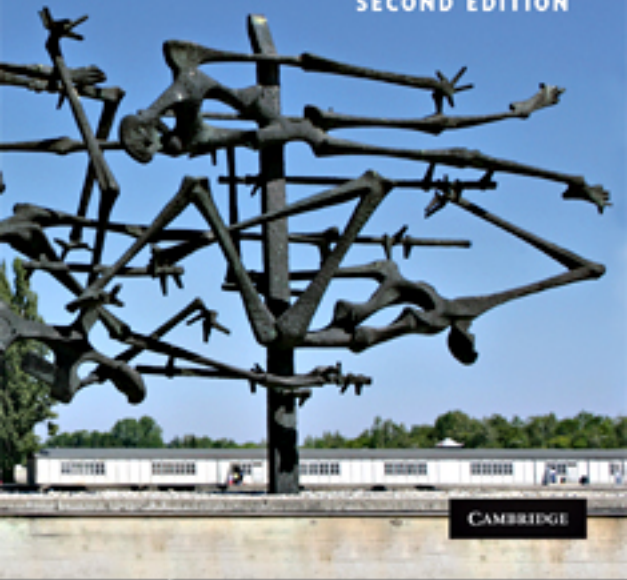
William A. Schabas

Genocide in International Law

The Crime of Crimes

SECOND EDITION



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GENOCIDE IN INTERNATIONAL LAW

Second Edition

The 1948 Genocide Convention has become a vital legal tool in the international campaign against impunity. Its provisions, including its enigmatic definition of the crime and its pledge both to punish and prevent the 'crime of crimes', have now been interpreted in important judgments by the International Court of Justice, the *ad hoc* Tribunals for the former Yugoslavia and Rwanda and various domestic courts.

The second edition of this definitive work focuses on the judicial interpretation of the Convention, relying on debates in the International Law Commission, political statements in bodies like the General Assembly of the United Nations and the growing body of case law. Attention is given to the concept of protected groups, to problems of criminal prosecution and to issues of international judicial cooperation, such as extradition. The duty to prevent genocide and its relationship with the emerging doctrine of the 'responsibility to protect' are also explored.

WILLIAM A. SCHABAS OC MRIA is Director of the Irish Centre for Human Rights and professor of human rights law at the National University of Ireland, Galway. The author of many books and journal articles on the subject of international human rights law, Professor Schabas has served as an international member of the Sierra Leone Truth and Reconciliation Commission (2002 to 2004). He is also a member of the Board of Trustees of the United Nations Voluntary Fund for Technical Assistance in the Field of Human Rights, an Officer of the Order of Canada and a Member of the Royal Irish Academy.

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SECOND EDITION

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To my parents, Ann and Ezra

CONTENTS

Preface to the first edition *page* ix
Preface to the second edition xiii
Acknowledgments xv
List of abbreviations xvii

Introduction 1

1 **Origins of the legal prohibition of genocide** 17

2 **Drafting of the Convention and subsequent normative developments** 59

3 **Groups protected by the Convention** 117

4 **The physical element or *actus reus* of genocide** 172

5 **The mental element or *mens rea* of genocide** 241

6 **'Other acts' of genocide** 307

7 **Defences to genocide** 367

8 **Prosecution of genocide by international and domestic tribunals** 400

9 **State responsibility and the role of the International Court of Justice** 491

10 **Prevention of genocide** 520

11 **Treaty law questions and the Convention** 593

Conclusions 641

Appendix: The three principal drafts of the Convention 655
Bibliography 672
Index 711

PREFACE TO THE FIRST EDITION

The legal questions involved in studying genocide draw on three areas of law: human rights law, international law and criminal law. These are all subjects that I have both taught and practised. This alone ought to be sufficient to explain my interest in the subject. But there is more. Of the three great genocides in the twentieth century, those of the Armenians, the Jews and Gypsies, and the Tutsi, my life has been touched by two of them.

My grandparents on my father's side, and my ancestors before them for generations, came from Kosowa and Brzezany, towns in what was once called Eastern Galicia. Located in the general vicinity of the city of Lvov, they are now part of Ukraine. Essentially nothing remains, however, of the Jewish communities where my grandparents were born and raised. In the months that followed the Nazi invasion of the Soviet Union, the Einsatzgruppen murdered as many as two million Jews who were caught behind the lines in the occupied territories. On 16–17 October 1941, in a German Aktion, 2,200 Jews, representing about half the community of Kosowa, were taken to the hill behind the Moskalowka bridge and executed. Parts of the population of both towns, Brzezany and Kosowa, were deported to the Belzec extermination camp. As the Germans were retreating, after their disastrous defeat at Stalingrad in January 1943, the executioners ensured they would leave no trace of Jewish life behind. It is reported that more Jews were killed in Brzezany on 2 June 1943, and in Kosowa on 4 June 1943, a 'final solution' carried out while the Soviet forces were still 500 km away. The victims were marched to nearby forests, gravel pits and even Jewish cemeteries where, according to Martin Gilbert, 'executions were carried out with savagery and sadism, a crying child often being seized from its mother's arms and shot in front of her, or having its head crushed by a single blow from a rifle butt. Hundreds of children were thrown alive

into pits, and died in fear and agony under the weight of bodies thrown on top of them.'[1]

Although my grandparents had immigrated to North America many years before the Holocaust, some of my more distant relatives were surely among those victims. Several of the leaders of the Einsatzgruppen were successfully tried after the war for their role in the atrocities in Brzezany, Kosowa and in thousands of other European Jewish communities of which barely a trace now remains. The prosecutor in the Einsatzgruppen case, Benjamin Ferencz, a man I have had the honour to befriend, used the neologism 'genocide' in the indictment and succeeded in convincing the court to do the same in its judgment.[2]

Exactly fifty years after the genocide in my grandparents' towns, I participated in a human rights fact-finding mission to a small and what was then obscure country in central Africa, Rwanda. I was asked by Ed Broadbent and Iris Almeida to represent the International Centre for Human Rights and Democratic Development as part of a coalition of international non-governmental organizations interested in the Great Lakes region of Africa. The mission visited Rwanda in January 1993, mandated to assess the credibility and the accuracy of a multitude of reports of politically and ethnically based crimes, including mass murder, that had taken place under the regime of president Juvénal Habyarimana since the outbreak of civil war in that country in October 1990. At the time, a terrifying cloud hung over Rwanda, the consequence of a speech by a Habyarimana henchman a few weeks earlier that was widely interpreted within the country as an incitement to genocide. We interviewed many eyewitnesses but our fact-finding went further. In an effort to obtain material evidence, we excavated mass graves, thus confirming reports of massacres we had learned of from friends or relatives of the victims.

At the time, none of us, including myself, had devoted much study if any to the complicated legal questions involved in the definition of genocide. Indeed, our knowledge of the law of genocide rather faithfully reflected the neglect into which the norm had fallen within the human rights community. Yet faced with convincing evidence of mass killings

[1] Martin Gilbert, *Atlas of the Holocaust*, Oxford: Pergamon Press, 1988, p. 160. See also Israel Gutman, *Encyclopedia of the Holocaust*, Vol. I, New York: Macmillan, 1990, pp. 184–5.

[2] *United States of America* v. *Ohlendorf et al.* ('Einsatzgruppen trial'), (1948) 3 LRTWC 470 (United States Military Tribunal).

of Tutsis, accompanied by public incitement whose source could be traced to the highest levels of the ruling oligarchy, the word 'genocide' sprung inexorably to our lips. Rereading the definition in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide helped confirm our conclusion. In a press release issued the day after our departure from Rwanda, we spoke of genocide and warned of the abyss into which the country was heading. The term seemed to fit. Our choice of terminology may have been more intuitive than reasoned, but history has shown how closely we came to the truth. Three months after our mission, Special Rapporteur Bacre Waly Ndiaye visited Rwanda and essentially endorsed our conclusions. He too noted that the attacks had been directed against an ethnic group, and that article II of the Genocide Convention 'might therefore be considered to apply'.[3] In his 1996 review of the history of the Rwandan genocide, Secretary-General Boutros Boutros-Ghali took note of the significance of our report.[4]

Four months after the Rwandan genocide, I returned to Rwanda as part of an assistance mission to assess the needs of the legal system, and more specifically the requirements for prompt and effective prosecution of those responsible for the crimes. Over the past five years, much of my professional activity has been focused on how to bring the génocidaires to book. I have been back to Rwanda many times since 1994, and participated, as a consultant, in the drafting of legislation intended to facilitate genocide prosecutions. The International Secretariat of Amnesty International sent me to Rwanda in early 1997 to observe the *Karamira* trial, the first major genocide prosecution under national law in that country, or, for that matter, in any country, with the exception of the *Eichmann* case. I have since attended many other trials of those charged with genocide, both within Rwanda and before the International Criminal Tribunal for Rwanda, in Arusha, Tanzania, including the *Akayesu* trial, the first international prosecution pursuant to the Genocide Convention. I have also devoted much time to training a new generation of Rwandan jurists, lecturing regularly on criminal law and on the specific problems involved in genocide prosecutions as a visiting professor at the law faculty of the Rwandan National University. On 2 September 1998, I took a break from teaching the introductory criminal law class

[3] 'Report by the Special Rapporteur on Extrajudicial, Summary Arbitrary Executions on His Mission to Rwanda, 8–17 April 1993', UN Doc. E/CN.4/1994/7/Add.1, at para. 79.

[4] Boutros Boutros-Ghali, 'Introduction', in *The United Nations and Rwanda*, 1993–1996, New York: United Nations Department of Public Information, 1996, pp. 1–111 at p. 20.

to 140 eager young Rwandans and we all spent the morning listening attentively on the radio to Laïty Kama, president of the International Criminal Tribunal for Rwanda, as he read the first international judgment convicting an individual of the crime of genocide.

But I have also spent many hours with genocide survivors, and I have visited the melancholy memorials to the killings. The smell of the mass graves cannot be forgotten and, like the imagined recollections of my grandparents' birthplace, it has its own contribution to what sometimes may seem a rather dry and technical study of legal terms. There is more passion in this work than may initially be apparent.

William A. Schabas
Washington, 27 August 1999

PREFACE TO THE SECOND EDITION

There has probably been more legal development concerning the crime of genocide in the eight years since the first edition of this book was completed than in the five preceding decades. Where, in mid-1999, the *ad hoc* tribunals had only made a handful of judicial pronouncements interpreting the definition of genocide, there is now a rich body of jurisprudence, including several important rulings by the Appeals Chambers. At the time, there was a paucity of legal literature, with most scholarly writing dominated by historians and sociologists. Now, the legal bibliography on genocide is rich and extensive. Crowning this fertile period, in February 2007 the International Court of Justice issued its major ruling on the subject, a long-awaited conclusion to a case filed by Bosnia and Herzegovina against the Federal Republic of Yugoslavia in 1993.

Naturally, this second edition takes account of this, updating the scholarship and, where appropriate, revising certain assessments. The approach in the first edition to the interpretation of the terms of the 1948 Genocide Convention was relatively conservative. At the time, my mind was open to the prospect that the law would evolve in a different direction, driven by a certain logic that views progressive development as synonymous with constant expansion of definitions so as to encompass an increasingly broad range of acts. The case law has tended to confirm the former. For example, it has generally rejected the suggestion that 'ethnic cleansing' be merged with genocide. Along the same lines, it has resisted attempts to enlarge the categories of groups that are contemplated by the definition of genocide.

On some issues, my own thinking has evolved. Years of case law, discussion and reflection about the nature of genocide have generated what I think are new insights. No longer does the debate about the 'specific intent' of the crime, which has figured almost as a mantra in the case law, seem very helpful. When the recent judgment of the International Court of Justice considered whether the State of Serbia

had the 'specific intent' to commit genocide, the awkwardness of such an inquiry seemed evident. Unlike individuals, States do not have 'intent', they have *policy*. The Court was trying to transpose a concept of criminal law applicable to individuals to the field of State responsibility. Had it gone in the other direction, the result might have been more coherent. If we look for the State *policy* to commit genocide we can transfer the finding to the individual not by asking if he or she had the specific intent to perpetrate the crime, like some ordinary murderer, but rather whether he or she had knowledge of the policy and intended to contribute to its fulfilment. I develop this approach, which builds upon the thinking of scholars who have spoken of a 'knowledge-based' approach to the *mens rea* of genocide, in the second edition.

The first edition was principally a reference work on the 1948 Genocide Convention. It relied primarily on the *travaux préparatoires* of 1947 and 1948 not because these are decisive for its interpretation but simply because when I was writing the book there was little else to consult. That has all changed. Thus, the second edition incorporates relevant references to the abundant case law, adjusting observations of the first edition where this is appropriate, and confirming them in other respects.

William A. Schabas
Rome, 29 February 2008

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I wish to thank the Social Sciences and Humanities Research Council of Canada for a research grant and for the Bora Laskin Research Fellowship in Human Rights. The first edition of this work was completed while on sabbatical leave from the University of Quebec at Montreal, when I held a Jennings Randolph Senior Fellowship with the United States Institute of Peace in Washington. I hereby acknowledge my great appreciation for the Institute's support. The help and encouragement from my many colleagues at the United States Institute of Peace, but particularly Neil Kritz, Bill Stuebner, John Crist and Joe Klaits, is fondly recalled. A term as visiting professor at the University of Montpellier in 1998, the guest of Frédéric Sudre and Michel Levinet, gave me the opportunity for an intensive period of writing on an early draft of a portion of the manuscript.

The second edition was completed in 2007–8, while on sabbatical leave from the National University of Ireland, Galway. I spent part of the year at Cardozo Law School of Yeshiva University in New York and part at LUISS Guido Carli University in Rome. Both institutions gave me the time and the appropriate intellectual environment to review developments over the nine years since the first edition.

Short excerpts from articles I have written since the first edition appeared have been incorporated into the text without substantial modification: 'Darfur and the "Odious Scourge": The Commission of Inquiry's Findings on Genocide', (2005) 18 *Leiden Journal of International Law*, p. 871; 'Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes', (2007) 2:2 *Genocide Studies and Prevention*, p. 101; 'Genocide Trials and *Gacaca* Courts', (2005) 3 *Journal of International Criminal Justice*, p. 879; 'Genocide, Crimes Against Humanity and Darfur: The Commission of Inquiry's Findings on Genocide', (2005) 27 *Cardozo Law Review*, p. 101; 'Has Genocide Been Committed in Darfur? The State Plan or Policy Element in the Crime of Genocide', in Ralph Henham and Paul Behrens, eds., *The*

Criminal Law of Genocide, International, Comparative and Contextual Aspects, Aldershot, UK: Ashgate, 2007, pp. 35–44; 'National Courts Finally Begin to Prosecute Genocide, the "Crime of Crimes" ', (2003) 1 *Journal of International Criminal Justice*, p. 89.

Besides providing time and travel funds, my various research grants also blessed me with several gifted assistants with whom it was always a pleasure to work: Véronique Brouillette, Sophie Dormeau, Geneviève Dufour, Niru Kumar, Véronique Robert-Blanchard and particularly Cecilie Lund. Many colleagues and friends encouraged and assisted me with various aspects of my research. Inevitably, my colleagues and I will disagree about some of the many difficult issues in this field. I have great respect for their views, and know that our debates will continue as the subject evolves. Of course, the views expressed here are my own. I wish to thank particularly Elizabeth Abi-Mershed, Howard Adelman, Anees Ahmed, Catarina Albuquerque, Jaye Alderson, Kai Ambos, Cécile Aptel, M. Cherif Bassiouni, Chaloka Beyani, the late Katia Boustany, Rowly Brucken, Christina Cerna, Frank Chalk, Roger Clark, Emmanuel Decaux, René Degni-Segui, Rokhaya Diarra, Fidelma Donlon, Norman Farrell, Don Ferencz, Jim Fussell, Meg de Guzman, the late Bernard Hamilton, Frederick Harhoff, Kristine Hermann, Martin Imbleau, Laïty Kama, Ben Kiernan, Anne-Marie La Rosa, Ben Majekodunmi, Linda Melvern, Miltos Miltiades, Faustin Ntezilyayo, John Packer, Zach Pall, Robert Petit, Wolfgang Schomburg, Dorothy Shea, Wibke Timmermann, Brenda Sue Thornton, Otto Triffterer, Daniel Turp, Nicolai Uscoi and Alfred de Zayas. Diplomatic personnel in embassies and governments around the world, too numerous to mention individually, also gave generously of their time in providing me with their domestic legislation on genocide. The reliable professionalism, confidence and support of the personnel of Cambridge University Press, and in particular of Finola O'Sullivan, is also gratefully acknowledged.

As always, words fail in expressing my love and thanks to my wife, Penelope Soteriou, and to my daughters, Marguerite and Louisa.

ABBREVIATIONS

AC	Appeal Cases
AI	Amnesty International
AIDI	Annuaire de l'Institut de Droit International
All ER	All England Reports
BFSP	British Foreign and State Papers
BFST	British Foreign and State Treaties
BYIL	British Yearbook of International Law
CERD	Committee for the Elimination of Racial Discrimination
CHR	Commission on Human Rights
CHRY	Canadian Human Rights Yearbook
CLR	Commonwealth Law Reports
Coll.	Collection of Decisions of the European Commission of Human Rights
Cr App R	Criminal Appeal Reports
Crim LR	Criminal Law Review
CSCE	Conference on Security and Co-operation in Europe
Doc.	Document
DR	Decisions and Reports of the European Commission of Human Rights
Dumont	Corps universel diplomatique du droit des gens
EC	European Communities
ECOSOC	Economic and Social Council
EHRR	European Human Rights Reports
ESC	Economic and Social Council
ETS	European Treaty Series
F.	Federal Reporter
FCA	Federal Court of Australia
GA	General Assembly
HRJ	Human Rights Journal
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission

ILDC	International Law in Domestic Courts
ILM	International Legal Materials
ILR	International Law Reports
IMT	Trial of the Major War Criminals before the International Military Tribunal
JCPC	Judicial Committee of the Privy Council
JDI	Journal de droit international
JICJ	Journal of International Criminal Justice
KB	King's Bench
L Ed	Lawyer's Edition
LNTS	League of Nations Treaty Series
LRC	Law Reports of the Commonwealth
LRTWC	Law Reports of the Trials of the War Criminals
Martens	Martens Treaty Series
NAC	National Archives of Canada
NILR	Netherlands International Law Review
OAS	Organization of American States
OASTS	Organization of American States Treaty Series
OAU	Organization of African Unity
Res.	Resolution
RGD	Revue générale de droit
RSC	Revised Statutes of Canada
SC	Supreme Court
SCHR	Sub-Commission on Prevention of Discrimination and Protection of Minorities
SCR	Supreme Court Reports (Canada)
SD	Selected Decisions of the Human Rights Committee
TLR	Times Law Reports
TS	Treaty Series
TWC	Trials of the War Criminals
UKTS	United Kingdom Treaty Series
UN	United Nations
UNAMIR	United Nations Assistance Mission in Rwanda
UNCIO	United Nations Conference on International Organization
UNTS	United Nations Treaty Series
UNWCC	United Nations War Crimes Commission
UNYB	United Nations Yearbook
US	United States
USNA	United States National Archives
WCR	War Crimes Reports
Yearbook	Yearbook of the International Law Commission
YECHR	Yearbook of the European Convention on Human Rights
YIHL	Yearbook of International Humanitarian Law

Introduction

'The fact of genocide is as old as humanity', wrote Jean-Paul Sartre.[1] The law, however, is considerably younger. This dialectic of the ancient fact yet the modern law of genocide follows from the observation that, historically, genocide has gone unpunished. Hitler's famous comment, 'who remembers the Armenians?', is often cited in this regard.[2] Yet the Nazis were only among the most recent to rely confidently on the reasonable presumption that an international culture of impunity would effectively shelter the most heinous perpetrators of crimes against humanity.

The explanation for this is straightforward: genocide was generally, although perhaps not exclusively, committed under the direction or, at the very least, with the benign complicity of the State where it took place. Usually, the crime was executed as a quite overt facet of State policy, particularly within the context of war or colonial conquest. Obviously, therefore, domestic prosecution was virtually unthinkable, even where the perpetrators did not in a technical sense benefit from some manner of legal immunity. Only in rare cases where the genocidal regime collapsed in its criminal frenzy, as in Germany or Rwanda, could accountability be considered.

[1] Jean-Paul Sartre, 'On Genocide', in Richard A. Falk, Gabriel Kolko and Robert Jay Lifton, eds., *Crimes of War*, New York: Random House, 1971, pp. 534–49 at p. 534.

[2] Hitler briefed his generals at Obersalzburg in 1939 on the eve of the Polish invasion: 'Genghis Khan had millions of women and men killed by his own will and with a gay heart. History sees him only as a great state-builder . . . I have sent my Death's Head units to the East with the order to kill without mercy men, women and children of the Polish race or language. Only in such a way will we win the lebensraum that we need. Who, after all, speaks today of the annihilation of the Armenians?' Quoted in Norman Davies, *Europe, A History*, London: Pimlico, 1997, p. 909. The account is taken from the notes of Admiral Canaris of 22 August 1939, quoted by L. P. Lochner, *What About Germany?*, New York: Dodd, Mead, 1942. During the Nuremberg trial of the major war criminals, there were attempts to introduce the statement in evidence, but the Tribunal did not allow it. For a review of the authorities, and a compelling case for the veracity of the statement, see Vahakn N. Dadrian, 'The Historical and Legal Interconnections Between the Armenian Genocide and the Jewish Holocaust: From Impunity to Retributive Justice', (1998) 23 *Yale Journal of International Law*, p. 504 at pp. 538–41.

The inertia of the legal systems where the crimes actually occurred did little to inspire other jurisdictions to intervene, although they had begun to do so with respect to certain other 'international crimes' such as piracy and the trafficking in persons, where the offenders were by and large individual villains rather than governments. Refusal to exercise universal jurisdiction over these offences against humanitarian principles was defended in the name of respect for State sovereignty. But it had a more sinister aspect, for this complacency was to some extent a form of *quid pro quo* by which States agreed, in effect, to mind their own business. What went on within the borders of a sovereign State was a matter that concerned nobody but the State itself.

This began to change at about the end of the First World War and is, indeed, very much the story of the development of human rights law, an ensemble of legal norms focused principally on protecting the individual against crimes committed by the State. It imposes obligations upon States and ensures rights to individuals. Because the obligations are contracted on an international level, they pierce the hitherto impenetrable wall of State sovereignty. There is also a second dimension to international human rights law, this one imposing obligations on the individual who, conceivably, can also violate the fundamental rights of his or her fellow citizens. Where these obligations are breached, the individual may be punished for such international crimes as a matter of international law, even if his or her own State, or the State where the crime was committed, refuses to do so. Almost inevitably, the criminal conduct of individuals blazes a trail leading to the highest levels of government, with the result that this aspect of human rights law has been difficult to promote. While increasingly willing to subscribe to human rights standards, States are terrified by the prospect of prosecution of their own leaders and military personnel, either by international courts or by the courts of other countries, for breaches of these very norms. To the extent that such prosecution is even contemplated, States insist upon the strictest of conditions and the narrowest of definitions of the subject matter of the crimes themselves.[3] The law of genocide is a paradigm for these developments in international human rights law. As the prohibition of the ultimate threat to the existence

[3] The duty to prosecute individuals for human rights abuses has been recognized by the major international treaty bodies and tribunals: *Velasquez Rodriguez* v. *Honduras*, Judgment of 29 July 1988, Series C, No. 4; *Bautista de Arellana* v. *Colombia* (No. 563/1993), UN Doc. CCPR/C/55/D/563/1993, paras. 8.3, 10; *Streletz, Kessler and Krenz* v. *Germany*, European Court of Human Rights, 22 March 2001, para. 86.

of ethnic groups, it is right at the core of the values protected by human rights instruments and customary norms.

The law is posited from a criminal justice perspective, aimed at individuals yet focused on their role as agents of the State. The crime is defined narrowly, a consequence of the extraordinary obligations that States are expected to assume in its prevention and punishment. The centrepiece in any discussion of the law of genocide is the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948.[4] The Convention came into force in January 1951, three months after the deposit of the twentieth instrument of ratification or accession.

Fifty years after its adoption, it had slightly fewer than 130 States parties, a rather unimpressive statistic when compared with the other major human rights treaties of the United Nations system which, while considerably younger, have managed to approach a more general degree of support by the nations of the world.[5] In the decade that followed, barely another dozen joined the treaty. The reason cannot be the existence of any doubt about the universal condemnation of genocide. Rather, it testifies to unease among some States with the onerous obligations that the treaty imposes, such as prosecution or extradition of individuals, including heads of State.

In its advisory opinion on reservations to the Genocide Convention, the International Court of Justice wrote that:

> The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations. The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.[6]

[4] (1951) 78 UNTS 277.

[5] For the purposes of comparison, see Convention on the Rights of the Child, GA Res. 44/25, annex, 192 States parties; International Convention for the Elimination of All Forms of Racial Discrimination, (1969) 660 UNTS 195, 173 States parties; Convention for the Elimination of Discrimination Against Women, (1981) 1249 UNTS 13, 185 States parties. See also the Geneva Convention of 12 August 1949 Relative to the Protection of Civilians, (1950) 75 UNTS 135, 194 States parties.

[6] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, [1951] ICJ Reports 16, p. 23. Quoted in *Legality of the Threat or Use*

This important statement is often cited as the judicial recognition of the prohibition of genocide as a customary legal norm, although the Court does not refer to it expressly in this way. The Statute of the International Court of Justice recognizes two non-conventional sources of international law: international custom and general principles.[7] International custom is established by 'evidence of a general practice accepted as law', while general principles are those 'recognized by civilized nations'.

Reference by the Court to such notions as 'moral law' as well as the quite clear allusion to 'civilized nations' suggest that it may be more appropriate to refer to the prohibition of genocide as a norm derived from general principles of law rather than a component of customary international law. On the other hand, the universal acceptance by the international community of the norms set out in the Convention since its adoption in 1948 means that what originated in 'general principles' ought now to be considered a part of customary law.[8] In 2006, the International Court of Justice said that the prohibition of genocide was 'assuredly' a peremptory norm (*jus cogens*) of public international law, the first time it has ever made such a declaration about any legal rule.[9] A year later, it said that the affirmation in article I of the Convention that genocide is a crime under international law means it sets out 'the

of Nuclear Weapons (Advisory Opinion), [1996] ICJ Reports 226, para. 31; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 161. See also 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)', UN Doc. S/25704, para. 45.

[7] Statute of the International Court of Justice, art. 38(1)(b) and (c).

[8] For a brief demonstration of relevant practice and *opinio juris*, see Bruno Simma and Andreas L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View', (1999) 93 *American Journal of International Law*, p. 302 at pp. 308–9. According to a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, 'the 1948 Genocide Convention reflects customary international law': *Prosecutor* v. *Sikirica et al.* (Case No. IT-95-8-I), Judgment on Defence Motions to Acquit, 3 September 2001, para. 55. Also: *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment, 27 January 2000, para. 151; *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, para. 54. The Australian High Court wrote that '[g]enocide was not [recognized as a crime under customary international law] until 1948, *Polyukhovich* v. *Commonwealth of Australia*, (1991) 101 ALR 545, at p. 598 (*per* Brennan J).

[9] *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, 3 February 2006, para. 64.

existing requirements of customary international law, a matter emphasized by the Court in 1951'.[10]

Besides the Genocide Convention itself, there are other important positive sources of the law of genocide. The Convention was preceded, in 1946, by a resolution of the General Assembly of the United Nations recognizing genocide as an international crime, putting individuals on notice that they would be subject to prosecution and could not invoke their own domestic laws in defence to a charge.[11] Since 1948, elements of the Convention, and specifically its definition of the crime of genocide, have been incorporated in the statutes of the two *ad hoc* tribunals created by the Security Council to judge those accused of genocide and other crimes in the former Yugoslavia and Rwanda.[12] Affirming its enduring authority, the Convention definition was included without any modification in the Rome Statute of the International Criminal Court, which was adopted on 17 July 1998 and entered into force on 1 July 2002.[13] There have been frequent references to genocide within the resolutions, declarations and statements of United Nations organs, including particularly the work of expert bodies and special rapporteurs. In 2004, the Secretary-General of the United Nations established a Special Adviser on the Prevention of Genocide, a senior position within the Secretariat with responsibility for warning the institution of threatened catastrophes.

A large number of States have enacted legislation concerning the prosecution and repression of genocide, most by amending their penal or criminal codes in order to add a distinct offence. Usually they have borrowed the Convention definition, as set out in articles II and III, but occasionally they have contributed their own innovations. Sometimes these changes to the text of articles II and III have been aimed at clarifying the scope of the definition, for both internal and international purposes. For example, the United States of America's legislation specifies that destruction 'in whole or in part' of a group, as stated in the Convention, must actually represent destruction 'in whole or in substantial part'.[14]

[10] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 161.

[11] GA Res. 96 (I).

[12] 'Statute of the International Criminal Tribunal for the Former Yugoslavia', UN Doc. S/RES/827 (1993), annex, art. 4; 'Statute of the International Criminal Tribunal for Rwanda', UN Doc. S/RES/955 (1994), annex, art. 2.

[13] Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, art. 6.

[14] Genocide Convention Implementation Act of 1987 (the Proxmire Act), S. 1851, § 1091(a).

Others have attempted to enlarge the definition, by appending new entities to the groups already protected by the Convention. Examples include political, economic and social groups. Going even further, France's Code pénal defines genocide as the destruction of any group whose identification is based on arbitrary criteria.[15] The Canadian implementing legislation for the Rome Statute states that '"genocide" means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that, at the time and in the place of its commission, constitutes genocide according to customary international law', adding that the definition in the Rome Statute, which is identical to that of the Convention, is deemed a crime according to customary international law. The legislation adds, in anticipation: 'This does not limit or prejudice in any way the application of existing or developing rules of international law.'[16]

The variations in national practice contribute to an understanding of the meaning of the Convention but also, and perhaps more importantly, of the ambit of the customary legal definition of the crime of genocide. Yet, rather than imply some larger approach to genocide than that of the Convention, the vast majority of domestic texts concerning genocide repeat the Convention definition and tend to confirm its authoritative status.

The Convention on the Prevention and Punishment of the Crime of Genocide is, of course, an international treaty embraced by the realm of public international law. Within this general field, it draws on elements of international criminal law, international humanitarian law and international human rights law. By defining an international crime, and spelling out obligations upon States parties in terms of prosecution and extradition, the Convention falls under the rubric of international criminal law.[17] Its claim to status as an international humanitarian law treaty is supported by the inclusion of the crime within the subject

[15] Penal Code (France), *Journal officiel*, 23 July 1992, art. 211–1.

[16] Crimes Against Humanity and War Crimes Act, 48–49 Elizabeth II, 1999–2000, C-19, s. 4.

[17] See the comments of *ad hoc* judge Milenko Kreca in *Legality of Use of Force* (*Yugoslavia* v. *Belgium et al.*), Request for the Indication of Provisional Measures, Order, 2 June 1999, Dissenting Opinion of Judge Kreca, para. 21: 'A certain confusion is also created by the term "humanitarian law" referred to in paragraphs 19 and 48 of the Order. The reasons for the confusion are dual: on the one hand, the Court has not shown great consistency in using this term. In the *Genocide* case the Court qualified the Genocide Convention as a part of humanitarian law, although it is obvious that, by its nature, the Genocide Convention falls within the field of international criminal law.'

matter jurisdiction of the two *ad hoc* tribunals charged with prosecuting violations of humanitarian law.[18]

Genocide is routinely subsumed – erroneously – within the broad concept of 'war crimes'. Nevertheless, the scope of international humanitarian law is confined to international and non-international armed conflict, and the Convention clearly specifies that the crime of genocide can occur in peacetime.[19] Consequently, it may more properly be deemed an international human rights law instrument. Indeed, René Cassin once called the Genocide Convention a specific application of the Universal Declaration of Human Rights.[20] Alain Pellet has described the Convention as 'a quintessential human rights treaty'.[21] For Benjamin Whitaker, genocide is 'the ultimate human rights problem'.[22]

The prohibition of genocide is closely related to the right to life, one of the fundamental human rights defined in international declarations and conventions.[23] These instruments concern themselves with the

[18] 'Statute of the International Criminal Tribunal for the Former Yugoslavia', note 12 above; 'Statute of the International Criminal Tribunal for Rwanda', note 12 above.

[19] The International Court of Justice has described international humanitarian law as a *lex specialis* of international human rights law, applicable during armed conflict. See *Legality of the Threat or Use of Nuclear Weapons*, note 6 above, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, International Court of Justice, 9 July 2004, para. 106; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, International Court of Justice, 19 December 2005, para. 216. On this subject, see William A. Schabas, 'Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum', (2007) 40 *Israel Law Review*, p. 592.

[20] UN Doc. E/CN.4/SR.310, p. 5; UN Doc. E/CN.4/SR.311, p. 5. There is a cross-reference to the Genocide Convention in the right-to-life provision (art. 6(2) and (3)) of the International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, the result of an amendment from Peru and Brazil who were concerned about mass death sentences being carried out after a travesty of the judicial process. Because the Covenant admits to limited use of capital punishment, Peru and Brazil considered it important to establish the complementary relationship with the Genocide Convention: UN Doc. A/C.3/SR.813, para. 2. See also Manfred Nowak, *Covenant on Civil and Political Rights: CCPR Commentary*, 2nd edn, Kehl: Engel, 2005, pp. 120–56; William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd edn, Cambridge: Cambridge University Press, 2003.

[21] 'Report of the International Law Commission on the Work of its Forty-Ninth Session, 12 May–18 July 1997', UN Doc. A/52/10, para. 76. See also *Prosecutor* v. *Kayishema and Ruzindana* (Case No. ICTR-95-1-T), Judgment, 21 May 1999, para. 88.

[22] UN Doc. E/CN.4/Sub.2/1984/SR.3, para. 6.

[23] Universal Declaration of Human Rights, GA Res. 217 A (III), UN Doc. A/810, art. 3; International Covenant on Civil and Political Rights, note 20 above, art. 6; Convention for the Protection of Human Rights and Fundamental Freedoms, (1955) 213 UNTS 221,

individual's right to life, whereas the Genocide Convention is associated with the right to life of human groups, sometimes spoken of as the right to existence. General Assembly Resolution 96(I), adopted in December 1946, declares that '[g]enocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings'. States ensure the protection of the right to life of individuals within their jurisdiction by such measures as the prohibition of murder in criminal law. The repression of genocide proceeds somewhat differently, the crime being directed against the entire international community rather than the individual. As noted by Mordechai Kremnitzer, '[i]t is a frontal attack on the value of human life as an abstract protected value in a manner different from the crime of murder'.[24]

As the Genocide Convention marked its fiftieth birthday, in 1998, there had been no legal monographs on the subject of the Convention, or the legal aspects of prosecution of genocide, for more than two decades.[25] Most academic research on the Genocide Convention had been undertaken by historians and philosophers. They frequently ventured onto judicial terrain, not so much to interpret the instrument and to wrestle with the legal intricacies of the definition as to express frustration with its limitations. Even legal scholars tended to focus on what were widely perceived as the shortcomings of the Convention.

The Convention definition of genocide has seemed too restrictive, too narrow. It has failed to cover, in a clear and unambiguous manner, many of the major human rights violations and mass killings perpetrated by dictators and their accomplices. In the past, jurists often looked to the Genocide Convention in the hope it might apply, and either proposed exaggerated and unrealistic interpretations of its terms or else called for its amendment so as to make it more readily applicable. The principal deficiency, many argued, is that it applies only to 'national, racial, ethnical and religious groups'.

And that was how things stood until 1992. War broke out in Bosnia and Herzegovina in April. By August 1992, United Nations bodies, including the Security Council and the General Assembly, were accusing

ETS 5, art. 2; American Convention on Human Rights, (1979) 1144 UNTS 123, OASTS 36, art. 4.

[24] Mordechai Kremnitzer, 'The Demjanjuk Case', in Yoram Dinstein and Mala Tabory, eds., *War Crimes in International Law*, The Hague, Boston and London: Martinus Nijhoff, 1996, pp. 321–49 at p. 325.

[25] David Kader, 'Law and Genocide: A Critical Annotated Bibliography', (1988) 11 *Hastings International and Comparative Law Review*, p. 381.

the parties to the conflict of responsibility for 'ethnic cleansing'.[26] In December 1992, the General Assembly adopted a resolution stating that 'ethnic cleansing' was a form of genocide.[27] In March 1993, Bosnia and Herzegovina invoked the Genocide Convention before the International Court of Justice in an application directed against Serbia and Montenegro. The Court issued two provisional orders on the basis of the Convention, the first time that it had applied the instrument in a contentious case.[28] A month later, the Security Council created an *ad hoc* tribunal for the former Yugoslavia with subject matter jurisdiction over the crime of genocide, as defined by the Convention.[29]

In April 1993, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions of the Commission on Human Rights warned of acts of genocide in Rwanda against the Tutsi minority, echoing the conclusions of an international fact-finding mission composed of non-governmental organizations that had visited the country some weeks earlier.[30] The warnings were ignored by the international community and, in April 1994, genocidal extremists within Rwanda put into effect their evil plan to exterminate the Tutsi. The Security Council visibly flinched at the word 'genocide' in its resolutions dealing with Rwanda, betraying the concerns of several members that use of the 'g word' might have onerous legal consequences in terms of their obligations under the Convention. Later, the Security Council set up a second *ad hoc* tribunal with jurisdiction over the Rwandan genocide of 1994.[31]

Some may have legitimately questioned, in the 1970s and 1980s, whether the Genocide Convention was no more than an historical curiosity, somewhat like the early treaties against the slave trade whose significance is now largely symbolic. The emergence of large-scale ethnic

[26] UN Doc. S/RES/771 (1992); 'The Situation in Bosnia and Herzegovina', GA Res. 46/242.
[27] 'The Situation in Bosnia and Herzegovina', GA Res. 47/121.
[28] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Requests for the Indication of Provisional Measures, 8 April 1993, [1993] ICJ Reports 16; *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, [1993] ICJ Reports 325. In 1973, Pakistan invoked the Convention against India, but discontinued its application before the Court made an order: *Trial of Pakistani Prisoners of War (Pakistan* v. *India)*, Interim Protection Order of 13 July 1973, [1973] ICJ Reports 328.
[29] UN Doc. S/RES/827.
[30] 'Report by the Special Rapporteur on Extrajudicial, Summary Arbitrary Executions on His Mission to Rwanda, 8–17 April 1993', UN Doc. E/CN.4/1994/7/Add.1.
[31] UN Doc. S/RES/955.

conflicts in the final years of the millennium has proven such a hopeful assessment premature. The Genocide Convention remains a fundamental component of the contemporary legal protection of human rights. The issue is no longer one of stretching the Convention to apply to circumstances for which it may never have been meant, but rather one of implementing the Convention in the very cases contemplated by its drafters in 1948. The new challenges for the jurist presented by the application of the Convention are the substance of this study.

Thus, the focus here is on interpreting the definition and addressing the problems involved in both the prosecution and defence of charges of genocide when committed by individuals. The criticisms of lacunae or weaknesses in the Convention will be considered, but I understand the definition as it stands to be adequate and appropriate. While genocide is a crime that is, fortunately, rarely committed, it remains a feature of contemporary society. It has become apparent that there are undesirable consequences to enlarging or diluting the definition of genocide. This weakens the terrible stigma associated with the crime and demeans the suffering of its victims. It is also likely to enfeeble whatever commitment States may believe they have to prevent the crime. The broader and more uncertain the definition, the less responsibility States will be prepared to assume. This can hardly be consistent with the new orientation of human rights law, and of the human rights movement, which is aimed at the eradication of impunity and the assurance of human security.

Why is genocide so stigmatized? In my view, this is precisely due to the rigours of the definition and its clear focus on crimes aimed at the eradication of ethnic minorities or, to use the Convention terminology, 'national, racial, ethnical and religious groups'. Human rights law knows of many terrible offences: torture, disappearances, slavery, child labour, apartheid, and enforced prostitution, to name a few. For the victims, it may seem appalling to be told that, while these crimes are serious, others are still more serious. Yet, since the beginnings of criminal law society has made such distinctions, establishing degrees of crime and imposing a scale of sentences and other sanctions in proportion to the social denunciation of the offence. Even homicide knows degrees, from manslaughter to premeditated murder and, in some legal systems, patricide or regicide. The reasons society qualifies one crime as being more serious than another are not always clear and frequently obey a rationale that law alone cannot explain. Nor does the fact that a crime is considered less serious than another mean that it is in some way trivialized or overlooked. But, in any hierarchy, something must sit at the top. The crime of

genocide belongs at the apex of the pyramid. In imposing its first sentence in *Prosecutor* v. *Kambanda*, the International Criminal Tribunal for Rwanda described genocide as the 'crime of crimes'.[32]

For decades, the Genocide Convention has been asked to bear a burden for which it was never intended, essentially because of the relatively underdeveloped state of international law dealing with accountability for human rights violations. In cases of mass killings and other atrocities, attention turned inexorably to the Genocide Convention because there was little else to invoke. This has changed in recent years. The law applicable to atrocities that may not meet the strict definition of genocide but that cry out for punishment has been significantly strengthened. Such offences usually fit within the definition of 'crimes

[32] *Prosecutor* v. *Kambanda* (Case No. ICTR-97-23-S), Judgment and Sentence, 4 September 1998, para. 16. Also: *Prosecutor* v. *Serushago* (Case No. ICTR-98-39-S), Sentence, 2 February 1999, para. 15; *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 699; *Prosecutor* v. *Jelisić* (Case No. IT-95-10-A), Partial Dissenting Opinion of Judge Wald, 5 July 2001, para. 2; *Prosecutor* v. *Niyitegeka* (Case No. ICTR-96-14-A), Judgment, 9 July 2004, para. 53; *Armed Activities on the Territory of the Congo (New Application: 2000) (Democratic Republic of Congo* v. *Rwanda)*, Dissenting Opinion of Judge Koroma, 3 February 2006, para. 26. Raphael Lemkin himself used the expression 'crime of crimes': Broadcast on Genocide, Lake Success, 23 December 1947, in Lemkin Papers, American Jewish Archives, Box 5, Folder 5; Raphael Lemkin, 'Genocide as a Crime under International Law', *United Nations Bulletin*, Vol. IV, 15 January 1948, pp. 70–1. The expression was used by the Permanent Representative of Rwanda during debate in the Security Council on the establishment of the Tribunal: UN Doc. S/PV.3453 (8 November 1994). The expression 'crimes of crimes' appears in debates of the International Law Commission as early as 1994; its author is, apparently, Alain Pellet: UN Doc. A/CN.4/SER.A/1994, pp. 114, 119. The International Commission of Inquiry on Darfur said in its report that the Appeals Chamber agreed with an accused who argued that the characterization of genocide as 'the crime of crimes' was wrong (see 'Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur', UN Doc. S/2005/60, para. 506). This is probably a misreading of the Appeals Chamber judgment in *Prosecutor* v. *Kayishema et al.* (Case No. ICTR-95-1-A), Judgment (Reasons), 1 June 2001. It is certainly hard to reconcile with the use of the expression 'crime of crimes' to describe genocide by the Appeals Chamber three years after *Kayishema*: *Niyitegeka* v. *Prosecutor* (Case No. ICTR-96-14-A), Judgment, 9 July 2004, para. 49. As the Darfur Commission noted, the Appeals Chamber said that 'there is no hierarchy of crimes *under the Statute*, and that all of the crimes specified therein are "serious violations of international humanitarian law", capable of attracting the same sentence' (my italics). There is, it is true, nothing in the Statute of the International Criminal Tribunal for Rwanda to indicate a hierarchy. That does not mean there is no hierarchy under general international law. In any case, despite the professed opinion of the Appeals Chambers, sentencing decisions of the tribunals have tended to confirm that convictions for genocide attract the longest terms. Plea agreements systematically involve withdrawing charges of genocide in favour of conviction for crimes against humanity, which is not what would be expected if there was no hierarchy.

against humanity', a broader concept that might be viewed as the second tier of the pyramid. According to the most recent definition, comprised within the Rome Statute of the International Criminal Court, crimes against humanity include persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law.[33] This contemporary approach to crimes against humanity is really no more than the 'expanded' definition of genocide that many have argued for over the years.

One of the main reasons why the international community felt compelled to draft the Genocide Convention in 1948 was the inadequate scope given to the notion of 'crimes against humanity' at the time. When the International Military Tribunal judged the Nazis at Nuremberg for the destruction of the European Jews, it convicted them of crimes against humanity, not genocide. But the Nuremberg Charter seemed to indicate that crimes against humanity could only be committed in time of war, not a critical obstacle to the Nazi prosecutions but a troubling precedent for the future protection of human rights.[34]

The *travaux préparatoires* of the Charter leave no doubt that the connection or nexus between war and crimes against humanity was a *sine qua non*, because the great powers that drafted it were loathe to admit the notion, as a general and universal principle, that the international community might legitimately interest itself in what a State did to its own minorities.[35]

Thus, the Genocide Convention, not the Nuremberg Charter, first recognized the idea that gross human rights violations committed in the absence of an armed conflict are nevertheless of international concern, and attract international prosecution. In order to avoid any ambiguity and acutely conscious of the limitations of the Nuremberg Charter, the drafters of the Convention decided not to describe genocide as a form of crime against humanity, although only after protracted debate.[36]

[33] Rome Statute of the International Criminal Court, note 13 above, art. 7(1)(h).

[34] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), annex, (1951) 82 UNTS 279, art. 6(c).

[35] The drafting of the 'crimes against humanity' provision of the Charter of the International Military Tribunal is discussed in chapter 1, at pp. 38–42 below.

[36] The original draft genocide convention, proposed by Saudi Arabia in 1946, described it as 'an international crime against humanity' (UN Doc. A/C.6/86). But GA Res. 96(I) avoided such a qualification (UN Doc. E/623/Add.1; UN Doc. E/AC.25/3) and the distinction was reinforced in GA Res. 180(II) of December 1947. At the time, France was one of the

Accordingly, article I of the Convention confirms that genocide may be committed in time of peace as well as in time of war.[37]

Nevertheless, the *ad hoc* tribunals have resisted the suggestion that genocide overlaps with crimes against humanity in an absolute sense.[38] The question has arisen in the context of multiple charges, and the permissibility of convicting where two offences contain essentially the same elements. According to the Appeals Chamber of the International Criminal Tribunal for Rwanda, it is acceptable to register a conviction for both genocide and the crime against humanity of extermination with regard to the same factual elements. Following the test developed by the tribunals, multiple convictions are allowed where there are materially distinct elements of each infraction:

> Genocide requires proof of an intent to destroy, in whole or in part, a national, ethnical, racial or religious group; this is not required by extermination as a crime against humanity. Extermination as a crime against humanity requires proof that the crime was committed as a part of a widespread or systematic attack against *a* civilian population, which proof is not required in the case of genocide.[39]

But there is much compelling support from other authorities for the view that the two categories are intimately related.[40] The judges of the

principal advocates of genocide being viewed as a crime against humanity (e.g. UN Doc. A/401/Add.3; UN Doc. A/AC.10/29). The final version eschewed any reference to crimes against humanity (for the debates in the Sixth Committee, see UN Doc. A/C.6/SR.67).

[37] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)*), Preliminary Objections, [1996] ICJ Reports 595, para. 31.

[38] In *Prosecutor* v. *Kayishema et al.*, note 21 above, para. 89, a Trial Chamber of the Rwanda Tribunal observed that the correspondence between genocide and crimes against humanity is not perfect. Specifically, crimes against humanity must be directed against a 'civilian population', whereas genocide is directed against 'members of a group', without reference to civilian or military status (*ibid.*, para. 631). In *Prosecutor* v. *Sikirica et al.* (Case No. IT-95-8-I), Judgment on Defence Motions to Acquit, 3 September 2001, para. 58, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia said genocide was a crime against humanity and that it belonged to a 'genus' that included the crime against humanity of persecution.

[39] *Prosecutor* v. *Musema* (Case No. ICTR-96-13-A), Judgment, 16 November 2001, para. 363. Also: *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 751.

[40] Convention on the Nonapplicability of Statutory Limitations to War Crimes and Crimes Against Humanity, (1970) 754 UNTS 73, art. I; European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes of 25 January 1974, ETS 82, art. 1(1); 'Second Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', *Yearbook . . . 1984*, Vol. II, p. 93, paras. 28–9; 'Report of the International Law Commission

tribunals probably missed a good opportunity to rationalize the relationship between genocide and crimes against humanity, a mission they accomplished so well with respect to the disparate forms of war crimes recognized by treaty and custom, which they linked within an 'umbrella' category of 'serious violations of international humanitarian law'.[41] They might have done the same by situating genocide under the umbrella of crimes against humanity.

Since 1948, the law concerning crimes against humanity has evolved substantially. That crimes against humanity may be committed in time of peace as well as war has been recognized in the case law of the *ad hoc* international tribunals,[42] and codified in the Rome Statute.[43] Arguably, the obligations upon States found in the Genocide Convention now apply *mutatis mutandis*, on a customary basis, in the case of crimes against humanity. Therefore, the alleged gap between crimes against humanity and genocide has narrowed considerably. Speaking of the relative gravity of crimes against humanity, the International Commission of Inquiry on Darfur said: 'It is indisputable that genocide bears a special stigma, for it is aimed at the *physical obliteration* of human groups. However, one should not be blind to the fact that some

on the Work of its Forty-Eighth Session, 6 May–26 July 1996', UN Doc. A/51/10, p. 86; Stefan Glaser, *Droit international pénal conventionnel*, Brussels: Bruylant, 1970, p. 109; Yoram Dinstein, 'Crimes Against Humanity', in Jerzy Makarczyk, ed., *Theory of International Law at the Threshold of the 21st Century*, The Hague, London and Boston: Kluwer Law International, 1997, pp. 891–908 at p. 905; Theodor Meron, 'International Criminalization of Internal Atrocities', (1995) 89 *American Journal of International Law*, p. 554 at p. 557; *A-G Israel* v. *Eichmann*, (1968) 36 ILR 5 (District Court, Jerusalem), para. 26; *A-G Israel* v. *Eichmann*, (1968) 36 ILR 277 (Israel Supreme Court), para. 10; *Prosecutor* v. *Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 140; *Prosecutor* v. *Tadić* (Case No. IT-94-1-T), Opinion and Judgment, 7 May 1997, paras. 622 and 655; *Prosecutor* v. *Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999, para. 251; *Prosecutor* v. *Stakić* (Case No. IT-97-24-T), Decision on Rule 98*bis* Motion for Judgment of Acquittal, 31 October 2002, para. 26; 'Report on the Situation of Human Rights in Rwanda Submitted by Mr René Degni-Segui, Special Rapporteur, under Paragraph 20 of Resolution S-3/1 of 25 May 1994', UN Doc. E/CN.4/1996/7, para. 7; 'Report of the Committee on the Elimination of Racial Discrimination', UN Doc. A/52/18, para. 159. For a discussion of the issue at the time of the drafting of the Genocide Convention, see the annotation to *United States of America* v. *Greifelt et al.* ('RuSHA trial'), (1948) 13 LRTWC 1 (United States Military Tribunal), pp. 40–1.

[41] *Prosecutor* v. *Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 94.

[42] *Prosecutor* v. *Tadić* (Case No. IT-94-1-AR72), *ibid.*, paras. 78, 140, 141.

[43] Rome Statute, note 12 above, art. 7.

categories of crimes against humanity may be similarly heinous and carry an equally grave stigma.'[44]

Certainly the practical consequences in a legal sense of the distinction between genocide and crimes against humanity are now less important. Some have argued that we should eliminate the different categories altogether, in favour of an over-arching concept of 'atrocity crime'.[45] Perhaps reflecting a similar line of thought, in 2006 the Secretary-General proposed renaming the Special Adviser on the Prevention of Genocide, who had only been established two years earlier, as the Special Adviser on the Prevention of Genocide and Mass Atrocity, although he later retreated from this. But the interest in defining a separate offence of genocide persists. In the public debate, suggesting that atrocities are better described as crimes against humanity rather than genocide, as President Jimmy Carter did with reference to Darfur in October 2007, is condemned for trivialization of a humanitarian crisis. Carter was treated unfairly by his critics, who demagogically seized upon his insistence on accurate terminology. He had roundly denounced the ethnic cleansing in Darfur as a crime against humanity, and hardly deserved the charges that he was pandering to the Sudanese regime. International lawyers seem sometimes to insist in vain that the distinction between genocide and crimes against humanity is of little or no importance. The argument is not about the state of the law: it is one of symbolism and semantics.

If the result of the terminological quarrel is to insist upon the supreme heinousness of 'racial hatred', for want of a better term, and to reiterate society's condemnation of the mass killings of Jews, Tutsis and Armenians, to cite the primary historical examples of the past century, the distinction retains and deserves all of its significance. From this perspective, genocide stands to crimes against humanity as premeditated murder stands to intentional homicide. Genocide deserves its title as the 'crime of crimes'.

This study follows, in a general sense, the structure of the Convention itself, after an initial presentation of the origins of the norm. An inaugural chapter, with an historical focus, addresses the development of international legal efforts to prosecute genocide, up to and including

[44] 'Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur', UN Doc. S/2005/60, para. 506.

[45] E.g. David J. Scheffer, 'The Future of Atrocity Law', (2002) 25 *Suffolk Transnational Law Review*, p. 399; L. C. Green, ' "Grave Breaches" or Crimes Against Humanity', (1997–8) 8 *USAF Academy Journal of Legal Studies*, p. 19.

the Nuremberg trial. The second chapter surveys the process of drafting the Convention, as well as subsequent normative activity within United Nations bodies such as the Security Council and the International Law Commission. Chapters 3 to 6 examine the definition of genocide set out in articles II and III, reviewing the groups protected by the Convention, the *mens rea* or mental element of the offence, the *actus reus* or physical element of the offence, and the punishable acts, including acts of participation such as conspiracy, complicity and attempt. Admissible defences to the crime of genocide are considered in chapter 7. Domestic and international prosecution of genocide, matters raised by articles V, VI and VII of the Convention, comprise chapter 8. Chapter 9 deals with State responsibility for genocide, an issue addressed indirectly by several provisions of the Convention, including article IX. Chapter 10 is devoted to the prevention of genocide, a question of vital importance but one considered only incompletely in the Convention, principally by articles I and VIII. A variety of treaty law matters addressed in articles X to XIX of the Convention are examined in chapter 11. The law is up to date as of 31 December 2007.

1

Origins of the legal prohibition of genocide

Winston Churchill called genocide 'the crime without a name'.[1] A few years later, the term 'genocide' was coined by Raphael Lemkin in his 1944 work, *Axis Rule in Occupied Europe*.[2] Rarely has a neologism had such rapid success.[3] Within little more than a year of its introduction to the English language,[4] it was being used in the indictment of the International Military Tribunal, and within two, it was the subject of a United Nations General Assembly resolution. But the resolution spoke in the past tense, describing genocide as crimes which 'have occurred'.

By the time the General Assembly completed its standard setting, with the 1948 adoption of the Convention on the Prevention and Punishment of the Crime of Genocide, 'genocide' had a detailed and quite technical definition as a crime against the law of nations. Yet the preamble to that instrument recognizes 'that at all periods of history genocide has inflicted great losses on humanity'. This study is principally concerned with genocide as a legal norm.

The origins of criminal prosecution of genocide begin with the recognition that persecution of ethnic, national and religious minorities was not only morally outrageous, it might also incur legal liability. As a general rule, genocide involves violent crimes against the person, including murder. Because these crimes have been deemed anti-social since time immemorial, in a sense there is nothing new in the prosecution of genocide to the extent that it overlaps with the crimes of homicide and assault. Yet genocide almost invariably escaped prosecution because

[1] Leo Kuper, *Genocide, Its Political Use in the Twentieth Century*, New Haven: Yale University Press, 1981, p. 12.

[2] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington: Carnegie Endowment for World Peace, 1944.

[3] Lemkin later wrote that '[a]n important factor in the comparatively quick reception of the concept of genocide in international law was the understanding and support of this idea by the press of the United States and other countries': Raphael Lemkin, 'Genocide as a Crime in International Law', (1947) 41 *American Journal of International Law* 145, p. 149, n. 9.

[4] And French as well: Raphael Lemkin, 'Le crime de génocide', [1946] *Rev. dr. int.* 213.

it was virtually always committed at the behest and with the complicity of those in power. Historically, its perpetrators were above the law, at least within their own countries, except in rare cases involving a change in regime. In human history, the concept of international legal norms from which no State may derogate has emerged only relatively recently. This is, of course, the story of the international protection of human rights. The prohibition of persecution of ethnic groups runs like a golden thread through the defining moments of the history of human rights.

International law's role in the protection of national, racial, ethnic and religious groups from persecution can be traced to the Peace of Westphalia of 1648, which provided certain guarantees for religious minorities.[5] Other early treaties contemplated the protection of Christian minorities within the Ottoman empire[6] and of francophone Roman Catholics within British North America.[7] These concerns with the rights of national, ethnic and religious groups evolved into a doctrine of humanitarian intervention which was invoked to justify military activity on some occasions during the nineteenth century.

International human rights law can also trace its origins to the law of armed conflict, or international humanitarian law. Codification of the law of armed conflict began in the nineteenth century. In its early years, this was oriented to the protection of medical personnel and the prohibition of certain types of weapons. The Hague Regulations of 1907 reflect the focus on combatants but include a section concerning the treatment of civilian populations in occupied territories. In particular, article 46 requires an occupying belligerent to respect '[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice'.[8] Moreover, the preamble to the Hague Regulations contains the promising 'Martens clause', which states that

[5] Treaty of Peace between Sweden and the Empire, signed at Osnabruck, 14(24) October 1648; Dumont VI, Part 1, p. 469, arts. 28–30; Treaty of Peace between France and the Empires, signed at Münster, 14(24) October 1648, Dumont VI, Part 1, p. 450, art. 28.

[6] For example, Treaty of Peace between Russia and Turkey, signed at Adrianople, 14 September 1829, BFSP XVI, p. 647, arts. V and VII.

[7] Treaty of Peace and Friendship between France and Great Britain, signed at Utrecht, 11 April 1713, Dumont VIII, Part 1, p. 339, art. 14; Definitive Treaty of Peace between France, Great Britain and Spain, signed at Paris, 10 February 1763, BFSP I, pp. 422 and 645, art. IV.

[8] Convention (IV) Respecting the Laws and Customs of War by Land, [1910] UKTS 9, annex, art. 46. See *Prosecutor* v. *Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 56.

'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'.[9] But, aside from sparse references to cultural and religious institutions,[10] nothing in the Regulations suggests any particular focus on vulnerable national or ethnic minorities.[11]

Early developments in the prosecution of 'genocide'

The new world order that emerged in the aftermath of the First World War, and that to some extent was reflected in the 1919 peace treaties, manifested a growing role for the international protection of human rights. Two aspects of the post-war regime are of particular relevance to the study of genocide. First, the need for special protection of national minorities was recognized. This took the form of a web of treaties, bilateral and multilateral, as well as unilateral declarations. The world also saw the first serious attempts at the internationalization of criminal prosecution, accompanied by the suggestion that massacres of ethnic minorities within a State's own borders might give rise to both State and individual responsibility. Several decades later, after adoption of the Genocide Convention, the United States government told the International Court of Justice that 'the Turkish massacres of Armenians' was one of the 'outstanding examples of the crime of genocide'.[12]

The wartime atrocities committed against the Armenian population in the Ottoman Empire[13] had been met with a joint declaration

[9] *Ibid.*, preamble. The Martens clause first appeared in 1899 in Convention (II) with respect to the Laws and Customs of War on Land, 32 Stat. 1803, 1 Bevans 247, 91 BFST 988.

[10] *Ibid.*, art. 56.

[11] In 1914, an international commission of inquiry considered atrocities committed against national minorities during the Balkan wars to be violations of the 1907 Hague Regulations: *Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars*, Washington: Carnegie Endowment for International Peace, 1914, pp. 230–4. The section entitled 'Extermination, Emigration, Assimilation', pp. 148–58, documents acts that we would now characterize as genocide or crimes against humanity.

[12] 'Written Statement of the United States of America', *Reservations to the Convention on the Prevention of Genocide (Advisory Opinion)*, Pleadings, Oral Arguments, Documents, pp. 23–47 at p. 25.

[13] Richard G. Hovannisian, ed., *The Armenian Genocide, History, Politics, Ethics*, New York: St Martin's Press, 1991; R. Melson, *Revolution and Genocide: On the Origin of the*

from the governments of France, Great Britain and Russia, dated 24 May 1915, asserting that, '[i]n the presence of these new crimes of Turkey against humanity and civilization, the allied Governments publicly inform the Sublime Porte that they will hold personally responsible for the said crimes all members of the Ottoman Government as well as those of its agents who are found to be involved in such massacres'.[14] It has been suggested that this constitutes the first use, at least within an international law context, of the term 'crimes against humanity'.[15] At the time, United States Secretary of State Robert Lansing admitted what he called the 'more or less justifiable' right of the Turkish government to deport the Armenians to the extent that they lived 'within the zone of military operations'. But, he said, '[i]t was not to my mind the deportation which was objectionable but the horrible brutality which attended its execution. It is one of the blackest pages in the history of this war, and I think we were fully justified in intervening as we did on behalf of the wretched people, even though they were Turkish subjects.'[16]

Armenian Genocide and of the Holocaust, Chicago: University of Chicago Press, 1992; Vahakn N. Dadrian, 'Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications', (1989) 14 *Yale Journal of International Law*, p. 221; Vahakn N. Dadrian, *Warrant for Genocide, Key Elements of Turko-Armenian Conflict*, New Brunswick, NJ: Transaction, 1999; Yves Ternon, *The Armenians: History of a Genocide*, 2nd edn, Delmar, NY: Caravan Books, 1990; Peter Balakian, *Burning Tigris*, New York: HarperCollins, 2003; Taner Akcam, *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility*, New York: Holt, 2007.

[14] English translation quoted in United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London: His Majesty's Stationery Office, 1948, p. 35.

[15] The expression 'crimes against humanity' appears to have been in use for many years. During debates in the National Assembly, French revolutionary Robespierre described the King, Louis XVI, as a '[c]riminal against humanity': Maximilien Robespierre, *êuvres*, IX, Paris: Presses universitaires de France, 1952, p. 130. In 1890, an American observer, George Washington Williams, wrote to the United States Secretary of State that King Leopold's regime in Congo was responsible for 'crimes against humanity': Adam Hochschild, *King Leopold's Ghost*, Boston and New York: Houghton Mifflin, 1998, p. 112. In 1906, Robert Lansing described the slave trade as a crime against humanity: Robert Lansing, 'Notes on World Sovereignty', (1921) 15 *American Journal of International Law*, p. 13 at p. 25.

[16] Quoted in Vahakn N. Dadrian, 'Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications', (1989) 14 *Yale Journal of International Law*, p. 221 at p. 228.

Versailles and the Leipzig trials

The idea of an international war crimes trial had been proposed by Lord Curzon at a meeting of the Imperial War Cabinet on 20 November 1918.[17] The British emphasized trying the Kaiser and other leading Germans, and there was little or no interest in accountability for the persecution of innocent minorities such as the Armenians in Turkey.[18] The objective was to punish 'those who were responsible for the War or for atrocious offences against the laws of war'.[19] As Lloyd George explained, '[t]here was also a growing feeling that war itself was a crime against humanity'.[20] At the second plenary session of the Paris Peace Conference, on 25 January 1919, a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties was created.[21] Composed of fifteen representatives of the victorious powers, the Commission was mandated to inquire into and to report upon the violations of international law committed by Germany and its allies during the course of the war.

The Commission's report used the expression 'Violations of the Laws and Customs of War and of the Laws of Humanity'.[22] Some of these breaches came close to the criminal behaviour now defined as genocide or crimes against humanity and involved the persecution of ethnic minorities or groups. Under the rubric of 'attempts to denationalize the inhabitants of occupied territory', the Commission cited many offences in Serbia committed by Bulgarian, German and Austrian authorities, including prohibition of the Serb language, '[p]eople beaten for saying "good morning" in Serbian', destruction of archives of churches and law courts, and the closing of schools.[23] As for 'wanton destruction of

[17] David Lloyd George, *The Truth About the Peace Treaties*, Vol. I, London: Victor Gollancz, 1938, pp. 93–114. For a discussion of the project, see 'Question of International Criminal Jurisdiction', UN Doc. A/CN.4/15, paras. 6–13; Howard S. Levie, *Terrorism in War: The Law of War Crimes*, New York: Oceana, 1992, pp. 18–36; 'First Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', UN Doc. A/CN.4/364, paras. 7–23.

[18] Lloyd George, *Truth About Peace Treaties*, pp. 93–114.

[19] *Ibid.*, p. 93.

[20] *Ibid.*, p. 96.

[21] Seth P. Tillman, *Anglo-American Relations at the Paris Peace Conference of 1919*, Princeton: Princeton University Press, 1961, p. 312.

[22] *Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of America and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919*, Oxford: Clarendon Press, 1919, p. 23.

[23] *Ibid.*, p. 39.

religious, charitable, educational and historic buildings and monuments', there were examples from Serbia and Macedonia of attacks on schools, monasteries, churches and ancient inscriptions by the Bulgarian authorities.[24]

The legal basis for qualifying these acts as war crimes was not explained, although the Report might have referred to Chapter III of the 1907 Hague Regulations, which codified rules applicable to the occupied territory of an enemy.[25] But nothing in the Hague Regulations suggested their application to anything but the territory of an occupied belligerent. Indeed, there was no indication in the Commission's report that the Armenian genocide fell within the scope of its mandate.[26] The Commission proposed the establishment of an international 'High Tribunal', and urged 'that all enemy persons alleged to have been guilty of offences against the laws and customs of war and the laws of humanity' be excluded from any amnesty and be brought before either national tribunals or the High Tribunal.[27]

A 'Memorandum of Reservations' submitted by the United States challenged many of the legal premises of the Commission, including the entire notion of crimes against the 'Laws of Humanity'. The American submission stated that '[t]he laws and principles of humanity vary with the individual, which, if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law'.[28] The United States also took issue with the suggestion that heads of State be tried for 'acts of state',[29] and that leaders be deemed liable for the acts of their subordinates.[30] But, while clearly lukewarm to the idea, the American delegation did not totally oppose the convening of war crimes trials. However, it said efforts should be confined to matters undoubtedly within the scope of the term 'laws and customs of war', which provided 'a standard certain, to be

[24] *Ibid.*, p. 48.
[25] Convention (IV) Respecting the Laws and Customs of War by Land, note 9 above.
[26] However, see Dadrian, 'Genocide as a Problem', p. 279, n. 210.
[27] *Violations of the Laws and Customs of War*, note 22 above, p. 25.
[28] *Ibid.*, p. 64. See also p. 73.
[29] Citing *Schooner Exchange* v. *McFaddon et al.*, 7 Cranch 116, in support.
[30] 'It is one thing to punish a person who committed, or, possessing the authority, ordered others to commit an act constituting a crime; it is quite another thing to punish a person who failed to prevent, to put an end to, or to repress violations of the laws or customs of war', said the American dissent: *Violations of the Laws and Customs of War*, note 21 above, p. 72.

found in books of authority and in the practice of nations'.[31] The Japanese members also submitted dissenting comments, but these were considerably more succinct, and did not focus on the issue of crimes against humanity.

At the Peace Conference itself, Nicolas Politis, Greek Foreign Minister and a member of the Commission of Fifteen, proposed creating a new category of war crimes, designated 'crimes against the laws of humanity', intended to cover the massacres of the Armenians.[32] Woodrow Wilson protested a measure he considered to be *ex post facto* law.[33] Wilson eventually withdrew his opposition, but he felt that in any case such efforts would be ineffectual.[34] At the meeting of the Council of Four on 2 April 1919, Lloyd George said it was important to judge those responsible 'for acts against individuals, atrocities of all sorts committed under orders'.[35]

Although article 227 of the Treaty of Versailles stipulated that Kaiser Wilhelm II was to be tried by a 'special tribunal' that was to be 'guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality', this never took place because of the refusal of the Netherlands to extradite him. It would have been the first truly international criminal tribunal of modern times.[36] Pursuant to articles 228 to 230 of the Versailles Treaty, Germany recognized the right of the victors to prosecute its own nationals before Allied military tribunals for violations of the laws and customs of war. In deference to the American objections, the Treaty of Versailles did not refer to 'crimes against the laws of humanity'. The new German government voted to accept the treaty, but conditionally, and it refused the war criminals clauses, noting

[31] *Ibid.*, p. 64. [32] Dadrian, 'Genocide as a Problem', p. 278.

[33] George Goldberg, *The Peace to End Peace: The Paris Peace Conference of 1919*, New York: Harcourt, Brace & World, 1969, p. 151.

[34] Arthur Walworth, *Wilson and His Peacemakers: American Diplomacy at the Paris Peace Conference, 1919*, New York and London: W. W. Norton & Co., 1986, pp. 214–16 at p. 216. See also Tillman, *Anglo-American Relations*, p. 313.

[35] Arthur S. Link, ed., *The Papers of Woodrow Wilson*, Vol. 56, Princeton: Princeton University Press, 1987, p. 531.

[36] Treaty of Peace between the Allied and Associated Powers and Germany ('Treaty of Versailles'), [1919] TS 4, entered into force 28 June 1919. There were similar penal provisions in the related peace treaties: Treaty of St Germain-en-Laye, [1919] TS 11, art. 173; Treaty of Neuilly-sur-Seine, [1920] TS 5, art. 118; and Treaty of Trianon, (1919) 6 LNTS 187, art. 15.

that its penal code prevented the surrender of Germans to a foreign government for prosecution and punishment.[37] A compromise was effected, deemed compatible with article 228 of the Versailles Treaty, whereby the Supreme Court of the Empire in Leipzig would judge those charged by the Allies. Germany opposed arraignment of most of those chosen for prosecution by the Allies, arguing that the trial of its military and naval elite could imperil the government's existence.[38] In the end, only a handful of German soldiers were tried, for atrocities in prisoner of war camps and the sinking of hospital ships.[39] A Commission of Allied jurists set up to examine the results at Leipzig concluded 'that in the case of those condemned the sentences were not adequate'.[40]

The Treaty of Sèvres and the Armenian genocide

With regard to Turkey, the Allies considered prosecution for mistreatment of prisoners, who were mostly British, but also for 'deportations and massacres', in other words, the persecution of the Armenian minority.[41] The British High Commissioner, Admiral Calthorpe, informed the Turkish Foreign Minister on 18 January 1919 that 'His Majesty's Government are resolved to have proper punishment inflicted on those responsible for Armenian massacres'.[42] Calthorpe's subsequent dispatch to London said he had informed the Turkish government that British statesmen 'had promised [the] civilized world that persons connected would be held personally responsible and that it was [the] firm intention of HM Government to fulfil [that] promise'.[43] Subsequently, the High Commissioner proposed the Turks be punished for the Armenian massacres by dismemberment of their Empire and the criminal trial of high officials to serve as an example.[44]

[37] Goldberg, *Peace to End Peace*, p. 151.
[38] *German War Trials, Report of Proceedings before the Supreme Court in Leipzig*, London: His Majesty's Stationery Office, 1921, p. 19. See also 'Question of International Criminal Jurisdiction, Report by Ricardo J. Alfaro, Special Rapporteur', UN Doc. A/CN.4/15 and Corr.1, para. 9.
[39] James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War*, Westport, CT: Greenwood Press, 1982; Sheldon Glueck, *War Criminals: Their Prosecution and Punishment*, New York: Knopf, 1944.
[40] United Nations War Crimes Commission, *History*, p. 48.
[41] Dadrian, 'Genocide as a Problem', p. 282.
[42] FO 371/4174/118377 (folio 253), cited in *ibid.* [43] *Ibid.*
[44] FO 371/4173/53352 (folios 192–3), cited in *ibid.*, pp. 282–3.

London believed that prosecution could be based on 'the common law of war', or 'the customs of war and rules of international law'.[45] Trials would be predicated on the concept that an occupying military regime is entitled to prosecute offenders on the territory where the crime has taken place because it is, in effect, exercising *de facto* authority in place of the former national regime. Jurisdiction would not, therefore, be based on broader notions rooted in the concept of universality. Under pressure from Allied military rulers, the Turkish authorities arrested and detained scores of their leaders, later releasing many as a result of public demonstrations and other pressure.[46] In late May 1919, the British seized sixty-seven of the Turkish prisoners and spirited them away to more secure detention in Malta and elsewhere.[47] But the British found that political considerations, including the growth of Kemalism and competition for influence with other European powers, made insistence on prosecutions increasingly untenable.[48] In mid-1920, a political-legal officer at the British High Commission in Istanbul cautioned London of practical difficulties involved in prosecuting Turks for the Armenian massacres, including obtaining evidence.[49] By late 1921, the British had negotiated a prisoner exchange agreement with the Turks, and the genocide suspects held in Malta were released.[50]

Attempts by Turkish jurists to press for trial before the national courts of those responsible for the atrocities were slightly more successful.[51] Prosecuted on the basis of the domestic penal code, several ministers in the wartime cabinet and leaders of the Ittihad party were found guilty by a court martial, on 5 July 1919, of 'the organization and execution of crime of massacre' against the Armenian minority.[52] The criminals were sentenced, *in absentia*, to capital punishment or lengthy terms of imprisonment.[53] According to the Treaty of Sèvres, signed on 10 August 1920, Turkey recognized the right of trial 'notwithstanding any proceedings or prosecution before a tribunal in Turkey' (art. 226), and was obliged to surrender 'all persons accused of having committed

[45] FO 371/4174/129560 (folios 430–1), cited in *ibid.*, p. 283.
[46] Dadrian, 'Genocide as a Problem', p. 284. [47] *Ibid.*, p. 285.
[48] FO 371/4174/156721 (folios 523–4), cited in *ibid.*, p. 286.
[49] FO 371/6500, W.2178, appendix A (folios 385–118 and 386–119), cited in *ibid.*, p. 287.
[50] Dadrian, 'Genocide as a Problem', pp. 288–9.
[51] *Ibid.*, pp. 293–317; Vahakn N. Dadrian, 'The Turkish Military Tribunal's Prosecution of the Authors of the Armenian Genocide: Four Major Court-Martial Series', (1997) 11 *Holocaust and Genocide Studies*, p. 28.
[52] Cited in Dadrian, 'Genocide as a Problem', p. 307. [53] *Ibid.*, pp. 310–15.

an act in violation of the laws and customs of war, who are specified either by name or by rank, office or employment which they held under Turkish authorities'.[54] This formulation was similar to the war crimes clauses in the Treaty of Versailles. But the Treaty of Sèvres contained a major innovation, contemplating prosecution of what we now define as 'crimes against humanity'[55] as well as of war crimes. Pursuant to article 230:

> The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on the 1st August, 1914. The Allied Powers reserve to themselves the right to designate the Tribunal which shall try the persons so accused, and the Turkish Government undertakes to recognise such Tribunal. In the event of the League of Nations having created in sufficient time a Tribunal competent to deal with the said massacres, the Allied Powers reserve to themselves the right to bring the accused persons mentioned above before the Tribunal, and the Turkish Government undertakes equally to recognise such Tribunal.[56]

However, the Treaty of Sèvres was never ratified. As Kay Holloway wrote, the failure of the signatories to bring the treaty into force 'resulted in the abandonment of thousands of defenceless peoples – Armenians and Greeks – to the fury of their persecutors, by engendering subsequent holocausts in which the few survivors of the 1915 Armenian massacres perished'.[57] The Treaty of Sèvres was replaced by the Treaty of Lausanne of 24 July 1923.[58] It included a 'Declaration of Amnesty' for all offences committed between 1 August 1914 and 20 November 1922.

Inter-war developments

The post-First World War efforts at international prosecution of war crimes and crimes against humanity were a failure. Nevertheless, the idea had been launched. Over the next two decades, criminal law specialists turned their attention to a series of proposals for the repression

[54] [1920] UKTS 11, Martens, *Recueil général des traités*, 99, 3e série, 12, 1924, p. 720 (French version).
[55] Egon Schwelb, 'Crimes Against Humanity', (1946) 23 BYIL, p. 178 at p. 182.
[56] *Ibid.*
[57] Kay Hollaway, *Modern Trends in Treaty Law*, London: Stevens & Sons, 1967, pp. 60–1.
[58] Treaty of Lausanne Between Principal Allied and Associated Powers and Turkey, (1923) 28 LNTS 11.

of international crimes. The first emerged from the work of the Advisory Committee of Jurists, appointed by the Council of the League of Nations in 1920 and assigned to draw up plans for the international judicial institutions. One of the members, Baron Descamps of Belgium, proposed the establishment of a 'high court of international justice'.

Borrowing language from the Martens clause in the preamble to the Hague Convention, Descamps wrote that the jurisdiction of the court might include not only rules 'recognized by the civilized nations but also by the demands of public conscience [and] the dictates of the legal conscience of civilized nations'. However, as a result of American pressure, his formulation was later changed to 'general principles of law recognized by civilized nations'. In any case, the Third Committee of the Assembly of the League declared Descamps' ideas 'premature'.[59]

The International Law Association and the International Association of Penal Law also studied the question of international criminal jurisdictions.[60] These efforts culminated, in 1937, in the adoption of a treaty by the League of Nations contemplating establishment of an international criminal court.[61] A year later, the Eighth International Conference of American States, held in Lima, considered criminalizing '[p]ersecution for racial or religious motives'.[62] Hitler was, tragically, one step ahead. Only after his genocidal policies were ineluctably underway did the law begin to assume its pivotal role in the repression of the crime of genocide.

Also in the aftermath of the First World War, the international community constructed a system of protection for national minorities that, *inter alia*, guaranteed to these groups the 'right to life'.[63] It is

[59] 'Question of International Criminal Jurisdiction', UN Doc. A/CN.4/15 (1950), paras. 14–17.

[60] *Ibid.*, paras. 18–25.

[61] Convention for the Creation of an International Criminal Court, League of Nations OJ Spec. Supp. No. 156 (1936), LN Doc. C.547(I).M.384(I).1937.V (1938). Failing a sufficient number of ratifying States, the treaty never came into force.

[62] 'Final Act of the Eighth Interamerican Conference', in J. B. Scott, ed., *The International Conferences of the American States*, Washington: Carnegie Endowment for International Peace, 1940, p. 260.

[63] Treaty of Peace Between the United States of America, the British Empire, France, Italy and Japan, and Poland, [1919] TS 8, art. 2: 'Poland undertakes to assure full and complete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race or religion'. Similarly, Treaty between the Principal Allied and Associated Powers and Roumania, (1921) 5 LNTS 336, art. 1; Treaty between the Principal Allied and Associated Powers and Czechoslovakia, [1919] TS 20, art. 1; Treaty between the Principal Allied and Associated Powers and the Serb-Croat-Slovene State, [1919] TS 17, art. 1.

almost as if international law-makers sensed the coming Holocaust. Their focus was on vulnerable groups identified by nationality, ethnicity and religion, the very groups that would bear the brunt of Nazi persecution and ultimately mandate development of the law of genocide. According to the Permanent Court of International Justice, the minorities treaties were intended to 'secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs'.[64] According to Hersh Lauterpacht, 'the system of Minorities Treaties failed to afford protection in many cases of flagrant violation and although it acquired a reputation for impotence, with the result that after a time the minorities often refrained from resorting to petitions in cases where a stronger faith in the effectiveness of the system would have prompted them to seek a remedy'.[65] Yet to a certain and limited extent their provisions stalled the advance of Nazism. In Upper Silesia, for example, the Nazis delayed introduction of racist laws because this would have violated the applicable international norms. Jews in the region, protected by a bilateral treaty between Poland and Germany, were sheltered from the Nuremberg laws and continued to enjoy equal rights, at least until the convention's expiry in 1937.[66] The minorities treaties are one of the forerunners of the modern international human rights legal system. They contributed the context for the work of Raphael Lemkin, who viewed the lack of punishment for gross violations to be among their major flaws. Lemkin's pioneering work on genocide is to a large extent the direct descendant of the minorities treaties of the inter-war years.

Raphael Lemkin

Raphael Lemkin was born in eastern Poland, near the town of Bezwodene. He worked in his own country as a lawyer, prosecutor and university teacher. By the 1930s, internationally known as a scholar in the field of

[64] *Minority Schools in Albania*, Advisory Opinion, 6 April 1935, PCIJ Series A/B, No. 64, p. 17.

[65] Hersh Lauterpacht, *An International Bill of the Rights of Man*, New York: Columbia University Press, 1945, p. 219.

[66] Jacob Robinson, *And the Crooked Shall Be Made Straight*, New York: MacMillan, 1965, pp. 72–3.

international criminal law, he participated as a rapporteur in such important meetings as the Conferences on the Unification of Criminal Law. A Jew, Lemkin fled Poland in 1939, making his way to Sweden and then to the United States, finding work at Duke University and later at Yale University.[67] He initiated the World Movement to Outlaw Genocide, working tirelessly to promote legal norms directed against the crime. Lemkin was present and actively involved, largely behind the scenes but also as a consultant to the Secretary-General, throughout the drafting of the Genocide Convention. 'Never in the history of the United Nations has one private individual conducted such a lobby', wrote John P. Humphrey in his diaries.[68]

Lemkin created the term 'genocide' from two words, *genos*, which means race, nation or tribe in ancient Greek,[69] and *caedere*, meaning to kill in Latin.[70] As an alternative, he considered the ancient Greek term *ethnos*, which denotes essentially the same concept as *genos*.[71] Lemkin proposed the following definition of genocide:

> [A] co-ordinated 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. The objective of such a plan would be disintegration of the political and social institutions of culture, language, national feelings, religion, and the economic existence of national groups and the destruction of the personal security, liberty, health, dignity and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.[72]

[67] A. J. Hobbins, ed., *On the Edge of Greatness: The Diaries of John Humphrey, First Director of the United Nations Division of Human Rights*, Vol. I, 1948–9, Montreal: McGill University Libraries, 1994, p. 30.

[68] John P. Humphrey, *Human Rights and the United Nations: A Great Adventure*, Dobbs Ferry, NY: Transnational, 1984, p. 54.

[69] Henry George Liddell and Robert Scott, *A Greek–English Lexicon*, Oxford: Clarendon Press, 1996, p. 344; William F. Arndt and F. Wilbur Gingrich, *A Greek–English Lexicon of the New Testament and Other Early Christian Literature*, Chicago: University of Chicago Press, 1957, p. 155; Pierre Chantraine, *Dictionnaire étymologique de la langue grecque*, Paris, Editions Klincksieck, 1968, p. 222.

[70] During the drafting of the Convention, some pedants complained the term was an unfortunate mixture of Latin and Greek, and that it would be better to use the term 'generocide', with pure Latin roots: UN Doc. A/PV.123 (Henriquez Ureña, Dominican Republic).

[71] Since Lemkin, the term 'ethnocide' has also entered the vocabulary, mainly in the French language, and is generally used to refer to cultural genocide, particularly with respect to indigenous peoples.

[72] Raphael Lemkin, *Axis Rule*, p. 79.

Lemkin's definition was narrow, in that it addressed crimes directed against 'national groups' rather than against 'groups' in general. At the same time, it was broad, to the extent that it contemplated not only physical genocide but also acts aimed at destroying the culture and livelihood of the group. Lemkin's interest in the subject dated to his days as a student at Lvov University, when he intently followed attempts to prosecute the perpetrators of the massacres of the Armenians.[73] In 1933, he proposed the recognition of two new international crimes, 'vandalism' and 'barbarity' (barbarie), in a report to the Fifth International Conference for the Unification of Penal Law.[74] For Lemkin, 'vandalism' constituted a crime of destruction of art and culture in general, because these are the property of 'l'humanité civilisée qui, liée par d'innombrables liens, tire toute entière les profits des efforts de ses fils, les plus géniaux, dont les oeuvres entrent en possession de tous et augmentent leur culture'. In other words, the cultural objects in question belonged to humanity as a whole, and consequently humanity as a whole had an interest in their protection.[75] As for the crime of barbarie, this comprised acts directed against a defenceless 'racial, religious or social collectivity', such as massacres, pogroms, collective cruelties directed against women and children and treatment of men that humiliates their dignity. Elements of the crime included violence associated with anti-social and cruel motives, systematic and organized acts, and measures directed not against individuals but against the population as a whole or a racial or religious group.[76] Lemkin credited the Romanian jurist Vespasien V. Pella with authorship of the concept, which appears in Pella's report to the third International Congress on Penal Law, held at Palermo in 1933.[77] Lemkin later explained that 'I did not succeed because the lawyers argued that the crime appeared too seldom to legislate against it.'[78]

[73] 'Totally Unofficial' (unpublished autobiography of Raphael Lemkin in the Raphael Lemkin Papers, New York Public Library), in *United States of America, Hearing Before the Committee on Foreign Relations, United States Senate, 5 March 1985*, Washington: US Government Printing Office, 1985, p. 204.

[74] Lemkin, *Axis Rule*, p. 91.

[75] Luis Jimenez de Asua, Vespasien Pella and Manuel Lopez-Rey Arroyo, eds., *V^e Conférence internationale pour l'unification du droit pénal, Actes de la Conférence*, Paris: Pedone, 1935, pp. 54–5.

[76] *Ibid.*, p. 55. See also Raphael Lemkin, 'Genocide as a Crime in International Law', (1947) 41 *American Journal of International Law*, p. 145 at p. 146.

[77] Lemkin cited the provisional proceedings of the 1933 meeting, *ibid.*, p. 55, n. 11.

[78] 'Interview on the Genocide Convention for Italy', Raphael Lemkin Papers, New York Public Library, Reel 1.

Axis Rule in Occupied Europe

A decade later, in his volume, *Axis Rule in Occupied Europe*, Lemkin affirmed that the crimes he had recommended in 1933 'would amount to the actual conception of genocide'.[79] But, as Sir Hartley Shawcross noted during the 1946 General Assembly debate, the 1933 conference rejected Lemkin's proposal.[80] During the war, Lemkin lamented the fact that, had his initiative succeeded, prosecution of Nazi atrocities would have been possible.[81] But the Allies proceeded anyway, on the basis of a definition of 'crimes against humanity' that encompassed 'extermination' and 'persecutions on political, racial or religious grounds'.[82] The International Military Tribunal and other post-war courts consistently dismissed arguments that this constituted *ex post facto* criminal law.[83]

'New conceptions require new terms', explained Lemkin. Noting that 'genocide' referred to the destruction of a nation or of an ethnic group, he described it as 'an old practice in its modern development'. Genocide did not necessarily imply the immediate destruction of a national or ethnic group, but rather different actions aiming at the destruction of the essential foundations of the life of the group, with the aim of annihilating the group as such. 'The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.'[84]

The major part of *Axis Rule in Occupied Europe* consisted of laws and decrees of the Axis powers and of their puppet regimes for the

[79] Lemkin, *Axis Rule*, p. 91.

[80] UN Doc. A/C.6/SR.22 (Shawcross, United Kingdom). The conference proceedings do not show that the proposal was defeated; it appears to have been quietly dropped by a drafting committee preparing a text for the Second Commission of the Conference: de Asua, Pella and Arroyo, *V^e Conférence*, p. 246.

[81] Lemkin, *Axis Rule*, p. 92.

[82] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), annex, (1951) 82 UNTS 279, art. 6(c).

[83] *France et al.* v. *Goering et al.*, (1946) 22 IMT 203, pp. 497–8; *United States of America* v. *Alstötter et al.* ('Justice trial'), (1948) 6 LRTWC 1, 3 TWC 1 (United States Military Tribunal), pp. 41–3; *United States of America* v. *Flick et al.*, (1948) 9 LRTWC 1 (United States Military Tribunal), pp. 36–9; *United States of America* v. *Krupp et al.*, (1948) 10 LRTWC 69 (United States Military Tribunal), p. 147.

[84] Lemkin, *Axis Rule*, p. 79.

government of occupied areas. These were analysed in detailed commentaries. One chapter of the book was devoted to the subject of the new crime of genocide. Lemkin defined several categories of genocide. Basing his examples on the practice of the Nazis in occupied Europe, he wrote that genocide was effected:

> through a synchronized attack on different aspects of life of the captive peoples: in the political field (by destroying institutions of self-government and imposing a German pattern of administration, and through colonization by Germans); the social field (by disrupting the social cohesion of the nation involved and killing or removing elements such as the intelligentsia, which provide spiritual leaderships – according to Hitler's statement in *Mein Kampf*, 'the greatest of spirits can be liquidated if its bearer is beaten to death with a rubber truncheon'); in the cultural field (by prohibiting or destroying cultural institutions and cultural activities; by substituting vocational education for education in the liberal arts, in order to prevent humanistic thinking, which the occupant considers dangerous because it promotes national thinking); in the economic field (by shifting the wealth to Germans and by prohibiting the exercise of trades and occupations by people who do not promote Germanism 'without reservations'); in the biological field (by a policy of depopulation and by promoting procreation by Germans in the occupied countries); in the field of physical existence (by introducing a starvation rationing system for non-Germans and by mass killings, mainly of Jews, Poles, Slovenes, and Russians); in the religious field (by interfering with the activities of the Church, which in many countries provides not only spiritual but also national leadership); in the field of morality (by attempts to create an atmosphere of moral debasement through promoting pornographic publications and motion pictures, and the excessive consumption of alcohol).[85]

Lemkin identified two phases in genocide, the first being the destruction of the national pattern of the oppressed group, and the second, the imposition of the national pattern of the oppressor.[86] He referred to the war crimes commission established in 1919, which had used the term 'denationalization' to describe the phenomenon.[87] Lemkin also cited remarks by Hitler, speaking to Rauschning:

[85] *Ibid.*, pp. xi–xii. [86] *Ibid.*

[87] *Ibid.* In a subsequent article, Lemkin suggested that 'denationalization' had been used in the past to describe genocide-like crimes: Lemkin, 'Le crime de génocide', p. 372. See the discussion on genocide-like war crimes in the note accompanying *United States of America* v. *Greifelt et al.*, (1948) 4 TWC 1, 13 LRTWC 1 (United States Military Tribunal), p. 42 (LRTWC). Specific cases of the war crime of 'denationalization' were also considered by the United Nations War Crimes Commission, *History*, p. 488. In a report to the United

> It will be one of the chief tasks of German statesmanship for all time to prevent, by every means in our power, the further increase of the Slav races. Natural instincts bid all living beings not merely conquer their enemies, but also destroy them. In former days, it was the victor's prerogative to destroy entire tribes, entire peoples. By doing this gradually and without bloodshed, we demonstrate our humanity. We should remember, too, that we are merely doing unto others as they would have done to us.[88]

Yet Lemkin observed that, while some groups were to be 'Germanized' (Dutch, Norwegians, Flemings, Luxemburgers), others did not figure in the Nazi plans (Poles, Slovenes, Serbs), and, as for the Jews, they were to be destroyed altogether.[89]

Lemkin wrote of the existence of 'techniques of genocide in various fields' and then described them, including political, social, cultural, economic, biological, physical, religious and moral genocide. Political genocide – not to be confused with genocide of political groups, which Lemkin did not view as falling within the definition – entailed the destruction of a group's political institutions, including such matters as forced name changes and other types of 'Germanization'.[90] On the subject of physical destruction, Lemkin said it primarily transpired through racial discrimination in feeding, endangering of health, and outright mass killings.[91]

The chapter on genocide concluded with 'recommendations for the future', calling for the 'prohibition of genocide in war and peace'.[92] Lemkin insisted upon the relationship between genocide and the growing interest in the protection of peoples and minorities by the post-First World War treaties. He noted the need to revisit international legal instruments, pointing out particularly the inadequacies of the Hague Regulations.[93] For Lemkin, the Hague Regulations dealt with technical rules concerning occupation, 'but they are silent regarding the preservation of the integrity of a people'.[94] Lemkin urged their revision in

Nations War Crimes Commission dated 28 September 1945, Bohuslav Ecer argued that 'denationalisation' was not only a war crime but also 'a genuine international crime – a crime against the very foundations of the Community of Nations'. 'Preliminary Report by the Chairman of Committee III', UNWCC Doc. C/148, p. 3.

[88] Lemkin, *Axis Rule*, p. 81, quoting Hermann Rauschning, *The Voice of Destruction*, New York: G. P. Putman's Sons, 1940, p. 138.

[89] Lemkin, *Axis Rule*, p. 82. [90] *Ibid.* [91] *Ibid.*, pp. 87–9. [92] *Ibid.*, p. 90.

[93] Convention (IV) Respecting the Laws and Customs of War by Land, note 9 above.

[94] Lemkin, *Axis Rule*, p. 90.

order to incorporate a definition of genocide. '*De lege ferenda*, the definition of genocide in the Hague Regulations thus amended should consist of two essential parts: in the first should be included every action infringing upon the life, liberty, health, corporal integrity, economic existence, and the honour of the inhabitants when committed because they belong to a national, religious, or racial group; and in the second, every policy aiming at the destruction or the aggrandizement of one of such groups to the prejudice or detriment of another.'[95] Lemkin also said that the Hague Regulations should be modified 'to include an international controlling agency vested with specific powers, such as visiting the occupied countries and making inquiries as to the manner in which the occupant treats natives in prison'.[96] But he also signalled the great shortcoming of the Hague Regulations: their limited application to circumstances of international armed conflict.

Lemkin observed that the system of minorities protection created following the First World War 'proved to be inadequate because not every European country had a sufficient judicial machinery for the enforcement of its constitution'.[97] He proposed the development of a new international multilateral treaty requiring States to provide for the introduction, in constitutions but also in domestic criminal codes, of norms protecting national, religious or racial minority groups from oppression and genocidal practices. Lemkin also had important recommendations with respect to criminal prosecution of perpetrators of genocide. 'In order to prevent the invocation of the plea of superior orders', argued Lemkin, 'the liability of persons who *order* genocidal practices, as well as of persons who *execute* such orders, should be provided expressly by the criminal codes of the respective countries'.

Finally, Lemkin urged that the principle of universal repression or universal jurisdiction be adopted for the crime of genocide. Lemkin made the analogy with other offences that are *delicta juris gentium* such as 'white slavery', trade in children and piracy, saying genocide should be added to the list of such crimes.[98]

[95] *Ibid.*, p. 93.

[96] *Ibid.*, p. 94. Here, Lemkin may be able to claim credit for conceiving of the fact-finding commission eventually provided for under art. 90 of Protocol Additional I to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts, (1979) 1125 UNTS 3, that was created in 1991.

[97] Lemkin, *Axis Rule*, p. 93.

[98] *Ibid.*, pp. 93–4 (italics in the original).

Prosecuting the Nazis

During the Second World War, activity intensified with regard to the creation of an international criminal court and the international prosecution of war crimes and crimes against humanity. An unofficial body, the League of Nations Union, established what was known as the 'London International Assembly' to work on the problem. In October 1943, it proposed the establishment of an international criminal court whose jurisdiction was to encompass 'crimes in respect of which no national court had jurisdiction (e.g. crimes committed against Jews) . . . [T]his category was meant to include offences subsequently described as crimes against humanity.'[99] On 17 December 1942, British Foreign Secretary Anthony Eden declared in the House of Commons that reports had been received 'regarding the barbarous and inhuman treatment to which Jews are being subjected in German-occupied Poland', and that the Nazis were 'now carrying into effect Hitler's oft repeated intention to exterminate the Jewish people in Europe'. Eden affirmed his government's intention 'to ensure that those responsible for these crimes shall not escape retribution'.[100]

The United Nations War Crimes Commission

The Moscow Declaration of 1 November 1943 is generally viewed as the seminal statement of the Allied powers on the subject of war crimes prosecutions. While referring to 'evidence of the atrocities, massacres and cold-blooded mass executions' being perpetrated by the Nazis, and warning those responsible that they would be brought to book for their crimes, there was no direct reference to the racist aspect of the offences or an indication that they involved specific national, ethnic and religious groups such as the Jews of Europe.[101] The United Nations Commission for the Investigation of War Crimes, established immediately prior to the Moscow Declaration,[102] was composed of representatives of most of the Allies and chaired by Sir Cecil Hurst of the United Kingdom.

[99] Quoted in United Nations War Crimes Commission, *History*, p. 103; see also p. 101.
[100] Parliamentary Debates, House of Commons, Vol. 385, No. 17, cols. 2082–4.
[101] 'Declaration on German Atrocities', Department of State Publication 2298, Washington: Government Printing Office, 1945, pp. 7–8. See also (1944) 38 *American Journal of International Law*, p. 5.
[102] United Nations War Crimes Commission, *History*, p. 112; Arieh J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment*, Chapel Hill, NC, and London: University of North Carolina Press, 1998; Arieh J. Kochavi, 'The British

It initially agreed to use the list of offences that had been drafted by the Responsibilities Commission of the Paris Peace Conference in 1919 as the basis for its prosecutions. The enumeration was already recognized for the purposes of international prosecution. In addition, Italy and Japan had agreed to it, and Germany had never formally objected.[103]

Although the 1919 list included the crime of 'denationalization' as well as murder and ill-treatment of civilians, the Commission did not initially consider that its mandate extended to prosecutions for the extermination of European Jews. The Commission's 'Draft Convention for the Establishment of a United Nations War Crimes Court', prepared in late 1944, was confined to 'the commission of an offence against the laws and customs of war'.[104] Nevertheless, from an early stage in its work, there were efforts to extend the jurisdiction of the Commission to civilian atrocities committed against ethnic groups not only within occupied territories but also those within Germany itself. In the Legal Committee of the Commission, the United States representative Herbert C. Pell used the term 'crimes against humanity' to describe offences 'committed against stateless persons or against any persons because of their race or religion'.[105] On 24 March 1944, President Roosevelt referred in a speech to 'the wholesale systematic murder of the Jews of Europe' and warned that 'none who participate in these acts of savagery shall go unpunished'.[106] Nevertheless, the State Department was decidedly

Foreign Office Versus the United Nations War Crimes Commission During the Second World War', (1994) 8 *Holocaust and Genocide Studies*, p. 28.

[103] 'Transmission of Particulars of War Crimes to the Secretariat of the United Nations War Crimes Commission, 13 December 1943', NAC RG-25, Vol. 3033, 4060-40C, Part Two.

[104] 'Draft Convention for the Establishment of a United Nations War Crimes Court', UN War Crimes Commission, Doc. C.50(1), 30 September 1944, NAC RG-25, Vol. 3033, 4060-40C, Part Four, art. 1(1).

[105] 'Resolution moved by Mr Pell on 16th March 1944', United Nations War Crimes Commission, Committee II, Doc. III/1, 18 March 1944; United Nations War Crimes Commission, *History*, p. 175; Kochavi, *Prelude*, pp. 143ff. In 1985, during debates about ratification of the Genocide Convention, United States Senator Claiborne Pell said 'this Convention has a very real personal meaning for me, because it was through my father's efforts as US Representative on the UN War Crimes Commission that genocide was initially considered a war crime': *United States of America, Hearing Before the Committee on Foreign Relations, United States Senate, 5 March 1985*, Washington: US Government Printing Office, 1985, p. 3. See also *United States of America, Hearing Before the Committee on Foreign Relations, United States Senate, 12 September 1984*, Washington: US Government Printing Office, 1984, p. 40.

[106] 'Statement of the Acting Secretary of State, 1 February 1945, on War Criminals', NAC RG-25, Vol. 3033, 4060-40C, Part Four.

lukewarm to the idea that war crimes prosecutions might innovate and hold Germans accountable for crimes committed against minority groups within their own borders.[107]

In May 1944, the Legal Committee submitted a draft resolution to the plenary Commission urging it to adopt a broad view of its mandate, and to address 'crimes committed against any persons without regard to nationality, stateless persons included, because of race, nationality, religious or political belief, irrespective of where they have been committed'.[108] Studying what it called 'crimes for reasons of race, nationality, religious or political creed', the Commission considered that recommendations on 'this vital and most important question' should be sent to the Allied governments.[109] On 31 May 1944, Hurst wrote to Foreign Secretary Eden: 'A category of enemy atrocities which has deeply affected the public mind, but which does not fall strictly within the definition of war crimes, is undoubtedly the atrocities which have been committed on racial, political or religious grounds in enemy territory.'[110] The reply came from Lord Simon, the Lord Chancellor, on 23 August 1944:

> This would open a very wide field. No doubt you have in mind particularly the atrocities committed against the Jews. I assume there is no doubt that the massacres which have occurred in occupied territories would come within the category of war crimes and there would be no question as to their being within the Commission's terms of reference. No doubt they are part of a policy which the Nazi Government have adopted from the outset, and I can fully understand the Commission wishing to receive and consider and report on evidence which threw light on what one might describe as the extermination policy. I think I can probably express the view of His Majesty's Government by saying that it would not desire the Commission to place any unnecessary restriction on the evidence which may be tendered to it on this general subject. I feel

[107] Kochavi, *Prelude*, p. 149. See also Shlomo Aronson, 'Preparations for the Nuremberg Trial: The OSS, Charles Dworak, and the Holocaust', (1998) 12 *Holocaust and Genocide Studies*, p. 257.

[108] United Nations War Crimes Commission, *History*, p. 176.

[109] 'Memorandum on the Present Position of the United Nations War Crimes Commission, the Work Already Done and its Future Tasks, by Dr B. Ecer', UNWCC Doc. C.76, 8 February 1945, NAC RG-25, Vol. 3033, 4060-40C, Part Four, p. 7.

[110] 'Correspondence Between the War Crimes Commission and HM Government in London Regarding the Punishment of Crimes Committed on Religious, Racial or Political Grounds', UNWCC Doc. C.78, 15 February 1945, NAC RG-25, Vol. 3033, 4060-40C, Part Four.

> I should warn you, however, that the question of acts of this kind committed in enemy territory raises serious difficulties.[111]

As a compromise, Hurst thought the Commission might issue reports dealing with 'special categories of the atrocities committed by the Axis Powers' and that '[o]ne of these reports might well deal with this campaign for the extermination of the Jews as a whole'.[112] Hurst also told the Commission that 'Lord Wright was of opinion that the persecution of the Jews in Germany was, logically, a war crime, and that the Commission might have to consider extending its definition of war crimes'.[113] Hurst presented his idea of preparing reports on 'special categories' and the Commission agreed with the approach.[114] Hurst died in the midst of this work, but had already made preparations for the drafting of a report on 'atrocities committed against the Jews'.[115]

The London Conference

The United States became the first to alter its position, as Washington prepared for the meeting of the Big Three in Yalta. On 22 January 1945, the Secretary of State, the Secretary of War and the Attorney-General issued a memorandum entitled 'Trial and Punishment of War Criminals'.[116] It called for prosecution of German leaders for pre-war atrocities and those committed against their own nationals:[117]

> Many of these atrocities . . . were '*begun by the Nazis in the days of peace* and multiplied by them a hundred times in time of war.' These pre-war atrocities are neither 'war crimes' in the technical sense, nor offences

[111] *Ibid.* [112] *Ibid.*, p. 3.

[113] 'Minutes of the Thirty-Third Meeting Held on 26 September 1944', UNWCC Doc. M.28, NAC RG-25, Vol. 3033, 4060-40C, Part Three, p. 3.

[114] 'Minutes of the Twenty-Eighth Meeting Held on 22 August 1944', UNWCC Doc. M.28, NAC RG-25, Vol. 3033, 4060-40C, Part Three, pp. 3–4. See also 'Progress Report', UNWCC Doc. C.48(1), NAC RG-25, Vol. 3033, 4060-40C, Part Three; 'Minutes of the Thirty-Second Meeting Held on 19 September 1944', UNWCC Doc. M.32, p. 7, NAC RG-25, Vol. 3033, 4060-40C, Part Three; and 'Minutes of the Thirty-Eighth Meeting Held on 6 December 1944', UNWCC Doc. M.38, p. 3, NAC RG-25, Vol. 3033, 4060-40C, Part Four.

[115] 'Reports on Special Classes of Axis War Crimes, Note by the Secretary General on the History of the Question', UNWCC Doc. C.72, 29 January 1945, NAC RG-25, Vol. 3033, 4060-40C, Part Four.

[116] 'Memorandum for the President, Subject: Trial and Punishment of Nazi War Criminals', in Bradley F. Smith, *The American Road to Nuremberg: The Documentary Record, 1944–1945*, Stanford, CA: Hoover Institution Press, 1982, pp. 117–22.

[117] Kochavi, *Prelude*, p. 160.

> against international law; and the extent to which they may have been in violation of German law, as changed by the Nazis, is doubtful. Nevertheless, the declared policy of the United Nations is that these crimes, too, shall be punished; and the interests of post-war security and a necessary rehabilitation of German peoples, as well as the demands of justice, require that this be done.[118]

On 1 February 1945, the United States issued a public statement indicating its intent to punish the Nazi leaders 'for the whole broad criminal enterprise devised and executed with ruthless disregard of the very foundation of law and morality, including offences wherever committed against the rules of war and against minority elements, Jewish and other groups and individuals'.[119] By April 1945, the Americans were circulating a draft 'Implementing Instrument' for trial of the major Nazi war criminals. A proposed 'document of arraignment' set out the offences with which they were to be charged, including '[t]he programme of persecution of minority groups in Germany and the occupied countries, conducted with a view to suppressing opposition to the Nazi regime and destroying or weakening certain racial strains'.[120] Later, this became a more timid reference to 'the right to charge and try defendants under this instrument for . . . [atrocities and crimes committed in] violation[s] of the domestic law of any Axis Power or satellite or of any of the United Nations'.[121] A draft dated 16 May 1945, and developed during the San Francisco conference, provided for a tribunal with jurisdiction to try '[a]trocities and offences committed since 1933 in violation of any applicable provision of the domestic law of any any of the parties or of [*sic*] Axis Power or satellite, including atrocities and persecutions on racial or religious grounds'.[122]

At the London Conference, which began on 26 June 1945, the United States submitted a text that drew on the Martens clause of the Hague

[118] 'Memorandum for the President, Subject: Trial and Punishment of Nazi War Criminals', in Smith, American Road, pp. 117–22 at p. 119 (italics in the original).

[119] Kochavi, *Prelude*, p. 161. See generally Eugène Aroneanu, *Le crime contre l'humanité*, Paris: Dalloz, 1961.

[120] 'Revision of Portions of the "Implementing Instrument"', in Smith, *American Road*, pp. 152–5 at p. 153. See also 'Punishment of War Criminals, Redraft by Colonel Cutter, 28 April 1945', *ibid.*, pp. 173–80 at p. 174.

[121] 'Draft Executive Agreement, 2 May 1945', *ibid.*, pp. 181–93 at p. 183.

[122] 'Executive Agreement, Draft No. 2', *ibid.*, pp. 193–9 at p. 195. See also 'Proposed Amendments by the United Kingdom Delegation to the United States Draft Protocol', in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, Washington: US Government Printing Office, 1949, pp. 86–8 at p. 87.

Conventions. But the reference to 'the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience' was linked to the crime of aggression.[123] The record of the meetings leaves no doubt that the four powers insisted upon a nexus between the war itself and the atrocities committed by the Nazis against their own Jewish populations. It was on this basis, and this basis alone, that they considered themselves entitled to contemplate prosecution. The distinctions were set out by the head of the United States delegation, Robert Jackson, at a meeting on 23 July 1945:

> It has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the way Germany treats its inhabitants, or any other country treats its inhabitants is not our affair any more than it is the affair of some other government to interpose itself in our problems. The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal war. Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities. They were a part of the preparation for war or for the conduct of the war in so far as they occurred inside of Germany and that makes them our concern.[124]

Speaking of the proposed crime of 'atrocities, persecutions, and deportations on political, racial or religious grounds', Justice Jackson betrayed the lingering concerns of his government:

> [O]rdinarily we do not consider that the acts of a government toward its own citizens warrant our interference. We have some regrettable circumstances at times in our own country in which minorities are unfairly treated. We think it is justifiable that we interfere or attempt to bring retribution to individuals or to states only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved. We see no other basis on which we are justified in reaching the atrocities which were committed inside Germany, under German law, or even in violation of German law, by authorities of the German state.[125]

[123] 'Revised Draft of Agreement and Memorandum Submitted by American Delegation, 30 June 1945', *ibid.*, pp. 119–27 at p. 121. For a descriptive review of the drafting of the Charter of the International Military Tribunal, see 'Formulation of Nurnberg Principles, Report by J. Spiropoulos, Special Rapporteur', UN Doc. A/CN.4/22, paras. 1–24.

[124] 'Minutes of Conference Session of 23 July 1945', in *Report of Robert H. Jackson*, note 122 above, pp. 328–47 at p. 331.

[125] *Ibid.*, p. 333.

Jackson's words made clear enough why the United States, and presumably the other powers too, were so concerned that any prosecutions directed against minorities within Germany have some connection with the aggressive war. They were worried about establishing a principle under international law by which others, including themselves, might be held liable for 'regrettable circumstances' in their own countries, in which minorities are unfairly treated. France was the only delegation to express concerns with Jackson's narrow view. Professor Gros of the French delegation questioned whether it was necessary to insist upon a connection between persecutions and armed conflict. He said:

> I know it was very clearly explained at the last session by Mr Justice Jackson that we are in fact prosecuting those crimes only for that reason, but for the last century there have been many interventions for humanitarian reasons. All countries have interfered in affairs of other countries to defend minorities who were being persecuted. Perhaps it is only a question of wording – perhaps if we could avoid to appear as making the principle that those interventions are only justified because of the connection with aggressive war, it would not change your intention, Mr Justice Jackson, and it would not be so exclusive of the other intervention that has taken place in the last century.[126]

Gros warned of the difficulties in proving that persecutions of the Jews were carried out in pursuit of aggression. He said it would be easy for the lawyers of the war criminals 'to submit to the court that the Nazis' plan against the Jews is a purely internal matter without any relation whatsoever to aggression as the text stands'.[127] The head of the British delegation, Sir David Maxwell-Fyfe, replied that there would be no problem establishing the connection.[128]

The delegates to the London Conference continued to exchange drafts containing the 'atrocities and persecutions and deportations' category of crimes.[129] Each of the four powers was associated with one or several of

[126] 'Minutes of Conference Session of 24 July 1945', *ibid.*, pp. 360–72 at p. 360.
[127] *Ibid.*, p. 361. [128] *Ibid.*, p. 362.
[129] 'Redraft of Charter, Submitted by British Delegation, 23 July 1945', *ibid.*, pp. 348–58 at p. 352; 'Redraft of Soviet Definition of "Crimes" (Article 6), Submitted by British Delegation, 23 July 1945', *ibid.*, p. 359; 'Redraft of Definition of "Crimes", Submitted by Soviet Delegation, 25 July 1945', *ibid.*, p. 373; 'Redraft of Definition of "Crimes", Submitted by American Delegation, 25 July 1945', *ibid.*, p. 374; 'Revised Definition of "Crimes", Prepared by British Delegation and Accepted by French Delegation, 28 July 1945', *ibid.*, pp. 390–1; 'Revised Definition of "Crimes", Prepared by British Delegation to Meet Views of Soviet Delegation, 28 July 1945', *ibid.*, p. 392; 'Revised Definition of "Crimes", Submitted by American Delegation, 30 July 1945', *ibid.*, p. 374.

the drafts. But all of the drafts reflected the insistence of Judge Jackson upon a connection with the international armed conflict. On 31 July 1945, the United States submitted a revised definition of crimes over which the Tribunal would have jurisdiction. The category of 'atrocities' was quite substantially redrafted and, for the first time, bore a title: 'Crimes against humanity'.

> (c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in furtherance of or in connection with any crime within the jurisdiction of the International Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[130]

In a note accompanying the submission, Jackson explained that language had been inserted in the definition to make it clear that persecution would cover that directed against Jews and others in Germany as well as outside of it, and both before and during the war.[131] But the nexus with the war remained.

The Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT) was formally adopted on 8 August 1945, and signed by representatives of the four powers.[132] The Charter of the International Military Tribunal was annexed to the Agreement. This treaty was eventually adhered to by nineteen other States who, although they played no active role in the tribunal's activities, sought to express their support.[133] In October 1945, twenty-four Nazi leaders were served with indictments, and their trial – known as the Trial of the Major War Criminals – commenced the following month. It concluded nearly a year later with the conviction of nineteen defendants and the imposition of death sentences in twelve cases.

[130] 'Redraft of Definition of "Crimes", Submitted by American Delegation, 31 July 1945', *ibid*., p. 395.

[131] 'Notes on Proposed Definition of "Crimes", Submitted by American Delegation, 31 July 1945', *ibid*., p. 394.

[132] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), (1951) 82 UNTS 279.

[133] Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela and Yugoslavia.

The Nuremberg trial

Referring to article 6(c) of the Charter of the International Military Tribunal, the indictment of the International Military Tribunal charged the defendants with 'deliberate and systematic 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, particularly Jews, Poles, and Gypsies'.[134] The United Nations War Crimes Commission later observed that '[b]y inclusion of this specific charge the Prosecution attempted to introduce and to establish a new type of international crime'.[135] During the trial, Sir David Maxwell-Fyfe, the British prosecutor, reminded one of the accused, Von Neurath, that he had been charged with genocide, 'which we say is the extermination of racial and national groups, or, as it has been put in the well-known book of Professor Lemkin, "a co-ordinated 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"'.[136] In his closing argument, the French prosecutor, Champetier de Ribes, stated: 'This is a crime so monstrous, so undreamt of in history through the Christian era up to the birth of Hitlerism, that the term "genocide" had to be coined to define it.'[137] He spoke of 'the greatest crime of all, genocide'.[138] The British prosecutor, Sir Hartley Shawcross, also used the term in his summation: '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.'[139] Shawcross referred to how '[t]he

[134] *France et al.* v. *Goering et al.*, (1946) 22 IMT 203, pp. 45–6. Also: (1947) 2 IMT, pp. 44–58. The term 'genocide' had been used some months earlier by Justice Jackson. In a 'Planning Memorandum Distributed to Delegations at Beginning of London Conference, June 1945', Jackson outlined the evidence he planned to adduce in the trial. Referring to 'Proof of the defendant's atrocities and other crimes', he included: 'Genocide or destruction of racial minorities and subjugated populations by such means and methods as (1) underfeeding; (2) sterilization and castration; (3) depriving them of clothing, shelter, fuel, sanitation, medical care; (4) deporting them for forced labor; (5) working them in inhumane conditions.' *Report of Robert H. Jackson*, supra note 122, p. 68.

[135] United Nations War Crimes Commission, *History*, p. 197. [136] (1947) 17 IMT 61.

[137] *France et al.* v. *Goering et al.*, (1947) 19 IMT 531. [138] (1947) 19 IMT 531.

[139] *Ibid.*, p. 497. See also *France et al.* v. *Goering et al.*, (1948) 19 IMT 509.

aims of genocide were formulated by Hitler'.[140] He went on to explain: 'The Nazis also used various biological devices, as they have been called, to achieve genocide. They deliberately decreased the birthrate in the occupied countries by sterilization, castration, and abortion, by separating husband from wife and men from women and obstructing marriage.'[141]

Although the final judgment in the Trial of the Major War Criminals, issued 30 September–1 October 1946, never used the term, it described at great length what was in fact the crime of genocide. Lemkin later wrote that '[t]he evidence produced at the Nuremberg trial gave full support to the concept of genocide'.[142] More than fifty years later, the International Criminal Tribunal for Rwanda noted that 'the crimes prosecuted by the Nuremberg Tribunal, namely the Holocaust of the Jews or the "Final Solution", were very much constitutive of genocide, but they could not be defined as such because the crime of genocide was not defined until later'.[143] A distinct and important section of the judgment of the Tribunal was entitled 'Persecution of the Jews'. The Tribunal noted:

> The persecution of the Jews at the hands of the Nazi Government has been proved in the greatest detail before the Tribunal. It is a record of consistent and systematic inhumanity on the greatest scale. Ohlendorf, chief of Amt III in the RSHA from 1939 to 1943, and who was in command of one of the Einsatz groups in the campaign against the Soviet Union, testified as to the methods employed in the extermination of the Jews. He said that he employed firing squads to shoot the victims in order to lessen the sense of individual guilt on the part of his men; and the 90,000 men, women and children who were murdered in one year by his particular group were mostly Jews.[144]

The tribunal noted that defendant Hans Frank has spoken 'the final words of this chapter of Nazi history' when he testified: 'We have fought against Jewry, we have fought against it for years: and we have allowed ourselves to make utterances and my own diary has become a witness against me in this connection – utterances which are terrible ... A thousand years will pass and this guilt of Germany will not be erased.'[145]

[140] (1947) 19 IMT 496. [141] *Ibid.*, p. 498. Also, pp. 509 and 514.
[142] Lemkin, 'Genocide as a Crime', p. 147.
[143] *Prosecutor* v. *Kambanda* (Case No. ICTR 97-23-S), Judgment and Sentence, 4 September 1998, para. 16.
[144] *France et al.* v. *Goering et al.*, (1946) 22 IMT 203, p. 491. [145] *Ibid.*

The Tribunal documented the emergence of the Nazi Party's genocidal policy, something that was plain to see more than fifteen years before the ovens of Auschwitz went into operation. The judgment reviewed the history of the Nazi movement, describing the role played by anti-Semitism in its thought and propaganda.[146] It noted that the Nazi Party programme stated that Jews were to be treated as foreigners, that they should not be permitted to hold public office, that they should be expelled from the Reich if it were impossible to nourish the entire population of the State, that they should be denied any further immigration into Germany, and that they should be prohibited from publishing German newspapers.

> With the seizure of power, the persecution of the Jews was intensified. A series of discriminatory laws were passed, which limited the offices and professions permitted to Jews; and restrictions were placed on their family life and their rights of citizenship. By the autumn of 1938, the Nazi policy towards the Jews had reached the stage where it was directed towards the complete exclusion of Jews from German life. Pogroms were organised which included the burning and demolishing of synagogues, the looting of Jewish businesses, and the arrest of prominent Jewish business men. A collective fine of one billion marks was imposed on the Jews, the seizure of Jewish assets was authorised, and the movement of Jews was restricted by regulations to certain specified districts and hours. The creation of ghettos was carried out on an extensive scale, and by an order of the Security Police Jews were compelled to wear a yellow star to be worn on the breast and back.[147]

Nazi anti-Semitic doctrine was disseminated through *Der Stuermer* and other publications, as well as in the speeches and public declarations of the Nazi leaders. In a September 1938 diatribe in *Der Stuermer*, editor Julius Streicher described the Jew 'as a germ and a pest, not a human being, but "a parasite, an enemy, an evil-doer, a disseminator of diseases who must be destroyed in the interest of mankind" '. A lead article in *Der Stuermer* in May 1939 proclaimed:

> A punitive expedition must come against the Jews in Russia. A punitive expedition which will provide the same fate for them that every murderer and criminal must expect. Death sentence and execution. The Jews in Russia must be killed. They must be exterminated root and branch.[148]

Addressing implicitly the issue of the nexus between crimes against humanity and the war itself, something that appeared fundamental in

[146] *Ibid.*, p. 421. [147] *Ibid.*, p. 492. [148] *Ibid.*, p. 548.

order to comply with the Charter of the Tribunal, the judges noted that '[i]t was contended for the Prosecution that certain aspects of this antiSemitic policy were connected with the plans for aggressive war'.[149] Thus, the Tribunal made a distinction between pre-war persecution of German Jews, which it characterized as 'severe and repressive', and German policy during the war in the occupied territories. United States prosecutor Telford Taylor observed in his final report to the Secretary of the Army that '[n]one of the Nuremberg judgments squarely passed on the question whether mass atrocities committed by or with the approval of a government against a racial or religious group of its own inhabitants in peacetime constitute crimes under international law'. Taylor said that the practical significance of this problem could hardly be overstated, and cited the 1948 Genocide Convention, whose drafting had just been completed when he penned these words, as a manifestation of the interest in this question.[150]

The Tribunal noted that mass murders and cruelties committed against the civilian population in Eastern Europe went beyond the purpose of stamping out opposition or resistance to the German occupying forces: 'In Poland and the Soviet Union these crimes were part of a plan to get rid of whole native populations by expulsion and annihilation, in order that their territory could be used for colonisation by Germans.'[151] It explained Hitler's comments in *Mein Kampf* along such lines, and that the plan had been put in writing by Himmler in July 1942, when he stated: 'It is not our task to Germanise the East in the old sense, that is to teach the people there the German language and the German law, but to see to it that only people of purely Germanic blood live in the East.'[152]

The judgment referred to the testimony of Hans Frank, who in December 1941 stated: 'We must annihilate the Jews wherever we find them and wherever it is possible, in order to maintain there the structure of Reich as a whole.'[153] Frank testified that, at the outset of the war, there were approximately 3,500,000 Jews in this territory, and that, by January 1944, only 100,000 remained.[154] The Tribunal concluded that the Germans organized special groups that travelled through Europe, to

[149] *Ibid.*, p. 492.
[150] Telford Taylor, *Final Report to Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10*, Washington: US Government Printing Office, 1951, pp. 224 and 226.
[151] *France et al.* v. *Goering et al.*, (1946) 22 IMT 203, p. 480. [152] *Ibid.* [153] *Ibid.*, p. 543.
[154] *Ibid.*

such countries as Hungary, Romania and Bulgaria, to find Jews and subject them to the 'final solution'.[155] The judgment stated:

> Originally the policy was similar to that which had been in force inside Germany. Jews were required to register, were forced to live in ghettos, to wear the yellow star, and were used as slave labourers. In the summer of 1941, however, plans were made for the 'final solution' of the Jewish question in all of Europe. This 'final solution' meant the extermination of the Jews, which early in 1939 Hitler had threatened would be one of the consequences of an outbreak of war, and a special section in the Gestapo under Adolf Eichmann, as head of Section B4 of the Gestapo, was formed to carry out the policy.[156]

The judgment went on to describe the establishment of concentration camps, equipped with gas chambers for the murder of the inmates and furnaces to burn the bodies. It noted that some of the camps were used for the extermination of Jews 'as part of the "final solution"' of the Jewish problem.[157] With regard to the notorious concentration camp complex at Auschwitz, the Tribunal heard the testimony of Rudolf Hoess, its commandant from May 1940 until December 1943. According to Hoess, some 2,500,000 persons were exterminated, principally in gas chambers, and a further 500,000 died from disease and starvation.[158]

Among those condemned by the Tribunal, Julius Streicher's role stands out because he was not a member of the military establishment and had played no direct role in what were qualified as war crimes or crimes against peace. As editor of *Der Stuermer*, his hate propaganda of the 1930s continued during the war. The Tribunal found that twenty-six articles published between August 1941 and September 1944, of which twelve were signed by Streicher himself, 'demanded annihilation and extermination in unequivocal terms'.[159] On 25 December 1941, he wrote: 'If the danger of the reproduction of that curse of God in the Jewish blood is to finally come to an end, then there is only one way – the extermination of that people whose father is the devil.'[160] The Tribunal concluded: 'Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial

[155] *Ibid.*, p. 496. [156] *Ibid.*, p. 493. [157] *Ibid.*, p. 494.
[158] *Ibid.*, p. 495. Hoess was convicted by a Polish national tribunal and condemned to death: *Poland* v. *Hoess*, (1948) 7 LRTWC 11 (Supreme National Tribunal of Poland).
[159] *France et al.* v. *Goering et al.*, (1946) 22 IMT 203, p. 548. [160] *Ibid.*

grounds in connection with war crimes as defined by the Charter, and constitutes a crime against humanity.'[161] Streicher was sentenced to death and executed by hanging on 16 October 1946. Other defendants singled out for their role in the genocide of Jews were Hermann Goering, Joachim von Ribbentrop, Wilhelm Keitel, Hans Frank, Wilhelm Frick, Walter Funk, Baldur von Schirach, Arthur Seyss-Inquart and Martin Bormann. In his dissenting judgment, I. T. Nikitchenko, the Soviet judge, found Hjalmar Schacht and Hans Fritzche, both of whom were acquitted by the majority, to be guilty of persecution of the Jews. He also believed that Rudolf Hess, who fled Germany in 1941 and spent the rest of the war in detention in England, was involved in anti-Semitic persecution, although the majority made no finding on this point.

Genocide prosecutions after the Nuremberg Trial of the Major War Criminals

In December 1945, the four Allied powers enacted a somewhat modified version of the Charter of the International Military Tribunal, known as Control Council Law No. 10.[162] It provided the legal basis for a series of trials before military tribunals of the victorious allies as well as for subsequent prosecutions by German courts that continued over several decades. Control Council Law No. 10, which was really a form of domestic legislation because it applied to prosecution of Germans by courts of the civil authorities, largely borrowed the definition of crimes against humanity found in the Charter of the Nuremberg Tribunal but omitted the reference to other crimes within the jurisdiction of the tribunal, thereby eliminating the nexus with the war.[163]

Pursuant to Control Council Law No. 10, United States Military Tribunals held twelve thematic trials, dealing with crimes committed by various elements of the Nazi military and civilian hierarchy, including

[161] *Ibid.*, p. 549.

[162] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, *Official Gazette of the Control Council for Germany*, No. 3, Berlin, 31 January 1946, pp. 50–5.

[163] *Ibid.*, art. II(1)(c): '(a) Crimes Against Humanity. Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or 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.'

SS commanders, the officer corps, doctors and jurists.[164] They provide a more detailed exploration of the atrocities committed by bodies like the Einsatzgruppen and the RuSHA, and many of the legal principles that they examined and developed are generally considered to form part of international war crimes jurisprudence.[165] They also showed the emerging acceptance of the term 'genocide'. In the Ohlendorf trial, the prosecutor used the word 'genocide' in the indictment, as did the Tribunal in its judgment, to characterize the activities of the Einsatzgruppen in Poland and the Soviet Union.[166] Because of the definition of crimes against humanity in their enabling legislation, which did not insist upon the nexus with the war, the tribunals were more clearly entitled to address the issue of persecution of Jews within Germany prior to the outbreak of the war than had been the International Military Tribunal. Alstötter's case, known as the 'Justice trial', concerned Nazi judges and prosecutors and their application of anti-Semitic legislation, even prior to September 1939. The court cited General Assembly Resolution 96(I), adopted in December 1946, to declare genocide a crime under international law:[167]

> The General Assembly is not an international legislature, but it is the most authoritative organ in existence for the interpretation of world opinion. Its recognition of genocide as an international crime [in Resolution 96(I)] is persuasive evidence of the fact. We approve and adopt its conclusions . . . [We] find no injustice to persons tried for such crimes. They are chargeable with knowledge that such acts were wrong and were punishable when committed.[168]

For example, the Tribunal concluded that Oswald Rothaug, a Berlin prosecutor, 'participated in the national program of racial persecution . . . He participated in the crime of genocide.'[169] Another Berlin prosecutor, Ernst Lautz, was convicted of enforcing the law against Poles and Jews which comprised 'the established government plan for the extermination of those races. He was an accessory to, and took a consenting

[164] Frank M. Buscher, *The US War Crimes Trial Program in Germany, 1946–1955*, Westport, CT: Greenwood Press, 1989.

[165] *Prosecutor* v. *Furundžija* (Case No. IT-95-17/1-T), Judgment, 10 December 1998, para. 195.

[166] *United States of America* v. *Ohlendorf et al.* ('Einsatzgruppen trial'), (1948) 3 LRTWC 470 (United States Military Tribunal).

[167] See pp. 52–8 below.

[168] *United States of America* v. *Alstötter et al.* ('Justice trial'), (1948) 6 LRTWC 1, 3 TWC 1 (United States Military Tribunal), p. 983 (TWC).

[169] *Ibid.*, p. 1156 (TWC).

part in, the crime of genocide.'[170] Genocide was charged because it was deemed an example of 'crimes against humanity', which were punishable under Control Council Law No. 10.[171]

In the RuSHA case, the defendants were charged before the United States Military Tribunal with participation in a 'systematic program of genocide, aimed at the destruction of foreign nations and ethnic groups, in part by murderous extermination, and in part by elimination and suppression of national characteristics'.[172] The court described genocide as 'the master scheme', noting it 'had been devised by the top ranking Nazi leaders in pursuance of their racial policy of establishing the German nation as a master race and to this end exterminate or otherwise uproot the population of other nations'.[173] As part of this plan, the judgment referred to such genocidal activities as treatment of 'racially valuable children' and those from 'racial mixed marriages', 'kidnapping of alien children', preventing birth by forced abortions, punishment for sexual intercourse with Germans, 'impeding the reproduction of Enemy Nationals' and forced evacuation, resettlement and 'Germanization' of the inhabitants of occupied territories.[174] Ulrich Greifelt, Rudolf Creutz, Herbert Huebner, Werner Lorentz, Heintz Brueckner, Richard Hildebrandt and Fritz Schwalm were found guilty of genocide, the first such conviction in history.

Genocide was also charged in the 'Ministries case'. The indictment said: 'The Third Reich embarked upon a systematic programme of genocide, aimed at the destruction of nations and ethnic groups within the German sphere of influence, in part by murderous extermination, and in part by elimination and suppression of national characteristics.'[175] The Foreign Office officials were convicted, the judgment noting: 'All those who implemented, aided, assisted, or consciously participated in these things bear part of the responsibility for the criminal program.'[176] The indictment in the 'High Command case' observed that '[t]he German Army officially disseminated propaganda, literature, and public expressions advocating and inciting murder, enslavement, genocide, and extermination'.[177] In the 'Medical case', Prosecutor Telford Taylor told the court that 'the techniques for

[170] *Ibid.*, p. 1128 (TWC). [171] *Ibid.*, p. 983.
[172] *United States of America* v. *Greifelt et al.*, note 87 above, p. 609 (TWC).
[173] *Ibid.* [174] *Ibid.*, pp. 3–19.
[175] *United States* v. *von Weizsaecker et al.*, (1951) 12 LRTWC 44, para. 39.
[176] *United States* v. *von Weizsaecker et al.*, (1951) 14 LRTWC 474.
[177] *United States* v. *von Leeb et al.* (1951) 10 LRTWC 36, indictment, para. 60.

genocide, a policy of the Third Reich [were] exemplified in the "euthanasia" program and in the wide spread slaughter of Jews, gypsies, Poles, and Russians'.[178] Taylor spoke of attempts to develop 'a new branch of medical science which would give them the scientific tools for the planning and practice of genocide'.[179]

Other post-war trials, held by national tribunals, also established responsibilities for the genocide of European Jews. The Polish Supreme National Tribunal tried and convicted Rudolf Franz Hoess, the commandant at Auschwitz, who had earlier testified in the trial of the major war criminals at Nuremberg. The tribunal drew attention to the so-called medical research conducted at the notorious concentration camp, measures that 'constituted the preparatory stage of one of the forms of the crime of genocide, which was intended to be perpetrated by scientific means'.[180] In the trial of Arthur Greiser, the Supreme National Tribunal of Poland identified crimes committed against Poland including 'genocidal attacks on Polish culture and learning': '[t]he accused ordered and countenanced and facilitated, as is shown by the evidence, criminal attempts on the life, health and property of thousands of Polish inhabitants of the "occupied" part of Poland in question, and at the same time was concerned in bringing about in that territory the general totalitarian genocidal attack on the rights of the small and medium nations to exist, and to have an identity and culture of their own'.[181] Amon Leopold Goeth, an Austrian Nazi, was found guilty by the Polish Supreme National Tribunal for '[t]he wholesale extermination of Jews and also of Poles [that] had all the characteristics of genocide in the biological meaning of this term, and embraced in addition destruction of the cultural life of these nations'.[182] Over the ensuing decades, many trials were held within Germany itself for anti-Semitic persecution in the death camps of Treblinka, Belzec, Sobibor and elsewhere.[183]

[178] *United States* v. *Brandt et al.*, (1951) 1 LRTWC 36. [179] *Ibid.*, p. 38.

[180] *Poland* v. *Hoess*, note 158 above, pp. 24–6. Hoess was sentenced to death by the Polish Supreme Court on 2 April 1947 and hanged at Auschwitz two weeks later. He penned an autobiography while in detention in Poland, which was published in an English translation: Rudolf Hoess, *Commandant of Auschwitz, Autobiography*, Cleveland: World Publishing, 1959.

[181] *Poland* v. *Greiser*, (1948) 13 LRTWC 70, [1946] ILR 389 (Supreme National Tribunal of Poland), pp. 112–14; also pp. 71–4 and 105 (LRTWC).

[182] *Poland* v. *Goeth*, (1946) 7 LRTWC 4 (Supreme National Tribunal of Poland).

[183] Dick de Mildt, *In the Name of the People: Perpetrators of Genocide in the Reflection of their Post-War Prosecution in West Germany, the 'Euthanasia' and 'Aktion Reinhard' Trial Cases*, The Hague, London and Boston: Martinus Nijhoff Publishers, 1996.

Some of the prosecutions also referred to the crime of 'denationalization', a category of war crime recognized since 1919 that, while narrower in scope, resembles genocide in many ways. Under the war crimes law of Australia and the Netherlands, it was an offence to attempt 'to denationalize the inhabitants of occupied territory'.[184] The manufacturer of Zyklon B gas, which was used at Auschwitz and other concentration camps for purposes of extermination during the Second World War, was condemned by a British military court for violating 'the laws and usages of war'.[185] In another concentration camp prosecution, members of the staff at Belsen and Auschwitz were found 'in violation of the laws and usages of war [to be] together concerned as parties to the ill-treatment of certain persons'.[186] The judge-advocate charged them with 'deliberate destruction of the Jewish race'.[187]

General Assembly Resolution 96(I) of 11 December 1946

The Nuremberg judgment was issued on 30 September–1 October 1946 as the first session of the United Nations General Assembly, then sitting in Lake Success, New York, was getting underway. Cuba, India and Panama asked that the question of genocide be put on the agenda.[188] The matter was discussed briefly, and then referred to the Sixth Committee where, on 22 November 1946, the same three States proposed a draft resolution on genocide.[189] Cuba's Ernesto Dihigo, who presented the text, noted that the Nuremberg trials had precluded punishment of certain crimes of genocide because they had been committed before the beginning of the war. Fearing they might remain unpunished owing to the principle of *nullum crimen sine lege*, the representative of Cuba asked that genocide be declared an international crime, adding that this was the purpose of the draft resolution. Dihigo argued that, although the General Assembly was not a legislative body, 'and that its recommendations could not be

[184] (1948) 5 LRTWC 95; (1948) 15 LRTWC 123. One tribunal spoke of 'forced Germanization'.
[185] *United Kingdom* v. *Tesch et al.* ('Zyklon B case'), (1947) 1 LRTWC 93 (British Military Court).
[186] *United Kingdom* v. *Kramer et al.* ('Belsen trial'), (1947) 2 LRTWC 1 (British Military Court), p. 4.
[187] *Ibid.*, p. 106.
[188] UN Doc. A/BUR.50. For a summary of the history of the resolution, see UN Doc. E/621.
[189] UN Doc. A/C.6/SR.22 (Dihigo, Cuba).

considered as laws', any measure it took 'was vested with incontestable authority'.[190]

The draft resolution stated:

> Whereas throughout history and especially in recent times many instances have occurred when national, racial, ethnical or religious groups have been destroyed, entirely or in part; and such crimes of genocide not only shook the conscience of mankind, but also resulted in great losses to humanity in the form of cultural and other contributions represented by these human groups;
>
> Whereas genocide is a denial of the right to existence of entire human groups in the same way as homicide is the denial of the right to live for individual human beings and that such denial of the right to existence is contrary to the spirit and aims of the United Nations;
>
> Whereas the punishment of the very serious crime of genocide when committed in time of peace lies within the exclusive territorial jurisdiction of the judiciary of every State concerned, while crimes of a relatively lesser importance such as piracy, trade in women, children, drugs, obscene publications are declared as international crimes and have been made matters of international concern;
>
> Be it resolved that the United Nations Assembly draw the attention of the Social and Economic Council to the crime of genocide; and invite the Council to study this problem and to prepare a report on the possibilities of declaring genocide an international crime and assuring international co-operation for its prevention and punishment, and also recommending, inter alia, that genocide and related offences should be dealt with by national legislations in the same way as other international crimes such as piracy, trade in women, children and slaves, and others.[191]

In the course of the debate, the notion that the resolution be completed with a full-blown convention soon began to circulate. Saudi Arabia took the initiative, urging preparation of a new text[192] and subsequently submitting a draft convention on genocide.[193] In support, the Soviet

[190] *Ibid.*

[191] UN Doc. A/BUR/50. The General Assembly decided to include the point in its agenda (UN Doc. A/181), and the matter was referred to the Sixth Committee (UN Doc. A/C.6/64).

[192] UN Doc. A/C.6/SR.23 (Riad Bey, Saudi Arabia).

[193] UN Doc. A/C.6/86. It consisted of a preamble and four articles. The preamble denounced genocide as 'an international crime against humanity'. Article I defined it as 'the destruction of an ethnic group, people or nation carried out either gradually against individuals or collectively against the whole group, people or nation'. Article I also described acts of genocide: mass killing, destruction of 'the essential potentialities of life', 'planned disintegration of the political, social or economic structure', 'systematic moral debasement' and 'acts of terrorism committed for the purpose of

Union proposed asking the Economic and Social Council to undertake preparatory work 'with a view to elaborating a draft international convention concerning the struggle against racial discrimination'.[194] This became a formal amendment: 'It is desirable that the Economic and Social Council should study the question of the preparatory work to be done for a convention on crimes against any particular race.'[195]

Several other amendments to the draft resolution were presented,[196] but after some discussion on procedure it was agreed to refer the question to a sub-committee, chaired by Chile and composed of representatives of Saudi Arabia, Chile, Cuba, France, India, Panama, Poland, the Soviet Union, the United Kingdom and the United States.[197] Within the sub-committee, the proposal to begin work on a draft convention met with no apparent opposition, although there was considerable debate about who should assume responsibility for the task. Several delegations believed the responsibility should devolve to an expert body such as the Committee on the Development of International Law and its Codification,[198] to whom the General Assembly was also proposing to entrust the codification of the Nuremberg principles.[199] However, the majority favoured assigning the duty to the Economic and Social Council, and agreed upon such a proposal 'for the sake of unanimity'.[200]

Controversy also surrounded the nature of criminal responsibility for genocide. Shawcross of the United Kingdom had proposed an amendment to replace paragraph 3 of the original draft resolution: 'Declares that genocide is an international crime for the commission of which principals and accessories, as well as States, are individually responsible.'[201] France took exception because its law made no provision for criminal responsibility of States. It urged a small change to the United Kingdom amendment: 'Declares that genocide is an international crime for which the principal authors and accomplices, whether responsible statesmen or

creating a state of common danger and alarm . . . with the intent of producing [the group's] political, social, economic or moral disintegration'. Article II required States parties to take international action. Article III excluded the defence of superior orders and required States to enact legislation penalizing genocide. Article IV provided for universal jurisdiction, and set out the *non bis in idem* rule.

