

# GENOCIDE: THE CRIME OF THE CENTURY. THE JURISPRUDENCE OF DEATH AT THE DAWN OF THE NEW MILLENNIUM

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The twentieth century was terrorized by the terrible triad of nationalism,<sup>1</sup> communism<sup>2</sup> and totalitarianism.<sup>3</sup> There were considerable costs. Substantial portions of various ethnic, racial and religious groups were exterminated in the service of these higher callings.<sup>4</sup> In the last decade, the decline of communism and the transcendence of totalitarianism, rather than alleviating atrocities, has unleashed ancient animosities which threaten to further fracture and splinter the territorial integrity of many states.<sup>5</sup>

This article traces the international legal response to a century of global genocide. Initially, the development of the concept of genocide is discussed. Next, the doctrine's application and refinement in post-World War II war crimes trials is traced. In the next section, the drafting of the 1948 Convention on the

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1 See BRANMIR ANZULOVIC, *HEAVENLY SERBIA: FROM MYTH TO GENOCIDE* 175 (1999) (calling President Slobodan Milosevic "the man who used nationalism to gain power and lead [Serbia] into war"). *Id.*

2 See STÉPHANE COURTOIS ET. AL., *THE BLACK BOOK OF COMMUNISM: CRIMES, TERROR, REPRESSION* 1-2 (1999). "The fact remains that our century has outdone its predecessors in its bloodthirstiness. . . . Communism has its place in this historical setting overflowing with tragedies." *Id.*

3 See generally HENRY FRIEDLANDER, *THE ORIGINS OF NAZI GENOCIDE: FROM EUTHANASIA TO THE FINAL SOLUTION* 1-22 (1995).

4 It has been claimed recently that communist regimes were responsible for many more than the twenty-five million deaths attributable to the Nazis. See Martin Malia, *Foreword* to COURTOIS, *supra* note 2, at x-xi.

5 See generally HUMAN RIGHTS WATCH, *SLAUGHTER AMONG NEIGHBORS THE POLITICAL ORIGINS OF COMMUNAL VIOLENCE* 1, 2 (1995).

Prevention and Punishment of the Crime of Genocide is sketched. This is followed by a discussion of the evolution of the law of genocide in the Eichmann trial, Vietnam War and in the decisions of the Yugoslav and Rwandan war crimes tribunals and International Court of Justice. The article concludes with various observations on the legal efforts to deter and punish genocide.

## I. THE UNITED NATIONS

### A. *The Need for a Binding International Convention*

In 1946, the General Assembly passed a resolution that proclaimed that genocide was the deprivation of a group's right to exist in the same fashion that homicide was the denial of an individual's right to exist.<sup>6</sup> Acts of genocide were viewed as having resulted in a great loss to humanity in terms of culture and other possible contributions.<sup>7</sup> This form of mass murder was described as constituting a shock to the conscience of mankind and was considered contrary to moral law and the spirit of the United Nations Charter.<sup>8</sup> The resolution observed that racial, religious, and political groups had been the particular target of genocide and had been destroyed in whole or in part, and that such atrocities were of international concern.<sup>9</sup> This text limited genocide to physical extermination, but stressed the resulting cultural loss to the human family.<sup>10</sup> The resolution also noted that such instances of mass murder were violative of moral norms that transcended national boundaries.<sup>11</sup> The resolution also suggested that the loss resulting from genocide did not merely lie in the number of individuals who were killed.<sup>12</sup> In addition, there was the suggestion that a group, like an

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6 G.A. Res. 96 (I), U.N. GAOR 1st Sess., pt. 2, 55th plen. mtg., at 188, U.N. Doc. A/64/Add.1 (1946).

7 *Id.* at 189.

8 *Id.* at 188–89.

9 *Id.* at 189.

10 *See id.*

11 G.A. Res. 96 (I), U.N. GAOR 1st Sess., pt. 2, 55th plen. mtg., at 189, U.N. Doc. A/64/Add.1 (1946).

12 *See id.*

individual, is distinctive and unique and has a right to exist and to prosper.<sup>13</sup> The eradication of a collectivity deprives the world community of an irreplaceable part.<sup>14</sup>

In the main body of the resolution, the General Assembly affirmed that genocide is a crime under international law which the civilized world condemned and which carried criminal liability, whether committed by private individuals or public officials.<sup>15</sup> It was an offense whether undertaken on religious, racial, political, or any other grounds.<sup>16</sup> The latter was an unprecedented affirmation by an international body that genocide was an international offense regardless of the animus motivating the act.<sup>17</sup>

States were invited to enact the necessary legislation for the prevention and punishment of genocide.<sup>18</sup> The Economic and Social Council was requested to draw up a draft convention that was to be submitted to the General Assembly.<sup>19</sup>

In 1947, the Sixth Committee considered the merits of adopting an international convention on genocide. The Sixth Committee Resolution was resolutely rejected by the United Nations General Assembly.<sup>20</sup> A Cuban, Egyptian, and Panamanian draft, as amended by China, was adopted by a vote of thirty-four to fifteen with two abstentions.<sup>21</sup> General Assembly Resolution 180(II) provided, in part, that the Economic and Social Council should "continue the work it has begun concerning the suppression of genocide" and should "proceed with the completion of a convention."<sup>22</sup> A Chinese amendment attempted to accommodate the British and Soviet views by

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13 *See id.*

14 *See id.*

15 *Id.*

16 *Id.* at 188.

17 G.A. Res. 96 (I), U.N. GAOR 1st Sess., pt. 2, 55th plen. mtg., at 188, U.N. Doc. A/64/Add.1 (1946).

18 *Id.*

19 *Id.*

20 G.A. Res. 174 (II), U.N. GAOR 2d Sess., 123d plen. mtg., at 1283, U.N. Doc. A/510 (1947).

21 *See id.* at 1305–06.

22 G.A. Res. 180 (II), U.N. GAOR 2d Sess., at 129–30, U.N. Doc. A/519 (1947).

providing that the Council should take into account the work of the International Law Commission which had been “charged with the formulation of the principles recognized in the Charter of the Nuremberg Tribunal, as well as the preparation of a draft code of offenses against peace and security.”<sup>23</sup>

The International Law Commission was content to defer to the Economic and Social Council and the Sixth Committee.<sup>24</sup> The Commission’s formulation of the Nuremberg Principles restricted crimes against humanity to acts undertaken during, or in connection with, a crime against peace and declined to define or discuss the relationship between crimes against humanity and genocide.<sup>25</sup>

### *B. The Genocide Convention*

The General Assembly, at its 179th meeting on December 9, 1948, unanimously adopted the Convention on the Prevention and Punishment of the Crime of Genocide (the “Genocide Convention” or the “Convention”).<sup>26</sup> The President of the General Assembly, Mr. H.V. Evatt of Australia, declared that “the supremacy of international law had been proclaimed and a significant advance had been made in the development of international law.”<sup>27</sup> This had resulted in the recognition of the “fundamental right of a human group to exist as a group.”<sup>28</sup> Most significantly, the protection of this right would be the responsibility of the United Nations rather than individual states.<sup>29</sup>

The drafting of the Genocide Convention was strongly

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23 G.A. Res. 174 (II), U.N. GAOR 2d Sess., 123d plen. mtg., at 1305, U.N. Doc. A/510 (1947).

24 See *Report of the International Law Commission*, U.N. GAOR, 5th Sess., Supp. No. 12, at 14, U.N. Doc. A/1316 (1950).

25 *Id.*

26 United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, G.A. Res. 260, U.N. GAOR, 3d Sess., 179th plen. mtg. at 174, U.N. Doc. A/810 (1948) [hereinafter *Genocide Convention*].

27 U.N. GAOR, 3d Sess., 179th plen. mtg., at 852, U.N. Doc. A/760 (1948) (Mr. Evatt, Austl.).

28 *Id.*

29 *Id.*

influenced by the memory of the Holocaust and the conflicts accompanying the Cold War.<sup>30</sup> A tension existed between the desire to condemn Nazi atrocities and the requirement that the proposed convention be sufficiently expansive to anticipate and prevent future acts of genocide.<sup>31</sup> The United States and the Soviet Union also opposed provisions that might be used to criticize or to condemn their conduct.<sup>32</sup> Member states also aspired to craft a convention against genocide that did not intrude upon their domestic prerogatives.<sup>33</sup>

The Sixth Committee recognized the role of historic events in propelling the passage of the Convention. It accordingly determined that the preamble should recognize that genocide “at all periods of history has inflicted great losses on humanity” and that “in order to liberate mankind from such an odious scourge, international action is required.”<sup>34</sup> The General Assembly accepted this text and concluded that reference to the barbarism of the Third Reich would detract from the Convention’s primary purpose, which was to prevent and punish the repetition of state-sponsored genocide, whether committed in times of peace or war.<sup>35</sup>

Article I provides that “genocide, whether committed in time of peace or in time of war, is a crime under international law which [the Contracting Parties] undertake to prevent and punish.”<sup>36</sup> The Sixth Committee combined the text of General Assembly Resolution 96(I)<sup>37</sup> with the language of the Secretary-General’s draft in order to form this article.<sup>38</sup>

The phrase “in time of war and in time of peace” was inserted by the Ad Hoc Committee in order to clarify that,

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30 See *id.* at 839–840 (Mr. Katz-Suchy, Pol.).

31 See *id.* at 844.

32 *Report of the Sixth Committee*, U.N. GAOR, 3d Sess., Annex 1, Agenda Item 32, at 496–97, U.N. Doc A/760 & Corr. 2 (1948) [hereinafter *Report of the Sixth Committee*].

33 U.N. GAOR, 3d Sess., 179th plen. mtg., at 843, U.N. Doc. A/760 (1948) (Mr. Katz-Suchy, Pol.).

34 *Report of the Sixth Committee*, *supra* note 32, at 501.

35 See U.N. GAOR, 3d Sess., 178th plen. mtg., at 820 (1948) (Mr. Gross, U.S.).

36 *Genocide Convention*, *supra* note 26, art. I.

37 G.A. Res. 96 (I), U.N. GAOR 1st Sess., pt. 2, 55th plen. mtg., at 188–89, U.N. Doc. A/64/Add.1 (1946).

38 See *Report of the Sixth Committee*, *supra* note 32, at 494.

unlike the Nuremberg Charter, the Genocide Convention was not limited to acts committed during armed conflict.<sup>39</sup> The reference to genocide as a “crime under international law” was inserted as a compromise provision.<sup>40</sup> A number of delegates in the Ad Hoc Committee urged that genocide should be referred to as “a crime against humanity” in order to identify the proposed treaty with the proceedings at Nuremberg.<sup>41</sup> There was a consensus that, although genocide was a crime against humanity, this characterization went beyond the boundaries of the relevant General Assembly resolutions.<sup>42</sup> The United States expressed the reservation in the Sixth Committee that such a reference might divert the committee into a discussion of the entire range of crimes against humanity.<sup>43</sup>

The last clause of Article I obligates the High Contracting Parties to undertake to prevent and to punish genocide.<sup>44</sup> The Sixth Committee shifted this language from the preamble to Article I in order to strengthen the obligation to prevent and to punish genocide.<sup>45</sup> This commitment is reinforced in the last paragraph of the preamble that provides “in order to liberate mankind from such odious scourge [of genocide] international co-operation is required.”<sup>46</sup>

Article II defines genocide as entailing the commission of any one of a series of enumerated acts that are committed with the “intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such.”<sup>47</sup> These acts include killing members of the group,<sup>48</sup> causing serious bodily or mental harm,<sup>49</sup>

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39 *Report of the Ad Hoc Committee on Genocide*, U.N. ESCOR, 7th Sess., Supp. No. 6, at 4–5, U.N. Doc. E/794 (1948) [hereinafter *Ad Hoc Committee Report*].

40 *Id.*

41 *Id.*

42 *Id.*

43 U.N. GAOR 6th Comm., 3d Sess., pt. 1, 67th mtg. at 43, U.N. Doc. A/C.6/SR.67 (1948) (Mr. Maktos, U.S.).

44 *Genocide Convention*, *supra* note 26, art. I.

45 U.N. GAOR 6th Comm., 3d Sess., pt. 1, 67th mtg. at 38, U.N. Doc. A/C.6/SR.67 (1948) (Mr. Kaeckenbeeck, Bel.).

46 *Genocide Convention*, *supra* note 26, at pmbl.

47 *Id.* at art. II.

48 *Id.* at art. II(a).

49 *Id.* at art. II(b).

deliberately inflicting conditions of life calculated to bring about its physical destruction in whole or in part,<sup>50</sup> imposing measures intended to prevent births,<sup>51</sup> and forcibly transferring children to another group.<sup>52</sup>

This prefatory paragraph presents five central components: motive, intent, extent of destruction, premeditation, and protected groups.<sup>53</sup> Sub-paragraphs (a) through (e) then enumerate acts which, when undertaken with the requisite mental state, comprise the international crime of genocide.<sup>54</sup>

The decision was made to omit a motive requirement.<sup>55</sup> The United Kingdom persuaded the Sixth Committee that listing motives would enable defendants to claim that their actions had been animated by motives other than those enumerated.<sup>56</sup> The killing of members of a racial, ethnic, national or religious group *qua* members of that group thus may be inspired by various motives, including national security and a desire to expel a group from a territory or state.<sup>57</sup>

Genocide requires a specific intent to destroy a group “in whole or in part.”<sup>58</sup> The phrase “in whole or in part” was inserted as a result of a Norwegian initiative.<sup>59</sup> The Soviet Union admonished that individuals might claim they lacked the specific intent to wholly or partially destroy a group.<sup>60</sup> A Soviet motion to encompass negligent acts within the scope of Article II was nevertheless rejected.<sup>61</sup> The Convention does not require the

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50 *Id.* at art. II(c).

51 *Id.* at art. II(d).

52 *Id.* at art. II(e).

53 *Id.* at art. II.

54 *Id.* at art. III.

55 U.N. GAOR 6th Comm., 3d Sess., pt. 1, 77th mtg. at 118, 119, U.N. Doc. A/C.6/SR.77 (1948) (Mr. Fitzmaurice, U.K.).

56 *Id.*

57 Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 ARIZ. J. INT'L & COMP. L. 415, 454 (1998).

58 *Genocide Convention*, *supra* note 26, art. II.

59 U.N. GAOR 6th Comm., 3d Sess., pt.1, 73d mtg. at 92-93, U.N. Doc. A/C.6/SR.73 (1948) (Mr. Wikborg, Nor.).

60 *Id.* at 96.

61 *Id.* at 97.

destruction of an entire group.<sup>62</sup> France went so far as to propose that as long as the requisite intent existed, even the killing of a single individual would constitute genocide.<sup>63</sup> France later withdrew this amendment, explaining that the Norwegian proposal expressed the same fundamental idea.<sup>64</sup>

General Assembly Resolution 96(I) of 1946 affirms that genocide is a crime under international law whether committed on religious, racial, political, or any other grounds.<sup>65</sup> This provided the basis for the Secretary General's expansive provision that encompasses racial, national, linguistic, religious, or political groups.<sup>66</sup> The Ad Hoc Committee omitted linguistic groups from protection.<sup>67</sup> The Sixth Committee concurred with this decision and also excluded political groups.<sup>68</sup> The rationale was that racial, religious, ethnic, and national groups historically had been the targets of animosity and were characterized by cohesiveness, homogeneity, inevitability of membership, stability, and tradition.<sup>69</sup> Affiliation with political groups, in contrast, was considered a matter of individual choice and such movements were viewed as ephemeral.<sup>70</sup> Some noted that political groups often were a destructive force that did not merit protection.<sup>71</sup>

The term "religious" encompasses theistic, non-theistic, and atheistic groups that are united by a single spiritual ideal.<sup>72</sup>

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62 See *Genocide Convention*, *supra* note 26, art. II.

63 U.N. GAOR 6th Comm., 3d Sess., pt.1, 73d mtg. at 90–91, U.N. Doc. A/C.6/SR.73 (1948) (Mr. Chaumont, Fr.).

64 *Id.* at 93.

65 G.A. Res. 96 (I), U.N. GAOR 1st Sess., pt. 2, 55th plen. mtg., at 188–89, U.N. Doc. A/64/Add.1 (1946).

66 *Genocide Draft Convention on the Crime of Genocide: Commentary of the U.N. Secretary General*, U.N. ESCOR, 5th Sess., U.N. Doc. E/447 art I (1), at 5 (1947) [hereinafter Secretary General's Draft].

67 *Ad Hoc Committee Report*, *supra* note 39, at 5.

68 *Report of the Sixth Committee*, *supra* note 32, at 499–500.

69 See U.N. GAOR 6th Comm., 3d Sess., pt.1, 69th mtg. at 56–57, U.N. Doc. A/C.6/SR.69 (1948) (Mr. Amado, Braz.).

70 *Id.* at 56.

