human rights, because these freedoms are delicate and vulnerable, as well as supremely precious in our society, and the threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Justice Makasiar held that for there to be a constitutional or valid infringement of human rights, there is a more stringent criterion, that is, the existence of a grave and immediate danger of a substantive evil which the State has the right to prevent. This grave and immediate danger that we find in our time is that of kidnapping. Having found the common denominator that underpins government action –upholding the freedom from fear – it remains to be seen where the equilibrium point lies, between the values of living our lives free from anxiety and that of exercising the rights that make life human.

On Bloodshed, National Healing and the Rule of Law: The Genocide Convention and its Progress, Problems and Prospects*

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I. INTRODUCTION: WHEN DOES THE VIOLENCE STOP?

For a great majority, the horrors of the Second World War – the camps, the cruelty, the extermination, the Holocaust – were a nightmare yearning to be to buried in the darkest recesses of human history. As Justice Robert Jackson in his opening statement at Nuremberg put it, "the wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating that civilization cannot tolerate their being ignored because it cannot survive their being repeated."[1]

Regrettably, the reality of it all is that they *did* happen *again*. The Nazi aberration is not an isolated event. The German massacre of Hereros in

1. 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 98-99 (1947).

1904,[2] the Ottoman massacre of Armenians in 1915-1916,[3] the Ukrainian pogrom of Jews in 1919,[4] the Tutsi massacre of Hutu in Burundi in 1965 and 1972,[5] the Paraguayan massacre of Ache Indians prior to 1974,[6] the Khmer Rouge massacre in Kampuchea between 1975 and 1978,[7] and the

2. General von Trotha issued an extermination order; water-holes were poisoned and the African peace emissaries were shot. In all, three quarters of the Herero Africans were killed by the Germans then colonizing present-day Namibia, and the Hereros were reduced from 80,000 to some 15,000 starving refugees. *See* P. FRAENK, THE NAMIBIANS (1985).

3. At least 1 million, and possibly well over half of the Armenian population, are reliably estimated to have been killed or death marched. This is corroborated by reports in United States, German and British archives and of contemporary diplomats in the Ottoman Empire, including those of its ally Germany. The German Ambassador, Wangenheim, for example, on July 7, 1915 wrote "the government is indeed pursuing its goal of exterminating the Armenian race in the Ottoman Empire." Though the successor Turkish Government helped to institute trials of a few of those responsible for the massacres at which they were found guilty, the present official Turkish contention is that genocide did not take place although there were many casualties and dispersals in the fighting, and that all the evidence to the contrary is forged. *See generally*, V. BRYCE AND A. TOYNBEE, THE TREATMENT OF ARMENIANS IN THE OTTOMAN EMPIRE 1915-16 (1916); R.G. HOVANISSIAN, ARMENIA ON THE ROAD TO INDEPENDENCE (1967); B. SIMSIR ET AL., ARMENIANS IN THE OTTOMAN EMPIRE (Istanbul, Bogazici University Press, 1984); T. ATAOV, A BRIEF GLANCE AT THE "ARMENIAN QUESTION" (1984); V. GOEKJIAN, THE TURKS BEFORE THE COURT OF HISTORY (1984).

4. Between 100,000 - 250,000 Jews were killed in 2,000 pogroms by Whites, Cossacks and Ukrainian nationalists. Z. KATZ, HANDBOOK OF MAJOR SOVIET NATIONALITIES 362 (1975). *See generally*, A. SACHAR, A HISTORY OF THE JEWS (1967).

5. The Tutsi minority government first liquidated the Hutu leadership in 1965, and then slaughtered between 100,000 and 300,000 Hutu in 1972. *See* R. LEMARCHAND, SELECTIVE GENOCIDE IN BURUNDI (1974); L. KUPER, THE PITY OF IT ALL (1977).

6. In 1974, the International League for the Rights of Man together with the Inter-American Association for Democracy and Freedom, charging the Government of Paraguay with complicity in genocide against the Ache (Guayaki Indians), alleged that the latter had been enslaved, tortured and massacred; that food and medicine had been denied them; and their children removed and sold. *See* N. LEWIS ET AL., GENOCIDE IN PARAGUAY (R. Arens ed., 1976).

7. It is estimated that at least 2 million people were killed by Pol Pot's Khmer Rouge government of Democratic Kampuchea, out of a total population of 7 million. Even under the most restricted definition, this constituted genocide, since the victims included target groups such as the Chams (an Islamic minority) and the Buddhist monks. *See* F. PONCHAUD, CAMBODIA YEAR ZERO (1978);

contemporary Iranian killings of Baha'is[8] are just some of the instances of human violence and bloodshed, other than Rwanda and Bosnia and Herzegovina, deemed qualified to be genocide under contemporary international law.

Whether fueled by nationalism,[9] communism,[10] or totalitarianism,[11] the considerable costs for the pursuit of these different callings were high, sacrificing, sometimes to the point of annihilation, substantial portions of various ethnic, racial and religious groups in the process. Despite the emergence of the concept of the inherent dignity of man, as well as the genesis of the rule of law in the international community, atrocities have seldom been alleviated but rather unleashed, threatening to further fracture and splinter the territorial integrity of many States.[12]

Indeed, our time has shown us that man's capacity for evil knows no limits. Genocide –the destruction of an entire people on the basis of ethnic or national origins – is now a word of our time. The only distinguishing characteristics of the twentieth century in evolving the development of genocide "are that it is committed in cold blood by the deliberate fiat of holders of despotic political power, and that the perpetrators of genocide employ all the resources of present-day technology and organization to make their planned massacres systematic and complete."[13] Genocide thereby calls for nothing but a historic response,[14] if only to usher in a new age of bloodless politicking and societal building.

W. SHAWCROSS, SIDESHOW; KISSINGER, NIXON AND THE DESTRUCTION OF CAMBODIA (1979); D. HAWK, THE CAMBODIA DOCUMENTATION COMMISSION (1983); L. KUPER, INTERNATIONAL ACTION AGAINST GENOCIDE (1984).

8. *See* R. COOPER, THE BAHA'IS OF IRAN (1985).

9. *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").

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

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

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

13. ARNOLD TOYNEE, EXPERIENCES (1969).

14. Secretary-General Kofi Annan, Advocating for an International Criminal Court, Opening Remarks Before the Int'l Bar Ass'n (June 11, 1997), *in* 21 FORDHAM INT'L L.J. 363, 364-65 (1997).

II. THE LEGAL UNDERPINNINGS OF GENOCIDE

A. The Early Notions of Genocide

Winston Churchill had once described genocide as a crime without a name. By the time of the Nazi prosecution, this was still the case as the French prosecutor could only refer to it as "a crime so monstrous, so undreamt of in history throughout the Christian era up to the birth of Hitlerism."

It was Polish scholar and jurist Raphael Lemkin who first used genocide, as a term, in 1944[15] to describe the Nazi atrocities committed against the Jews during the Holocaust.[16] Lemkin himself, who was of Jewish descent, fled Poland during the height of the Nazi invasion.[17] He later published a comprehensive study on the cruel and inhumane practices of the Axis Powers during the Second World War.

The term genocide is a combination of two words, the Greek word *genos*, meaning race or tribe, and the Latin word *cide*, referring to killing.[18] According to Lemkin, the term characterized the two-phase process of genocide which involves the destruction of the national pattern of the oppressed group and the imposition of the national pattern of the oppressor.[19] Simply put, genocide is the slaughtering of individuals belonging to a distinct ethnic or racial group solely because they are members of that particular group.[20]

Genocide, however, is not a novel phenomenon. It is actually "a modern word for an old crime."[21] The commission of genocidal violence against particular groups in a massive and large scale dates back to the days of

15. *See* RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE (1944). [hereinafter LEMKIN, AXIS RULE]

16. Sonali Shah, *The Oversight of the Last Great International Institution of the Twentieth Century: The International Criminal Court's Definition of Genocide*, 16 EMORY INT'L L. REV. 353 (2001) [hereinafter Shah].

17. David Nersessian, *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunal*, 37 TEXAS INT'L L. J. 246 (2002) [hereinafter Nersessian].

18. LEMKIN AXIS RULE, *supra* note 15, at 79; *See* HELEN FEIN, GENOCIDE: A SOCIOLOGICAL PERSPECTIVE 10 (1993).

19. Shah, *supra* note 16, at 354.

20. Ameer Gopalani, *The International Standard of Direct and Public Incitement to Commit Genocide: An Obstacle to U.S. Ratification of the International Criminal Court Statute?*, 32 CAL. W. INT'L L. J. 91 (2001) [hereinafter Gopalani].

21. Beth Van Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L.J. 2262 (1997); Nersessian, *supra* note 17, at 247.

the Romans. As early as 146 B.C., the Romans had caused the ravages against Carthage and its citizens.[22] Genghis Khan and Tamerlane later gained notoriety for the wholesale massacres that occurred in the wars they waged.[23] In the twentieth century, Germany massacred tribal Hereros in Southwest Africa in 1904.[24] The Young Turks of the disintegrating Ottoman Empire likewise committed the same against Turkish Armenians in 1915.[25]

There were, however, no known prosecution and punishment for these atrocious acts in history. Until the end of the Second World War, little or nothing was done to prevent or punish genocide on an international level.[26] Treaty or conventional law merely protected the population in warring States, but nothing more. The Martens Clause[27] of the 1907 Hague Convention[28] provides that inhabitants and belligerents remain under the protection and the rule of the principles of the laws of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience.[29] This nevertheless merely

22. *See* Frank Chalk & Kurt Jonassohn, *The History and Sociology of Genocidal Killings*, *in* GENOCIDE: A CRITICAL BIBLIOGRAPHIC REVIEW 39, 42 (Israel W. Charney ed., 1988).

23. LEMKIN AXIS RULE, *supra* note 15, at 80 n. 3.

24. *See* BARBARA HARFF, GENOCIDE AND HUMAN RIGHTS: INTERNATIONAL LEGAL AND POLITICAL ISSUES 3 (1984).

25. *Id.*

25. Gopalani, *supra* note 20, at 246.

26. *Id.* at 91.

27. The Martens Clause reads:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

28. 1899 Hague Convention for the Pacific Settlement of International Dispute, U.K.T.S. 9 (1901); 1907 Hague Convention for the Pacific Settlement of International Dispute, U.K.T.S. 6 (1971).

29. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 3 MARTENS NOUVEU RECUEI 461, 36 STAT. 2277, *reprinted* in 2 AM. J. INT'L L. 90 (Supp. 1908).

served as recognition of principles of humanity that need to be observed in order to protect individuals against the abuses of States.[30]

In 1919, as an epilogue to the First World War, the Preliminary Peace Conference at Verailles established the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties to prosecute those who had engaged in barbarous or illegitimate methods in violation of the established customs of war and elementary laws of humanity.[31] Unfortunately though, the international consensus to hold responsible those who committed atrocities in the war was never concretely manifested as only nine trials were conducted involving mostly low-level military personnel.[32]

International efforts to codify the crime of genocide in a convention began in 1933 when Lemkin sought to introduce a proposal to criminalize the destruction of religious, racial, and social groups at the International Conference for the Unification of Criminal Law.[33] Unfortunately, his proposal was rejected. Had this been accepted, the Nazis would have then been subjected to prosecution for crimes against humanity committed prior to September 1939.[34]

B. *Hitler's Final Solutions and its Legal Repercussions*

The unveiling of the Nazi concentration camps revealed the horrific full scope of the Nazi Final Solution. The challenge of understanding and explaining the enormity of the Holocaust begins with a look at the prosecution of the Nazi criminals.

In October 1943, after the conclusion of the Moscow Conference, President Franklin Roosevelt, Prime Minister Winston Churchill, and Premier Joseph Stalin breathed new life to the proposal when it issued the Declaration on German Atrocities[35] warning that Axis forces would be sent

30. Matthew Lippman, *Genocide*, *in* M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW 589 (M.C. Bassiouni ed., 2d. 1999) [hereinafter BASSIOUNI, INTERNATIONAL CRIMINAL LAW].

31. Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, 14 AM J. INT'L L. 95,115 (1970).

32. BASSIOUNI, INTERNATIONAL CRIMINAL LAW, *supra* note 30, at 589.

33. Raphael Lemkin, *Genocide as a Crime under International Law*, 41 AM. J. INT'L L. 145, 146 (1947).

34. *See* 41 JOURNAL OF THE UNITED NATIONS SUPP. (No. 6) 52, U.N. Doc. A/C.6/84 (1986).

35. Declaration of Four Nations on General Security, Oct. 30, 1943, U.S.-U.K.-U.S.S.R.-P.R.C., 9 DEP'T ST. BULL, Nov. 1943, at 307, 308-11.

back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of the liberated countries.[36] The London Agreement[37] was concluded on August 8, 1945 crystallizing the provisions of the Moscow Conference. This Agreement gave birth to the Nuremberg Charter and the International Military Tribunal (IMT).[38] More importantly, the London Agreement facilitated the return of war criminals to the *situs* of their crimes for trial and punishment under domestic law.[39] Aside from providing for the punishment of those who had committed crimes against peace and war crimes as a result of the Second World War,[40] the IMT's mandate also included a provision to address Nazi abuses of civilians under the concept of crimes against humanity.[41]

Genocide per se was not included in the Tribunal's Charter;[42] hence, during the drafting of the Nuremberg trial indictments, genocide was not perceived as a distinct international crime. But this was not to decriminalize such atrocious violence. Those directly responsible for and engaged in the execution of the Holocaust were indicted to stand trial on charges of crimes against the peace, war crimes, crimes against humanity, and a common plan or conspiracy to commit these former crimes.[43] While genocide was mentioned in the indictment, it was only as a distinct manifestation of war crimes[44] and crimes against humanity.[45] Nonetheless, the famous indictment[46] of October 8, 1945 against the major Nazi war criminals was

36. Nersessian, *supra* note 17, at 248 .

37. Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic, and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1944, 82 U.N.T.S. 280 [hereinafter London Agreement].

38. Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 284.

39. London Agreement, pmbl., arts. 4 & 6.

40. Nuremberg Charter, arts. 6(a)-(b).

41. *Id.* at arts. 6(c).

42. Nersessian, *supra* note 17, at 249.

43. 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 45-6 (1947) [hereinafter Nuremberg Indictment].

44. *Id.*

45. *Id.*

46. *See id.* The indictment read:

> deliberate and systemic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups.

the first international document to refer to genocide as a crime. Allegations of genocide also appeared in the closing arguments of the Nuremberg prosecutors.[47]

Based on their charges in the indictment, the Nazi war criminals were convicted of crimes against humanity, war crimes, and crimes against peace[48] alongside with the declaration of the Nazi Party as a criminal organization.[49] As expected, the IMT did not, however, convict any defendant directly on the genocide charge.[50] This was perceived as a jurisdictional defect in the Tribunal's mandate[51] caused by delimiting its jurisdiction over crimes against humanity solely to acts that took place after World War II began when Germany invaded Poland in September 1939.[52]

Pursuant to Allied Control Council Law No. 10 (C.C.10),[53] which became effective in December 1945, additional trials of Nazi war criminals occurred. It authorized trials in French, British, Russian and American

47. 19 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 497 (1948). The following was the final statement of British Prosecutor Sir Hartley Shawcross:

> Genocide was not restricted to extermination of the Jewish people or of the Gypsies. It was applied in different forms to Yugoslavia, to the non-German inhabitants of Alsace-Lorraine, to the people of the Low Countries and of Norway. The technique varied from nation to nation, from people to people. The long-term aim was the same in all cases.

Id. at 531. The Chief Prosecutor for the French Republic M. Auguste Champetier De Ribes uttered the following remarks:

> [The defendants engaged in] the scientific and systematic extermination of millions of human beings and more especially of certain national or religious groups whose existence hampered the hegemony of the German race. This is a crime so monstrous, so undreamt of in history . . . that the term "genocide" has had to be coined to define it and an accumulation of documents and testimonies has been needed to make it credible.

48. *See* Trial of the Major War Criminals before the International Military Tribunal—Judgment (Int'l Mil. Trib., Nuremberg, 1947), *reprinted in* 22 THE NUREMBERG TRIALS (1950) [hereinafter Nuremberg Judgment].

49. BASSIOUNI, INTERNATIONAL CRIMINAL LAW, *supra* note 30, at 127.

50. *Id.*

51. *See, e.g.*, DAVID LUBAN, LEGAL SCHOLARSHIP 343 (1994).

52. Nuremberg Judgment, *supra* note 48, at 254.

53. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and Crimes against Humanity, Dec. 20, 1945, *reprinted in* Official Gazette of the Control Council for Germany 50 (1945-1948).

tribunals[54] while Poland conducted trials under the Polish Supreme National Tribunal.[55] Although C.C.10 made no mention of the crime of genocide, some of the earliest convictions for the crime took place pursuant to its provisions.[56] C. C. 10 convicted its defendants of genocide, not as a distinct crime, but again as a crime against humanity.[57] The Justice Case[58] involved the prosecution of former Nazi lawyers and public officials for their abuses of the German legal system. The trials focused in particular upon Germany's decree, which required the death penalty for even relatively minor offenses by foreign nationals.[59] Trial for such offenses could take place in occupied territories only if the death penalty would be passed and carried out immediately; otherwise, the defendants were returned to Germany for trial.[60] Defendants were denied even the most fundamental due process rights, including the right to present evidence, to confront charges, and to prepare a defense.[61] Thousands of prisoners – including some who were acquitted locally – were deported to Germany for trial and subsequently executed or sent to concentration camps.[62]

Two genocide convictions arose from the proceedings in the Justice Case as examples of crimes against humanity. The Court labeled genocide "the prime illustration of a crime against humanity under C.C. Law 10."[63] The Court held that "[w]hether the crime against humanity [genocide] is the product of statute or of common international law, or, as we believe, of both, we find no injustice to persons tried for such crimes."[64] Defendant Lautz, former Chief Prosecutor in Berlin, participated in the Nazi plan to exterminate the Polish and Jewish races through the perversion of the law of

54. Nersessian, *supra* note 17, at 251.

55. *Id.* at 252.

56. C.C.10 arguably provided a broader mandate than the Nuremberg Charter, defining crimes against humanity as: atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, and other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

57. Case No. 35, Trial of Josef Alstotter and Others, 6 L. REP TRIALS WAR CRIMS., 1, 74-6 (1949) [hereinafter Justice Case]; Case No. 73, Trial of Ulrich Greifelt and Others, 8 L. REP TRIALS WAR CRIMS., 1 (1949) [hereinafter Greifelt].

58. Justice Case, *supra* note 57, at 1.

59. *Id.* at 8-9.

60. *Id.*

61. *Id.* at 9.

62. *Id.*

63. *Id.* at 48.

