: <https://scholarcommons.usf.edu/gsp/vol4/iss2/8>

This Article is brought to you for free and open access by the Open Access Journals at Scholar Commons. It has been accepted for inclusion in *Genocide Studies and Prevention: An International Journal* by an authorized editor of Scholar Commons. For more information, please contact [scholarcommons@usf.edu](mailto:scholarcommons@usf.edu).

---

# “Definitional Traps” and Misleading Titles

William A. Schabas

*National University of Ireland, Galway; Director, Irish Centre for Human Rights; Global Legal Scholar, University of Warwick; Visiting Fellow, Kellogg College, Oxford*

---

Many people don't pay much attention to the preface of a book. I think they presume that if the authors have something important to say, it will feature in the body of the text. Often the preface addresses rather perfunctory matters, such as acknowledging research assistants and copy editors. But a reader who skips the preface to the recent report titled *Preventing Genocide: A Blueprint for U.S. Policymakers* (the Albright-Cohen Report), the work of the Genocide Prevention Task Force, will miss something important, indeed primordial. Tucked away toward the end of the front matter, under the general heading “Defining the Challenge,” is a three-paragraph section titled “Avoiding Definitional Traps.” It refers to

the definitional challenge of invoking the word *genocide*, which has unmatched rhetorical power. The dilemma is how to harness the power of the word to motivate and mobilize while not allowing debates about its definition or application to constrain or distract policymakers from addressing the core problems it describes.<sup>1</sup>

The task force indicates its intention to “avoid the legalistic arguments that have repeatedly impeded timely and effective action” (xxi). As a consequence, it defines the scope of the report as the prevention of “genocide and mass atrocities” (xxii). It says this means “large-scale and deliberate attacks on civilians” (xxii), pointing to the definitions of genocide, crimes against humanity, and grave breaches of the war crimes that are recognized in international treaties: “We use the term *genocide* in this report as a shorthand expression for this wider category of crimes” (xxii).

It's an old debate, really. The pages of this journal have often contained articles by academics questioning the scope of the definition of genocide. The scholarly literature is replete with proposals to redefine, and generally to expand, the concept. Others, such as David Scheffer, have advocated that the term “genocide” be replaced by the broader concept of “atrocities crimes.”<sup>2</sup> The task force goes further, simply confusing the concept of genocide with the much broader notion of mass atrocity. To start with, the packaging of this report is misleading: if the subject is preventing “genocide and mass atrocity,” then the authors should say so in the title.

The members of the Genocide Prevention Task Force will no doubt consider the views expressed here to be precisely the kind of legalistic pedantry that they are trying to avoid. But let me explain why there is more to this issue than a mere “definitional trap.”

As everyone now knows, the word “genocide” was invented in 1944 by Raphael Lemkin.<sup>3</sup> Lemkin proposed his own definition, but as work advanced on incorporating the concept in international treaty law, the drafters had to take the views of states into account in an effort to build sufficient consensus to ensure adoption of the Convention on the Prevention and Punishment of the Crime of Genocide (UNCG) and its prompt ratification. Meanwhile, a cognate concept, “crimes against humanity,” was

also developed to address much the same phenomenon that Lemkin was concerned with. To a large extent, the terms “genocide” and “crimes against humanity” were used almost synonymously during the preparations for and the actual conduct of the Nuremberg trials. However, for reasons that remain obscure, those who established the International Military Tribunal chose to include “crimes against humanity” and not “genocide” in the statute, and it was on that basis that the Nazi leaders were tried and, for the most part, convicted.