71 U.N. GAOR, 6th Comm., 3d Sess., pt.1, 75th mtg. at 110–111, U.N. Doc. A/C.6/SR.75 (1948) (Mr. Lachs, Pol.).

72 See U.N. GAOR, 6th Comm., 3d Sess., pt. 1, 63d mtg. at 10–11, U.N. Doc. A/C.6/SR.63 (1948) (Mrs. Ikramulla, Pak.).

“National” refers to groups identified with an established nation state, while “ethnic” encompasses cultural, linguistic or other distinct minorities within a state.<sup>73</sup> Various delegates viewed “racial” and ethnic groups as equivalent and were skeptical over the utility of including a racial category in the definition.<sup>74</sup>

The enumeration of acts constituting genocide was intended to be restrictive rather than illustrative.<sup>75</sup> The Sixth Committee rejected a Soviet amendment that characterized these acts as exemplary.<sup>76</sup> The Chinese also argued that it was impossible to anticipate the acts that might be utilized to perpetrate genocide.<sup>77</sup> However, the majority of delegates insisted that individuals should be provided notice regarding the acts constituting the crime of genocide.<sup>78</sup> It was also feared that a failure to fully enumerate the acts constituting genocide would lead to a lack of uniformity among the provisions of various national criminal codes.<sup>79</sup>

The second sub-paragraph encompasses the infliction of serious bodily injury, such as mutilation or other forms of violence that might lead to the death of the members of a group.<sup>80</sup> The phrase “mental harm” was inserted in response to a Chinese amendment, which was designed to include acts of genocide committed through the use of narcotics.<sup>81</sup> Mr. Fitzmaurice of the United Kingdom interpreted this as encompassing the intentional infliction of mental harm that did

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73 U.N. GAOR, 6th Comm., 3d Sess., pt. 1, 73d mtg. at 97–98, U.N. Doc. A/C.6/SR.73 (1948) (Mr. Petren, Swed.).

74 See U.N. GAOR, 6th Comm., 3d Sess., pt. 1, 75th mtg. at 115–116, U.N. Doc. A/C.6/SR.75 (1948) (Mr. Desmesmin, Haiti, Mr. Kaeckenbeek, Belg., Mr. Manini Y Rios, Uru., Mr. Raafat, Egypt, Mr. Petren, Swed.).

75 See U.N. GAOR, 6th Comm., 3d Sess., pt. 1, 81st mtg. at 178–79, U.N. Doc. A/C.6/SR.81 (1948) (Mr. Morozov, U.S.S.R.).

76 *Id.* at 176–77.

77 U.N. GAOR, 6th Comm., 3d Sess., pt. 1, 78th mtg. at 143, U.N. Doc. A/C.6/SR.78 (1948) (Mr. Ti-tsun Li, P.R.C.).

78 *Id.* at 145.

79 See *id.* at 143–44 (Mr. Manini Y Rios, Uru., Mr. Kaeckenbeek, Belg., Mr. Amado, Braz.).

80 *Report of the Sixth Committee, supra* note 32, at 501.

81 U.N. GAOR, 6th Comm., 3d Sess., pt. 1, 81st mtg. at 175, U.N. Doc. A/C.6/SR.81 (1948) (Mr. Ti-tsun Li, P.R.C.).

not result in physical repercussions.<sup>82</sup>

The deliberate infliction of substandard living conditions calculated to bring about the physical destruction of a group, in whole or in part, is prohibited.<sup>83</sup> This prohibits the creation of conditions that are likely to result in death.<sup>84</sup> Mr. Morozov of the Soviet Union noted that it was impossible to anticipate all the measures that might be encompassed within this provision.<sup>85</sup> The Sixth Committee rejected an Uruguayan amendment to include conditions which resulted in “disease or a weakening” of the members of a group.<sup>86</sup>

The prevention of births within a group, so-called “biological genocide,” was broadly conceived as encompassing castration, compulsory abortion, sterilization, and the segregation of the sexes.<sup>87</sup> The forced transfer of children was a corollary to the prevention of births.<sup>88</sup> Mr. Perez Perozo of Venezuela observed that the forced transfer of impressionable children into an alien culture was tantamount to the destruction of a group because it deprived the group of its future generations.<sup>89</sup>

Following a prolonged debate, the General Assembly decided against including a provision on cultural genocide.<sup>90</sup> The Sixth Committee recognized that the prohibition against genocide was intended to protect a group’s physical existence as well as its culture.<sup>91</sup> The destruction of a culture fractured a group’s unity, limited the diversity of the human family, and exposed a group to anti-social influences.<sup>92</sup> Mr. Khan of Pakistan noted that cultural and physical genocide shared the aim of destroying a

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82 *See id.* at 178 (Mr. Fitzmaurice, U.K.).

83 *Id.* at 175 (Mr. Morozov, U.S.S.R.).

84 *Id.* at 173.

85 *Id.* at 180.

86 *Id.*

87 U.N. ESCOR, 6th Sess., 1st mtg. at 11, U.N. Doc. E/AC.25/SR.1 (1948) (Mr. Ordonneau, Fr.).

88 *See* U.N. GAOR, 6th Comm., 3rd Sess., pt. 1, 83rd mtg. at 195, U.N. Doc. A/C.6/SR.83 (1948) (Mr. Perez Perozo, Venez.).

89 *Id.*

90 *Report of the Sixth Committee, supra* note 32, at 496.

91 U.N. GAOR, 6th Comm., 3d Sess., pt. 1, 83rd mtg. at 195 U.N. Doc. A/C.6/SR.83 (Mr. Perez Porozo, Venez.).

92 *See id.* at 195–96.

group's customs, ideals and values.<sup>93</sup> As a result, these forms of genocide could not be easily distinguished and it made little sense to punish physical, but not cultural genocide.<sup>94</sup> The Sixth Committee nevertheless determined that the prohibition against cultural genocide was best included within a supplemental convention.<sup>95</sup> The rationale was that the Convention under discussion should be limited to the most aggravated forms of genocide.<sup>96</sup>

Article III imposes criminal liability for genocide, conspiracy to commit genocide, attempted genocide, complicity in genocide, and direct and public incitement to genocide.<sup>97</sup> Mr. Maktos of the United States stated that conspiracy had a very precise meaning in Anglo-Saxon law: an agreement between two or more persons to commit an unlawful act.<sup>98</sup> The Ad Hoc Committee report noted that conspiracy to commit genocide should be punished based on both the gravity of the crime and the fact that genocide is a collective offense.<sup>99</sup>

Sub-paragraph (c) punishes direct and public incitement to commit genocide.<sup>100</sup> A U.S. amendment claiming that this provision constituted a violation of freedom of speech was defeated.<sup>101</sup> The majority believed that it was essential to prohibit preparatory acts that provoked the crime of genocide.<sup>102</sup> Mr. Bartos of Yugoslavia noted that incitement to genocide was the central catalytic act leading to the commission of genocide.<sup>103</sup>

Article IV of the Genocide Convention states that "[p]ersons committing genocide or any of the other acts enumerated in

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93 *Id.* at 193 (Mr. Khan, Pak.).

94 *See id.*

95 *Report of the Sixth Committee, supra* note 32, at 496.

96 U.N. GAOR, 6th Comm., 3d Sess., pt. 1, 83d mtg. at 200 U.N. Doc. A/C.6/SR.83 (1948) (Mr. Abdoh, Iran).

97 *Genocide Convention, supra* note 26, art. III.

98 U.N. GAOR, 6th Comm., 3d Sess., pt. 1, 84th mtg. at 212, U.N. Doc. A/C.6/SR.84 (1948) (Mr. Maktos, U.S.).

99 Ad Hoc Committee Report, *supra* note 39, at 8.

100 *Genocide Convention, supra* note 26, art. III(c).

101 U.N. GAOR, 6th Comm., 3d Sess., pt. 1, 85th mtg. at 228–29, U.N. Doc. A/C.6/SR.85 (1948).

102 *Id.* at 219 (Mr. Morozov, U.S.S.R.).

103 *Id.* at 216 (Mr. Bartos, Yugoslavia).

Article III shall be punished whether they are constitutionally responsible rulers, public officials or private individuals.”<sup>104</sup> The term “constitutionally responsible rulers” was substituted for “heads of state” in order to satisfy the Swedish objection that a Monarch, as head of state, may not be brought before domestic or foreign courts.<sup>105</sup> The debate clarified that Article IV imposes criminal liability upon government ministers and officials, with the exception of those constitutional monarchs and heads of state who enjoy constitutional immunity for criminal acts.<sup>106</sup>

Mr. Morozov of the Soviet Union unsuccessfully argued that all those committing genocide should be punished.<sup>107</sup> He also contended that the Convention should explicitly follow the Nuremberg standard and state that neither the command of law nor superior orders should constitute a defense to genocide.<sup>108</sup> Subordinates would then be placed in an untenable position.<sup>109</sup> Those who obeyed an order would be internationally liable for genocide; those who did not might be brought before a domestic court for insubordination.<sup>110</sup> This paradox inevitably would encourage combatants to question the commands of their superiors and present an obstacle to the ratification of the Convention.<sup>111</sup> In the end, the Committee rejected inclusion of a provision pertaining to the superior orders defense.<sup>112</sup>

Article V requires that the “Contracting Parties undertake to enact, in accordance with their respective 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 any of the other acts enumerated in article III.”<sup>113</sup> This requires signatories to enact

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104 *Genocide Convention*, *supra* note 26, art. IV.

105 U.N. GAOR, 6th Comm., 3d Sess., pt. 1, 92nd mtg. at 303, U.N. Doc. A/C.6/SR92 (1948) (Mr. Petren, Swed.); *Id.*, 93rd mtg. at 317, U.N. Doc. A/C.6/SR93.

106 *Report of the Sixth Committee*, *supra* note 32, at 497.

107 *Id.*, 92d mtg. at 302, U.N. Doc. A/C.6/SR92 (Mr. Morozov, U.S.S.R.).

108 *Id.*

109 *See id.*

110 *See id.*

111 U.N. GAOR, 6th Comm., 3rd Sess., pt. 1, 92d mtg. at 306, U.N. Doc. A/C.6/SR.92 (1948).

112 *Id.* at 313.

113 *Genocide Convention*, *supra* note 26, art. V.

both criminal and non-criminal measures.<sup>114</sup> However, the obligation to prosecute and punish genocide is highlighted by the requirement that the contracting parties provide “effective penalties.”<sup>115</sup> A contracting party’s duties may be limited by its constitutional powers and procedures.<sup>116</sup> Mr. Morozov of the Soviet Union stressed that Article V did not preclude the assertion of jurisdiction by an international penal court.<sup>117</sup>

Article VI provides that persons charged with genocide 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 that shall have accepted its jurisdiction.”<sup>118</sup> Thus, jurisdiction was based on the territorial principle.<sup>119</sup> The Sixth Committee debate clarified that the text did not limit the right of a state to bring its own nationals to trial for extra-territorial acts of genocide.<sup>120</sup> India noted that the recognition that Article VI did not preclude other bases of jurisdiction, by implication, satisfied Sweden’s demand that the Convention recognize the prerogative of states to prosecute extra-territorial acts of genocide against their own nationals.<sup>121</sup>

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114 See *Ad Hoc Committee Report*, *supra* note 39, at 10. The language eventually approved “was deemed preferable because it dealt with all the obligations of the States under the Convention and not merely with penal measures.” *Id.*

115 See U.N. GAOR 6th Comm., 3d Sess., pt. 1 93d mtg. at 324, U.N. Doc. A/C.6/SR.93 (1948) (Mr. Morozov, U.S.S.R.); *id.* at 325 (Mr. Abdoh, Iran).

116 See *id.* at 323–24 (Mr. Maktos, U.S.). The question remains whether this Article merely requires ratification of the Convention in accordance with constitutional procedures or whether it authorizes a Contracting Party to limit its obligations under Article V in accordance with domestic doctrine. The latter would undermine the integrity of the Treaty and is contrary to prevailing international law. The Sixth Committee discussion of Article VI clearly anticipated that Contracting parties would enact and conform to the requirements of the Convention. See *id.* at 324 (Mr. Morozov, U.S.S.R.); see also *Ad Hoc Committee Report*, *supra* note 39, at 10.

117 See U.N. GAOR 6th Comm., 3d Sess., pt. 1, 93d mtg. at 324, U.N. Doc. A/C.6/SR.93 (1948) (Mr. Morozov, U.S.S.R.).

118 *Genocide Convention*, *supra* note 26, art VI.

119 See *id.*

120 U.N. GAOR 6th Comm., 3d Sess., pt. 1, 132d mtg. at 697, U.N. Doc. A/C.6/SR.132 (1948) (Mr. Kaeckenbeek, Belg.).

121 See *id.* (Mr. Sundaram, India); U.N. GAOR 6th Comm., 3d Sess., pt. 1, 131st mtg. at 685, U.N. Doc. A/C.6/SR.131 (1948) (Mr. Petren, Swed.).

There was continuing disagreement over vesting jurisdiction in an international court.<sup>122</sup> Proponents pointed out that genocide was a collective crime that was typically committed with the participation or tolerance of governmental regimes.<sup>123</sup> Thus, there was little logic in leaving punishment to these same states.<sup>124</sup> Provision for an international court would serve notice to those contemplating genocide that they could not evade punishment.<sup>125</sup> Failure to provide for multinational jurisdiction would necessitate amending the Convention in the event that an international court was created.<sup>126</sup>

Others dismissed discussion of a transnational tribunal as unrealistic and queried how such a court could enforce its jurisdiction and judgments.<sup>127</sup> These delegations pointed out that an international court would be viewed as a threat to national sovereignty and would jeopardize the Convention's ratification.<sup>128</sup> Incorporation of international jurisdiction was initially defeated in the Sixth Committee<sup>129</sup> but was later reinserted.<sup>130</sup> This provision was intended as aspirational rather than obligatory; signatories were required to recognize the jurisdiction of any international tribunal that might be established.<sup>131</sup>

Various delegates were disappointed at the Committee's decision to place primary reliance on domestic criminal courts.<sup>132</sup> Mr. Demesmin of Haiti noted that the United Nations had been established to encourage states to meet their responsibilities as

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122 See U.N. GAOR 6th Comm., 3d Sess., pt. 1, 97th mtg. at 363–67, U.N. Doc. A/C.6/SR.97 (1948).

123 *Id.* at 365 (Mr. Inglés, Phil.).

124 *Id.*

125 See *id.* at 365–66 (Mr. Manini y Ríos, Uru.).

126 See *id.* at 369 (Mr. Demesmin, Haiti).

127 See *id.* at 366 (Mr. Bammate, Afg.).

128 *Id.*

129 U.N. GAOR 6th Comm., 3d Sess., pt. 1, 98th mtg., at 381, U.N. Doc. A/C.6/SR.98 (1948).

130 U.N. GAOR 6th Comm., 3d Sess., pt. 1, 130<sup>th</sup> mtg., at 684, U.N. Doc. A/C.6/SR.130 (1948).

131 See *id.* at 676 (Mr. Fitzmaurice, U.K.).

132 U.N. GAOR 6th Comm., 3d Sess., pt. 1, 97th mtg. at 369–70, U.N. Doc. A/C.6/SR.97 (1948).

members of the community of nations.<sup>133</sup> They failed to meet this obligation when they opposed measures that were essential to the protection of world order.<sup>134</sup>

Article VII provides that genocide and the other acts punishable in the Convention “shall not be considered as political crimes for the purpose of extradition. The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.”<sup>135</sup> The text clarifies that genocide does not constitute a political crime for purposes of extradition.<sup>136</sup> Extradition, however, is not compulsory under the Convention.<sup>137</sup> It is limited by the requirements of a signatory state’s domestic law and international obligations.<sup>138</sup> A state, for instance, would not be required to contravene its domestic code and extradite its own nationals.<sup>139</sup> Mr. Chaumont of France, however, articulated the consensus of the committee when he protested that all acts of genocide were equally serious and should not be considered political crimes for purposes of extradition.<sup>140</sup>

Article VIII provides that “[a]ny Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.”<sup>141</sup> Article VIII affirmed that all relevant U.N. organs possess the

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133 *Id.* at 369 (Mr. Demesmin, Haiti).

134 *See id.*

135 *Genocide Convention*, *supra* note 26, art VII.

136 *Id.*

137 *See id.*

138 *See Ad Hoc Committee Report*, *supra* note 39, at 13 n.22 (Declaration of United States Representative).

With respect to the Article on extradition, the representative of the United States desires to state that until the Congress of the United States shall have enacted the necessary legislation . . . it will not be possible for the Government of the United States to surrender a person of a crime not already extraditable under existing laws. *Id.*

139 *See id.*; *see also Genocide Convention*, *supra* note 26, art. VII.