64. *Id.*

high treason. As such, "he was an accessory to and took a consenting part in the crime of genocide."[65] Defendant Rothaug, a former judge and prosecutor, likewise was found guilty of having "participated in the crime of genocide."[66]

In the second genocide case, Ulrich Greifelt and his companions carried out the Nazi race policy in occupied territories.[67] The defendants were all officials in Nazi organizations who implemented Reich decrees against Jews and other racial and ethnic groups in order to "safeguard the supposed superiority of 'Nordic' blood."[68] Their crimes included kidnapping children of "racial value" for "Germanization," requiring abortions, preventing marriage and reproduction, and systematically exterminating so-called "undesirable" racial elements.[69] The defendants were accused of crimes against humanity for their "systematic programme of genocide" aimed at the "destruction of foreign nations and ethnic groups."[70]

In its first session in 1946, the United Nations General Assembly proclaimed in a resolution that the crime of genocide is "a denial of the right to existence of entire human groups" and noted that such denial "shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and the spirit and aims of the United Nations."[71] This document has therefore explicitly affirmed that genocide is a crime under international law, which the civilized world condemns.[72] It further stated that principals and accomplices to genocide, without exception, must be punished.[73] This same resolution requested the Economic and Social Council to create a draft convention on the crime of genocide.[74]

The UN Secretary-General and the *Ad Hoc* Committee of the Economic and Social Council of the General Assembly prepared the first drafts.[75] It is interesting to note that at this point of history, the Soviet

65. *Id.* at 75.

66. *Id.* at 83 n. 3.

67. Greifelt, *supra* note 57, at 1.

68. *Id.* at 3-6.

69. *Id.* at 3.

70. *Id.*

71. 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).

72. *Id.* at 189.

73. *Id.*

74. BASSIOUNI, INTERNATIONAL CRIMINAL LAW, *supra* note 30, at 595.

75. *Id.* at 595; Gopalani, *supra* note 20, at 91.

Union, led by Stalin, was purging political groups.[76] As such, the Soviet Union, as well as the United States, were opposed to provisions that might be used to criticize or condemn their own acts.[77] The Sixth Committee then examined and amended the drafts and referred the Convention to the General Assembly for adoption.[78] 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.[79] 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."[80] This had resulted in the recognition of the "fundamental right of a human group to exist as a group."[81] Most significantly, the protection of this right would be the responsibility of the United Nations rather than individual States.[82] This convention had finally provided the basis for the emergence of a norm of customary international law, with the force of jus cogens, which renders genocide punishable. By the end of the millenium, a total of 127 States, including the United States, had ratified the Genocide Convention.[83]

In 1951, the International Court of Justice (I..C.J.) addressed the legal limitations on reservations to the Genocide Convention.[84] The Court noted that the Convention was manifestly adopted for a purely humanitarian and civilizing purpose,[85] which was "to safeguard the very existence of certain human groups" and "to confirm and endorse the most elementary principles of morality."[86] The object and purpose of the Genocide Convention implied that it was the intention of the General Assembly and of the adopting States that as many States as possible should participate.[87] Thus, the Court opined

76. Shah, *supra* note 16, at 355.

77. *Id.* at 355.

78. Gopalani, *supra* note 20, at 91.

79. 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].

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

81. *Id.*

82. *Id.*

83. Shah, *supra* note 16, at 355.

84. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 21 (May 28).

85. *Id.* at 23.

86. *Id.*

87. *Id.*

that "the complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis."[88]

C. The Prosecution of Adolf Eichmann

Adolf 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.[89] He served as the Head of the Jewish Affairs in the Gestapo and was responsible for the evacuation, internment, and extermination of the Jews.[90] The Court argued that it was well-established that genocide was a crime under both customary and conventional international law[91] 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.[92] 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.[93]

The District Court ruled that genocide was the "gravest type of a crime against humanity"[94] that was intended to "exterminate the nation as a group."[95] This intent, when combined with an attack against an entire group, in whole or in part, distinguished genocide from murder.[96]

88. *Id.*

89. 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].

90. *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).

91. *Eichmann Case*, *supra* note 89, at 34-35.

92. *See Id.* at 35-36.

93. *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.

94. *Id.* at 41.

95. *Id.* at 57.

96. *See id.* at 233.

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."[97]

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.[98] He was sentenced to death and subsequently executed.[99]

In summary, the *Eichmann Case* was the first major postwar genocide prosecution. The Israeli prosecution was impeded by the jurisdictional constraints of the Genocide Convention.[100] The judiciary circumvented the contours of the Convention by differentiating between the customary and conventional law of genocide.[101] According to the Israeli Court, 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. 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.[102]

D. The Rebirth of Genocide: The Experiences of Rwanda and Yugoslavia

In an effort to what the United Nations (U.N.) Security Council perceived to be as a threat to international peace and security,[103] two *ad hoc* international criminal tribunals were established to prosecute and punish those who are alleged have committed crimes *jure gentium*. The International Criminal Tribunal for the Former Yugoslavia (ICTY)[104] was a response to

97. *Id.* at 54.

98. *See id.* at 304.

99. *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").

100. *See id.*

101. *See id.*

102. *Id.* at 53.

103. U.N. CHARTER, ch. VII (discussing the powers of the U.N. Security Council as regards the determination of breaches to international peace and security).

104. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. S/25704, Annex (1993) [hereinafter Yugoslavia Charter].

the massive killings that occurred in the Balkans in the early 1990s[105] stemming from centuries of ethnic and religious bickerings.[106] Meanwhile, the widespread attention that the mass exterminations of Tutsis and moderate Hutus evoked[107] led to the establishment of another similar tribunal for Rwanda.[108]

In 1996, the ICTY issued its most comprehensive discussion of the legal contours of genocide.[109] In this judgment, the judges affirmed that there were reasonable grounds to confirm the indictment for war crimes, crimes against humanity, and genocide, against Karadzic, political leader of the Bosnian Serbs, and Mladic, commander of the Serbian armed forces.[110] 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.[111]

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,[112] without any attention paid to the number ultimately killed.[113] A range of acts included in the indictment were genocidal in nature.[114] These included acts of mass murder,[115] inhumane

105. *See* MASS KILLING AND GENOCIDE IN CROATIA 1991-92: A BOOK OF EVIDENCE (Ivan Kostovic and Milos Judas eds., 1992); Philip J. Cohen, The Complicity of Serbian Intellectuals in Genocide in the 1990's, *in* THIS TIME WE KNEW: WESTERN RESPONSES TO GENOCIDE IN BOSNIA 46 (Thomas Cushman & Stjepan G. Mestrovic eds., 1996) (retelling the atrocious acts committed in the ethnic cleansing in the Balkans).

106. RICHARD HOLBROOKE, TO END A WAR 22 (1998) (many had believed that the ethnic cleansing was a result of "ancient hostilities").

107. *See* ALISON DES FORGES, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA (1999) (accounting the genocidal violence in Rwanda).

108. International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994, S.C. Res. 955, Annex, UN SCOR, 49th Sess., UN Doc. S/INF/50 (1994) [hereinafter Rwanda Charter].

109. 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).

110. *Id.* at 86-88.

111. *Id.* at 92.

112. *Id.* at 133-34.

113. *Id.*

114. *Id.* at 134-35

treatment, torture, rape and deportation of civilians,[116] and the deliberate infliction of substandard living conditions.[117] The central issue in determining whether these two Serb leaders had been responsible for genocide was genocidal intent.[118] The Trial Chamber noted that 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.[119] The Trial Chamber ultimately concluded that various acts in the indictment likely could have been planned or ordered with a genocidal intent.[120] 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.[121]

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.[122] This may be established circumstantially and need not require independent proof.[123] The Tribunal also 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.[124] The determination as to whether individuals belong to a coherent collectivity is a subjective standard that is based on the perception of the perpetrators.[125] 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.[126] The tribunal also made a significant

115. *Id.* at 133-34.

116. *Id.* at 134-35.

117. *Id.* at 134.

118. *Id.*

119. *Id.*

120. *Id.* at 135.

121. *Id.*

122. Prosecutor v. Kupreskic, IT-95-16-T ¶ 751 (2000), *available at* http://www.un.org/icty/kupresic/trialc2/judgement/index.htm (last visited March 4, 2004).

123. *Prosecutor v. Karadzic*, 108 I.L.R. at 134-35.

124. *Prosecutor v. Kupreskic*, IT-95-16-T para. 614.

125. *See* Prosecutor v. Goran Jelisic, IT-95-10 ¶ 70 (1999), available at http://www.un.org/icty/brcko/trialc1/judgement/jel-tj991214e.htm (last visited March 4, 2004).

126. *See id.* ¶ 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).

conceptual contribution by noting that the material aspect of genocide may be measured in quantitative or selective terms.[127]

The central component of genocide is specific intent.[128] The decisions of the Yugoslav Tribunal indicate that this is difficult to discern and, absent a clear factual pattern, the tribunal has been reluctant to issue such a pronouncement.[129] 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"[130] and the forcible expulsion of 740,000 individuals[131] by forces of the Federal Republic of Yugoslavia in 1999 resulted in an indictment for crimes against humanity and war crimes rather than genocide.[132]

Fifty years after the adoption of the Genocide Convention, the Rwanda Tribunal, in the case of *Prosecutor v. Akayesu*,[133] rendered the first *conviction* ever for acts of genocide. Akayesu is the first international war criminal to have also been *tried* for the crime of genocide.[134] He was adjudged guilty of one count each of genocide and incitement to commit genocide and seven crimes against humanity.[135]

127. *See id.* ¶¶ 81-83.

128. *Prosecutor v. Karadzic*, 108 I.L.R. at 134.

129. *Prosecutor v. Kupreskic*, IT-95-16-T ¶¶ 636, 751.

130. *See* Prosecutor v. Milosevic, IT-99-37 ¶ 98 (Int'l Crim. Trib. for the Former Yugoslavia 1999) available at http://www.un.org/cty/indictment/english/milii990524e.htm (last visited March 4, 2004).

131. *See id.* ¶ 97.

132. *Id.* ¶ 100.

133. Prosecutor v. Akayesu, ICTR-96-4-T, (Int'l Crim. Trib. for Rwanda 1998) available at http://www.ictr.org/ENGLISH/cases/Akayesu/judgment/akayo01.htm (last visited March 4, 2004).

134. Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwanda Tribunals: Current Status*, 93 AM. J. INT'L L. 97, 105 (1999).

135. Mariann Meier Wang, *The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact*, 27 COLUM. HUM. RTS. L. REV. 177, 195 (1995).

Akayesu received three life sentences plus 80 years in prison; he has appealed. Ann M. Simmons, *Prosecutor's Convictions Spans the World Law*, L.A. TIMES, Oct. 3, 1998, at A1.

Akayesu, mayor of Taba, was responsible for maintaining order in the commune and possessed authority over the police.[136] 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.[137] 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.[138] He ordered executions,[139] watched as the victims were killed using various traditional weapons, including machetes and axes,[140] and addressed a public meeting and called on the population to unite in order to eliminate the enemy, clearly referring to the Tutsi.[141] 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.[142]

The Trial Chamber clearly pronounced that genocide was one of the most malevolent of international crimes, for which there could be few mitigating factors.[143] 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.[144] The Tribunal also made the unprecedented finding that widespread and organized rape may constitute genocide.[145]

Also in 1998, Kambanda, former Prime Minister of the Interim Government of Rwanda and Head of the Council of Ministers, was convicted by the *ad hoc* tribunal for Rwanda after having been adjudged guilty of genocide, conspiracy to commit genocide, public incitement to commit genocide and complicity in genocide.[146] It was determined that he participated in the genocide by distributing arms, making incendiary speeches, as well as presiding over cabinet and other meetings in which

136. *Id.* ¶¶ 55-56.

137. *Id.* ¶¶ 691-93, 731.

138. *Id.* ¶ 704.

139. *Id.* ¶¶ 272-80.

140. *Id.*

141. *Id.* ¶ 311.

142. *Id.* ¶¶ 672-74.

143. Prosecutor v. Kambanda, ICTR-97-23-S, *reprinted in* 37 I.L.M. 1411, 1425 (Int'l Crim. Trib. for Rwanda 1998).

144. *Prosecutor v. Akayesu*, ICTR-96-4-T ¶¶ 672-74, 728-35.

145. *Id.* at ¶¶ 731-32.

146. *Prosecutor v. Kambanda*, 37 I.L.M. at 1422.

exterminations were discussed and planned.[147] He nevertheless failed to take necessary and reasonable steps to prevent the slaughter.[148]

E. Questions Arising From the Yugoslav Incident: Cases Before the ICJ

In April 1993, Bosnia and Herzegovina filed a motion for Provisional Measures Against Yugoslavia (Serbia and Montenegro).[149] 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.[150] 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.[151]

The I.C.J. based its jurisdiction on Article IX of the Genocide Convention 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.[152] 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.[153]

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.[154] 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."[155] The Government of the Federal Republic of Yugoslavia was directed to take all measures within

147. *See Id.*at 1420.

148. *Id.* at 1423

149. 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].

150. *See id.* at 4-5.

151. *Id.*

152. *Id.* at 22, 24.

153. *See id.* at 18.

154. *Id.* at 22.

155. *Id.* at 23.

its power to prevent the commission of genocide and to ensure that any regular and irregular armed units or individuals subject to its control, direction, support or influence did not engage in genocide, whether directed against Bosnian Muslims or other groups.[156] 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.[157]

The I.C.J. affirmed these measures in September 1993.[158] The Court noted that a judgment on the merits would only bind the parties to each other through the measures taken by the Court.[159] As a result, the Court declined to issue provisional measures clarifying the responsibility under the Genocide Convention of third-party states or other entities.[160]

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.[161] The I.C.J. was not satisfied that all steps had been taken by the parties to prevent genocide within Bosnia and Herzegovina.[162] 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.[163]

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."[164] He noted that the continuance of the U.N. arms embargo against the Balkan region, which the Court had considered to be outside its

156. *Id.* at 24.

157. 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).

158. 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].

159. *Id.* at 344.

160. *See id.*

161. *Id.* at 348.

162. *Id.* at 348-49.

163. *Id.* at 349.

164. *Id.* (Lauterpacht, J., sep.op.).

jurisdictional competence, had left the Muslim population of Bosnia subject to "genocidal activity at the hands of the Serbs."[165]

In 1996, the I.C.J. determined that it possessed jurisdiction to consider the merits of Bosnia and Herzegovina's complaint of genocide.[166] 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.[167] 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.[168]

Yugoslavia filed various preliminary objections challenging whether there was a dispute within Article IX of the Genocide Convention.[169] 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.[170] The obligation to prevent and punish genocide was incumbent upon the states in periods of peace as well as during internal and international conflict.[171] 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.[172] The I.C.J. also noted that it was not relevant whether Yugoslavia had exercised jurisdiction over the territorial situs of genocide.[173] 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.[174] 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

165. *Id.* at 438.

166. *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].

167. *Id.* at 610.

168. *Id.* at 611-12.

169. *Id.* at 605.

170. *Id.* at 615.

171. *Id.*

172. *Id*

173. *See id.* at 616.

174. *Id.*

itself had committed genocide.[175] The Court thus clarified that Article IX contemplated the scrutiny of state responsibility for any and all acts enumerated under Article III.[176]

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.[177] 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.[178]

F. Developments under Domestic Jurisdiction and the International Criminal Court

In September 1998, Chilean Senator-for-life Augusto Pinochet traveled to England for medical treatment.[179] 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.[180] English authorities placed Pinochet under arrest in October 1998, pursuant to a warrant issued by Spanish Magistrate Baltasar Garzon.[181]

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.[182] 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.[183]

175. *Id.*

176. *See id.*

177. *Id.* at 616.

178. *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.").

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

180. Steve Anderson, Pinochet Makes First Public Appearance Since Return to Chile, UPI, Aug. 23, 2000, LEXIS, Nexis Library, UPI File.

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

182. 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) [hereinafter Carrasco & Fernandez].

183. *Id.* at 691.

The eleven-member judicial panel ruled that in 1985 Spanish law had recognized universal jurisdiction over the international crime of genocide.[184] 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.[185]

Spain's claim also was not precluded by Article VI of the Genocide Convention.[186] 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.[187] A contrary ruling would prevent states from punishing its own nationals for acts committed abroad and would undermine the prevention of genocide.[188]

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.[189] Instead it was constituted by a group sharing some common view or trait.[190] Thus, genocide may entail the systematic elimination of distinctive groups, such as AIDS patients, the elderly, or aliens.[191] The Court noted that in Chile the victims were comprised of those individuals who were not deemed suitable to structure the new social order.[192]

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.[193] Lord Steyn recognized that the acts of the police and intelligence officers presumably are the paradigmatic official acts.[194] 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.[195] 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

184. *See id.* at 690-91, 692.

185. *Id.* at 692-93.

186. *See id.* at 693.

187. *See id.*

188. *Id.*

189. *Id.*

190. *See id.*

191. *Id.*

192. *See also* Carrasco & Fernandez, *supra* note 182, at 693.

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

194. *Id.* at 1338.

195. *Id.*

murdering his gardener or arranging the torture of his opponents for the sheer spectacle of it."[196]

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.[197] 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.[198] 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 intervened in the November 1998 adjudication.[199]

In March 1999, the Law Lords approved Pinochet's extradition for torture and conspiracy to torture which were committed after December 1988.[200] Home Secretary Straw announced that these charges were sufficiently serious to warrant extradition.[201] Pinochet's extradition was halted when it was determined that he was too ill to stand trial.[202]

A step was taken towards remedying the Genocide Convention's failure to provide for an international criminal court in 1994 when the Security Council formed an Ad Hoc Committee on the Establishment of an International Criminal Court. The Committee included genocide among the serious international crimes[203] which were subject to the Tribunal's jurisdiction.

196. *Id.*

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

198. *See* Carrasco & Fernandez, supra note 182, at 694-95.

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

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

201. 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).

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

203.

III. DEFINING THE CRIME OF GENOCIDE

In 1946, the United Nations General Assembly proclaimed that the crime of genocide is "a denial of the right to existence of entire human groups" and noted that such denial "shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and the spirit and aims of the United Nations."[204] Two years after, the International Convention on the Prevention and Punishment of the Crime of Genocide[205] (or "Genocide Convention") was enacted, providing the basis for prosecuting and punishing genocide. It was only in 1998 though, in the Prosecutor v. Jean-Paul Akayesu case,[206] that an individual was specifically convicted and held liable for acts of genocide.

While the Genocide Convention has existed for more than 50 years, the definition and scope of the crime of genocide is not without controversy.

A. The Genocide Convention

204. G.A. Res. 96(I), U.N. GAOR, 1st Sess., Part II (Resolutions), U.N. Doc. A/64/Add.1 (1947). *See also* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 14, 23 (May 28); Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), 1993 I.C.J. 1 (April 8); Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), 1993 I.C.J. 325, 348 (Sept. 13).

205. 78 U.N.T.S. 277 (*entered into force* Jan. 12, 1951), *reprinted in* 28 I.L.M. 763, adopted by G.A. Res. 260(III)(A), U.N. GAOR, 3rd Sess., pt. 1, at 174, U.N. Doc. A/810 (1948) [Genocide Convention]. The Convention entered into force on January 12, 1951, and has been joined by 133 parties. For ratification and reservation status, see United Nations Treaty Collection, Convention on the Prevention and Punishment of the Crime of Genocide, at http://www.unhchr.ch/html/menu3/b/treaty1gen.htm (last modified Oct. 9, 2001). For drafting history of the Genocide Convention and commentary on each article, *see generally* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES (2000) [hereinafter SCHABAS, GENOCIDE IN INTERNATIONAL LAW].

206. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, at 588 (ICTR Trial Chamber Sept. 2, 1998) *at* http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akayo01.htm. Summary of judgment is published in 37 I.L.M. 1399 (1998). *See also* Paul J. Magnarella, *Some Milestones and Achievements at the International Criminal Tribunal for Rwanda: The 1998 Kambanda and Akayesu Cases*, 11 FLA. J. INT'L L. 517, 522-27.

The first four articles of the Genocide Convention prescribe the substantive principles that now constitute the crime of genocide. It declares genocide as "a crime under international law"[207] and defining it as any one of an enumerated list of acts, designating what acts of genocide constitute "punishable acts,"[208] and establishing persons punishable for committing genocide under the Convention.[209] The substantive heart of which is Article II. Article II defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical,[210] racial or religious group, as such:"[211]

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group, conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent birth within the group;

207. Genocide Convention art. I

208. *Id.* art. III. The provision states: The following acts shall be punishable: (a)Genocide; (b)Conspiracy to commit genocide; (c)Direct and public incitement to commit genocide;(d)Attempt to commit genocide; (e) Complicity in genocide.

209. Genocide Convention, art. IV provides: "[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

210. Several texts incorporating the Genocide Convention replace "ethnical" with "ethnic." *See* Proxmire Act, 18 U.S.C. § 1091(1) (1988); Draft Code of Crimes Against the Peace and Security of Mankind: Titles and Texts of Articles on the Draft Code of Crimes Against the Peace and Security of Mankind, Adopted by the International Law Commission at its Forty-Eighth Session, art. 17, Report of the International Law Commission on the Work of Its Forty-Eighth Session, U.N. GAOR, 51st Sess., Supp. No. 10, at 87, U.N. Doc. A/51/10 (1996) [hereinafter Draft Code of Crimes]. *Contra* Statute of the International Tribunal, (for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committed in the Territory of Former Yugoslavia) (ICTY Statute), May 25, 1993, Annex, art. 4(2), U.N. Doc. S/25704, adopted pursuant to S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 1-2, U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1159, 1193; Statute of the International Tribunal for Rwanda (ICTR Statute), S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., Annex, art. 2(2), U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598, 1602; Rome Statute of the International Criminal Court, art. 6, U.N. Doc. A/CONF.183/9 (1998) *reprinted in* 37 I.L.M. 999.

211. Genocide Convention, art. 2.

(e) Forcibly transferring children of the group to another group.[212]

From the definition, three elements are necessary for the crime of genocide: (1) identifiable acts in conjunction with the intent to destroy the identified group victim (2) an identifiable national, ethical, racial or religious group as the victim; and (3) an intent to destroy the group in whole or in part. The first two comprise the actus reus, or material component of the crime.[213] The latter element comprises genocide's mens rea, or requisite mental state.[214]

Remarkably, since its codification, the definition of genocide, as defined in the Genocide Convention,[215] and further embodied in the Statutes of the ICTY,[216] ICTR,[217] and of the International Criminal Court (ICC),[218] has remained the same. Both the tribunals and the ICC define genocide with language taken verbatim from the Convention.[219] Although the definition seems straightforward, there exists an ambiguity of language susceptible of various interpretation, allowing states great flexibility to obscure issues and avoid judicial scrutiny.[220]

212. *Id.*

213. *See* Prosecutor v. Jelisic, Case No. IT-95-10, at 20 n.71 (ICTY Trial Chamber Dec. 14, 1999), *at* http://www.un.org/icty/brcko/trialc1/judgement/index.htm.

214. *Id.*

215. Genocide Convention, art 2.

216. ICTY Statute, art. 4(1), contained in annex of Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), *reprinted in* 32 I.L.M. 1193 (1993).

217. ICTR Statute, art. 2.

218. Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) art. 6, *available at* http://www.un.org/icc/part1.htm> (last accessed Mar. 9, 2004) [hereinafter Rome Statute].

219. Compare ICTR Statute, art. 2, and ICTY Statute, art. 4, *reprinted in* 32 I.L.M. at 1172-73, with Genocide Convention, arts. 2, 3(b), 102 Stat. at 3045, 78 U.N.T.S. at 280, and Rome Statute, *supra* note 218, art. 6.

220. *See* Lawrence J. LeBlanc, *The Intent to Destroy Groups in the Genocide Convention: the Proposed U.S. Understanding*, 48 AM. J. INT'L L. 369, 380 (1984); Paul Starkman, *Genocide and International Law: Is there a Cause of Action?*, 8 ASIL S. INT'L. L.J. 1, 28 (1984) [hereinafter Starkman, *Genocide and International Law*].

B. Defining the Prohibited Acts

Subparagraphs (a) through (e) of Article II of the Genocide Convention enumerate the acts which, when undertaken with the requisite mental state, comprise the international crime of genocide. The enumeration of acts constituting genocide was intended to be restrictive rather than illustrative. The majority of delegates drafting the Genocide Convention rejected the idea of a provision which detailed acts as exemplary of genocide. Instead, the delegates preferred the principle of *nulla crimen sin lege* to dictate conduct constituting genocide.[221]

The acts constituting genocide, though varying from killing members of the group to the forced transfer of children from one group to another, possess one common characteristic: each act listed depicts an action or actions which would contribute to the destruction of the victim group in whole or in part.[222] Subparagraph (a) – killing members of a group – encompasses the direct commission of individual and mass murder. The infliction of serious bodily harm, defined in subparagraph (b), entails mutilation or torture, as well as other forms of violence, which might lead to the death of members of a group. Subparagraph (c), the intentional infliction of mental harm, was inserted to prohibit acts which cause mental suffering through methods which do not impair physical health. The prevention of births, subparagraph (d), was included to encompass castration, compulsory abortion, sterilization, and the segregation of the sexes. Subparagraph (e), the forced transfer of children, was a corollary to the prevention of births.[223]

In the 1993 *Case Concerning Application of the Convention on the Prevention and Prosecution of the Crime of Genocide*, the "acts of genocide and genocidal acts" complained of included, and was expressly not confined to:

> murder, summary executions, torture, rape, mayhem, ethnic cleansing, the wanton devastation of villages, towns, districts and cities, the siege of villages, towns, districts and cities, the starvation of the civilian population, the interruption of, interference with, and harassment of humanitarian relief supplies to the civilian population by the international community, the bombardment of civilian population centers, and the detention of civilians

221. J.D. VAN DER VYVER, GENDER-SPECIFIC CRIMES IN INTERNATIONAL LAW 14 (2000) [hereinafter VAN DER VYVER].

222. Genocide Convention, art. II; Johan D. van der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 FORDHAM INT'L L. J. 286, 290 (1999) [hereinafter van der Vyver, *Prosecution and Punishment*].

223. Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 ARIZ. J. INT'L & COMP. L. 414, 457 (1998) [hereinafter Lippman, *Fifty Years Later*].

> in concentration camps or elsewhere.[224] Moreover, in Prosecutor v. Jean-Paul Akayesu,[225] the Rwanda[n] Tribunal which analyzed the different components of the *actus reus* in some detail, took into consideration the circumstances prevailing to qualify the conduct as acts of genocide. Thus, different circumstances might render certain acts as genocidal conduct.[226]

It can, therefore, be surmised that the enumerated acts under Article II of the Genocide Convention raise many questions and fail to clarify what specific acts or methodologies undertaken to carry out such activities do and do not constitute genocide.

1. Killing Members of the Group

The first act described in Article II(a), killing members of the group, is a straight forward criteria. It encompasses the intentional and direct commission of individual and mass murders, as well as a series of separate, but related, executions.[227] In Akayesu, the Rwanda Tribunal noted that the material aspects of this provision would be satisfied if the victim was dead and that death resulted from an unlawful act or omission by the accused or one of his subordinates.[228]

However, the Rwanda Tribunal goes on to note that "killing" could mean intentional and unintentional homicides. The assertion seems to be brought about by the disparity between the French and English versions of the text. The French text speaks of "meurtre" (murder), which more accurately depicts the true intention of drafters of the Genocide Convention while the English version uses "killing." Based on the object and purpose of the Genocide Convention,[229] this has been interpreted to denote "homicide committed with the intent to cause death."[230] Thus, the broad meaning enunciated in *Akayesu* ought not to be given to "killing" as contemplated in the definition of genocide. This, however, raises the issue regarding the double requisite requirement – intent to kill and intent to destroy (commit genocide).

224. Case Concerning Application of the Convention on the Prevention and Prosecution of the Crime of Genocide (Bosnia & Others v. Yugoslavia (Serbia and Montenegro)), 1993 I.C.J. 1 (April 8).

225. Prosecutor v. Akayesu, Case No. ICTR-96-4-T.

226. van der Vyver, *Prosecution and Punishment*, *supra* note 222, at 299.

227. *See* 3 GAOR C.6. 78th mtg., at 143 (1948) (Mr. Rios, Uru) (Mr. Kaeckenbeeck, Belg.).

228. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, at 588.

229. *See* Vienna Convention on the Law of Treaties (VCLT), May 23, 1969, art. 31(1), 1155 U.N.T.S. 331.

230. Jean-Paul Akayesu, Case ICTR-96-4-T. 500

2. Causing Serious Bodily or Mental Harm to Members of the Group

Subparagraph (b) contains broad language that requires some degree of interpretation. No definition of the "mental harm" exists elsewhere in the article. Sensible textual construction indicates that the modifier "serious" applies to the provision on mental harm as well as to bodily injury.[231] Thus, not every bodily or mental injury is sufficient to constitute genocide;[232] it must be serious enough to threaten the group's destruction.[233]

The phrase mental harm appeared in order to prohibit acts of genocide committed through narcotics,[234] and also included intentionally causing mental suffering through methods which do not cause physical injury.[235] It need not be permanent, nor particularly brutal to constitute the requisite "act" so long as the group can be effectively destroyed through psychological destruction.[236]

In the *Eichmann* Case, the District Court of Jerusalem, in its Judgment of December 12, 1961, noted that serious bodily or mental harm of members of a group could be caused by the enslavement, starvation, deportation and persecution ... [of members of the group] and by their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation or their rights as human beings, and to suppress them and cause them inhumane suffering and torture.[237]

The Rwanda Tribunal later adopted much of the Eichmann formulation and held that Article II(b) includes, without limitation, "acts of bodily or mental torture, inhumane or degrading treatment, rape, sexual violence, and persecution."[238] It held in *Akayesu* and *Musema* that mental injury "need not entail permanent or irremediable harm."[239]

Though the enumeration of genocidal act is restrictive, a variety of acts that constitute independent crimes under domestic and/or international law

231. *See* VCLT, art. 31(1).

232. Draft Code of Crimes, art. 17 cmt. 14.

233. *See* Bunyan Bryant, *Substantive Scope of the Convention*, 16 HARV. INT'L L.J. 686, 694 (1975) [hereinafter Bryant, *Substantive Scope*].

234. *See* 3 GAOR C.6, 81st mtg., at 175 (1948) (Mr. Ti-tsun Li, China).

235. *See* 3 GAOR C.6, 81st mtg., at 178 (1948) (Mr. Fitzmaurice, U.K.).

236. Bryant, *Substantive Scope*, *supra* note 233.

237. *Eichmann Case*, *supra* note 89, at 18, 238, 199.

238. Prosecutor v. Akayesu, Case ICTR-96-4-T, at 507; Prosecutor v. Musema, Case No. ICTR-96-13-T, at 156 (ICTR Trial Chamber Jan. 27, 2000), *at* http://www.ictr.org.ENGLISH/cases/Musema/index.htm

239. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, at 502; Prosecutor v. Musema, Case No. ICTR-96-13-T, at 157.

may also satisfy the *actus reus* of genocide falling under Article II(b). Rape,[240] sexual violence,[241] the imposition of mind-altering drugs,[242] and acts of torture[243] and other forms of violence which might to lead to death of members of a group.[244] As a consequence, Article II(b) seems to grant great latitude for Tribunals and States to characterize certain acts as genocide.

3. Deliberately Inflicting on the Group, Conditions of Life Calculated to Bring About its Physical Destruction

Article II(c) does not define specifically the prohibited conduct, as the determination must be made on a case-by-case basis under the totality of the circumstances.[245] This omission was deliberate and stems from the practical impossibility of specifying in advance all of the acts that might qualify.[246] The Akayesu Court opined that this provision contemplates exterminating a group over time, rather than seeking its immediate destruction,[247] covering acts that lack the temporal immediacy of "killing" under Article II(a).

The acts of imposing destructive conditions of life clearly includes such measures as "placing a group on a subsistence diet, reducing required medical services below a minimum, [and] withholding sufficient living accommodations,"[248] prompting the reminder of the Cuban Delegation to

240. *Id.* at 597-8.

241. *Id.* at 598.

242. *See, e.g.,* Proxmire Act, 18 U.S.C. § 1091(a)(3) (1988). China's representative noted during the drafting of the Convention that, during World War II, the Japanese had built a massive opium extraction plant in Mukden that could process 400 tons of opium annually, fifty times the legitimate world requirements and enough to administer lethal doses to 200-400 million people. *See* Report of the Ad Hoc Committee on Genocide to the Economic and Social Council on the Meetings of the Committee Held at Lake Success, New York, U.N. ESCOR, 7th Sess., Supp. No. 6, at 6 n.6, U.N. Doc. E/794, 15 (1948).

243. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, at 594.

244. *See* U.N. ESCOR Ad Hoc. Comm. on Genocide, 6th Sess., 13th mtg., at 10, U.N. Doc. E/AC.25/SR.13 (1948) (Mr. Ordonneau, Fr.).

245. *See* NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION: A COMMENTARY 63 (1960) [hereinafter ROBINSON, THE GENOCIDE CONVENTION].

246. *Id.*

247. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, at 505. *See also* Prosecutor v. Musema, Case No. ICTR-96-13-T, at 157.

248. *See* ROBINSON, THE GENOCIDE CONVENTION, *supra* note 245, at 63-64; Draft Code of Crimes, art. 17 cmt. 12 n.121, 15; Prosecutor v. Akayesu, Case No. ICTR-96-4-T, at 505-06; Prosecutor v. Musema, Case No. ICTR-96-13-T, at 157.

the Rome Conference, that it could also consist of the "economic, financial and commercial blockade intentionally causing great suffering or seriously injuring physical integrity or mental or physical health."[249] It covers deportations committed with the requisite intent[250] and other acts that cause the "slow death" of group members, including eliminating the necessities of life, acts of rape, or imposing excessive work or physical exertion upon the group.[251] Thus, the deliberate infliction of conditions of life calculated to bring about a group's physical destruction, in whole or in part, prohibits the imposition of conditions which are likely to result to death.[252]

4. Imposing Measures Intended to Prevent Birth Within the Group

Again, under this subparagraph, the wrongful conduct can include a broad variety of acts and only requires the presence of the coercive element.[253] It encompasses imposed measures that can be mental as well as physical and includes threats and trauma leading a group not to procreate.[254]

Article II(d) applies to any measure imposed to prevent the group from reproducing and "was broadly conceived as encompassing castration, compulsory abortion, sterilization, segregation of the sexes."[255] [256] In a less direct form, it includes forced birth control, separation of the sexes and prohibitions on marriage.[257] [258] The selective deportation of certain parts of

249. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court, Proposal for Article 5, Submitted by Cuba, 53rd Sess., U.N. Doc. A/CONF.183/C.1/L.17 (1998). The Cuban proposal to include such blockades in the definition of crimes against humanity for purposes of ICC jurisdiction *ratione materiae* fell on deaf ears.

250. Draft Code of Crimes, cmt. 15; ERICA A. DAES, THE PROTECTION OF MINORITIES UNDER THE INTERNATIONAL BILL OF HUMAN RIGHTS AND THE GENOCIDE CONVENTION 72 (1973) [hereinafter DAES, THE PROTECTION OF MINORITIES].

251. *See* Prosecutor v. Kayishema and Ruzindana, Judgment, Case No. ICTR-95-1-T, at 115-6 (ICTR Trial Chamber May 21, 1999), *available at* http://www.ictr.org/ENGLISH/cases/KayishemaRuzindana/judgement/index.htm.

252. *See* 3 GAOR C.6, 81st mtg., at 173, 180 (1948) (Mr. Morozov, U.S.S.R.).

253. *See* Draft Code of Crimes, cmt. 16.

254. *See* Draft Code of Crimes, art. 17 cmt. 15; DAES, THE PROTECTION OF MINORITIES, *supra* note 250.

255. *See* Lippman, *Fifty Years Later*, *supra* note 223, at 457.

256. *See* U.N. ESCOR Ad Hoc. Comm. on Genocide, 6th Sess., 13th mtg., at 11, 14 (1948) (Mr. Azkoul, Leb.).

257. Prosecutor v. Musema, Case No. ICTR-96-13-T, at 158.

258. Prosecutor v. Akayesu, Case ICTR-96-4-T, P 506.

the group (*i.e.*, all males, all females of child-bearing years, etc.) also qualifies as a measure to prevent births within the group.[259] Rape can also fall under this provision as in some communities, loss of virginity or extra-marital pregnancy as such disqualifies the woman from the prospect of marriage.[260] In *Akayesu*, the Tribunal went on to say:

> In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group .... [R]ape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats of trauma, not to procreate.[261]

5. Forcibly Transferring Children of the Group to Another Group

The forced transfer of children was corollary to the prevention of births. It was deemed as tantamount to the eradication of the next generation. However, the Convention and the Statues do not provide age specifications defining "children." In contrast, the Proxmire Act defines a child as someone under eighteen years of age,[262] which seems consonant with other international laws on the issue.[263]

The prohibited acts contemplated by this provision were discussed at length in the *Greifelt* case, where "racially valuable" infants and children of foreign nationals were removed from their parents and sent to the Third Reich for "Germanization."[264] This component of the *actus reus* must again not be understood in the physical sense only, but also includes "acts of threats or trauma which would lead to the forcible transfer of children from one group to another."[265] Simply removing children from a group is

259. *See* Draft Code of Crimes, art. 17 cmt. 15; DAES, THE PROTECTION OF MINORITIES, *supra* note 250.

260. *See* Sharon A. Healey, *Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia*, 21 BROOK. J. INT'L L. 327, 338-40 (1995); Siobhán K. Fisher, *Occupation of the Womb: Forced Impregnation as Genocide*, 46 DUKE L.J. 91, 93, 123-24 (1996).

261. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, P 506-507.

262. Proxmire Act, 18 U.S.C. § 1093(1) (1988).

263. *See* Convention on the Rights of the Child, G.A. Res. 44/25, 44th Sess., 61st plen. mtg., Annex, 44 U.N. GAOR Supp. No. 49, at 167, art. 1, U.N. Doc. A/RES/44/25 (1989).

264. *See* Greifelt *supra* note 57, at 3, 6-9, 12-15.

265. Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, P 508.

insufficient, however. The children must be removed and transferred to another group, ostensibly to another category of group protected under the Convention (i.e., racial, ethnic, national, or religious).[266] Thus, the removal of children to other social groups or for purposes of political "re-education" is not genocide under the Convention; the relocation of adolescents into environments must be for the purpose of instilling them with new customs, languages, religions, and values.[267]

The definition of the crimes under the Rome Statute is taken verbatim from the 1948 Genocide Convention.[268] The U.N. Preparatory Commission, however, has broken out the elements of the crime individually as separate crimes of genocide.[269] Thus, the crime of genocide, although defined similarly in the Rome Statute and the Genocide Convention, is now articulated with much more clarity through its elemental subdivision in the ICC's supporting documents; however some groups remain unprotected.[270]

C. Expansive Scope of Prohibited Acts

Under the Genocide Convention, genocide has been extended to mean any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial or religious group on grounds of the national or racial origin or religious belief of its members.[271] Such has been termed as "cultural genocide." Though cultural genocide, or ethnocide, is not of the same magnitude as genocide, this might lead to physical genocide, with the possible result of protected groups' destruction.

Property crimes, not directly covered by the treaty, can also fall within the provisions relating to physical genocide. For example, intentionally

266. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, at 510; Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, at 55 (ICTR Trial Chamber Dec. 6, 1999), *at* http://www.ictr.org/ENGLISH/cases/Rutaganda/judgement/index.htm.

267. *See* 3 GAOR, 83rd mtg., at 195 (1948) (Mr. Perozo, Venez.).

268. Rome Statute, *supra* note 218, art 6.

269. Preparatory Commission for the International Criminal Court, Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II: Finalized Draft Text of the Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (June 30, 2000), *available at* http://www.un.org/law/icc/statute/elements/elemfra.htm.

270. Michael J. Kelly, *Can Sovereigns Be Brought To Justice? The Crime Of Genocide's Evolution And The Meaning Of The Milosevic Trial*, SAINT JOHN'S LAW REVIEW 257, 319 (2002).

271. PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 72 (1991) [hereinafter THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES].

destroying or removing food, water, clothing, shelter, or medicine, the absence of which causes death or serious injury, probably violates Articles II(a), II(b), and/or II(c).[272]

Thus, various acts, not precisely falling strictly within the prohibited act, may be considered as genocide, through the expansive interpretation of the enumerated prohibited acts which contains no definite definition. Considering the gravity of the offense, the risk of trivializing it is apparent should all unlawful acts be considered as falling under the ambit of genocide.[273]

D. Defining the Victims: The Protected Groups

The second element of genocide addresses the victims of the crime. By definition, genocide can occur only against individuals who are members of protected national, ethnic, racial, or religious groups. It is group members, and group members only, who are protected by the Convention.[274] If the victim lacks membership in a protected group, genocide has not occurred, even if the actor's ultimate intention is to facilitate the destruction of a protected group.

The group rights that form the core of the genocide concept emerged from the post-World War II political climate.[275] After atrocities committed against national minorities during World War I went largely unpunished,[276] the international legal community initiated numerous bilateral agreements and unilateral declarations in an effort to establish minority protections premised, at least implicitly, on the group right to exist.[277]

272. ROBINSON, THE GENOCIDE CONVENTION, *supra* note 245, at 63-64.

273. *See* Isidor Wallimann & Michael N. Dobkowski, *Introduction*, *in* GENOCIDE AND THE MODERN AGE xvi-xvii (Isidor Wallimann & Michael N. Dobkowski eds., 1987).

274. Prosecutor v. Akayesu, Judgment, Case No. ICTR-96-4-T P 521l. *See* G.A. Res. 96 (I), U.N. Doc. A/64/Add.1, at 188-89 (1946), *reprinted in* 1 UNITED NATIONS RESOLUTIONS 175 (Dusan J. Djonovich ed., 1973); Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 240 (July 8); Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (May 28); Philip Alston, *Peoples' Rights: Their Rise and Fall*, *in* PEOPLES' RIGHTS 259, 261 (Philip Alston ed., 2001).

275. *See* SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 205, at 16-24, 71-81 & n.201, n.204.

276. *See* Lippman, *Fifty Years Later*, *supra* note 223, at 417-21.

277. *See* Treaty Concerning the Protection of Minorities in Poland, June 28, 1919, art. 2, 225 Consol. T.S. 412, 416; Treaty Concerning the Protection of Minorities in Greece, Aug. 10, 1920, art. 2, 28 L.N.T.S. 243, 254; Treaty

The Genocide Convention thereafter emerged in light of the failings of the interwar period to protect minority rights.[278] Certain human groupings were recognized as having value within the world community in and of themselves.[279] Therefore, the Convention was premised on a theory that destruction of such groups harms the entirety of humanity.[280] It stands for the principle that no one may decide the fate of a protected group[281] without risk of criminal punishment.[282]

This was largely influenced by the work of Raphael Lemkin[283] who coined the term genocide and defined it as "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves."[284] His approach contemplated the crime in terms of groups' very existence: "Genocide is directed against the national group as an entity, and the actions

Concerning the Protection of Minorities in Romania, Dec. 9, 1919, art. 2, 5 L.N.T.S. 335, 339; Treaty Concerning the Protection of Minorities in Czechoslovakia, Sept. 10, 1919, art. 2, 226 Consol. T.S. 170, 173; Treaty Concerning the Protection of Minorities in the Serb-Croat-Slovene State, Sept. 10, 1919, art. 2, 226 Consol. T.S. 182, 185; Treaty of Lausanne, July 24, 1923, art. 38, 28 L.N.T.S. 11, 31; Treaty of Trianon, June 4, 1920, art. 55, 12 Martens Nouveau Recueil (ser. 3) 423, 438; Treaty of Saint-Germain, Sept. 10, 1919, art. 63, 226 Consol. T.S. 8, 29; Treaty of Neuilly, Nov. 27, 1919, art. 50, 226 Consol. T.S. 332, 343. *See also* SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 205, at 16-24, 26-30; Lippman, *Fifty Years Later, supra* note 223, at 421-23; Asbjörn Eide, *Minority Situations: In Search of Peaceful and Constructive Solutions*, 66 NOTRE DAME L. REV. 1311, 1316-19 (1991).

278. *See* Olivia Q. Goldman, *The Need for an Independent International Mechanism to Protect Group Rights: A Case Study of the Kurds*, 2 TULSA J. COMP. & INT'L L. 45, 50-51 (1994); Lippman, *Fifty Years Later, supra* note 223, at 421-23; Advisory Opinion No. 64, Minority Schools in Albania, 1935 P.C.I.J. (ser. A/B) No. 64, at 4 (Apr. 6).

279. *See generally* William A. Schabas, *Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda*, 6 ILSA J. INT'L & COMP. L. 375 (2000) [hereinafter Schabas, *Conflicting Interpretations*].

280. *See* M. CHERIF BASSIOUNI, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 523 (1996).

281. *See* Genocide Convention, art. 2.

282. Genocide Convention, art. 5.

283. Lemkin is widely regarded as the inventor of the term "genocide." *See generally* LEMKIN, AXIS RULE, *supra* note 15. For a brief biographical account of Lemkin, see SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 205, at 24-30.

284. LEMKIN, AXIS RULE, *supra* note 15, at 79.

involved are directed against individuals, not in their individual capacity, but as members of the national group."[285]

Thus, genocide is directed against a group of people, not against individuals per se. As stated in *Akayesu*, "the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnic, racial or religious group."[286]

National, ethnic, racial, and religious groups were chosen by the General Assembly to be included in the class of protected groups, because each group has historically been the target of animosity and each group is characterized by cohesiveness, homogeneity, inevitability of membership, stability, and tradition.[287] Thus, the drafters assumed that groups were permanent, stable, and intractable, construing the Convention's purpose as protecting groups that already existed and that any one could clearly recognize.[288] One distinguished commentator even goes to the extent of seeing the right of existence of a group as a necessary prerequisite for other rights.[289]

In the vernacular of Dutch legal philosopher Herman Dooyeweerd (1894-1977), the common denominator of the four group entities mentioned in the definition of genocide is that they all represent "institutional communities . . . which by their inner nature are destined to encompass their members to an intensive degree, continuously or at least for a considerable part of their life, and such in a way independent of their will."[290]

Thus, political groups are conspicuously not afforded protection under the Convention.[291] This was done at the Soviet Union's insistence[292] and the

285. *Id.*

286. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, at 508, 520.

287. Lippman, *Fifty Years Later, supra* note 223, at 455.

288. U.N. GAOR, 3d Sess., Part 1, 6th Comm. and Annexes (1948-49), 63rd-69th meetings, 71st-81st meetings, 91st-110th meetings, and 128th-134th meetings.

289. THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES, *supra* note 271, at 57.

290. HERMAN DOOYEWEERD, III, A NEW CRITIQUE OF THEORETICAL THOUGHT 187 (1984).

291. LAWRENCE J. LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION 57 (1991) [hereinafter LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION].

292. M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 199, 212 (1998) [hereinafter Bassiouni Normative Framework].

rest of the parties' acquiescence.[293] Several reasons were given for the exclusion of political groups from the definition. Some of which include: (1) the instability of political groups compared to national, ethnic, racial, or religious groups into which people are generally born and which by their very nature are more enduring groups,[294] and (2) the possibility that support for the treaty itself may be jeopardized in many states if political groups were included.[295] Unfortunately, an unscrupulous entity could attempt to avoid application of the Convention in cases of discriminate killings by labelling the victims as a political group.[296]

However, group status is not always easy to determine. As the *Rutaganda* Trial Chamber held:

> [T]he concepts of national, ethnical, racial and religious groups have been researched extensively and ... at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social, and cultural context.[297]

At a minimum, the prohibition against genocide[298] affirms that specified groups possess the right to exist[299] and that states are bound to prevent and

293. LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION, *supra* note 291, at 62; Shah, *supra* note 16, at 356.

294. Lippman, *Fifty Years Later, supra* note 223, at 455.

295. LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION, *supra* note 291, at 61-63.

296. Starkman, *Genocide and International Law*, supra note 220, at 37

297. Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, at 55. *See also* Prosecutor v. Krstic, Case No. ICTY-98-33-T, at 557 (ICTY Trial Chamber Aug. 2, 2001), *at* http:// www.un.org/icty/krstic/TrialC1/judgement/index.htm.

298. *See generally* Prosecutor v. Sikirica, Judgment, Case No. IT-95-8-T, at 58, 60 (Int'l Crim. Trib. Yugoslavia, Trial Chamber, Sept. 3, 2001), http://www.un.org/icty/sikirica/judgement/010903r98bis-e.pdf; Prosecutor v. Musema, Judgment, Case No. ICTR-96-13-T; Prosecutor v. Rutaganda, Judgment, Case No. ICTR-96-3-T; Prosecutor v. Kayishema and Ruzindana, Judgment, Case No. ICTR-95-1-T; Prosecutor v. Ruggiu, Judgment and Sentence, Case No. ICTR 97-32-I (Int'l Crim. Trib. Rwanda, Trial Chamber I, June 1, 2000), *at* http:// www.ictr.org/wwwroot/ENGLISH/cases/Ruggiu/judgement/rug010600.htm; Prosecutor v. Serushago, Judgment, Case No. ICTR-98-39-S (Int'l Crim. Trib. Rwanda, Trial Chamber, Feb. 5, 1999), *at* http:// www.ictr.org/wwwroot/ENGLISH/cases/Serushago/judgement/os1.htm; Kambanda, Judgment and Sentence, ICTR-97-23-S; Prosecutor v. Bagilishema, Judgment and Sentence, Case No. ICTR-95-1A-T (Int'l Crim. Trib. Rwanda, Trial Chamber, June 7, 2001), *at* http:// www.ictr.org/wwwroot/ENGLISH/cases/Bagilishema/judgement.htm; Prosecutor v. Krstic, Judgment, Case No. IT-98- 33-T; Prosecutor v. Sikirica, Judgment, Case No. IT-95-8-T; Prosecutor v. Jelisic, Judgment, Case No. IT-95-10-T. *See also* International Criminal Tribunal for Rwanda, Cases in Progress, *at* http:// www.ictr.org/wwwroot/ENGLISH/cases/inprogress.htm (last visited Feb. 15, 2004).

punish violations of that right.[300] The right to exist is a fundamental right that has been upheld universally by the world community.[301] "Genocide" is the criminal violation of the group right to exist and is distinct from the right itself. At present, while other groups may possess legal personality under international law,[302] protection under the statute extends only to national,[303] ethnic,[304] racial,[305] and religious[306] groups.[307]

299. *See* G.A. Res. 96 (I), at 188. *See also* James Crawford, *The Rights of Peoples: "Peoples" or "Governments"?, in* THE RIGHTS OF PEOPLES 55, 59-60 (James Crawford ed., 1988); THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES, *supra* note 271, at 59- 85; Lippman, *Fifty Years Later, supra* note 223, at 469-70; International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, arts. 1, 27, 6 I.L.M. 368, 369, 999 U.N.T.S. 171, 173, 179; International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, art. 1, 6 I.L.M. 360, 360, 993 U.N.T.S. 3, 5; Organization of African Unity: Banjul Charter on Human and Peoples' Rights, June 27, 1981, arts. 19-24, 21 I.L.M. 59, 62-63, OAU Doc. CAB/LEG/67/3/Rev.5; Natsu Taylor Saito, *Beyond Civil Rights: Considering "Third Generation" International Human Rights Law in the United States*, 28 U. MIAMI INTER-AM. L. REV. 387 (1996-1997). *See generally* Philip Alston, *Peoples' Rights: Their Rise and Fall, in* PEOPLES' RIGHTS 259-319 (Philip Alston ed., 2001).

300. *See* Genocide Convention, arts. 1, 3, 8-9 at 280, 282.

301. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 240 (July 8); Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (May 28).

302. *See generally* Schabas, *Conflicting Interpretations, supra* note 279.

303. *See* Ian Brownlie, *The Rights of Peoples in Modern International Law, in* THE RIGHTS OF PEOPLES 1 (James Crawford ed., 1988).

304. *See* ICCPR, arts. 1, 1(1), 27, at 171, 173, 179.

305. *See generally* International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, at 47-52, U.N. Doc. A/6014 (1965) (entered into force January 4, 1969), *reprinted in* 10 United Nations Resolutions 143 (Dusan J. Djonovich ed., 1974); United Nations Declaration on the Elimination of All Forms of Racial Discrimination, G.A. Res. 1904 (XVIII), U.N. GAOR, 18th Sess., 1261st Plen. Mtg., Agenda Item 43, U.N. Doc A/Res/1904 (XVIII) (1963), *reprinted in* 9 United Nations Resolutions, *supra*, at 224.

306. *See* ICCPR, art. 27, at 179; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc. A/36/6 (1982), *reprinted in* 20 United Nations Resolutions 401 (Dusan J. Djonovich ed., 1986).

1. National Groups

National refers to groups whose primary identity is based on affiliation with an established nation-state.[308] It was defined in the Nottebohm Case, the International Court of Justice as "a legal bond having its basis [in] a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[309] And in Akayesu, the Rwanda Tribunal defined a national groups as a "a collection of people who are perceived to share a common legal bond based on common citizenship, coupled with reciprocity of rights and duties."[310]

2. Ethnic Groups

As distinguished from national group, and ethnic group refers to social, cultural, linguistic, or other distinct minorities within or outside a state.[311] The Rwanda Tribunal specified that an "ethnical group is generally defined as a group whose members share a common language or culture."[312]

3. Racial Groups

Racial groups are defined by the Rwanda Tribunal on the basis of the "hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors."[313] The Proxmire Act defines them as "a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent."[314]

4. Religious Groups

307. Genocide Convention, arts. 2, 3(b), at 280; Rome Statute, art. 6; ICTR Statute, art. 2; ICTY Statute, art. 4.

308. *See* U.N. GAOR 6th Comm., 3rd Sess., 74th mtg. at 98 (1948) (Mr. Petren, Swed.).

309. Nottebohm Case (Liechtenstein v. Guatemala) (Second Phase), 1955 I.C.J. 4, 23 (Apr. 6).

310. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, at 511-512.

311. *See* U.N. GAOR 6th Comm., 3rd Sess., 73rd mtg. at 97-98 (1948) (Mr. Petren, Swed.).

312. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, at 512- 513. *See also* Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L & COMP. L. Q. 102, 103 (1976).

313. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, at 513-14.

314. Proxmire Act, 18 U.S.C. § 1093(6) (1988).

The *Akayesu* Trial Chamber opined that a "religious group is one whose members share the same religion, denomination or mode of worship."[315] The Proxmire Act additionally accounts for the subjective belief system of group members and defines a religious group as one whose members have a "common religious creed, beliefs, doctrines, practices or rituals."[316] It has been even posited to include religious groups include theistic, non-theistic, and atheistic communities who believe in and are united by a single spiritual ideal.[317]

E. The Unprotected Victims

It has been contended that the main problem with the Convention definition lies in its restrictive notion of group[318] as it denied protection to a number of identifiable groups that are potential victims of action designed to destroy them.[319] The enumeration of protected groups has even been argued to be arbitrary.[320] Israel Charny points out that "mass killings, on an enormous scale, can fail to qualify as genocide under the present [United Nations] definition if the victims are either a heterogeneous group or native citizens of a country that is destroying them. How absurd, and ugly."[321] He notes further that "planned killing of even millions of one's political opponents would not constitute genocide if one were careful that they were all of different faiths or different ethnic backgrounds."[322]

Moreover, Thomas Simons[323] posits, "It would be reprehensible if the world could not condemn massive slaughter of members of a group ... simply because of a preordained idea of what types of groups qualified for coverage under the [Genocide] Convention."[324] Thus, he advocates that

315. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, at 514-15.

316. Proxmire Act, 18 U.S.C. § 1093(7) (1988).

317. Lippman, *Fifty Years Later, supra* note 223, at 455; Proxmire Act, 18 U.S.C. § 1093(7) (1988); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, at 515.

318. Thomas W. Simon, *Defining Genocide*, 15 WIS. INT'L L.J. 243 (1996) [hereinafter Simon, *Defining Genocide*].

319. van der Vyver, *Prosecution and Punishment, supra* note 222, at 303.

320. *See* Shah, *supra* note 16..

321. Israel W. Charny, *Toward a Generic Definition of Genocide, in* GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS 64, 71 (George J. Andreopoulos ed., 1994).

322. Israel W. Charny, *Review of Helen Fein's Genocide: A Sociological Perspective, in* INTERNET ON THE HOLOCAUST AND GENOCIDE (1991)

323. Professor of Philosophy, Illinois State University; Ph.D., 1973, Washington University; J.D., 1991, University of Illinois.