One of the prosecutors at Nuremberg, Henry T. King, told the story of meeting Lemkin in the lobby of Nuremberg’s Grand Hotel a day or two after the judgment was pronounced, on 30 September–1 October 1946. ‘At the time, Lemkin was unshaven, his clothing was in tatters, and he looked disheveled.’<sup>4</sup> According to King,

When I saw him at Nuremberg, Lemkin was very upset. He was concerned that the decision of the International Military Tribunal (IMT)—the Nuremberg Court—did not go far enough in dealing with genocidal actions. This was because the IMT limited its judgment to wartime genocide and did not include peacetime genocide. At that time, Lemkin was very focused on pushing his points. After he had buttonholed me several times, I had to tell him that I was powerless to do anything about the limitation in the Court’s judgment.<sup>5</sup>

Lemkin’s complaint was actually with the definition of crimes against humanity in the Charter of the International Military Tribunal, but, like many, he had hoped the shortcomings would be corrected by judicial interpretation. To his disappointment, the Nuremberg judges had done no more than confirm it. The problem lay in a limitation on crimes against humanity. Crimes against humanity consisted of a wide range of “atrocious crimes,” to borrow Scheffer’s expression, but their scope was restricted to acts perpetrated in association with an illegal war. International lawyers call this “the *nexus*.” The drafting history of the Nuremberg Charter clearly indicates that the *nexus* with armed conflict was imposed in order to avoid any precedent by which those who established the tribunal (namely the United States, the United Kingdom, France, and the Soviet Union) could be held accountable for the persecution of minorities within their own borders or those of their colonies.<sup>6</sup>

“The blackest day of my life” is how Lemkin later described the delivery of the verdict in the Nuremberg trial.<sup>7</sup> Lemkin had recently learned that essentially his entire family had perished, victims of the crime to which he had given its name. He had been hospitalized in Paris<sup>8</sup> and was evidently going through a period of great physical and emotional turmoil. According to biographer John Cooper, from his hospital bed “he happened to hear on the radio about the forthcoming meeting of the General Assembly of the United Nations in New York” and was “electrified by the news, believing that here at last was a forum which would listen to him.”<sup>9</sup> Lemkin immediately returned to New York, where he launched a campaign at the first session of the UN General Assembly that led to the adoption of a resolution to condemn genocide as an international crime.<sup>10</sup> At the General Assembly, Lemkin quickly obtained the support of three delegations—India, Cuba, and Panama—for a proposed resolution on genocide that he had drafted.<sup>11</sup> The Cuban delegate, Ernesto Dihigo, explained to the General Assembly that the resolution was necessary to address a shortcoming in the Nuremberg trials by which acts committed prior to the war were left unpunished.<sup>12</sup>

All of this resulted in the 1948 UNGA which proclaims, in article 1, that the crime can be “committed in time of peace or in time of war.”<sup>13</sup> Thus, Lemkin’s campaign did indeed fix the flaw in the Nuremberg judgment. But there was a big price to pay.

Although the great powers who had established the International Military Tribunal in 1945 had only four votes in the General Assembly, strictly speaking, they also had many allies and some vassal states and could effectively control the results. After insisting at Nuremberg that crimes against humanity be perpetrated only in wartime, they were not about to reverse themselves a mere three years later. Thus, although the UNCG admits that genocide can be committed in peacetime, its scope is otherwise much narrower than that of crimes against humanity. It protects national, ethnic, racial, and religious groups but not political groups, which are covered by crimes against humanity. Moreover, it requires that the acts involve physical destruction of a group, and not mere persecution, as is the case with crimes against humanity.

Because of the limitations on the definitions of crimes against humanity and genocide adopted in the aftermath of World War II, from the 1940s until the 1990s there were important gaps in the ability of international law to deal with atrocities. This is no longer the case. An important legal evolution, which began with the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia<sup>14</sup> and culminated in the Rome Statute of the International Criminal Court,<sup>15</sup> means that "crimes against humanity" now addresses a broad range of atrocities committed in peacetime.

So, in fact, what the Albright-Cohen Report is talking about is "crimes against humanity," not "genocide." Why not simply title the report *Preventing Crimes Against Humanity*? The explanation is the "unmatched rhetorical power" of the "G-word." But this is not what Scheffer proposed, although I am told that his views were very influential when the task force was preparing its report. What the task force has done is really a form of deception: the report uses one term, whose definition is well recognized and well accepted in international law, to replace another. Both genocide and crimes against humanity began their terminological careers as international crimes. Criminal law insists upon rigorous definitions for a number of reasons, not the least of which is a requirement of precision that is deeply rooted in fair trial standards. Not every form of sexual harassment will qualify as rape; all homicide is not murder; not every fizzy drink should be described as champagne; and all meat is not filet mignon. Words matter.