140 U.N. GAOR 6th Comm., 3d Sess., pt. 1, 94th mtg. at 332, U.N. Doc. A/C.6/SR.94 (1948) (Mr. Chaumont, Fr.).

141 *Genocide Convention*, *supra* note 26, art VIII.

authority and responsibility to combat genocide.<sup>142</sup> The Sixth Committee rejected a Soviet proposal to require complainants to notify the Security Council.<sup>143</sup> It was pointed out that this would restrict the competence of other U.N. organs, particularly the international court.<sup>144</sup>

Article IX of the Genocide Convention provides that disputes relating to the “interpretation, application or fulfillment” of the Convention, including “those relating to the responsibility of a State for genocide or for any of the other acts” set forth in the Convention “shall be submitted to the International Court of Justice (“I.C.J.”) at the request of any of the parties to the dispute.”<sup>145</sup> This Article authorizes the I.C.J. to determine whether the Convention is applicable, to clarify treaty terms, and to assess whether the Contracting Party has fulfilled its statutory obligations.<sup>146</sup> The Court is also authorized to adjudge responsibility for genocide or other acts enumerated in Article III.<sup>147</sup> Most states recognized that governmental regimes were usually implicated in genocide and that the determination of state culpability was particularly important in the absence of an international court.<sup>148</sup>

Great Britain stressed that Article IX imposed an obligation on signatories to refer disputes to the international court.<sup>149</sup> In those instances in which a state was alleged to have committed genocide in the territory of another country, the international court was authorized to affix state responsibility, enjoin the continuance of such acts, and to award damages or reparations to the aggrieved party.<sup>150</sup> The United Kingdom noted that Article IX did not preclude submitting a case of genocide that

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142 *Id.*; U.N. GAOR 6th Comm., 3d Sess., pt.1, 105th mtg. at 454, 456, U.N. Doc. A/C.6/SR.105 (1948).

143 *See id.* at 458 (Mr. De Beus, Neth.).

144 *Id.*

145 *Genocide Convention, supra* note 26, art. IX.

146 *See id.*

147 *Id.*

148 *See* U.N. GAOR 6th Comm., 3d Sess., 103rd mtg. at 430 (1948) (Mr. Fitzmaurice, U.K.).

149 *Id.* at 430–31.

150 *Id.* at 438 (Mr. Pescatore, Lux.).

threatened international peace and security to the Security Council or to other competent U.N. organs.<sup>151</sup> The Security Council also could be called upon to enforce the judgments of the International Court of Justice.<sup>152</sup>

### C. *Reform of the Genocide Convention*

The 1978 report of the Special Rapporteur on genocide concluded that the Convention lacked effective international measures to prevent and punish genocide and has not provided an "obstacle" to the perpetration of genocide.<sup>153</sup> The Special Rapporteur's 1985 report echoed this conclusion, observing that "all to [sic] much evidence continues to accumulate that acts of genocide are still being committed in various parts of the world . . . . [I]n its present form, the Convention . . . must be judged to be not enough. Further evolution of international measures against genocide are necessary and indeed overdue."<sup>154</sup> The 1985 Special Rapporteur recommended that additional measures be incorporated into a supplementary convention or protocol.<sup>155</sup> He urged that respect for state sovereignty and domestic jurisdiction should not take precedence over the protection against genocide.<sup>156</sup>

Article II restricts the scope of the Genocide Convention to national, ethnic, racial or religious groups.<sup>157</sup> One alternative is to afford protection to any coherent collectivity subject to

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151 U.N. GAOR 6th Comm., 3d Sess., pt. 1, 104th mtg. at 444, U.N. Doc. A/C.6/SR.104 (1948) (Mr. Fitzmaurice, U.K.).

152 *Id.*

153 Nicodeme Ruhashyankiko, Special Rapporteur, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, U.N. ESCOR, Hum. Rts. Comm., Subcomm. On Prevention of Discrimination and Protection of Minorities, 31st Sess., para. 440 at 120, U.N. Doc. E/CN.4/Sub.2/416 (1978) [hereinafter 1978 Special Rapporteur].

154 Benjamin Whitaker, Special Rapporteur, *Review Of Further Developments in Fields with Which the Sub-Commission Has Been Concerned, Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, Prepared by Mr. B. Whitaker*, U.N. ESCOR, Hum. Rts. Comm., Subcomm. on the Prevention of Discrimination and Protection of Minorities, 37th Sess., para. 71, U.N. Doc. E/CN.4/Sub.2/1985/6 (1985) [hereinafter 1985 Special Rapporteur].

155 *See id.* para. 77.

156 *Id.*

157 *Genocide Convention*, *supra* note 26, art II.

persecution.<sup>158</sup> A more modest proposal is to protect political groups and possibly women, homosexuals, and economic and professional classes.<sup>159</sup> Historically, political movements, in particular, have been victimized and, like religious groups, are typically united by a common code and vision.<sup>160</sup> The failure to protect political groups permits regimes to claim that genocidal acts are aimed at decimating dissidents, rather than ethnic or religious groups.<sup>161</sup> The 1978 Special Rapporteur expressed the fear that an extension of the scope of protection would impede the ratification of the Convention and observed that political groups were adequately protected under existing human rights instruments.<sup>162</sup>

Modification of the intent requirement should also be considered. This might involve prohibiting negligent as well as intentional genocide. The specific intent standard might be retained for executive decision-makers while imposing a general intent or knowledge requirement for functionaries. This would deter and facilitate the prosecution of those commanded to commit genocide because liability could be established by proof that they were aware of the collective identity of their victims. The argument against broadening the intent requirement is that it is the mental element that distinguishes genocide from homicide. The systematic and intentional murder of ethnic, racial, and religious minorities, absent the intent to exterminate such groups, remains punishable as mass murder under domestic law and as a crime against humanity and war crime under international law.<sup>163</sup>

The proposal to modify the requirement that a perpetrator intends to destroy a group “in whole or in part” to read “in whole or in substantial part” poses a problem. The modification would clarify that genocide requires the destruction of a substantial proportion of a group and that isolated and individual killings do not fall within the ambit of the crime. This would establish a

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158 See 1985 Special Rapporteur, *supra* note 154, paras. 30, 33.

159 See *id.* paras. 30, 34.

160 See *id.* para. 36.

161 See *id.*

162 1978 Special Rapporteur, *supra* note 153, para. 87.

163 See *id.* paras. 96–100, at 25–26.

vague and variable threshold for adjudging acts of genocide. What of an individual who cleanses a local area and claims that this only comprised a small segment of the group? Is there a persuasive philosophical rationale for distinguishing between a “part” and a “substantial part” of a group?<sup>164</sup>

The acts enumerated in Article II attempt to strike a balance between being overly restrictive and unnecessarily broad. The text, however, often fails to adequately delineate prohibited actions. It, too often, is assumed that genocide requires the direct killing of a group. The Secretariat should clarify the circumstances under which acts such as enslavement, expulsions, population transfers, rape, forced religious conversions, environmental devastation, trade boycotts, and forced sterilization would constitute genocide. Consideration might be given to amending the Convention to include the involuntary displacement of indigenous populations.<sup>165</sup>

The question of cultural genocide remains controversial.<sup>166</sup> The prohibition on genocide is intended to prohibit extermination and the infliction of potentially lethal pain and suffering. An equally important aspiration is to preserve the complex cultural mosaic of the human family. Critics contend that a prohibition on cultural genocide might impede assimilationist policies. However, this must be distinguished from the deliberate destruction and desecration of icons, libraries, and monuments, and coercive religious conversions. The latter might be prohibited when undertaken in conjunction with acts of physical genocide. In such cases there is little doubt that there is an intent to both physically exterminate the group and to eliminate all remnants of its existence.<sup>167</sup>

Criminal liability should be extended to constitutional monarchs and heads of state who do not enjoy executive power. There is no reason that individuals who conspire to commit genocide or who incite the commission of genocide should be immune from liability based on the fact that they lack

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164 See 1985 Special Rapporteur, *supra* note 154, para. 29.

165 See *id.* para. 33.

166 See *id.* para. 32.

167 See *id.*

constitutional authority. Heads of state also should be expected to use their good auspices to prevent genocide. Also, legislators who enjoy domestic immunity should also be held criminally liable under the Convention.<sup>168</sup>

In 1985, the Special Rapporteur advocated inclusion of a provision which abrogated the superior-orders defense, observing that this would align the Convention with prevailing international practice and more recent human rights instruments.<sup>169</sup> The failure to incorporate such a provision enables individuals who have enthusiastically embraced the dictates of authority to invoke superior orders in those jurisdictions which recognize the defense. This, in effect, results in liability being limited to those few officials who conspired to commit the crime.<sup>170</sup> The Special Rapporteur also proposed harmonizing the Genocide Convention with prevailing international standards by specifying that liability shall be imposed for acts of omission as well as commission.<sup>171</sup> He further favored extending the prohibition on incitement to genocide to encompass propaganda in favor of genocide.<sup>172</sup> This was likely based on the rationale that extreme measures were required to prevent the commission of genocide. The Special Rapporteur took no position on the issue of whether the denial of historical instances of genocide should be subject to criminal penalties.<sup>173</sup>

Perhaps the Genocide Convention's central flaw is that it places primary reliance on prosecution by states in which acts of genocide have been committed. These governments usually have sponsored, or have been in complicity with such acts, and are unlikely to vigorously pursue prosecutions. Even following their removal from office, the perpetrators of genocide often possess sufficient support to avoid prosecution.<sup>174</sup>

The 1985 Special Rapporteur noted that individuals who flee

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168 1978 Special Rapporteur, *supra* note 153, paras. 171–76.

169 *See* 1985 Special Rapporteur, *supra* note 154, paras. 50, 52.

170 *Id.* paras. 50–54.

171 *Id.* paras. 40–41.

172 *Id.* paras. 47–48.

173 *Id.* para. 49.

174 *See id.* para. 76.

abroad typically find refuge in sympathetic states.<sup>175</sup> These countries are not obligated under the Convention to extradite offenders.<sup>176</sup> Enforcement problems are magnified in the case of armed conflict; states are unlikely in such circumstances to prosecute or extradite their own combatants. The Special Rapporteur thus concluded that, absent the establishment of an effective international criminal court, the provisions of the Genocide Convention remained largely unenforceable.<sup>177</sup>

The 1978 Special Rapporteur advocated universal jurisdiction as an antidote to the failure to create an international criminal court.<sup>178</sup> The 1985 Special Rapporteur observed that this could be accomplished by adopting the “prosecute or extradite” standard contained in other treaties which requires that states either bring offenders to trial or turn them over to other states.<sup>179</sup> Of course, third party states will only be in a position to exercise jurisdiction over individuals who allegedly committed genocide in a limited number of cases. The text also should affirm that there is no statute of limitations on the prosecution and punishment of the crime of genocide.<sup>180</sup>

Article IX, which provides for jurisdiction by the I.C.J., is subject to numerous reservations by signatory states.<sup>181</sup> This situation eviscerates a crucial component of the Convention and it would be advisable to clarify that reservations to this article are inconsistent with the object and purpose of the Treaty.<sup>182</sup>

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175 *Id.* para. 63.

176 *Id.*

177 *Id.* para. 76.

178 1978 Special Rapporteur, *supra* note 153, para. 211.

179 1985 Special Rapporteur, *supra* note 154, paras. 63–64.

180 See *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, G.A. Res. 2391, 23 U.N. GAOR, 23d Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968) [hereinafter *Non-Applicability of Statutory Limitations*].

181 1978 Special Rapporteur, *supra* note 153, paras. 318–21 (noting that Albania, Bulgaria, the Byelorussian [sic] Soviet Socialist Republic, Czechoslovakia, the German Democratic Republic, Hungary, India, Mongolia, Morocco, Poland, Romania, Spain, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics and Venezuela “declared that they did not consider themselves bound by the provisions of [Article IX] . . .” and Argentina and the Philippines made more limited reservations).

182 *Id.* paras. 322–23.

Article IX also contains a fundamental limitation, in that the I.C.J. may order a state to pay damages for genocide committed against the citizens of a complaining country, but there is no mechanism for ensuring that a state which victimizes its own nationals will provide compensation.<sup>183</sup> It is possible that a third party state could bring a complaint on their behalf. Another possibility is to create an international fund to reconstruct monuments and charitable and cultural institutions and to provide for some measure of compensation. Third-party states also might be required to safeguard the accounts and assets of victims. In addition, the Convention might void any territorial and other gains obtained through genocide.<sup>184</sup>

The Special Rapporteur's 1985 report observed that the Convention's central weakness was the failure to provide preventive measures.<sup>185</sup> The obligation of contracting parties, under Article I, to prevent and punish genocide requires clarification. States might be expressly obligated to cooperate in prosecutions, assist victims, engage in educational efforts, and promote diversity.<sup>186</sup> There is strong support for the creation of a genocide early warning system that would be administered by a Special Rapporteur or by a newly created genocide committee.<sup>187</sup> This early warning system would monitor situations that threaten to degenerate into genocide, as well as sponsor research and issue reports.<sup>188</sup>

## II. ADDITIONAL DEVELOPMENTS

### A. *The International Court of Justice*

In 1951, the I.C.J. addressed the legal limitations on

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183 *Id.* para. 315.

184 *Id.* paras. 324–331.

185 1985 Special Rapporteur, *supra* note 154, para. 78.

186 *See id.* paras. 79–82; *Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30, at 78–79, U.N. Doc. A/9030 (1973).

187 1985 Special Rapporteur, *supra* note 154, para. 83, 85.

188 *Id.* paras. 79–84.

reservations to the Genocide Convention.<sup>189</sup> Reservations traditionally had been conditions upon their being accepted by all the contracting parties to a multilateral treaty.<sup>190</sup> The I.C.J. emphasized that the humanitarian purpose of the Genocide Convention dictated a flexible approach to reservations so as to insure widespread international ratification.<sup>191</sup>

The I.C.J. noted that the General Assembly intended the Genocide Convention to be universal in scope and application.<sup>192</sup> According to the court, the principles underlying the Convention were recognized as binding upon the states even absent a convention.<sup>193</sup> The obligation to adhere to these principles and to prevent and punish this international crime was universal in application.<sup>194</sup>

The court went on to note that the Convention was adopted for a “purely humanitarian and civilizing purpose.”<sup>195</sup> This “object and purpose” indicates that it was the intention of the General Assembly to encourage widespread ratification.<sup>196</sup> The exclusion of one or more states would restrict the scope of the Convention’s application and would detract from the Convention’s moral and humanitarian authority. The court reasoned that the General Assembly could not have intended that a third-party state’s objection to a minor reservation would prevent a signatory from assuming the status of a contracting party.<sup>197</sup> On the other hand, the General Assembly could not have anticipated that a state that deposited a reservation undermining the Convention’s object and purpose could be

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189 *See* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 21 (May 28) [hereinafter Genocide Reservations].

190 *See id.* at 21–22.

191 *Id.* at 24. The I.C.J. noted a number of factors which dictated this flexible approach, including: (1) the universal character of the United Nations; (2) the widespread ratification envisaged under Article IX; (3) the fact that the Convention was the product of a series of majority votes cast by a large number of states; and (4) the fact that reservations were considered during the drafting process. *Id.* at 21–22.

192 *Id.* at 23.

193 *Id.*

194 *Id.*

195 *Id.*

196 *Id.* at 24.

197 *Id.*

considered as a signatory to the Convention.<sup>198</sup>

The I.C.J., in balancing the interests of universalism and sovereignty, concluded that a state possessed the prerogative to lodge an objection to a reservation and to refuse to recognize another state as a signatory party to the Genocide Convention so long as the reservation was violative of the object and purpose of the Convention.<sup>199</sup> However, a single state could arbitrarily prevent a country from being considered a contracting party to the Convention in relation to all states.<sup>200</sup> The I.C.J. went on to hold that an objection to a reservation which was compatible with the object and purpose of the Convention only resulted in the disputed clause being considered inoperable as between the parties.<sup>201</sup> The court noted that signatory states were authorized to litigate the status of a reservation before the International Court of Justice.<sup>202</sup>

In summary, the tribunal rejected a contractual model based upon the indelible integrity of treaties.<sup>203</sup> This promissory principle provides that the failure of one or more state parties to accept a reservation precludes a reserving state from being considered a contracting party.<sup>204</sup> Instead, the tribunal based its judgment on a compatibility concept, which conceived of objections and reservations as being limited by the humanitarian object and purpose of the Genocide Convention.<sup>205</sup> An objection to an otherwise compatible reservation only affected the legal relationship between the reserving and objecting states in relation to that single clause which was in dispute.<sup>206</sup> Thus, the court ruled that the Genocide Convention's altruistic aspiration was best achieved by encouraging widespread ratification while limiting the prerogative of states to issue reservations that deprived a state of the status of a

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198 *Id.*

199 *Id.* at 26–27.

200 *Id.* at 26.

201 *Id.* at 27.

202 *See id.*

203 *See id.* at 21–22.

204 *See id.* at 21.

205 *Id.* at 24.

206 *See id.* at 27.

signatory and undermined the integrity of the Treaty.<sup>207</sup>

*B. The Eichmann Trial*

The tension between state sovereignty and the prohibition against genocide, which threaded through the I.C.J.'s opinion also characterized the debate over Israel's kidnapping and prosecution of Adolf Eichmann. Eichmann had served as the Head of Jewish Affairs in the Gestapo and was responsible for the evacuation, internment, and extermination of Jews.<sup>208</sup> Following the war he managed to escape and settle in Argentina under an assumed name.<sup>209</sup>

Israel had succeeded in apprehending Eichmann, but how could it claim jurisdiction over the former Nazi official? At the time of his criminal conduct, the Jewish State did not exist.<sup>210</sup> His victims had been citizens of Europe, and Israel planned to prosecute him under the Nazis and Nazi Collaborators (Punishment) Act,<sup>211</sup> which had been adopted six years following Eichmann's last criminal act.<sup>212</sup> This was compounded by the fact that Eichmann had been illegally kidnapped from Argentina and was being tried before a panel of Jewish judges.<sup>213</sup>

Argentina petitioned the U.N. Security Council claiming that Israel's action had contravened Argentinean sovereignty and constituted a threat to international peace.<sup>214</sup> Mario Amadeo of Argentina pointed out that condoning Israel's violation of the territorial boundaries of another country under the claim of vindicating the cause of justice would reduce the international community to lawlessness and threaten the security of millions

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207 See *supra* notes 199–205 and accompanying text.