324. Simon, *Defining Genocide, supra* note 318, at 247.

genocide cover "the intentional killing of members of a group, negatively identified by perpetrators, because of their actual or perceived group affiliation. [325] In other words, the negative definition (as advanced by the perpetrator) of the group should be the guidepost.[326] Mathew Lippman[327] also argues that the Genocide Convention ought to be applied (or amended) to afford protection to "any coherent collectivity which is subject to persecution," including "political groups and possibly women, homosexuals, and economic and professional classes."[328]

Though expanding the scope of the coverage of the groups protected by the Genocide Convention is notable, precisely because of the seriousness and magnitude of the offense, it has to be strictly construed.

It is noteworthy that the Rwanda Tribunal broadened the reach of the Genocide Convention in an effort to prevent the vindication of mass murderers from happening again. Drawing from the *traveux preparatories* of the Genocide Convention, the Rwanda Tribunal asserted that the common denominator among protected groups is involuntary membership[329] and the intent to protect extends beyond the four enumerated groups, reaching any group similar in terms of its stability and permanence.[330] The Tribunal further stipulated that "[s]uch group membership must be 'determined by birth,' 'in a continuous and often irremediable manner.'"[331]

Thus, Johan van der Vyver, observes that a consequence of reading the Convention's definition in "a strictly positivistic approach might lead to the conclusion that only persons falling precisely in any of the categories mentioned by name in the Genocide Convention could be victims of the crime of genocide as perceived in international law."[332]

325. *Id.* at 244.

326. *Id.*; *See also* FRANK CHALK & KURT JONASSOHN, THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSES AND CASE STUDIES 23 (1990).

327. Matthew Lippman served as of counsel for Bosnia and Hercegovina in its suit against Yugoslavia in the International Court of Justice.

328. Lippman, *Fifty Years Later, supra* note 223, at 468.

329. Schabas, *Conflicting Interpretations, supra* note 279, at 379.

330. Diane Marie Amann, *International Decisions: Prosecutor v. Akayesu. Case ICTR-96-4-T. International Criminal Tribunal for Rwanda, September 2, 1998*, 93 AM. J. INT'L L. 195, 196 (1999).

331. Jean-Paul Akayesu, Case ICTR-96-4-T, at 510.

332. VAN DER VYVER, *supra* note 38, at 14.

F. Generous Interpretation of the Genocide Convention

The Genocide Convention, at first glance, seems to be restrictive and limited in its application. As today, forms of genocide exist that were not contemplated at the time of the drafting of the Genocide Convention in 1948. Even the Special Rapporteur's 1985 report on genocide concluded that "all too much evidence continues to accumulate that acts of genocide are still being committed in various parts of the world .... In its present form, the [Genocide] Convention ... must be judged inadequate."[333] The drafters of the Convention "produced a text that remains susceptible to remarkably divergent interpretations, with far-reaching implications for the scope of the Convention's application."[334]

However, the Convention justifies an evolving and progressive interpretation that fulfills its goals and purposes.[335] The United Nations Commission of Experts, in their final report, observed that the Genocide Convention's preamble suggested that the Treaty should be interpreted to encompass existing, as well as evolving methods of genocide[336] and that it should be "considered in [their] entirety in order to interpret the provisions of the Genocide Convention in a spirit consistent with its purpose."[337]

As noted by the International Court of Justice in its advisory opinion, "[t]he Convention was ... adopted for a purely humanitarian and civilizing purpose .... The high ideals which inspired the Convention provide ... the foundation and measure of all its provisions."[338] The four dissenting judges stressed that the "enormity of the crime of genocide can hardly be exaggerated" and requires that the Convention should be accorded the "most generous interpretation."[339]

333. Lippman, *Fifty Years Later, supra* note 223, at 463.

334. Alexander K.A. Greenawalt, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259, 2264 (1999) [hereinafter Greenawalt].

335. Bassiouni Normative Framework , *supra* note 292, at 617, 628.

336. *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780o* (1992), U.N. SCOR, Annex, U.N. Doc. S/1994/674 (May 27, 1994).

337. *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780o* (1992), ¶ 94, at 25, U.N. SCOR, Annex, U.N. Doc. S/1994/674 (May 27, 1994).

338. Reservations to the Convention of the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23.

339. *Id.*

IV. THE CONTOURS OF GENOCIDAL INTENT

A. Inferring Intent: The Strict Standard of Dolus Specialis

Under the Genocide Convention,[340] aside from the actus reus, or material component of the crime,[341] the mens rea, or requisite mental state, [342] should also be established.[343] This, however, is likewise subject to much debate.

The third element of the crime of genocide, namely the *mens rea*, goes into the genocidist's mental state.[344] The intent to destroy a group, in whole or in part, is the primary distinguishing characteristic of genocide which sets it apart from homicide.[345] The intent requirement, however, has been strictly construed, whereby a mere general intent would not suffice; as it contemplates a *dolus specialis* or special intent to commit genocidal acts. Generally, *mens rea* may take one of three forms: *dolus directus*, *dolus indirectus*, and *dolus eventualis*.[346]

> *Dolus directus*, in which event the wrongful consequences of the act were foreseen and desired by the perpetrator (A desires the death of B and foresees that his act will bring about B's death: if A in these circumstances commits the act and B dies in consequence of that act, then A will be judged to have acted with direct intent to kill B);
>
> *Dolus indirectus*, in which event certain (secondary) consequences in addition to those desired by the perpetrator of the act were foreseen by the perpetrator as a certainty, and although the perpetrator did not desire those secondary consequences he/she nevertheless committed the act and those consequences did set in (A desires the death of B and foresees that if he were to put poison in B's food, other guests at B's table will most certainly also die; knowing that C will be joining B for dinner, A nevertheless poisons the food and in so doing causes the death of both B and C; in regard to the death of C, A acted with indirect intent); and
>
> *Dolus eventualis*, in which event the perpetrator foresaw consequences other than those desired as a possibility (not a certainty) and nevertheless went ahead with the act (A desires the death of B and foresees that if he were to shoot B while B is driving his car, other passengers in the car may possibly also be injured or even killed; if A nevertheless goes ahead and shoots B while B is driving the car with C as his passenger, A will be held liable for the injuries, or the death, of C under the rubric of dolus eventualis even though he might not have wished C any harm).

The Statute of the International Criminal Court (ICC Statute), under which the crime of genocide is also punished, generally requires that the material elements of the crimes therein must have been committed "with intent and knowledge."[347] Intent therein, is defined as requiring that "[the] person means to cause [the] consequence or is aware that it will occur in the ordinary course of events."[348] Knowledge, in turn, is only present if "awareness that . . . a consequence will occur in the ordinary course of events" can be demonstrated.[349] The wording of the intent and knowledge elements for crimes punished under the ICC Statute seem to require that the aim of the actor must be to produce particular consequences, and therefore excludes those situations where the consequences are inadvertently produced, thereby excluding acts committed with only *dolus eventualis*.[350]

Certain academic commentators have argued that a knowledge standard should be sufficient.[351] Prior to the enactment of the ICC Statute and the Genocide Convention, it had been opined that crimes such as genocide, aggression, war crimes and crimes against humanity are, by their very nature, conscious, intentional or volitional acts, which an individual could not usually commit without *knowing* that certain consequences would result.[352]

340. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention or Convention]. The Convention entered into force on January 12, 1951, and has been joined by 133 parties. For ratification and reservation status, see United Nations Treaty Collection, Convention on the Prevention and Punishment of the Crime of Genocide, at http://www.unhchr.ch/html/menu3/b/treaty1gen.htm (last modified Oct. 9, 2001).

341. *Id.* at 255, citing Prosecutor v. Jelisic, Case No. IT-95-10, ¶ 65 n.71 (ICTY Trial Chamber Dec. 14, 1999), *at* http://www.un.org/icty/brcko/trialc1/judgement/index.htm (on file with author) [hereinafter Jelisic (TC)].

342. Nersessian, *supra* note 17, at 255.

343. *Id.* at 231.

344. *Id*, at 262.

345. *See* Shah, *supra* note 16, at 357; Lippman, *Fifty Years Later*, *supra* note 223, at 423; Nersessian, *supra* note 17, at 262-263; Prosecutor v. Akayesu, Case No. ICTR-96-4-T P. 498 (ICTR Trial Chamber Sept. 2, 1998), *at* http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm (on file with author) [hereinafter Akayesu (TC)]

346. van der Vyver, *Prosecution and Punishment*, *supra* note 222, at 307.

347. Rome Statute, *supra* note 218, art 30(1).

348. *Id.*, art. 30 (2)(b).

349. *Id.*, art. 30 (3).

350. van der Vyver, *Prosecution and Punishment*, *supra* note 222, at 308.

351. *See e.g.*, Greenawalt, *supra* note 334, at 2288-92.

352. *See* Draft Code of Crimes Against the Peace and Security of Mankind: Titles and Texts of Articles on the Draft Code of Crimes Against the Peace and Security of Mankind, Adopted by the International Law Commission at its Forty-Eighth Session, arts. 16 (aggression), 17 (genocide), 18 (crimes against humanity), 20 (war crimes), Report of the International Law Commission on

Although, in the case of genocide, a qualification was made that "a general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act" would not be deemed sufficient.[353] While this pronouncement would not totally exclude using a knowledge standard for genocidal acts, it was meant to specifically leave out to prevent the possibility of a finding of genocide with *dolus eventualis*. Whether the knowledge standard under the ICC Statute would find application to acts of genocide remains an open question, as even the drafters of the ICC's Elements of Crimes failed to clarify the issue in their final draft on genocide.[354]

Decisions from the international criminal tribunals explicitly rejected a knowledge standard for acts of genocide.[355] In the case of *Prosecutor v. Akayesu*, the Trial Chamber held that the offender is only culpable "when he commits a [prohibited offence] with the clear intent to destroy, in whole or in part, a particular group."[356] This therefore underpinned the notion that a "clear intent to destroy" would require a specific purpose to destroy the group, which could not be reasonably equated with mere knowledge that certain acts will destroy the group.[357] This was made even more explicit in the case of *Prosecutor v. Jelisic*, where it was held that the defendant "could not be found guilty of genocide if he himself did not share the goal of destroying in part or in whole a group even if he knew that he was contributing to or thought his acts might be contributing to the partial or total destruction of a group."[358] Recently, in the case of *Prosecutor v. Krstic*, a purposeful standard for genocidal liability was adopted, although no definite

the Work of Its Forty-Eighth Session, U.N. GAOR, 51st Sess., Supp. No. 10, at 87, U.N. Doc. A/51/10 (1996) [hereinafter Draft Code of Crimes].

353. Draft Code, art. 17 cmt. 5.

354. *See* Report of the Preparatory Commission for the International Criminal Court, Addendum 2, Finalized Draft Text of the Elements of Crimes, at 6-8, U.N. Doc. PCNICC/2000/INF/3/Add.2 (1948) [hereinafter Elements of Crimes], *available at* http:// www.un.org/law/icc/statute/elements/english/_add2e.doc.

355. Nersessian, *supra* note 17, at 264.

356. *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T ¶ 521 (ICTR Trial Chamber Sept. 2, 1998), *available at* http:// www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm (last accessed Mar. 9, 2004) [hereinafter Akayesu (TC)].

357. Nersessian, *supra* note 17, at 264.

358. *See* Prosecutor v. Jelisic, Case No. IT-95-10, ¶ 86 (ICTY Trial Chamber Dec. 14, 1999), *available at* http:// www.un.org/icty/brcko/trialc1/judgement/index.htm (last accessed Mar. 9, 2004) [hereinafter Jelisic (TC)].

pronouncements were made as to whether a knowledge standard for the crime could be justified under customary international law.[359]

Without making any definitive pronouncements, it seems that given the present application of the definition of genocide, its distinctive characteristic in requiring an "intent to destroy" has been construed to be limited to *dolus directus*, leaving no room for liability for the principal act in cases of *dolus indirectus*.[360] Destruction of the group should always be the primary objective of the principal perpetrator.[361] *Dolus indirectus* only applies to secondary consequences beyond those actually desired by the perpetrator and would probably only lead to a conviction in cases of complicity in genocide.[362]

In this same way that *dolus indirectus* is excluded, it seems that there would be no place for *versari in re illicita* in the international law prohibition of genocide, where a person committing a wrongful act is responsible for all harmful consequences of the act, i.e. those brought about by one's act including those ensuing from the act of someone else, irrespective of the former's fault regarding those other consequences. [363] The requirement of special intent for the crime of genocide, as well as the circumscription in the ICC Statute of the "mental element" as a precondition for criminal liability, clearly excludes *versari in re illicita*.[364]

One problem, however, of strictly requiring specific genocidal intent, is the possibility of invoking superior orders to negate genocidal intent of subordinates. Although, admittedly, it is a general principle of international criminal law that the existence of superior orders cannot be used as a defense for the criminal conduct of subordinates,[365] it does not totally preclude

359. Prosecutor v. Krstic, Case No. ICTY-98-33-T ¶ 572 (ICTY Trial Chamber Aug. 2, 2001), *available at* http:// www.un.org/icty/krstic/TrialC1/judgement/index.htm (last accessed Mar. 9, 2004) [hereinafter Krstic (TC)].

360. Van der Vyver, *Prosecution and Punishment*, *supra* note 222, at 307

361. *Id.* at 307

362. *Id.*

363. *Id.* at 308

364. *Id.*

365. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, art. 6(c), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, [Nuremburg Charter] art. 8; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991, U.N. Doc. S/25704, Annex, *reprinted in* 32 I.L.M. 1192 (1994) 7(4) [ICTY Statute]; Statute of the International Criminal Tribunal for Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International

raising such defense where the very definition of the crime requires a *dolus specialis*. Of note it the case of Adolf Eichmann where his defense of superior orders was rejected because it was found that Eichmann's acts were so broad that there was no way he could have performed his duties without directing himself towards the genocidal purpose of his superiors.[366] However, the rationale behind the finding of a genocidal intent in that case highlights the possible difficulty in deciphering a genocidal intent when the acts performed pursuant to superior orders do not require any particular attitude toward the identity the victims. Thus, the danger in requiring a specific intent standard is that not only may perpetrators evade liability for genocide by raising lack of specific intent, but it also creates evidentiary problems which will compel courts to squeeze ambiguous fact patterns into the specific intent paradigm.[367]

Another solution to the problem of evading responsibility by a superior orders defense was illustrated in the case of *Akeyasu*. The ICTR, in this case, took the position that a perpetrator lacking specific genocidal intent could nevertheless be guilty of complicity in genocide for knowingly aiding or abetting a principal who does possess the requisite intent.[368] It has been said that this approach would seem to uphold the specific intent standard while simultaneously evading it.[369] The confusion in this view can be seen in the following illustration:

> Take, for example, the case where perpetrator A, lacking specific intent, physically exterminates members of a protected victim group. By these acts alone, perpetrator A is guilty of murder. But perpetrator B, who has ordered these acts with specific genocidal intent, is thus guilty of genocide by way of his complicity in A's actions. Under the ICTR's analysis A's knowledge of B's purposes will have the further effect of rendering A guilty by way of complicity in B's genocidal crime. Thus, despite the fact that A himself has committed the actus reus of genocide, he is only culpable because he is complicit in someone else's complicity in his own actions. In the end, this curious approach presents an awkward circumvention of the specific intent requirement.[370]

Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, S.C. Res. 955, U.N. SCOR, 3453d mtg. at 3., U.N. Doc. S/RES/955, Annex (1994), *reprinted in* 33 I.L.M. 1598, 1602 (1994) at art. 6(4) [ICTR Statute]; Rome Statute,*supra* note 218, art.33.

366. *Eichmann case, supra* note 89, at 228.

367. Greenawalt, *supra* note 334, at 2281.

368. *Id.*at 2282 (citing Akayesu (TC), at ¶ 540.)

369. Greenawalt, *supra* note 334, at 2282-3

370. *Id.* at 2283-4

While the application of these principles have not really gone far beyond the theoretical level, it is curious to not the ambiguous application of forcing the requirement of a specific genocidal intent with the overall policy considerations of deploring genocidal acts.

1. Deciphering the Mental State of the Perpetrator

As stated earlier, intent goes into the mental state of the perpetrator and has been described to be difficult and even almost impossible, to decipher.[371] It is therefore necessary to look into the peculiar facts surrounding each case to determine the presence of a genocidal intent. In *Prosecutor v. Karadzic & Mladic*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) noted that special intent to commit genocide may be inferred from a number of facts, such as the general political doctrine which gave rise to the acts, the repetition of destructive and discriminatory acts, the perpetration of acts defined under the Convention, and the perpetration of acts which are not in themselves covered by the definition of genocide but which are committed as part of the same pattern of conduct.[372] In the case of *Akayesu*, the International Criminal Tribunal for Rwanda (ICTR) held that "it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the preparation of other culpable acts systematically directed against the same group, whether these acts were committed by the same offender or by others."[373]

Other decisions of criminal tribunals have come up with a number of factors that could be considered, including: the scale of atrocities committed and their general nature; the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups; the weapons employed and the extent of bodily injury; and documents reflecting participation in or knowledge of atrocities.[374] The number of group members victimized which should also be considered within the overall framework of events.[375] So are the social and political context of the prohibited acts indicative of

371. Akayesu Judgment, ¶ 523

372. *Id.* at 310; citing Prosecutor v. Karadzic & Mladic, Cases Nos. IT-95-5-R61 and IT-95-18-R61 ¶ 94 (July 11, 1996) 108 I.L.R. 86 (1998) [hereinafter Karadzic and Mladic].

373. Akayesu, at ¶ 522

374. Akayesu, at ¶ 522; Prosecutor v Kayishema and Ruzindana, Judgment, Case No. ICTR-95-1-T ¶ 93-4 (Int'l Crim. Trib. Rwanda, Trial Chamber II, May 21, 1999), *at* http://ww.ictr.org/wwwroot/ENGLISH/cases/KayRuz/judgement/index.htm. (last accessed Mar. 9, 2004) [hereinafter Kayishema].

375. Nersessian, *supra* note 17, at 266.

whether certain acts constitute genocide, as it has been held that the "general political doctrine that gave rise to the acts" is relevant, as is the "repetition of destructive and discriminatory acts."[376] This context of victimization provides judicial presumptions about the actor's intent such that an individual knowingly acting against the backdrop of widespread and systematic violence being committed against only one specific group cannot deny that he chose his victims discriminatorily.[377] While a special intent is necessary, there is no need for any particular genocidist to know all of the details of the plan or policy to be culpable for it.[378]

The acts and deeds of the defendant unquestionably are relevant to genocidal intent,[379] as is the accused's use of derogatory language toward the targeted population.[380] Acts of cultural genocide, though not covered by the Convention, can demonstrate a specific intent to destroy a protected group.[381] The ICTY described such conduct as acts that either violate or are perceived by the perpetrator to violate the "very foundation of the group."[382] While there is no *per se* requirement of State involvement or of a widespread and organized plan of genocidal conduct under the Convention, such that the possibility of a lone genocidist has been accepted, it has been said that "it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread [and organized]."[383]

From all this it seems therefore, that in order to make a finding that genocide has been committed, the determination of a proper *mens rea* is inextricably linked with the *actus reus* characterizing the act. It has been opined thus:

> The objective of genocide as embodied in the requirement of special intent, on the one hand, limits the kind of acts that would constitute genocide. On the other hand, the objective of genocide can also serve to bring into the confines of *the actus reus* a broad perception of killings, bodily or mental harm, that inflicts conditions of life, prevents births, and transfers children.[384]

376. Prosecutor v. Karadzic and Mladic, Confirmation of Indictment Pursuant to Rule 61, Case Nos. ICTY-95-5-R61 and ICTY-95-18-R61, ¶ 294 (ICTY Trial Chamber, Jul. 11, 1996) (on file with author) [hereinafter Karadzic and Mladic].

