

1-1-1988

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### Recommended Citation

David Kader, *Law and Genocide: A Critical Annotated Bibliography*, 11 HASTINGS INT'L & COMP. L. REV. 381 (1988).  
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# *Bibliography*

## **Law and Genocide: A Critical Annotated Bibliography\***

By DAVID KADER

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### **I. A REVIEW OF THE WRITING ON LAW AND GENOCIDE**

Since Raphael Lemkin's work nearly half a century ago, the essential purpose of legal scholarship on genocide is unchanged. His ambition to fashion an edifice of law enabling the emerging world community to punish and prevent genocide remains unrealized. The opening passages of the writings on law and genocide repeatedly declare that this monstrous crime continues unprevented and its perpetrators unpunished. This double failure—both the existence of the crime and the impotent response—suffuses the themes in the writings on law and genocide, from the first to the most recent.

Despite the fact that genocide and associated crimes persist, there has been significant progress toward the eventual control, if not prevention, of these crimes. Lemkin provided a cornerstone. The edifice of law Lemkin sought is painstakingly being created, with the energies of many over much time. Part of that edifice is in place. A new keystone—the international human rights revolution—has changed the agenda. While the goal remains the same, the focus has shifted from rights to remedies.

Provoked by the atrocities of World War II, the world community has revolutionized international human rights law. This legal revolution

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\* In preparation of this work, the author was fortunate to have the help of a talented reference librarian, Ms. Marcelle Chase of the Arizona State University College of Law Library. In addition, the author thanks the staff of the law collection at the Southampton University Library, Southampton, England, where the author completed this Bibliography while a visiting scholar with the Faculty of Law.

made the rights of individuals (and not solely the rights of states) the subject of international law. The Genocide Convention is the best expression of the universality of concern for human rights and the individuality of responsibility for their denial. The individual is now a person in international law, with both rights and duties. International, state-centered law is moving to truly international law.

Within this context, the history of the ideas pertaining to law and genocide can be fully understood. The writings annotated here are a microcosm of a vast and growing literature on international human rights.<sup>1</sup> For that reason, a number of important titles which do not specifically address genocide are listed to provide a context for the more narrow discourse on genocide.

The law and genocide titles can be organized by subject matter. The writings from the 1940s and 1950s represent the normative phase of the human rights revolution. Individual rights were announced and certain deeds were proclaimed crimes in this period. Yet the pronouncement of certain rights did not necessarily lead to enjoyment of those rights. The prevention and punishment of rights violations thus dominate the contemporary works. The demise of the exclusive state-centrism of international law of the first half of this century opens new possibilities for insuring the protection of human rights. The genocide laws and writings of the 1980s largely explore these new possibilities by advancing new structures and methods and identifying new links between international crimes, including genocide, and the world order that still allows them to go largely unpunished.

This exploration in the last decade has revealed that while some fine tuning of available legal instruments is required, the primary dilemmas are no longer legal ones. These later works devote less attention to the riddles of the law. Instead, they focus on the predicaments of international policies and morality that frustrate successful application of available legal instruments. The consensus that arose out of the ashes of World War II established norms in which the individual became a subject of international law, not merely its object. The hope must be that more ashes are not the necessary antecedent to new action in our time for effective prevention and punishment of genocide. Unfortunately, we currently are without the necessary will to apply the present law and to successfully move to alternatives. Enforcement then is frozen, not out of the law's inadequacy as an instrument, but because of the political and

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1. Reynolds, *Highest Aspirations or Barbarous Acts . . . The Explosion in Human Rights Documentation: A Bibliographic Survey*, 71 LAW LIBRARY J. 1 (1978).

moral paralysis of the national actors. Law does not create order. It is order that permits law.

This paralysis, however, has itself created conditions for original new work and new actors. It largely accounts for the rapidly increasing number of important titles and the growth of important nongovernmental international human rights activities (such as Amnesty International). Coupled with the success of the early normative phase of the international human rights revolution, marginal changes in state behavior are increasingly possible by publicizing departures from recognized legal norms of behavior. New ideas and idealists have come forward, reminiscent of Lemkin's era.

More important titles on law and genocide can be collected out of the yet unfinished decade of the 1980s than in any previous decade. Moreover, these modern writings reflect characteristics of Lemkin's work: they make fundamental assertions about deficiencies and remedies. While the intermediate decades were devoted to the important work of consolidation and trend assessment, many of the recent works suggest new regimes rooted in new assumptions about world order.