[194] UN Doc. A/C.6/SR.22 (Lavrischev, Soviet Union). [195] UN Doc. A/C.6/83.
[196] *Ibid.* [197] UN Doc. A/C.6/SR.24 (Jiménez, chair).
[198] UN Doc. A/C.6/SR.32, p. 173 (Liu Shih-shun, China). The International Law Commission was not created until the following year (GA Res. 177(II)).
[199] GA Res. 95(I). [200] UN Doc. A/C.6/SR.32, p. 173 (Fahy, United States).
[201] UN Doc. A/C.6/83.

private individuals, should be punished.'[202] The sub-committee chair later explained that 'the question of fixing States' responsibility, as distinguished from the responsibility of private individuals, public officials, or statesmen, was a matter more properly to be considered at such time as a convention on the subject of genocide is prepared'.[203] Indeed, two years later, France and the United Kingdom would lock horns on the same issue in the Sixth Committee during preparation of the convention.[204]

The draft resolution, as prepared by the sub-committee and approved without change by the Sixth Committee, was adopted on 11 December 1946 by the General Assembly, unanimously and without debate. Resolution 96(I) states:

> Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence 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 to the spirit and aims of the United Nations.
>
> Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.
>
> The punishment of the crime of genocide is a matter of international concern.
>
> The General Assembly, therefore
>
> Affirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices – whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable;

[202] UN Doc. A/C.6/SR.22 (Chaumont, France). France later amended the text (UN Doc. A/C.6/SR.24 (Chaumont, France)): 'Declares that genocide is an international crime, for which the principals and accomplices, whether private persons or responsible statesmen, should be punished' (UN Doc. A/C.6/83). The text was amended a second time: 'Declares that genocide is an international crime, entailing the responsibility of guilty individuals, whether principals or accessories, as well as States on behalf of which they may have acted' (UN Doc. A/C.6/95).

[203] UN Doc. A/C.6/120.

[204] Judge Tomka of the International Court of Justice referred to these exchanges between France and the United Kingdom in the General Assembly in 1946 to support his opinion that genocide was not a crime of State: *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, paras. 161, 162 and 194; *ibid.*, Separate Opinion of Judge ad hoc Kreca, para. 117; *ibid.*, Separate Opinion of Judge Tomka, paras. 43–4.

> Invites the Member States to enact the necessary legislation for the prevention and punishment of the crime;
>
> Recommends that international co-operation be organized between States with a view to facilitating the speedy prevention and punishment of the crime of genocide, and, to this end,
>
> Requests the Economic and Social Council to undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly.[205]

Because it is a resolution of the General Assembly, Resolution 96(I) is not a source of binding law. Nevertheless, as the International Court of Justice wrote in 1996:

> The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinio juris. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an opinio juris exists as to its normative character. Or a series of resolutions may show the gradual evolution of the opinio juris required for the establishment of a new rule.[206]

The fact that it was adopted unanimously and without debate enhances its significance. It is expressly referred to in the first paragraph of the preamble to the 1948 Genocide Convention itself. Moreover, Resolution 96(I) has been cited frequently in subsequent instruments and judicial decisions, reinforcing its claim to codify customary principles.[207] Nonetheless, the resolution was adopted hastily and there is

[205] GA Res. 96(I).

[206] *Legality of the Threat or Use of Nuclear Weapons (Request by the United Nations General Assembly for an Advisory Opinion)*, [1996] ICJ Reports 226, para. 70.

[207] *United States of America* v. *Alstötter et al.*, note 168 above; *United States of America* v. *Ohlendorf et al.*, note 166 above; *Reservations to the Convention on the Prevention of Genocide (Advisory Opinion)*, [1951] ICJ Reports 16, p. 370; *A-G Israel* v. *Eichmann*, (1968) 36 ILR 18 (District Court, Jerusalem), paras. 17, 19, 22 and 28; *A-G Israel* v. *Eichmann*, (1968) 36 ILR 277 (Israel Supreme Court), paras. 9 and 13(8)(a); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Requests for the Indication of Provisional Measures, 8 April 1993, [1993] ICJ Reports 16, p. 23 (Shahabuddeen), pp. 348, 440; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Preliminary Objections, [1996] ICJ Reports 595, para. 31; *Legality of the Threat or Use of Nuclear Weapons (Request by the United Nations General Assembly for an Advisory Opinion)*, Dissenting Opinion of Judge Shahabuddeen, [1996] ICJ Reports 226;

little recorded debate on some important questions, such as the inclusion of political groups within the definition. Because this issue and others were reconsidered and revised somewhat during the more protracted debates concerning adoption of the Convention in 1947 and 1948, some caution is advised in assessing the contents of Resolution 96(I) as an authoritative statement of international law.

What are the norms that Resolution 96(I) sets out? First, the General Assembly 'affirms' that genocide is a crime under international law for which both private individuals and officials are to be held responsible. Resolution 96(I) eliminates any nexus between genocide and armed conflict, the unfortunate legacy of the Nuremberg jurisprudence. Its designation of genocide as a crime under international law means that perpetrators are subject to prosecution, even when there has been no breach of the domestic law in force at the time of the crime. The resolution does not, however, clarify the question of the appropriate jurisdiction for such prosecutions. The following year, in 1947, Raphael Lemkin and two other experts consulted by the Secretariat considered that the Resolution was consistent with recognition of universal jurisdiction.[208] However, the sub-committee had replaced an explicit recognition of universal jurisdiction in the original draft of Resolution 96(I) with a much vaguer reference to 'international co-operation'. In light of the General Assembly's subsequent decision to exclude universal jurisdiction from the text of the Genocide Convention, the better view is that the resolution does not recognize universal jurisdiction for genocide. Rather, it authorizes prosecution by international jurisdictions similar to the Nuremberg Tribunal. The reference to international co-operation implies that States are obliged to prosecute in accordance with classic rules of international law concerning jurisdiction, or to facilitate extradition to States entitled to undertake such prosecutions.[209]

Mugesera v. *Minister of Citizenship and Immigration* (Canada), File No. QML-95-00171, 11 July 1996 (Immigration and Refugee Board Adjudication Division), 7 *Revue universelle des droits de l'homme* 190; *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 556; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, paras. 161 and 162, 194; *ibid*., Separate Opinion of Judge *ad hoc* Kreca, para. 117; *ibid*., Separate Opinion of Judge Tomka, paras. 43 and 44.

[208] UN Doc. E/447, p. 18. See also Nehemiah Robinson, *The Genocide Convention: A Commentary*, New York: Institute of Jewish Affairs, 1960, p. 31.

[209] On these questions, see chapter 8 below.

Resolution 96(I) also proposes certain elements of the definition of genocide, notably with respect to the groups protected. Interestingly, the initial draft of the Resolution listed four groups, 'national, racial, ethnical or religious groups', an enumeration that is virtually identical to that of article II of the Convention, adopted two years later. However, the sub-committee of the Sixth Committee that reworked the draft resolution modified the list, for reasons that cannot be divined from the published documents. The final version adopted by the Assembly refers to 'racial, religious, political and other groups'. The terminology appears to be patterned on that of the definition of crimes against humanity in article 6(c) of the Nuremberg Charter, which speaks of 'persecutions on political, racial or religious grounds', except that the enumeration in the Nuremberg Charter is exhaustive whereas that of Resolution 96(I) also allows for the protection of 'other groups'.

Thus, Resolution 96(I) imposes obligations and creates international law with respect to prevention and punishment of genocide. But, because of the uncertainty present at a time when international criminal law was still very underdeveloped, the General Assembly recognized that additional instruments were necessary. Resolution 96(I)'s final and most significant conclusion is its mandate to draft a convention. Only five years after its adoption, in 1951, the International Court of Justice associated Resolution 96(I) with the Convention in order to conclude 'that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation'.[210]

[210] *Reservations to the Convention on the Prevention and Punishment of Genocide (Advisory Opinion)*, [1951] ICJ Reports 6.

2

Drafting of the Convention and subsequent normative developments

Early in 1947, the Secretary-General conveyed General Assembly Resolution 96(I), declaring genocide to be a crime under international law, to the Economic and Social Council (ECOSOC).[1] The resolution requested the ECOSOC 'to undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly'. The Secretary-General suggested that the ECOSOC might assign the task to the Commission on Human Rights or to a special committee of the Council.[2] The United Kingdom warned that the Commission on Human Rights already had a heavy programme, and proposed that the matter be returned to the Secretariat which would prepare a draft convention for subsequent review by a commission of ECOSOC.[3]

ECOSOC's Social Committee favoured returning the matter to the Secretary-General.[4] On 28 March 1947, ECOSOC adopted a resolution asking the Secretary-General:

> (a) To undertake with the assistance of experts in the field of international and criminal law, the necessary studies with a view to drawing up a draft convention in accordance with the resolution of the General Assembly; and (b) After consultation with the General Assembly

[1] For detailed reviews of the *travaux préparatoires* of the Convention, see Nehemiah Robinson, *The Genocide Convention: A Commentary*, New York: Institute of Jewish Affairs, 1960; Pieter Nicolaas Drost, *Genocide, United Nations Legislation on International Criminal Law*, Leyden: A. W. Sythoff, 1959; Matthew Lippman, 'The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide', (1985) 3 *Boston University International Law Journal*, p. 1; and Matthew Lippman, 'The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later', (1994) 8 *Temple International and Comparative Law Journal*, p. 1.

[2] UN Doc. E/330. Two draft resolutions were submitted, one by the United States proposing referral to the Commission on Human Rights (UN Doc. E/342), the other by Cuba proposing the creation of an *ad hoc* drafting committee.

[3] UN Doc. E/PV.70 (Mayhew, United Kingdom).

[4] UN Doc. E/AC.7/15; UN Doc. E/AC.7/15/Add.2; UN Doc. E/AC.7/W.14.

> Committee on the Progressive Development of International Law and its Codification and, if feasible, the Commission on Human Rights and, after reference to all Member Governments for comments, to submit to the next session of the Economic and Social Council a draft convention on the crime of genocide.[5]

The Secretariat draft

The Secretary-General turned to the Secretariat's Human Rights Division for preparation of an initial draft.[6] The Division consulted three experts, Raphael Lemkin, author of *Axis Rule in Occupied Europe* and inventor of the word 'genocide', Henri Donnedieu de Vabres, professor at the University of Paris Law Faculty and a former judge of the Nuremberg Tribunal, and Vespasian V. Pella, a Romanian law professor and President of the International Association for Penal Law. The experts[7] reviewed the preliminary draft with the Director of the Division of Human Rights, John P. Humphrey, and the Chief of the Research Section of the Division of Human Rights.[8] The Secretary-General felt that genocide should be defined so as not to encroach 'on other notions, which logically are and should be distinct'.[9] This was an oblique reference to 'crimes against humanity', already defined in the Charter of the Nuremberg Tribunal and in its judgment of 30 September–1 October 1946, as well as to the question of minority rights, then under consideration by the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities and the Commission on Human Rights within the context of the drafting of the Universal Declaration of Human Rights.[10]

[5] ESC Res. 47(IV).

[6] UN Doc. E/447. For a detailed commentary on the draft, see Drost, *Genocide*, pp. 8–28.

[7] Apparently Donnedieu de Vabres never attended the meetings, and was represented by a member of the French delegation to the United Nations: John P. Humphrey, *Human Rights and the United Nations: A Great Adventure*, Dobbs Ferry, NY: Transnational, 1984, p. 54.

[8] UN Doc. E/447, p. 15; A. J. Hobbins, ed., *On the Edge of Greatness: The Diaries of John Humphrey, First Director of the United Nations Division of Human Rights*, Vol. I, *1948–1949*, Montreal: McGill University Libraries, 1994, p. 30.

[9] UN Doc. E/447, p. 15.

[10] The Universal Declaration of Human Rights, GA Res. 217 A (III), UN Doc. A/810, was adopted on 10 December 1948, by the United Nations General Assembly after nearly two years of debate in the Commission on Human Rights and the Assembly's Third Committee. On the drafting of the Declaration, see Alfred Verdoodt, *Naissance et signification de la Déclaration universelle des droits de l'homme*, Louvain and Paris: Nauwelaerts, 1963.

The Secretary-General considered that the draft should, as far as possible, embrace all points likely to be adopted, leaving it to the competent organs of the United Nations to eliminate what they did not wish to include.[11] Donnedieu de Vabres later described it as 'a maximum programme' that 'the authors of the Convention would be able to draw from . . . as they considered appropriate, in view of the fact that controversial questions had been raised'.[12] The resulting twenty-four-article text was accompanied by a commentary and two draft statutes for an international criminal court.[13] Nothing in General Assembly Resolution 96(I), however, indicated that the statute of an international criminal court was to be prepared in conjunction with the draft genocide convention.

The Secretariat draft began with a preamble defining genocide as 'the intentional destruction of a group of human beings' and a crime against the law of nations. The commentary stressed the importance of a narrow definition, so as not to confuse genocide with other crimes, and to ensure the success of the convention by facilitating ratification by a large number of States.[14] Article I stated that the purpose of the convention was 'to prevent the destruction of racial, national, linguistic, religious or political groups of human beings'. This enumeration differed from the letter of General Assembly Resolution 96(I), which had spoken of 'racial, religious, political and other groups', by eliminating the reference to 'other groups'.[15] Lemkin preferred to omit political groups, which he said lacked the required permanency.[16] In its description of three types of acts of genocide, physical, biological and cultural, the draft followed the approach taken by Lemkin's book. After questioning whether cultural genocide belonged, the Secretary-General decided to include it in the draft, subject to change by the ECOSOC or the General Assembly.[17] Donnedieu de Vabres and Pella 'held that cultural genocide represented an undue extension of the notion of genocide and amounted to reconstituting the former protection of minorities (which was based on other conceptions) under cover of the term genocide', whilst Lemkin felt its inclusion was important.[18]

[11] UN Doc. E/447, p. 16.

[12] UN Doc. A/AC.10/SR.28, p. 13. Not surprisingly, the same opinion was expressed in France's submissions to the General Assembly on the draft convention later in 1947: UN Doc. A/401/Add.3.

[13] UN Doc. A/AC.10/41; UN Doc. A/362, appendix II. [14] UN Doc. E/447, p. 17.

[15] *Ibid.* [16] *Ibid.*, p. 22. [17] *Ibid.*, p. 17. [18] *Ibid.*, p. 27.

Article II asserted that genocide includes attempts, preparatory acts, wilful participation, direct public incitement and conspiracy. Under article III, all forms of public propaganda tending to promote genocide were also punishable. According to article IV, all persons committing genocide, including rulers, were subject to punishment. Article V declared that command of the law or superior orders shall not justify genocide. The draft convention required States parties to enact legislation to provide for punishment of genocide (art. VI), and set out the rule of universal punishment: 'The High Contracting Parties pledge themselves to punish any offender under this Convention within any territory under their jurisdiction, irrespective of the nationality of the offender or of the place where the offence has been committed' (art. VII).[19] Moreover, States were obliged to grant extradition (art. VIII) and could not set up the political offence exception (art. VIII). Furthermore, States parties vowed to commit persons suspected of genocide for trial by an international court in cases where they were themselves unwilling to try the offenders or grant extradition, or where the acts were committed by individuals acting as organs of the State or with its support or tolerance (art. IX). States parties undertook to disband organizations involved in acts of genocide (art. XI). They were also required to provide reparation to victims of genocide (art. XIII). Disputes concerning interpretation or application of the convention were to be submitted to the International Court of Justice (art. XIV). Several technical or protocolar provisions addressed such matters as signature, the number of States parties required for coming into force and denunciation of the convention.

In the appendix, the first draft statute provided for an international court to have jurisdiction only in cases of genocide, while the second – the Secretariat's preference – had a broader jurisdiction in matters of international criminal law. As a subsequent note stated: 'If ILC [International Law Commission] not only defines offences but also organizes their punishment, there would be an advantage to punishing them as a whole according to the same principles, and even to judging them before the same tribunal; this is why it may not be helpful to establish a special genocide tribunal.'[20] Pella and Lemkin proposed that the resolution of the General Assembly adopting the convention should also contain two recommendations: '1. The High Contracting Parties should take suitable steps likely to allay such racial, national, or religious antagonisms or conflicts as may lead to genocide; 2. Special national offices should be

[19] *Ibid.*, p. 38. [20] UN Doc. E/AC.25/3.

created by each High Contracting Party in order to centralize information on antagonisms between human groups and to transmit such information to the Secretary-General of the United Nations.'[21]

The Secretariat draft, accompanied by a summary of the comments of the three experts,[22] was sent to the Committee on the Progressive Development of International Law and its Codification, on 13 June 1947.[23] In preparation for the debate, France circulated a memorandum 'on the subject of genocide and crimes against humanity' which challenged the use of the term 'genocide', calling it a useless and even dangerous neologism. France preferred to approach the problem of extermination of racial, social, political or religious groups from the standpoint of crimes against humanity.[24] The United Kingdom proposed that the Committee decline to reply to the Secretary-General's request for comments on the draft convention.[25] Poland disagreed, saying the Committee had the duty to consider at least the general principles involved.[26] A proposal by the Netherlands that the Committee recommend referral to the International Law Commission,[27] which had not yet been created, was defeated.[28] Eventually, the Committee reached agreement upon the text of a letter to be sent to the Secretary-General declining to review the matter.[29] The Chair wrote that the Committee felt unable to express any opinion on the matter, given that it did not have comments from member governments.[30]

The Secretariat draft was presented to the Economic and Social Council at its fifth session, in July–August 1947. The Secretary-General had fulfilled part of the mandate given at ECOSOC's previous session, but some elements remained unaccomplished. The draft had not been considered, at least in substance, by the Committee on the Progressive

[21] UN Doc. E/447, p. 64. [22] UN Doc. A/AC.10/41.
[23] UN Doc. A/AC.10/42/Add.1. See also UN Doc. A/AC.10/15.
[24] UN Doc. A/AC.20/29.
[25] UN Doc. A/AC.10/44. See also UN Doc. A/AC.10/SR.28, pp. 12–13 (United States); UN Doc. A/AC.10/SR.28, p. 14 and UN Doc. A/AC.10/SR.29, p. 7 (France); and UN Doc. A/AC.10/SR.28, pp. 18–19 (Colombia).
[26] UN Doc. A/AC.10/SR.28, p. 15. See also UN Doc. A/AC.10/SR.28, pp. 15–16 (India); UN Doc. A/AC.10/SR.28, p. 16 and UN Doc. A/AC.10/SR.28, pp. 18–19 (Yugoslavia).
[27] UN Doc. A/AC.10/SR.29, p. 10; see also pp. 20–1.
[28] *Ibid.*, p. 25 (ten in favour, four against, with two abstentions).
[29] UN Doc. A/AC.10/SR.30, p. 10. Australia, the Netherlands and Poland had drafted the resolution, with James L. Brierly of the United Kingdom as convenor of the drafting committee: UN Doc. A/AC.10/SR.29, p. 28.
[30] UN Doc. A/AC.10/55; UN Doc. E/447, p. 65.

Development of International Law, or by the Commission on Human Rights, which had not met in the interim. Although it had been transmitted to member States for their comments,[31] there were as yet no replies.[32] On 6 August 1947, the ECOSOC instructed the Secretary-General to collate the comments of member States on the draft, and to transmit these to the General Assembly together with the draft convention. It informed the General Assembly that it proposed to proceed as rapidly as possible, subject to further instructions from the General Assembly.[33]

Comments by member States

Only seven States replied to the Secretary-General's initial appeal for comments,[34] and two of them (India[35] and the Philippines[36]) confined their remarks to procedural matters. The most detailed observations, from France and the United States, largely reflected, perhaps not surprisingly, the views expressed by Henri Donnedieu de Vabres and Raphael Lemkin during preparation of the Secretariat draft. Both France[37] and the United States[38] also prepared draft conventions as a contribution to the debate. Four non-governmental organizations, the Commission of the Churches on International Affairs (representing the World Council of Churches and the International Missionary Council),[39] the World Jewish Congress,[40] the Consultative Council on Jewish Organizations[41] and the World Federation of United Nations Associations,[42] also made observations.

While the proposal to adopt a special convention on genocide was unchallenged, Denmark said that it 'would prefer a briefer text regarding the punishable conditions, as a more elaborate summing up as the one indicated in the draft – although detailed – cannot be complete

[31] UN Doc. A/362. [32] UN Doc. A/476.
[33] ESC Res. 77(V). See UN Doc. E/573, pp. 21–2, adopted following a draft resolution prepared by the Social Committee: UN Doc. E/522.
[34] UN Doc. E/447 (Denmark, France, Haiti, India, the Philippines, the United States and Venezuela).
[35] UN Doc. A/401. [36] UN Doc. A/401/Add.1. [37] UN Doc. E/623/Add.1.
[38] UN Doc. E/623. [39] UN Doc. E/C.2/63. [40] UN Doc. E/C.2/52.
[41] UN Doc. E/C.2/49.
[42] UN Doc. E/C.2/64. It was supported by an appended document entitled 'A Call for International Action Against Genocide', signed by Gabriella Mistral, Edouard Herriot, Francois Mauriac, Aldous Huxley, Pearl Buck, Count Folke Bernadotte, Quincy Wright, Robert G. Sproul and other eminent intellectuals, authors and international personalities.

and exhaustive'.[43] Venezuela felt that the Secretariat draft had gone beyond the terms of General Assembly Resolution 96(I), raising the bugbear of State sovereignty. Venezuela was particularly disturbed by the importance placed in the Secretariat draft upon the creation of an international criminal court, which it considered to be 'clearly inconsistent with the principle laid down in paragraph 7 of article 2 of the United Nations Charter'.[44] Venezuela insisted that it would 'prefer a convention by which member States undertook to adopt national criminal legislation ensuring the punishment of genocide and to apply the appropriate penalties themselves'.[45] Haiti's brief comments essentially concerned the issue of United Nations intervention to prevent genocide, and encouraged an enhanced role for the Secretary-General.[46]

France, on the other hand, regarded the draft as too preoccupied with domestic prosecution for genocide: 'The utility of such provisions would appear to be relative since the crime can only take place with the complicity of the government.'[47] According to France, the convention should affirm its relationship with the principles of the Nuremberg Tribunal, and explain that genocide was merely one aspect of crimes against humanity. It believed that genocide ought to relate directly to State action and punishment, on an international basis, and should be restricted to rulers who would otherwise enjoy impunity within their own States. France favoured excluding cultural genocide as a punishable act.[48]

The United States said the convention should exclude 'preparatory acts' such as studies or research, or address the issue of hate propaganda, matters too far removed from the crime itself. It urged that the jurisdiction of national and international tribunals be carefully circumscribed. Moreover, the convention should cover genocide of political groups, but only if this could be confined to physical destruction. The text should carefully insist on the intentional element in the commission of the crime. Like France, the United States wanted to exclude cultural genocide from the convention. The United States proposed replacing the text of the preamble, which it found too wordy, with: 'The High Contracting Parties declare that genocide constitutes a crime under international law, which the civilized world condemns, and which the

[43] UN Doc. A/401.

[44] Art. 2(7) of the Charter of the United Nations states: 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.'

[45] UN Doc. A/401/Add.1. [46] UN Doc. A/401. [47] *Ibid.* [48] UN Doc. A/401/Add.3.

Parties to this Convention agree to prevent and repress as hereinafter provided.'[49]

Later in 1947, the Secretary-General submitted a new appeal to member States for comments.[50] This generated additional answers from the United Kingdom,[51] Norway,[52] the Netherlands,[53] Luxembourg[54] and Siam (Thailand).[55] Norway focused its attention on the problem of prosecuting State officials, urging an international criminal jurisdiction in order to overcome obstacles within national legislation.[56] The Netherlands preferred the draft convention submitted by the United States, and said the entire question should be referred to the International Law Commission.[57]

Second session of the General Assembly

The convention returned to the agenda of the General Assembly at its second session, held from September to December 1947, where the matter was referred to the Sixth (Legal) Committee.[58] Some delegations were impatient. France, supported by the United States,[59] argued that the General Assembly could take action without waiting for observations from all member States.[60] The United Kingdom, on the other hand, attempted to obstruct further progress on the matter. Sir Hartley Shawcross noted that genocide was already recognized as a crime under international law, a consequence of the judgment of the International Military Tribunal at Nuremberg. Shawcross said a convention would defeat the purpose it sought to achieve, because the failure to ratify by some States would undermine the claim that it stood for universally accepted principles.[61] The United Kingdom submitted a resolution referring the draft convention to the International Law Commission so that it might 'consider whether a convention on this matter is desirable or necessary'.[62] The Soviet Union basically sided with the United

[49] UN Doc. A/401. [50] UN Doc. A/362.
[51] UN Doc. E/623/Add.2. The United Kingdom presented no detailed comments.
[52] *Ibid.* Norway repeated the comments of its representative in the Sixth Committee Assembly, in 1947, concerning prosecution of State officials.
[53] UN Doc. E/623/Add.3.
[54] UN Doc. E/623/Add.4. Luxembourg made no substantive observations. [55] *Ibid.*
[56] UN Doc. E/623/Add.2. [57] UN Doc. E/623/Add.3. [58] UN Doc. A/C.6/39–42.
[59] UN Doc. A/C.6/SR.39 (Fahy, United States). [60] *Ibid.* (Chaumont, France).
[61] *Ibid.* (Shawcross, United Kingdom). [62] UN Doc. A/C.6/155.

Kingdom, but it proposed a compromise amendment that did not directly question the principle of a draft convention.[63]

A sub-committee of the Sixth Committee, established to assess which United Nations body should be entrusted with advancing the work on genocide, opted for the Economic and Social Council. Its members could not agree whether ECOSOC should be empowered to decide if a convention was desirable, because some argued that the issue had already been settled in General Assembly Resolution 96(I).[64] A draft resolution prepared by the sub-committee requesting ECOSOC to continue its efforts on the draft convention was forwarded to the Sixth Committee, which studied it together with a number of amendments. A United Kingdom proposal adding a preambular paragraph declaring 'that genocide is an international crime entailing national and international responsibility on the part of individuals and states'[65] was adopted by a strong majority.[66] An amendment proposed by the Soviet Union noted that 'a large majority of the members of the United Nations have not yet submitted their observations on the draft convention'. It called on the ECOSOC to proceed with more studies on measures to combat genocide, to examine 'whether a convention on genocide is desirable and necessary' and, if so, whether it should be considered separately or in conjunction with the drafting of a convention on the principles of international law recognized in the Charter of the International Military Tribunal and in its judgment. Finally, it asked the ECOSOC to report back to the General Assembly 'after having received comments from most of the governments of the States Members of the United Nations'.[67] In effect, the Soviet amendment put the whole question of whether or not a convention was desirable back onto the table. After a minor amendment proposed by the rapporteur, changing the reference to 'comments from the governments' to 'comment from most of the governments', the amendment was put to a roll-call vote and adopted by a very slim majority.[68]

Several States were furious with the Sixth Committee draft resolution, an unquestioned retreat from the text adopted the previous year. The Egyptian representative qualified the Sixth Committee's resolution as 'retrograde', noting that the General Assembly had answered in the

[63] UN Doc. A/C.6/151.

[64] UN Doc. A/C.6/190/Rev.1. Proposed amendments: UN Doc. A/C.6/149, UN Doc. A/C.6/151, UN Doc. A/C.6/159, UN Doc. A/C.6/160, UN Doc. A/C.6/192, UN Doc. A/C.6/198, UN Doc. A/C.6/201 and UN Doc. A/C.6/204.

[65] UN Doc. A/C.6/192.

[66] UN Doc. A/C.6/SR.59 (twenty-one in favour, six against).

[67] UN Doc. A/C.6/201.

[68] UN Doc. A/C.3/SR.59.

affirmative the previous year and could not now pull back.[69] Panama's Ricardo J. Alfaro protested that 'what was yesterday a conviction or a decision that a certain thing had to be done, appears today beclouded by doubts and is a subject of consultation'.[70] Panama, Cuba and Egypt, who were most critical of the draft resolution, proposed an amendment.[71] To support the Sixth Committee's draft, the United Kingdom argued once again that genocide was so closely related to crimes against humanity that it was preferable to refer the whole matter to the International Law Commission, for study in the context of its work on codification of the Nuremberg principles. 'We wonder why it is necessary to insist that there must be a convention without due deliberation; why there must be a convention which may not be the best method of carrying further this declaration and which is a method, as I have already stated, not altogether satisfactory to a large number of Members who would presumably be unwilling to accede to such a convention', said Davies, the representative of the United Kingdom.[72] The Soviet Union was the only other delegation to speak in favour of the Sixth Committee's draft resolution.[73]

Presenting a Chinese amendment[74] to the proposal from Panama, Egypt and Cuba, Wellington Koo Jr said: 'We feel that the Economic and Social Council should draw up the text of this convention bearing in mind that another body, the International Law Commission, has been charged with the responsibility of dealing with a cognate subject – namely, the formulation of the principles of the Nurnberg Tribunal – and also with the preparation of a draft code of offences against peace and security.'[75] The heart of the issue was whether to consider genocide as a variety of crime against humanity, or to treat it as a distinct form of criminal behaviour. The Chinese amendment, which implied the latter, was adopted on a roll-call vote,[76] followed by adoption of the amendment from Panama, Egypt and Cuba, also on a roll-call vote.[77] General

[69] *Ibid.* (Rafaat, Egypt).
[70] *Ibid.* (Alfaro, Panama). See also the comments of Dihigo (Cuba), Raafat (Egypt), Pérez-Perozo (Venezuela), de la Tournelle (France), Seyersted (Norway), Fahy (United States), Villa Michel (Mexico), Henriquez Ureña (Dominican Republic) and Wellington Koo Jr (China), and draft amendments from China (UN Doc. A/514) and Venezuela (UN Doc. A/413).
[71] UN Doc. A/512. [72] UN Doc. A/PV.123 (Davies, United Kingdom).
[73] *Ibid.* (Durdenevsky, Soviet Union). [74] UN Doc. A/512.
[75] UN Doc. A/PV.123, p. 241.
[76] *Ibid.* (twenty-nine in favour, fifteen against, with eight abstentions).
[77] *Ibid.* (thirty-four in favour, fifteen against, with two abstentions).

Assembly Resolution 180(II), its wording substantially reinforced by the amendments of China and of Panama, Egypt and Cuba, was adopted on 21 November 1947.[78] It read as follows:

> The General Assembly,
>
> Realizing the importance of the problem of combating the international crime of genocide, Reaffirming its resolution 96(I) of 11 December 1946 on the crime of genocide;
>
> Declaring that genocide is an international crime entailing national and international responsibility on the part of individuals and States;
>
> Noting that a large majority of the Governments of Members of the United Nations have not yet submitted their observations on the draft convention on the crime of genocide prepared by the Secretariat and circulated to those Governments by the Secretary General on 7 July 1947;
>
> Considering that the Economic and Social Council has stated in its resolution of 6 August 1947 that it proposes to proceed as rapidly as possible with the consideration of the question of genocide, subject to any further instructions which it may receive from the General Assembly;
>
> Requests the Economic and Social Council to continue the work it has begun concerning the suppression of genocide, including the study of the draft convention prepared by the Secretary, and to proceed with the completion of the convention, taking into account that the International Law Commission, which will be set up in due course in accordance with General Assembly resolution 174 (II) of 21 November 1947, has been charged with the formulation of the principles recognized in the Charter of the Nuremberg Tribunal, as well as the preparation of a draft code of offences against peace and security;
>
> Informs the Economic and Social Council that it need not await the receipt of the observations of all Members before commencing its work; and Requests the Economic and Social Council to submit a report and the convention on this question to the third regular session of the General Assembly.[79]

The Ad Hoc Committee draft

General Assembly Resolution 180(II) directed the Economic and Social Council to pursue work on the draft convention, and not to wait for comments from member States before taking further steps.[80] At its sixth session, in early 1948, the ECOSOC created an *ad hoc* drafting

[78] *Ibid.* (thirty-eight in favour, with fourteen abstentions). [79] GA Res. 180(II).
[80] See the 'Terms of Reference' prepared by the Secretary-General for the Economic and Social Council: UN Doc. A/622.

committee composed of China, France, Lebanon, Poland, the Soviet Union, the United States and Venezuela.[81] The committee was instructed:

> (a) To meet at the headquarters of the United Nations in order to prepare the draft convention on the crime of genocide . . . and to submit this draft convention, together with the recommendation of the Commission on Human Rights thereon to the next session of the Economic and Social Council; and
> (b) To take into consideration in the preparation of the draft convention, the draft convention prepared by the Secretary-General, the comments of the Member Governments on this draft convention, and other drafts on the matter submitted by any Member Government.

The Ad Hoc Committee met a total of twenty-eight times over the course of April and May 1948,[82] preparing a new draft convention and an accompanying commentary.[83]

Preparation for the Ad Hoc Committee

In preparation for the work of the Ad Hoc Committee, the Secretariat submitted a memorandum reviewing a number of questions that might be addressed, most of which had arisen in the course of work on the Secretariat draft or in comments on it by member States. First was the issue of what groups should be protected by the convention, and whether it should cover all racial, national, linguistic, religious, political or other human groups, or only some of them. Secondly, the Secretariat raised the issue of what acts of genocide would be contemplated, and more specifically whether the convention would include cultural genocide, consisting 'in the destruction by brutal means of the specific characteristics of a human group, that is to say, its moral and sociological characteristics'. The memorandum noted that several governments proposed the exclusion of cultural genocide, and limited the scope of the convention to physical and biological genocide. Thirdly, should the convention apply to rulers, or to rulers, officials and private persons without distinction? 'Opinions differ on this point', said the

[81] ESC Res. 117(VI); UN Doc. E/734. See UN Doc. E/SR.139–140; UN Doc. E/AC.7/SR.37; UN Doc. E/663 (with the United Kingdom amendment, E/AC.7/65); and UN Doc. E/662/Add.1.

[82] The Secretariat had earlier estimated the process would take two weeks, and be completed by mid-April: UN Doc. E/AC.25/2.

[83] UN Doc. E/AC.25/12; UN Doc. E/794. See Drost, *Genocide*, pp. 29–53.

note. Fourthly, should an international criminal court be created to punish genocide, or should prosecution be left to national courts? Even if the international court were favoured, the Secretariat observed that questions concerning its relationship with national courts needed to be resolved eventually, although this was perhaps not necessary at such a preliminary stage. Finally, and in keeping with the mandate of the General Assembly, the Ad Hoc Committee would need to address the relationship between the convention and related matters being considered by the International Law Commission, namely, formulation of the Nuremberg principles and the preparation of a draft code of offences against the peace and security of mankind.[84]

The memorandum recommended using one of the existing drafts as a basis for discussion. Furthermore, '[s]ince relatively few Governments have presented their comments on the question of genocide, and the *ad hoc* committee consists only of seven members, the committee may, in certain cases, think it advisable to follow the suggestion made in the Economic and Social Council to submit alternative texts and leave the final choice to the Economic and Social Council and the General Assembly'.[85] The Secretariat proposed that the Ad Hoc Committee also consider some other substantive questions: the defences of command of the law, superior orders, head of state immunity, *nullum crimen sine lege*, and the relationship between genocide and crimes against humanity.[86]

Alongside the Secretariat draft, the United States,[87] France[88] and China[89] prepared alternative texts. Those of the United States and France essentially corresponded to their comments on the Secretariat draft. China's draft articles dealt with the substantive issues of the convention but excluded the various protocolar clauses. China did not describe genocide as a crime against humanity. It advocated prosecution of cultural genocide, as well as physical and biological genocide. China also sought universal prosecution of genocide and the establishment of an international court.[90]

The Soviet Union did not present its own draft, producing instead a document entitled 'Basic Principles of a Convention on Genocide'. The Soviet proposals limited the scope of genocide to extermination 'on racial, national (religious) grounds', omitting the category of political groups. They had a distinctly ideological bent, insisting upon the relationship between genocide and 'Fascism-Nazism and other similar race

[84] UN Doc. E/AC.25/2. [85] *Ibid.* [86] UN Doc. E/AC.25/11. [87] UN Doc. A/401.
[88] UN Doc. A/401/Add.3. [89] UN Doc. E/AC.25/9. [90] *Ibid.*

"theories" which preach racial and national hatred, the domination of the so-called "higher" races and the extermination of the so-called "lower" race'. The Soviets felt that repression of genocide should include prohibition of incitement to racial hatred as well as various preparatory or preliminary acts, such as study and research aimed at developing techniques of genocide. They also wanted the convention to cover cultural genocide, giving as examples the prohibition or restriction of the national language in public and private life and the destruction of historical or religious monuments, museums and libraries.[91]

Debates in the Ad Hoc Committee

At its first meeting, the Ad Hoc Committee elected John Maktos of the United States as its chair, and Platon D. Morozov of the Soviet Union as vice-chair. Karim Azkoul of Lebanon was designated rapporteur. Henri Laugier, Assistant Secretary-General in charge of the Department of Social Affairs, represented the Secretariat, in the absence of John Humphrey.[92] Surprisingly, the Committee never formally debated the Secretariat draft convention, although this was the chair's original proposal[93] and had been, at least informally, agreed to.[94] The first series of meetings, sessions three to eleven, concerned issues raised by the Soviet 'Basic Principles', while the second series, from twelve to twenty-three, considered the Chinese draft convention, which the Committee agreed to make the basis of its work,[95] although the other texts were to be taken into account. The Committee decided to assign the final or protocolar clauses to a sub-committee.[96] The last five meetings were occupied with adoption of the Committee's report and various technical matters. The Committee's draft convention, which differed substantially from that of the Secretariat a year earlier, was adopted by five votes in favour, with the Soviet Union voting against and Poland abstaining.[97]

One of the more difficult issues confronting the Ad Hoc Committee was reconciling the draft convention with the 'Nuremberg Principles'

[91] UN Doc. E/AC.25/7. [92] UN Doc. E/AC.25/SR.1. [93] UN Doc. E/AC.25/SR.3, p. 9.
[94] UN Doc. E/794, p. 1.
[95] As agreed by the Committee: UN Doc. E/AC.25/SR.3, p. 10.
[96] UN Doc. E/AC.25/SR.6, p. 21; UN Doc. E/AC.25/SR.7, p. 1. The report of the sub-committee, UN Doc. E/AC.25/10, consisting of John Maktos of the United States, Platon D. Morozov of the Soviet Union and Aleksandr Rudzinski of Poland, was discussed at the twenty-sixth meeting: UN Doc. E/AC.25/SR.26, pp. 2–3.
[97] UN Doc. E/AC.25/SR.26, pp. 4–7.

that the General Assembly had asked the International Law Commission to formulate. In Resolution 180(II), the General Assembly instructed the Economic and Social Council to take into account the terms of reference given to the International Law Commission. Here, the principal question was defining the relationship between genocide and crimes against humanity. In accordance with a suggestion from the Secretariat, the debate arose in the context of discussion of the preamble.[98]

France was the most insistent about the linkage between genocide and crimes against humanity, while others were equally firm in their view that the concepts had to be made distinct and separate. France had, in fact, urged that the preamble describe genocide as 'a crime against humanity',[99] but this was rejected by the Ad Hoc Committee, which chose instead to characterize it as 'a crime against mankind'.[100] Aleksandr Rudzinski of Poland said it was true that genocide was a crime against humanity, but that this did not mean it needed to be stated in the convention; this was overreaching the provisions of General Assembly Resolution 180(II).[101] According to the final report of the Committee, its members 'categorically opposed the expression "crimes against humanity" because, in their opinion, it had acquired a well-defined legal meaning in the Charter of the Nuremberg Tribunal'.[102]

France also proposed that the preamble make reference to the International Military Tribunal,[103] an idea that was supported by China and the United States.[104] Lebanon objected, saying that the Nuremberg trial dealt with crimes against humanity and not genocide.[105] Venezuela was opposed to any reference to Nuremberg.[106] The reasons for the opposition stemmed from the same concern, namely, that the crime of genocide might be confused with the crimes against humanity that had been judged by the International Military Tribunal.[107] Here, France's efforts were more successful, resulting in the adoption of a preambular paragraph reading: 'having taken note of the fact that the International Military Tribunal at Nuremberg, in its judgment of 30 September–1 October 1946 has punished certain persons who have committed analogous acts . . .'.[108]

[98] UN Doc. E/AC.25/11. [99] UN Doc. E/AC.25/SR.20, p. 7. [100] UN Doc. E/794, p. 2.
[101] UN Doc. E/AC.25/SR.20, p. 7. [102] UN Doc. E/794, p. 3.
[103] UN Doc. E/AC.25/SR.23, p. 3. [104] *Ibid.*, p. 4. [105] UN Doc. E/AC.25/SR.23, p. 4.
[106] *Ibid.*, pp. 4–5. [107] UN Doc. E/794, p. 4.
[108] UN Doc. E/AC.25/SR.23, pp. 4–5 (four in favour, with three abstentions).

The Ad Hoc Committee decided that genocide directed against political groups should be prohibited by the convention, with Poland and the Soviet Union opposed.[109] The Secretariat draft had omitted any reference whatsoever to a motive element of the crime of genocide, something that gave rise to considerable debate in the Ad Hoc Committee. Eventually, the Committee voted to include a reference to motive in the definition of the crime, requiring that those charged with genocide be driven by 'grounds of national or racial origin, religious belief or political opinion of its members'.[110] That genocide might involve the 'partial' destruction of a group was also envisaged in some of the proposals.[111] The Committee initially agreed that a reference to 'in whole or in part' should be included,[112] but the concept disappeared in the final draft.[113]

The United States representative proposed that the definition of genocide should require the involvement or complicity of the government. John Maktos argued that genocide could not be an international crime unless a government participated in its perpetration, either by act or by omission.[114] France agreed with the United States, saying that 'it was necessary to retain in the definition of genocide the concept of governmental complicity, providing always that the word "complicity" be understood in its widest sense: for example, the mere act of granting impunity to the group committing genocide would constitute complicity'.[115] But, after strenuous objections from Lebanon, Poland and China, France 'thought it might be better to abandon this limitation, which was likely to create practical difficulties'.[116] It was so decided by the Committee.

The Secretariat had suggested that the Committee might consider three basic types of genocide: physical, biological and cultural.[117] Physical genocide clearly was meant to cover cases of homicide, and, on a French proposal, this was extended to '[a]ny act directed against the corporal integrity of members of the group'.[118] The Committee also added to the list of punishable acts 'inflicting on the members of the group such measures or conditions of life which would be aimed to cause their deaths'.[119] The Committee voted to include '[a]ny act or

[109] UN Doc. E/AC.25/SR.24, pp. 4 and 6. [110] UN Doc. E/794, p. 5.
[111] UN Doc. E/AC.25/7, Principle VII. [112] UN Doc. E/AC.25/SR.10, p. 16.
[113] UN Doc. E/AC.25/SR.24, p. 4. [114] UN Doc. E/AC.25/SR.4, pp. 3–4. [115] *Ibid.*, p. 4.
[116] UN Doc. E/AC.25/SR.4, p. 6. [117] UN Doc. E/AC.25/2.
[118] UN Doc. E/AC.25/SR.13, p. 12 (five in favour, one against, with one abstention).
[119] *Ibid.*, pp. 13–14 (four in favour, one against, with three abstentions).

measure calculated to prevent births within the group'.[120] The central issue with respect to acts of genocide concerned cultural genocide. The United States was vigorously opposed to this,[121] but its views were rather isolated. France was less aggressive, but made its discomfort with the concept known.[122] The other five States favoured including cultural genocide, and their detailed text was subsequently adopted.[123]

The Committee decided to place what became known as 'other acts of genocide' within a distinct provision.[124] There was no difficulty with the notion that the convention should go beyond the principal perpetrator of the crime and cover accomplices. Inchoate or incomplete offences posed more problems, notably drawing the line between genuine attempts and the more distant concepts of 'preparation' and unsuccessful incitement. A proposal to omit the concept of preparation was ultimately adopted.[125] The Committee was reluctant to go any further 'upstream' in the prevention of genocide, as it had been invited to do by the Soviet Union.

The Committee accepted the Secretariat's recommendation for a specific provision declaring that '[h]eads of State, public officials or private individuals' were all punishable under the convention.[126] The Committee had more trouble with the issue of whether to exclude expressly the defences of superior orders and command of the law. The Secretariat had advised following the example of the Charter of the Nuremberg Tribunal and explicitly eliminated the defences of command of the law and superior orders.[127] The United States, while not challenging the inadmissibility of the two defences as a norm of international law, favoured silence on the point, leaving the issue for the judges who would ultimately interpret the convention.[128] Others, however, openly opposed exclusion of the superior orders defence.[129] The rejection of a Soviet proposal excluding the defences of superior orders and command of the law[130] provoked an

[120] *Ibid.*, p. 14. [121] UN Doc. E/AC.25/SR.14, p. 10. [122] UN Doc. E/AC.25/SR.5, p. 5.
[123] UN Doc. E/AC.25/SR.14, p. 14 (five in favour, two against).
[124] UN Doc. E/AC.25/SR.10, p. 5; UN Doc. E/AC.25/SR.15, p. 1.
[125] *Ibid.*, p. 7 (four in favour, two against, with one abstention).
[126] UN Doc. E/AC.25/SR.18, p. 4. See also UN Doc. E/AC.25/SR.9, p. 7. That the rule about trying rulers did not impair the system of diplomatic immunity was common ground: UN Doc. E/AC.25/SR.9, p. 7.
[127] UN Doc. E/447, art. V. [128] UN Doc. E/AC.25/SR.18, p. 5.
[129] UN Doc. E/AC.25/SR.9, p. 8 and UN Doc. E/AC.25/SR.18, p. 6 (Venezuela); UN Doc. E/AC.25/SR.18, p. 6 (China); UN Doc. E/AC.25/SR.18, p. 6 (Lebanon).
[130] UN Doc. E/AC.25/SR.18, p. 9 (two in favour, four against, with one abstention).

angry outburst from Rudzinski of Poland who suggested the Nuremberg principles were being repudiated.[131]

The Committee was also sharply divided on the nature of the obligations that the convention would impose, and its means of implementation. For some, it should establish an international criminal legal system, necessary because genocide was generally committed by the State or with its complicity, and that any hope of domestic prosecution was futile. Others saw in it a source of obligations that States parties were to implement within their own domestic legal systems. A particularly extreme form of this position held strictly to the territorial principle of jurisdiction: besides eschewing the idea of an international tribunal, it confined prosecution to courts with jurisdiction on the territory where the crime was committed. Some understood that repression of genocide might involve a combination of domestic and international jurisdiction, the latter to apply when the former failed to ensure prosecution. A related issue was universal jurisdiction: whether States other than those where the crime had taken place were entitled to prosecute genocide. Ultimately, a text almost identical to the eventual article VI was adopted, rejecting universal jurisdiction in favour of exclusive jurisdiction for the territorial State, accompanied by a proposal to create an international criminal court.[132]

A Soviet proposal requiring the Security Council to intervene in all cases of genocide was rejected.[133] Instead, the Committee favoured a Chinese text allowing parties to the convention to submit matters to 'any competent organ of the United Nations', something they could do anyway.[134] A compromissory clause, giving the International Court of Justice jurisdiction in disputes arising amongst parties to the convention, was approved over Soviet and Polish opposition.[135] The Ad Hoc Committee's draft was submitted to the third session of the Commission on Human Rights in June 1948. The Commission established a sub-committee to consider the convention, and briefly discussed it during a plenary session. It was, however, preoccupied with the draft international declaration of human rights, and gave the genocide convention only cursory attention. The Commission referred the matter back to ECOSOC, expressing the view that the draft convention represented 'an appropriate basis for urgent consideration and

[131] *Ibid.*, pp. 9–10. [132] UN Doc. E/AC.25/SR.24, p. 10.
[133] UN Doc. E/AC.25/SR.20, p. 4. [134] *Ibid.*, p. 5. [135] *Ibid.*, p. 6.

action by the ECOSOC and the General Assembly during their coming sessions'.[136]

The draft convention was also discussed at the third session of the Commission on Narcotic Drugs.[137] The Commission expressed its discontent at the fact that the report of the Ad Hoc Committee did not condemn the suppression of a people with narcotic drugs. It said it was 'profoundly shocked by the fact that the Japanese occupation authorities in North-eastern China utilized narcotic drugs . . . for the purpose of undermining the resistance and impairing the physical and mental wellbeing of the Chinese people'. The Commission warned that narcotic drugs might eventually constitute 'a powerful instrument of the most hideous crime against mankind' and urged ECOSOC to 'ensure that the use of narcotics as an instrument of committing a crime of this nature be covered by the proposed Convention on the Prevention and Punishment of Genocide'.[138]

ECOSOC discussed the draft convention only summarily at its August 1948 session before submitting it unchanged to the General Assembly.[139] As John Humphrey's diaries report: 'Partly because of Lemkin's lobbying and other efforts the public has become extremely interested in genocide and any postponement of the question now by Council would affect the latter's prestige.'[140]

The third session of the General Assembly

The United Nations General Assembly held its third session at the Palais de Chaillot in Paris. Two draft instruments of momentous importance for the era of human rights were on the agenda, the 'international declaration of human rights' and the convention on genocide. The declaration occupied the time of the General Assembly's Third Committee for several weeks, and was finally adopted on 10 December 1948 as the Universal Declaration of Human Rights.[141] The eventual Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the plenary Assembly one day earlier, on 9 December 1948, following detailed debate in the Sixth Committee, accompanied

[136] UN Doc. E/800, pp. 8–9. The Soviet Union included a dissenting statement in the Commission's report charging that the Ad Hoc Committee draft did not provide 'a sufficiently effective instrument to combat genocide'.
[137] UN Doc. E/799, para. 17. [138] *Ibid.* [139] UN Doc. E/SR.218–219.
[140] Hobbins, *On the Edge*, p. 30.
[141] Universal Declaration of Human Rights, GA Res. 217 A (III), UN Doc. A/810.

by two related resolutions, one calling for the establishment of an international criminal court,[142] the other concerning the application of the Convention to dependent territories.[143]

At the beginning of the Assembly session, the report of the Economic and Social Council on the draft genocide convention, including the instrument prepared by the Ad Hoc Committee, was referred to its Sixth Committee.[144] The Ad Hoc Committee draft was debated by the Sixth Committee from 28 September 1948 to 2 December 1948.[145] After detailed article-by-article consideration, the Committee assigned its revised text of the convention to a drafting committee composed of representatives of Australia, Belgium, Brazil, China, Czechoslovakia, Egypt, France, Iran, Poland, the Soviet Union, the United Kingdom, the United States and Uruguay.[146] The drafting committee's text and the accompanying report[147] were then returned to the Sixth Committee for adoption.

Preliminary matters

At the outset of the debates in the Sixth Committee at the end of September 1948, some delegations proposed that the convention be referred for further study to the nascent International Law Commission.[148] They argued that the Commission was an expert body, best qualified to prepare legal documents. This was nothing more than a tactic aimed at delaying adoption.[149] Similarly, New Zealand said the draft convention had not been adequately studied, and proposed that it be examined further by member States, the Economic and Social Council, and the Commission on Human Rights.[150] Some delegations, such as Belgium, preferred that

[142] 'Study by the International Law Commission of the Question of an International Criminal Jurisdiction', GA Res. 216 B (III).

[143] 'Application with Respect to Dependent Territories, of the Convention on the Prevention and Punishment of the Crime of Genocide', GA Res. 216 C (III).

[144] UN Doc. A/PV/142. [145] See Drost, *Genocide*, pp. 54–136.

[146] Created at the 104th meeting. Australia, Brazil, Iran and Czechoslovakia were added at the 105th meeting. At the 108th meeting, Uruguay replaced Cuba, whose representative could no longer participate.

[147] UN Doc. A/C.6/288; UN Doc. A/C.6/289.

[148] UN Doc. A/C.6/SR.64 (Egeland, South Africa); UN Doc. A/C.6/SR.65 (Arancibia Lazo, Chile).

[149] See the comments of Raafat of Egypt, Chaumont of France and Spiropoulos of Greece: UN Doc. A/C.6/SR.63; and Pérez-Perozo of Venezuela, Kaeckenbeeck of Belgium and Paredes of the Philippines: UN Doc. A/C.6/SR.65.

[150] UN Doc. A/C.6/SR.65 (Reid, New Zealand).

the General Assembly adopt only a declaration on genocide, a view supported by the Dominican Republic.[151] Sir Hartley Shawcross of the United Kingdom said he was not 'enthusiastic' about the draft convention, adding that member States would be deluded to think adoption of such a convention would give people a greater sense of security or would diminish dangers of persecution on racial, religious or national grounds. He noted that physical genocide was already punishable by law as murder, and that cultural genocide was a question of fundamental rights better addressed elsewhere.[152]

Initally, then, these efforts to block the convention had to be overcome. Leading the opposition to them, the United States urged negotiation and prompt adoption of the convention. 'Having regard to the troubled state of the world, it was essential that the convention should be adopted as soon as possible, before the memory of the barbarous crimes which had been committed faded from the minds of men', said Ernest A. Gross. The United States launched the debate in the Sixth Committee with an oddly phrased resolution: 'The Committee decides not to refer to the International Law Commission the preparation of the final text of the convention on genocide, and to proceed with the preparation of such said text for submission to this session of the Assembly.'[153] The Soviet Union, although quite critical of the Ad Hoc Committee draft, was also opposed to sending the draft to a committee or to the International Law Commission for further study, and eager to proceed with clause-by-clause study.[154] In the end, a proposal by South Africa,[155] supported by the United Kingdom,[156] to refer the draft convention to the International Law Commission was convincingly defeated.[157] Then the Committee agreed to article-by-article consideration of the Ad Hoc Committee draft.[158]

[151] *Ibid.* (Messina, Dominican Republic).
[152] UN Doc. A/C.6/SR.64 (Shawcross, United Kingdom).
[153] UN Doc. A/C.6/208. See also UN Doc. A/C.6/SR.63 (Dignam, Australia); UN Doc. A/C.6/SR.65 (Lapointe, Canada); and UN Doc. A/C.6/SR.66 (Abdoh, Iran).
[154] UN Doc. A/C.6/SR.64 (Morozov, Soviet Union). See also UN Doc. A/C.6/SR.66 (Prochazka, Czechoslovakia).
[155] UN Doc. A/C.6/SR.66 (Egeland, South Africa).
[156] *Ibid.* (Shawcross, United Kingdom).
[157] *Ibid.* (twenty-seven in favour, eleven against, with nine abstentions).
[158] The United States proposal (UN Doc. A/C.6/208) was adopted by thirty-eight to seven, with four abstentions: UN Doc. A/C.6/SR.66. A resolution, presented by the Philippines (UN Doc. A/C.6/213), calling for an article-by-article study of the draft, was adopted: UN Doc. A/C.6/SR.66 (forty-eight in favour, with one abstention).

Then disagreement arose regarding the order in which the draft would be discussed. The Soviet Union insisted this begin with the preamble, so as to clarify the basic principles involved,[159] while others preferred this be left to the end, as the preamble merely repeated the principles set out in the substantive provisions.[160] The Committee resolved to begin debate with article I of the Ad Hoc Committee draft, and leave the preamble for later.[161]

Article-by-article study

Article I of the Convention, as eventually adopted is, in any case, somewhat 'preambular', and as a result many of the issues were debated twice.[162] One of them is the nature of the crime, that is, whether genocide is an autonomous infraction or a form of crime against humanity. France had prepared a rival draft convention, and article I of that text began by affirming that '[t]he crime against humanity known as genocide is an attack on the life of a human group or of an individual as a member of such group, particularly by reason of his nationality, race, religion or opinions'.[163] This was, of course, connected with the idea, included in the final version of article I, that genocide was a crime that could be committed in time of peace or of war.[164] Crimes against humanity were still widely believed to be crimes that could only be committed during armed

[159] UN Doc. A/C.6/SR.66 (Morozov, Soviet Union). Supported by Haiti, Yugoslavia, Poland, Czechoslovakia and Venezuela.

[160] UN Doc. A/C.6/SR.66 (Spiropoulos, Greece). Supported by Egypt, Cuba and Australia.

[161] A Soviet proposal to discuss the preamble and art. I at the same time was rejected: UN Doc. A/C.6/SR.66 (thirty-two in favour, eleven against, with six abstentions). Then, Iran's proposal to begin with art. I was adopted (thirty-six in favour, four against, with seven abstentions).

[162] The Soviet Union (UN Doc. A/C.6/215/Rev.1) and Iran (UN Doc. A/C.6/218) felt that art. I was so 'preambular' that it ought to be left out altogether and incorporated in the preamble.

[163] UN Doc. A/C.6/211, art. I. See also UN Doc. A/C.6/SR.67 (Chaumont, France). France had been concerned that its own proposal would be forgotten if the Committee studied the Ad Hoc Committee draft. The chair assured the French representative that this was not the case: UN Doc. A/C.6/SR.66 (Alfaro, chair).

[164] See the following comments: UN Doc. A/C.6/SR.67 (Amado, Brazil); *ibid.* (Morozov, Soviet Union); and UN Doc. A/C.6/SR.68 (de Beus, Netherlands). According to the Commission of Experts on Rwanda, prior to the adoption of art. I, 'genocide was not specifically prohibited by international law except in laws of war'. The Commission said that art. I of the Convention 'represented an advance in international law' for this reason: 'Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)', UN Doc. S/1995/1405, annex, para. 150.

conflict, a consequence of the Nuremberg jurisprudence. Some nations thought it important to affirm that genocide was a crime under international law,[165] while others found this to be unnecessary.[166]

The basis of article I was not the Ad Hoc Committee draft, but rather an amendment proposed by the Netherlands: 'The High Contracting Parties reaffirm that genocide is a crime under international law, which they undertake to prevent and to punish, in accordance with the following articles.'[167] The Soviet Union unsuccessfully urged deletion of the phrase 'under international law'.[168] An amendment by the United Kingdom to insert 'whether committed in time of peace or of war' after the words 'under international law' was easily adopted.[169] The final text stated '[t]he High Contracting Parties confirm that genocide is a crime under international law whether committed in time of peace or of war, which they undertake to prevent and to punish',[170] although several delegations expressed reservations and indicated they wanted to come back to the point when the preamble was being reviewed.

Perhaps the most intriguing phrase in article I is the obligation upon States to prevent and punish genocide, added in the Sixth Committee upon proposals from Belgium[171] and Iran.[172] Belgium argued that article I, as drafted by the Ad Hoc Committee, did nothing more than reproduce the text of General Assembly Resolution 96(I). Because the purpose of a convention was to create obligations, 'it was preferable that the undertaking to prevent and suppress the crime of genocide which appeared at the end of the preamble, should constitute the text of article I of the convention'.[173] Yet, while the final Convention has much to say about punishment of genocide, there is little to suggest what prevention of genocide really means. Certainly, nothing in the debates about article I provides the slightest clue as to the scope of the obligation to prevent.

Articles II and III are the heart of the Convention.[174] They define the crime, as well as the modalities of its commission. In the Sixth

[165] UN Doc. A/C.6/SR.67 (Raafat, Egypt).
[166] *Ibid.* (Bartos, Yugoslavia); *ibid.* (Morozov, Soviet Union).
[167] UN Doc. A/C.6/220.
[168] UN Doc. A/C.6/SR.68 (thirty-six in favour, three against, with seven abstentions).
[169] *Ibid.* (thirty in favour, seven against, with six abstentions).
[170] UN Doc. A/C.6/256; UN Doc. A/C.6/SR.68 (thirty-seven in favour, three against, with two abstentions).
[171] UN Doc. A/C.6/217.
[172] UN Doc. A/C.6/SR.68 (Abdoh, Iran).
[173] UN Doc. A/C.6/SR.67 (Kaeckenbeeck, Belgium).
[174] The drafting of art. II is considered in detail in chapters 3, 4 and 5 at pp. 120–1, 173–5 and 257–60 below respectively. For the drafting of art. III, see chapter 6, pp. 310–12 below.

Committee, the debate returned to issues that had been bruited since the first days of the drafting: definition of the intentional element; inclusion of political groups among the victims of genocide; and treatment of cultural genocide as an act of genocide. Article II consists of an enumeration of 'acts of genocide', but actually begins by delimiting the intentional element of the crime: 'genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'. The Sixth Committee of the General Assembly made four changes to the Ad Hoc Committee draft: it eliminated the word 'deliberate' before 'acts'; it incorporated the qualification that genocide need not involve the total destruction of a group, but can also occur where destruction is only partial; it redefined the notion of protected 'groups', adding 'ethnical' and removing 'political'; and it replaced the suggestion that genocide was committed 'on grounds of the national or racial origin, religious belief, or political opinion of its members' with the enigmatic words 'as such'. The Sixth Committee agreed without difficulty to include a list of 'acts' of genocide and, after considerable debate, decided that this should be exhaustive and not indicative. It also voted to limit the punishable acts to physical and biological genocide, excluding cultural genocide, which several delegates said should be addressed elsewhere in the United Nations as a human rights issue.[175]

Article III of the Convention lists what the Ad Hoc Committee labelled 'punishable acts', and raises issues relating to criminal participation as well as incomplete or inchoate offences. It begins 'The following acts shall be punishable' and is followed by five paragraphs setting out the various acts. The first paragraph of article III consists of the word 'genocide', and in effect refers the interpreter back to article II, where genocide is defined. This did not give rise to any real difficulty in the Sixth Committee. The remaining four paragraphs are what the Convention refers to as 'other acts'. The debate in the Sixth Committee involved questions of comparative criminal law, with delegates searching for common ground as to the meaning of such terms as conspiracy, complicity and attempt. The third paragraph, dealing with direct and public incitement to commit genocide, was the most controversial of these provisions. Some delegations argued for its deletion, fearing it might encroach upon freedom of expression. The Soviet Union tried to push the incitement issue even further, with an additional act of

[175] UN Doc. A/C.6/SR.83.

genocide: 'All forms of public propaganda (Press, radio, cinema, etc.) aimed at inciting racial, national or religious enmities or hatreds or at provoking the commission of acts of genocide.'[176] This obviously went well beyond 'direct incitement'. A similar proposal had been rejected by the Ad Hoc Committee, and the Sixth Committee reacted no differently.[177]

It should be borne in mind that, when the debate took place, the Committee had already agreed to include genocide of political groups within the text, a decision it later reversed. This context undoubtedly influenced attitudes towards the hate propaganda amendment. The fourth paragraph of article III defines 'attempt' as an act of genocide. In the Sixth Committee there was no debate whatsoever about the text, and there were no amendments. It was adopted unanimously.[178] But, as in the case of incitement, the Soviet delegation made a similar, unsuccessful effort to enlarge the scope of attempted genocide with an amendment concerning 'preparatory acts', which encompassed 'studies and research for the purpose of developing the technique of genocide; setting up of installations, manufacturing, obtaining, possessing or supplying of articles or substances with the knowledge that they are intended for genocide; issuing instructions or orders and distributing tasks with a view to committing genocide'.[179]

Article IV concerns the defence of 'official capacity', by which rulers or heads of government or armed forces attempt to avoid criminal liability.[180] The debate revealed sharply differing opinions about the Convention's purpose. Article IV vexed the drafting committee, and the chair reported that the wording 'had satisfied none of the members'.[181] The debate spilled over onto ancillary issues, notably the creation of an international criminal court susceptible of prosecuting such officials. The United Kingdom observed that article IV was predicated on the creation of an international penal tribunal. For France, this was 'the essential purpose of the convention on genocide'. According to Charles Chaumont, '[t]he convention would be a mere accumulation of entirely ineffective formulas, if such a court were not established within a reasonable period'.[182]

[176] UN Doc. A/C.6/215/Rev.1. [177] UN Doc. A/C.6/SR.87. [178] UN Doc. A/C.6/SR.85.
[179] UN Doc. A/C.6/215/Rev.1.
[180] The drafting of art. IV is discussed in detail in chapter 7, pp. 371–4 below.
[181] UN Doc. A/C.6/SR.128 (Amado, Brazil).
[182] UN Doc. A/C.6/SR.95 (Chaumont, France).

Article V imposes upon States parties an obligation to take the necessary legislative measures to give effect to the Convention.[183] As the Belgian Kaeckenbeeck explained, the article involved States in 'an obligation to introduce the definition of genocide and the penalties envisaged for it into their own penal codes, and also to determine the competent jurisdiction and the procedure to be followed'.[184] That this entailed penalties may have been obvious, but the Soviet Union insisted upon an explicit amendment to this effect.[185] The Committee adopted a revised text, but then reopened the debate a few days later in order to correct the impression that the provision pertained only to penal measures. The final version of article V makes it clear that criminal law is merely one of the areas in which States are required to enact necessary legislation.

Article VI deals with jurisdiction for the prosecution of genocide, from the standpoint of both domestic and international courts.[186] With respect to the former, the central issue was universal jurisdiction, already recognized in certain other treaties dealing with international crimes. The Sixth Committee rejected universal jurisdiction and opted for territorial jurisdiction. With respect to international courts, the major question was creation of an international jurisdiction. The original Secretariat draft included draft statutes for such a court. The Ad Hoc Committee had endorsed the idea of the creation of the international criminal court as an alternative to jurisdiction of the territorial state. Reference to an international court was eliminated in an initial vote of the Sixth Committee, but was successfully reintroduced by the United States.

Article VII concerns extradition, and was rendered particularly important in light of Article VI, which declared that as a general rule genocide suspects will be tried in the territory where the crime took place.[187] It was important to eliminate the possibility that offenders would invoke the political offence exception to extradition, which is widely recognized in extradition treaties as well as at customary law.[188] But the debates made it clear that States whose legislation did not provide for extradition of their own nationals would be under no obligation to grant this.[189]

[183] The drafting of art. V is discussed in detail in chapter 8, pp. 401–3 below.
[184] UN Doc. A/C.6/SR.93 (Kaeckenbeeck, Belgium).
[185] UN Doc. A/C.6/215/Rev.1; UN Doc. A/C.6/SR.93 (Morozov, Soviet Union).
[186] The drafting of art. VI is considered in detail in chapter 8, pp. 411–16 and 444–54 below.
[187] The drafting of art. VII is considered in detail in chapter 8, pp. 472–4 below.
[188] UN Doc. A/C.6/217. [189] UN Doc. A/C.6/SR.95 (Alfaro, chair).

Article VIII affirms the right of all States parties to 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.[190] In fact, it declares nothing more than something to which all member States of the United Nations are entitled in any case, although theoretically it extends this right to a handful of non-member States, such as Switzerland. The Soviets had sought a provision requiring States to address the Security Council, but this met with opposition. The Sixth Committee actually voted to delete article VIII,[191] but Australia successfully revived the provision in a subsequent debate.[192]

Article IX is a compromissory clause, conferring jurisdiction on the International Court of Justice in the case of disputes concerning the interpretation, application or fulfilment of the Convention.[193] The United Kingdom, which had not participated in the Ad Hoc Committee and which believed the convention really concerned State rather than individual liability, was particularly enthusiastic about this provision. Yet there appeared to be much confusion about what it really meant. France and Belgium presumed it dealt with State responsibility, while the Philippines thought it concerned State crimes.[194]

A Soviet Union amendment pledging States parties to disband and prohibit organizations that incite racial hatred or the commission of genocidal acts was defeated.[195] The Ad Hoc Committee had rejected a similar proposal. In the Sixth Committee, France had attempted to help the Soviet proposal with a friendly amendment, but the Soviets were not seduced and refused to accept it.[196]

After drafting the technical or 'protocolar' clauses,[197] the Sixth Committee turned to the question that logically belonged at the beginning but that it had agreed to leave for the end: the preamble. In its final version, the preamble consists of three succinct sentences. The first

[190] The drafting of art. VIII is considered in detail in chapter 10, pp. 534–8 below.
[191] UN Doc. A/C.6/SR.101.
[192] UN Doc. A/C.6/265; UN Doc. A/C.6/SR.105 (Dignam, Australia).
[193] The drafting of art. IX is considered in detail in chapter 9, pp. 495–9 below.
[194] UN Doc. A/C.6/SR.105 (eighteen in favour, two against, with fifteen abstentions).
[195] UN Doc. A/C.6/215/Rev.1: 'The High Contracting Parties pledge themselves to disband and prohibit any organizations aimed at inciting racial, national or religious hatred or the commission of acts of genocide.'
[196] UN Doc. A/C.6/SR.107.
[197] The drafting of the protocolar clauses is discussed in detail in chapter 11, pp. 593–640 below.

refers to General Assembly Resolution 96(I), observing that 'genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world'. The second recognizes that at all periods of history genocide has inflicted great losses on humanity. The final paragraph states that, in order to liberate mankind from such an odious scourge, international co-operation is required.

Several States altogether opposed including a preamble.[198] The Sixth Committee set aside the Ad Hoc Committee draft and conducted its debate around a new Venezuelan proposal,[199] described by John Maktos of the United States as 'a unified and highly satisfactory text, which was likely to rally a great number of votes'.[200] Venezuela explained that it had endeavoured to draft a preamble that would be as short as possible, that would have a historical basis, showing that genocide had existed long before the rise of fascism and Nazism, but that would omit any reference to the Nuremberg Tribunal, as genocide was distinct from crimes against humanity.[201] Because the chair had ruled that the Venezuelan proposal would be debated first,[202] the Soviets, who had a far more lengthy draft preamble of their own,[203] introduced amendments to the Venezuelan draft that they believed belonged within the preamble.[204] France too had proposals, of which the most significant was addition of a reference to the Nuremberg judgment.[205]

[198] UN Doc. A/C.6/SR.109 (Manini y Ríos, Uruguay); *ibid.* (Dihigo, Cuba); *ibid.* (Abdoh, Iran); *ibid.* (Amado, Brazil).

[199] UN Doc. A/C.6/261: 'The High Contracting Parties, Considering that the General Assembly of the United Nations has declared in its resolution 96(I) of 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and which the civilized world condemns, Recognizing that at all periods of history genocide has inflicted great losses on humanity, and Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required; Hereby agree as hereinafter provided . . .'

[200] UN Doc. A/C.6/SR.109 (Maktos, United States).

[201] *Ibid.* (Pérez-Perozo, Venezuela).

[202] UN Doc. A/C.6/SR.110 (Morozov, Soviet Union).

[203] UN Doc. A/C.6/215/Rev.1.

[204] UN Doc. A/C.6/273: '1. After the words "has inflicted great losses on humanity", insert a comma and add the words "while recent events provide evidence that genocide is organically bound up with fascism-nazism and other similar race 'theories' which preach racial and national hatred, the domination of the so-called higher races and the extermination of the so-called lower races". 2. After the words "from such an odious scourge", add the words "and to prevent and punish genocide".'

[205] UN Doc. A/C.6/267. '3. Substitute the following for the third sub-paragraph: "Having taken note of the legal precedent established by the judgment of the International Military Tribunal at Nürnberg of 30 September–1 October 1946".' The Soviet

There was no real disagreement with reference to the historical basis of the crime of genocide, and recognition that it had existed long before the adoption of the Convention or of General Assembly Resolution 96(I). The Soviets, however, also believed it was important to refer to recent history or events,[206] and to indicate that genocide was 'organically bound up with fascism-nazism' and similar ideologies.[207] Venezuela refused to accept the amendment, explaining that the Convention was directed against genocide and not fascism-Nazism. 'The statement that genocide was organically bound up with fascism-nazism was not historically accurate, as acts of genocide had been committed as recently as the previous year without having any connection with such theories', said Victor M. Pérez-Perozo.[208] The United States agreed with Venezuela, adding that this could suggest that acts of genocide committed for other motives might not be punishable.[209] Egypt also opposed the Soviet amendment: 'instances of genocide were to be found in the far more distant past, instances which had no connexion at all with theories of racial superiority'.[210] On a roll-call vote, the Soviet proposal was decisively rejected.[211] The Soviets also proposed that reference to 'prevention and punishment' as purposes of the Convention be included in the preamble. The idea was hardly controversial, because it was also found in article I, already adopted by the Sixth Committee, but the Soviet suggestion was not taken up.[212]

A number of reasons were advanced for excluding any reference to the Nuremberg judgment. Several States feared this would confuse genocide with crimes against humanity, and consequently limit the concept, because crimes against humanity had received a relatively restrictive interpretation at Nuremberg, notably in the requirement that they be

preamble, UN Doc. A/C.6/215/Rev.1, included a similar paragraph: 'Having taken note of the fact that the International Military Tribunal at Nürnberg in its judgments of 30 September–1 October 1946 has punished under a different legal description certain persons who have committed acts similar to those which the present Convention aims at punishing.'

[206] UN Doc. A/C.6/SR.110 (Morozov, Soviet Union).

[207] UN Doc. A/C.6/273.

[208] UN Doc. A/C.6/SR.110 (Pérez-Perozo, Venezuela).

[209] *Ibid.* (Maktos, United States).

[210] *Ibid.* (Raafat, Egypt). See also *ibid.* (Abdoh, Iran).

[211] *Ibid.* The Soviets reintroduced the proposal in the General Assembly on 9 December 1948, where the amendment (UN Doc. A/766) was rejected by thirty-four to seven, with ten abstentions.

[212] UN Doc. A/C.6/SR.110 (twenty-three in favour, fifteen against, with six abstentions).

committed in relation to international armed conflict.[213] According to the United States, genocide was a new concept that originated in General Assembly Resolution 96(I) and 'did not need to be propped up by any precedents'.[214] Jean Spiropoulos explained, but to no avail, that this was a misunderstanding of the Nuremberg jurisprudence. 'That Tribunal had, in fact, dealt with crimes committed in peace-time, crimes committed in war-time and crimes against humanity whether committed in peace- or war-time, as article 6(c) of the Nurnberg Charter showed. In [his opinion], genocide belonged to the category of crimes against humanity, as defined by that article.'[215] The Chinese were unhappy with reference to the Nuremberg judgment because there was no corresponding mention of the Tokyo Tribunal, an objection that the United States considered reasonable.[216] It was also argued that the General Assembly had assigned the International Law Commission the task of drafting the 'Nuremberg Principles' and the genocide convention should not prejudice the process.[217] But the debate betrayed dissatisfaction with the Nuremberg judgment, particularly among Latin-American States. Peru said that: 'The trials had been an improvization, made necessary by exceptional circumstances resulting from the war, and had disregarded the rule *nullum crimen sine lege*, which meant that any penal sanction must be based on a law existing at the time of the perpetration of the crime to be punished.'[218] The issue never formally came to a vote. The chair ruled that the Venezuelan amendment as a whole should be decided, and its adoption[219] obviated the need to consider any other proposals.

[213] UN Doc. A/C.6/SR.109 (Correa, Ecuador); *ibid.* (Azkoul, Lebanon); *ibid.* (Manini y Ríos, Uruguay); *ibid.* (Dihigo, Cuba); *ibid.* (Abdoh, Iran); UN Doc. A/C.6/SR.110 (Agha Shahi, Pakistan); *ibid.* (Pérez-Perozo, Venezuela).

[214] UN Doc. A/C.6/SR.109 (Maktos, United States).

[215] *Ibid.* (Spiropoulos, Greece). Spiropoulos was only partially correct in indicating that the Nuremberg judgment had 'dealt with crimes committed in peacetime'. Pre-war crimes were discussed by the judgment, but they did not result in any convictions given the Tribunal's conclusion about the scope of its jurisdiction.

[216] *Ibid.* (Maktos, United States). Syria agreed, urging a preambular reference to the Tokyo judgment: *ibid.* (Tarazi, Syria). This was indeed a curious suggestion, because, while evidence of grave crimes against humanity was presented to the Tokyo Tribunal, it was not seriously claimed that the Japanese engaged in genocide.

[217] UN Doc. A/C.6/SR.110 (Azkoul, Lebanon).

[218] UN Doc. A/C.6/SR.109 (Maurtua, Peru). See also UN Doc. A/C.6/SR.110 (Maurtua, Peru); UN Doc. A/C.6/SR.109 (Messina, Dominican Republic); UN Doc. A/C.6/SR.110 (Abdoh, Iran); and *ibid.* (Dihigo, Cuba).

[219] *Ibid.* (thirty-eight in favour, nine against, with five abstentions).

The Sixth Committee completed its consideration of the draft convention on 2 December 1948. The draft resolution and the draft convention were adopted by thirty votes to none, with eight abstentions.[220] Following the vote, Gerald Fitzmaurice explained that the United Kingdom had abstained in order to indicate its reservations. The United Kingdom considered it preferable not to go beyond the scope of General Assembly Resolution 96(I), and for this reason had not participated in the Ad Hoc Committee. For the United Kingdom, the Convention approached genocide from the wrong angle, the responsibility of individuals, whereas it was really governments that had to be the focus.[221] Poland said that it had abstained because of the text's failure to prohibit hate propaganda and measures aimed against a nation's art and culture.[222] Yugoslavia made a similar intervention.[223] Czechoslovakia regretted the inability of the Convention to prevent genocide.[224] Finally, France expressed its reservations about certain provisions, adding that 'the principle of an international criminal court had, irreversibly, become part of statute law. It was because that principle had been introduced that France was able to sign the convention.'[225]

Two resolutions were adopted at the same time as the Convention. The first noted that the discussion of the Convention had 'raised the question of the desirability and possibility of having persons charged with genocide tried by a competent international tribunal'. The resolution stated that there would be 'an increasing need of an international judicial organ for the trial of certain crimes under international law' and invited the International Law Commission 'to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions'. The General Assembly requested the Commission to consider whether establishing a criminal chamber of the International Court of Justice might do this.[226] A second resolution recommended that States parties to the Convention which administer dependent territories 'take such

[220] UN Doc. A/C.6/SR.132. Iran subsequently apologized for its absence during the vote, but indicated its support: UN Doc. A/C.6/SR.133 (Abdoh, Iran).
[221] UN Doc. A/C.6/SR.132 (Fitzmaurice, United Kingdom).
[222] UN Doc. A/C.6/SR.133 (Litauer, Poland). [223] *Ibid.* (Kacijan, Yugoslavia).
[224] *Ibid.* (Augenthaler, Czechoslovakia). [225] *Ibid.* (Chaumont, France).
[226] 'Study by the International Law Commission of the Question of an International Criminal Jurisdiction', GA Res. 260 B (III) (twenty-seven in favour, five against, with six abstentions).

measures as are necessary and feasible to enable the provisions of the Convention to be extended to those territories as soon as possible'.[227]

The Sixth Committee draft was submitted to the General Assembly on 9 December 1948, in the form of a resolution to which was annexed the text, as prepared by the drafting committee, and the two accompanying resolutions.[228] The Soviet Union proposed a series of amendments, in effect returning to the points it had unsuccessfully advanced in the sessions of the Sixth Committee: reference to racial hatred and Nazism in the preamble, disbanding of racist organizations, prohibition of cultural genocide, rejection of an international criminal jurisdiction, and automatic application to non-self-governing territories.[229] Venezuela also proposed an amendment prohibiting cultural genocide by adding a sixth paragraph to the list of punishable acts in article II.[230] Venezuela withdrew its amendment after determining it could not rally sufficient support. The Soviet amendments were all rejected.[231] The Convention itself was adopted on a roll-call vote, by fifty-six to none. The resolution concerning the international criminal tribunal was adopted by forty-three to six, with three abstentions, and the resolution on non-self-governing territories was adopted by fifty votes, with one abstention.

Subsequent developments

There have been several efforts by international institutions to develop further the norms of the Convention. Four legal instruments are primarily involved: the draft Code of Crimes Against the Peace and Security of Mankind, prepared by the International Law Commission; the Rome Statute of the International Criminal Court, adopted by the 1998 Diplomatic Conference; and the statutes of the *ad hoc* tribunals for the former Yugoslavia and Rwanda, whose author is the United Nations Security Council. The drafting of these instruments is of interest not only from the standpoint of interpretation of the texts in their own right, but also as an aid to construing the Convention itself.

[227] 'Application with Respect to Dependent Territories, of the Convention on the Prevention and Punishment of the Crime of Genocide', GA Res. 260 C (III) (twenty-nine in favour, with seven abstentions).
[228] UN Doc. A/C.6/289; UN Doc. A/760 and A/760/Corr.2.
[229] UN Doc. A/760. For Morozov's speech, see UN Doc. A/PV.178.
[230] UN Doc. A/770: 'Systematic Destruction of Religious Edifices, Schools or Libraries of the Group'.
[231] UN Doc. A/PV.178.

The Draft Code of Crimes Against the Peace and Security of Mankind

At its second session in 1947, the General Assembly asked the International Law Commission to prepare a draft code of offences against the peace and security of mankind, an idea that apparently originated with the presiding judge of the Nuremberg Tribunal in a letter to President Truman following the final judgment.[232] The General Assembly resolution also directed the Commission to '[f]ormulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal'. The Commission was to indicate 'clearly the place to be accorded' to the Nuremberg Principles in the draft code of offences.[233] The Nuremberg Principles were completed in 1950.[234] However, the Commission only proceeded sporadically on the draft code, completing its work in 1996. In the final version, genocide is defined as one of the crimes against the peace and security of mankind. In the course of the half-century during which it studied the subject, the Commission periodically addressed issues relating to the law of genocide.

The initial 'draft code of offences against the peace and security of mankind' was prepared for the International Law Commission by Special Rapporteur Jean Spiropoulos in 1950. Crime No. VIII consisted of two components, genocide and crimes against humanity. The provision was drawn from article II of the Genocide Convention and article VI(c) of the London Charter.[235] 'That genocide cannot be omitted from the draft code should not be questioned', wrote Spiropoulos in his report.[236] He added that the distinction between genocide and crimes against humanity was 'not easy to draw', citing the commentary in the case reports of post-war trials, where it was said: 'While the two concepts may overlap, genocide is different from crimes against humanity in that, to prove it, no connexion with war need be shown and, on the other hand,

[232] UN Doc. A/CN.4/5, pp. 11 and 12; 'Question of International Criminal Jurisdiction', UN Doc. A/CN.4/15, para. 111.
[233] GA Res. 177(II), para. (b).
[234] *Yearbook . . . 1950*, Vol. II, paras. 95–127. In the Principles, the Commission confirmed the relationship between crimes against humanity and armed conflict. It said it did not exclude the possibility that crimes against humanity could be committed in time of peace, to the extent that they took place 'before a war in connexion with crimes against peace' (*ibid.*, para. 123).
[235] 'Report by J. Spiropoulos, Special Rapporteur', UN Doc. A/CN.4/25, para. 64.
[236] *Ibid.*, para. 66.

genocide is aimed against groups whereas crimes against humanity do not necessarily involve offences against or persecutions of groups.'[237]

Several members of the International Law Commission questioned whether to include genocide, as the crime could be committed in time of peace, and they believed that they were drafting a code applicable only to wartime.[238] The United States indicated that it favoured inclusion of genocide in the draft code.[239] The debate at the 1950 session of the Commission suggests a malaise with the Genocide Convention, which had not yet come into force. Some Commission members noted that no great power had yet ratified the instrument, implying that this imperilled its future success. The absence of protection of political groups in the Convention definition was also criticized.[240]

In a memorandum for the Secretariat on the Spiropoulos draft, Vespasian V. Pella, one of the international criminal law experts retained by the Secretariat in 1947 to work on the initial draft of the Convention, opposed the inclusion of genocide. According to Pella, genocide and crimes against humanity (whose incorporation in the code he supported) overlapped considerably. But there was a significant distinction because, unlike genocide as defined in the Convention, crimes against humanity, as set out in article 6(c) of the Nuremberg Charter, covered persecution on political grounds. Pella observed that General Assembly Resolution 96(I), which referred to political groups, was 'tout à fait indépendante' of the Genocide Convention. He went so far as to claim that it would go against the decisions of the General Assembly to include genocide in the draft code.[241] The Secretariat took care to note that the document expressed Pella's personal views and did not necessarily represent its own position. The International Law Commission subsequently rejected Pella's somewhat extreme assessment.[242]

For the 1951 session, Jean Spiropoulos prepared a revised draft code.[243] His new text modified slightly the Convention definition, specifying that acts of genocide could be committed 'by the authorities of a

[237] *Ibid.*, para. 65. [238] *Yearbook . . . 1950*, Vol. I, 59th meeting, pp. 138–44.
[239] *Ibid.*, 61st meeting, p. 162, para. 82b. See also UN Doc. A/CN.4/19, Part II.
[240] *Ibid.*, 59th meeting, p. 144, paras. 79a, 80 and 81.
[241] 'Mémorandum présenté par le Secrétariat', UN Doc. A/CN.4/39, para. 141. See also Vespasian V. Pella, 'La codification du droit pénal international', (1952) 56 *Revue générale de droit international public*, p. 398.
[242] 'Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', UN Doc. A/CN.4/398, paras. 50–1.
[243] UN Doc. A/CN.4/44.

State or by private individuals', language borrowed from article IV and in no way incompatible with the Convention in a substantive sense. He also added the word 'including' at the end of the chapeau of the definition, just prior to the enumeration of the acts of genocide.[244] This was more significant, because article II of the Convention is an exhaustive list of acts of genocide, and quite intentionally so. The report adopted by the Commission claimed – inaccurately – that the new text 'follow[ed] the definition' in the Convention.[245] There was open disagreement among members of the Commission about the relationship between genocide and crimes against humanity. Chaumont of France insisted that the concept of crime against humanity had been incorporated in the Genocide Convention, and that it was therefore 'contrary to existing international law to lay down as a principle that crimes against humanity were inseparably linked with crimes against peace or war crimes'.[246] Spiropoulos, on the other, considered that crimes against humanity had been exhaustively defined by the Nuremberg Charter. 'He believed that crimes against humanity and the crime of genocide were two quite different things. Doubtless, the crime of genocide might constitute a crime against humanity, but only if it was perpetrated against a group of human beings either in wartime or in connexion with crimes against peace or war crimes.'[247]

The Commission's 1951 draft was submitted to member States for their comments. When the Commission returned to the code, in 1954, Spiropoulos said that the comments on the genocide provision were conflicting and he had therefore decided not to make any changes. Consequently, the International Law Commission in 1954 adopted the draft code's genocide provision, with its slight departure from the text of article II of the Convention.[248] An important development in the 1954 draft concerned the 'inhuman acts' paragraph (really, 'crimes against humanity'). It had been coupled with the definition of genocide in the

[244] *Yearbook . . . 1951*, Vol. II, p. 136: '(9) Acts by the authorities of a State or by private individuals, committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, including . . .' (the enumeration of acts of genocide in art. II of the Convention follows). For the debates, see *Yearbook . . . 1951*, Vol. I, 90th meeting, pp. 66–8.

[245] *Yearbook . . . 1951*, Vol. II, p. 136. See also Drost, Genocide, p. 180.

[246] *Yearbook . . . 1951*, Vol. II, para. 118.

[247] *Ibid.*, para. 120.

[248] *Yearbook . . . 1954*, Vol. I, 267th meeting, para. 39, p. 131 (ten in favour, with one abstention). On the 1954 draft code in general, see D. H. N. Johnson, 'Draft Code of Offences Against the Peace and Security of Mankind', (1955) 4 *International and Comparative Law Quarterly*, p. 445.

1951 draft. The phrase 'when such acts are committed in execution of or in connexion with other offences defined in this article' was eliminated, by a close vote of six to five, with one abstention.[249] This did not resolve the problem, however, because absent the nexus with crimes against peace and war crimes, the Commission did not see how a distinction could be made between ordinary crimes and crimes against humanity. In effect, the Commission voted to replace the war nexus with a different contextual element, namely, that crimes against humanity be committed 'by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities'.[250]

Acting on the instructions of the General Assembly, the International Law Commission suspended work on the draft code in 1954,[251] and did not return to the matter until 1982,[252] when Doudou Thiam was designated the Special Rapporteur of the Commission. Thiam's first draft stuck to Spiropoulos' definition of genocide in the 1954 draft code.[253] He did not use the term genocide, but placed the contents of article II of the Genocide Convention under the rubric 'crimes against humanity'.[254] In 1986, Thiam produced a substantially revised set of draft articles.[255] In a new and more detailed list of offences, genocide was placed in Part II of Chapter II, entitled 'Crimes against humanity', together with apartheid, other inhuman acts and crimes against the environment. The 1954 definition of genocide had been revised once again. The list of acts was the same, but the chapeau read: 'Genocide, in other words any act committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, including . . .' The word 'genocide' had finally been introduced into the provision, where it was treated as a distinct category of 'Acts constituting crimes against humanity'. As for

[249] *Yearbook . . . 1954*, Vol. I, 267th meeting, para. 59. The difficult issue was revived, however, and the Commission agreed to reopen discussion, referring the matter to a sub-committee: *ibid.*, 268th meeting, paras. 1–12; *ibid.*, 269th meeting, paras. 17–43; *ibid.*, 270th meeting, paras. 30–4.

[250] *Yearbook . . . 1954*, Vol. II, p. 150. [251] GA Res. 897(IX) (1954).

[252] GA Res. 36/106 (1981).

[253] 'Second Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', *Yearbook . . . 1984*, Vol. II, Part I, pp. 92–3, paras. 28–9, p. 100, para. 79; UN Doc. A/CN.4/377, paras. 28–9 and 79. See also 'Report of the Commission to the General Assembly on the Work of its Thirty-Sixth Session', *Yearbook . . . 1984*, Vol. II, Part II, pp. 13–14, paras. 45–6; *Yearbook . . . 1984*, Vol. I, 1815th meeting, p. 6, para. 9, p. 9, paras. 29–34, p. 10, para. 37 (indicating that the word 'genocide' was used erroneously in para. 29 of Thiam's report, and it should be replaced by the words 'crime against humanity').

[254] *Ibid.*, paras. 28–30. [255] UN Doc. A/CN.4/398 (1986).

the non-exhaustive aspect of the list of punishable acts, which had been Spiropoulos' 'improvement' on article II of the Convention, this notion was further strengthened by adding the phrase 'any act committed . . .'.

Thiam also replaced the term 'ethnical' with 'ethnic',[256] a linguistic change of no substantive significance. Thiam's 1986 report discussed the distinctions between genocide and 'inhuman acts', which are a component of crimes against humanity, noting that genocide needed to be committed with the purpose of destroying a group, something that was not required in the case of inhuman acts.[257] Here, Thiam was insisting upon a motive requirement for the crime of genocide.

The Commission did not revisit the issue of genocide and crimes against humanity until 1989. Thiam retained the wording he had proposed in 1986, but his comments focused almost exclusively on crimes against humanity and he had nothing to add on genocide.[258] During debate in the Commission, Calero Rodrigues questioned the use of the term 'including', noting that article II of the Genocide Convention had been intended as an exhaustive enumeration of punishable acts.[259] Emmanuel Roucounas, on the other hand, said the word 'including' corrected a shortcoming in the Convention.[260] The report of the 1989 session noted that Thiam's draft provision on genocide had been favourably received by the Commission, 'first because it placed genocide first among the crimes against humanity; secondly, because it abided by the definition given in the 1948 Convention; and thirdly because, unlike that in the 1948 Convention, the enumeration of acts constituting the crime of genocide proposed by the Special Rapporteur was not exhaustive'.[261]

At the 1991 session of the International Law Commission, a Drafting Committee was established to revise the Thiam draft. The Committee

[256] *Ibid.*, art. 12(1). Thiam's reports were originally drafted in French, and it is likely that translators at the Secretariat introduced this minor linguistic change to the English version.

[257] 'Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', UN Doc. A/CN.4/398, para. 30. Thiam confused the notions of purpose and intent; purpose is actually related to motive and not intent. See chapter 5, pp. 294–306 below.

[258] 'Seventh Report on the Draft Code of Crimes Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', UN Doc. A/CN.4/419 and Add.1, paras. 33–42.

[259] *Yearbook . . . 1989*, Vol. I, 2099th meeting, p. 25, para. 42.

[260] *Ibid.*, 2100th meeting, p. 27, para. 2. See also the comments of Barsegov, *ibid.*, p. 30, para. 31; Thiam, *Yearbook . . . 1989*, Vol. I, 2102nd meeting, p. 41, para. 12.

[261] 'Report of the Commission to the General Assembly on the Work of Its Forty-First Session', UN Doc. A/CN.4/SER.A/1989/Add.1 (Part 2), p. 59, para. 160.

recommended that the Commission return to the original Convention text, rejecting the approach in the Spiropoulos and Thiam drafts by which the list of punishable acts was indicative rather than exhaustive.[262] According to the report: 'The Commission decided in favour of that solution because the draft Code is a criminal code and in view of the *nullum crimen sine lege* principle and the need not to stray too far from a text widely accepted by the international community.'[263] The provision consisted of two paragraphs:

> 1. An individual who commits or orders the commission of an act of genocide shall, on conviction thereof, be sentenced [to . . .].
> 2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such . . .

This was followed by the five sub-paragraphs of article II of the Genocide Convention. Paragraph 1 was original, and reflected concerns among some members of the Commission that distinct penalties be set out for each crime in the code. Aside from deleting the words 'In the present Convention', at the beginning of the provision, paragraph 2 replicated article II of the Convention. The Commission agreed to use the term 'act of genocide' rather than 'crime of genocide' in the interests of linguistic harmony.[264] In the 1991 draft, the Commission dispensed entirely with the 'crimes against humanity' category. Instead, the draft consisted of a list of crimes against the peace and security of mankind that included genocide (art. 19), apartheid (art. 20) and '[s]ystematic or mass violations of human rights' (art. 20), the latter comprising many of the classic crimes against humanity listed in earlier instruments, such as murder, torture, enslavement and persecution.

[262] *Yearbook . . . 1991*, 2239th meeting, paras. 6–10.

[263] *Yearbook . . . 1991*, Vol. I, 2239th meeting, p. 214, paras. 7–8; *ibid.*, 2251st meeting, pp. 292–3, paras. 9–17; 'Report of the Commission to the General Assembly on the Work of Its Forty-Third Session', UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 2), p. 102, para. (2). See Albin Eser, 'The Need for a General Part, Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind', (1993) 11 *Nouvelles études pénales* 43; L. C. Green, 'Crimes under the ILC 1991 Draft Code', in Yoram Dinstein and Mala Tabory, eds., *War Crimes in International Law*, The Hague, Boston and London: Martinus Nijhoff Publishers, 1996, pp. 19–40; Timothy L. H. McCormack and G. J. Simpson, 'The International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions', (1994) 5 *Criminal Law Forum*, p. 1.

[264] *Yearbook . . . 1991*, Vol. I, 2239th meeting, p. 216, para. 33.

Thiam prepared yet another draft code for the 1995 session of the Commission, with an entirely new provision on genocide.[265] Article 19 consisted of four paragraphs, of which the first specified that '[a]n individual convicted of having committed or ordered' the commission of genocide would be sentenced to a period of detention, still unspecified. Paragraph 2 resembled article II of the Convention, except that the words '[I]n this Convention', with which article II begins, were omitted. Paragraphs 3 and 4 indicated that direct and public incitement of genocide and attempted genocide would also be punishable, leaving room for specific penalties.[266] Members of the Commission expressed mixed opinions about these changes.[267] The majority believed that genocide should respect the Convention definition.[268] Thiam also recommended that the Commission return to the classic nomenclature, and reinstate the heading 'Crimes against humanity' in place of 'Systematic or mass violations of human rights', as it 'corresponded to an

[265] 'Thirteenth Report of the Special Rapporteur', UN Doc. A/CN.4/466:

> Article 19. Genocide
>
> 1. An individual convicted of having committed or ordered the commission of an act of genocide shall be sentenced to . . .
> 2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:
> (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 births within the group;
> (e) forcibly transferring children of the group to another group.
> 3. An individual convicted of having engaged in direct and public incitement to genocide shall be sentenced to . . .
> 4. An individual convicted of an attempt to commit genocide shall be sentenced to . . .

[266] 'Report of the International Law Commission on the Work of Its Forty-Seventh Session, 2 May–21 July 1995', UN Doc. A/50/10, p. 43, para. 80, n. 37.

[267] *Yearbook . . . 1995*, Vol. I, 2379th meeting, pp. 3–4, para. 10; *ibid.*, 2379th meeting, p. 6, para. 26; *ibid.*, 2382nd meeting, p. 24, para. 43; *ibid.*, 2383rd meeting, p. 31, para. 28; *ibid.*, 2384th meeting, p. 40, para. 52.

[268] 'Report of the International Law Commission on the Work of Its Forty-Seventh Session, 2 May–21 July 1995', note 266 above, p. 43, para. 78, p. 65, para. 132. See also *Yearbook . . . 1995*, Vol. I, 2379th meeting, p. 3, para. 3; *ibid.*, 2381st meeting, p. 17, para. 26; *ibid.*, 2381st meeting, pp. 20–1, para. 13; *ibid.*, 2383rd meeting, p. 31, para. 28; *ibid.*, 2384th meeting, p. 38, para. 40; *ibid.*, 2384th meeting, p. 39, para. 51; *ibid.*, 2384th meeting, p. 41, para. 63; *ibid.*, 2384th meeting, p. 41, para. 69.

expression used both in international law and in domestic law' and 'because the justification for the change and particularly the requirement that the crime should be "massive" in nature were highly debatable'.[269]

Following the debate, the Drafting Committee reviewed the comments and prepared yet another version, submitted as an interim report. Articles II and III of the Convention were combined, consistent with the model developed by the Security Council in the statutes of the *ad hoc* tribunals.[270] As a result, the text comprised not only the definition of the elements of genocide, drawn from article II of the Convention, but also the forms of participation and inchoate offences taken from article III. The Drafting Committee said it would return to this point once the Commission decided how criminal participation in general, with respect to all of the crimes in the code, was to be treated.[271] The entire provision was prefaced by a paragraph 1, in square brackets, which said: '[1. An individual who commits an act of genocide shall be punished under the present Code.]' The chair of the Drafting Committee explained that paragraph 1 had been modified from the draft adopted on first reading, which had also referred to the ordering of genocide.[272] It was really

[269] *Yearbook . . . 1995*, Vol. I, 2379th meeting, p. 4, para. 4.

[270] 'Statute of the International Criminal Tribunal for the Former Yugoslavia', UN Doc. S/RES/827, annex, art. 4; 'Statute of the International Criminal Tribunal for Rwanda', UN Doc. S/RES/955, annex, art. 2.

[271] UN Doc. A/CN.4/L.506; 'Draft Articles Proposed by the Drafting Committee on Second Reading', *Yearbook . . . 1995*, Vol. I, 2408th meeting, pp. 197–8, para. 1:

Article 19. Genocide

[1. An individual who commits an act of genocide shall be punished under the present Code.]

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:
   (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 births within the group;
   (e) Forcibly transferring children of the group to another group.
3. The following acts shall be punishable:
   (a) Conspiracy to commit genocide;
   (b) Direct and public incitement to commit genocide;
   (c) Attempt to commit genocide;
   (d) Complicity in genocide.

[272] *Yearbook . . . 1995*, Vol. I, 2408th meeting, p. 203, para. 41.

superfluous to include a reference to 'ordering' genocide: a commander who orders the commission of a crime is either a perpetrator or an accomplice and can be held responsible pursuant to general principles of law.[273]

The International Law Commission adopted the final version of the draft code in 1996.[274] After tinkering with the Convention definition for nearly half a century, the Commission eventually returned to the exact text of article II of the Convention, with one minor and intriguing difference. 'The definition of genocide contained in article II of the Convention, which is widely accepted and generally recognized as the authoritative definition of this crime, is reproduced in article 17 of the present Code', reads the commentary of the Commission.[275] This is not quite accurate. Instead of beginning the provision with 'Genocide means . . .', it says 'A crime of genocide means . . .', possibly implying that there are other types of crime of genocide.[276] Was the Commission hinting at a return to its earlier position, whereby the list of acts of genocide is non-exhaustive? Indeed, the words suggest an even larger view, by which there is a customary content not only of the acts of genocide but also of the other aspects of the definition. The commentary provides no guidance on this point.

In its report, the Commission noted the very particular historical context: '[I]ndeed the tragic events in Rwanda clearly demonstrated that the crime of genocide, even when committed primarily in the territory of a single State, could have serious consequences for international peace and security and, thus, confirmed the appropriateness of including this crime in the present Code.'[277] One of the members of the Commission, Christian Tomuschat, described the genocide provisions

[273] See the discussion of complicity in chapter 6, pp. 339–61 below.

[274] Martin C. Ortega, 'The ILC Adopts the Draft Code of Crimes Against the Peace and Security of Mankind', (1997) 1 *Max Planck Yearbook of United Nations Law*, p. 283; John Allain and John R. W. D. Jones, 'A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes Against the Peace and Security of Mankind', (1997) 8 *European Journal of International Law*, p. 100; Rosemary Rayfuse, 'The Draft Code of Crimes Against the Peace and Security of Mankind: Eating Disorders at the International Law Commission', (1997) 8 *Criminal Law Forum*, p. 52; Christian Tomuschat, 'Le Code des crimes contre la paix et la sécurité de l'humanité et les droits intangibles ou non susceptibles de dérogation', in Daniel Premont, Christina Stenersen and Isabelle Oseredczuk, eds., *Droits intangibles et états d'exception*, Brussels: Bruylant, 1996, pp. 91–7.

[275] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', UN Doc. A/51/10, p. 87.

[276] *Ibid.*, p. 85. [277] *Ibid.*, p. 87.

as being 'in a way the cornerstone of the draft Code'.[278] The Commission also insisted upon the close relationship between genocide and the second category of crimes against humanity, namely 'persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal'.[279] The commentary stated: 'Article II of the Convention contains a definition of the crime of genocide which represents an important further development in the law relating to the persecution category of crimes against humanity recognized in the Nurnberg Charter.'[280]

Where the Commission departed significantly from the Convention was in its treatment of the other acts of genocide, that is, the forms of participation listed in article III of the Convention. The Commission decided not to repeat the terms of article III within the definition of genocide, as the Security Council had done in the statutes of the *ad hoc* tribunals, believing that general notions of participation belonged within an umbrella provision, applicable to the code as a whole. In so doing, it discarded some forms of participation provided for in article III of the Convention, eliminating the inchoate forms of conspiracy and direct and public incitement. Under the draft code, these acts cannot be committed if genocide itself does not take place.

In the *Furundžija* judgment, a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia remarked that the draft code had been prepared by 'a body consisting of outstanding experts in international law, including government legal advisers, elected by the General Assembly'. Moreover, the General Assembly, in Resolution 51/160, had expressed its 'appreciation' for the completion of the draft code. According to the Trial Chamber, 'the Draft Code is an authoritative international instrument which, depending upon the specific question at issue, may (i) constitute evidence of customary law, or (ii) shed light on customary rules which are of uncertain content or are in the process of formation, or, at the very least, (iii) be indicative of the legal views of eminently qualified publicists representing the major legal systems of the world'.[281]

[278] *Yearbook . . . 1995*, Vol. I, 2385th meeting, p. 43, para. 5.

[279] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 275 above, p. 86.

[280] *Ibid.*, p. 87.

[281] *Prosecutor* v. *Furundžija* (Case No. IT-95-17/1-T), Judgment, 10 December 1998, para. 227. The final phrase reproduces the language of art. 38(1)(d) of the Statute of the International Court of Justice.

The International Criminal Court

One of the two resolutions adopted by the General Assembly in conjunction with the Convention, on 9 December 1948, noted that the adoption of the Genocide Convention had 'raised the question of the desirability and possibility of having persons charged with genocide tried by a competent international tribunal'. It stated that there would be 'an increasing need of an international judicial organ for the trial of certain crimes under international law' and invited the International Law Commission to pursue the question.[282]

This invitation and the implicit mandate attributed by article VI of the Convention were taken up the following year when the Commission assigned two special rapporteurs the task of formulating a draft statute for such a court.[283] Their initial reports were submitted to the Commission in 1950. One of the rapporteurs, A. E. F. Sandström, was quite pessimistic about the possibility of creating a court given the existing political climate,[284] while the other, Ricardo J. Alfaro, was somewhat more encouraging.[285] The Commission recognized the difficulty of proceeding on the subject separately from the closely related work on the Code of Offences Against the Peace and Security of Mankind, being undertaken by another special rapporteur, Jean Spiropoulos.[286] Professor Cherif Bassiouni has described this piecemeal approach to the work as '[contrary] to logic and rational drafting policy'.[287]

In 1951, parallel to the work of the International Law Commission, the General Assembly established a committee charged with drafting the statute of an international criminal court. Composed of seventeen States, it submitted its draft statute the following year.[288] A new Committee, established by the General Assembly to review the comments by member States, reported to the General Assembly in 1954.[289] But, that year, work on the entire project ground to a halt when the General Assembly

[282] UN Doc. A/C.6/SR.132 (twenty-seven in favour, five against, with six abstentions).
[283] 'Report of the Commission to the General Assembly', *Yearbook . . . 1949*, p. 283, para. 34.
[284] UN Doc. A/CN.4/20 (1950), para. 39. [285] UN Doc. A/CN.4/15 (1950).
[286] See pp. 92–4 above.
[287] M. Cherif Bassiouni, 'From Versailles to Rwanda: The Need to Establish a Permanent International Criminal Court', (1996) 10 *Harvard Human Rights Journal*, p. 1 at p. 51.
[288] 'Report of the Committee on International Criminal Court Jurisdiction', UN Doc. A/2135 (1952).
[289] 'Report of the Committee on International Criminal Court Jurisdiction', UN Doc. A/2645 (1954).

considered it could advance no further until there was an acceptable definition of aggression.[290] Given the Cold War context, this sounded the death knell for an international criminal court, at least in the foreseeable future. The Soviet Union remained quite vehemently opposed to the idea of such a jurisdiction. According to one Soviet author, 'the prevention and punishment of genocide should remain within the realm of national legislation and should not be left to some sort of a vague "international criminal law" and "international criminal justice" about which American diplomats have recently prattled much in the United Nations'.[291]

The international criminal court project remained dormant until 1989, the year the Berlin Wall fell. Trinidad and Tobago, a Caribbean state plagued by narcotic drug problems, introduced a General Assembly resolution directing the International Law Commission to consider the subject within the framework of the draft Code of Crimes Against the Peace and Security of Mankind.[292] Initially, these initiatives were not focused on genocide and other international crimes against human rights, but rather on the more mundane matter of drug trafficking, although this soon changed.

Special Rapporteur Doudou Thiam submitted a draft in 1992 to the International Law Commission that comprised a provision whereby States parties to the Statute 'recognize the exclusive and compulsory jurisdiction of the Court in respect of the following crimes: genocide . . .'.[293] Thiam noted that '[c]ertain crimes, because of their particular gravity, heinous nature, and the considerable detriment they cause to mankind, must come within the purview of an international court'.[294] In its report, the International Law Commission emphasized the importance of spelling out the crimes for which the Court would have jurisdiction, although it conceded that 'there exist rules of general international law, for example, the prohibition of genocide, which directly bind the individual and make individual violations punishable'.[295]

[290] GA Res. 898(IX).

[291] S. Volodin, 'Convention on the Prevention and Punishment of the Crime of Genocide', [1954] *Sovetskoe Gosudarstvo i Pravo*, p. 125 at p. 126, translated in W. W. Kulski, 'The Soviet Interpretation of International Law', (1955) 49 *American Journal of International Law*, p. 518 at p. 529.

[292] GA Res. 44/89.

[293] 'Tenth Report on the Draft Code of Crimes Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', UN Doc. A/CN.4/442, para. 36.

[294] *Ibid.*, para. 38.

[295] 'Report of the Working Group on the Question of an International Criminal Jurisdiction', *Yearbook . . . 1992*, Vol. II (Part 2), annex, p. 71, para. 102.

By 1993, the Commission had prepared a draft statute. Article 22, entitled 'List of crimes defined by treaties', began: 'The Court may have jurisdiction conferred on it in respect of the following crimes: (a) genocide and related crimes as defined by articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948 . . .'[296] This was simplified in the 1994 report:

> Article 20. Crimes within the jurisdiction of the Court The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide . . .

No detailed text set out the elements of the crime. However, the *travaux* pointed to the Convention as the authoritative definition. Speaking of the crimes within the court's subject matter jurisdiction, the Commission's report stated: 'The least problematic of these, without doubt, is genocide. It is clearly and authoritatively defined in the Convention on the Prevention and Punishment of the Crime of Genocide which is widely ratified, and which envisages that cases of genocide may be referred to an international criminal court.'[297] The Commission's 1994 report said: 'it cannot be doubted that genocide, as defined in the Convention on the Prevention and Punishment of the Crime of Genocide, is a crime under general international law'.[298] A crime under general international law is 'accepted and recognized by the international community of States as a whole as being of such a fundamental character that its violation attracts the criminal responsibility of individuals'.[299]

The Commission also recommended that genocide constitute a crime of 'inherent' jurisdiction, the only crime so characterized.[300] In effect, this confirmed genocide's position at the apex of the pyramid of international crimes. By inherent jurisdiction, the Commission meant that the Court would have subject matter jurisdiction over the crime by

[296] 'Report of the Working Group on a Draft Statute for an International Criminal Court', *Yearbook . . . 1993*, Vol. II (Part 2), annex, pp. 108–9.

[297] 'Report of the International Law Commission to the General Assembly on the Work of Its Forty-Sixth session', UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), p. 38.

[298] 'Report of the Working Group on a Draft Statute for an International Criminal Court', *Yearbook . . . 1993*, note 296 above, pp. 108–9.

[299] *Ibid.*

[300] See Timothy L. H. McCormack and Gerry J. Simpson, 'Achieving the Promise of Nuremberg: A New International Criminal Law Regime?', in Timothy L. H. McCormack and Gerry J. Simpson, *The Law of War Crimes: National and International Approaches*, The Hague, Boston and London: Martinus Nijhoff Publishers, 1997, pp. 229–54 at p. 242.

virtue of ratification of the Statute by a State party to the 1948 Convention.[301] For all other crimes, States would be required to 'opt in' to the jurisdiction of the Court, choosing from a menu including crimes against humanity, war crimes, aggression, torture and apartheid. The Commission considered that genocide deserved this unique treatment not only because of the significance of the crime itself, but also because the Court's creation had been specifically envisaged by article VI of the Convention.

> The case for considering such 'inherent jurisdiction' is powerfully reinforced by the Convention itself, which does not confer jurisdiction over genocide on other States on an *aut dedere aut judicare* basis. The draft statute can thus be seen as completing in this respect the scheme for the prevention and punishment of genocide begun in 1948 – and at a time when effective measures against those who commit genocide are called for.[302]

When some members favoured recognition of an inherent jurisdiction for a broader list of crimes[303] or generally questioned the validity of the approach,[304] Christian Tomuschat responded: 'Genocide was undeniably the most horrible and atrocious of crimes under general international law and he found it incomprehensible that anyone could be reproached for placing too much emphasis on it.'[305] Tomuschat saw the criticisms as an attempt to trivialize genocide, which he described during the debate as 'the extermination of entire ethnic communities, the supreme negation of civilization and solidarity'.[306] Special rapporteur James Crawford observed that: 'Among what were described as the "crimes of crimes", genocide was the worst of all. Moreover it was a crime that was still being committed.'[307] The draft statute was submitted to the United Nations General Assembly at its 1994 session.[308]

[301] 'Draft Statute for an International Criminal Court', UN Doc. A/49/10, arts. 21(1)(a) and 25(1).

[302] 'Report of the International Law Commission to the General Assembly on the Work of Its Forty-Sixth Session', UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), p. 37. See also *Yearbook . . . 1994*, Vol. I, 2374th meeting, p. 298, para. 28.

[303] *Yearbook . . . 1994*, Vol. I, 2358th meeting, pp. 205–6, paras. 23–4; *ibid.*, 2359th meeting, p. 211, para. 3; *ibid.*, 2359th meeting, p. 212, para. 7; *ibid.*, 2374th meeting, p. 299, para. 30.

[304] *Ibid.*, 2358th meeting, p. 207, para. 33; *ibid.*, 2359th meeting, p. 215, para. 28.

[305] *Ibid.*, 2359th meeting, p. 214, para. 21.

[306] *Ibid.*

[307] *Ibid.*, 2358th meeting, p. 208, para. 34.

[308] James Crawford, 'The ILC Adopts a Statute for an International Criminal Court', (1995) 89 *American Journal of International Law*, p. 404; James Crawford, 'The ILC's

The General Assembly decided, in 1994, to pursue work towards the establishment of an international criminal court.[309] Taking the International Law Commission draft statute as a basis, it convened an Ad Hoc Committee, that met twice in 1995. The Ad Hoc Committee did not agree with the International Law Commission's approach, which had left genocide undefined, and favoured incorporating the Convention definition within the statute. Some delegations suggested that the definition might be expanded to encompass social and political groups, taking the position that 'any gap in the definition should be filled'.[310] In reply, others argued that any change in the Convention definition might lead to a problem of conflicting decisions by international judicial bodies when dealing with the same fact situation. Delegates suggested that, where acts fell outside the scope of the definition because the victims were not an enumerated group, the offence 'could also constitute crimes against humanity when committed against members of other groups, including social and political groups'.[311] Although many delegations expressed concerns about the intent requirement, general solutions emerged from the discussions.[312]

Building upon the progress made by the Ad Hoc Committee, at its 1995 session the General Assembly convened a Preparatory Committee, mandated to revise the International Law Commission draft for submission to a diplomatic conference which would formally adopt the treaty. The Preparatory Committee's 1996 report essentially reiterated the points raised the previous year concerning the definition of genocide.[313] That article II of the Genocide Convention should be reproduced, with or without modification, was not disputed. Several delegations were concerned with article III of the Convention, however. While some argued that forms of criminal participation or 'ancillary

Draft Statute of an International Tribunal', (1994) 88 *American Journal of International Law*, p. 140; Bradley E. Berg, 'The 1994 ILC Draft Statute for an International Criminal Court: A Principled Appraisal of Jurisdictional Structure', (1996) 28 *Case Western Reserve Journal of International Law*, p. 221.

[309] On the drafting of the genocide provision in the Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, see William A. Schabas, 'Article 6', in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, Baden-Baden: Nomos Verlagsgesellschaft, 1999, pp. 107–16.

[310] 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court', UN Doc. A/50/22, pp. 12–13, paras. 59–60.

[311] *Ibid.*, para. 61. [312] *Ibid.*, para. 62.

[313] 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', Vol. I, UN Doc. A/51/22, pp. 17–18, paras. 58–64; Vol. II, pp. 56–7.

crimes' be included in the genocide article, others thought these belonged in a general provision applicable to all crimes within the court's subject matter jurisdiction.[314]

The Preparatory Committee's Working Group on the Definition of Crimes, which met in February 1997, considered a number of proposed modifications but ultimately returned to the text of the Convention.[315] It added that:

> with respect to the interpretation and application of the provisions concerning the crimes within the jurisdiction of the Court, the Court shall apply relevant international conventions and other sources of international law. In this regard, the Working Group noted that for purposes of interpreting [the provision concerning genocide] it may be necessary to consider other relevant provisions contained in the Convention for the Prevention and Punishment of the Crime of Genocide, as well as other sources of international law. For example, article I would determine the question of whether the crime of genocide set forth in the present article could be committed in time of peace or in time of war.[316]

A footnote contributed by the Working Group at the February 1997 session of the Preparatory Committee affirmed this point: 'The reference to "intent to destroy, in whole or in part . . . a group, as such" was understood to refer to the specific intention to destroy more than a small number of individuals who are members of a group.'[317] Although

[314] *Ibid.*, Vol. I, p. 18, para. 64.

[315] 'Decisions Taken by the Preparatory Committee at Its Session Held 11 to 21 February 1997', UN Doc. A/AC.249/1997/L.5, Annex I, p. 2; see also UN Doc. A/AC.249/1997/WG.1/CRP.1 and Corr.1. The Working Group did not consider genocide at its December 1997 session: 'Decisions Taken by the Preparatory Committee at Its Session Held 1 to 12 December 1997', UN Doc. A/AC.249/1997/L.9/Rev.1, annex I.

[316] 'Decisions Taken by the Preparatory Committee at its Session Held 11 to 21 February 1997', *ibid.*, p. 3, n. 3; see also 'Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands', UN Doc. A/AC.249/1998/L.13, p. 17, n. 12. A similar idea was expressed in the 1996 report of the International Law Commission, 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', UN Doc. A/51/10, p. 93.

[317] 'Decisions Taken by the Preparatory Committee at its Session Held 11 to 21 February 1997', *ibid.*, p. 3, n. 1; see also 'Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands', *ibid.*, p. 17, n. 10. Two academic commentators said the footnote was 'misleading and should not appear in its present form. Genocide *can occur* with the specific intent to destroy a small number of a relevant group. Nothing in the language of the Convention's definition, containing the phrase "or in part," requires such a limiting interpretation. Moreover, successful counts or prosecutions of crimes against humanity, of which genocide is a species, have involved relatively small numbers of victims.' Leila Sadat Wexler and Jordan Paust, 'Preamble,

some delegations to the Preparatory Committee requested clarification of the term 'in part', none was ever provided.[318] With respect to the enumeration of acts of genocide, the Preparatory Committee Working Group appended a footnote stating that '[t]he reference to "mental harm" is understood to mean more than the minor or temporary impairment of mental faculties',[319] reflecting a persistent concern of the United States.[320] The final Preparatory Committee draft, submitted in April 1998, left the text of article II of the Convention untouched, adding the text of article III in square brackets, to indicate that it was not yet a basis for consensus.[321]

These efforts to create a permanent court with jurisdiction over genocide culminated in a diplomatic conference, held in Rome from 15 June to 17 July 1998. The outcome – the Rome Statute of the International Criminal Court – establishes a court charged with inherent jurisdiction for genocide, as well as crimes against humanity, war crimes and aggression.[322] Drafting of the genocide provision in the Statute proved to be one of the easiest tasks at Rome, further confirmation of the authoritative nature of the Convention definition. Herman von Hebel and Darryl Robinson have observed that '[a]t the Rome Conference, the definition of the crime of genocide was not discussed in substance . . .'.[323] The Bureau proposed, with virtually no objection,[324]

Parts 1 & 2', (1998) 13ter *Nouvelles études pénales*, p. 1 at p. 5 (emphasis in the original, references omitted).

[318] 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', Vol. I, note 313 above, p. 17, para. 60.

[319] 'Decisions Taken by the Preparatory Committee at its Session Held 11 to 21 February 1997', note 315 above, p. 3, n. 4; see also 'Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands', note 316 above, p. 17, n. 13.

[320] Similar wording appears in its understanding (2) formulated at the time of ratification. Nehemiah Robinson, in his seminal study of the Convention, considered that mental harm within the meaning of art. II of the Convention 'can be caused only by the use of narcotics'. Robinson, *Genocide Convention*, p. ix.

[321] 'Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands', note 316 above, pp. 17–18; 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc. A/CONF.183/2/Add.1, pp. 13–14.

[322] Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, art. 5; subject to an exception concerning war crimes in art. 124.

[323] Herman von Hebel and Darryl Robinson, 'Crimes Within the Jurisdiction of the Court', in Roy Lee, ed., *The International Criminal Court, the Making of the Rome Statute, Issues, Negotiations, Results*, Ardsley, NY: Transnational, 1999, at p. 89.

[324] UN Doc. A/CONF.183/C.1/SR.3, paras. 2, 18, 20 (Germany), 22 (Syria), 24 (United Arab Emirates), 26 (Bahrain), 28 (Jordan), 29 (Lebanon), 30 (Belgium), 31 (Saudi

that the definition of the crime be taken literally from article II of the Convention.[325] The text drawn from article II was submitted by the Drafting Committee to the Committee of the Whole by that body without modification.[326]

Like the International Law Commission in the drafting of the Code of Crimes Against the Peace and Security of Mankind, and the Security Council in the drafting of the statutes of the *ad hoc* tribunals, the Rome conference also had to deal with the forms of participation in the crime of genocide set out in article III of the Convention. The International Law Commission had opted for a general provision dealing with participation, applicable to all crimes covered by the draft Code of Crimes, while the Security Council took a different approach, incorporating the text of article III within the definition of the crime of genocide. At the Rome conference, the Working Group on General Principles agreed to omit article III of the Convention from the definition of genocide, but on the condition that its provisions would be accurately reflected in article 25, dealing with individual criminal responsibility. This result was only partially achieved. The Statute's texts concerning complicity and attempt initially appear to cover the same ground as the corresponding parts of article III of the Genocide Convention.[327] Article III(c) of the Convention creates an offence of incitement that is distinct from incitement as a form of complicity, in that 'direct and public incitement' within the meaning of the Convention may be committed even if

Arabia), 33 (Tunisia), 35 (Czech Republic), 38 (Morocco), 40 (Malta), 41 (Algeria), 44 (India), 49 (Brazil), 54 (Denmark), 57 (Lesotho), 59 (Greece), 64 (Malawi), 67 (Sudan), 72 (China), 76 (Republic of Korea), 80 (Poland), 84 (Trinidad and Tobago), 85 (Iraq), 107 (Thailand), 111 (Norway), 113 (Côte d'Ivoire), 116 (South Africa), 119 (Egypt), 122 (Pakistan), 123 (Mexico), 127 (Libya), 132 (Colombia), 135 (Iran), 137 (United States), 141 (Djibouti), 143 (Indonesia), 145 (Spain), 150 (Romania), 151 (Senegal), 153 (Sri Lanka), 157 (Venezuela), 161 (Italy), 166 (Ireland), 172 (Turkey), 174.

[325] UN Doc. A/CONF.183/C.1/L.53, p. 1; also UN Doc. A/CONF.183/C.1/L.59, p. 2. See also UN Doc. A/CONF.183/C.1/L.58, p. 9; and UN Doc. A/CONF.183/C.1/L.91, p. 2. Academic commentators also took the view that the Convention definition was best left untouched: Leila Sadat Wexler, 'First Committee Report on Jurisdiction, Definition of Crimes and Complementarity', (1997) 13 *Nouvelles études pénales*, p. 163 at p. 169; Jordan J. Paust, 'Commentary on Parts 1 and 2 of the Zutphen Intersessional Draft', (1998) 13bis *Nouvelles études pénales*, p. 27 at p. 27.

[326] UN Doc. A/CONF.183/C.1/L.91, p. 2.

[327] Paragraphs (b), (c) and (d) of art. 25(3) of the Statute cover, somewhat redundantly, what art. III(e) of the Convention accomplishes with a single word, 'complicity'. Paragraph (f) deals with attempt, spelling out the difficult issue of the threshold for an attempt that art. III(d) of the Convention leaves to the discretion of the court.

nobody is in fact incited.[328] For this reason, article 25(3)(e) of the Rome Statute specifies individual criminal liability for a person who '[i]n respect of the crime of genocide, directly and publicly incites others to commit genocide'. The drafting is redundant, it being unnecessary to specify that direct and public incitement to commit genocide must take place 'in respect of the crime of genocide'. The awkward text betrays the concerns of some delegations that inchoate incitement might be extended by interpretation to other crimes within the subject matter jurisdiction of the court, something that was not the drafters' intent.

With respect to conspiracy, article 25(d) of the Rome Statute envisions 'the commission or attempted commission of such a crime by a group of persons acting with a common purpose'. Under the Statute, conspiracy can occur only when the underlying crime is also committed or attempted. The Statute does not, therefore, cover the inchoate form of conspiracy, something contemplated by article III(b) of the Genocide Convention. No real debate took place on this point at Rome. The Statute follows the approach of the International Law Commission's 1996 draft Code, and the inconsistency with the terms of the Genocide Convention was probably inadvertent.[329]

During the drafting of the Rome Statute, isolated and unsuccessful initiatives tried to enlarge the list of groups protected by the definition.[330] In a footnote to the genocide provision in its final draft, the Preparatory Committee 'took note of the suggestion to examine the possibility of addressing "social and political" groups in the context of crimes against humanity'.[331] In debate in the Committee of the Whole at Rome, Cuba argued again for inclusion of social and political groups.[332] Ireland answered that 'we could improve upon the definition

[328] This interpretation of art. III(c) of the Convention has been endorsed by the International Criminal Tribunal for Rwanda, in *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, paras. 548–61.

[329] UN Doc. A/CONF.183/C.1/WGGP/L.3.

[330] 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', Vol. I, note 313 above, pp. 17–18, para. 60; *ibid.*, Vol. II, p. 57.

[331] 'Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Draft Final Act', UN Doc. A/CONF.183/2/Add.1, p. 11, n. 2. See also 'Decisions Taken by the Preparatory Committee at Its Session Held 11 to 21 February 1997', note 315 above, p. 3, n. 2; 'Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands', note 316 above, p. 17, n. 11.

[332] UN Doc. A/CONF.183/C.1/SR.3, para. 100.

if we were drafting a new genocide convention', but said it was better to retain the existing formulation.[333]

The Rome Statute requires the preparation of an additional instrument, entitled the 'Elements of Crimes', intended to 'assist the Court in the interpretation and application' of the provisions that define the infractions, including genocide.[334] The Elements form part of the 'applicable law', according to article 21(1)(a) of the Statute, although in case of conflict with the Statute itself, the latter takes precedence.[335] They were drafted by the Preparatory Commission of the International Criminal Court and adopted by the Assembly of States Parties in September 2002 after the Statute had entered into force.[336] The United States, which originated the idea, submitted a draft 'Elements' text at the Rome conference that reflected some of its traditional positions on the definition of genocide.[337] At the February 1999 session of the Preparatory Commission, the United States presented a quite new and different text on the elements of the crime of genocide.[338]

[333] Author's personal notes of debate, Committee of the Whole, 17 June 1998. However, there is no trace of these remarks in the summary records of the session: UN Doc. A/CONF.183/C.1/SR.3, para. 166.

[334] Rome Statute of the International Criminal Court, note 322 above, art. 9. Also: 'Report of the Preparatory Commission for the International Criminal Court, Addendum, Finalized Draft Text of the Elements of Crimes', UN Doc. PCNICC/2000/INF/3/Add.2, p. 5.

[335] *Ibid.*, art. 9(3).

[336] 'Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court', UN Doc. A/CONF.183/10, Annex I.F.

[337] UN Doc. A/CONF.183/C.1/L.10, p. 1:

> (i) That the accused intentionally committed one or more of the following acts against a person in a national, ethnical, racial or religious group, because of that person's membership in that group:
> a. Killing;
> b. Causing serious bodily or mental harm;
> c. Inflicting conditions of life intended to bring about physical destruction of the group in whole or in part;
> d. Imposing measures intended to prevent births within the group; or
> e. Forcibly transferring children of the group to another group;
> (ii) That when the accused committed such act, there existed a plan to destroy such group in whole or in part;
> (iii) That when the accused committed such act, the accused had intent to take part in or had knowledge of the plan to destroy such group in whole or in part.

[338] See 'Draft Elements of Crimes', UN Doc. PCNICC/1988/DP.4. See also 'Discussion Paper Proposed by the Co-ordinator, Article 6: The Crime of Genocide', UN Doc. PCNICC/1999/WGEC/RT.1; 'Discussion Paper Proposed by the Co-ordinator,

Although only summary attention had been paid to article 6 during the drafting of the Rome Statute, some of the issues involved in interpretation of the crime of genocide were explored in more detail by the Preparatory Commission in the course of preparing the Elements of Crimes. In particular, the Elements address various aspects of the mental element for the commission of genocide. They also impose a contextual element that does not appear in the Convention itself: 'The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.' This paragraph, which is placed in the elements of each specific act of genocide, is further developed in the Introduction:

> With respect to the last element listed for each crime: The term 'in the context of' would include the initial acts in an emerging pattern; The term 'manifest' is an objective qualification; Notwithstanding the normal requirement for a mental element provided for in article 30, and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis.

The term 'circumstance' appears in article 30 of the *Rome Statute*, requiring as a component of the *mens rea* of crimes that an accused have 'awareness that a circumstance exists'.[339]

In its draft 'definitional elements' on the crime of genocide, which were circulated at the Rome conference, the United States had proposed that the mental element of genocide require a 'plan to destroy such group in whole or in part'.[340] During subsequent debate in the Preparatory Commission, the United States modified the 'plan' requirement, this time borrowing from crimes against humanity the concept of 'a widespread or systematic policy or practice'.[341] The wording was widely criticized as an unnecessary addition to a well-accepted definition, with no basis in case law or in the *travaux* of the

Suggested Comments Relating to the Crime of Genocide', UN Doc. PCNICC/1999/WGEC/RT.3; 'Proposal Submitted by Colombia', UN Doc. PCNICC/1999/WGEC/DP.2; 'Proposal Submitted by France', UN Doc. PCNICC/1999/WGEC/DP.1.

[339] 'Rome Statute of the International Criminal Court', (2002) 2187 UNTS 90, art. 30(3).

[340] 'Annex on Definitional Elements for Part Two Crimes', UN Doc. A/CONF.183/C.1/L.10, p. 1. The elements also specify that 'when the accused committed such act, there existed a plan to destroy such group in whole or in part'.

[341] The draft proposal stated that genocide was carried out 'in conscious furtherance of a widespread or systematic policy or practice aimed at destroying the group': 'Draft Elements of Crimes', UN Doc. PCNICC/1999/DP.4, p. 7.

Convention.[342] Israel, however, made the quite compelling point that it was hard to conceive of a case of genocide that was not conducted as a 'widespread and systematic policy or practice'. While the Preparatory Commission was debating the draft Elements, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia ruled that genocide could be committed by an individual, acting alone, and in the absence of any State or organisational plan or policy.[343] Probably in reaction to this decision, a consensus appeared to develop recognizing the 'plan' element, although in a more cautious formulation.[344] As proposed by the Preparatory Commission, the Elements were formally adopted by the Assembly of States Parties at its first session, held in September 2002 shortly after the entry into force of the Rome Statute.[345]

The ad hoc *tribunals*

While the International Law Commission was considering its draft statute of an international criminal court, events compelled the creation of a court on an *ad hoc* basis in order to address the atrocities occurring in the former Yugoslavia. In late 1992, as war raged in Bosnia, a Commission of Experts established by the Security Council identified a range of war crimes that had been committed and that were continuing. It urged the establishment of an international criminal tribunal, an idea originally recommended by Lord Owen and Cyrus Vance.[346] The General Assembly supported the proposal in a December 1992 resolution.[347] The rapporteurs appointed under the Moscow Human Dimension Mechanism of the Conference on Security and Co-operation in Europe, Hans Correll, Gro Hillestad Thune and Helmut Türk, prepared a draft statute.[348] Several governments also submitted draft statutes or otherwise

[342] Comments by Canada, Norway, New Zealand and Italy, 17 February 1999 (author's personal notes).

[343] *Prosecutor* v. *Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 100.

[344] 'Discussion paper proposed by the Co-ordinator, Article 6: The Crime of Genocide', UN Doc. PCNICC/1999/WGEC/RT.1: 'The accused knew . . . that the conduct was part of a similar conduct directed against that group.'

[345] Elements of Crimes, ICC-ASP/1/3, pp. 108–55.

[346] 'Interim Report of the Commission of Experts', UN Doc. S/25274, para. 74.

[347] 'The Situation in Bosnia and Herzegovina', UN Doc. A/RES/47/121, para. 10.

[348] *Ibid.* The CSCE rapporteurs were concerned with establishing an overlap between applicable international law and the law in force within the territory of the former Yugoslavia. They proposed that the crime of genocide be included within the statute because it had also been introduced in the domestic legislation of Yugoslavia.

commented upon the creation of a tribunal. There was general agreement that genocide should be within the subject matter jurisdiction of the court and that the definition should conform to the text in the Genocide Convention.[349]

On 22 February 1993, the Security Council decided to establish a tribunal to prosecute 'persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991'.[350] A draft statute prepared by the Secretary-General[351] was adopted without modification by the Security Council in

[349] France: 'Letter Dated 10 February 1993 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General', UN Doc. S/25266 (1993), annex V. Art. VI(1)(a) of the French proposal reproduced art. II of the Genocide Convention. Italy: 'Letter Dated 16 February 1993 from the Permanent Representative of Italy to the United Nations Addressed to the Secretary-General', UN Doc. S/25300 (1993), annex I. Art. 4(b) of the Italian draft statute read: 'Crimes of genocide, in violation of the Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature in New York on 9 December 1948.' See also the brief explanatory note to art. 4 in annex II. Organization of Islamic Conference (OIC): 'Letter Dated 31 March 1993 from the Representatives of Egypt, the Islamic Republic of Iran, Malaysia, Pakistan, Saudi Arabia, Senegal and Turkey to the United Nations Addressed to the Secretary-General', UN Doc. A/47/920*, S/25512* (1993), annex. Under the title 'Applicable Law', the OIC draft listed: 'Genocide, violations of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.' Russian Federation: 'Letter Dated 5 April 1993 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General', UN Doc. S/25537 (1993), annex I. Art. 12(1)(b) of the Russian draft said: 'The crime of genocide, as defined in the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 or in legislation which is not contrary to international law and which, at the time the crime was committed, was in force in the State formed on the territory of the former Yugoslavia in which the crime was committed.' United States: 'Letter Dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General', UN Doc. S/25575 (1993), annex II. According to art. 10(b)(ii), the Tribunal was to have jurisdiction over 'Acts that violate the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.' Canada: 'Letter Dated 13 April 1993 from the Permanent Representative of Canada to the United Nations Addressed to the Secretary-General', UN Doc. S/25594 (1993), annex. The Canadian comments said: 'Canada interprets serious violations of international humanitarian law to include . . . (c) Acts which violate the Convention on the Prevention and Punishment of the Crime of Genocide . . .' The Netherlands did not propose a genocide provision, but appeared to consider that this was subsumed within the rubric of crimes against humanity: 'Note Verbale Dated 30 April 1993 from the Permanent Representative of the Netherlands to the United Nations Addressed to the Secretary-General', UN Doc. S/25716 (1993).

[350] UN Doc. S/RES/808 (1993).

[351] 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)', UN Doc. S/25704.

May 1993.[352] According to the Secretary-General's report, the tribunal was to apply rules of international humanitarian law which are 'beyond any doubt part of the customary law'.[353] The report continued: 'The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in . . . the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.'[354] As a creation of the Security Council, the International Criminal Tribunal for the former Yugoslavia is not exactly what the drafters of article VI of the Convention had in mind. Article VI refers to a court applicable to 'those Contracting Parties which shall have accepted its jurisdiction'. Yugoslavia, of course, did not accept the jurisdiction of the Tribunal.

In November 1994, acting on a request from Rwanda,[355] the Security Council voted to create a second *ad hoc* tribunal, charged with the prosecution of genocide and other serious violations of international humanitarian law committed in Rwanda and in neighbouring countries during the year 1994.[356] Its Statute closely resembles that of the International Criminal Tribunal for the former Yugoslavia, although the war crimes provisions reflect the fact that the Rwandan genocide took place within the context of a purely internal armed conflict.[357] The resolution creating the Tribunal expressed the Council's 'grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda', referring to the reports of the Special Rapporteur for Rwanda of the United Nations Commission on Human Rights,[358] as well as the preliminary report of the Commission of Experts established some time earlier.[359]

[352] UN Doc. S/RES/827 (1993), annex. [353] Note 351 above, para. 34.
[354] *Ibid*., para. 35; see also para. 45. [355] UN Doc. S/1994/1115.
[356] UN Doc. S/RES/955 (1994), annex.
[357] On the Rwandan genocide, see Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families: Stories from Rwanda*, New York: Farrar Strauss and Giroux, 1998; Gerard Prunier, *The Rwanda Crisis: History of a Genocide*, New York: Columbia University Press, 1995; Colette Braeckman, *Rwanda, Histoire d'un génocide*, Paris: Fayard, 1994; Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda*, New York, Washington, London and Brussels: Human Rights Watch, Paris: International Federation of Human Rights, 1999.
[358] UN Doc. S/1994/1157, annex I and annex II.
[359] 'Preliminary Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)', UN Doc. S/1994/1125; 'Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)', UN Doc. S/1994/1405.

The applicable provisions concerning genocide are the same in the statutes of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.[360] They consist of three paragraphs, the first stating that: 'The [International Tribunal for the former Yugoslavia] [International Tribunal for Rwanda] shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.' The second paragraph comprises the text of article II of the Convention, minus the introductory words '[i]n this Convention'. The third paragraph lists 'other acts' punishable, following article III of the Convention, namely, conspiracy, direct and public incitement, attempt and complicity. This approach to article III, it will be recalled, differs from that of the International Law Commission, which placed the 'other acts' and forms of criminal participation within a general provision applicable to all crimes. Because the *ad hoc* tribunals have jurisdiction over war crimes and crimes against humanity as well as genocide, their statutes also include such a general provision. As a result, each statute contains two different provisions dealing with complicity and incitement that are applicable to the crime of genocide.

In January 2002, the United Nations established a third international tribunal, the Special Court for Sierra Leone. Although its creation results from an initiative of the Security Council,[361] the Statute itself is an international agreement reached between the Government of Sierra Leone and the United Nations.[362] The Statute is quite obviously derived from the Statute of the International Criminal Tribunal for Rwanda, but contains no provision for the crime of genocide. According to the

[360] 'Statute of the International Criminal Tribunal for the Former Yugoslavia', note 270 above, art. 4; 'Statute of the International Criminal Tribunal for Rwanda', note 270 above, art. 2. See M. Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, Irvington-on-Hudson, NY: Transnational Publishers, 1996; Roger S. Clark and Madeleine Sann, eds., *The Prosecution of International War Crimes*, New Brunswick, NJ: Transaction Publishers, 1996; Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, Irvington-on-Hudson, NY: Transnational Publishers, 1995; Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for Rwanda*, Irvington-on-Hudson, NY: Transnational Publishers, 1997; William A. Schabas, *The UN International Criminal Tribunals, the former Yugoslavia, Rwanda, Sierra Leone*, Cambridge: Cambridge University Press, 2006.