377. Jelisic, at ¶ 73

378. Kayishema (TC), at ¶94.

379. Jelisic, at ¶73

380. Kayishema, at ¶ 93

381. Krstic (TC), at ¶ 480

382. Karadzic and Mladic, at ¶ 94.

383. Jelisic, at ¶¶100-101

Therefore, while the commission of any of the acts as enumerated in the definition of genocide would be indicative of a *mens rea,* particularly a *dolus specialis* to destroy a group; the contemporaneous commission of other acts not specifically mentioned, could also be found to come within the scope of being done with a genocidal intent and could bolster the finding of such intent.

There has been some discussion as to whether the intent requirement merely contemplates a general intent to destroy, or whether this should be construed even more strictly by requiring a secondary and more deliberate intent to actually cause death to a member of the group.[385] Though certainly rare, it is possible for an individual to intend to destroy a group through certain acts and yet not intend those acts to cause the death of group members, such as through chemical sterilization in order to prevent propagation of a particular race.[386] It is absurd to suggest that the grievous physical and mental injury occasioned by a failed murder attempt, while clearly satisfying the *actus reus* component somehow would be excused from constituting genocide because the perpetrator only intended to destroy the protected group, without the additional purpose to inflict physical or mental harm upon the individual.[387]

2. The Weight of Numbers: Quantitative Criterion

As clear-cut evidence of a specific genocidal intent is often wanting, resort must be had to the circumstantial evidence of the acts committed. It has been said that one factor used to infer genocidal intent is the number of group embers victimized.[388] In the *Kayishema* case, it was held that "[t]he number of Tutsi victims is clear evidence of the intent to destroy this ethnic group in whole or in part.... The killers had the common intent to exterminate the ethnic group and Kayishema was instrumental in the realisation of that intent."[389]

Whether the number of victims is therefore controlling, has been put to question. In *Sikirca,* the ICTY created a "quantitative criterion"[390] in

384. van der Vyver, *Prosecution and Punishment, supra* note 222, at 310.

385. Nersessian, *supra* note 17, at 271.

386. *Id.* at 271.

387. *Id.* at 275.

388. Nersessian, *supra* note 17, at 266.

389. Kayishema (TC), ¶.533

390. Prosecutor v. Sikirica, Judgment, Case No. IT-95-8-T ¶.76 (Int'l Crim. Trib. Yugoslavia, Trial Chamber, Sep. 3, 2001),

requiring that the alleged acts for which a defendant stands trial affect a "reasonably substantial number of the group relative to its total population" even prior to making any inference of genocidal intent.[391] This emerging doctrine of the ICTY, however, may possibly undermine the object and purpose of the Genocide Convention on which the former's statute is based and prevents the development of a meaningful intent standard.[392] The ICTY has misplaced the quantitative requirement within the intent element by interpreting the "in whole or in part" language in increasingly absolute terms, relying on extrastatutory policy considerations, including an effort to reserve genocide only to the most egregious and widespread atrocities.[393]

Application of this "quantitative criterion" is also found in other decisions, but not with as bold pronouncements as that in *Sikirca*. For instance, the tribunal in *Krstic* ultimately held that "in part" simply "means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it."[394] The *Krstic* Court was more reasonable in applying quantitative considerations in relation to the geographically circumscribed location in which genocidal acts are alleged to have taken place.[395] The court explained: "Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such."[396] In order to decipher this intent, the court examined the context among which the killings took place, and the implications these had on the group in general. The Krstic court concluded that the defendant's forces "sought to eliminate all the Bosnian Muslims in [the geographic location] as a community" even though "only the men of military age were systematically massacred."[397]

In *Jelisic*, the court characterized the defendant's acts as discriminatory in nature and discussed the proximity between genocide and persecution, a

http://www.un.org/icty/sikirica/judgement/010903r98bis-e.pdf (last accessed Mar. 9, 2004) [hereinafter Sikirica].

391. Sikirica, at ¶¶ 67-75.

392. David Alonzo-Maizlish, *In Whole or In Part; Group Rights, the Intent Element of Genocide, and the "Quantitative Criterion"*, 77 NYU L. Rev. 1369, 1386 (2002) [hereinafter Alonzo-Maizlish]

393. See Matthew Lippman, *Genocide: The Crime of the Century. The Jurisprudence of Death at the Dawn of the New Millennium*, 23 HOUS. J. INT'L L. 467, 526-30 (2001). [hereinafter Lippman, *The Crime of the Century*]

394. Krstic, Judgment, IT-98-33-T ¶590

395. Alonzo-Maizlish, *supra* note 392, at 1388.

396. Krstic, Judgment, IT-98-33-T ¶ 590

397. Krstic, Judgment, IT-98-33-T ¶ 595

crime against humanity. [398] The court then acknowledged that "[g]enocide . . . differs from the crime of persecution in which the perpetrator chooses his victims because they belong to a specific community but does not necessarily seek to destroy the community as such."[399]

Furthermore, the tribunal divided the element of "in whole or in part" into two possible forms: "in part" first refers to "desiring the extermination of a very large number of the members of the group" and/or secondly to "the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group."[400] In making these assertions, the tribunal characterized the element of "in part" would have to give regard either to the quantity of those killed, or the qualities, *e.g.* the leadership or standing, of those targeted in relation to the community. The *Jelisic* model establishes a categorical rule under which acts will not be deemed genocidal until either the number of deaths reaches a "very large number" or a "significant part" of the population.[401]

These additional requirements in determining the element of genocidal intent have been criticized as being too narrow and undermining the purpose of the Genocide Convention. *Jelisic* and *Sikirica* unnecessarily introduce act requirements into the *mens rea* analysis by treating the quantity and/or quality of the killings as a threshold requirement. Realistically, no court can establish satisfactorily the appropriate quantity of killings necessary to infer intent without diminishing the right to exist of the group. It has been noted thus:

> Jurists rightly differentiate genocide from other crimes on both legal and moral grounds, but in doing so they risk importing ambiguous extralegal concepts into the prosecution of genocide that detract from the development of clear jurisprudence and precise interpretation of the requisite mens rea.... Admittedly, the quantitative element – in both proportionate and whole number terms – carries important evidentiary weight for the determination of whether or not genocidal intent is inferable from a particular presentation of facts. However, genocide's position at the pinnacle of moral condemnation has no necessary or logical role in this determination. On the contrary, the inference of intent concerns the single factual question of whether or not a defendant intended to destroy the group.[402]

398. Alonzo-Maizlish, *supra* note 392, at 1391 (citing Jelisic, Judgment, IT-95-10-T P 67-68)

399. Jelisic, Judgment, IT-95-10-T ¶ 79

400. Jelisic, Judgment, IT-95-10-T ¶¶ 81-82.

401. Alonzo-Maizlish, *supra* note 392, at 1391

402. *Id.* at 1401

3. Irrelevant Motivations

In the drafting of the Genocide Convention, the Ad Hoc Committee introduced an explicit motive requirement by specifying that genocide requires the intent to destroy a national, racial, religious, or political group on grounds of the national or racial origin, religious belief, or political opinion of its members.[403] Reservations were aired, however, that an enumeration of motives was useless and even dangerous, because such a restrictive enumeration would be a powerful weapon in the hands of the guilty parties and would help them to avoid being charged with genocide.[404] The killing of members of a racial, ethnic, national, or religious group qua members of that group, thus may reflect a range of motives, including the desire to expel the group from territory or from a state.

Thus, the motive requirement was deliberately removed from the final text of the Genocide Convention. In its stead, it was required that genocidal acts take place with the intent to destroy a protected group "as such."[405] The underlying motivations for the crime are thus, irrelevant, other than as evidentiary proof of intent.[406] Provided the requisite intent exists, it matters not whether that intent was fueled by animus toward the protected group, by hopes of financial gain, by a personal grudge against individual group members, by ideological or wartime resistance, by misguided beneficence (i.e., mass euthanasia), or by any reason at all.[407] There is no general requirement of reflective premeditation under the Convention and any distinction between spontaneous and reflective acts of genocide would be largely beside the point, and would probably only affect the prosecution's burden at trial.[408]

403. Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later*, 8 TEMP. INT'L & COMPL. L.J. 1 (1994) [hereinafter Lippman, *Forty-Five Years Later*]; Report of the Ad Hoc Committee on Genocide to the Economic and Social Council on the Meetings of the Committee Held at Lake Success, New York, from April 5 to May 10, 1948, 7 U.N. ESCOR, Supp. No. 6, at 2, U.N. Doc. E/794 (1948) art. II at 5.

404. U. U.N. GAOR 6th Comm., 3d Sess., 76th mtg. at 124, U.N. Doc. A/c.6/Sr. 61-140 (1948); U.N. GAOR 6th Comm., 3d Sess., 75th mtg. at 120, U.N. Doc. A/c.6/Sr. 61-140 (1948).

405. See U.N. GAOR 6th Comm., 3d Sess., 77th mtg. at 33, U.N. Doc. A/C.6/SR.77 (1948).

406. Nersessian, *supra* note 17, at 268; *See* Frederick M. Lawrence, *The Case for a Federal Bias Crime Law*, 16 NAT'L BLACK L.J. 144, 156-57 (1999).

407. 2 PIETER N. DROST, THE CRIME OF STATE: GENOCIDE 82, 83-84 (1959).

408. U.N. GAOR 6th Comm., 3d Sess., 72nd mtg. at 87-88, U.N. Doc. A/C.6/SR.72 (1948) (Mr. Bartos, Yugo.).

While motive is not controlling, it can blur a proper finding of genocidal intent. In order to illustrate such problem, the case of Albanians in Kosova would be in point. Several of the killings and other acts of terror perpetrated against the Albanian population would satisfy the *actus reus* element in genocide. However, a finding of the requisite *mens rea* is not as simple. The intent of the Serb attacks appears to have been to drive the Albanian population from the areas they inhabited, *i.e.* ethnic cleansing.[409] This would then lead many to conclude that the abuses would more properly fall under the categories of crimes against humanity or war crimes, rather than genocide, because it seems that the intent is to drive the victims from their homes and not to destroy them.[410] This is how motive becomes confused with intent.

> While the intent to destroy a group is a required element for genocide, the *travaux preparatoires* of the Genocide Convention make clear that the motive of the perpetrator is irrelevant to whether an act constitutes genocide. Accordingly, in those cases where it can be proven that Serb elements carried out acts intending to destroy the Albanian population or a part of it, for example those living in a particular area of Kosovo, the fact that the perpetrator did so in order to drive the remaining Albanians out of Kosovo is irrelevant to a finding of genocide. Nevertheless, with regard to most of the Kosovo terror, the pattern and the scale of the violence would seem to make it difficult to establish that this was merely the motive of the Serb forces and not their intent. [411]

This clearly highlights the difficulty in establishing a genocidal intent. The concepts of intent and motive can sometimes seem to overlap, and a strict construction in favor of the perpetrator, as is done with most crimes, will most likely prevent a finding that genocide was what was intended. More often than not, there will be no direct evidence of genocidal intent, i.e. official pronouncements to eliminate the group and the like. Thus, the totality of the circumstantial evidence must be taken into consideration, but great care must be exercised in deciphering whether the intent to destroy, regardless of the underlying motivations therefor, is present.

B. The Intent Requirement: A Critique

Apart from the criticisms on the varying factors for determining genocidal intent, are criticisms on the very fact of requiring intentionality as an element. One group of critics finds the intentionality requirement irrelevant while the

409. Jason Abrams, *The Atrocities in Cambodia and Kosovo: Observations on the Codification of Genocide*, 35 NEW ENG. L. REV. 303, 308 (2001) [hereinafter Abrams].

410. *Id.* at 308.

411. *Id.* at 308-309.

other sees it as obscuring more critical, structural forms of group harm.[412] There is one view that genocide should apply to all situations where there is willful killing of masses of human beings, regardless of the reasons and means used therefore.[413] Take the case of nuclear weapons, for instance. The 1996 Advisory Opinion of the I.C.J. on the legality of nuclear weapons[414] failed to make any declarations as to whether the threat or use of nuclear weapons was was contrary to the Genocide Convention. Clearly, the deployment of atomic arms would result in an enormous number of deaths, necessarily including persons of particular national, ethnic, racial, or religious groups. However, 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.[415] Thus, the Court required an independent finding of intent, despite the fact that the mere deployment of nuclear arms already produces a degree and depth of harm, which would be indistinguishable from genocide.[416]

Another criticism on the inentionality requirement is the fact that it allegedly fails to give the proper importance to cases of massive killings cause by structural causes.[417] It has been asserted that genocide should be understood as "a structural and systematic destruction of innocent people by a state apparatus."[418] Emphasizing intent as an element has been said to have the effect of detracting the focus from the more pressing realities of genocidal acts caused by structural violence, *i.e.* violence caused by social, political, and economic institutions and structures.[419] Admittedly, it has become increasingly difficult to locate intentional actors in a bureaucratic world dominated by numerous anonymous forces.[420] This view properly

412. Simon, *Defining Genocide*, *supra* note 318, at 247.

413. *Id* .at 247-248 (citing Israel W. Charny, *Review of Helen Fein's Genocide: A Sociological Perspective*, 30-31 INTERNET ON THE HOLOCAUST AND GENOCIDE (Inst. on the Holocaust and Genocide, Jerusalem, Isr.), Feb. 1991.

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

415. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 240 (Jul. 8).

416. Lippman, *The Crime of the Century*, *supra* note 393, at 517 (citing Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. at 240, 244).

417. Simon, *Defining Genocide*, *supra* note 318, at 249.

418. IRVING LOUIS HOROWITZ, TAKING LIVES: GENOCIDE AND STATE POWER 17 (1980).

419. William Eckhart & Gernot Köhler, *Structural and Armed Violence in the 20th Century: Magnitudes and Trends*, 6 INT'L INTERACTIONS 347, 348 (1980).

420. *See* ISIDOR WALLIMANN & MICHAEL N. DOBKOWSKI, INTRODUCTION TO GENOCIDE AND THE MODERN AGE (ISIDOR WALLIMANN & MICHAEL N. DOBKOWSKI EDS., 1987).

brings to fore the reality of systemic foundations of genocide, but it cannot be denied that such structures are likewise rooted in individual actors. Although intentional and structural approaches to genocide do not necessarily conflict,[421] the present definition of genocide fails to address the situation of genocidal acts that are so deeply embedded in bureaucratic structures where it would be nigh impossible to make a finding of genocidal intent when links between the structures and individuals are difficult to establish.

While the intent requirement may seem problematic in failing to address all deplorable situations of mass killings of certain groups, it is important in order to assure that the concept of responsibility remains closely linked to genocide.[422] Accepting the need for intent as an element of genocide is what creates a distinction between discriminate forms of killing and indiscriminate forms of killing. Although the means of deciphering this intent could pose obstacles to actual convictions for the crime, it does not detract from its practical necessity.

V. THE QUESTION OF JURISDICTION

Owing to the gravity and nature of the offense[423] in the commission of genocide, the issue of accountability[424] of the offenders comes to fore. The need to combat impunity for these offenders entails a two-pronged process:

421. Simon, *Defining Genocide*, *supra* note 318, at 249.

422. *Id.* at 251.

423. As early as 1917, the Belgian government had already issued a report regarding German deportation and forced labor of the Belgian civil population, noting:

> [r]eports that would make any uncivilized man tremble with indignation... showing unspeakable suffering inflicted on thousands of innocent people huddled together, in order that this herd of pitiable human cattle may be sorted out and enslaved for the ends of despotism... There is only one word that can describe it: 'It is a hell.'

424. *See* J. Balint, *The Place of Law in Addressing International Regime Conflicts*, 59 L. & CONTEMP. PROB. 103 (1996); M. C. Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 L. & CONTEMP. PROB. 9 (1996); M. Morris, *International Guidelines Against Impunity: Facilitating Accountability*, 59 L. & CONTEMP. PROB. 29 (1996); N. Kritz, *Coming To Terms With Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 L. & CONTEMP. PROB. 127 (1996); M. Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 L. & CONTEMP. PROB. 59 (1996); N. Roht-Arriaza, *Combating Impunity: Some Thoughts on the Way Forward*, 59 L. & CONTEMP. PROB.93 (1996); M. Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. & INT'L L. 175, 177 (1995).

bringing the offenders to justice[425] either through prosecution or extradition while at the same time ensuring adequate and effective remedies for the victims to pursue their respective claims, all set to be achieved in a precarious time of national healing and reconciliation.[426]

425. As regards this matter, Orentlicher notes:

> Despite this focus [on permissive international jurisdiction], the law is fairly interpreted to require, and not merely to authorize, states to punish crimes against humanity when committed in their own jurisdiction. Correctly understood, the emphasis on permissive international jurisdiction signifies the strength of international law's insistence that crimes against humanity must be punished . . .

D. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of A Prior Regime*, 100 YALE L. J. 2539, 2593 (1991) [hereinafter Orentlicher, *Settling Accounts*] .

See UN Principles of International Co-operation 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., 2187th Mtg., Supp. (No. 30), at 78, U.N. Doc.A/9030 (1973), setting out as a principle of international cooperation that "[w]ar crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.". The General Assembly had earlier urged all States "to take measures in accordance with international law to put an end to and prevent war crimes and crimes against humanity and to ensure the punishment of all persons guilty of such crimes, including their extradition to those countries where they have committed such crimes." Question on the Punishment of War Criminals and of Persons who have Committed Crimes Against Humanity, G.A. Res. 2840 (XXVI), U.N. GAOR, 26th Sess., Supp. No. 29 at 444, U.N. Doc. A/5892 (1971).

And while the conventional non-applicability of statutory limitations do not obligate States parties to prosecute alleged offenders of crimes against humanity, they still evince a conviction among States parties that perpetrators of such crimes should not escape punishment. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73; European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, Jan. 25, 1974, EUROP. T.S. NO. 82, 13 I.L.M. 540.

These pronouncements apply to genocide considering that acts constituting genocide can be subsumed under acts deemed as crimes against humanity. Prior to the enactment of the Genocide Convention, genocide was in fact prosecuted as a subset of either war crimes or crimes against humanity.