It is not as if this were some technical issue of interest only to specialists. For several years now, the international community has been discussing whether to describe the atrocities occurring in Darfur as "genocide" or as "crimes against humanity." The "genocide" label has a lot of traction in the United States, having first been proposed by the Bush administration in late 2004.<sup>16</sup> It has not, however, been adopted by most other governments, nor has it been endorsed by the leading international human-rights organizations. A UN report, prepared at the behest of the Security Council, concluded that criminal acts in Darfur were better described as crimes against humanity.<sup>17</sup> Recently, a pre-trial chamber of the International Criminal Court authorized an arrest warrant for President Omar Al-Bashir of Sudan on charges of crimes against humanity, refusing, however, to also endorse charges for genocide.<sup>18</sup>

Is this merely a case of "legalistic arguments" that "impede timely and effective action," as the Albright-Cohen Report seems to suggest? In fact, at the practical level it makes no difference whatsoever whether Al-Bashir is charged with crimes against humanity or with genocide: one way or another, he is threatened with prosecution and, if convicted, will go to jail for a very long time.

The task force is focused on prevention, not on punishment. In this area, the principal document is the “responsibility to protect” (R2P) resolution, adopted by the UN General Assembly in 2005. Here is what it says:

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

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and should support the United Nations to establish an early warning capability.

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapter VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the UN Charter, including Chapter VII, on a case by case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity and its implications, bearing in mind the principles of the Charter of the United Nations and international law. We also intend to commit ourselves, as necessary and appropriate, to help states build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assist those which are under stress before crises and conflicts break out.<sup>19</sup>

Note the terminology: “genocide, war crimes, ethnic cleansing and crimes against humanity.” There is no distinction between them. The obligation to protect vulnerable populations applies whether the violations are characterized as crimes against humanity or as genocide.

I will not reprise here my arguments about why it may be useful to retain a distinction between genocide and crimes against humanity, despite the fact that such a distinction now has virtually no legal consequences.<sup>20</sup> But it is still extremely important at the political level.

The establishment of the UN Special Adviser on the Prevention of Genocide is an important recent development, following a pledge by UN Secretary-General Kofi Annan in January 2004 at the Stockholm International Forum titled Preventing Genocide: Threats and Responsibilities. In July 2004, the secretary-general announced that he had appointed Juan Méndez to the position.<sup>21</sup> Annan explained that the mandate was derived from Security Council Resolution 1366 (2001), in which the Security Council acknowledged the lessons to be learned from the failure of preventive efforts that preceded such tragedies as the genocide in Rwanda and resolved to take appropriate action within its competence to prevent any recurrence. The Security Council also said it was willing to give prompt consideration to early-warning or prevention cases brought to its attention by the secretary-general. The “mission” of the Special Adviser was endorsed by the 2005 World Summit of heads of state and government.<sup>22</sup>

An Advisory Committee on Genocide Prevention was appointed by the secretary-general in May 2006 to assist the special adviser. The committee recommended that the special adviser's title be changed by adding "mass atrocities," so as "to make it broader in scope without the need to determine first whether a specific situation has a 'genocidal' character."<sup>23</sup> When Francis Deng was appointed to replace Méndez, in mid-2007, the secretary-general described Deng as his "Special Adviser on the Prevention of Genocide and Mass Atrocity." Unusually, the Security Council took several months to respond to a letter from the secretary-general informing it of the proposed changes, and requested 'further details from you on the implications of the change in title for Mr Deng's post set out in your letter.'<sup>24</sup> In February 2008, the General Assembly authorized the upgrading of the position to the under-secretary-general level but continued to refer to it as "Special Adviser on the Prevention of Genocide."<sup>25</sup> Interpreting this as discomfort with his initial proposal, the secretary-general withdrew to the initial title of "Special Adviser on the Prevention of Genocide" that had been adopted in 2004.