[361] UN Doc. S/RES/1315 (2000).

[362] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002.

Secretary-General, '[b]ecause of the lack of any evidence that the massive, large-scale killing in Sierra Leone was at any time perpetrated against an identified national, ethnic, racial or religious group with an intent to annihilate the group as such, the Security Council did not include the crime of genocide in its recommendation, nor was it considered appropriate by the Secretary-General to include it in the list of international crimes falling within the jurisdiction of the Court'.[363] Likewise, the fourth United Nations criminal court to be established, the Special Tribunal for Lebanon, is targeted at specific terrorist bombings and does not have jurisdiction over the crime of genocide.[364]

[363] 'Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone', UN Doc. S/2000/915, para. 13.
[364] UN Doc. S/RES/1757 (2007).

3

Groups protected by the Convention

The chapeau of article II of the Convention on the Prevention and Punishment of the Crime of Genocide states that the intent to destroy must be directed against one of four enumerated groups: national, racial, ethnical or religious. The Convention does not even invite application to what might be called analogous groups, a departure from General Assembly Resolution 96(I), which referred to 'other groups' in its definition of genocide.[1] Moreover, the drafters of the Convention quite intentionally excluded 'political' groups from its scope,[2] as they did reference to 'ideological',[3] 'linguistic'[4] and 'economic'[5] groups. The Convention's list of protected groups has probably provoked more debate since 1948 than any other aspect of the instrument. This is often reflected in frustration that the victims of a particular atrocity, that otherwise would respond to the terms of the Convention, do not neatly fit within the four categories. According to scholars Frank Chalk and Kurt Jonassohn, 'the wording of the Convention is so restrictive that not one of the genocidal killings committed since its adoption is covered by it'.[6] They add that 'potential perpetrators have taken care to victimize only those groups that are not covered by the convention's definition'.[7]

The limited scope of the Convention definition has led many academics and human rights activists in two distinct directions. There have been frequent attempts to stretch the Convention definition, often going beyond all reason, in order to fit particular atrocities within the meaning

[1] GA Res. 96(I). The resolution is discussed in chapter 1, pp. 52–8 above.
[2] See pp. 153–65 below. [3] UN Doc. E/623/Add.4.
[4] UN Doc. A/AC.10/41; UN Doc. A/362, appendix II, art. I § I.
[5] UN Doc. A/C.6/214.
[6] Frank Chalk and Kurt Jonassohn, 'The Conceptual Framework', in Frank Chalk and Kurt Jonassohn, eds., *The History and Sociology of Genocide*, New Haven and London: Yale University Press, 1990, pp. 3–43 at p. 11. See also Kurt Jonassohn, 'What Is Genocide?', in Helen Fein, ed., *Genocide Watch*, New Haven: Yale University Press, 1991, pp. 17–26; and Kurt Jonassohn and Karin Solveig Björnson, *Genocide and Gross Human Rights Violations*, New Brunswick, NJ: Transaction, 1998, p. 1.
[7] Chalk and Jonassohn, 'Conceptual Framework'.

of article II. Sometimes this is presented as the argument that the lacunae in the definition are filled by customary norms.[8] Other commentators have proposed new definitions in order to enlarge the scope of the term, among them Stefan Glaser,[9] Israel W. Charny,[10] Vahakn Dadrian,[11] Helen Fein,[12] and Frank Chalk and Kurt Jonassohn.[13] The most extreme position applies the term 'genocide' to any and all groups. According to Pieter Drost, one of the advocates of this view: 'a convention on genocide cannot effectively contribute to the protection of certain described minorities when it is limited to particular defined groups . . . It serves no purpose to restrict international legal protection to some groups; firstly, because the protected members always belong at the same time to other unprotected groups.'[14]

Concerns about the scope of groups protected by the Convention may represent a passing phase in the law of genocide. For several decades, the

[8] Lori Lyman Bruun, 'Beyond the 1948 Convention – Emerging Principles of Genocide in Customary International Law', (1993) 17 *Maryland Journal of International Law and Trade*, p. 193 at pp. 210–18; Beth Van Schaack, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot', (1997) 106 *Yale Law Journal*, p. 2259 at pp. 2280–2.

[9] Stefan Glaser, *Droit international pénal conventionnel*, Brussels: Bruylant, 1970, p. 112, para. 83.

[10] Israel W. Charney, 'Toward a Generic Definition of Genocide', in George J. Andreopoulos, *Genocide, Conceptual and Historical Dimensions*, Philadelphia: University of Pennsylvania Press, 1994, pp. 64–94 at p. 75: 'Genocide in the generic sense is the mass killing of substantial numbers of human beings, when not in the course of military action against the military forces of an avowed enemy, under conditions of the essential defenselessness and helplessness of the victims.'

[11] Vahakn Dadrian, 'A Typology of Genocide', (1975) 5 *International Review of Modern Sociology*, p. 201: 'Genocide is the successful attempt by a dominant group, vested with formal authority and/or with preponderant access to the overall resources of power, to reduce by coercion or lethal violence the number of a minority group whose ultimate extermination is held desirable and useful and whose respective vulnerability is a major factor contributing to the decision for genocide.'

[12] Helen Fein, 'Genocide, Terror, Life Integrity, and War Crimes', in Andreopoulos, *Genocide*, pp. 95–107 at p. 97: 'Genocide is sustained purposeful action by a perpetrator to physically destroy a collectivity directly or through interdiction of the biological and social reproduction of group members.'

[13] Chalk and Jonassohn, 'Conceptual Framework', p. 23: 'Genocide is a form of onesided mass killing in which a state or other authority intends to destroy a group, as that group and members in it are defined by the perpetrator.' See also Frank Chalk, 'Redefining Genocide', in Andreopoulos, *Genocide*, pp. 47–63 at p. 52; Frank Chalk, 'Definitions of Genocide and Their Implications for Prediction and Prevention', (1989) 4 *Holocaust and Genocide Studies*, p. 149. Chalk and Jonassohn's proposed definition is endorsed by Irving Louis Horowitz, *Taking Lives: Genocide and State Power*, 4th edn, New Brunswick, NJ: Transaction Publishers, 1997, pp. 12–13.

[14] Pieter Nicolaas Drost, *The Crime of State*, Vol. 2, *Genocide*, Leyden: A. W. Sijthoff, 1959, pp. 122–3.

Convention was the only international legal instrument enjoying widespread ratification that imposed meaningful obligations upon States in cases of atrocities committed within their own borders and, as a general rule, by their officials. The temptation was great to subsume a variety of State-sanctioned criminal behaviour within its ambit due to the absence of other comparable legal tools.[15] This problem has diminished in recent years with the progressive development of international criminal law in the field of human rights abuses.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[16] and the statutes of the *ad hoc* criminal tribunals[17] stand out among the newer instruments. Case law of the *ad hoc* tribunals for the former Yugoslavia and Rwanda has both clarified and enlarged the scope of 'crimes against humanity' in customary law.[18] The entry into force, on 1 July 2002, of the Rome Statute of the International Criminal Court, constitutes the culmination of the process. Besides genocide, the Statute takes subject matter jurisdiction over crimes against humanity, defined as criminal acts 'committed as part of a widespread or systematic attack directed against any civilian population . . .'.[19] Such acts include 'persecution', perpetrated against 'any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are universally recognized as impermissible under international law'.[20] Consequently, many of the so-called lacunae of the Genocide Convention have been or are in the process of being filled by international law.

Raphael Lemkin, in his 1933 proposal to the Fifth International Conference for the Unification of Penal Law, sought to criminalize actions aimed at the destruction of a 'racial, religious or social group'.[21]

[15] Matthew Lippman, 'The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide', (1985) 3 *Boston University International Law Journal*, p. 1 at p. 62.

[16] (1987) 1465 UNTS 85.

[17] 'Statute of the International Criminal Tribunal for the Former Yugoslavia', UN Doc. S/RES/827, annex; 'Statute of the International Criminal Tribunal for Rwanda', UN Doc. S/RES/955, annex.

[18] *Prosecutor* v. *Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

[19] Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, art. 7(1).

[20] *Ibid.*, art. 7(1)(h).

[21] Raphael Lemkin, 'Terrorism', in *Actes de la Ve Conférence Internationale pour l'Unification du Droit Pénal*, Paris, 1935. See also Raphael Lemkin, *Axis Rule in Occupied*

Lemkin's 1944 book, which coined the term 'genocide', said that '[b]y "genocide" we mean the destruction of a nation or of an ethnic group'.[22] Lemkin called for the development of 'provisions protecting minority groups from oppression because of their nationhood, religion, or race'.[23] Lemkin's writings indicate he conceived of the repression of genocide within the context of the protection of what were then called 'national minorities'. The same perception was shared by his contemporaries, such as Vespasian Pella, who wrote: 'Le crime de genocide est, selon le professeur Lemkin, constitué par un ensemble d'actes dont le but est la destruction des bases essentielles de vie de groupes nationaux, avec l'intention d'annihiler ces groupes.'[24] Use of terms such as 'ethnic', 'racial' or 'religious' merely fleshed out the idea, without at all changing its essential content. According to the initial Saudi Arabian draft convention, submitted to the General Assembly during the 1946 debate on Resolution 96(I), '[g]enocide is the destruction of an ethnic group, people or nation'.[25] But, among those who participated in developing the law of genocide in its early years, some saw the crime differently, and hoped to incorporate other groups within its scope.

The Secretariat draft, prepared in early 1947, replaced the General Assembly's reference to 'other groups' with two categories, 'national' and 'linguistic' groups.[26] It began the text with the title '[p]rotected groups', furnishing an exhaustive enumeration: 'The purpose of this Convention is to prevent the destruction of racial, national, linguistic, religious or political groups of human beings.'[27] The three experts convened to examine the Secretariat draft disagreed on this subject.

A note from the Secretary-General in preparation for the sessions of the Ad Hoc Committee said that the Committee would have to decide whether or not to include all of the groups set out in the Secretariat draft,

Europe, Analysis of Government, Proposals for Redress, Washington: Carnegie Endowment for World Peace, 1944, p. 91.

[22] *Ibid.*, p. 79. [23] *Ibid.*, pp. 93–4.

[24] Vespasian V. Pella, *La guerre-crime et les criminels de guerre, Réflexions sur la justice pénale internationale, ce qu'elle est ce qu'elle devrait être*, Neuchatel: Éditions de la baconnière, 1964, p. 80, n. 1.

[25] UN Doc. A/C.6/86.

[26] In its explanatory comments on the draft, the Secretariat said that, on the subject of groups to be included, it had decided to follow the General Assembly resolution: UN Doc. E/447, pp. 17 and 22.

[27] UN Doc. A/AC.10/41; UN Doc. A/362, appendix II, art. I § I.

or only some of them.[28] For the members of the Ad Hoc Committee, coverage of national, racial and religious groups was common ground, notwithstanding a suggestion that the term 'national' lacked a degree of clarity.[29] However, there were very divergent views within the Committee as to whether or not to include political groups within the ambit of the definition.[30]

In the Sixth Committee of the General Assembly, every category except 'racial' groups led to debate.[31] Several delegations formulated the view that the protected groups should be immutable, and not subject to individual decisions to join or leave the group.[32] The Committee added 'ethnical' to the enumeration.[33] Many States expressed discomfort with the reference to 'religious' groups.[34] Predictably, the sharpest conflict in the Sixth Committee emerged on inclusion of political groups.[35] Initially, it decided to retain them.[36] Later in the session, after the drafting committee had presented its report, renewed proposals to remove political groups resulted in another vote reversing the earlier ruling.[37]

'Groups'

Lemkin's early work, as well as his major study, *Axis Rule in Occupied Europe*, referred to 'groups' as the entity that deserved protection by the emerging law of genocide.[38] But sometimes Lemkin mentioned 'minority groups', suggesting that he viewed the two concepts as somewhat synonymous.[39] The drafting history of the Convention does not record any meaningful discussion about use of the term 'group'. Nehemiah Robinson, in his study of the Genocide Convention, proposed an obvious and succinct formulation: 'groups consist of individuals'.[40]

[28] 'Ad Hoc Committee on Genocide, Ad Hoc Committee's Terms of Reference, Note by the Secretary General', UN Doc. E/AC.25/2.
[29] UN Doc. E/AC.25/SR.10, p. 16.
[30] UN Doc. E/AC.25/SR.1, pp. 4–8. See also UN Doc. E/AC.25/SR.3, pp. 5–6 and 11; UN Doc. E/AC.25/SR.4, pp. 10–12; UN Doc. E/AC.25/SR.13, pp. 2–4; UN Doc. E/AC.25/SR.3, p. 12; UN Doc. E/AC.25/SR.13, p. 4; and UN Doc. E/AC.25/SR.24, pp. 4 and 6.
[31] UN Doc. A/C.6/SR.69 (Shawcross, United Kingdom).
[32] *Ibid.* (Amado, Brazil).
[33] UN Doc. A/C.6/SR.73 (Petren, Sweden); UN Doc. A/C.6/SR.74 (Petren, Sweden).
[34] UN Doc. A/C.6/SR.69, 75. [35] UN Doc. A/C.6/SR.74–75. [36] UN Doc. A/C.6/SR.75.
[37] UN Doc. A/C.6/SR.128. [38] Lemkin, 'Terrorism'. See also Lemkin, *Axis Rule*, p. 91.
[39] Lemkin, *Axis Rule*, pp. 79 and 93–4.
[40] Nehemiah Robinson, *The Genocide Convention: A Commentary*, New York: Institute of Jewish Affairs, 1960, p. 58.

The word 'groups' appears in other international instruments in the field of human rights. General Assembly Resolution 96(I) states that: 'Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings.' The Universal Declaration of Human Rights affirms that education 'shall promote understanding, tolerance and friendship among all nations, racial or religious groups'.[41] Article 30 of the Universal Declaration speaks of 'any State, group or person', indicating the ordinary meaning of 'group', that is, an entity composed of more than one individual.[42] The minorities provision in the International Covenant on Civil and Political Rights contemplates members of a minority 'group'.[43] Article 13(1) of the International Covenant on Economic, Social and Cultural Rights speaks of 'nations and all racial, ethnic or religious groups'.[44] The International Convention for the Elimination of All Forms of Racial Discrimination uses the expression 'racial or ethnic groups'.[45] The Convention on the Rights of the Child lists 'all peoples, ethnic, national and religious groups and persons of indigenous origin'.[46]

Professor Natan Lerner, in his book, *Group Rights and Discrimination in International Law*, employs the term 'groups' in a generic sense, as if it were unnecessary to precede it with the adjectives religious, ethnic or national, much in the way 'minorities' is often used to refer not to any minority in a numeric sense but more specifically to ethnic, linguistic and religious minorities. Lerner regards the term 'groups' as an improvement on references to 'minorities', an archaic usage that is to an extent stigmatized. 'The term may or may not be preceded by qualifying notions such as "racial", "ethnic", "religious", "cultural", or "linguistic"', he writes. 'In international law, the notion of group requires the presence

[41] Universal Declaration of Human Rights, GA Res. 217 A (III), UN Doc. A/810, art. 26(2).
[42] *Ibid.* See also the International Covenant on Civil and Political Rights, (1976) 9 UNTS 171, art. 5(1); and the International Covenant on Economic, Social and Cultural Rights, (1976) 993 UNTS 3, art. 5(1). Similarly, the American Convention on Human Rights, (1979) 1144 UNTS 123, OASTS 36, art. 13(5).
[43] *Ibid.*, art. 27. See also the Convention on the Rights of the Child, GA Res. 44/25, annex, art. 17(d); and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, GA Res. 47/135, annex, art. 5.
[44] Note 42 above. See also the Convention on the Rights of the Child, note 43 above, art. 30.
[45] (1969) 660 UNTS 195, art. 1(4). See also art. 2(2), which refers to 'racial groups', art. 4(a), which refers to 'any race or group of persons of another colour or ethnic origin', and art. 7, which speaks of 'racial or ethnical groups'.
[46] Convention on the Rights of the Child, note 43 above, art. 29(1)(d).

of those already mentioned unifying, spontaneous (as opposed to artificial or planned) and permanent factors that are, as a rule, beyond the control of the members of the group.'[47]

Given that minorities constitute the principal beneficiaries of genocide law, it might be asked why the drafters of the Convention did not opt for this designation, already well-recognized in international jurisprudence. First, the term 'minorities' may have been felt to have a technical meaning that might limit the scope of the Convention. Its use, in the treaties and declarations of post-First World War Europe, implies the protection of 'national minorities' with ties to their 'kin-State', or, in exceptional cases such as European Jews, a religious minority without any such kin-State.[48] Secondly, the drafters may have understood that the majority of a population, for example in an occupied territory, might also become victim of genocide.[49] Benjamin Whitaker observed that a victim group can constitute either a minority or a majority.[50] The reference, in article II(e) of the Convention, to transferring children from one 'group to another group' implies that the term encompasses both majority and minority.[51] Certainly the label 'group' is flexible, enabling the Convention to apply without question to the destruction of

[47] Natan Lerner, *Group Rights and Discrimination in International Law*, Dordrecht, Boston and London: Martinus Nijhoff, 1990, pp. 30–1.

[48] On the minorities treaties regime, see F. Capotorti, 'Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities', UN Doc. E/CN.4/Sub.2/384/Add.1–7, UN Sales No. E.78.XIV.I. See also P. de Azcarate, *The League of Nations and National Minorities*, Washington: Carnegie Endowment, 1945; Patrick Thornberry, *International Law and the Rights of Minorities*, Oxford: Clarendon Press, 1991; and Nathan Feinberg, *La question des minorités à la Conférence de la paix de 1919–1920 et l'action juive en faveur de la protection internationale des minorités*, Paris: Librairie Arthur Rousseau, 1929.

[49] An example might be the atrocities committed against the Hutu of Burundi in 1972. The Hutu represent the majority of the population. See René Lemarchand, 'Burundi: The Politics of Ethnic Amnesia', in Helen Fein, ed., *Genocide Watch*, New Haven: Yale University Press, 1991, pp. 70–86; René Lemarchand and David Martin, *Selective Genocide in Burundi*, London: Minority Rights Group, 1974; René Lemarchand, 'The Hutu-Tutsi Conflict in Burundi', in Jack Nusan Porter, *Genocide and Human Rights: A Global Anthology*, Lanham, MD, New York and London: University Press of America, 1982, pp. 195–218.

[50] Benjamin Whitaker, 'Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide', UN Doc. E/CN.4/Sub.2/1985/6, p. 16, para. 29. See also Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law*, Oxford: Clarendon Press, 1997, p. 33.

[51] In the same sense, International Convention for the Elimination of All Forms of Racial Discrimination, note 45 above, art. 4.

entities that may not qualify as 'minorities', or for which expressions such as 'peoples' may be preferable.[52]

Some States, in introducing offences of genocide into their own domestic law, have deviated from the Convention terminology. In place of the term 'group', the Portuguese penal code of 1982 uses 'community',[53] although the word disappeared in the 1995 revision when law-makers decided to return to the letter of the Convention definition.[54] The Romanian penal code of 1976 employs the term 'collectivity', but this appears to have been chosen in order to reflect the meaning of 'group' within article II of the Convention, not to modify it.[55]

Groups listed in the Convention

The four groups listed in the Convention resist efforts at precise definition. Professor Joe Verhoeven has pointed out that over the years many have tried to provide some clarity to the terms, but that their efforts remain unconvincing. This is hardly a surprise, he continues, because the concepts of race, ethnic and national group are a *priori* imprecise.[56] Israeli law avoided any discussion about the nature of 'groups' by simply reformulating the definition of genocide so as to refer to 'crimes against the Jewish people'.[57] Nothing in the record suggests that Eichmann ever challenged the fact that the victims of Nazi atrocities were the 'Jewish people'. The issue does not appear to have been particularly controversial in litigation concerning the conflict in Bosnia. In *Krstić*, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia concluded that 'Bosnian Muslims' were a 'national group',[58] a finding that was not challenged on appeal and that was accepted by the Appeals Chamber.[59]

[52] ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, ILO, *Official Bulletin*, vol. LXXII, 1989, Ser. A, No. 2, p. 63, art. 1(2); James Crawford, *The Rights of Peoples*, Oxford: Clarendon Press, 1992.

[53] Penal Code of 1982 (Portugal), art. 189.

[54] Decree-Law No. 48/95 of 15 March 1995 (Penal Code (Portugal), art. 239).

[55] Penal Code (Romania), 1976, art. 357. However, it also uses the term 'group': 'The commission of any of the following acts for the purpose of completely or partially destroying a collectivity or a national, ethnic, racial, or religious group.'

[56] Joe Verhoeven, 'Le crime de génocide, originalité et ambiguïté', [1991] *Revue belge de droit international*, p. 5.

[57] Nazi and Nazi Collaborators (Punishment) Law, 1950 (Law 5710/1950), s. I(a).

[58] *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, paras. 559–60.

[59] *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Judgment, 19 April 2004, para. 6.

The difficulties in the application of the four concepts can be seen in the case of Rwanda. The Rwandan Tutsis are, it is widely believed, descendants of Nilotic herders, whereas the Rwandan Hutus are considered to be of 'Bantu' origin from south and central Africa. Historically, their economies were different, the Tutsis raising cattle while the Hutus tilled the soil. There are genomic differences, a typical Tutsi being tall and slender, with a fine, pointed nose, a typical Hutu being shorter with a flatter nose. These differences are visible in some, but not in many others. Rwandan Tutsis and Hutus speak the same language, practise the same religions and have essentially the same culture. Mixed marriages are common. Distinguishing between them was so difficult that the Belgian colonizers established a system of identity cards, and determined what Rwandan law calls 'ethnic origin' based on the number of cattle owned by a family.[60] Yet the hatred that fired and drove the genocide in 1994 was undoubtedly directed towards a 'national, ethnical, racial or religious group'. And, if the Tutsi of Rwanda are not such a group, what are they? After initially deliberating over the point, Trial Chambers of the International Criminal Tribunal for Rwanda have now taken judicial notice of the fact that the Tutsi, as well as the Hutu and the Twa, were ethnic groups within Rwanda at the time of the 1994 genocide.[61]

Generally, it is the perpetrator of genocide who defines the individual victim's status as a member of a group protected by the Convention.[62] The Nazis, for example, had detailed rules establishing, according to objective criteria, who was Jewish and who was not. It made no difference if the individual, perhaps a non-observant Jew of mixed parentage, denied belonging to the group. As Jean-Paul Sartre wrote in *Réflexions sur la question juive*: 'Le juif est un homme que les autres hommes tiennent pour juif: voilà la vérité simple d'où il faut partir.

[60] André Guichaoua, *Les crises politiques au Rwanda et au Burundi (1993–1994)*, Paris: Karthala, 1995; Jean-Pierre Chrétien, *Le défi de l'ethnisme; Rwanda et Burundi: 1990–1996*, Paris: Karthala, 1997; G. Prunier, *The Rwanda Crisis, 1959–1994: History of a Genocide*, Kampala: Fountain Publishers, 1995; Filip Reyntjens, *L'Afrique des Grands Lacs en crise*, Paris: Karthala, 1994.

[61] *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment, 1 December 2003, para. 241.

[62] For consideration of this question from the standpoint of minorities law, see John Packer, 'On the Content of Minority Rights', in J. Räikkä, ed., *Do We Need Minority Rights*, Dordrecht: Kluwer, 1996, pp. 121–78 at pp. 124–5; John Packer, 'Problems in Defining Minorities', in B. Bowring and D. Fottrell, eds., *Minority and Group Rights Towards the New Millennium*, The Hague: Kluwer, 1999.

En ce sens le démocrate a raison contre l'antisémite: c'est l'antisémite qui fait le juif.'[63]

In Rwanda, Tutsis were betrayed by their identity cards, for in many cases there was no other way to tell. Problems with the four categories in article II of the Convention have led some writers to argue for a purely subjective approach.[64] If the offender views the group as being national, racial, ethnic or religious, then that should suffice, they contend. In *Kayishema and Ruzindana*, a Trial Chamber of the International Criminal Tribunal for Rwanda adopted a purely subjective approach, noting that an ethnic group could be 'a group identified as such by others, including perpetrators of the crimes'.[65] Indeed, it concluded that the Tutsi were an ethnic group based on the existence of government-issued official identity cards describing them as such.[66]

Another Trial Chamber, in *Rutaganda*, said 'that for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept'.[67] Striking a course between the two, yet another Trial Chamber said '[a]lthough membership of the targeted group must be an objective feature of the society in question, there is also a subjective dimension'.[68] The Trial Chamber explained:

> A group may not have precisely defined boundaries and there may be occasions when it is difficult to give a definitive answer as to whether or not a victim was a member of a protected group. Moreover, the perpetrators of genocide may characterize the targeted group in ways that do not fully correspond to conceptions of the group shared generally, or by

[63] Jean-Paul Sartre, *Réflexions sur la question juive*, Paris: Gallimard, 1954, pp. 81–4.

[64] Jean-Michel Chaumont, *La concurrence des victimes: génocide, identité, reconnaissance*, Paris: La Découverte, 1997, pp. 211–12.

[65] *Prosecutor* v. *Kayishema et al.* (Case No. ICTR-95-1-T), Judgment, 21 May 1999, para. 98. The International Criminal Tribunal for the former Yugoslavia has taken the same approach in its first judgment on a genocide indictment. However, the Trial Chamber, presided by Judge Claude Jorda, also conceded that the intent of the drafters of the Genocide Convention was to assess groups on an objective rather than a subjective basis. *Prosecutor* v. *Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, paras. 69–72.

[66] *Ibid.*, paras. 522–30.

[67] *Prosecutor* v. *Rutaganda* (Case No. ICTR-96-3-T), Judgment, 6 December 1999, para. 56. However, in the same judgment, the Trial Chamber said, at para. 57, that 'a subjective definition alone is not enough to determine victim groups as provided for in the Genocide Convention'.

[68] *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, para. 65. Also: *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment and Sentence, 27 January 2000, paras. 161–2.

> other segments of society. In such a case, the Chamber is of the opinion that, on the evidence, if a victim was perceived by a perpetrator as belonging to a protected group, the victim could be considered by the Chamber as a member of the protected group, for the purposes of genocide.[69]

A similar approach has been taken by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia. In *Jelisic*, it said: 'It is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators.'[70] In *Brdanin*, the Trial Chamber said 'the relevant protected group may be identified by means of the subjective criterion of the stigmatisation of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics. In some instances, the victim may perceive himself or herself to belong to the aforesaid group.'[71]

The International Commission of Inquiry on Darfur concluded that the persecuted tribes were subsumed within the scope of the crime of genocide to the extent that victim and persecutor 'perceive each other and themselves as constituting distinct groups'.[72] The Commission noted that '[t]he various tribes that have been the object of attacks and killings (chiefly the Fur, Massalit and Zaghawa tribes) do not appear to make up ethnic groups distinct from the ethnic group to which persons or militias that attack them belong. They speak the same language (Arabic) and embrace the same religion (Muslim).'[73] Nevertheless, although 'objectively the two sets of persons at issue do not make up two distinct protected groups',[74] over recent years 'a self-perception of two distinct groups' has emerged.[75] According to the Darfur Commission, the rebel tribes were viewed as 'African' and their opponents as 'Arab', even if the distinction lacked a genuinely objective basis.

The subjective approach is appealing, especially because the perpetrator's intent is a decisive element in the crime of genocide. Perhaps its flaw is allowing, at least in theory, genocide to be committed against a

[69] *Ibid.*
[70] *Prosecutor* v. *Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 70.
[71] *Prosecutor* v. *Brdanin* (Case No. IT-99-36-T), Judgment, 1 September 2004, para. 683 (references omitted).
[72] 'Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur', UN Doc. S/2005/60, para. 509.
[73] *Ibid.*, para. 508. [74] *Ibid.*, para. 509. [75] *Ibid.*, para. 511.

group that does not have any real objective existence. To make an analogy with ordinary criminal law, many penal codes stigmatize patricide, that is, the killing of one's parents. But the murderer who kills an individual believing, erroneously, that he or she is killing a parent, is only a murderer, not a patricide. The same is true of genocide. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has insisted that the subjective approach alone is not acceptable:

> [C}ontrary to what the Prosecution argues, the *Krstić* and *Rutaganda* Trial Judgments do not suggest that target groups may only be defined subjectively, by reference to the way the perpetrator stigmatises victims. The Trial Judgement in *Krstić* found only that 'stigmatisation . . . by the perpetrators' can be used as 'a criterion' when defining target groups – not that stigmatisation can be used as the sole criterion. Similarly, while the *Rutaganda* Trial Chamber found national, ethnical, racial, and religious identity to be largely subjective concepts, suggesting that acts may constitute genocide so long as the perpetrator perceives the victim as belonging to the targeted national, ethnical, racial, or religious group, it also held that 'a subjective definition alone is not enough to determine victim groups, as provided for in the Genocide Convention'.[76]

Determination of the relevant protected group should be made on a case-by-case basis, referring to both objective and subjective criteria.[77] At the International Court of Justice, the two parties 'essentially agree[d] that international jurisprudence accepts a combined subjective-objective approach', and the Court said it was not interested in pursuing the matter.[78] In practice, however, the subjective approach seems to function effectively virtually all the time. Trying to find an objective basis for racist crimes suggests that the perpetrators act rationally, and this is more credit than they deserve.

The High Commissioner on National Minorities of the Organization for Security and Co-operation in Europe, Max van der Stoel, was once quoted saying that, although he could not define the term, 'I know a

[76] *Prosecutor* v. *Stakić* (Case No. IT-97-24-A), Judgment, 22 March 2006, para. 25.

[77] *Prosecutor* v. *Brdanin* (Case No. IT-99-36-T), Judgment, 1 September 2004, para. 684. Also: *Prosecutor* v. *Semanza* (Case No. ICTR-97-20-T), Judgment and Sentence, 15 May 2003, para. 317; *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 811.

[78] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 191.

minority when I see one.'[79] Put differently, difficulty in definition does not render an expression useless, particularly from the legal point of view. For example, issue may be taken with the term 'racial' because the existence of races themselves no longer corresponds to usage of progressive social science.[80] However, the terms 'racial' as well as 'race', 'racism' and 'racial group' remain widely used and are certainly definable. They are social constructs, not scientific expressions, and were intended as such by the drafters of the Convention. To many of the delegates attending the General Assembly session of 1948, Jews, Gypsies and Armenians might all have been qualified as 'racial groups', language that would be seen as quaint and perhaps even offensive a half-century later. Their real intent was to ensure that the Convention would contemplate crimes of intentional destruction of these and similar groups. The four terms were chosen in order to convey this message. International law knows of similar examples of anachronistic language. One of the earliest multilateral treaties dealing with human rights was aimed at 'white slavery'.[81] Its goal, the eradication of forced prostitution on an international scale, remains laudatory and relevant, although the terminology is obviously archaic.

The four terms in the Convention not only overlap,[82] they also help to define each other, operating much as four corner posts that delimit an area within which a myriad of groups covered by the Convention find protection. This was certainly the perception of the drafters. For example, they agreed to add the term 'ethnical' so as to ensure that the term 'national' would not be confused with 'political'.[83] On the other hand, they deleted the reference to 'linguistic' groups, 'since it is not

[79] Max van der Stoel, 'Prevention of Minority Conflicts', in L. B. Sohn, ed., *The CSCE and the Turbulent New Europe*, Washington: Friedrich-Naumann-Stiftung, 1993, pp. 147–54 at p. 148. His comment was inspired by United States Supreme Court Justice Potter Stewart who said the same thing about pornography: *Jacobellis* v. *Ohio*, 378 US 184 at 197 (1963).

[80] According to the Commission of Experts on Rwanda, 'to recognize that there exists discrimination on racial or ethnic grounds, it is not necessary to presume or posit the existence of race or ethnicity itself as a scientifically objective fact': 'Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)', UN Doc. S/1995/1405, annex, para. 159.

[81] International Agreement for the Suppression of the White Slave Traffic, (1904) 1 LNTS 83; International Convention for the Suppression of the White Slave Traffic, (1910) 7 *Martens Nouveau Recueil* (3d) 252, 211 Consol. TS 45.

[82] 'Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', UN Doc. A/CN.4/398, para. 56.

[83] UN Doc. A/C.6/SR.73 (Petren, Sweden); UN Doc. A/C.6/SR.74 (Petren, Sweden).

believed that genocide would be practised upon them because of their linguistic, as distinguished from their racial, national or religious, characteristics'.[84] The drafters viewed the four groups in a dynamic and synergistic relationship, each contributing to the construction of the other.

The 1996 report of the International Law Commission on the Draft Code of Crimes Against the Peace and Security of Mankind adopted this approach in considering 'tribal groups' to fall within the scope of the definition of genocide,[85] although the Darfur Commission disagreed, stating that 'tribes as such do not constitute a protected group'.[86] The Darfur Commission looked to anthropological textbooks for the meaning of 'tribe' or 'tribal'. The *Shorter Oxford English Dictionary* defines a tribe as '[a] group of families, esp[ecially] of an ancient or indigenous people, claiming descent from a common ancestor, sharing a common culture, religion, dialect, etc., and usually occupying a specific geographic area and having a recognized leader'. Certainly, tribal groups are cognates of the four terms used in article II of the Convention, whereas it is obvious that other categories, such as political or gender groups, are not. In any event, the Darfur Commission subsequently concluded that the three 'tribes' were in fact protected groups because they themselves as well as their oppressors viewed them as such. Thus, a tribe that is perceived as a racial or ethnic group falls within the scope of the Convention. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia noted that Raphael Lemkin conceived of genocide as targeting 'a race, *tribe*, nation, or other group with a particular positive identity'.[87]

Yet, in concluding that tribal groups meet the definition of genocide, it seems unnecessary to attempt to establish within which of the four enumerated categories they should be placed. In the same spirit, the Canadian Criminal Code's genocide provision includes the term 'colour' in its list of protected groups.[88] We readily appreciate the fact that groups defined by 'colour' are also protected by the Convention without

[84] UN Doc. A/401.

[85] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', UN Doc. A/51/10, p. 89.

[86] 'Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur', UN Doc. S/2005/60, para. 496.

[87] *Prosecutor* v. *Stakić* (IT-97-24-A), Judgment, 22 March 2006, para. 21 (my italics).

[88] Criminal Code (Canada), RSC 1985, c. C-46, s. 318(4): 'any section of the public distinguished by colour, race, religion or ethnic origin'.

it being important to determine whether they are in fact subsumed within the adjectives national, racial, ethnical or religious.

There is a danger that a search for autonomous meanings for each of the four terms will weaken the overarching sense of the enumeration as a whole, forcing the jurist into an untenable Procrustes bed. To a degree, this problem is manifested in the 2 September 1998 judgment of the International Criminal Tribunal for Rwanda in the *Akayesu* case,[89] as well as in the definitions accompanying the genocide legislation adopted by the United States,[90] both of which dwell on the individual meanings of the four terms. Deconstructing the enumeration risks distorting the sense that belongs to the four terms, taken as a whole.

A negative approach to definition, referring to a group by what it is not rather than what it is, has been fairly convincingly rejected by the courts. This had first been mooted by the Commission of Experts for the former Yugoslavia.[91] An early Trial Chamber decision of the International Criminal Tribunal for the former Yugoslavia agreed that 'all individuals thus rejected would, by exclusion, make up a distinct group',[92] but the view has since been rejected by another Trial Chamber[93] whose views were upheld on appeal.[94] The conclusions of the Appeals Chamber were endorsed by the International Court of Justice. In *Bosnia* v. *Serbia*, the applicant had argued that the victim of genocide has been 'the non-Serb national, ethnical or religious group within, but not limited to, the territory of Bosnia and Herzegovina, including in particular the Muslim population'. According to the Court, genocide 'requires an intent to destroy a collection of people who have a particular group identity. It is a matter of whom those people are, not whom they are not.[95] The Court referred to General Assembly Resolution 96(I), which contrasted genocide, as 'the denial of the existence of entire human groups', with homicide, considered as 'the denial of the right to live of individual human beings'.[96] According to the Court, the drafters of the Genocide

[89] *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998.
[90] Genocide Convention Implementation Act of 1987 (Proxmire Act), S. 1851, s. 1093.
[91] 'Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)', UN Doc. S/1994/674, para. 96.
[92] *Prosecutor* v. *Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 71.
[93] *Prosecutor* v. *Stakić* (Case No. IT-97-24-T), Judgment, 31 July 2003, para. 512.
[94] *Prosecutor* v. *Stakić* (Case No. IT-97-24-A), Judgment, 22 March 2006, paras. 20–8.
[95] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 193.
[96] *Ibid.*, para. 195.

Convention 'gave close attention to the positive identification of groups with specific distinguishing characteristics in deciding which groups they would include and which (such as political groups) they would exclude'.[97]

Raphael Lemkin conceived of genocide as a crime committed against 'national groups', something made apparent by frequent references in his book, *Axis Rule in Occupied Europe*.[98] In his famous study, he associated the prohibition of genocide with the protection of minorities.[99] Lemkin clearly did not intend the prohibition of genocide to cover all minorities, but rather those that had been contemplated by the minorities treaties of the inter-war years. The term 'national' had an already well-accepted technical meaning, having been used to describe minorities in the legal regime established in the aftermath of the First World War. For Lemkin, genocide was above all meant to describe the destruction of the Jews, who cannot in a strict sense be termed a national group at all. Yet the term's usage was clear enough in what it covered and what it was meant to protect. The historical circumstances and the context of Nazi persecution further enhanced this perspective. The etymology of the term 'genocide' also confirms this. In ancient Greek, *genos* means 'race' or 'tribe'. It does not refer to any group in the abstract, or even to groups defined on the basis of political view, or economic and social status. Lemkin's outlook was not shared by all participants in the drafting of the Convention. For example, he differed with his colleague on the Ad Hoc Committee, Henri Donnedieu de Vabres, about the inclusion of political groups.

Fundamentally, the problem with including political groups is the difficulty in providing a rational basis for such a measure. If political groups are to be included, why not the disabled, or other groups based on arbitrary criteria? Logically, the definition ought to be expanded to cover all episodes of mass killing. But, despite criticism that the enumeration of protected groups within the Convention is limited and restrictive, the final result is coherent. It aims at protecting groups that were defined, prior to the Second World War, as 'national minorities', 'races' and 'religious groups'. A more contemporary usage seems to

[97] *Ibid.*

[98] Note 21 above, pp. 79, 80–2, 85–7 and 90–3. See also Raphael Lemkin, 'Le génocide', [1946] Rev. int. droit pénal, p. 25: 'Par "génocide" nous voulons dire la destruction d'une nation ou d'un groupe ethnique.'

[99] Lemkin, *Axis Rule*, p. 90.

prefer 'ethnic groups'. But these are really all efforts to describe a singular reality. Applied with a mix of common sense and intuition, the definition seems to work.

The Convention enumeration is also defensible from a policy perspective. Critics who see no reason to protect the four enumerated groups and omit others, defined by different criteria, might consider why the international community has adopted an important convention dealing with racial discrimination[100] and another concerning apartheid,[101] instead of simply condemning discrimination in general and in all of its forms. The International Convention for the Elimination of All Forms of Racial Discrimination defines racial discrimination as any distinction, exclusion, restriction or preference 'based on race, colour, descent, or national or ethnic origin'.[102] Interestingly, these terms closely overlap the categories recognized in article II of the Genocide Convention. Religion is excluded, but, at the time, the United Nations planned a companion instrument on religious discrimination.[103] However, discrimination on the basic of political opinion, or belonging to a political group, was not included.[104]

Attacks on groups defined on the basis of race, nationality, ethnicity and religion have been elevated, by the Genocide Convention, to the apex of human rights atrocities, and with good reason. The definition is a narrow one, it is true, but recent history has disproven the claim that it was too restrictive to be of any practical application. For society to define a crime so heinous that it will occur only rarely is testimony to the value of such a precise formulation. Diluting the definition, either by formal amendment of its terms or by extravagant interpretation of the existing text, risks trivializing the horror of the real crime when it is committed.

[100] International Convention for the Elimination of All Forms of Racial Discrimination, note 45 above.

[101] International Convention on the Suppression and Punishment of the Crime of Apartheid, (1976) 1015 UNTS 243.

[102] Note 45 above, art. 1.

[103] No convention was ever drafted. In 1981, the General Assembly adopted a resolution on the subject: 'Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief', GA Res. 36/55.

[104] However, it is included in other instruments, for example the Universal Declaration of Human Rights, note 41 above, art. 2; the International Covenant on Civil and Political Rights, note 42 above, art. 26; and the ILO Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, (1960) 361 UNTS 31, art. 1(1).

National groups

The original draft of General Assembly Resolution 96(I) included 'national' groups within the enumeration,[105] but they were eliminated, with no evident explanation, from the final text. The Secretariat draft of the Convention reintroduced the concept of 'national' groups, together with 'linguistic' groups,[106] replacing the reference to 'other groups'. Within the Ad Hoc Committee, some suggested the term 'national' lacked clarity.[107] In the Sixth Committee, the United Kingdom questioned including 'national groups', because people were free to join and to leave them.[108] The Egyptian delegate replied that: 'The well-known problem of the German minorities in Poland or of the Polish minorities in Germany, and the question of the Sudeten Germans, showed that the idea of the national group was perfectly clear.'[109] Out of concern that 'national' might be confused with 'political', Sweden proposed adding 'ethnical' to the enumeration.[110]

According to a Trial Chamber of the International Criminal Tribunal for Rwanda, the term 'national group' refers to 'a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties'.[111] As authority for this statement, the Tribunal cited the *Nottebohm* decision of the International Court of Justice.[112] However, in *Nottebohm*, the Court was interested in establishing 'nationality', not membership in a 'national group'.[113] The difference is significant, because the International Court of Justice focused on the

[105] UN Doc. A/BUR/50, proposed by Cuba, India and Pakistan. The Saudi Arabian draft convention referred to 'the destruction of an ethnic group, people or nation': UN Doc. A/C.6/86.

[106] UN Doc. E/447, pp. 17 and 22.

[107] UN Doc. E/AC.25/SR.10, p. 16.

[108] UN Doc. A/C.6/SR.69 (Shawcross, United Kingdom).

[109] UN Doc. A/C.6/SR.74 (Raafat, Egypt). See also UN Doc. A/C.6/SR.75 (Kaeckenbeeck, Belgium).

[110] UN Doc. A/C.6/SR.73 (Petren, Sweden); UN Doc. A/C.6/SR.74 (Petren, Sweden).

[111] *Prosecutor* v. *Akayesu*, note 89 above, para. 511.

[112] *Nottebohm Case* (Second Phase), Judgment of 6 April, [1955] ICJ Reports p. 24. For an alternative definition, see the Inter-American Court of Human Rights advisory opinion, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, 19 January 1984, Series A, No. 4, para. 35: 'Nationality can be deemed to be the political and legal bond that links a person to a given state and binds him to it with ties of loyalty and fidelity, entitling him to diplomatic protection from that state.'

[113] See J. F. Rezek, 'Le droit international de la nationalité', (1986) 198 *Recueil des cours de l'académie du droit international de la Haye*, p. 335.

correspondence between a formal grant of 'nationality' and the reality of the bonds linking an individual and his or her State of nationality. *Nottebohm* does not address the situation of national minorities who, while sharing cultural and other bonds with a given State, may actually hold the nationality of another State, or who may even be stateless.[114] Thus, the Rwanda Tribunal's reference to *Nottebohm* is incomplete.

The latest edition of *Oppenheim's International Law* says: '"Nationality", in the sense of citizenship of a certain state, must not be confused with "nationality" as meaning membership in a certain nation in the sense of race.'[115] In his commentary on the Genocide Convention, Stéfan Glaser observed that: 'What characterizes a nation is not only a community of political destiny, but, above all, a community marked by distinct historical and cultural links or features. On the other hand, a "territorial" or "state" link (with the State) does not appear to me to be essential.'[116] Nicodème Ruhashyankiko referred to the drafting of the International Convention for the Elimination of All Forms of Racial Discrimination[117] for guidance as to the meaning of 'national group' in the Genocide Convention. He noted distinctions between the 'politico-legal' sense of the term, which referred to citizenship, and the 'ethnographical' or 'sociological' sense of the term, which referred to origin.[118] The United States legislation to implement the Genocide Convention expresses a similar although somewhat narrower view, defining 'national group' as 'a set of individuals whose identity as such is distinctive in terms of nationality or national origins'.[119]

The core concern of the Genocide Convention, as the drafting history and context of adoption make clear, is protection of what are known in

[114] Malcolm N. Shaw, 'Genocide and International Law', in Yoram Dinstein, ed., *International Law at a Time of Perplexity (Essays in Honour of Shabtai Rosenne)*, Dordrecht: Martinus Nijhoff, 1989, pp. 797–820 at p. 807.

[115] Robert Jennings and Arthur Watts, *Oppenheim's International Law*, Vol. II, 9th edn, London and New York: Longman, 1996, p. 857.

[116] Glaser, *Droit international*, pp. 111–12 (translated into English in Whitaker, 'Revised Report', note 50 above, pp. 15–16).

[117] Note 45 above.

[118] 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Progress Report by Mr Nicodème Ruhashyankiko, Special Rapporteur', UN Doc. E/CN.4/Sub.2/L.583 (1973), paras. 56–61; 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur', UN Doc. E/CN.4/Sub.2/416, paras. 59–64. See also Egon Schwelb, 'The International Convention on the Elimination of All Forms of Racial Discrimination', (1966) 15 *International and Comparative Law Quarterly*, p. 1007.

[119] Genocide Convention Implementation Act of 1987, note 90 above, s. 1093(5).

Europe as 'national minorities'.[120] When he first conceived of the notion of genocide, Lemkin favoured the term 'national'. Doubtless, this stemmed from the minorities system created under the aegis of the League of Nations. The Permanent Court of International Justice had already ventured a definition to assist in construing the minorities treaties. Working with the term 'communities', it said: 'By tradition . . . the "community" is a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each another.'[121] A considerably more recent attempt to define the term 'national minority' was made by the European Commission for Democracy through Law (the 'Venice Commission'), an institution affiliated with the Council of Europe. It entails 'a group which is smaller in number than the rest of the population of a State, whose members, who are nationals of that State, have ethnical, religious or linguistic features different from those of the rest of the population, and are guided by the will to safeguard their culture, traditions, religion or language'.[122] European human rights law

[120] These views, originally set out in the first edition of this book, have since been endorsed by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia: *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 556. See also: Diane Marie Amann, 'Group Mentality, Expressivism and Genocide', (2002) 2 *International Criminal Law Review*, p. 93. Contra Hurst Hannum, 'International Law and Cambodian Genocide: The Sounds of Silence', (1989) 11 *Human Rights Quarterly*, p. 82.

[121] *Greco-Bulgarian Community, Advisory Opinion*, 31 July 1930, PCIJ, Ser. B, No. 17, pp. 19, 21, 22 and 33. Although the definition applies to 'communities', rather than 'national minorities', it is generally considered to be transposable: F. Capotorti, 'Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities', UN Doc. E/CN.4/Sub.2/384/Add.1-7, UN Sales No. E.78.XIV.I, para. 21.

[122] European Commission for Democracy Through Law, *The Protection of Minorities*, Strasbourg: Council of Europe Press, 1994, p. 12. The definition uses the term 'minority' without the adjective 'national' in para. 1 of art. 2, but in para. 3 refers to 'national minority', suggesting the two terms are interchangeable. The Venice Commission's definition is modelled on one developed by F. Capotorti, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, but applicable to 'ethnic, linguistic and religious' minorities rather than 'national minorities': 'A group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directing towards preserving their

continues to favour the term 'national minorities',[123] resisting the expression consecrated by the universal human rights instruments, which refer to 'ethnic, linguistic and religious minorities'.[124] The Venice Commission definition shows, however, that in European law 'national minorities' is meant to cover ethnic, linguistic and religious minorities. In 1992, the General Assembly of the United Nations combined the two definitions, in its resolution on 'national, ethnic, linguistic and religious minorities'.[125]

Discussing the definition of genocide, International Law Commission Special Rapporteur Doudou Thiam noted that national groups often comprise several different ethnic groups, particularly in Africa, where territories were divided without taking them into account:

> With rare exceptions (Somalia, for example), almost all African States have an ethnically mixed population. On other continents, migrations, trade, the vicissitudes of war and conquests have created such mixtures that the concept of the ethnic group is only relative or may no longer have any meaning at all. The nation therefore does not coincide with the ethnic group but is characterized by a common wish to live together, a common ideal, a common goal and common aspirations.[126]

While Thiam's culturally sensitive approach is laudable, it has the same shortcoming as the definitions proposed by the Rwanda Tribunal and by the United States legislation. In attempting to impose contemporary usage on a term whose meaning was different in 1948, it has the curious result of narrowing the Convention's scope. Set within the

culture, traditions, religion or language.' See Capotorti, note 121 above. Subsequently, another definition was prepared for the Sub-Commission by Jules Deschênes, UN Doc. E/CN.4/Sub.2/1985/31, para. 181: 'A group of citizens of a state, constituting a numerical minority and in a non-dominant position in that state, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.'

[123] Framework Convention for the Protection of National Minorities, ETS 157. See also Convention for the Protection of Human Rights and Fundamental Freedoms ('European Convention on Human Rights'), (1955) 213 UNTS 221, ETS 5, art. 14.

[124] International Covenant on Civil and Political Rights, note 42 above, art. 27. But, for use of the term 'national minority' in a treaty of the United Nations system, see UNESCO Convention Against Discrimination in Education, (1960) 429 UNTS 93, art. 5 § 1c.

[125] 'Declaration on the Rights of Persons Belonging to National or Ethnic Religious and Linguistic Minorities', UN Doc. E/CN.4/1992/48 and Corr.1, UN Doc. A/RES/48/138.

[126] 'Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', UN Doc. A/CN.4/398, para. 57.

context of 1948 and the writings of Raphael Lemkin, the term 'national group' dictates a large scope corresponding to the concept of 'minority' or 'national minority', one that in reality is broad enough to encompass racial, ethnic and religious groups as well.

What is sometimes called 'auto-genocide', that is, mass killing of members of the group to which the perpetrators themselves belong, has been presented under the rubric of national groups.[127] The expression appears to have been coined by a United Nations rapporteur referring to the Khmer Rouge atrocities in Cambodia.[128] It is argued that, since this constitutes the intentional destruction of part of a national group, it meets the Convention definition.[129] Legislation adopted in the United States in 1994 declares: 'The persecution of the Cambodian people under the Khmer Rouge rule, [when] the bulk of the Khmer people were subjected to life in an Asian Auschwitz, constituted one of the clearest

[127] Whitaker, 'Revised Report', note 50 above, p. 16, para. 31. See also: UN Doc. E/CN.4/SR.1510, para. 22.

[128] UN Doc. E/CN.4/SR.1510.

[129] Terence Duffy, 'Toward a Culture of Human Rights in Cambodia', (1983) 16 *Human Rights Quarterly*, p. 82 at p. 83; James Dunn, 'East Timor: A Case of Cultural Genocide', in Andreopoulos, *Genocide*, pp. 171–90; Hannum, 'Cambodian Genocide'; Ben Kiernan, 'Genocide and "Ethnic Cleansing"', in Robert Wuthnow, ed., *The Encyclopedia of Politics and Religion*, Vol. I, Washington: Congressional Quarterly, 1998, pp. 294–9; Ben Kiernan, 'The Cambodian Genocide, 1975–1979', in Samuel Totten, William S. Parsons and Israel W. Charny, eds., *Genocide in the Twentieth Century*, New York and London: Garland Publishing, 1995, pp. 429–82; Ben Kiernan, 'The Cambodian Genocide: Issues and Responses', in Andreopoulos, *Genocide*, pp. 191–228; Paul Starkman, 'Genocide and International Law; Is There a Cause of Action?', (1984) 8 *ASILS International Law Journal*, p. 1; Mohamed Ali Lejmi, 'Prosecuting Genocide: Problems Caused by the Passage of Time since the Alleged Commission of Crimes', (2006) 4 *Journal of International Criminal Justice*, p. 300; Jason Abrams, 'The Atrocities in Cambodia and Kosovo: Observations on the Codification of Genocide', (2001) 35 *New England Law Review*, p. 303; William Schabas, 'Problems of International Codification: Were the Atrocities in Cambodia and Kosovo Genocide?', (2001) 35 *New England Law Review*, p. 287. See also: 'Report of the Committee on the Elimination of Racial Discrimination', UN Doc. A/53/18, para. 283; UN Doc. E/CN.4/SR.1517, para. 13 (Austria), UN Doc. E/CN.4/SR.1518, para. 54 (United Kingdom), para. 48 (United States); and UN Doc. E/CN.4/SR.1519, para. 18 (Soviet Union). On 7 April 1978, the Canadian House of Commons adopted a motion entitled 'Condemnation of Communist Atrocities in Kampuchea' that spoke of 'the terrible genocide committed on two million babies, children, women and men': UN Doc. E/CN.4/Sub.2/414/Add.1, p. 2. However, William Shawcross says that 'the Genocide Convention on its face probably does not apply to the majority of these killings, and this has been the predominant view within the international legal community until recently': William Shawcross, 'Persecutions on Political, Racial, or Religious Grounds', in Roy Gutman and David Rieff, eds., *Crimes of War: What the Public Should Know*, New York: Norton, 1999, pp. 272–5 at p. 274.

examples of genocide in recent history.'[130] The point was taken with some scepticism by the Group of Experts in its 1999 report. While agreeing that the Khmer people of Cambodia constituted a national group within the meaning of the Convention, the Group said that 'whether the Khmer Rouge committed genocide with respect to part of the Khmer national group turns on complex interpretative issues, especially concerning the Khmer Rouge's intent with respect to its non-minority-group victims'. The Group declined taking a position on the issue, saying that the matter should be addressed by the courts if Khmer Rouge officials are charged with genocide against the Khmer national group.[131] The issue should soon be addressed by the Extraordinary Chambers of the Courts of Cambodia in their trials of former Khmer Rouge leaders.

Racial groups

The reference to 'racial' groups posed the least problem for the drafters of the Convention, although it may well be the most troublesome a half-century later. The *travaux préparatoires* reveal no significant discussion of the term. This suggests that it is very close to the core of what the drafters intended the Convention to protect. As a term, 'racial groups' was present throughout the drafting process, in General Assembly Resolution 96(I), the Secretariat draft,[132] and the drafts submitted by the United States,[133] France[134] and China.[135] The penal codes of

[130] The United States Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, § 906. In 1994, the United States Congress passed the Cambodian Genocide Justice Act, Pub. L. No. 103-236, 108 Stat. 486, 486–7 (1994), which states that: 'Consistent with international law, it is the policy of the United States to support efforts to bring to justice members of the Khmer Rouge for their crimes against humanity committed in Cambodia between April 17, 1975 and January 7, 1979' (§ 572 (a)); it authorized the creation of the Office of Cambodian Genocide Investigation to 'develop the United States proposal for the establishment of an international criminal tribunal for the prosecution of those accused of genocide in Cambodia' (§ 573(b)(4)).

[131] 'Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135', UN Doc. A/53/850, UN Doc. S/1999/231, annex, para. 65.

[132] In its explanatory comments on the issue of groups, the Secretariat said it had decided to follow the General Assembly resolution: UN Doc. E/447, pp. 17 and 22.

[133] UN Doc. E/623, art. I.I. [134] UN Doc. E/623/Add.1, art. 1.

[135] 'Draft Articles for the Inclusion in the Convention on Genocide Proposed by the Delegation of China on 16 April 1948', UN Doc. E/AC.25/9, art. I.

Bolivia[136] and Paraguay[137] omit mention of 'racial' groups altogether in their genocide provisions: perhaps legislators considered the term redundant and unnecessary, given the other elements of the enumeration.[138]

A general discomfort with the term on this basis may explain why the International Criminal Tribunal for Rwanda has not classified the Tutsi as a racial group. The general conception of Tutsi within Rwanda is based on hereditary physical traits, even though these may be difficult to distinguish in many cases. According to the Rwanda Tribunal, '[t]he conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors'.[139] The genocide legislation in the United States adopts a similar view, defining 'racial group' as 'a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent'.[140] References to the problem in the academic literature are rare. Stéfan Glaser wrote that: '"Race" means a category of persons who are distinguished by common and constant, and therefore hereditary, features.'[141]

What did the drafters of the Genocide Convention mean by 'racial group'? The *Oxford English Dictionary* provides an indication of usage at the time. It proposes several definitions of 'race', of which the most appropriate are: 'A group of persons, animals, or plants, connected by common descent or origin'; 'A group or class of persons, animals, or things, having some common feature or features.'[142] This definition can be readily extended to cover national, ethnic, and even religious minorities, which is how the term was understood in 1948, although this no longer corresponds to modern-day usage.[143] For example, the

[136] Penal Code (Bolivia), 23 August 1972, Chapter IV, art. 138.

[137] Penal Code (Paraguay), art. 308.

[138] Perhaps employing the same reasoning, the Costa Rican code eliminates ethnic groups from its enumeration: it refers to race rather than to 'racial group': Penal Code (Costa Rica), art. 373.

[139] *Prosecutor* v. *Akayesu*, note 89 above, para. 513. See also *Prosecutor* v. *Kayishema and Ruzindana*, note 65 above, para. 98.

[140] Genocide Convention Implementation Act of 1987, note 90 above, s. 1093.

[141] Glaser, *Droit international*, pp. 111–12 (translated into English in Whitaker, 'Revised Report', note 50 above, pp. 15–16).

[142] R. W. Burchfield, ed., *The Compact Edition of the Oxford English Dictionary*, Vol. II, Oxford: Clarendon Press, 1971, p. 2400.

[143] David Levinson, ed., *Ethnic Relations: A Cross-Cultural Encyclopedia*, Santa Barbara, CA: ABC-CLIO, 1994, p. 195. In the early 1980s, a Netherlands court concluded Jews were covered by the word 'race' in the country's Penal Code, because '[t]he widely held

Permanent Court of International Justice, in a 1935 advisory opinion, spoke of 'the preservation of [the] racial peculiarities' of national minorities.[144] A United Nations Declaration of 17 December 1942 denounced ill-treatment of the 'Jewish race' in occupied Europe.[145] The judgment of the International Military Tribunal at Nuremberg noted that judges in Germany were removed from the bench for 'racial reasons', a reference to the harassment of Jewish jurists.[146] It also condemned Julius Streicher for crimes against humanity because his incitement to murder and extermination at a time when Jews in the East were being killed under the most horrible conditions constituted 'persecution on political and racial grounds'. Even reputable anthropologists of the time employed such terms: 'The Jews are an ethnic unit, although one that has little regard for spatial considerations. Like other ethnic units, the Jews have their own standard racial character.'[147] A British war crimes tribunal at the end of the Second World War convicted Nazis for their 'persecution of the Jewish race'.[148] The International Military Tribunal for the Far East charged the Japanese Government with failing to take into account the 'racial needs' and 'racial habits' of prisoners of war.[149]

Subsequent international instruments apply a similarly broad approach to the term. The International Convention for the Elimination of All Forms of Racial Discrimination uses the term 'racial group' in two places,[150] defining 'racial discrimination' as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin'. According to Michael Banton, former chair of the Committee for the Elimination of Racial Discrimination, the concept of

opinion is that the term "race" in paragraph 429(4) cannot be construed solely in the biological sense but rather . . . must be viewed as defining "race" by reference also to ethnic and cultural minorities': S. J. Roth, 'The Netherlands and the "Are Jews a Race?" Issue', (1983) 17:4 *Patterns of Prejudice* 52.

144 *Minority Schools in Albania, Advisory Opinion*, 6 April 1935, PCIJ Series A/B, No. 64.

145 Quoted in Manfred Lachs, *War Crimes: An Attempt to Define the Issues*, London: Stevens & Sons, 1945, pp. 97–8.

146 *France et al.* v. *Goering et al.*, (1946) 22 IMT 203, p. 419 (IMT).

147 Carleton S. Coon, *Races of Europe*, New York: Macmillan, 1939, p. 444.

148 *United Kingdom* v. *Kramer et al.* ('Belsen trial'), (1947) 2 LRTWC 1 (British Military Court), p. 106.

149 *United States of America et al.* v. *Araki et al.*, Judgment of the International Military Tribunal for the Far East, 4 November 1948, in R. John Pritchard and Sonia Magbanua Zaide, *The Tokyo War Crimes Trial*, New York and London: Garland Publishing, 1981, p. 49,688.

150 Note 45 above, arts. 2(2) and 7.

race is itself culturally sensitive, with different meanings in different continents, in some cases with no real basis in heredity whatsoever.[151]

The term 'racial group' is also used in the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the General Assembly in 1973. The Apartheid Convention defines apartheid as 'inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons'.[152] As recently as 1993, the Vienna Declaration and Plan of Action made reference to 'racial or religious groups'.[153] It was also incorporated in definitions in the 1998 Rome Statute for the International Criminal Court.[154]

The UNESCO Declaration on Race and Race Prejudice of 27 November 1978 does not explicitly reject the notion of race, yet it affirms, in article 1(1), that '[a]ll human beings belong in a single species and are descended from a common stock'. It condemns theories which label 'racial or ethnic groups' as inherently superior or inferior. The Declaration resists any suggestion that racial and ethnic groups exist in an objective sense, addressing the concept only within the context of denouncing theories about racial superiority.[155] From a purely scientific standpoint, the value of the term 'race' is now disputed by modern specialists.[156] As a way to classify humans into major subspecies based on certain phenotypical and genotypical traits (e.g. Negroid, Mongoloid, Caucasoid), race has become virtually obsolete.

Indeed, efforts to define these so-called races have in themselves a racist connotation, in that generally they aim to demonstrate not only some common denominator of physical characteristics, such as type of hair and skin colour, but also purportedly scientific justifications for

[151] Michael Banton, *International Action Against Racial Discrimination*, Oxford: Clarendon Press, 1996, pp. 76–82.

[152] Note 101 above, art. II. The meaning of the term 'racial group' in the Apartheid Convention is discussed in Ratner and Abrams, *Accountability*, pp. 114–15.

[153] 'Vienna Declaration and Programme of Action', UN Doc. A/CONF.157/24, para. 33.

[154] Rome Statute of the International Criminal Court, note 19 above, arts. 7(1)(h) and 7(2)(h).

[155] UN Doc. E/CN.4/Sub.2/1982/2/Add.1, annex V.

[156] See the discussion in 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur', UN Doc. E/CN.4/Sub.2/416, paras. 69–76. See also John Packer, 'On the Definition of Minorities', in John Packer and Kristian Myntti, *The Protection of Ethnic and Linguistic Minorities in Europe*, Abo and Turku, Finland: Institute for Human Rights, Abo Akademi University, 1993, pp. 23–65 at p. 58.

slavery and colonialism. Anthropologist Ashley Montagu described the very existence of race as a fallacy.[157] Apart from references to the 'human race' as a unified group, 'nearly all social scientists only use "race" in [the] sense of a social group defined by somatic visibility'.[158] Nevertheless, in popular usage the concept of racial distinctions continues to have 'tremendous social significance' because 'we attach meaning to them, and the consequences vary from prejudice and discrimination to slavery and genocide'.[159]

Thus, although the term 'racial group' may be increasingly antiquated, the concept persists in popular usage, social science and international law. Understandably, progressive jurists search for a meaning consistent with modern values and contemporary social science. This explains the Rwanda Tribunal's insistence upon hereditary traits as the basis of a definition. Yet the meaning of 'racial groups' was unquestionably much broader at the time the Convention was drafted, when it was to a large extent synonymous with national, ethnic and religious groups. Although it may seem archaic, the 1948 meaning of 'racial group', which encompassed national, ethnic and religious groups as well as those defined by inherited physical characteristics, ought to be favoured over some more contemporary, and more restrictive, gloss.[160]

Ethnical groups

The first draft of General Assembly Resolution 96(I) mentioned 'ethnical' groups,[161] but this reference was eliminated by the drafting committee of the Sixth Committee and did not appear in the final version of the resolution. The Secretariat draft convention of early 1947 did not reintroduce the concept.[162] It was only added in the Sixth

[157] Ashley Montagu, *Man's Greatest Myth: The Fallacy of Race*, New York: Oxford University Press, 1975.

[158] Pierre L. van den Berghe, 'Race – As Synonym', in Ellis Cashmore, ed., *Dictionary of Race and Ethnic Relations*, London and New York: Routledge, 1996, p. 297.

[159] Edgar F. Borgatta and Marie L. Borgatta, eds., *Encyclopedia of Sociology*, New York: Macmillan, 1992, p. 1617.

[160] Support for a historical approach to the definition of 'racial group', as well as the other groups, can be found in *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, para. 66: 'The Chamber notes that the concepts of national, ethnical, racial and religious groups enjoy no generally or internationally accepted definition. Each of these concepts must be assessed in the light of a particular political, social, historical and cultural context.'

[161] UN Doc. A/BUR/50. [162] UN Doc. E/447, pp. 17 and 22.

Committee, on a proposal from Sweden, which felt that use of the term 'national' might be confused with 'political'.[163] The Swedish delegate also noted that the constituent factor of a minority might be its language. If a linguistic group did not coincide with an existing State, it would be protected as an ethnical rather than as a national group.[164]

The Soviets supported the Swedish proposal, stating that '[a]n ethnical group was a sub-group of a national group; it was a smaller collectivity than the nation, but one whose existence could nevertheless be of benefit to humanity'.[165] Several States said they saw no difference between ethnical and racial groups.[166] Remarking on confusion between the terms, Haiti observed that 'ethnic' might well apply where 'racial' was problematic.[167] But the motion to add 'ethnical' to the enumeration succeeded in the Sixth Committee by only the barest of majorities.[168]

The International Law Commission, in its Code of Crimes Against the Peace and Security of Mankind of 1996, changed the word 'ethnical' in the definition of genocide to 'ethnic' to reflect modern English usage without in any way affecting the substance of the provision.[169] But, in the Rome Statute's definition of genocide, the Diplomatic Conference returned to 'ethnical' out of fidelity to the Convention,[170] although the word 'ethnic' appears elsewhere in the instrument.[171] The word 'ethnical' was used by the International Court of Justice as recently as 1993,[172] and it also appears in article 7 of the International Convention for the Elimination of All Forms of Racial Discrimination.[173]

[163] UN Doc. A/C.6/SR.73 (Petren, Sweden); UN Doc. A/C.6/SR.74 (Petren, Sweden). See also Robinson, *Genocide Convention*, p. 59.
[164] UN Doc. A/C.6/SR.75 (Petren, Sweden).
[165] UN Doc. A/C.6/SR.74 (Morozov, Soviet Union).
[166] UN Doc. A/C.6/SR.75 (Raafat, Egypt); UN Doc. A/C.6/SR.75 (Manini y Ríos, Uruguay); UN Doc. A/C.6/SR.75 (Kaeckenbeeck, Belgium).
[167] UN Doc. A/C.6/SR.75 (Demesmin, Haiti).
[168] *Ibid.* (eighteen in favour, seventeen against, with eleven abstentions).
[169] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', UN Doc. A/51/10, p. 89. The change was introduced by Special Rapporteur Doudou Thiam in 1986: 'Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', UN Doc. A/CN.4/398.
[170] Rome Statute of the International Criminal Court, note 19 above, art. 6.
[171] *Ibid.*, arts. 7(1)(h), 7(2)(f) and 21.
[172] *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, [1993] ICJ Reports 325 at pp. 342–3.
[173] Note 45 above.

'Ethnic origin' is not a prohibited ground of discrimination listed in the Universal Declaration of Human Rights[174] or the International Covenant on Civil and Political Rights,[175] implying it must be covered by other terms such as race, colour and nationality. However, article 27 of the International Covenant asserts that persons belonging to ethnic minorities have the right 'to enjoy their own culture'.[176] Article 13 of the International Covenant on Economic, Social and Cultural Rights contains the phrase 'racial, ethnic or religious groups'.[177] The International Convention on the Elimination of All Forms of Racial Discrimination speaks of 'race, colour, descent, or national or ethnic origin'.[178]

The *Oxford English Dictionary* provides a guide to contemporary usage of the term. In its 1933 edition, 'ethnical' is defined as '[o]f an ethnic character'. Ethnic receives two meanings: '[p]ertaining to nations not Christian or Jewish; Gentile, heathen, pagan' and '[p]ertaining to race; peculiar to a race or nation; ethnological'.[179] In the 1987 supplement, an additional usage appears: 'pertaining to or having common racial, cultural, religious or linguistic characteristics, esp[ecially] designating a racial or other group within a larger system'.[180] The word is derived from the ancient Greek term *ethnos*, which was used to denote 'heathen' or 'pagan'. In 1935, Sir Julian Huxley and A. C. Hadon maintained that the groups in Europe then commonly called races would be better designated as ethnic groups,[181] and this has prompted suggestions that ethnicity is a 'sociological euphemism' for race.[182] Classical theorist Max Weber viewed an ethnic group as one whose members 'entertain a subjective

[174] Note 41 above, art. 2. [175] Note 42 above, arts. 2(2) and 26.

[176] *Ibid.* Art. 27 protects 'ethnic, religious or linguistic minorities'. This formulation can be traced to the definition of 'minorities' mooted by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1950: UN Doc. E/CN.4/358. The Universal Declaration of Human Rights does not contain a minority rights provision: William A. Schabas, 'Les droits des minorités: Une déclaration inachevée', in *La Déclaration universelle des droits de l'homme 1948–98, Avenir d'un idéal commun*, Paris: La Documentation française, 1999, pp. 223–42.

[177] Note 42 above, art. 2(2). [178] Note 45 above, art. 1(1).

[179] R. W. Burchfield, ed., *The Compact Edition of the Oxford English Dictionary*, Vol. I, Oxford: Clarendon Press, 1987, p. 901 (minature version of the 1933 edition).

[180] *Ibid.*, Vol. III, p. 245.

[181] Ellis Cashmore, ed., *Dictionary of Race and Ethnic Relations*, London and New York: Routledge, 1996, p. 295.

[182] J. Milton Yinger, *Ethnicity: Source of Strength? Source of Conflict?*, Albany, NY: State University of New York Press, 1994, pp. 16–18.

belief in their common descent because of similarities of physical type or of customs or both, or because of memories of colonization'.[183]

Stéfan Glaser wrote that 'ethnic', as employed in article II of the Genocide Convention, was larger than 'racial' and designated a community of people bound together by the same customs, the same language and the same race.[184] According to Malcolm Shaw: 'It is also rather difficult to distinguish between "ethnical" and "racial" groups . . . [I]t is probably preferable to take the two concepts together to cover relevant cases rather than attempting to distinguish between these so that unfortunate gaps appear.'[185]

In its work on the draft Code of Crimes Against the Peace and Security of Mankind, the International Law Commission considered whether it was necessary to retain both 'ethnic' and 'racial', given the apparent redundancy. Special Rapporteur Doudou Thiam considered it 'normal to retain these two terms, which give the text on genocide a broader scope covering both physical genocide and cultural genocide'. While agreeing that the distinction was 'perhaps harder to grasp', Thiam observed:

> It seems that the ethnic bond is more cultural. It is based on cultural values and is characterized by a way of life, a way of thinking and the same way of looking at life and things. On a deeper level, the ethnic group is based on a cosmogony. The racial element, on the other hand, refers more typically to common physical traits.[186]

But, as with national and racial groups, there has been a tendency to narrow the scope of the term ethnic with respect to the meaning that prevailed in 1948. This is the result of efforts to give each term in the enumeration an autonomous meaning, as well as to take into account contemporary usage in popular language and in the social sciences. Cultural and linguistic factors are the common denominator of this modern approach. In the *Akayesu* case, a Trial Chamber of the International Criminal Tribunal for Rwanda stated: 'An ethnic group is

[183] Max Weber, 'What Is an Ethnic Group?', in Montserrat Guibernau and John Rex, *The Ethnicity Reader: Nationalism, Multiculturalism and Migration*, Malden, MA: Polity Press, 1997, p. 575.

[184] Glaser, *Droit international*, pp. 111–12 (translated into English in Whitaker, 'Revised Report', note 50 above, pp. 15–16).

[185] Shaw, 'Genocide', p. 807.

[186] 'Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', UN Doc. A/CN.4/398, para. 58.

generally defined as a group whose members share a common language or culture.'[187]

Another Trial Chamber of the Rwanda Tribunal wrote: 'An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others).'[188] The legislation in the United States defines ethnic group as 'a set of individuals whose identity as such is distinctive in terms of common cultural traditions or heritage'.[189] The better view is to take the concept as being largely synonymous with the other elements of the enumeration, encompassing elements of national, racial and religious groups within its scope.

Religious groups

Religious groups were part of the list of protected groups in General Assembly Resolution 96(I)[190] and in the early drafts of the convention.[191] However, in the Sixth Committee of the General Assembly, the United Kingdom questioned the inclusion of religious groups, arguing that people were free to join and to leave them.[192] The Soviets also questioned the term 'religious', urging that it be added in brackets after the reference to national groups.[193] But there was an important historical argument: religious groups had come within the ambit of the post-First World War minorities treaties.[194] The drafters of the Convention considered religious groups as closely analogous to ethnic or national groups, the result of historical conditions that, while theoretically voluntary, in reality circumscribed the group in as immutable a sense as racial or ethnic characteristics.[195] The Soviets and Yugoslavs

[187] *Prosecutor* v. *Akayesu*, note 89 above, para. 512.
[188] *Prosecutor* v. *Kayishema et al.*, note 65 above, para. 98.
[189] Genocide Convention Implementation Act of 1987, note 90 above, s. 1093(2).
[190] UN Doc. A/BUR/50.
[191] UN Doc. A/AC.10/41; UN Doc. A/362, appendix II, art. I § I; UN Doc. E/623, art. I.I; UN Doc. E/623/Add.1, art. 1; UN Doc. E/AC.25/9, art. I.
[192] UN Doc. A/C.6/SR.69 (Shawcross, United Kingdom).
[193] UN Doc. A/C.6/223.
[194] UN Doc. A/C.6/SR.75 (Spiropoulos, Greece).
[195] More than fifty years later, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia noted how Bosnian Muslims, while originally perceived as a religious group, had taken on the identity of a 'national' or 'ethnic' group: *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, paras. 559–60.

sought to refine the definition[196] but this seemed unnecessary to the majority of delegates.[197] Wahid Fikry Raafat of Egypt gave the example of the St Bartholomew massacre of French protestants in the late sixteenth century, noting that '[r]ecent events in India, Pakistan and Palestine also provided examples of destruction of religious and not racial or national groups'.[198]

In *Kayishema et al.*, the International Criminal Tribunal for Rwanda wrote that a 'religious group includes denomination or mode of worship or a group sharing common beliefs'.[199] National law in the United States defines 'religious group' as 'a set of individuals whose identity as such is distinctive in terms of common religious creed, beliefs, doctrines, practices, or rituals'.[200] Once again, as with the other categories of groups, these attempts at definition are more restrictive than both the drafters' intent and the common meaning of the term in 1948.

Identifying a 'religious group' involves identifying a religion. The Human Rights Committee has said 'religion' should not be limited to 'traditional religions or to religions and beliefs with institutional characteristics analogous to those of traditional religions'.[201] But the Committee refused to consider that a group known as the 'Assembly of the Church of the Universe' was entitled to this protection because 'a belief consisting primarily or exclusively in the worship and distribution of a narcotic drug cannot conceivably be brought within the

[196] UN Doc. A/C.6/223.

[197] UN Doc. A/C.6/SR.75 (Morozov, Soviet Union); UN Doc. A/C.6/SR.75 (Bartos, Yugoslavia). In a clairvoyant comment, Bartos said 'it was his duty to call attention to exceptions to that rule which had occurred in his country during the recent war. In view of the fact that there were both Serbs and Croats who belonged to one of three religions, there had been cases, among both the Serbian and Croatian peoples, of genocide for purely religious motives. The Chetniks who were in the service of the forces of occupation had encouraged acts of genocide and had perpetrated them against Serbs. Still more flagrant cases had been committed against Croats at the instigation of certain Catholic bishops. For those reasons, his country had had to include provisions in its legislation for the prevention and suppression of religious genocide as such.'

[198] UN Doc. A/C.6/SR.75 (Raafat, Egypt).

[199] *Prosecutor* v. *Kayishema et al.*, note 65 above, para. 98. See also *Prosecutor* v. *Akayesu*, note 89 above, para. 514.

[200] Genocide Convention Implementation Act of 1987, note 90 above, s. 1093(7).

[201] UN Doc. CCPR/C/21/Rev.1/Add.4, para. 2 (1993). For similar broad interpretations, see the report of Special Rapporteur Theo van Boven, 'Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief', UN Doc. E/CN.4/Sub.2/1989/32, para. 5.

scope of article 18 of the Covenant'.[202] And a decision of the European Court of Human Rights indicates a concern that so-called sects may improperly benefit from freedom of religion.[203] Professor Malcolm Shaw has urged that 'an overly restrictive definition ought to be avoided, provided that a coherent community based upon a concept of a single, divine being is concerned and that such a community is not engaged, for example, in criminal practices'.[204] According to Matthew Lippman, '[r]eligious groups encompass both theistic, non-theistic, and atheistic communities which are united by a single spiritual ideal'.[205] Spanish judge Garzon, in an application alleging genocide in Argentina, ruled:

> To destroy a group because of its atheism or its common non-acceptance of the Christian religious ideology is . . . the destruction of a religious group, inasmuch as, in addition, the group to be destroyed also technically behaves as the object of identification of the motivation or subjective element of the genocidal conduct. It seems, in effect, that the genocidal conduct can be defined both in a positive manner, vis a vis the identity of the group to be destroyed (Muslims, for example), as in a negative matter, and, indeed, of greater genocidal pretensions (all non-Christians, or all atheists, for example).[206]

In its 1999 report, the Group of Experts for Cambodia said that persecution by the Khmer Rouge of the Buddhist monkhood might qualify as genocide of a religious group. It said the intent to destroy the group was evidenced by 'the Khmer Rouge's intensely hostile statements towards religion, and the monkhood in particular; the Khmer Rouge's policies to eradicate the physical and ritualistic aspects of the Buddhist religion; the disrobing of monks and abolition of the monkhood; the number of victims; and the executions of Buddhist leaders and recalcitrant monks'.[207]

[202] *M.A.B., W.A.T. and J.-A.Y.T.* v. *Canada* (No. 570/1993), UN Doc. CCPR/C/51/D/570/1993 (1994). See also: Shaw, 'Genocide', p. 807.

[203] *Kokkinakis* v. *Greece*, Series A, No. 260-A, 25 May 1993. See also Donna Gomien, David Harris and Leo Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter*, Strasbourg: Council of Europe Publishing, 1996, p. 267.

[204] Shaw, 'Genocide', p. 807.

[205] Matthew Lippman, 'The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later', (1994) 8 *Temple International and Comparative Law Journal*, p. 1 at p. 29.

[206] Margarita Lacabe, 'The Criminal Procedures Against Chilean and Argentinian Repressors in Spain', http://hrdata.aaas.org/ceh/report/english/toc.html.

[207] 'Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135', UN Doc. A/53/850, UN Doc. S/1999/231, annex, para. 64. See also Ben Kiernan, 'The Cambodian Genocide, 1975–1979', p. 436.

This raises the intriguing issue of whether the destruction of religion can be equated with destruction of a religious group.

The Group of Experts for Cambodia did not claim that the group of believers as such, that is, Buddhists, was destroyed in whole or in part. Thus, the destruction of the Buddhists took the form of 'cultural' rather than 'physical' genocide, culture being taken in a sense that would include religion. Of course, eliminating the religious leaders and institutions was necessary to eradicate religion, but the purpose was to destroy the religion, not to destroy physically its followers. An alternative view, only implicit in the report of the Group of Experts, views the clergy itself as a religious group contemplated by the Convention, or as being numerically significant enough to qualify as 'part' of a protected group pursuant to article II of the Convention. The Group of Experts also identified the Muslim Cham as both an ethnic and religious group victimized by the Khmer Rouge. It said that the intent to destroy the Cham was evidenced by an 'announced policy of homogenization, the total prohibition of these groups' distinctive cultural traits, the dispersal among the general population and the execution of their leadership'. This is arguably cultural rather than physical genocide, and therefore beyond the scope of the Convention.[208]

Other groups

Beyond its list of three categories, General Assembly Resolution 96(I) added that genocide could also be directed against 'other groups'. The sparse records of the discussions provide no guidance whatsoever on what these might entail. General rules of interpretation would suggest an *ejusdem generis* approach; the 'other groups' must in some way be similar to or analogous with those that are enumerated.[209] The Secretariat draft convention replaced the General Assembly's reference to 'other groups' with two categories, 'national' and 'linguistic' groups,[210] perhaps hinting at what the Assembly meant. The text began with a provision entitled '[p]rotected groups', thus making the list an exhaustive one.[211] Although debate raged about the content of the

[208] See chapter 4, pp. 207–21 below.
[209] *Prosecutor* v. *Delalić et al.* (Case No. IT-96-21-T), Judgment, 16 November 1998, para. 166.
[210] UN Doc. E/447, pp. 17 and 22.
[211] UN Doc. A/AC.10/41; UN Doc. A/362, appendix II, art. I § I.

enumeration, particularly political groups, there is no question the drafters intended to list the protected groups in an exhaustive fashion. For many years, the International Law Commission flirted with modifying article II of the Convention so as to make the enumeration of protected groups non-exhaustive, before finally returning to the original 1948 version.[212]

There are references in national legislation, case law and academic writing to groups not contemplated specifically by the Convention. The most important of these, without a doubt, are political groups. Some isolated support also exists for the recognition of economic and social groups and linguistic groups. The Canadian legislation adopted in 2000 for implementation of the Rome Statute of the International Criminal Court defines genocide as an attempt to destroy 'an identifiable group of persons', to the extent that the definition is consistent with 'genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations'.[213] As the Canadian legislation deems the definition in the Rome Statute to be consistent with customary international law, what the Canadian Parliament is doing in effect is to leave room for future evolution of the definition of genocide so as to comprise groups other than those enumerated in the 1948 Convention.

Stable and permanent groups

The Trial Chamber of the International Criminal Tribunal for Rwanda, in its 2 September 1998 decision in *Akayesu*, considered the enumeration of protected groups in article II of the Genocide Convention, as

[212] *Yearbook . . . 1951*, Vol. I, 90th meeting, pp. 66–8; *Yearbook . . . 1951*, Vol. II, p. 136; 'Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', UN Doc. A/CN.4/398 (1986), art. 12(1); *Yearbook . . . 1989*, Vol. I, 2099th meeting, p. 25, para. 42; *Yearbook . . . 1989*, Vol. I, 2100th meeting, p. 27, para. 2, p. 30, para. 31; *Yearbook . . . 1989*, Vol. I, 2102nd meeting, p. 41, para. 12; 'Report of the Commission to the General Assembly on the Work of Its Forty-First Session', UN Doc. A/CN.4/SER.A/1989/Add.1 (Part 2), p. 59, para. 160; *Yearbook . . . 1991*, Vol. I, 2239th meeting, p. 214, paras. 7–8; *Yearbook . . . 1991*, Vol. I, 2251st meeting, pp. 292–3, paras. 9–17; 'Report of the Commission to the General Assembly on the Work of Its Forty-Third Session', UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 2), p. 102, para. (2).

[213] Crimes Against Humanity and War Crimes Act, 48–49 Elizabeth II, 1999–2000, C-19, s. 4(3).

well as in article 2 of the Tribunal's Statute, to be too restrictive. In light of the above comments on racial and ethnic groups, it can hardly be doubted that the Tutsi fall within the Convention definition. But the categorization of Rwanda's Tutsi population clearly vexed the Tribunal. The Trial Chamber concluded that the drafters of the 1948 Convention meant to encompass all 'stable' and 'permanent' groups.[214] It was a somewhat extravagant reading of the *travaux*, based on rather isolated comments by a few delegations and, moreover, it appeared to contradict a finding elsewhere in the judgment that the Tutsi were an ethnic group for the purposes of charges of crimes against humanity.[215] According to Guénaël Mettraux, '[a]lthough the meritorious agenda behind such a position is obvious, this proposition would appear to be, unfortunately, unsupported in law and at the time of its exposition in fact constitute purely judicial law-making'.[216] The novel interpretation was repeated in two subsequent decisions of the same Trial Chamber, although in a rather more guarded fashion: 'It appears from a reading of the *travaux préparatoires* of the Genocide Convention that certain groups, such as political and economic groups have been excluded from the protected groups, because they are considered to be "mobile groups" which one joins through individual, political commitment. That would seem to suggest *a contrario* that the Convention was presumably intended to cover relatively stable and permanent groups.'[217]

The 'stable and permanent' theory put forward by Trial Chamber I of the International Criminal Tribunal for Rwanda had been effectively forgotten until the Darfur Commission of Inquiry revived the matter in its January 2005 report. According to the Commission, the 'interpretative expansion' effected by the Trial Chamber in *Akayesu* was 'in line with the object and scope of the rules on genocide (to protect from deliberate annihilation essentially stable and permanent human groups, which can be differentiated on one of the grounds contemplated by the Convention and the corresponding customary rules)'. The Commission suggested that the theory had been generally accepted by both Tribunals, adding that 'perhaps more importantly, this broad interpretation has

[214] *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 515.
[215] *Prosecutor* v. *Akayesu*, note 89 above, para. 652.
[216] Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals*, Oxford: Oxford University Press, 2005, at p. 230.
[217] *Prosecutor* v. *Rutaganda* (Case No. ICTR-96-3-T), Judgment and Sentence, 6 December 1999, para. 57; *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment and Sentence, 27 January 2000, para. 162 (reference omitted).

not been challenged by States'. Therefore, '[i]t may ... be safely held that that interpretation and expansion has become part and parcel of international customary law'.[218]

In fact, the *Akayesu* Trial Chamber's approach has never been affirmed by the Appeals Chamber of the International Criminal Tribunal for Rwanda, and has been ignored by other Trial Chambers.[219] Moreover, the 'permanent and stable groups' hypothesis finds no echo whatsoever in any of the judgments of the International Criminal Tribunal for the former Yugoslavia. For this reason, States cannot be expected to challenge such an isolated judicial finding. Their silence is therefore of no assistance in identifying a customary norm, contrary to the suggestion of the Darfur Commission. Trial Chambers of the Yugoslavia Tribunal have noted that the crime of genocide in many respects fits within the historical framework of the international legal protection of national minorities, and that the concept of 'national, ethnic, racial or religious' groups should be interpreted in this context.[220] This approach indicates a quite different view of the philosophical basis for the crime of genocide than the 'stable and permanent groups' theory initially advanced in the *Akayesu* ruling. The Darfur Commission went too far in suggesting that the interpretative expansion of the four groups enumerated in the Genocide Convention 'has become part and parcel of international customary law'. The Commission said this could be 'safely held', but the opposite is the better view.

Political groups

The first draft of General Assembly Resolution 96(I) did not include political groups.[221] It was added by a sub-committee of the Sixth Committee. No reported debate explains this development. It has subsequently been argued that the presence of political groups within the 1946 definition suggests the existence of a broader concept of genocide than that expressed in the Convention, one that reflects customary law.

[218] 'Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur', UN Doc. S/2005/60, para. 501.

[219] George William Mugwanya, *The Crime of Genocide in International Law: Appraising the Contribution of the UN Tribunal for Rwanda*, London: Cameron May, 2007, p. 67.

[220] *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, paras. 555–6. Also: *Prosecutor* v. *Brdanin* (Case No. IT-99-36-T), Judgment, 1 September 2004, para. 682.

[221] UN Doc. A/BUR/50.

But, given the very meagre record of the debates, the haste with which the resolution was adopted, the novelty of the term, and the fact that the subsequent Convention excludes reference to political groups, such a conclusion seems adventuresome at best. The fact that the enumeration in Resolution 96(I) also omits ethnic and national groups is a further argument against its authority on this issue.

Taking the lead from General Assembly Resolution 96(I), the Secretariat draft convention contained a reference to political groups. This provoked sharp disagreement among the three experts consulted by the Secretariat.[222] Raphael Lemkin said political groups lacked the permanency and specific characteristics of the other groups, insisting that the Convention should not risk failure by introducing ideas on which the world was deeply divided. In practice, history had shown that racial, national and religious groups were the most predominant victims of genocide, Lemkin observed.[223] But Henri Donnedieu de Vabres differed, arguing that 'genocide was an odious crime, regardless of the group which fell victim to it and that the exclusion of political groups might be regarded as justifying genocide in the case of such groups'.[224] The third expert, Vespasian V. Pella, did not pronounce himself, saying this was a matter for the General Assembly.[225]

Among member States involved in drafting the Convention, the inclusion of political groups initially appeared well accepted. The United States proposal of 30 September 1947 spoke of 'criminal acts directed against a racial, national, religious, or political group of human beings'.[226] France's draft convention of 5 February 1948 referred to an attack on the life of a human group or an individual as a member of such group, 'particularly by reason of his nationality, race, religion or opinions'.[227] Only one non-governmental organization, the Consultative Council of Jewish Organizations, urged deleting 'political groups' so as not to delay acceptance of the Convention.[228]

[222] UN Doc. A/AC.10/41; UN Doc. A/362, appendix II, art. I § I. For a review of the debates, see 'Prevention of Discrimination and Denial of Fundamental Freedoms in Respect of Political Groups (Memorandum by the Secretary-General)', UN Doc. E/CN.4/Sub.2/129, paras. 3–16.

[223] UN Doc. E/447, p. 22. In Lemkin, *Axis Rule*, pp. 62–83, Lemkin spoke of 'political genocide', but meant something entirely different than the destruction of political groups. Rather, he was concerned with genocide of ethnic groups by the destruction of their political institutions.

[224] UN Doc. E/447, p. 22. [225] *Ibid.* [226] UN Doc. E/623, art. I.I.

[227] UN Doc. E/623/Add.1, art. 1. [228] UN Doc. E/C.2/49.

The Ad Hoc Committee was seriously divided on this issue. Venezuela said it could only inhibit ratification of the Convention, 'as such a prevention might be interpreted as hampering the action of Governments with regard to subversive activities against them'.[229] Lebanon's Karim Azkoul called attention to the essential differences between racial, national and religious groups, all of which bore an inalienable character, and political groups, which were far less stable in character.[230] China likewise expressed hesitation, Moushong Lin questioning that political groups 'had neither the stability nor the homogeneity of an ethnical group'. He said 'there was a risk of bringing about a confusion between the idea of political crime and that of genocide'.[231]

The Soviet Union's 'Basic Principles', tabled during the meetings of the Ad Hoc Committee, excluded political groups.[232] Platon D. Morozov explained that: 'From a scientific point of view, and etymologically, "genocide" meant essentially persecution of a racial, national or religious group.'[233] According to the Soviets: 'The crime of genocide is organically bound up with Fascism-Nazism and other similar race "theories" which preach racial and national hatred, the domination of the so-called "higher" races and the extermination of the so-called "lower" race.'[234] Poland expressed similar resistance to including political groups, observing that national, racial and religious groups 'had a fully established historical background, while political groups had no such stable form'.[235]

France's Pierre Ordonneau argued that 'it was necessary to protect freedom of opinion not only in political matters but also in all other fields'.[236] France wanted to take the issue a step further, advocating reference to 'political and other opinion', and noting that the term had been used in the 1789 Déclaration des droits de l'homme et du citoyen.[237] The United States did not like the French proposal: 'many of the groups against which a State might proceed held certain opinions, and it was a

[229] UN Doc. E/AC.25/SR.1, pp. 4–8. See also UN Doc. E/AC.25/SR.4, p. 12; UN Doc. E/AC.25/SR.13, p. 2; UN Doc. E/AC.25/SR.3, p. 12.
[230] UN Doc. E/AC.25/SR.4, p. 10. [231] UN Doc. E/AC.25/SR.3, pp. 5–6.
[232] 'Basic Principles of a Convention on Genocide', UN Doc. E/AC.25/7: 'I. Genocide, which aims at the extermination of particular groups of the population on racial, national (religious) grounds is one of the gravest crimes against humanity.'
[233] UN Doc. E/AC.25/SR.13, p. 3. [234] UN Doc. E/AC.25/7, Principle I.
[235] UN Doc. E/AC.25/SR.4, pp. 10–11. [236] UN Doc. E/AC.25/SR.3, p. 11.
[237] UN Doc. E/AC.25/SR.4, p. 10.

mistake to shelter them by allowing them to appear as groups persecuted on account of their opinion'. John Maktos said 'a political group was more easily recognizable than a group holding a certain opinion, bearing as it does distinguishing marks which leave less room for confusion'.[238]

China's Lin rallied to the French suggestion to include both political groups and groups based on opinion in the definition, but warned against making the definition needlessly lengthy. There was, in fact, no good reason why social, economic and other groups should not be included as well, he remarked.[239] Recalling that General Assembly Resolution 96(I) had mentioned political groups,[240] the United States proposed an amendment retaining political groups in the enumeration and referring to political belief within the motives of genocide.[241] But, according to the Soviet Union: 'Crimes committed for political motives belonged to a special type of crime and had nothing in common with crimes of genocide, the very name of which, derived as it was from the word genus – race, tribe – referred to the destruction of nations or races as such for reasons of racial or national persecution, and not for political opinions of those groups.'[242] On first reading, the Committee voted to include political groups, by four to three;[243] on second reading, at its twenty-fourth meeting, the vote was five to two in favour, with only Poland and the Soviet Union opposed.[244] However, a United States proposal to add the words 'or political' to the preamble was defeated.[245]

In the Sixth Committee of the General Assembly, amendments by Uruguay[246] and Iran[247] called for removal of the terms 'political' and 'political opinion'. Several States argued that incorporating political groups in the enumeration rather dramatically extended the definition of genocide, and might inhibit ratification.[248] Venezuela said: 'The inclusion of political groups might endanger the future of the convention

[238] *Ibid.*, p. 11. [239] *Ibid.*, pp. 11–12. [240] *Ibid.*, p. 12.

[241] UN Doc. E/AC.25/SR.13, p. 2. As amended, it read: 'In this convention genocide means any of the following deliberate acts directed against a national, racial, religious or political group, on grounds of national or racial origin or religious or political belief.' China successfully proposed changing the final words to read 'or political opinion': UN Doc. E/AC.25/SR.13, p. 3.

[242] UN Doc. E/AC.25/SR.24, p. 4. [243] UN Doc. E/AC.25/SR.13, p. 4.

[244] UN Doc. E/AC.25/SR.24, pp. 4 and 6.

[245] UN Doc. E/AC.25/SR.21, p. 7 (four in favour, three against).

[246] UN Doc. A/C.6/209. [247] UN Doc. A/C.6/218.

[248] UN Doc. A/C.6/SR.69 (Amado, Brazil); UN Doc. A/C.6/SR.69 (Raafat, Egypt); UN Doc. A/C.6/SR.69 (Maúrtua, Peru); UN Doc. A/C.6/SR.69 (Pérez-Perozo, Venezuela).

because many States would be unwilling to ratify it, fearing the possibility of being called before an international tribunal to answer charges made against them, even if those charges were without foundation. Subversive elements might make use of the convention to weaken attempts of their own Government to suppress them.'[249] Sweden, too, was opposed, maintaining that, 'in principle, the question of the protection of political and other groups should come within the scope of the Commission on Human Rights'.[250] The Dominican Republic also favoured excluding political groups.[251] Iran saw a distinction between groups whose membership was inevitable, such as those based on race, religion or nationality, and those of which membership was voluntary: 'it must be admitted that the destruction of the first type appeared more heinous in the light of the conscience of humanity, since it was directed against human beings whom chance alone had grouped together . . . Although it was true that people could change their nationality or their religion, such changes did not in fact happen very often.'[252]

Belgium referred to the etymology of the word 'genocide', which made it clear that political – or for that matter economic – groups were not included.[253] Uruguay added: 'If an international tribunal were established – and the speaker was in favour of such a course – it was probable that many States would refuse to allow such a tribunal to intervene in their internal affairs on the pretext that political genocide had been committed. In order, therefore, that an international tribunal might be established, the convention must not apply to political groups.'[254] Also advocating the removal of 'political groups', the Soviet Union said such acts would belong to the category of crimes against humanity. 'Genocide therefore applied to racial and national groups, although that did not make crimes committed against other groups any the less odious', said Morozov. He observed that the essence of genocide was that the criterion for belonging to a group was objective, not subjective. Answering the argument that this did not apply to religious groups, because a person could always change religion, Morozov noted that, 'in all known cases of genocide perpetrated on grounds of religion, it had always been evident that nationality or race were concomitant reasons'. It was for this reason that the Soviet Union wanted religion listed in parentheses, after racial

[249] UN Doc. A/C.6/SR.69 (Pérez-Perozo, Venezuela). [250] *Ibid.* (Petren, Sweden).
[251] UN Doc. A/C.6/SR.74 (Messina, Dominican Republic). [252] *Ibid.* (Abdoh, Iran).
[253] *Ibid.* (Kaeckenbeeck, Belgium). [254] *Ibid.* (Manini y Ríos, Uruguay).

and national groups.[255] 'Those who needed protection most were those who could not alter their status', said Manfred Lachs of Poland. Political groups, on the other hand, were not only more subjective, but also often quite subversive.[256]

Bolivia preferred retention: 'genocide meant the physical destruction of a group which was held together by a common origin or a common ideology. There was no valid reason for restricting the concept of genocide by excluding political groups.'[257] The Netherlands likewise was supportive, noting the Nazis had also attacked socialist and communist parties.[258] Ecuador said that, 'if the convention did not extend its protection to political groups, those who committed the crime of genocide might use the pretext of the political opinions of a racial or religious group to persecute and destroy it, without becoming liable to international sanctions'.[259] Others noted that General Assembly Resolution 96(I) had referred to political groups, saying that '[p]ublic opinion would not understand it if the United Nations no longer condemned in 1948 what it had condemned in 1946'.[260] Sweden, which had changed its mind in the course of the debate, said that, while it understood the arguments of those who wanted to exclude political groups, it felt it was important not to leave political groups unprotected. Sweden's delegate argued that, as the prohibition in article II was confined to physical destruction, 'all States could guarantee that limited measure of protection to political groups'.[261]

On a roll-call vote, the Sixth Committee decided, by twenty-nine votes to thirteen with nine abstentions, that political groups be retained within the Convention.[262] But the debate was not over. Despite an apparently convincing majority, renewed proposals to remove political groups surfaced later in the session, after presentation of the drafting committee's report. Iran, Uruguay and Egypt proposed amendments to this effect.[263] Brazil said it was opposed to the inclusion of political groups, 'should the Committee decide to re-examine the question'.[264]

[255] *Ibid.* (Morozov, Soviet Union). See UN Doc. A/C.6/223.
[256] UN Doc. A/C.6/SR.75 (Lachs, Poland).
[257] UN Doc. A/C.6/SR.74 (Medeiros, Bolivia).
[258] *Ibid.* (de Beus, Netherlands). On the same point, see *ibid.* (Gross, United States).
[259] *Ibid.* (Correa, Ecuador). See also *ibid.* (Demesmin, Haiti); *ibid.* (Dihigo, Cuba); *ibid.* (Camey Herrera, Guatemala); and UN Doc. A/C.6/SR.75 (Guillen, El Salvador).
[260] UN Doc. A/C.6/SR.74 (Correa, Ecuador). See also *ibid.* (Gross, United States).
[261] UN Doc. A/C.6/SR.75 (Petren, Sweden). [262] *Ibid.* [263] UN Doc. A/C.6/SR.128.
[264] *Ibid.* (Amado, Brazil).

Egypt, which had abstained in the original vote, explained that it wished to exclude political groups 'primarily for practical reasons' because this could be an impediment to ratification.[265] The United States, which had spearheaded efforts to include political groups, quickly retreated: 'The United States delegation continued to think that its point of view was correct but, in a conciliatory spirit and in order to avoid the possibility that the application of the convention to political groups might prevent certain countries from acceding to it, he would support the proposal to delete from article II the provisions relating to political groups.'[266] The change in the United States position was decisive, and no real debate on the issue ensued. The Sixth Committee voted, by twenty-six to four with nine abstentions,[267] to review the question. Then, the proposal to delete political groups was adopted by twenty-two to six, with twelve abstentions.[268]

A few delegations congratulated the United States for its flexibility. The United States delegation itself, in internal reports on the debates, wrote that 'when it appeared that some States might refrain from ratifying the convention because of the retention of these groups therein [i.e. political groups], the United States delegate stated that he would support the proposal for deletion of political groups in the hope that there would be a maximum number of ratifications, and in the further hope that at a future date the Convention might be amended to include them'.[269] China was unhappy with the result, and in a statement after the vote declared that it still preferred to retain political groups, which 'at a time of ideological strife' were 'in greater need of protection than national and religious groups'.[270]

[265] *Ibid.* (Raafat, Egypt).

[266] *Ibid.* (Gross, United States). Aware that this issue might prove difficult, particularly for Latin American States, even prior to the General Assembly session, the United States had planned to compromise on this point and to agree to drop political groups from the definition. See 'Letter, 14 July 1948, Acting Legal Adviser to James Rosenberg', National Archives, United States of America, 501.BD-Genocide, 1945–9; 'Memorandum of Conversation, 16 July 1948, Between John Maktos and Raphael Lemkin', National Archives, United States of America, 501.BD-Genocide, 1945–9; 'Minutes of the Ninth Meeting of the United States Delegation, Paris, Hotel d'Iéna, 30 September 1948', in *Foreign Relations of the United States, 1948*, Vol. I, Washington: United States Government Printing Office, 1975, pp. 295–7 at p. 296.

[267] *Ibid.* [268] *Ibid.*

[269] United States of America, Department of State, *Foreign Relations of the United States*, Vol. I, *General; The United Nations, Part 1*, Washington: United States Government Printing Office, 1975, p. 299.

[270] UN Doc. A/C.6/SR.128 (Ti-tsun Li, China).

It is clear that political groups were excluded from the definition for 'political' reasons rather than reasons of principle.[271] Rigorous examination of the *travaux* fails to confirm a popular impression in the literature[272] that the opposition to inclusion of political genocide was some Soviet machination. The Soviet views were shared by a number of other States for whom it is difficult to establish any geographic or social common denominator: Lebanon,[273] Sweden,[274] Brazil,[275] Peru,[276] Venezuela,[277] the Philippines,[278] the Dominican Republic,[279] Iran,[280] Egypt,[281] Belgium[282] and Uruguay.[283] The exclusion of political groups was in fact originally promoted by a non-governmental organization, the World Jewish Congress,[284] and it corresponded to Raphael Lemkin's vision of the nature of the crime of genocide.[285]

Since 1948, there has been unrelenting criticism of what one commentator has called the Convention's 'blind spot'.[286] During preparation of the Rome Statute of the International Criminal Court, a few delegations

[271] In its 1996 report, the International Law Commission said political groups were excluded by the General Assembly 'because this type of group was not considered to be sufficiently stable': 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', UN Doc. A/51/10, p. 89.

[272] Drost, *The Crime of State*, pp. 60–3; Whitaker, 'Revised Report', note 50 above, p. 18, para. 35; Glaser, *Droit international*, p. 110, n. 99; Shaw, 'Genocide', p. 808; Bruun, 'Beyond the Convention', p. 206; Verhoeven, 'Le crime de génocide', p. 21; Ratner and Abrams, *Accountability*, p. 32.

[273] UN Doc. E/AC.25/SR.4, p. 10. [274] UN Doc. A/C.6/SR.69 (Petren, Sweden).

[275] UN Doc. A/C.6/SR.63 (Amado, Brazil); UN Doc. A/C.6/SR.68, p. 56.

[276] UN Doc. A/C.6/SR.69 (Maúrtua, Peru).

[277] UN Doc. A/C.6/SR.65 (Pérez-Perozo, Venezuela). [278] *Ibid.* (Paredes, Philippines).

[279] UN Doc. A/C.6/SR.74 (Messina, Dominican Republic).

[280] UN Doc. A/C.6/218; UN Doc. A/C.6/SR.74 (Abdoh, Iran).

[281] UN Doc. A/C.6/SR.63 (Raafat, Egypt); UN Doc. A/C.6/SR.72 (Raafat, Egypt); UN Doc. A/C.6/SR.74, p. 91.

[282] UN Doc. A/C.6/SR.74 (Kaeckenbeeck, Belgium).

[283] UN Doc. A/C.6/209; UN Doc. A/C.6/SR.74 (Manini y Ríos, Uruguay).

[284] UN Doc. E/623. Cited in Robinson, *Genocide Convention*, p. 59, n. 9.

[285] Lemkin, *Axis Rule*, pp. 82–3. The United States Committee for a United Nations Genocide Convention, with which Raphael Lemkin was associated, lobbied with the United States delegation to exclude political groups from the Convention: 'Letter from James N. Rosenberg to John Foster Dulles, 3 November 1948', Raphael Lemkin Papers, New York Public Library, Reel 1.

[286] Van Schaack, 'Political Genocide'. See also Lawrence J. Leblanc, 'The United Nations Genocide Convention and Political Groups: Should the United States Propose an Amendment?', (1988) 13 *Yale Journal of International Law*, p. 268; Glaser, *Droit international*, p. 112; Stanislav Plawski, *Etude des principes fondamentaux du droit international pénal*, Paris: Librairie générale de droit et de jurisprudence, 1972, p. 114; 'Study of the Question of the Prevention and Punishment of the Crime of Genocide,

proposed that political groups be added to what they hoped would become a revised and updated version of the text of article II of the Genocide Convention.[287] In 1994, the Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted a resolution suggesting that the Convention 'could be improved' and that it would 'study the possibility of extending its application . . . to political genocide'.[288] Benjamin Whitaker argued for a broader 'lay' concept of genocide, applied by sociologists and historians,[289] which includes political groups.[290] Some writers have introduced the term 'politicide'.[291] Also, certain domestic legal systems have taken the initiative of including 'political' genocide within their own criminal law texts. Ethiopia is one of them, the result of provisions that date from its 1957 Penal Code.[292] In the 1990s, these texts formed the basis of prosecutions of former leaders of the Derg regime for 'genocide' committed against political opponents.[293] The domestic penal

Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur', note 156 above, para. 87.

[287] 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court', UN Doc. A/50/22, p. 12, para. 61; 'Report of the Preparatory Committee on Establishment of an International Criminal Court', UN Doc. A/51/22, Vol. I, p. 17, para. 59; *ibid.*, Vol. II, p. 57; 'Decisions Taken by the Preparatory Committee at its Session Held 11 to 21 February 1997', UN Doc. A/AC.249/1997/L.5, annex I, p. 3, n. 2; see also UN Doc. A/AC.249/1997/WG.1/CRP.1 and Corr.1; 'Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands', UN Doc. A/AC.249/1998/L.13, p. 17, n. 11; and 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc. A/CONF.183/2/Add.1, p. 13, n. 2.

[288] 'Strengthening the Prevention and Punishment of the Crime of Genocide', SCHR Res. 1994/11, para. 4.

[289] Chalk and Jonassohn, 'Conceptual Framework', pp. 12–27.

[290] Whitaker, 'Revised Report', note 50 above, p. 20.

[291] Harff, 'Recognizing Genocides and Politicides', in Fein, ed., *Genocide Watch*, New Haven: Yale University Press, 1991, pp. 27–41; Barbara Harff and Ted Robert Gurr, 'Victims of the States: Genocides, Politicides and Group Repression Since 1945', (1989) 1 *International Review of Victimology*, p. 23; Jordan J. Paust, 'Aggression Against Authority: The Crime of Oppression, Politicide and Other Crimes Against Human Rights', (1986) 18 *Case Western Reserve Journal of International Law*, p. 283; Ben Kiernan, 'Genocide and "Ethnic Cleansing"'.

[292] Penal Code of the Empire of Ethiopia of 1957, art. 281 (*Negarit Gazeta*, Extraordinary Issue No. 1 of 1957). Apparently, it was added at the initiative of a zealous young intern, Cherif Bassiouni, who was eager to correct the shortcomings of the Convention definition.

[293] Julie V. Mayfield, 'The Prosecution of War Crimes and Respect for Human Rights: Ethiopia's Balancing Act', (1995) 9 *Emory International Law Review*, p. 553; Firew Kebede Tiba, 'The Mengistu Genocide Trial in Ethiopia', (2007) 5 *Journal of International Criminal Justice*, p. 513.

codes of Bangladesh,[294] Panama,[295] Costa Rica,[296] Peru,[297] Slovenia[298] and Lithuania[299] also recognize genocide of political groups. But there are few such States, and it is ambitious to suggest that the practice of a few defines some customary norm including political groups in the definition of genocide. The vast majority of States follow the Convention to the letter in their domestic legislation.

In a 1996 report, the Inter-American Commission on Human Rights considered inadmissible a claim that a Colombian political party, whose members were subject to extrajudicial executions, disappearances and other human rights violations, was a victim of genocide.[300] The Commission noted that the Genocide Convention codifies customary international law, citing article II:

> 23. The petitioners have not alleged facts which would tend to show that the Patriotic Union is a 'national, ethnical, racial or religious group.' Instead, the petitioners have alleged that the members of the Patriotic Union have been persecuted solely because of their membership in a political group. Although political affiliation may be intertwined with national, ethnic or racial identity under certain circumstances, the petitions have not alleged that such a situation exists in relation to the membership of the Patriotic Union.
>
> 24. The definition of genocide provided in the Convention does not include the persecution of political groups, although political groups were mentioned in the original resolution of the General Assembly of the United Nations leading to the preparation of the Convention on Genocide. The mass murders of political groups were explicitly excluded from the definition of genocide in the final Convention. Even in its more recent application such as the Yugoslavia War Crimes Tribunal, the definition of genocide has not expanded to include persecution of political groups.

[294] International Crimes (Tribunals) Act 1973 (Bangladesh), s. 3(2)(c).
[295] Penal Code 1993 (Panama), art. 311.
[296] Penal Code 1992 (Costa Rica), art. 373.
[297] Penal Code of 1995 (Peru), art. 129.
[298] Slovenia respects the Convention definition, but appends to its Penal Code provision dealing with genocide the following: 'The same punishment shall be imposed on whoever commits any of the acts under the previous paragraph against a social or political group' (Penal Code (1994) (Slovenia), Chapter 35, art. 373(2)).
[299] Criminal Code of the Republic of Lithuania, art. 71.
[300] In accordance with art. 29(b) of the American Convention on Human Rights, (1979) 1144 UNTS 123, OASTS 36, the Inter-American Commission on Human Rights is competent to interpret provisions of treaties like the Genocide Convention: *'Other Treaties' Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights)*, Advisory Opinion OC-1/82, 24 September 1982, Series A, No. 1, paras. 43–4.

> 25. The Commission concludes that the facts alleged by the petitioners set forth a situation which shares many characteristics with the occurrence of genocide and might be understood in common parlance to constitute genocide. However, the facts alleged do not tend to establish, as a matter of law, that this case falls within the current definition of genocide provided by international law.[301]

There has also been occasional reference to political genocide in international instruments, such as the Cairo Declaration of 29 November 1995, which, speaking of the situation in the Great Lakes Region of Africa, 'forcefully condemn[ed] the ideology of ethnic and political genocide used in the rivalry for the conquest and monopoly of power'.[302] The Special Rapporteur on Burundi of the Commission on Human Rights has lamented the fact that criteria based on the political affiliation of the victims of genocide are not included within the Convention definition.[303] Interestingly, however, in recent years, when the question has been examined by bodies such as the International Law Commission,[304] the Ad Hoc Committee on the Establishment of an International Criminal Court[305] and the Preparatory Committee on the Establishment

[301] *Diaz et al.* v. *Columbia* (Case No. 11.227), Report No. 5/97, On Admissibility, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.95 Doc. 7 rev. at 99 (1997).

[302] 'Cairo Declaration on the Great Lakes Region', 29 November 1995, www.cartercenter.org/NEWS/RLS95/cairodec.html (visited 26 February 1999).

[303] 'Interim Report on the Human Rights Situation in Burundi Submitted by the Special Rapporteur of the Commission on Human Rights, Pursuant to Commission on Human Rights Resolution 1996/1 and Economic and Social Council Decision 1996/254', UN Doc. A/51/459, para. 49.

[304] For example, 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', UN Doc. A/51/10, pp. 86 and 89. Early attempts to amend the definition and add political groups were promptly dismissed as unrealistic. See *Yearbook . . . 1950*, Vol. I, 59th meeting, para. 25, p. 140; *Yearbook . . . 1951*, Vol. I, 90th meeting, paras. 57–61, p. 67.

[305] 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court', note 287 above, para. 61: 'There was a suggestion to expand the definition of the crime of genocide contained in the Convention to encompass social and political groups. This suggestion was supported by some delegations who felt that any gap in the definition should be filled. However, other delegations expressed opposition to amending the definition contained in the Convention, which was binding on all States as a matter of customary law and which had been incorporated in the implementing legislation of the numerous States parties to the Convention. The view was expressed that the amendment of existing conventions was beyond the scope of the present exercise. Concern was also expressed that providing for different definitions of the crime of genocide in the statute could result in the International Court of Justice and the international criminal court rendering conflicting decisions with respect to the same situation under the two respective instruments. It was suggested that acts such as murder

of an International Criminal Court,[306] the question has not led to very serious debate, and the allegedly much-desired improvement to the Convention has never been made. Nor was such a position seriously advanced by any of the influential non-governmental organizations in their persistent lobbying during the drafting of the Rome Statute.

The omission of political groups has inspired some critics to make comments that can only be characterized as hyperbole. According to Pieter Drost: 'By leaving political and other groups beyond the purported protection the authors of the Convention also left a wide and dangerous loophole for any Government to escape the human duties under the Convention by putting genocide into practice under the cover of executive measures against political or other groups for security, public order or any other reason of state.'[307] His words were echoed by Benjamin Whitaker in his 1985 report.[308] According to Barbara Harff, because 'the two most recent events most closely resembling the Holocaust (Uganda and Kampuchea) cannot properly be called genocide', they 'cannot properly be called a crime under international law'.[309] Beth van Schaack has asserted that, because of shortcomings in the Convention definition, those who perpetrate 'political genocide' will 'escape liability'.[310] Yet, would anybody credibly argue that the International Convention for the Elimination of All Forms of Racial Discrimination constitutes incitement to discrimination based on gender, sexual orientation and disability because of its narrow focus? Obviously,

that could qualify as genocide when committed against one of the groups referred to in the Convention could also constitute crimes against humanity when committed against members of other groups, including social or political groups.' Egypt was apparently the source of the proposal: Herman von Hebel and Darryl Robinson, 'Crimes Within the Jurisdiction of the Court', in Roy S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*, The Hague, London and Boston: Kluwer Law International, 1995, pp. 79–128 at p. 89, n. 37.

[306] In its final version of the 'Text of the Draft Statute for the International Criminal Court', adopted at the conclusion of the March–April 1998 session of the Preparatory Committee, the Convention definition of genocide was accompanied by the following footnote: 'The Preparatory Committee took note of the suggestion to examine the possibility of addressing "social and political" groups in the context of crimes against humanity. N.B. The need for this footnote should be reviewed in the light of the discussions that have taken place in respect of crimes against humanity.' UN Doc. A/AC.249/1998/CRP.8, p. 2.

[307] Drost, *The Crime of State*, p. 123. [308] Whitaker, *Droit international*, p. 19, para. 36.

[309] Barbara Harff, *Genocide and Human Rights: International Legal and Political Issues*, Denver: Graduate School of International Studies, University of Denver, 1984, p. 17.

[310] Van Schaack, 'Political Genocide', p. 2290.

excluding political groups from the definition of genocide is in no way a licence to eliminate them, especially because for many decades the destruction of political groups has been encompassed within the customary law notion of crimes against humanity. As the International Law Commission stated, in resisting perfunctory efforts to amend the Convention definition: 'Political groups were included in the definition of persecution contained in the Nuremberg Charter, but not in the definition of genocide contained in the Convention because this type of group was not considered to be sufficiently stable for purposes of the latter crime. None the less persecution directed against members of a political group could still constitute a crime against humanity.'[311]

A Trial Chamber of the International Criminal Tribunal for Rwanda, in the 'Media Case', suggested that genocide was committed against Hutu opponents, because they had supported the Tutsi ethnic group.[312] The Appeals Chamber described the finding as 'problematic' by its incorrect implication that political groups might be included within the ambit of the definition of genocide.[313] As the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia had pointed out, the General Assembly of the United Nations had declined to include destruction of political groups within the definition of genocide, 'accepting the position of countries that wanted the Convention to protect only "definite groups distinguished from other groups by certain well-established", immutable criteria'.[314]

Economic and social groups

During the drafting of the Convention, there were isolated proposals to add economic and social groups to the enumeration. Genocide of 'economic' groups was suggested by the United States,[315] but later dropped. In the Sixth Committee, the Netherlands said this would be going too far: 'It would lead to the absurd result that certain professions, when threatened by economic measures which were required in the

[311] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', UN Doc. A/51/10, p. 89.
[312] *Prosecutor* v. *Nahimana et al.* (Case No. ICTR-99-52-T), Judgment and Sentence, 3 December 2003, para. 948.
[313] *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007, para. 496.
[314] *Prosecutor* v. *Stakić* (Case No. IT-97-24-A), Judgment, 22 March 2006, para. 22.
[315] UN Doc. A/C.6/214.

interest of the country, might invoke the convention to protect their own interests.'[316] Lemkin had written about 'economic genocide', but by this he meant not the destruction of economic groups but instead the destruction of the foundations of the economic life of a nation or national minority.[317] Lemkin's philosophy was picked up in the 1946 Saudi Arabian draft: 'Planned disintegration of the political, social or economic structure of a group, people or nation.'[318]

Considerable academic literature tends to favour inclusion of economic and social groups within the scope of the crime of genocide. The persecution of rich peasants or kulaks during collectivization in the Soviet Union,[319] and the massacres associated with various social changes that the Khmer Rouge attempted to effect in Cambodia during the late 1970s,[320] are given as examples. In draft legislation directed at the prosecution of Khmer Rouge leaders, prepared in August 1999, the Cambodian Government enlarged the Convention definition of genocide to include 'wealth, level of education, sociological environment (urban/rural), allegiance to a political system or regime (old people/new people), social class or social category (merchant, civil servant etc.)'.[321]

Commenting on the Cambodian proposal, a United Nations delegation headed by legal officer Ralph Zacklin noted the discrepancy with the Convention definition and charged that any such provision would violate the prohibition of retroactive offences.[322] It noted, however, that the categories not covered by the Convention definition would be captured

[316] UN Doc. A/C.6/SR.74 (de Beus, Netherlands). See also UN Doc. A/C.6/SR.69 (Pérez-Perozo, Venezuela); and UN Doc. A/C.6/SR.72 (Raafat, Egypt).

[317] Lemkin, *Axis Rule*, pp. 85–6.

[318] UN Doc. A/C. 6/86.

[319] Chalk and Jonassohn, 'Conceptual Framework', pp. 290–322; James E. Mace, 'Soviet Man-Made Famine in Ukraine', in Totten, Parsons and Charny, eds., *Genocide*, pp. 97–137; Lyman H. Legters, 'The Soviet Gulag: Is It Genocidal?', in Israel W. Charny, ed., *Toward the Understanding and Prevention of Genocide: Proceedings of the International Conference on the Holocaust and Genocide*, Boulder and London: Westview Press, 1984, pp. 60–6; A. J. Hobbins and Daniel Boyer, 'Seeking Historical Truth: The International Commission of Inquiry into the 1932–33 Famine in Ukraine', (2002) 24 *Dalhousie Law Review*, p. 139.

[320] Chalk and Jonassohn, 'Conceptual Framework', pp. 398–407; Ben Kiernan, 'The Cambodian Genocide: Issues and Responses', in Andreopoulos, *Genocide*, pp. 191–228; Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975–1979*, New Haven: Yale University Press, 1996.

[321] 'Draft Law on the Repression of Crimes of Genocide and Crimes Against Humanity', unofficial translation from French.

[322] 'Comments on the Draft Law Concerning the Punishment of the Crime of Genocide and Crimes Against Humanity', August 1999, para. 4.

under crimes against humanity.[323] The United Nations counter-proposal confined itself to the text of article II of the Convention, as well as to the definition of crimes against humanity contained in the Statute of the International Criminal Tribunal for Rwanda.[324]

There were proposals to include economic and social groups in the genocide provision of the Rome Statute for the International Criminal Court.[325] Peru,[326] Paraguay[327] and Lithuania[328] include 'social groups' within their legislation prohibiting genocide. When Spain enacted a crime of genocide in 1971, it defined it with reference to a 'national ethnic, social or religious group'. However, the legislation was changed in 1983 and Spain returned to the enumeration in article II of the Convention. Portugal's 1982 penal code also included 'social groups' within the definition of genocide.[329] However, the code was revised in 1995 and Portugal reverted to the Convention definition.[330]

Linguistic groups

The Secretariat draft replaced the General Assembly's reference to 'other groups' with two categories, one of which was 'linguistic' groups.[331] The United States argued against what it considered an unnecessary reference to linguistic groups in the enumeration, 'since it is not

[323] *Ibid.*, para. 3.

[324] 'Draft Law on the Establishment of a Tribunal for the Prosecution of Khmer Rouge Leaders Responsible for the Most Serious Violations of Human Rights', August 1999.

[325] 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc. A/51/22, Vol. I, pp. 17–18, para. 60; 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc. A/51/22, Vol. II, p. 57; 'Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Draft Final Act', UN Doc. A/CONF.183/2/Add.1, p. 11, n. 2. See also 'Decisions Taken by the Preparatory Committee at its Session Held 11 to 21 February 1997', UN Doc. A/AC.249/1997/L.5, p. 3, n. 2; 'Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands', UN Doc. A/AC.249/1998/L.13, pp. 17–18; and UN Doc. A/CONF.183/2/Add.1, p. 17, n. 11; UN Doc. A/CONF.183/C.1/SR.3, para. 106.

[326] Penal Code 1995 (Peru), art. 129. The relevant provisions were invoked in a case before the Inter-American Court of Human Rights: *Case of the Miguel Castro-Castro Prison* v. *Peru*, Judgment of 5 November 2006 (Merits, Reparations and Costs), paras. 6, 80 and 229.

[327] Penal Code (Paraguay), art. 308.

[328] Criminal Code of the Republic of Lithuania, art. 71.

[329] Penal Code of 1982 (Portugal), art. 189.

[330] Decree-Law No. 48/95 of 15 March 1995. The provision is now art. 239 of the Penal Code.

[331] In explanatory comments on the draft, the Secretariat said it had been guided by the General Assembly resolution: UN Doc. E/447, pp. 17 and 22. See Drost, *The Crime of State*, pp. 22–3.

believed that genocide would be practised upon them because of their linguistic, as distinguished from their racial, national or religious, characteristics'.[332] Later, in introducing the term 'ethnical' during debates in the Sixth Committee, Sweden also noted that the constituent factor of a minority might be its language, and, if linguistic groups were not connected with an existing state, then they would be protected as an ethnical group rather than a national group.[333]

Gender

Some scholars have advocated adding groups defined by gender to the enumeration. Benjamin Whitaker, in his 1985 report to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, said the list of groups should be extended to cover both men and women.[334] If the basis of the enumeration is groups that are 'stable and permanent', as proposed by a Trial Chamber of the International Criminal Tribunal for Rwanda in *Akayesu*, it can certainly be applied to women.[335] On closer scrutiny, however, the purpose of such initiatives is to facilitate the prosecution of crimes directed against the reproductive capacity of women, and this is more a matter of the survival of the national, ethnic, racial or religious group to which women belong. In such cases, the intent of the offender is to destroy the group to which the women victims belong, not the women as a group. The real interest in extending the Convention's scope to gender groups is to strengthen its role in the prosecution of crimes directed against women.[336] This is better accomplished by purposive interpretation of the acts of genocide than by adding to the enumeration of protected groups.

Any group

The first draft of General Assembly Resolution 96(I) spoke of 'national, racial, ethnical or religious groups',[337] echoing the terminology finally

[332] UN Doc. A/401. [333] UN Doc. A/C.6/SR.75 (Petren, Sweden).
[334] Whitaker, 'Revised Report', note 50 above, p. 16, para. 30.
[335] Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, Vol. I, Irvington-on-Hudson, NY: Transnational Publishers, 1995, p. 88, n. 279.
[336] Kelly Dawn Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, The Hague: Martinus Nijhoff, 1997, pp. 342–4.
[337] UN Doc. A/BUR/50.

adopted, but the drafting committee of the Sixth Committee changed this to 'racial, religious, political and other groups'.[338] The debates in no way indicate that the term 'other groups' was meant to be interpreted broadly, so as to encompass any group. The *ejusdem generis* rule of interpretation indicates that 'such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned'.[339] In 1947, the Secretariat warned that 'protection is not meant to cover a professional or athletic group'.[340]

French legislation has taken genocide to imply groups, of whatever kind, identified by an 'arbitrary' criterion.[341] Belgium made a proposition along these lines in its comments on the International Law Commission's draft Code of Crimes Against the Peace and Security of Mankind, arguing for what it called a 'non-exhaustive list of groups':

> The non-exhaustive nature of the list of groups is totally justified: genocide is a concept intended to cover a variety of situations which do not necessarily coincide with the few examples documented by history. Thus, in the case of the acts of genocide perpetrated in Cambodia, the target group did not have any of the characteristics included in the definition of genocide set out in article II of the Convention of 9 December 1948 . . . Consequently, the definition of genocide should be reviewed. There are two possible solutions: either adopting a non-exhaustive list of groups, or supplementing the exhaustive list with other notions such as those of political groups and socio-economic groups.[342]

A non-exhaustive list may certainly be large enough to cover, for example, groups of disabled persons, for whom there are definite historical examples of persecution.[343] It also satisfies long-standing demands to include political groups. Other groups for whom it has been occasionally argued that the term genocide should offer protection

[338] GA Res. 96(I).

[339] *Black's Law Dictionary*, 6th edn, St Paul, MN: West Publishing, 1991, p. 517. On *ejusdem generis*, see *Prosecutor* v. *Delalić et al.*, note 209 above, para. 166.

[340] UN Doc. E/447, p. 22.

[341] Penal Code (France), *Journal officiel*, 23 July 1992, art. 211-1.

[342] 'Comments and Observations of Governments on the Draft Code of Crimes Against the Peace and Security of Mankind Adopted on First Reading by the International Law Commission at its Forty-Third Session', UN Doc. A/CN.4/448, pp. 35–6.

[343] Hugh Gregory Gallagher, 'Holocaust: The Genocide of Disabled Peoples', in Totten, Parsons and Charny, *Genocide*, pp. 265–98.

include homosexuals,[344] the elderly[345] and the mentally disturbed.[346]

So-called 'auto-genocide' can also fall within the rubric of genocide of any group. The Spanish National Audience adopted this view in 1998, upholding rulings by Judge Baltasar Garzon that genocide had been committed in Argentina during the 1970s and 1980s, and later the same year in his determination in the Augusto Pinochet case. According to the Spanish court, a dynamic or evolutive interpretation of the Convention should extend the scope of article II to all groups:

> We know that in the 1948 convention the term 'political' or the words 'or others' do not appear, when it relates in article 2 the characteristics of the groups object of the destruction proper of genocide. But silence is not the equivalent of unfailing exclusion. Whatever the intentions of the writers of the text were, the Convention acquires life by virtue of the successive signatures and ratifications of the treaty by members of the United Nations who shared the idea of genocide as an odious scourge that they should commit themselves to prevent and sanction. Article 137bis of the repealed Criminal Code, fed by the worldwide concern that funded the 1948 Convention, cannot exclude from its typification acts as those alleged in this case. The sense of the force of the necessity felt by the countries party to the 1948 Convention of responding criminally to genocide, avoiding its impunity, for considering it to be a horrible crime against international law, requires that the term 'national group' not mean 'group formed by people who belong to a same nation', but simply a national human group, a distinct human group, characterized by something, integrated to a larger community. The restrictive understanding of the type of genocide that the appellants defend would stop the qualification as genocide of such odious actions as the systematic elimination by the power or by a band of AIDS patients, as a distinct group, or of the elderly, also as a distinct group, or of foreigners who reside in a country, who, even though they are of different nationalities, can be considered a national group in relationship to the country where they live, differentiated precisely for not being nationals of that state.
>
> That social conception of genocide – felt, understood by the community, in which it founds its rejection and horror for the crime – would not permit exclusions such as those pointed out. The prevention and punishment of genocide as such genocide, that is to say, as an international crime, as an evil that affects the international community directly, in the intentions of the 1948 Convention that appear from the text, cannot exclude, without reason in the logic of the system, certain distinct

[344] Whitaker, 'Revised Report', note 50 above, p. 16, para. 30; Jack Nusan Porter, 'What Is Genocide? Notes Toward a Definition', in Jack Nusan Porter, *Genocide*, pp. 2–33 and p. 8.

[345] Lippman, 'Drafting', p. 62. [346] *Ibid.*

> national groups, discriminating against them for others. Neither the 1948 Convention or our Penal Code, nor the repealed code, expressly exclude this necessary integration. Garzon's interpretation was confirmed by the National Audience.[347]

It is difficult to quarrel with the humanitarian sympathies of the Spanish court, although the legal analysis is hardly compelling. In the end, such reasoning leads to an absurdity that trivializes the very nature of genocide: the human race itself constitutes a protected group, and therefore genocide covers any mass killing. From a legal standpoint, the principal drawback of this approach is that it can in no way be stretched to apply to the Convention. Arguably, it might be subsumed within a customary law conception of genocide. But the basis for such a claim is indeed flimsy. Aside from the wishful thinking of some commentators, there is a paucity of supporting evidence to show either *opinio juris* or State practice, the two components of customary norms. Nor is the reference to 'other groups' in General Assembly Resolution 96(I) particularly convincing, given what we know of the superficial and very preliminary discussions that took place on this point in the Sixth Committee. Atrocities committed against groups not covered by article II of the Genocide Convention are adequately addressed by other legal norms, in particular the prohibition of crimes against humanity.

[347] Case 173/98, Penal Chamber, Madrid, 5 November 1998, www.derechos.org/nizkor/chile/juicio/audi.html (consulted 20 April 1999). Translation from: Margarita Lacabe, 'The Criminal Procedures Against Chilean and Argentinian Repressors in Spain'. The genocide provision in the Spanish penal code differs somewhat from the Convention, although the reasoning of the Spanish judges indicates reliance on more than an idiosyncratic definition of the crime. See Richard J. Wilson, 'Prosecuting Pinochet in Spain', *Human Rights Brief*, Vol. 6, issue 3, pp. 3–4 and 23–4 at pp. 3–4.

4

The physical element or *actus reus* of genocide

This chapter and the one that follows concern the two basic elements of the offence called 'genocide'. Because genocide constitutes a criminal infraction, and because this study concentrates essentially on the law of genocide, a jargon familiar to criminal lawyers has been chosen for this discussion. To the criminal lawyer, the 'elements of the offence' are fundamental because they set out the ground rules of the trial, determining what must be proven by the prosecution for a case to succeed. If the prosecution establishes all the elements of the offence beyond a reasonable doubt (or the *intime conviction*) of the trier of fact, then a conviction may lie. If the defence casts reasonable doubt on even one 'element of the offence', then the accused is entitled to acquittal.

Criminal law analysis of an offence proceeds from a basic distinction between the physical element (the *actus reus*) and the mental element (the *mens rea*). The prosecution must prove specific material facts, but must also establish the accused's criminal intent or 'guilty mind': *actus non facit reum nisi mens sit rea*.[1] The definition of genocide in the 1948 Convention invites this analysis, because it rather neatly separates the two elements.[2] The initial phrase or chapeau of article II addresses the *mens rea* of the crime of genocide, that is, the 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'. The five subparagraphs of article II list the criminal acts or *actus reus*. The distinction between *actus reus* and *mens rea* features in virtually all of the judgments of the international tribunals that concern charges of genocide.[3] It has even been extended into the realm of State responsibility.[4]

[1] *Reynolds* v. *G. H. Austin & Sons Ltd* [1951] 2 KB 135; *Sherras* v. *De Rutzen* [1895] 1 QB 918, 921.

[2] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', UN Doc. A/51/10, p. 87.

[3] E.g. *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 542.

[4] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 219.

In his book, *Axis Rule in Occupied Europe*, Raphael Lemkin conceived of several 'techniques of genocide in various fields': physical and biological, political, social, cultural, religious, economic and moral.[5] He was not referring to political, social, cultural, religious, economic or moral groups, but rather to acts of genocide directed at various aspects of the life of a group. Political genocide, for example, involves the destruction of a group's political institutions and may even entail forced name changes.[6] Economic genocide targets the group's economic institutions and its source of livelihood. Lemkin said physical genocide is carried out mainly by racial discrimination in feeding, endangering of health, and outright mass killings.[7] In all of this, his mind was turned to the ongoing genocide in Nazi Germany and in the Reich's occupied territories.

Lemkin's broad view of the nature of genocide was reflected in the original draft convention, proposed by Saudi Arabia in late 1946.[8] Article I contemplated mass killing, destruction of 'the essential potentialities of life', 'planned disintegration of the political, social or economic structure', 'systematic moral debasement' and 'acts of terrorism committed for the purpose of creating a state of common danger and alarm ... with the intent of producing [the group's] political, social, economic or moral disintegration'.

It became clear, from the adoption of General Assembly Resolution 96(I) in December 1946, that any international consensus on the scope of genocide would be considerably more narrow. The preamble described genocide as 'a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings'. This association between genocide and homicide focused on the physical dimension. The resolution noted that genocide had resulted 'in great losses to humanity in the form of cultural and other contributions represented by these human groups'.[9] But the reference to culture did not have the same connotation as in Lemkin's writings. It merely lamented cultural loss occasioned by physical genocide, without necessarily suggesting that the destruction of culture, in the absence of violence against the person, might also amount to the crime of genocide.

The Secretariat draft contained three categories of genocide, corresponding roughly to the headings of physical, biological and cultural

[5] Raphael Lemkin, *Axis Rule in Occupied Europe: Analysis of Government, Proposals for Redress*, Washington: Carnegie Endowment for World Peace, 1944, p. 82.
[6] *Ibid.* [7] *Ibid.*, pp. 87–9. [8] UN Doc. A/C.6/86. [9] GA Res. 96(I).

genocide. According to the Secretariat, physical genocide involved acts intended to cause the death of members of a human group; biological genocide consisted in placing restrictions upon births; cultural genocide was the destruction 'by brutal means of the specific characteristics of a human group, that is to say, its moral and sociological characteristics'.

In its explanatory report, the Secretariat noted that Lemkin had distinguished between these three types. Should all three, or only the first two, be included, asked the Secretariat? It also cautioned the General Assembly about covering too much ground with the convention, insisting upon a restrictive definition: '[O]therwise there is a danger of the idea of genocide being expanded indefinitely to include the law of war, the right of peoples to self-determination, the protection of minorities, the respect of human rights, etc.'[10] The Secretariat also signalled a tendency to include crimes that did not constitute genocide, saying this could jeopardize the success of the convention.[11]

The Ad Hoc Committee and the Sixth Committee of the General Assembly both decided to exclude acts of cultural genocide.[12] Besides working on the precise definitions of acts of genocide, the debates addressed whether the enumeration should be merely indicative. The list in the draft adopted by the Ad Hoc Committee was an exhaustive one. In the Sixth Committee, China proposed replacing the words 'the following', used in the Ad Hoc Committee draft, with 'including the following',[13] to make the enumeration non-exhaustive.[14] Similarly, Peru proposed adding the phrase 'for example' in order to convey the idea that the enumeration was not exhaustive.[15] In opposition, Poland argued that the Charter of the International Military Tribunal contained an indicative enumeration of war crimes.[16] Yugoslavia observed that the future convention was not 'a law which judges would have to apply' but rather an international obligation, so a similar approach was acceptable.[17] Opponents of the Chinese amendment claimed that law required certainty, and that a failure to specify all acts of genocide

[10] *Ibid.*
[11] 'Ad Hoc Committee on Genocide, Ad Hoc Committee's Terms of Reference, Note by the Secretary-General', UN Doc. E/AC.25/2.
[12] See pp. 209–14 below.
[13] UN Doc. A/C.6/232/Rev.1. France (UN Doc. A/C.6/233) and the Soviet Union (UN Doc. A/C.6/223) proposed similar amendments.
[14] UN Doc. A/C.6/SR.78 (Ti-tsun Li, China). See also UN Doc. A/C.6/SR.81 (Morozov, Soviet Union).
[15] UN Doc. A/C.6/241. [16] UN Doc. A/C.6/SR.78 (Lachs, Poland).
[17] *Ibid.* (Bartos, Yugoslavia).

might mean the convention would be applied differently in different countries.[18] The United States warned against incorporating provisions that could encourage international tension, explaining that an open-ended list of acts of genocide might increase the chances of one State accusing another of violating the convention. The example it gave dealt with freedom of the press,[19] a sore point where the Soviet Union and the United States had serious differences. In any case, the Chinese amendment was soundly defeated.[20] Thus, any suggestion that article II invites the addition of analogous acts is unsustainable.

Despite what seems a convincing rejection of the idea of an indicative list of acts of genocide, the International Law Commission opted for a non-exhaustive enumeration during the initial drafting of the Code of Crimes Against the Peace and Security of Mankind in 1951.[21] Later, Special Rapporteur Doudou Thiam proposed yet another definition which said genocide consisted of 'any act committed with intent to destroy . . .' and retaining the word 'including' to indicate that the list was not exhaustive. Even though Thiam's initiative received considerable support,[22] the drafting committee established by the Commission in 1991 preferred a return to the Convention text, 'in view of the *nullum crimen sine lege* principle and the need not to stray too far from a text widely accepted by the international community'.[23] No suggestion to enlarge the list of acts or to deem the enumeration non-exhaustive even arose during the drafting of the Rome Statute, although there has been some support for the idea in the academic literature.[24]

[18] *Ibid.* (Manini y Ríos, Uruguay). See also *ibid.* (Kaeckenbeeck, Belgium); and *ibid.* (Amado, Brazil).