426. The grant of amnesty rather than prosecution of offenders, particularly high-ranking military officers and other public officials, has in fact been deemed historically as a more viable option to further the goals of peace-keeping, nation-building and reconciliation. *See* N. Roht-Arriaza, *Conclusion: Combating Impunity*, *in* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 299-302 (N. Roht-Arriaza ed., 1995); Economic Community of West African States, Peace Agreement, July 7, 1999, Sierra Leone-Revolutionary United Front of Sierra Leone (RUF/SL), art. IX, *reprinted in* 11 AFR. J. INT'L & COMP. L 557, 563 (1999); Peace Agreement, Nov. 20, 1996, Sierra Leone-Revolutionary United Front of Sierra Leone (RUF/SL), art. 14, *reprinted in* 9 AFR. J. INT'L & COMP. L. 414, 417-18 (1997). *See also* Azanian Peoples Org. v. President of the Republic of S. Afr. 1996 (4) SALR 671, 690 (CC) (describing amnesty as tool for effective constructive transitions towards democratic order); Rodriguez v. Uruguay, Hum. Rts. Comm., U.N. Doc. CCPR/C/51/D/322/1988, at 12.2 (1994) (stating the grant of amnesty to consolidate democracy and assure peace).

As with any enforcement of international criminal law, what has emerged has been a patchwork system[427] of addressing and bringing criminal accountability, comprised of domestic courts, courts of other States not involved in the conflict, ad hoc tribunals, and an international criminal court. Hence, genocide has been prosecuted and has since been the subject of jurisdiction from the Nuremberg[428] and the Tokyo Trials precedents,[429] to the

427. S. RATNER AND J. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 291 (1997) [hereinafter RATNER & ABRAMS]

428. Charter of the International Military Tribunal for the Trial of the Major War Criminals, Appended to the Agreement for the Prosecution and Punishment of the Major War Crime Criminals of the European Axis, 82 U.N.T.S. 279 (1945) [hereinafter Nuremberg Charter]. This Charter is to be read and interpreted with the Treaty of Peace Between the Allied and Associated Powers and Germany (Treaty of Versailles), June 28, 1919, art. 227, 11 MARTEN'S (3d.) 323, *reprinted in* 2 BEVANS 42, 1 FRIEDMAN 417 [hereinafter Treaty of Versailles] and the Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Crimes Against Humanity *excerpted in* 3 INTERNATIONAL CRIMINAL LAW 66, 79-81 (M.C. Bassiouni ed., 2d. 1999) [hereinafter Allied Control Council Law No. 10].

429. International Military Tribunal for the Far East, Jan. 19, 1946, *amended* April 26, 1946, T.I.A.S. No. 1589, 4 BEVANS 20 [hereinafter Tokyo Trials Charter].

International Criminal Tribunals in Rwanda (ICTR)[430] and Yugoslavia (ICTY)[431] and ultimately to the International Criminal Court (ICC).[432]

The bottom line, however, is that the reality of genocide persists notwithstanding the concurrent existence of these international institutions and domestic legal systems. Ultimately then, who has jurisdiction over these offenders?

C. *National Courts and the Notion of Territoriality and Nationality*

The Genocide Convention provides that persons charged with genocide or any other acts related thereto shall be tried by "a competent tribunal of the State in the territory of which the act was committed."[433] Article VI thereby imposes an obligation, first and foremost, on domestic tribunals to prosecute acts of genocide and other genocide-related acts committed within their own borders. This underscores the territoriality principle, the bedrock of criminal law, that national criminal jurisdiction is jurisdiction over crimes committed in the territory of a State.[434]

Since sovereignty over territory and authority over nationals are two of the most basic aspects of statehood,[435] the territorial and nationality

430. International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994, S.C. Res. 955, Annex, UN SCOR, 49th Sess., UN Doc. S/INF/50 (1994) [hereinafter Rwanda Charter].

431. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. S/25704, Annex (1993) [hereinafter Yugoslavia Charter].

432. Rome Statute, *supra* note 218.

433. Genocide Convention, art. 6.

434. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (5d. 1998);301, 303; L. HENKIN ET AL., INTERNATIONAL LAW CASES AND MATERIALS 826 (2d. 1987). *See* An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE] art 11; An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE] ARTS. 2, 114-123.

435. As U.S. Chief Justice Marshall explains:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself.

The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812).

principles of criminal jurisdiction could thus be plausibly argued as more fundamental than other competing principles of jurisdiction. International law, however, establishes no definite priority among them. As such inter-State conflicts resulting from this overlapping concurrent jurisdiction are generally resolved through comity and cooperation, with treaties on extradition or judicial assistance providing the legal framework for interstate cooperation. Nevertheless, in the absence of an extradition treaty, a State has no general legal obligation to extradite a person within its territory to another state for prosecution.[436] Multilateral treaties do create an obligation for States to prevent impunity for certain defined international crimes; nothing, however, in these regimes establishes a priority among the competing jurisdictional claims of Sates over such crimes. Voluntary interstate cooperation cannot resolve what the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has referred to as the "perennial danger of international crimes being characterized as 'ordinary crimes,'[437] or proceedings being 'designed to shield the accused', or cases not being diligently prosecuted."[438]

B. *Filling the Gaps in Criminal Territorial Enforcement: The Exercise of Universal Jurisdiction*

Domestic jurisdiction to prosecute genocide under Article VI establishes a hollow obligation in that the crime is most frequently perpetrated with the assistance or acquiescence of the State.[439] This circumstance along with the gravity of the offense committed[440] thereby subjects the offenders to the exercise of universal jurisdiction.

436. Factor v. Laubenheimer, 270 U.S. 276 (1933).

437. ICTR Statute, art. 10, ¶ 2(a).

438. *Id.* art. 10, ¶ 2(b).

439. Continuation of the Consideration of the Draft Convention on Genocide [E/794]: Report of the Economic and Social Council [A/633], U.N. GAOR 6th Comm., 97-98th mtgs., at 365 (1948); P. Akhavan, *Enforcement of the Genocide Convention: A Challenge to Civilization*, 8 HARV. HUM. RTS. J. 229, 234 (1995).

440. As viewed by the International Military Tribunal at Nuremberg, "[a]n international crime is ... an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the [S]tate that would have

The universality principle provides every State with jurisdiction over a limited category of offenses of universal concern, without regard to the *situs* of the offense and the nationalities of the offender and the offended.[441] Hence, while other jurisdictional bases require a nexus between the prosecuting State and the offense, the universality principle assumes that every State has an interest in exercising jurisdiction to combat egregious offenses that States have universally condemned.[442] As such, the universality principle emerges from the notion that any State possesses both legal competence and jurisdictional authority to define and punish particular offenses, irrespective of whether that State had any direct or material connection with the specific offenses at issue.[443]

Universality over genocide offenders is a matter of customary law.[444] The prohibition of genocide being a *jus cogens* norm,[445] the International Court of

control over it under ordinary circumstances." 11 TRIALS OF WAR CRIMINALS 1241 (1946-49).

There is, thus, an interest of the international community to enforce for the prosecuting State to act not as a national court but as a surrogate for the international community. M.C. Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 96 (2001).

441. K. Randall, *Universal Jurisdiction Under International Law*, 66 TEXAS L. REV. 785, 787 (1988) [hereinafter Randall].

442. O. SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 245, 262 (1985).

443. C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 L CONT. PROB. 153, 167 (2001).

444. J. Jordan, *Universal Jurisdiction in A Dangerous World: A Weapon for All Nations Against International Crime*, 9 MSU-DCL J. INT'L L. 1, 16 (2000); D. Cassel, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court*, 35 NEW ENG. L. REV. 421, 426-427 (2001); L. Damrosch, *Enforcing International Law Through No-Forcible Measures*, 269 RECUEIL DES COURS, 216, 218 (1997); Y. Dinstein, *International Criminal Law*, 20 ISRAEL L. REV. 206, 214 (1986); G. Gilbert, *Crimes* Sans Frontiérs: *Jurisdictional Problems in English Law*, 63 BRIT. Y.B. INT'L L. 415, 423-424 (1992); R. Wolfrum, *The Decentralized Prosecution of International Offences Through National Courts*, 24 ISRAEL Y.B. INT'L HUM. RTS. 183 (1995).

445. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Further Requests for the Indication of Provisional Measures, Order of 13 September 1993, ¶¶100, 101 (Lauterpacht, Ad Hoc Judge, sep. op.) and (Kreca, Ad Hoc Judge, dissenting).

Justice in 1951 has held that "the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation" and noted "the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge.'"[446] On several occasions, the Court has even expressly stated that the prohibition of genocide is an obligation *erga omnes*, that is, an obligation owed to all States.[447]

The exercise of universal jurisdiction as regards genocide has now been argued to be embraced by treaty law. Notably, the Genocide Convention does not create an *aut dedere, aut judicare* ("extradite or prosecute") obligation and instead requires parties to exercise domestic, rather than universal jurisdiction. The *travaux préparatoires* (preparatory work), however, indicate that the framers did not intend Article VI to *prevent* States Parties to the Convention from continuing to exercise extraterritorial jurisdiction over genocide in their "pragmatic compromise" on this issue.[448] Scholarly opinion also supports such conclusion.[449] The *Eichmann* Court in fact noted that "reference to Article 6 (of the Genocide Convention) to territorial jurisdiction is not exhaustive" and that "every sovereign [S]tate may exercise

In the national context, *see Nulyarimma v. Thompson*, 1999 FCA 1192 (Federal Court of Australia 1 September 1999), *at* http://www.austlii.edu.au/au/cases/cth/federal_ct/1999/1192.html (last visited July 4, 2003).

446. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 ICJ REP. 23.

447. Barcelona Traction, Light and Power Company Ltd., Judgment, 1972 I.C.J. REP. ¶34; Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Preliminary Objections, Order of 11 July 1996, 1996 ICJ REP. ¶31.

448. SCHABAS, GENOCIDE IN INTERNATIONAL LAW , *supra* note 205, at 548.

449. ROBINSON, THE GENOCIDE CONVENTION, *supra* note 245, *at* 84; C. Blakesley, *Extraterritorial Jurisdiction, in* 2 INTERNATIONAL CRIMINAL LAW: PROCEDURES AND ENFORCEMENT MECHANISMS 33, 77 (M. C. Bassiouni, ed., 1999); T. Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 569 (1995); Orentlicher, *Settling Accounts, supra* note 425, at 2565; Randall, *supra* note 441, at 835-837; RATNER AND ABRAMS, *supra* note 427, at 142; M. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 63 LAW & CONTEMP. PROBS 67, 86 (2000); Simma & A. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Armed Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 314 (2000).

its existing powers within the limits of customary international law."[450] As Randall notes:

> It is anomalous to argue that General Assembly resolutions affirming the Nuremberg principles, declaring genocide to be an international crime, and creating a convention to outlaw genocide have deprived the parties of their customary law right to prosecute genocide under the universality principle. That argument also leads to the dubious conclusion that non parties have a more expansive right to prosecute genocide - the customary law right to exercise universal jurisdiction - than do parties to the Genocide Convention.[451]

In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judge Lauterpacht likewise held that the definition of "genocide" in Article I of the Genocide Convention was intended "to permit parties, within the domestic legislation that they adopt, to assume universal jurisdiction over the crime of genocide--that is to say, even when the acts have been committed outside their respective territories by persons who are not their nationals."[452]

Reading the Convention in its totality provides further ample basis for the exercise of universal jurisdiction. In confirming that "genocide, whether committed in time of peace or in time of war, is a crime under international law which [States] undertake to prevent and to punish," nowhere does the Convention provide for any notion of territorial limitation. Moreover, Article VII *requires* States Parties to comply with extradition requests by other states, whether they are parties to the Genocide Convention or not and without limiting the obligation to requests from territorial States.

Universality over genocide under customary law vis-à-vis territoriality under treaty law can therefore co-exist.[453] Customary law jurisdiction relates to a *jurisdictional right*, that is, every State has the right to assert universality over genocide, wherever and whomever committed. Treaty law jurisdiction meanwhile pertains to a *jurisdictional obligation*, which means that States Parties to the Genocide Convention are obligated to prosecute offenses particularly committed within their territory.[454]

450. *Eichmann Case*, *supra* note 89, at 277.

451. Randall, *supra* note 441, at 836.

452. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures, 1993 I.C.J. 325, 443, ¶110 (Sept. 13).

453. Randall, *supra* note 441, at 836.

454. For a comprehensive look at genocide prosecutions at the national level, *see* http://preventgenocide.org/punish/domestic/index.htm (last visited May 25, 2003). For an enumeration of the specific implementation of the Genocide Convention through domestic legislation, *see* http://www.preventgenocide.org/law/domestic/ (last visited May, 25, 2003).

B. The Creation of Ad-Hoc International Criminal Tribunals and the Notion of Primacy

Article VI of the Genocide Convention likewise envisions prosecutions "by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." This provision relies on consent to international jurisdiction, as such, reference to an international court is more of an aspiration rather than an obligatory provision that gives States the right to elect jurisdiction.[455]

The ICTR and the ICTY were created ad hoc[456] to deal with the unique situation in the two regions concerned, specifically to address a threat to international peace and security, the maintenance of which is the primary purpose of the United Nations.[457] Pursuant to its mandate to identify threats to peace and decide what measures to take in response,[458] the Security Council decided to create judicial organs as a Chapter VII non-military enforcement measure to give effect to its decision.[459] With the establishment

455. Lippman, *Forty-Five Years Later*, *supra* note 403, at 58.

456. The ICTY and ICTR are ad hoc institutions in the sense that each was created by the Security Council as a temporary measure to deal with a specific threat to international peace and security. The ICTY was created on May 25, 1993, by U.N. Security Council Resolution 827. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827, ¶ 2 (1993). The ICTR meanwhile was created on November 8, 1994, by Security Council Resolution 955. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955, ¶ 1 (1994).

457. The first purpose of the United Nations, as specified in the Charter, is: [t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, the adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

U.N. CHARTER, art. 1, ¶ 1.

458. "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." *Id* art. 39

459. Article 41 of the U.N. charter provides:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of

of these tribunals endowed with territorial and temporal limitations,[460] the question of the appropriate relationship between the jurisdiction of national courts and that of an international criminal court was raised for the first time. On its face, the Statute of the ICTY, like that of the ICTR, resolves the jurisdictional conflict in favor of the International Tribunal. Thus, while the Statute recognizes that national courts have concurrent jurisdiction[461] over crimes within the competence of these Tribunals, it endows the international bodies with primacy[462] This arrangement represents the high-water mark for the priority of international criminal tribunals over national courts.

Primacy [463] compromises the sovereign prerogatives of States by requiring them to defer to an international tribunal, and, more generally, to cooperate with the international court and to obey its orders concerning such matters as the production of evidence and the arrest and detention of persons.[464] Considering that primacy was authorized by the Security Council

rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

460. Article 7 of the ICTR Statute explains:

> The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.

The counterpart provision in Article 8 of the ICTY Statute meanwhile states: "The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991."

461. ICTY Statute, art. 9(1); ICTR Statute, art. 8(1).

462. ICTY Statute, art. 9(2); ICTR Statute, art. 8(2).

463. The term "primacy" was used in an attempt to convey a somewhat complicated notion of jurisdictional hierarchy in which States were encouraged to assume a substantial portion of the responsibility for the prosecution and trial of the apparently large number of perpetrators of reported atrocities, while at the same time preserving the inherent supremacy of the jurisdiction of the International Tribunal which may need to be asserted for various reasons in particular cases – not in the usual sense of reviewing the decisions of "lower" courts but rather to exercise jurisdiction in the first instance as a trial court.

1 V. MORRIS AND M. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUANL FOR THE FORMER YUGOSLAVIA 126 (1995).

464. ICTY Statute, art. 29; ICTR Statute, art. 28.

in response to specific threats to international peace and security,[465] it is thus binding upon all Member States of the United Nations.[466]

Two points are worth underscoring at this juncture. First, one reason for granting the international tribunals such broad primacy over national courts is to prevent multiple courts from simultaneously exercising jurisdiction over an accused. If courts of different States were allowed contemporaneously to prosecute the same offenders, chaos is more likely to ensue. For instance, there could be evidentiary problems resulting from the different investigative procedures employed in each individual system.[467] Evidence could likewise be destroyed or damaged if it were in more than one trial.[468] Witnesses might be more reluctant to testify in front of the Tribunal for fear of facing physical danger as a result of their cooperation. [469] National court proceedings would appear biased and partial if a court dominated by one of the competing groups were to try an accused war criminal of its own ethnicity, or even of a rival ethnicity.[470] As observed by the Tribunal in the *Decision on the Defence Motion on Jurisdiction for Dusko Tadic*, allowing concurrent jurisdiction without granting primacy to the Tribunal would, in effect, permit the accused "to select the forum of his choice, contrary to the principles relating to coercive criminal jurisdiction."[471] Forum shopping would thereby only entitle the accused to pick a sympathetic court, resulting to a biased trial.

Second, the rationale for jurisdictional priority lies not only in practical considerations but likewise in the very special purpose and nature of the Security Council – created international criminal tribunals. It must be noted that each of the ad hoc tribunals was specially created to protect compelling humanitarian interests in the context of a situation identified as a threat to international peace and security. Extraordinary measures are justified to deal with such a situation, and, in the cases of the former Yugoslavia and Rwanda, they have been formally authorized under the U.N. Charter. All cases within the jurisdiction of the ad hoc tribunals involve fundamental humanitarian interests of concern to the international community as a whole. It is for this

465. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704/Add.1/Corr.1, ¶ 28 (1993).

466. U.N. CHARTER, arts. 25, 39-42.

467. *See* Prosecutor v. Karadzic, No. IT-95-5-D, ¶ 24 (I.C.T.Y. May 15, 1995) (request for deferral).

468. *See id.* ¶ 28.

469. *See id.* ¶ 27.

470. *See* Proposal for an International War Crimes Tribunal for the Former Yugoslavia, U.N. SCOR, 48th Sess., U.N. Doc. S/25307 (1993).

471. Prosecutor v. Tadic, No. IT-94-1-T, ¶ 41 (I.C.T.Y. Aug. 10, 1995) (defense motion on jurisdiction).

reason that primacy is afforded to the proceedings in the international tribunals rather than in domestic prosecutions.

C. Reconciling Interests in the Exercise of Concurrent Jurisdiction

The exercise of concurrent jurisdiction between two different entities, namely the domestic courts and the international criminal tribunals expose certain difficult issues which will likely recur in future contexts in which similar structures of actively shared jurisdiction are undertaken. For instance, concurrent jurisdiction raises complex questions as regards cooperation in investigations and the sharing of evidence. Difficulties concerning confidentiality of evidence, witness protection, due process standards, and the need to avoid any appearance of partiality of the international tribunal all raise delicate issues which have yet to be systematically addressed.[472]

Particularly, an area of concern is the distribution of defendants between the national and international fora. The appropriate distribution of defendants has in fact been the cause of uncertainty and, at times, of tension between national governments and the ICTR. The ICTR and the government of Rwanda have sought several times to obtain custody of the same suspect.[473] In one case, not only the ICTR and the Rwandan government, but also the Belgian government were engaged in efforts to gain custody of the same suspects who were being held in Cameroon.[474]

The tensions between the Rwandan government and the ICTR over distribution of defendants have resulted in part from a lack of communication over time and also in part from a more fundamental conflict of interests or, at least, of agendas. When the ICTR was established, the Rwandan government had not yet decided upon an approach to national prosecutions. Subsequently, the approach adopted relied heavily on plea agreements. This appeared incompatible with the operation of an international tribunal that views its mandate as prosecuting the top-level leaders of the genocide.[475]

Given this backdrop, a threshold requirement for greater coherence in the interaction of national and international jurisdictions is a clear articulation, in each case in which an international tribunal is to be convened, of the needs which that particular tribunal is intended to meet. Obviously,

472. M. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349, 362 (1997).

473. *See* P. Gourevitch, *Justice in Exile*, N.Y. TIMES, June 24, 1996, at A15.