208 See Matthew Lippman, *The Trial of Adolph Eichmann and the Protection of Universal Human Rights Under International Law*, 5 HOUS. J. INT'L L. 1, 2–4 & n.3 (1982) [hereinafter Lippman, *The Trial of Adolph Eichmann*].

209 *Id.* at 5 & n.26.

210 Lippman, *The Trial of Adolph Eichmann*, *supra* note 208, at 19.

211 See Nazi and Nazi Collaborators (Punishment) Act of 1950, 1950 Y.B. on H.R. 163.

212 Lippman, *The Trial of Adolph Eichmann*, *supra* note 208, at 13.

213 *Id.* at 17–18.

214 U.N. SCOR, 15th Sess., 865th mtg. at 6, U.N. Doc. S/PV.865 (1960).

of refugees around the globe.<sup>215</sup> In rebuttal, the Israeli representative, Golda Meir, argued that her country's actions were justified in light of Eichmann's involvement in the murder of twelve million people, half of whom were Jews.<sup>216</sup> The Security Council, while stressing that it did not condone Eichmann's contemptible crimes, proclaimed that the type of actions engaged in by Israel posed a threat to international peace and security.<sup>217</sup>

Eichmann's trial centered on crimes against the Jewish people, which the Israeli district court recognized constituted the crime of genocide as defined in the Genocide Convention.<sup>218</sup> The court argued that it was well-established that genocide was a crime under both customary and conventional international law<sup>219</sup> and that vesting of jurisdiction in the state in which the crime had been committed, pursuant to Article VI, was purely a procedural mechanism that only pertained to crimes committed following the adoption of the Convention.<sup>220</sup> The Genocide Convention significantly affirmed that genocide was a grave crime under international law that, according to the district court was necessarily subject to the universal jurisdiction of all countries.<sup>221</sup>

The district court ruled that genocide was the "gravest type of a crime against humanity"<sup>222</sup> that was intended to "exterminate the nation as a group."<sup>223</sup> This intent, when

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215 *Id.* at 6–7.

216 U.N. SCOR, 15th Sess., 866th mtg. at 4–5, U.N. Doc. S/PV.866 (1960).

217 U.N. SCOR, 15th Sess., Supp., Apr.–June 1960, at 35, U.N. Doc. S/4349 (1960).

218 Attorney-General of the Government of Israel v. Adolf Eichmann, 36 I.L.R. 5, 30, 41 (D.C. Jm. 1961) (Israel) [hereinafter Eichmann Case].

219 *Id.* at 34–35.

220 *See id.* at 35–36.

221 *Id.* at 34. At any rate, the district court reasoned that a narrow interpretation of Article Six which limited jurisdiction over genocide to the state on whose territory the crime had been committed would frustrate the object of the Convention. *Id.* at 35–36. This was a statutory minimum and in no way limited the discretion of a state to rely on other bases of jurisdiction under customary international law, including universal jurisdiction. *See id.* at 34–36. The clear criminality of these acts under customary international law was sufficient to negate the contention that the charge of crimes against the Jewish people constitutes a retroactive application of the law. *See id.* at 42.

222 *Id.* at 41.

223 *Id.* at 57.

combined with an attack against an entire group, in whole or in part, distinguished genocide from murder.<sup>224</sup> Significantly, the court contended that a “people” possessed the right upon assuming sovereign recognition to seek redress against those who had conspired to “perpetrate their total murder in cold blood.”<sup>225</sup>

The Israeli Supreme Court affirmed Eichmann’s conviction, ruling that the harmful and murderous impact of his international delicts had reverberated throughout the global community and that Israel was entitled, as a guardian of international law, to bring Eichmann before the bar of justice.<sup>226</sup> He was sentenced to death and subsequently executed.<sup>227</sup>

In summary, the *Eichmann* case was the first major post-war genocide prosecution. The Israeli prosecution was impeded by the jurisdictional constraints of the Genocide Convention.<sup>228</sup> The judiciary circumvented the contours of the Convention by differentiating between the customary and conventional law of genocide.<sup>229</sup> According to the Israeli courts, the international status of genocide and the catastrophic consequences of the crime for the global community dictated that states exercise universal jurisdiction over the customary component of the offense.<sup>230</sup> Absent this assertion of authority, Eichmann would not have been brought to the bar of justice because none of the eighteen states with a territorial claim had indicated an interest in prosecuting the former Nazi official.<sup>231</sup>

The procedural problems raised by the *Eichmann* trial are not merely of historic interest. The ability of the international community to bring perpetrators of genocide to the bar of justice continues to be frustrated by the inability and unwillingness of

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224 See *id.* at 233.

225 *Id.* at 54.

226 See *id.* at 304.

227 See *id.* at 341–42 (acknowledging “how utterly inadequate the sentence of death is compared with the millions of unnatural deaths he decreed for his victims”).

228 See *id.*

229 See *id.*

230 See *supra* notes 222–28 and accompanying text.

231 See *Eichmann Case*, *supra* note 218, at 53.

states to exercise jurisdiction over genocide.<sup>232</sup> Nevertheless, as illustrated by the following discussion of the debate over genocide during the Vietnam War, the intent requirement of the offense remains an additional barrier to prosecution and a point of contention.

### C. *The Vietnam War*

French philosopher Jean-Paul Sartre argued that, under the guise of anti-communism, the United States was engaged in genocide.<sup>233</sup> Sartre argued that American involvement was animated by the containment of communist China.<sup>234</sup> Even more important was the desire to demonstrate to the Third World that efforts to loosen the yoke of American economic exploitation would be met by mass murder.<sup>235</sup> According to Sartre, the United States' call for military capitulation merely concealed the "true goal of imperialism, which is to reach, step by step, the highest stage of escalation—total genocide."<sup>236</sup>

Sartre argued that the U.S. genocidal intent was "implicit in the facts" of its indiscriminate and devastating deployment of military might.<sup>237</sup> The inevitable result of this confrontation between a western industrialized force fueled by racist resentment and a Third World peasant society caused slaughter and suffering.<sup>238</sup> This was the seminal stage of a larger struggle: "the current genocide is conceived as an answer to people's war and perpetrated in Vietnam not against the Vietnamese alone,

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232 See Ruti Teitel, *The International Criminal Court: Contemporary Perspectives and Prospects for Ratification*, 16 N.Y.L. SCH. J. HUM. RTS. 505, 506 (2000) (arguing that the inability of national courts to prosecute international crimes such as genocide manifests the need for an international criminal court).

233 See Jean-Paul Sartre, *On Genocide*, in CRIMES OF WAR: A LEGAL, POLITICAL-DOCUMENTARY, AND PSYCHOLOGICAL INQUIRY INTO THE RESPONSIBILITY OF LEADERS, CITIZENS, AND SOLDIERS FOR CRIMINAL ACTS IN WARS 534 (Richard A. Falk et al. eds., 1971).

234 See *id.* at 539.

235 See *id.* at 540.

236 *Id.* at 543–44.

237 *Id.* at 545 (stating that it would be impossible to determine whether the American decision-makers who had organized and implemented the anti-guerilla genocide in Vietnam were "thoroughly conscious of their intentions").

238 See *id.* at 546–47.

but against humanity.”<sup>239</sup>

Philosopher Hugo Adam Bedau conceded that the charge of genocide seemed to coincide with the methods and magnitude of American policy in Vietnam.<sup>240</sup> He recognized that there was little doubt that the United States had acted with reckless and dangerous disregard in killing thousands of innocent people.<sup>241</sup> Although aspects of U.S. policy seemed to fall within the parameters of the Genocide Convention,<sup>242</sup> there was no indication that U.S. decision-makers possessed the requisite specific intent.<sup>243</sup> Civilians were killed because they were suspected of being Viet Cong or because they were in areas thought to be supporting guerilla forces.<sup>244</sup> According to Bedau, Sartre had confused the “false proposition that the United States armed forces killed Vietnamese peasants because they are Vietnamese, with the true proposition that the Vietnamese peasants were killed because they were in the way, because they were there.”<sup>245</sup>

The Genocide Convention’s failure to address the type of massive bombardment launched by the United States in Vietnam raised questions concerning its relevance. How could such destruction not fall within the definition of genocide? Was

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239 *Id.* at 548.

240 Hugo Adam Bedau, *Genocide in Vietnam*, 53 B. U. L. Rev. 574, 620 (1973) (stating that no other word but genocide “captures the magnitude of the offensiveness of the [Vietnam] war in light of the methods used to fight it, the purposes advanced in its justification, the facts of the political and social realities in Southeast Asia, and the complex but not entirely elusive intentions of the Johnson and Nixon administrations in fighting it as they did”).

241 *Id.*

242 *See id.* at 595.

243 *See id.* at 620–21 (admitting that an accusation of genocide against the United States could only be sustained “by further conceptual argument or evidential research”).

244 *Id.* at 619.

245 *Id.* at 613 (emphasis omitted). *See also* Helen Fein, *Discriminating Genocide From War Crimes: Vietnam and Afghanistan Reexamined*, 22 DENV. J. INT’L L. & POL’Y 29, 52–53 (1993) (explaining that since the United States relied extensively on air power in order to minimize the American casualties, the military operations were “designed to destroy Vietcong support by stripping away their protective layer of villages and driving the villagers into refugee camps to escape bombardment”). *See generally* Lawrence J. LeBlanc, *The Intent To Destroy Groups In The Genocide Convention: the Proposed U.S. Understanding*, 78 AM. J. INT’L L. 369 (1984).

this the rule of law or lawlessness?<sup>246</sup>

### III. THE INTERNATIONAL CRIMINAL TRIBUNALS FOR YUGOSLAVIA AND RWANDA

#### A. *The International Criminal Tribunal for the Former Yugoslavia*

Article Four of the resolution establishing an International Criminal Tribunal for Yugoslavia (“ICTY”) for prosecutory serious violations committed in the territory<sup>247</sup> establishes jurisdiction over the crime of genocide as defined in the 1948 Convention.<sup>248</sup> The Secretary-General noted that the resolution “confirms” that genocide is an international crime<sup>249</sup> and that the instrument has assumed the status of customary international law.<sup>250</sup>

The Yugoslav war crimes tribunal, established under the resolution, charged Dusko Tadic with war crimes and crimes against humanity stemming from his participation in the collection, confinement, and mistreatment of Bosnian Muslims and Croats in Prijedor and in the Omarska prison camp.<sup>251</sup> Tadic filed an interlocutory appeal challenging the jurisdiction of the Yugoslav war crimes tribunal.<sup>252</sup> The Appellate Chamber ruled

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246 See Roger S. Clark, *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, 327–28 (1981) (stating that criminal liability should attach in a case of negligent or reckless genocide).

247 *Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Humanitarian Law Committed in the Territory of the Former Yugoslavia*, U.N. Doc. S/RES/827, 32 I.L.M. 1203, 1203–05 (1993).

248 United Nations Secretary-General, Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, U.N. Doc. S/25704, reprinted in 32 I.L.M. 1159, 1172–73, (1993) [hereinafter ICTY].

249 *Id.* at 1172.

250 *Id.*

251 *Prosecutor v. Tadic*, T-94-1-T (1995), available at <http://www.un.org/icty/indictment/english/tad-ii9502/3e.htm> (last visited Feb. 15, 2001).

252 *Prosecutor v. Dusko Tadic*, IT-94-1-AR72, 35 I.L.M. 32, 35 (1996).

that it would be a travesty to betray the universal aspiration for justice by permitting a claim of state sovereignty to be raised on behalf of those who had disregarded the elementary rights of humanity.<sup>253</sup> There was a danger that vesting jurisdiction over these crimes in national courts would result in the crimes being treated as ordinary crimes that would not be diligently pursued and prosecuted.<sup>254</sup> Furthermore, the Appellate Chamber ruled that the Genocide Convention illustrated that crimes against humanity no longer required connection with an armed conflict.<sup>255</sup>

The Trial Chamber, in convicting Tadic, provided the parameters of crimes against humanity under Article Five of the statute of the international tribunal.<sup>256</sup> This discussion implicitly distinguished this offense from genocide.<sup>257</sup> According to the Trial Chamber, a crime against humanity requires a defendant to be aware that his or her criminal conduct is part of a sustained and widespread formal or informal policy that connected with an armed conflict and directed against a civilian population.<sup>258</sup> The Tribunal noted that the prohibition of such acts was part of customary international law and included “two of its most egregious manifestations: genocide and apartheid.”<sup>259</sup> The judges observed that in addition to acts of the “murder-type” crimes against humanity include conduct of the “persecution-type.”<sup>260</sup> The latter involves a serious violation of the right to equality that “infringes on the enjoyment of a basic or fundamental human right” and must be based on political, racial or religious grounds.<sup>261</sup>

In convicting Tadic, the tribunal determined that he had

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253 *Id.* at 52.

254 *Id.*

255 *Id.* at 72.

256 *Prosecutor v. Dusko Tadic, supra* note 252, at paras. 624–27.

257 *See id.*; *see also* ICTY, *supra* note 248 at 1172–74 (distinguishing genocide from crimes against humanity and providing definitions for both terms).

258 *Prosecutor v. Dusko Tadic, supra* note 252, para. 626, 652 (noting that the actions must be undertaken with both awareness and discriminatory intent).

259 *Id.* para. 622.

260 *Id.* para. 697.

261 *Id.*

committed acts of detention, beating, deportation, and physical suffering with the intent of furthering the establishment of a Greater Serbia and that he had shared the view that non-Serbs should be forcibly removed from Bosnia.<sup>262</sup> This provided the necessary political and religious discriminatory basis for his actions.<sup>263</sup>

On appeal, the Appeals Chamber offered two points of clarification concerning crimes against humanity.<sup>264</sup> First, a defendant must be aware that his or her criminal act comprises part of a pattern of widespread or systematic crimes committed against a civilian population.<sup>265</sup> Second, the tribunal ruled that the resolution establishing the ICTY did not preclude conviction for crimes against humanity committed for purely personal reasons.<sup>266</sup> A contrary conclusion would result in the acquittal of a Nazi military official who had participated in the genocide of Jews and Gypsies based on personal antagonism towards Gypsies and Jews.<sup>267</sup>

The Appellate Chamber also clarified that, in accordance with the statutory language, persecution was the only crime against humanity that had to be carried out on political, racial, or religious grounds.<sup>268</sup> The tribunal noted that, in light of the humanitarian purpose of the provision on crimes against humanity, it would be illogical to exclude instances of serious and widespread or systematic crimes against civilians that were not animated by a discriminatory intent.<sup>269</sup> This exclusion would result in the exoneration of individuals who engaged in random and indiscriminate violence or who committed acts based on an unenumerated discriminatory basis such as physical or mental disability, age, infirmity, class, or sexual preference.<sup>270</sup>

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262 *See id.* para. 714.

263 *Id.*

264 *Prosecutor v. Dusko Tadic*, (Appeals Chamber, 1999), 38 I.L.M. 1518, 1567 (1999).

265 *Id.*

266 *Id.*

267 *Id.* at 1571.

268 *Id.* at 1573.

269 *Id.* at 1574

270 *Id.*

In *Kupreskic*, the Trial Chamber further refined the distinction between the crime against humanity of persecution and genocide.<sup>271</sup> Four of the defendants were convicted of war crimes and crimes against humanity stemming from their involvement in an organized and systematic attack against the Muslim residents of the central Bosnian village of Ahmici (in April 1993).<sup>272</sup> This was alleged to have been carried out as part of a campaign to terrorize Muslims and expel them from the territory.<sup>273</sup> The attack resulted in the deaths of 116 people and the wounding of twenty-four inhabitants, including women, children and the elderly.<sup>274</sup> The Croatian forces burned 169 houses and two mosques.<sup>275</sup> The Trial Chamber determined that individuals had been targeted by this violence based upon their ethnicity.<sup>276</sup> The court, after reviewing the evidence, noted that the events in Ahmici “had gone down in history as comprising one of the most vicious illustrations of man’s inhumanity to man. . . . [T]he name of that small village must be added to the long list of previously unknown hamlets and towns that recall abhorrent misdeeds and make us all shudder with horror and shame.”<sup>277</sup>

The Trial Chamber ruled that war crimes and crimes against humanity were peremptory norms of international law which were non-derogable and of an overriding character.<sup>278</sup> The commission of such acts accordingly could not be justified under either the *tu quoque*<sup>279</sup> (reciprocity) defense or as an act of reprisal.<sup>280</sup> The Trial Chamber explained that the obligation to refrain from such conduct was owed to the entire international community and was not based on a bilateral exchange of rights;

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271 Prosecutor v. Kupreskic, IT-95-16-T (2000), available at <http://www.un.org/icty/kupresic/trialc2/judgement/index.htm> (last visited Feb. 14, 2001)

272 *Id.* para. 2.