[19] *Ibid.* (Maktos, United States).

[20] *Ibid.* (thirty-five in favour, nine against, with five abstentions).

[21] *Yearbook . . . 1951*, Vol. II, p. 136: '(9) Acts by the authorities of a State or by private individuals, committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, including . . . [the enumeration of acts of genocide in article II of the Convention follows].' For the debates, see *Yearbook . . . 1951*, Vol. I, 90th meeting, pp. 66–8.

[22] 'Report of the Commission to the General Assembly on the Work of Its Forty-First session', UN Doc. A/CN.4/SER.A/1989/Add.1 (Part 2), p. 59, para. 160.

[23] *Yearbook . . . 1991*, Vol. I, 2239th meeting, p. 214, paras. 7–8; *ibid.*, 2251st meeting, pp. 292–3, paras. 9–17; 'Report of the Commission to the General Assembly on the Work of Its Forty-Third Session', UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 2), p. 102, para. (2).

[24] Matthew Lippman, 'The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide', (1985) 3 *Boston University International Law Journal*, p. 1 at p. 62.

Genocidal acts defined in the Convention

After the chapeau, article II of the Convention comprises five paragraphs, an exhaustive list of acts constituting the crime of genocide:

(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 births within the group;
(e) Forcibly transferring children of the group to another group.

Together, they define the physical element or *actus reus* of the offence, although within the paragraphs there are also elements of the mental element or *mens rea*.

The term 'acts' is also used in article III of the Convention, but in a different context. Article III of the Convention deals essentially with criminal participation, and provides for liability of individuals other than the principal offender, such as accomplices, as well as for incomplete or inchoate offences, such as attempts and conspiracy, where there is no principal offender at all because the ultimate crime never takes place. Other provisions of the Convention distinguish between 'acts' of genocide – those defined in article II – and 'other acts' of genocide – those listed in paragraphs (b) to (e) of article III. The 'other acts', all of which have their own specific material element or *actus reus*, are defined in article III and are considered in chapter 6 of this study. The present chapter concerns the physical element of the crime of genocide itself, taken from the standpoint of the principal offender.

The expression 'acts of genocide' appears only once in the Convention, in article VIII, a provision addressing the right of States parties to submit cases to the relevant bodies of the United Nations. Article VIII contemplates 'acts of genocide or any of the other acts enumerated in article III', indicating that the words 'acts of genocide' refer to the five subparagraphs of article II and not to the 'other acts' defined in article III. The Security Council referred to 'acts of genocide' in Resolution 925, adopted on 8 June 1994 with respect to Rwanda, the first time in its history that it had used the word 'genocide' in a resolution. The General Assembly has also spoken of 'acts of genocide' in certain of its resolutions.[25]

[25] 'The Situation in Bosnia and Herzegovina', UN Doc. A/RES/48/88, preamble; 'The Situation in Bosnia and Herzegovina', UN Doc. A/RES/49/10, preamble.

Criminal acts, depending upon the definition of the crime, may require proof not only of the act itself, but also of a result. Put differently, the material element includes a result. Three of the five acts defined in article II of the Convention require proof of a result: killing members of the group; causing serious bodily or mental harm to members of the group; forcibly transferring children of the group to another group. Two of the acts do not demand such proof, but require a further specific intent: deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; or imposing measures intended to prevent births within the group. In the three cases where the outcome is an element of the offence, the accused may still be subject to prosecution for attempting to commit the crime even if no result can be proven.[26] Proof of a crime of result also requires evidence that the act itself is a 'substantial cause' of the outcome.[27]

The *actus reus* of an offence may be either an act of commission or an act of omission. This principle applies to all of the acts of genocide enumerated in article II, including killing. The most obvious act of genocide by omission is article II(c): 'deliberately imposing conditions of life designed to destroy the group'.[28] Manfred Lachs called it 'negative violence', observing how the Nazi authorities reduced the amount of food in occupied countries to 400 and even 250 calories a day.[29] Robert Ley, the German Minister for Labour, who was indicted at Nuremberg but committed suicide before the trial began, stated: 'A lower race needs less room, less clothing, less food, and less culture, than a higher race. The Germans cannot live in the same fashion as the Poles and the Jews.'[30] But omission can also apply to the other paragraphs of article II, as the International Criminal Tribunal for Rwanda noted in the *Kambanda* judgment:

Jean Kambanda acknowledges that on 3 May 1994, he was personally asked to take steps to protect children who had survived the massacre at

[26] Pursuant to art. III(d) of the Convention. Attempts are discussed in chapter 6, pp. 334–9 below.

[27] *Prosecutor* v. *Delalić et al.* (Case No. IT-96-21-T), Judgment, 16 November 1998, para. 424.

[28] See the dissenting opinion of Judge Kreca in *Legality of Use of Force (Yugoslavia* v. *Belgium)*, Request for the Indication of Provisional Measures, Order of 2 June 1999, [1999] ICJ Reports 124, para. 13.

[29] Manfred Lachs, *War Crimes: An Attempt to Define the Issues*, London: Stevens & Sons, 1945, p. 21.

[30] 'Rationing Under Axis Rule, Report 2 of the Inter-Allied Information Committee', London, 1942.

a hospital and he did not respond. On the same day, after the meeting, the children were killed. He acknowledges that he failed in his duty to ensure the safety of the children and the population of Rwanda.[31]

Moreover, the possibility that a commander or superior may be found guilty of genocide for failing to intervene when subordinates are actually carrying out acts of genocide, while not specifically contemplated by the Convention, is also clearly recognized in the statutes of the *ad hoc* tribunals as well as in the Rome Statute.[32] Nevertheless, troubled by the possibility that crimes of omission might not be adequately covered, Benjamin Whitaker proposed an amendment to article II: 'In any of the above conduct, a conscious act or acts of advertent omission may be as culpable as an act of commission.'[33] The word 'advertent' clarifies the intentional aspect of the omission, although the proposed amendment is totally unnecessary for judges to give such an interpretation to article II.

Killing

The term 'killing' initially appeared in the 1946 Saudi Arabian proposal.[34] The Secretariat draft divided the *actus reus* into three categories, the first entitled 'causing the death of members of a group or injuring their health or physical integrity'. Its four subcategories included 'group massacres or individual executions'.[35] In the Ad Hoc Committee, China significantly simplified this provision.[36] The Committee's chair further reworked the text to contain two paragraphs dealing with physical genocide, and a third covering cultural genocide. The first form of physical genocide was 'killing members thereof'.[37] The concept was

[31] *Prosecutor* v. *Kambanda* (Case No. ICTR 97-23-S), Judgment and Sentence, 4 September 1998, para. 39(ix).

[32] 'Statute of the International Criminal Tribunal for the Former Yugoslavia', UN Doc. S/RES/827, annex, art. 7(3); 'Statute of the International Criminal Tribunal for Rwanda', UN Doc. S/RES/955, annex, art. 6(3); Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, art. 28.

[33] Benjamin Whitaker, 'Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide', UN Doc. E/CN.4/Sub.2/1985/6, p. 20, para. 41.

[34] UN Doc. A/C.6/86: 'Mass killing of all members of a group, people or nation.'

[35] UN Doc. E/447.

[36] UN Doc. E/AC.25/9: '1. Destroying totally or partially the physical existence of such group; 2. Subjecting such group to such conditions or measures as will cause the destruction, in whole or in part, of the physical existence of such group.'

[37] UN Doc. E/AC.25/SR.12.

relatively uncontroversial, and, with the final wording changed to '[k]illing of members of the group', it was adopted.[38] The Sixth Committee agreed to 'killing' as the first form of genocide, after little discussion and without a vote.

A Trial Chamber of the International Criminal Tribunal for Rwanda in *Akayesu* identified two material elements: the victim is dead; and the death resulted from an unlawful act or omission of the accused or a subordinate.[39] The reference to 'members of the group' as victims of the genocidal act in paragraph (a) of article II, as well as in the subsequent paragraphs, may suggest that the act itself must involve the killing of at least two members of the group.[40] Such an interpretation seems a bit absurd, however, and, from a grammatical standpoint, the phrase can just as easily apply to a single act of killing. Judgments of the Tribunals support the thesis that only one victim is required.[41] In one judgment, the Appeals Chamber of the International Criminal Tribunal for Rwanda said that 'there need not be a large number of victims to enter a genocide conviction'.[42] The co-ordinator's discussion paper, submitted at the conclusion of the February 1999 session of the Working Group on Elements of Crimes, following informal discussions with interested States, took the reference to 'members of the group' to mean 'one or more persons of that group'.[43] Clearly, the quantitative dimension, that genocide involves the intentional destruction of a group 'in whole or in part', belongs to the mental and not the material element, as explained in chapter 5.

The Elements of Crimes of the Rome Statute state that the term 'killed' is interchangeable with the term 'caused death'.[44] While there

[38] UN Doc. E/AC.25/SR.13, p. 8 (five in favour, two against).

[39] *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 588. In *Prosecutor* v. *Kayishema et al.* (Case No. ICTR-95-1-T), Judgment, 21 May 1999, another Trial Chamber purported to discuss the *actus reus* of 'killing', but in fact addressed only the difficulties in defining the mental element: paras. 101–4.

[40] This must be why the United States genocide legislation specifies that 'the term "members" means the plural': Genocide Convention Implementation Act of 1987 (the Proxmire Act), S. 1851, s. 1093(4). Yet the United States delegation to the Preparatory Commission of the International Court took the view that acts of genocide apply to one or more members of a group: 'Draft Elements of Crimes', UN Doc. PCNICC/1988/DP.4, pp. 5–6.

[41] *Prosecutor* v. *Mpampara* (Case No. ICTR-01-65-T), Judgment, 11 September 2006, para. 8.

[42] *Prosecutor* v. *Ndindabahizi* (Case No. ICTR-01-71-A), Judgment, 15 July 2004, para. 135.

[43] 'Discussion Paper Proposed by the Co-ordinator, Article 6: The Crime of Genocide', UN Doc. PCNICC/1999/WGEC/RT.1.

[44] Elements of Crimes, ICC-ASP/1/3, p. 113.

must be proof that a person is dead, this can be inferred, and it is not necessary to actually show that the body was recovered. It has been held that causing the suicide of a person may amount to murder where the acts or omissions of the accused 'induced the victim to take action which resulted in his death, and that his suicide was either intended, or was an action of a type which a reasonable person could have foreseen as a consequence'.[45]

Paragraph (a) of article II of the Convention specifies that the victim must be a member of the national, racial, ethnic or religious group that is the target of the genocide in question.[46] In *Akayesu*, a Trial Chamber of the International Criminal Tribunal for Rwanda considered whether murder of an individual who was not a member of the group, but who was killed within the context of genocide, could be considered an act of genocide under the Convention definition. The Chamber was convinced of Akayesu's presence and participation when Victim V was beaten with a stick and the butt of a rifle by a communal policeman called Mugenzi and by a member of the Interahamwe militia. It said that the act would have constituted genocide had Victim V been a Tutsi, but, because Victim V was Hutu, Akayesu could not be convicted of genocide for this particular act.[47]

Causing serious bodily or mental harm

The Secretariat draft included 'mutilations and biological experiments imposed for other than curative purposes' as a punishable act.[48] What is now paragraph (b) did not really emerge until the meetings of the Ad Hoc Committee. It was based on a French proposal: 'Any act directed against the corporal integrity of members of the group.'[49] Delegates to the Sixth Committee advanced similar alternatives. Belgium proposed 'impairing physical integrity'.[50] The Soviets favoured 'the infliction of

[45] *Prosecutor* v. *Krnojelac* (Case No. IT-97-25-T), Judgment, 15 March 2002, para. 326 (referring to 'murder', but the same considerations apply to 'killing').

[46] Nothing prevents the offender from being a member of the targeted group, however: Whitaker, 'Revised Report', note 33 above, para. 31, p. 16.

[47] *Prosecutor* v. *Akayesu*, note 39 above, para. 710.

[48] The United States proposed that the words 'physical violence' should be inserted before the words 'mutilations and biological experiments', that 'mutilations and biological experiments' be changed to 'mutilations or biological experiments', and that the words 'imposed for other than curative purposes' should be deleted: UN Doc. E/623.

[49] UN Doc. E/AC.25/SR.13, p. 12 (five in favour, one against, with one abstention).

[50] UN Doc. A/C.6/217.

physical injury or pursuit of biological experiments'.[51] The United Kingdom suggested 'causing grievous bodily harm to members of the group'.[52] India recommended that the United Kingdom replace the term 'grievous' with 'serious'.[53] The principle that the Convention punish serious acts of physical violence falling short of actual killing was affirmed without difficulty.

The concept of 'mental harm' was more troublesome for some delegates. China initiated an amendment reading 'impairing the physical or mental health of members of the group'.[54] It insisted on mentioning drug use as a method of perpetrating genocide,[55] explaining this related to 'crimes committed by Japan against Chinese people by promoting consumption of narcotics'.[56] According to China, 'Japan had committed numerous acts of that kind of genocide against the Chinese population. If those acts were not as spectacular as Hitlerite killings in gas chambers, their effect had been no less destructive.'[57] China's amendment was defeated.[58] The United States said it had voted in favour, believing that physical integrity also included mental integrity.[59] But the United Kingdom considered that 'to introduce into the convention the notion of impairment of mental health might give rise to some misunderstanding'.[60] Nevertheless, India submitted a new amendment to add 'or mental' after the word 'physical'.[61] The United Kingdom argued that the idea had been defeated with the Chinese amendment, but India insisted, and its proposal was adopted.[62]

[51] UN Doc. A/C.6/223 and Corr.1.

[52] UN Doc. A/C.6/222. Gerald Fitzmaurice explained that 'grievous' had a very precise meaning in English law, but said he would not press the point, because the idea of intention was made very clear in the first part of art. II: UN Doc. A/C.6/SR.81.

[53] UN Doc. A/C.6/SR.81 (Sundaram, India).

[54] UN Doc. A/C.6/211. China was really recycling an idea it had promoted, unsuccessfully, before the Ad Hoc Committee. In the debate on cultural genocide, China had requested that the systematic distribution of narcotic drugs for the purposes of bringing about the physical debilitation of a human group be included in the list of measures or acts aimed against a national culture: UN Doc. E/AC.25/SR.5, p. 9. An additional paragraph was not adopted, although China insisted on the inclusion of a statement in the final report of the Committee referring to Japan's wartime construction of an opium extraction plant and the intention to commit genocide using narcotics: UN Doc. E/794, p. 6.

[55] UN Doc. A/C.6/SR.65 (Tsien Tai, China).

[56] UN Doc. A/C.6/232/Rev.1.

[57] UN Doc. A/C.6/SR.81 (Ti-tsun Li, China).

[58] *Ibid.* (seventeen in favour, ten against, with thirteen abstentions).

[59] *Ibid.* (Maktos, United States).

[60] *Ibid.* (Fitzmaurice, United Kingdom).

[61] UN Doc. A/C.6/244.

[62] UN Doc. A/C.6/SR.81 (fourteen in favour, ten against, with fourteen abstentions).

The notion of acts that cause bodily harm is well known in domestic legal systems.[63] It differs from assault, requiring proof that actual harm has resulted. Domestic laws often recognize degrees of assault causing bodily harm, distinguishing between harm in a general sense and harm of a serious or permanent nature. The Convention text does not specify that the harm caused be permanent, but it does use the adjective 'serious'.

The International Law Commission proposed a very demanding standard, requiring that: 'The bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part.'[64] This interpretation goes beyond the plain words of the text, and is not supported by the *travaux préparatoires*. Indeed, it indicates a confusion between the mental element of the chapeau and the material element of paragraph (b).

The District Court of Jerusalem, in its 12 December 1961 judgment in the *Eichmann* case, stated that serious bodily and mental harm of members of a group could be caused 'by the enslavement, starvation, deportation and persecution . . . and by their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture'.[65] In *Akayesu*, a Trial Chamber of the Rwanda Tribunal ruled the term 'serious bodily or mental harm, without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution'.[66] Another Trial Chamber of the Rwanda Tribunal defined this as 'harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses'.[67] In *Stakić*, a Trial Chamber of the International Criminal Tribunal for the

[63] In submissions to the Preparatory Commission of the International Criminal Court, the United States used the term 'physical harm': 'Draft Elements of Crimes', UN Doc. PCNICC/1988/DP.4.

[64] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 2 above, p. 91.

[65] *A-G Israel* v. *Eichmann* (1968) 36 ILR 5 (District Court, Jerusalem), p. 340.

[66] *Prosecutor* v. *Akayesu*, note 39 above, para. 503.

[67] *Prosecutor* v. *Kayishema et al.*, note 39 above, para. 109. Also: *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment and Sentence, 27 January 2000, para. 156; *Prosecutor* v. *Semanza* (Case No. ICTR-97-20-T), Judgment and Sentence, 15 May 2003, para. 320; *Prosecutor* v. *Ntagerura et al.* (Case No. ICTR-99-46-T), Judgment and Sentence, 25 February 2004, para. 663; *Prosecutor* v. *Seromba* (Case No. ICTR-2001-66-I), Judgment, 13 December 2006, para. 317; *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, para. 59.

former Yugoslavia said the term was 'understood to mean, *inter alia*, acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or injury. The harm inflicted need not be permanent and irremediable.'[68]

In *Krstić*, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia considered the ordeal inflicted on the few who survived the Srebrenica massacres to fall within the ambit of bodily and mental harm. Even if the objective had been killing rather than inflicting bodily or mental harm, the Trial Chamber in effect considered the result as a kind of 'lesser and included' offense, noting this was 'a natural and foreseeable consequence of the enterprise'.[69] However, harm that amounts to 'a grave and long-term disadvantage to a person's ability to lead a normal and constructive life' is not sufficient to meet the terms of article II(b) of the Convention.[70]

Including 'causing mental harm' within acts of genocide was tendentious, and the scope of this act of genocide remains problematic. In the *Akayesu* judgment, a Trial Chamber of the Rwanda Tribunal explained that rape and sexual violence may constitute genocide on both a physical and a mental level.[71] Nehemiah Robinson, in his important study of the Convention, wrote that mental harm 'can be caused only by the use of narcotics'.[72] Robinson obviously relied on China's statements during the drafting. Interestingly, however, the Chinese amendment was defeated. It was India that proposed the final wording of the provision, without any particular reference to use of drugs. Robinson also cited Canadian diplomat Lester B. Pearson, during domestic parliamentary debates, saying that 'mental harm' could not mean anything but 'physical

[68] *Prosecutor* v. *Stakić* (Case No. IT-97-24-T), Judgment, 31 July 2003, para. 516. Also: *Prosecutor* v. *Karadžić et al.* (Case Nos. IT-95-5-R61, IT-95-18-R61), Consideration of the Indictment within the Framework of Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 93.

[69] *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 635. Also: *Prosecutor* v. *Brdanin* (Case No. IT-99-36-T), Judgment, 1 September 2004, para. 690; *Prosecutor* v. *Blagojević* (Case No. IT-02-60-T), Judgment, 17 January 2005, para. 646.

[70] *Ibid.*, para. 512; *Prosecutor* v. *Krajisnik* (Case No. IT-00-39-T), Judgment, 27 September 2006, para. 862.

[71] Note that Spain's new Penal Code, art. 607, enacts an offence of genocide that includes sexual aggression as a punishable act: (1998) 1 YIHL, p. 504.

[72] Nehemiah Robinson, *The Genocide Convention: A Commentary*, New York: Institute of Jewish Affairs, 1960, p. ix.

injury to the mental faculties' of the members of the group.[73] Pearson said: 'I therefore suggest to the House that the use of the words "mental harm" would and should be interpreted, as a measure of both our domestic and our international responsibilities, as meaning "physical injury to the mental faculties".'[74] Pearson's views are unsupported by either the Convention text or the *travaux*. Consequently, Robinson's interpretation of article II(b) is excessively narrow.

It seems well accepted that physical harm need not be permanent, but there is more controversy with respect to mental harm.[75] When the United States Senate was considering ratification of the Convention, in 1950, it proposed the following 'understanding': 'That the United States Government understands and construes the words "mental harm" appearing in article II of the convention to mean physical permanent injury to mental facilities.'[76] When ratifying the Convention, the United States formulated the following 'understanding': '(2) That the term "mental harm" in article II(b) means permanent impairment of mental faculties through drugs, torture or similar techniques.' Its domestic legislation is to the same effect.[77] Professor Jordan Paust has criticized the 'permanent impairment' notion, pointing to the possibility of alleged terrorists or Nazi war criminals defending their actions with evidence that intense fear or anxiety produced in the primary victims was not intended to be 'permanent' but temporary.[78] The Preparatory Committee of the International Criminal Court took a similar although far more moderate approach to the issue, indicating, in a footnote to its draft provision on genocide, that '[t]he reference to "mental harm" is understood to mean more than the minor or temporary impairment of mental faculties'.[79] This makes sense, since such impairment of mental faculties would in any event

[73] *Ibid.*, p. 65, n. 32.
[74] Parliamentary Debates, House of Commons (Canada), 21 May 1952, p. 2442.
[75] Stephen Gorove, 'The Problem of "Mental Harm" in the Genocide Convention', (1951) 4 *Saskatchewan University Law Quarterly*, p. 174.
[76] *New York Times*, 13 April 1950.
[77] Genocide Convention Implementation Act of 1987, note 40, s. 1091(a)(3). Interestingly, the point is not made in the 'Annex on Definitional Elements for Part Two Crimes' prepared by the United States: UN Doc. A/CONF.183/C.1/L.10, p. 1.
[78] Jordan Paust, 'Congress and Genocide: They're Not Going to Get Away with It', (1989) 11 *Michigan Journal of International Law*, p. 90 at p. 97. This seems to confound the *actus reus* and the *mens rea*. The Convention does not require that the offender intend to cause permanent harm; rather, this must be the result of the act accomplished by the offender, who must also intend to destroy the group in whole or in part.
[79] 'Draft Statute for the International Criminal Court. Part 2. Jurisdiction, Admissibility and Applicable Law', UN Doc. A/AC.249/1998/CRP.8, p. 2.

fail to meet the threshold of seriousness required by article II(b). The Preparatory Committee's definition was endorsed by the International Criminal Tribunal for Rwanda,[80] but it was not included in the final version of the Elements of Crimes adopted by the Assembly of States Parties of the International Criminal Court in September 2002.

A Trial Chamber of the International Criminal Tribunal gave as examples of serious mental harm:

> The trauma and wounds suffered by those individuals who managed to survive the mass executions . . . The fear of being captured, and, at the moment of the separation, the sense of utter helplessness and extreme fear for their family and friends' safety as well as for their own safety, is a traumatic experience from which one will not quickly – if ever – recover. Furthermore, the Trial Chamber finds that the men suffered mental harm having their identification documents taken away from them, seeing that they would not be exchanged as previously told, and when they understood what their ultimate fate was. Upon arrival at an execution site, they saw the killing fields covered with bodies of the Bosnian Muslim men brought to the execution site before them and murdered. After having witnessed the executions of relatives and friends, and in some cases suffering from injuries themselves, they suffered the further mental anguish of lying still, in fear, under the bodies – sometimes of relative or friends – for long hours, listening to the sounds of the executions, of the moans of those suffering in pain, and then of the machines as mass graves were dug.[81]

Reflecting long-standing gender stereotypes, sexual crimes of violence directed against women have often been treated in national law from the standpoint of morality rather than as assaults on the physical and mental integrity of the victim.[82] In *Akayesu*, the Trial Chamber affirmed that rape and other crimes of sexual violence may fall within the ambit of paragraph (b).

> [T]he Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence

[80] *Prosecutor* v. *Kayishema et al.*, note 39 above, para. 94.

[81] *Prosecutor* v. *Blagojević* (IT-02-60-T), Judgment, 17 January 2005, para. 647. See also: *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, paras. 290–1.

[82] Susan Brownmiller, *Against Our Will: Men, Women and Rape*, New York: Simon and Schuster, 1975.

certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflict [*sic*] harm on the victim as he or she suffers both bodily and mental harm. In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole. The rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them. A Tutsi woman, married to a Hutu, testified before the Chamber that she was not raped because her ethnic background was unknown. As part of the propaganda campaign geared to mobilizing the Hutu against the Tutsi, the Tutsi women were presented as sexual objects. Indeed, the Chamber was told, for an example, that before being raped and killed, Alexia, who was the wife of the Professor, Ntereye, and her two nieces, were forced by the Interahamwe to undress and ordered to run and do exercises 'in order to display the thighs of Tutsi women'.

The Interahamwe who raped Alexia said, as he threw her on the ground and got on top of her, 'let us now see what the vagina of a Tutsi woman tastes like'. As stated above, Akayesu himself, speaking to the Interahamwe who were committing the rapes, said to them: 'don't ever ask again what a Tutsi woman tastes like'. This sexualized representation of ethnic identity graphically illustrates that Tutsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the Tutsi group – destruction of the spirit, of the will to live, and of life itself. On the basis of the substantial testimonies brought before it, the Chamber finds that in most cases, the rapes of Tutsi women in Taba, were accompanied with the intent to kill those women. Many rapes were perpetrated near mass graves where the women were taken to be killed. A victim testified that Tutsi women caught could be taken away by peasants and men with the promise that they would be collected later to be executed.

Following an act of gang rape, a witness heard Akayesu say 'tomorrow they will be killed' and they were actually killed. In this respect, it appears clearly to the Chamber that the acts of rape and sexual violence, as other acts of serious bodily and mental harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process. In light of the foregoing, the Chamber finds firstly that the acts described

> supra are indeed acts as enumerated in Article 2(2) of the Statute [corresponding to article II(b) of the Genocide Convention], which constitute the factual elements of the crime of genocide, namely the killings of 164 Tutsi or the serious bodily and mental harm inflicted on the Tutsi. The Chamber is further satisfied beyond reasonable doubt that these various acts were committed by Akayesu with the specific intent to destroy the Tutsi group, as such.[83]

On this point, the *Akayesu* judgment constitutes a major contribution to the progressive development of the law of genocide.[84] The recognition that sexual violence accords with serious bodily and mental harm is perhaps not revolutionary. It should also be borne in mind that the Tutsi victims of rape were also murdered, as a general rule.[85] In the above-cited extract from *Akayesu*, the Trial Chamber noted that 'in most cases, the rapes of Tutsi women in Taba, were accompanied with the intent to kill those women'. Nevertheless, the historic trivialization of such crimes of violence directed principally against women impacted upon the prosecution of genocide as it did upon war crimes and crimes against humanity. The Prosecutor did not include gender-based crimes in the initial indictment of Akayesu. It was only midway through the trial, after pressure from non-governmental organizations, that the indictment was amended.[86] The *Akayesu* case law on this point found a

[83] *Prosecutor* v. *Akayesu*, note 39 above, para. 731.

[84] On the subject of rape and sexual assault as acts of genocide, see also Kelly Dawn Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, The Hague: Martinus Nijhoff, 1997; Beverley Allen, *Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia*, Minneapolis: University of Minnesota Press, 1996; Catherine A. Mackinnon, 'Rape, Genocide and Women's Human Rights', (1994) 17 *Harvard Women's Law Journal*, p. 5; Yolanda S. Wu, 'Genocidal Rape in Bosnia: Redress in United States Courts under the Alien Tort Claims Act', (1993) 4 *UCLA Women's Law Journal*, p. 101; Siobhan K. Fisher, 'Occupation of the Womb: Forced Impregnation as Genocide', (1996) 46 *Duke Law Journal*, p. 91; Kate Fitzgerald, 'Problems of Prosecution and Adjudication of Rape and Other Sexual Assaults under International Law', (1997) 8 *European Journal of International Law*, p. 638; and Pamela Goldberg and Nancy Kelly, 'International Human Rights and Violence Against Women', (1993) 6 *Harvard Human Rights Journal*, p. 195. See also the discussion of the subject in: 'Working Paper by Françoise Hampson on the Criminalization, Investigation and Prosecution of Acts of Serious Sexual Violence', UN Doc. E/CN.4/Sub.2/2004/12, paras. 57–63.

[85] See, e.g. *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, paras. 622–36.

[86] Akayesu himself complained about this, saying the indictment had been amended because of pressure from the women's movement and women in Rwanda, whom he described as 'worked up to agree that they have been raped'. See *Prosecutor* v. *Akayesu*, note 39 above, para. 447.

sympathetic ear in the Preparatory Commission for the International Criminal Court when it was drafting the Elements of Crimes. A discussion paper of the Preparatory Commission 'recognized that rape and sexual violence may constitute genocide in the same way as any act, provided that the criteria of the crime of genocide are met'.[87] A footnote to the Elements for article 6(b) of the Rome Statute states: 'This conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.'[88]

Yet, while sexual violence and rape may in fact have the effect of contributing in a significant manner to the destruction of a group in whole or in part, this is not what the text of paragraph (b) requires. The prosecution need not demonstrate a cause and effect relationship between the acts of violence and the destruction of the group. The result that the prosecution must prove is that one or more victims actually suffered physical or mental harm.[89] If this act is perpetrated with the requisite mental element, the crime has been committed.

Deliberately inflicting conditions of life calculated to destroy the group

The 1946 Saudi Arabian draft contained '[d]estruction of the essential potentialities of life of a group, people or nation, or the intentional deprivation of elementary necessities for the preservation of health or existence'.[90] Under its heading physical genocide, the Secretariat draft presented two provisions addressing this issue: the subjection to conditions of life which, by lack of proper housing, clothing, food, hygiene and medical care, or excessive work or physical exertion, are likely to result in the debilitation or death of the individuals;[91] and the

[87] 'Discussion Paper Proposed by the Co-ordinator, Suggested Comments Relating to the Crime of Genocide', UN Doc. PCNICC/1999/WGEC/RT.3.

[88] Elements of Crimes, ICC-ASP/1/3, p. 113.

[89] But see M. Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, Irvington-on-Hudson, NY: Transnational Publishers, 1996, pp. 587–8, arguing that sexual violence may cause destruction of a group through 'deliberate emotional destruction of a vital part of that group'. Women are the care-takers of society, and, if they become dysfunctional, the survival of the society is threatened, according to Bassiouni.

[90] UN Doc. A/C.6/86.

[91] The United States attempted to improve on the wording: 'Subjection to conditions of life wherein, by lack of proper housing, clothing, food, hygiene and medical care, or excessive work or physical exertion the individuals are doomed to weaken or die' (UN Doc. E/623).

deprivation of all means of livelihood,[92] by confiscation of property, looting, curtailment of work, denial of housing and of supplies otherwise available to the other inhabitants of the territory concerned. Only the second category led to a significant comment in the explanatory report: 'If a state systematically denies to members of a certain group the elementary means of existence enjoyed by other sections of the population, it condemns such persons to a wretched existence maintained by illicit or clandestine activities and public charity, and in fact condemns them to death at the end of a medium period instead of to a quick death in concentration camps; there is only a difference of degree.'[93]

In the Ad Hoc Committee, China's proposal noted that the *actus reus* of genocide should include not only destruction of the physical existence of the group but also 'subjecting such group to such conditions or measures as will cause the destruction, in whole or in part, of the physical existence of such group'.[94] The Soviet 'Basic Principles' likewise urged that '[t]he concept of physical destruction must embrace not only cases of direct murder of particular groups of the population for the above-mentioned reasons, but also the premeditated infliction on such groups of conditions of life aimed at the destruction of the group in question'.[95] The United States and the Soviet Union submitted revisions of the Chinese text on this point.[96] In general, the idea received support within the Ad Hoc Committee.[97] As France explained, '[t]o quote an historical example, the ghetto, where the Jews were confined in conditions which, either by starvation or by illness accompanied by the absence of medical care, led to their extinction, must certainly be regarded as an instrument of genocide. If any group were placed on rations so short as to make its extinction inevitable, merely because it belonged to a certain nationality, race or religion, the fact would also come under the category of genocidal crime.'[98] The Soviet proposal, reworked by Venezuela, was adopted:

[92] The United States proposed deletion of the word 'all' which it said seemed to narrow unduly the crime: UN Doc. E/623.

[93] UN Doc. E/447, p. 25. [94] UN Doc. E/AC.25/9. [95] UN Doc. E/AC.25/7, Principle II.

[96] The United States proposal, UN Doc. E/AC.25/SR.13, p. 12, said: 'Subjecting members of a group to such conditions or measures as will cause their deaths or prevent the procreation of the group.' The Soviet Union proposal, UN Doc. E/AC.25/SR.13, p. 12, said: 'The premeditated infliction on those groups of such conditions of life which will be aimed at destroying totally or partially their physical existence.' Platon Morozov subsequently agreed to withdraw the word 'premeditated' and to insert the words 'measures or' before the words 'conditions of life'.

[97] See also UN Doc. E/AC.25/SR.4, p. 14 (Ordonneau); *ibid.*, pp. 15–16 (Rudzinski).

[98] *Ibid.*, p. 14 (four in favour, one against, with three abstentions).

'Inflicting on the members of the group such measures or conditions of life which would be aimed to cause their deaths.'[99] Debate on the provision in the Sixth Committee addressed the mental element of the act, and is considered in chapter 5.

A Trial Chamber of the International Criminal Tribunal for Rwanda has proposed the following interpretation of the provision:

> The Chamber holds that the expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction. For purposes of interpreting Article 2(2)(c) of the Statute [and article II(c) of the Convention], the Chamber is of the opinion that the means of deliberate inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or part, include, inter alia, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.[100]

The examples provided by the Tribunal appear to be drawn from Nehemiah Robinson's commentary on the Convention:[101]

> It is impossible to enumerate in advance the 'conditions of life' that would come within the prohibition of Article II; the intent and probability of the final aim alone can determine in each separate case whether an act of Genocide has been committed (or attempted) or not. Instances of Genocide that could come under subparagraph (c) are such as placing a group of people on a subsistence diet, reducing required medical services below a minimum, withholding sufficient living accommodations, etc., provided that these restrictions are imposed with intent to destroy the group in whole or in part.[102]

In *Kayishema and Ruzindana*, a Trial Chamber of the Rwanda Tribunal said the conditions of life include 'rape, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a reasonable period, provided the above would lead to the destruction of the group in whole

[99] UN Doc. E/AC.25/SR.13, pp. 13–14.

[100] *Prosecutor* v. *Akayesu*, note 39 above, para. 505. See also *Prosecutor* v. *Rutaganda* (Case No. ICTR-96-3-T), 6 December 1999.

[101] Robinson, *Genocide Convention*, p. 64.

[102] *Ibid.*, pp. 60 and 63–4. Cited with approval by the International Law Commission in 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 2 above, p. 92, n. 123.

or in part'.[103] In other words, there is no precise duration of time over which conditions need be imposed. They also include circumstances that would lead to a slow death such as lack of proper housing, clothing and hygiene or excessive work or physical exertion.[104] This act of genocide is distinct from direct killing, and the creation of circumstances leading to a slow death.[105]

The Elements of Crimes of the International Criminal Court provide: 'The term "conditions of life" may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.'[106]

Several indictments before the International Criminal Tribunal for the former Yugoslavia have suggested that article 4(2)(c) of the Statute was breached by conditions in detention camps, where inmates were deprived of proper food and medical care and generally subjected to conditions 'calculated to bring about the physical destruction of the detainees, with the intent to destroy part of the Bosnian Muslim and Bosnian Croat groups, as such'.[107] In *Sikirica*, for example, the Prosecutor argued that:

> the detainees in Keraterm had been 'systematically' expelled from their homes and had been forced to endure a subsistence diet. The medical care that they received – if any – was below the minimal standards to ensure their physical well-being. In short, the living conditions were totally insufficient.[108]

A Trial Chamber, in an examination under Rule 61 of the Rules of Procedure and Evidence, endorsed one of these detention camp indictments,[109] but none of them has resulted in a conviction for

[103] *Prosecutor* v. *Kayishema et al.*, note 39 above, para. 116. Also: *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment, 27 January 2000, para. 157.
[104] *Prosecutor* v. *Stakić* (Case No. IT-97-24-T), Judgment, 31 July 2003, para. 517.
[105] *Prosecutor* v. *Brdanin* (Case No. IT-99-36-T), Judgment, 1 September 2004, para. 691.
[106] Elements of Crimes, ICC-ASP/1/3, p. 114.
[107] *Prosecutor* v. *Kovačević et al.* (Case No. IT-97-24-I), Indictment, 13 March 1997, paras. 12–16; *Prosecutor* v. *Kovačević et al.* (Case No. IT-97-24-I), Amended Indictment, 23 June 1998, paras. 28 and 32. Also: *Prosecutor* v. *Karadžić et al.* (Case No. IT-95-5-I), Indictment, 24 July 1995, paras. 18 and 22; *Prosecutor* v. *Meakic et al.* (Case No. IT-95-4), Indictment, 13 February 1995, para. 18.3; *Prosecutor* v. *Sikirica et al.* (Case No. IT-95-8-I), Indictment, 21 July 1995, para. 12.3.
[108] *Prosecutor* v. *Sikirica et al.* (Case No. IT-95-8-T), Judgment on Defence Motions to Acquit, 3 September 2001, para. 42.
[109] *Prosecutor* v. *Karadžić et al.* (Case No. IT-95-5-R61 and IT-95-18-R61), Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996.

genocide.[110] The International Court of Justice stated that 'terrible conditions were inflicted upon detainees of the camps' but that in none of the prosecutions of the International Criminal Tribunal concerning camps was it found that the accused acted with genocidal intent.[111]

Unlike the crimes defined in paragraphs (a) and (b), the offence of deliberately imposing conditions of life calculated to bring about the group's destruction does not require proof of a result.[112] The conditions of life must be calculated to bring about the destruction, but whether or not they succeed, even in part, is immaterial. If a result is achieved, then the proper charge will be paragraphs (a) or (b). This important distinction was made by the District Court of Jerusalem in the *Eichmann* case.

Eichmann was charged with imposing living conditions upon Jews calculated to bring about their physical extermination. In the view of the District Court of Jerusalem, such an accusation was only applicable to the persecution of Jews who had survived the Holocaust:

> We do not think that conviction on the second Count [i.e., imposing living conditions calculated to bring about the destruction] should also include those Jews who were not saved, as if in their case there were two separate acts – first, subjection to living conditions calculated to bring about their physical destruction, and later the physical destruction itself.[113]

The treatment of the Armenians by the Turkish rulers in 1915 provides the paradigm for the provision dealing with imposition of conditions of life. These crimes have often been described as 'deportations'. But they went far beyond mere expulsion or transfer, because the deportation

[110] *Prosecutor* v. *Sikirica et al.* (Case No. IT-95-8-T), Judgment on Defence Motions to Acquit, 3 September 2001; *Prosecutor* v. *Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999; *Prosecutor* v. *Stakić* (Case No. IT-97-24-T), Judgment, 31 July 2003, para. 557; *Prosecutor* v. *Stakić* (Case No. IT-97-24-A), Judgment, 22 March 2006, paras. 46–8.

[111] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 354.

[112] Nevertheless, in its 'Draft Elements of Crimes' paper submitted to the Preparatory Conference of the International Criminal Court, the United States suggested that the prosecution establish that 'the conditions of life contributed to the physical destruction of that group': 'Draft Elements of Crimes', UN Doc. PCNICC/1988/DP.4, p. 7. The error of the United States' view was pointed out by delegates during the general debate on 17 February 1999, and in a paper submitted by Colombia: 'Proposal Submitted by Colombia', UN Doc. PCNICC/1999/WGEC/DP.2, p. 2.

[113] *A-G Israel* v. *Eichmann*, note 65 above, para. 196.

itself involved deprivation of fundamental human needs with the result that large numbers died of disease, malnutrition and exhaustion. When the International Law Commission considered adding 'deportation' to the list of acts of genocide, Juri Barsegov explained that in 1948 the General Assembly was unaware 'of many existing precedents in which whole populations had been destroyed by depriving them of their means of subsistence, such as soil and water, or forcing them to emigrate'.[114] He argued that 'deportation' of populations should be considered an act of genocide.[115] However, the Commission concluded an amendment was unnecessary, the situation being adequately covered by the text of paragraph (c) as it stands, to the extent a deportation occurred with the intent to destroy the group in whole or in part.[116]

In its February 2007 judgment in *Bosnia* v. *Serbia*, the International Court of Justice cautioned, however, that:

> deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement. This is not to say that acts described as 'ethnic cleansing' may never constitute genocide, if they are such as to be characterized as, for example, 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part', contrary to Article II, paragraph (c), of the Convention, provided such action is carried out with the necessary specific intent (*dolus specialis*), that is to say with a view to the destruction of the group, as distinct from its removal from the region.[117]

The Guatemalan Commission for Historical Clarification that concluded genocide had been committed against the Mayan people by the army in 1981–3 noted practices which included the razing of villages, the destruction of property, including collectively worked fields, and the burning of harvests. These left the communities without food. In the opinion of the Commission, this amounted to infliction of conditions of life 'that could bring about, and in several cases did bring about, its

[114] *Yearbook . . . 1989*, Vol. I, 2100th meeting, p. 30, para. 32.

[115] *Ibid.*, para. 34; 'Report of the Commission to the General Assembly on the Work of Its Forty-First Session', note 22 above, p. 59, para. 161; *Yearbook . . . 1991*, Vol. I, 2239th meeting, p. 215, para. 21; *ibid.*, 2251st meeting, p. 293, paras. 15–17.

[116] *Yearbook . . . 1991*, Vol. I, 2239th meeting, p. 215, para. 9; 'Report of the Commission to the General Assembly on the Work of Its Forty-First Session', note 22 above, p. 102, para. (5); 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 2 above, p. 92; see also *Yearbook . . . 1991*, Vol. II (Part 2), p. 102.

[117] *Ibid.*, para. 190.

physical destruction in whole or in part'.[118] The conclusions of the Historical Clarification Commission concerning genocide have been cited with approval by Judge A. A. Cançado-Trindade of the Inter-American Court of Human Rights.[119]

Yugoslavia based its charges of genocide, which were directed against several NATO States in a May 1999 application to the International Court of Justice, upon article III(c). In its oral argument in an application for provisional measures, the Yugoslav agent said:

> Continued bombing of the whole territory of the State, pollution of soil, air and water, destroying the economy of the country, contaminating the environment with depleted uranium inflicts conditions of life on the Yugoslav nation calculated to bring about its physical destruction. The Respondents have used weapons containing depleted uranium. The Institute for Nuclear Science, based in Belgrade, confirmed this fact (Ann. 7).
>
> The Army Environmental Policy Institute tasked by the Office of the Assistant Secretary of the Army Installations, Logistic and Environment of the USA has produced the technical report on health and environmental consequences of depleted uranium use in the US Army. Commenting on the health risk from radiation, the Report informed: 'Internalized DU [depleted uranium] delivers radiation wherever it migrates in the body. Within the body, alfa radiation is the most important contributor to the radiation hazard posed by DU. The radiation dose to critical body organs depends on the amount of time that DU resides in the organs. When this value is known or estimated, cancer and hereditary risk estimates can be determined.' (Health and Environmental; Consequences of Depleted Uranium Use in the US Army: Technical Report, p. 108, Ann. 8)
>
> It is well known that the radiation hazard materialized in the case of a large number of US soldiers participating in actions against Iraq. Serious health and environmental consequences have been detected in areas of Bosnia and Herzegovina exposed to effects of weapons containing depleted uranium. Farreaching health and environmental damage is a matter of certain pre-knowledge of the Respondents, and that implies the intent to destroy a national group as such in whole or in part.[120]

[118] Guatemala: Memory of Silence, Report of the Commission for Historical Clarification, Conclusions and Recommendations, 'Conclusions', paras. 116–18.

[119] *Plan de Sánchez Massacre* v. *Guatemala*, Judgment of 29 April 2004 (Merits), Separate Opinion of Judge A. A. Cançado-Trindade, para. 5.

[120] *Legality of Use of Force (Yugoslavia* v. *Belgium et al.)*, Verbatim Record, 10 May 1999 (Rodoljub Etinski).

Ian Brownlie, counsel to Yugoslavia, proposed a six-point list of evidence to support the claim that article II(c) had been breached: the large number of civilian deaths and the resulting knowledge of the risk of death; the high explosive power of the missiles and the widespread effects of blast; the incendiary element in the weapons and the knowledge that some victims are quite commonly burnt to death; the general disruption of patterns of life; the extensive damage to the health care system and the deliberate creation of risks to patients by causing power cuts.[121] The argument is fine from a theoretical basis, in that far-reaching health and environmental damage might well constitute an act calculated to destroy a group in whole or in part. It is, however, virtually impossible to distinguish acts of warfare in a general sense from these charges of genocide, and it was surely not the intent of the Convention's drafters to include this within the scope of the definition. The most serious difficulty with the Yugoslav case on this point was establishing a genocidal intent, as several of the respondent States insisted during their oral arguments.[122] As the agent for Canada pointed out, the Yugoslav approach to genocide amounted to the assertion that 'any use of force and any act of war is automatically equated with genocide'.[123] In his response, Professor Brownlie did not answer the challenges from the NATO States to provide evidence of genocidal intent.[124]

Cherif Bassiouni has argued that rape and sexual assault may be deliberately used to create conditions of life calculated to bring about the destruction of the group, noting that Islamic law provides that women who have sexual relations outside of marriage are not marriageable. He has explained that 'targeting Muslim women for rape and sexual assault in order to effectively separate Bosnian Muslim women from Bosnian Muslim men may create a condition of life calculated to bring about the group's destruction'.[125]

[121] *Ibid*., 12 May 1999 (Ian Brownlie).

[122] *Legality of Use of Force (Yugoslavia* v. *the Netherlands)*, Verbatim Record, 11 May 1999, para. 29 (J. G. Lammers); *Legality of Use of Force (Yugoslavia* v. *Portugal)*, Verbatim Record, 11 May 1999, para. 2.1.2.2.2 (José Maria Teixeira Leite Martins); *Legality of Use of Force (Yugoslavia* v. *United Kingdom)*, Verbatim Record, 11 May 1999, para. 20 (John Morris).

[123] *Legality of Use of Force (Yugoslavia* v. *Canada)*, Verbatim Record, 10 May 1999 (Philippe Kirsch).

[124] *Legality of Use of Force (Yugoslavia* v. *Belgium et al.)*, Verbatim Record, 12 May 1999 (Ian Brownlie).

[125] Bassiouni and Manikas, *International Criminal Tribunal*, p. 587. For similar comments, see Fisher, 'Occupation', p. 123.

Although it is possible for all five acts of genocide to be committed by omission, the concept applies most clearly to paragraph (c). Because of the specific intent requirement in the first paragraph of article II, not to mention the requirement in the subparagraph that the conditions be 'calculated', the omission cannot be one of simple negligence. The examples given by the Rwanda Tribunal and by Nehemiah Robinson, namely, placing a group of people on a subsistence diet, reducing required medical services below a minimum and withholding sufficient living accommodations, are all to a certain extent acts of omission. As a general rule, domestic criminal law takes the position that intentional acts of omission are criminal in nature where there is a positive duty to act.[126] Such a positive duty is stronger in penal codes of the Napoleonic tradition, which usually require an individual to intervene where the life of another is in danger,[127] than in the common law, where positive duties to act are considerably rarer.[128] A positive duty to act to prevent genocide is imposed upon military and civilian superiors by the superior responsibility provisions of the Rome Statute.[129] They may be held liable before the International Criminal Court for their failure to exercise control properly if their subordinates have committed genocide.

Nevertheless, in the case of genocide, an approach to crimes of omission that relies on the existence of a positive duty may unduly limit the scope of the Convention. It is difficult to establish the extent of the obligation of a State, or for that matter of an individual, in terms of assuring adequate nutrition, medical care and housing. International human rights law has made promising inroads in the protection of economic and social rights, and its norms may provide helpful guidance here.[130] Where genocide is committed by the omission to provide necessities of life, in a manner calculated to destroy the group in whole or in part, this omission will probably be apparent not by some abstract

[126] *Prosecutor* v. *Delalić et al.*, note 27 above, para. 334.

[127] Code pénal (France), art. 434-1. See Jean Pradel, *Droit pénal comparé*, Paris: Dalloz, 1995, pp. 234–8; L. Moreillon, *L'infraction par omission. Etudes infractions à la vie et à l'intégrité corporelle en droits anglais, français, allemand et suisse*, Geneva: Droz, 1993.

[128] *R* v. *Miller* [1983] 1 All ER 978; [1983] AC 161 (HL).

[129] Rome Statute of the International Criminal Court, note 32 above, art. 28.

[130] Universal Declaration of Human Rights, GA Res. 217 A (III), UN Doc. A/810, arts. 22–26; International Covenant on Economic, Social and Cultural Rights, (1976) 993 UNTS 3. See the discussion of this in Roger W. Smith, 'Scarcity and Genocide', in Michael N. Dobkowski and Isidor Wallimann, eds. *The Coming Age of Scarcity: Preventing Mass Death and Genocide in the Twenty-First Century*, Syracuse, NY: Syracuse University Press, 1998, pp. 199–219 at pp. 207–9.

standard of a vital minimum but because it is discriminatory *vis-à-vis* other groups.[131]

Imposing measures intended to prevent births

In the Secretariat draft, biological genocide was addressed under the heading 'restricting births',[132] a rubric which contained three subcategories: sterilization and/or compulsory abortion; segregation of the sexes; and obstacles to marriage.[133] The explanatory report noted segregation of the sexes could 'be induced by various causes such as compulsory residence in remote places, or the systematic allocation of work to men and women in different localities'.[134] In comments on the draft, Siam (Thailand) proposed adding the phrase 'including racial prohibition' to the third subcategory, 'obstacles to marriage', observing that '[a]t the present time, there exist certain racial groups with less female in number than male and the prohibition of their marriage with persons belonging to other racial groups may result in their gradual extinction'.[135]

China's draft for the Ad Hoc Committee removed all reference to forms of biological genocide, that is, to restriction of births.[136] Proposals from the United States[137] and the Soviet Union[138] also omitted the concept. The Soviet Union said the Committee needed first to decide whether genocide encompassed biological and cultural destruction, as well as physical acts.[139] But, after brief discussion, it agreed to modify the Soviet 'principles' to include '[r]estriction of births by means including among others, sterilization and compulsory abortion'.[140] The Ad Hoc Committee eventually adopted an additional paragraph dealing with restrictions on births, proposed by Lebanon: 'Any act or measure

[131] In the Ministries case, the court agreed the defendant's department had issued decrees depriving Jews of special food rations allowed to other German citizens. However, the prosecution conceded that they were not 'so severe or their effects so harsh as to cause sickness or exposure to sickness and death'. The accused were exonerated on charges of crimes against humanity for such acts: *United States of America* v. *von Weizsaecker et al.* ('Ministries case'), (1948) 14 TWC 314 (United States Military Tribunal), pp. 557–8.

[132] The United States proposed that the heading be changed to 'Compulsory restriction of births': UN Doc. E/623.

[133] Norway made the interesting observation that, in distinction to the other crimes listed in the Convention, creation of obstacles to marriage was a crime that could only be committed by organs of a State and not by individuals: UN Doc. E/623/Add.2.

[134] UN Doc. E/447, p. 26. [135] UN Doc. E/623/Add.4. [136] UN Doc. E/AC.25/9.

[137] UN Doc. E/AC.25/SR.12, p. 2. [138] *Ibid.*, p. 3. [139] UN Doc. E/AC.25/SR.4, p. 5.

[140] *Ibid.*, p. 13.

calculated to prevent births within the group.'[141] The Sixth Committee perfunctorily adopted the phrase 'imposing measures intended to prevent births'.[142] A Soviet variant, 'the prevention of births by means of sterilization and enforced abortion',[143] was rejected following no real debate.[144]

The Nazi atrocities remained very fresh in the minds of the drafters of article II(d), introduced largely to deal with the revelations of the post-war trials. The Supreme National Tribunal of Poland found the director of the Auschwitz camp responsible for sterilization and castration, qualifying these acts as a form of genocide.[145] Similarly, a United States Military Tribunal condemned Ulrich Greifelt and his associates for sterilization and other measures aimed at restricting births, acts that it also described as genocide.[146] But the scope of article III(d) is not confined to acts analogous to those committed by the Nazis. Nehemiah Robinson, in his commentary on the Convention, remarked that: 'The measure imposed need not be the classic action of sterilization; separation of the sexes, prohibition of marriages and the like are measures equally restrictive and produce the same results.'[147]

Article II(d) of the Convention does not make a result a material element of the offence. The *actus reus* consists of the imposition of the measures; it need not be proven that they have actually succeeded. Nevertheless, in its proposed 'Elements of Crimes' for the Rome Statute, the United States suggested that the prosecution must establish that 'the measures imposed had the effect of preventing births within that group'.[148]

In recent years, attention has focused on rape as a war crime or a crime against humanity. That rape and sexual assault are covered by

[141] UN Doc. E/AC.25/SR.13, p. 14 (by four votes with three abstentions).
[142] UN Doc. A/C.6/SR.82. [143] UN Doc. A/C.6/223 and Corr.1.
[144] UN Doc. A/C.6/SR.82 (thirty votes in favour, five against, with seven abstentions).
[145] *Poland* v. *Hoess*, (1948) 7 LRTWC 11 (Supreme National Tribunal of Poland), p. 25.
[146] *United States* v. *Greifelt et al.*, (1948) 13 LRTWC 1 (United States Military Tribunal), p. 17.
[147] Robinson, *Genocide Convention*, p. 64. Cited with approval by the International Law Commission in 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 2 above, p. 92, n. 124.
[148] UN Doc. PCNICC/1988/DP.4, p. 8. The United States proposal also added the requirement that the imposition be accomplished 'forcibly', which seems to be totally redundant. The United States position was criticized on these grounds: 'Proposal Submitted by Colombia', UN Doc. PCNICC/1999/WGEC/DP.2, p. 2.

paragraph (b)[149] cannot be questioned, and there are also compelling arguments for considering these crimes in the context of paragraph (c).[150] Can it moreover be argued that rape and sexual assault are forms of biological genocide akin to other techniques for 'restricting births' within the group? Testifying before the Yugoslavia Tribunal, Christine Cleirin, a member of the Commission of Experts established in 1992 by the Security Council, was asked if rape had been used systematically to change the ethnic character of the population by impregnating women. She answered: 'The Commission did not have enough information to verify, let us say, these testimonies, who spoke in these terms. I guess it is possible that both happened.'[151] Based on this and other testimony, a Trial Chamber concluded that: 'The systematic rape of women . . . is in some cases intended to transmit a new ethnic identity to the child.'[152]

Before the International Criminal Tribunal for the former Yugoslavia, charges that Serbs committed genocide by imposing measures intended to prevent births in the Muslim community do not appear to have been seriously argued. They did, however, form part of the Bosnian case before the International Court of Justice. There it was alleged that 'forced separation of male and female Muslims in Bosnia and Herzegovina, as systematically practised when various municipalities were occupied by the Serb forces . . . in all probability entailed a decline in the birth rate of the group, given the lack of physical contact over many months'. The Court confined itself to the observation that 'no evidence was provided in support of this statement'.[153] Bosnia also alleged that 'rape and sexual violence against women led to physical trauma which interfered with victims' reproductive functions and in some cases resulted in infertility'. The Court observed that the only evidence adduced to support the claim was an indictment in which the Prosecutor stated that one witness could no longer give birth to children as a result of the sexual abuse she suffered. For the Court, 'an indictment by the Prosecutor does not constitute persuasive evidence', and, in any event, the case never went to trial

[149] See pp. 185–8 above. [150] See p. 195 above.

[151] *Prosecutor* v. *Karadžić et al.* (Case Nos. IT-95-18-R61, IT-95-5-R61), Transcript of Hearing, 2 July 1996, p. 19.

[152] *Prosecutor* v. *Karadžić et al.*, note 151 above, para. 94.

[153] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 355.

because of the death of the accused.[154] Bosnia also argued that sexual violence against men prevented them from procreating. In support, it referred to a finding in the *Tadić* Trial Judgment that prison guards had forced a Bosnian man to bite off the testicles of another Bosnian man,[155] and an article in *Le Monde* based upon a study by international organizations observing that sexual violence against men during the conflict 'was practically always accompanied by threats to the effect that the victim would no longer produce Muslim children'. The Court did not attach significance to these sources.[156] Bosnia also argued that 'rape and sexual violence against men and women led to psychological trauma which prevented victims from forming relationships and founding a family', and that 'Muslim women who suffered sexual violence might be rejected by their husbands or not be able to find a husband', but here too the Court said that no evidence had been presented.[157]

Bosnia had relied upon the Trial Chamber of the International Criminal Tribunal for Rwanda which, in *Akayesu*, had considered that rape could be subsumed within paragraph (d) of the definition of genocide:

> For purposes of interpreting Article 2(2)(d) of the Statute [and article II(d) of the Convention], the Chamber holds that the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. 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. Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape 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 or trauma, not to procreate.[158]

[154] *Ibid.*, para. 356, referring to *Prosecutor* v. *Gagović et al.* (Case No. IT-96-23-I), Initial Indictment, 26 June 1996, para. 7.10.

[155] *Ibid.*, para. 357, referring to *Prosecutor* v. *Tadić* (Case No. IT-94-1-T), Judgment, 7 May 1997, para. 198.

[156] *Ibid.*, para. 357. [157] *Ibid.*, paras. 358–60.

[158] *Prosecutor* v. *Akayesu*, note 39 above, para. 507. See also *Prosecutor* v. *Kayishema and Ruzindana*, note 39 above, para. 117; *Prosecutor* v. *Rutaganda*, note 100 above; and *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment, 27 January 2000, para. 158. Similar views are expressed in Bassiouni and Manikas, *International Criminal Tribunal*,

Such views may seem exaggerated, because it is unrealistic and perhaps absurd to believe that a group can be destroyed in whole or in part by rape and similar crimes. But this is not what the Convention provision demands. In contrast with paragraph (c), paragraph (d) does not require that the measures to restrict births be 'calculated' to bring about the destruction of the group in whole or in part, only that they be intended to prevent births within the group. Such measures can be merely ancillary to a genocidal plan or programme, as it was, for example, in the case of the Nazis. Adolf Eichmann was tried on a charge of 'devising measures intended to prevent child-bearing among the Jews'. The District Court of Jerusalem said it did not regard the prevention of child-bearing as an explicit part of the 'final solution', concluding Eichmann's involvement in 'imposing measures' had not been proven.[159] Nevertheless, he was convicted for devising 'measures the purpose of which was to prevent child-bearing among Jews by his instruction forbidding births and for the interruption of pregnancy of Jewish women in the Theresin Ghetto with intent to exterminate the Jewish people'.[160] Recent case law supports the position that forced separation of males and females may be a measure intended to prevent births within the group.[161]

Forcibly transferring children

Paragraph (e), '[f]orcibly transferring children of the group to another group', was added to the Convention almost as an afterthought, with little substantive debate or consideration. The provision is enigmatic, because the drafters clearly rejected the concept of cultural genocide.

The International Law Commission treated paragraph (e) as 'biological genocide'.[162] But the idea for such a provision originated in the Secretariat draft, which quite logically proposed that 'forcible transfer of children to another human group' be considered as an act of cultural genocide. The three experts consulted by the Secretariat differed on the

p. 588. Also: Sherrie L. Russell-Brown, 'Rape as an Act of Genocide', (2003) 21 *Berkeley Journal of International Law*, p. 350.

[159] *A-G Israel* v. *Eichmann*, note 65 above, para. 199. [160] *Ibid.*, para. 244.

[161] *Prosecutor* v. *Rutaganda* (Case No. ICTR-96-3-T), Judgment and Sentence, 6 December 1999, para. 53; *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 507.

[162] 'Report of the Commission to the General Assembly on the Work of Its Forty-First Session', note 22 above, p. 102, para. (4).

issue of cultural genocide but, exceptionally, agreed on including 'forced transfer of children' as a punishable act.[163] Subsequently, it disappeared from the Ad Hoc Committee's compromise text.[164] In the Sixth Committee, after the notion of cultural genocide had been definitively rejected, Greece proposed adding '[f]orced transfer of children to another human group' to the list of punishable acts.[165] Greece noted that States opposed to cultural genocide did not necessarily contest 'forced transfer'.[166]

Manfred Lachs of Poland was uncomfortable with the Greek text: 'The transfers carried out by the Germans during the Second World War were certainly to be condemned, but the word "transfer" could also be applied to the evacuation of children from a theatre of war.'[167] Platon Morozov maintained that 'no one had been able to quote any historical case of the destruction of a group through the transfer of children'.[168] But, despite the concerns of several delegates, and an unsuccessful attempt at postponement, the Greek amendment was adopted.[169]

According to the International Law Commission, '[t]he forcible transfer of children would have particularly serious consequences for the future viability of a group as such'.[170] Like the acts of genocide defined in paragraphs (a) and (b), paragraph (e) requires proof of a result, namely, that children be transferred from the victim group to another group. But, in *Akayesu*, a Trial Chamber of the International Criminal Tribunal for Rwanda suggested that this went further, covering threats of such transfer: 'as in the case of measures intended to prevent births, the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another'.[171] The Elements

[163] UN Doc. E/447, p. 27. The same view was taken by the United States in its comments on the draft: UN Doc. E/623. The World Jewish Congress, in submissions to the Secretary-General, urged that the Convention 'should specifically outlaw the systematic practice of forcibly separating children from their parents and bringing them up in a culture different from that of their parents': UN Doc. E/C.2/52.

[164] UN Doc. E/AC.25/SR.14, p. 14.

[165] UN Doc. A/C.6/242.

[166] UN Doc. A/C.6/SR.82 (Vallindas, Greece).

[167] *Ibid.* (Lachs, Poland).

[168] *Ibid.* (Morozov, Soviet Union).

[169] *Ibid.* (twenty in favour, thirteen against, with thirteen abstentions). Siam, Haiti, Belgium, Yugoslavia, Poland and Czechoslovakia made statements.

[170] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 2 above, p. 92.

[171] *Prosecutor* v. *Akayesu*, note 39 above, para. 505. See also *Prosecutor* v. *Kayishema and Ruzindana*, note 39 above, para. 118; *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment, 27 January 2000, para. 159.

of Crimes of the International Criminal Court declare, in a footnote: 'The term "forcibly" is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.'[172]

The Convention does not specify what is meant by 'children',[173] and the question was not addressed by the drafters. The authoritative international precedent is the Convention on the Rights of the Child, defining a child as anyone under eighteen.[174] The United States genocide law declares that, for the purposes of the crime of genocide, children are under eighteen.[175] Israel's genocide legislation offers the same definition.[176] The Elements of Crimes of the International Criminal Court state: 'The person or persons were under the age of 18 years.'[177] But, although not stated in the Convention, the genocidal act of transferring children only makes sense with relatively young children, and eighteen years must be too high a threshold. Presumably, when children are transferred from one group to another, their cultural identity may be lost. They will be raised within another group, speaking its language, participating in its culture, and practising its religion. But older children are unlikely to lose their cultural identity by such transfer.

The difficulty of applying forcible transfer to older children becomes even more obvious in the case of adults. From a legal standpoint, while children may be considered to belong to their parents, the principle is completely inapplicable to adults. There is nobody from whom to be forcibly transferred. Of course, article II(e) does not apply to adults, but some States have taken the position that this is a lacuna in the Convention. For example, the genocide provision in Bolivia's Penal

[172] Elements of Crimes, ICC-ASP/1/3, p. 114. [173] Robinson, *Genocide Convention*, p. 65.
[174] Convention on the Rights of the Child, UN Doc. A/RES/44/25, annex, art. 1.
[175] Genocide Convention Implementation Act of 1987, note 40 above, s. 1093(1). In the 'Draft Elements of Crimes' that the United States submitted to the first session of the Preparatory Commission for the International Criminal Court, the age had dropped to fifteen: UN Doc. PCNICC/1988/DP.4, p. 8.
[176] The Crime of Genocide (Prevention and Punishment) Law, *Laws of the State of Israel*, Vol. 4, 5710-1949/50 P101, s. 1(b).
[177] Elements of Crimes, ICC-ASP/1/3, p. 115.

Code refers to transfer of both children and adults.[178] Paraguay made a similar submission to the International Law Commission with respect to the genocide provision of the Code of Crimes Against the Peace and Security of Mankind,[179] although it received little serious support.[180]

Nevertheless, in its report the Commission stated: 'Although the present article does not extend to the transfer of adults, this type of conduct in certain circumstances could constitute a crime against humanity ... or a war crime ... Moreover, the forcible transfer of members of a group, particularly when it involves the separation of family members, could also constitute genocide under subparagraph (c) [inflicting conditions of life, etc.].'[181]

In its draft 'Elements of Crimes' paper submitted to the Preparatory Commission of the International Criminal Court, the United States approached the issue of transfer as being 'from that person's or those persons' lawful residence'.[182] Amnesty International criticized this new gloss on the Convention, noting that: 'Any such requirement would not only be contrary to the Convention for the Prevention and Punishment of the Crime of Genocide, but also exclude transfers of children born in prison or in concentration camps and children whose parents were not in a location which was considered lawful, such as immigrants whose papers were not in order or persons who were evicted from housing for non-payment of rent.'[183]

During the drafting of the Genocide Convention, the Soviet delegate challenged the Sixth Committee to provide an historical example of genocide committed by transfer of children. There was no response, but delegates might have referred to the Nuremberg judgment. There, Nazi leader Heinrich Himmler was proven to have said:

> What happens to a Russian, a Czech, does not interest me in the slightest. What the nations can offer in the way of good blood of our type, we will

[178] Penal Code (Bolivia), 23 August 1972, Chapter IV, art. 138.

[179] 'Comments and Observations of Governments on the Draft Code of Crimes Against the Peace and Security of Mankind Adopted on First Reading by the International Law Commission at its Forty-Third Session', UN Doc. A/CN.4/448, p. 80.

[180] *Yearbook . . . 1995*, Vol. I, 2384th meeting, p. 40, para. 53.

[181] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 2 above, pp. 92–3.

[182] UN Doc. PCNICC/1988/DP.4, p. 8.

[183] Amnesty International, 'The International Criminal Court: Fundamental Principles Concerning the Elements of Genocide', AI Index IOR 40/01/99, February 1999. Colombia, also, attacked the proposal from the United States: 'Proposal Submitted by Colombia', UN Doc. PCNICC/1999/WGEC/DP.2, p. 2.

> take. If necessary, by kidnapping their children and raising them here with us. Whether nations live in prosperity or starve to death interests me only in so far as we need them as slaves for our Kultur, otherwise it is of no interest to me.[184]

These were, apparently, only threats. But there have been recent accusations concerning aboriginal children in Australia. In 1997, the Australian Human Rights and Equal Opportunities Commission concluded that the Australian practice of forcible transfer of indigenous children to non-indigenous institutions and families violated article II(e) of the Genocide Convention.[185] According to its report: 'The Inquiry's process of consultation and research has revealed that the predominant aim of Indigenous child removals was the absorption or assimilation of the children into the wider, non-Indigenous, community so that their unique cultural values and ethnic identities would disappear, giving way to models of Western culture . . . Removal of children with this objective in mind is genocidal because it aims to destroy the "cultural unit" which the Convention is concerned to preserve.'[186]

Before the International Court of Justice, Bosnia also invoked article II(e) of the Genocide Convention, alleging that Serbs used rape 'as a way of affecting the demographic balance by impregnating Muslim women with the sperm of Serb males' in what was termed 'procreative rape'. It said that children born from such 'forced pregnancies' would not be considered to be part of the protected group. Bosnia argued that Serbs

[184] *France et al.* v. *Goering et al.*, (1946) 22 IMT 203 at 480.

[185] Australian Human Rights and Equal Opportunity Commission, 'Bringing Them Home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families', pp. 270–5.

[186] *Ibid.* The Commission's conclusions were favourably received by the Federal Court of Australia: *Nulyarimma* v. *Thompson* [1999] FCA 1192, paras. 5–11 (*per* Wilcox J). See: Ben Saul, 'The International Crime of Genocide in Australian Law', (2000) 22 *Sydney Law Review*, p. 527; Andrew Mitchell, 'Genocide, Human Rights Implementation and the Relationship Between International and Domestic Law', (2000) 24 *Melbourne University Law Review*, p. 15; Sean Peters, 'The Genocide Case: Nulyarimma v Thompson', [1999] *Australian International Law Journal*, p. 233. On the other Australian case dealing with the 'stolen generations', *Kruger* v. *Commonwealth* ('The Stolen Generations Case'), (1997) 190 CLR 1, see Sarah Joseph, 'Kruger v Commonwealth: Constitutional Rights and the Stolen Generations', (1998) 24 *Monash Law Review*, p. 486; Michael Schaefer, 'The Stolen Generations – In the Aftermath of Kruger and Bray', (1998) 21 *University of South Wales Law Journal*, p. 247; Tony Buti, 'Kruger and Bray and the Common Law', (1998) 21 *University of South Wales Law Journal*, p. 231; Matthew Storey, 'Kruger v The Commonwealth: Does Genocide Require Malice?', (1998) 21 *University of New South Wales Law Journal*, p. 224.

intended 'to transfer the unborn children to the group of Bosnian Serbs'. In support, reference was made to an indictment before the International Criminal Tribunal for the former Yugoslavia, the Report of the Commission of Experts, the Rule 61 decision in *Karadžić and Mladić*, and a finding in *Kunarac*.[187] The Court acknowledged the reply from Serbia to the effect that 'Muslim women who had been raped gave birth to their babies in Muslim territory and consequently the babies would have been brought up not by Serbs but, on the contrary, by Muslims. Therefore, in its view, it cannot be claimed that the children were transferred from one group to the other.'[188] It concluded that the evidence did not establish the existence of any form of policy of forced pregnancy, or an aim to transfer children of the protected group to another group within the meaning of article II(e) of the Convention.[189]

Acts of genocide not punishable under the Convention

Raphael Lemkin described a broad range of acts that might be carried out in the course of commission of genocide, as a frenzied racist regime endeavoured to destroy a group's political, economic, linguistic and cultural existence. The Convention's drafters were more conservative, deliberately excluding what is known as cultural genocide, as well as forced expulsion from the group's homeland, an act known more recently as 'ethnic cleansing'. The destruction of political institutions, including partition, dismemberment or annexation of a sovereign State, is also excluded from the Convention, as the International Court of Justice noted in its ruling of 13 September 1993.[190]

[187] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, paras. 363–5, citing: *Prosecutor* v. *Gagović et al.* (Case No. IT-96-23-I), Initial Indictment, 26 June 1996, para. 9.3, 'Report of the Commission of Experts', Vol. I, p. 59, para. 248, *Prosecutor* v. *Karadžić et al.* (Case Nos. IT-95-5-R61 and IT-95-18-R61), Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 64, and *Prosecutor* v. *Kunarac et al.* (Case Nos. IT-96-23-T and IT-96-23/1-T), Judgment, 22 February 2001, para. 583.

[188] *Ibid.*, para. 366. [189] *Ibid.*, para. 367.

[190] *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, [1993] ICJ Reports 325 at 345, para. 42.

Cultural genocide

Axis Rule in Occupied Europe attached great attention to the cultural aspects of genocide.[191] Destruction of a people often began with a vicious assault on culture, particularly language and religious and cultural monuments and institutions. During the post-war trials, attention had focused on the cultural aspects of the Nazi genocide. In the RuSHA case, the defendants were charged with participation in a 'systematic program of genocide' that included 'limitation and suppression of national characteristics'.[192] Evidence revealed that Greifelt and his accomplices carried out 'Germanization' orders from Himmler.[193] In another post-war decision, Arthur Greiser was found guilty of 'genocidal attacks on Polish culture and learning'.[194] Amon Leopold Goeth was convicted of '[t]he wholesale extermination of Jews and also of Poles [which] had all the characteristics of genocide in the biological meaning of this term, and embraced in addition destruction of the cultural life of these nations'.[195]

The Secretariat draft divided acts of genocide into three categories, of which the third, entitled 'destroying the specific characteristics of the group', dealt with the crime's cultural manifestations. There were five subcategories: the forcible transfer of children to another human group; forced and systematic exile of individuals representing the culture of a group; the prohibition of the use of the national language even in private intercourse; the systematic destruction of books printed in the national language or of religious works or prohibition of new publications; systematic destruction of historical or religious monuments or their diversion to alien uses; and the destruction or dispersion of documents and objects of historical, artistic or religious value and of objects used in religious worship. Two of the three experts consulted by the Secretariat opposed inclusion of cultural genocide, with the exception of 'forced transfer of children'.[196] Otherwise, Donnedieu de Vabres and Pella believed cultural genocide unduly extended genocide, reconstituting the former protection of national minorities which they said

[191] Lemkin, *Axis Rule*, pp. 84–5.
[192] *United States of America* v. *Greifelt et al.*, note 128 above, pp. 36–42. [193] *Ibid.*, p. 12.
[194] *Poland* v. *Greiser*, (1948) 13 LRTWC 70 (Supreme National Tribunal of Poland), pp. 112–14; see also *ibid.*, pp. 71–4 and 105.
[195] *Poland* v. *Goeth*, (1946) 7 LRTWC 4 (Supreme National Tribunal of Poland).
[196] UN Doc. E/447, p. 27.

was based on other conceptions.[197] This argument emerged as a theme in the debate on cultural genocide. In these initial exchanges, for example, it was maintained that forced assimilation did not constitute genocide, and that '[t]he system of protection of minorities should provide for the protection of minorities against a policy of forced assimilation employing relatively moderate methods'.[198] Nevertheless, Lemkin felt strongly that cultural genocide should be included, and his arguments were compelling. He insisted that a racial, national or religious group cannot continue to exist unless it preserves its spiritual and moral unity.[199]

The United States and France supported the majority of the three experts in excluding acts of cultural genocide. The United States insisted on confining the convention 'to those barbarous acts directed against individuals which form the basic concept of public opinion on this subject. The acts provided for in these paragraphs are acts which should appropriately be dealt with in connection with the protection of minorities.'[200] France maintained the definition should be '[l]imited to physical and biological genocide, for to include cultural genocide invites the risk of political interference in the domestic affairs of States, and in respect of questions which, in fact, are connected with the protection of minorities'.[201] Similarly, the Netherlands said this was 'a human rights issue'.[202]

Siam favoured retaining cultural genocide, and made suggestions aimed at improving the text.[203] So did the Soviet Union, which insisted upon the point in its 'Principles'. While conceding that genocide 'essentially connotes the physical destruction of groups', the Soviet Union argued for coverage of measures and actions aimed against the use of the national language or national culture. It called this 'national-cultural genocide', giving as examples the prohibition or restriction of the use of the national tongue in both public and private life, the destruction or prohibition of the printing and circulation of books and other printed matter in the national tongues, and the destruction of historical or religious monuments, museums, documents, libraries and other monuments and objects of national culture or of religious worship.[204]

[197] *Ibid.* [198] *Ibid.*, pp. 24 and 27. [199] *Ibid.*, p. 27.
[200] UN Doc. E/623. The United States also wanted to eliminate wording from the preamble that addressed the issue of cultural genocide. The Secretariat draft included 'by depriving it of the cultural and other contributions of the group so destroyed'.
[201] UN Doc. A/401/Add.3. [202] UN Doc. E/623/Add.3. [203] UN Doc. E/623/Add.4.
[204] UN Doc. E/AC.25/7.

Early in its work, the Ad Hoc Committee decided, by six votes to one, to recognize the principle of the prohibition of cultural genocide.[205] The United States was the dissenting voice: 'The decision to make genocide a new international crime was extremely serious, and the United States believed that the crime should be limited to barbarous acts committed against individuals, which, in the eyes of the public, constituted the basic concept of genocide.'[206] John Maktos, head of the United States delegation and chair of the Ad Hoc Committee, reminded the Committee that the General Assembly resolution had been inspired by the systematic massacre of Jews by Nazi authorities during the Second World War. 'Were the Committee to attempt to cover too wide a field in the preparation of a draft convention for example, in attempting to define cultural genocide – however reprehensible that crime might be – it might well run the risk to find that some States would refuse to ratify the convention.'[207] France, while not so openly hostile to the notion, said initially that it 'would adopt a waiting attitude, for, above all, it was necessary to succeed in drafting a convention condemning physical genocide'.[208]

In the Ad Hoc Committee debates, Maktos suggested placing cultural genocide in a separate article, so as to 'enable Governments to make reservations on a particular point of the Convention'.[209] But the Soviet Union said 'a Convention constituted a whole which could only be ratified or rejected in its entirety'.[210] Although agreeing with the Soviet delegate, France said it would be useful to put cultural genocide in a separate article to avoid confusion, as the crimes were rather distinct.[211] The Committee decided to insert the notion of cultural genocide in a separate provision.[212] France expressed concern about the possibility that the problem really fell within the scope of the protection of minorities.[213] The United States also argued that the matter was one of defence of national minorities, especially in time of armed conflict, and on that account it should be included in the conventions regarding war.[214] Even the Soviets seemed alive to the problem, insisting upon the term 'nationalcultural' rather than simply 'cultural', 'as the crime had to be considered only from a national standpoint'; otherwise, this might

[205] UN Doc. E/AC.25/SR.5, p. 8. The negative vote presumably was the United States.
[206] UN Doc. E/AC.25/SR.14, p. 10. [207] UN Doc. E/AC.25/SR.5, p. 3. [208] *Ibid.*, p. 5.
[209] UN Doc. E/AC.25/SR.10, p. 5. [210] *Ibid.*, p. 7. [211] *Ibid.*, p. 8.
[212] *Ibid.*, p. 12 (three in favour, one against, with two abstentions).
[213] UN Doc. E/AC.25/SR.14, pp. 8–9. [214] UN Doc. E/AC.25/SR.5, p. 3.

concern individual members of a national minority and should be dealt with not by the convention but by the international bill of rights.[215] Lebanon claimed that General Assembly Resolution 96(I) 'made it a duty for the Committee to mention cultural genocide', although what it meant by this is unclear, because there is no particular reference to cultural genocide in the resolution.[216] The only relevant allusion in the 1946 resolution was in the first preambular paragraph, which deplored the fact that genocide 'results in great losses to humanity in the form of cultural and other contributions represented by these human groups'.[217]

A committee, made up of China, Lebanon, Poland, the Soviet Union and Venezuela, all of whom had been openly favourable to the concept of cultural rights, prepared a new draft:

> In this convention, genocide also means any of the following deliberate acts committed with the intention of destroying the language or culture of a national, racial or religious group on grounds of national or racial origin or religious belief:
>
> (1) prohibiting the use of the language of the group in daily intercourse or in schools, or prohibiting the printing and circulation of publications in the language of the group;
> (2) destroying, or preventing the use of, the libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.[218]

Lebanon suggested adding the words 'such as' at the end of the first paragraph so that the enumeration would be indicative and not exhaustive. Lebanon also proposed a third paragraph: '(3) subjecting members of a group to such conditions as would cause them to renounce their language, religion or culture'. With these amendments, the article was adopted, by five votes to two (the United States and France).[219]

The Sixth Committee reversed the Ad Hoc Committee's decision to include cultural genocide as a punishable act of genocide. France

[215] *Ibid.*, p. 2. [216] UN Doc. E/AC.25/SR.5, p. 6. [217] GA Res. 96(I).
[218] UN Doc. E/AC.25/SR.14, p. 13.
[219] *Ibid.*, p. 14. The final Ad Hoc Committee text said: 'In this Convention genocide also means 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 such as: 1. prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group; 2. destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.'

launched the battle, proposing the matter be referred to the Third Committee, which would ensure 'the protection of language, religion and culture within the framework of the international declaration on human rights'.[220] Belgium had a similar amendment: 'Omit, with a view to inclusion among provisions for the protection of human rights. Such transfer could be noted in a resolution.'[221] Sweden noted that the draft provision resembled texts in the post-First World War minorities treaties, agreeing that the genocide convention was not 'the appropriate instrument for such protection'.[222] Iran opposed inclusion of cultural genocide, advocating instead the adoption of a supplementary convention on the subject.[223] Others favouring elimination of a reference to cultural genocide were the United Kingdom,[224] India,[225] the United States,[226] Peru[227] and the Netherlands.[228]

Nevertheless, many States that wanted to retain cultural genocide found the Ad Hoc Committee draft too broad. Pakistan submitted an amendment that was more limited than what had been adopted by the Ad Hoc Committee.[229] Venezuela recalled that genocide had been defined, in General Assembly Resolution 96(I), as 'a denial of the right of existence of entire human groups', saying this implied protection against cultural genocide.[230] But it warned that the term cultural genocide 'should be used with reference only to violent and brutal acts which were repugnant to the human conscience, and which caused losses of particular importance to humanity, such as the destruction of religious sanctuaries, libraries, etc.'[231] Along the same lines, the Philippines cautioned that the draft provision 'could be interpreted as depriving nations of the right to integrate the different elements of which they were composed into a homogeneous whole as, for instance in the case of language'.[232] Egypt urged that the definition be 'reduced

[220] UN Doc. A/C.6/216. See also UN Doc. A/C.6/SR.65 (Chaumont, France).
[221] UN Doc. A/C.6/217. [222] UN Doc. A/C.6/SR.83 (Petren, Sweden).
[223] *Ibid.* (Abdoh, Iran). See also UN Doc. A/C.6/218. [224] UN Doc. A/C.6/222.
[225] UN Doc. A/C.6/SR.83 (Setalvad, India). [226] *Ibid.* (Gross, United States).
[227] *Ibid.* (Goytisolo, Peru). [228] *Ibid.* (de Beus, Netherlands).
[229] UN Doc. A/C.6/229: 'In this Convention, genocide also means any of the following acts committed with the intent to destroy the religion or culture of a religious, racial or national group: 1. Systematic conversions from one religion to another by means of or by threats of violence. 2. Systematic destruction or desecration of places and objects of religious worship and veneration and destruction of objects of cultural value.'
[230] UN Doc. A/C.6/SR.83. [231] UN Doc. A/C.6/SR.65 (Pérez-Perozo, Venezuela).
[232] *Ibid.* (Paredes, Philippines).

to the very reasonable proportions suggested by the delegation of Pakistan'.[233]

It was clear that the issue had hit a nerve with several countries who were conscious of problems with their own policies towards minority groups, specifically indigenous peoples and immigrants. Sweden noted that the fact it had converted the Lapps to Christianity might lay it open to accusations of cultural genocide.[234] Brazil said: 'The cultural protection of the group could be sufficiently organized within the international framework of the protection of human rights and of minorities, without there being any need to define as genocide infringements of the cultural rights of the group.'[235] Brazil warned that 'some minorities might have used it as an excuse for opposing perfectly normal assimilation in new countries'.[236] New Zealand argued that even the United Nations might be liable to charges of cultural genocide, because the Trusteeship Council itself had expressed the opinion that 'the now existing tribal structure was an obstacle to the political and social advancement of the indigenous inhabitants'.[237] South Africa endorsed the remarks of New Zealand, insisting upon 'the danger latent in the provisions of article III where primitive or backward groups were concerned'.[238] Canada declared that, if the Committee were to retain the cultural genocide provision, the Canadian government would have to make certain reservations 'as the Canadian Constitution limited the legislative powers of the Federal Government to the benefit of the provincial legislatures'.[239]

[233] UN Doc. A/C.6/SR.83 (Raafat, Egypt). See also UN Doc. A/C.6/SR.63 (Raafat, Egypt). In support, see *ibid.* (Tarazi, Syria); *ibid.* (Correa, Ecuador); *ibid.* (Khomussko, Byelorussia); *ibid.* (Tsien Tai, China); UN Doc. A/C.6/SR.65 (Kovalenko, Ukraine); and UN Doc. A/C.6/SR.83 (Morozov, Soviet Union).

[234] UN Doc. A/C.6/SR.83 (Petren, Sweden).

[235] *Ibid.* (Amado, Brazil).

[236] UN Doc. A/C.6/SR.133 (Amado, Brazil). See also UN Doc. A/C.6/SR.63 (Amado, Brazil).

[237] UN Doc. A/C.6/SR.83 (Reid, New Zealand). Referring to UN Doc. A/603, concerning Tanganyika.

[238] UN Doc. A/C.6/SR.83 (Egeland, South Africa). See also UN Doc. A/C.6/SR.64 (Egeland, South Africa).

[239] UN Doc. A/C.6/SR.83 (Lapointe, Canada). The National Archives of Canada reveal that 'cultural genocide' was the single most important issue for the Canadian Government. 'The Canadian delegation to the seventh session of Economic and Social Council was instructed to support or initiate any move for the deletion of Article III on "cultural" genocide (see document E/794) and, if this move were not successful, it should vote against Article III and, if necessary, against the whole convention. The delegation was instructed that the convention as a whole, less Article III, was acceptable though legislation will naturally be required in Canada to implement the convention.': 'Commentary for the Use of the Canadian Delegation', NAC RG 25, Vol. 3699, File

On a roll-call vote, the Sixth Committee decided to exclude cultural genocide from the Convention.[240] But the Soviet Union and Venezuela returned to the point in the General Assembly debate on 9 December 1948 with amendments aimed at incorporating cultural genocide in the Convention.[241] Venezuela quickly withdrew its proposal after realizing there was no chance of success.[242] The Soviet proposal was defeated on a roll-call vote.[243]

Many of the delegates had argued against including cultural genocide in the Convention because it was a 'human rights question' more properly addressed under that rubric. Of course, while debate on the Convention was proceeding in the Sixth Committee, the Third Committee was drafting the Universal Declaration of Human Rights.[244] But, despite the sentiments expressed in the Sixth Committee, the protection of the cultural survival of ethnic minorities was not included in the Declaration, which was adopted by the General Assembly only hours after the final approval of the Genocide Convention.[245] A text on

5475-DG-3-40"2" (this text is also in NAC RG 25, Vol. 3699, File 5475-DG-1-40). In a report to Ottawa at the conclusion of the debate, the Canadian representative took a rather exaggerated view of his own importance in the debate: 'According to instructions from External Affairs, the Canadian delegate had only one important task, namely to eliminate the concept of "cultural genocide" from the Convention. He took a leading part in the debate on this point and succeeded in having his viewpoints accepted by the Committee. The remaining articles are of no particular concern for Canada. Most of the contentious items have already been settled. The delegates are for the greater part wearying of their own eloquence on the subject and the final articles may well be dealt with during the next two weeks.': 'Progress Reports on Work of Canadian Delegation, in Paris, 1 November 1948', NAC RG 25, Vol. 3699, File 5475-DG-2-40.

[240] UN Doc. A/C.6/SR.83 (twenty-five in favour, sixteen against, with four abstentions). See *Yearbook . . . 1991*, Vol. 2 (Part 2), p. 102.

[241] The Soviet Union (UN Doc. A/760) proposed the addition of a new article: 'In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion or culture of a national racial or religious group on grounds of national or racial origin, or religious beliefs, such as: (a) prohibiting the use of the language of the group in daily intercourse or in schools or the printing and circulation of publications in the language of the group; (b) destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.' Venezuela's amendment (UN Doc. A/770) was more modest: 'Systematic destruction of religious edifices, schools or libraries of the group.'

[242] UN Doc. A/PV.179.

[243] *Ibid.* (fourteen in favour, thirty-one against, with ten abstentions).

[244] International Covenant on Economic, Social and Cultural Rights, (1976) 993 UNTS 3, art. 27.

[245] On the exclusion of a minority rights provision from the Universal Declaration, see William A. Schabas, 'Les droits des minorités: Une déclaration inachevée', in *La*

minority rights, based on an original proposal by Hersh Lauterpacht,[246] appeared in the initial drafts of the declaration prepared in the Commission on Human Rights,[247] but ultimately it voted against the idea of a minority rights provision.[248] The delegations in the Sixth Committee who called the issue of cultural genocide a 'human rights issue' to be studied by the Third Committee were thus well aware the latter was unlikely to give the matter serious treatment. In fact, there was sharp debate about this in the Third Committee, with the United States opposed to a provision and Yugoslavia, the Soviet Union and Denmark in favour. On 10 December 1948, the General Assembly adopted a companion resolution to the Universal Declaration that noted the decision not to have such a provision, calling upon the Sub-Commission on Prevention of Discrimination and Protection of Minorities to study the matter.[249]

Some twenty years later, the General Assembly adopted a text on cultural rights of ethnic minorities, article 27 of the International Covenant on Civil and Political Rights: 'In those States in which ethnic, religious or linguistic minorities exist persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'[250] In its general comment on article 27, the Human Rights Committee stated:

> With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, specially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to life in reserves protected by law. The enjoyment of those rights may

Déclaration universelle des droits de l'homme 1948–98, Avenir d'un idéal commun, Paris: La Documentation française, 1999, pp. 223–42.

[246] Hersh Lauterpacht, *An International Bill of the Rights of Man*, New York: Columbia University Press, 1945. See also UN Doc. E/CN.4/AC.1/3/Add.1, pp. 380–1.

[247] UN Doc. E/CN.4/AC.1/3, art. 46; UN Doc. E/CN.4/AC.1/W.2/Rev.2, art. 39; UN Doc. E/CN.4/77/Annex.

[248] UN Doc. E/800, p. 38.

[249] GA Res. 217 C (III).

[250] International Covenant on Civil and Political Rights, (1976) 999 UNTS 171. See Manfred Nowak, *Covenant on Civil and Political Rights: CCPR Commentary*, 2nd edn, Kehl: Engel, 2005; Dominic McGoldrick, *The Human Rights Committee*, Oxford: Clarendon Press, 1991; Louis Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights*, New York: Columbia University Press, 1981; Marc J. Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights*, Dordrecht: Martinus Nijhoff, 1987.

> require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[251]

According to the Committee, which is responsible for implementation of the Covenant, the protection of the rights enshrined in article 27 'is directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned ... States parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected.'[252] Measures of cultural genocide contemplated during the drafting of the Genocide Convention, such as destruction of libraries and the suppression of the minority language, obviously fall within the ambit of article 27. In its general comment on reservations, the Committee declared that the minority rights set out in article 27 are customary norms.[253]

Cultural rights of minorities are also protected by instruments of international humanitarian law, applicable in armed conflict. The regulations annexed to the fourth Hague Convention of 1907 prohibit '[a]ll seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science'.[254] Protocol Additional I to the Geneva Conventions defines 'extensive destruction' of 'clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples' as a grave breach under certain conditions.[255] A specialized instrument, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, also applies in this context.[256]

[251] 'General Comment No. 23 (art. 27)', UN Doc. CCPR/C/21/Rev.1/Add.5, para. 7 (reference omitted). See also the views of the Committee on these issues: *Lubicon Lake Band (Bernard Ominayak)* v. *Canada* (No. 167/1984), UN Doc. CCPR/C/38/D/167/1984, UN Doc. A/45/40, Vol. II, p. 1, 11 *Human Rights Law Journal*, 305; *Kitok* v. *Sweden* (No. 197/1985), UN Doc. A/43/40, p. 221.

[252] 'General Comment No. 23 (art. 27)', note 252 above, para. 9.

[253] 'General Comment No. 24', UN Doc. CCPR/C/21/Rev.1/Add.6, para. 8.

[254] Convention (IV) Respecting the Laws and Customs of War by Land, [1910] UKTS 9, annex, art. 46. For a case where the destruction of monuments was considered a violation of art. 56 of the regulations annexed to Hague Convention IV, which protects cultural monuments, see Karl Lingenfelder, (1949) 8 LRTWC 67 (Permanent Military Tribunal, Metz).

[255] Protocol Additional I to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts, (1979) 1125 UNTS 3, art. 53(a).

[256] Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, (1954) 249 UNTS 240.

Nevertheless, in light of the *travaux préparatoires* of the Genocide Convention, it seems impossible to consider acts of cultural genocide as punishable crimes if they are unrelated to physical or biological genocide. According to the International Law Commission:

> As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word 'destruction', which must be taken only in its material sense, its physical or biological sense. It is true that the 1947 draft Convention prepared by the Secretary-General and the 1948 draft prepared by the *ad hoc* Committee on Genocide contained provisions on 'cultural genocide' covering any deliberate act committed with the intent to destroy the language, religion or culture of a group, such as prohibiting the use of the language of the group in daily intercourse or in schools or the printing and circulation of publications in the language of the group or destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.[257]

In his dissenting opinion in *Krstić*, Judge Shahabuddeen set out a theory by which acts of cultural genocide would be subsumed within the definition of genocide, albeit indirectly, through the manifestly physical act of killing. He explained that '[a] group is constituted by characteristics – often intangible – binding together a collection of people as a social unit. If those characteristics have been destroyed in pursuance of the intent with which a listed act of a physical or biological nature was done, it is not convincing to say that the destruction, though effectively obliterating the group, is not genocide because the obliteration was not physical or biological.'[258] Judge Shahabuddeen's approach concerns the intent to destroy, and therefore should perhaps more properly be discussed in the next chapter of this book. Judge Shahabuddeen acknowledged 'the generally accepted view' that cultural genocide was excluded from the Convention, but said: 'The intent certainly has to be to destroy, but, except for the listed act, there is no reason why the destruction must always be physical or biological.'[259] He said that, if there was

[257] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 2 above.
[258] *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Partially Dissenting Opinion of Judge Shahabuddeen, 19 April 2004, para. 50.
[259] *Ibid.*, para. 51.

inconsistency between his view and the *travaux préparatoires*, 'the interpretation of the final text of the Convention is too clear to be set aside by the *travaux préparatoires*'.[260] He concluded:

> [T]he foregoing is not an argument for the recognition of cultural genocide. It is established that the mere destruction of the culture of a group is not genocide: none of the methods listed in article 4(2) of the Statute need be employed. But there is also need for care. The destruction of culture may serve evidentially to confirm an intent, to be gathered from other circumstances, to destroy the group as such. In this case, the razing of the principal mosque confirms an intent to destroy the Srebrenica part of the Bosnian Muslim group.

To the extent that Judge Shahabuddeen was arguing that destruction of cultural institutions is evidence of intent to commit physical or biological genocide, his observations are uncontroversial. The tone of his dissent, however, suggests an indication to enlarge the definition so as to include borderline cases, where there are abundant examples of ethnic hatred but an absence of evidence that physical destruction was intended. His views were formally adopted by a Trial Chamber in a subsequent case,[261] and found an echo in a judgment of another Trial Chamber. In *Krajisnik*, a Trial Chamber wrote:

> 'Destruction', as a component of the *mens rea* of genocide, is not limited to physical or biological destruction of the group's members, since the group (or a part of it) can be destroyed in other ways, such as by transferring children out of the group (or the part) or by severing the bonds among its members. Thus it has been said that one may rely, for example, on evidence of deliberate forcible transfer as evidence of the *mens rea* of genocide.[262]

A footnote to this paragraph provided further explanation:

> It is not accurate to speak of 'the group' as being amenable to physical or biological destruction. Its members are, of course, physical or biological beings, but the bonds among its members, as well as such aspects of the group as its members' culture and beliefs, are neither physical nor biological. Hence the Genocide Convention's 'intent to destroy' the group cannot sensibly be regarded as reducible to an intent to destroy the group physically or biologically, as has occasionally been said.[263]

[260] *Ibid.*, para. 52.
[261] *Prosecutor* v. *Blagojević* (Case No. IT-02-60-T), Judgment, 17 January 2005, paras. 659–60.
[262] *Prosecutor* v. *Krajisnik* (Case No. IT-00-39-T), Judgment, 27 September 2006, para. 854 (references omitted).
[263] *Ibid.*, n. 1701.

The Trial Chamber did not provide any precise references or authority, beyond indicating that 'it has been said', although the obvious references would be to the Shahabuddeen dissent in *Krstić* and the Trial Chamber judgment in *Blagojević*. Several months after these words were written, the conviction of Blagojević for complicity in genocide was reversed by the Appeals Chamber.[264]

In *Bosnia* v. *Serbia*, the International Court of Justice cited approvingly the views of a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia that, even in customary law, 'despite recent developments', genocide was limited to physical or biological destruction of a group'.[265] Accordingly, the Court concluded 'that the destruction of historical, religious and cultural heritage cannot be considered to be a genocidal act within the meaning of Article II of the Genocide Convention'. Nevertheless, the Court endorsed a statement in *Krstić* that 'where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group'.[266]

The cultural component remains relevant as evidence of the intent to destroy a group. Proof an accused was involved in the destruction of cultural monuments or similar acts directed against the culture of the group will aid a tribunal in assessing the elements of intent and motive.

In the Rule 61 hearing into charges of genocide in *Karadžić and Mladić* before the International Criminal Tribunal for the former Yugoslavia,[267] a UNESCO expert on cultural heritage described the destruction of monuments in Mostar and other towns in Bosnia and Herzegovina.[268] He concluded that this constituted an attempt to change 'the physical environment' by destroying cultural evidence of a culture or civilization. Asked by Judge Riad whether this was part of a strategy, he answered:

[264] *Prosecutor* v. *Blagojević* (Case No. IT-02-60-A), Judgment, 9 May 2007.

[265] Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 26 February 2007, para. 344, citing *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 580.

[266] *Ibid.*

[267] On Rule 61 hearings, see: William A. Schabas, *The UN International Criminal Tribunals, the former Yugoslavia, Rwanda, Sierra Leone*, Cambridge: Cambridge University Press, 2006, pp. 382–3.

[268] *Prosecutor* v. *Karadžić et al.* (Case Nos. IT-95-18-R61, IT-95-5-R61), Transcript of Hearing, 2 July 1996, pp. 35–59.

> Well, if it was not the strategy at the beginning of the war, it certainly became part of the strategy. You cannot possibly have 1,183 damaged mosques without something fairly deliberate being done. I return back to my original position: it certainly became one, it was very useful, but destruction or damaging of a minaret is clearly a sign to a population. I know of an example in western Herzegovina where you have a village which is totally undisturbed, with a village of Muslims in 1993, and then in 1994 or 1995 you have one shot on the minaret. This is a signal. Hitting a minaret is also one way of chasing, chasing the people.[269]

The Trial Chamber concluded:

> The destruction of mosques or Catholic churches is designed to annihilate the centuries-long presence of the group or groups; the destruction of the libraries is intended to annihilate a culture which was enriched through the participation of the various national components of the populations.[270]

Similarly, in *Krstić*, a Trial Chamber wrote:

> Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide. The Trial Chamber however points out that where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group.[271]

The conviction of General Krstić for aiding and abetting genocide with respect to the Srebrenica massacre implies an evolution in judicial interpretation and a willingness to consider aspects of cultural genocide that characterize ethnic cleansing as evidence of genocidal intent. The Trial Chamber seemed to understand that it was necessary to expand the scope of the term 'destroy' in the chapeau of the definition in order to cover 'acts that involved cultural and other non-physical forms of group destruction'.[272]

[269] *Ibid.*, p. 59.
[270] *Prosecutor* v. *Karadžić et al.*, note 68 above, para. 94. See also *Prosecutor* v. *Karadžić et al.* (Case No. IT-95-5-I), Indictment, 25 July 1995, para. 31.
[271] *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 580.
[272] *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Judgment, 19 April 2004, para. 33.

Critics of the Convention continue to lament the absence of cultural genocide,[273] although among international law-makers this is a dead issue. Neither the International Law Commission nor the drafters of the Rome Statute seriously entertained adding cultural genocide to the list of punishable acts. Recognizing that 'cultural genocide' does not fall within the ambit of the Convention, another term, 'ethnocide', appears in the academic literature,[274] documents of international human rights organs[275] and even in international instruments.[276] According to the UNESCO 'Declaration of San José':

> Ethnocide means that an ethnic group is denied the right to enjoy, develop and transmit its own culture and its own language, whether individually or collectively. This involves an extreme form of massive violation of human rights . . .
>
> 1. We declare that ethnocide, that is, cultural genocide, is a violation of international law equivalent to genocide, which was condemned by the United Nations Convention on the Prevention and Punishment of the Crime of Genocide.[277]

Of course cultural genocide is not 'a violation of international law equivalent to genocide', because no international instrument exists making it a punishable act. Moreover, in light of the above, it would be

[273] Whitaker, 'Revised Report', note 33 above, p. 17, para. 32; Lippman, 'Drafting', pp. 62–3.

[274] Ben Kiernan, 'Genocide and "Ethnic Cleansing"', in Robert Wuthnow, ed., *The Encyclopedia of Politics and Religion*, Vol. I, Washington: Congressional Quarterly, 1998, pp. 294–9 at p. 295; C. C. Tennant and M. E. Turpel, 'A Case Study of Indigenous Peoples: Genocide, Ethnocide and Self-Determination', (1990–1) 59–60 *Nordic Journal of International Law*, p. 287; G. Weiss, 'The Tragedy of Ethnocide: A Reply to Hippler', in J. H. Bodley, ed., *Tribal Peoples and Development Issues: A Global Overview*, Mountain View, CA: Mayfield Publishing Co., 1988, pp. 124–33; Frank Chalk and Kurt Jonassohn, 'The Conceptual Framework', in Frank Chalk and Kurt Jonassohn, eds., *The History and Sociology of Genocide*, New Haven and London: Yale University Press, 1990, pp. 3–43 at p. 23; Natan Lerner, *Group Rights and Discrimination in International Law*, Dordrecht, Boston and London: Martinus Nijhoff, 1990, p. 143; Israel W. Charney, 'Toward a Generic Definition of Genocide', in George J. Andreopoulos, *Genocide: Conceptual and Historical Dimensions*, Philadelphia: University of Pennsylvania Press, 1994, pp. 64–94 at p. 85; Barbara Harff, 'Recognizing Genocides and Politicides', in Helen Fein, ed., *Genocide Watch*, New Haven: Yale University Press, 1991, pp. 27–41 at p. 29; Robert Jaulin, *La Décivilisation: politique et pratique de l'ethnocide*, Brussels: Editions Complexe, 1974; Robert Jaulin, *La paix blanche; introduction à l'ethnocide*, Paris: Editions du Seuil, 1970.

[275] Whitaker, 'Revised Report', note 33 above, p. 17, para. 33.

[276] UNESCO Latin-American Conference, Declaration of San José, 11 December 1981, UNESCO Doc. FS 82/WF.32 (1982), reproduced in James Crawford, *The Rights of Peoples*, Oxford: Clarendon Press, 1988.

[277] *Ibid.*

implausible to argue that there was some customary norm to fill the void in the Convention on this issue.

The debate about cultural genocide is closely related to the relationship between genocide and 'ethnic cleansing'.

'Ethnic cleansing'

The expression 'ethnic cleansing' may first have been used immediately following the Second World War by Poles and Czechs intending to 'purify' their countries of Germans and Ukrainians. But, if this is the case, the language is the direct descendant of expressions used by the Nazis in their racial 'hygiene' programmes. The latter had a term, *sauberung*, and their goal was to make Germany territory *judenrein*, that is, free of Jews.[278] The term resurfaced in 1981 in Yugoslav media accounts of the establishment of 'ethnically clean territories' in Kosovo.[279] It entered the international vocabulary in 1992, used to describe policies being pursued by the various parties to the Yugoslav conflict aimed at creating ethnically homogeneous territories.[280] There have been a number of attempts at definition. According to the Security Council's Commission of Experts on violations of humanitarian law during the Yugoslav war: 'The expression "ethnic cleansing" is relatively new. Considered in the context of the conflicts in the former Yugoslavia, "ethnic cleansing" means rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area.'[281] This definition proposed by the Commission of Experts was

[278] Mark Kramer, 'Introduction', in Mark Kramer, ed., *Redrawing Nations: Ethnic Cleansing in East Central Europe*, Boulder: Rowman & Littlefield, 2001, p. 1.

[279] Drazen Petrovic, 'Ethnic Cleansing – An Attempt at Methodology', (1994) 5 *European Journal of International Law*, p. 342 at p. 343.

[280] See Norman Cigar, *Genocide in Bosnia: The Policy of Ethnic Cleansing*, College Station, TX: Texas A&M University Press, 1995; Nathan Lerner, 'Ethnic Cleansing', (1994) 24 *Israel Yearbook of Human Rights*, p. 103; John Webb, 'Genocide Treaty – Ethnic Cleansing – Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia', (1993) 23 *Georgia Journal of International and Comparative Law*, p. 377; Damir Mirkovic, 'Ethnic Cleansing and Genocide: Reflections on Ethnic Cleansing in the Former Yugoslavia', (1996) 548 *Annals of the American Academy of Political and Social Science*, p. 191; Andrew Bell-Fialkoff, 'A Brief History of Ethnic Cleansing', *Foreign Affairs*, Summer 1993, pp. 110–21.

[281] 'Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)', UN Doc. S/35374 (1993), para. 55. See also Bassiouni and Manikas, *International Criminal Tribunal*, p. 608.

accepted by the International Court of Justice.[282] The Commission considered techniques of ethnic cleansing to include murder, torture, arbitrary arrest and detention, extra-judicial executions, and sexual assault, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian populations, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property.[283] During the Rule 61 hearing in *Karadžić and Mladić*, the Prosecutor of the International Criminal Tribunal for the former Yugoslavia was asked to define the term. He said:

> Well, ethnic cleansing is a practice which means that you act in such a way that in a given territory the members of a given ethnic group are eliminated. It means a practice that aims at such and such a territory be, as they meant, ethnically pure. So, in other words, that that territory would no longer contain only members of the ethnic group that took the initiative of cleansing the territory. So, in other words, the members of the other group are eliminated by different ways, by different methods. You have massacres. Everybody is not massacred, but I mean in terms of numbers, you have massacres in order to scare these populations. Sometimes these massacres are selective, but they aim at eliminating the elite of a given population, but they are massacres. I mean, that is the point. So whenever you have massacres, naturally the other people are driven away. They are afraid. They try to run away and you find yourself with a high number of a given people that have been massacred, persecuted and, of course, in the end these people simply want to leave. They also submitted to such pressures that they go away. They are driven away either on their own initiative or they are deported. But the basic point is for them to be out of that territory and some of them are sometimes locked up in camps. Some women are raped and, furthermore, often times what you have is the destruction of the monuments which marked the presence of a given population in a given territory, for instance, religious places, Catholic churches or mosques are destroyed. So basically, this is how ethnic cleaning is practised in the course of this war.[284]

The Special Rapporteur of the Commission on Human Rights, Tadeusz Mazowiecki, said that '"[e]thnic cleansing" may be equated with a systematic purge of the civilian population with a view to forcing

[282] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 191.

[283] UN Doc. S/25274 (1993), para. 56.

[284] *Prosecutor* v. *Karadžić et al.* (Case Nos. IT-95-18-R61, IT-95-5-R61), Transcript of Hearing, 28 June 1996, p. 10.

it to abandon the territories in which it lives'.[285] The Commission itself, in the resolution adopted during its first special session in August 1992, said that 'ethnic cleansing ... at a minimum entails deportations and forcible mass removal or expulsion of persons from their homes in flagrant violation of their human rights, and which is aimed at the dislocation or destruction of national ethnic racial or religious groups'.[286] *Ad hoc* Judge Elihu Lauterpacht of the International Court of Justice defined ethnic cleansing as 'the forced migration of civilians'.[287]

In a speech to the Security Council, Sir David Hannay of the United Kingdom said it was 'the forcible removal of civilian populations'.[288] Ambassador Colin Keating of New Zealand, in the General Assembly, said the term ethnic cleansing 'covered a multitude of gross violations of human rights such as systematic expulsion, forcible relocation, destruction of dwellings, degrading treatment of human beings, rape and killings'.[289] A member of the Committee for the Elimination of Racial Discrimination described ethnic cleansing as a form of 'enforced segregation'.[290] In a 1998 resolution, the Sub-Commission on Prevention of Discrimination and Protection of Minorities described it as 'forcible displacement of populations within a country or across borders'.[291] The expression 'ethnic cleansing' began to appear in the documents of international bodies in August 1992. That month, the term was used, always within quotation marks, in resolutions of the Security Council,[292] the General Assembly,[293] the Commission on Human Rights[294] and the Economic and Social Council.[295] The quotation marks reflected the view that the term had been coined by the perpetrators

[285] UN Doc. S/PV.3134, para. 39. In an early report, Mazowiecki defined ethnic cleansing as 'the elimination by the ethnic group exerting control over a given territory of members of other ethnic groups': UN Doc. A/47/666, UN Doc. S/24809 (1992).

[286] 'The Situation of Human Rights in the Territory of the Former Yugoslavia', CHR Res. 1992/S-1/1, preamble.

[287] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, note 190 above, Separate Reasons of Judge *ad hoc* Lauterpacht, p. 431, para. 69.

[288] UN Doc. S/PV.3106 (1992), p. 36. [289] UN Doc. A/C.3/48/SR.6, para. 29.

[290] UN Doc. A/CERD/SR.1003. [291] 'Forced Population Transfer', SCHR Res. 1998/27.

[292] UN Doc. S/RES/771 (1992), para. 2; UN Doc. S/RES/787 (1992), para. 2; UN Doc. S/RES/808 (1993), preamble; UN Doc. S/RES/827 (1993), preamble.

[293] UN Doc. A/RES/46/242, preamble, paras. 6 and 8.

[294] UN Doc. E/CN.4/1992/84/Add.1. [295] ECOSOC Res. 1992/305.

themselves,[296] although by 1994 the General Assembly no longer used the quotation marks.[297]

The 1993 World Conference on Human Rights adopted a resolution on Bosnia and Herzegovina which said: 'the practice of ethnic cleansing resulting from Serbian aggression against the Muslim and Croat population in the Republic of Bosnia and Herzegovina constitutes genocide in violation of the Convention on the Prevention and Punishment of the Crime of Genocide'.[298] The Commission of Experts appointed by the Security Council stated that '"[e]thnic cleansing" is contrary to international law'.[299] It suggested that in some cases 'ethnic cleansing' could be considered a breach of the Genocide Convention:

> Based on the many reports describing the policy and practices conducted in the former Yugoslavia, 'ethnic cleansing' has been carried out by means of murder, torture, arbitrary arrest and detention, extrajudicial executions, rape and sexual assault, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property. Those practices constitute crimes against humanity and can be assimilated to specific war crimes. Furthermore, such acts could also fall within the meaning of the Genocide Convention.[300]

The most authoritative assertion that ethnic cleansing is equivalent to genocide appears in a December 1992 General Assembly resolution that evokes 'the abhorrent policy of "ethnic cleansing", which is a form of genocide'.[301] This reference has been reaffirmed in a number of subsequent resolutions.[302] During the debates on the December 1992

[296] UN Doc. S/PV.3106 (1992), p. 22.

[297] 'The Situation in Bosnia and Herzegovina', UN Doc. A/RES/49/10; 'The Situation in the Occupied Territories of Croatia', UN Doc. A/RES/49/43; 'Third Decade to Combat Racism and Racial Discrimination', UN Doc. A/RES/49/146.

[298] UN Doc. A/CONF.157/24 (Part 1), pp. 47–8.

[299] 'Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)', note 281 above, para. 55.

[300] *Ibid.*, para. 56.

[301] 'The Situation in Bosnia and Herzegovina', UN Doc. A/RES/47/121. See: UN Doc. A/47/PV.91, p. 99 (102 in favour, with 57 abstentions, on a recorded vote). The abstentions concerned a provision in the resolution calling for an arms embargo to be lifted, and had nothing to do with the reference to genocide.

[302] 'Situation of Human Rights in the Territory of the Former Yugoslavia: Violations of Human Rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)', UN Doc. A/RES/48/153; 'Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia',

resolution, several delegates described ethnic cleansing as 'genocide'[303] or, more frequently, 'genocidal',[304] as well as a 'crime against humanity'[305] and a form of 'apartheid'.[306] The debates are, however, embarrassingly laconic with respect to the assertion that ethnic cleansing is a form of genocide, considering the months that the General Assembly devoted to defining the crime in 1948. Significantly, another resolution adopted by consensus at the same session in December 1992, entitled '"Ethnic Cleansing" and Racial Hatred', approached the question from the standpoint of racial discrimination and the protection of minorities and did not even refer to genocide or to the Convention.[307] Many years later, the General Assembly referred to the phenomena of 'genocide, war crimes, ethnic cleansing and crimes against humanity',[308] implying that ethnic cleansing is an autonomous category distinct from both genocide and crimes against humanity. But it is probably wise not to attempt to comprehend General Assembly resolutions using principles of interpretation normally applied to rigorously drafted legal texts.

In debates in both the General Assembly and the Security Council, delegations sometimes have equated genocide with ethnic cleansing, among them Malaysia,[309] Pakistan,[310] Egypt,[311] Iran,[312] Bangladesh,[313] the Czech Republic[314] and Senegal.[315] But most countries use the term 'ethnic cleansing' in a way that suggests they understand it is distinct from genocide, although related.[316] There has also been occasional

UN Doc. A/RES/48/143; 'Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia', UN Doc. A/RES/49/205; 'Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia', UN Doc. A/RES/50/192; 'Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia', UN Doc. A/RES/51/115.

[303] UN Doc. A/47/PV.86, p. 31 (Jaya, Brunei Darussalam); UN Doc. A/47/PV.87, pp. 14–15 (Khoshroo, Iran); UN Doc. A/47/PV.87, pp. 24–5 (Elaraby, Egypt); UN Doc. A/47/PV.87, p. 46 (Huq, Bangladesh); UN Doc. A/47/PV.88, p. 22 (Shkurti, Albania).

[304] UN Doc. A/47/PV.86, p. 21 (Nobilo, Croatia); UN Doc. A/47/PV.86, p. 48 (Pirzada, Pakistan); UN Doc. A/47/PV.87, p. 2 (Al-Ni'mah, Qatar); UN Doc. A/47/PV.88, p. 65 (Ansay, Organization of the Islamic Conference).

[305] UN Doc. A/47/PV.86, p. 46 (Cissé, Senegal); UN Doc. A/47/PV.88, p. 65 (Ansay, Organization of the Islamic Conference).

[306] UN Doc. A/47/PV.88, p. 12 (Arria, Venezuela).

[307] UN Doc. A/RES/47/80. See also 'Third Decade to Combat Racism and Racial Discrimination', GA Res. 48/91.

[308] UN Doc. A/RES/60/1, paras. 138–9.

[309] UN Doc. S/52/PV.71, p. 7.

[310] *Ibid.*, p. 12.

[311] UN Doc. A/48/PV.82, p. 17.

[312] UN Doc. S/PV.3136, para. 68.

[313] UN Doc. S/PV.3137, para. 111.

[314] UN Doc. A/C.3/48/SR.10, para. 2.

[315] UN Doc. A/48/PV.83, p. 9.

[316] *Ibid.*; UN Doc. A/48/PV.84.

reference to 'religious cleansing' in debates in the United Nations organs.[317]

In the academic literature, 'ethnic cleansing' has sometimes been described as a euphemism for genocide.[318] The special rapporteur of the Commission on Human Rights on extrajudicial, summary and arbitrary executions has also said ethnic cleansing is a euphemism for genocide.[319]

The term 'ethnic cleansing' was unknown to the drafters of the Genocide Convention. It certainly never figured in any of their debates. But the notion of 'rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area' has a long history in international relations, and only in the late twentieth century has it come to be understood as a serious human rights violation.[320] For example, in post-war Europe, the Allies forcibly removed ethnic German populations from areas in Western Poland. As many as 15 million Germans were expelled and resettled pursuant to Article 12 of the 1945 Potsdam Protocol.[321] It was to be conducted 'in an orderly and humane manner', according to Article 12 of the Agreement, but in practice was associated with much human suffering.

During the drafting of the Convention, the United States expressed concern that the proposed definition of the crime 'might be extended to embrace forced transfers of minority groups such as have already been carried out by members of the United Nations'.[322] And, while the

[317] UN Doc. A/C.3/48/SR.5, para. 17; UN Doc. A/C.3/48/SR.9, para. 54.

[318] Petrovic, 'Ethnic Cleansing'; Mackinnon, 'Rape', p. 8; Lori Lyman Bruun, 'Beyond the 1948 Convention – Emerging Principles of Genocide in Customary International Law', (1993) 17 *Maryland Journal of International Law and Trade*, p. 193 at p. 200. See also Webb, 'Genocide Treaty', pp. 402–3.

[319] 'Extrajudicial, Summary or Arbitrary Executions, Note by the Secretary-General', UN Doc. A/51/457, para. 69.

[320] Jennifer Jackson Preece, 'Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms', (1998) 20 *Human Rights Quarterly*, p. 817.

[321] A. De Zayas, 'International Law and Mass Population Transfers', (1975) 16 *Harvard International Law Journal*, p. 207; A. De Zayas, *Nemesis at Potsdam; The Expulsion of the Germans from the East*, Lincoln, NE: University of Nebraska Press, 1989; Freiherr Von Braun, 'Germany's Eastern Border and Mass Expulsions', (1964) 58 *American Journal of International Law*, p. 747.

[322] 'Comments by Governments on the Draft Convention Prepared by the Secretariat, Communications from Non-Governmental Organizations', UN Doc. E/623. The United States cited specifically para. 3(b): 'Destroying the specific characteristics of the group by . . . (b) Forced and systematic exile of individuals representing the culture of a group . . .' The fears of the United States were not totally misplaced. One academic writer has said that 'the expulsion of Germans and of persons of German descent living

Convention was being drafted, Palestinians were 'cleansed' of areas in the new state of Israel.[323]

Another contemporary indication of the acceptability of 'ethnic cleansing' appears in the debates of the 1952 session of the prestigious Institut de Droit International. Rapporteur Giorgio Balladore Pallieri listed twenty 'population transfer' treaties between 1913 and 1945, admitting that 'il n'y a jamais de transfert vraiment volontaire des populations'.[324] Pallieri concluded, with the logic of an ethnic cleanser, that there was nothing in international law to oppose the legitimacy of population transfers and that they were even, in certain circumstances, desirable. They were the consequences of the legitimate desire of all modern States to have loyal citizens, he said.[325] Pallieri's analysis was well received by most of the members of the Institute, including Max Huber, Jean Spiropoulos and Fernand de Visscher. Georges Scelle stood alone, deeming the whole idea repulsive and incompatible with the emerging law of human rights.

There is no doubt the drafters of the Convention quite deliberately resisted attempts to encompass the phenomenon of ethnic cleansing within the punishable acts. According to the comments accompanying the Secretariat draft, the proposed definition excluded 'certain acts which may result in the total or partial destruction of a group of human beings ... namely ... mass displacements of population'.[326] The commentary

in the former eastern provinces of Germany and in eastern and southeastern European countries frequently took place under conditions that are classifiable as genocide': Hans-Heinrich Jescheck, 'Genocide', in Rudolph Bernhardt, ed., *Encyclopedia of Public International Law*, Vol. II, Amsterdam: North-Holland Elsevier, 1995, pp. 541–4 at p. 541. During the United States Senate's consideration of the Genocide Convention in 1950, James Finucane of the National Council for the Prevention of War testified about the United States' 'genocidal intent, or genocidal carelessness, at Potsdam': *United States of America, Hearings Before a Subcommittee of the Committee on Foreign Relations, United States Senate, January 23, 24, 25, and 9 February 1950*, Washington: United States Government Printing Office, 1950, p. 312.

[323] Mark Tessler, *A History of the Israeli–Palestinian Conflict*, Bloomington and Indianapolis: Indiana University Press, 1994, pp. 291–307; Baruch Kimmerling and Joel S. Migdal, *Palestinians: The Making of a People*, New York: The Free Press, 1993, pp. 146–56; Benny Morris, *1948 and After: Israel and the Palestinians*, Oxford: Clarendon Press, 1990, p. 22; John Quigley, 'Displaced Palestinians and a Right of Return', (1998) 39 *Harvard International Law Journal*, p. 171.

[324] Giorgio Balladore Pallieri, 'Les transferts internationaux de populations', (1952) 2 AIDI, pp. 138–99 at pp. 142–3. For a more recent discussion of these issues, see: Michael Barutciski, 'Les transfers de populations quatre-vingt ans après la Convention de Lausanne', (2003) 41 *Canadian Yearbook of International Law*, p. 271.

[325] *Ibid.*, p. 149. [326] UN Doc. E/447, p. 23.

continued: 'Mass displacement of populations from one region to another also does not constitute genocide. It would, however, become genocide if the occupation were attended by such circumstances as to lead to the death of the whole or part of the displaced population (if, for example, people were driven from their homes and forced to travel long distances in a country where they were exposed to starvation, thirst, heat, cold and epidemics).'[327] The unspoken reference here is to the mass displacement of Armenians within the Ottoman Empire in 1915, where the exposure to starvation, thirst, heat, cold and epidemics resulted in the death of hundreds of thousands.

In the Sixth Committee, Syria proposed an amendment to the definition of genocide corresponding closely to the contemporary notion of 'ethnic cleansing'. The Syrian amendment read: 'Imposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment.'[328] The Syrian representative said: 'The problem of refugees and displaced persons to which his delegation's proposal referred had arisen at the end of the Second World War and remained extremely acute.'[329] Yugoslavia supported the amendment, citing the Nazis' displacement of Slav populations from a part of Yugoslavia in order to establish a German majority. 'That action was tantamount to the deliberate destruction of a group', said the Yugoslav delegate. 'Genocide could be committed by forcing members of a group to abandon their homes', he added.[330] But the United States argued that the Syrian proposal 'deviated too much from the original concept of genocide'.[331] For the United Kingdom, 'the problem raised by the Syrian amendment was a serious one but did not fall within the definition of genocide'.[332] The Soviets said: 'Measures compelling members of a group to abandon their homes, in the case of acts committed under the Hitler regime, were rather a consequence of genocide.'[333] The Syrian amendment was resoundingly defeated, by twenty-nine votes to five, with eight abstentions.[334] There has been reference in the case law to the rejection of the Syrian amendment as evidence of the exclusion of 'ethnic cleansing' from the scope of the Convention.[335]

[327] *Ibid.*, p. 24. [328] UN Doc. A/C.6/234. [329] UN Doc. A/C.6/SR.82 (Tarazi, Syria).
[330] *Ibid.* (Bartos, Yugoslavia). [331] *Ibid.* (Maktos, United States).
[332] *Ibid.* (Fitzmaurice, United Kingdom). [333] *Ibid.* (Morozov, Soviet Union).
[334] UN Doc. A/C.6/SR.82.
[335] *Prosecutor* v. *Stakić* (Case No. IT-97-24-T), Judgment, 31 July 2003, para. 519; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 190.

During discussion of the 'Elements of Crimes' of the Rome Statute, the 'Arab Group' criticized a United States draft for failing to deal with the practice of ethnic cleansing as a means of genocide within the context of article 6(b)(iii) of the Statute, which corresponds to article II(c) of the Convention. Accordingly: 'This confirms the difficulty of enumerating all the so-called elements of crimes. It is more than likely that future events in the world will reveal other forms of genocide that have not been mentioned in this or similar proposals.'[336]

The concept of 'ethnic cleansing' has never figured in any of the work of the International Criminal Tribunal for Rwanda. The case for full-blown genocide was too clear. No doubt earlier atrocities, committed over Rwanda's long history of post-colonial ethnic conflict, might fit within the term. The same cannot be said, of course, for the International Criminal Tribunal for the former Yugoslavia, where the debate about whether 'ethnic cleansing' constituted genocide has been central to many of the cases as well as to the political debate. In its first years of operation it was extremely cautious in laying charges of genocide. The Prosecutor addressed the acts of ethnic cleansing carried out by the Milošević regime in Kosovo in early 1999 under the rubrics of 'deportation' and 'persecutions', both of which belong within the general category of crimes against humanity.[337]

Judges of the Tribunal were not always as restrained. For example, in the confirmation of the Srebrenica indictment (second indictment) in *Karadžić and Mladić*, Judge Riad referred to 'ethnic cleansing' as a form

[336] 'Proposal by Algeria, Bahrain, Comoros, Djibouti, Egypt, Jordan, Iraq, Kuwait, Lebanon, Libyan Arab Jamahiriya, Morocco, Oman, Palestine, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic, Tunisia, United Arab Emirates and Yemen, Comments on the Proposal Submitted by the United States of America Concerning Terminology and the Crime of Genocide', UN Doc. PCNICC/1999/WGEC/DP.4, p. 3.

[337] *Prosecutor* v. *Milosevic et al.* (Case No. IT-99-37-I), Indictment, 22 May 1999. In a Memorandum of 30 March 1999, the Legal Bureau of the Canadian Department of Foreign Affairs pointed out first that, in the Kosovo case, an element of genocide was present ('targeting a group on the basis of ethnicity'). Then, after noting that so-called ethnic cleansing was expressly excluded from the Genocide Convention in the 1948 negotiations, it pointed out that such notion (namely, the forcible expulsion of persons from their homes in order to escape the threat of subsequent ill-treatment) showed an intent different from the 'intent to destroy'. It went on to note: 'Ethnic Albanians are being killed and injured *in order to drive them from their homes*, not in order to *destroy them as a group, in whole or in part*' (in (1999) 37 *Canadian Yearbook of International Law*, p. 328; emphasis in the original). The Canadian opinion was cited in the 'Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur', UN Doc. S/2005/60, para. 504.

of genocide.[338] A similar perspective was adopted by Trial Chamber I in its Rule 61 decision in *Nikolić*.[339] But these were early rulings, and soon the Chambers became more careful about equating genocide and ethnic cleansing. In the *Tadić* judgment, a Trial Chamber spoke of the horrors of ethnic cleansing but stopped shy of using the word genocide.[340] A Trial Chamber of the Tribunal noted, in *Sikirica*, the relative paucity of genocide indictments, and the fact that virtually all of the prosecutions involved 'ethnic cleansing'. The Trial Chamber seemed to consider that 'ethnic cleansing' was better described within the framework of the crime against humanity of persecution.[341]

A doctrine by which some overlap between the two terms was admitted began to emerge. In *Krstić*, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia said 'there are obvious similarities between a genocidal policy and the policy commonly known as "ethnic cleansing"'.[342] The *Brdanin* Trial Chamber cited these words approvingly, adding that it did 'not negate that ethnic cleansing may under certain circumstances ultimately reach the level of genocide, but in this particular case, it is not the only reasonable inference that may be drawn from the evidence'.[343] It also cited an excerpt from a closed session in the *Krstić* trial: '"Ethnic cleansing" was a strategy to force

[338] *Prosecutor* v. *Karadžić et al.* (Case No. IT-95-18-I), Confirmation of Indictment, p. 4.

[339] *Prosecutor* v. *Nikolić* (Case No. IT-95-2-R61), Review of Indictment Pursuant to Rule 61, 20 October 1995, para. 34. During the hearing, Judge Jorda asked expert witness James Gow, of King's College, London, whether 'the concept of ethnic cleansing is to be found somewhere, either officially or in documents or proclamations as organized plans'. Professor Gow answered: 'The term ethnic cleansing has been widely used. It does have some history, but it has come to prominence and has been used in a widespread way in connection with the war in Bosnia and Herzegovina and, particularly, with the Serbian campaign there. The term is often attributed to one of the Serbian paramilitary leaders, Vojislav Šešelj, in the current context. It has also been used by one of the other Serbian paramilitary leaders, Zeljko Raznjatovic (Arkan), and there is some film evidence, I believe, in which Arkan is giving instructions to his troops to be careful in this particular cleansing operation. But to say that there is some official document in which a plan for ethnic cleansing appears, I think, would be to take – would be to make too strong a statement. I have seen no evidence of an official document in which the term "ethnic cleansing" is used, but the term has been used and it has been used by some of the people involved in the activity that they have been carrying out.' *Prosecutor* v. *Nikolić* (Case No. IT-95-2-R61), Transcript, 9 October 1995.

[340] *Prosecutor* v. *Tadić* (Case No. IT-94-1-T), Opinion and Judgment, 7 May 1997, para. 62.

[341] *Prosecutor* v. *Sikirica et al.* (Case No. IT-95-8-I), Judgment on Defence Motions to Acquit, 3 September 2001, para. 90.

[342] *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 562.

[343] *Prosecutor* v. *Brdanin* (Case No. IT-99-36-T), Judgment, 1 September 2004, para. 977, n. 2455.

people to move through different steps, starting by threats, by selective killings, selective destruction of building, and then once the separation of the communities took place, i.e., when the Serbian people left the places, then the second phase started with the use of paramilitary to take control of the towns and then organise the return of Serbs from the village and Serbs coming from other areas of Yugoslavia. I'm talking about displaced Serbs coming from Croatia, for instance.'[344] The *Brdanin* Trial Chamber noted that the underlying criminal acts of 'ethnic cleansing' and genocide may often be the same.[345]

The *Krstić* Trial Chamber said 'it must interpret the Convention with due regard for the principle of *nullum crimen sine lege*' and that therefore, 'despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group'. By recent developments, it cited the 1992 General Assembly resolution equating genocide with 'ethnic cleansing'[346] and a 2000 judgment of the Federal Constitutional Court of Germany holding that 'the intent to destroy the group ... extends beyond physical and biological extermination'.[347]

The distinction between 'ethnic cleansing' and genocide has been addressed by the International Court of Justice. In its 13 September 1993 ruling on provisional measures, *ad hoc* Judge Lauterpacht appended a separate opinion in which he asked 'Has Genocide Been Committed?' He noted 'the forced migration of civilians, more commonly known as "ethnic cleansing", is, in truth, part of a deliberate campaign by the Serbs to eliminate Muslim control of, and presence in, substantial parts of Bosnia-Herzegovina'. Judge Lauterpacht declared he was prepared to order, pursuant to the Genocide Convention, 'a prohibition of "ethnic cleansing" or conduct contributing thereto such as attacks and firing upon, sniping at and killing of non-combatants, and bombardment and blockade of areas of civilian occupation and other conduct having as its effect the terrorization of civilians in such a manner as to lead them to abandon their homes'.[348] These individual views were not, however, echoed in the majority decision.

[344] *Ibid.*, para. 982, n. 2465. [345] *Ibid.*, citing the first edition of the book, at p. 200.
[346] *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 578, citing UN Doc. A/RES/47/121.
[347] *Ibid.*, para. 579, citing Federal Constitutional Court, 2 BvR 1290/99, 12 December 2000, para. (III)(4)(a)(aa).
[348] *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

When the Court returned to the matter, in 2007, it said that ethnic cleansing could only be a form of genocide within the meaning of the Convention if it corresponds to or fell within one of the categories of acts prohibited by Article II of the Convention. 'Neither the intent, as a matter of policy, to render an area "ethnically homogeneous", nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is "to destroy, in whole or in part" a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement', said the Court.[349] The Court acknowledged that certain acts described as 'ethnic cleansing' could correspond to prohibited acts under the Convention, giving as an example the direct infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part, 'that is to say with a view to the destruction of the group, as distinct from its removal from the region'.[350] The Court cited, with approval, a statement in the judgment of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, in *Stakić*, that '[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide.'[351] Thus, said the Court, 'whether a particular operation described as "ethnic cleansing" amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term "ethnic cleansing" has no legal significance of its own.'[352]

The Court's opinion provides an authoritative definition of the term, namely, 'rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area', or, more succinctly, 'forced displacement'. It usefully distinguishes ethnic cleansing

the Indication of Provisional Measures, 13 September 1993, Separate Opinion of Judge Lauterpacht, [1993] ICJ Reports 407, para. 123.

[349] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 190.

[350] *Ibid.*

[351] *Ibid.*, citing *Prosecutor* v. *Stakić* (Case No. IT-97-24-T), Judgment, 31 July 2003, para. 519.

[352] *Ibid.*

from genocide, although with a fuzzy rather than a bright line. The tendency in the case law and in legal writing to blur the line between the two concepts remains. Thus, it is argued, 'ethnic cleansing' may involve some of the acts prohibited by article II of the Convention. To the extent these are perpetrated with a genocidal intent, they constitute acts of genocide. This line of reasoning is not very productive, however, because essentially the same thing can be said about other violations of international law, such as apartheid, or aggressive war, or colonialism, or the use of weapons of mass destruction. Any of these phenomena might involve 'killing', 'causing serious bodily or mental harm', and even 'preventing births' within a group. They *might* also amount to genocide if associated with an intent to destroy the group. But it does not seem at all helpful to muddy discussions about apartheid, or aggressive war or colonialism by suggesting that in some cases they may also be genocidal. Each has its own 'specific intent', implied in the concept itself. The same can be said of 'ethnic cleansing', whose intent or purpose is 'forced displacement' rather than 'physical destruction'.

To use an historical example, until 1941, Nazi anti-Semitic policies were directed towards convincing Jews in Germany to leave the country. Jews were required, of course, to pay a price for their freedom. Moreover, large numbers who attempted to leave were unable to find refuge because other 'civilized' States refused to admit them.[353] The Nazi policy, at the time, was one of ethnic cleansing. Jews were incited to leave by various forms of persecution, including discriminatory laws and periodic outbursts of violence such as the *Kristalnacht* of 9–10 November 1938. After the war against the Soviet Union was underway, the Nazi policy became destruction of the Jews of Europe, in whole or in part. No longer was emigration permitted, even if asylum was possible.

At this point, the Nazi policy became genocidal. The District Court of Jerusalem, in the *Eichmann* case, noted this evolution in Nazi policy, commenting that: 'The implementation of the "Final Solution", in the sense of total extermination, is to a certain extent connected with the cessation of emigration of Jews from territories under German influence.'[354] Until mid-1941, when the 'final solution' emerged, the Israeli court said 'a doubt remains in our minds whether there was here that specific intention to exterminate', as required by the definition of

[353] United States Holocaust Memorial Museum, *Historical Atlas of the Holocaust*, New York: Macmillan, Simon & Schuster, 1996, pp. 25–7.

[354] *A-G Israel* v. *Eichmann*, note 65 above, para. 80.

genocide. The Court said it would deal with such inhuman acts as being crimes against humanity rather than genocide. Eichmann was acquitted of genocide for acts prior to August 1941.[355]

In a sense, both genocide and ethnic cleansing may share the same goal, which is to eliminate the persecuted group from a given area, although ethnic cleansing tolerates the existence of the group elsewhere whereas genocide may not. Hitler had the modest ambition of eliminating all Jews in Europe, but given the chance he would have extended his murderous campaign to the rest of the world. Milošević, on the other hand, wanted to drive Muslims from Kosovo, although he seemed untroubled by the idea that they might live elsewhere, in Macedonia or Albania for example. Isn't there a meaningful difference here? While the material acts performed to commit the crimes may often resemble each other, they have two quite different specific intents. One is intended to displace a population, the other to destroy it. The issue is one of intent and it is logically inconceivable that the two agendas coexist.[356] Of course, as the *Eichmann* judgment notes, ethnic cleansing – described as 'deportation' – remains punishable as a crime against humanity and a war crime.[357]

Ethnic cleansing is also a warning sign of genocide to come. In *Krstić*, the International Criminal Tribunal for the former Yugoslavia found that a plan to ethnically cleanse the Srebrenica enclave of Muslims 'escalated' into a genocidal plan designed to guarantee that the Bosnian Muslim population would be permanently eradicated.[358] Genocide is the last resort of the frustrated ethnic cleanser.

[355] *Ibid*., para. 244(1)–(3); see also paras. 186–7.

[356] These words in the first edition of this book were cited in *Prosecutor* v. *Brdanin* (Case No. T-99-36-T), Judgment, 1 September 2004, para. 977, n. 2456. The Trial Chamber suggested that they were disapproved of by the Appeals Chamber, which 'appears to regard the two as compatible' (referring to *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 19 April 2004, para. 31). The Appeals Chamber did not expressly criticize my statement, however.

[357] See M. Cherif Bassiouni, *Crimes Against Humanity*, Dordrecht, Boston and London: Martinus Nijhoff, 1992, pp. 301–17; and Bassiouni and Manikas, *International Criminal Tribunal*, p. 530. The Rome Statute expands slightly upon the terminology, referring to 'deportation or forcible transfer of population'. These terms are defined as the 'forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law'. Rome Statute of the International Criminal Court, note 32 above, art. 8(1)(d) and (2)(d).

[358] *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 619.

Ecocide and other 'cides'

Raphael Lemkin's brilliant neologism, 'genocide', has prompted commentators to propose a number of other 'cides'. Threats to the integrity of the environment can conceivably imperil the survival of a group or people. If associated with the intent to destroy the group, the definition of genocide may apply. The term 'ecocide' has emerged to describe cases of environmental destruction falling short of genocide because the evidence can only establish negligence and not the special intent of genocide.[359] 'Ecocide' means 'adverse alterations, often irreparable, to the environment – for example through nuclear explosions, chemical weapons, serious pollution and acid rain, or destruction of the rain forest – which threaten the existence of entire populations'.[360] According to Malcolm Shaw, 'ecocide' is 'generally defined as the intention to disrupt or destroy the ecosystem by assault upon the environment, usually for military purposes'.[361] Professor Shaw has urged that concern with ecocide be focused elsewhere than on the Genocide Convention.[362] Nicodème Ruhashyankiko noted that States had placed the question of ecocide 'in a context other than that of genocide', and that 'it is becoming increasingly obvious that an exaggerated extension of the idea of genocide to cases which can only have a very distant connexion with that idea is liable to prejudice the effectiveness of the 1948 Convention Genocide [*sic*] very seriously'.[363]

Rudolph J. Rummel has devised the term 'democide' which means simply 'destruction of people'. According to Rummel, some 170 million people were victims of democide between 1900 and 1987, 38 million of

[359] Richard A. Falk, 'Ecocide, Genocide and the Nuremberg Tradition of Individual Responsibility', in V. Held, S. Morgenbesser and T. Nagel, *Philosophy, Morality, and International Affairs*, New York: Oxford University Press, 1974, pp. 123–37; Aaron Schwabach, 'Ecocide and Genocide in Iraq: International Law, the Marsh Arabs, and Environmental Damage in Non-International Armed Conflicts', (2004) 15 *Colorado Journal of International Environmental Law and Policy*, p. 1.

