

# Summary

The prevention of genocide and mass killing is arguably the greatest moral imperative resting on the United Nations (UN). The Genocide Convention was one of the first human rights instruments to be adopted by the UN, along with the Universal Declaration on Human Rights. However, in the immediate post-Second World War climate, it was assumed that, at least in peacetime, what states did to their own peoples within their own frontiers was largely their own business.

There has been considerable progress since then. The *Outcome Document* adopted at the UN summit in September 2005 underlines the responsibility of the international community to protect threatened populations, a responsibility to be met through peaceful means but also, if these prove inadequate, by taking collective action through the UN Security Council. Further, it reaffirms the principle that protecting minority rights contributes to states' stability and cultural diversity.

In July 2004, the Secretary-General appointed Juan Mendez to be the first Special Adviser to the Secretary-General on the Prevention of Genocide (SAPG). Supported by a small but highly professional staff, the SAPG has already engaged actively on Darfur, among other situations. The mechanism may seem modest, and it is too early to give a judgment on its effectiveness.

In April 2005, the Commission on Human Rights established an Independent Expert on Minority Issues, Gay McDougall. While it is also premature to judge the effectiveness of this post, it is likely that it will complement the SAPG's role by focusing on violations of the rights of minorities which have not yet reached the stage of potential genocides.

The International Criminal Court (ICC) is another ground-breaking initiative. As a mechanism for prosecuting individuals accused of serious human rights violations, one of the key hopes of those who worked to establish it was that it would contribute to deterring would-be violators. International criminal law is often predicated on a preventive or deterrent function. One trial chamber of the International Criminal Tribunal for the former Yugoslavia has explained that in establishing the institution, the Security Council:

*'intended to send the message to all persons that any violations of international humanitarian law – and particularly the practice of "ethnic cleansing" – would not be tolerated and must stop.'*

With its modest resources and limited jurisdictional reach, the ICC cannot fill the entire impunity gap. Ultimately, faith and intuition rather than any hard evidence support the claim that international criminal justice has a deterrent role in the prevention of genocide and mass killing. More importantly, perhaps, the ICC enables the prosecution of a wider range of violations than the Genocide Convention, which excluded crimes based on forms of discriminatory criteria other than nationality, race, ethnicity and religion, such as political groups, and was limited to the physical destruction of the group. The drafters of the Genocide Convention quite intentionally excluded a category of punishable act that would apply to our contemporary concept of 'ethnic cleansing'.

The ICC also illustrates another issue of concern. The prosecutions to date favour the prosecution of non-state actors – for example the Uganda case, which focuses on crimes committed by the Lord's Resistance Army. The Prosecutor understandably finds the prospect of investigating crimes in which states are complicit a daunting one. Without their benign assistance, investigation is difficult, nigh impossible, as he is learning in Sudan. However, it would seem that the ICC was created to deal with such state actors, who typically go unpunished, rather than non-state actors, who are exposed to the full force of the law if and when the government catches them.

The UN Committee on the Elimination of Racial Discrimination has signalled its intention to address genocide prevention more directly, with the adoption of new internal guidelines and indicators for genocide. While these developments are extremely welcome, this and the other UN treaty monitoring bodies, could be more creative with their mandates, for example, allowing them to convene in emergency session to consider potentially genocidal situations. Another important development would be to equip the Genocide Convention with its own treaty monitoring body, which could monitor the implementation of states parties' responsibilities in preventing and prosecuting genocide.

Another crucial recent development was the establishment of the International Commission of Inquiry on Darfur set up in accordance with a Security Council resolution. The Darfur Commission provides a model for future situations of genocide and mass killing. It marries the urgency and dynamism of an *ad hoc* commission with the resources and expertise of the Office of the High Commissioner for Human Rights. It has, in a sense,

proven that the 'system' of the Genocide Convention has the potential to work. As a result of the Commission's findings, a referral was made to the ICC. While the Commission did not uncover sufficient evidence to prove that genocide has taken place in Darfur, it shows that quarrels about whether specific atrocities 'rise to the level of genocide' or are 'merely' crimes against humanity are counterproductive. Although the term 'genocide' reserves its unique stigma, any distinction between the two concepts is now without significant legal consequences.

A further, little noticed element of the UN's tools to prevent large-scale violations is preventive diplomacy, as exercised through the good offices initiatives of the

Secretary-General and the High Commissioner for Human Rights. These initiatives are necessarily low-profile. They offer great potential for simple initiatives to promote constructive solutions to situations of tension, and it is hoped that the UN will develop its capacity in this area.

More recently, the 2005 *Outcome Document* has called for further, far-reaching reform of the UN human rights machinery. It pledges to establish a Peacebuilding Commission, to lend coherence to post-conflict reconstruction initiatives and, in an attempt to place human rights more centrally in the UN system, to replace the discredited Commission on Human Rights with a new, more powerful Human Rights Council.