Despite the excitement of this new energy, the progressive nature of the contemporary agenda, and the focus on remedies and not merely rights, one cannot claim major accomplishments in the foreseeable future. What can be claimed is that human rights are now an indelible part of the aspirations of peoples and increasingly even a part of the rhetoric and action of governments. The situation is, therefore, paradoxical. While the wretched condition of human rights practice is well documented, concern with human rights enforcement is on the rise. This concern, especially when manifested by a state, is not necessarily evidence of a new found enlightenment, but may be evidence of the perceived jeopardy for all and the recognized connection between the respect for human rights and the peace and security of nations. The hope that propels the continued work in the law of genocide is that the early work of Lemkin and others which contributed greatly to the establishment of human rights norms at midcentury can be matched in late century with achievements in the enforcement of those norms.

This assessment of the writings of law and genocide would be incomplete without a comment on what largely is missing from the literature: analysis of the roles of legal institutions and the legal profession as either abettors of or resisters to genocide. While the doctrinal study of genocide is beneficial, much of value remains unmined in nondoctrinal connections. The genocide literature is rich with work *of* law, but what is sorely missing is work *about* the law.

For example, what was the role of the legal establishment in Nazi Germany in the development of the Nuremberg Laws of the 1930s? What judicial complicity or acquiescence occurred in the application of immoral Nazi laws? How did the German Justice Ministry respond to the program of compromising professional values to those of National Socialism? What was the nature and context of the intellectual tradition of the professional trained in law in early twentieth century Germany as it pertained to political values and questions of legal philosophy? To what extent and why did legal practitioners maintain their roles or quit them in favor of open or clandestine resistance? Ultimately, what can be learned from the complexity of the process of complicity, about dilemmas of role and conscience, and about the relationship of law to justice?

Many identified with the Nazi regime, yet others recognized its injustice. More study of the collaboration is needed, as is examination of the reasons why some escaped a life of compromise with immorality. The situation calls for a parallel work to Alan D. Beyerchen's *Scientists Under Hitler: Politics and the Physics Community in the Third Reich* (New Haven, Connecticut & London: Yale University Press, 1977). How did lawyers and judges cope with the Nazi Law regime? How did they respond to the increasing pressures from both party and state to the "Aryanization" of the law? How should lawyers, judges, and legal academicians behave in a system they consider unjust? The best work on such themes in law is Robert Cover's *Justice Accused: Antislavery and the Judicial Process* (New Haven, Connecticut & London: Yale University Press, 1975), which studies the action of nineteenth century American judges with antislavery convictions facing laws upholding slavery. The Beyerchen and Cover studies are useful models because they not only illuminate the connections between professionals, major social institutions and an oppressive and immoral regime, but ultimately reveal the dynamics in the personal relationship to evil.

Recognition of the merit of further study in this largely neglected area provokes many related questions of a more contemporary character. For example, what is the relationship between the legal profession and the current status of genocide prevention and punishment? Naziism and its legal process forced narrow options for legal practitioners in their various roles, but opportunities in modern democratic states certainly differ. In such states opportunities exist to make law just, to merge conscience and role, and to allow the private self to emerge in a public role. Given this, what has been the pattern of institutional and personal choices as it pertains to genocide? For example, the American Bar Association's historic opposition (until 1976) to the United States ratification of the Geno-

cide Convention warrants some study. In a similar vein, what explains the relative indifference of law schools, as institutions, to studying the development of international human rights in general and the ongoing work on the prevention and punishment of genocide, in particular?

Raphael Lemkin's work remains the touchstone of the legal agenda on questions pertaining to genocide. Raphael Lemkin himself, however, ought to serve as a subject of study, as should the legal profession of each relevant generation and nation. The resulting binocular view of and about the law will inform and provide a foundation for more effective involvement of those trained in law in the campaign against genocide.

## II. AN ANNOTATED BIBLIOGRAPHY OF LAW AND GENOCIDE

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Describes and critiques the formulation and development of the international human rights program provoked by the Holocaust, from its impact on the law of war (the Nuremberg Principles) to its relationship to the law of peace (the Genocide Convention and other laws).

2. Bassiouni, M. Cherif & Ved P. Nanda (eds.), *A Treatise on International Criminal Law—Vol. I: Crimes and Punishment & Vol. II: Jurisdiction and Cooperation* (Springfield, Illinois: C.C. Thomas, 1973).

A collection of essays presenting a comprehensive assessment of the doctrinal and theoretical foundations of international criminal law, with substantial focus on the role of genocide.

3. Beres, Louis R., "Reason and Realpolitik: International Law and the Prevention of Genocide," 30 *Chitty's L.J.* 223-42 (1982).