[360] Whitaker, 'Revised Report', note 33 above, p. 17, para. 33.

[361] Malcolm N. Shaw, 'Genocide and International Law', in Yoram Dinstein, ed., *International Law at a Time of Perplexity (Essays in Honour of Shabtai Rosenne)*, Dordrecht: Martinus Nijhoff, 1989, pp. 797–820 at p. 810.

[362] *Ibid.*, p. 811.

[363] 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur', UN Doc. E/CN.4/Sub.2/416, para. 478.

them victims of genocide.[364] Irwin Cotler has written of 'thefticide' to describe the appropriation of property.[365] Other variants on this theme are 'politicide',[366] patrimonicide[367] and 'gendercide'.[368] Undoubtedly, yet other 'cides' will be suggested in the future. The relationship with 'genocide' will remain somewhat distant, unless, of course, it can be shown that the perpetrators intended to destroy a national, ethnic, racial or religious group, in whole or in part. Nevertheless, the idea behind these new terms seems to be an extension or development built upon the base of genocide.

Apartheid

Apartheid is a crime against humanity, defined by the Apartheid Convention as 'inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them'.[369] The preamble to the Apartheid Convention refers to the Genocide Convention: 'Observing that, in the Convention on the Prevention and Punishment of the Crime of Genocide, certain acts which may also be qualified as acts of apartheid constitute a crime under international law . . .'[370]

The Ad Hoc Working Group of Experts of the Commission on Human Rights considered that certain practices of apartheid should be characterized as genocide:

> (a) The institution of group areas ('Bantustan policies'), which affected the African population by crowding them together in small areas where they could not earn an adequate livelihood, or the Indian

[364] Rudolph J. Rummel, *Democide*, New Brunswick, NJ: Transaction, 1992; Rudolph J. Rummel, *Death by Government*, New Brunswick, NJ: Transaction, 1995. Also: Yehuda Bauer, *Rethinking the Holocaust*, New Haven: Yale University Press, 2001, p. 12.

[365] Irwin Cotler, 'Confiscated Jewish Property: The Holocaust, Thefticide, and Restitution: A Legal Perspective', (1998) 20 *Cardozo Law Review*, p. 601.

[366] Barbara Harff, 'Recognizing Genocides and Politicides', in Helen Fein, ed., *Genocide Watch*, New Haven: Yale University Press, 1991, pp. 27–41 at p. 29.

[367] Ndiva Kofele-Kale, 'Patrimonicide: The International Economic Crime of Indigenous Spoliation', (1995) 28 *Vanderbilt Journal of Transnational Law*, p. 45.

[368] Adam Jones, 'Gendercide and Genocide', (2000) 2 *Journal of Genocide Research*, p. 185.

[369] International Convention on the Suppression and Punishment of the Crime of Apartheid, (1976) 1015 UNTS 243, art. II.

[370] See Kader Asmal, Louise Asmal and Ronald Suresh Roberts, *Reconciliation Through Truth: A Reckoning of Apartheid's Criminal Governance*, New York: St Martin's Press, 1997, pp. 198–202.

population by banning them to areas which were totally lacking the preconditions for the exercise of their traditional professions;

(b) The regulations concerning the movement of Africans in urban areas and especially the forcible separation of Africans from their wives during long periods, thereby preventing African births;

(c) The population policies in general, which were said to include deliberate malnutrition of large population sectors and birth control for the non-white sectors in order to reduce their numbers, while it was the official policy to favour white immigration;

(d) The imprisonment and ill-treatment of non-white political (group) leaders and of non-white prisoners in general;

(e) The killing of the non-white population through a system of slave or tied labour, especially in so-called transit camps.[371]

The Working Group believed that apartheid did not fall within the scope of the Genocide Convention definition, however, recommending it be revised to make punishable 'inhuman acts resulting from the policies of apartheid'.[372] It also urged that cultural genocide be recognized as a crime against humanity.[373] Subsequently, an Ad Hoc Working Group of Experts on Violations of Human Rights in Southern Africa concluded that: 'The way in which the South African regime implements the policy of apartheid should henceforth be considered as a kind of genocide.' The Working Group requested the Commission on Human Rights to call upon the General Assembly to seek an advisory opinion from the International Court of Justice 'on the extent to which apartheid as a policy entails criminal effects bordering on genocide'.[374]

In his study on genocide, Special Rapporteur Nicodème Ruhashyankiko concluded that apartheid should be approached as a crime against humanity rather than as genocide.[375] His successor, Benjamin Whitaker, discussed the question in some detail but did not take a

[371] 'Study Concerning the Question of Apartheid from the Point of View of International Penal Law', UN Doc. E/CN.4/1075. See also UN Doc. E/CN.4/950; UN Doc. E/CN.4/984/Add.18; UN Doc. E/CN.4/1020; UN Doc. E/CN.4/1020/Add.2.

[372] 'Study Concerning the Question of Apartheid from the Point of View of International Penal Law', UN Doc. E/CN.4/1075, para. 161. See also Leo Kuper, *Genocide: Its Political Use in the Twentieth Century*, New Haven: Yale University Press, 1981, pp. 197–204.

[373] 'Study Concerning the Question of Apartheid from the Point of View of International Penal Law', UN Doc. E/CN.4/1075, para. 163.

[374] UN Doc. E/CN.4/1985/14.

[375] 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur', note 363 above, paras. 404–5.

position.[376] The Rome Statute defines apartheid as a crime against humanity.[377]

The South African Truth and Reconciliation Commission, established as part of the democratic transition in South Africa, considered whether acts perpetrated by the white supremacist regime should be described as genocide. In the result, it rejected the qualification as inappropriate, and the term 'genocide' does not appear in its final report.

Use of nuclear weapons

In its 1996 advisory opinion, the International Court of Justice examined whether the threat to use or the use of nuclear weapons could be considered genocide. Some States had argued that the Genocide Convention set out 'a relevant rule of customary international law which the Court must apply' in examining whether nuclear weapons were contrary to customary international law.[378] The Court observed:

> It was maintained before the Court that the number of deaths occasioned by the use of nuclear weapons would be enormous; that the victims could, in certain cases, include persons of a particular national, ethnic, racial or religious group; and that the intention to destroy such groups could be inferred from the fact that the user of the nuclear weapon would have omitted to take account of the well-known effects of the use of such weapons. The Court would point out in that regard that the prohibition of genocide would be pertinent in this case if the recourse to nuclear weapons did indeed entail the element of intent, towards a group as such, required by the provision quoted above. In the view of the Court, it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case.[379]

A few of the judges took the argument somewhat more seriously. Judge Weeramantry wrote: 'If the killing of human beings, in numbers

[376] Whitaker, 'Revised Report', note 33 above, paras. 43–5.

[377] Rome Statute of the International Criminal Court, note 32 above, art. 7(1)(j). Apartheid is defined as inhuman acts 'committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime': art. 7(2)(h).

[378] See Vera Gowland-Debbas, 'The Right to Life and Genocide: The Court and an International Public Policy', in Philippe Sands and Laurence Boisson de Chazournes, *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge: Cambridge University Press, 1999.

[379] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, [1996] ICJ Reports 226, para. 26.

ranging from a million to a billion, does not fall within the definition of genocide, one may well ask what will.'[380] Judge Koroma expressed his apprehension over the Court's dismissal of the genocide argument. He said the Court:

> must be mindful of the special characteristics of the Convention, its object and purpose, to which the Court itself referred in the Reservations case as being to condemn and punish 'a crime under international law involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity and which is contrary to moral law and the spirit and aims of the United Nations.

According to Judge Koroma:

> The Court cannot therefore view with equanimity the killing of thousands, if not millions, of innocent civilians which the use of nuclear weapons would make inevitable, and conclude that genocide has not been committed because the State using such weapons has not manifested any intent to kill so many thousands or millions of people. Indeed, under the Convention, the quantum of the people killed is comprehended as well. It does not appear to me that judicial detachment requires the Court from [*sic*] expressing itself on the abhorrent shocking consequences that a whole population could be wiped out by the use of nuclear weapons during an armed conflict, and the fact that this could tantamount to genocide, if the consequences of the act could have been foreseen. Such expression of concern may even have a preventive effect on the weapons being used at all.[381]

Debate about the incompatibility of the use of nuclear weapons with the prohibition of genocide has been around since 1948. During drafting of the Convention, the Netherlands warned that: 'Attention will have to be paid that the definition of genocide is not made so large as to include every act of war against a large group of persons, notably an attack by atom bombs.'[382] A few years later, when ratification was being considered by the United Kingdom Parliament, Emrys Hughes said that, if there were another war, persons responsible for the use of nuclear weapons could be charged with genocide.[383] In his commentary on the Convention, Nehemiah Robinson described Hughes' remarks as a 'misunderstanding of the Convention'. According to Robinson: 'It is hard to understand how anyone could have arrived at this groundless

[380] *Ibid.*, Dissenting Opinion of Judge Weeramantry, p. 61.
[381] *Ibid.*, Dissenting Opinion of Judge Koroma, p. 16. [382] UN Doc. E/623/Add.3.
[383] Hansard, 18 May 1950.

fear, since the Convention does not treat of the outlawing of wars, nor does it deal with the destructions (even though intended) of "enemy" populations within the meaning of the laws of war.'[384]

Certainly the use of nuclear weapons, where the intent is to destroy a protected group in whole or in part, meets the definition of genocide. But, in the absence of the special characteristics of genocide, situations of mass killing such as those occasioned by the use of nuclear weapons are better examined from the perspective of crimes against humanity or war crimes.

[384] *Ibid.*

5

The mental element or *mens rea* of genocide

Genocide is one of the five 'acts' of the subparagraphs of article II of the Convention, committed with the 'intent' defined in the chapeau. Even where an act itself appears criminal, if it was purely accidental, or committed in the absence of intent to do harm or knowledge of the circumstances, then the accused is innocent. According to Lord Goddard, 'the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind'.[1] But, in cases that cannot be described as purely accidental, the accused's mental state may be far from totally innocent and yet not egregiously evil. To quote Racine, '[a]insi que la vertu, le crime a ses degrés'.[2] Criminal law systems establish levels of culpability based more or less entirely on the mental element, even when the underlying act is identical. Homicide is a classic example, because virtually all legal regimes recognize degrees of the crime based on differences in the mental element alone. For instance, involuntary homicide or manslaughter is a form of homicide that is not completely accidental and is attributable to the gross negligence of the offender. Homicide that is truly intentional, on the other hand, qualifies as murder. Even within murder, criminal law systems may make further distinctions, defining particularly reprehensible forms such as planned and premeditated murder, patricide, multiple murder, murder associated with other crimes such as sexual assault, and contract killing.

Within national legal orders, introduction of genocide *per se* is rarely necessary for domestic offenders to be judged and punished. Even if genocide as such is not codified, they will be subject to prosecution for most if not all of the acts described in the subparagraphs of article II of the Convention. The core offences of article II, killing (article II(a)) and serious assault (article II(b)), are punishable under all domestic penal codes. In enacting the crime of genocide, States stigmatize it above and

[1] *Brend* v. *Wood* (1946) 62 TLR 462 at 463. See also *Harding* v. *Price* [1948] 1 KB 695 at 700.

[2] Jean Racine, *Phèdre*, Paris: Éditions du Seuil, 1946, p. 158.

beyond ordinary murder or serious assault, in much the same way as they introduce the crime of intentional murder in order to distinguish it from the less reprehensible offence of manslaughter or involuntary homicide.

These levels of culpability are often associated with, or rather expressed by, degrees of criminal sanction, so that the punishment will fit the crime. To an extent, this analysis breaks down in the case of genocide because 'ordinary' murder normally exposes the offender to the maximum penalty available in the domestic legal system, generally lengthy imprisonment up to and including life imprisonment or even the death penalty, leaving little room for an even more severe sanction. In the two major domestic cases of genocide prosecution since 1948, namely, that of Adolf Eichmann in Israel in 1961 and of the Rwandan *génocidaires* in 1998, capital punishment was reintroduced after a period of *de facto* abolition for ordinary crimes in order to address this issue.[3]

The drafters of the Rome Statute of the International Criminal Court were the first to attempt a codification of the mental element of serious international crimes, including genocide. Article 30 of the Statute declares that the *mens rea* or mental element of genocide has two components, knowledge and intent. According to article 30, 'a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.' Knowledge is defined as 'awareness that a circumstance exists or a consequence will occur in the ordinary course of events'. Both knowledge and intent are relevant to the *mens rea* of genocide, although most recent case law has tended to emphasize intent rather than knowledge, probably because the word 'intent' actually appears in the definition of the crime. Professor Claus Kress and others have contrasted a 'purpose-based' approach, which focuses on intent, with a 'knowledge-based' approach.[6] Adoption of a 'purpose-based' approach, which dwells

[3] On sentences for genocide, see chapter 8, pp. 462–70 below.
[4] Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, art. 30.
[5] *Ibid.*, art. 30(3).
[6] Claus Kress, 'The Darfur Report and Genocidal Intent', (2005) 3 *Journal of International Criminal Justice*, p. 565 at p. 578. Claus Kress, 'The Crime of Genocide Under International Law', (2006) 6 *International Criminal Law Review*, p. 461 at pp. 492–7; Claus Kress, 'The International Court of Justice and the Elements of the Crimes of Genocide', (2007) 18 *European Journal of International Law*, p. 619 at pp. 625–7. See also: Alexander Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation', (1999) 99 *Columbia Law Review*, p. 2288; Hans Vest, 'A Structure-Based Concept of Genocidal Intent', (2007) 5 *Journal of International Criminal Justice*, p. 781.

on intent, results in a focus on individual offenders and their own personal motives. A 'knowledge-based' approach, on the other hand, directs the inquiry towards the plan or policy of a State or similar group, and highlights the collective dimension of the crime of genocide.

Knowledge

The core international crimes, genocide, crimes against humanity and war crimes, distinguish themselves from ordinary crimes, as a general rule, by the context in which they are committed. It is in this way that courts draw a line between international crimes – the Rome Statute uses the expression 'the most serious crimes of concern to the international community as a whole',[7] judges of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia have spoken of 'universally condemned offences'[8] – and ordinary crimes, such as murder or killing. For example, a war crime of wilful killing, or murder, must take place during an armed conflict and must have a connection or nexus with the conflict. The individual perpetrator must be aware of 'the factual circumstances that established the existence of an armed conflict'.[9] Similarly, the definition of crimes against humanity in the Rome Statute imposes a knowledge requirement: '"crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, *with knowledge of the attack* . . .'.[10]

However, with respect to genocide, there has been a certain reluctance to impose a requirement of knowledge of the context in which the crime was committed. Rather, the case law has dwelled on the notion of intent, citing the literal text of the introductory paragraph of article II of the Convention in support. Indeed, there is nothing in article II that refers explicitly to a context of genocide and therefore, it is argued, no knowledge of such a context can be part of the mental element of the

[7] Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, preamble, preambular paras. 4 and 10, arts. 1 and 5(1).

[8] *Prosecutor* v. *Nikolić* (Case No. IT-94-2-AR73), Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003, paras. 24 and 25. The expression was apparently coined by Rosalyn Higgins, President of the International Court of Justice: Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Oxford: Clarendon Press, 1995, p. 72.

[9] Elements of Crimes, ICC-ASP/1/3, p. 125.

[10] Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, art. 7(1) (emphasis added).

crime. Such an approach may seem counter-intuitive, given that genocide presents itself as the archetypical crime of State, requiring organization and planning. But this is the direction in which judicial decisions of the International Criminal Tribunal for the former Yugoslavia have taken the law.

In *Jelisić*, a Trial Chamber of the Yugoslavia Tribunal acquitted the accused of complicity in genocide when it failed to find evidence that others had committed the crime, that is, proof of a context of some organized or collective plan to exterminate minorities. But that was not enough to dispose of what the Trial Chamber conceded was only a 'theoretical possibility' that genocide had been committed by the accused, acting alone:

> [T]he preparatory work of the Convention of 1948 brings out that premeditation was not selected as a legal ingredient of the crime of genocide, after having been mentioned by the *ad hoc* committee at the draft stage, on the grounds that it seemed superfluous given the special intention already required by the text and that such precision would only make the burden of proof even greater. It ensues from this omission that the drafters of the Convention did not deem the existence of an organisation or a system serving a genocidal objective as a legal ingredient of the crime. In so doing, they did not discount the possibility of a lone individual seeking to destroy a group as such.[11]

The scenario seems rather like that of an insane serial killer, hardly worthy of much attention from international criminal justice.[12] Jelisić was a marginal figure, crazed with hatred of Muslims and proudly going under the sobriquet 'the Serbian Adolf'.

The Trial Chamber in *Jelisić* was quite correct to note that the drafters of the Convention rejected incorporating a requirement of premeditation, but it is reading an enormous amount into the *travaux préparatoires* to take this as evidence that they believed genocide could be unplanned, and that it could take place at the isolated level of the individual social deviant. Careful scrutiny of the records of the debates

[11] *Prosecutor* v. *Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 100.

[12] 'The perpetrator of a single, isolated act of violence could not possess the requisite intent based on a delusion that, by his action, the destruction of the group, in whole or in part, could be effected', wrote a Trial Chamber of the International Criminal Tribunal for Rwanda: *Prosecutor* v. *Mpampara* (Case No. ICTR-01-65-T), Judgment, 11 September 2006, para. 8, n. 7. Another Trial Chamber also addressed the issue of the isolated genocidal killer, but differently, noting that genocide was not established 'without proof of the mens rea at some level of the hierarchy of actors': *Prosecutor* v. *Krajisnik* (Case No. IT-00-39-T), Judgment, 27 September 2006, para. 1094.

in 1947 and 1948, rather than a deduction based upon a single decision during the drafting of the Convention, confirms that the Trial Chamber misread these materials. The premeditation debate is certainly relevant to the enumerated acts such as killing. But, with its incorrect transposition of the issue to the concept of genocide as a whole, the Trial Chamber opened the door to a troublesome interpretation of the Convention.

On appeal, the view that genocide required no plan or policy was confirmed:

> The Appeals Chamber is of the opinion that the existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime.[13]

Shortly thereafter, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia said that plan or policy was not an element of crimes against humanity either. Amongst the authorities to which it referred was its own ruling with respect to genocide.[14] The Appeals Chamber's discussion of the matter with respect to crimes against humanity is even more unsatisfactory than with respect to genocide. The issue is buried in a footnote. Moreover, one of the most important arguments for the inclusion of a plan or policy by customary law, namely, the requirement in article 7(2)(a) of the Rome Statute that crimes against humanity be commited 'pursuant to or in furtherance of a State or organizational policy' is not even mentioned.

In what is surely an understatement, the Trial Chamber in *Jelisić* said that, although no plan was required, 'it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes

[13] *Prosecutor* v. *Jelisić* (Case No. IT-95-10-A), Judgment, 5 July 2001, para. 48. The Appeals Chamber's *obiter dictum* was followed in *Prosecutor* v. *Sikirica et al.* (Case No. IT-95-8-I), Judgment on Defence Motions to Acquit, 3 September 2001, para. 62; *Semanza* v. *Prosecutor* (Case No. ICTR-97-20-A), Judgment, 20 May 2005, para. 260; *Prosecutor* v. *Simba* (Case No. ICTR-01-76-A), Judgment, 27 November 2007, para. 260. The Appeals Chamber of the International Criminal Tribunal for Rwanda declined pronouncing on '[t]he much-debated question whether genocide could be committed by a person acting alone': *Prosecutor* v. *Kayishema and Ruzindana* (Case No. ICTR-95-1-A), Judgment (Reasons), 1 June 2001, para. 172.

[14] *Prosecutor* v. *Kunarac et al.* (Case No. IT-96-23/1-A), Judgment, 12 June 2002, para. 98, n. 114.

committed are not widespread and if the crime charged is not backed by an organisation or a system'.[15] The Trial Chamber began its discussion of this matter by saying that the issue was 'theoretical', and any perusal of the authorities confirms this to be the case. Because of the scope of genocide it seems implausible that it can be committed by an individual, acting alone.[16] This is another way of saying that, for genocide to take place, there must be a plan, even though there is nothing in the Convention that explicitly requires this.[17] Raphael Lemkin spoke regularly of a plan as if this was a *sine qua non* for the crime of genocide.[18] Genocide is an organized and not a spontaneous crime.[19]

Although there have been convictions for crimes against humanity in the absence of a plan or policy,[20] there is nothing similar in the case law concerning genocide. In practice, although the jurisprudence often says that it is inquiring into whether 'the perpetrator consciously desired the prohibited acts he committed to result in the destruction, in whole or in

[15] *Prosecutor* v. *Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 101.

[16] Note, however, that proposals to include an explicit requirement that genocide be planned by government were rejected: UN Doc. E/AC.25/SR.4, pp. 3–6. See also *Kadic* v. *Karadžić*, 70 F 3d 232 (2nd Cir. 1995), cert. denied, 64 USLW 3832 (18 June 1996).

[17] See contra: Amnesty International, 'The International Criminal Court: Fundamental Principles Concerning the Elements of Genocide', AI Index IOR 40/01/99, February 1999: 'There is no requirement that the accused had to have committed an act in conscious furtherance of a plan or a widespread or systematic policy or practice aimed at destroying, "in whole or in part"', a protected group. See also 'Proposal Submitted by Colombia', UN Doc. PCNICC/1999/WGEC/DP.2, p. 2: 'the Statute does not refer to the widespread or systematic nature of the acts [of genocide], which element is found in the description of crimes against humanity. The judicial decisions of the international tribunals did refer to that systematic or widespread nature because genocide was traditionally included among the crimes against humanity. In establishing genocide as a separate offence from other crimes against humanity, it stands out as a special type but also as one having its own or autonomous characteristics. Accordingly, there are historical, logical and juridical arguments which justify our not endorsing the United States proposal to include within the elements of the crime "a widespread or systematic policy or practice". The proposal clearly goes beyond the definition of article 6 of the Statute and produces a lessening of the protection of the "group".'

[18] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington: Carnegie Endowment for World Peace, 1944, p. 79.

[19] According to the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, 'a policy must exist to commit these acts [although] it need not be the policy of a State': *Prosecutor* v. *Tadić* (Case No. IT-94-1-T), Opinion and Judgment, 7 May 1997, para. 655.

[20] *Prosecutor* v. *Kunarac et al.* (Case No. IT-96-23/1-A), Judgment, 12 June 2002, para. 98, n. 114.

part, of the group as such',[21] judges invariably discuss the existence of the organized plan or policy, and conclude as to the existence of the 'intent' of the accused based on knowledge of such circumstances.

The requirement of something analogous to a State plan or policy as an element of international crimes was set out in the chapeau of article VI of the Charter of the International Military Tribunal. The Tribunal had jurisdiction over 'the trial and punishment of the major war criminals of the European Axis countries' and had 'the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes . . .'. It probably could never, as a jurisdictional matter, have judged a Jelisić. Obviously, the issue of whether war crimes, crimes against humanity and crimes against peace could be committed in the absence of a State plan or policy never arose at Nuremberg.

Adolf Eichmann was the first person to be accused of genocide pursuant to provisions drawn from the Genocide Convention. The element of state plan was considered by the District Court of Jerusalem, because Eichmann was convicted of genocide only for acts committed after June 1941, that is, when he was made aware of the plan for a 'Final Solution'. Since he was, from that date, 'privy to the extermination secret', it was clear that his intention was, from then on, 'the total biological extermination of the entire Jewish People'.[22] The existence of a plan was clear in the circumstances, and its knowledge by Eichmann determined that he had the requisite 'intent to destroy the group', therefore qualifying his acts as genocide.

Some of the early rulings of the *ad hoc* tribunals supported the existence of a plan as an element of the crime of genocide. In its ruling on the sufficiency of evidence in the case of Karadžić and Mladić, who were charged with genocide, the International Criminal Tribunal for the former Yugoslavia spoke of a 'project' or 'plan'.[23] The International

[21] 'Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur', UN Doc. S/2005/60, para. 491.

[22] *A-G Israel* v. *Eichmann*, (1968) 36 ILR 18 (District Court, Jerusalem), para. 195. Acts committed by Eichmann before that date constituted crimes against humanity because he lacked the genocidal intent: '[A] doubt remained in our minds as to whether there was that intentional aim to exterminate which is required for the proof of a crime against the Jewish People, and we shall, therefore, deal with these inhuman acts as being crimes against humanity': at para. 187.

[23] *Prosecutor* v. *Karadžić et al.* (Case No. IT-95-5-R61, IT-95-18-R61), Consideration of the Indictment within the Framework of Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 94. 'Project' may be an overly literal translation of the French word

Criminal Tribunal for Rwanda, in *Akayesu*, did not insist upon proof of a plan with respect to the indictment for genocide, but this may have been because the issue was self-evident. At one point in the judgment, it referred to the 'massive and/or systematic nature' of the crime of genocide.[24] Convicting Akayesu of crimes against humanity as well as genocide, the Tribunal said that the crimes had been widespread and systematic,[25] defining 'systematic' as involving 'some kind of preconceived plan or policy'.[26]

In *Kayishema and Ruzindana*, a Trial Chamber of the Rwanda Tribunal wrote: 'although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without a plan or organization'.[27] Furthermore, it said that 'the existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide'.[28] The Guatemalan truth commission, which examined charges of genocide with respect to atrocities committed during that country's civil war in the early 1980s, and which was chaired by the distinguished international lawyer Christian Tomuschat, considered it necessary to demonstrate the existence of a plan to exterminate Mayan communities that obeyed a higher, strategically planned policy, manifested in actions which had a logical and coherent sequence.[29]

Even if the judges are prepared to entertain the hypothesis of genocide without a plan or policy, evidence of a plan or policy has proven to be of fundamental importance in all convictions for genocide by the International Tribunals, and especially those dealing with complicity.

projet, which means 'plan', and possibly reflects the role of French judge Claude Jorda in the drafting of the decision. Judge Jorda came back to this point in *Jelisić*, where he noted that, while it was theoretically possible for genocide to be committed by an individual acting in the absence of some more general plan, in practice it would be impossible to make proof of such a situation. Thus, the *Jelisić* judgment tends to confirm the requirement of a plan as an evidentiary matter even if this is not explicitly part of the definition within the Convention: *Prosecutor* v. *Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 655.

[24] *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 477.

[25] *Ibid.*, para. 651.

[26] *Ibid.*, para. 579. The Tribunal cited the 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', UN Doc. A/51/10, p. 94.

[27] *Prosecutor* v. *Kayishema and Ruzindana* (Case No. ICTR-95-1-T), Judgment, 21 May 1999, para. 94.

[28] *Ibid.*, para. 276.

[29] *Guatemala: Memory of Silence, Report of the Commission for Historical Clarification, Conclusions and Recommendations*, 'Conclusions', para. 120.

Only a few weeks after the *Jelisić* appeals decision, which confirmed the lone *génocidaire* hypothesis, another Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (whose membership included one of the judges in the *Jelisić* appeal, Judge Patricia M. Wald), wrote:

> As a preliminary, the Chamber emphasises the need to distinguish between the individual intent of the accused and the intent involved in the conception and commission of the crime. The gravity and the scale of the crime of genocide ordinarily presume that several protagonists were involved in its perpetration. Although the motive of each participant may differ, the objective of the criminal enterprise remains the same. In such cases of joint participation, the intent to destroy, in whole or in part, a group as such must be discernible in the criminal act itself, apart from the intent of particular perpetrators. It is then necessary to establish whether the accused being prosecuted for genocide shared the intention that a genocide be carried out.[30]

In *Ntakirutimana*, the Appeals Chamber of the International Criminal Tribunal for Rwanda recalled that 'an individual who aids and abets other individuals committing a specific intent offence may be held responsible if he assists the commission of the crime knowing the intent behind the crime'.[31] General Krstić was found guilty of aiding and abetting in genocide at Srebrenica because he 'had knowledge of the genocidal intent of some of the Members of the VRS Main Staff',[32] whilst Colonel Blagojević was acquitted of complicity in genocide because the evidence did not show 'he had knowledge of the principal perpetrators' genocidal intent'.[33] Of course, neither Krstić nor Blagojević could read the minds of the 'principal perpetrators'. In reality, the Appeals Chamber was asking what a reasonable person under the circumstances would deduce from the acts of the principal perpetrators, taken collectively.

[30] *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 549. Note also para. 571 of the same decision, which states: 'Moreover, the Chamber notes that the domestic law of some States distinguishes genocide by the existence of a plan to destroy a group.' The Chamber referred to art. 211-1 of the French Criminal Code which states that the crime must be committed 'in the execution of a concerted plan to destroy wholly or partially a group'.

[31] *Prosecutor* v. *Ntakirutimana* (Case No. ICTR-96-10-A and ICTR-96-17-A), Judgment, 13 December 2004, para. 500. The Appeals Chamber supported its remarks with reference to: *Prosecutor* v. *Krnojelac* (Case No. IT-97-25-A), Judgment, 17 September 2003; *Prosecutor* v. *Vasiljević* (Case No. IT-98-32-A), Judgment, 25 February 2004, para. 142.

[32] *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Judgment, 19 April 2004, para. 137.

[33] *Prosecutor* v. *Blagojević* (Case No. IT-02-60-A), Judgment, 9 May 2007, para. 123.

In other words, the real question was whether Krstić and Blagojević knew of the plan or policy that was underway. To the extent that they did, and they intentionally contributed to the furtherance of the policy, they were guilty of genocide (or, perhaps, aiding and abetting or complicity in genocide).

The existence of a plan or policy has also proven decisive when the analysis shifts from individual criminal liability to State responsibility. Rather than seriously inquire as to whether a single individual, whose acts could be imputed to the State in question, had killed members of the group or committed one of the other acts with genocidal intent at the personal level *à la* Jelisić, the analysis has focused on evidence of State policy. For example, the International Commission of Inquiry on Darfur concluded that 'the Government of Sudan has not pursued a policy of genocide' in answering the Security Council's question whether genocide had been committed.[34] The same can be said of the International Court of Justice with respect to the atrocities perpetrated in Bosnia and Herzegovina.[35]

The Elements of Crimes, adopted pursuant to article 9 of the Rome Statute, provide some support for the significance of a plan or policy as an element of the crime of genocide. In its draft 'definitional elements' on the crime of genocide for the Rome Statute, the United States had proposed that the mental element of genocide include the requirement of a 'plan to destroy such group in whole or in part'.[36] During subsequent debate in the Preparatory Commission for the International Criminal Court, the United States modified the 'plan' requirement, this time borrowing from crimes against humanity the concept of 'a widespread or systematic policy or practice'.[37] The wording was widely criticized as an unnecessary addition to a well-accepted definition, with no basis in case law or in the *travaux* of the Convention.[38] Israel, however, made the

[34] 'Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur', UN Doc. S/2005/60, para. 518.

[35] In the context of State responsibility, the issue of 'intent' is discussed in detail in chapter 9, at pp. 517–19.

[36] 'Annex on Definitional Elements for Part Two Crimes', UN Doc. A/CONF.183/C.1/L.10, p. 1. The elements also specify that, 'when the accused committed such act, there existed a plan to destroy such group in whole or in part'.

[37] The draft proposal specified that genocide was carried out 'in conscious furtherance of a widespread or systematic policy or practice aimed at destroying the group': 'Draft Elements of Crimes', UN Doc. PCNICC/1999/DP.4, p. 7.

[38] Comments by Canada, Norway, New Zealand and Italy, 17 February 1999 (author's personal notes).

quite compelling point that it was hard to conceive of a case of genocide that was not conducted as a 'widespread and systematic policy or practice'. As the debate evolved, a consensus appeared to develop recognizing the 'plan' element, although in a more cautious formulation.[39] The final version of the Elements, adopted by the Preparatory Commission of the International Criminal Court in June 2000 and confirmed by the Preparatory Commission in September 2002, includes the following: 'The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.'[40]

The 'manifest pattern of similar conduct' is what the Elements deem to be a 'contextual circumstance',[41] to distinguish such facts from the classic criminal law concept of material element or *actus reus*. The term 'circumstance' appears in article 30 of the Rome Statute, requiring that an accused have 'awareness that a circumstance exists'.[42] Three additional provisions complete but also complicate the construction of this somewhat puzzling text about genocidal conduct in the Elements of Crimes. The term 'in the context of' is to include the initial acts in an emerging pattern, the term 'manifest' is deemed an objective qualification, and '[n]otwithstanding the normal requirement for a mental element provided for in article 30 [of the Rome Statute], and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis'.[43] The Elements eschew the word 'plan' in favour of a 'manifest pattern of similar conduct', but any difference between the two expressions would appear to be entirely semantic. Alternatively, the context may be 'conduct that could itself effect such destruction'.

Whether a plan or policy is an element of the crime of genocide, and therefore whether proof of knowledge of the plan or policy is essential for a conviction, is probably not a question of any great practical importance. It seems highly unlikely that individual cases like that of Goran Jelisić will ever again come within the sights of international

[39] 'Discussion Paper Proposed by the Co-ordinator, Article 6: The Crime of Genocide', UN Doc. PCNICC/1999/WGEC/RT.1: 'The accused knew . . . that the conduct was part of a similar conduct directed against that group.'

[40] Elements of Crimes, ICC-ASP/1/3, pp. 113–15. [41] *Ibid.*

[42] Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, art. 30(3).

[43] Elements of Crimes, ICC-ASP/1/3, pp. 113–15.

criminal justice. The International Criminal Court will inevitably reject, as inadmissible, cases that are not of 'sufficient gravity'.[44] Although there is no similar gravity threshold with respect to universal jurisdiction, it is also highly doubtful that national justice systems will ever concern themselves with isolated individuals who commit crimes outside of their own territorial or personal jurisdiction. Therefore, genocide prosecutions will invariably involve individuals who participate in a plan or policy being implemented by a State or similar body. Knowledge of this plan or policy will be decisive in establishing the guilt or innocence of an accused, regardless of whether courts deem such a plan or policy to be an 'element' in a formal sense.

Knowledge of a plan or policy was also considered in the commentary of the International Law Commission on its draft Code of Crimes Against the Peace and Security of Mankind:

> The extent of knowledge of the details of a plan or a policy to carry out the crime of genocide would vary depending on the position of the perpetrator in the governmental hierarchy or the military command structure. This does not mean that a subordinate who actually carries out the plan or policy cannot be held responsible for the crime of genocide simply because he did not possess the same degree of information concerning the overall plan or policy as his superiors. The definition of the crime of genocide requires a degree of knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail of a comprehensive plan or policy of genocide.[45]

But individual offenders need not participate in devising the plan. If they commit acts of genocide with knowledge of the plan, then the requirements of the Convention are met.[46]

Proving a leader's knowledge of a genocidal plan may be relatively easy, although Nazi war criminal Albert Speer and some other intimates of Hitler argued successfully that even they were not privy to the 'final solution'.[47] To this day, debates continue about how widespread the knowledge was within the German Government, army and population

[44] Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, art. 17(1)(d).
[45] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 26 above, p. 90.
[46] See, for example, 'Proposal by Algeria, Bahrain, Comoros, Djibouti, Egypt, Jordan, Iraq, Kuwait, Lebanon, Libyan Arab Jamahiriya, Morocco, Oman, Palestine, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic, Tunisia, United Arab Emirates and Yemen, Comments on the Proposal Submitted by the United States of America Concerning Terminology and the Crime of Genocide', UN Doc. PCNICC/1999/WGEC/DP.4, p. 4.
[47] Gitta Sereni, *Albert Speer: His Battle with Truth*, New York: Knopf, 1995.

as a whole about the plan to destroy the Jews of Europe.[48] In *Tadić*, the International Criminal Tribunal for the former Yugoslavia dealt with the accused's knowledge of policies of ethnic cleansing, an element necessary for conviction of crimes against humanity. The court accepted evidence that Tadić was an 'earnest SDS [Serb Democratic Party] member and an enthusiastic supporter of the idea of creating Republika Srpska', both of which embraced the notion of an ethnically pure Serbian territory. Evidence showed that he knew of and supported the goals of the SDS, including the fact that as president of an SDS branch 'he must have had knowledge of the SDS programme, which included the vision of a Greater Serbia'.[49]

Knowledge of the genocidal plan or policy, or of 'the wider context in which the act occurs', should not be confused with knowledge that these amount to genocide as a question of law. An accused cannot answer that, while fully aware of a plan to destroy an ethnic group in whole or in part, he or she was not aware that this met the definition of the crime of genocide.[50] Addressing this point, the Yugoslav Tribunal, referring to the analogous situation of crimes against humanity, said that 'it would not be necessary to establish that the accused knew that his actions were inhumane'.[51]

The accused must also have knowledge of the consequences of his or her act in the ordinary course of events. If the genocidal act is killing, then the consequence will be death, and the accused must be aware that this will indeed result or at least be reckless as to the act's occurrence. Knowledge of the consequences will vary, of course, depending on the act with which the accused is charged. In some cases, the genocidal act does not require proof of consequences. An example is direct and public incitement to genocide. In such cases, no proof of knowledge of the consequences is required.

In order to meet the standard of knowledge required for *mens rea*, it may also be sufficient for the prosecution to demonstrate that the

[48] Daniel Jonah Goldhagen, *Hitler's Willing Executioners*, New York: Alfred A. Knopf, 1996.

[49] *Prosecutor* v. *Tadić*, note 19 above, para. 459.

[50] See also *Rome Statute of the International Criminal Court*, note 4 above, art. 33(2): 'A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.'

[51] *Prosecutor* v. *Tadić*, note 19 above, para. 657, citing *R* v. *Finta* [1994] 1 SCR 701.

accused was reckless as to the consequences.[52] An isolated sentence in the *Akayesu* judgment of the International Criminal Tribunal for Rwanda refers to this aspect of the knowledge requirement: 'The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group.'[53] This is sometimes described as indirect intent. A criminal who is reckless possesses knowledge of a danger or risk, and knows that the consequence is possible. Criminal law theory takes different approaches to this question, depending on whether the offender need only contemplate a probability that the act will occur or whether it requires a virtual certainty.[54] At the low end of recklessness, continental jurists speak of *dolus eventualis*, a level of knowledge that must surely be insufficient to constitute the crime of genocide.[55] As the recklessness moves closer to a virtual certainty, the knowledge requirement of the *mens rea* becomes increasingly apparent. Although there is as yet no case law on this subject, it is relatively easy to conceive of examples of recklessness within the context of genocide. A commander accused of committing genocide by 'inflicting on the group conditions of life calculated to bring about its physical destruction', and who was responsible for imposing a restricted diet or ordering a forced march, might argue that he or she had no knowledge that destruction of the group would indeed be the consequence. An approach to the knowledge requirement that considers recklessness about the consequences of an act to be equivalent to full knowledge provides an answer to such an argument.

The rejection of a proposal during the drafting of the Elements of Crimes is of assistance in indicating whether the line should be drawn between full knowledge and recklessness. The Co-ordinator's discussion

[52] *Prosecutor* v. *Delalić et al.* (Case No. IT-96-21-T), Judgment, 16 November 1998, para. 439; Yves Sandoz, Christophe Swinarksi and Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva: Martinus Nijhoff, 1987, para. 3474. But see 'Proposal Submitted by Spain; Working Paper on Elements of Crimes', UN Doc. PCNICC/1999/DP.9, p. 3, which describes genocide as an '[i]ntentional crime which excludes wrongful or reckless commission'. In oral argument before the International Court of Justice, Ian Brownlie stated that '[a]s a general principle, *dolus* – intention – extends both to intended consequences and also to risks of harm which are deliberately inflicted as risks of harm': *Legality of Use of Force (Yugoslavia* v. *Belgium et al.*), Verbatim Record, 12 May 1999.

[53] *Prosecutor* v. *Akayesu*, note 24 above, para. 519.

[54] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, Oxford: Basil Blackwell, 1948, p. 202; English Law Commission, Working Paper No. 31, 'The Mental Element in Crime', p. 30.

[55] On *dolus eventualis*, see *Prosecutor* v. *Delalić*, note 52 above, para. 435.

paper, submitted at the conclusion of the February 1999 session of the Working Group on Elements of Crimes, contained the following: 'The accused knew or should have known that the conduct would destroy, in whole or in part, such group or that the conduct was part of similar conduct directed against that group.'[56] The 'should have known' standard is generally used to describe crimes of negligence. It did not find its way into the final draft.

But criminal knowledge should also be established in cases of 'wilful blindness', where an individual deliberately fails to inquire into the consequences of certain behaviour, and where the person knows that such inquiry should be undertaken.[57] Even where there is no proof that a concentration camp guard knew mass murder of genocidal proportions was being undertaken, the offender may have sufficient knowledge of the crime of genocide if it can be shown that he or she was wilfully blind to what was going on within the walls of the camp.[58] This is what the International Criminal Tribunal for the former Yugoslavia meant when it spoke of the requirement of either actual or 'constructive' knowledge that criminal acts were occurring on a widespread or systematic basis.[59] According to the International Law Commission:

> A subordinate is presumed to know the intentions of his superiors when he receives orders to commit the prohibited acts against individuals who belong to a particular group. He cannot escape responsibility if he carries out the orders to commit the destructive acts against victims who are selected because of their membership in a particular group because he was not privy to all aspects of the comprehensive genocidal plan or policy. The law does not permit an individual to shield himself from criminal responsibility by ignoring the obvious. For example, a soldier who is ordered to go from house to house and kill only persons who are members of a particular group cannot be unaware of the relevance of the identity of the victims and the significance of their membership in a particular group. He cannot be unaware of the destructive effect of this criminal conduct on the group itself. Thus, the necessary degree of knowledge and intent may be inferred from the nature of the order to

[56] 'Discussion Paper Proposed by the Co-ordinator, Article 6: The Crime of Genocide', UN Doc. PCNICC/1999/WGEC/RT.1.

[57] Glanville Williams, *Criminal Law: The General Part*, 2nd edn, London: Stevens & Sons Ltd, 1961, p. 159: 'The rule that wilful blindness is equivalent to knowledge is essential, and is found throughout the criminal law.' In a prosecution for crimes against humanity, the Supreme Court of Canada allowed that 'wilful blindness' would be sufficient to establish knowledge: R v. Finta [1994] 1 SCR 701.

[58] *Case No. 3*, (1947) 13 ILR 100 (Spruchgerichte, Stade, Germany), pp. 100–2.

[59] *Prosecutor* v. *Tadić*, note 19 above, para. 659.

> commit the prohibited acts of destruction against individuals who belong to a particular group and are therefore singled out as the immediate victims of the massive criminal conduct.[60]

Intent

It is a commonplace to state that genocide is a crime requiring 'intent'. All true crimes require proof of intent. Even without the terms 'with intent' in the definition of genocide, it is inconceivable that an infraction of such magnitude could be committed unintentionally. The requirement of intent is reaffirmed in article 30 of the Rome Statute.

The District Court of Jerusalem, in *Eichmann*, said that the intent requirement explained the special nature of the crime of genocide, as defined in the Convention:

> What is it that endows this crime with its special character in the criminal law of a State which adopts in its domestic legislation the definition of the crime of genocide? One would say, the all-embracing total form which this crime is liable to take. This form is already indicated by the definition of the criminal intention necessary in this crime, which is general and total: the extermination of members of a group as such, i.e., a whole people or part of a people. As the Supreme Court said in the case of Pal (1952) 6 PD 489, 502 [(1951) 18 ILR 542]: 'Under section I of the Nazi and Nazi Collaborators (Punishment) Law, 1950, a person may also be found guilty of an offence which in fact he committed against specific persons, if the offence against those persons was committed as a result of an intent to harm the group, and the act committed by the offender against those persons was a kind of "part performance" of his wilful intent against the whole group, be it the Jewish people or any civilian population.'[61]

The definition of *mens rea* in the Statute of the International Criminal Court states that a person has intent where, in relation to conduct, that person means to engage in the conduct; in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.[62] But the words 'with intent' that appear in the chapeau of article II of the Genocide Convention do more than simply reiterate that genocide is a crime of intent. Article II of the Genocide Convention introduces a precise description of the intent,

[60] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 26 above, p. 90.
[61] *A-G Israel* v. *Eichmann*, note 22 above, para. 190.
[62] Rome Statute of the International Criminal Court, note 4 above, art. 30(2).

namely, 'to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'. The reference to 'intent' in the text indicates that the prosecution must go beyond establishing that the offender meant to engage in the conduct, or meant to cause the consequence. The offender must also be proven to have a 'specific intent' or *dolus specialis*. Where the specified intent is not established, the act remains punishable, but not as genocide. It may be classified as a crime against humanity or it may be simply a crime under ordinary criminal law.[63]

Drafting history

The 1946 Saudi Arabian draft convention contained several references to intent. The list of offences included 'planned disintegration of the political, social or economic structure', 'systematic moral debasement' and 'acts of terrorism committed for the purpose of creating a state of common danger and alarm . . . with the intent of producing [the group's] political, social, economic or moral disintegration'.[64] The terms 'planned', 'systematic' and 'with the intent of', are all markers for the intentional element of a crime.

The preamble to the Secretariat draft described genocide as 'the intentional destruction of a group of human beings'. The word 'intent' did not appear in the substantive portions of the draft, although the definition proposed in article I § II labelled genocide an act committed 'with the purpose of destroying [the group] in whole or in part, or of preventing its preservation or development'.[65] In its commentary, the Secretariat described genocide as 'the deliberate destruction of a human

[63] In a series of case studies, Cherif Bassiouni concluded that genocide was not committed by the United States against the aboriginal population, or in the case of the Vietnam war, because of an absence of proof of the specific intent. See M. Cherif Bassiouni, 'Has the United States Committed Genocide Against the American Indian?', (1979) 9 *California Western International Law Journal*, p. 271; M. Cherif Bassiouni, 'United States Involvement in Vietnam', (1979) 9 *California Western International Law Journal*, p. 274. In 1995, a Special Rapporteur of the Commission on Human Rights wrote that '[t]he history of the United States of America is closely bound up with the . . . genocide of the Indians that [was] openly practised from the seventeenth century to the nineteenth century': 'Report by Mr Maurice Glélé-Ahanhanzo, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance on His Mission to the United States of America from 9 to 22 October 1994, Submitted Pursuant to Human Rights Resolutions 1993/20 and 1994/64', UN Doc. E/CN.4/1995/78/Add.1, para. 21.

[64] UN Doc. A/C.6/86, art. I. [65] UN Doc. E/447, pp. 5–13.

group'.[66] By this definition, it continued, 'certain acts which may result in the total or partial destruction of a group of human beings are in principle excluded from the notion of genocide, namely, international or civil war, isolated acts of violence not aimed at the destruction of a group of human beings, the policy of compulsory assimilation of a national element, mass displacements of population'.[67] The Secretariat argued that war would generally fall outside the scope of genocide, because it was not normally directed at the total destruction of the enemy.

> War may, however, be accompanied by the crime of genocide. This happens when one of the belligerents aims at exterminating the population of enemy territory and systematically destroys what are not genuine military objectives. Examples of this are the execution of prisoners of war, the massacre of the populations of occupied territory and their gradual extermination. These are clearly cases of genocide.[68]

Referring to times of political or religious turmoil, in which there is loss of life, the Secretariat stated that: 'Such acts are outside the notion of genocide so long as the intention physically to destroy a group of human beings is absent.'[69]

In comments on the Secretariat draft, the United States objected that the preamble was wordy, and that it dealt with substantive matters. It called attention to the fact that 'the important matter of "intent" is injected into the definition contained in the Preamble by the inclusion of the phrase "intentional destruction", which in any event might better read "deliberate destruction or attempt to destroy"'. Moreover, '[i]t is obviously not intended that groups must be totally destroyed before the crime of genocide exists'. Feeling it important that there be some reference to 'purpose' or 'intent' in the draft,[70] the United States recommended the phrase 'for the purpose of totally or partially destroying such group or of preventing its preservation or development'.[71]

The Ad Hoc Committee did not initially use the word 'intent',[72] opting instead for 'deliberate'. But there was no serious debate about the principle, the Committee being more concerned with the related but distinct issue of motive. The preliminary text adopted by the Ad Hoc Committee read: 'In this convention genocide means any of the

[66] *Ibid.*, p. 17 [67] *Ibid.*, p. 23. [68] *Ibid.* [69] *Ibid.*, p. 24. [70] UN Doc. A/401.
[71] UN Doc. E/623.
[72] It appeared in some of the amendments: UN Doc. E/AC.25/SR.11, p. 1; UN Doc. E/AC.25/SR.12, p. 2.

following deliberate acts directed against a national, racial, religious [or political] group, on grounds of national or racial origin or religious belief.'[73] On a proposal from the United States, the Committee later added the word 'intent': 'In this Convention genocide means any of the following deliberate acts committed with the intent to destroy a national, racial, religious or political group, on the grounds of the national or racial origin, religious belief, or political opinion of its members.'[74] The report of the Ad Hoc Committee stated that the proposed definition encompasses 'the notion of premeditation'.

In the Sixth Committee, the word 'deliberate' provoked a debate about whether or not genocide was a crime requiring premeditation. According to Belgium, any reference to premeditation was superfluous because article II sufficiently defined the intentional element.[76] Egypt said that, where genocide was not only intentional but premeditated, this would constitute an aggravating circumstance.[77] Cuba agreed, opposing deletion of the word 'deliberate'.[78] In reply, Yugoslavia cited cases where charges involving lynching of blacks had been dismissed because premeditation had not been established.[79] Haiti espoused the view that premeditation was merely an aggravating circumstance, although it believed that in practice it was always implicit in genocide because preparatory acts were necessary if a group was to be exterminated.[80] At the close of the debate, the word 'deliberate' in the Ad Hoc Committee draft was deleted.[81]

Peru argued that retaining the concept of premeditation would also have the drawback of excluding from responsibility those who, through negligence or omission, were guilty of the crime of genocide.[82] France and the Soviet Union were likewise concerned about the danger that the definition of the intentional element might be too narrow

[73] UN Doc. E/AC.25/SR.12, p. 12. [74] UN Doc. E/AC.25/SR.24, p. 3.
[75] UN Doc. E/794, p. 5.
[76] UN Doc. A/C.6/SR.72 (Kaeckenbeeck, Belgium). See also UN Doc. A/C.6/SR.71 (Paredes, Philippines); and UN Doc. A/C.6/SR.72 (Fawcett, United Kingdom).
[77] UN Doc. A/C.6/SR.72 (Raafat, Egypt).
[78] UN Doc. A/C.6/SR.73 (Dihigo, Cuba). See also UN Doc. A/C.6/SR.73 (Noriega, Mexico); *ibid.* (Messina, Dominican Republic); and *ibid.* (Manini y Rios, Uruguay).
[79] UN Doc. A/C.6/SR.72 (Bartos, Yugoslavia). See also *ibid.* (Setelvad, India); and *ibid.* (Pérez-Perozo, Venezuela).
[80] *Ibid.* (Demesmin, Haiti).
[81] UN Doc. A/C.6/SR.73 (twenty-seven in favour, ten against, with six abstentions).
[82] UN Doc. A/C.6/SR.72 (Maúrtua, Peru).

and result in acquittals.[83] These debates were confusing and sometimes contradictory, and it is particularly dangerous to rely on isolated remarks from certain delegations in attempting to establish the intent of the drafters. The wording represents a compromise aimed at generating consensus between States with somewhat different conceptions of the purposes of the convention.

Specific intent or dolus specialis

The degree of intent required by article II of the Genocide Convention is usually described as a 'specific' intent or 'special' intent.[84] This common law concept corresponds to the *dol spécial* or *dolus specialis* of continental legal systems.[85] 'Specific' intent and 'special' intent appear to be synonymous expressions.[86] 'Specific' intent is used in the common law to distinguish offences of 'general' intent, which are crimes for which no particular level of intent is actually set out in the text of the infraction. In a general intent offence, the only issue is the performance of the criminal act, and no further ulterior intent or purpose need be proven. An example would be the minimal intent to apply force in the case of common assault. A specific intent offence requires performance of the *actus reus* but in association with an intent or purpose that goes beyond the mere performance of the act. Assault with intent to maim or wound is an example drawn from ordinary criminal law.

According to the International Court of Justice, in addition to the intentional elements contained in the underlying crimes of killing and the other punishable acts, article II of the Genocide Convention

[83] UN Doc. A/C.6/SR.73 (Morozov, Soviet Union); UN Doc. A/C.6/SR.73 (Chaumont, France).

[84] In *Prosecutor* v. *Akayesu*, note 24 above, paras. 121, 497, 498, 516 and 539, the Trial Chamber of the International Criminal Tribunal for Rwanda suggested that *dolus specialis* is a synonym for *mens rea*. In fact, the term *mens rea* comprises crimes of *dolus generalis* as well as crimes of *dolus specialis*. See also *A-G Israel* v. *Eichmann*, note 22 above, para. 30; and *Prosecutor* v. *Serushago* (Case No. ICTR-98-39-S), Sentence, 5 February 1999, para. 15.

[85] Jean Pradel, *Droit pénal comparé*, Paris: Dalloz, 1995, pp. 254–5. In his report on genocide, Special Rapporteur Nicodème Ruhashyankiko used the term 'particular intent': 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur', UN Doc. E/CN.4/Sub.2/416, paras. 96 and 99.

[86] Gaston Stefani, Georges Levasseur and Bernard Bouloc, *Droit pénal général*, 16th edn, Paris: Dalloz, 1997, p. 220.

> requires a further mental element. It requires the establishment of the 'intent to destroy, in whole or in part . . . [the protected] group, as such' It is not enough to establish, for instance in terms of paragraph (a), that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or *dolus specialis* . . . It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part.[87]

In its commentary on the 1996 Code of Crimes Against the Peace and Security of Mankind, the International Law Commission qualified genocide's specific intent as 'the distinguishing characteristic of this particular crime under international law'.[88]

> The prohibited acts enumerated in subparagraphs (a) to (c) are by their very nature conscious, intentional or volitional acts which an individual could not usually commit without knowing that certain consequences were likely to result.
>
> These are not the type of acts that would normally occur by accident or even as a result of mere negligence. However, a general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide. The definition of this crime requires a particular state of mind or a specific intent with respect to the overall consequences of the prohibited act.[89]

Echoing the District Court of Jerusalem in the *Eichmann* case,[90] the International Law Commission noted that, where the specific intent of genocide cannot be established, the crime may still meet the conditions

[87] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 187. See also (e.g.) *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, paras. 497 and 516; *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Judgment, 19 April 2004, para. 20.

[88] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May-26 July 1996', note 26 above, p. 87. See also 'Report of the International Law Commission on the Work of Its Forty-Seventh Session, 2 May–21 July 1995', UN Doc. A/50/10, p. 43, para. 79.

[89] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 26 above, p. 87.

[90] *A-G Israel* v. *Eichmann*, note 22 above, para. 25: 'under the Convention a special intention is requisite for its commission, an intention that is not required for the commission of a "crime against humanity"'.

of the crime against humanity of 'persecution'.[91] Within the Commission, some suggested the genocide provision might be rephrased in order to clarify the specific intent requirement, 'using a formulation such as "acts committed with the aim of" or "acts manifestly aimed at destroying" to avoid any ambiguity on this important element of the crime'.[92] The specific or special intent requirement of genocide was also discussed during the negotiations surrounding the establishment of the International Criminal Court. According to the record of debates: 'The reference to "intent to destroy, in whole or in part . . . a group, as such" was understood to refer to the specific intention to destroy more than a small number of individuals who are members of a group.'[93]

However, in *Sikirica*, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia resisted attempts to qualify or define the nature of the intent requirement for genocide:

> In contradistinction to the manner in which many crimes are elaborated in treaties and, indeed, in the domestic law of many States, Article 4 expressly identifies and explains the intent that is needed to establish the crime of genocide. This approach follows the 1948 Genocide Convention and is also consistent with the ICC Statute . . . An examination of theories of intent is unnecessary in construing the requirement of intent in Article 4(2). What is needed is an empirical assessment of all the evidence to ascertain whether the very specific intent required by Article 4(2) is established, that is, the 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.[94]

The United States has been particularly insistent on qualifying the genocidal intent as 'specific'. Its 'understandings', formulated at the time of ratification of the Convention, include the following: 'That the term "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such" appearing in article II means the specific intent to destroy, in whole or in substantial part, a national, ethnical, racial or religious group as such by the acts specified in article II'; and 'That acts in the course of armed conflicts committed without the specific intent required by Article II are not sufficient to constitute genocide as defined

[91] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 26 above, p. 87.
[92] 'Report of the International Law Commission on the Work of Its Forty-Seventh Session, 2 May–21 July 1995', note 88 above, para. 79.
[93] UN Doc. A/AC.249/1998/CRP.8, p. 2.
[94] *Prosecutor* v. *Sikirica et al.* (Case No. IT-95-8-I), Judgment on Defence Motions to Acquit, 3 September 2001, paras. 58–9.

by this convention.'[95] The second of these understandings is puzzling, because the specific intent requirement of article II applies to acts committed in time of peace as well as in armed conflict, as article I of the Convention makes clear. The Genocide Convention Implementation Act, adopted by the United States Congress prior to ratification of the Convention, declares that the intent component requires 'specific intent to destroy'.[96] In its comments on the Code of Crimes Against the Peace and Security of Mankind, the United States referred to its understandings, implying that the draft Code's definition of genocide, which mirrored the Convention definition on this point, 'fails to establish the mental state needed for the imposition of criminal liability'.[97] Curiously, however, in its 'definitional elements' presented to the Diplomatic Conference on the Establishment of an International Criminal Court, the United States did not use the term 'specific intent' to describe the mental element of genocide.[98]

The first paragraph or chapeau of article II of the Convention defines the specific intent: 'to destroy in whole or in part a national, racial, ethnical or religious group as such'. The components of this phrase are discussed in greater detail below. In some cases, the acts of genocide defined in the five subsequent paragraphs of article II also contain elements of specific intent. Paragraphs (a) and (b) involve a result, and the offender must have the specific intent to effect this result. The crime of killing, set out in paragraph (a), requires the specific intent to kill the victim. Paragraph (b), 'causing serious bodily or mental harm', also involves a special intent. Subparagraphs (c) and (d), which do not require proof of a result, nevertheless introduce an additional mental

[95] A fierce critic of the United States' reservations and declarations, Professor Jordan Paust, has written that the qualification of genocide as a crime of 'specific intent' is appropriate under the circumstances: Jordan Paust, 'Congress and Genocide: They're Not Going to Get Away With It', (1989) 11 *Michigan Journal of International Law*, p. 90 at p. 95. See also Joe Verhoeven, 'Le crime de génocide, originalité et ambiguïté', [1991] *Revue belge de droit international* 5.

[96] Genocide Convention Implementation Act of 1987 (the Proxmire Act), S. 1851, s. 1091(a).

[97] 'Comments and Observations of Governments on the Draft Code of Crimes Against the Peace and Security of Mankind Adopted on First Reading by the International Law Commission at its Forty-Third Session', UN Doc. A/CN.4/448.

[98] UN Doc. A/CONF.183/C.1/L.10, p. 1; see also 'Draft Elements of Crimes', UN Doc. PCNICC/1988/DP.4. But see the 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court', UN Doc. A/50/22, para. 62: 'There was a further suggestion to clarify the intent requirement for the crime of genocide by distinguishing between a specific intent requirement for the responsible decision makers or planners and a general intent or knowledge requirement for the actual perpetrators of genocidal acts.'

element. In the case of imposing conditions of life, these must be 'calculated' to bring about its physical destruction of the group in whole or in part. As for paragraph (d), which deals with imposing measures that prevent births, these must be specifically intended to prevent births within the group. Only paragraph (e), 'forcibly transferring children', does not seem to have a specific intent.

A line of cases in the *ad hoc* tribunals takes the view that specific intent is not necessary where an accused is charged with aiding and abetting genocide, rather than the crime of genocide itself.[99] An accused charged with aiding and abetting must know of the specific intent of the principal perpetrator, however.[100] The distinction seems to straddle the blurred line that divides intent and motive. The point here is that the aider and abetter need not share the purpose or goal of the principal perpetrator. The chemical supplier who provides Zyklon B gas to an extermination camp may only seek to make a profit rather than pursue the genocidal objectives of those who actually do the killing, goes the argument. But the authorities are clear that the personal motives of individual perpetrators are not relevant in any event.[101] The knowledge-based approach, discussed earlier in this chapter, whereby the *mens rea* of both perpetrator and accomplice is assessed not by their goal or purpose but by their knowledge of the plan or policy, avoids these difficulties.

Proof of intent

In practice, proof of intent is rarely a formal part of the prosecution's case. The prosecution does not generally call psychiatrists as expert witnesses to establish what the accused really intended. Rather, intent is a logical deduction that flows from evidence of the material acts. Criminal law presumes that an individual intends the consequences of his or her acts, in effect deducing the existence of the *mens rea* from proof of the physical act itself. As the United States Military Tribunal said in the Hostages case: 'we shall require proof of a causative, overt act or omission from which a guilty intent can be inferred.'[102] For ordinary crimes, of general rather than specific intent, this is a relatively

[99] *Prosecutor* v. *Ntakirutimana et al.* (Case No. ICTR-96-10-A and ICTR-96-17-A), Judgment, 13 December 2004, para. 508.
[100] *Ibid.*, paras. 499–500.
[101] *Niyitegeka* v. *Prosecutor* (Case No. ICTR-96-14-A), Judgment, 9 July 2004, para. 52.
[102] *United States of America* v. *List*, (1948) 8 LRTWC 34 (United States Military Tribunal).

straightforward exercise. An individual who assaults another will be presumed to have intended the crime, in the absence of evidence indicating the material act was purely accidental. But the material act may not provide enough information to enable a court to conclude that the intent is specific, and not merely general. For example, if a victim is killed by an automobile, in the absence of other elements the likely conclusion will be that it was an 'accident'. Upon further proof of negligent behaviour by the perpetrator, there may be a finding of manslaughter or involuntary homicide. If the prosecution intends to prove that killing by an automobile is intentional, or even premeditated, considerably more evidence of intent will be required.

The specific intent necessary for a conviction of genocide is even more demanding than that required for murder. The crime must be committed with intent to destroy, in whole or in part, a protected group, as such. If the accused accompanied or preceded the act with some sort of genocidal declaration or speech, its content may assist in establishing the special intent. In practice, because of the large scale of genocide, its association with a State plan or policy, and the requirement of a racist climate in public opinion, as a minimum, there is actually no shortage of examples in the case law of perpetrators betraying their intent through public speeches[103] or in meetings with others.[104] Otherwise, the prosecution will rely on the context of the crime, its massive scale, and elements of its perpetration that suggest hatred of the group and a desire for its destruction. The Appeals Chamber of the International Criminal Tribunal for Rwanda has explained: 'By its nature, intent is not usually susceptible to direct proof. Only the accused himself has first-hand knowledge of his own mental state, and he is unlikely to testify to his own genocidal intent. Intent thus must usually be inferred'.[105] It has noted that 'explicit manifestations of criminal intent are . . . often rare in the context of criminal trials'.[106]

[103] E.g. *Prosecutor* v. *Gacumbitsi* (Case No. ICTR-2001-64-A), Judgment, 7 July 2006, para. 43; *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007, para. 527; *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 531.

[104] *Prosecutor* v. *Kamuhanda* (Case No. ICTR-95-54A-A), Judgment, 19 September 2005, para. 81; *Prosecutor* v. *Karera* (Case No. ICTR-01-74-T), Judgment and Sentence, 7 December 2007, para. 542.

[105] *Prosecutor* v. *Gacumbitsi* (Case No. ICTR-2001-64-A), Judgment, 7 July 2006, para. 40. Also: *Prosecutor* v. *Rutaganda* (ICTR-96-3-A), Judgment, 26 May 2003, para. 525.

[106] *Prosecutor* v. *Kayishema et al.* (Case No. ICTR-95-1-A), Judgment (Reasons), 1 June 2001, para. 525.

Such relevant facts and circumstances may include 'the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts'.[107] Factors that may establish intent include the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts.[108]

The Appeals Chamber of the International Criminal Tribunal for Rwanda has described such proof as 'circumstantial evidence', noting that it brings into play the rule by which no other reasonable explanation may exist as an explanation.[109] In this respect, a Trial Chamber of the Rwanda Tribunal sounded a note of caution in its acquittal judgment of Ignace Bagilishema:

> Thus evidence of the context of the alleged culpable acts may help the Chamber to determine the intention of the Accused, especially where the intention of a person is not clear from what that person says or does. The Chamber notes, however, that the use of context to determine the intent of an accused must be counterbalanced with the actual conduct of the Accused. The Chamber is of the opinion that the Accused's intent should be determined, above all, from his words and deeds, and should be evident from patterns of purposeful action.[110]

[107] *Prosecutor* v. *Jelisić* (IT-95-10-A), Judgment, 5 July 2001, para. 47. Also: *Prosecutor* v. *Rutaganda* (ICTR-96-3-A), Judgment, 26 May 2003, para. 525; *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Judgment, 19 April 2004, paras. 27, 34 and 35; *Prosecutor* v. *Blagojević* (Case No. IT-02-60-A), Judgment, 9 May 2007, para. 123; *Prosecutor* v. *Gacumbitsi* (Case No. ICTR-2001-64-T), Judgment, 17 June 2004, para. 253.

[108] *Prosecutor* v. *Simba* (Case No. ICTR-2001-76-T), Judgment and Sentence, 13 December 2005, para. 411; *Prosecutor* v. *Semanza* (Case No. ICTR-97-20-T), Judgment and Sentence, 15 May 2003, para. 313; *Semanza* v. *Prosecutor* (Case No. ICTR-97-20-A), Judgment, 20 May 2005, paras. 261–2. Also: *Prosecutor* v. *Rutaganda* (ICTR-96-3-A), Judgment, 26 May 2003, para. 525; *Prosecutor* v. *Ndindabahizi* (Case No. ICTR-01-71-T), Judgment, 15 July 2004, para. 454; *Prosecutor* v. *Ntagerura et al.* (Case No. ICTR-99-46-T), Judgment and Sentence, 25 February 2004, para. 663.

[109] *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007, para. 524.

[110] *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, para. 63. Also: *Prosecutor* v. *Kamuhanda* (Case No. ICTR-95-54A-T), Judgment, 22 January 2004, para. 626.

Although the Genocide Convention does not recognize cultural genocide as a criminal act falling within its scope,[111] proof of attacks directed against cultural institutions or monuments, committed in association with killing, may prove important in establishing the existence of a genocidal rather than merely a homicidal intent.

The question of proof of genocidal intent seems inexorably to bring the discussion back to the problem of the plan or policy. It is the identification of a plan or policy, either through specific documentary evidence or by deduction based on various factual manifestations, that permits the inference that perpetrators acted with genocidal intent.

Premeditation

Premeditation implies that there is a degree of planning and preparation in the commission of a crime.[114] Many national criminal law systems consider premeditation to be an aggravating factor, particularly in the case of homicide.[115] The *travaux préparatoires* of the Genocide Convention indicate that the drafters did not intend to extend the concept of premeditation to the crime of genocide.[116] In removing the term 'deliberate' from the Ad Hoc Committee draft, the Sixth Committee meant to eliminate the suggestion that genocide be premeditated.

The issue of premeditation should not be confused with the requirement of proof of a plan as part of the circumstances of the crime. Genocide cannot be committed without a degree of planning and preparation. Courts have never convicted for genocide in the absence of evidence of a plan. At trial, proof of the plan, or at the very least the logical inference that a plan exists drawn from the actual conduct of the crime, will inevitably be an important element in the prosecution case, as discussed earlier in this chapter. However, there is a distinction between proof of a plan of genocide, to which an individual may be privy, and

[111] On cultural genocide, see chapter 4, pp. 209–14 above.

[112] M. Cherif Bassiouni, 'Commentary on the International Law Commission's 1991 Draft Code of Crimes against the Peace and Security of Mankind', (1993) 11 *Nouvelles études pénales*, p. 233.

[113] *Ibid.* [114] Pradel, *Droit pénal comparé*, p. 473.

[115] For example, the French Penal Code, art. 132-72.

[116] See pp. 257–60 above. See also Nehemiah Robinson, *The Genocide Convention: A Commentary*, New York: Institute of Jewish Affairs, 1960, p. 60; Matthew Lippman, 'The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later', (1994) 8 *Temple International and Comparative Law Journal*, p. 1 at pp. 25–6.

premeditation on the part of the individual with respect to perpetration of specific acts of genocide. An individual offender may participate in genocide, with full knowledge of the plan, and yet act without premeditation. Of course, such an offender would obviously be a minor player in the genocide as a whole and would probably attract less prosecutorial attention than those more intimately involved in the crime.

In some early decisions, the International Criminal Tribunal for Rwanda appeared to insist upon premeditation, at least with respect to the specific intent component found in the chapeau of article II. It stated that, 'for the crime of genocide to occur, the *mens rea* must be formed prior to the commission of the genocidal acts. The individual acts themselves, however, do not require premeditation; the only consideration is that the act should be done in furtherance of the genocidal intent.'[117] Later judgments affirm the position that premeditation is not an element of any of the specific acts of the crime of genocide.[118]

The International Criminal Tribunal for the former Yugoslavia, in *Krstić*, said: 'Article 4 of the Statute does not require that the genocidal acts be premeditated over a long period.'[119] It found that a plan to ethnically cleanse the Srebrenica region 'escalated' into genocide only a day or two before the actual deeds were perpetrated.[120] In *Eichmann*[121] and *Akayesu*,[122] premeditation was evidenced from the circumstances. In *Serushago*, the International Criminal Tribunal for Rwanda noted that the crimes had been committed with premeditation, treating this as an aggravating factor in the determination of sentence.[123]

'Negligent' genocide

Article II's intent requirement excludes 'negligent' genocide. A crime of negligence is one without genuine intent, but resulting from extreme carelessness. Negligence imposes an objective standard of criminal responsibility, holding the accused liable for failing to exercise the

[117] *Prosecutor* v. *Kayishema et al.*, note 13 above, para. 91.
[118] *Prosecutor* v. *Semanza* (Case No. ICTR-97-20-T), Judgment and Sentence, 15 May 2003, para. 319; *Prosecutor* v. *Ntagerura et al.* (Case No. ICTR-99-46-T), Judgment and Sentence, 25 February 2004, para. 664.
[119] *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 572. In the same judgment, at para. 711, it said there was no requirement that genocide be committed with premeditation.
[120] *Ibid.*, para. 619. [121] *A-G Israel* v. *Eichmann*, note 22 above.
[122] *Prosecutor* v. *Akayesu*, note 24 above.
[123] *Prosecutor* v. *Serushago*, note 84 above, para. 30.

degree of care expected of an ordinary or prudent individual. This is obviously incompatible with the specific intent requirement of the crime of genocide.[124] As the International Criminal Tribunal for Rwanda observed in the *Akayesu* case, an individual cannot be guilty as a participant in genocide 'where he did not act knowingly, and even where he should have had such knowledge'.[125]

Negligence should not be confused with omission. An individual may intentionally omit to perform an act, thereby participating in a result. Where the result is an act of genocide, the individual may participate with the required level of intent. Omission is not an issue of intent so much as one addressing the material element of the crime. Depending on the circumstances, an omission may occur intentionally, although it may also be the result of negligence. For example, one of the acts of genocide defined in article II is '[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction'. An individual may inflict conditions of life on a group by failing to provide it with essentials for survival. The crime is committed by omitting to take action, rather than by taking action. Obviously, such an act can be committed with the specific intent to destroy the group.[126]

Recognition of a crime of 'negligent genocide' or 'genocide in the second degree' has been proposed.[127] It is explained that such a crime would be particularly applicable in the case of economic development policies that displace aboriginal peoples.[128] But, while the desire to extend international law to cover negligent behaviour of governments and corporations is commendable, this becomes somewhat far removed from the stigmatization of genocide as the 'crime of crimes' for which the highest level of evil and malicious intent is presumed. Extending the

[124] Lippman, '1948 Convention', p. 27. In his dissent in *Bagilishema*, Judge Mehmet Güney set a very liberal standard for guilt by negligence. However, he would have convicted the accused of crimes against humanity, rather than genocide, on this basis. *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-T), Separate and Dissenting Opinion of Judge Mehmet Güney, 7 June 2001, para. 101.

[125] *Prosecutor* v. *Akayesu*, note 24 above, para. 478. The Tribunal was referring to liability under art. 6(1) of its Statute, making an exception in the case of superior or command responsibility.

[126] For a more detailed discussion of the issue of omission, see chapter 4, pp. 177–8 above.

[127] Matthew Lippman, 'The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide', (1985) 3 *Boston University International Law Journal*, p. 1 at p. 62.

[128] K. Glaser and S. Possony, *Victims of Politics: The State of Human Rights*, New York: Columbia University Press, 1979, p. 37.

scope of genocide to crimes of negligence can easily trivialize the entire concept.

Arguably, an individual may commit genocide by negligence as an accomplice rather than as a principal offender. This is, of course, implicit in the whole concept of command or superior responsibility.[129] Command responsibility holds the superior liable for the acts of subordinates when the superior knew or ought to have known that the subordinates were committing such acts and the superior failed to intervene. Where the superior knew and failed to intervene, the crime is one of intentional omission and meets the criteria of article II of the Convention without any difficulty. Where the superior 'ought to have known', the standard becomes one of negligence. Liability of commanders on this basis has been recognized by international war crimes law for more than half a century, although its application in a non-military context is far less manifest. The essence of the Convention, and specifically the definition of the crime in article II, challenges the idea that it may be committed by negligence. Nevertheless, the plain words of the statutes of the *ad hoc* tribunals and of the International Criminal Court, recognizing the application of command responsibility to genocide, make it at least theoretically possible for a superior or commander to be found guilty of genocide where the mental element was only one of negligence.

Components of the specific intent to commit genocide

The specific intent of the crime of genocide, subject to the additional intent requirements of the punishable acts in the five paragraphs of article II, has three basic components. The offender must intend to destroy the group, the offender must intend that the group be destroyed in whole or in part, and the offender must intend to destroy a group that is defined by nationality, race, ethnicity or religion.

'to destroy'

Article II of the Convention specifies that the offender must intend 'to destroy' a protected group. Raphael Lemkin took a large view of this concept, observing that genocide involved the destruction of political institutions, economic life, language and culture. Physical destruction

[129] Command responsibility is discussed in greater detail in chapter 6, at pp. 361–6 below.

was only the ultimate or final stage in genocide.[130] Nevertheless, the drafters of the Convention clearly chose to limit its scope, in terms of the acts of genocide set out in the five subparagraphs of article II, to physical and biological genocide. Still, an important problem of interpretation arises as to whether the destruction that is part of the intent, in the first part of article II, must correspond to the physical or biological destruction defined in the second part of article II. For example, a State might intend to destroy a group by eliminating its political structures, economy and culture, but not its physical existence in the sense of mass killing or similar acts. In the course of such measures, perhaps only in an incidental way, members of the group might be killed. If destruction is viewed from this large perspective, then such killing would meet the definition of genocide, being killing of members of a group with the intent to destroy the group, even though the intent is not to destroy the group by killing.

The words of the Convention can certainly bear such an interpretation. This might facilitate extending the Convention to cases such as ethnic cleansing, where an intent at physical destruction is not obvious but where the intent to destroy the community as a political, economic, social and cultural entity is beyond question.[131] It would also encompass without doubt the destruction of aboriginal communities by a combination of violence, eradication of economic life, and incitement to assimilation.[132] The *travaux préparatoires* of the Convention do not, however, sustain this construction. While these questions were not specifically debated during the drafting of article II, the spirit of the discussions resists extending the concept of destruction beyond physical and biological acts. During consideration of the draft Code of Crimes, the International Law Commission addressed this problem:

> As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are to be

[130] Lemkin, *Axis Rule*, pp. 79 and 87–9.

[131] This interpretation was adopted by a German court: Bundesgerichtshof, Urteil vom. 30 April 1999, 3 StR 215/98. It is suggested by the International Criminal Tribunal for Rwanda in *Prosecutor* v. *Kayishema et al.*, note 13 above, para. 95.

[132] See C. C. Tennant and M. E. Turpel, 'A Case Study of Indigenous Peoples: Genocide, Ethnocide and Self-Determination', (1990–1) 59–60 *Nordic Journal of International Law*, p. 287.

> taken into consideration in the definition of the word 'destruction', which must be taken only in its material sense, its physical or biological sense. It is true that the 1947 draft Convention prepared by the Secretary-General and the 1948 draft prepared by the *ad hoc* Committee on Genocide contained provisions on 'cultural genocide' covering any deliberate act committed with the intent to destroy the language, religion or culture of a group, such as prohibiting the use of the language of a group in daily intercourse or in schools or the printing and circulation of publications in the language of the group or destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group. However, the text of the Convention, as prepared by the Sixth Committee and adopted by the General Assembly, did not include the concept of 'cultural genocide' contained in the two drafts and simply listed acts which come within the category of 'physical' or 'biological' genocide.[133]

A court seeking to adopt the broader and more liberal view could, however, rely on the text itself, the objectives of the Convention, the need for dynamic interpretation of legal instruments that protect human rights,[134] and the principle established in the Vienna Convention on the Law of Treaties which authorizes resort to a convention's preparatory work only when the ordinary meaning of the provision, taken in its context and in light of its object and purpose, leaves a provision 'ambiguous or obscure'.[135]

The Federal Constitutional Court of Germany appears to have adopted such a view. It said:

> [T]he statutory definition of genocide defends a supra-individual object of legal protection, i.e. the *social* existence of the group . . . [T]he intent to destroy the group . . . extends beyond physical and biological extermination . . . The text of the law does not therefore compel the interpretation that the culprit's intent must be to exterminate physically at least a substantial number of the members of the group.[136]

Some support for this approach can also be found in the case law of the International Criminal Tribunal for the former Yugoslavia. Judge

[133] 'Report of the Commission to the General Assembly on the Work of its Forty-First Session', UN Doc. A/CN.4/SER.A/1989/Add.1 (Part 2), p. 102, para. (4).

[134] *Soering* v. *United Kingdom and Germany*, 7 July 1989, Series A, Vol. 161, 11 EHRR 439; *Loizidou* v. *Turkey* (Preliminary Objections), 23 March 1995, Series A, Vol. 310, 16 *Human Rights Law Journal*, 15.

[135] Vienna Convention on the Law of Treaties, (1979) 1155 UNTS 331, arts. 31–32.

[136] 2 BvR 1290/99, 12 December 2000, para. (III)(4)(a)(aa). Cited in *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 579.

Shahabuddeen took such a view of the scope of the words 'to destroy' in his individual opinion in *Krstic*,[137] and his opinion was followed by a Trial Chamber in *Blagojević*.[138]

'*in whole or in part*'

The initial sentence of article II says that acts of genocide must be committed with the intent to destroy a protected group 'in whole or in part'. In *Axis Rule in Occupied Europe*, Raphael Lemkin did not focus on the quantitative question, declaring simply that genocide means 'the destruction of a nation or of an ethnic group'.[139] However, the notion that genocide might constitute destruction of groups 'entirely or in part' appeared in the preamble to General Assembly Resolution 96(I).[140] The Secretariat draft defined genocide as 'a criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying it in whole or in part, or of preventing its preservation or development'.[141] That the quantitative threshold might be rather low was reflected in the Secretariat draft's reference to 'group massacres or individual executions' in the list of acts of genocide.[142] The issue does not seem to have concerned the expert committee that considered the Secretariat draft.[143] The United States reformulated the concept in its 1947 draft, which spoke of destroying a group 'totally or partially'.[144]

France's draft convention did not adopt the 'in whole or in part' language, but obviously seemed to accept the concept, saying genocide consisted of 'an attack on the life of a human group or of an individual as a member of such group'.[145] A Secretariat note to the Ad Hoc Committee reiterated the idea: 'Genocide in the most restricted sense consists

[137] *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Partial Dissenting Opinion of Judge Shahabuddeen, 19 April 2004.

[138] *Prosecutor* v. *Blagojević* (Case No. IT-02-60-T), Judgment, 17 January 2005, paras. 659–66.

[139] Lemkin, *Axis Rule*, p. 79.

[140] See also the first draft: UN Doc. A/BUR/50.

[141] UN Doc. A/AC.10/41; UN Doc. A/362, appendix II, art. I § II. The Saudi Arabian draft expressed the same idea with the word 'gradually'. Art. I defined genocide as 'the destruction of an ethnic group, people or nation carried out either gradually against individuals or collectively against the whole group, people or nation' (UN Doc. A/C.6/86).

[142] *Ibid.*, art. I.1(a). The phrase 'group massacres or individual executions' was well accepted, and reappeared in the United States draft (UN Doc. E/623, art. 1(a)) and the Soviet Union's 'Basic Principles of a Convention on Genocide' (UN Doc. E/AC.25/7, Principle VII).

[143] UN Doc. E/447. [144] UN Doc. E/623. [145] UN Doc. E/623/Add.1.

in the physical destruction of the members of a human group with the purpose of destroying the whole or part of that human group.'[146] But the Secretariat also commented that: 'The victim of the crime of genocide is a human group. It is not a greater or smaller number of individuals who are affected for a particular reason (execution of hostages) but a group as such.'[147] China's draft definition referred to genocide's quantitative aspect in the enumeration of specific acts: destroying 'totally or partially' the physical existence of the group or subjecting it to conditions causing its destruction 'in whole or in part'. The third category, cultural genocide, had no quantitative qualification.[148] The Soviet Basic Principles stated that the convention 'should include as instances of genocide such crimes as group massacres or individual executions on the grounds of race, nationality (or religion)'.[149] When asked by Venezuela whether the definition would cover the destruction of one or more persons,[150] the Soviets answered that it 'obviously applied not only to the destruction of a group but to that of the individuals composing it whenever murder for racial, national or religious reasons was involved. Naturally, the murder of an individual could not be considered genocide unless it could be proved that it was the first of a series of acts aimed at the destruction of an entire group.'[151] The Ad Hoc Committee initially agreed that reference to 'in whole or in part' should appear in the text of the definition rather than in the reference to the specific acts of genocide.[152] But the debate apparently startled some delegates who feared that perceived ambiguity in the term might result in an excessively low quantitative threshold. A revised text from the United States deleted 'in part'.[153]

The final version of the Ad Hoc Committee eliminated any suggestion that genocide might be 'partial'.[154] In the Sixth Committee, a Chinese proposal reactivated the concept of partial destruction: 'genocide means any of the acts committed with the intent to destroy, in whole or in part, a national ethnic, racial, religious or political group as such'.[155]

[146] 'Relations Between the Convention on Genocide on the One Hand and the Formulation of the Nuremberg Principles and the Preparation of a Draft Code of Offences Against Peace and Security on the Other, Note by the Secretariat', Chapter I, No. 1.
[147] *Ibid.* [148] UN Doc. E/AC.25/9.
[149] UN Doc. E/AC.25/7, Principle VII. They later proposed another formulation: '[d]estroying totally or partially the physical existence of such groups' (UN Doc. E/AC.25/SR.12, p. 2).
[150] UN Doc. E/AC.25/SR.10, p. 13. [151] *Ibid.*, p. 14. [152] *Ibid.*, p. 16.
[153] UN Doc. E/AC.25/SR.12, p. 2. [154] UN Doc. E/AC.25/SR.24, p. 4.
[155] UN Doc. A/C.6/223/Rev.1.

Amendments from the Soviet Union,[156] Sweden[157] and Venezuela[158] had a similar import. Norway focused the debate by inserting 'in whole or in part' after the words 'with the intent to destroy' in the Ad Hoc Committee draft.[159] Venezuela insisted 'it should be stated that destruction of part of a group also constituted genocide'.[160] But, for Belgium, genocide had to be aimed at the destruction of a whole group, 'even if that result was achieved only in part, by stages . . . It would be illogical to introduce into the description of the requisite intention the idea of partial destruction, genocide being characterized by the intention to destroy a group.'[161]

New Zealand cautioned that 'in whole or in part' might imply genocide had been committed even where there was no intention of destroying a whole group.[162] A French amendment sought to address the same issue, but by another route, returning to the draft it had proposed earlier in the year.[163] France explained that the crime of genocide occurred as soon as an individual became the victim of acts of genocide. If a motive for the crime existed, genocide existed even if only a single individual were the victim. France said its amendment 'had the advantage of avoiding a technical difficulty . . . namely, that of deciding the minimum number of persons constituting a group'.[164] Egypt suggested that the aim of the French amendment would be met if the Committee adopted the Norwegian proposal to insert the terms 'in whole or in part'.[165] The United States delegation worried about 'broadening' the concept of genocide to cases where 'a single individual was attacked as a member of a group'.[166] Egypt agreed that 'the idea of genocide could

[156] UN Doc. A/C.6/215/Rev.1: 'The physical destruction in whole or in part of such group.' See also UN Doc. A/C.6/223 and Corr.1.

[157] UN Doc. A/C.6/230 and Corr.1: 'In this Convention genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.'

[158] UN Doc. A/C.6/231: 'In this Convention genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, racial or religious group as such.'

[159] UN Doc. A/C.6/228.

[160] UN Doc. A/C.6/SR.69 (Pérez-Perozo, Venezuela). See also UN Doc. A/C.6/SR.69 (Wikborg, Norway).

[161] UN Doc. A/C.6/SR.73 (Kaeckenbeeck, Belgium).

[162] *Ibid.* (Reid, New Zealand).

[163] UN Doc. A/C.6/224 and Corr.1. See note 145 above and accompanying text.

[164] UN Doc. A/C.3/SR.73 (Chaumont, France).

[165] *Ibid.* (Raafat, Egypt).

[166] UN Doc. A/C.6/SR.73 (Gross, United States). On concerns in the United States that the Genocide Convention might be applied to ethnic violence, see: Robinson, *Genocide Convention*, p. ix; Lawrence J. Leblanc, 'The Intent to Destroy Groups in the Genocide

hardly be reconciled with the idea of an attack on the life of a single individual'.[167] Yugoslavia was more equivocal, conceding that 'it would be difficult to establish whether or not the murder of an individual was genocide'.[168] The United Kingdom said that, when a single individual was affected, it was a case of homicide, not genocide. But, 'if it was desired to ensure that cases of partial destruction should also be punished, the amendment proposed by the Norwegian delegation would have to be adopted'.[169] This is in fact what happened, and by a decisive majority.[170]

The 1948 debates in the Sixth Committee and, for that matter, all of the preparatory work of the Convention, provide little guidance as to what the drafters meant by 'in part'. The French approach, with its reference to individual victims, seems to confuse the intentional element, or *mens rea*, with the material element, or *actus reus*.[171] Even a small number of actual victims is enough to establish the material element.[172] The quantity killed or injured remains a relevant material fact, but what is really germane to the debate is whether the author of the crime intended to destroy the group 'in whole or in part'. As discussed earlier in this chapter, intent is normally proven as a deduction from the material act. Where genocide involves the destruction of a large number of members of a group, the logical deduction will be more obvious. If there are only a few victims, this deduction will be far less evident, even if the criminal is in fact animated with the intent to destroy the entire group. Hence, unable to rely on the quantity of the victims as evidence of genocidal intent, the prosecution will be required to introduce other elements of proof. The greater the number of actual victims, the more

Convention', (1984) 78 *American Journal of International Law*, p. 370. See also Payam Akhavan, 'Enforcement of the Genocide Convention: A Challenge to Civilization', (1995) 8 *Harvard Human Rights Journal*, p. 229.

[167] UN Doc. A/C.6/SR.73 (Raafat, Egypt).

[168] *Ibid.* (Bartos, Yugoslavia).

[169] *Ibid.* (Fitzmaurice, United Kingdom).

[170] *Ibid.* (forty-one in favour, eight against, with two abstentions).

[171] For other examples, see 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur', note 85 above, pp. 14–15; Pieter Nicolaas Drost, *Genocide: United Nations Legislation on International Criminal Law*, Leyden: A. W. Sythoff, 1959, pp. 84–6; Malcolm N. Shaw, 'Genocide and International Law', in Yoram Dinstein, ed., *International Law at a Time of Perplexity (Essays in Honour of Shabtai Rosenne)*, Dordrecht: Martinus Nijhoff, 1989, pp. 797–820 at p. 806.

[172] Stefan Glaser, *Droit international pénal conventionnel*, Brussels: Bruylant, 1970, p. 112.

apparent the conclusion that the accused intended to destroy the group, in whole or in part.

Interpretations of the words 'in part'

The term 'in whole or in part' refers to the intent of the perpetrator, not to the result. As the International Law Commission noted in its 1996 report on the draft Code of Crimes: 'it is not necessary to achieve the final result of the destruction of a group in order for a crime of genocide to have been committed. It is enough to have committed any one of the acts listed in the article with the clear intention of bringing about the total or partial destruction of a protected group as such.'[173]

There are four different approaches to the scope of the term 'in part'. The first is the most narrow, and effectively insists that, while the result may only be partial destruction, the intent must be to destroy the entire group. It was advanced by the Truman administration in its failed attempt to get approval for the Genocide Convention. Members of the Senate were concerned that article II might apply to the lynching of African-Americans, a not infrequent occurrence in the apartheid-like regime of the southern United States at the time.[174] Dean Rusk, then Deputy Under-Secretary of State, testified before the Senate that the drafters of Article II meant to deal only with the intent to destroy the group as a whole, although the crime would be made out even if part of the group were actually destroyed. Rusk said: 'United Nations negotiators felt that it should not be necessary that an entire group be destroyed to constitute the crime of genocide, but rather that genocide meant the partial destruction of a group with the intent to destroy the

[173] *Ibid.*, p. 126. Also: 'Report of the Commission to the General Assembly on the Work of its Forty-First Session', note 133 above, p. 102, para. (6).

[174] Lawrence J. Leblanc, 'The Intent to Destroy Groups', p. 377. According to a 1947 State Department internal memorandum: 'The possibility exists that sporadic outbreaks against the Negro population in the United States may be brought to the attention of the United Nations, since the treaty, if ratified, would place this offence in the realm of international jurisdiction and remove the "safeguard" of article 2(7) of the Charter. However, since the offence will not exist unless part of an overall plan to destroy a human group, and since the Federal Government would under the treaty acquire jurisdiction over such offences, no possibility can be foreseen of the United States being held in violation of the treaty': 'US Commentary on Secretariat Draft Convention on Genocide, Memorandum, Sept. 10, 1947, Gross and Rusk to Lovett', National Archives, United States of America, 501.BD-Genocide, 1945–9.

entire group concerned.'[175] In somewhat the same spirit, Raphael Lemkin wrote to the Senate Committee in 1950 that 'the destruction in part must be of a substantial nature so as to affect the entirety'.[176] But this approach is not only not confirmed by the *travaux préparatoires*, it is also inconsistent with the words of article II themselves.

The second approach adds the adjective 'substantial' in order to modify 'part'. This is the interpretation that the United States eventually adopted when it ratified the Convention some forty years later. The United States formulated a declaration affirming that the meaning of article II is 'in whole or in substantial part'.[177] In its own domestic legislation, the United States defines 'substantial part' as 'a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part'.[178] The International Law Commission considered that '[i]t is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe. None the less the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group.'[179] Nehemiah Robinson wrote that genocide is aimed at destroying 'a multitude of persons of the same group', as long as the number is 'substantial'.[180] Similarly, the final draft statute of the Preparatory Committee of the International Criminal Court noted that '[t]he reference to "intent

[175] United States of America, *Hearing Before a Subcommittee of the Committee on Foreign Relations, United States Senate, Jan. 23, 1950*, Washington: US Government Printing Office, 1950, p. 12. According to Alfred J. Schweppe of the American Bar Association, Rusk 'misspoke', because the Convention clearly contemplates destruction of a group 'in part': *ibid.*, 24 January 1950, p. 201. Discussed in Lawrence J. Leblanc, 'The Intent to Destroy Groups', p. 373.

[176] 2 Executive Sessions of the Senate Foreign Relations Committee, Historical Series 370 (1976). These views were not new to Lemkin, who had written, in 1947, that the definition of genocide was subordinated to the intent 'to destroy or to cripple permanently a human group'. See: Raphael Lemkin, 'Genocide as a Crime in International Law', (1947) 41 *American Journal of International Law*, p. 145 at p. 147.

[177] Lemkin had proposed the text of an 'understanding' that he invited the United States to file at the time of ratification: '[o]n the understanding that the Convention applies only to actions undertaken on a mass scale and not to individual acts even if some of these acts are committed in the course of riots or local disturbances'. 2 Executive Sessions of the Senate Foreign Relations Committee, Historical Series 370 (1976).

[178] Genocide Convention Implementation Act of 1987, s. 1093(8).

[179] 'Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May–26 July 1996', p. 125.

[180] Nehemiah Robinson, *Genocide Convention*, p. 63.

to destroy, in whole or in part . . . a group, as such" was understood to refer to the specific intention to destroy more than a small number of individuals who are members of a group'.[181] The International Criminal Tribunal for Rwanda, in *Kayishema and Ruzindana*, said 'that "in part" requires the intention to destroy a considerable number of individuals'.[182] The International Criminal Tribunal for the former Yugoslavia said that genocide must involve the intent to destroy a 'substantial' part, although not necessarily a 'very important part'.[183] In another judgment, the Tribunal referred to a 'reasonably substantial' number relative to the group as a whole.[184] The 'substantial part' interpretation is well entrenched in the case law of the *ad hoc* tribunals.[185]

Critics of the 'substantial part' terminology fear it might shelter individuals responsible for killing millions of blacks who will plead they did not intend to kill a 'substantial part' of the African-American population in the United States.[186] Similarly, the 'viable entity' notion that appears in the United States legislation has been challenged: 'If ninety-five percent of a group of thirty-five million men, women and children was brutally and systematically exterminated at the hands of some nation wide conspirators, would a defence be that the remaining five percent, now even more unified in its group identification and determination, was never targeted and still constitutes a viable entity?'[187] But this view seems to cast the net too broadly, as it fails to make room for a meaningful distinction between genocide and the racist killing of only a few people.

[181] 'Draft Statute for the International Criminal Court. Part 2. Jurisdiction, Admissibility and Applicable Law', UN Doc. A/AC.249/1998/CRP.8, p. 2, n. 1.

[182] *Prosecutor* v. *Kayishema et al.* (Case No. ICTR-95-1-T), Judgment and Sentence, 21 May 1999, para. 97. Cited in: *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, para. 64; *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 586.

[183] *Prosecutor* v. *Jelisić* (Case No. IT-95-10-T), Judgment, 19 October 1999; also *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, Ch. III, para. 2.1.1.

[184] *Prosecutor* v. *Sikirica et al.* (Case No. IT-95-8-I), Judgment on Defence Motions to Acquit, 3 September 2001, para. 65.

[185] *Prosecutor* v. *Semanza* (Case No. ICTR-97-20-T), Judgment and Sentence, 15 May 2003, para. 316; *Prosecutor* v. *Simba* (Case No. ICTR-2001-76-T), Judgment and Sentence, 13 December 2005, para. 409.

[186] Jordan J. Paust, 'Congress and Genocide: They're Not Going to Get Away with It', (1989) 11 *Michigan Journal of International Law*, p. 90, pp. 95–6.

[187] *Ibid.*

More helpful is the observation of a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia to the effect that:

> the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it. 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. A campaign resulting in the killings, in different places spread over a broad geographical area, of a finite number of members of a protected group might not thus qualify as genocide, despite the high total number of casualties, because it would not show an intent by the perpetrators to target the very existence of the group as such.[188]

Along much the same lines, the International Law Commission observed:

> [T]he intention must be to destroy a group and not merely one or more individuals who are coincidentally members of a particular group. The prohibited act must be committed against an individual because of his membership in a particular group and as an incremental step in the overall objective of destroying the group. It is the membership of the individual in a particular group rather than the identity of the individual that is the decisive criterion in determining the immediate victims of the crime of genocide. The group itself is the ultimate target or intended victim of this type of massive criminal conduct.[189]

In other words, the intent requirement that the destruction contemplate the group 'in whole or in part' should not be confused with the scale of the participation by an individual offender. The accused may only be involved in one or a few killings or other punishable acts. No single accused, as the principal perpetrator of the physical acts, could plausibly be responsible for destroying a group in whole or in part. In *Sikirica*, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia said it must be the group which is targeted, and not merely individuals within the group, adding that this is the meaning to be ascribed to the words 'as such' in the definition of genocide.[190]

[188] *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 590.
[189] 'Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May–26 July 1996', note 26 above, p. 88.
[190] *Prosecutor* v. *Sikirica et al.* (Case No. IT-95-8-I), Judgment on Defence Motions to Acquit, 3 September 2001, para. 89.

The International Court of Justice endorsed the 'substantial part' interpretation in its ruling on the merits in the Bosnian application against Serbia:

> In the first place, the intent must be to destroy at least a substantial part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole.[191]

The Court described the substantiality criterion as 'critical'.[192]

Within the quantitative or numerical context, there have been suggestions that the law recognize the existence of acts falling short of full-blown genocide, that might be characterized as 'genocidal massacre'. Leo Kuper originally proposed the concept.[193] It differs from genocide in that 'the mass murder is on a smaller scale, that is, smaller numbers of human beings are killed'.[194] Examples would be pogroms and mass executions. This concept is already covered, and in an adequate fashion, by the concept of crimes against humanity or, when it occurs in the course of armed conflict, by violations of the laws and customs of war. But, here too, international prosecution is wary of involvement in what are only individual or isolated acts.

A third approach takes more of a qualitative than a quantitative perspective on the meaning of 'in part', reading in the adjective 'significant'. In a sense, it is similar to the 'viable group' concept of the United States declaration, although it treats viability not as if there is some critical mass of a group in a numeric sense below which it cannot survive, but rather in terms of irreparable impact upon a group's chances of survival when a stratum of its population, generally political, social or economic, is liquidated. There is nothing to support this in the *travaux*, and the idea seems to have been launched by Benjamin Whitaker in his 1985 report. He wrote that the term 'in part' denotes 'a reasonably

[191] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 198.

[192] *Ibid*., para. 201.

[193] Leo Kuper, 'Other Selected Cases of Genocide and Genocidal Massacres: Types of Genocide', in Israel W. Charny, *Genocide – A Critical Bibliographic Review*, New York: Facts on File, 1988, 1991, pp. 155–71.

[194] Israel W. Charny, 'Toward a Generic Definition of Genocide', in George J. Andreopoulos, ed., *Genocide, Conceptual and Historical Dimensions*, Philadelphia: University of Pennsylvania Press, 1994, pp. 64–94 at p. 77.

significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership'.[195]

Citing the Whitaker report, the Commission of Experts established by the Security Council in 1992 to investigate violations of international humanitarian law in the former Yugoslavia held that 'in part' had not only a quantitative but also a qualitative dimension. According to the chair of the Commission of Experts, Professor M. Cherif Bassiouni, it considered the definition in the Genocide Convention to be 'sufficiently pliable to encompass not only the targeting of an entire group, as stated in the convention, but also the targeting of certain segments of a given group, such as the Muslim elite or Muslim women.

> Furthermore, a given group can be defined on the basis of its regional existence, as opposed to a broader and all-inclusive concept encompassing all the members of that group who may be in different regions or areas. For example, all Muslims in Bosnia-Herzegovina could be considered a protected group. One could also define the group as all Muslims in a given area of Bosnia-Herzegovina, such as Prijedor, if the intent of the perpetrator is the elimination of that narrower group . . . For example, all Bosnians in Sarajevo, irrespective of ethnicity or religion, could constitute a protected group.[196]

The Commission gave several examples of such 'significant' portions of a group: political and administrative leaders, religious leaders, academics and intellectuals, business leaders, and others. 'Similarly, the extermination of a group's law enforcement and military personnel may be a significant section of a group in that it renders the group at large defenceless against other abuses of a similar or other nature, particularly if the leadership is being eliminated as well', the Commission noted.[197]

This novel approach of the Commission of Experts was invoked by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia in some indictments,[198] and subsequently endorsed by the

[195] Benjamin Whitaker, 'Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide', UN Doc. E/CN.4/Sub. 2/1985/6, p. 16, para. 29.

[196] M. Cherif Bassiouni, 'The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia', (1994) 5 *Criminal Law Forum*, p. 279 at pp. 323–4.

[197] 'Final Report of the Commission of Experts', UN Doc. S/1994/674, para. 94.

[198] *Prosecutor* v. *Karadžić and Mladić* (Case Nos. IT-95-18-R61, IT-95-5-R61), Transcript of Hearing of 27 June 1996, p. 15 (the Prosecutor, Eric Ostberg, noted that he relied on Benjamin Whitaker, 'Revised and Updated Report', note 195 above, p. 16, para. 19); *Prosecutor* v. *Jelisić and Cesić* (Case No. IT-95-10-I), Indictment, 21 July 1995, para. 17;

judges themselves. According to a Trial Chamber in *Jelisić*, it might be possible to infer the requisite genocidal intent from 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 as such'.[199] However, ultimately the Trial Chamber said it was not possible 'to conclude beyond all reasonable doubt that the choice of victims arose from a precise logic to destroy the most representative figures of the Muslim community in Brcko to the point of threatening the survival of that community'.[200] The same scenario of relatively small numbers of killings in concentration camps returned in *Sikirica*, but again, the judges could not discern any pattern in the camp killings that suggested the intent to destroy a 'significant' part of the local Muslim community so as to threaten its survival. The victims were taxi drivers, school-teachers, lawyers, pilots, butchers and café owners but not, apparently, community leaders. The Trial Chamber observed that 'they do not appear to have been persons with any special significance to their community, except to the extent that some of them were of military age, and therefore could be called up for military service'.[201]

The test, then, using the 'significant group' approach, would appear to be whether the destruction of a social strata threatens the group's survival as a whole. As the Commission of Experts noted, such an attack 'must be viewed *in the context of the fate of what happened to the rest of the group*. If a group suffers extermination of its leadership and in the wake of that loss, a large number of its members are killed or subjected to other heinous acts, for example deportation, the cluster of violations ought to be considered in its entirety in order to interpret the provisions of the Convention in a spirit consistent with its purpose.'[202] In *Krstić* – the only Trial Chamber decision to result in a conviction for genocide – the judges seemed convinced by prosecution arguments whereby the men and boys of military age, who were the victims of the Srebrenica massacre of July 1995, were the 'significant part' of the Muslim

Prosecutor v. *Jelisić and Cesić* (Case No. IT-95-10-I), Amended Indictment, 12 May 1998, para. 16; *Prosecutor* v. *Jelisić and Cesić* (Case No. IT-95-10-I), Second Amended Indictment, 19 October 1998, para. 14.

[199] *Prosecutor* v. *Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 82.

[200] *Ibid.*, para. 93.

[201] *Prosecutor* v. *Sikirica et al.* (Case No. IT-95-8-I), Judgment on Defence Motions to Acquit, 3 September 2001, para. 80.

[202] 'Final Report of the Commission of Experts', UN Doc. S/1994/674, para. 94 (emphasis added).

community. This is not the same as the 'leadership', although the reasoning is similar. The Trial Chamber spoke of 'a precise logic to destroy the most representative figures of the Muslim community in Brcko to the point of threatening the survival of that community'.[203] In *Sikirica*, they were alleged to be community leaders.[204] The *Krstić* judgment explains:

> Granted, only the men of military age were systematically massacred, but it is significant that these massacres occurred at a time when the forcible transfer of the rest of the Bosnian Muslim population was well under way. The Bosnian Serb forces could not have failed to know, by the time they decided to kill all the men, that this selective destruction of the group would have a lasting impact upon the entire group. Their death precluded any effective attempt by the Bosnian Muslims to recapture the territory. Furthermore, the Bosnian Serb forces had to be aware of the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society, an impact the Chamber has previously described in detail. The Bosnian Serb forces knew, by the time they decided to kill all of the military aged men, that the combination of those killings with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica.[205]

The 'significant part' approach inevitably leads to speculation about what the killing of one or another strata in a community will do to its survival. Perhaps killing the 'leaders' will do the trick. But somebody bent upon destroying a group might more logically focus on the children, or the women, as they ensure the group's survival. And this results in value judgments about how important one or another group may be to the survival of the community.

It seems important not to confuse the concept of destruction of a 'substantial part' and that of a 'significant part'. The recent authorities that develop the 'significant part' interpretation use the phenomenon of selective killing of certain segments of a group as evidence of intent to destroy the group as a whole, assuming it is predicated on a calculation that destruction of the 'significant' members of the group will irrevocably compromise the existence of what remains. The same reasoning does not apply to destruction of a 'substantial part', because it accepts

[203] *Prosecutor* v. *Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 93.
[204] *Prosecutor* v. *Sikirica et al.* (Case No. IT-95-8-I), Judgment on Defence Motions to Acquit, 3 September 2001, para. 80.
[205] *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 595.

the possibility that the perpetrators may only intend to destroy a part of the group. Of course, there is no reason why destruction of the leadership, that is, of a 'significant' part, could not provide proof of intent to destroy a 'substantial' part of a particular group. But, as the International Court of Justice put it, 'the qualitative approach cannot stand alone'.[206]

Finally, some interpretations of 'in whole or in part' focus on the groups in a geographic sense. Thus, destroying all members of a group within a continent, or a country, or an administrative region or even a town, might satisfy the 'in part' requirement of article II. The Turkish government targeted Armenians within its borders, not those of the diaspora. The intentions of the Nazis may only have been to rid Europe of Jews; they were probably not ambitious enough, even in their heyday, to imagine this possibility on a world scale. Indications they were prepared to accept the departure of Jews from Europe for Palestine, even in the later stages of the war, could support such a claim. Similarly, in 1994 the Rwandan extremists do not appear to have given serious consideration to eliminating Tutsi populations beyond the country's borders. In all three 'classic' cases, then, an argument can be made that the intent was not to destroy the group as a whole, but rather a geographically delimited part of the group. Surely, it is cases like these that are contemplated by the phrase 'in whole or in part' found in article II of the Convention.

But, if this approach seems plausible when applied to a single country, can it also work with respect to much smaller units? A Trial Chamber of the Yugoslavia Tribunal has noted that '[i]n view of the particular intent requirement, which is the essence of the crime of genocide, the relative proportionate scale of the actual or attempted physical destruction of a group, or a significant section thereof, should be considered in relation to the factual opportunity of the accused to destroy a group in a specific geographic area within the sphere of his control, and not in relation to the entire population of the group in a wider geographic sense'.[207] In *Jelisić*, another Trial Chamber of the same Tribunal agreed that genocide could be committed in a 'limited geographic zone'.[208] And, in *Krstić*, the Trial Chamber held that 'the physical destruction may target only a part

[206] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 200.

[207] *Prosecutor* v. *Karadžić and Mladić* (Case Nos. IT-95-18-R61, IT-95-5-R61), Transcript of Hearing of 27 June 1996, pp. 15–16.

[208] *Prosecutor* v. *Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 83.

of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue'.[209] The International Court of Justice said that 'it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area'.[210] Recent judgments of the Federal Constitutional Court of Germany and the Bavarian Appeals Chamber also confirm this view.[211] Nehemiah Robinson wrote that the real point of the term 'in part' is to encompass genocide where it is directed against a part of a country, or a single town.[212]

A 1982 resolution of the United Nations General Assembly declared the massacre of a few hundred victims in the Palestinian refugee camps of Sabra and Shatila, located in the suburbs of Beirut, to be an 'act of genocide'.[213] The resolution was not unanimous, however, and a separate vote on the paragraph referring to genocide was approved by ninety-eight to nineteen, with twenty-three abstentions, on a recorded vote.[214] Doubtless, many States used the term 'genocide' to express their outrage at the atrocity in a manner calculated to torment a State whose population had itself suffered so much as a result of the same crime. A General Assembly resolution could, in theory, be of considerable assistance in construing the scope of the words 'in whole or in part', as a form of authentic interpretation or merely an indication of *opinio juris* of States. Yet the circumstances surrounding adoption of the Sabra and Shatila resolution, and the lack of unanimity, argue against drawing any meaningful conclusions.[215]

[209] *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 590. Also: *Prosecutor* v. *Sikirica et al.* (Case No. IT-95-8-I), Judgment on Defence Motions to Acquit, 3 September 2001, para. 68.

[210] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 199.

[211] *Nikolai Jorgić*, Bundesverfassungsgericht [Federal Constitutional Court], Fourth Chamber, Second Senate, 12 December 2000, 2 BvR 1290/99, para. 23; *Novislav Djajic*, Bayerisches Oberstes Landesgericht, 23 May 1997, 3 St 20/96, excerpted in 1998 *Neue Juristische Wochenschrift*, p. 392.

[212] Nehemiah Robinson, *Genocide Convention*, p. 63.

[213] GA Res. 37/123 D. See chapter 10, pp. 540–2. [214] UN Doc. A/37/PV.108, para. 151.

[215] See: *Prosecutor* v. *Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 83. Also: Antonio Cassese, *Violence and Law in the Modern Age*, Princeton, NJ: Princeton University Press, 1988, pp. 82–4; Antonio Cassese, 'La Communauté internationale et le génocide', in *Le droit international au service de la paix, de la justice et du développement:*

Groups

The groups contemplated by the Convention are examined in detail in chapter 3, and it is unnecessary to review those comments here. Article II of the Genocide Convention specifies that the accused must intend to destroy one of the enumerated groups as such. Therefore, intent to destroy the group as well as knowledge of its existence are certainly elements of the specific intent that must be established by the prosecution.

Mens rea of the punishable acts

The five paragraphs that follow the chapeau of article II list the punishable acts of genocide. These punishable acts have their own specific mental elements.

Killing

Paragraph (a) obviously addresses homicide, but the word 'killing' gives it an additional mental element.[216] During drafting of the Convention in the Sixth Committee, Gerald Fitzmaurice of the United Kingdom explained that 'killing' had a much wider meaning than 'murder'. 'If, for example, a Government destroyed a group, that might not be "murder" according to some national laws, but it would be "killing"', he maintained.[217] The United States said the word was used because the idea of intent was sufficiently clear in the first part of the provision, and 'it had never been a question of defining unpremeditated killing as an act of genocide'.[218] There was also some consideration of the French term, *meurtre*, which translates into English as either 'killing' or 'murder'. France said that killing was an act of manslaughter; if committed without

Mélanges Michel Virally, Paris: Pedone, 1991, pp. 183–94, pp. 191–192. Four of six members of an international commission, chaired by Sean MacBride and established to investigate the massacre, concluded that the 'deliberate destruction of the national and cultural rights and identity of the Palestinian people amount[ed] to genocide': cited in Linda A. Malone, 'Sharon v. Time: The Criminal Responsibility Under International Law for Civilian Massacres', (1986) 3 *Palestine Yearbook of International Law*, p. 41 at p. 70, n. 169. Also: W. Thomas Mallison and Sally V. Mallison, *The Palestine Problem in International Law and World Order*, London: Longman, 1986, pp. 387–440.

[216] *Prosecutor* v. *Kayishema et al.*, note 13 above, paras. 103–4.

[217] UN Doc. A/C.6/SR.81 (Fitzmaurice, United Kingdom).

[218] *Ibid.* (Maktos, United States).

premeditation, it was an act of homicide; with premeditation, it became an act of murder. 'In view of the very precise legal meaning of the words "homicide" and "murder", it seemed that the French word *meurtre* was the term closest in meaning to the English word "killing"', explained the French delegate.[219] But Uruguay would only accept the English version,[220] and Australia could not agree that *meurtre* and 'killing' were synonyms.[221]

According to Nehemiah Robinson: 'The act of "killing" (subparagraph (a)) is broader than "murder"; and it was selected to correspond to the French word "*meurtre*", which implies more than "*assassinat*"; otherwise it is hardly open to various interpretations.'[222] This analysis was endorsed by the International Law Commission.[223] *Assassinat* in French law is equated with premeditated murder in English law, whereas the broader term *meurtre* corresponds to intentional but not necessarily premeditated murder. Yet the above review of the *travaux préparatoires* shows it is hardly accurate to suggest the term was chosen to correspond to the French word *meurtre*. Some delegates expressly rejected any attempt to introduce comparisons with the French language into the debate. Nor was there any discussion whatsoever in the Sixth Committee comparing the French terms *meurtre* and *assassinat*. Besides, 'murder' in English generally serves as an equivalent for either of the French terms. English-language legal instruments use a qualifying adjective such as 'intentional' or 'premeditated', or else refer to degrees of murder, in order to make the distinction that the French language effects with a single word.

In *Akayesu*, the Rwanda Tribunal said the English term 'killing' was 'too general', and that the 'more precise' French term *meurtre* should be applied. This reasoning was supported with reference to the Rwandan Penal Code, as well as the canon of interpretation by which the accused should benefit from the more favourable version.[224] But, in *Kayishema and Ruzindana*, a differently constituted Trial Chamber of the same tribunal said there was 'virtually no difference between the term

[219] *Ibid.* (Spanien, France). [220] *Ibid.* (Manini y Ríos, Uruguay).
[221] *Ibid.* (Dignam, Australia). [222] Robinson, *Genocide Convention*, p. 63.
[223] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 26 above, n. 122.
[224] *Prosecutor* v. *Akayesu*, note 24 above, paras. 492–3. Also *Prosecutor* v. *Rutaganda* (Case No. ICTR-96-3-T), Judgment and Sentence, 6 December 1999; *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment and Sentence, 27 January 2000, para. 155; *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, para. 57.

"killing" in the English version and "*meurtre*" in the French version'.[225] This view was upheld on appeal, the Appeals Chamber noting 'that if the word "virtually" is interpreted in a manner that suggests a difference, though minimal, between the two terms, it would construe them both as referring to intentional but not necessarily premeditated murder, this being, in its view, the meaning to be assigned to the word "*meurtre*".'[226] It is now well established that killing as an act of genocide must be intentional but need not be premeditated.[227] It consists of 'homicide committed with intent to cause death'.[228]

Trial Chambers of the International Criminal Tribunal for the former Yugoslavia have taken the view that the elements of 'killing' as an act of genocide are identical to those of 'wilful killing', which is set out in the grave breach provision of the Statute.[229]

The Elements of Crimes of the International Criminal Court appear to adopt a broader view of 'killing' that would enable it to cover even negligent homicide. A footnote to the Elements of 'killing' states: 'The term "killed" is interchangeable with the term "caused death".'[230] One of the problems with interpreting the act of genocide of 'killing' is that the corresponding acts in the Rome Statute under the headings of war crimes and crimes against humanity refer respectively to 'wilful killing' and 'murder'. It does not seem coherent that, in the case of war crimes and crimes against humanity, homicide could be defined in such a

[225] *Prosecutor* v. *Kayishema et al.* (Case No. ICTR-95-1-T), Judgment and Sentence, 21 May 1999, para. 104.

[226] *Prosecutor* v. *Kayishema and Ruzindana* (Case No. ICTR-95-1-A), Judgment (Reasons), 1 June 2001, para. 151.

[227] *Prosecutor* v. *Semanza* (Case No. ICTR-97-20-T), Judgment and Sentence, 15 May 2003, para. 319; *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, paras. 55, 57 and 58; *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment and Sentence, 27 January 2000, para. 155; *Prosecutor* v. *Rutaganda* (Case No. ICTR-96-3-T), Judgment and Sentence, 6 December 1999, paras. 49 and 50; *Prosecutor* v. *Kayishema et al.* (Case No. ICTR-95-1-T), Judgment and Sentence, 21 May 1999, para. 103; *Prosecutor* v. *Kayishema et al.* (Case No. ICTR-95-1-A) Judgment (Reasons), 1 June 2001, para. 151; *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 501; *Prosecutor* v. *Simba* (Case No. ICTR-2001-76-T), Judgment and Sentence, 13 December 2005, para. 414; *Prosecutor* v. *Stakić* (Case No. IT-97-24-T), Judgment, 31 July 2003, para. 515.

[228] *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment and Sentence, 27 January 2000, para. 155; *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, paras. 57–8; *Prosecutor* v. *Seromba* (Case No. ICTR-2001-66-I), Judgment, 13 December 2006, para. 317.

[229] *Prosecutor* v. *Brdanin* (Case No. IT-99-36-T), Judgment, 1 September 2004, para. 739.

[230] Elements of Crimes, ICC-ASP/1/3, p. 113.

fundamentally different manner. The explanation for the different terminology is historical. The term 'wilful killing', which is used in the modern definitions of war crimes, is derived from the grave breach provisions of the Geneva Conventions of 1949,[231] while the term 'murder' is used in both the war crimes and crimes against humanity definitions of the Charter of the International Military Tribunal.[232] The Elements of Crimes attempt to reconcile these differences in terminology by describing 'murder' and 'wilful killing' as 'killing', and adding the same footnote as with the Elements of genocide, namely, that this means 'causing death'.[233] The Elements reduce all forms of homicide to the lowest level, in terms of mental element, but of course also require that death be caused by a perpetrator with the very much more demanding mental element related to the context of the international crime in question.

Case law has established that the victim must in fact be a member of the persecuted group, but whether this must be known to the offender has not yet been addressed by the courts.[234] It would seem perverse to acquit a killer with the specific intent to commit genocide simply because of a failure by the prosecution to establish knowledge of the victim's racial, ethnic, national or religious identity.

Causing serious bodily or mental harm

The mental element of paragraph (b) does not appear to pose any particular difficulties. The offender must have the specific intent to cause serious bodily or mental harm to a member of the group.

Deliberately inflicting conditions of life calculated to destroy the group

Besides the general intent to inflict conditions of life, paragraph (c) includes the specific intent that these be deliberately calculated to destroy the group. This additional mental element originated in a Belgian

[231] E.g. Geneva Convention Relative to the Protection of Civilians, (1950) 75 UNTS 135, art. 147.
[232] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), (1951) 82 UNTS 279, art. VI.
[233] Elements of Crimes, ICC-ASP/1/3, pp. 116 and 125.
[234] *Ibid.*, para. 710.

proposal in the Sixth Committee: 'inflicting enforced measures or conditions of life, aimed at causing death'.[235] It was withdrawn after the Soviets agreed to substitute 'as are calculated to bring about . . .' for 'as is aimed at . . .' in their text.[236] Another alternative, 'likely to cause death, disease or a weakening of such members generally',[237] was criticized for being too vague and was rejected.[238] A slightly modified version of the Soviet amendment met with consensus: 'The deliberate infliction of conditions of life for such groups as are calculated to bring about their physical destruction in whole or in part.'[239]

In fact, the word 'deliberately' is a pleonasm, because the chapeau of article II already addresses the question of intent.[240] The acts defined in paragraphs (a) and (b) of article II must also be 'deliberate', although the word is not used. A person who imposes such conditions of life on a group with the intent to destroy obviously does so 'deliberately'. The French version of article II(c) confirms this interpretation, using *intentionnelle* in place of 'deliberately'.[241] According to Nehemiah Robinson, '"deliberately" was included there to denote a precise intention of the destruction, i.e., the premeditation related to the creation of certain conditions of life'.[242]

The word 'calculated' definitely adds an important concept to the offence, implying not only intent and even premeditation but also indicating that the imposition of conditions must be the principal mechanism used to destroy the group, rather than some form of ill-treatment that accompanies or is incidental to the crime.[243] This goes beyond the requirements of paragraphs (a) and (b), where proof of killing or causing serious harm, even on a relatively isolated level, is sufficient to establish guilt given the intent to destroy the group, in whole or in part.

[235] UN Doc. A/C.6/217. As was noted by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor* v. *Stakić* (Case No. IT-97-24-T), Judgment, 31 July 2003, para. 518.

[236] UN Doc. A/C.6/SR.82 (Kaeckenbeeck, Belgium).

[237] *Ibid.* (Sunduram, India).

[238] UN Doc. A/C.6/SR.81 (twenty-one in favour, six against, with nine abstentions).

[239] UN Doc. A/C.6/223 and Corr.1. UN Doc. A/C.6/SR.82 (twenty-three in favour, seven against, with seven abstentions).

[240] Verhoeven, 'Le crime de génocide', p. 15.

[241] 'Soumission intentionnelle du groupe à des conditions d'existence devant entrainer sa destruction physique totale ou partielle.'

[242] Robinson, *Genocide Convention*, pp. 60 and 63–4. Cited with approval by the International Law Commission in 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 26 above, p. 92, n. 123.

[243] 'Discussion Paper Proposed by the Co-ordinator, Article 6: The Crime of Genocide', UN Doc. PCNICC/1999/WGEC/RT.1.

Several indictments of the International Criminal Tribunal for the former Yugoslavia have invoked article II(c) of the Convention with respect to conditions in detention camps, where inmates were deprived of proper food and medical care and generally subjected to conditions 'calculated to bring about the physical destruction of the detainees, with the intent to destroy part of the Bosnian Muslim and Bosnian Croat groups, as such'.[244] None of these has resulted in a conviction. From the beginning of the work of the Tribunal, in fact, prosecutorial policy with respect to charges of genocide in the detention camps was characterized by ambiguity. Several indictments concerning the camps did not charge genocide.[245] In another case, the Prosecutor withdrew a charge of genocide as part of a plea agreement.[246] In *Stakić*, the Trial Chamber said 'the *dolus specialis* has not been proved in relation to "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." The Trial Chamber recalls in this context that deporting a group or part of a group is insufficient if it is not accompanied by methods seeking the physical destruction of the group.'[247] These conclusions were upheld by the Appeals Chamber.[248] In *Brdanin*, the Trial Chamber listed many examples where it was satisfied beyond reasonable doubt that conditions calculated to bring about physical destruction were inflicted upon the Bosnian Muslim and Bosnian Croat detainees and, further, that they were inflicted deliberately.[249] But the Trial Chamber said that such acts were not committed with the specific intent to commit

[244] *Prosecutor* v. *Kovačević et al.* (Case No. IT-97-24-I), Indictment, 13 March 1997, paras. 12–16; *Prosecutor* v. *Kovačević et al.* (Case No. IT-97-24-I), Amended Indictment, 23 June 1998, paras. 28 and 32; *Prosecutor* v. *Stakić* (Case No. IT-97-24-PT), Fourth Amended Indictment, 10 April 2002, para. 41; *Prosecutor* v. *Karadžić et al.* (Case No. IT-95-5-I), Indictment, 25 July 1995, paras. 18 and 22; *Prosecutor* v. *Meakić et al.* (Case No. IT-95-4), Indictment, 13 February 1995, para. 18.3; *Prosecutor* v. *Sikirica et al.* (Case No. IT-95-8-I), Indictment, 21 July 1995, para. 12.3; *Prosecutor* v. *Brdanin* (Case No. IT-99-36-I), Sixth Amended Indictment, 9 December 2003, paras. 37 and 43; *Prosecutor* v. *Krajisnek and Plavsic* (Case No. IT-00-39 and 40-PT), Amended Consolidated Indictment, 7 March 2002; para. 17.

[245] *Prosecutor* v. *Tadić* (Case No. IT-94-1-I), Indictment (Amended), 14 December 1995; *Prosecutor* v. *Simić et al.* (Case No. IT-95-9-PT), Amended Indictment, 24 April 2001; *Prosecutor* v. *Kvočka et al.* (Case No. IT-98-30-PT), Amended Indictment, 31 May 1999; *Prosecutor* v. *Krnojelak* (Case No. IT-97-25-I), Third Amended Indictment, 25 June 2001.

[246] *Prosecutor* v. *Plavšić* (Case No. IT-00-39 and 40/1), Sentencing Judgment, 27 February 2003.

[247] *Prosecutor* v. *Stakić* (Case No. IT-97-24-T), Judgment, 31 July 2003, para. 557.

[248] *Prosecutor* v. *Stakić* (Case No. IT-97-24-A), Judgment, 22 March 2006, paras. 46–8.

[249] *Prosecutor* v. *Brdanin* (Case No. IT-99-36-T), Judgment, 1 September 2004, paras. 910–62.

genocide.[250] The Prosecutor did not appeal these findings. Similar charges were dismissed in two other cases for failure to establish the mental element.[251]

The findings of the Trial Chambers of the International Criminal Tribunal for the former Yugoslavia with respect to the camp cases were endorsed by the International Court of Justice:

> [T]he Court considers that there is convincing and persuasive evidence that terrible conditions were inflicted upon detainees of the camps. However, the evidence presented has not enabled the Court to find that those acts were accompanied by specific intent (*dolus specialis*) to destroy the protected group, in whole or in part. In this regard, the Court observes that, in none of the ICTY cases concerning camps cited above, has the Tribunal found that the accused acted with such specific intent (*dolus specialis*).[252]

Before the International Court of Justice, Bosnia and Herzegovina also argued that various measures of 'ethnic cleansing' constituted genocide in that they imposed measures calculated to destroy the group. Amongst the allegations were a policy by the Bosnian Serb forces to encircle civilians and to subsequently shell those areas, cutting off supplies in order to starve the population. It also charged that Bosnian Serb forces attempted to eradicate all traces of the culture of the protected group through the destruction of historical, religious and cultural property.[253] The Court was generally convinced that the facts of these atrocities had been established, but, like the Trial Chambers of the International Criminal Tribunal for the former Yugoslavia, that the mental element was absent.[254]

Imposing measures intended to prevent births

Examining the additional mental element of paragraph (d) leads to a tautology, because the act itself is defined with respect to the additional intent. Any measures imposed must be 'intended' to prevent births. Concerned by the provision, Ecuador's comments on the International

[250] *Ibid.*, para. 989.

[251] *Prosecutor* v. *Sikirica et al.* (Case No. IT-95-8-T), Judgment on Defence Motions to Acquit, 3 September 2001, para. 97; *Prosecutor* v. *Krajisnik* (Case No. IT-00-39-T), Judgment, 27 September 2006, para. 1091.

[252] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 354.

[253] *Ibid.*, paras. 320–44. [254] *Ibid.*, paras. 328, 334 and 344.

Law Commission draft Code recommended a clarification: 'As currently drafted, it is vague and could create misunderstanding and confusion between purely social birth control programmes and crimes of genocide.'[255] The solution to this problem lies in assessment of the mental element. 'Purely social birth control programmes' are not intended to destroy a group as such.

Forcibly transferring children

The mental element of paragraph (e) does not appear to pose any particular difficulties. The offender must have the specific intent to transfer forcibly children of the group to another group. The offender must have knowledge of the fact that the children belong to one group, and that they are being transferred to another group. Thus, an individual who perpetrated the transfer of children from a victim group would have to know that the children were in fact members of the group. Similarly, he or she would have to know that what the children were being transferred to was in fact another group. Paragraph (e) is somewhat anomalous, because it contemplates what is in reality a form of cultural genocide, despite the clear decision of the drafters to exclude cultural genocide from the scope of the Convention. As a result, in prosecution of the perpetrator of the crime defined by paragraph (e), the prosecution would be required to prove the intent 'to destroy' the group in a cultural sense rather than in a physical or biological sense.

Motive

There is no explicit reference to motive in article II of the Genocide Convention, and the casual reader will be excused for failing to guess that the words 'as such' are meant to express the concept. Here, the *travaux préparatoires* prove indispensable. It should be noted at the outset that intent and motive are not interchangeable notions. Several individuals may intend to commit the same crime, but for different motives.

Domestic criminal law systems rarely require proof of motive, in addition to proof of intent, as an element of the offence. Under ordinary

[255] 'Comments and Observations of Governments on the Draft Code of Crimes Against the Peace and Security of Mankind Adopted on First Reading by the International Law Commission at its Forty-Third Session', UN Doc. A/CN.4/448, p. 57.

circumstances, a motive requirement unnecessarily narrows the offence, and allows individuals who have intentionally committed the prohibited act to escape conviction. This is not to say that motive is irrelevant.

Evidence of motive or lack of it may always be germane to the outcome of a trial. If an accused can prove lack of motive, this will colour assessment of ostensibly inculpatory factors, especially if the evidence is indirect. Finally, motive will normally be taken into account in assessing the appropriate penalty once the offender's guilt has been determined.[256] A crime driven by passion will not be punished as severely as one motivated by avarice or pure sadism.

The significance of motive in defining international crimes of race hatred appears in such early attempts at the development of international criminal norms as the Eighth International Conference of American States. The Final Act of the Conference condemned '[p]ersecution for racial or religious motives'.[257] The Charter of the Nuremberg Tribunal's definition of crimes against humanity also recognized the relevance of motive.[258] There is a somewhat ambiguous reference in General Assembly Resolution 96(I) to genocide being 'committed on religious, racial, political or any other grounds'.[259]

The Secretariat draft of the Convention eschewed reference to motive, referring to 'a criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying it in whole or

[256] *Prosecutor* v. *Delalić et al.*, note 52 above, para. 1235.

[257] J. B. Scott, ed., *The International Conferences of the American States*, Washington: Carnegie Endowment for International Peace, 1940, p. 260.

[258] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), (1951) 82 UNTS 279: 'namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions *on political, racial or religious grounds* in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the court where perpetrated' (emphasis added). See also Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Humanity, 20 December 1945, *Official Gazette of the Control Council for Germany*, No. 3, Berlin, 31 January 1946, art. II.1(c) ('murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds); 'Statute of the International Tribunal for the Former Yugoslavia', UN Doc. S/RES/827, annex, art. 5 ('persecutions on political, racial and religious grounds') and 'Statute of the International Tribunal for Rwanda', UN Doc. S/RES/955, annex, art. 3 ('when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds').

[259] GA Res. 96(I).

in part, or of preventing its preservation or development'.[260] Conceivably, a variety of 'purposes' might be invoked to explain the destruction of a group, of which racist grounds would be only one. Mention of 'purpose' addresses the issue of intent, not motive; it explains what is being attempted without asking why. The experts who considered the Secretariat draft had no particular remarks on the subject of motive.[261]

The draft's omission was explained to the Ad Hoc Committee by Henri Giraud of the Secretariat, who said that it should be unnecessary to prove motive: 'the minute the intention arose to destroy a human group, genocide was committed'.[262] The chair, John Maktos, seemed to grasp this, observing that: 'if the reasons were mentioned, it might be claimed that a crime was committed for motives other than those specified'.[263] But there was support for the idea from Lebanon, which considered that 'the criterion was to be found in the motive provoking such destruction. Included in the crime of genocide, therefore, would be all acts tending towards the destruction of a group on the grounds of hatred of something different or alien, be it race, religion, language, or political conception, and acts inspired by fanaticism in whatever form'.[264] Lebanon proposed the following language: 'namely, that of the destruction of a group, as such'.[265] The Soviet Union[266] and Poland[267] also insisted that motive be included. Reacting to these views, China agreed to change its draft text to read 'particularly on grounds of national or racial origin or religious belief'. But this was not enough for the Soviet Union, as it implied that genocide might consist of criminal acts committed for reasons other than national, racial or religious persecution.[268] A Lebanese amendment to delete 'particularly' from the

[260] UN Doc. E/447, art. I § II.

[261] *Ibid.* See 'Comments by Governments on the Draft Convention Prepared by the Secretariat, Communications from Non-Governmental Organizations', UN Doc. E/623: 'Genocide means any of the following criminal acts directed against a racial, national, religious, or political group of human beings, for the purpose of totally or partially destroying such group, or of preventing its preservation or development.'

[262] UN Doc. E/AC.25/SR.11, p. 3. Yet a Secretariat document prepared for the Ad Hoc Committee (UN Doc. E/AC.25/3) observed: 'The destruction of the human group is that actual aim in view. In the case of foreign or civil war, one side may inflict extremely heavy losses on the other but its purpose is to impose its will on the other side and not to destroy it.'

[263] *Ibid.*, p. 1. [264] UN Doc. E/AC.25/SR.2, p. 4.

[265] UN Doc. E/AC.25/SR.10, p. 13. The term 'as such' was also picked up in a United States proposal: UN Doc. E/AC.25/SR.12, p. 2.

[266] UN Doc. E/AC.25/SR.11, p. 1. [267] UN Doc. E/AC.25/SR.10, p. 11.

[268] UN Doc. E/AC.25/SR.12, p. 9.

Chinese draft was adopted by four to three,[269] and the phrase as a whole ('grounds of national or racial origin or religious belief') by six votes.[270]

Reference to 'political opinion of its members' was added in a subsequent amendment.[271] The Committee's report discussed the issue of motive as follows: 'In the opinion of some members of the Committee it was in the first place unnecessary to lay down the motives for genocide since it was indicated in the text that the intent to destroy the group must be present and in the second place, motives should not be mentioned since, in their view the destruction of a human group on any grounds should be forbidden. They accepted the mention of motives, but only by way of illustration.'[272]

In the Sixth Committee, the United Kingdom fought to delete reference to motive.[273] According to Gerald Fitzmaurice:

> [T]he concept of intent had already been expressed at the beginning of the article. Once the intent to destroy a group existed, that was genocide, whatever reasons the perpetrators of the crime might allege. The phrase was not merely useless; it was dangerous, for its limitative nature would enable those who committed a crime of genocide to claim that they had not committed that crime 'on grounds of' one of the motives listed in the article.[274]

Fitzmaurice maintained that: 'Motive was not an essential factor in the penal law of all countries. Motive did not enter into the establishment of the nature of the crime; its only importance was in estimating the punishment.'[275] Venezuela, too, argued that reference to motive be deleted, explaining that, if '[t]he aim of the Convention was to prevent the destruction of those groups, the motive was of no importance'.[276] Norway concurred: 'it was the fact of destruction which was vital, whereas motives were difficult to determine'.[277] Panama also argued that: 'It was unnecessary to add the factor of motive in the convention, since no provision was made for it in any penal code.'[278] Brazil said it was enough to specify the *dolus specialis*, noting that motive was only relevant in the penalty phase.[279] France suggested appending the word

[269] *Ibid.*, p. 12. [270] *Ibid.*
[271] UN Doc. E/AC.25/SR.24, p. 4 (five in favour, two against).
[272] UN Doc. E/794, p. 5. [273] UN Doc. A/C.6/222.
[274] UN Doc. A/C.6/SR.75 (Fitzmaurice, United Kingdom). [275] *Ibid.*
[276] UN Doc. A/C.6/SR.69 (Pérez-Perozo, Venezuela). [277] *Ibid.* (Wikborg, Norway).
[278] UN Doc. A/C.6/SR.75 (Alemán, Panama).
[279] UN Doc. A/C.6/SR.76 (Amado, Brazil).

'particularly' to the enumeration in order to allay British fears.[280] The Soviet Union protested that the United Kingdom proposal 'lacked all foundation in law or history'. Platon Morozov stated that 'a crime against a human group became a crime of genocide when that group was destroyed for national, racial, or religious motives'.[281] Egypt likewise opposed efforts to remove reference to motive. It considered this an essential component of the offence, as 'it was the motives which characterized the crime'.[282] Iran said that, if a national group was destroyed for motives of profit, this should not be an international crime.[283] New Zealand noted that 'modern war was total', and that bombing which might destroy an entire group should nevertheless be distinguished from genocide.[284] Yugoslavia said it was important to distinguish between common law crimes and crimes of genocide; for that reason, '[i]ntent and motive should, therefore, be stressed'.[285] The Philippines urged that, if the Sixth Committee wished the concept of genocide to retain its restrictive meaning, the reference to motive should remain.[286] Panama called it 'a grave mistake to omit the statement of motives, as the nature of the crime which it was intended to prevent and to punish would thus be obscured'.[287] Many delegates conceded that, under common law, motive is generally irrelevant to guilt, but they argued that genocide was a special case.

In a search for consensus, Venezuela, which favoured the United Kingdom proposal to delete the reference to motive, proposed that the words 'as such' should be introduced.[288] Venezuela said its amendment 'should meet the views of those who wished to retain a statement of motives; indeed, the motives were implicitly included in the words "as such"'.[289] Fearing that the inclusion of a statement of motives 'might give rise to ambiguity', the United States supported Venezuela's proposal.[290] Morozov said that the willingness of States opposed to an enumeration of motive to compromise by accepting 'as such' showed the cogency of his arguments: 'In the view of the Soviet Union, the

[280] UN Doc. A/C.6/SR.75 (Chaumont, France).
[281] *Ibid.* (Morozov, Soviet Union). See also the comments of Kural (Turkey) and Zourek (Czechoslovakia).
[282] UN Doc. A/C.6/SR.72 (Raafat, Egypt). See UN Doc. A/C.6/214.
[283] UN Doc. A/C.6/SR.75 (Abdoh, Iran). [284] *Ibid.* (Reid, New Zealand).
[285] *Ibid.* (Bartos, Yugoslavia). [286] *Ibid.* (Paredes, Philippines).
[287] *Ibid.* (Zourek, Czechoslovakia).
[288] UN Doc. A/C.6/SR.75 (Pérez-Perozo, Venezuela). See also UN Doc. A/C.6/231.
[289] UN Doc. A/C.6/SR.76 (Pérez-Perozo, Venezuela). [290] *Ibid.* (Gross, United States).

words "as such" in the Venezuelan amendment would mean that, in cases of genocide, the members of a group would be exterminated solely because they belonged to that group.'[291] Jean Spiropoulos said that: 'The adoption of the Venezuelan or the French amendment would mean, therefore, that it was decided to include the motives in the definition but not to enumerate them.'[292]

The chair began the voting with the United Kingdom's amendment, 'inasmuch as it proposed that the motives should be left out entirely, whereas the Venezuelan amendment retained those motives by implication'. He considered that the 'essential question' was whether the Committee wished to include in article II a statement of the motives for which genocide was committed.[293] The United Kingdom proposal was rejected by a large majority.[294] A few delegations later explained that they accepted the Venezuelan proposal as a compromise, and for this reason had not voted in favour of the British amendment, although they would have preferred deletion of motive.[295] However, there were not enough of them to make a difference in the vote, confirming that a majority of States did not want to exclude all reference to motive.