273 *Id.* para. 338.

274 *Id.* para. 749.

275 *Id.*

276 *Id.* para. 337.

277 *Id.* para. 755.

278 *Id.* para. 520.

279 *Id.* para. 517.

280 *Id.* paras. 528–30.

the aspiration was to protect individuals rather than belligerent states.<sup>281</sup>

The Trial Chamber proceeded to note the core elements of crimes against humanity: the existence of an armed conflict; acts which were undertaken as part of the widespread or systematic commission of crimes directed against a civilian population; and the knowledge on the part of the perpetrator that his or her acts were part of an attack on a civilian population.<sup>282</sup> The *Kupreskic* court affirmed that a discriminatory intent was only an element of the crime against humanity of persecution.<sup>283</sup> The three-judge panel further noted that the *actus rea* of persecution consists of the deprivation of a wide variety of fundamental rights, which are not restricted to those enumerated under the statutory prohibition on crimes against humanity under the statute of the Yugoslavian war crimes tribunal.<sup>284</sup> This includes serious acts against the person such as murder, extermination, and torture, as well as equally serious acts involving attacks on fundamental political, social, and economic rights.<sup>285</sup> Persecution thus comprises those criminal offenses which are motivated by racial, religious, or political animus, but which fall short of genocide. An example is “ethnic cleansing” which is intended to remove a group from a territory.<sup>286</sup> The court noted that the discriminatory intent underlying these acts accounted for them being considered inhumane.<sup>287</sup>

The *mens rea* requirement for persecution is more stringent than for ordinary crimes against humanity, although less strict than for genocide.<sup>288</sup> The Trial Chamber stressed that persecution, as a crime against humanity, is an offense that is part of the same genus as genocide.<sup>289</sup> Both involve

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281 *Id.* paras. 517–18.

282 *Id.* para. 557.

283 *Id.* para. 558.

284 *Id.* para. 614.

285 *Id.* para. 615(a)–(c).

286 *Id.* para. 606.

287 *Id.* para. 616.

288 *Id.* para. 636.

289 *Id.*

discriminatory attacks on individuals based on their identity.<sup>290</sup> Genocide, however, requires an intent to exterminate a group, in whole or in part, and “is an extreme and most inhuman form of persecution. . . . [W]hen persecution escalates to the extreme form of willful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.”<sup>291</sup> “Persecution is only one step away from genocide—the most abhorrent crime against humanity—for in genocide the persecutory intent is pushed to its uttermost limits through the pursuit of the physical annihilation of the group or of [its] members.”<sup>292</sup> The crime of genocide involves the intent to destroy a group or its members.<sup>293</sup> The crime of persecution, on the other hand, involves the criminal intent to forcibly discriminate against a group or its members and thereby systematically violate their fundamental human rights.<sup>294</sup>

In *Kupreskic*, the Trial Chamber evaluated the evidence in light of these differing intent standards and ruled that the killing of Muslim civilians was primarily aimed at expelling the group from their village, not at destroying the Muslim group as such.<sup>295</sup>

The crimes against humanity of persecution and genocide shock the conscience of humanity based upon the fact that they are directed against individuals by reason of their membership in a group.<sup>296</sup> The crime of persecution demands a discriminatory intent, but unlike genocide, does not require an intent to eliminate or to extinguish a group, in whole or in part.<sup>297</sup> The category of crimes against humanity are broader in scope than genocide, encompassing enslavement, deportation and civil and political persecutions.<sup>298</sup> Finally, as interpreted by the

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290 *Id.*

291 *Id.* para. 636.

292 *Id.* para. 751.

293 *Id.*

294 *Id.*

295 *Id.*

296 *Id.* para. 636.

297 *Id.*

298 *Prosecutor v. Karadzic and Mladic*, IT-95-5-R61 and IT-95-18-R61 (1996), 108 I.L.R. 133 (Int'l Crim. Trib. for the Former Yugoslavia 1998).

International Criminal Tribunal for Yugoslavia, crimes against humanity must be connected with an internal or international armed conflict.<sup>299</sup>

In 1996, the ICTY issued its most comprehensive discussion of the legal contours of genocide.<sup>300</sup> In this judgment, a three-judge panel affirmed that there were reasonable grounds to confirm the indictment for war crimes, crimes against humanity, and genocide, against Radovan Karadzic, political leader of the Bosnian Serbs, and Ratko Mladic, commander of the Serbs' armed forces.<sup>301</sup> The genocide count in the indictment was based on the inhumane treatment in detention camps of civilians based upon their national, ethnic, political, or religious affiliation.<sup>302</sup> This included acts intended to bring about their destruction, including the deprivation of food; health and medical care; the infliction of mental and physical harm; systematic rape; and the deployment of human shields during armed conflict.<sup>303</sup> The Trial Chamber suggested to the prosecutor that the charge of genocide should be extended beyond abuse in the detention camps to encompass the totality of acts involved in the ethnic cleansing of Bosnian Muslims and Croats.<sup>304</sup>

The judges observed that genocide requires the commission of an act enumerated in the statutory definition of genocide in conjunction with a specific, aggravated intent.<sup>305</sup> The judges stressed that the number ultimately killed was not integral to a finding that genocide had occurred.<sup>306</sup> The panel noted that a range of acts included in the indictment were genocidal in nature.<sup>307</sup> For instance, the defendants' acts of mass murder contravened the Convention's prohibition on the killing of

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299 See Prosecutor v. Dusko Tadic, *supra* note 252, para. 77; see also *supra* notes 282–87 and accompanying text.

300 See Prosecutor v. Karadzic and Mladic, IT-95-5-R61 and IT-95-18-R61 (1996), 108 I.L.R. 132–38 (Int'l Crim. Trib. for the Former Yugoslavia 1998).

301 *Id.* at 86–88.

302 *Id.* at 92.

303 *Id.* at 92–93.

304 *Id.* at 132.

305 *Id.* at 133–34.

306 *Id.*

307 *Id.* at 134–35.

members of a group.<sup>308</sup> The infliction of serious bodily or mental harm, which is prohibited under the Convention, occurred as a result of the inhumane treatment, torture, rape and deportation of civilians.<sup>309</sup> The deliberate infliction of substandard living conditions calculated to bring about a group's physical destruction in whole or in part was carried out in the detention camps and through the siege and shelling of cities and protected areas.<sup>310</sup>

In reviewing the *Karadzic* and *Mladic* indictment, the Trial Chamber observed that the central issue in determining whether these two Serb leaders had been responsible for genocide was whether the pattern of ethnic cleansing which they had directed, when viewed in "its totality," reveals a genocidal intent.<sup>311</sup> The Trial Chamber noted that the intention to commit genocide need not be explicitly established.<sup>312</sup> This intent may be inferred from facts such as the general political doctrine that gave rise to the acts charged in the indictment or the repetition of destructive and discriminatory acts.<sup>313</sup> The intent to commit genocide may also be inferred from "the perpetration of acts which violate, or which the perpetrators themselves consider to violate, the very foundation of the group."<sup>314</sup>

The Trial Chamber noted that the premeditated and public intent of the Serbian Democratic Party in Bosnia and Herzegovina to create an ethnically homogeneous state necessarily required the exclusion of the Muslim and Croat populations who were not viewed as possessing any valid territorial claims.<sup>315</sup> These often violent deportations were only the first step in the extermination process.<sup>316</sup> The creation of a Greater Serbia inspired the crimes committed in the indictment and, in the view of the judges, "contemplates" the destruction of

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308 *Id.* at 133–34.

309 *Id.* at 134–35.

310 *Id.* at 134.

311 *Id.* at 134.

312 *Id.*

313 *Id.*

314 *Id.* at 134–35.

315 *Id.* at 135.

316 *Id.*

non-Serbian groups as the “ultimate step.”<sup>317</sup>

In addition to this ideological animus, the implementation of the policy of ethnic cleansing revealed an aggravated intent.<sup>318</sup> The trial chamber found that the number of victims selected based on their membership in a group suggested an intent to eliminate the group.<sup>319</sup> The methods utilized were directed to reach “the very foundations of the group or what is considered as such.”<sup>320</sup> For instance, the systematic rape of women in some cases was designed to result in the procreation of Serbian children; the destruction of mosques or Catholic churches and libraries was designed to annihilate the groups’ history and culture.<sup>321</sup>

The Trial Chamber thus concluded that various acts in the indictment likely could have been planned or ordered with a genocidal intent.<sup>322</sup> This determination of the defendants’ underlying intent was based on the defendants’ ideological aspirations and statements, the scale of the ethnic cleansing, and the fact that various acts attacked the foundation of the victim group.<sup>323</sup> The judges invited the prosecutor to consider broadening the scope of the charge of genocide to encompass the range of criminal acts enumerated in the indictment.<sup>324</sup>

Interestingly, Karadzic and Mladic were to be prosecuted for acts committed by their subordinates.<sup>325</sup> Responsibility was imputed to the defendants based upon their prominent positions that led to their presiding over a pervasive pattern of pernicious crimes committed by the Serbian forces against Muslims and Croats.<sup>326</sup> This systematic strategy necessarily required command coordination and calibration.<sup>327</sup> The argument that

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317 *Id.*

318 *Id.*

319 *Id.*

320 *Id.*

321 *Id.*

322 *Id.*

323 *Id.*

324 *Id.* at 136.

325 *Id.* at 119.

326 *Id.*

327 *Id.*

these high-level decision-makers possessed a genocidal intent had a persuasiveness which is lacking when compared to the more confined conduct of lower-level defendants.<sup>328</sup> The Trial Chamber also attempted to avoid having to differentiate ethnic cleansing from genocide by stressing that the former necessarily resulted in mass slaughter and was merely the first step in a process of extermination.<sup>329</sup>

The ICTY has made a substantial contribution to the jurisprudence of genocide. The tribunal firmly held that the establishment of genocide requires proof of specific intent.<sup>330</sup> This may be established circumstantially and need not require independent proof.<sup>331</sup> The tribunal made a significant step towards the refinement of international criminal law by developing the crime of persecution that entails a discriminatory intent, absent an intent to eliminate a group.<sup>332</sup>

The determination as to whether individuals belong to a coherent collectivity is a subjective standard that is based on the perception of the perpetrators.<sup>333</sup> This group may be defined in terms of membership in a group or by the fact that individuals are not members of the dominant group.<sup>334</sup> The tribunal also made a significant conceptual contribution by noting that the material aspect of genocide may be measured in quantitative or selective terms.<sup>335</sup>

The central component of genocide is specific intent.<sup>336</sup> The decisions of the Yugoslav tribunal indicate that this is difficult

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328 *Id.* at 130.

329 *See supra* notes 289–94 and accompanying text.

330 *See supra* note 293 and accompanying text.

331 *See supra* notes 312–14 and accompanying text.

332 *See supra* note 284 and accompanying text.

333 *See* Prosecutor v. Goran Jelusic, IT-95-10 para. 70 (1999), available at <http://www.un.org/icty/brcko/trialc1/judgement/jel-tj991214e.htm> (last visited March 22, 2001).

334 *See id.* para. 71 (stating that under a “positive approach” individuals may be distinguished as members of a group by the characteristics which the perpetrators of the crime deem to be particular to the group; whereas under a “negative approach,” individuals may be identified as not being part of the group to which the perpetrators of the crime themselves belong).

335 *See id.* paras. 81–83.

336 *See supra* note 311 and accompanying text.

to discern and, absent a clear factual pattern, the tribunal has been reluctant to issue such a pronouncement.<sup>337</sup> The reluctance of prosecutors to bring such a charge is indicated by the fact that the indictment of Serbian leaders stemming from the “widespread or systematic” killing of “hundreds of Kosovo Albanian civilians”<sup>338</sup> and the forcible expulsion of 740,000 individuals<sup>339</sup> by forces of the Federal Republic of Yugoslavia in 1999 resulted in an indictment for crimes against humanity and war crimes rather than genocide.<sup>340</sup>

*B. The International Criminal Tribunal for Rwanda*

The Resolution establishing the International Criminal Tribunal for Rwanda (“ICTR”) also provided for jurisdiction over the crime of genocide as defined in the 1948 Convention.<sup>341</sup>

In May 1998, Jean Kambanda, former Prime Minister of the Interim Government of Rwanda and Head of the Council of Ministers, pled guilty to various stipulated facts.<sup>342</sup> The Trial Chamber accepted his plea and, *inter alia*, found him guilty of genocide, conspiracy to commit genocide, public incitement to commit genocide and complicity in genocide.<sup>343</sup> The tribunal noted that these crimes had been committed during Kambanda’s tenure as a government official and thus constituted a breach of his responsibility for maintaining peace and security.<sup>344</sup> It determined that he participated in the genocide by distributing arms, making incendiary speeches, as well as presiding over cabinet and other meetings in which exterminations were discussed and planned.<sup>345</sup> He nevertheless failed to take

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337 See *supra* notes 289–94 and accompanying text.

338 See Prosecutor v. Milosevic, IT-99-37 para. 98 (Int’l Crim. Trib. for the Former Yugoslavia 1999) available at <http://www.un.org/cty/indictment/english/milii990524e.htm> (last visited Jan. 29, 2001).

339 See *id.* para. 97.

340 *Id.* para. 100.

341 S.C. Res. 955, U.N. SCOR, 49<sup>th</sup> Sess., 3453<sup>rd</sup> mtg. (Nov. 8, 1994) reprinted in 33 I.L.M. 1598, 1602–03.

342 Prosecutor v. Kambanda, ICTR-97-23-S, reprinted in 37 I.L.M. 1411, 1420 (Int’l Crim. Trib. for Rwanda 1998).

343 *Id.* at 1422.

344 See *id.* at 1423.

345 See *id.* at 1420.

necessary and reasonable steps to prevent the slaughter.<sup>346</sup>

The Trial Chamber observed that customary and conventional war crimes were “lesser crimes” than genocide and crimes against humanity, which were “crimes which particularly shock the collective conscience.”<sup>347</sup> Precedent for Kambanda’s prosecution could be found in the “holocaust of the Jews” prosecuted at Nuremberg, which the Trial Chamber observed was “very much constitutive of genocide, but could not be defined as such because the crime of genocide was not defined until later.”<sup>348</sup>

In adjudging the gravity of Kambanda’s crimes, the Trial Chamber noted that the killing of an estimated half-million people in a short span of one hundred days constituted an aggravating factor<sup>349</sup> and it was the “crime of crimes that must be taken into account when deciding the sentence.”<sup>350</sup> The Trial Chamber noted that it was statutorily limited to the imposition of a prison sentence.<sup>351</sup> Despite the fact that Kambanda had entered a guilty plea and had provided the prosecution with valuable information, the Trial Chamber concluded that his crimes carried an “intrinsic gravity, and their widespread atrocious and systematic character is particularly shocking to the human conscience;”<sup>352</sup> he was sentenced to life imprisonment.<sup>353</sup>

In the *Akayesu* case, the Trial Chamber convicted Jean-Paul Akayesu, *bourgmestre* or political leader and administrative head of the Tabu commune in Rwanda,<sup>354</sup> of genocide.<sup>355</sup>

The Trial Chamber reiterated that genocide required the commission of any one of various specified acts committed with

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346 *Id.* at 1423.

347 *Id.* at 1417.

348 *Id.*

349 *Id.* at 1423.

350 *Id.* at 1417.

351 *Id.* at 1418.

352 *Id.* at 1425.

353 *Id.* at 1425–26.

354 See *Prosecutor v. Akayesu*, ICTR-96-4-T, para. 3 (Int’l Crim. Trib. for Rwanda 1998) available at <http://www.ictt.org/ENGLISH/cases/Akayesu/judgment/akay001.htm>.

355 *Id.* pt. 8.

the specific intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.<sup>356</sup> The act must have been committed against one or several individuals due to their membership in a specific group.<sup>357</sup> The victims thus were not selected because of their identity, but rather on account of membership in a national, ethnic, racial, or religious group.<sup>358</sup> According to the Trial Chamber, the victim of genocide is the group rather than the individual.<sup>359</sup>

The Trial Chamber noted that intent was a mental factor which was difficult, if not impossible, to discern.<sup>360</sup> In the absence of a confession, the intent of the accused could only be inferred from a number of factual circumstances.<sup>361</sup> These included the scale, character, and systematic character of the acts directed against a particular group.<sup>362</sup> The Tutsi victims, in the view of the Trial Chamber, were encompassed within the Genocide Convention in that they constituted a stable and permanent ethnic group.<sup>363</sup> This conclusion was supported by the fact that the witnesses identified themselves as Tutsi.<sup>364</sup>

In reviewing the events in Rwanda, the Trial Chamber concluded that the widespread killing of Tutsi was an act of genocide involving the killing or imposition of serious bodily harm to the members of a group.<sup>365</sup> Considering the scale and systematic nature of these killings, there was no doubt they were committed with the intent to destroy the group so that, in the words of one expert witness, Hutu children would only know

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356 *Id.* para. 517.

357 *Id.* para. 520.

358 *Id.* paras. 521–22.

359 *Id.*

360 *Id.* para. 523.

361 *Id.* paras. 523–24.

362 *See id.*

363 *Id.* paras. 674–75 and para. 702.