There is no further information in the public record, and nothing to explain which UN member states were opposed to expanding the mandate of the special adviser, as proposed by the secretary-general. According to one rumor, the Russian Federation was uncomfortable with the proposed change. This makes sense: Moscow is probably satisfied that it is not committing genocide in Chechnya, and therefore unconcerned that it might be targeted by the special adviser; it cannot be so sure when it comes to crimes against humanity. And Russia is far from the only country in this situation. As was the case in 1948, when states were prepared to agree to a convention on genocide provided that it was narrowly defined, today they will accept a Special Adviser on Genocide but are uncomfortable with one named "Special Adviser on Genocide and Mass Atrocity." The fact is, sometimes states will agree to what are clearly important, progressive developments in law and politics only when they are relatively confident that the terms are precise and strictly defined. To that extent, it is terminological clarity, and not the confusing over-breadth proposed in the Albright-Cohen Report, that is truly mobilizing.

Any anxiety about muddling the boundaries of genocide with the much vaguer notion of "mass atrocity" will only be aggravated upon a full reading of the report. Of course, it is addressed to the US government rather than to the international community. But because it constitutes a blueprint for action for the most powerful nation in the world, it really concerns everyone. The fact that it is destined for consumption in Washington doesn't make the fact that it is rather short on multilateralism any more acceptable. Most countries would expect that initiatives to prevent genocide should originate from the United Nations in New York, not from the Department of State and the Pentagon in Washington. Particularly troubling are the report's hints at unilateral action by the United States (98). At one point, the report says that 'nations may act without Security Council authorization' (75). This proposition, which was used to justify the NATO bombing of Serbia in 1999, is today rejected by the vast majority of states—as is confirmed in the R2P resolution, which plainly excludes any intervention aimed at preventing genocide (or crimes against humanity) outside of the legal framework of the UN Charter.<sup>26</sup>

Military action in breach of the UN Charter had a certain seductive ring about it in 1999, when we were being deluged with reports of "genocide" in Kosovo. In the early days of the bombardments, NATO leaders, including US President Bill Clinton, spoke of genocide.<sup>27</sup> Even the UN secretary-general referred to "the dark cloud of the crime of

genocide.”<sup>28</sup> At the time, many were taken in by the “rhetorical power” of the “G-word,” because it seemed that even the sacrosanct Charter of the United Nations ought to give way when genocide is being perpetrated. But “genocide and mass atrocity”? As defined by the government of the United States? This is a step too far.

President Barack Obama has done a great deal to improve the tarnished image of the United States in the world. He has emphasized the importance of multilateralism by such moves as agreeing to seek a place on the Human Rights Council. His acknowledgment of American arrogance in the past was a useful message, and appropriately humble. An endorsement of the Albright-Cohen Report may be a step in the wrong direction, however, given the report’s exaggerated emphasis on the use of force and its cavalier dismissal of important legal distinctions, and Obama might be wise to put it on the shelf. Prevention of genocide (and of mass atrocity) will result from stronger international institutions, in particular the United Nations and the International Criminal Court, not from the threat of unilateral military action by the United States.