474. *See* C. Tomlinson, *Tug of War Over Rwanda Suspect*, INDEP., Mar. 13, 1996, at 10; M. Bigg, *U.N. Rwanda Genocide Tribunal Adjourns*, REUTERS WORLD SERV., Jan. 9, 1997.

475. Morris, *supra* note 472, at 363.

the purposes for an international tribunal varies across contexts. The needs that are likely to be present in greater or lesser degree, singly or in combination, include any of the following:

> a. responding to an overwhelmed national justice system;
>
> b. substituting for a national system where the fact or appearance of bias would substantially undermine justice processes, either because of a lack of will to prosecute, or of a will to prosecute "with a vengeance";
>
> c. substituting for a national justice system where the national system would be unable to obtain custody of suspects; and/or
>
> d. expressing, through the exercise of international jurisdiction, a universal condemnation of some special feature of the crimes in question such as the special international responsibility of certain perpetrators.[476]

In determining the purpose to which the international tribunal is convened, an articulation of said purpose determines, to a certain degree, whether an international tribunal will best serve the goals sought in that particular context.[477] Thus, if the purpose is to respond to a situation where the national system is overwhelmed, then one can ascertain whether it is best to provide an international tribunal or simply to provide assistance to the national system, or some combination of the two.

Moreover, having reference to clearly articulated purposes for convening an international tribunal allows the operation of that particular tribunal, and especially its interaction with national jurisdictions, to be appropriately tailored to those goals. For instance, if the purpose is to substitute for national courts where they cannot obtain custody then, the international tribunal should defer to the national justice system if the domestic system can obtain custody over eth defendants. In contrast, if the purpose is to express universal condemnation of certain crimes, then that international tribunal may wish to exercise jurisdiction even where the national courts could gain custody. In such a case, a very careful analysis of how the international interest in "universal condemnation" should be weighed against the national (and international) interest in successful operation of the national justice system if the two should conflict. It is therefore essential to the fruitful operation of an international court that its purposes are clearly articulated in each instance and that its operations are appropriately tailored to those purposes in each case.

476. *Id* .at 372-73.

477. This synthesizes the arguments presented by Morris, *see id.* at 373.

D. The Establishment of the International Criminal Court

Being a crime of serious international concern, the commission of genocide or any acts related thereto falls within the jurisdiction of the International Criminal Court.[478] Unlike however the jurisdictional system established under the ICTR and ICTY Statutes, the Rome Statute provides for the creation of the ICC which shall be "complementary to national criminal jurisdictions."[479] This means that the Statute allows States the *first opportunity* to investigate and prosecute alleged perpetrators of the international crimes covered therein.[480] It is only in cases where States fail to do so when the ICC assumes jurisdiction.[481] This is the system of complementarity, which lies at the very heart of the ICC criminal law enforcement and adjudication.[482]

The most straightforward instance wherein the ICC assumes jurisdiction is where no State has initiated investigative action or declared its intent to do so.[483] However, under the express mandate of the Rome Statute, the Court should defer to States if:

> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

478. Rome Statute, *supra* note 218, arts. 5 (1) (a) and 6.

479. *Id.* pmbl.

480. D. Robinson, *The Rome Statute and Its Impact on National Law, in* 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1849, 1860 (Cassesse et al. eds. 2002) [hereinafter Robinson, *The Rome Statute*].

481. It is recognized that if States fulfill their obligations under international law by exercising effective jurisdiction over the perpetrators of international crimes covered therein, the Court will thereby not be seized of any cases as the Court itself recognizes the primacy of national jurisdiction explicitly provided for in the Statute. Holmes, *supra* note 397, at 667.

The reality, however, is that States may still be unwilling to exercise jurisdiction over international crimes, despite the duty to so, particularly in cases where there is limited nexus between the supposedly prosecuting State and the crime. Moreover, States which may have the best jurisdictional claims over certain cases may be unable to investigate and prosecute for a variety of reasons. And even if the State could thus investigate and prosecute, such course of action may be with a view to shielding the alleged perpetrator from any meaningful determination. Thus, jurisdiction can still and will eventually be exercised by the ICC. *Id.* at 667-68.

482. M. Delmas-Marty, *The ICC and the Interaction of International and National Legal Systems, in* 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1915, 1915 (Cassesse et al. eds. 2002).

483. Robinson, *The Rome Statute*, *supra* note 480, at 1860.

> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
>
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
>
> (d) The case is not of sufficient gravity to justify further action by the Court.[484]

In these instances, national jurisdiction was or had been exercising its jurisdiction and a putative investigation or prosecution by the Court would have eventually led to a jurisdictional conflict between the Court and the State concerned. By virtue of complementarity, the Court is thereby obligated to declare the case inadmissible to recognize and give way to the primary prosecutory duty of the State concerned over the international crimes involved.[485] In ascertaining the unwillingness or inability of a State to prosecute alleged perpetrators, the Statute employs a fairly stringent test in requiring the Court to consider whether national authorities are in reality attempting to shield the person from justice or whether the national judicial system has so collapsed that genuine proceedings cannot be had.[486]

484. Rome Statute, *supra* note 218, art 17 (1).

485. Holmes, *supra* note 397, at 673.

486. In providing for a standard, the Statute states:

> 2. In order to determine *unwillingness* in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
>
> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
>
> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
>
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
>
> 3. In order to determine *inability* in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability

Articles 15, 18, and 19 of the Rome Statute further provide the procedural framework upon which the principle of complementarity operates. Underlying these provisions are several principles such as the importance of expeditious action in a criminal proceeding; the Court's involvement at an early stage to consider and resolve jurisdiction and admissibility questions; the need to avoid duplication of efforts at the national and international level; and the principle of justice being done and being seen to be done.[487]

Pursuant to the principle of *pacta tertiis nec nocent nec prosunt*, the ICC binds only Parties who have signed and ratified the Rome Statute.[488] Nevertheless, Article 12 of the Rome Statute likewise empowers the ICC to exercise jurisdiction over third parties accepting the jurisdiction of the Court,[489] should any of the Parties or non-Parties accepting ICC jurisdiction is (1) the State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; or (2) the State of which the person accused of the crime is a national.[490]

States concerned about their sovereignty may take comfort in precautions embodied in the ICC Statute to prevent frivolous prosecutions. For instance, the Prosecutor decides whether to proceed with a prosecution, taking into account, among other things, the conditions of admissibility laid down in Article 17.[491] The decision to prosecute (or not to prosecute) is likewise subject to review by the Pre-Trial Chamber composed of three judges.[492] Furthermore, the jurisdiction of the ICC may be challenged on the basis of the principle of complementarity by the accused, by a State that

> of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.
>
> Rome Statute, *supra* note 218, art 17 (2) and (3) (emphasis supplied).

487. Holmes, *supra* note 397, at 679.

488. "A treaty does not create either obligations or rights for a third State without its consent." Vienna Convention on the Law of Treaties, May 23, 1969, art. 34, 8 I.L.M. 698. Furthermore, "a State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes." Rome Statute, *supra* note 218, art. 12 (1).

489. "If the acceptance of a State which is not a Party to this Statute is required... that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception..." Rome Statute, *supra* note 218, art. 12 (3).

490. *Id.* art. 12 (2) (a) and (b).

491. *Id.* art. 53 (1).

492. *Id.* art. 53 (3).

has jurisdiction to prosecute the accused, or by the territorial State or the national State of the accused.[493] Last, the ICC may of its own accord determine the admissibility of the case with a view to the prior right of a state to prosecute the accused.[494]

The principle of complementarity is also decisive when the custodial State receives a request from the ICC to surrender a suspect to the Court[495] and is also called upon to extradite the same person to another State[496] that has jurisdiction to prosecute that person. The custodian State is required to surrender a suspect to the ICC only after the ICC has established that the State requesting extradition is unwilling or unable to prosecute that person--that is, if the requesting state is a State Party to the ICC Statute.[497] If the requesting state is not a State Party to the ICC Statute and the custodian state is not under an obligation, by virtue of an extradition treaty or otherwise, to extradite the suspect to the requesting state, then the custodian state will be obliged to surrender the suspect to the ICC.[498] Should the requesting State, however, be not a Party to the ICC Statute but the custodial State is under an international obligation to extradite the suspect to the requesting State, then the former is given a discretion to either surrender the suspect to the ICC or to extradite her/him to the requesting State.[499]

The ICC Statute is also quite meticulous in stipulating the duty of the custodian State in cases where the ICC requests the surrendering of a suspect for a particular crime while the requesting State seeks extradition of the same person to stand trial for conduct other than that which constitutes the basis of the crime which the ICC has in mind.[500] Here a distinction is not made, as far as the requesting State is concerned, between States Parties to the ICC Statute and non-States Parties. But if the custodian State is not under an international obligation to extradite the suspect to the requesting state, priority must always be given to the request of the ICC. Meanwhile should

493. *Id.* art 19(2).

494. *Id.* art 19(1).

495. *Id.* art. 102 (a).

496. *Id.* art . 102 (b).

497. *Id.* art. 90 (2).

498. *Id.* art. 90 (4).

499. *Id.* art. 90 (6). In this regard, the custodial State is not vested with absolute discretion. Rather in its exercise of discretion, the custodial State must consider all the relevant facts, including the date on which the request to surrender and the request to extradite were received the interests of the requesting state in the matter, including, *inter alia*, whether the crime was committed in the territory of the requesting state, the nationality of the suspect and of the victims of the, and the possible surrender of the suspect by the requesting State to the ICC.

500. *Id.* art. 90 (7).

the custodian State be obliged to extradite the suspect to the requesting State, then it is again given a judicial discretion to choose between the ICC and the requesting State.[501]

The Rome Statute is criticized[502] in that its procedures are so sufficiently complex that the Court may spend more time adjudicating jurisdiction than justice. And in most instances in which a regime has 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. Offenders can also seek asylum in sympathetic States. Furthermore, 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. In any event, the Court's jurisdiction is limited in every instance by the conditions of admissibility which are designed to defer to State sovereignty. There likewise exists the issue of State cooperation in the surrender of offenders and preservation and transmittal of evidence. Thus, although the Court may achieve long-term success and sophistication, in the meantime, it is more likely that it will be slow and sporadic in bringing the perpetrators of genocide to justice.

E. Resort to United Nations Organs

Article VIII of the Genocide Convention further 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 [related] acts." This provision affirms that all relevant United Nations organs possess the authority and responsibility to combat genocide.[503] The proposal to require complainants to notify the Security Council was rejected on the ground that such action restricts the competence of other United Nations institutions, particularly the International Court.[504]

Moreover, Article IX of the Genocide Convention provides that "[d]isputes between the Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute." This Article authorizes the

501. *See id.* art 90 (4) and (5).

502. This summarizes the criticisms presented by Matthew Lippman. *See* Lippman, *The Crime of the Century*, *supra* note 393, at 522-23.

503. *See* 3 U.N. GAOR C.6, 105th mtg. at 456, U.N. Doc. A/C.6/SR.105 (1948) (Mr. Ti-Tsun Li (P.R.C.).

504. *Id.* at 458 (Mr. De Beus, Neth.).

International Court to determine the applicability of the Convention, to clarify treaty terms, and to assess a Party's fulfillment or non-fulfillment of statutory obligations.[505] The Court is likewise authorized to adjudge State responsibility for genocide or other acts enumerated, enjoin the continuance of such acts and award damages or reparations to the aggrieved party.[506] Most States recognized that governmental regimes usually were implicated in genocide and that the determination of State culpability was particularly important in the absence of an international criminal court.[507] Article IX, however, does not preclude submitting a case of genocide which threatened international peace and security to the Security Council or to other competent United Nations organs.[508] The Security Council could likewise be called upon to enforce the judgments of the International Court of Justice.[509]

VI. CONCLUSION: ADDRESSING PROBLEM AREAS UNDER THE GENOCIDE CONVENTION

> "The graves are not yet quite full. Who is going to do the good work and help us fill them completely?"[510]
>
> "You have to kill (the Tutsis); they are cockroaches. . . . We must all fight (the Tutsis); we must finish with them, exterminate them, sweep them from the whole country."[511]

Far from being ancient, genocide has been in existence from the days of the Early Romans to the more recent conflict between the Hutus and the Tutsis in Rwanda. And this actuality is far more likely to continue, albeit with the unconsciousness and, even at times, apathy of the international community, save in those instances when societies have been totally destroyed, peoples annihilated, economic relations ruptured, and politics needed to be brokered by more powerful international actors. As concluded by the Special

505. Lippman, *Fifty Years Later*, *supra* note 223, at 463.

506. U.N. GAOR 6th Comm., 3d Sess., pt.1, 105th mtg., *supra* note ___, at 438 (Mr. Pescatore, Lux.).

507. U.N. GAOR 6th Comm., 3d Sess., pt. 1, 104th mtg. at 430-31, U.N. Doc. A/C.6/SR.104 (1948) (Mr. Fitzmaurice, U.K.).

508. *Id.* at 444 (Mr. Fitzmaurice, U.K.).

509. *Id.*

510. ARYEH NEIER, WAR CRIMES 203-04 (1998) (quoting GERARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 24 (1995)).

511. Colette Braekman, *Incitement to Genocide*, *in* CRIMES OF WAR 192, 192 (Roy Gutman and David Rieff eds., 1999) (quoting Radio Televison des Milles Collines (RTLM) in Rwanda).

Rapporteur as early as 1985, "all too much evidence continues to accumulate that acts of genocide are still being committed in various parts of the world."[512]

Genocide, that is, any act committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such, is two-pronged. The act itself is dated and archaic while the concept itself is new and the legal underpinnings revolutionary. Nevertheless, what is troubling is the heightened tolerance and indifference afforded to the various commission of genocide in an age that has supposedly embraced the notion of fundamental human rights and criminal accountability for gross and atrocious violations of said rights.

As far as international law is concerned, the formal circumscription of the crime of genocide in the Genocide Convention has become sacrosanct. Today's realities, however, call for the imperative to reexamine and reconsider the substance of the concept of genocide.

Forms of genocide today exist that are totally beyond the contemplation of the parties at the time of the drafting of the Convention in 1948. The drafters of the Convention are deemed to have "produced a text that remains susceptible to remarkably divergent interpretations, with far-reaching implications for the scope of the Convention's application."[513] This has particularly serious consequences as regards the prosecution of the perpetrators, and the scope of protected groups under the Convention.

From the 1948 Genocide Convention to its most recent inclusion in the Rome Statute of the International Criminal Court, the international crime of genocide has been defined as an act committed with "intent to destroy, in whole or in part, a national, ethnical, racial or religious group." The predominant interpretation of this language depicts genocide as a crime of "specific" or "special" intent, in which the perpetrator deliberately seeks the whole or partial destruction of protected groups. Perhaps, as Greenawalt maintains, "in defined situations, principal culpability for genocide should extend to those who may personally lack a specific genocidal purpose, but who [nevertheless] commit genocidal acts while understanding the destructive consequences of their actions."[514] This modified interpretation of intent necessarily embodies "perpetrators [who] knowingly engage in the extermination of protected groups but in which the ideology of persecution evades encapsulation within the specific intent framework."[515]

512. Lippman, *Fifty Years Later, supra* note 223, at 463.

513. Alexander K.A. Greenawalt, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259, 2264 (1999).

514. *Id.* at 2259.

515. *Id.* at 2279.

In addition to the vague intent requirement, much controversy likewise exists over what acts constitute genocide. Under a broad definition, several examples can be deemed embraced as acts of genocide:

> the denial of ethnic Hawaiian culture by the American run public school system in Hawaii[;] government policies letting one race adopt the children of another race[;] African slavery by whites[;] South African Apartheid [;] any murder of women by men[;] death squad murders in Guatemala [;] deaths in the Soviet gulag[;] . . . . 'race mixing'; . . . drug distribution; . . . the practice of birth control and abortions among Third World people; [and] sterilization . . .[516]

A delineation of the acts that characterize genocide is therefore needed to aid in the prosecution of perpetrators of this international crime. An enumeration that allows for extension by analogical reasoning would also help clarify the circumstances under which various acts, such as expulsions, population transfer, rape, and torture, would constitute genocide.

Currently, racial, ethnic, religious, and national groups are the only ones that are protected under the definition of genocide. The torture and murder of women, homosexuals, political dissidents, and people of lower socio-economic status, will be therefore viewed, at most, as a crime against humanity. Lippman presents a sound argument by emphasizing that that the Genocide Convention ought to be applied (or, at the very least, amended) to afford protection to "any coherent collectivity which is subject to persecution," including "political groups and possibly women, homosexuals, and economic and professional classes."[517] Simon likewise proposes to remedy the defective definition of genocide, in particular the scope of those groups afforded protection, by altering the definition to read: "genocide is the intentional killing of members of a group, negatively identified by the perpetrators, because of their actual or perceived group affiliation."[518] It is to be noted that both Simon's and Lippman's definition of genocide improve the definition in the Genocide Convention by removing the restrictive language and allowing for a more expansive scope and further reaching protection.

The emphasis afforded to provide for criminal accountability and combat impunity with regard to perpetrators of genocide and other related acts also needs to be addressed. More confusion has emerged from a patchwork system of different prosecutors vested with jurisdiction, either customarily or conventionally, by international law: domestic courts, States asserting the exercise of universal jurisdiction, ad hoc criminal tribunals, United Nations organs, and the International Criminal Court. The primacy or concurrence

516. Simon, *Defining Genocide, supra* note 318, 247.

517. Lippman, *Fifty Years Later, supra* note 223, at 468.

518. Simon, *Defining Genocide, supra* note 318, at 244.

of these jurisdictional priorities is far from settled, ultimately leaving the question of jurisdiction to unilateral or conflicting assertions of States or criminal tribunals or to voluntary inter-State acts of cooperation as the case may be. This, however, far from resolves the problem. Worse, a complicated procedural and evidentiary system of rules permeate these State-to-State, State-to-the United Nations and State-to-International Criminal Court interactions thereby confounding the issue rather than affording a solution to the jurisdictional dilemma in the first place.

The exoneration of the Khmer Rouge, the extermination of the moderate Hutus, and numerous other groups that have been robbed of their existence, should have taught the world that such inhumanity will not be tolerated, nor will it happen again. With the gaps, however, in the Genocide Convention an opposite terrifying message is relayed: so long as you are a member of a group that is not defined as national, ethnical, racial or religious, so long as the requisite intent is not established, and so long as the question of who has proper jurisdiction is not resolved, your mass extermination will not be prosecuted as genocide, the perpetrators will evade a genocidal conviction, and justice will ultimately not be served.