364 *See id.* para. 702. The Hutu and Tutsi shared the same language and culture. The Tribunal nevertheless treated them as distinct ethnic groups in conformity with the distinction adopted by the French colonizers. These designations appeared on the identification cards of Rwandan citizens. Those Hutus who were killed were targeted based on the fact that they were viewed as supporters of the Tutsi. *Id.* at n. 56–57.

365 *Id.* paras. 118–22.

what a Tutsi looked like if they consulted a history book.<sup>366</sup> The bodies later were deposited in the Nyabarongo River so that they would be carried back to their place of origin in Abyssinia, a symbolic statement that the Tutsi were interlopers on Rwandan territory.<sup>367</sup> The Trial Chamber concluded that the killings were planned and organized by political and military leaders.<sup>368</sup> The killings were carried out in conjunction with the anti-guerilla campaign in Rwanda, but were unrelated and irrelevant to the military effort.<sup>369</sup> The conflict was used as a pretext to inflame popular passions against the Tutsi.<sup>370</sup>

Akayesu was responsible for maintaining order in the Taba commune and possessed authority over the police.<sup>371</sup> The Trial Chamber determined that a large number of killings had occurred in Taba and that Akayesu had been present and had ordered or witnessed the killings and other associated acts such as rape, which had resulted in serious mental or bodily harm.<sup>372</sup> This determination was sufficient to impose individual responsibility on Akayesu for having ordered, committed, or otherwise aided and abetted in the preparation or execution of killings and causing serious bodily or mental harm.<sup>373</sup> In one instance, he removed eight individuals from prison, handed them over to the militia, and ordered their execution.<sup>374</sup> Akayesu urged the killers to act quickly and watched as the victims were killed using various traditional weapons, including machetes and axes.<sup>375</sup> Akayesu also addressed a public meeting and called on the population to unite in order to eliminate the enemy, clearly referring to the Tutsi.<sup>376</sup> During the speech, he publicly named and condemned particular individuals, thereby placing

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366 *Id.* para. 118.

367 *See id.* para. 120.

368 *See id.* para. 126.

369 *Id.* paras. 127–28.

370 *See id.* para. 127.

371 *Id.* paras. 55–56.

372 *Id.* paras. 691–93 and para. 731.

373 *Id.* para. 704.

374 *Id.* paras. 272–80.

375 *Id.*

376 *Id.* para. 311.

them in danger.<sup>377</sup>

The Trial Chamber held that it was able to infer Akayesu's genocidal intent from his public statements that, more or less, explicitly advocated the genocide of the Tutsi.<sup>378</sup> In addition, the Trial Chamber also was able to discern the defendant's mental state based on the high number and widespread atrocities systematically and deliberately directed against the Tutsi throughout Rwanda.<sup>379</sup> The Trial Chamber made the unprecedented ruling that rape and sexual violence had been directed against Tutsi women with genocidal intent.<sup>380</sup> As a result of this systematic sexual violence, Tutsi women were humiliated, mutilated, and raped in public, resulting in the physical and psychological destruction of Tutsi women, their families, and communities.<sup>381</sup> Many of these women, after being subjected to serious bodily and mental harm, were executed.<sup>382</sup>

The Trial Chamber clearly pronounced that genocide was one of the most malevolent of international crimes, for which there could be few mitigating factors.<sup>383</sup> The Trial Chamber was able to infer that Akayesu possessed the requisite mental state for genocide based upon his statements and the fact that his acts were part of a systematic pattern of abuse and killing of Tutsi in Rwanda.<sup>384</sup> The Tribunal also made the unprecedented finding that widespread and organized rape may constitute genocide.<sup>385</sup>

#### IV. THE INTERNATIONAL COURT OF JUSTICE

##### A. *Bosnia and Herzegovina I*

In April 1993, Bosnia and Herzegovina filed a motion for Provisional Measures Against Yugoslavia (Serbia and

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<sup>377</sup> *Id.*

<sup>378</sup> *Id.* paras. 672–74.

<sup>379</sup> *Id.* paras. 728–35.

<sup>380</sup> *Id.* paras. 731–32.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.* para. 733.

<sup>383</sup> *See supra* note 352 and accompanying text.

<sup>384</sup> *See supra* notes 378–79 and accompanying text.

<sup>385</sup> *See supra* note 380 and accompanying text.

Montenegro).<sup>386</sup> Bosnia alleged that acts of genocide and other war crimes had been committed by former members of the Yugoslavia People's Army ("YPA") and by Serb military and paramilitary forces assisted and directed by Yugoslavia.<sup>387</sup> This alleged genocide included the killing of the Muslim inhabitants of Bosnia and Herzegovina and the torture, rape, kidnapping, wounding, starvation, and the physical and mental abuse and detention of the citizens of Bosnia and Herzegovina.<sup>388</sup>

The I.C.J. based its jurisdiction on Article IX of the Genocide Convention<sup>389</sup> and stated that the issuance of provisional measures was intended to preserve the rights of the parties within the former Yugoslavia pending a decision on the merits.<sup>390</sup> The judges noted that Article VIII did not augment its function or competence and cautioned that it would only indicate measures to protect disputed rights which might form the basis of a judgment under Article IX.<sup>391</sup>

The I.C.J. ruled that, regardless of whether prior acts of genocide were legally imputable to Yugoslavia or to Bosnia and Herzegovina, Article I of the Convention imposed a "clear obligation" on the parties to do all in their power to prevent the commission of acts in the future which contravened the protections embodied in the Convention.<sup>392</sup> The majority was "satisfied" that there was a grave risk of action which "may aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult of solution."<sup>393</sup> The government of the Federal Republic of Yugoslavia was directed to take all measures within its power to prevent the commission of genocide and to ensure that any regular and irregular armed units or individuals subject to its

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386 *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), 1993 I.C.J. 3 (April 8) [hereinafter First Provisional Measures].

387 *See id.* at 4–5.

388 *Id.*

389 *Id.* at 18.

390 *Id.* at 22, 24.

391 *See id.* at 18.

392 *Id.* at 22.

393 *Id.* at 23.

control, direction, support or influence did not engage in genocide, whether directed against Bosnian Muslims or other groups.<sup>394</sup> Yugoslavia and Bosnia and Herzegovina were instructed to refrain from any action and to prevent action that might aggravate or extend the existing dispute over the crime of genocide or render it more difficult of solution.<sup>395</sup>

The I.C.J. affirmed these measures in September 1993.<sup>396</sup> The court noted that a judgment on the merits would only bind the parties to each other through the measures taken by the court.<sup>397</sup> As a result, the court declined to issue provisional measures clarifying the responsibility under the Genocide Convention of third-party states or other entities.<sup>398</sup>

The I.C.J., in reaffirming the previously indicated measures, condemned the continued commission of heinous acts in Bosnia and Herzegovina that shocked the conscience of mankind and flagrantly conflicted with moral law and the spirit and aims of the United Nations.<sup>399</sup> The I.C.J. was not satisfied that all steps had been taken by the parties to prevent genocide within Bosnia and Herzegovina.<sup>400</sup> The court concluded that the “present perilous situation” does not demand an indication of additional provisional measures, but rather required an “immediate and effective implementation of those measures” which previously had been indicated.<sup>401</sup>

In a concurring opinion, Ad Hoc Judge Hershel Lauterpacht, concluded that “it is difficult to regard the Serbian acts as other than acts of genocide. . . . [Yugoslavia] stands behind the Bosnian Serbs and it must, therefore, be seen as an accomplice to, if not an actual participant in, this genocidal behaviour.”<sup>402</sup>

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394 *Id.* at 24.

395 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 1993 I.C.J. 3, 24 (Apr. 8).

396 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) 1993 I.C.J. 325, 349–50 (Sept. 13) [hereinafter Second Provisional Measures].

397 *Id.* at 344.

398 *See id.*

399 *Id.* at 348.

400 *Id.* at 348–49.

401 *Id.* at 349.

402 *Id.* (Separate Opinion of Judge Lauterpacht).

He noted that the continuance of the U.N. arms embargo against the Balkan region, which the court had considered to be outside its jurisdictional competence, had left the Muslim population of Bosnia subject to “genocidal activity at the hands of the Serbs.”<sup>403</sup>

*B. Bosnia and Herzegovina II*

In 1996, the I.C.J. determined that it possessed jurisdiction to consider the merits of Bosnia and Herzegovina’s complaint of genocide.<sup>404</sup> The court ruled that both Bosnia and Yugoslavia had filed instruments of succession to the obligation assumed in 1948 by the former Socialist Republic of Yugoslavia to be bound by the Genocide Convention.<sup>405</sup> The court noted that this was without prejudice as to whether Bosnia and Herzegovina may have automatically succeeded to rights and obligations under the Genocide Convention based on the fact that this instrument protected fundamental human rights.<sup>406</sup>

Yugoslavia filed various preliminary objections challenging whether there was a dispute within Article IX of the Genocide Convention.<sup>407</sup> These were dismissed by the court, which ruled that there was no requirement that the acts contemplated within the Convention occur within the context of an international conflict.<sup>408</sup> The obligation to prevent and punish genocide was incumbent upon the states in periods of peace as well as during internal and international conflict.<sup>409</sup> In regard to Yugoslavia’s contention that it had not participated directly or indirectly, in the conflict, the court noted that it was unnecessary to resolve this question which clearly pertained to the merits of the dispute.<sup>410</sup> The I.C.J. also noted that it was not

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403 *Id.* at 438.

404 *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosn. & Herz. v. Yug.), 1996 I.C.J. 595, 595–96 (July 11) [hereinafter Preliminary Objections].

405 *Id.* at 610.

406 *Id.* at 611–12.

407 *Id.* at 605.

408 *Id.* at 615.

409 *Id.*

410 *Id.*

relevant whether Yugoslavia had exercised jurisdiction over the territorial situs of genocide.<sup>411</sup> It stressed that the obligation to prevent and punish the crime of genocide was universal in nature and scope and was not limited by territorial boundaries.<sup>412</sup> The court also rejected Yugoslavia's contention that the court was restricted to examining whether a state had failed to prevent and punish genocide as contemplated by Articles V, VI, and VII and that Article IX did not authorize the court to determine whether a state itself had committed genocide.<sup>413</sup> The court thus clarified that Article IX contemplated the scrutiny of state responsibility for any and all acts enumerated under Article III.<sup>414</sup>

The court concluded that there was a dispute between the parties under Article IX relating to the interpretation, application, or fulfillment of the Convention, including Yugoslavia's responsibility for genocide.<sup>415</sup> The court observed that the parties differed with respect to the facts of the case, their imputability, and the applicability of the provisions of the Genocide Convention.<sup>416</sup>

### C. Nuclear Weapons

In 1996, the I.C.J., at the request of the United Nations General Assembly, issued an advisory opinion on the legality of nuclear weapons.<sup>417</sup> The court, *inter alia*, concluded that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflicts, and, in particular, the principles and rules of humanitarian law.<sup>418</sup>

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411 *See id.* at 616.

412 *Id.*

413 *Id.*

414 *See id.*

415 *Id.* at 616.

416 *See id.* at 616–17 (“For the Court, there is accordingly no doubt that there exists a dispute between [the parties] relating to ‘the interpretation, application or fulfillment of the . . . Convention, including . . . the responsibility of a State for Genocide.’”).

417 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

418 *Id.* at 266.

However, the court stated that it was unable to determine “definitively” whether the threat or use of nuclear weapons was “lawful or unlawful in an extreme circumstance of self-defense.”<sup>419</sup>

The court refused to rule that the use of nuclear weapons was contrary to the Genocide Convention.<sup>420</sup> The petitioners noted that the deployment of atomic arms would result in an enormous number of deaths, which likely would include persons of particular national, ethnic, racial, or religious groups.<sup>421</sup> It was contended that the intent to destroy such groups could be inferred from the fact that a state deploying such armaments certainly would have failed to consider the inevitable impact of such weapons.<sup>422</sup> The I.C.J. ruled that the prohibition on genocide would assume relevance only in instances in which those deploying the weapons possessed the relevant intent.<sup>423</sup> This conclusion could only be reached after examining “the circumstances specific to each case.”<sup>424</sup>

In summary, the I.C.J. opinion suggests that a nuclear attack animated by an intent to exterminate a group protected under the Genocide Convention would constitute genocide. This intent must be independently established and may not be inferred from the utilization of nuclear arms.<sup>425</sup> The majority opinion conceded that the use of these weapons inflicted a degree and depth of harm which was indistinguishable from genocide.<sup>426</sup> The central question was whether those deploying such weapons harbored a genocidal intent.<sup>427</sup> This internal debate on the I.C.J. reflected the continuing debate over the

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419 *Id.*

420 *See id.* at 240.

421 *Id.*

422 *Id.*

423 *Id.*

424 *Id.*

425 *See supra* notes 423–24 and accompanying text.

426 *See* Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. at 240, 244 (suggesting that “in order correctly to apply to the present case . . . humanitarian law, it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come”).

427 *Id.* at 240.

requisite intent to establish genocide.<sup>428</sup>

## V. RECENT DEVELOPMENTS

### A. *The Extradition of Augusto Pinochet*

Genocide is not considered to be a crime of a political character subject to extradition.<sup>429</sup> As recognized in *Artukovic*, “[r]idding a country of some of its population for . . . reprehensible reasons [racial or religious hatred], as part of some larger political scheme, is not a crime of a ‘political character’ and is thus not covered by the political offense exception to extradition.”<sup>430</sup> United States courts have also recognized that states possess universal jurisdiction over the crime of genocide.<sup>431</sup> Courts will undertake an independent examination of the facts to determine whether there is probable cause to conclude that genocide has occurred and will not extradite an individual in the absence of a formal extradition agreement.<sup>432</sup>

In September 1998, Chilean Senator-for-life Augusto Pinochet traveled to England for medical treatment.<sup>433</sup> Pinochet was the former head of the military junta that violently overthrew the democratically elected government of President Salvador Allende in 1973 and ruled the country for seventeen years.<sup>434</sup> English authorities placed Pinochet under arrest in

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428 See *id.* at 501–02 (dissenting opinion of Judge Weeramantry) (“The Court’s treatment of the relevance of genocide to the nuclear weapon is, in my view, inadequate. . . . The argument offered is that there must be an intention to target a particular national, ethnical, racial or religious group qua such group, and not incidentally to some other act. However . . . there can be no doubt that the [nuclear] weapon targets, in whole or in part, the national group of the State at which it is directed.”).

429 *Genocide Convention*, *supra* note 26, art VII.

430 *Extradition of Artukovic v. Rison*, 628 F. Supp. 1370, 1376 (C.D. Cal. 1986).

431 *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582–83 (6th Cir. 1985) (“The underlying assumption is that the crimes are offenses against the law of nations or against humanity and that the prosecuting nation is acting for all nations.”).

432 *In re Surrender of Ntakirutimara*, 988 F. Supp. 1038, 1042 (S.D. Tex. 1997).

433 Charles Trueheart, *Rights Activists Cheer Pinochet Precedent*, WASH. POST, Jan. 14, 2000 at A22.

434 Steve Anderson, *Pinochet Makes First Public Appearance Since Return to*

October 1998, pursuant to a warrant issued by Spanish Magistrate Baltasar Garzon.<sup>435</sup>

In November 1998, the Spanish National Court (*Audiencia Nacional*), unanimously ruled that Spain had properly asserted universal jurisdiction over the crime of genocide and related international offenses.<sup>436</sup> The court also ruled that Spain had a legitimate interest in exercising such jurisdiction because at least fifty Spaniards had disappeared or had been killed in Chile.<sup>437</sup> The eleven-member judicial panel ruled that in 1985 Spanish law had recognized universal jurisdiction over the international crime of genocide.<sup>438</sup> The assumption of jurisdiction over acts which occurred between 1973 and 1983 did not constitute retroactive application of the law because genocide had been an international crime at the time of Pinochet's acts in Chile.<sup>439</sup>

Spain's claim also was not precluded by Article VI of the Genocide Convention.<sup>440</sup> According to the court, this provision merely provided that a claim of territorial or international jurisdiction would take precedence over the jurisdictional assertions of other states.<sup>441</sup> A contrary ruling would prevent states from punishing its own nationals for acts committed abroad and would undermine the prevention of genocide.<sup>442</sup>

The Spanish court adopted a broad view of genocide, ruling that a national group was not limited to a collectivity formed by people belonging to the same nation.<sup>443</sup> Instead it was constituted by a group sharing some common view or trait.<sup>444</sup>

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*Chile*, UPI, Aug. 23, 2000, LEXIS, Nexis Library, UPI File.

<sup>435</sup> See Richard J. Wilson, *Prosecuting Pinochet: International Crimes in Spanish Domestic Law*, 21 HUM. RTS. Q. 927, 929-30 (1999).

<sup>436</sup> Maria del Carmen Marquez Carrasco & Joaquin Alcaide Fernandez, *In re Pinochet: Initiation of Criminal Proceedings Against Former President of Chile for Offenses While in Office*, 93 AM. J. INT'L. L. 690 (1999).

<sup>437</sup> *Id.* at 691.

<sup>438</sup> See *id.* at 690-91, 692.