Then the Committee turned to the Venezuelan amendment, which replaced an enumeration of motives with the phrase 'as such'. France was initially unhappy with the compromise text, but withdrew an alternative proposal after receiving assurances from Venezuela, 'it being understood that the Venezuelan amendment reintroduced motive into the definition of genocide'.[296] Venezuela explained that its amendment:

> omitted the enumeration . . . but re-introduced the motives for the crime without, however, doing so in a limitative form which admitted of no motives other than those which were listed. The aim of the amendment was to give wider powers of discretion to the judges who would be called upon to deal with cases of genocide. The General Assembly had manifested its intention to suppress genocide as fully as possible. The adoption of the Venezuelan amendment would enable the judges to take into account other motives than those listed in the *ad hoc* Committee's draft.[297]

[291] *Ibid.* (Morozov, Soviet Union). [292] *Ibid.* (Spiropoulos, Greece).
[293] UN Doc. A/C.6/SR.75 (Alfaro (chair)).
[294] UN Doc. A/C.6/SR.76 (twenty-eight in favour, nine against, with six abstentions).
[295] *Ibid.* (Manini y Ríos, Uruguay); *ibid.* (Kaeckenbeeck, Belgium).
[296] UN Doc. A/C.6/SR.77 (Chaumont, France). The French proposal was to replace 'as such' with 'by reason of its nature'. Pérez-Perozo told the Committee that, in Spanish translation, both of these texts came out the same: UN Doc. A/C.6/SR.76 (Pérez-Perozo, Venezuela).
[297] UN Doc. A/C.6/SR.77 (Pérez-Perozo, Venezuela).

When the chair put the Venezuelan amendment to the vote, he noted that 'its interpretation would rest with each Government when ratifying and applying the convention'.[298] Because the Venezuelan amendment had the consequence of eliminating the enumeration of grounds for motive, the Soviets requested this point be put to a vote. The Soviet position favouring a more detailed motive provision was rejected.[299]

The debate continued about the meaning to be given to the Venezuelan amendment. The United States warned that: 'The judge who would have to apply the text would certainly tend to assume that the majority of the Committee had decided in favour of the interpretation given to the amendment by its author, since that interpretation had been known to the Committee before the amendment was voted upon.' As a result, the United States said the report should say that the Committee 'did not necessarily adopt the interpretation given by its author'.[300] The chair said that this had been his intention.[301] El Salvador advanced an interesting procedural explanation. For the Venezuelan amendment to be deemed to rule out all consideration of motive, such a modification of a decision already adopted should have been voted by a two-thirds majority, which was not the case. But if, on the contrary, it was construed as incorporating all motives, it should not have been voted upon before the Soviet amendment.[302] Therefore, the procedure bolstered Venezuela's interpretation of the amendment.

The next day, Manini y Ríos of Uruguay said there were three possible interpretations of the Venezuelan amendment:

> Some delegations had intended to vote for an express reference to motives in the definition of genocide; others had intended to omit motives while retaining intent; others again, among them the Uruguayan delegation, while recognizing that, under the terms of the amendment, genocide meant the destruction of a group perpetrated for any motives whatsoever, had wanted the emphasis to be transferred to the special intent to destroy a group, without enumerating the motives, as the concept of such motives was not sufficiently objective.

This was further complicated by the uncertainty regarding implications of the rejection of the United Kingdom amendment, he continued. 'It certainly could not be maintained, as the representative of the Soviet

[298] *Ibid.* The amendment was adopted by twenty-seven in favour, twenty-two against, with two abstentions.
[299] *Ibid.* (thirty-four in favour, eleven against, with six abstentions).
[300] *Ibid.* (Gross, United States).
[301] *Ibid.* (Alfaro (chair)).
[302] *Ibid.* (Guillen, El Salvador).

Union had suggested, that in rejecting that amendment the Committee had intended to retain the motives in the definition of the crime', said Manini y Ríos.[303] Uruguay proposed, and the chair agreed, that a working group be set up to endeavour to clarify the consequences of the vote on the Venezuelan proposal. However, the Committee rejected the suggestion.[304]

Did the Committee agree to disagree? In his study of the Convention, Nehemiah Robinson considered the debate about 'as such' to be indecisive, leaving the issue for interpretation.[305] Another student of the Convention, Matthew Lippmann, appeared prepared to admit that the *travaux préparatoires* connote a motive requirement.[306] Special Rapporteur Nicodème Ruhashyankiko acknowledged the seriousness of the controversy, but took no position on the subject himself.[307]

Referring to these debates during the adoption of the Convention, the Appeals Chamber of the International Criminal Tribunal for Rwanda wrote:

> The words 'as such', however, constitute an important element of genocide, the 'crime of crimes'. It was deliberately included by the authors of the Genocide Convention in order to reconcile the two diverging approaches in favour of and against including a motivational component as an additional element of the crime. The term 'as such' has the *effet utile* of drawing a clear distinction between mass murder and crimes in which the perpetrator targets a specific group because of its nationality, race, ethnicity or religion. In other words, the term 'as such' clarifies the specific intent requirement. It does not prohibit a conviction for genocide in a case in which the perpetrator was also driven by other motivations that are legally irrelevant in this context. Thus the Trial Chamber was correct in interpreting 'as such' to mean that the proscribed acts were committed against the victims *because of* their membership in the protected group, but not *solely* because of such membership.[308]

[303] UN Doc. A/C.6/SR.78 (Manini y Ríos, Uruguay).

[304] UN Doc. A/C.6/SR.78 (thirty in favour, fifteen against, with three abstentions). Spiropoulos also proposed that the Committee itself should vote on the interpretations of the Venezuelan amendment, but no action was taken on his suggestion: UN Doc. A/C.6/SR.78 (Spiropoulos, Greece).

[305] Robinson, *Genocide Convention*, pp. 60–1.

[306] Lippman, '1948 Convention', pp. 22–4.

[307] 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur', note 85 above, paras. 101–6.

[308] *Niyitegeka* v. *Prosecutor* (Case No. ICTR-96-14-A), Judgment, 9 July 2004, para. 49. The reference in the citation to the first edition of this work, and to the German translation, has been omitted. See also: *Prosecutor* v. *Ntakirutimana* (Case No. ICTR-96-10-A and ICTR-96-17-A), Judgment, 13 December 2004, paras. 304 and 363.

Nevertheless, much of the academic writing rejects the relevance of motive, although the reasoning is rarely very compelling.[309] Little in the way of justification is offered to support this view, the main rationale being essentially pragmatic, namely, that it can only further complicate prosecutions of genocide.[310] The Commission of Experts on war crimes in the former Yugoslavia inferred that motive was not an element of genocide because it is not a constituent element of crimes in most countries. According to the Commission, the term 'as such' appears in the Convention in order to indicate that 'the crimes against a number of individuals must be directed at them in their collectivity or at them in their collective character or capacity'.[311] On the other hand, the 'Annex on Definitional Elements' of the Rome Statute prepared by the United States suggested an element of motive, specifying that genocide is committed 'against a person in a national, ethnical, racial, or religious group, *because* of that person's membership in that group'.[312] A 1996 judgment of the English Divisional Court revealed divided views on whether or not the words 'as such' denote a motive element.[313] The Netherlands, in its oral argument before the International Court of Justice in the *Legality of Use of Force* case, noted that the words 'as such' referred to the concept of 'discriminatory purpose', a concept analogous to motive.[314] The International Court of Justice confined itself to a rather banal observation: 'The words "as such" emphasize the intent to destroy the protected group.'[315]

In the appeal of his conviction by the International Criminal Tribunal for Rwanda, Obed Ruzindana argued that evidence that his motives were purely personal had not been taken into account. Some witnesses at trial had suggested that he participated in the genocidal bloodshed in order to eliminate business competitors. The Appeals Chamber

[309] Ratner and Abrams, *Accountability*, p. 36; Drost, *Genocide*, p. 84; David, *Principes de droit*, para. 4.137; and Bassiouni and Manikas, *International Criminal Tribunal*, p. 528.
[310] David, *Principes de droit*.
[311] 'Interim Report of the Commission of Experts', UN Doc. S/25274.
[312] UN Doc. A/CONF.183/C.1/L.10, p. 1 (emphasis added). The motive requirement was dropped, without explanation, in a subsequent iteration: 'Draft Elements of Crimes', UN Doc. PCNICC/1988/DP.4.
[313] *Hipperson et al.* v. *DPP*, (1998) 111 ILR 584 (England, Divisional Court, QBD), p. 587.
[314] *Legality of Use of Force (Yugoslavia* v. *Netherlands)*, Provisional Measures, Oral Argument of Counsel for the Netherlands, 11 May 1999, paras. 29 and 31.
[315] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 187.

dismissed the argument, noting that *mens rea* and motive should not be confused. In the case of genocide, the Appeals Chamber said that a personal motive could not exclude liability to the extent that the acts were committed with the intent to destroy a protected group.[316]

Defendants before the International Criminal Tribunal for Rwanda have argued that their participation within a genocidal attack was without enthusiasm, or that their tolerant views confirmed the absence of genocidal intent. While not irrelevant in terms of establishing the genocidal intent, a Trial Chamber concluded that 'even accepting his submissions as true ... at that moment, he acted with genocidal intent'.[317]

The International Law Commission's commentary on this point is profoundly inadequate, and completely neglects the issue of motive: 'The intention must be to destroy the group "as such", meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group. In this regard, the General Assembly distinguished between the crimes of genocide and homicide in describing genocide as the "denial of the right of existence of entire human groups" and homicide as the "denial of the right to live of individual human beings" in resolution 96(I).'[318] In fact, the debates within the International Law Commission reveal conflicting views on this issue.[319] The Australian Human Rights and Equal Opportunity Commission considered the relevance of motive with respect to charges that genocide had been committed in transferring indigenous children to families of European descent, in violation of article II(e) of the Convention. It was said in defence that the transfers had been committed in order to give children an education or job training. The Commission concluded that,

[316] *Prosecutor* v. *Kayishema and Ruzindana* (Case No. ICTR-95-1-A), Judgment, 1 June 2001, para. 161; *Prosecutor* v. *Simba* (Case No. ICTR-01-76-A), Judgment, 27 November 2007, para. 269; *Prosecutor* v. *Ntakirutimana* (Case No. ICTR-96-10-A and ICTR-96-17-A), Judgment, 13 December 2004, paras. 302–4; *Niyitegeka* v. *Prosecutor* (Case No. ICTR-96-14-A), Judgment, 9 July 2004, paras. 48–53; *Prosecutor* v. *Kvočka et al.* (IT-98-30/1-A), Judgment, 28 February 2005, para. 106; *Prosecutor* v. *Jelisić* (IT-95-10-A), Judgment, 5 July 2001, para. 49; *Prosecutor* v. *Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999, para. 269.

[317] *Prosecutor* v. *Simba* (Case No. ICTR-2001-76-T), Judgment and Sentence, 13 December 2005, paras. 417–18.

[318] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 26 above, p. 88.

[319] 'Report of the Commission to the General Assembly on the Work of its Forty-First Session', note 133 above, pp. 58–9, paras. 154–6.

even if motives were mixed, a fundamental element in the programme was the elimination of indigenous cultures, and that as a result the co-existence of other motives was no defence.[320]

As discussed elsewhere in this study, genocide is often recognized in the authorities as a particular form of crime against humanity.[321] Even those who view it as an autonomous category of infraction will concede its close relationship to crimes against humanity. There is some support for the view that crimes against humanity include an element of motive, at least with respect to the 'persecution' component which is the one most analogous to genocide.[322] In his 1986 report to the International Law Commission, rapporteur Doudou Thiam observed that it was 'motive' that distinguished a crime against humanity.[323] In *Tadić*, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia declared that, for an individual offender to participate in crimes against humanity, it must be shown that this is for more than 'purely personal reasons unrelated to the armed conflict', adding that 'while personal motives may be present they should not be the sole motivation'.[324] But this finding was overturned by the Appeals Chamber.[325]

The International Convention on the Suppression and Punishment of the Crime of Apartheid establishes responsibility for apartheid 'irrespective of the motive involved' and, like genocide, apartheid is a special form of crime against humanity.[326] In the International Law Commission, Juri G. Barsegov said: 'Whatever the reasons for its perpetration, whatever the open or secret motives for the acts or measures directed against the life of the protected group, if the members of the group as such were destroyed, the crime of genocide was being

[320] Australian Human Rights and Equal Opportunity Commission, 'Bringing Them Home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families', pp. 270–5.

[321] See the Introduction, pp. 12–15 above.

[322] Ratner and Abrams, *Accountability*, pp. 60–4. See also *Prosecutor* v. *Tadić*, note 19 above, paras. 650–2.

[323] 'Report of the Commission to the General Assembly on the Work of its Thirty-Eighth Session', *Yearbook . . . 1986*, Vol. II (Part 2), pp. 44–5, para. 86.

[324] *Prosecutor* v. *Tadić*, note 19 above, paras. 634 and 658. The International Criminal Tribunal for Rwanda made the same statement with respect to serious violations of common article 3 of the Geneva Conventions and Protocol Additional II: *Prosecutor* v. *Akayesu*, note 24 above, para. 635.

[325] *Prosecutor* v. *Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999, para. 270. See also David, *Principes de droit*, p. 659, para. 4.138. See also Verhoeven, 'Le crime de génocide', p. 19.

[326] (1976) 1015 UNTS 243, art. III.

committed.'[327] Barsegov claimed that, while crimes against humanity required a motive, genocide did not.[328] Nevertheless, the crime against humanity with which genocide has the most affinity is 'persecution'.[329] It is defined in the Rome Statute as '[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law',[330] unquestionably indicating a motive element. But, regardless of the words in the definition, in practice motive will remain extremely relevant to prosecutions. Where the defence can raise a doubt about the existence of a motive, it will have cast a large shadow of uncertainty as to the existence of genocidal intent.

Interpreters of article II of the Convention cannot simply ignore the words 'as such', which were inserted as a compromise to take account of views favouring recognition of a motive component. An effort should be made to address the concerns of both positions on the question, as they were expressed during the drafting of the Convention. For the purposes of analysis, it may be helpful here to distinguish between what might be called the collective motive and the individual or personal motive. Genocide is, by nature, a collective crime, committed with the cooperation of many participants. It is, moreover, an offence generally directed by the State. The organizers and planners must necessarily have a racist or discriminatory motive, that is, a genocidal motive, taken as a whole. Where this is lacking, the crime cannot be genocide.

Evidence of hateful motive will constitute an integral part of the proof of existence of a genocidal policy, and therefore of a genocidal intent. At the same time, individual participants may be motivated by a range of factors, including financial gain, jealousy and political ambition. During the drafting of the Convention, States like the United Kingdom urged caution with respect to motive because of evidentiary difficulties arising when it was applied on an individual level, surely a wise approach.

These States cited practice under domestic law for ordinary crimes, explaining the obstacles that a motive requirement put in the way of effective prosecution. Proponents of a motive requirement, however,

[327] *Yearbook . . . 1989*, 2100th meeting, p. 29, para. 29. [328] *Ibid.*

[329] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 26 above, p. 86. Also: *Prosecutor* v. *Krajisnik* (Case No. IT-00-39-T), Judgment, 27 September 2006, para. 891, n. 1697.

[330] Rome Statute of the International Criminal Court, note 4 above, art. 7(1)(h).

focused on the collective dimension of motive. If those who organized and planned the crime were not driven by hatred of the group, they argued, and if it were not committed 'on grounds of' existence of and membership in the victim group, then this should not be stigmatized as genocide.

The drafters did not manage to articulate these two quite different angles on the problem of motive as an element of the crime of genocide. Had they succeeded, the text of the Convention might have been clearer on this point. The analysis proposed here remains faithful to the spirit of the debates, while giving the terms 'as such' an *effet utile*. Nor should it present impossible evidentiary hurdles for prosecutors. In conclusion, it should be necessary for the prosecution to establish that genocide, taken in its collective dimension, was committed 'on the grounds of nationality, race, ethnicity, or religion'. The crime must, in other words, be motivated by hatred of the group. The purpose of criminalizing genocide was to punish crimes of this nature, not crimes of collective murder prompted by other motives. In the classic cases of genocide – Nazi Germany and Rwanda – the existence of motive cannot be gainsaid.

Thus, the reasoned arguments made by the United Kingdom and others during the drafting deserve respect. Individual offenders should not be entitled to raise personal motives as a defence to genocide, arguing for instance that they participated in an act of collective hatred but were driven by other factors. This position, it should be pointed out, joins that of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Tadić* judgment. While a purely personal motive such as the desire to feed one's family might, in some cases, suggest mitigation of guilt, it is hard to understand why other personal motives would compel any particular sympathy. On the issue of individual motive, practical considerations should nevertheless not be overlooked. An individual who does not manifest genocidal motives, and who appears to have been driven by purely personal considerations, is unlikely to attract much attention from international and even domestic authorities in the course of genocide prosecutions at a time when there are plenty of the proverbial bigger fish to fry.

6

'Other acts' of genocide

In addition to genocide itself, which is defined in article II of the Convention on the Prevention and Punishment of the Crime of Genocide,[1] article III describes four forms of participation in the crime: conspiracy, direct and public incitement, attempt and complicity. These are the 'other acts' mentioned in articles IV, V, VI, VII, VIII and IX. With its reference to 'genocide' in the first paragraph of article III, the Convention establishes that the four subsequent 'other acts' are not, strictly speaking, 'genocide'. Arguably, they are lesser crimes, and therefore do not bear the same stigma that is attached to the crime of genocide. Lawyers often refer to them as forms of 'secondary' liability, and domestic legal systems usually attach penalties to them that are significantly reduced from those for the principal offender. Yet complicity in genocide should hardly be viewed as being less serious than genocide itself. The accomplice may well be the leader who gives the order to commit genocide, while the 'principal' offender is the lowly subordinate who carries out the instructions. In this scenario, the guilt of the accomplice is really superior to that of the principal offender.

Most of the acts defined in article III – incitement, conspiracy and attempt – are 'inchoate' or incomplete crimes, and can be committed even if the principal offence itself never takes place. For example, direct and public incitement to commit genocide may be perpetrated even if nobody is actually incited to act. Attempted genocide is also an inchoate offence; if the crime is committed, the offender is prosecuted for genocide, not the attempt. George Fletcher has made the interesting observation that in a sense all of the acts of genocide are, in a sense, inchoate:

> The very nature of genocide as a crime is that it is inchoate. All five of these provisions represent early stages in a course of action that could

[1] Paragraph (a) of article III is really unnecessary, and could be removed from the Convention without changing anything from a practical standpoint. The statement in article III that genocide shall be punishable is, in effect, repeated in article V.

> lead to the extinction of the 'group' in the long run. According to the statute, then, the Nazis committed genocide the first time they approached a Jew with the 'final solution' in mind.[2]

Inchoate offences are particularly important in the repression of genocide because of their preventive role. The seriousness of genocide and its dire consequences for humanity compel the application of the law before the crime actually takes place. A broad and teleological conception of the inchoate acts of genocide is totally consistent with the spirit of the Convention and, moreover, gives meaning to the enigmatic word 'prevention' that appears in both the title and article I.

There are two approaches to incorporating the 'other acts' of genocide set out in article III within international criminal law instruments. The first, that of the Rome Statute of the International Criminal Court[3] and the International Law Commission's draft Code of Crimes Against the Peace and Security of Mankind,[4] is to merge the 'other acts' into a general provision dealing with criminal participation, applicable not only to genocide but to other offences as well, such as crimes against humanity and war crimes. Most national penal codes do the same thing, distinguishing between general principles or a 'general part', and the definition of individual offences or the 'special part'. The second approach, that of the statutes of the two *ad hoc* tribunals, is to incorporate the provisions of article III within the definition of the crime of genocide.[5] But, because the statutes of the *ad hoc* tribunals address other crimes in addition to genocide, they still require a general provision dealing with criminal participation. The result is a degree of overlap between the general provision, dealing with participation in all crimes within the subject matter jurisdiction of the statutes, and the special provision, which is applicable only to genocide.

The statutes of the *ad hoc* tribunals retain the Convention's distinction between genocide and the 'other acts': 'The International Tribunal for [the Former Yugoslavia] [Rwanda] shall have the power to prosecute

[2] Cited in Ruti Teitel, 'The International Criminal Court: Contemporary Perspectives and Prospects for Ratification', (2000) 16 *New York Law School Journal of Human Rights*, p. 505 at p. 526.

[3] Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, art. 6.

[4] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', UN Doc. A/51/10, art. 17.

[5] 'Statute of the International Criminal Tribunal for the Former Yugoslavia', UN Doc. S/RES/827 (1993), annex, art. 4; 'Statute of the International Criminal Tribunal for Rwanda', UN Doc. S/RES/955 (1994), annex, art. 2.

persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.'[6] But the Rome Statute does not make the same differentiation. Article 5(1)(a) of the Rome Statute limits the jurisdiction of the International Criminal Court to the crime of genocide, making no mention of any 'other acts'. Article 25 provides for individual criminal responsibility for genocide in cases of attempt, incitement, conspiracy and complicity. In other words, under the Rome Statute, the 'secondary' offender commits the crime of genocide, whilst under the Genocide Convention and the statutes of the *ad hoc* tribunals he or she is guilty of an 'other act'.

Article III of the Convention raises difficult problems of comparative criminal law. The concepts it sets out are all familiar ones in domestic systems of criminal law, although their application varies considerably from jurisdiction to jurisdiction. The great legal traditions, principally the influential common law and continental systems, approach these issues differently. But, even within judicial systems of the same tradition, the distinctions can be considerable. The caution of the International Criminal Tribunal for the former Yugoslavia should be borne in mind, when it said that, whenever international criminal rules do not define a notion of criminal law, reference may be made to national legislation, but not to one national system only. 'Rather, international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world', said a Trial Chamber of the Tribunal.[7]

Many of the 'other acts' set out in article III do not get addressed adequately in the judgments because the judicial inquiry focuses on the crime of genocide as such. Writing in the context of State responsibility the International Court of Justice said:

> Even though it is theoretically possible for the same acts to result in the attribution to a State of acts of genocide (contemplated by Art. III, para. (a)), conspiracy to commit genocide (Art. III, para. (b)), and direct and public incitement to commit genocide (Art. III, para. (c)), there would be little point, where the requirements for attribution are fulfilled under (a), in making a judicial finding that they are also satisfied under (b) and (c), since responsibility under (a) absorbs that under the other two. The idea of holding the same State responsible by attributing to it acts of

[6] 'Statute of the International Criminal Tribunal for the Former Yugoslavia', *ibid.*, art. 4; 'Statute of the International Criminal Tribunal for Rwanda', *ibid.*, art. 2.

[7] *Prosecutor* v. *Furundžija* (Case No. IT-95-17/1-T), Judgment, 10 December 1998, para. 178.

> 'genocide' (Art. III, para. (a)), 'attempt to commit genocide' (Art. III, para. (d)), and 'complicity in genocide' (Art. III, para. (e)), in relation to the same actions, must be rejected as untenable both logically and legally.[8]

The same considerations apply when individual criminal liability is at issue. In effect, the 'other acts' play second fiddle to the crime of genocide as defined in article II.

Conspiracy

'Conspiracy to commit genocide' is listed as a punishable act in article III(b) of the Convention. Conspiracy is derived from Latin and means, literally, to breathe together. It is crime committed collectively, with a minimum of two offenders. By its very nature, the crime of genocide will inevitably involve conspiracy and conspirators. Common law and the continental tradition take two quite different approaches to the concept of conspiracy.[9] In continental law, conspiracy is a form of participation in the crime itself, and is only punishable to the extent that the underlying crime is also committed. At common law, a conspiracy is committed once two or more persons agree to commit a crime, whether or not the crime itself is committed. Thus, common law conspiracy is an inchoate offence. The drafting history of the Genocide Convention shows that the word 'conspiracy' in article III(b) was intended to refer to common law conspiracy.

Drafting history

The Secretariat draft listed 'conspiracy to commit acts of genocide' as a punishable act.[10] According to the accompanying commentary, 'the mere fact of conspiracy to commit genocide should be punishable even if no "preparatory act" has yet taken place'.[11] The Secretariat's conception of conspiracy was obviously drawn from the common law. The United States' 1947 draft had an identical provision.[12] The Soviet 'Principles' reflected the continental legal view, referring to '[c]omplicity

[8] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 380.
[9] Jean Pradel, *Droit pénal comparé*, Paris: Dalloz, 1995, pp. 239–41.
[10] UN Doc. E/447, pp. 5–13, art. II.II.3. [11] *Ibid.*, p. 31. [12] UN Doc. E/623.

or other forms of conspiracy for the commission of genocide', implying that conspiracy could only be committed if it actually led to the crime of genocide.[13] The Chinese text did not ostensibly favour one approach or the other: 'It shall be illegal to conspire, attempt, or incite persons, to commit' genocide.[14] A reformulated Chinese text reading 'conspiracy to commit the crime of genocide'[15] was adopted by the Ad Hoc Committee.[16]

In the Sixth Committee, John Maktos of the United States explained the common law meaning of conspiracy as 'the agreement between two or more persons to commit an unlawful act'.[17] Egypt noted that: 'The idea of conspiracy, which was unknown in French and Belgian penal law, had been introduced into Egyptian law; it meant the connivance of several persons to commit a crime, whether the crime was successful or not.'[18] The common law approach to conspiracy was surprisingly uncontroversial, even if it constituted an innovation for many delegations. For example, the Danish representative said that, although Danish law made no provision for 'conspiracy' or *complot*, Denmark would nevertheless apply the provisions of the convention. 'It seemed inadvisable to embark on a discussion as to the exact meaning of the terms used, for that would make it practically impossible to draft the convention', the Danish delegate added.[19] The French version of the provision proved a problem because the concept of common law conspiracy was unfamiliar to French law. Belgium proposed replacing the initial term *entente*, which it said was too vague and unknown in Belgian law, with the word *complot*. Belgium conceded that the idea of *complot* was more limited than the English concept of 'conspiracy', but argued it was impossible to find an entirely appropriate expression.[20] In effect, in penal codes derived from the Napoleonic code, such as the Belgian penal code, *complot* indicates an agreement to commit a crime but one that must be '*concrétisée par un ou plusieurs actes matériels*'.[21] Belgium, France and the Netherlands abstained in the vote on article III(b)

[13] 'Basic Principles of a Convention on Genocide', UN Doc. E/AC.25/7, Principle V.3.
[14] UN Doc. E/AC.25/9, art. I *in fine*.
[15] UN Doc. E/AC.25/SR.16, p. 12. The Soviet proposal had earlier been rejected, by three to two, with two abstentions: *ibid*., p. 5.
[16] *Ibid*., p. 12; UN Doc. E/AC.25/SR.17, p. 9 (six in favour, one against).
[17] UN Doc. A/C.6/SR.84 (Maktos, United States). [18] *Ibid*. (Raafat, Egypt).
[19] *Ibid*. (Federspiel, Denmark).
[20] UN Doc. A/C.6/217; see also UN Doc. A/C.6/SR.84 (Kaeckenbeeck, Belgium).
[21] For example, Code pénal (France), art. 412-2. See Pradel, *Droit pénal comparé*, p. 240.

because the Sixth Committee failed to decide whether to use *entente* or *complot* in the French text.[22] The final French version of the Convention defines '*entente en vue de commettre le génocide*' as a punishable act.[23]

The Nuremberg legacy

The debates on conspiracy in the Sixth Committee seem straightforward enough, but the subject has had a controversial history in international criminal law. The Charter of the Nuremberg Tribunal also recognized conspiracy as a distinct crime.[24] The French and Soviet drafters agreed with the British and Americans that it was the common law concept, because this was appropriate to the type of crimes being prosecuted.[25]

However, the intent of the drafters was not fully grasped by the judges at Nuremberg, and they decided, based on an analysis of article 6 of the Charter of the International Military Tribunal, that conspiracy could not stand alone as an autonomous crime. Moreover, it could only, in their opinion, apply to crimes against peace, and not war crimes and crimes against humanity, as had been charged in the indictment.[26] The

[22] UN Doc. A/C.6/SR.84 (forty-one in favour, with four abstentions).

[23] Nehemiah Robinson's study virtually ignored conspiracy, stating only that it 'did not provoke any controversy because of [its] unmistakable meaning', which he said was to incorporate the common law concept: Nehemiah Robinson, *The Genocide Convention: A Commentary*, New York: Institute of Jewish Affairs, 1960, p. 66. See also Pieter Nicolaas Drost, *Genocide: United Nations Legislation on International Criminal Law*, Leyden: A. W. Sythoff, 1959, p. 88.

[24] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), (1951) 82 UNTS 279, annex. Conspiracy was included in the definition of 'crimes against peace': 'planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, *or participation in a common plan or conspiracy* for the accomplishment of any of the foregoing' (art. 6(a); emphasis added). The same language does not appear in the definitions of war crimes or crimes against humanity. The subject matter jurisdiction provision concludes with: 'Leaders, organisers, instigators and accomplices participating in the formulation or execution of *a common plan or conspiracy* to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan' (emphasis added).

[25] Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, Washington: US Government Printing Office, 1949, p. vii. See also Howard S. Levie, *Terrorism in War – The Law of War Crimes*, Oceana Publications, 1992, pp. 405–11; Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford: Clarendon Press, 1997, pp. 118–19.

[26] *France et al.* v. *Goering et al.*, (1946) 22 IMT 203, p. 469.

International Military Tribunal identified the 'common plan or conspiracy' in the waging of aggressive war going as far back as 1919, with the formation of the Nazi party. Among its elements, the Tribunal said, 'the persecution of the Jews' was one of the steps deliberately taken to carry out the common plan. But the Tribunal considered this conception to be too broad for the terms of its statute:

> [T]he conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party programme, such as are found in the twenty-five points of the Nazi Party, announced in 1920, or the political affirmations expressed in 'Mein Kampf' in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan.[27]

The Tribunal rejected the argument that common planning cannot exist where there is complete dictatorship: 'A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it.'[28] The Tribunal noted that a criminal organization could constitute a form of conspiracy:

> A criminal organisation is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter.[29]

Nevertheless, the International Military Tribunal said membership in the organization in and of itself was insufficient to prove conspiracy. Members without knowledge of the criminal purposes or acts of the organization could not be found guilty of conspiracy.[30] Accordingly, the Tribunal acquitted Frick, Bormann and Doenitz of conspiracy.[31] The conspiracy provision in Control Council Law No. 10[32] was virtually the same as the one in the Nuremberg Charter and the military tribunals

[27] *Ibid.*, pp. 467–8. [28] *Ibid.*, p. 468. [29] *Ibid.*, p. 528. [30] *Ibid.*
[31] *Ibid.*, pp. 545, 556 and 585.
[32] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, *Official Gazette of the Control Council for Germany*, No. 3, Berlin, 31 January 1946, pp. 50–5. Control Council Law No. 10 included 'conspiracy' for crimes against peace, borrowing the text from the Charter, but did not have the concluding paragraph.

followed the narrow precedent set by the International Military Tribunal.[33]

Post-Nuremberg efforts at codification

Law-makers continue to be haunted by the restrictive construction given to conspiracy at Nuremberg. The International Law Commission, in its draft Code of Crimes, provided for conspiracy to commit an offence only when it 'in fact occurs'.[34] The Commission explained that the Code's conspiracy provision 'sets forth a principle of individual responsibility with respect to a particular form of participation in a crime rather than creating a separate and distinct offence or crime'. This was completed with a footnote: 'This is consistent with the Nurnberg Judgment which treated conspiracy as a form of participation in a crime against peace rather than as a separate crime. Nurnberg Judgment, 56.'[35]

The same approach to conspiracy obtains in the Rome Statute.[36] The text makes it clear that this is not the inchoate offence of conspiracy as contemplated by the common law but rather a form of complicity, adding considerably to the redundancy of the article.[37] The term

[33] *United States of America* v. *Alstötter et al.* ('Justice trial'), (1948) 6 LRTWC 1, p. 32; *United States of America* v. *Pohl et al.* ('Pohl case'), (1948) 5 TWC 193; *United States of America* v. *Brandt et al.*, (1946) 2 TWC 1, p. 122. Telford Taylor argued before the United States Military Commission: 'I am sure that it never occurred to the Allied Control Council when it adopted Law No. 10 in December, 1945, during the proceedings before the International Military Tribunal, that by following the language of the London Charter they had excluded from the scope of Law No. 10 conspiracies to commit war crimes and crimes against humanity': *United States* v. *Alstötter*, *ibid.*, p. 108. See, generally, 'Types of Offences', (1948) 15 LRTWC 89, pp. 90–106.

[34] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 4 above, p. 25, art. 2(3)(e).

[35] *Ibid.* For the background of this provision, see: 'Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', UN Doc. A/CN.4/398 (1986), paras. 118–31, pp. 66–8, para. 261, p. 86; 'Report of the Commission to the General Assembly on the Work of its Thirty-Eighth Session', *Yearbook . . . 1986*, Vol. II (Part 2), paras. 123–7, pp. 48–9; 'Eighth Report on the Draft Code of Crimes Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', UN Doc. A/CN.4/430 and Add.1, paras. 39–62, pp. 32–4.

[36] Rome Statute of the International Criminal Court, note 3 above. See Kai Ambos, 'General Principles of Criminal Law in the Rome Statute', (1999) 10 *Criminal Law Forum*, p. 1; William A. Schabas, 'General Principles of Criminal Law', (1998) 6 *European Journal of Crime, Criminal Law and Criminal Justice*, p. 84.

[37] Edward M. Wise, 'Commentary on Parts 2 and 3 of the Zutphen Intersessional Draft: General Principles of Criminal Law', (1998) 13bis *Nouvelles études pénales*, p. 43 at p. 47.

'conspiracy' is not even used.[38] The precise wording of the provision is derived from the recently adopted International Convention for the Suppression of Terrorist Bombings.[39] Consequently, although the Genocide Convention defines the inchoate crime of conspiracy as an 'other act' of genocide, it cannot be prosecuted by the International Criminal Court because of the narrow definition of the concept in the Rome Statute. Ostensibly, the Rome diplomatic conference was attempting to transfer to the Rome Statute all of the offences defined in the Genocide Convention, as can be seen from its attention to the very specific provision dealing with direct and public incitement to genocide.[40] The discrepancy between the Genocide Convention and the Rome Statute was probably an oversight of exhausted drafters.

There is an essentially similar problem in the domestic legislation of the vast majority of States from the continental criminal law tradition. Although many have adopted specific provisions in their law setting out a crime of genocide, they have not provided for the offence of conspiracy, probably under the mistaken assumption that the existing norms in the general parts of their penal codes are adequate, which is not the case. The outstanding exceptions are the statutes of the two *ad hoc* tribunals, precisely because article III of the Convention is incorporated within their genocide provisions.

The scope of conspiracy

Conspiracy to commit genocide has not figured in judgments of the International Criminal Tribunal for the former Yugoslavia,[41] nor did it play any significant part in the Bosnian application before the International Court of Justice. However, conspiracy has often been charged

[38] For the drafting history, see 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court', UN Doc. A/50/22, annex II, p. 59; 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc. A/51/10, Vol. II, pp. 94–5; UN Doc. A/AC.249/1997/L.5, p. 22; UN Doc. A/AC.249/1997/WG.2/CRP.2/Add.2; 'Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands', UN Doc. A/AC.249/1998/L.13, pp. 53–4; 'Draft Statute for the International Criminal Court', UN Doc. A/CONF.183/2/Rev.1, p. 50; UN Doc. A/CONF.183/C.1/WGGP/L.3; UN Doc. A/CONF.183/C.1/WGGP/L.4, p. 3; and UN Doc. A/CONF.183/C.1/L.76/Add.3, p. 2.

[39] UN Doc. A/RES/52/164, annex, art. 2(3).

[40] See pp. 319–34 below.

[41] Conspiracy to commit genocide is charged in a trial expected to conclude in 2009: *Prosecutor* v. *Popovic et al.* (Case No. IT-05-88-PT), Second Consolidated Amended Indictment, 14 June 2006.

in indictments before the International Criminal Tribunal for Rwanda, and there have been several convictions.[42]

To establish conspiracy, the prosecution must prove that two or more persons agreed upon a common plan to perpetrate genocide.[43] In *Musema*, a Trial Chamber of the International Criminal Tribunal for Rwanda described conspiracy to commit genocide as an 'inchoate offence'. Accordingly, '[t]he Chamber is of the view that the crime of conspiracy to commit genocide is punishable even if it fails to produce a result, that is to say, even if the substantive offence, in this case genocide, has not actually been perpetrated'.[44] Nevertheless, the conspirators must reach an agreement. It is insufficient to prove that negotiations were underway with a view to commission of genocide.[45]

As for the mental element, the prosecution must establish that the accused intended to destroy, in whole or in part, a protected group as such.[46] The conspirators must share the *mens rea* of genocide.[47]

[42] *Prosecutor* v. *Kambanda* (Case No. ICTR-97-23-S), Judgment and Sentence, 4 September 1998, para. 40.

[43] *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment, 27 January 2000, para. 191; *Prosecutor* v. *Ntakirutimana* (Case No. ICTR-96-10-T and ICTR-96-17-T), Judgment, 21 February 2003, para. 798; *Prosecutor* v. *Ntagerura et al.* (Case No. ICTR-99-46-A) Judgment, 7 July 2006, para. 92; *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007, para. 344; *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 787.

[44] *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment, 27 January 2000, para. 194; *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 788; *Prosecutor* v. *Nahimana et al.* (Case No. ICTR-99-52-T), Judgment and Sentence, 3 December 2003, para. 1044; *Prosecutor* v. *Seromba* (Case No. ICTR-2001-66-I), Judgment, 13 December 2006, para. 345; *Prosecutor* v. *Bikindi* (Case No. ICTR-2001-72-T), Decision on Defence Motion for Judgment of Acquittal, Rule 98bis of the Rules of Procedure and Evidence, 26 June 2007, para. 16; *Prosecutor* v. *Ndindiliyimana et al.* (Case No. ICTR-00-56-T), Decision on Defence Motions Pursuant to Rule 98bis, 29 March 2007, para. 14; *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Partly Dissenting Opinion of Judge Shahabuddeen, 28 November 2007, para. 6.

[45] *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 787.

[46] *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007, para. 894; *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment, 27 January 2000, para. 192; *Prosecutor* v. *Seromba* (Case No. ICTR-2001-66-I), Judgment, 13 December 2006, para. 347; *Prosecutor* v. *Niyitegeka* (Case No. ICTR-96-14-T), Judgment and Sentence, 16 May 2003, para. 423.

[47] *Prosecutor* v. *Ndindiliyimana et al.* (Case No. ICTR-00-56-T), Decision on Defence Motions Pursuant to Rule 98bis, 29 March 2007, para. 14; *Prosecutor* v. *Bagosora et al.* (Case No. ICTR-98-1-T), Decision on Motions for Judgment of Acquittal, 2 February 2005, para. 12, *Prosecutor* v. *Niyitegeka* (Case No. ICTR-96-14-T), Judgment and Sentence, 16 May 2003, para. 423.

Discussing issues of temporal jurisdiction, one Trial Chamber noted that, although the International Criminal Tribunal for Rwanda could only prosecute crimes committed during 1994, 'evidence of acts that occurred prior to 1994 may be relied upon as evidence of a conspiracy that culminated in genocide committed during the period between 1 January 1994 and 31 December 1994'.[48] The agreement to commit the crime must take place within the boundaries of the Tribunal's temporal jurisdiction. This does not mean that evidence of a conspiracy that begins before the start of the Tribunal's temporal jurisdiction, and even after it, may not be relevant to proving the existence of a conspiracy that continues into the relevant time period.[49]

One of the consequences of the common law approach is that an accused may be convicted of both conspiracy and the substantive offence, where the objective of the conspiracy extends beyond the offences actually committed.[50] Trial Chambers have differed as to whether a conviction may be entered for conspiracy to commit genocide and perpetration of the crime as such. One judgment holds that cumulative convictions cannot be sustained, based upon the drafting history of the Convention,[51] but in another case a conviction was registered for both.[52] In a third judgment, a Trial Chamber noted the

[48] *Prosecutor* v. *Nahimana et al.* (Case No. ICTR-99-52-T), Judgment and Sentence, 3 December 2003, para. 1044; *Prosecutor* v. *Ndindiliyimana et al.* (Case No. ICTR-00-56-T), Decision on Defence Motions Pursuant to Rule 98bis, 29 March 2007, para. 15; *Prosecutor* v. *Bikindi* (Case No. ICTR-2001-72-T), Decision on the Defence Motion Challenging the Temporal Jurisdiction of the Tribunal and Objecting to the Form of the Indictment and on the Prosecutor's Motion Seeking Leave to File an Amended Indictment, 22 September 2003, para. 34; *Prosecutor* v. *Bikindi* (Case No. ICTR-2001-72-T), Decision on Defence Motion for Judgment of Acquittal, Rule 98bis of the Rules of Procedure and Evidence, 26 June 2007, para. 16.

[49] *Prosecutor* v. *Bikindi* (Case No. ICTR-2001-72-T), Decision on Defence Motion for Judgment of Acquittal, Rule 98bis of the Rules of Procedure and Evidence, 26 June 2007, para. 17. The Appeals Chamber declined to clarify the law on this point in *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007, para. 318.

[50] *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment, 27 January 2000, para. 197; *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 790.

[51] *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment and Sentence, 27 January 2000, para. 197.

[52] *Prosecutor* v. *Niyitegeka* (Case No. ICTR-96-14-T), Judgment and Sentence, 16 May 2003, paras. 429, 480, 483 and 502; *Prosecutor* v. *Kambanda* (Case No. ICTR-97-23-S), Judgment and Sentence, 4 September 1998, para. 40; *Prosecutor* v. *Nahimana et al.* (Case No. ICTR-99-52-T), Judgment and Sentence, 3 December 2003, paras. 1043, 1091–4 and 1096–108.

divergent views but did not take a firm position.[53] The Appeals Chamber declined to resolve the controversy,[54] given that it had overturned the convictions of Nahimana, Barayagwiza and Ngeze for conspiracy, and therefore considered the question to be moot.[55]

Proof of the material element of the crime will obviously be facilitated by documentary evidence, or by a statement emanating from one or more of the conspirators. But, where this is lacking, circumstantial evidence of the common plan or conspiracy will be sufficient.[56] Conspiracy may be inferred from coordinated actions of individuals who have a common purpose and are acting within a unified framework.[57] Where the evidence shows only a tacit conspiracy, the evidence must demonstrate that there was a will to act together and not simply similar behaviour.[58] In *Niyitegeka*, a Trial Chamber inferred the existence of conspiracy to commit genocide from the participation by the accused in meetings held for the purpose of planning the massacre of Tutsi, his words and the leadership exercised during those meetings, his involvement in the planning of attacks against the Tutsi and his role in the distribution of weapons to the attackers.[59]

[53] *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 793.

[54] For discussion of the issue, see: George William Mugwanya, *The Crime of Genocide in International Law: Appraising the Contribution of the UN Tribunal for Rwanda*, London: Cameron May, 2007, pp. 176–82.

[55] *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007, para. 1023.

[56] *Prosecutor* v. *Bikindi* (Case No. ICTR-2001-72-T), Decision on Defence Motion for Judgment of Acquittal, Rule 98bis of the Rules of Procedure and Evidence, 26 June 2007, para. 16; *Prosecutor* v. *Bagosora et al.* (Case No. ICTR-98-41-T), Decision on Motions for Judgment of Acquittal, 2 February 2005, para. 12; *Prosecutor* v. *Ndindabahizi* (Case No. ICTR-01-71-A), Judgment, 15 July 2004, para. 454.

[57] *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007, paras. 896–7; *Prosecutor* v. *Nahimana et al.* (Case No. ICTR-99-52-T), Judgment and Sentence, 3 December 2003, para. 1047; *Prosecutor* v. *Seromba* (Case No. ICTR-2001-66-I), Judgment, 13 December 2006, para. 346; *Prosecutor* v. *Nyiramasuhoko et al.* (Case Nos. ICTR-97-21-T, ICTR-97-29A-T, ICTR-96-15-T, ICTR-96-8-T and ICTR-98-42-T), Decision on Defence Motions for Acquittal under Rule 98bis, 18 December 2004, para. 97.

[58] *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007, para. 898.

[59] *Prosecutor* v. *Niyitegeka* (Case No. ICTR-96-14-T), Judgment and Sentence, 16 May 2003, paras. 427–8.

Direct and public incitement to commit genocide

Article III(c) prohibits 'direct and public incitement' to commit genocide. Incitement is, of course, a form of complicity ('abetting'), and to that extent it is already covered by article III(e). But, as a general rule, incitement qua complicity, or abetting, is only committed when the underlying crime occurs. Under both the continental and common law traditions, there is no crime of incitement if nobody is incited. Nehemiah Robinson said: 'The present wording of Article III excludes incitement "in private" because it was felt that such incitement was not serious enough to be included in the Convention.'[60] This is inaccurate, because incitement in private is subsumed within the act of complicity, listed in Article III(e). Incitement in private is punishable only if the underlying crime of genocide occurs, whereas incitement in public can be prosecuted even where genocide does not take place. In specifying a distinct act of 'direct and public incitement', the drafters of the Genocide Convention sought to create an autonomous infraction, one that, like conspiracy, is an inchoate crime, in that the prosecution need not make proof of any result. It is sufficient to establish that direct and public incitement took place, that the direct and public incitement was intentional, and that it was carried out with the intent to destroy in whole or in part a protected group as such. The crime of incitement butts up against the right to freedom of expression, and the conflict between these two concepts has informed the debate on the subject.

Drafting history

The Secretariat draft stated: 'The following shall likewise be punishable: . . . 2. direct public incitement to any act of genocide, whether the incitement be successful or not.'[61] This text was located in a more general section dealing with criminal participation. The Secretariat commentary indicated what was meant by 'direct public incitement':

> This does not mean orders or instructions by officials to their subordinates, or by the heads of an organization to its members, which are covered by the 'preparatory acts' referred to above. It refers to direct appeals to the public by means of speeches, radio or press, inciting it to genocide. Such appeals may be part of an agreed plan but they may simply reflect a purely personal initiative on the part of the speaker. Even

[60] Robinson, *Genocide Convention*, p. 67. [61] UN Doc. E/447, pp. 5–13.

> in the latter case, public incitement should be punished. It may well happen that the lightly or imprudently spoken word of a journalist or speaker himself incapable of doing what he advises will be taken seriously by some of his audience who will regard it as their duty to act on his recommendation. Judges will have to weigh the circumstances and show greater or lesser severity according to the position of the criminal and his authority, according to whether his incitement is premeditated or merely represents thoughtless words.[62]

Predictably, the United States, with its strong judicial and political commitment to freedom of expression, was opposed to such a provision: 'Under Anglo-American rules of law the right of free speech is not to be interfered with unless there is a clear and present danger that the utterance might interfere with a right of others.' The United States proposed that the provision on 'incitement' be so qualified.[63] Subsequently, it put forward an alternative text: 'Direct and public incitement of any person or persons to any act of genocide, whether the incitement be successful or not, when such incitement takes place under circumstances which may reasonably result in the commission of acts of genocide.'[64] The Soviet Union was at the other end of the spectrum on this issue.[65] The Soviets made an even more controversial proposal that the Convention repress 'hate crimes', treated as preparation for genocide.[66]

Initially, the Ad Hoc Committee adopted the Soviet principle on criminalizing incitement, whether successful or not. However, it stopped short of endorsing a broader prohibition of hate propaganda. The unease of the United States with measures restricting freedom of expression was noted.[67] The Committee turned to the Chinese draft articles, which implied that incitement was an inchoate crime. Incitement was listed in the same sentence with two other similar infractions, conspiracy and attempt.[68] It was agreed to enumerate such acts in a

[62] *Ibid.*, pp. 30–1. [63] UN Doc. E/623. [64] *Ibid.*

[65] 'Basic Principles of a Convention on Genocide', UN Doc. E/AC.25/7, Principle V: 'The convention should establish the penal character, on equal terms with genocide, of . . . 2. Direct public incitement to commit genocide, regardless of whether such incitement had criminal consequences.'

[66] *Ibid.*, Principle VI: 'The convention should make it a punishable offence to engage in any form of propaganda for genocide (the press, radio, cinema, etc.), aimed at inciting racial, national or religious enmity or hatred.'

[67] UN Doc. E/AC.25/SR.6, p. 2.

[68] 'Draft Articles for the Inclusion in the Convention on Genocide Proposed by the Delegation of China on 16 April 1948', UN Doc. E/AC.25/9: 'It shall be illegal to conspire, attempt, or incite persons, to commit acts enumerated in 1, 2, and 3.'

distinct provision:[69] 'Conspiring, attempting, or inciting people to commit genocide shall be punishable.'[70] France suggested adding the word 'direct' before 'incitement', but the vote was an indecisive three to three, with one abstention.[71] The Committee voted again on the question – this time the word was 'directly' – and it was so agreed, by three to two.[72] Venezuela's suggestion that 'publicly or privately' be added after the word 'directly' was also accepted.[73] According to Venezuela, the addition of 'publicly or privately' would obviate the need for further particulars, such as 'press, radio, etc.'.[74] At no point did the Committee discuss what 'direct' or 'public' might mean. Venezuela also suggested adding 'whether the incitement be successful or not':[75] France and Lebanon considered this unnecessary and the United States agreed, but the proposal was adopted anyway.[76] The final Ad Hoc Committee text read: 'The following acts shall be punishable . . . (4) direct public or private incitement to commit the crime of genocide whether such incitement be successful or not.'[77]

In the Sixth Committee, the United States took a more aggressive posture, contesting entirely any reference to incitement as an inchoate offence. It argued that incitement was 'too remote' from the real crime of genocide. 'Even with regard to preventive measures, it should be borne in mind that direct incitement, such as would result in the immediate commission of the crime, was in general merely one aspect of an attempt or overt act of conspiracy', said the United States. The heart of the United States' objection was that criminalization of incitement might endanger freedom of the press. 'If it were admitted that incitement were an act of genocide, any newspaper article criticizing a political group, for example, or suggesting certain measures with regard to such group for the general welfare, might make it possible for certain States to claim that a Government which allowed the publication of

[69] UN Doc. E/AC.25/SR.15, p. 1. [70] *Ibid.*, p. 2.

[71] *Ibid.*, p. 3. There were similar suggestions from Venezuela ('direct private and public incitement') and the Soviet Union ('direct' and 'indirect' before 'incitement').

[72] UN Doc. E/AC.25/SR.16, p. 1. [73] *Ibid.* (five in favour, with two abstentions).

[74] *Ibid.* [75] *Ibid.*, p. 3. [76] *Ibid.* (four in favour, with three abstentions).

[77] UN Doc. E/AC.25/SR.16, p. 12 (adopted by six votes to one); UN Doc. E/AC.25/SR.17, p. 9. The United States was the dissenting vote. In an internal memorandum, Ernest Gross wrote that 'the provision in its present form is not too objectionable from our point of view since we probably will be in a position to insist on a narrow interpretation of "direct incitement"': 'Additional Punishable Offences Agreed upon by Ad Hoc Committee on Genocide, 23 April 1948, Gross to Sandifer', National Archives, United States of America, 501.BD-Genocide, 1945–9.

such an article was committing an act of genocide; and yet that article might be nothing more than the mere exercise of the right of freedom of the press.'[78]

The United Kingdom gave the United States some support. Gerald Fitzmaurice argued it was unlikely that incitement would not lead to conspiracy, attempt or complicity, which were already covered by the draft convention. Therefore, it was unnecessary to criminalize incitement, and preferable to delete the provision 'so as to avoid giving anyone the slightest pretext to interfere with freedom of opinion'.[79] The United States was also backed by Chile,[80] the Dominican Republic[81] and Brazil.[82] Belgium, which later proposed a compromise formulation, indicated that it also preferred deletion and would vote for the United States' amendment.[83]

Arguing for the provision, Manfred Lachs of Poland insisted that prevention was also the goal of the convention, and that freedom of the press 'must not be so great as to permit the Press to engage in incitement to genocide'.[84] Venezuela, too, insisted that the purpose of the convention was to prevent and not only to punish genocide.[85] The Philippines challenged the United States on the issue of freedom of the press with an innovative and somewhat provocative argument. Its delegate explained that Philippines law considered criminalization of incitement to be compatible with freedom of expression, a repressive legacy of United States rule.[86] Other delegations upholding retention of the provision included France, Haiti, Australia, Yugoslavia, Sweden, Cuba, Denmark, the Dominican Republic, the Soviet Union, Uruguay (subject to clarification of the words 'in private') and Egypt.[87]

However, several delegations, while supporting the incitement provision, were concerned about the scope of the Ad Hoc Committee text. Belgium urged a 'happy compromise', deleting the phrase 'or in private'.[88] Arguing in support, Iran stated that: 'Incitement in private

[78] UN Doc. A/C.6/SR.84 (Maktos, United States); UN Doc. A/C.6/SR.85 (Maktos, United States).
[79] UN Doc. A/C.6/SR.84 (Fitzmaurice, United Kingdom).
[80] *Ibid.* (Arancibia Lazo, Chile).
[81] UN Doc. A/C.6/SR.85 (Messina, Dominican Republic).
[82] UN Doc. A/C.6/SR.84 (Guerreiro, Brazil).
[83] *Ibid.* (Kaeckenbeeck, Belgium).
[84] *Ibid.* (Lachs, Poland). See also *ibid.* (Morozov, Soviet Union); and UN Doc. A/C.6/SR.85 (Zourek, Czechoslovakia).
[85] UN Doc. A/C.6/SR.84 (Pérez-Perozo, Venezuela).
[86] UN Doc. A/C.6/SR.85 (Inglés, Philippines).
[87] UN Doc. A/C.6/SR.84–85.
[88] UN Doc. A/C.6/217; see also UN Doc. A/C.6/SR.84 (Kaeckenbeeck, Belgium).

could have no influence on the perpetration of the crime of genocide; it therefore presented no danger.'[89] But Venezuela answered that: 'Incitement could be carried out in public, but it could also take place in private, through individual consultation, by letter or even by telephone. It was necessary to punish both forms of incitement.'[90] The Committee voted to delete the words 'or in private'.[91]

Belgium also proposed deleting 'whether such incitement be successful or not'.[92] Belgium said this 'would allow the legislature of each country to decide, in accordance with its own laws on incitement, whether incitement to commit genocide had to be successful in order to be punishable'.[93] But, as other delegations quite correctly argued, if this were the case, the provision would be superfluous; incitement, if successful, becomes a form of complicity covered by paragraph (e) of the same article.[94] On a roll-call vote, deletion of the words 'whether such incitement be successful or not' was approved.[95] After the separate votes to delete 'in private' and 'whether such incitement be successful or not', the Belgian amendment was adopted.[96] The United States amendment, aimed at simply deleting the provision dealing with incitement, was defeated on a roll-call vote.[97] Loss of the debate about 'incitement' was a major setback for the United States.[98] The United States declared that it reserved its position on the subject of incitement to commit genocide.[99] A few days later, when the entire article was being voted, the United States explained that it abstained 'because incitement appeared in the list of punishable acts'.[100]

[89] UN Doc. A/C.6/SR.84 (Abdoh, Iran).
[90] *Ibid.* (Pérez-Perozo, Venezuela).
[91] UN Doc. A/C.6/SR.85 (twenty-six in favour, six against, with ten abstentions).
[92] UN Doc. A/C.6/217; see also UN Doc. A/C.6/SR.84 (Kaeckenbeeck, Belgium).
[93] UN Doc. A/C.6/SR.85 (Kaeckenbeeck, Belgium).
[94] UN Doc. A/C.6/SR.84 (Abdoh, Iran); UN Doc. A/C.6/SR.85 (Manini y Ríos, Uruguay).
[95] UN Doc. A/C.6/SR.85 (nineteen in favour, twelve against, with fourteen abstentions).
[96] *Ibid.* (twenty-four in favour, twelve against, with eight abstentions).
[97] *Ibid.* (twenty-seven in favour, sixteen against, with five abstentions).
[98] The Canadian delegate to the Sixth Committee observed, in a dispatch to Ottawa: 'The battle lines are the usual ones – the Soviet bloc arrayed against the rest of the world, although on occasion the United States delegate, who is leading the debate for "the West", has failed to convince the Latin Americans, Arabs *et al* of the cogency of his arguments. He did succeed in having "political" added to the "national", "racial" and "religious" groups protected against genocide. However, he failed in his insistence that freedom of the press would be threatened by describing "incitement" to genocide as a crime': 'Progress Reports on Work of Canadian Delegation, in Paris, 1 November 1948', NAC RG 25, Vol. 3699, File 5475-DG-2-40.
[99] UN Doc. A/C.6/SR.85 (Maktos, United States).
[100] UN Doc. A/C.6/SR.91 (Maktos, United States).

Meanwhile, the Soviet Union sought to go even further, and urged adoption of an additional paragraph prohibiting '[a]ll forms of public propaganda (press, radio, cinema, etc.) aimed at inciting racial, national or religious enmities or hatreds or at provoking the commission of acts of genocide'.[101] The Soviet amendment was decisively defeated, after a vote taken in two parts.[102]

Incitement in other instruments

In the latter stages of its work on the draft Code of Crimes, the International Law Commission debated whether to recognize a distinct offence of inchoate incitement to genocide. Contemporary events in Rwanda and Burundi undoubtedly coloured its assessment, and underlined the importance of incitement.[103] One of the members of the Commission, Salifou Fomba of Mali, was a member of the Commission appointed by the Security Council in 1994 to investigate the Rwandan genocide, and he regularly reminded delegates of the significance of repressing incitement. During the debates, Yamada of Japan made the rather bizarre observation that his country had not acceded to the Convention because inchoate incitement was only prosecuted 'in the most serious cases', as if genocide was not a serious case.[104] In the end, the International Law Commission only provided for a general offence of direct and public incitement, applicable to all crimes in the Code including genocide, specifying that this applied to inciting a crime that 'in fact occurs'.[105] The report of the Commission revealed a serious misunderstanding, because the Commission cited article III(c) of the Convention as the *raison d'être* of the provision. Yet, by making incitement dependent on the occurrence of the crime, the Commission obviously departed from the spirit of article III(c). In any case, the Commission's special provision for direct and public incitement is totally redundant, because article 2(3)(d) of the same Code creates an offence of 'abetting', which is incitement when the underlying crime

[101] UN Doc. A/C.6/215/Rev.1.

[102] UN Doc. A/C.6/SR.87 (twenty-eight in favour, eleven against, with four abstentions; thirty in favour, eight against, with six abstentions).

[103] 'Report of the International Law Commission on the Work of Its Forty-Seventh Session, 2 May–21 July 1995', UN Doc. A/50/10, p. 43, para. 80.

[104] *Yearbook . . . 1995*, Vol. I, 2383rd meeting, p. 29.

[105] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 4 above, pp. 26–7.

occurs. The Commission did not seem to understand the meaning of the term 'abetting', describing it as 'providing assistance'.[106] According to *Black's Law Dictionary*, 'abet' means '[t]o encourage, incite, or set another on to commit a crime . . .'.[107] Like much common law terminology, it is derived from old French, *à beter*, meaning to bait or to excite.

The Rome Statute provides for the inchoate crime of direct and public incitement to commit genocide, faithfully reflecting the Convention on this point. There were unsuccessful efforts to enlarge the inchoate offence of incitement so as to cover the other core crimes but the same arguments that had been made in 1948, essentially based on the sanctity of freedom of expression, resurfaced.[108] The Working Group on General Principles at the Rome Conference rejected suggestions that incitement to commit genocide be included in the definition of the offence, and instead incorporated it in article 25, a general provision applicable to all crimes within the subject matter jurisdiction of the statute, but with the proviso that direct and public incitement only concerned genocide and could not be extended to war crimes, crimes against humanity and aggression.[109]

Within the statutes of the *ad hoc* tribunals, inchoate direct and public incitement is also incorporated because of the incorporation of article III of the Convention within the definition of genocide. The complex drafting of the statutes means that 'instigating' and 'abetting', which are equivalent to incitement, are also criminalized in the general provision dealing with individual responsibility. There have been no

[106] *Ibid.*, p. 24.

[107] *Black's Law Dictionary*, 5th edn, St Paul, MN: West Publishing, 1979, p. 5.

[108] 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', note 38 above, Vol. II, p. 83; 'Decisions Taken by the Preparatory Committee at its Session Held 11 to 21 February 1997', UN Doc. A/AC.249/1997/L.5, annex I, p. 22; 'Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands', note 38 above, p. 54; 'Draft Statute for the International Criminal Court', note 38 above, p. 50.

[109] UN Doc. A/CONF.183/C.1/WGGP/L.4, p. 3. Adopted unchanged in the final version: UN Doc. A/CONF.183/C.1/L.76/Add.3, p. 2. Yet misunderstanding and confusion about the nature of the provision persists. The proposed 'Elements of Crimes' submitted by the delegation of the United States to the first session of the Court's Preparatory Commission present direct and public incitement to genocide as requiring a result, even though the title of the document refers to inchoate crimes. The document requires '[t]hat the accused committed a public act that had the direct effect of causing one or more persons to commit the crime of genocide in question': UN Doc. PCNICC/1999/DP.4/Add.3, p. 3.

indictments by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia for direct and public incitement to commit genocide.[110] In the case of the Rwanda Tribunal, however, there have been several trials and convictions for the offence.

Judicial interpretation

The distinction between the 'other act' of genocide of 'direct and public incitement' and incitement as a form of complicity in genocide is well established in the case law. Whereas incitement as a form of complicity requires evidence of a substantial contribution to commission of the crime itself, direct and public incitement is a crime even if no result can be proven.[111] To be convicted of direct and public incitement, it must be established that the perpetrator had a genocidal intent.[112] This is of no practical difficulty, because the *mens rea* is generally obvious enough from the content of the message. The argument that direct and public incitement is a continuing offence, in the sense that if committed before the beginning of the temporal jurisdiction of a court the offence may be prolonged into the period over which the tribunal has jurisdiction is not compatible with the inchoate nature of the crime and has been rejected by the Appeals Chamber of the International Criminal Tribunal for Rwanda.[113]

Genocide was committed in Rwanda in 1994, an historical fact of which the Appeals Chamber of the Rwanda Tribunal has taken judicial

[110] Racist incitement has been approached as the crime against humanity of persecution: *Prosecutor* v. *Kordić and Čerkez* (Case No. IT-95-14/2-T), Judgment, 26 February 2001, para. 209 and p. 349.

[111] *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007, para. 678; *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 855; *Prosecutor* v. *Niyitegeka* (Case No. ICTR-96-14-T), Judgment, 16 May 2003, para. 431; *Prosecutor* v. *Musema* (ICTR-96-13-T), Judgment, 27 January 2000, para. 120; *Prosecutor* v. *Rutaganda* (Case No. ICTR-96-3-T), Judgment and Sentence, 6 December 1999, para. 38; *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 562.

[112] *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007, para. 677; *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 560; *Prosecutor* v. *Nahimana et al.* (Case No. ICTR-99-52-T), Judgment, 3 December 2003, para. 1012.

[113] *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007, paras. 722–4. See, however, *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Partly Dissenting Opinion of Judge Shahabuddeen, 28 November 2007, paras. 21–35.

notice.[114] In reality, then, the practical interest in pursuing charges of the inchoate crime of direct and public incitement to commit genocide is not necessarily apparent. Indeed, many of the judgments blur the distinction, convicting individuals both for direct and public incitement, and for the crime of incitement as complicity.[115] The Appeals Chamber deftly avoided addressing this issue by noting that the three accused in the 'Media case' had been acquitted of genocide, and that as a result there was no issue of overlapping offences.[116]

A more appropriate example of direct and public incitement is provided in the *Mugesera* case, which has generated several Canadian decisions including a seminal ruling by the Supreme Court of Canada.[117] Mugesera gave a public address in Rwanda in November 1992, more than two years before full-blown genocide began, that has been deemed to fit the terms of direct and public incitement.[118] He left Rwanda for Canada within weeks of delivering the speech, and the link with the events of 1994 was simply too remote for a finding that he actually incited the crimes committed at that time.

[114] *Prosecutor* v. *Karemera et al.* (Case No. ICTR-98-44-AR73(C)), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, paras. 29 and 35; see also: *Prosecutor* v. *Karemera et al.* (Case No. ICTR-98-44-AR73(C)), Decision on Motions for Reconsideration, 1 December 2006; *Semanza* v. *Prosecutor* (Case No. ICTR-97-20-A), Judgment, 20 May 2005, para. 192; *Prosecutor* v. *Rwamakuba* (Case No. ICTR-98-44C-T), Judgment, 20 September 2006, paras. 2 and 210; *Prosecutor* v. *Muvunyi* (Case No. ICTR-2000-55A-T), Summary of Judgment, 12 September 2006, para. 8; *Prosecutor* v. *Seromba* (Case No. ICTR-2001-66-I), Judgment, 13 December 2006, para. 340.

[115] *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998; *Prosecutor* v. *Kambanda* (Case No. ICTR-97-23-S), Judgment and Sentence, 4 September 1998; *Prosecutor* v. *Ruggiu* (Case No. ICTR-97-32-I), Judgment and Sentence, 1 June 2000; *Prosecutor* v. *Nahimana et al.* (Case No. ICTR-99-52-T), Judgment, 3 December 2003; *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003.

[116] *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007, para. 1022.

[117] Prosecutors at the International Criminal Tribunal for Rwanda apparently considered indicting Mugesera, but rejected the idea because the speech was so far outside the jurisdictional timeframe of the court.

[118] *Mugesera* v. *Canada (Minister of Citizenship and Immigration)* [2005] 2 SCR 100, confirming *Mugesera* v. *Minister of Citizenship and Immigration*, QML-95-00171, Immigration and Refugee Board, Appeal Division, 11 July 1996, and overturning *Mugesera* v. *Minister of Citizenship and Immigration* [2004] 1 FCR 3; 232 DLR (4th) 75; 309 NR 14; 31 Imm LR (3d) 159 (FCA). Also: *Mugesera* v. *Canada* (Case Nos. M96-10465, M96-10466), Reasons and Order, 6 November 1998 (Immigration and Refugee Board, Appeal Division); *Mugesera et al.* v. *Canada (Minister of Citizenship and Immigration)* [2001] 4 FC 421 (TD).

The Rwanda Tribunal has drawn upon comparative law sources to interpret the term 'incitement'. Under common law, incitement involves 'encouraging or persuading another to commit an offence'.[119] Both continental and common law consider that incitement may consist of threats or other forms of pressure. The Tribunal associated the notion of 'direct and public incitement' with the crime of provocation in continental penal codes. A Trial Chamber referred to the French Penal Code, which defines provocation as follows:

> Anyone, who whether through speeches, shouting or threats uttered in public places or at public gatherings or through the sale or dissemination, offer for sale or display of written material, printed matter, drawings, sketches, paintings, emblems, images or any other written or spoken medium or image in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication shall have directly provoked the perpetrator(s) to commit a crime or misdemeanour, shall be punished as an accomplice to such a crime or misdemeanour.[120]

Direct and public incitement to commit genocide is recognized in many domestic legal systems that have incorporated the crime of genocide into their criminal law. Canada, for example, decided that it did not need to amend its criminal code in order to punish genocide as such, but was aware that the 'other act' of direct and public incitement would not fall under its ordinary criminal law provision dealing with incitement.[121] As a result, a specific offence of inciting genocide was enacted.[122] Jamaica reached a similar conclusion, and amended its legislation accordingly.[123]

[119] *Ibid*., p. 554. The Tribunal cited Professor Andrew Ashworth: 'someone who instigates or encourages another person to commit an offence should be liable to conviction for those acts of incitement, both because he is culpable for trying to cause a crime and because such liability is a step towards crime prevention': Andrew Ashworth, *Principles of Criminal Law*, Oxford: Clarendon Press, 1995, p. 462.

[120] Law No. 72-546 of 1 July 1972 (France) and Law No. 85-1317 of 13 December 1985 (France).

[121] *Prosecutor* v. *Akayesu*, note 115 above, p. 559. Also: *Prosecutor* v. *Ruggiu* (Case No. ICTR-97-32-I), Judgment and Sentence, 1 June 2000, para. 14.

[122] Criminal Code, RSC 1985, c. C-46, s. 318: 'Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.' See also Canada, *Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada*, Ottawa: Queen's Printer, 1966, p. 62.

[123] Offences Against the Person (Amendment) Act 1968, s. 33.

Meaning of 'direct' and 'public'

The *travaux préparatoires* give little guidance as to the scope of the words 'direct and public', although clearly these terms were the technique by which the drafters meant to limit the scope of any offence of inchoate incitement. The word 'public' is the less difficult of the two terms to interpret.[124] Public incitement, according to the International Law Commission, 'requires communicating the call for criminal action to a number of individuals in a public place or to members of the general public at large'. Referring to events in Rwanda,[125] the Commission considered that the incitement could occur in a public place or by technological means of mass communication, such as radio or television.[126] 'This public appeal for criminal action increases the likelihood that at least one individual will respond to the appeal and, moreover, encourages the kind of "mob violence" in which a number of individuals engage in criminal conduct.' It added that private incitement would be considered a form of complicity; but, in that case, proof would be required that the incitement had succeeded and that there was a causal link with the crime of genocide itself.[127] A Trial Chamber of the International Criminal Tribunal for Rwanda, citing French case law, said that words are public where they are spoken aloud in a place that is public by definition.[128] Thus,

[124] The 1954 draft Code of Offences Against the Peace and Security of Mankind deleted the words 'and public': *Yearbook . . . 1954*, Vol. II, pp. 149–52, UN Doc. A/2693, art. 2(13)(ii). The International Law Commission decided upon the omission after a short debate in which members failed to see why private incitement should not also be punishable: *Yearbook . . . 1950*, Vol. I, 60th meeting, p. 154, para. 88; *Yearbook . . . 1951*, Vol. I, 91st meeting, p. 77, paras. 87–92.

[125] On the use of radio in the Rwandan genocide, see J.-P. Chrétien, J.-F. Dupaquier, M. Kabanda and J. Ngarambe, *Rwanda: les médias du génocide*, Paris: Karthala, 1995; Frank Chalk, 'Hate Radio in Rwanda', in Howard Adelman and Astri Suhrke, eds., *The Path of a Genocide: The Rwanda Crisis from Uganda to Zaire*, New Brunswick, NJ, and London: Transaction, 1999, pp. 93–110; 'Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)', UN Doc. S/1994/1405; Jamie Frederic Metzl, 'Rwandan Genocide and the International Law of Radio Jamming', (1997) 91 *American Journal of International Law*, p. 628; *Broadcasting Genocide: Censorship, Propaganda and State-Sponsored Violence in Rwanda 1990–1994*, London: Article 19, 1996, pp. 157–8.

[126] Cited in *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 556; *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 851.

[127] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 4 above, pp. 26–7.

[128] *Prosecutor* v. *Akayesu*, note 115 above, p. 555. Citing the French Court of Cassation, Criminal Tribunal, 2 February 1950, *Bulletin criminel* No. 38, p. 61.

> the public element of incitement to commit genocide may be better appreciated in light of two factors: the place where the incitement occurred and whether or not [incitement] was selective or limited. A line of authority commonly followed in Civil law systems would regard words as being public where they were spoken aloud in a place that was public by definition. According to the International Law Commission, public incitement is characterized by a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television.[129]

Addressing the scope of 'direct' incitement in the 'Media case', which involved three racist propagandists before and during the Rwandan genocide, the Appeals Chamber of the International Criminal Tribunal for Rwanda explained that '[a] vague or indirect suggestion is not sufficient'.[130] The Appeals Chamber insisted upon a distinction between direct incitement to commit genocide and the phenomena of 'hate speech' and of incitement to violence and discrimination. The latter are addressed in important human rights treaties.[131] According to the Appeals Chamber, in most cases, direct and public incitement to commit genocide will be preceded or accompanied by hate speech. In the 'Media case', the Trial Chamber distinguished between acts of racist hate speech and specific manifestations of incitement to genocide, as the Appeals Chamber noted approvingly.[132]

According to the International Law Commission: 'The element of direct incitement requires specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion.'[133] United States legislators took a somewhat

[129] *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 284. Also: *Prosecutor* v. *Ruggiu* (Case No. ICTR-97-32-T), Judgment, 1 June 2000, para. 17; *Prosecutor* v. *Bikindi* (Case No. ICTR-2001-72-T), Decision on Defence Motion for Judgment of Acquittal, Rule 98bis of the Rules of Procedure and Evidence, 26 June 2007, para. 29; *Prosecutor* v. *Bagosora et al.* (Case No. ICTR-98-41-T), Decision on Motions for Judgment of Acquittal, 2 February 2005, para. 22.

[130] *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007, para. 692; *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 852; *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 557.

[131] International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, art. 20; International Convention on the Elimination of All Forms of Racial Discrimination, (1969) 660 UNTS 195, art. 4.

[132] *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007, paras. 696 and 715.

[133] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 4 above, p. 26.

different approach, declaring that it means urging another 'to engage imminently in conduct in circumstances under which there is a substantial likelihood of imminently causing such conduct'.[134]

The problem with requiring that incitement be 'direct' is that history shows that those who attempt to incite genocide speak in euphemisms. It would surely be contrary to the intent of the drafters to view such coded language as being insufficiently direct. In *Akayesu*, the Trial Chamber stated that 'the direct element of incitement should be viewed in the light of its cultural and linguistic content. A particular speech may be perceived as "direct" in one country, and not so in another, depending on the audience.'[135] For example, during the Rwandan genocide, the president of the interim government exhorted a crowd to 'get to work'.

For Rwandans, this meant using machetes and axes and would be taken as an invitation to kill Tutsis, according to the Special Rapporteur, René Degni-Segui.[136] In *Kambanda*, the Tribunal cited the accused's use of an incendiary phrase, 'you refuse to give your blood to your country and the dogs drink it for nothing'.[137] The problem of interpreting ambiguous language also confronted the Canadian tribunal in the *Mugesera* case. Mugesera's speech consisted of a series of *double entendres* and implied references, clearly understandable to his audience but sufficiently ambiguous to provide Mugesera with arguments in his defence, especially in remote Canada. He said, for example: 'Well, let me tell you, your home is in Ethiopia, we'll send all of you by the Nyabarongo so that you get there fast.' Only with the assistance of expert testimony was the Tribunal able to determine the real meaning of this sentence, which implied murder of Tutsis by drowning in the Nyabarongo River.[138] A Trial Chamber of the International Criminal

[134] Genocide Convention Implementation Act of 1987 (the Proxmire Act), S. 1851, s. 1093(3).

[135] *Prosecutor* v. *Akayesu*, note 115 above, para. 556. Also: *Prosecutor* v. *Bikindi* (Case No. ICTR-2001-72-T), Decision on Defence Motion for Judgment of Acquittal, Rule 98bis of the Rules of Procedure and Evidence, 26 June 2007, para. 29.

[136] 'Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Rwanda', UN Doc. A/50/709, annex II, UN Doc. S/1995/915, annex II, UN Doc. E/CN.4/1995/71, para. 24.

[137] *Prosecutor* v. *Kambanda*, note 115 above, para. 39(x).

[138] *Mugesera* v. *Minister of Citizenship and Immigration*, File No. QML-95-00171, 11 July 1996 (Immigration and Refugee Board, Adjudication Division).

Tribunal for Rwanda expressed the same view, noting that 'implicit' incitement could nonetheless be direct:

> The Chamber will therefore consider on a case-by-case basis whether, in light of the culture of Rwanda and the specific circumstances of the instant case, acts of incitement can be viewed as direct or not, by focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof. In light of the foregoing, it can be noted in the final analysis that whatever the legal system, direct and public incitement must be defined for the purposes of interpreting Article 2(3)(c), as directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.[139]

These words have been cited with approval by other Trial Chambers of the Rwandan Tribunal,[140] by its Appeals Chamber[141] and by the Supreme Court of Canada.[142] Despite the fact that the Rwanda Tribunal does not have jurisdiction over crimes committed prior to 1 January 1994, manifestations of incitement to genocide and forms of hate speech may be relevant evidence to establish the context of acts committed subsequently.[143]

Although not charged with 'direct incitement' – the crime did not exist in international law at the time[144] – Hans Fritzche was accused before the International Military Tribunal at Nuremberg of inciting and encouraging the commission of war crimes 'by deliberately falsifying news to arouse in the German people those passions which led them to the commission of atrocities'. The Tribunal found definite evidence of

[139] *Prosecutor* v. *Muvunyi* (Case No. ICTR-2000-55A-T), Judgment, 12 September 2006, para. 502; *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 853; *Prosecutor* v. *Niyitegeka* (Case No. ICTR-96-14-T), Judgment and Sentence, 16 May 2003, para. 431.

[140] *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007, paras. 698–700.

[141] *Mugesera* v. *Canada (Minister of Citizenship and Immigration)* [2005] 2 SCR 100, paras. 87 and 94.

[142] *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007, para. 725.

[143] *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007, para. 702.

[144] *Prosecutor* v. *Akayesu*, note 115 above, para. 557.

anti-Semitism in his broadcasts, which blamed Jews for the war. But, said the Tribunal, 'these speeches did not urge persecution or extermination of Jews'. Consequently, it refused to hold 'that they were intended to incite the German people to commit atrocities on conquered peoples'. In effect, Fritzche's anti-Semitic propaganda was not 'direct' enough.[145] Julius Streicher, on the other hand, was found guilty at Nuremberg for such direct incitement as the following: 'A punitive expedition must come against the Jews in Russia. A punitive expedition which will provide the same fate for them that every murderer and criminal must expect. Death sentence and execution. The Jews in Russia must be killed. They must be exterminated root and branch.'[146]

Although a punishable act of genocide, incitement also bears on the obligation of States parties to the Genocide Convention to prevent genocide. The activities of the hate-mongering Radio Mille Collines were well known to the international community prior to the April 1994 genocide in Rwanda, but the United Nations peacekeeping mission did not intervene.[147] The Security Council has urged States and relevant organizations, with respect to the African Great Lakes region, 'to cooperate in countering radio broadcasts and publications that incite acts of genocide, hatred and violence in the region'.[148] The emerging doctrine of the 'responsibility to protect', coupled with the robust interpretation of the duty to prevent genocide set out by

[145] *France et al.* v. *Goering et al.*, note 26 above, pp. 584–5. But Fritzche was subsequently prosecuted by the German courts under the de-Nazification laws, found guilty, and sentenced to nine years of hard labour and loss of his civic rights. Fritzche waved the Nuremberg judgment before the German judges, but to no avail. It provides a marvellous example of national justice stepping in when international justice fails, although the approach to the *non bis in idem* rule is flexible, to say the least. Fritzche was pardoned in 1950 and died of cancer in 1953: Eugene Davidson, *The Trial of the Germans*, New York: Macmillan, 1966, pp. 549–61; Telford Taylor, *The Anatomy of the Nuremberg Trials*, New York: Alfred A. Knopf, 1992, p. 612.

[146] *France et al.* v. *Goering et al.*, note 26 above, p. 548. See also the findings of the United States Military Tribunal in the case of another Nazi propagandist, Dietrich: *United States of America* v. *von Weizsaecker et al.* ('Ministries case'), (1948) 14 TWC 314 (United States Military Tribunal), pp. 565–76.

[147] The rules of engagement prepared for the United Nations Assistance Mission in Rwanda (UNAMIR) stated that it would intervene, if necessary alone, in order to prevent the occurrence of crimes against humanity: In Force Commander, Operational Directive No. 2: Rules of Engagement (Interim), 19 November 1993, UN Restricted, UNAMIR, File No. 4003.1, art. 17. However, the rules were never formally adopted.

[148] UN Doc. S/RES/1161 (1998), para. 5.

the International Court of Justice in its 2007 judgment on the Bosnian application, has obvious implications in terms of measures to prevent hate propaganda.[149]

One of the more insidious forms that propaganda in favour of genocide has taken in recent years is revisionism or negationism. Some States have enacted laws prohibiting public denial of genocides such as the Holocaust or Shoah of the Jews during the Second World War. The Human Rights Committee held criminal prosecution of a Holocaust denier did not breach the fundamental right to freedom of expression, although it stopped short of endorsing the law upon which the conviction was based.[150] The Committee for the Elimination of Racial Discrimination praised Germany for adopting legislation prohibiting denial of genocide, noting only that it was 'too restricted' because it did not refer to all types of genocide.[151] According to the European Court of Human Rights, denial of 'clearly established historical facts – such as the Holocaust' would not be covered by the right to freedom of expression.[152] Benjamin Whitaker described negationism as a form of incitement to genocide.[153] But, according to Malcolm Shaw, it is doubtful that article III(c) of the Convention is 'sufficiently broad to cover what may be termed public propaganda in favour of genocide'.[154] Holocaust denial and other forms of revisionism are forms of hate propaganda, and should generally be addressed within that context rather than as incitement to genocide.

Attempt

Article III(d) includes '[a]ttempt to commit genocide' as an 'other act'. The Secretariat draft defined '[a]ny attempt to commit genocide' as a punishable offence.[155] The Ad Hoc Committee also proposed that

[149] This subject is discussed in detail in chapter 10, at pp. 520–5.
[150] *Faurisson* v. *France* (No. 550/1993), UN Doc. CCPR/C/58/D/550/1993.
[151] 'Annual Report of the Committee for the Elimination of Racial Discrimination', UN Doc. A/52/18, paras. 217 and 226.
[152] *Lehideaux and Isornia* v. *France* (No. 55/1997/839/1045), Judgment, 23 September 1998, para. 47.
[153] Benjamin Whitaker, 'Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide', UN Doc. E/CN.4/Sub.2/1985/6, para. 49.
[154] Malcolm N. Shaw, 'Genocide and International Law', in Yoram Dinstein, ed., *International Law at a Time of Perplexity (Essays in Honour of Shabtai Rosenne)*, Dordrecht: Martinus Nijhoff, 1989, pp. 797–820 at p. 811.
[155] UN Doc. E/447, pp. 5–13, art. II.I.1.

'[a]ttempt to commit genocide' be included within the convention.[156] There were no amendments in the Sixth Committee, and the paragraph was adopted unanimously without debate.[157] A provision prohibiting 'preparatory acts' contained in the Secretariat draft[158] was voted down in the Ad Hoc Committee[159] and again in the Sixth Committee.[160]

Attempt to commit genocide is also contemplated by the statutes of the two *ad hoc* tribunals, which incorporate article III of the Convention in their definitions of genocide.[161] There is, however, no text on attempt applicable to all of the crimes within the jurisdiction of the *ad hoc* tribunals.[162] This is quite logical, as there is hardly a need to prosecute attempt when a tribunal is set up *ex post facto*. The draft Code of Crimes contains a general provision applicable to all crimes in its subject matter jurisdiction, including genocide: 'An individual shall be responsible for a crime set out in article 17 [genocide] . . . if that individual: . . . (g) attempts to commit such a crime by taking action

[156] UN Doc. E/794, art. IV(c). The French 'Draft Convention on Genocide' (UN Doc. A/C.6/211), which was never put to a vote, included the following provision: 'Article 2. Any attempt, provocation or instigation to commit genocide is also a crime.' The United States draft of 30 September 1947 said: 'It shall be unlawful and punishable to commit genocide or to wilfully participate in an act of genocide, or to engage in any . . . attempt to commit an act of genocide': UN Doc. E/623, art. II.1. See also 'Draft Articles for the Inclusion in the Convention on Genocide Proposed by the Delegation of China on 16 April 1948', UN Doc. E/AC.25/9 ('It shall be illegal to conspire, attempt, or incite persons, to commit acts enumerated in 1, 2, and 3'); and the Soviet Principles, 'Basic Principles of a Convention on Genocide', UN Doc. E/AC.25/7, Principle IV ('The following actions should also be included in the convention as crimes of genocide: 1. Attempts . . . ').

[157] UN Doc. A/C.6/SR.85. See also Robinson, *Genocide Convention*, p. 66.

[158] UN Doc. E/447, pp. 5–13: 'I. The following are likewise deemed to be crimes of genocide . . . 2. The following preparatory acts: (a) studies and research for the purpose of developing the technique of genocide; (b) setting up of installations, manufacturing, obtaining, possessing or supplying of articles or substances with the knowledge that they are intended for genocide; (c) issuing instructions or orders, and distributing tasks with a view to committing genocide.'

[159] UN Doc. E/AC.25/SR.17, p. 7. For the debate in the Ad Hoc Committee, distinguishing between preparatory acts and attempts, see UN Doc. E/AC.25/SR.6, p. 4.

[160] UN Doc. A/C.6/SR.86.

[161] 'Statute of the International Criminal Tribunal for Rwanda', note 5 above, art. 2(3)(d); 'Statute of the International Criminal Tribunal for the Former Yugoslavia', note 5 above, art. 4(3)(d).

[162] 'Statute of the International Criminal Tribunal for the former Yugoslavia', note 5 above, art. 7(1); 'Statute of the International Criminal Tribunal for Rwanda', note 5 above, art. 6(1).

commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.'[163] There is a similar provision in the Rome Statute, applicable to all offences within the Court's jurisdiction, including genocide:

> In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: . . . (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.[164]

Apart from their rejection of the concept of 'mere preparatory acts',[165] the *travaux préparatoires* of the Genocide Convention provide no useful guidance on how the concept of 'attempt' is to be applied.

[163] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 4 above, p. 18. See also 'Eighth Report on the Draft Code of Crimes Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', note 35 above, paras. 63–7, p. 34; 'Report of the Commission to the General Assembly on the Work of Its Forty-Second Session', *Yearbook . . . 1990*, Vol. II (Part 2), UN Doc. A/CN.4/SER.A/1990/Add.1 (Part 2), paras. 68–76.

[164] Rome Statute of the International Criminal Court, note 3 above, art. 25(3)(f). For the drafting history, see 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court', note 38 above, annex II, p. 59; 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', note 38 above, Vol. II, pp. 93–4; UN Doc. A/AC.249/1997/L.5, p. 22; UN Doc. A/AC.249/1997/WG.2/CRP.2/Add.2; 'Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands', note 38 above, p. 54; 'Draft Statute for the International Criminal Court', note 38 above, p. 50; UN Doc. A/CONF.183/C.1/WGGP/L.4, p. 4; A/CONF.183/C.1/WGGP/L.4, p. 3; UN Doc. A/CONF.183/C.1/L.65/Rev.1, p. 3; UN Doc. A/CONF.183/C.1/L.76/Add.3, pp. 2–3.

[165] The author of the first version of the International Law Commission's draft Code, Jean Spiropoulos, proposed that 'preparatory act' be added to art. III of the Genocide Convention. According to Spiropoulos: 'Preparatory acts are declared punishable by the Nürnberg Charter, the Charter of the International Military Tribunal for the Far East and by the Control Council Law No. 10 in the case of aggressive war or war in violation of international treaties, agreements or assurances. The great importance of the crimes to be established by the draft code renders advisable the declaration that the preparatory acts to these crimes are punishable': 'Report by J. Spiropoulos, Special Rapporteur', UN Doc. A/CN.4/25, para. 83(d).

There is no case law on the subject because there have never been any prosecutions for attempted genocide. Even in the case of war crimes, only a handful of prosecutions are reported.[166] During the post-Second World War period, Norway, the Netherlands, Yugoslavia and France all had legal provisions authorizing prosecution for attempted war crimes,[167] although the closest that the Nuremberg Charter or Control Council Law No. 10 came to the concept was in the offence of planning certain crimes.[168] In a French trial, a Nazi official was found guilty of attempt when he recommended that the Gestapo arrest and deport some 'politically undesirable' individuals, although no subsequent action was taken. The conviction was based on a provision in the French penal code stating: 'Any attempt to commit a crime which is displayed by a commencement of execution, when it is suspended or has failed to achieve its object on account of circumstances independent of the will of the perpetrator is regarded as the crime itself.'[169] The International Law Commission considered that an individual who has taken a significant step towards the commission of genocide or any of the other crimes addressed in the Code 'entails a threat to international peace and security because of the very serious nature of these crimes'.[170] Certainly the preventive mission of the Convention mandates diligent prosecution of any attempt.

The principal interpretative problem in attempts is establishing the threshold at which innocent preparatory acts become criminal. Domestic legal texts vary considerably in this area.[171] All legal regimes require that attempt involve something going beyond mere preparation and showing

[166] See, generally, 'Types of Offences', (1948) 15 LRTWC 89 at p. 89.

[167] 'Report by J. Spiropoulos, Special Rapporteur', note 165 above, para. 83(c). See also *United States* v. *Alstötter*, note 33 above, p. 109, n. 1.

[168] In his report on the subsequent proceedings held pursuant to Control Council Law No. 10, note 32 above, Telford Taylor noted that art. II(2) did not include attempt as a form of criminal activity but suggested that there was criminal liability for attempt to commit international crimes by analogy with domestic legal systems: Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10*, Washington: US Government Printing Office, 1949, p. 229.

[169] *France* v. *Stucker*, (1948) 7 LRTWC 72 (Permanent Military Tribunal at Metz).

[170] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 4 above, p. 28.

[171] See George P. Fletcher, *Basic Concepts of Criminal Law*, New York: Oxford University Press, 1998, pp. 171–87; Nathalie Hustin-Denies and Dean Spielmann, *L'infraction inachevée en droit pénal comparé*, Brussels: Bruylant, 1997; and Pradel, *Droit pénal comparé*, pp. 241–7.

a beginning of execution of the crime.[172] Four somewhat different approaches emerge from comparative criminal law: the material act must be unequivocal; the material act must have a causal link with the offence to which it leads directly; the material act must be the first step after preparation; the material act must be the final step before commission of the crime itself. The Rome Statute is the first instrument to articulate a test, declaring that attempt occurs when the offender 'commences its execution by means of a substantial step',[173] a hybrid formulation drawn from French and English law that sets a relatively low threshold.[174] It appears to situate the analysis somewhere between 'the first step after preparation' and 'the last step before commission'. In its commentary on the draft Code of Crimes, the International Law Commission said that attempt involves 'a significant step' towards completion.[175]

The Rome Statute also codifies the significance of voluntary abandonment, which is a form of defence invoked if the attempt has actually been perpetrated but the offender has since failed to complete the crime. The possibility of voluntary abandonment was considered in sessions of the Preparatory Committee,[176] and the diplomatic conference agreed, upon a proposal from Japan, to exclude liability in the case of voluntary abandonment.[177] Why this should be is hard to understand, although presumably it is based on the questionable supposition that this may induce criminals to change their minds.[178] The punishment for an

[172] See 'Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', UN Doc. A/CN.4/398 (1986), paras. 132–41.

[173] Rome Statute of the International Criminal Court, note 3 above, art. 25(3)(f). The draft 'Elements of Crime' submitted by the United States to the February 1999 session of the Preparatory Commission of the Court give the 'substantial step' test a very low threshold, saying only that '[t]he "substantial step" requirement for this offence means that the act must amount to more than mere preparation': UN Doc. PCNICC/1999/DP.4/Add.3, p. 3.

[174] Edward M. Wise, 'Part 3. General Principles of Criminal Law', (1998) 13ter *Nouvelles études pénales*, p. 39 at p. 44.

[175] *Ibid.*, p. 28.

[176] 'Decisions Taken by the Preparatory Committee at Its Session Held 11 to 21 February 1997', note 108 above, p. 22, n. 12; UN Doc. A/AC.249/1998/L.13, p. 54, n. 84.

[177] UN Doc. A/CONF.183/C.1/WGGP/L.4, p. 4. The draft 'Elements of Crime' submitted by the United States to the February 1999 session of the Preparatory Commission state: 'The fact that the crime must fail to occur owing to circumstances independent of the accused's intentions means that no offence of attempt exists if the crime failed to occur because the accused completely and voluntarily gave up the criminal purpose and abandoned the effort to commit the crime': UN Doc. PCNICC/1999/DP.4/Add.3, p. 3.

[178] J. C. Smith and Brian Hogan, *Criminal Law*, 7th edn, London: Butterworths, 1992, p. 317.

attempt is, as a general rule, considerably less than that for the completed crime, which ought to be a sufficient incentive to desist before the deed is done.

Complicity

The final 'other act' of genocide listed in Article III is '[c]omplicity in genocide'. Probably all criminal law systems punish accomplices, that is, those who aid, abet, counsel and procure or otherwise participate in criminal offences, even if they are not the principal offenders.[179] As the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia declared in the 'Celebici' case: 'that individuals may be held criminally responsible for their participation in the commission of offences in any of several capacities is in clear conformity with general principles of criminal law'.[180] Another Trial Chamber has identified a customary law basis for the criminalization of accessories or participants.[181] The 'Nuremberg Principles' formulated by the International Law Commission stated that: 'Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.'[182]

The responsibility of accomplices was recognized in the Charter of the International Military Tribunal in only a limited way.[183] However, on

[179] *United Kingdom* v. *Schonfeld et al.*, (1948) 11 LRTWC 64 (British Military Court), pp. 69–70; *United Kingdom* v. *Golkel et al.*, (1948) 5 LRTWC 45 (British Military Court), p. 53.

[180] *Prosecutor* v. *Delalic et al.* (Case No. IT-96-21-T), Judgment, 16 November 1998, para. 321.

[181] *Prosecutor* v. *Tadić* (Case No. IT-94-1-T), Opinion and Judgment, 7 May 1997, paras. 666 and 669. The Trial Chamber provided several examples of post-Second World War cases to support its assertion: *France* v. *Wagner et al.*, (1948) 3 LRTWC 23, pp. 40–2 and 94–5 (Permanent Military Tribunal at Strasbourg); *United States* v. *Weiss*, (1948) 11 LRTWC 5 (General Military Government Court of the United States Zone); 'Provisions Regarding Attempts, Complicity and Conspiracy', (1948) 9 LRTWC 97–8; 'Inchoate Offences', (1948) 15 LRTWC 89; 'Questions of Substantive Law', (1948) 1 LRTWC 43.

[182] 'Principles of the Nuremberg Charter and Judgment Formulated by the International Law Commission', GA Res. 177A(II); 'Report of the International Law Commission Covering Its Second Session, 5 June to 29 July 1950', UN Doc. A/1316, p. 12, art. VII.

[183] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), note 24 above, art. 6 *in fine*: 'Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.'

this point, the Nuremberg Tribunal seems to have given its Charter a liberal interpretation informed by general principles of law. In fact, many of those convicted at Nuremberg were held responsible as accomplices rather than as principals.[184] A provision in Control Council Law No. 10 established criminal liability of an individual who was an accessory to the crime, took a consenting part therein, was connected with plans or enterprises involving its commission, or was a member of any organization or group connected with the commission of any such crime.[185] The concept of complicity is also recognized in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[186] and the International Convention on the Suppression and Punishment of the Crime of Apartheid.[187]

Complicity is sometimes described as secondary participation,[188] but, when applied to genocide, there is nothing 'secondary' about it. The 'accomplice' is often the real villain, and the 'principal offender' a small cog in the machine. Hitler did not, apparently, physically murder or brutalize anybody; technically, some might describe him as 'only' an accomplice to the crime of genocide. As explained by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia:

> Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.[189]

Therefore, a provision authorizing prosecution for complicity seems important in order to reach those who organize, direct or otherwise

[184] 'Formulation of Nurnberg Principles, Report by J. Spiropoulos, Special Rapporteur', UN Doc. A/CN.4/22, para. 43. In *Prosecutor* v. *Tadić*, note 181 above, para. 674, the Trial Chamber noted that the post-Second World War judgments generally failed to discuss in detail the criteria upon which guilt was determined.

[185] Control Council Law No. 10, note 32 above, art. II.2.

[186] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1987) 1465 UNTS 85, art. 4(1).

[187] International Convention on the Suppression and Punishment of the Crime of Apartheid, (1976) 1015 UNTS 243, art. III.

[188] Or 'principals in the second degree': Glanville Williams, *Criminal Law*, London: Stevens & Sons, 1961, p. 353.

[189] *Prosecutor* v. *Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999, para. 191.

encourage genocide but who never actually wield machine guns or machetes. Such a requirement is not as obvious as it might seem, however.

Drafting history

General Assembly Resolution 96(I) of 11 December 1946 affirmed that genocide was a crime under international law 'for the commission of which principals and accomplices' were punishable.[190] The Secretariat draft of the convention described 'wilful participation in acts of genocide of whatever description' as a punishable act.[191] The various drafts submitted by the United States, France, the Soviet Union and China all included complicity.[192] Nor was the idea of secondary liability for genocide at all contested in the Ad Hoc Committee.[193] Essentially, the debate in the Ad Hoc Committee turned on whether complicity of the State was an essential element of the crime of genocide.[194] The Ad Hoc Committee draft referred to '[c]omplicity in any of the acts enumerated in this article', making it evident that complicity in the 'other acts of genocide', that is, conspiracy, incitement and attempt, both before and after the crime, was also covered.[195]

In the Sixth Committee, Belgium proposed an amendment reading '[c]omplicity in crimes of genocide'.[196] At first blush, this was identical

[190] GA Res. 96(I). [191] UN Doc. E/447, pp. 5–13, art. II.II.1.

[192] 'United States draft of 30 September 1947', UN Doc. E/623, art. II: it shall be unlawful and punishable 'to commit genocide or to wilfully participate in an act of genocide'; 'French Draft Convention of 5 February 1948', UN Doc. E/623/Add.1, art. 1: 'Its authors or their accomplices shall be responsible before International Justice.' The French draft also stated: 'Any attempt, provocation or instigation to commit genocide is also a crime'; Soviet 'Basic Principles of a Convention on Genocide', UN Doc. E/AC.25/9, Principle V: 'The convention should establish the penal character, on equal terms with genocide, of: 1. Deliberated participation in genocide in all its forms . . . 3. Complicity or other forms of conspiracy for the commission of genocide'; 'Draft Articles for the Inclusion in the Convention on Genocide Proposed by the Delegation of China on 16 April 1948', UN Doc. E/AC.25/9, art. II: 'For the commission of genocide, principals and accomplices, whether they are public officials or private individuals, shall be punishable.'

[193] See UN Doc. E/AC.25/SR.3, pp. 3–5 (Rudzinski).

[194] UN Doc. E/AC.25/SR.4, pp. 3–7; UN Doc. E/AC.25/SR.7, p. 9. A judgment of the United States Military Commission also suggests that government complicity is required in the commission of crimes against humanity: *United States* v. *Alstötter*, note 33 above, p. 80.

[195] UN Doc. E/AC.25/SR.16, p. 12; UN Doc. E/AC.25/SR.17, pp. 7 and 9.

[196] UN Doc. A/C.6/217.

in substance with that of the Ad Hoc Committee. But, under the Belgian proposal, complicity was only meant to apply to genocide as such, and not to the 'other acts'. Luxembourg claimed the whole issue was rather irrelevant. It was meaningless to talk of complicity in conspiracy, said its representative; although it was theoretically possible to have complicity in incitement, this was unclear and vague; and it was also undesirable to have complicity for attempts, especially in light of the evidentiary difficulties.[197] But there were compelling arguments for the distinction.

Venezuela observed it could be important to prosecute an accomplice after the fact, that is, one who assisted principal offenders to escape punishment.[198] Iran, however, wanted to limit complicity to the crime of genocide *tout court*.[199] The United Kingdom proposed adding the word 'deliberate' before 'complicity'.[200] Gerald Fitzmaurice explained that it was important to specify that complicity must be deliberate, because there existed some systems where complicity required intent, and others where it did not.[201] Several delegates said that this was unnecessary, because there had never been any doubt that complicity in genocide must be intentional.[202] The United Kingdom eventually withdrew its amendment, 'since it was understood that, to be punishable, complicity in genocide must be deliberate'.[203] The United Kingdom's amendment was now essentially identical to that of Belgium. The latter graciously withdrew its proposal[204] and the United Kingdom amendment reading 'complicity in any act of genocide' was adopted.[205] These debates leave no doubt that the term 'complicity' in article III(e) of the Convention applies only to the crime of genocide itself, and not to the other acts described in article III.[206]

[197] UN Doc. A/C.6/SR.87 (Pescatore, Luxembourg).
[198] UN Doc. A/C.6/SR.84 (Pérez-Perozo, Venezuela).
[199] UN Doc. A/C.6/SR.87 (Abdoh, Iran).
[200] UN Doc. A/C.6/236 and Corr.1. Gerald Fitzmaurice noted that 'deliberate' had been translated incorrectly in French as the word *prémedité*, whereas it should really be *intentionnelle*: UN Doc. A/C.6/SR.87.
[201] UN Doc. A/C.6/SR.87.
[202] *Ibid.* (Pescatore, Luxembourg); *ibid.* (Raafat, Egypt); *ibid.* (Morozov, Soviet Union); *ibid.* (Bartos, Yugoslavia).
[203] *Ibid.* (Fitzmaurice, United Kingdom).
[204] *Ibid.* (Houard, Belgium).
[205] *Ibid.* (twenty-five in favour, fourteen against, with three abstentions).
[206] This was the conclusion of a Trial Chamber of the International Criminal Tribunal for Rwanda: 'It appears from the *travaux préparatoires* of the Genocide Convention that only complicity in the completed offence of genocide was intended for punishment and not complicity in an attempt to commit genocide, complicity in incitement to commit genocide nor complicity in conspiracy to commit genocide, all of which were, in the

Belgium also proposed an amendment introducing the notion of cooperation in genocide.[207] This was criticized for suggesting genocide had to be committed by a number of individuals.[208] Belgium said it would be prepared to replace 'co-operate' by 'participate'. It 'had put forward its amendment on the ground that it was almost inconceivable that a crime aimed particularly at the destruction of a race or group could be the work of a single individual'.[209] This provoked debate about whether the convention was aimed at the State, or required State complicity; or whether genocide could be committed by individuals.

Egypt said 'it was possible to imagine cases where physical or biological genocide was committed without co-operation or participation and where the head of State was alone responsible'.[210] The United States observed that the Committee would not be acting in accordance with General Assembly Resolution 96(I) 'if it drafted a convention which did not afford protection to human groups against the acts of individuals'.[211] Belgium explained that its intention was to emphasize the 'collective' nature of genocide, but agreed that this might be better done in the provision on complicity, and did not push the point.[212]

Complicity in other instruments

The issue of complicity takes a slightly different dimension in the statutes of the *ad hoc* tribunals for the former Yugoslavia and Rwanda. Both instruments repeat article III(e) of the Genocide Convention within paragraph 3 of the substantive genocide provision. In addition, the statute contains a general complicity provision, applicable to all of the offences over which the two tribunals have subject matter jurisdiction, including genocide. It establishes criminal liability for persons who have 'planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime' within the tribunal's jurisidiction.[213]

eyes of some states, too vague to be punishable under the Convention.' *Prosecutor* v. *Akayesu*, note 115 above, para. 526.

[207] UN Doc. A/C.6/217. [208] UN Doc. A/C.6/SR.73 (Abdoh, Iran).

[209] *Ibid.* (Houard, Belgium). [210] *Ibid.* (Raafat, Egypt).

[211] *Ibid.* (Gross, United States). [212] *Ibid.* (Kaeckenbeeck, Belgium).

[213] 'Statute of the International Criminal Tribunal for the Former Yugoslavia', note 5 above, art. 7(1); 'Statute of the International Criminal Tribunal for Rwanda', note 5 above, art. 6(1).

The International Law Commission's draft Code of Crimes defines complicity in five rather detailed provisions:

> 3. An individual shall be responsible for a crime set out in article 17 [genocide] . . . if that individual:
>
> . . .
>
> (b) orders the commission of such a crime which in fact occurs or is attempted;
> (c) fails to prevent or repress the commission of such a crime in the circumstances set out in article 6;
> (d) knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;
> (e) directly participates in planning or conspiring to commit such a crime which in fact occurs;
> (f) directly and publicly incites another to commit such a crime which in fact occurs . . .[214]

The provision seems at times redundant and at times contradictory. The ordinary meaning of abetting, in paragraph (d), means inciting, instigating or encouraging the commission of a crime, even in private.[215] Yet paragraph (f) seems to offer a complete codification of the issue of incitement. The commentary on the Code reveals that the Commission did not understand the meaning of the term 'abetting'.[216] If nothing else, the International Law Commission text on complicity shows the pitfalls of obsessive codification, which has been the unfortunate result of the mechanistic application of the *nullum crimen sine lege* principle. The considerably simpler formulations in the Genocide Convention and in the statutes of the *ad hoc* tribunals have much to recommend themselves.

The Rome Statute provision on complicity suffers from some of the same weaknesses as the International Law Commission's draft Code:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> . . .

[214] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 4 above, p. 18. The reference to art. 6 is to the provision dealing with command or superior responsibility. This issue is discussed at pp. 361–6 below.

[215] Smith and Hogan, *Criminal Law*, p. 126.

[216] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 4 above, p. 24.

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
  (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
  (ii) Be made in the knowledge of the intention of the group to commit the crime . . .[217]

There is a certain redundancy about these provisions, perhaps because of an unfamiliarity of the drafters with the common law term 'abets' which, although it appears in paragraph (c), in reality covers everything described in paragraph (b).[218]

Accomplice or perpetrator?

The District Court of Jerusalem considered Eichmann to be a principal offender 'in the same way as two or more persons who collaborate in forging a document are all principal offenders'.[219] The Court noted that the extermination of the Jews was a most elaborate operation requiring a 'complicated establishment'. According to the Court: 'Whoever was let into the secret of the extermination plan, above a certain rank, knew that such an establishment was required, that it existed and functioned, although not everyone knew how each part of the establishment operated, with what means, at what pace or even where.' But this establishment was 'a single comprehensive act, not to be split up into the acts or operations performed by sundry people at sundry times and in sundry places. One team of men carried it out in concert the whole time and everywhere.'[220] It follows, said the Court, that a collaborator in the extermination of the Jews, who had knowledge of the plan for the 'final solution', should be

[217] Rome Statute of the International Criminal Court, note 3 above, art. 25.
[218] See Ambos, 'General Principles'; and Schabas, 'General Principles'.
[219] *A-G Israel* v. *Eichmann*, (1968) 36 ILR 18 (District Court, Jerusalem), para. 194.
[220] *Ibid.*, para. 193.

regarded 'as an accomplice in the extermination of the millions who were destroyed during the years 1941–1945, irrespective of whether his actions extended over the entire extermination front or only over one or more sectors of it. His responsibility is that of a "principal offender" who has committed the entire crime in conjunction with the others.'[221]

An essentially similar approach was adopted by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia when it found General Krstić guilty as a 'principal perpetrator' with respect to the massacre at Srebrenica.

> General Krstić did not conceive the plan to kill the men, nor did he kill them personally. However, he fulfilled a key co-ordinating role in the implementation of the killing campaign. In particular, at a stage when his participation was clearly indispensable, General Krstić exerted his authority as Drina Corps Commander and arranged for men under his command to commit killings. He thus was an essential participant in the genocidal killings in the aftermath of the fall of Srebrenica. In sum, in view of both his *mens rea* and *actus reus*, General Krstić must be considered a principal perpetrator of these crimes.[222]

But this finding was overturned by the Appeals Chamber, which preferred to characterize Krstić's role as that of an aider and abettor in genocide.[223]

There is no consensus among judges at the Appeals Chamber of the International Criminal Tribunal for Rwanda on where to draw the line between the accomplice and the perpetrator. In a Rwandan case, Judge Shahabuddeen of the Appeals Chamber suggested that complicity-related charges should be reserved for those who are not actually present at the crime scene. Gacumbitsi had given orders to others to carry out killings:

> A person who engaged in the attacks in those ways would plainly be guilty of 'committing' genocide. Justice would not be served by holding that this view does not apply to the appellant as the principal actor; it would be a misunderstanding and misapplication of the law to say that, on those findings of fact made by the Trial Chamber, he was guilty of 'ordering' or 'instigating' but not of 'committing' genocide. He not only 'ordered' or 'instigated' but actually participated in the 'commission' of the crime.[224]

[221] *Ibid.*, para. 194.
[222] *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 644.
[223] *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Judgment, 19 April 2004, paras. 135–44.
[224] *Prosecutor* v. *Gacumbitsi* (Case No. ICTR-2001-64-A), Separate Opinion of Judge Shahabuddeen, 7 July 2006, para. 22.

Judge Schomburg wrote in a similar vein, arguing against an overly narrow concept in distinguishing a perpetrator from an accomplice. Crimes under international law are often committed by a plurality of co-operating individuals, not all of whom carry out the crimes by their own hand, he explained. '[N]evertheless, in general, they are not less culpable. On the contrary, within the context of international macro criminality, the degree of criminal responsibility frequently grows as distance from the actual act increases.'[225] But Judge Güney wrote a dissenting opinion along opposite lines,[226] and his views were endorsed by Judge Meron.[227]

When the United Kingdom incorporated the Genocide Convention in its domestic law, it did not include a provision dealing with complicity. Parliamentary Secretary Elystan Morgan, in explaining the legislation to Parliament, noted that: 'Complicity in genocide has not been included in Clause 2(1) [because] we take the view that the subheading in Article III is subsumed in the act of genocide itself in exactly the same way as, under our domestic criminal law, aiding and abetting is a situation in which a person so charged could be charged as a principal in relation to the offence itself.'[228]

Forms of complicity

The International Criminal Tribunal for Rwanda, in the *Akayesu* case, attempted to explain the distinctions between the different terminologies used to describe secondary participation. The first term it discussed was 'planning'. According to the Rwanda Tribunal:

> Such planning is similar to the notion of complicity in Civil law, or conspiracy under Common law, as stipulated in Article 2(3) of the Statute. But the difference is that planning, unlike complicity or plotting, can be an act committed by one person. Planning can thus be defined as

[225] *Prosecutor* v. *Gacumbitsi* (Case No. ICTR-2001-64-A), Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, 7 July 2006, para. 3.

[226] *Prosecutor* v. *Gacumbitsi* (Case No. ICTR-2001-64-A), Partially Dissenting Opinion of Judge Güney, 7 July 2006. Also: *Ndindabahizi* v. *Prosecutor* (Case No. ICTR-01-71-A), Partially Dissenting Opinion of Judge Güney, 16 January 2007.

[227] *Prosecutor* v. *Gacumbitsi* (Case No. ICTR-2001-64-A), Partially Dissenting Opinion of Judge Meron, 7 July 2006.

[228] Official Report, Fifth Series, Parliamentary Debates, Commons 1968–9, Vol. 777, 3–14 February 1969, pp. 480–509.

> implying that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.[229]

But it is inaccurate to associate 'planning' with conspiracy as it is intended in the common law, because conspiracy is an inchoate crime. 'Planning' within the meaning of the statutes of the *ad hoc* tribunals is only criminal if the underlying crime is committed.[230] It may be proven through circumstantial evidence. The involvement of the planner must be substantial, such as actually formulating a plan or endorsing a plan proposed by another individual.[231]

The second category was 'instigation', which the Rwanda Tribunal agreed is synonymous with 'incitement', at least in English law. According to the Tribunal, this involves 'prompting another to commit an offence'.[232] The Tribunal noted that instigation or incitement, as set out in the general provision of the Statute concerning criminal participation, is not the same as the crime of 'direct and public incitement' listed in the specific provision concerning genocide. 'Direct and public incitement' is an inchoate crime, and not a form of complicity. Instigation, on the other hand, requires proof of a causal connection with the commission of the crime itself.[233]

The third category is 'ordering' the commission of an offence.

> Ordering implies a superior–subordinate relationship between the person giving the order and the one executing it. In other words, the person in a position of authority uses it to convince another to commit an offence. In certain legal systems, including that of Rwanda (See Article 91 of the Penal Code, in 'Codes et Lois du Rwanda', Université nationale du Rwanda, 31 December 1994 update, Volume I, 2nd edition: 1995,

[229] *Prosecutor* v. *Blaškić* (Case No. IT-95-14-T), Judgment, 3 March 2000, para. 278.

[230] *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, para. 30.

[231] *Prosecutor* v. *Akayesu*, note 115 above, para. 480. Also: *Prosecutor* v. *Semanza* (Case No. ICTR-97-20-T), Judgment and Sentence, 15 May 2003, para. 380; *Prosecutor* v. *Blaškić* (Case No. IT-95-14-T), Judgment, 3 March 2000, para. 386; *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment and Sentence, 27 January 2000, para. 119; *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 760.

[232] *Ibid.*, para. 482. Also: *Prosecutor* v. *Semanza* (Case No. ICTR-97-20-T), Judgment and Sentence, 15 May 2003, para. 381; *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, para. 30; *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 762.

[233] *Prosecutor* v. *Semanza* (Case No. ICTR-97-20-T), Judgment and Sentence, 15 May 2003, para. 381; *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, para. 30; *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 762.

> p. 395), ordering is a form of complicity through instructions given to the direct perpetrator of an offence. Regarding the position of authority, the Chamber considers that sometimes it can be just a question of fact.[234]

A formal superior–subordinate relationship is not required for 'ordering', but it must be shown that the accused possessed the authority to make the order.[235] Judge Schomburg of the Appeals Chamber of the International Criminal Tribunal for Rwanda has questioned whether 'ordering' is properly encompassed within the 'closed system' of article 2 of the Statute of the Tribunal.[236]

The final form of criminal participation in the statutes of the *ad hoc* tribunals is 'aiding and abetting'. This is a rather classic common law formulation of complicity. According to the Rwanda Tribunal, aiding means giving assistance to someone, while abetting involves facilitating the commission of an act by being sympathetic thereto.[237] The two terms are disjunctive, and it is sufficient to prove one or the other form of participation, the Tribunal declared.[238]

Nevertheless, subsequent case law tends to treat the terms 'aiding and abetting' as if they have a collective sense, with no distinct or autonomous meanings for the two elements: 'practical assistance, encouragement or moral support which has a substantial effect on the perpetration of the crime'.[239] There must be a signficant link with the crime itself. The

[234] *Ibid*., paras. 478–82. Also: *Prosecutor* v. *Semanza* (Case No. ICTR-97-20-T), Judgment and Sentence, 15 May 2003, para. 381; *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 762.

[235] *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 763.

[236] *Prosecutor* v. *Kamuhanda* (Case No. ICTR-95-54A-A), Separate Opinion of Judge Wolfgang Schomburg, 19 September 2005, para. 367, n. 812.

[237] *Ibid*., para. 484; *Prosecutor* v. *Semanza* (Case No. ICTR-97-20-T), Judgment and Sentence, 15 May 2003, para. 384; *Prosecutor* v. *Ntakirutimana et al.* (Case No. ICTR-96-10 and ICTR-96-17-T), Judgment, 21 February 2003, para. 787; *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 763. According to Smith and Hogan, the words 'aiding' and 'abetting' connote different forms of activity. 'The natural meaning of "to aid" is "to give help, support or assistance to"; and of "to abet", "to incite, instigate or encourage"': Smith and Hogan, *Criminal Law*, p. 126.

[238] *Prosecutor* v. *Kayishema and Ruzindana* (Case No. ICTR-95-1-T), Judgment, 21 May 1999, para. 197.

[239] *Prosecutor* v. *Furundžija*, note 7 above, para. 249. See also *Prosecutor* v. *Tadić*, note 189 above, para. 689: 'aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present'. Also: *Prosecutor* v. *Semanza* (Case No. ICTR-97-20-T), Judgment and Sentence, 15 May

assistance or encouragement provided by the aider and abettor need not have caused the crime,[240] but it must have had a 'substantial effect' upon its commission.[241]

An early decision of the Rwanda Tribunal claimed there was a distinction between 'aiding and abetting', set out in the general provision of the Statute and applicable to all crimes covered by the Statute,[242] and 'complicity', which is in the genocide provision alone, and not in those concerning war crimes and crimes against humanity.[243] Subsequent case law, however, has adopted the view that aiding and abetting genocide, pursuant to article 6(1), and complicity in genocide,[244] in article 2(2) of the Statute, 'are overlapping, if not substantially similar forms of criminal conduct'.[245] According to the Appeals Chambers of the two Tribunals, 'complicity in genocide' includes 'aiding and abetting'.[246]

2003, para. 384; *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 765.

[240] *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007, para. 502.

[241] *Prosecutor* v. *Semanza* (Case No. ICTR-97-20-T), Judgment and Sentence, 15 May 2003, para. 386; *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 766.

[242] 'Statute of the International Criminal Tribunal for Rwanda', note 5 above, art. 6(1).

[243] *Ibid.*, art. 2(3)(e).

[244] It proposes more detailed definitions of some of these terms: *Prosecutor* v. *Akayesu*, note 115 above, para. 536. Thus, 'complicity by procuring means, such as weapons, instruments or any other means, used to commit genocide, with the accomplice knowing that such means would be used for such a purpose; complicity by knowingly aiding or abetting a perpetrator of a genocide in the planning or enabling acts thereof; complicity by instigation, for which a person is liable who, though not directly participating in the crime of genocide, gave instructions to commit genocide, through gifts, promises, threats, abuse of authority or power, machinations or culpable artifice, or who directly incited to commit genocide'.

[245] *Prosecutor* v. *Semanza* (Case No. ICTR-97-20-T), Judgment and Sentence, 15 May 2003, para. 394; *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, paras. 138–9; *Prosecutor* v. *Ntakirutimana* (Case No. ICTR-96-10-A and ICTR-96-17-A), Judgment, 13 December 2004, paras. 500–1; *Prosecutor* v. *Bagosora et al.* (Case No. ICTR-98-41-T), Decision on Motions for Judgment of Acquittal, 2 February 2005, para. 21; *Prosecutor* v. *Bikindi* (Case No. ICTR-2001-72-T), Decision on Defence Motion for Judgment of Acquittal, Rule 98bis of the Rules of Procedure and Evidence, 26 June 2007, para. 28.

[246] *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Judgment, 19 April 2004, paras. 138–9; *Prosecutor* v. *Ntakirutimana* (Case No. ICTR-96-10-A and ICTR-96-17-A), Judgment, 13 December 2004, para. 371.

Mental element of complicity

Decisions of the Appeals Chambers take the view that the aider and abettor must have knowledge of the *mens rea* of the perpetrator, but that he or she need not have the specific intent to commit genocide.[247] In *Ntakirutimana*, the Appeals Chamber of the Rwanda Tribunal concluded:

> Elizaphan Ntakirutimana was present during several attacks on refugees in Bisesero, including situations where the armed attackers sang: 'Exterminate them; look for them everywhere; kill them; and get it over with, in all the forests', and 'Let us exterminate them', while chasing and killing Tutsis. It is from this, as well as from his transporting the armed attackers and directing them toward fleeing Tutsi refugees that the Trial Chamber found that Elizaphan Ntakirutimana had the requisite intent to commit genocide, convicting him of aiding and abetting genocide. In the view of the Appeals Chamber, it is not necessary to consider whether the Trial Chamber correctly concluded that Elizaphan Ntakirutimana had the specific intent to commit genocide, given that it convicted him not of committing that crime, but rather of aiding and abetting genocide, a mode of criminal participation which does not require the specific intent. The Appeals Chamber finds that Elizaphan Ntakirutimana knew of the genocidal intent of the attackers whom he aided and abetted in the perpetration of genocide in Bisesero and, therefore, that he possessed the requisite *mens rea* for that crime.[248]

The discussion about the *mens rea* of the accomplice gets to the core of the debate about whether genocidal intent should be purpose-based or knowledge-based.[249] When the Appeals Chambers distinguish between the *mens rea* of the accomplice and the intent of the principal perpetrator, they hinge their analysis on the different purposes of the two individuals. Accordingly, the accomplice need not have the 'purpose' to commit genocide, but he or she must have 'knowledge' that the principal perpetrator has the 'purpose' to commit the crime.

This appears much too focused on the knowledge and intent of a few specific individuals. In the example given above, was it really necessary to prove that Ntakirutimana knew the intent of the killers because they were singing songs calling for extermination of the Tutsi? Didn't Ntakirutimana already know what was going on in Rwanda, given the

[247] *Prosecutor* v. *Blagojević* (Case No. IT-02-60-A), Judgment, 9 May 2007, para. 122.
[248] *Prosecutor* v. *Ntakirutimana* (Case No. ICTR-96-10-A and ICTR-96-17-A), Judgment, 13 December 2004, para. 364.
[249] This issue is discussed in the previous chapter, at pp. 243–56.

genocidal context, the mass scale of the killings, and the official support for them? If there had been no manifestation by the local mobs of genocidal intent, would Ntakirutimana have been entitled to an acquittal on a charge of aiding and abetting? The better approach would be to take the existence of a plan or policy as the starting point. Then, the central question concerning complicity, namely, whether genocide has been committed at all, does not depend upon the specific intent of the individual principal perpetrator but rather upon evidence of a State plan or policy. The focus is on the collective nature of the crime.[250] From that point onward, the issue is simply whether any of the individuals involved, be they accomplice or principal perpetrator, has knowledge of the plan or policy and commits punishable acts – killing, causing serious bodily or mental harm, and so on – that substantially assist in its implementation.[251]

There is a rather puzzling nuance in the case law of the Appeals Chambers, which distinguishes the *mens rea* of aiding and abetting genocide and that of complicity in genocide. In *Krstić*, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia acquitted the accused of genocide but convicted him for aiding and abetting because it said he knew of the specific genocidal intent of the actual perpetrators. According to the Appeals Chamber, 'there is authority to suggest that complicity in genocide, where it prohibits conduct broader than aiding and abetting, requires proof that the accomplice had the specific intent to destroy a protected group'. But the Appeals Chamber made this observation in order to bolster the conclusion that '[t]he texts of the Tribunal's Statute and of the Genocide Convention, combined with the evidence in the Convention's *travaux préparatoires*, provide additional support to the conclusion that the drafters of the Statute opted for applying the notion of aiding and abetting to the prohibition of genocide under Article 4'.[252] Several months later, in *Ntakirutimana*, an Appeals Chamber of the International

[250] Hans Vest, 'A Structure-Based Concept of Genocidal Intent', (2007) 5 *Journal of International Criminal Justice*, p. 781.

[251] See, by analogy, the remarks of a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia with respect to crimes against humanity: 'knowing that crimes are being committed within a system and knowingly participating in that system in a way that substantially assists or facilitates the commission of a crime or which allows the criminal enterprise to function effectively or efficiently would be enough to establish criminal liability'. *Prosecutor* v. *Kvočka et al.* (Case No. IT-98-30/1-T), Judgment, 2 November 2001, para. 312.

[252] *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Judgment, 19 April 2004, para. 142.

Criminal Tribunal for Rwanda that included three judges who had participated in the *Krstic* appeal, said that 'the *Krstić* Appeals Chamber derived aiding and abetting as a mode of liability from Article 7(1) of the ICTY Statute, but also considered that aiding and abetting constitutes a form of complicity, suggesting that complicity under Article 2 of the ICTR Statute and Article 4 of the ICTY Statute would also encompass aiding and abetting, based on the same *mens rea*, while other forms of complicity may require proof of specific intent'.[253] Subsequently, a Trial Chamber attempted to make sense of this:

> The Appeals Chamber has said that complicity, as it occurs in the Genocide Convention, may encompass conduct 'broader' than aiding and abetting. For complicity that is 'broader', the Prosecution must prove that the accomplice not only *knew* of the principal's specific intent to destroy the protected group in whole or in part, but also shared that intent . . .[254]

There is no explanation in the case law to explain why the *mens rea* requirement should be different for one form of complicity and not another.[255] As discussed earlier in this chapter, a knowledge-based approach to genocide based upon a State policy or plan obviates the rationale for such arcane distinctions. It may well be that the mysterious distinctions of the Appeals Chamber manifest nothing more than attempts by judges with quite different views of genocidal intent to reach consensus.[256]

Joint criminal enterprise

In *Tadić*, the Appeals Chamber developed the concept of 'common purpose' complicity, which is distinct from 'aiding and abetting'.[257] It said 'aiding and abetting' lacked the stigmatization of 'common purpose' complicity. The concept is widely known by the label 'joint criminal

[253] *Prosecutor* v. *Ntakirutimana* (Case No. ICTR-96-10-A and ICTR-96-17-A), Judgment, 13 December 2004, para. 500.

[254] *Prosecutor* v. *Krajisnik* (Case No. IT-00-39-T), Judgment, 27 September 2006, para. 8.

[255] See: *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Declaration of Judge Keith, 26 February 2007, para. 7.

[256] The Rwandan Penal Code was adopted in 1977, but is modelled on the nineteenth-century codes of France and Belgium. See William A. Schabas and Martin Imbleau, *Introduction to Rwandan Law*, Cowansville, Quebec: Editions Yvon Blais, 1998.

[257] *Prosecutor* v. *Tadić*, note 189 above: 'to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility'. For the distinction between 'aiding and abetting' complicity and 'common purpose' complicity, see para. 229.

enterprise' or, simply, 'JCE'. The Appeals Chamber observed that criminal liability could be extended to cover responsibility where two or more persons have a common design to pursue a course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose.[258] It said this form of liability derived from customary law and could be inferred from the Statute.

Trial Chambers have found the so-called 'third category' of the joint criminal enterprise doctrine, whereby an accused is convicted for crimes perpetrated by other participants in the common purpose to the extent that these were reasonably foreseeable outcomes, to be incompatible with the specific intent requirement for genocide,[259] but such conclusions have been reversed on appeal.[260] Quickly embraced by the Yugoslavia Tribunal, the International Criminal Tribunal for Rwanda approached the concept of joint criminal enterprise with more caution, perhaps out of misgivings concerning its application to the crime of genocide. One Trial Chamber refused to convict on the basis of joint criminal enterprise,[261] while another denied an amendment that specifically alleged joint criminal enterprise.[262] In some cases, the Prosecutor did not make joint criminal enterprise a live issue at trial (and therefore failed in attempts to invoke joint criminal enterprise on appeal).[263] Eventually, the Appeals Chamber intervened: 'Given the fact that both the ICTY and the ICTR have mirror articles identifying the

[258] *Ibid.*, paras. 204–20.

[259] *Prosecutor* v. *Stakić* (Case No. IT-97-24-T), Judgment, 31 July 2003, para. 530; *Prosecutor* v. *Brdanin* (Case No. IT-99-36-T), Decision on Motion for Acquittal Pursuant to Rule 98bis, 28 November 2003, para. 57.

[260] *Prosecutor* v. *Brdanin* (Case No. IT-99-36-A), Decision on Interlocutory Appeal, 19 March 2004; *Prosecutor* v. *Rwamakuba* (Case No. ICTR-98-44-AR72.4), Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004. See: Elies van Sliedregt, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide', (2007) 5 *Journal of International Criminal Justice*, p. 184.

[261] *Prosecutor* v. *Gacumbitsi* (Case No. ICTR-2001-64-T), Judgment, 17 June 2004, para. 289.

[262] *Prosecutor* v. *Karemera et al.* (Case No. ICTR-98-44-T), Decision Denying Leave to File an Amended Indictment, 8 October 2003. Reversed: *Prosecutor* v. *Karemera et al.* (Case No. ICTR-98-44-AR73), Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October Denying Leave to File an Amended Indictment, 19 December 2003.

[263] *Prosecutor* v. *Ntakirutimana et al.* (Case No. ICTR-96-10-A and ICTR-96-17-A), Judgment, 13 December 2004, paras. 467–84.

modes of liability by which an individual can incur criminal responsibility, the Appeals Chamber is satisfied that the jurisprudence of the ICTY should be applied to the interpretation of Article 6(1) of the ICTR Statute.'[264]

In practice, however, the role of joint criminal enterprise complicity in genocide has to date remained largely theoretical. That may change with the enlargement of the doctrine by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia to so-called 'big fish'.[265] Nevertheless, to the extent that a State plan or policy is fundamental to the crime of genocide, even if it may not be viewed as a formal element, leaders and organizers will inevitably be approached as perpetrators rather than more indirectly, under the joint criminal enterprise theory. At best, it must be said that any genuine utility of joint criminal enterprise in genocide prosecutions remains unproven.

Problems of application

War crimes case law provides many examples of prosecution for complicity law, including some directly related to the Nazi genocide. The manufacturer of Zyklon B gas, which was used for mass extermination at Auschwitz and other concentration camps, was condemned by a British Military Court for violating 'the laws and usages of war'.[266] His attorney argued, unsuccessfully, that he was 'merely an accessory before the fact, and even so, an unimportant one'.[267] In another concentration camp prosecution, members of the staff at Belsen and Auschwitz were found 'in violation of the laws and usages of war [and to be] together concerned as parties to the ill-treatment of certain persons'.[268] The judge-advocate who successfully prosecuted the case conceded that 'mere presence on the staff was not of itself enough to justify a conviction', but insisted that 'if a number of people took a part, however small in an offence, they were parties to the whole'.[269] Judges and prosecutors who applied racist laws, contributing to persecution and

[264] *Ibid.*, para. 468.
[265] *Prosecutor* v. *Brdanin* (Case No. IT-99-36-A), Judgment, 3 April 2007, paras. 393–4.
[266] *United Kingdom* v. *Tesch et al.* ('Zyklon B case'), (1947) 1 LRTWC 93 (British Military Court).
[267] *Ibid.*, p. 102.
[268] *United Kingdom* v. *Kramer et al.* ('Belsen trial'), (1947) 2 LRTWC 1 (British Military Court), p. 4.
[269] *Ibid.*, pp. 109 and 120.

genocide, were convicted as parties. According to the United States Military Tribunal: 'This is but an application of general concepts of criminal law. The person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission, and the person who pulls the trigger are all principals or accessories to the crime.'[270]

In *Tadić*, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia noted that the degree of aiding or abetting has not been specified by the case law, although it offered some examples as guidance.[271] The authorities suggest that the contribution of the accomplice must meet a qualitative and quantitative threshold. The prosecutor of the International Criminal Tribunal for the former Yugoslavia argued that 'any assistance, even as little as being involved in the operation of one of the camps', constitutes sufficient participation to meet the terms of complicity. '[T]he most marginal act of assistance' can constitute complicity, pleaded the Prosecutor.[272] The Tribunal viewed the matter otherwise, saying that criminal participation must have a direct and substantial effect on the commission of the offence.[273] It endorsed the views of the International Law Commission, noting that, while the latter provided no definition of 'substantially', the case law required 'a contribution that in fact has an effect on the commission of the crime'.[274] The Tribunal suggested that participation is substantial if 'the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed'.[275]

[270] *United States* v. *Alstötter*, note 33 above, p. 62.

[271] *Prosecutor* v. *Tadić*, note 189 above, para. 681, citing Jordan Paust, 'My Lai and Vietnam', (1972) 57 *Military Law Review*, p. 99 at p. 168.

[272] *Prosecutor* v. *Tadić*, note 189 above, para. 671.

[273] *Ibid.*, paras. 691 and 692. See also *Prosecutor* v. *Delalić et al.*, note 180 above, para. 326; *Prosecutor* v. *Furundžija*, note 7 above, paras. 223 and 234; *Prosecutor* v. *Aleksovski* (Case No. IT-95-14/1-T), Judgment, 25 June 1999, para. 61; *Prosecutor* v. *Kayishema and Ruzindana* (Case No. ICTR-95-1-A) Judgment (Reasons), 1 June 2001, para. 186.

[274] The International Law Commission required that accomplices participate 'directly and substantially' in the commission of the crime. In addition, the commentary to the draft Code noted that 'the accomplice must provide the kind of assistance which contributes directly and substantially to the commission of the crime, for example by providing the means which enable the perpetrator to commit the crime. Thus, the form of participation of an accomplice must entail assistance which facilitates the commission of a crime in some significant way: 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 4 above, p. 24.

[275] *Prosecutor* v. *Tadić*, note 189 above, para. 688.

But 'assistance need not constitute an indispensable element, that is, a *conditio sine qua non* for the acts of the principal'.[276]

The Rome Statute does not provide any indication as to whether there is some quantitative degree of aiding and abetting required to constitute the *actus reus* of complicity. The absence of words like 'substantial' in the Rome Statute, and the failure to follow the International Law Commission draft, may imply that the diplomatic conference meant to reject the higher threshold of the recent case law of The Hague. Even the accused who is not actually present when the crime takes place may be a participant. As the Yugoslavia Tribunal observed: 'direct contribution does not necessarily require the participation in the physical commission of the illegal act. That participation in the commission of the crime does not require an actual physical presence or physical assistance appears to have been well accepted at the Nuremberg war crimes trials.'[277] Robert Mulka, a camp commander at Auschwitz, was convicted by a German court as an accessory in the murder of approximately 750 persons. Mulka was involved in procuring Zyklon B gas, constructing gas ovens, arranging for trucks to transport inmates to the gas chambers, and alerting the camp bureaucracy as to the imminent arrival of transports.[278] Identification of a victim to those who subsequently carry out the crime, if the informer knows that this will lead to the commission of genocide and intends this consequence or is recklessly indifferent to it, may also constitute complicity.[279]

Just as presence at the scene of the crime is not essential for complicity, it is also clear that mere presence at the scene of the crime, in the absence of a material act or omission, is not an act of complicity. On

[276] *Prosecutor* v. *Furundžija*, note 7 above, para. 209. Also: *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, para. 33. But see *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-T), Separate and Dissenting Opinion of Judge Mehmet Güney, 7 June 2001.

[277] *Prosecutor* v. *Tadić*, note 189 above, paras. 678 and 691. In *Tadić*, the Trial Chamber cited *United Kingdom* v. *Golkel et al.*, note 179 above, p. 53 ('it is quite clear that [concerned in the killing does] not mean that a man actually had to be present at the site of the shooting') and pp. 45–7 and 54–5 (defendants who only drove victims to woods to be killed there were found to have been 'concerned in the killing'); *United Kingdom* v. *Wielen et al.*, (1948) 9 LRTWC 31 (British Military Court, Hamburg), pp. 43–4 and 46 (it is not necessary that a person be present to be 'concerned in a killing').

[278] *United Kingdom* v. *Tesch et al.*, note 266 above, pp. 93–101.

[279] *France* v. *Becker et al.*, (1948) 7 LRTWC 67 (Permanent Military Tribunal at Lyon), pp. 70–1.

this issue, the Yugoslavia Tribunal referred to the judge-advocate's statement before a British Military Court in the Schonfeld case:[280]

> Those who are present at the commission of an offence, and aid and abet its commissions, are principals in the second degree . . . The presence of a person at the scene of the crime may be actual in the sense that he is there, or it may be constructive. It is not necessary that the party should be actually present, an eye-witness or ear witness to the transaction; he is, in construction of law, present, aiding and abetting, with the intention of giving assistance, if he is near enough to afford it should occasion arise . . . There must also be a participation in the act; for even if a man is present whilst a felony is committed, if he takes no part in it and does not act in concert with those who commit it, he will not be a principal in the second degree, merely because he did not endeavour to prevent the felony. It is not necessary, however, to prove that the party actually aided in the commission of the offence; if he . . . was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, he was, in contemplation of law, present aiding and abetting.[281]

Where the accused has a legal duty to intervene, mere presence may, however, constitute a form of complicity.[282] An example would be where police do not act to prevent a racist mob. Indeed, failure to intervene is in reality a form of encouragement or abetting. In the Borkum Island case, civilians brutalized and killed captured American pilots who were being paraded in public, without any intervention by German guards who were present at the time. The latter were convicted, as well as the commander who ordered that the prisoners be paraded.[283]

In *Tadić*, the Prosecutor also contended that the accused was criminally responsible because he had taken part in earlier acts and thereafter remained present, never withdrawing from the subsequent acts: 'the continued presence of the accused gave both support and encouragement to the other members of his group and thereby aided them in the commission of the illegal acts'.[284] The Trial Chamber concluded:

[280] *Prosecutor* v. *Tadić*, note 189 above, para. 678.
[281] *United Kingdom* v. *Schonfeld et al.*, note 179 above, pp. 69–72.
[282] Under many legal systems, failure to assist a person whose life is in danger may constitute a distinct crime, rather than a form of complicity. The accused must have been in a position to intervene without incurring personal harm.
[283] *United States of America* v. *Goebell et al.* (Case. No. 12-489), 15 September 1948, USNA RG 338, File M1217, Roll 1.
[284] *Prosecutor* v. *Tadić*, note 189 above, para. 671.

> Under this theory, presence alone is not sufficient if it is an ignorant or unwilling presence. However, if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it . . . Moreover, when an accused is present and participates in the beating of one person and remains with the group when it moves on to beat another person, his presence would have an encouraging effect, even if he does not physically take part in this second beating, and he should be viewed as participating in this second beating as well. This is assuming that the accused has not actively withdrawn from the group or spoken out against the conduct of the group.[285]

In *Furundžija*, the Tribunal said that 'an approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their conduct' could be found guilty as an accomplice to crimes against humanity.[286] The responsibility of a superior is not automatic on this basis, although presence at the scene will create a strong presumption of guilt.[287]

Sometimes, complicity is established because the accused is employed in a criminal enterprise or belongs to some civilian or military unit. But complicity should never be equated with some form of collective guilt, by which members of a regime or of armed forces in the regime are deemed, by that fact alone, to share criminal liability.[288] In the judgment of the International Military Tribunal, Kaltenbrunner was acquitted of crimes against peace due to the absence of evidence showing a material act of participation, even though his guilty intent was hardly in doubt.[289] In the Dachau trial, employees of the notorious concentration camp were found guilty as accomplices once their direct involvement in the running of the camp had been established.[290] In the Mauthausen case, the court concluded: 'That any official, governmental, military or civil . . . or any guard or civil employee, in any way in control of or

[285] *Ibid.*, paras. 689–90.
[286] *Prosecutor* v. *Furundžija*, note 7 above, para. 207. See also *Prosecutor* v. *Kayishema and Ruzindana*, note 273 above, paras. 200–1; *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, para. 34.
[287] *Prosecutor* v. *Aleksovski*, note 273 above, para. 65.
[288] 'If war crimes are being committed in Indochina, not every member of the armed forces is an accomplice to those crimes': *Switkes* v. *Laird*, 316 F Supp 358 at 365 (SDNY 1970). See also Paust, 'My Lai', p. 165.
[289] *France et al.* v. *Goering et al.*, note 26 above, pp. 536–7.
[290] *United States* v. *Weiss et al.*, note 181 above, pp. 12–14.

stationed at or engaged in the operation of the Concentration Camp Mauthausen, or any or all of its by-camps in any manner whatsoever, is guilty of a crime against the recognized laws, customs and practices of civilised nations.'[291] In the Sandrock case, the prosecution relied on British military regulations which specified: 'Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group, may be received as prima facie evidence of the responsibility of each member of that unit or group for that crime.'[292] This amounts to a very useful presumption that the prosecution ought to be entitled to rely on in appropriate circumstances.[293] Of course, the prosecution must also be able to establish the mental element in cases of genocide, including knowledge by the accused of the plan to destroy the group concerned.