Asserts the importance of individual states coming to believe that international legal steps to prevent and punish genocide are always in their own best interests. Concludes that the best hope for preventing crimes against humanity lies in universal compliance with the complementary imperatives of national interest and anti-genocide norms.

4. Bilder, Richard B., "International Promotion of Human Rights: A Current Assessment," 58 *Am. J. Int'l L.* 728-34 (1964).

A brief comment on the general condition of human rights containing an agenda of questions and proposals that continues to have relevance for genocide prevention.

5. Bryant, Bunyan, "Codification of Customary International Law in the Genocide Convention," 16 *Harv. Int'l L.J.* 686-96 (1975).

Discusses definitional problems in the Convention of the terms "intent" and "mental harm" arising from proposed United States interpretations of these terms.

6. Clark, Roger S., "Does the Genocide Convention Go Far Enough? Some Thoughts on the Nature of Criminal Genocide in the Context of Indonesia's Invasion of East Timor," 8 *Ohio N.U.L. Rev.* 321-28 (1981).

Asserts that criminal liability should not be limited to only those genocides committed "with intent," but should apply to other fault-based genocides (such as negligent and reckless genocidal acts).

7. D'Amato, Anthony D., "The Concept of Human Rights in International Law," 82 *Colum. L. Rev.* 1110-59 (1982).

A critical review of the recent debate over the validity of international human rights as an idea, which seeks to prevent despair over the "wretched" condition of human rights from leading to the abandonment of the concept of human rights law.

8. Drost, Pieter N., *The Crime of State—Book I: Humancide & Book II: Genocide* (Leyden, Holland: A.W. Sythoff Co., 1959).

A treatment of international governmental crime against individual human rights and United Nations legislation on international criminal law. Book II is primarily a detailed analysis of the Genocide Convention with comprehensive description of the United Nations proceedings leading to the Convention's adoption.

9. Edwards, Richard W., "Contributions of the Genocide Convention to the Development of International Law," 8 *Ohio N.U.L. Rev.* 300-14 (1981).

Identifies important contributions to the substantive and procedural development of international law, while recognizing the failure of the Convention to prevent the reoccurrence of genocide.

10. Falk, Richard A., "The Question of War Crimes: A Statement of Perspective," in Richard A. Falk, Gabriel Kolka & Robert J. Lifton (eds.), *Crimes of War*, at 3-10 (New York: Random House, 1971).

An introductory essay in an extensive multi-disciplinary indictment of United States war crimes in Vietnam, which concludes that the definition of activity as criminal within the international legal framework accomplishes the preventive function in tandem with the change in political consciousness.

11. Goldenberg, Sydney L., "Crimes Against Humanity 1945-1970," 10 *W. Ontario L. Rev.* 1-55 (1971).

Traces the development of crimes against humanity in the wider context of international human rights, with special attention to international and domestic systems of enforcement and sanctions.

12. Gorove, Stephen, "The Problem of 'Mental Harm' in the Genocide Convention," 1951 *Wash. U.L.Q.* 174-87.

Answers the objection that the Convention's incorporation of the term "mental harm" renders it too broad by assessing the purpose of the Convention and the rules of interpretation in international law.

13. Harff, Barbara, *Genocide and Human Rights: International Legal and Political Issues*, World Affairs Series No. 20:3 (Denver, Colorado: University of Denver, 1984).

A legal and philosophical case for unilateral or collective humanitarian intervention as the appropriate response to genocide.

14. Jones, Robert H., "Jurisdiction and Extradition Under the Genocide Convention," 16 *Harv. Int'l L.J.* 696-704 (1975).

Discusses procedural questions of state jurisdiction to extradite and try under the Convention in light of United States policy declarations.

15. Kunz, Josef L., "The United Nations Convention on Genocide," 43 *Am. J. Int'l L.* 738-946 (1949).

Early identification of noteworthy features of the Convention.

16. Kuper, Leo, *Genocide: Its Political Use in the Twentieth Century* (New Haven, Connecticut & London: Yale University Press, 1982).

A general study of twentieth century genocide, which includes a probative evaluation of the controversies surrounding the drafting of the Genocide Convention and the limitations of the Convention as an effective tool of prevention.

17. Kutner, Luis, "A World Genocide Tribunal—Rampart Against Future Genocide: Proposal for Planetary Preventive Measures Supplementing a Genocide Early Warning System," 18 *Val. U.L. Rev.* 373-414 (1984).

Argues for the necessity and feasibility of a treaty-based world tribunal to try and to punish those who commit genocide.