<sup>439</sup> *Id.* at 692-93.

<sup>440</sup> See *id.* at 693.

<sup>441</sup> See *id.*

<sup>442</sup> *Id.*

<sup>443</sup> *Id.*

<sup>444</sup> See *id.*

Thus, genocide may entail the systematic elimination of distinctive groups, such as AIDS patients, the elderly, or aliens.<sup>445</sup> The court noted that in Chile the victims were comprised of those individuals who were not deemed suitable to structure the new social order.<sup>446</sup>

The English House of Lords voted three to two that Pinochet was not immune from prosecution in the United Kingdom for crimes under international law.<sup>447</sup> Lord Steyn recognized that the acts of the police and intelligence officers presumably are the paradigmatic official acts.<sup>448</sup> However, he ruled that the murders and disappearances perpetrated by the Chilean secret service pursuant to the orders of General Pinochet fell outside of the conduct constituting the lawful function of a head of state.<sup>449</sup> Pinochet's acts are "no more to be categorized as acts undertaken in the exercise of the functions of a head of state than the examples already given of a head of state murdering his gardener or arranging the torture of his opponents for the sheer spectacle of it."<sup>450</sup>

The English Home Secretary ruled that the Spanish request to extradite Senator Pinochet to stand trial for genocide did not satisfy the requirement that an extraditable crime conform to the definition of the crime under British law.<sup>451</sup> Pinochet's attacks against political opponents did not fit within the conventional definition of genocide and might be better viewed as crimes against humanity, which were not included as delicts of universal jurisdiction under the Spanish criminal code.<sup>452</sup> In January 1999, the House of Lords set aside its verdict on the ground that one of the presiding judges, Lord Hoffman, had an undisclosed relationship with Amnesty International, which had

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445 *Id.*

446 See Wilson, *supra* note 435, at 960–61; see also Carrasco & Fernandez, *supra* note 436, at 693.

447 See Regina v. Bartle et al. *ex parte* Pinochet, 37 I.L.M. 1302 (House of Lords 1998).

448 *Id.* at 1338.

449 *Id.*

450 *Id.*

451 See United Kingdom Home Secretary: Response Of Her Majesty's Government Regarding The Spanish Extradition Request, 38 I.L.M. 489, 490 (1999).

452 See Carrasco & Fernandez, *supra* note 436, at 694–95.

intervened in the November 1998 adjudication.<sup>453</sup>

In March 1999, the Law Lords approved Pinochet's extradition for torture and conspiracy to torture which were committed after December 1988.<sup>454</sup> Home Secretary Straw announced that these charges were sufficiently serious to warrant extradition.<sup>455</sup> Pinochet's extradition was halted when it was determined that he was too ill to stand trial.<sup>456</sup>

The Pinochet decision has been described as the first time that a local domestic court has refused to afford immunity to a head of state or to a former head of state on the grounds that such immunity does not extend to the perpetrators of severe international crimes.<sup>457</sup> The decision affirmed the proposition that the interest in prosecuting those who engage in gross violations of human rights is not limited to the state in which territory these crimes were committed or the state of the victim's nationality.<sup>458</sup> At the same time, the impact of the Pinochet decision in terms of genocide is limited by the fact that the small number of governments that have asserted extra-territorial jurisdiction over genocide are not likely to demand the extradition of non-national defendants who happen to reside outside of their state of nationality.<sup>459</sup> The practicality and effectiveness of such prosecutions also is questionable.<sup>460</sup> States are reluctant to extradite individuals to countries where they doubt the impartiality of the legal system and which do not have ready access to documents and witnesses.<sup>461</sup> The newly formed

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453 See *In re Pinochet*, 38 I.L.M. 430-32 (House of Lords 1999).

454 See *Pinochet Lawyers to Appeal Britain's Ruling*, AGENCE FRANCE PRESSE, April 30, 1999.

455 Christine M. Chinkin, *Immunity of former head of state from prosecution by foreign state for acts committed while in office—effect of Torture Convention on immunity—extradition—application of dual criminality requirement to extralegal offenses*, 93 AJIL 703, 708-09 (1999).

456 Warren Hoge, *Pinochet Is Ruled Unfit for a Trial and May Be Freed*, N.Y. TIMES, Jan. 12, 2000, at A1.

457 Chinkin, *supra* note 455, at 709.

458 *Id.* at 711.

459 See Matthew Lippman, *The Pursuit of Nazi War Criminals in the United States and in Other Anglo-American Legal Systems*, 29 CAL. W. INT'L L. J. 1, 45 (1998).

460 See *id.* at 47.

461 See *id.* at 46.

international criminal court may provide some promise of providing a forum for the prosecution of heads of state.

*B. The New International Criminal Court*

The statute of the newly created International Criminal Court ("ICC"), in Article 6, provides for jurisdiction over the crime of genocide.<sup>462</sup> Article 6 conforms to the definition established in the Genocide Convention and was adopted with the support of virtually every state that represented at the Rome Conference.<sup>463</sup>

This was consistent with the Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, which in 1995 recommended that any court which might be established be given jurisdiction over the crime of genocide.<sup>464</sup> Some members of the Ad Hoc Committee unsuccessfully urged that the definition of genocide be expanded to include social and political groups.<sup>465</sup> The majority, however, believed that the existing definition reflected customary international law and already had been incorporated into the statutes of various states.<sup>466</sup> The adoption of a separate standard would lead to divergent doctrines and could create a conflict between the international tribunal and the World Court of Justice.<sup>467</sup> At any rate, social and political groups were protected within the concept of crimes against humanity.<sup>468</sup>

There also was a suggestion that a specific intent standard be adopted for high-level decision-makers and a general or implied intent test for the low-level perpetrators of genocide.<sup>469</sup>

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<sup>462</sup> *Id.*; Rome Statute of the International Criminal Court, 37 I.L.M. 999, 1004 (1998) [hereinafter Rome Statute].

<sup>463</sup> Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 30 (1999).

<sup>464</sup> *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, U.N.GAOR Ad Hoc Comm. on the Establishment of an Int'l Crim. Ct.*, 50th Sess., Supp. No. 22, at 12, U.N. Doc. A/50/22 (1995).

<sup>465</sup> *Id.*

<sup>466</sup> *Id.*

<sup>467</sup> *Id.*

<sup>468</sup> *Id.* at 12-13.

<sup>469</sup> *Id.* at 13.

In the end, the Statute of the International Criminal Court incorporated a system of complementarity.<sup>470</sup> The court is authorized to exercise jurisdiction with respect to genocide in those instances in which either the state in which the crime was committed or the state of which the accused is a national are parties to the statute and have accepted the jurisdiction of the tribunal.<sup>471</sup> A non-party state also may accept the court's jurisdiction.<sup>472</sup> Such jurisdiction may be exercised in those instances in which an investigation is initiated by the prosecutor<sup>473</sup> or referred to the prosecutor by a state party<sup>474</sup> or by the Security Council.<sup>475</sup>

A case is inadmissible in those instances in which it is being investigated or prosecuted by a state which has jurisdiction, unless the state is unwilling or genuinely unable to carry out the investigation or prosecution.<sup>476</sup> A case is also inadmissible in those instances in which the case is being investigated by a state that has jurisdiction and has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state to genuinely prosecute.<sup>477</sup> The court's jurisdiction is also precluded in those situations in which the accused has already been prosecuted<sup>478</sup> or the case is not of sufficient gravity to justify additional action.<sup>479</sup> The Security Council may request the prosecutor to postpone an investigation or prosecution.<sup>480</sup>

These procedures are so sufficiently complex that the court may spend more time adjudicating jurisdiction than justice.<sup>481</sup> Most importantly, in most instances in which a regime has

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470 Arsanjani, *supra* note 463, at 24.

471 Rome Statute, *supra* note 462, art. 12.

472 *Id.* art. 12(3).

473 *Id.* art. 13(c).

474 *Id.* art. 13(a).

475 *Id.* art. 13(b).

476 *Id.* art. 17(1)(a).

477 *Id.* art. 17(1)(b).

478 *Id.* art. 17(1)(c).

479 *Id.* art. 17(1)(d).

480 *Id.* art. 16.

481 *See id.* arts. 13, 15, 17–20, 53–61.

committed genocide, it is not likely to provide permission to the ICC to exercise jurisdiction, even in those cases in which it is a signatory to the statute.<sup>482</sup> Offenders may also seek asylum in sympathetic states.<sup>483</sup> Cases may only come before the court at the request of the Security Council in those limited cases in which it is able to achieve unanimity.<sup>484</sup> At any rate, as noted earlier, the court's jurisdiction is limited in every instance by the conditions of admissibility which are designed to defer to state sovereignty.<sup>485</sup> There also exists the issue of state cooperation in the surrender of offenders and preservation and transmittal of evidence.<sup>486</sup> Although the court may achieve long-term success and sophistication, in the short term, it likely will be slow and sporadic in bringing the perpetrators of genocide before the bar of justice.<sup>487</sup>

## VI. THE FUTURE OF GENOCIDE PROSECUTIONS

### A. *The Inadequacy of the Genocide Convention*

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide formally anointed the crime of genocide as an international delict and imposed obligations on states to prevent and punish this crime.<sup>488</sup> The Convention helped to elevate human rights to international concern. Following a lengthy hibernation, the Convention has been roused in reaction to the renewal of communal violence and genocide. However, a historical reprise indicates that the Convention has had virtually no obvious impact in impeding mass state-sponsored

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482 See *id.* art. 17 (implying that the ICC may still have authority to investigate if the sympathetic state is found to be unwilling to prosecute).

483 See *id.*

484 See *id.* art. 13(b). Because of the veto power of the permanent members of the Security Council, a "functional paralysis" occurs when member states disagree. Tadashi Mori, *Namibia Opinion Revisited: A Gap in the Current Arguments on the Power of the Security Council*, 4 ILSA J. INT'L & COMP. L. 121, 1997.

485 See *supra* notes 478–82 and accompanying text.

486 See Rome Statute, *supra* note 462, arts. 86–99.

487 See David Stoelting, *The Rome Treaty on the International Criminal Court*, 33 INT'L LAW. 613, 614–16 (1999) (discussing the tedious process necessary to maneuver among many nations to prosecute).

488 See *Genocide Convention*, *supra* note 26.

atrocities.<sup>489</sup>

Despite the Convention's singular significance, it has not been assimilated into the International Bill of Rights,<sup>490</sup> and no effort has been made to revise its provisions to insure a more effective enforcement regime. Genocide remains an international delict whose enforcement under the Convention is curiously vested in the state on whose territory the crime was committed.<sup>491</sup> It seems a state would typically have little interest in pursuing the perpetrators of such delicts. Is it conceivable that Nazi Germany would have extradited or meaningfully pursued the other principals and planners of the Holocaust? Successor regimes typically are too torpid and tenuous to conduct such prosecutions. Despite claims that genocide is a crime under customary international law that is subject to universal jurisdiction, the enforcement regime remains fractured and fragmentary.<sup>492</sup> This is unlikely to be solved by the creation of the new international criminal tribunal.

The Convention also remains inadequate in coverage. For instance, political and economic groups were omitted based on their fragility and fluidity.<sup>493</sup> The omission of cultural genocide is significant to the extent that the eradication of groups deprives the human family of an element of aesthetic expression. The deprivation of language, monuments, ritual and religion may as effectively eviscerate a group as does its extermination. In fact, the transfer of children—which is condemned in the Convention—appears to constitute more of a cultural than a biological attack on the integrity of a group.<sup>494</sup>

The Genocide Convention also suffers from a pervasive ambiguity. For example, what are the criteria for determining whether a group has been destroyed “in part”? Does the destruction of a single village constitute a sufficient part of a

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489 See *supra* Parts I(B) & (C) (consisting of a review of the development of the Genocide Convention and noting the numerous atrocities that have occurred since).

490 U.N. Action in the Field of Human Rights at 20, U.N. Doc. ST/HR/2, U.N. Sales No. E.74.XIV.2 (1974).

491 See *Genocide Convention*, *supra* note 26 art. 6.

492 See *supra* notes 113–31 and accompanying text.

493 See *supra* notes 65–71 and accompanying text.

494 See *id.*

group to satisfy this provision? What of the targeting of a particular professional or economic segment of a group? This is merely one example of the broad and ambiguous criteria for genocide under the Convention.<sup>495</sup>

The provision for the jurisdictional competence of the World Court of Justice in the Convention has had minimal significance. A number of states have issued reservations to this provision and there have been remarkably few petitions requesting the court to configure the confines of the Convention.<sup>496</sup>

### B. Genocidal Intent

The Genocide Convention establishes a strict standard of specific intent.<sup>497</sup> This enables regimes to claim that their acts were intended to combat a group that is not protected within the provisions of the Convention or to deny that their acts were inspired by a specific genocidal intent.<sup>498</sup>

The failure to protect a panoply of groups implicates the integrity of the Convention. It is not legally or logically persuasive to exclude severe, sustained and widespread violence from the universe of moral opprobrium merely because a specific intent to exterminate a protected group cannot be established or because such violence is purportedly, or actually, directed against a political, economic, or other excluded group? Was Stalin's extermination of economic groups and political dissidents clearly overshadowed by Hitler's racial repression? Should not Hitler's liability for genocide be extended to include his ruthless extermination of the aged and infirm? Categories typically overlap. Political violence often is animated by an underlying ethnic or racial animus. In the end, the essence of genocide is the denial of the singular uniqueness of individuals and their treatment as mere members of a collectivity that is targeted for extermination.<sup>499</sup>

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495 See *id.*

496 See Christopher C. Joyner, *The United States And Genocide Convention*, 27 INDIAN J. INT'L L. 411, 423-24 (1987).

497 See *Genocide Convention*, *supra* note 26, art. 2; see also *supra* notes 58-64 and accompanying text.

498 See *supra* notes 58-71 and accompanying text.

499 See Lawrence J. LeBlanc, *The United Nations Genocide Convention and*

Defining genocide as a crime of specific intent also results in mass violence resulting from a gross reckless disregard being excluded from the definition of genocide. At what point should sustained and wide-spread violence resulting from grossly negligent disregard, such as the carpet bombing of civilian areas, be categorized as genocide? The differentiation between ethnic cleansing and genocide also remains at times difficult to discern. Was the mass violence in the Balkans that was intended to terrorize a population and to drive inhabitants from their indigenous territory clearly distinguishable from genocide?<sup>500</sup>

### C. A Victimless Crime

Genocide is a collective crime. Any prosecution is inevitably incomplete, selective, unsatisfactory and symbolic. There is also a temptation to trade trials for internal stability. But, a failure to acknowledge and condemn genocide further dehumanizes the victims and continues the cycle of anger and resentment that initially ignited the process of extermination.<sup>501</sup>

Despite the severe suffering resulting from genocide, there has been a reluctance to charge governments and individuals with the commission of this crime. The conventional explanations center on problems of legal proof and political self-interest.<sup>502</sup>

There may be a deeper area of analysis. The Genocide Convention recognizes in the preamble that humanity has sustained great suffering as a result of genocide.<sup>503</sup> However, the Convention fails to provide for the prodigious procedures that

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*Political Groups: Should the United States Propose An Amendment?*, 13 YALE J. INT'L L. 268, 289 (1988).

<sup>500</sup> See *id.* at 289-90 (discussing the difficulty in interpreting and applying the intent element of the Genocide Convention).

<sup>501</sup> See Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 572 (1995).

<sup>502</sup> See Leo Kuper, *Theoretical Issues Relating to Genocide: Uses and Abuses*, in GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS 31, 36 (George J. Andreopoulos ed., 1994) (discussing that, because genocide is usually committed by governments and the United Nations is an association of governments, it can become difficult to prosecute if the government is a powerful member nation or the ally of a powerful member nation).

<sup>503</sup> See *Genocide Convention*, *supra* note 26.

would be required to prevent, punish, or deter this diabolical delict. It seems the Convention was drafted as a symbolic denunciation of the Nazi's depredations and atonement for the past rather than as an effort to eliminate future acts of genocide.<sup>504</sup> The Genocide Convention served to expiate the guilt of a global community who had remained largely indifferent to the plight of the victims of the Nazi horror. Its ineffectual, inert, and limited enforcement procedures have rendered it an antiquarian curiosity rather than an assertive affirmation of international interests.<sup>505</sup>

The identification of the Convention with the Nazi horrors has resulted in a close connection between the term genocide and the Holocaust. There is a reluctance to acknowledge that mass atrocities, which differ in scope, style and technique, merit this singular status. There is the unfortunate fact that to recognize the recurrence of genocide often is viewed as diminishing the distinctiveness of Jewish suffering.<sup>506</sup>

The singularity of Jewish suffering also is enhanced by the fact that various victim groups lack the organization, resources or popular pull to construct their suffering as genocide. Those groups that are recognized as having been targeted often remain reluctant to concede this status and to share the symbols of victimhood.<sup>507</sup> Unable to successfully capture the flag of genocide, victim groups retreat to the safety and security of less controversial and novel categories such as ethnic cleansing.<sup>508</sup>

In addition there is a reluctance of the international community to admit to genocide. This would be to concede that

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504 See FRANK CHALK & KURT JONASSOHN, *THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSES AND CASE STUDIES* 10–12 (1990); see also Lippman, *supra* note 459, at 24–25.