Under many legal systems, complicity may take place after the crime as well as prior to or during its commission.[294] The *travaux préparatoires* of the Convention give no indication as to whether it was the intent of the drafters that article III(e) include complicity after the fact.[295] In 1950, when the United States Senate was considering ratification of the Convention, it proposed an 'understanding' stating '[t]hat the United

[291] *Mauthausen Concentration Camp Case*, (1948) 11 LRTWC 15 (General Military Government Court of the United States Zone), pp. 15–16.

[292] *United Kingdom* v. *Sandrock et al.*, (1948) 1 LRTWC 35 (British Military Court), p. 43, referring to: Royal Warrant, 14 June 1945, as amended by Royal Warrant, 4 August 1945, reg. 8(ii).

[293] International legal instruments have not gone as far as the British military regulations, and do not contain any codified presumptions of this nature. Nevertheless, this does not exclude their application by judges as circumstances permit. Factual presumptions, whereby proof of one fact is deemed by the court to prove another fact, are widely recognized in criminal law, even where these are not set out in a positive law provision. An example would be the presumption that an individual who is in possession of recently stolen goods is deemed to be the thief, even in the absence of direct evidence showing theft. This presumption is really little more than a logical deduction based on circumstantial evidence. Presumptions of this nature have been deemed not to violate the presumption of innocence in rulings of bodies such as the European Court of Human Rights: *Salabiaku* v. *France*, Series A, No. 141-A, 7 October 1988, para. 28; *Pham Hoang* v. *France*, Series A, No. 243, 25 September 1992. See also *Duhs* v. *Sweden* (App. No. 12995/87), (1990) 67 DR 204.

[294] *United Kingdom* v. *Oenning and Nix*, (1948) 11 LRTWC 74 (British Military Court), p. 75; *United States* v. *Pohl et al.*, note 33 above, p. 49. See, generally, 'The Parties to Crimes', (1948) 15 LRTWC 49 at pp. 49–58.

[295] Nehemiah Robinson wrote that the Ad Hoc Committee intended complicity to refer to 'accessorship before and after the fact': Robinson, *Genocide Convention*, p. 69.

States Government understands and construes the words 'complicity in genocide' to mean participation before and after the fact and aiding and abetting in the commission of the crime of genocide'.[296] The general complicity provision in the statutes of the *ad hoc* tribunals speaks of 'planning, preparation or execution of a crime', again leaving this question without resolution. A Trial Chamber of the Yugoslavia Tribunal declared that complicity involved 'supporting the actual commission before, during, or after the incident'.[297] The International Law Commission debated whether or not to supply an explicit recognition of complicity after the fact in the Code of Crimes.[298] There is none. Special Rapporteur Doudou Thiam described complicity as 'a drama of great complexity and intensity', and said it could cover acts committed before the principal offence as well as afterwards.[299]

Complicity requires proof that the underlying or predicate crime has been committed by another person.[300] However, the other person need not be charged or convicted for the liability of the accomplice to be established. In some cases, prosecution may be quite impossible, because the principal offender is dead or has disappeared, or because the principal offender is unfit to stand trial, or a minor, or immune from process. According to a Trial Chamber of the International Criminal Tribunal for Rwanda: 'As far as the Chamber is aware, all criminal systems provide that an accomplice may also be tried, even where the principal perpetrator of the crime has not been identified, or where, for any other reasons, guilt could not be proven.'[301]

Command responsibility

Command or superior responsibility is a form of criminal participation by which a person in a hierarchically responsible position may be held liable for the acts of subordinates. It differs from ordinary complicity,

[296] *New York Times*, 13 April 1950.
[297] *Prosecutor* v. *Tadić*, note 189 above, para. 692.
[298] 'Eighth Report on the Draft Code of Crimes Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', note 35 above, paras. 28–38, pp. 31–2; 'Report of the Commission to the General Assembly on the Work of Its Forty-Second Session', note 163 above, para. 50.
[299] *Ibid.*, para. 38, p. 32.
[300] *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment and Sentence, 27 January 2000, para. 173.
[301] *Prosecutor* v. *Akayesu*, note 115 above, para. 530. Also: *Prosecutor* v. *Musema* (ICTR-96-13-T), Judgment, 27 January 2000, para. 174.

which exists upon proof that the commander ordered the act or otherwise aided and abetted its performance. A commander who knows that troops under his or her command are about to commit an atrocity or are in the course of committing one, and who fails to intervene, can be prosecuted as an accomplice, as discussed above. Command responsibility takes this one step further, implicating the commander in the absence of proof of knowledge. Under command responsibility, the commander 'ought to have known' of the crimes. The Secretary-General of the United Nations, in his report on the Statute of the International Criminal Tribunal for the former Yugoslavia, described command responsibility as 'imputed responsibility or criminal negligence'.[302]

Command responsibility developed in a military context and was applied, at least historically, to war crimes, where there is often no specific intent requirement.[303] It was later codified with respect to grave breaches of the Geneva Conventions in Protocol Additional I to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts.[304] Command responsibility in the case of war crimes is closely related to issues of military discipline, and the fact that a commander had specific duties that he or she had failed to fulfil. In the leading post-Second World War case, the United States Military Commission noted that Yamashita 'was an officer of long years of experience, broad in its scope, who has had extensive command and staff duty'.[305] Although acknowledging it would be absurd to condemn a commander merely because one of his or her soldiers committed a crime, the

[302] 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)', UN Doc. S/25704, para. 56. See also M. Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, Irvington-on-Hudson, NY: Transnational Publishers, 1996, pp. 345–74; Wise, 'General Principles', pp. 46–7.

[303] See L. C. Green, 'Command Responsibility in International Humanitarian Law', (1995) 5 *Transnational Law and Contemporary Problems*, p. 319; L. C. Green, 'Superior Orders and Command Responsibility', (1989) 27 *Canadian Yearbook of International Law*, p. 167; and Hays Parks, 'Command Responsibility for War Crimes', (1973) 62 *Military Law Review*, p. 1.

[304] (1979) 1125 UNTS 3, art. 86(2): 'The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.'

[305] *United States of America* v. *Yamashita*, (1948) 4 LRTWC 1, pp. 36–7; *In re Yamashita*, 327 US 1 (1945).

Commission held that, 'where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops'.[306] Yamashita had 'failed to provide effective control' of his troops as was required by the circumstances.[307]

Extending command responsibility from war crimes to genocide raises particular problems with respect to the intent element.[308] Unlike many war crimes, genocide requires the prosecution to establish the highest level of specific intent. But command responsibility is an offence that resembles negligence,[309] and exactly how a specific intent offence can be committed by negligence remains somewhat of a paradox. Command responsibility in the case of genocide, as a form of criminal participation, is not contemplated by article III of the Genocide Convention or elsewhere in the instrument. The only suggestion in the preparatory work is a proposal from a non-governmental organization, the Consultative Council of Jewish Organizations,[310] but nothing came of its recommendation.

Subsequent instruments aimed at the prosecution of genocide, however, have incorporated forms of command responsibility. It appears for the first time in the Statute of the International Criminal Tribunal for the former Yugoslavia: 'The fact that [genocide] was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.'[311] There is an identical provision in the

[306] *United States* v. *Yamashita*, note 305 above, p. 35. [307] *Ibid.*

[308] *In re Yamashita*, note 305 above.

[309] *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 217; *Prosecutor* v. *Blaškić* (Case No. IT-95-14-T), Judgment, 3 March 2000, para. 332.

[310] UN Doc. E/C.2/49: 'Add: "Rulers and public officials shall also be liable to punishment if they fail to employ every lawful means to prevent and punish offences under this Convention"; Add to article IX: "If individuals acting as organs of the State failed to employ all lawful means to prevent any offence under this Convention"; "If an individual was brought before a municipal court for an offence under this Convention but the Court failed to convict him or to impose upon him a penalty commensurate with the crime as a result of a manifest miscarriage of justice"; Add to article XI: "Failure by the responsible officials to carry out this pledge shall be deemed to constitute an offence under this convention."'

[311] Note 5 above, art. 7(3).

Rwanda statute.[312] Command responsibility in the case of genocide is also set out in article 28 of the Rome Statute.

There has been some judicial debate about whether superior or command responsibility can actually apply in a genocide case. One Trial Chamber of the International Criminal Tribunal for the former Yugoslavia wrote that '[i]t *follows* from Article 4 and the unique nature of genocide that the *dolus specialis* is required for responsibility under Article 7(3) as well. The Trial Chamber notes the legal problems and the difficulty in proving genocide by way of an omission on the part of civilian leaders.'[313] Another Trial Chamber, in a subsequent ruling, disagreed:

> As a matter of statutory interpretation, there is in the Trial Chamber's view no inherent reason why, having verified that it applies to genocide, Article 7(3) should apply differently to the crime of genocide than to any other crime in the Statute. The Appeals Chamber has observed that superior criminal responsibility requires the Prosecution to establish that a superior knew or had reason to know of the criminality of subordinates. In the case of genocide, this implies that the superior must have known or had reason to know of his or her subordinate's specific intent, with all the evidentiary difficulties that follow. The Appeals Chamber has held that superior criminal responsibility is a form of criminal liability that does not require proof of intent to commit a crime on the part of a superior before criminal liability can attach. It is therefore necessary to distinguish between the *mens rea* required for the crimes perpetrated by the subordinates and that required for the superior . . . Thus, the Trial Chamber is satisfied that the *mens rea* required for superiors to be held responsible for genocide pursuant to Article 7(3) is that the superiors knew or had reason to know that their subordinates (1) were about to commit or had committed genocide and (2) that the subordinates possessed the requisite specific intent.[314]

In most of the genocide indictments at the International Criminal Tribunal for Rwanda, the Prosecutor has invoked both bases of liability, that is, perpetration (or complicity) under article 6(1) of the Statute, and superior responsibility under article 6(3). Many early judgments entered convictions for both, an approach that may have been encouraged by an Appeals Chamber decision.[315] In *Musema*, for example, the Trial

[312] Note 5 above, art. 6(3).

[313] *Prosecutor* v. *Stakić* (Case No. IT-97-24-T), Decision on Rule 98bis Motion for Judgment of Acquittal, 31 October 2002, para. 92.

[314] *Prosecutor* v. *Brdanin* (Case No. IT-99-36-T), Judgment, 1 September 2004, paras. 720–1.

[315] *Prosecutor* v. *Delalić et al.* (Case No. IT-96-21-A), Judgment, 20 February 2001, para. 745, including n. 1261.

Chamber held the accused responsible on the basis of command responsibility after noting that he was 'personally present at the attack sites' and that he 'nevertheless failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in the commission of those acts, by his presence and personal participation'.[316] These decisions make it extremely difficult to make meaningful observations about superior responsibility for genocide, because the offender is guilty as a primary perpetrator in any event. Later, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia made the matter quite clear: 'Where the legal requirements of both forms of responsibility are met, a conviction should be entered on the basis of Article 7(1) only, and the superior position should be taken into account as an aggravating factor in sentencing.'[317]

As a general rule, superior or command responsibility has generated more heat than light. At the Yugoslavia Tribunal, where there have been a few convictions on this basis alone, its scope has been confined to war crimes, and the sentences that have resulted have been relatively light.[318] The obvious suggestion is that superior or command responsibility is not nearly as serious a form of liability as primary perpetration.

The conviction of Ferdinand Nahimana for genocide on the sole basis of superior responsibility, and the imposition of a thirty-year term of imprisonment, stands out as a dramatic exception in this context. On 28 November 2007, the Appeals Chamber quashed Nahimana's convictions based upon article 6(1) of the Statute, that is, as a principal perpetrator or accomplice, but upheld his convictions based upon article 6(3). It reduced the sentence from one of life imprisonment as a result.[319] A professor of history at the National University of Rwanda in Butare, Nahimana was a prominent ideologue and political activist in pre-genocide Rwanda. In 1992, Nahimana participated in the establishment of Radio télévision libre des mille collines (RTLM). The Appeals Chamber confirmed that the radio station was responsible for

[316] *Prosecutor* v. *Musema* (ICTR-96-13-T), Judgment, 27 January 2000, para. 894; also paras, 899, 905, 914 and 924.

[317] *Prosecutor* v. *Kvočka et al.* (Case No. IT-98-30/1-A), Judgment, 28 February 2005, para. 104; *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007, paras. 487–8.

[318] *Prosecutor* v. *Strugar* (Case No. IT-01-42), Judgment, 31 January 2005; *Prosecutor* v. *Hadžihasanović et al.* (Case No. IT-01-47-T), Judgment, 15 March 2006; *Prosecutor* v. *Orić* (Case No. IT-03-68-T), Judgment, 30 June 2006.

[319] *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007.

broadcasts during the period of genocide in Rwanda that could be characterized as direct and public incitement. Nahimana was the founder and guiding spirit of the radio station, with influence over its activities and the content of its broadcasts, but he failed to intervene to prevent the incitement. Judge Meron, in his partly dissenting opinion, considered the sentence 'too harsh', given that '[d]espite the severity of this crime, Nahimana did not personally kill anyone and did not personally make statements that constituted incitement'.[320]

Nahimana might be said to demonstrate the real utility of the superior responsibility concept. Nahimana was deeply involved in the operation of the racist radio station. It was part of his more general involvement in the anti-Tutsi movement in Rwanda that culminated in the terrible events of April to July 1994. But the Appeals Chamber said there was no evidence linking him directly to the broadcasts. It recalls the judgment of General Yamashita in the final months of 1945. Perhaps, however, the result in the Appeals Chamber judgment is the consequence of strategic decisions by the Prosecutor, who might well have approached the issue in another manner. Nahimana could have been charged as part of a joint criminal enterprise to incite genocide, one for which he would then readily have been convicted as the directing mind of a notorious radio station whose broadcasts dramatically contributed to the carnage. Such an approach would also more accurately describe his culpability. As a mastermind of the racist campaign against the Tutsi, his real crime must have been so much more than simply failing to supervise his subordinates. Indeed, how else can a thirty-year sentence be explained?

[320] *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Partly Dissenting Opinion of Judge Meron, 28 November 2007, para. 22.

7

Defences to genocide

A defence is an answer to a criminal charge. It is used to denote 'all grounds which, for one reason or another, hinder the sanctioning of an offence – despite the fact that the offence has fulfilled all definitional elements of a crime'.[1] The law of defences is complex and, because of the special nature of the crime of genocide, some defences that may be quite significant in another context, such as consent of the victim, are of little interest here.

Sometimes different terminology is used to describe 'defences'.[2] For example, the Rome Statute speaks of '[g]rounds for excluding criminal responsibility'.[3] There are also classifications within the general bodies of defences. The Ad Hoc Committee of the General Assembly on the International Criminal Court divided 'defences' into three categories: 'Negation of liability', including error of law, error of fact and diminished mental capacity; 'Excuses and justifications', including self-defence, defence of others, defence of property, necessity, lesser of evils, duress/coercion/force majeure, superior orders, and 'law enforcement/other authority to maintain order'; and 'Defences under public international law', including military necessity, reprisal, and self-defence pursuant to article 51 of the Charter of the United Nations.[4] Ultimately, however, the drafters of the Rome Statute did not attempt to classify defences in any analytical manner.

[1] Albin Eser, '"Defences" in War Crime Trials', in Yoram Dinstein and Mala Tabory, eds., *War Crimes in International Law*, The Hague, Boston and London: Kluwer Law International, 1996, pp. 251–73 at p. 251.

[2] The International Law Commission opted for the term 'defences': 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', UN Doc. A/51/10, pp. 73–81, art. 14.

[3] Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, art. 31.

[4] 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court', UN Doc. A/50/22, annex II, pp. 59–60.

Many legal systems distinguish between 'justification' and 'excuse', although the utility of this is not necessarily apparent.[5] As George Fletcher has explained:

> Claims of justification concede that the definition of the offence is satisfied, but challenge whether the act is wrongful; claims of excuse concede the act is wrongful, but seek to avoid the attribution of the act to the author. A justification speaks to the rightness of the act; an excuse, to whether the actor is accountable for a concededly wrongful act.[6]

It is often said that the defence of self-defence is a justification, in that the offender is considered to be morally right to have reacted as he or she did. On the other hand, the defence of duress is usually presented as an excuse, a recognition that, while the act was improper, the offender had no real choice in the matter. While an excuse to a charge of genocide might be conceivable, a justification seems unthinkable.

Criminal law also distinguishes between special defences and general defences. A special defence exists with respect to certain types of charges, whereas a general defence is an answer to all offences. Defences that establish a lack of specific intent are special defences to genocide. While leading to an acquittal for genocide, they cannot be set up against other crimes of violence against the person. It is no defence to a charge of homicide to claim lack of intent to destroy an ethnic group in whole or in part.

This study is not the place for a review of all general defences. It is primarily concerned with special defences available to the charge of genocide. Somewhat more incidentally, general defences are also of interest if special features render them germane to genocide prosecutions. Defences may also be classified according to whether they are substantive or procedural. The latter address issues such as lack of jurisdiction, or the plea of double jeopardy (*non bis in idem*). Procedural defences are also of general application within criminal law systems, and as a result they too do not receive detailed consideration in this part of the study.

The Genocide Convention addresses defences in only one provision. Article IV declares a defence of official capacity to be inadmissible to a charge of genocide. After considerable debate, a draft proposal to

[5] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 2 above, p. 74.

[6] George P. Fletcher, *Re-thinking Criminal Law*, Boston: Little, Brown, 1978, p. 759.

eliminate another defence, that of superior orders, was dropped from the Convention. However, they are implicitly addressed in article V, to the extent that States are required to enact 'the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article 3'. The concept of 'necessary legislation' should include not only the definition of the crime but also the available defences.

The statutes of the *ad hoc* tribunals are barely more complete than the Convention. They essentially repeat the Convention rule on official capacity, but add a prohibition of the defence of superior orders. In his report to the Security Council on the draft Statute of the International Criminal Tribunal for the former Yugoslavia, the Secretary-General said that '[t]he International Tribunal itself will have to decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principles of law recognised by all nations'.[7] As a Trial Chamber noted, defences 'form part of the general principles of criminal law which the International Tribunal must take into account in deciding the cases before it'.[8]

The International Law Commission draft Code of Crimes Against the Peace and Security of Mankind takes the same approach, adding in a general provision that the competent court shall determine the admissibility of defences 'in accordance with the general principles of law, in the light of the character of each crime'.[9] Only the Rome Statute attempts a more thorough codification of defences applicable to genocide.

Official capacity

Heads of State and other senior government officials may not invoke their status if charged with genocide, according to article IV of the Convention: 'Persons committing genocide or any of the other acts enumerated in article 3 shall be punished, whether they are constitutionally responsible

[7] 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)', UN Doc. S/25704 (1993), para. 58.

[8] *Prosecutor* v. *Kordić et al.* (Case No. IT-95-14/2-T), Judgment, 26 February 2001, para. 449.

[9] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 2 above, p. 73, art. 14.

rulers, public officials or private individuals.' A defence of official capacity was denied at Nuremberg and in the other post-Second World War instruments.[10]

Rejection of any defence of official capacity should not be confused with the issue of immunity. Although rulers and other senior functionaries may not invoke a defence of official capacity in proceedings where courts have jurisdiction, this does not eliminate their immunity with respect to courts, such as the national courts of a third State, that are not entitled to exercise jurisdiction over foreign heads of State.[11] The International Court of Justice, in the 2002 *Arrest Warrant Case*, declared it was unable to deduce, from the standpoint of customary international law, 'any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity'.[12]

The judgments often use the term 'immunity' in error, when they are in fact referring to the defence of official capacity. The International Military Tribunal, for example, used the word immunity in this manner, but in the context of a discussion of the defence of 'act of State' and official capacity. In fact, this was the oft-cited passage in which the Nuremberg Tribunal famously said that 'crimes against international law are committed by men, not by abstract entities, and only by

[10] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), (1951) 82 UNTS 279, annex, art. 7: 'Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.' See also Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Humanity, 20 December 1945, *Official Gazette of the Control Council for Germany*, No. 3, Berlin, 31 January 1946, art. II(4)(a): 'The official position of any person, whether as Head of State or as responsible official in a Government Department does not free him from responsibility for a crime or entitle him to mitigation of punishment'; 'Principles of the Nuremberg Charter and Judgment Formulated by the International Law Commission', GA Res. 177, A (II) art. III: 'The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.'

[11] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, [2002] ICJ Reports 3, para. 61.

[12] *Ibid.*, para. 58.

punishing individuals who commit such crimes can the provisions of international law be enforced'.[13]

Drafting history

While the principle by which heads of State and other senior officials could not invoke their official capacity as a defence has seemed clear enough since Nuremberg, the drafting of article IV of the Convention proved to be quite difficult, largely because it touched on related questions such as State responsibility. General Assembly Resolution 96(I) specified that persons responsible for genocide, 'whether private individuals, public officials or statesmen', were punishable.[14] This inspired the Secretariat draft, whose provision closely resembles article IV in the final version of the Convention: '[Persons Liable] Those committing genocide shall be punished, be they rulers, public officials or private individuals.'[15] Similar formulations were proposed by China,[16] the United States[17] and the Netherlands.[18] Endorsing views expressed by expert Henri Donnedieu de Vabres,[19] France considered that rulers alone should be punishable, given that genocide was the consequence of some culpable act or omission by the State. According to France, those private individuals who actually carried out the State's instructions should be tried by international courts but on a charge of murder and as common law criminals.[20] Norway also had trouble with the Secretariat's approach, because holding rulers liable for genocide before national courts, either of their own State or in another State, was simply not practical. Rulers should be judged by an international court, Norway believed.[21]

[13] *France et al.* v. *Goering et al.*, (1946) 22 IMT 203; 13 ILR 203; 41 *American Journal of International Law*, p. 172 at p. 221.

[14] GA Res. 96(I). [15] UN Doc. E/447, pp. 5–13, art. IV.

[16] 'For the commission of genocide, principals and accomplices, whether they are public officials or private individuals, shall be punishable': UN Doc. E/AC.25/9.

[17] 'Punishment under this Convention shall be meted out to the guilty be they rulers, public officials, private individuals, groups or organizations': UN Doc. E/623.

[18] The Netherlands suggested that the provision might be amplified 'so as to include specifically those who have taken the initiative for the genocide, and especially those who can be considered as the intellectual authors': UN Doc. E/623/Add.3.

[19] UN Doc. E/447, p. 35. [20] UN Doc. A/401.

[21] UN Doc. E/623/Add.2. Norway repeated the comments that its representative had made in the Sixth Committee of the General Assembly, in 1947, concerning prosecution of state officials.

The Ad Hoc Committee welcomed the Secretariat's suggestion to clarify the term 'public officials' so as to encompass heads of State.[22] It unanimously adopted the following: 'Those committing any of the acts enumerated in Article III shall be punished be they Heads of State, public officials or private individuals.'[23] But, when the provision was discussed in the Sixth Committee, sharply differing views about State responsibility for genocide emerged, as well as conflicting opinions about the creation of an international criminal jurisdiction, questions that were raised, at least indirectly, by the idea that rulers could be punished.[24]

States with constitutional monarchs were unhappy with the provision, because they claimed their heads of State were really nothing more than figureheads. In some, notably Sweden, the sovereign was immune from legal process. Sweden told the Sixth Committee that it could not guarantee that its constitution would be amended if the convention were to include such a provision, and proposed an alternative: 'Those committing genocide or any of the other acts enumerated in article V shall be punished, whether they are public officials or private individuals.' Sweden also questioned the role of legislative immunity, asking whether those adopting genocidal laws would not be immune from prosecution.[25] Several delegations challenged the Swedish proposal for eliminating the most important category of offenders.[26] The Philippines said constitutional monarchs who acquiesced in genocide shared responsibility.[27] Sweden subsequently volunteered that it 'would be satisfied if it were made clear one way or another that the constitutional heads of State would not be liable under the convention'. It would accept the word 'rulers', 'with the reservation that a suitable official interpretation should be inserted into the Committee's report'.[28] Most

[22] UN Doc. E/447.

[23] UN Doc. E/AC.25/SR.18, p. 4. See also UN Doc. E/AC.25/SR.9, p. 7. It was agreed that the rule about trying rulers did not impair the system of diplomatic immunity: UN Doc. E/AC.25/SR.9, p. 7.

[24] For discussion of these questions, see chapter 2, p. 83 above and chapter 8, pp. 443–54 below, on the establishment of an international criminal jurisdiction, and chapter 9, pp. 510–92 below, on State responsibility.

[25] UN Doc. A/C.6/SR.92 (Petren, Sweden). His views were endorsed by Bahadur Khan of Pakistan and Fitzmaurice of the United Kingdom.

[26] *Ibid.* (Chaumont, France); *ibid.* (Raafat, Egypt); *ibid.* (Pratt de María, Uruguay).

[27] UN Doc. A/C.6/SR.95 (Inglés, Philippines).

[28] UN Doc. A/C.6/SR.93 (Petren, Sweden). He was supported by Morozov of the Soviet Union.

delegations agreed to include a note in the report 'exempting constitutional monarchs from responsibility, thus providing a complete solution of the problem'.[29]

Much of the debate focused on terminology. In the French-language version, the term *gouvernants* had been used to translate 'Heads of State', provoking some dissatisfaction.[30] Pakistan noted that *gouvernants* included ministers or members of the government as well as heads of State, whereas the English expression 'heads of State' was less explicit.[31]

France answered that *gouvernants* should not create a problem, because it 'embraced only those having the actual responsibility of power'.[32] The chair noted that the Ad Hoc Committee had translated *gouvernants* as 'heads of States' because it felt the term 'rulers' was not suitable for the head of State.[33] The Netherlands proposed 'responsible rulers',[34] and 'constitutionally' was added on a suggestion from Siam.[35] As modified, the provision was then adopted: 'Those committing genocide or any of the other acts enumerated in article IV shall be punished whether they are constitutionally responsible rulers, public officials or individuals.'[36] The United Kingdom explained it had voted in favour, adding that in its view the provision only applied to genocide by individuals and not by governments.[37] The United States said it had abstained because the word 'rulers' could not be applied to heads of State, and particularly the President of the United States.[38] India declared that it did not think 'constitutionally responsible rulers' necessarily excluded the heads of State of countries having a parliamentary regime.[39] Sweden said the discussion had brought no clarification on the status of members of parliament, adding it would conclude that the article imposed no concrete obligation in that respect.[40] Subsequently, the drafting committee reviewed the text of article IV, 'the wording of which had satisfied none of the members'. It agreed, unanimously, to retain the terms *gouvernants* in French and 'constitutionally responsible rulers' in English.[41]

[29] UN Doc. A/C.6/SR.95 (Spiropoulos, Greece).
[30] UN Doc. A/C.6/SR.92 (Fitzmaurice, United Kingdom).
[31] *Ibid.* (Bahadur Khan, Pakistan). [32] UN Doc. A/C.6/SR.93 (Chaumont, France).
[33] *Ibid.* (Alfaro, chair). [34] UN Doc. A/C.6/253.
[35] UN Doc. A/C.6/SR.93 (Wan Waithayakon, Siam).
[36] *Ibid.* (thirty-one in favour, one against, with eleven abstentions).
[37] *Ibid.* (Fitzmaurice, United Kingdom). [38] *Ibid.* (Maktos, United States).
[39] *Ibid.* (Sundaram, India).
[40] UN Doc. A/C.6/SR.96 (Petren, Sweden). At Sweden's request, a statement was included in the report of the Sixth Committee: UN Doc. A/760 and Corr.2, para. 13.
[41] UN Doc. A/C.6/SR.128 (Amado, Brazil).

A Syrian amendment proposed extending the provision to cover 'de facto heads of state'.[42] Syria explained that this was intended to clarify the text: 'there was a definite distinction between heads of State, de facto heads of State and persons having usurped authority'.[43] Lebanon agreed, because 'de facto rulers might not be constitutionally responsible'.[44] But Jean Spiropoulos said the amendment was superfluous: 'It was obvious that de facto rulers would have the same responsibility as de jure rulers and usurpers of authority could be considered as private individuals.'[45] Spiropoulos' reasoning was compelling. If the de facto ruler is treated as a head of State, then the defence of head of State immunity is unavailable, pursuant to article IV. And, if the de facto ruler is not treated as a head of State, then the defence is unavailable in any case. The Syrian amendment was rejected.[46] Yet, despite the *travaux préparatoires*, many years later Special Rapporteur Benjamin Whitaker expressed concern about the application of article IV of the Convention to de facto rulers. While stating that this must necessarily be the case, he urged an amendment to clarify the point.[47]

Other instruments

The prohibition of the defence of official position is reaffirmed in all of the subsequent instruments that provide for prosecution of genocide. The statutes of the *ad hoc* tribunals declare: 'The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.'[48] The Secretary-General's report on the Statute of the Yugoslav Tribunal explained:

> Virtually all of the written comments received by the Secretary-General have suggested that the statute of the International Tribunal should contain provisions with regard to the individual criminal responsibility

[42] UN Doc. A/C.6/246. The amended provision read: 'Those committing genocide or any of the other acts enumerated in article V shall be punished, whether they are heads of State, public officials, persons having usurped authority or private individuals.'

[43] UN Doc. A/C.6/SR.96 (Tarazi, Syria).

[44] *Ibid.* (Saleh, Lebanon).

[45] *Ibid.* (Spiropoulos, Greece).

[46] *Ibid.* (twenty-eight in favour, five against, with fourteen abstentions).

[47] Benjamin Whitaker, 'Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide', UN Doc. E/CN.4/Sub.2/1985/6, p. 23, para. 50.

[48] 'Statute of the International Criminal Tribunal for the Former Yugoslavia', UN Doc. S/RES/827 (1993), annex, art. 7(2); 'Statute of the International Criminal Tribunal for Rwanda', UN Doc. S/RES/955 (1994), annex, art. 6(2).

> of heads of State, government officials and persons acting in an official capacity. These suggestions draw upon the precedents following the Second World War. The Statute should, therefore, contain provisions which specify that a plea of head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defence, nor will it mitigate punishment.
>
> A person in a position of superior authority should, therefore, be held responsible for failure to prevent a crime or to deter the unlawful behaviour of his subordinates.[49]

Similarly, the Rome Statute excludes any recourse to this defence. Article 27, entitled 'Irrelevance of official capacity', declares:

> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.[50]

The Secretary-General's report appears to confuse official capacity and immunity, but the two paragraphs of article 27 of the Rome Statute clearly demonstrate the distinction between the two concepts. There was no provision on either immunity or official capacity in the original International Law Commission draft statute, submitted in 1994.[51] The suggestion that the statute should address these issues emerged during the 1996 sessions of the Preparatory Committee.[52] A consensus text was proposed[53] and the provision was adopted with no significant debate or

[49] 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)', UN Doc. S/25704 (1993), paras. 55–6.

[50] Rome Statute of the International Criminal Court, note 3 above.

[51] 'Report of the Commission to the General Assembly on the Work of Its Forty-Sixth Session', *Yearbook . . . 1994*, Vol. II (Part 2), UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2).

[52] 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc. A/51/10, Vol. I, para. 193, p. 44; *ibid.*, Vol. II, p. 85.

[53] 'Decisions Taken by the Preparatory Committee at its Session Held from 11 to 21 February 1997', UN Doc. A/AC.249/1997/L.5, p. 22; UN Doc. A/AC.249/1997/WG.2/CRP.2/Add.1; 'Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands', UN Doc. A/AC.249/1998/L.13, p. 54; 'Draft Statute for the International Criminal Court', UN Doc. A/CONF.183/2/Add.2, p. 60.

controversy at the Rome conference.[54] Paragraph 1 of article 27, which corresponds to article IV of the Genocide Convention, prohibits a defence of official capacity by any defendant who is properly before the Court. By paragraph 2, States parties renounce the immunity from which their sovereigns and senior ministers benefit under customary international law. Paragraph 2 does not apply, however, to heads of non-party States, who continue to retain their immunity with respect to the International Criminal Court.

Judicial interpretation

Eichmann invoked a defence of act of State, which has similarities with the concept of official capacity. Eichmann argued that any guilty acts were committed by the State, and that no single individual could be held accountable for them. Dismissing his plea, the Supreme Court of Israel relied on article IV of the Genocide Convention as well as the 'Nuremberg Principles'. These had 'become part of the law of nations and must be regarded as having been rooted in it also in the past'.[55] The trial court, citing the advisory opinion of the International Court of Justice on reservations to the Genocide Convention, declared: 'This article affirms a principle recognized by all civilized nations.'[56] For both the District Court and the Supreme Court, it was inconceivable that an individual participant in such heinous crimes could escape justice with the claim. According to the District Court: 'The very contention that the systematic extermination of masses of helpless human beings by a Government or régime could constitute "an act of State", appears to be an insult to reason and a mockery of law and justice.'[57]

Slobodan Milošević was the President of the Federal Republic of Yugoslavia at the time he was indicted by the International Criminal

[54] UN Doc. A/CONF.183/C.1/WGGP/L.4, p. 4; UN Doc. A/CONF.183/C.1/WGGP/L.65/Rev.1, p. 4; UN Doc. A/CONF.183/C.1/L.76/Add.3, p. 3. 'Report of the Commission to the General Assembly on the Work of Its Thirty-Eighth Session', *Yearbook . . . 1986*, Vol. II (Part 2), para. 170, p. 52; 'Fifth Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', UN Doc. A/CN.4/404, *Yearbook . . . 1987*, Vol. II (Part 1), UN Doc. A/CN.4/SER.A/1987/Add.1 (Part 1), pp. 9–10.

[55] *A-G Israel* v. *Eichmann*, (1968) 36 ILR 277 (Israel Supreme Court), para. 14, p. 311.

[56] *A-G Israel* v. *Eichmann*, (1968) 36 ILR 18 (District Court, Jerusalem), para. 28.

[57] *Ibid.*

Tribunal for the former Yugoslavia. Of course, all of the acts with which he was charged, including genocide, took place while he was head of State or government. In pre-trial motions, Milošević argued that the Tribunal was without jurisdiction 'by reason of his status as former President'. On the advice of the *amici curiae*, the Trial Chamber took this as a challenge to the validity of article 7(2) of the ICTY Statute, although the judgment suggests that this was also viewed as raising the issue of immunity. Referring to article IV of the Genocide Convention,[58] and the conviction of former Rwandan Prime Minister Jean Kambanda by the International Criminal Tribunal for Rwanda, amongst other precedents,[59] the Trial Chamber answered: 'There is absolutely no basis for challenging the validity of Article 7, paragraph 2, which at this time reflects a rule of customary international law.'[60]

The Second Circuit of the United States Court of Appeals cited article IV of the Convention in a civil claim directed against Bosnian Serb leader Radovan Karadžić. A long line of authorities reflect that unambiguously, 'from its incorporation into international law, the proscription of genocide has applied equally to state and non-state actors'.[61]

During the extradition proceedings of Augusto Pinochet, article IV was briefly considered by the English courts. The United Kingdom authorities invoked article IV, saying the head of State defence had been excluded by customary international law and by the conventional codification of customary norms in such instruments as the Genocide Convention. But, in the Divisional Court, the Lord Chief Justice observed that, when the Convention was implemented in national law, Parliament had failed to incorporate article IV, implying equivocation about the principle set out in that provision.[62] On appeal to the House of Lords, this was noted by Lord Slynn of Hadley, in his dissenting reasons. His colleague, Lord Lloyd of Berwick, also dissenting, wrote:

[58] *R* v. *Bartle, ex parte Pinochet*, Divisional Court, Queen's Bench Division, 28 October 1998, (1998) 37 ILM 1302, paras. 65 and 68. See also the remarks of Lord Slynn of Hadley in the appeal, *R* v. *Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte* [1998] 4 All ER 897; [1998] 3 WLR 1456 (House of Lords), pp. 911–12 (All ER).

[59] *Prosecutor* v. *Milošević* (Case No. IT-02–54-PT), Decision on Preliminary Motions, 8 November 2001, para. 30.

[60] *Ibid.*, para. 26. [61] *Ibid.*, para. 28.

[62] *Kadić* v. *Karadžić*, 70 F 3d 232 at 241–2 (2nd Cir. 1995).

> Moreover when the Genocide Convention was incorporated into English law by the Genocide Act 1969, article 4 was omitted. So Parliament must clearly have intended, or at least contemplated, that a head of state accused of genocide would be able to plead sovereign immunity. If the Torture Convention and the Taking of Hostages Convention had contained a provision equivalent to article 4 of the Genocide Convention (which they did not) it is reasonable to suppose that, as with genocide, the equivalent provisions would have been omitted when Parliament incorporated those conventions into English law. I cannot for my part see any inconsistency between the purposes underlying these Conventions and the rule of international law which allows a head of state procedural immunity in respect of crimes covered by the Conventions.

The majority was unimpressed. Nor, on closer examination, can the suggestion be sustained that the UK Parliament intentionally omitted article IV from the 1969 Genocide Act. When Elystan Morgan, Under-Secretary of State for the Home Office, introduced the legislation at the second reading in the House of Lords on 5 February 1969, he called attention to the 1946 resolution of the United Nations General Assembly, which 'affirmed that genocide is a crime under international law and that those guilty of it, whoever they are and for whatever reason they commit it, are punishable'. He continued:

> We have to remember . . . the peculiar circumstances in which the crime of genocide may be committed. Past experience has amply shown that it may be committed by or with the consent of the authorities in power at the time, and that those authorities may take the necessary steps to legitimate such acts by, for instance, legalising concentration camps, experimental surgery, and so on. It would make nonsense of the Convention and of this legislation if its provisions could be completely negatived by the simple expedient of legitimating legislation of this kind.[63]

In effect, English legislators apparently felt it unnecessary to state the obvious, namely, that there could be no defence of official capacity for heads of State and senior officials charged with genocide.

In the 24 March 1999 ruling of the House of Lords, Lord Phillips of Worth Matravers wrote that article IV of the Convention was hardly

[63] Official Report, Fifth Series, Parliamentary Debates, Commons 1968–9, Vol. 777, 3–14 February 1969, pp. 480–509. I am indebted to Frank Chalk, who first researched this point.

even necessary, because customary law deprived heads of State of immunity in the case of such crimes:

> Had the Genocide Convention not contained this provision, an issue could have been raised as to whether the jurisdiction conferred by the Convention was subject to state immunity ratione materiae. Would international law have required a court to grant immunity to a defendant upon his demonstrating that he was acting in an official capacity? In my view it plainly would not. I do not reach that conclusion on the ground that assisting in genocide can never be a function of a state official. I reach that conclusion on the simple basis that no established rule of international law requires state immunity ratione materiae to be accorded in respect of prosecution for an international crime. International crimes and extra-territorial jurisdiction in relation to them are both new arrivals in the field of public international law. I do not believe that state immunity ratione materiae can co-exist with them. The exercise of extra-territorial jurisdiction overrides the principle that one state will not intervene in the internal affairs of another. It does so because, where international crime is concerned, that principle cannot prevail. An international crime is as offensive, if not more offensive, to the international community when committed under colour of office. Once extraterritorial jurisdiction is established, it makes no sense to exclude from it acts done in an official capacity.[64]

The reasoning of Lord Phillips seems to confound the defence of official capacity and State or sovereign immunity.

Two States have formulated reservations to article IV of the Convention. One of the original twenty States parties, the Philippines, declared: 'With reference to article IV of the Convention, the Philippine Government cannot sanction any situation which would subject its Head of State, who is not a ruler, to conditions less favourable than those accorded other Heads of State, whether constitutionally responsible rulers or not. The Philippine Government does not consider said article, therefore, as overriding the existing immunities from judicial processes guaranteed certain public officials by the Constitution of the Philippines.' Australia immediately objected to the Philippines reservation. Brazil, the United Kingdom, Norway, Greece and Cyprus have also objected over the years.

Finland's reservation to article IV made accession '[s]ubject to the provisions of Article 47, paragraph 2, of the Constitution Act, 1919,

[64] *R* v. *Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No. 3)* [1999] 2 All ER 97; [1999] 2 WLR 825 (HL), pp. 189–90 (All ER).

concerning the impeachment of the President of the Republic of Finland'.[65] The impeachment procedure for high treason or treason by the president stated that '[i]n no other case shall charges be brought against the President for an official act'.[66] There were no specific objections to the Finnish reservation, although the blanket objection by Greece and Cyprus to all reservations presumably applied. Finland withdrew its reservation on 5 January 1998.

Superior orders

Despite precedents from the Leipzig trials,[67] during the Second World War the conditions under which obedience to superior orders could be invoked as a defence to war crimes remained uncertain. Violation of the laws and customs of war as the result of an order from a superior was, from the standpoint of custom, excusable only to the extent that the offender did not know that the order was illegal, and furthermore to the extent that the order was not manifestly illegal.[68] Nevertheless, in 1944, the United States and the United Kingdom modified their military manuals in order to limit abusive recourse to the defence. To dispel any ambiguity, a provision of the Charter of the International Military Tribunal at Nuremberg excluded the defence altogether.[69] Despite the absence of a comparable provision in Control Council Law No. 10, the

[65] (1959) 346 UNTS 324.

[66] Martin Scheinin, 'Finland, Booklet 1', in Gisbert H. Flanz, ed., *Constitutions of the Countries of the World*, Dobbs Ferry, NY: Oceana Publications, 1996, pp. ix–x.

[67] *Empire* v. *Dithmar and Boldt (Hospital Ship 'Llandovery Castle')*, (1921) 2 ILR 437, 16 *American Journal of International Law* 708, *German War Trials, Report of Proceedings before the Supreme Court in Leipzig*, Cmd 1450, London: HMSO, 1921, pp. 56–7.

[68] *In re Eck et al. (The Peleus)*, (1945) 13 ILR 248, 1 LRTWC 1; *R* v. *Finta* [1994] 1 SCR 701; *Military Prosecutor* v. *Melinki*, (1985) 2 *Palestine Yearbook of International Law*, p. 69. See also Alexander N. Sack, 'Punishment of War Criminals and the Defence of Superior Orders', (1944) 60 *Law Quarterly Review*, p. 63; Alan M. Wilner, 'Superior Orders as a Defence to Violations of International Criminal Law', (1966) 26 *Maryland Law Review*, p. 127; L. C. Green, 'Superior Orders and Command Responsibility', (1989) 27 *Canadian Yearbook of International Law*, p. 167; L. C. Green, 'The Defence of Superior Orders in the Modern Law of Armed Conflict', (1993) 31 *Alberta Law Review*, p. 320; Yoram Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law*, Leyden: A. W. Sijthoff, 1965; M. J. Osiel, 'Obeying Orders: Atrocity, Military Discipline, and the Law of War', (1998) 5 *California Law Review*, p. 939.

[69] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), (1951) 82 UNTS 279, annex, art. 8.

post-war military tribunals generally applied the prohibition.[70] Assessing the treatment of the question by the post-war courts, Geoffrey Best wrote: 'Justice in the event was found to require sympathetic consideration of the "superior orders" plea when made by underlings in all but the most atrocious cases but the plea was indignantly dismissed when offered by officers and officials in the higher echelons.'[71] Yet, despite widespread recognition of the norm at the time the Convention was drafted, no provision on the matter was adopted in the final version.

Drafting history

In *Axis Rule in Occupied Europe*, Raphael Lemkin recommended that: 'In order to prevent the invocation of the plea of superior orders, "the liability of persons who order genocidal practices, as well as of persons who execute such orders, should be provided expressly by the criminal codes of the respective countries".'[72] The Saudi Arabian draft stated: 'An allegation that any act of genocide . . . has been committed under order of a superior authority shall not be available as a defence.'[73] The Secretariat draft contained in article V: 'Command of the law or superior orders shall not justify genocide.'[74] The Secretariat considered an express provision to be advisable, given lingering confusion about circumstances where the defence might be invoked.[75] Its proposal received general support from States and non-governmental organizations commenting on the draft.[76] Only Siam questioned whether the article should 'be more carefully considered since it affects the general principle in criminal law that a person should not be punished for any act committed in carrying out a lawful command'.[77]

In the Ad Hoc Committee, the Soviet Union strongly supported the Secretariat's provision on superior orders, noting it was consistent with the precedent not only of the Nuremberg Tribunal but also of all the courts established in the occupied zones after the defeat of Germany and

[70] *United States* v. *von Leeb* ('German High Command trial'), (1949) 11 LRTWC 1 (United States Military Tribunal); *United States of America* v. *Ohlendorf et al.* ('Einsatzgruppen trial'), (1948) 4 LRTWC 411 (United States Military Tribunal).

[71] Geoffrey Best, *War and Law Since 1945*, Oxford: Clarendon Press, 1994, p. 190.

[72] Raphael Lemkin, *Axis Rule in Occupied Europe, Analysis of Government, Proposals for Redress*, Washington: Carnegie Endowment for World Peace, 1944, pp. 93–4.

[73] UN Doc. A/C.6/86. [74] UN Doc. E/447, p. 36. [75] UN Doc. E/AC.25/11.

[76] UN Doc. A/401, UN Doc. E/623 (United States); UN Doc. E/623/Add.3 (The Netherlands); UN Doc. E/C.2/52 (World Jewish Congress).

[77] UN Doc. E/623/Add.4.

Japan.[78] But the United States said an express text was unnecessary because the principle had been set out in article 8 of the Nuremberg Charter, accepted since 1945 as an 'established rule'. The United States favoured leaving the matter 'to the judgment of the court in the light of the usual rules of law'.[79] Some States had more substantive objections. Venezuela said its constitution provided that those who act on superior orders are not subject to punishment.[80] The Venezuelan representative felt the draft 'might be interpreted as an incitement to disobedience and insubordination, since officials might invoke its provisions to question superior orders. He feared that States might hesitate to sign the convention if this provision were retained.'[81] China agreed, citing the danger of injustice, and saying that Nuremberg was a special case.[82] Lebanon, too, invoked the danger of injustice.[83] Secretariat official Egon Schwelb reminded the Committee that article 8 of the Nuremberg Charter excluded the defence, noting that two subsequent General Assembly resolutions had endorsed the Nuremberg Principles.[84] He also pointed out that even minor officials were being prosecuted under Control Council Law No. 10, which had no such provision.[85] The United States disagreed, arguing that the General Assembly resolutions did not confirm the Secretariat's interpretation.[86] Ultimately, the Soviet proposal on superior orders and command of the law was rejected.[87] Poland reacted sharply, saying it took no responsibility for the present draft, as the object of such a convention was to fill in the gaps in the principles established by the Nuremberg trials. 'The exclusion of a provision stating that superior orders and command of the law could not justify the crime of genocide is a definite regression both as concerns the Charter of Nurnberg and the accepted principles of international law', said Rudzinski. He asked that this statement, made in the name and on behalf of his government, be recorded verbatim in the report of the Ad Hoc Committee.[88]

In the Sixth Committee, the Soviet Union tabled an amendment based on article 8 of the Charter of the International Military Tribunal[89] that said: 'Command of the law or superior orders shall not justify

[78] UN Doc. E/AC.25/SR.9, p. 8. [79] UN Doc. E/AC.25/SR.18, p. 5. [80] *Ibid.*, p. 6.
[81] UN Doc. E/AC.25/SR.9, p. 8. [82] UN Doc. E/AC.25/SR.18, p. 6. [83] *Ibid.*
[84] *Ibid.*, p. 7. [85] *Ibid.*, p. 8. [86] *Ibid.*
[87] *Ibid.*, p. 9 (two in favour, four against, with one abstention). [88] *Ibid.*, pp. 9–10.
[89] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), note 69 above. See UN Doc. A/C.6/SR.92 (Morozov, Soviet Union).

genocide.'[90] Yugoslavia,[91] France[92] and Czechoslovakia[93] expressed support. Manfred Lachs of Poland noted that the Soviet proposal did not eliminate other possible defences, 'such as coercion and the impossibility of refusing to act, which could play an important part in determining the responsibility of the accused'.[94] But there were again objections from States whose legal systems admitted the defence. Venezuela argued that denying the defence eliminated the notion of intent, an essential element of the crime of genocide. Venezuela gave the example of a group of soldiers who opened fire on a political group, believing that they were suppressing disturbances, whereas the officer giving the order wanted to destroy the group.[95] Jean Spiropoulos agreed, noting that the principle was not acknowledged in all legal systems. Although recognized at Nuremberg, it was better to let the judge decide in each individual case whether there was intent, he said.[96] The United States said that such a provision would restrict the judge's freedom of action and might result in the conviction of innocent parties. 'There were therefore grounds for doubt as to whether it was wise to include in the Convention so inflexible a clause . . . or whether it would not be more advisable first to permit international law to develop in the matter', said John Maktos.[97] Sweden,[98] the Dominican Republic[99] and Belgium[100] expressed similar views.

Some States declared that, while agreeing in principle with the Soviet amendment, they would abstain[101] or vote against[102] to ensure the Convention would have broad appeal. In the end, the Soviet amendment was rejected in a recorded vote.[103] Ecuador said that, while it had voted against, it did not consider the principle to be invalid.[104] The Netherlands explained its negative vote, saying the matter was premature, and should be addressed by the International Law Commission in formulating the Nuremberg Principles.[105]

[90] UN Doc. A/C.6/215/Rev.1. [91] UN Doc. A/C.6/SR.92 (Bartos, Yugoslavia).
[92] *Ibid.* (Chaumont, France). [93] *Ibid.* (Zourek, Czechoslovakia).
[94] *Ibid.* (Lachs, Poland). [95] *Ibid.* (Pérez-Perozo, Venezuela).
[96] *Ibid.* (Spiropoulos, Greece). [97] *Ibid.* (Maktos, United States).
[98] *Ibid.* (Petren, Sweden). [99] *Ibid.* (Messini, Dominican Republic).
[100] *Ibid.* (Kaeckenbeeck, Belgium). [101] *Ibid.* (Inglés, Philippines).
[102] *Ibid.* (Federspiel, Denmark); *ibid.* (Camey Herrera, Guatemala).
[103] *Ibid.* (twenty-eight in favour, fifteen against, with six abstentions).
[104] *Ibid.* (Correa, Ecuador).
[105] *Ibid.* (de Beus, Netherlands). See also *ibid.* (Maktos, United States); and *ibid.* (Amado, Brazil).

Eichmann invoked obedience to superior orders as a defence, but this was dismissed by the District Court of Jerusalem on the basis of a clause in the 1950 law on genocide prosecutions to the contrary.[106] On appeal, the Israeli Supreme Court demonstrated that the statutory prohibition was consistent with evolving international law.[107]

Other instruments

The statutes of the *ad hoc* International Criminal Tribunals exclude entirely the defence of superior orders: 'The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the [Tribunal] determines that justice so requires.'[108] The Rome Statute of the International Criminal Court is slightly more equivocal. Rather than prohibit the defence altogether, as in the other models, it codifies judicial pronouncements on the subject. Article 33 (Superior orders and prescription of law) provides:

> 1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
>   (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
>   (b) The person did not know that the order was unlawful; and
>   (c) The order was not manifestly unlawful.
> 2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

It appears that the effect of paragraph 2 is to eliminate the defence of superior orders in cases of genocide.[109]

[106] *A-G Israel* v. *Eichmann*, note 56 above, paras. 216 and 218–26.

[107] *A-G Israel* v. *Eichmann*, note 55 above, para. 15.

[108] 'Statute of the International Criminal Tribunal for the Former Yugoslavia', note 48 above, art. 7(4); 'Statute of the International Criminal Tribunal for Rwanda', note 48 above, art. 6(4). See Christopher L. Blakesley, 'Atrocity and Its Prosecution: The Ad Hoc Tribunals for the Former Yugoslavia and Rwanda', in Timothy L. H. McCormack and Gerry J. Simpson, eds., *The Law of War Crimes, National and International Approaches*, The Hague, Boston and London: Martinus Nijhoff Publishers, 1997, pp. 189–228 at pp. 219–20.

[109] The provision adopted by the Working Group at the Diplomatic Conference was accompanied by a footnote: 'Some delegations are willing to accept the inclusion of crimes against humanity in this paragraph subject to the understanding that the definition of crimes against humanity will be sufficiently precise and will identify an

The International Law Commission's draft Code of Crimes excludes the defence of superior orders: 'The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires.'[110] According to the commentary: 'a governmental official who plans or formulates a genocidal policy, a military commander or officer who orders a subordinate to commit a genocidal act to implement such a policy or knowingly fails to prevent or suppress such an act and a subordinate who carries out an order to commit a genocidal act contribute to the eventual commission of the crime of genocide. Justice requires that all such individuals be held accountable.'[111] This reiterates expressions of the same principle by the International Law Commission in the Nuremberg Principles[112] and in its 1954 draft Code of Offences.[113]

Distinction from duress

Difficulties with superior orders sometimes arise because of confusion with the defence of duress. Article 8 of the Nuremberg Charter, which

appropriately high level of *mens rea* including knowledge of the gravity and scale of the offence': UN Doc. A/CONF.183/C.1/WGGP/L.9/Rev.1. For the drafting history, see 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court', note 4 above, annex II, p. 59; 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', Vol. I, note 52 above, para. 208, p. 47; *ibid.*, Vol. II, p. 102; UN Doc. A/AC.249/1997/L.9/Rev.1, pp. 23–4; UN Doc. A/AC.249/1997/WG.2/CRP.8; UN Doc. A/AC.249/1998/L.13, pp. 63–4; UN Doc. A/CONF.183/2/Add.1, p. 59; and UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.2, p. 3. Subsequently adopted, with minor stylistic changes, by the Drafting Committee: UN Doc. A/CONF.183/C.1/WGGP/L.65/Rev.1, p. 8; see also UN Doc. A/CONF.183/C.1/WGGP/L.76/Add.3, p. 6.

[110] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 2 above, pp. 31 and 76.

[111] *Ibid.*, p. 31.

[112] 'Report of the International Law Commission Covering Its Second Session, 5 June to 29 July 1950', note 55 above, paras. 95–127, Principle IV: 'The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.'

[113] *Yearbook . . . 1954*, Vol. II, pp. 150–2, UN Doc. A/2693, paras. 49–54, art. 4: 'The fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order.'

seemingly forbids any recourse to superior orders as a defence, disturbed many jurists because it imposed a form of 'absolute liability'.[114] It was, accordingly, interpreted by the Nuremberg Tribunal to allow a defence of superior orders under exceptional circumstances:

> The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.[115]

The Tribunal implied that superior orders might possibly be a defence where there was an absence of moral choice.[116] The Nuremberg Principles, endorsed by the General Assembly in 1950, confirmed the International Military Tribunal's interpretation of article 8 and its qualified prohibition of the defence of superior orders.[117] In the *Einsatzgruppen* case, the American Military Tribunal applied the *dictum* of the International Military Tribunal, rejecting the defence of superior orders because of the absence of compulsion or duress:

> But were any of the defendants coerced into killing Jews under the threat of being killed themselves if they failed in their homicidal mission? The test to be applied is whether the subordinate acted under coercion or whether he himself approved of the principle involved in the order. If the second proposition be true, the plea of superior orders fails. The doer may not plead innocence to a criminal act ordered by his superior if he is in accord with the principle and intent of the superior. When the will of the doer merges with the will of the superior in the execution of the illegal act, *the doer may not plead duress under superior orders.*[118]

A plea of superior orders in the absence of evidence of duress was inadmissible. In the alternative, evidence of superior orders could be relevant in establishing the factual basis of a plea of duress, although it would alone be insufficient. Thus, in practice, the two pleas overlap, to

[114] Eser, '"Defences" in War Crime Trials', p. 258.
[115] *France et al.* v. *Goering et al.*, (1946) 22 IMT 203, p. 466.
[116] Dinstein, *Obedience to Superior Orders*, pp. 147–8; *Prosecutor* v. *Erdemović* (Case No. IT-96-22-A), Separate and Dissenting Opinion of Judge Stephen, 7 October 1997, para. 30.
[117] 'Report of the International Law Commission Covering Its Second Session, 5 June to 29 July 1950', note 55 above.
[118] *United States of America* v. *Ohlendorf et al.* ('Einsatzgruppen trial'), note 70 above, p. 480 (emphasis added).

the extent that an individual is given an order, and then told that he or she will be killed if the order is not carried out. But, where obedience to an order is argued in the absence of any suggestion of real duress, the issue of 'moral choice' can hardly arise. The individual offender may be subject to disciplinary measures or some other form of sanction, but nothing that could conceivably approach a threshold of moral choice in cases dealing with genocide.

In *Erdemović*, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia reflected the views of the International Military Tribunal and the International Law Commission's Nuremberg Principles, recognizing the distinction between duress and superior orders and noting that 'the complete defence based on moral duress and/or a state of necessity stemming from superior orders is not ruled out'.[119] On appeal, Judge Gabrielle Kirk McDonald said she would take exception if the Trial Chamber was attempting to create a 'hybrid defence' out of superior orders and duress. According to Judge McDonald, obedience to superior orders could be considered 'merely as a factual element in determining whether duress is made out on the facts'.[120] Rather than nuance the issue of superior orders, in the manner of the International Military Tribunal, Judge McDonald stated unequivocally that 'obedience to superior orders per se has been specifically rejected as a defence in the Statute'.[121] Judge Antonio Cassese, who dissented on the merits of the appeal, shared the majority opinion as to the distinction between superior orders and duress:

> It is also important to mention that, in the case-law, duress is commonly raised in conjunction with superior orders. However there is no necessary connection between the two. Superior orders may be issued without being accompanied by any threats to life or limb. In these circumstances, if the superior order is manifestly illegal under international law, the subordinate is under a duty to refuse to obey the order. If, following such a refusal, the order is reiterated under a threat to life or limb, then the

[119] *Prosecutor* v. *Erdemović* (Case No. IT-96-22-T), Sentencing Judgment, 29 November 1996, para. 19. These remarks seem to echo the writings of Yoram Dinstein: '[W]e may conclude that the fact of obedience to superior orders may be taken into account in appropriate cases for the purpose of defence, but only within the scope of other defences, namely, those of mistakes of law and compulsion, insofar as the latter really constitute valid defences under international law': Dinstein, *Defence to Superior Orders*, p. 82.

[120] *Prosecutor* v. *Erdemović* (Case No. IT-96-22-A), Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 34.

[121] *Ibid.*

> defence of duress may be raised, and superior orders lose any legal relevance. Equally, duress may be raised entirely independently of superior orders, for example, where the threat issues from a fellow serviceman. Thus, where duress is raised in conjunction with manifestly unlawful superior orders, the accused may only have a defence if he first refused to obey the unlawful order and then only carried it out after a threat to life or limb.[122]

In conclusion, an order to commit genocide, or to participate in the crime in whatever fashion, must be deemed manifestly illegal. Whether or not there is an applicable statutory provision, as in the case of the *ad hoc* tribunals and the International Criminal Court, superior orders alone in the absence of duress is no plea to a charge of genocide. The absence of a provision in the Convention neither confirms nor rejects the status of superior orders as a defence.[123] Scrutiny of the *travaux* indicates that several of the States voting against the inclusion of a provision did not support the admissibility of such a defence but preferred silence on the subject in the interests of compromise with those who held a different view. Subsequent authorities, and specifically the case law of the International Criminal Tribunal for the former Yugoslavia, as well as the various efforts at codification including the Rome Statute, have clarified any doubt on the subject.

Duress, compulsion and coercion

Charged with crimes against humanity in the summary execution of scores of Bosnian civilians at Srebrenica in July 1995, Drazen Erdemović told the International Criminal Tribunal for the former Yugoslavia:

> Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: 'If you are sorry for them, stand up, line up with them and we will kill you too'. I am not sorry for myself but for my family, my wife and son who then had nine months, and I could not refuse because then they would have killed me.[124]

[122] *Prosecutor* v. *Erdemović* (Case No. IT-96-22-A), Separate and Dissenting Opinion of Judge Cassese, 7 October 1997, para. 15.

[123] Benjamin Whitaker was sufficiently concerned to recommend an amendment that might be placed at the end of article III stating: 'In judging culpability, a plea of superior orders is not an excusing defence': Whitaker, 'Revised Report', note 47 above, p. 26, para. 53.

[124] *Prosecutor* v. *Erdemović* (Case No. IT-96-22-T), Transcript of Hearing, 31 May 1996, p. 9.

Erdemović in effect entered a plea of duress, compulsion and coercion. He claimed that the imminent threat of force or use of force directed against himself or another deprived him of any moral choice. As a result, he implied that he did not possess a genuine criminal intent, he had no *mens rea*.

It is difficult to distil any general principles from comparative criminal law applicable to the defence of duress for genocide. As a rule, duress is admissible as a plea to any charge under codes of the continental tradition, where it is called an 'excuse'. Authority under common law is more equivocal, and tends to the position that duress cannot be generally admissible as a defence to crimes of homicide.[125] Moreover, a large number of States have enacted statutory provisions that limit or forbid a defence of duress to serious crimes of violence against the person.[126] The defence of duress to charges of war crimes was considered in the *Von Leeb* case:

> The defendants in this case who received obviously criminal orders were placed in a difficult position, but servile compliance with orders clearly criminal for fear of some disadvantage or punishment not immediately threatened cannot be recognized as a defence. To establish the defence of coercion or necessity in the face of danger there must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong.[127]

In the *Krupp* case, the United States Military Tribunal said that coercion should be assessed 'from the standpoint of the honest belief of the particular accused in question' and that 'the effect of the alleged compulsion is to be determined not by objective but by subjective standards'.[128] In the Einsatzgruppen case, it said that 'there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns . . . No court will punish a man who, with a loaded pistol at his head, is compelled to

[125] *R* v. *Dudley and Stephens*, (1884) 14 QBD 273 (CCR). But see the remarks of Judge Cassese with respect to *Dudley and Stephens* in *Prosecutor* v. *Erdemović*, note 122 above, para. 25.

[126] For example, Criminal Code (Canada), RSC 1985, c. C-46, s. 17; New Zealand Crimes Act, 1961, s. 24; Criminal Code Act (Australia), 1902, s. 31(4); Penal Code (India), s. 94.

[127] *United States* v. *von Leeb* ('German High Command trial'), note 70 above. See also Jordan J. Paust, 'My Lai and Vietnam: Norms, Myths and Leader Responsibility', (1972) 57 *Military Law Review*, p. 99 at pp. 169–70.

[128] *United States* v. *Krupp*, (1948) 9 TWC 1438.

pull a lethal lever.'[129] Duress was admitted by German courts as a defence in some of the prosecutions for 'euthanasia' committed at Grafeneck and Hadamar as part of the 'T-4' programme.[130]

Nevertheless, the plea was rejected by German courts in the 1964 trial of personnel of the Treblinka concentration camp. The court heard evidence that, while the SS imposed harsh punishment for theft and security breaches, there was no credible proof that 'disadvantages to life and limb' resulted from a refusal to participate in extermination activities. In practice, SS agents who balked at genocide were merely stalled in their career advancement, and sometimes transferred or demoted.[131] Eichmann also pleaded duress or necessity, but the defence was dismissed on a factual basis. The Court found that he willingly volunteered, and never displayed the slightest displeasure or lack of enthusiasm.[132]

The Genocide Convention says nothing on the defence of duress. There was only perfunctory discussion of the question during the drafting of the Convention. At one point in the debate on superior orders, Poland said that the proposed provision 'did not suppress certain other elements in the criminal act, such as coercion and the impossibility of refusing to act, which could play an important part in determining the responsibility of the accused'.[133] These comments were unopposed. The Special Rapporteur of the International Law Commission, Doudou Thiam, admitted duress as a defence to genocide: 'the exception of coercion may be accepted if it constitutes an imminent and grave peril to life or physical well-being. It goes without saying that this peril must be irremediable and that there must be no possibility of escaping it by any other means.'[134] His views on the subject met with general approval from the Commission.[135] The Commission's final report on the draft Code of Crimes observed that: 'There are different views as to whether even the most extreme duress can ever constitute a

[129] *United States of America* v. *Ohlendorf et al.* ('Einsatzgruppen trial'), note 70 above.
[130] See Dick de Mildt, *In the name of the People: Perpetrators of Genocide in the Reflection of Their Post-War Prosecution in West Germany: The 'Euthanasia' and 'Aktion Reinhard' Trial Cases*, The Hague, London and Boston: Martinus Nijhoff, 1996, pp. 206–8.
[131] *Ibid.*, pp. 269–74. [132] *A-G Israel* v. *Eichmann*, note 55 above, para. 18.
[133] UN Doc. A/C.6/SR.92 (Lachs, Poland).
[134] 'Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', UN Doc. A/CN.4/398, *Yearbook . . . 1986*, Vol. II (Part 1), para. 193, p. 75.
[135] 'Report of the Commission to the General Assembly on the Work of Its Thirty-Eighth Session', note 54 above, paras. 152–60 at pp. 51–2.

valid defence or extenuating circumstance with respect to a particularly heinous crime, such as killing an innocent human being.'[136]

Erdemović is the leading case on duress, decided by the Appeals Chamber of the Yugoslav Tribunal on 7 October 1997.[137] The court divided three to two, with the majority taking the position that duress could never be a defence to a charge of crimes against humanity. This reasoning must also apply to genocide. According to Judge McDonald, 'duress does not afford a complete defence in international law to a charge of a crime against humanity or a war crime which involves the killing of innocent human beings'.[138] The finding of the Appeals Chamber left great uncertainty about the question, because it settled the issue by only the barest of majorities. Judges Cassese and Stephen both wrote dissenting opinions in which they set out the reasons why the defence of duress should be admissible.[139]

Some nine months later, at the Rome Diplomatic Conference, it was agreed to allow duress as a defence to charges of genocide before the International Criminal Court. According to the Rome Statute:

> 1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct . . .
>
> (d) . . . The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
>
> (i) Made by other persons; or
>
> (ii) Constituted by other circumstances beyond that person's control.[140]

[136] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 2 above, p. 77.

[137] See L. C. Green, 'Drazen Erdemović: The International Criminal Tribunal for the Former Yugoslavia in Action', (1997) 10 *Leiden Journal of International Law*, p. 363; Olivia Swaak-Goldman, 'Prosecutor v. Erdemović', (1998) 92 *American Journal of International Law*, p. 282; Sien Ho Yee, 'The Erdemović Sentencing Judgment: A Questionable Milestone for the International Criminal Tribunal for the Former Yugoslavia', (1997) 26 *Georgia Journal of International and Comparative Law*, p. 263.

[138] *Prosecutor* v. *Erdemović*, note 120 above, para. 89.

[139] *Prosecutor* v. *Erdemović*, note 122 above; *Prosecutor* v. *Erdemović*, note 118 above.

[140] Rome Statute of the International Criminal Court, note 3 above, art. 31. For the drafting history, see 'Report of the Ad Hoc Committee on the Establishment of an

In effect, the Rome Statute sets aside *Erdemović* as a precedent and codifies the conclusions of dissenting Judge Cassese. Clearly, a defence of duress will be admissible in only the rarest of circumstances, because of these very strict criteria. In the history of genocide, there has never been a shortage of willing executioners.[141]

The standard of proportionality ('provided that the person does not intend to cause a greater harm than the one sought to be avoided') would at first glance seem to eliminate duress altogether as a possible defence to a charge of genocide. In *Erdemović*, Judge Cassese said that 'this requirement cannot normally be met with respect to offences involving the killing of innocents, since it is impossible to balance one life against another'.[142] Nevertheless, he explained that, where the offender participates in killing victims who would be killed in any case, the test of proportionality could be met. This opens the door to a plea of duress for subordinates who participate in genocide. The Auschwitz guard or the Interahamwe thug will always be able to plead that the victims were doomed, and that, given the scale of the enterprise, any refusal by an isolated individual would be insignificant. Of course, even if the plea is admissible, the accused must produce evidence showing that there was a credible threat to his or her life or some other circumstance allowing the defence of duress.

The defence of necessity is closely related to duress, in that the accused argues that the material act was committed under circumstances where there was an absence of moral choice. In the case of duress, the exterior pressure comes from an individual; in the case of

International Criminal Court', note 4 above, annex II, p. 59; 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', Vol. I, note 52 above, para. 208, p. 47; *ibid.*, Vol. II, pp. 100–1; UN Doc. A/AC.249/1997/L.9/Rev.1, pp. 20–1; UN Doc. A/AC.249/1997/WG.2/CRP.7; UN Doc. A/AC.249/1998/L.13, pp. 62–3; UN Doc. A/CONF.183/2/Add.1, p. 58; UN Doc. A/CONF.183/C.1/WGGP/L.6; UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.1, p. 5; see also UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.1/Rev.1, pp. 4–5. Considerably redrafted with a number of stylistic changes by the Drafting Committee: UN Doc. A/CONF.183/C.1/ Rev.1, p. 7. For the final version, see UN Doc. A/CONF.183/C.1/L.76/Add.3, p. 5. Eric David has argued that this text is somewhat illogical, because an individual acting under duress is deprived of criminal intent, and cannot therefore 'intend to cause a greater harm': Eric David, *Principes de droit des conflits armés*, 2nd edn, Brussels: Bruylant, 1999, p. 694, para. 4.184d.

[141] Daniel Jonah Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust*, New York: Alfred A. Knopf, 1996.

[142] *Prosecutor* v. *Erdemović*, note 122 above, para. 50.

necessity, it results from natural causes.[143] These concepts guided the debates preparatory to adoption of the Rome Statute[144] where the defence of necessity is codified in article 31(1)(d)(ii), cited above. On necessity, Albin Eser has stated: 'it is very difficult to imagine a factual situation in which a soldier is able to avert personal danger by simply committing a war crime.'[145] These remarks are all the more relevant in the case of genocide.

Self-defence

An individual acts in legitimate self-defence when proportionate force is used to defend that person or another from imminent use of unlawful force.[146] The European Convention on Human Rights recognizes self-defence as an exception to the principle of respect for the right to life.[147] There is no theoretical or policy reason why an individual, accused of genocide, could not plead self-defence in appropriate circumstances.

The specific intent of a person acting in self-defence would be to protect that person's life or the life of another, not to destroy a national, racial, ethnic or religious group as such.[148]

[143] The Special Rapporteur of the International Law Commission made a somewhat different distinction between duress and necessity. According to him: 'Whereas in the case of coercion, the perpetrator has no choice, in the case of state of necessity a choice does exist': 'Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', note 136 above, para. 195, p. 75.

[144] 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court', note 4 above, annex II, p. 59; 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', Vol. I, note 52 above, para. 208, p. 47; *ibid.*, Vol. II, pp. 100–1. See also UN Doc. A/AC.249/1997/L.9/Rev.1, pp. 20–1; UN Doc. A/AC.249/1997/WG.2/CRP.7; UN Doc. A/AC.249/1998/L.13, pp. 62–3; UN Doc. A/CONF.183/2/Add.1, p. 58; UN Doc. A/CONF.183/C.1/WGGP/L.6; UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.1, p. 5; also UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.1/Rev.1, pp. 4–5. Considerably redrafted with a number of stylistic changes by the Drafting Committee: UN Doc. A/CONF.183/C.1/Rev.1, p. 7. For the final version, see UN Doc. A/CONF.183/C.1/L.76/Add.3, p. 5.

[145] Eser, '"Defences" in War Crime Trials', p. 262.

[146] M. Cherif Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal*, Dordrecht and Boston: Martinus Nijhoff, 1987, pp. 109–10.

[147] Convention for the Protection of Human Rights and Fundamental Freedoms ('European Convention on Human Rights'), (1955) 213 UNTS 221, ETS 5, art. 2(2). See Gilbert Guillaume, 'Article 2', in Louis-Edmond Pettiti, Emmanuel Decaux and Pierre-Henri Imbert, eds., *La Convention européenne des droits de l'homme, Commentaire article par article*, Paris: Economica, 1995, pp. 143–54 at p. 152.

[148] 'Although this question was not discussed [during the drafting of the Convention], it must be assumed that an act, generally, cannot become punishable if it is committed

Self-defence as a plea to a charge of genocide is codified in the Rome Statute:

> 1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct . . .
>
> (c) . . . The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph . . .[149]

The reference to defence of property in the case of war crimes makes it clear *a contrario* that defence of property cannot be invoked with respect to genocide.[150]

Self-defence of individuals should not be confused with 'individual or collective self-defence', enshrined in article 51 of the Charter of the United Nations,[151] covering self-defence by States, either individually or

within the narrow context of legitimate self-defence and does not exceed the limits required by such action': Nehemiah Robinson, *The Genocide Convention: A Commentary*, New York: Institute of Jewish Affairs, 1960, p. 62.

[149] Rome Statute of the International Criminal Court, note 3 above, art. 31. For the drafting history, see 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court', note 4 above, annex II, p. 59; 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', Vol. I, note 52 above, paras. 206–7, pp. 46–7; *ibid.*, Vol. II, p. 99; UN Doc. A/AC.249/1997/L.9/Rev.1, p. 20; UN Doc. A/AC.249/1997/WG.2/CRP.7; UN Doc. A/AC.249/1998/L.13, p. 62; and UN Doc. A/CONF.183/2/Add.1, p. 58.

[150] According to Eric David, recognition of defence of property in the Rome Statute may violate a *jus cogens* norm and is therefore null and void: David, *Principes de droit*, para. 4.184c.

[151] See 'Report of the Commission to the General Assembly on the Work of Its Thirty-Eighth Session', note 54 above, para. 172, p. 53; 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 2 above, pp. 75–6. This point is also made in two footnotes appended to the provision on self-defence adopted by the Working Group on General Principles at the diplomatic conference: 'This provision only applies to action by individuals during an armed conflict. It is not intended to apply to the use of force by States, which is governed by applicable international law' (UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.3, p. 2, n. 1); 'This provision is not intended to apply to international rules applicable to the use of force by States' (UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.3, p. 2, n. 2; see also UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.1/Rev.1, p. 4, n. 9).

collectively. Although not expressed explicitly in the Charter, exercise of the right to self-defence must obey the rule of proportionality, and cannot comprise retaliatory or punitive action.[152] For this reason, no State or individual can ever be permitted to justify genocide in the name of self-defence.[153]

Mistake of law and mistake of fact

Mistake of fact is recognized generally in domestic legal systems. An individual in error about an essential element of a crime lacks the knowledge requirement, and cannot therefore have the appropriate *mens rea* of the offence. In terms of *mens rea*, an individual who is mistaken about the law ought logically to be in the same position as the individual who is mistaken about facts. However, mistake of law is generally refused in comparative criminal law, essentially on policy grounds,[154] although war crimes jurisprudence has been more flexible.[155]

The Rome Statute codifies the defences of mistake of law and mistake of fact:

> 1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.
> 2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.[156]

[152] Albrecht Randelzhofer, 'Article 51', in Bruno Simma, ed., *The Charter of the United Nations: A Commentary*, Oxford: Oxford University Press, 1994, pp. 661–78 at p. 677, para. 37. See also Eser, '"Defences" in War Crime Trials', p. 263.

[153] 'Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', note 134 above, para. 252, p. 81.

[154] Jean Pradel, *Droit pénal comparé*, Paris: Dalloz, 1995, pp. 301–5.

[155] *United Kingdom* v. *Buck et al.*, (1948) 5 LRTWC 39 (British Military Court); *United States* v. *Milch*, (1948) 7 LRTWC 39 (United States Military Tribunal), p. 64. See also 'Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', note 134 above, paras. 204–11, pp. 76–7.

[156] Rome Statute of the International Criminal Court, note 3 above. Article 33 of the Statute deals with the defence of superior orders. For the drafting history, see 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court', note 4 above, annex II, p. 59; 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', Vol. I, note 52 above, para. 205, p. 46; *ibid.*, Vol. II, pp. 95–6; UN Doc. A/AC.249/1997/L.5, p. 28; UN Doc. A/AC.249/1997/WG.2/CRP.6; UN Doc. A/AC.249/1998/L.13, pp. 60–1; UN Doc. A/CONF.183/2/Add.1, pp. 56–7; UN

The text was a difficult compromise. The provision adopted by the Working Group on General Principles included a footnote saying that: 'Some delegations were of the view that mistake of fact or mistake of law does not relieve an individual of criminal responsibility for the crimes within the jurisdiction of the court.'[157]

There are a number of factual elements in the *actus reus* of genocide about which an accused person might conceivably claim error. First and foremost, of course,[158] is knowledge of the genocidal plan itself. An accused might also argue mistake of fact, and even mistake of law, with respect to such knowledge-related aspects of the crime as membership in the targeted group. The Elements of Crimes of the International Criminal Court provide that, for the fifth act of genocide, that is, forcibly transferring children from one group to another, '[t]he perpetrator knew, *or should have known*, that the person or persons were under the age of 18 years'. This limits the scope of a defence of mistake of fact about age, and arguably conflicts with article 30 of the Rome Statute.

Reprisal and military necessity

Reprisal and military necessity are not formally prohibited by international humanitarian law as a defence to charges of war crimes.[159] Although not specifically mentioned in the Rome Statute as an available defence, they are not excluded,[160] and the *travaux préparatoires* imply their admissibility, to the extent they are recognized at public international law.[161] Reprisal is only justified if there has been a breach of international law by the adversary. Reprisal as a defence must be proportional, and on this basis its application to genocide would seem

Doc. A/CONF.183/C.1/WGGP/L.4/Add.1, p. 4, n. 10; see also UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.1/Rev.1, p. 3, n. 4; UN Doc. A/CONF.183/C.1/L.65/Rev.1, p. 8; and UN Doc. A/CONF.183/C.1/L.76/Add.3, p. 6.

157 UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.1/Rev.1, p. 3, n. 5.

158 Elements of Crimes, ICC-ASP/1/3, p. 115.

159 Eser, '"Defences" in War Crime Trials', pp. 268–9.

160 Rome Statute of the International Criminal Court, note 3 above, art. 31(3).

161 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court', note 4 above, annex II, p. 60; 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', Vol. I, note 52 above, para. 209, p. 47; *ibid.*, Vol. II, p. 103; UN Doc. A/AC.249/1997/L.9/Rev.1, p. 23; UN Doc. A/AC.249/1997/WG.2/CRP.8.

inconceivable.[162] In the Einsatzgruppen-Fall, a reprisal killing of 859 Jews based on the killing of twenty-one German soldiers was deemed to fail this test.[163] For the Trial Chamber of the Yugoslavia Tribunal, 'the rule which states that reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, even when confronted by wrongful behaviour of the other party, is an integral part of customary international law and must be respected in all armed conflicts'.[164] While military necessity may justify 'wanton destruction of cities, towns or villages, or devastation', it 'extends neither to killing of civilians nor to their deportation to concentration camps – actions that are never justified'.[165]

Tu quoque

The defence of *tu quoque* is a plea that the adversary committed similar atrocities. It sometimes takes the form of alleging that the adversary initiated the conflict. Obviously, certain aspects of Nazi behaviour during the Second World War were not explored at Nuremberg because of a perceived Allied vulnerability to such a plea.[166] A Trial Chamber of the Yugoslavia Tribunal held that evidence that another party to a conflict may have committed atrocities 'is, as such, irrelevant because it does not tend to prove or disprove any of the allegations made in the indictment against the accused'. According to the Trial Chamber,

[162] See: 'Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', note 136 above, paras. 241–50 at pp. 80–1.

[163] M. Cherif Bassiouni, *Crimes Against Humanity*, Dordrecht, Boston and London: Martinus Nijhoff, 1992, p. 458.

[164] *Prosecutor* v. *Martić* (Case No. IT-95-11-R61), Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 13 March 1996, para. 17. See also William Fenrick, 'The Development of the Law of Armed Conflict Through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', in Michael N. Schmitt and Leslie C. Green, eds., *The Law of Armed Conflict: Into the Next Millennium*, Newport, RI: Naval War College, 1998, pp. 77–118 at p. 111.

[165] Eser, '"Defences" in War Crime Trials', p. 270; 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', note 2 above, pp. 78–9.

[166] For example, submarine warfare: Best, *War and Law*, p. 78; Philippe Masson, 'La guerre sous-marine', in Annette Wieviorka, ed., *Les procès de Nuremberg et de Tokyo*, Paris: Editions Complexe, 1996, pp. 137–46; bombing of urban centres: Patrick Facon, 'La pratique de la guerre aérienne et le droit des gens', in Annette Wieviorka, *ibid.*, pp. 115–36; the Katyn massacre: Alexandra Viatteau, 'Comment a été traité la question de Katyn à Nuremberg', in Wieviorka, *ibid.*, pp. 145–58.

tu quoque is inapplicable to international humanitarian law, which creates obligations that are *erga omnes*.[167]

Intoxication

Voluntary intoxication has been recognized in case law as a defence to war crimes.[168] Where an individual is heavily intoxicated, even voluntarily, that person may not have the specific intent required for a crime such as genocide. Depending on the circumstances, then, the defence is certainly admissible. It was formally codified in the Rome Statute of the International Criminal Court.[169]

The defence is highly unlikely to arise in international prosecutions for genocide, where prosecutorial discretion should confine accusations to leaders or repeat offenders. The protracted nature of genocidal activities will virtually exclude the defence of voluntary intoxication. In domestic trials, where large numbers of offenders may be judged, intoxication as a defence is far more likely. In Rwanda in 1994, for example, many reports described crimes committed by bands of drugged or inebriated young militia members. Depending on the applicable texts of the national law system in question, intoxication may be a special defence to a charge of genocide, because of the specific intent element. Should the plea succeed, the result cannot generally be acquittal. The accused would remain guilty of involuntary homicide or manslaughter, or some other crime of general intent.[170]

Insanity

Virtually all legal regimes recognize that an individual who is insane when the crime is committed is entitled to clemency, although different solutions are proposed. Under the common law, an individual who is

[167] *Prosecutor* v. *Kupreškić et al.* (Case No. IT-95-16-T), Decision on Evidence of the Good Character of the Accused and the Defence of Tu Quoque, 17 February 1999, pp. 3–4. See also Eser, '"Defences" in War Crime Trials', p. 269; *United States* v. *von Leeb* ('German High Command trial'), note 72 above.

[168] *United Kingdom* v. *Yamamoto Chusaburo*, (1947) 3 LRTWC 76 (British Military Court).

[169] Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, art. 31(1)(b).

[170] In the case of Rwanda, for example, art. 70 of the Penal Code rules out voluntary intoxication as a full defence. See William A. Schabas and Martin Imbleau, *Introduction au droit rwandais*, Cowansville, Québec: Editions Yvon Blais, 1999, p. 43.

unable to distinguish right from wrong, or to appreciate the nature and quality of the impugned acts or omissions, cannot be found guilty of a crime.[171] In systems of the continental tradition, the approach is relatively similar.[172] There are isolated examples in war crimes case law of pleas of insanity,[173] including the 'Celebici' case.[174]

The defence of insanity is codified in the Rome Statute, and may be invoked where '[t]he person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law'.[175] An accused need only raise a reasonable doubt, and is not required to prove or establish insanity.[176]

The Statute provides for no consequence of the plea other than acquittal, nor should it. An individual who is insane at the time of the crime may well pose no threat either to him or herself or to others by the time of trial and in such circumstances ought simply to be released. In the alternative, the public health authorities in the Netherlands, where the Court has its seat, can be expected to take the appropriate measures.

[171] *M'Naghten's Case*, (1843) 10 Cl & Fin 200, 8 ER 718 (HL).

[172] Pradel, *Droit pénal comparé*, pp. 293–4.

[173] *United States* v. *Peter Back*, (1947) 3 LRTWC 60 (United States Military Commission).

[174] *Prosecutor* v. *Delalić et al.* (Case No. IT-96-21-T), Judgment, 16 November 1998, paras. 1156–86.

[175] Rome Statute of the International Criminal Court, note 3 above, art. 31(1)(a). For the preparatory work, see 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', Vol. I, note 52 above, para. 204, p. 46; *ibid.*, Vol. II, p. 97; UN Doc. A/AC.249/1997/L.9/Rev.1, p. 19; UN Doc. A/AC.249/1997/WG.2/CRP.7; UN Doc. A/AC.249/1998/L.13, p. 61; UN Doc. A/CONF.183/2/Add.1, p. 57; UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.1, p. 4; UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.1/Rev.1, p. 3; UN Doc. A/CONF.183/C.1/L.65/Rev.1, p. 6; and UN Doc. A/CONF.183/C.1/L.76/Add.3, p. 5.

[176] Rome Statute of the International Criminal Court, note 3 above, art. 67(1)(i).

8

Prosecution of genocide by international and domestic tribunals

Genocide may be prosecuted by international or national courts. The preference of international law for the latter can be seen in the decision of the drafters of the Convention to establish an obligation to repress genocide without at the same time creating an international jurisdiction, although such a possibility was certainly contemplated and, indeed, expected at some time in the future. It is also evident in the principle of 'complementarity' which defines the operations of the International Criminal Court, established in 2002 following the entry into force of the Rome Statute. Pursuant to this principle, genocide offenders are, preferably, to be tried before domestic or national courts.[1] Only when these fail should the international jurisdiction become operational.

From a policy standpoint, however, one or the other system may not always be preferable for genocide prosecution. Where a domestic judicial system operates in an effective manner, it may be quite capable of dealing appropriately with the crimes of the past. But, sometimes, a domestic judicial system will be operational yet require, for its own credibility, that some international trials be held to deal with major cases. Rwanda chose this approach when, in 1994, it requested that the Security Council establish an international criminal court. Accordingly, the Security Council resolution creating the International Criminal Tribunal for Rwanda stressed 'the need for international co-operation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects'.[2]

Article V of the Genocide Convention requires States to implement their obligations in domestic law, specifically by providing for trial and punishment of those responsible for the crime. Article VI says trials should be held by the courts of the territory where the crime took place,

[1] Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90.
[2] UN Doc. S/RES/955 (1994).

but does not explicitly address whether there are other options. These may include prosecution by the State of nationality of the offender, or of the victim, or any State prepared to see that justice be done. Article VI also recognizes the possibility of trial by an international criminal court. To facilitate prosecution, the Convention also addresses extradition. An obligation to co-operate in extraditing genocide suspects is set out in article VII.

Obligation to enact national legislation

According to article V: 'The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article 3.' The need for such a provision had been foreseen by Raphael Lemkin in *Axis Rule in Occupied Europe*. 'An international multilateral treaty should provide for the introduction, not only in the constitution but also in the criminal code of each country, of provisions protecting minority groups from oppression because of their nationhood, religion, or race', wrote Lemkin. 'Each criminal code should have provisions inflicting penalties for genocidal practices.'[3]

Drafting history

The Secretariat draft required States parties 'to make provision in their municipal law for acts of genocide as defined [in the Convention], and for their effective punishment'.[4] The Ad Hoc Committee agreed, but by a narrow margin of four to three, that the Convention should address this issue.[5] There were two proposals, one from the Soviet Union, spelling out in detail an obligation to adopt criminal legislation aimed at preventing and suppressing genocide as well as racial, national and religious hatred,[6] the other from the United States, defining an

[3] Raphael Lemkin, *Axis Rule in Occupied Europe: Analysis of Government, Proposals for Redress*, Washington: Carnegie Endowment for World Peace, 1944, pp. 93–4.
[4] UN Doc. E/447, pp. 5–13, art. VI.
[5] UN Doc. E/AC.25/SR.18, p. 12.
[6] *Ibid.* 'The High Contracting Parties pledge themselves to make provision in their criminal legislation for measures aimed at prevention and suppression of genocide and also at prevention and suppression of incitement to racial, national and religious hatred, as

obligation to give effect to the Convention by legislation, but only in the most general terms.[7] The United States said it required the vaguer wording because of its federal system.[8] A reworked United States provision was adopted: 'The High Contracting Parties undertake to enact the necessary legislation, in accordance with their constitutional procedures, to give effect to the provisions of the present convention.'[9]

In the Sixth Committee, the United States said there was a need to enact domestic legislation, but did not want the Convention to go further. Its government 'could enter into only a general engagement to respect the provisions of the convention'.[10] Belgium considered that the Ad Hoc Committee draft imposed 'an obligation to introduce the definition of genocide and the penalties envisaged for it into their own penal codes, and also to determine the competent jurisdiction and the procedure to be followed'.[11] The Soviet Union proposed two amendments, one requiring that necessary legislative measures be 'aimed at the prevention and suppression of genocide and also at the prevention and suppression of incitement to racial, national and religious hatred', the other that they 'provide criminal penalties for the authors of such crimes'.[12] The first proposal was ruled out of order, because the question of incitement to racial hatred had already been addressed by the Committee.[13] The second met with wide approval. The United States criticized the text for suggesting that the scope of the obligation was confined to penal sanctions.[14] Article V, as amended by the Soviet Union, was adopted: 'The High Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of this Convention, and, in particular, to provide effective penalties for the authors of the crimes

defined in articles I, II, III and IV of the present Convention and to provide measures of criminal penalties for the commission of those crimes, if such penalties are not provided for in the active codes of that State.'

[7] UN Doc. E/AC.25/SR.19, p. 3: 'The High Contracting Parties shall make such provisions in their laws in accordance with their constitutional procedures as will give effect within their borders to the purposes of the Convention.'

[8] *Ibid.*, p. 4. [9] *Ibid.*, p. 8 (four in favour, three against).

[10] UN Doc. A/C.6/SR.93 (Maktos, United States). [11] *Ibid.* (Kaeckenbeeck, Belgium).

[12] UN Doc. A/C.6/215/Rev.1; UN Doc. A/C.6/SR.93 (Morozov, Soviet Union). The entire amendment read: 'The High Contracting Parties undertake to enact the necessary legislative measures, in accordance with their constitutional procedures, aimed at the prevention and suppression of genocide and also at the prevention and suppression of incitement to racial, national and religious hatred, to give effect to the provisions of this Convention, and to provide criminal penalties for the authors of such crimes.'

[13] UN Doc. A/C.6/SR.93 (Alfaro, chair). [14] *Ibid.* (Maktos, United States).

mentioned in article [III].'[15] A few days later, Australia charged that the provision was 'ambiguous' and 'ungrammatical', and possibly more narrow than the Ad Hoc Committee text, although its intention was the opposite. 'The Sixth Committee had adopted a text which might well be construed as relating to penal measures only and not to the whole of the obligations of the States under the convention', said Australia. It proposed: 'The High Contracting Parties undertake, in order to give effect to the provisions of this Convention, to enact the necessary legislation in accordance with their constitutional procedures and to provide criminal penalties for the authors of crimes under this Convention.'[16] The Soviet Union agreed and the revised text was adopted.[17]

State practice

It has been suggested that article V is superfluous, because the obligation to enact legislation is implicit in the Convention.[18] Special Rapporteur Nicodème Ruhashyankiko believed that article V was included in the Convention 'in accordance with a well-established practice in the field of conventions concerning international penal law'.[19] The *travaux préparatoires* indicate that article V goes beyond an obligation to provide for genocide in domestic criminal law. It can be extended to such matters as extradition, imposing upon States parties an obligation to ensure that effective legislation is in place in this respect. Finally, States may also be required to enact measures to prevent the crime of genocide.

The reference to national constitutions – what has sometimes been called the 'constitutional reservation' – might be taken as implying that implementing provisions are subordinate to domestic constitutional

[15] UN Doc. A/C.6/SR.93 (twenty-six in favour, three against, with eleven abstentions).
[16] UN Doc. A/C.6/SR.96 (Dignam, Australia).
[17] UN Doc. A/C.6/SR.97 (thirty-six in favour, with two abstentions).
[18] Pieter Nicolaas Drost, *Genocide: United Nations Legislation on International Criminal Law*, Leyden: A. W. Sythoff, 1959, p. 129.
[19] 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Progress Report by Mr Nicodème Ruhashyankiko, Special Rapporteur', UN Doc. E/CN.4/Sub.2/L.597 (1974), para. 11; 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur', UN Doc. E/CN.4/Sub.2/416, para. 185. For an example, see the Slavery Convention, (1926) 60 LNTS 253, art. 6; and the International Convention for the Suppression of the White Slave Traffic, (1910) 7 *Martens Nouveau Recueil* (3d) 252, 211 Consol. TS 45, art. 3.

law. Ruhashyankiko said 'there is no reason to assume that the clause would have that effect firstly because it can be interpreted as providing that a national law must be enacted in accordance with the constitutional procedures, which is quite normal'. Accordingly, he continued, 'this clause must be interpreted as relating to rules of form rather than of substance'.[20]

The United States made the only reservation to article V: 'That nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.'[21] Obviously, if the United States considered article V as a 'constitutional reservation' this statement would be unnecessary. The United States' reservation provoked objections from Denmark, Estonia, Finland, Greece, Ireland, Italy, Mexico, the Netherlands, Norway, Sweden and the United Kingdom. Many of the objecting States[22] referred to article 27 of the Vienna Convention on the Law of Treaties, which declares that States may not invoke the provisions of their domestic law for failure to perform treaty obligations.[23] Thus, State practice confirms the view expressed by Ruhashyankiko.

In 'monist' States, ratification of or accession to an international treaty introduces the norms of the treaty into national law and makes them directly applicable before domestic courts. In some cases, the international obligations are deemed hierarchically superior to other legislation, and may even supersede the country's constitutional law.

[20] 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Progress Report by Mr Nicodème Ruhashyankiko, Special Rapporteur', UN Doc. E/CN.4/Sub.2/L.597 (1974), para. 12; 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur', UN Doc. E/CN.4/Sub.2/416, para. 186.

[21] The reservation is similar to others formulated by the United States to human rights treaties: reservations (1) and (3) to the International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, reservations (1) and (2) to the International Convention on the Elimination of All Forms of Racial Discrimination, (1969) 660 UNTS 195, and reservation (1) to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, (1987) 1465 UNTS 85. On the United States' reservations to human rights treaties, see Richard Lillich, ed., *US Ratification of the Human Rights Treaties*: With or Without Reservations?, Charlottesville, VA: University of Virginia, 1981; David Weissbrodt, 'United States Ratification of the Human Rights Covenants', (1978) 63 *Minnesota Law Review*, p. 35.

[22] Denmark, Estonia, Finland, Greece, Ireland, Mexico, the Netherlands, Norway and Sweden.

[23] (1979) 1155 UNTS 331.

Nevertheless, a treaty can only be implemented on this basis within domestic law to the extent that it is 'self-executing'. In other words, the treaty must be drafted in such a way as to be applicable without further addition or modification. The Genocide Convention provisions cannot easily be applied within domestic law without some additional legislation and are therefore, in a general sense, not self-executing.[24]

This is confirmed by the text of article V itself. For example, the offence of genocide defined in articles II and III of the Convention is not accompanied by a precise sanction or penalty. Rwanda confronted this problem following the 1994 genocide. At the time of accession in 1975, Rwanda published the Convention in the official gazette, thereby making it part of the law of the land. But, because of the non-self-executing character of the Convention, it could not readily be invoked in prosecutions. Rwandan legislators admitted this in the preamble to legislation enacted in 1996 to facilitate prosecutions for genocide.[25]

Many States have enacted provisions within their domestic penal codes providing for a specific offence of genocide. In some cases, they have simply taken article II of the Convention and incorporated it within a special part of their codes,[26] adding a provision setting out the

[24] This view was presented by Dean Rusk of the State Department to the *United States Senate in 1950: United States of America, Hearings Before a Subcommittee of the Committee on Foreign Relations, United States Senate, Jan. 23, 1950*, Washington: United States Government Printing Office, 1950, p. 13; see also *ibid.*, pp. 31–2; and *ibid.*, pp. 257–8.

[25] Organic Law No. 08/96 of 30 August 1996 on the Organisation of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed since 1 October 1990, *Journal Officiel* (Rwanda), 35th year, No. 17, 1 September 1996, preamble: 'Given that the acts committed constitute offences provided for and punished under the Penal Code as well as the crime of genocide or crimes against humanity; Given that the crime of genocide and crimes against humanity are provided for specifically in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and its additional Protocols, as well as the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26 November 1968; Given that Rwanda has ratified these three Conventions and has published them in the *Official Gazette*, but without having provided for penalties for these crimes; Given that, as a consequence, the prosecutions must be based on the Penal Code . . .'

[26] Among them Albania (Penal Code, art. 71); Austria (Penal Code, art. 321); Brazil (Act No. 2889 of 1 October 1956); Bulgaria (Penal Code, art. 416); Croatia (Penal Code, art. 119); Cuba (Law No. 62, Penal Code); Czech Republic (Penal Code, art. 259); Fiji (Genocide Act, 1969); Germany (Penal Code, art. 220a); Ghana (Criminal Code (Amendment) Act, 1993, s. 1); Hungary (Penal Code, art. 137); Israel (Crime of Genocide (Prevention and Punishment) Law); Italy (Act of 9 October 1967);

applicable penalties. There are also examples where States have incorporated the Convention definition by reference, making it an offence to commit an offence defined by article II of the Convention.[27] A few States have expanded upon article II, particularly with respect to the groups protected.[28] Sometimes, the definition has been slimmed down, for example by removing a protected group or a punishable act.[29]

For example, the Canadian committee designated to recommend legislative action said: 'we believe that the definition of genocide should be drawn somewhat more narrowly than in the international Convention so as to include only killing and its substantial equivalents'.[30] In addition to the definition of the crime itself in article II, full implementation requires legislation providing for the 'other acts' listed in article III.

Most States that have enacted genocide provisions do not appear to have considered the issues raised by article III. They leave the substantive offence of genocide subject to the general provisions of their

Liechtenstein (Penal Code, art. 321); Mexico (Penal Code for the Federal District, art. 149bis); Netherlands (Act of 2 July 1964 Implementing the Convention on Genocide); Panama (Penal Code, art. 311); Portugal (Decree-Law No. 48/95, Penal Code, art. 239); Romania (Penal Code, art. 357); Russian Federation (Penal Code, art. 357); Slovakia (Criminal Code, art. 259); Slovenia (Penal Code, 1994, Chapter 35, art. 373); Spain (Penal Code, 1996, art. 607); Sweden (Act of 20 March 1963); Tonga (Genocide Act, 1969); the United Kingdom (Genocide Act 1969); and the United States of America (USC Title 18, § 1091).

[27] For example, Antigua and Barbuda (Genocide Act, Laws of Antigua and Barbuda, Vol. 4, chapter 191, s. 3); Barbados (Genocide Act, chapter 133A, s. 4); Cyprus (Law 59/1980); Ireland (Genocide Act 1973, s. 2(1)); Seychelles (Genocide Act 1969 (Overseas Territories) Order, 1970, s. 1(1)); and St Vincent and the Grenadines (Criminal Code, cap. 124, s. 157(2)). The Israeli law declares that it is 'consequent upon the Convention on the Prevention and Punishment of the Crime of Genocide': the Crime of Genocide (Prevention and Punishment) Law, s. 10.

[28] Bangladesh (International Crimes (Tribunals) Act 1973, s. 3(2)(c)) providing for political groups; Canada (Criminal Code, RSC, 1985, c. C-46, s. 318), which adds reference to groups defined by 'colour'; Costa Rica (Code of 1992, art. 373), providing for political groups; Ethiopia (Penal Code, art. 281), protects political groups; Finland repeats the Convention enumeration of groups but says it also applies to 'a comparable group of people' (Criminal Code, 578/95, chapter 11, s. 6); France (Penal Code, 1992, art. 211–1), for 'any other arbitrary criterion'; Panama (Penal Code of 1993, art. 311), protects political groups; Peru (Penal Code of 1995, art. 129), protects social groups.

[29] Bolivia (Penal Code, 23 August 1972, chapter IV, art. 138), which removes reference to racial groups; Canada (Criminal Code, note 28 above, s. 318), which removes reference to national groups; and Costa Rica (Code of 1992, art. 373), which removes reference to ethnic groups.

[30] Canada, *Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada*, Ottawa: Queen's Printer, 1966, p. 61.

criminal law with respect to participation that, inevitably, address such issues as attempt and complicity. Nevertheless, many of these States have no provision for inchoate conspiracy, and virtually none have provisions for direct and public incitement. Thus, even where the obligation to enact the offence appears to be formally respected, by direct legislative action, the requirements of the Convention are not completely respected in the majority of cases.

Several States have concluded that no new legislation is required, because the underlying crimes of killing and causing serious physical or mental harm are already part of their criminal law.[31] Some take the view that no legislation is necessary because the Convention has force of law.[32] A few initially believed that no legislation was required, but later changed their minds.[33] Others have no legislation and no accounting for its absence,[34] or explain that the matter is being studied.[35] Some States have taken the position that, because no national, ethnic, racial or religious groups exist within their society, or because equality is ensured to all citizens irrespective of origin, no further legislative protection of groups is required.[36] In the Sixth Committee, Belgium claimed its constitution and penal law contained all the necessary provisions for the repression of genocide. Although the crime was not mentioned by

[31] Among them, Australia (communication from Australian Government, 9 March 1999); Belgium (UN Doc. E/CN.4/Sub.2/416, para. 498, n. 2); Ecuador (UN Doc. E/CN.4/Sub.2/416, para. 498, n. 4); Egypt (UN Doc. E/CN.4/Sub.2/416, para. 498, n. 3); Greece (UN Doc. E/CN.4/Sub.2/303/Add.5); Iceland; India (UN Doc. E/CN.4/Sub.2/303/Add.8); Iraq (UN Doc. E/CN.4/Sub.2/416, para. 498, n. 9); New Zealand (personal communication from Professor Roger Clark); Norway; Pakistan (UN Doc. E/CN.4/Sub.2/303/Add.10); Senegal (communication from Government of Senegal, 7 June 1999); Turkey (UN Doc. E/CN.4/Sub.2/303/Add.1); and Ukraine (UN Doc. E/CN.4/Sub.2/416, para. 498, n. 12). Bahrain takes the view that the crime of genocide is incorporated by virtue of the Islamic Sharia, which 'prohibits those acts made punishable by Article 2 of the Genocide Convention' (communication from State of Bahrain, 19 May 1999).

[32] Finland (UN Doc. E/CN.4/Sub.2/416, para. 498, n. 5); Luxembourg (communication from Luxembourg Government, 8 April 1999); Philippines (UN Doc. E/CN.4/Sub.2/416, para. 503); Poland (UN Doc. E/CN.4/Sub.2/416, para. 498, n. 11).

[33] France (UN Doc. E/CN.4/Sub.2/303/Add.8); Russian Federation (UN Doc. E/CN.4/Sub.2/416, para. 498, n. 14).

[34] Belarus, Cambodia, Gambia, Malaysia (communication from Malaysia, 27 September 1999), Maldives, Namibia, Papua New Guinea and Zimbabwe.

[35] Morocco (communication from Morocco, 10 August 1999).

[36] See the replies of Egypt and the Soviet Union to the Special Rapporteur: 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Progress Report by Mr Nicodème Ruhashyankiko, Special Rapporteur', UN Doc. E/CN.4/Sub.2/L.597 (1974), paras. 19 and 20.

name, Belgium said it was simply an aggravated form of crimes already defined.[37] Canada considered a provision for genocide unnecessary except with respect to 'advocating genocide', its domestic formulation of direct and public incitement.[38] Yet Nehemiah Robinson's observation should be borne in mind: 'From the viewpoint of the minority groups, which are or may be exposed to acts described in the Convention, it makes a great difference whether those who commit these acts against them are prosecuted on that basis or only the basis of "ordinary" violations of the criminal code.'[39] In any event, on closer examination this approach suffers from the same inconsistencies we see in States that have enacted provisions for genocide, particularly with respect to inchoate offences.

While criminalization of murder and assault is covered by essentially every criminal code, few provide for imposing conditions of life calculated to destroy groups, preventing births or transferring children. But it is harder for national legislators to address the forms of genocide other than murder and assault, because these so obviously involve the intervention of the State and, probably, implementing legislation. Thus, parliaments would find themselves adopting legislation against themselves, so to speak, prohibiting measures to restrict births or transfer children, or imposing conditions calculated to destroy the group.

Norway's failure to enact a crime of genocide in its domestic criminal law proved fatal to attempts to transfer a case from the International Criminal Tribunal for Rwanda, as part of the institution's completion strategy. Norway offered to take the case of Michel Bagaragaza, in accordance with the provisions of Rule 11bis of the Rules of Procedure and Evidence of the Rwanda Tribunal. The Tribunal's president at the time, Erik Møse, was a Norwegian national. Everything looked in order. Norway has no death penalty, its trials appear to meet international standards, and its prisons are adequate. But the judges refused to authorize the transfer, holding that Norway's proposal to prosecute Bagaragaza for murder was unacceptable. In an *amicus curiae* brief, Norway told the Tribunal that, upon ratification of the Genocide

[37] UN Doc. A/C.6/SR.65 (Kaeckenbeeck, Belgium).

[38] Canada (Criminal Code, note 28 above, s. 318). See Canada, *Report to the Minister*, note 30 above, p. 62. See also the Jamaican legislation, which also confines itself to incitement ('whosoever shall advocate or promote genocide'), Offences Against the Person (Amendment) Act, 1968, s. 33.

[39] Nehemiah Robinson, *The Genocide Convention: A Commentary*, New York: Institute of Jewish Affairs, 1960, p. 33.

Convention, in 1948, its Parliament considered it unnecessary to enact implementing legislation as all conduct prohibited under the convention was already criminal under existing provisions of its criminal law. Norway explained that its laws were drafted in a general manner but that they were interpreted in light of both its international legal obligations as well as relevant legislative history.[40] The Appeals Chamber ruled that transfers from the Tribunal were only acceptable to the extent that the national jurisdiction was prepared to prosecute for 'serious violations of international humanitarian law'.[41]

Jurisdiction

States exercise jurisdiction in the field of criminal law on five bases: territory, protection, nationality of offender (active personality), nationality of victim (passive personality) and universality.[42] Territory is the most common, if for no other reason than that it is the only form of jurisdiction where the State can be sure of actually enforcing the process of its courts. In the *Lotus* case, Judge Moore indicated a presumption favouring the *forum delicti commissi*.[43] One of the earliest criminal law treaties, the Treaty of International Penal Law, signed at Montevideo on 23 January 1889, stated that: 'Crimes are tried by the Courts and punished by the laws of the nation on whose territory they are perpetrated, whatever may be the nationality of the actor, or of the injured.'[44]

Sometimes territory may be given a rather broad scope, so as to encompass acts which take place outside the State's territory but which have a direct effect upon it.[45] Jurisdiction based on nationality of the victim or the offender, as well as on the right of a State to protect its interests, is somewhat rarer. The Permanent Court of International

[40] Cited at *Prosecutor* v. *Bagaragaza* (Case No. ICTR-05-86-AR11bis), Decision on Rule 11bis Appeal, 30 August 2006, para. 13.

[41] *Ibid.*, para. 16.

[42] *United States* v. *Yunis*, 681 F Supp 896 at 900–1 (DDC 1988). See Yoram Dinstein, 'The Universality Principle and War Crimes', in Michael N. Schmitt and Leslie C. Green, eds., *The Law of Armed Conflict: Into the Next Millennium*, Newport, RI: Naval War College, 1998, pp. 17–37.

[43] *SS Lotus (France* v. *Turkey)*, PCIJ, 1927, Series A, No. 10, p. 70.

[44] (1935) 29 *American Journal of International Law*, p. 638.

[45] *United States* v. *Noriega*, 746 F Supp 1506 (SD Fla 1990); *R* v. *Jacobi and Hiller*, (1881) 46 LR 595n; *Libman* v. *The Queen*, (1985) 21 CCC (3d) 206 (SC). See Lynden Hall, '"Territorial" Jurisdiction and the Criminal Law', [1972] *Criminal Law Review*, p. 276.

Justice, in the *Lotus* case, recognized the right of States to exercise jurisdiction based on personality.[46]

Universal jurisdiction applies to a limited number of crimes for which any State, even absent a personal or territorial link with the offence, is entitled to try the offender. In customary international law, these crimes included piracy,[47] the slave trade, and traffic in children and women. Recognition of universal jurisdiction for such crimes was largely predicated on the grounds that they were often committed in terra nullius, where no State could exercise territorial jurisdiction, or that they were transnational in nature. More recently, some multilateral treaties have also recognized universal jurisdiction for particular offences such as hijacking and other threats to air travel,[48] piracy,[49] attacks upon diplomats,[50] nuclear safety,[51] terrorism,[52] apartheid[53] and torture.[54]

The fundamental difficulty with genocide prosecutions based on territorial jurisdiction is a practical one. States where the crime took place are unlikely to be willing to proceed, either because the perpetrators remain in power or influence, or perhaps because a post-genocide social and political *modus vivendi* is built upon forgetting the crimes of the past. For this reason, it is often said that universal jurisdiction must be a *sine qua non* if those responsible for genocide are to be brought to book. Raphael Lemkin urged that universal jurisdiction be recognized for the crime of genocide.[55] Recognition of universal jurisdiction over genocide was one of the objectives of those who proposed General Assembly Resolution 96(I) in October 1946. The preamble of the draft text stated: 'Whereas the punishment of the very serious crime of genocide when committed in time of peace lies within the exclusive

[46] *SS Lotus* (*France* v. *Turkey*), note 43 above.
[47] *United States* v. *Smith*, 18 US (5 Wheat.) 153 at 161–2 (1820).
[48] Convention for the Suppression of Unlawful Seizure of Aircraft, (1971) 860 UNTS 105; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, (1976) 974 UNTS 177.
[49] Convention on the Law of the Sea, (1994) 1833 UNTS 3, art. 105.
[50] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents, (1977) 1035 UNTS 167.
[51] Vienna Convention of 1980, (1984) 1456 UNTS 101.
[52] European Convention on the Suppression of Terrorism, (1978) 1137 UNTS 99; International Convention Against the Taking of Hostages, (1983) 1316 UNTS 205.
[53] International Convention on the Suppression and Punishment of the Crime of Apartheid, (1976) 1015 UNTS 243, art. IV(b).
[54] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, note 21 above, art. 10.
[55] Raphael Lemkin, *Axis Rule*, pp. 93–4.

territorial jurisdiction of the judiciary of every State concerned, while crimes of a relatively lesser importance such as piracy, trade in women, children, drugs, obscene publications are declared as international crimes and have been made matters of international concern . . .'[56] However, this portion of the text disappeared during the drafting, and was not included in the final version. The issue returned two years later during drafting of the Genocide Convention itself. But, after bitter debate, the United Nations General Assembly opted for the most restrictive approach, stating, in article VI, that: 'Persons charged with genocide or any of the other acts enumerated in article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.'

Drafting history

The 1946 Saudi Arabian draft contemplated universal jurisdiction: 'Acts of genocide shall be prosecuted and punished by any State regardless of the place of the commission of the offence or of the nationality of the offender, in conformity with the laws of the country prosecuting.'[57] Similarly, the Secretariat draft stated: '[Universal Enforcement of Municipal Criminal Law] The High Contracting Parties pledge themselves to punish any offender under this Convention within any territory under their jurisdiction, irrespective of the nationality of the offender or of the place where the offence has been committed.'[58] The Secretariat's experts agreed with universal jurisdiction, noting that this was consistent with General Assembly Resolution 96(I), and because 'genocide is by its nature an offence under international law'.[59] Their reading of Resolution 96(I) was probably exaggerated, given the exclusion of a reference to universal jurisdiction in the final version.

The United States was the first dissenting voice. It proposed prosecution for crimes committed outside the territory of a State only with the consent of the States upon whose territory genocide was committed.[60] The Soviet Union was equally negative about universal jurisdiction.

[56] UN Doc. A/BUR/50. The drafting of Resolution 96(I) is discussed in Chapter 1 above.
[57] UN Doc. A/C.6/86. [58] UN Doc. E/447, pp. 5–13, art. VII. See also UN Doc. E/AC.25/8.
[59] UN Doc. E/447, p. 18. See also Robinson, *Genocide Convention*, p. 31.
[60] UN Doc. E/623, art. V.

According to the Soviets, cases of genocide 'should be heard by national courts in accordance with domestic legislation'. Alternatively, the Soviet Union said there should be an obligation to report genocide to the Security Council.[61] Views in support of confining the Convention to territorial jurisdiction were also expressed by the Netherlands.[62] In comments on the Secretariat draft, only Siam endorsed universal jurisdiction.[63]

A Secretariat memo noted that, where genocide was committed by members of a government, they would be prosecuted if they fell into enemy hands or were arrested 'in the course of international police action organized by the Security Council' or if, after having fled, they were arrested abroad.[64] In other cases, the Secretariat considered the option of *in absentia* trial. The court judging the accused, the memo continued, could be either international – an *ad hoc* court like the Nuremberg Tribunal – or one organized under the Convention. National courts, either of the State where the offender was captured, or one 'which the powers concerned had decided to entrust with the task of repression', might also assume jurisdiction. The Chinese draft was in line with the Secretariat's philosophy. It was worded permissively, and recognized universal jurisdiction: 'Genocide *may* be punished by any competent tribunal of the state, in the territory of which the crime is committed or the offender is found, or by such an international tribunal as may be established.'[65]

In the Ad Hoc Committee, the Soviet Union strenuously opposed internationalization of prosecution for genocide.[66] It disliked both universal jurisdiction and the idea of an international court, proposing as an alternative: 'The Convention should provide that persons guilty of genocide shall be prosecuted as being guilty of a criminal offence; that crimes thus committed within the territory coming under the law of a state shall be referred to the national courts for trial in accordance with the internal legislation of that state.' According to the Soviets, no exception would be made to the principle of the territorial jurisdiction, which alone was compatible with respect for national sovereignty.[67] France was hardly keener about universal jurisdiction although it strongly

[61] UN Doc. E/AC.25/7. [62] UN Doc. E/623/Add.3.
[63] UN Doc. E/623/Add.4. [64] UN Doc. E/AC.25/8.
[65] 'Draft Articles for the Inclusion in the Convention on Genocide Proposed by the Delegation of China on 16 April 1948', UN Doc. E/AC.25/9 (emphasis added).
[66] 'Basic Principles of a Convention on Genocide', UN Doc. E/AC.25/7, Principle IX.
[67] UN Doc. E/AC.25/SR.7, pp. 3–4.

favoured the establishment of an international tribunal.[68] It warned that universal jurisdiction might invite expressions of hostility on an international scale.[69] The analogy with other crimes subject to universal jurisdiction was misleading, it said, because crimes like piracy were not adequately covered by territorial jurisdiction.[70] The United States was also opposed to the principle of universal punishment.[71] There was equivocal support for the idea from Venezuela[72] and Poland.[73] China spoke in favour,[74] as did Lebanon.[75] But a Lebanese proposal to recognize universal jurisdiction was rejected by the Ad Hoc Committee.[76]

The chair suggested a rule of subsidiarity, by which courts with territorial jurisdiction would take precedence, an international court operating only when the former had failed to act.[77] The principle of subsidiarity (or complementarity, as it is now known) was adopted by the Ad Hoc Committee.[78] The United States revised the Chinese proposal to read: 'Genocide shall be punished by any competent tribunal of the State in the territory of which the crime is committed or by a competent international tribunal.'[79] It was agreed, by five votes with two abstentions, to retain the word 'shall' in order to stress the obligation to punish.[80] The final version, adopted by four to three, stated: 'Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed or by a competent international tribunal.'[81]

In the Sixth Committee, Iran proposed incorporating the concept of universal jurisdiction within the Convention, although it was subject to failure by the territorial State to seek extradition.[82] 'The answer to the assertion that the offender could be brought before an international tribunal was that no such tribunal existed yet, and that, even if it did

[68] *Ibid.*, p. 9. [69] UN Doc. E/AC.25/SR.8, p. 7. [70] *Ibid.* [71] *Ibid.*, p. 11.
[72] UN Doc. E/AC.25/SR.1, pp. 4–8; UN Doc. E/AC.25/SR.8, pp. 3 and 6.
[73] UN Doc. E/AC.25/SR.3, pp. 3–5. [74] *Ibid.*, pp. 5–6. [75] UN Doc. E/AC.25/SR.8, p. 2.
[76] *Ibid.*, p. 12 (four in favour, two against, with one abstention). The Chinese member abstained, saying he lacked instructions from his government on this point. Lebanon's request that the Committee reconsider the issue of universal jurisdiction was rejected by four to two, with one abstention: UN Doc. E/AC.25/SR.20, p. 3.
[77] *Ibid.*, p. 4. [78] *Ibid.*, p. 15 (four in favour, with three abstentions).
[79] UN Doc. E/AC.25/SR.18, p. 10. [80] UN Doc. E/AC.25/SR.20, p. 2.
[81] UN Doc. E/AC.25/SR.24, p. 10.
[82] UN Doc. A/C.6/218. Add a paragraph: 'They may also be tried by tribunals other than those of the States in the territories of which the act was committed, if they have been arrested by the authorities of such States, and provided no request has been made for their extradition.'

exist, it would be logical to submit to it only serious cases in which rulers or large organizations were involved',[83] said Iran. Brazil was supportive, noting that the principle of universal punishment had been accepted since the Middle Ages, and was reflected in nineteenth-century legislation.[84]

But India argued that analogies with other universal jurisdiction crimes, such as piracy, were not helpful. India said that universal repression of piracy was recognized because it was committed on the high seas and not on the territory of a State.[85] Similarly, the Soviet Union explained that universal punishment 'was justified in the cases of traffic in women or piracy by the fact that it was often extremely hard, if not impossible, to determine the place where the crime had been committed', something that was not the case with genocide.[86] According to Egypt, universal jurisdiction was not yet generally accepted.

Contrasting genocide with piracy, Egypt said '[i]t would be very dangerous if statesmen could be tried by the courts of countries with a political ideology different from that of their own country'.[87] For the United States, '[t]he principle of universal punishment was one of the most dangerous and unacceptable of principles, and he hoped, consequently, that the Committee would reject it'.[88] Its provocative example was prosecution of an individual 'for having uttered certain opinions in his own country where the Press was free'.[89] The United Kingdom opposed universal jurisdiction because its criminal law was based on the territorial principle.[90]

Others, while not questioning the principle of universal jurisdiction, felt its incorporation was inopportune. Jean Spiropoulos of Greece said that 'jurisprudence would have taken a great step forward if the principle of universal punishment would be applied to the crime of genocide'. But four of seven members of the Ad Hoc Committee, including France, the Soviet Union and the United States, opposed the principle, and it was therefore 'questionable' to include the notion

[83] UN Doc. A/C.6/SR.100 (Abdoh, Iran).
[84] *Ibid.* (Amado, Brazil). See also *ibid.* (Pérez-Perozo, Venezuela).
[85] *Ibid.* (Sundaram, India). [86] *Ibid.* (Morozov, Soviet Union).
[87] *Ibid.* (Raafat, Egypt). See also *ibid.* (Manini y Rios, Uruguay).
[88] *Ibid.* (Maktos, United States). Iran claimed the United States had changed its views on this point, and that its proposal of 30 September 1947 (UN Doc. A/401/Add.2) had advocated universal punishment: UN Doc. A/C.6/SR.100 (Abdoh, Iran).
[89] UN Doc. A/C.6/SR.100 (Maktos, United States).
[90] *Ibid.* (Fitzmaurice, United Kingdom).

if it would make it impossible for three of the great powers to ratify the Convention. The real remedy was not to adopt the principle of universal punishment but rather to create the international tribunal, said Spiropoulos.[91]

Iran's proposal was decisively defeated.[92] After this rejection of universal jurisdiction, the Sixth Committee embarked upon a protracted debate about other forms of jurisdiction, namely, those based upon the nationality of the offender and the nationality of the victim. An Indian amendment sought formal recognition of the right of domestic courts to try their own nationals, even where the crime was committed elsewhere.[93] The drafting committee felt this could be achieved with an explanatory statement in the report 'to the effect that the jurisdiction of the courts of a State over its own nationals was not excluded'.[94] It was agreed to include language to this effect in the report of the Committee.[95] Then Sweden suggested that jurisdiction over genocide could also be asserted by the courts of the nationality of the victim, a somewhat more controversial proposition.[96] Sweden had its own statement for the report: 'Furthermore, article VI should not be interpreted as depriving a State of jurisdiction in the case of crimes committed against its nationals outside national territory.'[97] The United States[98] and the United Kingdom were opposed, with Fitzmaurice stating it was dangerous to go beyond 'the two universally recognized principles according to which the jurisdiction of courts was based on the territoriality or the nationality of the perpetrators of a crime'.[99] Belgium said the Swedish position was 'not generally accepted and was embodied only in some of the various national legal systems'.[100]

The United States said that the whole problem had been provoked by the Indian text. It would be better to confine additional comment in the report to the phrase 'article VI has no other implications', said the United States.[101] Eventually, the chair proposed the following: 'The first

[91] *Ibid.* (Spiropoulos, Greece).
[92] Six in favour, twenty-nine against, with ten abstentions. Subsequently, India said it shared Iran's desire for universal punishment, but could not vote for the amendment in the form in which it was presented as it could 'have lent itself too easily to abuse'; as a result, India had abstained: UN Doc. A/C.6/SR.100 (Sundaram, India).
[93] UN Doc. A/C.6/SR.129 (Sundaram, India).
[94] UN Doc. A/C.6/SR.130 (Abdoh, Iran). [95] UN Doc. A/C.6/SR.131 (Alfaro, chair).
[96] *Ibid.* (Petren, Sweden). [97] UN Doc. A/C.6/313.
[98] UN Doc. A/C.6/SR.131 (Maktos, United States).
[99] *Ibid.* (Fitzmaurice, United Kingdom).
[100] UN Doc. A/C.6/SR.132 (Kaeckenbeeck, Belgium). [101] *Ibid.* (Maktos, United States).

part of article VI contemplates the obligation of the State in whose territory acts of genocide have been committed. Thus, in particular, it does not affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State.'[102]

The term 'in particular' reflected the compromise, and in effect left the issue of passive personality jurisdiction unresolved.[103] The chair's proposal was adopted.[104] John Maktos of the United States, speaking as chair of the Ad Hoc Committee, explained that the text 'did not at all imply that States could not punish their nationals for crimes of genocide committed abroad. The only obligation imposed on them by article [VI] was to punish crimes of genocide committed on their own territory; such a provision was not restrictive.'[105] The General Assembly has since recognized explicitly that States are entitled to try their own nationals for crimes against humanity, no matter where they are committed.[106]

Post-Second World War prosecutions by national jurisdictions

When article VI of the Genocide Convention was being negotiated, it was often said that the restrictive provision, by which only the courts of the territorial State, as well as the still only imagined international court, would have jurisdiction. Although the argument by which national courts would not be willing to prosecute such 'crimes of state' had great validity, subsequent practice provides several examples of genocide trials organized by the State with territorial jurisdiction over the crimes. The

[102] The United States made an 'understanding' to article VI: '(3) That . . . nothing in article VI affects the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside a state.' The same position is expressed in its implementing legislation: Genocide Convention Implementation Act of 1987 (the Proxmire Act), S. 1851, s. 1091(d). See also Robert H. Jones, 'Jurisdiction and Extradition Under the Genocide Convention', (1975) 16 *Harvard International Law Journal*, p. 696 at pp. 696–7.

[103] Eric David has written that art. VI does not mean that other States cannot try the offence of genocide, only that the jurisdiction of the territorial state should have priority. He has also said that the words 'in particular' (in French, *notamment*) are intended to reserve other extraterritorial forms of jurisdiction than active personality jurisdiction: Eric David, *Principes de droit des conflits armés*, 2nd edn, Brussels: Bruylant, 1994, p. 666, para. 4.145.

[104] UN Doc. A/C.6/SR.134 (twenty votes in favour, eight against, with six abstentions).

[105] UN Doc. A/C.6/SR.100 (Maktos, United States).

[106] 'Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity', GA Res. 3074(XXVIII), para. 2.

largest number by far have taken place in Rwanda, which seems to correspond exactly to the concept set out in article VI. A much smaller number have taken place in the States of the former Yugoslavia, but that is not unreasonable given uncertainty about the legal qualification of the crimes committed there during the 1990s. Some of the trials, in Romania, Ethiopia and Cambodia and some Latin American States, have followed expansive and even idiosyncratic definitions of genocide that depart significantly from the terms of article II of the Convention.

Poland was the first country to use the term 'genocide' in its criminal prosecutions. In July 1946, Arthur Greiser was charged with – and convicted of – genocide.[107] Genocide was also charged in three of the successor trials held at Nuremberg by United States military tribunals in the aftermath of the trial of the major war criminals, although technically the courts only had jurisdiction over crimes against humanity.[108] There were also many prosecutions in Germany itself as well as in other European states concerning genocidal atrocities committed during the Second World War, but for the cognate concept of crimes against humanity rather than genocide.

Bangladesh threatened to prosecute Pakistani soldiers for genocide for crimes committed during the secession of Bangladesh in the early 1970s. Legislation enacted by Bangladesh modified the Convention definition to include political groups.[109] When India indicated it was prepared to extradite Pakistani prisoners to Bangladesh, Pakistan launched proceedings against India before the International Court of Justice.[110] The case was settled when India agreed to repatriate the Pakistani prisoners and genocide prosecutions never took place.[111]

Many other national justice systems have undertaken prosecutions for the crime of genocide on the basis of territorial jurisdiction as well as universal jurisdiction. The most determined and uncompromising

[107] *Poland* v. *Greiser*, (1948) 13 LRTWC 70 (Supreme National Tribunal of Poland).
[108] These cases are discussed in chapter 1, at pp. 48–52 above.
[109] International Crimes (Tribunals) Act 1973 (Bangladesh), s. 3(2)(c).
[110] *Trial of Pakistani Prisoners of War* (*Pakistan* v. *India*), Pleadings, Oral Arguments, Documents, pp. 3–7. See chapter 9, at pp. 499–502 below.
[111] Niall MacDermot, 'Crimes Against Humanity in Bangladesh', (1973) 7 *International Lawyer*, p. 476; Jordan J. Paust and A. P. Blaustein, 'War Crimes Jurisdiction and Due Process: The Bangladesh Experience', (1978) 11 *Vanderbilt Journal of Transnational Law*, p. 1; Howard Levie, 'The Indo-Pakistani Agreement of 28 August 1973', (1974) 68 *American Journal of International Law*, p. 95; Howard Levie, 'Legal Aspects of the Continued Detention of the Pakistani Prisoners of War by India', (1973) 67 *American Journal of International Law*, p. 512.

example of domestic prosecution is surely Rwanda. Rwanda's genocide prosecutions have taken place in a country devastated by a civil war that destroyed what was at best a feeble judicial infrastructure. Special legislation was enacted in 1996 aimed at addressing the enormous case load by encouraging perpetrators to plead guilty in return for significantly reduced sentences.[112] The first trials began at the end of 1996 and were met with an international chorus of condemnation, journalists and other observers denouncing what they found to be a lack of due process. While some of the early trials were unquestionably open to criticism for failure to respect all internationally recognized rules of procedural fairness, the problems did not appear to be due so much to bad faith as to inexperience. By all accounts, there was a steady improvement in the quality of the trials. The genocide trials held pursuant to the 1996 legislation generated an impressive body of reported case law, published as an initiative of the Brussels-based Avocats Sans Frontières. They deal principally with the assessment of factual issues rather than legal matters, and are of undoubted interest in this respect as an insight into the dynamics of genocide. Some of the more lengthy judgments present fascinating detailed accounts of specific episodes during the months of April, May and June 1994.[113]

The Transitional National Assembly of Rwanda adopted Organic Law No. 40/2000 of 16 January 2001, 'on the Establishment of "*Gacaca* Jurisdictions" and the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed between 1 October 1990 and 31 December 1994'. *Gacaca* is a word in Kinyarwanda, the national language of Rwanda, that literally means 'the grass' or 'the lawn'.[114] It was an ancient dispute resolution method used at the local level, administered by respected local leaders or elders.[115] *Gacaca* became fully operational in 2005. It was expected

[112] Organic Law No. 8/96 of 30 August 1996, *Journal Officiel* (Rwanda), 35th year, No. 17, 1 September 1996.

[113] *Ministère Public* v. *Barayagwiza*, 3 *Receuil de jurisprudence contentieux du génocide et des massacres au Rwanda* 309 (Conseil de guerre, Kigali, 26 November 1998).

[114] Jeremy Sarkin, 'The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide', (2001) 45 *Journal of African Law*, p. 143. Also: Jeremy Sarkin, 'Promoting Justice, Truth and Reconciliation in Transitional Societies: Evaluating Rwanda's Approach in the New Millennium of Using Community Based Gacaca Tribunals to Deal with the Past', (2000) 2 *International Law Forum*, p. 112; Idi T. Gaparayi, 'Justice and Social Reconstruction in the Aftermath of Genocide in Rwanda: An Evaluation of the Possible Role of the Gacaca Tribunals', (2001) 1 *African Human Rights Law Journal*, p. 78.

[115] The phenomenon has been studied by F.-X. Nzanzuwera, who was formerly a prosecutor in Kigali and is now a Belgium-based academic. See: F.-X. Nzanzuwera, *Les*

to complete its work by the end of 2008. The encouragement of confessions and denunciation had the somewhat unexpected consequence of dramatically increasing the caseload, and at one point Rwandan officials were talking of judging as many as 1,000,000 before the *gacaca* systems.[116]

In 2007, Rwanda enacted new legislation creating a special procedure for cases transferred from the International Criminal Tribunal for Rwanda, in accordance with Rule 11bis of the Rules of Procedure and Evidence of that institution.[117] Trials were to be held before a single judge of the High Court, with an appeal to the Supreme Court. The system was created in order to reassure the International Criminal Tribunal for Rwanda that justice of acceptable quality would be administered. It specified, for example, that the death penalty would be excluded in the event of conviction. The legislation was also declared to apply where defendants were extradited from other countries to Rwanda. The first applications for transfer to Rwanda by the Prosecutor of the International Criminal Tribunal for Rwanda were submitted in 2007.[118] The international non-governmental organization Human Rights Watch intervened in the proceedings to oppose the transfers.[119]

Cambodia's Decree-Law No. 1, adopted by the People's Revolutionary Council of Kampuchea, set up a 'People's Revolutionary Tribunal to judge the genocide crimes committed by the Pol Pot–Ieng Sary clique'.[120] The Cambodian legislation defined genocide as 'the planned mass killing of innocent people, the forced evacuation of the inhabitants of towns and villages, the rounding up of the population and forcing them to labour in physically exhausting conditions, the banning of religious practices, the destruction of economic and cultural institutions

juridictions 'gacaca', une réponse au génocide rwandais ou le difficile équilibre entre châtiment et pardon, La répression internationale du génocide rwandais, Brussels: Bruylant, 2003.

[116] William A. Schabas, 'Genocide Trials and Gacaca Courts', (2005) 3 *Journal of International Criminal Justice*, p. 879; Avocats Sans Frontières, *Monitoring des juridictions gacaca, Phase de jugement, Rapport analytique No. 2*, October 2005–September 2006.

[117] Organic Law Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States, *Official Gazette of the Republic of Rwanda*, Year 46, Special issue of 19 March 2007, p. 22.

[118] *Prosecutor* v. *Kayishema* (Case No. ICTR-2001-67-I), Request for the Referral of the Case of Fulgence Kayishema to Rwanda Pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 11 June 2007.

[119] *Prosecutor* v. *Kayishema* (Case No. ICTR-2001-67-I), Brief of Human Rights Watch as Amicus Curiae in Opposition to Rule 11bis Transfer, 3 January 2008.

[120] UN Doc. A/C.3/34/1.

and social relations'.[121] In 1979, Pol Pot and Ieng Sary were found guilty of genocide in what commentators have described as a 'show trial'.[122]

After years of frustrating negotiations,[123] the United Nations and Cambodia finally agreed, in 2003, to the establishment of the 'Extraordinary Chambers of the Courts of Cambodia'.[124] These are a hybrid institution, with a complex combination of international and national prosecutors and judges. Article 9 of the Agreement between Cambodia and the United Nations provides that the subject matter jurisdiction of the Extraordinary Chambers includes 'the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide'.[125] The place that genocide charges will play in the prosecutions before the Extraordinary Chambers remains to be determined. Although genocide as the defining characteristic of the Khmer Rouge atrocities has a big place in the popular consciousness, both inside and outside Cambodia, from a purely legal standpoint there are grave doubts about its application, especially with respect to the 'self-genocide' of Khmers against other Khmers.[126] There will be intense pressure to include a genocide indictment, regardless of the purely legal dimension of the issue.

Several Romanian leaders, including the son of Nicolae Ceausescu, were tried in 1990 for abetting genocide.[127] The allegations concerned mass killings during the December 1989 popular uprising, as well as other victims of the Ceausescu regime.[128] Genocide charges were also filed against former police officers for their participation in killings in

[121] UN Doc. A/34/491, p. 34.

[122] Stephen P. Marks, 'Elusive Justice for the Victims of the Khmer Rouge', (1999) 52 *Journal of International Affairs*, p. 691 at p. 700.

[123] 'Report of the Secretary-General on Khmer Rouge Trials', UN Doc. A/57/759 (31 March 2003); 'Report of the Secretary-General on Khmer Rouge Trials', UN Doc. A/59/432 (12 October 2004).

[124] 'Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea', 6 June 2003.

[125] *Ibid.*, art. 9. For implementation: Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, NS/RKM/0801/12, art. 4.

[126] This is discussed in somewhat more detail in chapter 3, pp. 138–9 above.

[127] Eric David, 'La répression nationale', pp. 304–5.

[128] 'Romania Opens Trial of Ceausescu Aides', *Washington Post*, 28 January 1990, p. A-19; 'Ceausescu's Fallen Heir Faces Court', *New York Times*, 27 May 1990, p. A-14; 'Rumania; A Ceausescu Son to be Tried Soon', *New York Times*, 15 January 1990, p. A-9.

Timisoara in 1989 where nearly 100 people died.[129] Ceausescu's son was acquitted of complicity in genocide,[130] but the former dictator's brother, Nicolae Andruta Ceausescu, was convicted of incitement to genocide.[131] Four other Ceausescu aides, Emil Bobu, Manea Manescu, Ion Dinca and Tudor Postelnicu, were convicted of complicity in genocide for their role at Timisoara.[132] Romanian prosecutors appear to have taken the view that genocide was the proper charge solely because of the large numbers of victims, believed, erroneously, to have numbered in the thousands.

In the early 1990s, Ethiopia launched trials of former members of the Dergue military regime, which ruled the country from 1974 to 1991, charging them with genocide.[133] Ethiopia's Penal Code of 1957, drafted by Swiss expert Jean Graven, added political groups to the Convention's enumeration.[134] Established in 1992 after the fall of the old government, Ethiopia's Office of the Special Prosecutor indicted more than 5,000 suspects, many charged with genocide. The accusations were based on the fact that the victims were political opponents of the regime. An interlocutory decision in 1995 declared that extending genocide to cover political groups was not inconsistent with international law.[135] In December 2006, former Ethiopian dictator Mengistu Hailemariam and more than fifty of his associates were convicted of genocide and sentenced, the following month, to terms of life imprisonment.[136]

[129] 'Twenty-One Ex-Policemen Put on Trial in Romania in Timisoara Deaths', *New York Times*, 3 March 1990, p. A-7.

[130] 'Ceausescu's Son Convicted and Sentenced to 20 Years', *New York Times*, 22 September 1990, p. A-3. See also *Facts on File World News Digest*, 1990, p. 801B2.

[131] 'Ceausescu's Brother Draws 15 Years for December Role', *New York Times*, 22 June 1990, p. A-8. See also *Facts on File World News Digest*, 1990, p. 540F1.

[132] 'Four Ceausescu Aides Sentenced to Prison in Romania', *Washington Post*, 3 February 1990, p. A-20. See also *Facts on File World News Digest*, 1990, p. 6A1.

[133] Julie V. Mayfield, 'The Prosecution of War Crimes and Respect for Human Rights: Ethiopia's Balancing Act', (1995) 9 *Emory International Law Review*, p. 553.

[134] Penal Code of the Empire of Ethiopia of 1957, art. 281 (*Negarit Gazeta*, Extraordinary Issue No. 1 of 1957).

[135] *Special Prosecutor* v. *Col. Mengistu Hailemariam and 173 Others*, Federal High Court, Criminal File No. 1/87, Decision of Meskerem 29, 1988 EC (9 October, 1995 GC), ILDC 555 (ET 1995).

[136] *Special Prosecutor* v. *Col. Mengistu Hailamariam et al.*, Ethiopian Federal High Court, Criminal File No. 1/87, Judgment, 12 December 2006. A distinct sentencing judgment was issued on 11 January 2007. See: Firew Kebede Tiba, 'The Mengistu Genocide Trial in Ethiopia', (2007) 5 *Journal of International Criminal Justice*, p. 513.

There is only one reported genocide prosecution undertaken in Bosnia and Herzegovina while the war was underway, from 1992 to 1995. Sretko Damjanović and Borislav Herak were sentenced to death on 12 March 1993 for genocide by the District Military Court (Okruzni Vojni Sud) of Bosnia and Herzegovina, sitting in Sarajevo, pursuant to article 141 of the Criminal Law of the Socialist Federal Republic of Yugoslavia, which was incorporated into the laws of the Republic of Bosnia and Herzegovina in 1992. The verdict was upheld on 30 July 1993 by the Supreme Court (Vrhovni Sud), and on 29 December 1993, by a differently constituted Supreme Court sitting in third instance. The criminal acts for which they were convicted involved seven murders, two rapes and an abduction. Damjanović argued successfully before the Human Rights Chamber for Bosnia and Herzegovina – created as a result of the Dayton Agreement – that a death sentence would violate article 2 of the European Convention on Human Rights, which is part of the country's constitutional law.[137]

There is also an unpublished conviction for genocide by the Osijek District Court in Croatia, on 25 June 1997, of a Serb who participated in acts of 'ethnic cleansing' in the village of Branjina during the war in 1991. 'M.H.' was involved, with other local Serbs, in a local administration following occupation by the Yugoslav National Army. A number of criminal acts were imputed to him, but no killings. These included introducing identity cards, forcing Croats to join the Serb paramilitary units under threat of expulsion from the village if they refused, imposition of a curfew, destruction of property, forced labour, detention, taking of hostages, 'arming the gypsies and encouraging them to shoot against the Croat houses', looting and expulsion. He was sentenced to five years' imprisonment for genocide pursuant to article 119 of the Basic Criminal Law of the Republic of Croatia. The court said that, to establish genocide, it would be enough to establish that he committed only one act against a single victim, to the extent that his intent was to partly or entirely annihilate a protected group. It noted that M.H. participated in the realization of plans to create a Greater Serbia, and to ethnically cleanse the village of Branjina.[138]

Following the Dayton Agreement of November 1995, any genocide prosecutions before the courts in Bosnia and Herzegovina, Croatia and Serbia were to be governed by the 'rules of the road', which made

[137] *Damjanović* v. *Federation of Bosnia and Herzegovina* (Case No. CH/96/30), 5 September 1997, Decisions on Admissibility and Merits 1996–1997, p. 147.