## Notes

1. Madeleine K. Albright and William S. Cohen, chairs, *Preventing Genocide: A Blueprint for U.S. Policymakers* (Washington, DC: Genocide Prevention Task Force, 2008), [http://www.usip.org/genocide\\_taskforce/report.html](http://www.usip.org/genocide_taskforce/report.html) (accessed 11 June 2009), xxi. Subsequent references appear parenthetically in the text.
2. David Scheffer, “Genocide and Atrocity Crimes,” *Genocide Studies and Prevention* 1 (2006): 229–50.
3. Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, DC: Carnegie Endowment for World Peace, 1944).
4. Henry T. King, Jr., Benjamin Ferencz, and Whitney R. Harris, “Origins of the Genocide Convention,” *Case Western Reserve Journal of International Law* 40 (2008): 13–34, 13.
5. *Ibid.*, 13–14.
6. For a more extensive explanation of this history, see William Schabas, “Semantics or Substance? David Scheffer’s Welcome Proposal to Strengthen Criminal Accountability for Atrocities,” *Genocide Studies and Prevention* 2 (2007): 31–36.
7. William Korey, *An Epitaph for Raphael Lemkin* (New York: Jacob Blaustein Institute for the Advancement of Human Rights, 2001), 25.
8. John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention* (Basingstoke, UK: Palgrave Macmillan, 2008), 73.
9. *Ibid.*, 74–75.
10. *The Crime of Genocide*, UN General Assembly Resolution 96(I), UN Doc. A/64/Add. 1 (11 December 1946).
11. Cooper, *Raphael Lemkin*, 76–87. For Lemkin’s account see Raphael Lemkin, “Totally Unofficial Man,” in *Pioneers of Genocide Studies*, ed. Samuel Totten and Steven Leonard Jacobs, 365–99 (New Brunswick, NJ: Transaction Publishers, 2002), 384–87. Also see Samantha Power, *“A Problem from Hell”: America and the Age of Genocide* (New York: Basic Books, 2002), 51–54.
12. *Official Records of the First Session of the General Assembly, Legal Questions, Sixth Committee, Summary Record of Meetings*, UN Doc. A/C.6/SR.22 (29 October 1946).
13. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277, [http://www.unhcr.ch/html/menu3/b/p\\_genoci.htm](http://www.unhcr.ch/html/menu3/b/p_genoci.htm) (accessed 12 June 2009), art. 1.
14. *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY-94-1-AR72 (2 October 1995), para. 141; *Prosecutor v. Tadić*,

- Judgment, ICTY-94-1-A (15 July 1999), para. 251; *Prosecutor v. Kordić et al.*, Judgment, ICTY-95-14/2-T (26 February 2001), para. 23.
15. *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9, (1998) 37 I.L.M. 999, 2187 U.N.T.S. 90, art. 7
  16. Colin L. Powell, “The Crisis in Darfur” (written remarks before the Senate Foreign Relations Committee, 9 September 2004), <http://www.2001-2009.state.gov/secretary/former/powell/remarks/36042.htm> (accessed 12 June 2009).
  17. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1546 of 18 September 2004*, UN Doc. S/2005/60 (25 January 2005), [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf) (accessed 12 June 2009), para. 184.
  18. *Prosecutor v. Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09 (4 March 2009).
  19. *Outcome Document of the 2005 World Summit*, UN Doc. A/RES/60/1 (24 October 2005), paras. 138–39.
  20. These are set out in William Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed. (Cambridge: Cambridge University Press, 2009), 652–54.
  21. Letter dated 12 July 2004 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2004/567. See also letter dated 13 July 2004 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2004/568.
  22. *Outcome Document of the 2005 World Summit*, para. 140.
  23. Letter dated 31 August 2007 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2007/721.
  24. Letter dated 7 December 2007 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2007/722.
  25. *Special Subjects Relating to the Proposed Programme Budget for the Biennium 2008–2009*, UN Doc. A/RES/62/238, Part V, para. 10.
  26. *Outcome Document of the 2005 World Summit*, para. 139.
  27. John M. Broder, “In Address to the Nation, Clinton Explains Need to Take Action,” *New York Times*, 25 March 1999. See also Francis X. Clines, “NATO Refocuses Targets to Halt Serbian Attacks on Albanians in Kosovo,” *New York Times*, 30 March 1999; interview with David Scheffer on CNN, 18 April 1999, in which Scheffer refers to “clear indications of genocide” and adds, “I’m sure that the prosecutor [of the International Criminal Tribunal for the Former Yugoslavia] will have to start looking at that charge as she proceeds with her investigation.”
  28. *Secretary-General to Commission on Human Rights: I Have Made Human Rights a Priority in Every United Nations Programme*, UN Doc SG/SM/99/91 (7 April 1999), <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/F9C47F20F44BDC118025674D00295223?opendocument> (accessed 15 July 2009).