18. Lane, Eric, "Mass Killing by Governments: Lawful in the World Legal Order?," 12 *N.Y.U. J. Int'l L. & Pol.* 239-80 (1979).

Concludes that mass killings by a government of its own people is not in fact prohibited by international law and, to the extent some prohibition arguably might exist, the absence of any enforcement makes a mockery of normative human rights developments since World War II.

19. LeBlanc, Lawrence J., "The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding," 78 *Am. J. Int'l L.* 369-85 (1984).

Evaluation of United States objections to the Convention's use of the terms "intent" and "group."

20. Lemkin, Raphael, *Axis Rule in Occupied Europe* (Washington, D.C.: Carnegie Endowment for International Peace, 1944).

Coins the term "genocide" and extensively reviews the proposals for redress of World War II genocide.

21. Lemkin, Raphael, "Genocide—A Modern Crime," 9 *Free World* 39-43 (1945).

Assesses the international implications of genocide and argues for the international punishment of those who commit genocide.

22. Lemkin, Raphael, "Genocide," 15 *Am. Scholar* 227-30 (1946).

A proposal for a United Nations treaty providing for the punishment and prevention of genocide and setting forth principles that should be embodied in any such treaty.

23. Lemkin, Raphael, "Genocide as a Crime Under International Law," 41 *Am. J. Int'l L.* 145-51 (1947).

Early identification of the revolution in human rights law engendered by the Genocide Convention by the leading advocate of such a convention.

24. Levasseur, George, "The Prevention of Genocide," 8 *J. Int'l Comm'n of Jurists* 74-82 (1967).

A proposal to resolve inadequate implementation features of the Genocide Convention.

25. Lippman, Matthew, "The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide," 3 *B.U. Int'l L.J.* 1-65 (1985).

A detailed accounting of the drafting history of the Genocide Convention.

26. McDougal, Myres, Harold Laswell & Lung-Chu Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (New Haven, Connecticut & London: Yale University Press, 1980).

A comprehensive study of human rights in the context of evolving conceptions of world order, which seeks to root human rights in its most extreme form—global citizenship.

27. Pella, Vespasian V., "Towards an International Criminal Court," 44 *Am. J. Int'l L.* 37-68 (1950).

Outlines the needs, hurdles, and limitations in the movement for an international criminal court, with special reference to the Nuremberg Principles and the Genocide Convention.

28. Robinson, Nehemiah, *The Genocide Convention—Its Origins and Interpretation* (New York: Institute of Jewish Affairs, 1949) (shorter version in *The Genocide Convention: Hearings Before a Subcomm. on Foreign Relations*, 81st Cong., 2d Sess., 487 (1950) (statement of N. Robinson)).

Detailed treatment of the drafting history of the Convention, with attention to the ideologic conflicts in the Convention's birth and resulting compromises.

29. Ruhashyankiko, Nicodème, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, U.N. Doc. No. E/CN.4/Sub.2/416 (New York: United Nations, 1978).

A comprehensive study of the law and practice of genocide suggesting useful measures for prevention.

30. Schiller, Barry M., "Life in a Symbolic Universe: Comments on the Genocide Convention and International Law," 9 *Sw. U. L. Rev.* 47-83 (1977).

A commentary on the political and legal dimensions of the debate over the Genocide Convention.

31. Schwelb, Egon, "Crimes Against Humanity," 23 *Brit. Y.B. Int'l L.* 178-226 (1946).

A pre-Genocide Convention analysis of crimes against humanity, primarily as represented in the Nuremberg Charter, and of the challenge to effective protection.

32. Sussman, Richard L., "The Genocide Convention: A New Case for Ratification," 2 *B.U. Int'l L.J.* 241-66 (1983).

A summary of the history of the United States Senate deliberations over the ratification of the Convention.

33. Teson, Fernando, *Humanitarian Intervention: An Inquiry Into Law and Morality* (Dobbs Ferry, New York: Transnational Publishers, 1987).

Argues that force in the name of humanitarian intervention is consistent with international law, especially when understood in its

substantive moral setting, which finds just force in defense of human rights.

34. Tutorow, Norman E. (ed.), *War Crimes, War Criminals, and War Crimes Trials* (Westport, Connecticut: Greenwood Press, 1986).

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35. Weissbrodt, David, "A New U.N. Mechanism for Encouraging Ratification of Human Rights Treaties," 76 *Am. J. Int'l L.* 418-29 (1982).

An assessment of the Working Group on the Encouragement of Universal Acceptance of Human Rights Instruments, which demonstrates the critical nature of ratification for the respect and observance of human rights.