505 See Chalk, *supra* note 504 at 10–12.

506 See David E. Stannard, *Uniqueness as Denial: The Politics of Genocide Scholarship*, in *IS THE HOLOCAUST UNIQUE? PERSPECTIVES ON COMPARATIVE GENOCIDE* 163, 167 (Alan S. Rosenbaum ed., 1996).

507 See Steven T. Katz, *The Uniqueness of the Holocaust: The Historical Dimension*, in *IS THE HOLOCAUST UNIQUE? PERSPECTIVES ON COMPARATIVE GENOCIDE* 19, 19–20 (Alan S. Rosenbaum ed., 1996).

508 See ANDREW BELL-FIALKOFF, *ETHNIC CLEANSING* 1–2 (1996) (explaining the continuum of population cleansing events such as ethnic cleansing, reserving genocide to the Holocaust).

there are primordial forces that remain immune to the seductive allure of the ideology of liberal pluralistic democracy. It is to recognize that the basic equality of all individuals and peoples remain unrealized and calls into question the faith in human perfectibility and progress. Most threatening is the realization that the Holocaust is more than a mere memory; it is the expression of pernicious and perennial psychological processes which remain uncivilized and uncontained. These unsettling sentiments are allayed either by casting the claims of genocide aside or by portraying genocidal violence as the consequence of untamed tribal antagonisms and animosities.<sup>509</sup>

The emotive and powerful force of the term genocide also provides a moral imperative to act. A silent stance in the confrontation between victims and victimizers is an impossible psychological posture. Yet, we lack the resources, reserve and resolution to intervene to curtail every crisis. There are few issues as bedeviling as determining the threshold point at which inaction must give way to intervention. This very process confronts us with the crisis of conceding that there are limits to our compassion and concern and that some people are expendable.<sup>510</sup> The notion that the Western World makes a moral distinction between European and Third World genocide is particularly problematic.<sup>511</sup> Thus, we seek solace in the self-delusion that we are not witnessing genocide. Marshall Harris resigned from the United States Department of State in protest over the administration's ardent refusal to denounce Serbian atrocities in Bosnia as genocide.<sup>512</sup> Harris observed that "[t]o call

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509 See Katharine Q. Seelye, *Clinton Blames Milosevic, Not Fate, for Bloodshed*, N.Y. TIMES, May 14, 1999, at A12 (stating that President Clinton acknowledged that he was mistaken to have viewed ethnic conflict as the inevitable result of historical tensions).

510 See Joseph S. Nye, Jr., *Redefining the National Interest*, 78 FOREIGN AFF. 22, 31-32 (1999) (discussing how the United States should define its national interests in foreign policy in the post-Cold War era).

511 See *In the President's Words: 'We Act to Prevent a Wider War'*, N.Y. TIMES, Mar. 25, 1999, at A15.

512 Marshall Harris, *Introduction* to FRANCIS A. BOYLE, THE BOSNIAN PEOPLE CHARGE GENOCIDE PROCEEDINGS AT THE INTERNATIONAL COURT OF JUSTICE CONCERNING *BOSNIA V. SERBIA* ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE xi, xvii (1996).

it genocide would mean that there are victims, not 'warring factions' . . . it would mean that we have a moral imperative to prevent the genocide, if necessary by force. . . the administration was ever vigilant to diffuse pressure to act and an admission of genocide would have created one of the greatest pressures."<sup>513</sup> It also has been noted that during the initial bloody weeks in Rwanda "international leaders did not use the word 'genocide,' as if avoiding the term could eliminate the obligation to confront the crime."<sup>514</sup>

The reluctance to confront genocide extends to international organizations, which typically defer to the claims of sovereignty.<sup>515</sup> Frank Chalk and Kurt Jonassohn, after reviewing the evidence, note that the United Nations, "once a body that condemned the practice of genocide, is rapidly becoming one that condones it. Any hopes for the prevention of such killings in the future need to be placed elsewhere."<sup>516</sup> They note that this "collective denial" reflects the fact that the organization increasingly is comprised of states and their allies that have perpetrated genocide.<sup>517</sup> This inaction and delay can create devastating results. Genocide typically is the result of various ferocious forces that overpower the precarious pillars of social stability. One expert estimates that in Rwanda as many as 250,000 people were killed in the initial two weeks.<sup>518</sup>

The question to intervene often depends upon whether genocide can be substantiated. The debate over Serbia's conduct in Kosovo centered on the issue of whether the world was witnessing genocide. Professor William W. Hagen, in advocating a prudent policy in the Balkans, noted that the analogy between Serbian ethnic cleansing and the Nazi genocide was "misleading" and that such expulsions were characteristic of

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513 *Id.* at xix.

514 Allison Des Forges, *Leave None to Tell the Story*, in GENOCIDE IN RWANDA 595 (1999).

515 See Michael J. Glennon, *The New Interventionism*, 78 FOREIGN AFF. 2 (May/June 1999).

516 Chalk, *supra* note 504, at 12.

517 See *id.*

518 Alan J. Kuperman, *Rwanda in Retrospect*, 79 FOREIGN AFF. 94, 98 (Jan./Feb. 2000).

various countries in the region.<sup>519</sup> He conceded that the Serbian leadership certainly merited legal condemnation, but “diabolizing them serves no good strategic purpose.”<sup>520</sup> President Clinton also cautioned that ethnic cleansing in Kosovo was “not the same as the ethnic extermination of the Holocaust.”<sup>521</sup>

In summary, the Genocide Convention remains a symbolic denunciation of Nazi depredations. The reluctance to invoke the term has resulted in a Convention which punishes a crime that is rarely and reluctantly acknowledged: a crime without victims—a victimless crime in a world without perpetrators. David Rieff bemoans that, as a result of the centrality of the extermination of the Jews, “the Holocaust may have come not only to define the issue, but also to confuse it . . . . And in this way the Holocaust may be used to exonerate many crimes and many criminals.”<sup>522</sup>

#### *D. Genocide Trials*

Genocide trials create a conundrum. The prosecution of a single individual, such as Akeyasu, inevitably fails to capture the enormity of the crime. The defendant’s criminal conduct seems to pale in comparison to the immensity of the charge. Lower-level officials also typically fail to fulfill the ideological ferocity and fury that is expected of an engineer of extinction. The equitable question also arises whether such modest men should be brought to trial when the instigators, planners, and zealots typically are not subjected to criminal sanction.<sup>523</sup>

The genocide trials of political leaders, on the other hand, typically are used to document the full scope of atrocities. The individual defendant often disappears under an avalanche of evidence, and the question is presented whether such a savage series of atrocities can be credibly attributed to a single

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519 See William W. Hagen, *The Balkans’ Lethal Nationalisms*, 78 FOREIGN AFF. 53, 63 (1999).

520 *Id.* at 64.

521 Seelye, *supra* note 509 at A12.

522 David Rieff, *An Age of Genocide*, THE NEW REPUBLIC, January 29, 1996, at 35–36.

523 See MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS, FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 27–31 (1998).

individual. Others clearly carried out the commands and orchestrated the symphonies of slaughter. These trials often seem more like political primers and legal lessons than matters of judicial principle and procedure.<sup>524</sup>

It is startling to note that in the past fifty years only Eichmann,<sup>525</sup> the Rwandan defendants,<sup>526</sup> and a modest number of domestic defendants<sup>527</sup> have been convicted for genocide.<sup>528</sup> National leaders generally have escaped prosecution, and the crime has proven enormously difficult to sustain against lower-level officials and combatants. The special intent standard presents particular problems of proof unless a court is willing to draw inferences from circumstantial evidence.<sup>529</sup>

These trials provide psychic rewards but little meaningful recompense to the victims. The focus on the systematic suffering inflicted on a group detracts from the fact that genocide is a crime which terrorizes and inflicts damage on individual victims.<sup>530</sup> There is a temptation to credit the defense claim that the victims are to blame. This implicitly absolves those who stood still from responsibility, minimizes the venality of the crime, and provides reassurance that we live in a just world in which the bulk of individuals need not anticipate a similar fate.<sup>531</sup>

The evidentiary difficulty entailed in establishing the crime of genocide will likely be enhanced by the awareness of perpetrators that they now may confront international prosecution. In Kosovo, the Serbs went so far as to disinter the

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524 *See id.* at 35–37.

525 *See supra* text accompanying notes 208–32.

526 *See supra* text accompanying notes 341–85.

527 Alison Des Forges, *supra* note 514 at 755–60.

528 STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 41 (1997) (noting the significant obstacles that must be overcome to make a case of genocide).

529 *See id.* at 33–35.

530 *See* Diane F. Orentlicher, *Addressing Gross Human Rights Abuses: Punishment and Victim Compensation*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 425 (Louis Henkin & John Lawrence Hargrove eds. 1994) (expressing the fact that each individual should be assured legal redress for the violation of their human rights).

531 *See generally* AARON HASS, THE AFTERMATH 180, 193 (1995).

corpses of Kosovar Albanians which were then transported to mines and dumped into acid-filled smelting vats where they were burned.<sup>532</sup> Some individuals were buried alive in a mile-deep mine.<sup>533</sup> The perpetrators often were masked,<sup>534</sup> and crucial witnesses and those accused of war crimes were killed.<sup>535</sup> Even if the perpetrators of genocide were discovered, the issue of obtaining jurisdiction over them also continued to bedevil international tribunals.<sup>536</sup> Another issue concerns the inapplicability of the Convention to so-called auto-genocide: an attack by a regime, such as the Khmer Rouge, against its own ethnic group.<sup>537</sup>

### *E. Reconceptualizing Genocide*

In the same fashion that nuclear weapons threatened the integrity of the law of war, communal conflict and the resulting genocide and genocidal crimes present an unprecedented challenge to international criminal law.<sup>538</sup> The law of nations has been unable to curb, control, or to condemn this crime. There is ample reason to believe that the widening global gap between rich and poor will likely usher in a period of competition for political and economic resources that will heighten ethnic conflict. These disputes may then escalate into genocide.<sup>539</sup>

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532 Chris Hedges, *Acid and Smelting Vats evoke Fear of Grisly Burials by Serbs*, N.Y. TIMES, July 7, 1999, at A8.

533 *See id.*

534 David Rohde, *Where Neighbors Attacked Neighbors, Justice Is Far From Easy*, N.Y. TIMES, Jun. 23, 1999, at A12.

535 Steven Erlanger, *Political Motive Suspected in Killing of Serbian Warlord*, N.Y. TIMES, Jan. 17, 2000, at A3.

536 *See generally* Matthew Lippman, *The Pursuit Of Nazi War Criminals In The United States And In Other Anglo American Legal Systems*, 29 CAL. W. INT'L L. J.1, 100 (1998) (stating that Western democracies may be overwhelmed by the enormity of the genocide and the difficulty in arranging international cooperation in bringing the perpetrators before an international criminal court).

537 *See* RATNER & ABRAMS, *supra* note 528, at 243–47.

538 *See* Matthew Lippman, *Nuclear Weapons And International Law: Towards A Declaration On The Prevention And Punishment Of the Crime Of Nuclear Humancide*, 8 LOY. L.A. INT'L & COMP. L.J. 183, 220 (1986).

539 *See e.g.* ROBERT D. KAPLAN, *THE ENDS OF THE EARTH A JOURNEY AT THE DAWN OF THE 21ST CENTURY* 345–46 (1996) (observing in his travels the wide gap between economic classes and the resulting conflicts—for example, India being a net

Social science suggests that under certain conditions genocide is more likely; an insight that challenges our faith in the prophylactic capacity of law and legal institutions.<sup>540</sup>

The task is to construct a post-Rwandan and post-Bosnian jurisprudence that effectively addresses the crime of genocide. The alleviation of individual suffering rather than deference to state sovereignty and political self-interest must be the touchstone of this renewed commitment. The first step is to discuss the contours of a reformulated Genocide Convention. Equally important is an analysis of the types of governmental policies that prevent, as well as promote, the crime of genocide.<sup>541</sup>

The Genocide Convention and the Yugoslav War Crimes Tribunal resolution establish genocide as a discrete category of crime.<sup>542</sup> The international community's interest and indignation often appears to be reserved for the prevention and punishment of this delict. The decisions of the I.C.T.Y. have helped to conceptualize genocide as an aggravated form of the crime against humanity of persecution.<sup>543</sup> This comprehensive and contextual approach helps to highlight the distinctions and similarities between genocide and other international crimes. The I.C.T.Y. will hopefully contribute to the conceptualization of genocide as a point on the continuum of a comprehensive international criminal code and in this process will lend a compelling currency to charges of crimes against humanity.<sup>544</sup>

At the same time, the Genocide Convention could be broadened or a protocol adopted that encompasses political and other groups and expands the intent requirement.<sup>545</sup> Journalist

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exporter of food, yet having 270 million hungry people, enlivens a discussion of potential ethnic conflicts).

540 See HELEN FEIN, *GENOCIDE A SOCIOLOGICAL PERSPECTIVE* 32–50 (1993) (citing a psychological basis for the initiation of genocide).

541 See HUMAN RIGHTS WATCH, *SLAUGHTER AMONG NEIGHBORS: THE POLITICAL ORIGINS OF COMMUNAL VIOLENCE* 9–12 (1995).

542 See *supra* notes 248–52 and accompanying text.

543 See *supra* notes 271–99 and accompanying text.

544 See *supra* notes 256–99 and accompanying text.

545 See generally, Matthew Lippman, *Government Sponsored Summary And Arbitrary Executions*, 4 *FLA. J. INT'L L.* 401 (1989); Eric Lane, *Mass Killings By Governments: Lawful In The World Legal Order*, 12 *N.Y.U.J. INT'L L. & POL.* 239, 259

David Rieff writes that “strictness of definition can have the same unfortunate effect as sloppiness of definition. Our sense of genocide must be as flexible and as inventive as the human capacity for evil.”<sup>546</sup> The question arises whether the expansion of the groups protected would dilute the term genocide and create an unjustifiable equivalency between racial and political violence. The same aspiration may be achieved by punishing unjustifiable mass murder regardless of whether the perpetrator harbored an intent to exterminate a group. Is there a persuasive philosophical rationale for protecting groups rather than individuals? Would broadening the intent requirement to encompass grossly negligent acts undermine the significance of genocide?<sup>547</sup> David Rieff observes that the term genocide was

a moral and intellectual short-hand, a necessary but futile attempt to master evil by describing it. If the word itself has become a kind of mystification, a way of forcing the bitterest of human experiences into hierarchies of suffering that no longer make much moral or practical sense, then there is no reason to cling to it.<sup>548</sup>

## VII. CONCLUSION

In 1948, the United Nations adopted the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>549</sup> Despite various reform proposals, the Convention continues to retain its limiting characteristics.<sup>550</sup> The I.C.J. interpreted the provision on reservations under the Convention to encourage its widespread adherence.<sup>551</sup>

The *Eichmann* case was the first major post-war genocide prosecution and the judgment recognized universal jurisdiction

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(1979) (giving an example of the broad range of groups the Convention could cover).

546 See Rieff, *supra* note 522, at 36.

547 See ALAIN DESTEXHE, RWANDA AND GENOCIDE IN THE TWENTIETH CENTURY 6–14 (1994) (emphasizing the importance of maintaining the integrity of the term “genocide”).

548 See Rieff, *supra* note 522, at 36.

549 See *supra* note 405 and accompanying text.

550 See *supra* notes 153–88 and accompanying text.

551 See *supra* notes 189–207 and accompanying text.

over the crime. The legal controversy surrounding the case illustrated the difficulty of gaining jurisdiction over the perpetrators of genocide.<sup>552</sup>

The Yugoslav<sup>553</sup> and Rwandan<sup>554</sup> criminal tribunals clarified the legal nature and scope of genocide.<sup>555</sup> The I.C.J., however, has issued a series of less than vigorous decisions interpreting and applying the Genocide Convention.<sup>556</sup> British courts did clarify that high-level political officials are subject to prosecution for genocide and other severe international crimes.<sup>557</sup> The newly established international criminal court has established genocide as a core component of its jurisdictional responsibility. However, the court's convoluted procedures may mitigate the court's impact.<sup>558</sup>

The history of international law in the twentieth century to a large extent parallels the evolution of the crime of genocide. Despite the intricate and involved development of this crime, the issue remains whether the crime of genocide is of greater symbolic than substantive import. Thus, the question remains whether genocide will be the crime of the next century.<sup>559</sup>

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552 See *supra* notes 208–32 and accompanying text.

553 See *supra* notes 247–340 and accompanying text.

554 See *supra* notes 341–85 and accompanying text.

555 See *supra* notes 300–29 and accompanying text.

556 See *supra* notes 386–428 and accompanying text.

557 See *supra* notes 429–69 and accompanying text.

558 See *supra* notes 470–82 and accompanying text.

559 See Barry M. Schiller, *Life in a Symbolic Universe: Comments on the Genocide Convention and International Law*, 9 SOUTHWESTERN L. REV. 47 (1977) (indicating that the Convention may represent a “potential vehicle for the intensification of spurious political rhetoric” and that this may create a diversion from acts of racism and discrimination creating an atmosphere in which genocide may become a reality).