[138] Available at www.icrc.org/ihl-nat.nsf/ (visited February 2008).

the Prosecutor of the International Criminal Tribunal for the former Yugoslavia the gatekeeper for national prosecutions by the courts of the territorial State.[139] The 'rules of the road' were an agreement reached in early 1996 by the parties to the Dayton Accord providing that orders, warrants and indictments for serious violations of international humanitarian law, including genocide, were initially to be reviewed and deemed consistent with international legal standards by the International Criminal Tribunal for the former Yugoslavia.

There appear to have been no subsequent genocide prosecutions by the national courts of the region until the start of transfers under the 'completion strategy' of the International Criminal Tribunal for the former Yugoslavia, in 2005. A special War Crimes Section of the Courts of Bosnia and Herzegovina was established to deal with the cases transferred from The Hague, as well as other prosecutions that had never been the subject of indictments before the Tribunal. The War Crimes Section has jurisdiction over the crime of genocide, in accordance with article 171 of the Criminal Code of Bosnia and Herzegovina. In one of the transfer cases, Milorad Trbić has been charged with genocide for his participation in the killings at Srebrenica.[140] Several accused are charged with genocide in an indictment concerning the Kravica warehouse massacre, which was part of the Srebrenica events of July 1995.[141]

Under the international regime of the United Nations Mission in Kosovo, established following the 1999 conflict, the Supreme Court of Kosovo reversed the conviction of Miroslav Vuckovic by the District Court of Mitrovica for genocide pursuant to article 141 of the Criminal Law of Yugoslavia. The Supreme Court bench consisted of two international judges, Renate Winter of Austria and Patrice de Charette of France, and one Yugoslav national. According to the Supreme Court:

> the exactions committed by the Milosevic's [*sic*] regime in 1999 cannot be qualified as criminal acts of genocide, since their purpose was not the destruction of the Albanian ethnic group in whole or in part, but its forcefully departure from Kosovo as a result of [*sic*] systematic campaign

[139] 'Report of the 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', UN Doc. A/51/292–S/1996/665, paras. 80–2. Subsequent annual reports contain brief discussions on implementation of the programme, mainly about its backlog of cases and the poor record of support from the international donor community.

[140] *Trbić*, Case No. KT-RZ-139/07, Court of Bosnia and Herzegovina, Sarajevo, 20 July 2007.

[141] *Miloš et al.*, Case No. KY-RZ-10/05, Court of Bosnia and Herzegovina, Sarajevo, 12 December 2005.

> of terror including murders, rapes, arsons and severe maltreatments. Such criminal acts correspond to the definition of crimes against humanity given by international laws (widespread or systematic plan of attack against civilian population during the war) or can be qualified war crimes.[142]

The International Public Prosecutor, Michael Hartmann, had submitted that there was insufficient evidence of genocidal intent, and that the genocide conviction of Vuckovic should not be allowed to stand.[143]

Genocide prosecutions were also undertaken in Iraq, following the invasion by the United States and the United Kingdom.[144] In 2006, trial before the Iraqi High Tribunal began of several defendants charged with genocide with respect to the 'Anfal' campaign of 1988, which consisted of attacks by the Iraqi army against Kurdish populations in northern Iraq. The use of chemical weapons reportedly resulted in the deaths of 50,000 to 100,000 civilians. Saddam Hussein was one of the seven defendants, but his participation in the trial was terminated by his execution, a punishment resulting from his conviction in another case. The judgment, issued on 24 June 2007, confirmed that genocide was committed in Iraq by Saddam Hussein and his colleagues. Three of the six defendants were sentenced to death for genocide, two others to life imprisonment, and one was acquitted.

Although discouraged by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia and the International Court of Justice, an expansive interpretation of the definition of genocide nevertheless appears to prevail in a number of Latin American jurisdictions. An August 2006 judgment of the Brazilian Supreme Court confirmed a 1997 genocide conviction by the federal court against four gold prospectors for the 1993 massacre of twelve members of the Yanomani tribe, in Amazonia. The Yanomani had lived in isolation, but, since gold mining began in the 1970s, there are charges that as many as 2,000 have died as a result of violence as well as diseases transmitted by miners. According to the Brazilian judges, genocide was applicable beause of 'partial destruction' of the Yanomani ethnic group.

In Argentina, a former police chief, Miguel Angel Etchecolatz, was sentenced to life imprisonment for crimes against humanity concerning

[142] *Vucković*, Supreme Court of Kosovo, 31 August 2001, AP.156/2001.

[143] 'Opinion on Appeals of Genocide Conviction of Miroslav Vuckovic', Office of the Public Prosecutor of Kosovo, 30 August 2001.

[144] Michael A. Newton, 'The Iraqi High Criminal Court: Controversy and Contributions', (2006) 88 *International Review of the Red Cross*, p. 399.

kidnapping, torture and disappearance of six activists during the military dictatorship. According to the federal court, the crimes were committed in the context of 'genocide' in which 10,000 dissidents and guerillas disappeared. A similar judgment was issued against a former Argentine police chief, Christian von Wernich, on 10 October 2007.

A special commission appointed in 2005 concluded that Mexico's former president, Luis Echeverría, committed genocide by ordering the 1968 Tlateloco massacre, where hundreds of student demonstrators were killed at the time of the Mexico City Olympic Games. In September 2005, Echeverría was accused of genocide, but in July 2007 a federal tribunal quashed the charge on the ground that there was insufficient evidence. However, the tribunal said the massacre constituted genocide that was 'aimed at exterminating a national student group'. In another decision, Mexican courts authorized the extradition to Spain of Miguel Angel Cavallo, a former Argentine army officer, on charges of genocide committed during the late 1970s and early 1980s.

Although the text of article VI only permits national courts to exercise territorial jurisdiction, there was no disagreement during the drafting of the Convention when some states suggested that they would also be entitled to exercise jurisdiction over their own nationals.[145] In the case of States that refuse to extradite nationals, it would have been a terrible oversight had the Convention denied them the right to judge their own citizens. The International Court of Justice indicated that jurisdiction based upon nationality, known as 'active personality jurisdiction', is authorized by article VI.[146]

Probably the only such case is the prosecution of Dutch businessman Frans van Anraat with respect to the supply of chemicals that were used by the Iraqi regime of Saddam Hussein in a massacre of Kurds in the town of Halabja, in 1988. Van Anraat was acquitted of genocide on 23 December 2005 by the District Court of The Hague on charges of genocide,[147] and the judgment was upheld by the Court of Appeal.[148]

[145] UN Doc. A/C.6/SR.130–131.

[146] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 442.

[147] Harmen G. van der Wilt, 'Genocide, Complicity in Genocide and International v. Domestic Jurisdiction, Reflections on the van Anraat Case', (2006) 4 *Journal of International Criminal Justice*, p. 239.

[148] *Public Prosecutor* v. *Van Anraat*, LJN: BA4676, Court of Appeal, The Hague, 2200050906-2, ILDC 753 (NL 2007).

Universal jurisdiction and the Eichmann trial

The great shortcoming of article VI of the Genocide Convention is the failure to recognize universal jurisdiction over genocide. But, where there was political will, prosecutions on this basis have proceeded. Indeed, the main explanation for the relatively small number of universal jurisdiction trials for genocide is political rather than legal.

The great legal landmark for universal jurisdiction is the trial of Adolf Eichmann. In 1960, Eichmann was abducted from Argentina by Israeli agents and brought to Jerusalem where he was indicted under the Nazi and Nazi Collaborators (Punishment) Law[149] for 'crimes against the Jewish people', 'crimes against humanity' and 'war crimes'. The acts of 'crimes against the Jewish people' are modelled on article II of the Genocide Convention.[150] Eichmann was charged with four counts of genocide corresponding to the first four subparagraphs of article II: killing Jews, causing serious physical and mental harm, placing Jews in living conditions calculated to bring about their physical destruction, and imposing measures intended to prevent births among Jews. The Court disposed of a variety of arguments invoked by Eichmann, including the charge that the applicable legislation violated the *nullum crimen sine lege* principle,[151] the defence of act of State,[152] the assertion that crimes against humanity could only be committed in time of war (a claim of little practical importance to the facts in Eichmann's case),[153] and the charge that his abduction from Argentina deprived the court of jurisdiction.[154]

The trial court found Eichmann criminally responsible for the entire 'final solution'.[155] Alternatively, the court said he was responsible individually for elements of the final solution in which he personally participated: 'Even if we view each sector of the implementation of the "Final Solution" separately, there was in fact not one sector in which the accused was not active in some way or another, with varying degrees

[149] Nazi and Nazi Collaborators (Punishment) Law, 1950 (Law 5710/1950), s. I(a). The legislation only applied to Nazi war criminals. Israel also enacted genocide legislation with a prospective effect: Crime of Genocide (Prevention and Punishment) Law, note 26 above.

[150] *A-G Israel* v. *Eichmann*, (1968 36 ILR 5 (District Court, Jerusalem), paras. 16, 190.

[151] *Ibid*., para. 27. [152] *Ibid*., para. 28. [153] *Ibid*., para. 29.

[154] *Ibid*., para. 39. For a contemporary endorsement of the *Eichmann* decision on this point, rejecting the defence argument and holding that illegal arrest or rendition is not as such a valid answer to a charge concerning 'universally condemned offences' such as genocide, see: *Prosecutor* v. *Dragan Nicolic* (Case No. IT-94-2-AR73), Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003, especially para. 23.

[155] *A-G Israel* v. *Eichmann*, note 150 above, para. 196.

of intensity, so that this alternative would also lead to his conviction in respect of the whole front of extermination activities.'[156] Eichmann was convicted of all four counts charged, although acquitted with respect to acts prior to August 1941: 'he, together with others, caused the killing of millions of Jews for the purpose of executing the plan known as "the final solution of the Jewish problem" with intent to exterminate the Jewish people.'[157] On appeal, the Supreme Court upheld the reasoning of the District Court, although it developed some of the arguments a little differently. On retroactivity, it endorsed the District Court's conclusion concerning the customary nature of the crime of genocide, and noted that 'the enactment of the Law was not from the point of view of international law a legislative act which conflicted with the principle nulla poena or the operation of which was retroactive, but rather one by which the Knesset gave effect to international law and its objectives'.[158] Eichmann was executed on 31 May 1962.[159]

Adolf Eichmann relied on the Sixth Committee debates and on the text of article VI of the Convention when he challenged the Jerusalem court's jurisdiction: 'If the United Nations has failed to support universal jurisdiction for each country to try a crime of genocide committed outside its boundaries, but has expressly provided that, in the absence of an international criminal tribunal, those accused of this crime shall be tried by "a competent tribunal of the State in the territory of which the act was committed", how, it is asked, may Israel try the accused for a crime that constitutes "genocide"?'[160] The District Court recalled the words of the International Court of Justice, which, in its 1951 advisory opinion, declared that 'the principles underlying the Convention are principles which are recognized by civilized nations as binding on all States, even without any conventional obligation'. For the District Court, there was an important distinction between such principles, which applied even prior to adoption of Resolution 96(I) in 1946, and article VI of the Convention, 'which comprises a special provision undertaken by the contracting parties with regard to the trial of crimes that may be committed in the future'.[161]

[156] *Ibid.*, para. 197. [157] *Ibid.*, para. 244.
[158] *A-G Israel* v. *Eichmann*, (1968) 36 ILR 277 (Israel Supreme Court), para. 11.
[159] According to Hannah Arendt, 'Eichmann went to the gallows with great dignity': Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, New York: Penguin Books, 1994, p. 252.
[160] *A-G Israel* v. *Eichmann*, note 150 above, para. 20. [161] *Ibid.*, para. 22.

Aware of the weakness of this argument, the District Court attempted to demonstrate that article VI's drafters did not intend to confine prosecution of genocide to the territorial State. The Court cited the statement in the report of the Sixth Committee, declaring that article VI was not meant to limit the right of States to try their own nationals for acts committed outside the State. Referring to commentaries on the Convention,[162] the Court said that article VI imposed a duty of punishment, but did not impinge upon jurisdictional rules in criminal matters applicable within different States. According to the Court, territorial jurisdiction was nothing more than a 'compulsory minimum', a conservative compromise that could be contrasted with the more exigent provisions of the Geneva Conventions, which imposed a rule of compulsory universal jurisdiction.[163]

> It is the consensus of opinion [wrote the Court] that the absence from this Convention of a provision establishing the principle of universality (together with the failure to constitute an international criminal tribunal) is a grave defect in the Convention, which is likely to weaken the joint effort for the prevention of the commission of this abhorrent crime and punishment therefor, but there is nothing in this defect to lead us to deduce any rule against the principle of universality of jurisdiction with respect to the crime in question. It is clear that the reference in Article VI to territorial jurisdiction, apart from the jurisdiction of the non-existent international tribunal, is not exhaustive.[164]

The Israeli Court also took the view that it was entitled to exercise jurisdiction under the 'protective principle', 'which gives the victim nation the right to try any who assault its existence'.[165] The Court cited Hugo Grotius and other authorities:

> All this applies to the crime of genocide (including the 'crime against the Jewish people') which, although committed by the killing of individuals, was intended to exterminate the Nation as a group . . . The State of Israel, the sovereign State of the Jewish people, performs through its legislation the task of carrying into effect the right of the Jewish people to punish the criminals who killed its sons with intent to put an end to the survival of this people. We are convinced that this power conforms to the subsisting principles of nations.[166]

On appeal, the Supreme Court of Israel, while noting full agreement with the District Court on the protective principle of jurisdiction,

[162] Robinson, *Genocide Convention*, p. 84; Drost, *Genocide*, pp. 101–2.
[163] *A-G Israel* v. *Eichmann*, note 150 above, paras. 24–5. [164] *Ibid.*, para. 25.
[165] *Ibid.*, para. 30. [166] *Ibid.*, para. 38.

insisted upon the universal jurisdiction argument, as this applied not only to Jews, in whose name Israel claimed to exercise protective jurisdiction, but also to Poles, Slovenes, Czechs and Gypsies.[167]

In the late 1980s, Israel judged John Demjanjuk after obtaining his extradition from the United States.[168] Demjanjuk was believed to have been 'Ivan the Terrible' at the Treblinka death camp, but he was acquitted of this charge after the Court of Appeal ruled that ambiguous identification evidence entitled him to the benefit of the doubt.[169] The Attorney-General of Israel refused to proceed with new charges, despite compelling evidence that Demjanjuk had in fact served as a guard in the Trawniki camp. Extradition law prevents prosecution based on charges if these were not authorized by the extraditing State which, in Demjanjuk's case, was the United States. The High Court of Justice was petitioned to review the Attorney-General's decision, but declined to intervene.[170]

Evolution in customary law

Israel's judges claimed that universal jurisdiction was authorized by international law in the case of genocide, despite strong evidence to the contrary provided during the adoption of article VI of the Genocide Convention. Their audacious proclamation of a customary norm has gone relatively unchallenged, however. They may have exaggerated the state of customary law at the time of the *Eichmann* trial, but, even if this is true, their ambitious interpretation has done much to change the situation. Authority continues to grow in support of the proposition that, despite the terms of article VI, States may exercise universal jurisdiction over the crime of genocide. The evolution has been gradual,

[167] *A-G Israel* v. *Eichmann*, note 158 above, para. 12 *in fine*. For a critical assessment on the jurisdictional issue, see J. E. S. Fawcett, 'The Eichmann Case', (1962) 27 *British Yearbook of International Law*, p. 181 at pp. 202–8. The approach of the Israeli courts in *Eichmann* was followed by the United States courts in *Demjanjuk*, although the specific issue raised by the exclusion of universal jurisdiction in art. VI was apparently not considered: *In the Matter of the Extradition of John Demjanjuk*, 612 F Supp 544 (DC Ohio 1985), pp. 554–8.

[168] *In the Matter of the Extradition of John Demjanjuk*, note 167 above; *Demjanjuk* v. *Petrovsky*, 776 F 2d 571 (6th Cir. 1985).

[169] Kenneth Mann, 'Hearsay Evidence in War Crimes Trials', in Yoram Dinstein and Mala Tabory, eds., *War Crimes in International Law*, The Hague, Boston and London: Martinus Nijhoff, 1996, pp. 321–49.

[170] Mordechai Kremnitzer, 'The Demjanjuk Case', in Yoram Dinstein and Mala Tabory, eds., *War Crimes in International Law*, The Hague, Boston and London: Martinus Nijhoff, 1996, pp. 351–77.

however, and it is marked by a degree of ambiguity, despite many positive and authoritative signals.

The final report of the Commission of Experts established by the Security Council for the former Yugoslavia stated that: 'The only offences committed in internal armed conflict for which universal jurisdiction exists are "crimes against humanity" and genocide.'[171] The existence of universal jurisdiction in the case of genocide has also been acknowledged in academic writing.[172] According to Professor Theodor Meron: 'it is increasingly recognized by leading commentators that the crime of genocide (despite the absence of a provision on universal jurisdiction in the Genocide Convention) may also be cause for prosecution by any state'.[173] In *Tadić*, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia stated that 'universal jurisdiction [is] nowadays acknowledged in the case of international crimes'.[174]

Three States parties to the Genocide Convention formulated interpretative declarations affirming their opposition to universal jurisdiction in the case of genocide. Although these statements are rather old, none of the three has been withdrawn. Algeria, at the time of accession in 1963, declared: 'The Democratic and Popular Republic of Algeria declares that no provision of article VI of the said Convention shall be interpreted . . . as conferring such jurisdiction on foreign tribunals.'[175] Burma, upon accession in 1956, stated that nothing contained in article VI is to be construed 'as giving foreign courts and tribunals jurisdiction over any cases of genocide or any other acts enumerated in article III committed within the Union territory'. Upon accession in 1958, Morocco

[171] 'Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)', UN Doc. S/1994/674, annex, p. 13.

[172] Theodor Meron, 'International Criminalization of Internal Atrocities', (1995) 89 *American Journal of International Law*, p. 554 at p. 570; Jordan J. Paust, 'Congress and Genocide: They're Not Going to Get Away with It', (1989) 11 *Michigan Journal of International Law*, p. 90 at pp. 91–2; Kenneth Randall, 'Universal Jurisdiction Under International Law', (1988) 66 *Texas Law Review*, p. 785 at p. 837; Brigitte Stern, 'La compétence universelle en France: le cas des crimes commis en ex-Yougoslavie et au Rwanda', (1997) 40 *German Yearbook of International Law*, p. 280 at pp. 286–7.

[173] Meron, 'International Criminalization', p. 569.

[174] *Prosecutor* v. *Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 62. Also: *Prosecutor* v. *Furundžija* (Case No. IT-95-17/1-T), Judgment, 10 December 1998, para. 156.

[175] Special Rapporteur Ruhashyankiko called this 'an unfavourable position regarding the principle of universal punishment': 'Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur', UN Doc. E/CN.4/Sub.2/416, para. 197.

declared: 'With reference to article VI, the Government of His Majesty the King considers that Moroccan courts and tribunals alone have jurisdiction with respect to acts of genocide committed within the territory of the Kingdom of Morocco.' The United Kingdom, China[176] and the Netherlands[177] have objected to these statements. However, the silence of many other States that often object to suspect reservations suggests that they may share, or may have shared in the past, the views expressed by Algeria, Burma and Morocco about the scope of article VI.[178]

One of the indications that States did not necessarily accept the *Eichmann* precedent was the call for amendment of article VI of the Genocide Convention. In preparing his 1978 report for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Nicodème Ruhashyankiko canvassed States parties on this question, broaching the idea of an additional protocol to the Convention to recognize universal jurisdiction. Canada replied that the Convention could not be interpreted as conferring universal jurisdiction, but agreed that, pending creation of an international criminal court, 'the Convention would be more effective if universal jurisdiction were to be established for the competent domestic courts of the States party'.[179] Finland said that an additional protocol to create universal jurisdiction 'would obviously improve the effectiveness of the Convention'.[180] The Netherlands said it 'might improve the implementation of the Convention'.[181] Favourable responses were also received from Romania and Ecuador.[182] Italy said that no protocol was required, as the principle was already admitted in international law, but it seems to have been the only State to say this.[183] Oman said that such a position was 'unlikely to be favoured by a majority of States'.[184] Ruhashyankiko concluded that universal jurisdiction should be recognized, ideally in an additional protocol to the Convention.[185] Along the same lines, a 1994 resolution on Rwanda and the prevention of humanitarian crises of the Parliamentary Assembly of the Council of Europe called for amendment

[176] The objection was formulated by Taiwan in 1956 and is no longer in effect because of the subsequent invalidity of Taiwan's ratification of the Convention.

[177] There is no record of an objection to the Burmese reservation by the Netherlands. As this is inconsistent with its general policy of objecting to reservations, it is presumably an oversight.

[178] Australia, Belgium, Brazil, Ecuador, Norway and Sri Lanka.

[179] 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur', note 175 above, para. 201. [180] *Ibid.*, para. 202.

[181] *Ibid.*, para. 203. [182] *Ibid.*, paras. 204–5. [183] *Ibid.*, para. 207. [184] *Ibid.*, para. 208.

[185] *Ibid.*, para. 211.

of the Genocide Convention 'to make it possible for the perpetrators of genocide to be tried in countries other than those where they committed their crimes'.[186]

The issue of universal jurisdiction confronted the International Court of Justice in the *Arrest Warrant Case*.[187] The Court did not address the issue on the merits, because the Democratic Republic of Congo decided to withdraw its argument based on illegal exercise of universal jurisdiction by Belgium. Several judges wrote on the subject in their individual opinions. Even those who were most enthusiastic about universal jurisdiction noted the cautious approach taken by States in genocide prosecutions. They observed carefully that '[i]n recent years it has been suggested in the literature that Article VI [of the Genocide Convention] does not prevent a State from exercising universal jurisdiction in a genocide case'.[188] Judge Koroma said that, in his considered opinion, 'today, together with piracy, universal jurisdiction is available for certain crimes, such as war crimes and crimes against humanity, including the slave trade and genocide'.[189] Other judges refused to admit that international law allowed the exercise of universal jurisidiction in the case of serious violations of human rights such as crimes against humanity and, by logical extension, genocide.[190] The Court should address the issue again in a pending case, between the Republic of Congo and France.[191]

[186] Resolution 1050 (1994) on Rwanda and the prevention of humanitarian crises, adopted 10 November 1994.

[187] For an earlier exchange of views, see remarks of the two *ad hoc* judges in the *Bosnia* v. *Serbia* case: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Preliminary Objections, Dissenting Reasons of Judge *ad hoc* Kreca [1996] ICJ Reports 595, p. 766, para. 102; *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, 13 September 1993, Separate Opinion of Judge Lauterpacht, [1993] ICJ Reports 407, para. 110.

[188] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo* v. *Belgium)*, 14 February 2002, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 27; also paras. 22 and 24.

[189] *Ibid.*, Separate Opinion of Judge Koroma, para. 9. Also: *ibid.*, Dissenting Opinion of Judge Van den Wyngaert.

[190] *Ibid.*, Separate opinion of President Guillaume; *ibid.*, Individual Opinion of Judge Rezek; *ibid.*, Individual Opinion of Judge Ranjeva.

[191] *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo* v. *France)*, Request Provisional Measure, Order of 17 June 2003, [2003] ICJ Reports 102.

In the 1996 version of its draft Code of Crimes, the International Law Commission endorsed universal jurisdiction for the crime of genocide. Article 8 of the draft Code says a State party 'shall take such measures as may be necessary to establish its jurisdiction' over the crime of genocide, irrespective of where or by whom the crime was committed.[192] According to the commentary, this 'extension' was justified because universal jurisdiction obtained on the basis of customary law 'for those States that were not parties to the Convention and therefore not subject to the restriction contained therein'.[193] Thus, the Commission has admitted that universal jurisdiction cannot be read into the Convention, contrary to what many have suggested. Moreover, it seems to have taken the position that universal jurisdiction exists for States that are not party to the Genocide Convention, but not for those that are, a bizarre conclusion. Can it be true that States may reduce their international human rights obligations that exist at customary law by means of multilateral conventions that impose less stringent norms? A more logical result would be that widely ratified multilateral treaties tend to confirm the real content of customary international law.

As part of the completion strategy, the international criminal tribunals are transferring cases to national jurisdictions. These include, according to Rule 11bis(A) of their Rules of Procedure and Evidence, the State in whose territory the crime was committed, the State in which the accused was arrested; and a State having jurisdiction and being willing and adequately prepared to accept such a case. The attempted transfer of Michel Bagaragaza to Norway[194] and, subsequently, to the Netherlands,[195] to be prosecuted for genocide, contemplates an exercise of universal jurisdiction with the cooperation of the International Criminal Tribunal for Rwanda. The transfer proceedings have been described in detail by the Prosecutor of the Tribunal in his bi-annual reports to the Security Council. The absence of objection or complaint by members of the Security Council, and in some cases explicit

[192] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', UN Doc. A/51/10, p. 42.

[193] *Ibid.*, pp. 46–7.

[194] *Prosecutor* v. *Bagaragaza* (Case No. ICTR-05-86-AR11bis), Decision on Rule 11bis Appeal, 30 August 2006.

[195] *Prosecutor* v. *Bagaragaza* (Case No. ICTR-2005-86-R11bis), Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands, 13 April 2007.

encouragement,[196] to this exercise of universal jurisdiction can be taken as acquiescence, and provides further evidence of its acceptability under customary international law.

In the past, case law of domestic courts has been inconsistent. In *Demjanjuk* v. *Petrovsky*, a federal court in the United States said that 'some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law.'[197] However, French courts have refused to recognize universal jurisdiction in the case of genocide, referring to article VI of the Convention to support the idea that it does not form part of customary law.[198] In the first ruling of the House of Lords in the *Pinochet* case, Lord Slynn of Hadley, who dissented, rejected the suggestion that the 1948 debates were superseded by more recent customary law. But such views are increasingly marginal and isolated.

Many States have enacted legislation entitling themselves to exercise universal jurisdiction for genocide, apparently without protest.[199] There have been significant efforts to hold trials for genocide with respect to the former Yugoslavia and Rwanda in European States, including Austria, Germany, Denmark, France, Belgium and Switzerland, again

[196] See e.g. UN Doc. S/PV.5453, pp. 13 and 16, UN Doc. S/PV.5594, pp. 13. 15, 16 and 17; UN Doc. S/PV.5697, pp. 18 and 23; UN Doc. S/PV.5796, pp. 7, 11, 12 and 17.

[197] *Demjanjuk* v. *Petrovsky*, 776 F 2d 571 (6th Cir. 1985). See also *In the Matter of the Extradition of John Demjanjuk*, note 167 above; and *Beanal* v. *Freeport McMoran*, 969 F Sup 362 at 371 (ED La, 1997).

[198] *Javor et al.*, Order of Tribunal de grande instance de Paris, 6 May 1994; upheld on appeal by the Paris Court of Appeal, 24 October 1994, and by the Court of Cassation, Criminal Chamber, on 26 March 1996; *Dupaquier et al.*, Order of Tribunal de grande instance de Paris, 23 February 1995. See Stern, *La compétence universelle*, pp. 290–2 and 294–5; and Eric David, 'La répression nationale et internationale des infractions internationales', in *Eléments de droit pénal international*, Part 2, Brussels: Université libre de Bruxelles, 1995, p. 301.

[199] *R* v. *Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte* [1998] 4 All ER 897, [1998] 3 WLR 1456 (HL). The ruling of the House of Lords following the rehearing of the Pinochet case sends a troubling signal in the suggestion, by Lord Browne-Wilkinson, that the existence of universal jurisdiction is a kind of litmus test for the qualification of an 'international crime'. This is surely an error, for there can be no doubt that genocide is an international crime since 1946, despite the uncertain state of the law about universal jurisdiction over genocide: *R* v. *Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No. 3)* [1999] 2 All ER 97 at 114; [1999] 2 WLR 825 (HL).

without apparent opposition or challenge.[200] Several countries have taken important and ambitious new initiatives with respect to universal jurisdiction, including the Netherlands, Spain and Canada. In a 2007 judgment, the European Court of Human Rights signalled that many States parties to the European Convention on Human Rights include universal jurisdiction over genocide in their national legislation.[201] In early January 2008, President Bush signed legislation providing for the exercise of universal jurisdiction over genocide by the courts of the United States.[202]

Many of the norms in the Genocide Convention, including the definition itself, have remained essentially unchanged over the years. In one important respect, however, the Convention is woefully out of date. The rejection of universal jurisdiction by the General Assembly that is reflected in article VI no longer corresponds to State practice. Suggestions that the situation be corrected by an amendment to the Convention are no longer appropriate. There is simply too much State practice and judicial authority to support a credible challenge to the principle of universal jurisdiction where genocide is concerned.

Modern genocide prosecutions on the basis of universal jurisdiction

With the renaissance in international criminal justice that took place in the 1990s and the first decade of the twenty-first century, many national jurisdictions undertook genocide prosecutions on the basis of universal jurisdiction. Most of these prosecutions involved Rwanda and the former Yugoslavia.

In 1994, Austria tried a Bosnian Serb, Dusko Cvjetkovic, for genocide allegedly committed in Kucice, in central Bosnia and Herzegovina. On 13 July 1994, the Supreme Court of Austria ruled that article 321 of the Austrian Penal Code did not permit prosecutions for crimes committed outside the country. Citing Article VI of the Genocide Convention, the court concluded that a State party is obliged to extradite a war criminal to the State where the crime was committed.[203]

[200] Eric Gillet, 'Le génocide devant la justice', (1995) *Les temps modernes*, No. 583, July–August, pp. 228–71; Luc Reydams, 'Universal Jurisdiction over Atrocities in Rwanda: Theory and Practice', (1996) 1 *European Journal of Crime, Criminal Law and Criminal Justice*, p. 18.

[201] *Jorgić* v. *Germany* (Application No. 74613/01), Judgment, 12 July 2007, paras. 52–4.

[202] Genocide Accountability Act of 2007, Public Law 110-151 (S. 888).

[203] *Cvjetkovic*, Landesgericht Salzburg, 31 May 1995. 'Austria to Charge Bosnian Serb with Genocide', Reuters World Service, 3 August 1994; Steve Pagani, 'Serb Cleared of War

Also in 1994, German authorities arrested Duško Tadić, charging him with aiding and abetting genocide. Tadić's prosecution was cut short because the Prosecutor of the International Criminal Tribunal for the former Yugoslavia invoked the primacy of his jurisdiction,[204] but the case had already established a precedent concerning prosecution of non-German citizens for crimes committed outside Germany. An investigating judge of the Federal Court of Justice imposed two limitations upon the exercise of universal jurisdiction: that no rule of international law prohibits such a prosecution, and that a sufficient link or 'legitimate point of contact' (*legitimierende Anknüpfungspunkte*) exists with Germany. As the judge explained, the second requirement is actually linked to the first, and is justified by deference to the principle of non-intervention in the domestic affairs of other States. The investigating judge held that these conditions were met because Tadić had resided in Germany for several months and was arrested there, the acts with which he was charged were connected with other serious offences whose prosecution was compulsory under treaty law, and the fact that Germany and other members of the international community had reacted so strongly to the conflict in the former Yugoslavia and had adopted political, military and humanitarian measures to address it.[205] Tadić was subsequently transferred to The Hague, and, although he challenged the legality of his rendition before the International Criminal Tribunal for the

Crimes, Prosecutor Appeals', Reuters World Service, 31 May 1995. See: International Law Association, London Conference (2000), Committee on International Human Rights Law and Practice, 'Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences', p. 28; Axel Marschik, 'The Politics of Prosecution: European National Approaches to War Crimes', in Timothy L. H. McCormack and Gerry Simpson, eds., *The Law of War Crimes: National and International Approaches*, The Hague: Kluwer Law International, 1997, pp. 65–102 at pp. 79–81. The Supreme Court apparently ruled that the prosecutions in Austria could in fact proceed based on an interpretation of art. 65 of the Penal Code, which allows for prosecution in Austria of crimes committed abroad if they are punishable under the laws of the country where they occurred, if they cannot be justified under the law of war, and if extradition is not possible. But, in the end, he was acquitted, apparently because the prosecutor prepared the case poorly.

[204] *Prosecutor* v. *Tadić* (Case No. IT-94-1-D), Decision of the Trial Chamber on the Application by the Prosecutor for Formal Request for Deferral to the Competence of the International Criminal Tribunal for the Former Yugoslavia in the Matter of Dusko Tadić (Pursuant to Rules 9 and 10 of the Rules of Procedure and Evidence), 8 November 1994.

[205] *Dusko Tadić*, BGH-Ermittlungsrichter [Federal Court of Justice], 13 February 1994, BGs 100/94.

former Yugoslavia,[206] there does not appear to have been any appeal of the German Federal Court ruling. The two conditions attached to the exercise of universal jurisdiction in genocide prosecutions were subsequently upheld by other German courts, including the Federal Constitutional Court.[207] The Federal Constitutional Court observed that a hypothetical rule of customary international law forbidding the application of universal jurisdiction would be contrary to the rule prohibiting genocide, which is a peremptory or *jus cogens* norm.[208] The new German Code of Crimes Against International Law (*Voelkerstrafgesetzbuch*), which entered into force on 1 July 2002, appears to eliminate the two judge-made limitations on the exercise of universal jurisdiction.[209]

Nicolai Jorgić, a Bosnian Serb, was convicted of genocide and sentenced to life imprisonment by the Higher Regional Court at Dusseldorf.[210] The offender had acted as an accessory in eleven distinct cases of genocide involving killing, and the Court found that these had been committed with the intent to destroy an ethnic group. The accused challenged the legislation before the Federal Constitutional Court (*Bundesverfassungsgericht*) arguing that univeral jurisdiction was contrary to the provisions of the Genocide Convention.[211] When the conviction was upheld on appeal, Jorgić unsuccessfully applied to the European Court of Human Rights, arguing that the exercise of universal jurisdiction was contrary to article 6 of the European Convention on Human Rights.[212]

[206] *Prosecutor* v. *Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 49–64.

[207] *Nikolai Jorgić*, Bundesverfassungsgericht [Federal Constitutional Court], Fourth Chamber, Second Senate, 12 December 2000, 2 BvR 1290/99. The Federal Court of Justice, on appeal from the Higher Regional Court at Dusseldorf, held that the 'link' with Germany is not a requirement where there is a treaty obligation to prosecute. But, in this respect, it seems to have been referring to charges of grave breaches of the Geneva Conventions and not to genocide, as by no stretch of treaty interpretation can it be held that art. VI of the 1948 Convention imposes a duty to exercise universal jurisdiction: *Maksim Sokolovic*, Bundesgerichtshof [Federal Court of Justice], Third Criminal Senate, 21 February 2001, 3 StR 372/00.

[208] *Nikolai Jorgić*, Bundesverfassungsgericht [Federal Constitutional Court], Fourth Chamber, Second Senate, 12 December 2000, 2 BvR 1290/99.

[209] See: Gerhard Werle and Florian Jessberger, 'International Criminal Justice is Coming Home: The New German Code of Crimes Against International Law', (2002) 13 *Criminal Law Forum*, p. 191.

[210] *Nikolai Jorgić*, Oberlandesgericht Düsseldorf [Higher Regional Court, Dusseldorf], 26 September 1997, IV-26/96.

[211] *Jorgić Case (Individual Constitutional Complaint Procedure)*, BVerfG, 2 BvR 1290/99 vom 12.12.2000, Absatz-Nr. (1-49), ILDC 132 (DE 2000).

[212] *Jorgić* v. *Germany* (Application No. 74613/01), Judgment, 12 July 2007, paras. 52–4.

In another German case, the same Court imposed a sentence of nine years upon a Bosnian Serb for participation in acts of genocide in 1992.[213] In yet another, convictions were entered by the Bavarian Higher Regional Court for grave breaches of the Geneva Conventions but not for genocide. The trial was held after the International Criminal Tribunal for the former Yugoslavia had decided not to proceed. It involved a shooting incident directed at fifteen Bosnian Muslims on a bridge near Foca on 22 June 1992. The Bavarian Higher Regional Court concluded that the accused 'lacked the necessary *mens rea* [of genocide. T]he court presumed in the accused's favour that he did not see the policy of "ethnic cleansing" as the underlying reason for his action.'[214] But, with respect to the mental element of genocide, German courts appear generally to have taken a relatively expansive view, tending to equate acts of ethnic cleansing with genocide. Thus, the 'intent to destroy' set out in the chapeau of article II of the Convention need not be one to destroy the group physically. It is sufficient to put the group in a situation likely to result in its destruction.[215] The Federal Constitutional Court of Germany said:

> the statutory definition of genocide defends a supra-individual object of legal protection, i.e. the *social* existence of the group . . . the intent to destroy the group . . . extends beyond physical and biological extermination . . . The text of the law does not therefore compel the interpretation that the culprit's intent must be to exterminate physically at least a substantial number of the members of the group.[216]

These remarks were cited with a degree of sympathy by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, although the international judges declined to follow this approach because, 'despite recent developments, customary international law

[213] *Maksim Sokolovic*, Oberlandesgericht Düsseldorf [Higher Regional Court, Dusseldorf], 29 November 1999; appeal dismissed: *Maksim Sokolovic*, Bundesgerichtshof [Federal Court of Justice], Third Criminal Senate, 21 February 2001, 3 StR 372/00.

[214] *Novislav Djajic*, Bayerisches Oberstes Landesgericht, 23 May 1997, 3 St 20/96, excerpted in 1998 *Neue Juristische Wochenschrift*, p. 392. See: Christoph J. M. Safferling, 'Public Prosecutor v. Djajic', (1998) 92 *American Journal of International Law*, p. 528.

[215] *Kjuradj Kusljic*, Bayerisches Oberstes Landesgericht, 15 December 1999, 6 St 1/99, appeal dismissed: *Kjuradj Kusljic*, Bundesgerichtshof [Federal Court of Justice], 21 February 2001, BGH 3 StR 244/00.

[216] *Nikolai Jorgić*, Bundesverfassungsgericht [Federal Constitutional Court], Fourth Chamber, Second Senate, 12 December 2000, 2 BvR 1290/99, para. (III)(4)(a)(aa).

limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group'.[217]

Swiss prosecutors indicted Fulgence Niyonteze, who had once been the *bourgmestre* of Mushubati commune in Rwanda before moving to Switzerland. When the genocide began, in April 1994, he hurried back to his previous functions in Rwanda, but with the victory of the Rwandese Patriotic Front he fled the country and quickly obtained refugee status in Switzerland. On 30 April 1999, Niyonteze was convicted of murder, incitement to murder and grave breaches of the Geneva Conventions, and sentenced to life imprisonment. On appeal, the murder convictions were quashed and the sentence reduced to fourteen years.[218] The prosecutor had argued that such a sentence was insufficient, given the life term imposed by the International Criminal Tribunal for Rwanda upon another *bourgmestre*, Jean-Paul Akayesu, but this argument was dismissed by the Military Court of Cassation.[219] It is interesting to contrast the Swiss conviction for grave breaches with the reluctance of the judges of the International Criminal Tribunal for Rwanda to make similar findings; for several years the latter confined their guilty verdicts to genocide and crimes against humanity and dismissed charges dealing with war crimes.[220]

The prosecution did not initially charge Niyonteze with genocide, and failed in its attempt, some sixteen days after the trial had begun, to amend the indictment accordingly. In dismissing the prosecutor's motion to amend, the court noted that Switzerland was not, at the time of the trial, a State party to the 1948 Genocide Convention.[221]

[217] *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, paras. 579–80.

[218] Marco Sassoli, 'Le génocide rwandais, la justice militaire suisse et le droit international', (2002) 2 *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, p. 151.

[219] *Niyonteze*, Military Court of Cassation, 27 April 2001, *Arrêts du Tribunal militaire de cassation 2001/2002*, Office de l'Auditeur en chef, Vol. 12, 3ème fascicule, pp. 1–32 (No. 21), para. 13. See: Luc Reydams, 'International Decisions, Niyonteze v. Public Prosecutor', (2002) 96 *American Journal of International Law*, p. 231.

[220] See: *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, paras. 371–2; *Prosecutor* v. *Kayishema and Ruzindana* (Case No. ICTR-95-1-T), Judgment, 21 May 1999, paras. 623–4; *Prosecutor* v. *Rutaganda* (Case No. ICTR-96-3-T), Judgment and Sentence, 6 December 1999, paras. 444–5; *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment, 27 January 2000, paras. 974–5.

[221] Switzerland acceded to the Convention on 7 September 2000. Note that Switzerland has also cooperated with the International Criminal Tribunal for Rwanda in transferring genocide suspects for trial in Arusha: *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment, 27 January 2000, paras. 17–18; *Musema*, Tribunal federal [Federal Court], 28 April 1997, 1A.36/1997, ATF 123 II 175. Transcripts of interviews conducted by Swiss

According to the court, even if Switzerland was bound by a customary legal obligation to punish the crime of genocide, this did not mean that Swiss courts had jurisdiction in the absence of any applicable provision of national law. It considered that the applicable international norms were not sufficiently specific for them to be directly enforceable by national courts without running afoul of the principle of *nulla poena sine lege*; specifically, the international norms did not establish a penalty. The court conceded that the duty to punish would have been '*assurément plus contraignante*' if the acts had not been governed by other provisions of Swiss law, something which was not the case because of the applicability of the international humanitarian law provisions.[222]

The Military Court of Appeal took a slightly different approach, holding that the prohibition of genocide might be applicable given that article 109 of the Code pénal militaire incorporated customary legal norms, and that the Genocide Convention contained rules of customary international law. Nevertheless, article 108(2) of the Code, the Court of Appeal noted, distinguishes between international and non-international armed conflicts. Pursuant to the latter provision, customary law can only be enforced by the military courts in the case of international armed conflict, and unlike the war in the former Yugoslavia this could not be said to have been the case in the Rwandan conflict.[223]

On appeal from the Military Court of Appeal, the Military Court of Cassation agreed that genocide had taken place in Rwanda, relying upon the case law of the International Criminal Tribunal for Rwanda, and more specifically the Trial Chamber judgments in *Akayesu*, *Kayishema and Ruzindana* and *Rutaganda*,[224] as well as upon reports from international non-governmental organizations.[225] It did not change the findings of the lower courts with respect to the legal issues involving the crime of genocide.

juges d'instruction were used as evidence before the International Tribunal for Rwanda: *Prosecutor* v. *Musema*, *ibid.*, paras. 91–2.

[222] Marco Sassoli, 'Le génocide rwandais, la justice militaire suisse et le droit international', (2002) 2 *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, p. 151; *Niyonteze*, Military Court of Cassation, 27 April 2001, *Arrêts du Tribunal militaire de cassation 2001/2002*, Office de l'Auditeur en chef, Vol. 12, 3ème fascicule, pp. 1–32 (No. 21), para. 9(e).

[223] *Niyonteze*, Military Court of Appeal 1A, 26 May 2000.

[224] *Niyonteze*, Military Court of Cassation, 27 April 2001, para. 3(d).

[225] *Ibid.*, para. 6(b), referring to Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda*, New York, Washington, London and Brussels: Human Rights Watch, Paris: International Federation of Human Rights, 1999.

Belgian courts have also undertaken prosecutions relating to the Rwandan genocide. For example, four Rwandan officials were detained in Belgium, subject to prosecution before that country's courts, in actions initiated by individual victims acting as *parties civiles*.[226] Subsequently, the International Criminal Tribunal for Rwanda sought and obtained the transfer of three of them.[227] The fourth, Vincent Ntezimana, stood trial before the *cour d'assises*, after a motion in *non lieu* presented by the Belgian prosecutor was dismissed on 22 July 1996.[228] One of the arguments invoked in favour of his release was the fact that the International Criminal Tribunal for Rwanda did not seek to prosecute him, and as a result the evidence could not be very strong. These cases involved violations of the applicable provisions of the Geneva Conventions and the Additional Protocols, and did not include accusations of genocide. Consequently, the Belgian cases appear to be of no particular interest in terms of the law of genocide.[229] Much the same can be said of litigation relating to the Rwandan genocide in the United States[230] and Cameroon.[231]

After some indecisive prosecutions in France,[232] trials are now planned for two Rwandans who were initially indicted by the International Criminal Tribunal for Rwanda. In 2007, a Trial Chamber of the

[226] See: Eric Gillet, 'Le génocide devant la justice', *Les temps modernes*, No. 583, July–August 1995, p. 228. See also: Brussels Court of Appeal (Ch. mis. acc.), 17 May 1995, *Journal des Tribunaux*, 1995, p. 542.

[227] Court of Cassation (Second French Chamber), 15 May 1996, *Revue de droit pénal et de criminologie*, 1996, p. 906.

[228] Brussels Tribunal (Chambre du conseil), 22 July 1996, *Journal des Procès*, No. 310, 20 September 1996.

[229] Ntezimana, along with three other Rwandan defendants, was convicted of war crimes pursuant to a judgment of the Brussels Court of Assizes, on 8 June 2001. Appeal in cassation was dismissed on 9 January 2002, and the conviction became final. Ntezimana received a sentence of twelve years in prison; sentences of the others ranged from twelve to fifteen to twenty years.

[230] See: Jordan J. Paust, 'The Freeing of Ntakirutimana in the United States and Extradition to the International Criminal Tribunal for Rwanda', (1998) 1 *Yearbook of International Humanitarian Law*, p. 205; Goran Sluiter, 'To Cooperate or Not to Cooperate: The Case of the Failed Transfer of Ntakirutimana to the Rwanda Tribunal', (1998) 11 *Leiden Journal of International Law*, p. 383.

[231] Case No. 337/COR, Court of Appeal, 21 February 1997; Case No. 615/COR, Court of Appeal, 31 May 1996. These cases contributed to the famous debacle of the International Criminal Tribunal for Rwanda in the *Barayagwiza* case: *Barayagwiza* v. *Prosecutor* (Case No. ICTR-97-19-AR72), Decision, 5 November 1999; *Prosecutor* v. *Barayagwiza* (Case No. ICTR-97-19-AR72), Decision, 31 March 2000.

[232] William Bourdon, 'Détention et poursuites judiciaires en France', in Jean-François Dupaquier, ed., *La justice internationale face au drame rwandais*, Paris: Karthala, 1996, pp. 205–20. See also: Luc Reydams, 'Universal Jurisdiction over Atrocities in Rwanda:

Tribunal granted the Prosecutor's application for transfer, in accordance with Rule 11bis of the Rules of Procedure and Evidence.[233] Rwanda complained to the Security Council about the transfers, expressing its 'serious concerns . . . principally because well-known fugitives at large continue to live in that country with impunity'.[234]

An important Canadian universal jurisdiction case involved prosecution of a Hungarian Nazi, but for charges of crimes against humanity rather than genocide, which had not then been codified in Canadian criminal legislation.[235] Canadian law did have a provision dealing with incitement and advocating genocide, however, and it was to this provision that the courts turned in an immigration case concerning a Rwandan politician who had come to Canada before the 1994 genocide. Leon Mugesera fled the turmoil created by a speech he had delivered in 1992 in Rwanda that was widely perceived within the country as an incitement to genocide. After hearing expert testimony, the Canadian immigration judge agreed, and his findings were eventually endorsed by the Supreme Court of Canada after a seemingly endless series of appeals.[236] In 2005, following amendments to the Criminal Code, Canadian authorities initiated a genocide prosecution against Désiré Munyaneza with respect to crimes committed in Rwanda in 1994.

Spain's interest in universal jurisdiction came to international attention when Augusto Pinochet was charged before its courts with genocide because of the killings of political prisoners in Chile during the 1970s.[237] However, Pinochet's extradition on the basis of the genocide accusations was denied by the English authorities.[238] In 2005, the Supreme Court of

Theory and Practice', (1996) 1 *European Journal of Crime, Criminal Law and Criminal Justice*, p. 18.

[233] *Prosecutor* v. *Bucyibaruta* (Case No. ICTR-2005-86-I), Décision relative à la requête du Procureur aux fins de renvoi de l'acte d'accusation contre Laurent Bucyibaruta aux autorités françaises, 20 November 2007; *Prosecutor* v. *Munyeshyaka* (Case No. ICTR-2005-87-I), Décision relative à la requête du Procureur aux fins de renvoi de l'acte d'accusation contre Laurent Bucyibaruta aux autorités françaises, 20 November 2007.

[234] UN Doc. S/PV.5697, p. 32.

[235] *R* v. *Finta* [1994] 1 SCR 701, 88 CCC (3d) 417, 112 DLR (4th) 513.

[236] *Mugesera* v. *Canada (Minister of Citizenship and Immigration)* [2005] 2 SCR 100, para. 95, confirming *Mugesera* v. *Minister of Citizenship and Immigration*, QML-95-00171, Immigration and Refugee Board, Appeal Division, 11 July 1996, and overturning *Mugesera* v. *Minister of Citizenship and Immigration* [2004] 1 FCR 3, 232 DLR (4th) 75, 309 NR 14, 31 Imm LR (3d) 159 (FCA).

[237] Case 173/98, Penal Chamber, Madrid, 5 November 1998, www.derechos.org/nizkor/chile/juicio/audi.html (consulted 20 April 1999).

[238] *R* v. *Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, note 199 above.

Spain convicted a former captain in the Argentine Navy, Adolfo Scilingo, of crimes against humanity, but dismissed charges of genocide. Spanish courts now appear to have rejected an approach to genocide advocated by prosecutor Balthazar Garzon by which political groups are encompassed within the list of protected groups.[239] The same year, a case directed against Guatemalan generals was declared admissible.[240] In 2006, Spanish courts declared a complaint of genocide admissible against former Chinese President Jang Zemin, former Prime Minister Li-Ping and five others with respect to Tibet.[241]

International criminal tribunals

In addition to courts with territorial jurisdiction, article VI of the Genocide Convention mandates prosecution for genocide before 'such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'. The Convention establishes no hierarchy or preference between the two regimes. The text of article VI represents a compromise of sharply divergent views on the role of international justice, from those of the Soviet Union, which was opposed to any initiative in this respect, to France, which considered international prosecution the only effective way to repress genocide, to the United States, which favoured a combination of the two with priority to national courts. In a sense, article VI was also a mandate to the international community, to the States parties and to the United Nations to ensure the creation of an international jurisdiction. Attempts to establish such a court in the years following adoption of the Convention succumbed to Cold War tensions. In 1954, the work was suspended. It was only really resumed in 1989. The first international tribunal giving effect to article VI, the International Criminal Tribunal for the former Yugoslavia, was established in May 1993, with a mandate that was severely restricted in both time and space. Following the genocide in Rwanda in 1994, a second, similar body was created.[242]

[239] Alicia Gil Gil, 'The Flaws of the Scilingo Judgment', (2005) 3 JICJ, p. 1083. See also: Luis Benavides, 'Introductory Note to the Supreme Court of Spain: Judgment on the Guatemalan Genocide Case', (2003) 42 *International Legal Materials*, p. 683.

[240] Tribunal Constitucional, STC 237/2005, 26 September 2005.

[241] Christine A. E. Bakker, 'Universal Jurisdiction of Spanish Courts over Genocide in Tibet: Can it Work?', (2006) 4 *Journal of International Criminal Justice*, p. 595.

[242] On the creation of the *ad hoc* tribunals, see chapter 2, pp. 112–16 above.

The *ad hoc* tribunals for the former Yugoslavia and Rwanda proceeded to prosecute charges of genocide that were within their temporal and territorial jurisdiction. An initial conviction for genocide was recorded by the International Criminal Tribunal for Rwanda on 2 September 1998, just short of fifty years after the adoption of article VI of the Convention. Meanwhile, preparations for a full-blown international court of general jurisdiction culminated in the 1998 adoption of the Rome Statute of the International Criminal Court.[243] The Statute entered into force on 1 July 2002, and within a year the Court was fully operational.

Drafting history

The idea of an international criminal court can be traced to the mid-nineteenth century. In the 1870s, Gustav Moynier of the International Committee of the Red Cross drafted a statute for such a body.[244] The post-First World War peace treaties envisaged the creation of an international criminal tribunal, but the scheme was aborted for political considerations. In 1937, the League of Nations adopted the statute of an international court, charged with prosecuting the crime of terrorism, but it never came into force because of insufficient ratifications.[245] Nuremberg, of course, was the big breakthrough, its statute adopted on 8 August 1945 by the four-power conference held at London. Months later, a second international tribunal was created by decree in order to try offences committed by Japanese war criminals in the Far East.[246]

In its initial proposals on the genocide convention, the Secretariat clearly favoured establishing an international tribunal. This would be the appropriate body to try 'the more serious cases' of genocide, it said. Two options were considered, the first an international criminal court with general jurisdiction, the second a special court for the crime of genocide alone.[247] Model statutes reflecting these alternatives, based largely on the 1937 League of Nations treaty, were appended to the

[243] On the creation of the Court, see Chapter 2, pp. 101–12 above.

[244] Christopher Keith Hall, 'The First Proposal for a Permanent International Court', (1988) 322 *International Review of the Red Cross*, p. 57.

[245] Convention for the Creation of an International Criminal Court, League of Nations OJ Spec. Supp. No. 156 (1936), LN Doc. C.547(I).M.384(I).1937.V (1938).

[246] See 'Question of International Criminal Jurisdiction', UN Doc. A/CN.4/15 (1950); M. Cherif Bassiouni, 'From Versailles to Rwanda: The Need to Establish a Permanent International Criminal Court', (1996) 10 *Harvard Human Rights Journal*, p. 1.

[247] UN Doc. E/447, p. 19.

Secretariat draft.[248] The international court would hear cases if a State was unwilling to try or extradite offenders, or where genocide had been committed by individuals acting as organs of the State or with its support or tolerance.[249] The Secretariat explained that States might be reluctant to try or extradite for various reasons:

> It may consider itself incapable of seeing that justice is done; for instance, if the decision of the jury empanelled for the case is open to criticism. The State may also fear lest the trial further disturb its divided and excited public opinion, or it may be reluctant to risk the possibility of a decision by its courts attracting the animosity of other Powers, however unjustified. The State may refuse to grant extradition on request, either because public opinion in the country, rightly or wrongly, objects; because the State requesting it does not appear capable of ensuring justice; because the latter State is in fact endeavouring to let the offender whose extradition it is requesting go unpunished; or because the State requesting extradition proposes to take revenge on political opponents under cover of punishing genocide.[250]

The three experts consulted by the Secretariat were not of one mind on these subjects. Donnedieu de Vabres and Pella agreed that an international jurisdiction should have a subsidiary or complementary status, to be activated failing effective prosecution by national courts. Raphael Lemkin, on the other hand, believed the international court should take jurisdiction only in the most serious cases, involving rulers and other State officials. '[Lemkin] said that as the cases of these other persons were of lesser importance, no action should lie in an international court, since this involved the use of complicated procedure. The danger would be that the complexities of the procedure might eventually result in the offenders going unpunished.'[251] Donnedieu de Vabres envisaged a criminal chamber of the International Court of Justice.[252] Pella agreed, saying a draft adopted in 1928 by the International Association for Penal Law might form a basis of discussion.[253] Lemkin was more cautious, believing the establishment of a permanent court with general jurisdiction to be premature.[254]

The United States agreed with Lemkin that 'where genocide is committed by or with the connivance of the State the accused individuals should be tried by an international court'.[255] But it found the Secretariat's draft statutes far too ambitious, and warned that linking the

[248] *Ibid.*, pp. 5–13, art. X. [249] *Ibid.*, art. IX. [250] *Ibid.*, p. 40. [251] *Ibid.*, p. 41.
[252] *Ibid.*, p. 42. [253] *Ibid.* [254] *Ibid.* [255] UN Doc. A/401.

creation of an international tribunal with the genocide convention might compromise the latter's success. The United States said the matter should be referred to the International Law Commission.[256] It suggested that, pending creation of a permanent court, *ad hoc* tribunals could be established to deal with specific cases.[257] Venezuela contested the Secretariat's initiative on the issue of international jurisdiction as going beyond the mandate it had been given by General Assembly Resolution 96(I). Not only did Venezuela believe the creation of an international jurisdiction to be very premature, it claimed the whole idea was inconsistent with the principle of respect for national sovereignty laid down in article 2(7) of the Charter of the United Nations. 'The establishment of international criminal jurisdiction to deal with these cases seems to be a step that should be reserved for the future', said Venezuela, 'when the circumstances of international life are more favourable and the spirit of international co-operation in the legal sphere has, as is to be hoped, made further progress.'[258] For the Soviet Union, the Secretariat's recommendations 'ignored realities and were in flagrant contradiction with the principles of national sovereignty'.[259]

The Netherlands[260] and Siam[261] favoured international prosecution, but preferred expanding the jurisdiction of the existing International Court of Justice. France's draft convention of 5 February 1948 contained relatively detailed provisions for the creation of an international criminal court.[262] It was to sit at The Hague, and would have an independent prosecutor. *In absentia* trials would be allowed, and the court would be empowered to award reparation to victims. Non-compliance with its decisions would be submitted to the Security Council, and action to impede execution of its judgments could be considered an act of aggression under article 51 of the Charter of the United Nations.[263] France conceived of an international tribunal with exclusive jurisdiction, having no confidence in national justice systems to assume responsibility for genocide prosecutions. 'No State would commit its governing authorities to its own courts', said France.[264]

Faced with considerable opposition in the Ad Hoc Committee to the idea of a court, France pushed for a compromise. There should be some

[256] *Ibid.* [257] 'United States Draft of 30 September 1947', UN Doc. E/623, art. VII.
[258] UN Doc. A/401/Add.1.
[259] UN Doc. E/AC.25/SR.7, p. 4. See also 'Basic Principles of a Convention on Genocide', UN Doc. E/AC.25/7, Principle IX.
[260] UN Doc. E/623/Add.3. [261] UN Doc. E/623/Add.4. [262] UN Doc. E/623/Add.1.
[263] *Ibid.* [264] UN Doc. E/AC.25/SR.7, p. 9.

reference to the international court, but '[i]t was customary for international conventions to stipulate that the machinery for implementing certain points should be determined later'.[265] The Ad Hoc Committee's chair, John Maktos of the United States, proposed a rule of subsidiarity or complementarity, by which an international court would only have jurisdiction if the State with territorial jurisdiction had failed to act. He warned that anything more might discourage ratification of the convention by States nervous about encroachments upon sovereignty.[266]

Maktos urged inserting a clause stating 'the jurisdiction of the international court would be exercised in cases where it has found that the State in which the crime was committed, had not taken adequate measures for its punishment'.[267] The principle of subsidiarity was adopted by the Ad Hoc Committee.[268] The United States reworked a Chinese proposal to read: 'Genocide shall be punished by any competent tribunal of the State in the territory of which the crime is committed or by a competent international tribunal.'[269] The Soviet Union replied with a text that excluded all reference to international jurisdiction: 'The High Contracting Parties pledge themselves to prosecute the persons guilty of genocide, as defined in the present Convention, as responsible for criminal offences, submitting the cases of these crimes committed within the territory under their jurisdiction for trial by national courts in accordance with the national jurisdiction of that country.'[270] The Soviet proposal resulted in a division of votes, three to three, with one abstention.[271] The Committee turned to the United States proposal, which had been slightly modified. It was agreed to keep the word 'shall' so as to stress the obligation to punish.[272] The words 'or by such a competent international tribunal as may be established in the future' were adopted by four to three.[273] In the Ad Hoc Committee's final version, this was changed slightly: 'Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed or by a competent international tribunal.'[274]

France returned in the Sixth Committee to its ambitious proposal to have the convention itself create an international jurisdiction. It

[265] *Ibid.*, p. 3. [266] *Ibid.*, p. 4. [267] *Ibid.*, p. 13.
[268] *Ibid.*, p. 15 (four in favour, with three abstentions).
[269] UN Doc. E/AC.25/SR.18, p. 10. [270] UN Doc. E/AC.25/SR.20, p. 2. [271] *Ibid.*
[272] *Ibid.* (five in favour with two abstentions). [273] *Ibid.*
[274] UN Doc. E/AC.25/SR.24, p. 10 (four in favour, three against).

proposed replacing 'or by a competent international tribunal' with 'or by the international Criminal Court constitute[d] as follows . . .'.[275] And what followed were articles 4 to 10 of the French draft Convention, proposed earlier that year.[276] France's position was extreme, because it eliminated national jurisdiction in favour of an exclusively international jurisdiction. The Philippines supported France, stating that 'genocide was a crime of such proportions that it could rarely be committed except with the participation of the State; it would be paradoxical to leave to that same State the duty of punishing the guilty'.[277]

Many found the French view too radical, endorsing the idea of an international jurisdiction, but not to the exclusion of the national courts. Pakistan would have preferred an international tribunal with exclusive jurisdiction over all cases of genocide, but said this was going too far. It suggested that rulers be subject only to the international tribunal, and that the States parties to the convention have the right to appeal to that tribunal from judgments pronounced by national courts against officials and private individuals.[278]

Still others realized that the creation of an international tribunal was probably unrealistic, but felt nevertheless that the final phrase of the draft should be allowed to stand. Syria said: 'the Committee could declare itself in favour of the principle of the creation of an international criminal court and leave the elaboration of a plan for the establishment of such a court to the appropriate organs of the United Nations'.[279] Haiti believed that 'reference to an international tribunal in article [VI] would not fail to have a salutary effect on authorities who wished to commit acts of genocide and who, in the absence of such reference, would be ensured impunity'.[280] The United States favoured an international criminal court, but subject to the proviso that its jurisdiction be complementary to that of the State with territorial jurisdiction. Only if national courts failed to prosecute effectively would the international tribunal be entitled to exercise jurisdiction. The United States urged incorporating a sentence to recognize this principle,[281] adding

[275] UN Doc. A/C.6/255. [276] UN Doc. A/C.6/211.
[277] UN Doc. A/C.6/SR.97 (Inglés, Philippines). [278] *Ibid.* (Bahadur Khan, Pakistan).
[279] *Ibid.* (Tarazi, Syria). [280] *Ibid.* (Demesmin, Haiti).
[281] UN Doc. A/C.6/235: 'Jurisdiction of the international tribunal in any case shall be subject to a finding by the tribunal that the State in which the crime was committed had failed to take appropriate measures to bring to trial persons who, in the judgment of the court, should have been brought to trial or had failed to impose suitable punishment upon those convicted of the crime.'

that: 'If the proposal for the deletion of the final phrase of article VII were adopted, there would not be any foundation for the establishment of an international tribunal and the convention would greatly suffer thereby.'[282] Uruguay tabled a similar amendment.[283]

Several delegations called for deletion of the provision. Belgium[284] wanted it removed on practical grounds, namely, that no such tribunal existed. Cuba noted that 'the *ad hoc* committee has recognized the principle of an international tribunal in article VII of its draft, but it had made no provision regarding the composition of that tribunal, its procedure and the laws it was to enforce. In those circumstances, the final words of [article VI] had no practical value and should be deleted.'[285] The United Kingdom proposed a new sentence referring genocide cases to the International Court of Justice.[286] Fitzmaurice said article VI as drafted was useless:

> With regard to national jurisdiction, there were already other provisions in the convention, such as the preamble, article [IV] and article [V],

[282] UN Doc. A/C.6/SR.98 (Maktos, United States).

[283] UN Doc. A/C.6/209: 'Persons charged with genocide or any of the other acts enumerated in article IV shall be tried by the competent tribunals of the State in the territory of which the act was committed. Should the competent organs of the State which is under a duty to punish the crime fail to proceed to such punishment effectively, any of the Parties to the present Convention may submit the case to the International Court of Justice, which shall decide whether the complaint is justified. Should it be proved that there has been such failure as aforesaid, the Court shall deal with and pronounce judgment on the crime of genocide. For this purpose the Court shall organize a Criminal Chamber.' Uruguay withdrew its amendment after the resolution on the international criminal court was adopted: UN Doc. A/C.6/SR.99 (Manini y Rios, Uruguay).

[284] UN Doc. A/C.6/217.

[285] UN Doc. A/C.6/SR.97 (Dihigo, Cuba).

[286] UN Doc. A/C.6/236 and Corr.1: 'Where the act of genocide as specified by articles II and IV is, or is alleged to be the act of the State or government itself or of any organ or authority of the State or government, the matter shall, at the request of any other party to the present Convention, be referred to the International Court of Justice, whose decision shall be final and binding. Any acts or measures found by the Court to constitute acts of genocide shall be immediately discontinued or rescinded and if already suspended shall not be resumed or reimposed.' The United Kingdom also wanted to delete reference to national courts, saying that this was already covered by art. V of the Convention. An amendment to the United Kingdom amendment was presented by Belgium in UN Doc. A/C.6/252: 'Any dispute relating to the fulfilment of the present undertaking or to the direct responsibility of a State for the acts enumerated in article IV [art. III in the final version] may be referred to the International Court of Justice by any of the Parties to the present Convention. The Court shall be competent to order appropriate measures to bring about the cessation of the imputed acts or to repair the damage caused to the injured persons or communities.'

> which affirmed the obligation of States Parties to the convention to punish genocide on the national level, and as to international jurisdiction, the mention of a competent international tribunal – which could only be an international criminal tribunal – was useless since such a tribunal did not exist. Even if it did exist, it would be of as little use as national courts, for it was to be anticipated that culprits would not be handed over to it and that unless armed force were used it would be impossible to bring the perpetrators of an act of genocide to trial by that court.

For that reason, the United Kingdom preferred recourse to the International Court of Justice 'to enact measures capable of putting a stop to the criminal acts concerned and of awarding compensation for the damage caused to victims'.[287] After criticism that this question had already been debated and decided when article V was being considered,[288] Belgium and the United Kingdom withdrew their amendments and developed a new proposal which was discussed in conjunction with article IX.[289]

Some States took the view that an international jurisdiction, while ultimately desirable, was plainly unrealistic at the present time, and that it was better to delete any such reference in the draft. Afghanistan said international punishment could not be achieved 'since it was impossible to see how a sentence pronounced by an international tribunal could be carried out'.[290] Ecuador said it favoured an international tribunal but said article VI was too vague and should be deleted.[291] Manfred Lachs of Poland said he 'would have been among the first to urge the establishment of such a court if he had thought that the idea was really practicable. In existing circumstances, however, it seemed that the idea was not acceptable to all delegations and its inclusion in the convention might make it difficult for those delegations to sign the convention.'[292] Venezuela described the idea as 'unrealistic', observing that 'it might be better to postpone the establishment of an international tribunal to a later stage'.[293] For Brazil, '[t]he last words of article [VI] expressed merely a wish, an aspiration, and the delegation of Brazil thought they should be deleted in order that the convention might remain within

[287] UN Doc. A/C.6/SR.97 (Fitzmaurice, United Kingdom).
[288] UN Doc. A/C.6/SR.99 (Maktos, United States). See also *ibid.* (Morozov, Soviet Union).
[289] UN Doc. A/C.6/SR.100 (Kaeckenbeeck, Belgium).
[290] UN Doc. A/C.6/SR.97 (Bammate, Afghanistan).
[291] UN Doc. A/C.6/SR.98 (Correa, Ecuador).
[292] *Ibid.* (Lachs, Poland).
[293] *Ibid.* (Pérez-Perozo, Venezuela).

the confines of reality'.[294] Similarly, Chile said that, even if the provision was of little practical significance, it contained 'the expression of a hope'.[295]

The Sixth Committee decided, by a narrow majority, to delete the words 'or by a competent international tribunal'.[296] France asked that the following declaration be added to the record:

> Just as it has taken twenty-five years for collective security to prevail, so the French delegation is convinced that an international criminal court will come into being. The French delegation considers the vote which has just taken place to be of extreme gravity. By rejecting the principle of international punishment, the Committee has rendered the draft convention on genocide purposeless. In these circumstances, France will probably find itself unable to sign such a convention.[297]

Similarly, Canada said it voted against 'because the failure to provide for an international tribunal would defeat the very basis of the convention'.[298] But it was clear that the vote was not so unequivocal, because Luxembourg, Poland and Peru all stated that they did not oppose the concept of an international tribunal, only that it did not belong in the convention. Indeed, Belgium said it would be erroneous to interpret the vote as dispositive of the issue.[299] Then, draft article VI as a whole, as amended by deletion of the words 'or by a competent international tribunal', was adopted.[300]

The Committee proceeded forthwith to debate a resolution, proposed by Iran, assigning consideration of the creation of an international tribunal to the International Law Commission.[301] The Netherlands submitted an amendment specifying that crimes other than genocide might

[294] UN Doc. A/C.6/SR.97 (Amado, Brazil). [295] *Ibid.* (Arancibia Lazo, Chile).
[296] UN Doc. A/C.6/SR.98 (twenty-three in favour, nineteen against, with three abstentions).
[297] *Ibid.* (Chaumont, France). [298] *Ibid.* (Feaver, Canada).
[299] *Ibid.* (Kaeckenbeeck, Belgium).
[300] UN Doc. A/C.6/SR.100 (twenty-one in favour, ten against, with fifteen abstentions). The United Kingdom, Siam, Egypt, India and Australia explained that they had abstained. Uruguay, El Salvador, Canada, the Philippines and Cuba said they had voted against.
[301] UN Doc. A/C.6/218: 'Draft resolution concerning the establishment of an international tribunal competent to deal with the crime of genocide, Whereas genocide is a grave crime against mankind which the civilized world condemns, Whereas punishment must be meted out for the crime of genocide wherever and by whomever committed, and Whereas if a competent international tribunal were established, it could deal with crimes of genocide and mete out punishment to the guilty, The General Assembly Recommends the International Law Commission, after inviting the opinions of all Governments of Members on this question, to undertake the necessary studies with a

be submitted to the court.[302] The Soviet Union opposed the resolution, saying it was out of order and that the notion of international suppression of genocide had already been rejected by the Committee.[303]

But Egypt insisted that in the previous meeting several delegates had voted against the words dealing with an international tribunal because one did not yet exist, and it could not be presumed that, if one existed, they would have been opposed.[304] The joint resolution of the Netherlands and Iran[305] as adopted by the Sixth Committee, read:

> The General Assembly, Considering that the discussion of the Convention on the prevention and punishment of the crime of genocide had raised the question of the desirability and possibility of having persons charged with genocide tried by a competent international tribunal, Considering that in the course of development of the international community the need for trial of crimes by an international judicial organ will be more and more felt, Invites the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of individuals, whether private persons or officials, charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions; Requests the International Law Commission in the accomplishment of that task to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice.[306]

France said it abstained because it did not understand how the Committee could vote on the application of a principle that it had rejected. However, it 'took note of the admission which the Committee had thus made, namely, that an international tribunal was necessary'.[307] Venezuela recalled that it had voted for deletion of the final words of article VI because it opposed 'at that juncture' the creation of an international court, adding that it did not object to the International Law Commission studying the question.[308]

view to preparing a draft convention on the establishment of an international tribunal competent to deal with the crime of genocide.'

[302] UN Doc. A/C.6/248: 'Considering that the Convention on the Prevention and Punishment of the Crime of Genocide has raised the question of the desirability and possibility of having persons charged with genocide tried by a competent international tribunal.' See the comments in UN Doc. A/C.6/SR.98 (Spiropoulos, Greece); and *ibid.* (du Beus, Netherlands).

[303] UN Doc. A/C.6/SR.99 (Morozov, Soviet Union). [304] *Ibid.* (Raafat, Egypt).

[305] UN Doc. A/C.6/271.

[306] GA Res. 260B(III). UN Doc. A/C.6/SR.99 (thirty-two in favour, four against, with nine abstentions).

[307] *Ibid.* (Chaumont, France). [308] *Ibid.* (Pérez-Perozo, Venezuela).

In the course of the next few weeks, the Sixth Committee continued to stew over the question. When the drafting committee report was finally presented, towards the close of the session, there were new proposals. The United States wanted to add, at the end of article VI, the words 'or by a competent international penal tribunal subject to the acceptance at a later date by the contracting party concerned of its jurisdiction'.[309] It explained that some representatives had voted against the international penal tribunal because political groups were to be protected by the convention; others had been opposed because they first wanted to know more about the powers and scope of the tribunal. Both of these factors had changed and justified reconsidering the issue.[310]

Predictably, the Soviet Union opposed any reconsideration. The decision to refer the matter to the International Law Commission had already been taken, and adoption of the United States proposal would amount to a decision to establish a competent tribunal.[311] Reopening the question required a two-thirds vote, but this succeeded.[312] France submitted a modification of the United States amendment changing the end of the provision to read 'or by an international penal tribunal which shall have competence in respect of the contracting parties which shall have accepted its jurisdiction'.[313]

A new drafting committee on article VI was struck, composed of France, Belgium, India and the United States. It presented its report to the next session, taking the form of a joint text, authored by the United States, France and Belgium, that closely resembled the one debated at the previous session. Evidently, there was no consensus in the drafting committee. It incorporated the idea of a non-compulsory international criminal tribunal, adding 'or by such international penal tribunal as may have jurisdiction with respect to such Contracting Parties as shall have accepted the jurisdiction of such tribunal'.[314]

Czechoslovakia remained opposed to any mention of an international criminal tribunal, and, thus, to the United States–France–Belgium text. Venezuela said it did not like the vague reference to an international criminal court, given that no details about it were known. 'The Venezuelan delegation still considered that the institution of international

[309] UN Doc. A/C.6/295. [310] UN Doc. A/C.6/SR.129 (Gross, United States).
[311] *Ibid.* (Morozov, Soviet Union).
[312] *Ibid.* (thirty-three in favour, nine against, with six abstentions).
[313] UN Doc. A/C.6/SR.129 (Chaumont, France).
[314] UN Doc. A/C.6/SR.130 (Chaumont, France).

criminal jurisdiction could only lead to unfortunate results, in view of the existing world situation', said Pérez-Perozo. Brazil announced that it had changed its position, and would now vote in favour. The Sixth Committee adopted the joint amendment, followed by a successful vote on the article as a whole.

In the subsequent General Assembly debate, the Soviet Union unsuccessfully introduced an amendment consisting of the deletion of the words 'or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'. It seems clear enough from the text that article VI of the Convention does not make a State party automatically subject to the jurisdiction of a future international court. However, in order to dispel any possible ambiguity, some States made declarations to this effect at the time of ratification of accession.

Establishment and practice of international criminal tribunals

Three international penal tribunals have been created with subject matter jurisdiction over the crime of genocide: the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court. There has also been international involvement in genocide prosecutions in Kosovo, Bosnia and Herzegovina and Cambodia, but the so-called 'hybrid' institutions in those countries are more properly classified as national courts.[315]

In *Bosnia* v. *Serbia*, the International Court of Justice did not hesitate in concluding that the International Criminal Tribunal for the former Yugoslavia was an institution contemplated by article VI:

> The notion of an 'international penal tribunal' within the meaning of Article VI must at least cover all international criminal courts created after the adoption of the Convention (at which date no such court existed) of potentially universal scope, and competent to try the perpetrators of genocide or any of the other acts enumerated in Article III. The nature of the legal instrument by which such a court is established is without importance in this respect. When drafting the Genocide Convention, its authors probably thought that such a court would be created by treaty: a clear pointer to this lies in the reference to 'those Contracting Parties which shall have accepted [the] jurisdiction' of the international penal tribunal. Yet, it would be contrary to the object of the provision to

[315] These initiatives are discussed earlier in this chapter, at pp. 416–25.

> interpret the notion of 'international penal tribunal' restrictively in order to exclude from it a court which, as in the case of the [International Criminal Tribunal for the former Yugoslavia], was created pursuant to a United Nations Security Council resolution adopted under Chapter VII of the Charter. The Court has found nothing to suggest that such a possibility was considered by the authors of the Convention, but no intention of seeking to exclude it can be imputed to them.[316]

The reasoning applies to the International Criminal Tribunal for Rwanda equally. Because both *ad hoc* tribunals were imposed by the Security Council, States may argue that they have not 'accepted' their jurisdiction. The International Court of Justice considered that Serbia had 'accepted' the jurisdiction of the International Criminal Tribunal for the former Yugoslavia, at the very least since 1995, because of provisions of the Dayton Agreement that brought an end to the war in Bosnia and Herzegovina.[317] As for the International Criminal Court, which is treaty-based, its relationship to article VI of the Convention seems beyond any question.

In provisions modelled on articles II and III of the Genocide Convention, the Statute of the International Criminal Tribunal for the former Yugoslavia and the Statute of the International Criminal Tribunal for Rwanda establish jurisdiction over genocide itself as well as 'other acts', that is, conspiracy, attempt, direct and public incitement and complicity.[318] The Security Council resolution establishing the Rwanda Tribunal makes several references to genocide, and the term itself is included in the official name of the institution: 'International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law. . .' The International Criminal Tribunal for Rwanda is essentially a genocide tribunal. Trials have focused virtually exclusively on the genocide that took place from April to July 1994.[319] In a few cases, the Prosecutor has accepted plea agreements where genocide charges

[316] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 445

[317] *Ibid*., para. 447.

[318] Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827 (1993), annex, art. 4; Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1993), annex, art. 2.

[319] For detailed review of the work of the International Criminal Tribunal for Rwanda, see: William A. Schabas, *UN International Criminal Tribunals: Former Yugoslavia, Rwanda, Sierra Leone*, Cambridge: Cambridge University Press, 2006.

have been dropped in favour of crimes against humanity, but this appears to be little more than an expedient enabling the Tribunal to settle cases and reduce its case load, rather than a strategic decision to emphasize cases involving atrocities other than genocide.[320] Early in the work of the Tribunal, the Prosecutor actually decided not to proceed in a case involving the killing of Belgian troops and the assassination of the Prime Minister, but in which a judge refused to confirm any counts of genocide.[321] Whether indictments will ever be issued against individuals associated with the Rwandese Patriotic Front, against whom there is strong evidence of crimes against humanity but not genocide, remains an open question.[322]

The Yugoslavia Tribunal is a marked contrast with the Rwanda Tribunal, to the extent that genocide indictments have made up only a rather small number of charges laid before it. There has been one conviction for genocide,[323] although it was overturned on appeal. There is no reference in the Security Council resolution creating the Yugoslavia Tribunal, or in its name, in contrast with the situation for the Rwanda Tribunal. Nevertheless, the Appeals Chamber has confirmed that acts of genocide were committed at Srebrenica, in Bosnia and Herzegovina, in mid-July 1995.[324] A senior officer in the Bosnian Serb military during the Srebrenica massacre, General Radislav Krstić, was convicted of aiding and abetting genocide but acquitted of the crime itself,[325] while another, Colonel Vidoje Blagojević, was acquitted of genocide altogether.[326] All of the other genocide prosecutions have resulted in acquittals.[327] A large trial is currently underway concerning a

[320] *Prosecutor* v. *Rutaganira* (Case No. ICTR-95-1C-T), Jugement portant condamnation, 14 March 2005; *Prosecutor* v. *Bisengimana* (Case No. ICTR-00-60-T), Judgment and Sentence, 13 April 2006; *Prosecutor* v. *Nzabirinda* (Case No. ICTR-2001-77-T), Sentencing Judgment, 23 February 2007; *Prosecutor* v. *Rugambarara* (Case No. ICTR-00-59-T), Sentencting Judgment, 16 November 2007.

[321] *Prosecutor* v. *Ntuyahaga* (Case No. ICTR-98-40-T), Decision on the Prosecutor's Motion to Withdraw the Indictment, 18 March 1999.

[322] See: 'Completion Strategy of the International Criminal Tribunal for Rwanda', UN Doc. S/2007/323, Enclosure, para. 31; UN Doc. S/PV.5796, p. 13.

[323] *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001.

[324] *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Judgment, 19 April 2004.

[325] *Ibid.*

[326] *Prosecutor* v. *Blagojević* (Case No. IT-02-60-A), Judgment, 9 May 2007, paras. 119–24, reversing a conviction of complicity to commit genocide in *Prosecutor* v. *Blagojević* (Case No. IT-02-60-T), Judgment, 17 January 2005.

[327] *Prosecutor* v. *Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999; *Prosecutor* v. *Sikirica et al.* (Case No. IT-95-8-T), Judgment on Defence Motions to Acquit, 3 September 2001; *Prosecutor* v. *Stakić* (Case No. IT-97-24-T), Judgment, 31 July 2003;

number of defendants associated with the Srebrenica massacre in which genocide and conspiracy to commit genocide are charged.[328] The Tribunal has as yet been unable to arrest Bosnian Serb leaders Radovan Karadžić and Ratko Mladić, who are charged with genocide for their role at Srebrenica.[329]

The caution of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia with respect to accusations of genocide became evident in the very first case to actually come to trial. After Duško Tadić was arrested in Germany, national courts proceeded against him for aiding and abetting genocide, as well as torture, murder and causing grievous bodily harm.[330] Although Tadić was only a minor player in Bosnian war crimes, the youthful International Tribunal was hungry for work and jumped at the chance to pre-empt the German courts.[331] But the Prosecutor confined his indictment to war crimes and crimes against humanity, dropping the charge of genocide. 'We were amazed that Germany had no specific evidence on that charge', said Deputy Prosecutor Graham Blewitt. 'They were going to attempt to prove it solely on the basis of the testimony of an expert witness. But we thought it would be difficult to establish genocide with respect to Tadić.'[332] In another early case, *Nikolić*, the judges themselves invited the Prosecutor to add an indictment of genocide after hearing evidence of ethnic cleansing during a Rule 61 proceeding, a suggestion that was never taken up.[333]

Prosecutor v. *Brdanin* (Case No. IT-99-36-T), Judgment, 1 September 2004; *Prosecutor* v. *Krajisnik* (Case No. IT-00-39-T), Judgment, 27 September 2006.

328 *Prosecutor* v. *Popovic et al.* (Case No. IT-05-88-PT), Second Consolidated Amended Indictment, 14 June 2006, paras. 29–44.

329 *Prosecutor* v. *Karadžić and Mladić* (Case No. IT-95-18-I), Indictment, 16 November 1995.

330 Michael Scharf, *Balkan Justice*, Durham, NC: Carolina Academic Press, 1997, p. 97; *Prosecutor* v. *Tadić* (Case No. IT-94-1-T), Opinion and Judgment, 7 May 1997, para. 7.

331 *Prosecutor* v. *Tadić* (Case No. IT-94-1-1), Application for a Formal Request for Deferral, 8 November 1994.

332 Scharf, *Balkan Justice*, p. 101. Also: Michael P. Scharf, 'The Prosecutor v. *Dusko Tadić*: An Appraisal of the First International War Crimes Trial Since Nuremberg', (1997) 60 *Albany Law Review*, p. 861; Raymond M. Brown, 'Trial of the Century? Assessing the Case of Dusko Tadić before the International Criminal Tribunal for the Former Yugoslavia', (1997) 3 *ILSA Journal of International and Comparative Law*, p. 613.

333 *Prosecutor* v. *Nikolić* (Case No. IT-95-2-R61), Review of Indictment Pursuant to Rule 61, 20 October 1995, para. 34. For the indictment: *Prosecutor* v. *Nikolić* (Case No. IT-94-2-I), Indictment, 4 November 1994. See: Faiza Patel King and Anne-Marie La Rosa, 'The Jurisprudence of the Yugoslavia Tribunal: 1994–1996', (1997) 8 *European Journal of International Law*, p. 123 at pp. 130–2; Rafaëlle Maison, 'La décision de la Chambre

Aspects of prosecutorial policy also suggest uncertainty about the validity of genocide indictments. In the case of an important Bosnian Serb leader, genocide charges were dropped by the Prosecutor as part of a plea agreement.[334] In at least one other case, an acquittal for genocide of a Bosnian Serb leader at trial was not appealed.[335] Anecdotal accounts point to great division within the Office of the Prosecutor about whether genocide charges should be pursued.[336] The International Court of Justice referred to the ambiguity of prosecutorial practice, as well as to the pattern of acquittals, in support of its own conclusion that genocide had not been committed during the war in Bosnia and Herzegovina, save in the case of Srebrenica.[337]

Slobodan Milošević himself, who led the Yugoslav government in Belgrade throughout the Balkan wars during the 1990s, was only charged with genocide with respect to the conflict in Bosnia and Herzegovina, which raged from 1992 to 1995. The initial indictment relating to Kosovo in early 1999 did not charge genocide.[338] Nor did the subsequent indictment, filed in October 2001, covering the campaign in Croatia in late 1991.[339] In November 2001, Milošević was finally indicted for genocide with respect to the war in Bosnia and Herzegovina, which he is alleged to have directed as part of a 'joint criminal enterprise' with Bosnian Serb military and civilian leaders.[340] The Trial Chamber refused to dismiss the genocide charges, taking the view that a *prima facie* case had been made out by the Prosecutor: 'On the basis of the inference that may be drawn from this evidence, a Trial Chamber could be satisfied beyond reasonable doubt that there existed a joint

de première instance no. 1 du Tribunal pénal international pour l'ex-Yougoslavie dans l'affaire Nicolic', (1996) 7 *European Journal of International Law*, p. 284.

[334] *Prosecutor* v. *Plavšić* (Case No. IT-00-39 and 40/1), Sentencing Judgment, 27 February 2003.

[335] *Prosecutor* v. *Brdanin* (Case No. T-99-36-A), Judgment, 3 April 2007.

[336] Florence Hartmann, *Paix et châtiment*, Paris: Flammarion, 2007.

[337] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, paras. 374–5.

[338] *Prosecutor* v. *Milošević et al.* (Case No. IT-99-37-I), Indictment, 22 May 1999; *Prosecutor* v. *Milošević et al.* (Case No. IT-99-37-I), Amended Indictment, 29 June 2001; *Prosecutor* v. *Milošević et al.* (Case No. IT-99-37-PT), Second Amended Indictment, 16 October 2001.

[339] *Prosecutor* v. *Milošević* (Case No. IT-01-50-I), Indictment, 8 October 2001; *Prosecutor* v. *Milošević* (Case No. IT-02-54-T), First Amended Indictment, 23 October 2002.

[340] *Prosecutor* v. *Milošević* (Case No. IT-01-51-I), Indictment, 22 November 2001.

criminal enterprise, which included members of the Bosnian Serb leadership, whose aim and intention was to destroy a part of the Bosnian Muslim population.'[341] It seems unlikely, however, based on the findings of the Tribunal in other genocide prosecutions, coupled with the persuasive influence of the judgment of the International Court of Justice, that Milošević would have been convicted of genocide.

Unlike the Rwanda Tribunal, where the narrative was built around a campaign of genocide directed at the highest levels of the country's political and military establishment, the work of the Yugoslavia Tribunal has tended to focus on genocide at the local level. Genocidal intent was examined within a rather strict criminal law paradigm, the tone being set in the first case to come to judgment in which the Trial Chamber asked whether an individual offender, acting alone and in the absence of any plan or policy, could commit genocide.[342] This piecemeal approach to the crime culminated in the Srebrenica judgments, in which genocide is presented as an improvised decision taken by the military leader on the ground, something of which even some of his senior officers have been held to have been ignorant.[343] There is an incoherence to the conclusion that a single genocidal massacre perpetrated over a period of a few days was genocidal, when it is situated in the context of a three-year-long war that is, overall, better described by the label 'crimes against humanity'. Genocide appears to be merely idiosyncratic, as an abberation rather than as an overarching feature of the wartime strategy. The International Court of Justice may have reflected its own lack of enthusiasm on the subject when it wrote: 'The Court sees no reason to disagree with the concordant findings of the Trial Chamber and the Appeals Chamber.'[344] Perhaps a more affirmative statement might have been expected under the circumstances.

Two other criminal tribunals have also been established by the United Nations, but neither has been given jurisdiction over genocide. The Secretary-General's report at the time the Special Court for Sierra Leone

[341] *Prosecutor* v. *Milošević* (Case No. IT-02-54-T), Decision on Judgment for Motion of Acquittal, 16 June 2004, para. 246; also para. 323.

[342] *Prosecutor* v. *Jelisić* (IT-95-10-T), Judgment, 14 December 1999; *Prosecutor* v. *Jelisić* (IT-95-10-A), Judgment, 5 July 2001.

[343] *Prosecutor* v. *Blagojević* (Case No. IT-02-60-A), Judgment, 9 May 2007, paras. 119–24.

[344] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 296.

was being conceived states: 'Because of the lack of any evidence that the massive, large-scale killing in Sierra Leone was at any time perpetrated against an identified national, ethnic, racial or religious group with an intent to annihilate the group as such, the Security Council did not include the crime of genocide in its recommendation, nor was it considered appropriate by the Secretary-General to include it in the list of international crimes falling within the jurisdiction of the Court.'[345] As for the Special Tribunal for Lebanon, its subject matter jurisdiction contains no international crimes whatsoever.[346]

Genocide is part of the subject matter jurisdiction of the International Criminal Court. Article 6 of the Rome Statute reproduces article II of the Genocide Convention. Three of the 'other acts' set out in article III of the Convention, namely, attempt, direct and public incitement and complicity, but not conspiracy,[347] are comprised within article 25 of the Rome Statute. The definition of genocide is developed and clarified in the Elements of Crimes, which is a subsidiary instrument of the Rome Statute. Genocide has not yet been charged in any of the cases pending before the Court. In spite of allegations that genocide was being committed in Darfur, Sudan, the two arrest warrants issued by the Court in early 2007 confined themselves to charges of war crimes and crimes against humanity.[348] In the first case to proceed before the Court, the accused person was actually facing charges of genocide in the Democratic Republic of Congo when the arrest warrant was issued and he was transferred to The Hague. Thomas Lubanga was put on trial before the International Criminal Court for offences related to the recruitment of child soldiers, not genocide.[349] The implication may be that the Prosecutor did not consider the domestic genocide charges to be substantial enough for prosecution, although this was never stated in the proceedings. Instead, the Court accepted the argument that, because

[345] 'Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone', UN Doc. S/2000/915, para. 13.

[346] 'Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon', UN Doc. S/2006/893, paras. 23–5.

[347] See the discussion of this point in chapter 6, at pp. 314–15.

[348] *Prosecutor* v. *Harun* (Case No. ICC-02/05-01/07), Warrant of Arrest for Ahmad Harun, 27 April 2007; *Prosecutor* v. *Kushayb* (Case No. ICC-02/05-01/07), Warrant of Arrest for Ali Kushayb, 27 April 2007.

[349] *Prosecutor* v. *Lubanga* (Case No. ICC-01/04-01/06–8), Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006, paras. 33 and 39.

Lubanga was being prosecuted for genocide rather than for child soldier offences, the complementarity provisions of the Rome Statute were not satisfied and the case was admissible. Obviously, the accused preferred trial in The Hague for recruiting child soldiers to trial in the Democratic Republic of Congo for genocide and crimes against humanity, and did not therefore contest the intervention by the International Criminal Court.

The International Court of Justice went beyond the literal terms of article VI of the Genocide Convention by declaring that, where States have accepted the jurisdiction of an 'international penal tribunal', they are in breach of their obligations under article VI if they fail to cooperate with such an institution. In effect, this incorporates by reference provisions of the statutes of certain international criminal tribunals within the Genocide Convention. In the event of a genocide prosecution before an international penal jurisdiction, the Court would have jurisdiction to adjudicate a dispute about cooperation with the institution, pursuant to article IX of the Convention. According to the Court:

> The Court is of course without jurisdiction in the present case to declare that the Respondent has breached any obligations other than those under the Convention. But as the Court has jurisdiction to declare a breach of Article VI insofar as it obliges States to co-operate with the 'international penal tribunal', the Court may find for that purpose that the requirements for the existence of such a breach have been met. One of those requirements is that the State whose responsibility is in issue must have 'accepted [the] jurisdiction' of that 'international penal tribunal'; the Court thus finds that the Respondent was under a duty to co-operate with the tribunal concerned pursuant to international instruments other than the Convention, and failed in that duty.[350]

The Court's affirmation that article VI is not only permissive – in that it recognizes forms of jurisdiction (and, by implication, excludes others) – but that it also imposes obligations upon States to cooperate with such institutions is a substantial interpretative step, not supported by any authority in the *travaux préparatoires* of the Convention or in the practice of States.[351]

[350] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 449.

[351] Orna Ben-Naftali and Miri Sharon, 'What the ICJ Did Not Say about the Duty to Punish Genocide: The Missing Pieces in a Puzzle', (2007) 5 *Journal of International Criminal Justice*, p. 859.

Effective penalties

Article V of the Convention imposes an obligation to 'provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article 3'. The drafters gave the issue little attention. The Secretariat had initially recommended against specifying applicable penalties, 'because penal systems vary and because it is preferable to leave some freedom of action to States, wherever this does not present any real disadvantage. It is enough to say that the penalties should be sufficiently rigorous to make punishment effective.'[352] The Secretariat draft required States to 'make provision in their municipal law for acts of genocide' and to provide 'for their effective punishment'.[353] But later, the Secretariat suggested the Ad Hoc Committee might 'wish to consider the insertion, in the draft convention, of an express provision concerning the kind of punishment to be meted out for genocide. The provision might be of a general nature, e.g. a statement that genocide will be punished by death or any lesser punishment which might be provided for by international convention or which the court may find appropriate.'[354] No such action was taken. In the Sixth Committee, a Soviet amendment requiring States parties to 'provide criminal penalties for the authors of such crimes'[355] was adopted after only the most perfunctory debate.[356] France said that the application of penalties could not be left to domestic tribunals. 'There was a defect in the text of the convention prepared by the *ad hoc* Committee', argued Charles Chaumont. 'In no part of the convention were any real penalties specified; they had, however, to be provided at the international level.'[357]

During the post-war trials of the Nazis, there was some authority for the notion that international law recognized the death penalty as a

[352] UN Doc. E/447, p. 37. [353] *Ibid.*, pp. 5–13, art. VI.

[354] 'List of Substantive Items to be Discussed in the Remaining Stages of the Committee's Session, Memorandum Submitted by the Secretariat', UN Doc. E/AC.25/11.

[355] UN Doc. A/C.6/215/Rev.1; UN Doc. A/C.6/SR.93 (Morozov, Soviet Union). The entire amendment read: 'The High Contracting Parties undertake to enact the necessary legislative measures, in accordance with their constitutional procedures, aimed at the prevention and suppression of genocide and also at the prevention and suppression of incitement to racial, national and religious hatred, to give effect to the provisions of this Convention, and to provide criminal penalties for the authors of such crimes.'

[356] UN Doc. A/C.6/SR.93 (seventeen in favour, fourteen against, with eight abstentions).

[357] *Ibid.* (Chaumont, France).

maximum sentence in the case of war crimes, and therefore that the rule prohibiting retroactive punishments was not breached.[358] The 1940 United States Army manual, *Rules of Land Warfare*, declared that: 'All war crimes are subject to the death penalty, although a lesser penalty may be imposed.'[359] A post-war Norwegian court answered a defendant's plea that the death penalty did not apply to the offence as charged, because the death penalty had been abolished for such a crime in domestic law, by finding that violations of the laws and customs of war had always been punished by death at international law.[360]

The International Military Tribunal at Nuremberg was authorized to impose upon an individual convicted of crimes against humanity the sanction of 'death or such other punishment as shall be determined by it to be just'.[361] Of those accused in the Trial of the Major War Criminals, three were acquitted, seven were sentenced to prison terms, and twelve condemned to death by hanging. Within weeks of the conviction, the executions were carried out in the Nuremberg prison gymnasium by an American hangman.

Penalties for genocide were considered by the International Law Commission, in the context of its work on the Code of Crimes Against the Peace and Security of Mankind and on the draft statute of an international criminal court,[362] as well as during the drafting of the Rome Statute of the International Criminal Court.[363] International law now frowns upon capital punishment,[364] and the maximum sentence for

[358] (1949) 15 LRTWC 200.

[359] Field Manual 27-10, 1 October 1940, para. 357.

[360] *Public Prosecutor* v. *Klinge*, (1946) 13 ILR 262 (Supreme Court, Norway).

[361] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), annex, (1951) 82 UNTS 279, art. 27.

[362] See William A. Schabas, 'International Sentencing: From Leipzig (1923) to Arusha (1996)', in M. Cherif Bassiouni, *International Criminal Law*, 2nd revised edn, New York: Transnational Publishers, 1999, pp. 171–93; William A. Schabas, 'War Crimes, Crimes Against Humanity and the Death Penalty', (1997) 60 *Albany Law Journal*, p. 736.

[363] See William A. Schabas, 'Penalties in the Statute of the International Criminal Court', in Antonio Cassese, Paola Gaeta and John R. W. D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Oxford: Oxford University Press, 2002, pp. 1497–534.

[364] William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd edn, Cambridge: Cambridge University Press, 2002.

genocide allowed by the Code of Crimes, the statutes of the *ad hoc* tribunals and the Rome Statute of the International Criminal Court is life imprisonment. A Trial Chamber of the International Criminal Tribunal for the former Yugoslavia imposed a sentence of forty-six years' imprisonment in a conviction for genocide,[365] but this was reduced to thirty-five years when the judgment was reversed and one of aiding and abetting genocide substituted in its place.[366] Another Trial Chamber imposed a sentence of eighteen years where the conviction included a count of complicity in genocide.[367] The statutes of the *ad hoc* tribunals invite consultation of national sentencing practice. One Trial Chamber noted that the maximum sentence for such an offence under Yugoslav law was forty years,[368] while another recalled that even the death penalty was a possibility.[369]

The International Criminal Tribunal for Rwanda has imposed penalties that are sometimes described as 'life sentence'[370] and in other cases labelled 'remainder of life'.[371] It has been suggested that 'remainder of life' is intended to prohibit any possibility of parole or early release.[372] However, the Appeals Chamber of the Tribunal appears to consider 'remainder of life' to be synonymous with 'life imprisonment'.[373] The Rwanda Tribunal has also imposed custodial terms of forty-five,[374] thirty-five,[375]

[365] *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 726.
[366] *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Judgment, 19 April 2004, para. 275.
[367] *Prosecutor* v. *Blagojević* (Case No. IT-02-60-T), Judgment, 17 January 2005.
[368] *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 717.
[369] *Prosecutor* v. *Blagojević* (Case No. IT-02-60-T), Judgment, 17 January 2005, paras. 829–30.
[370] *Prosecutor* v. *Kambanda* (Case No. ICTR-97-23-S), Judgment and Sentence, 4 September 1998; *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Sentencing Judgment, 2 October 1998; *Prosecutor* v. *Rutaganda* (Case No. ICTR-96-3-T), Judgment and Sentence, 6 December 1999; *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment, 27 January 2000; *Prosecutor* v. *Niyitegeka* (Case No. ICTR-96-14-T), Judgment, 16 May 2003.
[371] *Prosecutor* v. *Kayishema and Ruzindana* (Case No. ICTR-95-1-T), Judgment, 21 May 1999; *Prosecutor* v. *Kamuhanda* (Case No. ICTR-95-54A-T), Judgment, 22 January 2004; *Prosecutor* v. *Muhimana* (Case No. ICTR-95-1B-T), Judgment, 28 April 2005; *Prosecutor* v. *Ndindabahizi* (Case No. ICTR-01-71-A), Judgment, 16 January 2007.
[372] George William Mugwanya, *The Crime of Genocide in International Law: Appraising the Contribution of the UN Tribunal for Rwanda*, London: Cameron May, 2007, pp. 239–41.
[373] *Prosecutor* v. *Ndindabahizi* (Case No. ICTR-01-71-T), Judgment, 16 January 2007, para. 142.
[374] *Prosecutor* v. *Kajelijeli* (Case No. ICTR-98-44A-A), Judgment, 23 May 2005.
[375] *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007.

thirty-two,[376] thirty,[377] twenty-five,[378] fifteen,[379] twelve,[380] ten,[381] seven[382] and six years in genocide prosecutions.[383]

When creating the International Criminal Tribunal for Rwanda in November 1994, the Security Council intended to exclude the death penalty, as it had done with the Yugoslavia Tribunal. Although it had not been applied for many years,[384] leading the Secretary-General of the United Nations to classify Rwanda as a *de facto* abolitionist State,[385] Rwandan political leaders noted that capital punishment was provided for as a penalty for murder in the country's Penal Code and they affirmed their intention to use it in appropriate genocide cases. During debate in the Security Council, Rwanda claimed there would be a fundamental injustice in exposing criminals tried by its domestic courts to execution if those prosecuted by the international tribunal – presumably the masterminds of the genocide – would only be subject to life imprisonment.[386] 'Since it is foreseeable that the Tribunal will be dealing with suspects who devised, planned and organized the genocide, these may escape capital punishment whereas those who simply carried

[376] *Ibid.*

[377] *Prosecutor* v. *Gacumbitsi* (Case No. ICTR-2001-64-T), Judgment, 17 June 2004; *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007.

[378] *Prosecutor* v. *Kayishema and Ruzindana* (Case No. ICTR-95-1-T), Judgment, 21 May 1999; *Prosecutor* v. *Ntakirutimana et al.* (Case Nos. ICTR-96-10 and ICTR-96-17-T), Judgment, 21 February 2003; *Prosecutor* v. *Simba* (Case No. ICTR-01-76-T), Judgment, 13 December 2005; *Prosecutor* v. *Muvunyi* (Case No. ICTR-2000-55A-T), Summary of Judgment, 12 September 2006.

[379] *Prosecutor* v. *Serushago* (Case No. ICTR-98-39-S), Sentence, 2 February 1999; *Prosecutor* v. *Semanza* (Case No. ICTR-97-20-T), Judgment and Sentence, 15 May 2003; *Prosecutor* v. *Ntagerura et al.* (Case No. ICTR-99-46-T), Judgment, 25 February 2004.

[380] *Prosecutor* v. *Ruggiu* (Case No. ICTR-97-32-T), Judgment, 1 June 2000.

[381] *Prosecutor* v. *Ntakirutimana et al.* (Case Nos. ICTR-96-10 and ICTR-96-17-T), Judgment, 21 February 2003.

[382] *Prosecutor* v. *Nzabirinda* (Case No. ICTR-2001-77-T), Sentencing Judgment, 23 February 2007.

[383] *Prosecutor* v. *Serugendo* (Case No. ICTR-2005-84-I), Judgment and Sentence, 12 June 2006.

[384] Death sentences were regularly commuted: Arrêté présidentiel No. 103/105, Mesure de grâce, *Journal Officiel* (Rwanda) 1992, p. 446, art. 1.

[385] 'Capital Punishment and Implementation of the Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty, Report of the Secretary-General', UN Doc. E/1995/78, § 36. See also 'The Death Penalty, List of Abolitionist and Retentionist Countries (September, 1985)', AI Index: ACT 50/06/95.

[386] UN Doc. S/PV.3453, p. 16. See Mutoy Mubiala, 'Le Tribunal international pour le Rwanda: Vraie ou fausse copie du Tribunal pénal international pour l'ex-Yougoslavie?', (1995) 99 *Revue générale de droit international public*, p. 929 at pp. 934–5.

out their plans would be subjected to the harshness of this sentence', said Rwanda's representative. 'That situation is not conducive to national reconciliation in Rwanda',[387] he added. New Zealand reminded Rwanda that: 'For over three decades the United Nations has been trying progressively to eliminate the death penalty. It would be entirely unacceptable – and a dreadful step backwards – to introduce it here.'[388] In April 1998, Rwanda held public executions of twenty-two offenders, convicted in its domestic trials. Several of the trials lacked the rigorous procedural guarantees that international law requires in the case of capital offences.[389] The executions were criticized by the United Nations High Commissioner for Human Rights, Mary Robinson, and by a resolution of the African Commission on Human and Peoples' Rights, as well as by non-governmental organizations such as Amnesty International. In sentencing offenders to heavy sentences, the International Criminal Tribunal for Rwanda noted the discrepancy between the international and national approaches, observing that, were the offenders to be judged by the national courts, they would likely have been sentenced to capital punishment.[390] Indeed, referring to capital punishment in Rwandan law, the Tribunal has said this 'general practice regarding prison sentences in Rwanda represents one factor supporting this Chamber's imposition of the maximum and very severe sentences'.[391]

The 1998 executions in Rwanda were also the last, a perhaps inevitable paroxysm of retributive justice for a people desperate for an outlet for their anger. As the years went by, many hundreds were sentenced to death for genocide but it became increasingly apparent that the sentences would never be carried out. As a precondition for transfer of cases from Arusha to the national courts of Rwanda, the International Criminal Tribunal imposed a requirement that capital punishment not be carried out. Rwanda pledged its compliance with this before the Security Council,[392] and then amended its legislation accordingly. The

[387] UN Doc. S/PV.3453, p. 16.
[388] *Ibid.*, p. 5. See also: *Yearbook . . . 1995*, Vol. I, 2382nd meeting, pp. 24–5, para. 45; *ibid.*, p. 25, para. 52.
[389] See Amnesty International, 'Africa Update – March–September 1998', AI Index AFR 01/05/90, p. 37.
[390] *Prosecutor* v. *Kambanda* (Case No. ICTR-97-23-S), Judgment and Sentence, 4 September 1998, para. 41; *Prosecutor* v. *Serushago* (Case No. ICTR-98-39-S), Sentence, 2 February 1999, para. 17.
[391] *Prosecutor* v. *Kayishema et al.* (Case No. ICTR-95-1-T), Sentence, 21 May 1999, para. 7.
[392] UN Doc. S/PV.5594, p. 30.

process prompted reconsideration of capital punishment generally within the country. In July 2007, legislation was enacted abolishing the death penalty. The move was welcomed by the High Commissioner for Human Rights, who said: 'Abolition in Rwanda sends a very strong message. A country that has suffered the ultimate crime and whose people's thirst for justice is still far from quenched has decided to forego a sanction that should have no place in any society that claims to value human rights and the inviolability of the person.'

Determination of the appropriate sentence for genocide also provoked a fierce debate in Israel when Adolf Eichmann was sentenced to hang.[393] The prosecution demanded death and argued it was mandatory under the law,[394] although Israel had abolished the death penalty for all other crimes. The defence argued that subsequent amendments to Israel's criminal law meant the sentence was not mandatory,[395] and that in any case the court's approach should be informed by the law then in force in Germany, where the death penalty had been abolished.[396] Although agreeing capital punishment was not mandatory,[397] the court ordered the death penalty, stating that 'for the punishment of the accused and the deterrence of others the maximum punishment authorized by law had to be imposed'.[398] On appeal, the Supreme Court wrote:

> But our knowledge that any treatment meted out to the Appellant would be inadequate – as would be any penalty or punishment inflicted on him – must not move us to mitigate the punishment. Indeed, there

[393] Leon Shaskolsky Sheleff, *Ultimate Penalties*, Columbus, OH: Ohio State University Press, 1987, pp. 193–217.

[394] Gideon Hausner, *Justice in Jerusalem*, New York: Schocken Books, 1966, pp. 428–30; D. Lasok, 'The Eichmann Trial', (1964) 11 *International and Comparative Law Quarterly*, p. 355 at p. 371; Robert K. Woetzel, 'The Eichmann Case in International Law', [1962] *Criminal Law Review*, p. 671; Helen Silving, 'In re Eichmann: A Dilemma of Law and Morality', (1961) 55 *American Journal of International Law*, p. 307; Haim Gouri, *Facing the Glass Booth: The Jerusalem Trial of Adolf Eichmann*, Detroit: Wayne State University Press, 2004.

[395] Four years later, the Penal Code Amendment (Modes of Punishment) Law appeared to leave this to the discretion of the tribunal, and the presiding judge seemed to agree that death was not mandatory.

[396] D. Lasok, 'Eichmann Trial'. On abolition of the death penalty in Germany, see Richard J. Evans, *Rituals of Retribution: Capital Punishment in Germany 1600–1987*, Oxford: Oxford University Press, 1996.

[397] Moshe Pearlman, *The Capture and Trial of Adolf Eichmann*, London: Weidenfeld and Nicolson, 1963, p. 618.

[398] D. Lasok, 'Eichmann Trial', p. 372; Lord Russell of Liverpool, *The Trial of Adolf Eichmann*, London: Heinemann, 1962, p. 305.

> can be no sense in sending to the gallows, under the Nazis and Nazi Collaborators (Punishment) Law, one who killed a hundred people, while setting free, or putting under guard and then keeping under close guard, one who killed millions. When, in 1950, the Israel legislature provided the maximum penalty laid down in the law, it could not have envisaged a criminal greater than Adolf Eichmann, and if we are not to frustrate the will of the legislature, we must impose on Eichmann the maximum penalty provided in Section 1 of the Law, which is the penalty of death.[399]

Martin Buber met with Israel's president Ben Gurion to plead for a life sentence. He argued that the death penalty should not be imposed, not only because he was an abolitionist, but because he felt that it might put an end to progressive developments among German youth.[400] Victor Gollancz later wrote that: 'For a court of three mortal judges to award death to such a man, on the ground of compensatory justice, is to trivialize, in a manner most grievous, the crucifixion of a whole people.'[401] For Hannah Arendt, the 'supreme justification for the death penalty' was that: 'Eichmann had been implicated and had played a central role in an enterprise whose open purpose was to eliminate forever certain "races" from the surface of the earth.' She criticized the judges, saying they should have directly addressed this aspect, and said that: 'Just as you supported and carried out a policy of not wanting to share the earth with the Jewish people and the people of a number of other nations – as though you and your neighbours had any right to determine who would not inhabit the world – we find that no one, that is, no member of the human race, can be expected to want to share the earth with you. This is the reason, and the only reason, you must hang.'[402]

That two abolitionist countries, Rwanda and Israel, have retreated from a commitment and, arguably, a social consensus, opposed to capital punishment when confronted with genocide, testifies to the overarching gravity of the offence. It also may represent the triumph of retributive theories of justice, at least when genocide is concerned. As Leon Sheleff has observed:

> The question is whether there are not certain acts committed against humanity that are so far beyond the pale with genocide prosecutions is

[399] *A-G Israel* v. *Eichmann*, note 157 above, pp. 341–2.
[400] *New York Times*, 5 June 1962. See also Peter Papadatos, *The Eichmann Trial*, London: Stevens & Sons, 1964, pp. 94–100.
[401] Victor Gollancz, *The Case of Adolf Eichmann*, London, 1961, p. 57.
[402] Arendt, *Eichmann in Jerusalem*.

> certainly instructive. On the one hand, it demonstrates how unacceptable capital punishment must be for 'ordinary crimes', but also signals the overwhelming force of retributive sentiments in the rare cases of genocide prosecutions of normal social intercourse that even considerations of mercy, justice, or forgiveness cannot serve to mitigate the ultimate penalty of death. The question arises even as to what are the obligations owed the memory of the victims. Those opposed to the death penalty are here confronted by a stern test of the sincerity and depth of their beliefs, the logic and consistency of their arguments, and the relevance and applicability of their approach in extreme cases . . . The use of the death penalty in such limited and extreme cases does not necessarily undermine the overall argument for abolition, but may, on the contrary, give it added emphasis.[403]

But the real lesson seems to have been delivered by Rwanda, in 2007, with its decision to abolish capital punishment altogether. In abandoning the death penalty even for the 'crime of crimes', Rwanda has thrown down a challenge to all other States and societies that retain the ultimate punishment in their criminal justice systems.

As a general rule, States that have enacted genocide legislation provide that it is to be punishable by the most serious sanctions known to their law, at least with respect to killing. This may consist of a lengthy prison term,[404] life imprisonment[405] and even death,[406] depending on the specifics of the domestic system. Many legislative systems allow reduced terms for 'lesser' offences of genocide, that is, those that do not involve homicide.[407] In some countries, the sentence is aggravated if

[403] Sheleff, *Ultimate Penalties*.

[404] Bolivia (Penal Code, 1972, Chapter IV, art. 138), ten to twenty years; Mexico (Penal Code for the Federal District, art. 149bis), twenty to forty years; Romania (Penal Code, art. 357), fifteen to twenty years; Slovakia (Criminal Code, No. 140/1961, art. 259), up to twenty-five years; Slovenia (Penal Code, 1994, Chapter 35, art. 373); Spain (*Yearbook . . . 1991*, Vol. I, p. 43, § 13), twelve to thirty years.

[405] Antigua and Barbuda (Genocide Act 1975, s. 3(2)(a)); Austria (Penal Code, art. 321(2)); Barbados (Genocide Act, s. 4(a)); Finland (Penal Code (1995) Chapter 11, s. 6); France (Penal Code (1994), Book II, art. 211-1); Germany (Penal Code, art. 220a (1)); Hungary (Penal Code, s. 137); Ireland (Genocide Act 1983, s. 2(2)(a)); Lithuania (Criminal Code of the Republic of Lithuania, art. 71); the Netherlands (Act of 2 July 1964 Implementing the Convention on Genocide, s. 1); Seychelles (Genocide Act 1969 (Overseas Territories) Order 1970, s. 1(2)(a)).

[406] Ethiopia (Penal Code (1957), art. 281, 'in cases of extreme gravity'); Ghana (Criminal Code (Amendment) Act, 1993, s. 1); Rwanda (Organic Law 8/96 of 30 August 1996); St Vincent and the Grenadines (Criminal Code (1988), s. 158(1)(a)); United States (USC Title 18, § 1091(b)(1)).

[407] Antigua and Barbuda (Genocide Act 1975, s. 3(2)(b)); Barbados (Genocide Act, s. 4(b)); Ireland (Genocide Act 1983, s. 2(2)(b)); Germany (Penal Code, art. 220a(2)); Seychelles

committed by government officials.[408] Most domestic legal systems treat accomplices as harshly as principal offenders, depending on the specific circumstances. Thus, an aider and abettor could be subject to the most severe sanctions. In many judicial systems, attempted crimes are subject to substantially reduced penalties, and the same principle ought to apply with respect to genocide.

The offence of direct and public incitement has been treated in domestic legislation as being significantly less serious than the other forms of participation in genocide. Maximum sentences for this offence, where provided, are in the range of five years' imprisonment.[409] Lesser sentences are also allowed in the case of conspiracy to commit genocide in some legal systems.[410]

Reparation

It is surely significant that Raphael Lemkin's seminal volume was subtitled 'proposals for redress'.[411] Yet the Convention is silent on the subject of reparation for the victims of genocide. The Secretariat draft included a provision on this subject: '[Reparations to Victims of Genocide] When genocide is committed in a country by the government in power or by sections of the population, and if the government fails to resist it successfully, the State shall grant to the survivors of the human group that is a victim of genocide redress of a nature and in an amount to be determined by the United Nations.'[412] The Secretariat explained that the provision represented 'an application of the principle that populations are to a certain extent answerable for crimes committed by their governments which they have condoned or which they have

(Genocide Act 1969 (Overseas Territories) Order 1970, s. 1(2)(b)); St Vincent and the Grenadines (Criminal Code (1988), s. 158(1)(a)); United States (USC Title 18, § 1091(b)(2)). When he signed the Act, President Ronald Reagan said that he would have preferred the death penalty be provided: Ronald Reagan, 'Remarks on Signing the Genocide Convention Implementation Act of 1987 (the Proxmire Act) in Chicago, Illinois', in *Ronald Reagan, 1988–89*, Book II, Washington: US Government Printing Office, 1991, pp. 1443–4.

[408] Bolivia (Penal Code, 23 August 1972, Chapter IV, art. 138).

[409] Bulgaria (Penal Code, art. 416(3)), one to eight years; Canada (Criminal Code, s. 318(1)), maximum of five years; Jamaica (Offences Against the Person (Amendment) Act 1968, s. 33(1)), maximum of ten years, with the possibility of hard labour; United States (USC Title 18, § 1091(c)), maximum of five years.

[410] Austria (Penal Code, art. § 321(2)), one to ten years.

[411] Lemkin, *Axis Rule*.

[412] UN Doc. E/447, pp. 5–13, art. XIII.

simply allowed their governments to commit'.[413] The Secretariat suggested that redress could consist of compensation to dependants, restitution of seized property, and special benefits such as houses or scholarships.[414] Groups might benefit from reconstruction of monuments, libraries, universities and churches, and compensation to the group for its collective needs.[415] Noting the matter would normally fall to the International Court of Justice, the United States said the issue should be considered by the International Law Commission. It viewed redress and compensation as part of the jurisdiction of an eventual genocide court.[416] The Netherlands agreed: 'The principle of awarding an indemnity in cases where this can be done, seems reasonable.'[417]

In 2005, the United Nations Commission on Human Rights adopted the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law',[418] based upon preparatory work by Theo van Boven[419] and Cherif

[413] *Ibid.*, p. 47. [414] *Ibid.*, p. 49. [415] *Ibid.*

[416] UN Doc. A/401: 'Article VII. The High Contracting Parties agree to take steps, through negotiation or otherwise, looking to the establishment of a permanent international penal tribunal, having jurisdiction to deal with offences under this Convention. Pending the establishment of such tribunal, and whenever a majority of the States party to this Convention agree that the jurisdiction under Article VIII has been or should be invoked, they shall establish by agreement an *ad hoc* tribunal to deal with any such case or cases. Such an *ad hoc* tribunal shall be provided with the necessary authority to indict, to try, and to sentence persons or groups who shall be subject to its jurisdiction, and to summon witnesses and demand production of papers and documents, and shall be provided with such other authority as may be needed for the conduct of a fair trial and the punishment of the guilty. *In addition, such an ad hoc tribunal shall also be authorized to assess damages on behalf of persons found to have sustained losses or injuries as a result of the violation of this Convention by any High Contracting Party.* Prior to the assessment of any such damages any State alleged to have violated the Convention, shall be given an opportunity to be heard and to submit evidence on its behalf. Each High Contracting Party agrees to pay such damages, and costs, as may be assessed against it as a result of its failure to comply with the terms of the Convention. The *ad hoc* tribunal shall have authority to determine the method of distribution and payment of any amounts so awarded' (emphasis added).

[417] UN Doc. E/623/Add.3.

[418] UN Doc. E/CN.4/RES/2005/35.

[419] 'Revised Set of Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law Prepared by Mr Theo van Boven Pursuant to Sub-Commission Decision 1995/117', annex, UN Doc. E/CN.4/Sub.2/1996/17.

Bassiouni.[420] The guidelines make no express reference to genocide, but because they apply to 'serious violations of international humanitarian law constituting crimes under international law' they are obviously applicable to victims of the 'crime of crimes'. The Basic Principles and Guidelines affirm the right to a remedy, including equal and effective access to justice, adequate, effective and prompt reparation for harm suffered, and access to relevant information concerning violations and reparation mechanisms.

Extradition

To the extent the Convention contemplates a regime of territorial jurisdiction, and rejects universal jurisdiction, extradition is obviously fundamental to effective prosecution. Yet the wording of article VII, at least at first reading, presents any obligation to extradite in the most equivocal terms. First, paragraph 1 of article VII eliminates the political offence exception to extradition: '[G]enocide and the other acts enumerated in article 3 shall not be considered as political crimes for the purpose of extradition.' Paragraph 2 states that: 'The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.' Arguably, paragraph 2 of article VII imposes no meaningful obligations at all, aside from a general duty to respect already existing treaties and laws. Yet it is profoundly unsatisfactory to conclude that the provision adds nothing to existing legal obligations. The *travaux préparatoires*, the other clauses of the Convention, as well as subsequent State practice, suggest more may be read into article VII than is at first apparent.

Pledge to grant extradition

The Secretariat draft stated: '[Extradition] The High Contracting Parties declare that genocide shall not be considered as a political crime and therefore shall be grounds for extradition. The High Contracting Parties pledge themselves to grant extradition in cases of genocide.'[421] The

[420] 'The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report of the Special Rapporteur, Mr M. Cherif Bassiouni, Submitted in Accordance with Commission Resolution 1999/33', UN Doc. E/CN.4/2000/62.

[421] UN Doc. E/447, pp. 5–13, art. VII.

Secretariat said that extradition requests in cases of genocide would nevertheless be subject to general principles of international law. Consequently, States would be entitled to refuse extradition if the crime had been committed in their territory or if the victims of the genocide were their nationals.[422] The United States favoured a somewhat more modest formulation, because the Convention could not incorporate an entire extradition convention on genocide. The United States preferred a text requiring States 'to grant extradition in these cases in accordance with [their] laws and treaties'.[423] Some States objected that they would have constitutional problems with an absolute obligation. Two additional issues were raised: rules preventing the extradition of nationals, and rules preventing extradition where fugitives were subject to life imprisonment or the death penalty.[424]

In the Ad Hoc Committee, the United States proposal was adopted unanimously and without significant debate.[425] Each State party to the convention 'pledge[d] itself to grant extradition in such cases in accordance with its laws and treaties in force'. The Sixth Committee considered only minor and largely technical amendments. Belgium proposed that the provision refer specifically to genocide as set out in article II, implying the exclusion of the other acts listed in article III.

Incitement or complicity might be carried on in such a way that some States could not, under their domestic legislation, extradite offenders, said Belgium, adding it would have great difficulty with extradition for all of the acts listed in article III, 'particularly in view of the fact that article [VII] made extradition obligatory'.[426] The United Kingdom supported the idea of limiting extradition to genocide itself, and not the other acts: 'The article would be more readily acceptable if its application were confined to the main crime of genocide excluding acts such as incitement which involved technical difficulties.'[427] The Belgian amendment was rejected by the barest of majorities.[428] The United Kingdom proposed that the phrase 'for purposes of extradition' be substituted for the phrase 'and therefore shall be grounds for extradition'.[429] Both the United Kingdom amendment[430] and the entire article were adopted by large majorities.[431]

[422] *Ibid.*, p. 39. [423] UN Doc. A/401; UN Doc. E/623. [424] UN Doc. A/401.
[425] UN Doc. E/AC.25/SR.24, p. 12. [426] UN Doc. A/C.6/SR.94 (Kaeckenbeeck, Belgium).
[427] *Ibid.* (Fitzmaurice, United Kingdom).
[428] *Ibid.* (seventeen in favour, sixteen against, with two abstentions).
[429] UN Doc. A/C.6/236 and Corr.1.
[430] UN Doc. A/C.6/SR.94 (twenty-seven in favour, seven against, with two abstentions).
[431] UN Doc. A/C.6/SR.95 (twenty-six in favour, two against, with five abstentions).

After the vote, the United States made an interpretative statement explaining that its Government could not give effect to such an undertaking until Congress had adopted legislative measures.[432] Belgium also reserved its position, noting that, pending legislative changes, the Belgian Government would implement the Convention only to the extent allowed by Belgian legislation and the treaties to which Belgium was a party. Considerable time might elapse before such changes could be made, it said.[433]

Benjamin Whitaker referred to experts who considered article VII flawed, in that it allowed each State party to interpret its own laws.[434] Certainly, the obligation assumed by article VII would be clearer if there was no reference to laws and treaties in force. But there is enough in the *travaux* to justify rejection of such a pessimistic interpretation. The Secretariat draft consisted of a pledge to grant extradition. The drafters essentially accepted this principle, although adding the language 'in accordance with their laws and treaties in force'. As a result, then, States are required to grant extradition subject only to legally recognized exceptions, principally the non-extradition of nationals[435] and the right to assurances that cruel, inhuman and degrading punishments, such as the death penalty, not be imposed. Suggesting that the phrase 'in accordance with their laws and treaties in force' goes so far as to allow absolute discretion in the extraditing State is inconsistent with the *travaux préparatoires* and has the consequence of depriving article VII of any *effet utile*.[436] Note that a more general obligation to co-operate in international prosecution of those responsible for war crimes and crimes against humanity has been recognized in a number of resolutions of the

[432] UN Doc. A/C.6/SR.133 (Gross, United States): 'With regard to article VII, relating to extradition, the United States representative declared that, until the United States Congress had passed the legislative measures necessary to bring the convention into force, the United States Government could not hand over any person accused of a crime by virtue of which he was not already liable to extradition under the terms of the existing laws. Moreover, the provisions of the United States Constitution relating to the non-retroactivity of laws were such as to prevent the United States Government from extraditing any person accused of a crime committed before the promulgation of the law defining the new crime.'

[433] UN Doc. A/C.6/SR.133 (Kaeckenbeeck, Belgium).

[434] UN Doc. E/CN.4/Sub.2/1985/6, para. 63.

[435] At the time of ratification, Venezuela made the following statement: 'With reference to article VII, notice is given that the laws in force in Venezuela do not permit the extradition of Venezuelan nationals.'

[436] *Corfu Channel Case (United Kingdom* v. *Albania)*, [1949] ICJ Reports 4, p. 131; *Free Zones Case (France* v. *Switzerland)*, 19 August 1929, PCIJ, Series A, No. 22, p. 13.

General Assembly,[437] the Commission on Human Rights[438] and the Sub-Commission on Human Rights.[439]

Aut dedere aut judicare

The text of the Genocide Convention stops short of imposing any general duty to try or extradite (*aut dedere aut judicare*), comparable to that found in the 1949 Geneva Conventions for grave breaches.[440] Yet, the combination of articles I, IV, V, VI and VII might be read to imply such an obligation.[441] Pursuant to article VI, States having territorial jurisdiction 'should' bring to trial persons suspected of committing genocide. In other cases, article VII imposes an obligation to extradite.[442] But, if this is the case, the scheme seems fraught with loopholes, principally because of the implicit exceptions to the duty to extradite.

During the drafting of the Convention, a Secretariat memo suggested that prosecuting genocide, even if committed outside of a State's territory, be treated not as a right but as a duty.[443] 'The convention will not confine itself to recognizing the right of States to punish genocide; it will make it obligatory for them to do so', said the Secretariat.[444] The Secretariat noted that this was a significant difference to the Charter of the International Military Tribunal, which did not impose on States a formal and general obligation to punish such crimes in the future.[445]

[437] GA Res. 3(I); GA Res. 170(II); GA Res. 2583(XXIV); GA Res. 2712(XXV); GA Res. 2840(XXVI); GA Res. 3020(XXVII); GA Res. 3074(XXVIII).

[438] UN Doc. E/CN.4/RES/2005/35, paras. 4–5.

[439] 'The Situation of Human Rights in Rwanda', SCHR 1996/3, para. 6.

[440] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (1950) 75 UNTS 31, art. 49; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, (1950) 75 UNTS 85, art. 50; Geneva Convention Relative to the Treatment of Prisoners of War, (1950) 75 UNTS 135, art. 129; Geneva Convention Relative to the Protection of Civilians, (1950) 75 UNTS 287, art. 146. See M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Dordrecht, Boston and London: Martinus Nijhoff, 1995.

[441] Lee A. Steven, 'Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations', (1999) 39 *Virginia Journal of International Law*, p. 425 at pp. 460–1.

[442] The duty to extradite persons suspected of committing crimes against humanity is also set out in General Assembly resolutions, for example 'Punishment of War Criminals and Persons Committing Crimes Against Humanity', GA Res. 2840(XXVI).

[443] UN Doc. E/AC.25/8. [444] UN Doc. E/AC.25/3. [445] *Ibid.*

The Secretariat said that a State party would be compelled, pursuant both to the convention and to 'general principles of law', to punish genocidal acts committed on its territory. If it complied, its national courts would have jurisdiction irrespective of the nationality of offenders. If suspects were captured elsewhere, the capturing State would grant extradition to the State where the crime was committed. If this did not occur, then the suspects would be judged pursuant to universal jurisdiction. This principle of law – *aut dedere aut judicare* – was already set out in several treaties, noted the Secretariat.[446]

Iran pushed to include the concept during the debate on article V, explaining a distinction between what it called 'primary universal punishment' and 'subsidiary universal punishment'. Iran said primary universal punishment, which applied to offences under international law such as piracy, differed from subsidiary punishment in that the offender was tried in the State which had arrested him, whether or not a request for extradition was received from the State upon whose territory the offence had been formulated. In contrast, under the principle of subsidiary punishment, which dated from the time of Grotius, the State was bound to extradite offenders unless extradition was not requested or was impossible. 'While few legal systems recognized the principle of primary universal punishment, many admitted the principle of subsidiary punishment', said Iran.[447]

In its commentary on the draft statute of the international criminal court, the International Law Commission observed that 'the [Genocide] Convention is not based on the principle *aut dedere aut judicare* but on the principle of territoriality'.[448] Nevertheless, in its draft Code of Crimes, adopted two years later, it proposed precisely such a rule in the case of genocide.[449] Professor Eric David has argued that a modern

[446] For example, the Slavery Convention, note 19 above, and the Convention for the Suppression of Counterfeiting Currency, (1931) 112 LNTS 371.

[447] UN Doc. A/C.6/SR.100 (Abdoh, Iran).

[448] 'Report of the Working Group on a Draft Statute for an International Criminal Court', *Yearbook . . . 1993*, Vol. II (Part 2), UN Doc. A/CN.4/SER.A/1993/Add.1 (Part 2), p. 110; 'Report of the Commission to the General Assembly on the Work of Its Forty-Sixth Session', *Yearbook . . . 1994*, Vol. II (Part 2), UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), p. 42. See also 'Report of the International Law Commission', UN Doc. A/42/10, pp. 12 and 15 (1987).

[449] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', UN Doc. A/51/10, pp. 51–5, art. 9.

interpretation of the Convention, flowing from the terms of article I, may imply the application of *aut dedere aut judicare*.[450]

The International Court of Justice has declined to find within the terms of the Genocide Convention any obligation upon States to prosecute persons suspected of perpetrating genocide, with the exception of crimes committed on the territory of the State in question. Referring to the conclusion that genocide had taken place in Srebrenica, the Court recalled that this was not part of the territory of Serbia. According to the Court, no obligation upon Serbia to prosecute perpetrators of the Srebrenica massacre could be deduced from the Convention. The Court said that States were neither prohibited from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed (adding, 'which are compatible with international law, in particular the nationality of the accused') but nor were they obliged to do so.[451] Had the Court or some of its judges felt that there was a customary legal duty going beyond the terms of the Convention, words to this effect might have been found in the judgment or in one of the individual opinions.

What if there is no extradition treaty in force? Some more recent treaties in the area of serious human rights abuses and international criminal law declare that, if there is no extradition treaty, the convention itself is deemed to fulfil that role.[452] An agreement by African heads of State in November 2006 does this expressly for the crime of genocide.[453] There is no practice permitting a conclusion as to whether or not the Genocide Convention might be considered to constitute an extradition treaty in and of itself and between States parties, in the absence of some more general bilateral arrangement. The question was considered by a Canadian Royal Commission of Inquiry presided by Jules Deschênes. Justice Deschênes felt that, had this been the intent of the drafters, a more explicit formulation would have been used in the Convention.[454]

[450] David, *Principes de droit*, pp. 667–8, para. 4.146.

[451] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 442.

[452] For example, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, note 21 above, art. 8.

[453] Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and All Forms of Discrimination, adopted by the International Conference on the Great Lakes Region on 29 November 2006, art. 14(2).

[454] Jules Deschênes, *Commission of Inquiry on War Criminals*, Part I, Ottawa: Supply and Service Canada, 1986, p. 108.

Answering the same question in a slightly different way, the legal adviser to the United States Department of State told the Senate Foreign Relations Committee that article VII of the Convention imposed no obligation to negotiate new extradition treaties in order to facilitate prosecution of genocide.[455]

Extradition of nationals

Another issue raised during drafting of the Genocide Convention was the extradition of nationals. Many domestic penal codes prohibit extradition of citizens and in some cases this is even elevated to a constitutional right. During debates in the Sixth Committee, Luxembourg asked whether the convention would oblige a State to extradite its own nationals.[456] France answered that 'the *ad hoc* committee had only envisaged extradition as applying to foreigners and not to a country's own nationals'.[457] Belgium 'thought that the phrase "in accordance with its laws" in the second paragraph of article [VII] made it quite clear that no country would be obliged to extradite its own nationals, if its laws did not permit that'.[458] Pratt de María of Uruguay told the Committee that some countries, including his own, accorded extradition of their own nationals. However, the text would enable each country to act in accordance with its own laws in that respect.[459] The discussion concluded with a statement by the chair that States whose legislation did not provide for extradition of their own nationals would be under no obligation to grant it.[460]

A norm tolerating impunity in cases where States refuse to extradite their own nationals is obviously incompatible with the object and purpose of the Convention. The rationale for such a rule is rooted in outdated concepts of national sovereignty. If States are unable or unwilling to bring their own nationals to trial for genocide, they should not be allowed to refuse extradition to States willing to assume their international duties.

[455] *United States of America, Hearing Before the Committee on Foreign Relations, United States Senate, 5 March 1985*, Washington: US Government Printing Office, 1985, pp. 18–19. See also *United States of America, Hearing Before the Committee on Foreign Relations, United States Senate, 12 September 1984*, Washington: US Government Printing Office, 1984, p. 48.

[456] UN Doc. A/C.6/SR.94 (Pescatore, Luxembourg). [457] *Ibid.* (Chaumont, France).

[458] *Ibid.* (Kaeckenbeeck, Belgium). [459] *Ibid.* (Pratt de María, Uruguay).

[460] UN Doc. A/C.6/SR.95 (Alfaro, chair).

Exceptions to extradition

As a crime committed, generally, by the State or with its complicity, and for what are generally political motives, genocide would seem to be the political crime *par excellence*. For this reason, article VII specifies that genocide and the other acts enumerated in article III of the Convention 'shall not be considered as political crimes for the purpose of extradition'. It is a highly important provision, neutralizing the political offence exception to extradition, codified in most extradition treaties.[461] As Gerald Fitzmaurice explained to the Sixth Committee, the crime of genocide is 'inherently political': 'It was precisely because of the political nature of the crime that it was necessary to state that, for purposes of extradition, it should be considered as non-political.'[462] Article VII was cited by Judge Anthony Evans of the Westminster Magistrates' Court, describing the Genocide Convention as 'persuasive' on the issue of any political offence exception to extradition.[463]

The Secretariat draft declared that 'genocide shall not be considered as a political crime and therefore shall be grounds for extradition'.[464] The United States draft contained a virtually identical provision.[465] In the Sixth Committee, Belgium proposed that: 'The crime of genocide as defined in article II shall not be considered as a political crime exempt from extradition.'[466] The United States explained that the provision would 'ensure that criminals would not escape being brought to justice on the pretext that the crime was not considered as extraditable'.[467] The Soviet Union was disturbed, because the text of the draft convention made it quite clear that genocide was not a political crime, complaining that so many delegations had changed their opinion on the point.[468]

[461] Geoff Gilbert, *Aspects of Extradition Law*, Dordrecht and Boston: Kluwer Academic Publishers, 1991. But note the European Convention on Extradition, (1960) 359 UNTS 273, ETS 24, art. 3(4), which declares that the political offence exception does not affect obligations assumed by the States parties pursuant to other multilateral treaties. The 1975 Additional Protocol to the European Convention on Extradition, ETS 86, art. 1 (a), specifies that art. 3(4) of the European Convention on Extradition applies to the Genocide Convention. See Jean Pradel and Geert Corstens, *Droit pénal européen*, Paris: Dalloz, 1999, pp. 119–20.

[462] UN Doc. A/C.6/SR.94 (Fitzmaurice, United Kingdom).

[463] *Government of the Republic of Rwanda* v. *Bajinya et al.*, 6 June 2008, para. 127.

[464] UN Doc. E/447, pp. 5–13, art. VIII. [465] UN Doc. E/623. [466] UN Doc. A/C.6/217.

[467] UN Doc. A/C.6/SR.94 (Maktos, United States). [468] *Ibid.* (Morozov, Soviet Union).

In comments to the Special Rapporteur of the Sub-Commission, Nicodème Ruhashyankiko, Germany said that requests for extradition for racially motivated killings during the Nazi era had been refused on several occasions on the grounds that these constituted political crimes. Germany said: 'It can only be assumed that the countries concerned feel entitled on the strength of Article VII(2) of the Convention to refuse such requests because the extradition obligation is, in their view, subject to national law, which may place a special interpretation on the concept of a political crime.'[469] Some countries have explicitly provided in their genocide legislation that it is not to be regarded as a political crime for the purposes of extradition.[470]

Most extradition treaties also impose a 'double criminality' requirement.[471] For extradition to be obtained, the requesting State must demonstrate that the same crime exists in the criminal law of the requested State. Given that the crime is defined in the Convention itself, this should be unnecessary for genocide. States pledge to grant extradition with respect to crimes defined in articles II and III of the Convention, and not with respect to some national perception of criminal behaviour. Nevertheless, at the time of ratification, the United States formulated the following understanding: 'That the pledge to grant extradition in accordance with a state's laws and treaties in force found in article VII extends only to acts which are criminal under the laws of both the requesting and the requested state.' Such an 'understanding' is really a reservation, in that it affects the obligations assumed by the United States.[472] Its apparent purpose is to make extradition conditional on the definition of genocide in the laws of the United States rather than the definition in the Convention. Malaysia made an identical reservation upon ratifying the Convention in 1994.

[469] 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur', note 176 above, para. 273.

[470] Germany (Act Concerning the Accession of the Federal Republic of Germany to the Convention for the Prevention and Punishment of the Crime of Genocide, UN Doc. E/CN.4/Sub.2/303/Add.2, art. 4); Brazil (Act No. 2889 Defining and Punishing the Crime of Genocide of 1 October 1956, art. 6); Italy (Constitutional Act No. 1 of 21 June 1969, Extradition in the Case of Crimes of Genocide, UN Doc. E/CN.4/Sub.2/303); Ireland (Genocide Act 1973, s. 3); Israel (Crime of Genocide (Prevention and Punishment) Law, art. 8); United Kingdom (Genocide Act 1969).

[471] Gilbert, *Aspects*, pp. 47–54.

[472] *Belilos* v. *Switzerland*, Series A, No. 132, 29 April 1988.

Rights of the accused

Whether or not States may refuse extradition because a suspect has already been tried and either convicted or acquitted is not resolved by the Convention. The issue does not appear to have been considered by the drafters. Many extradition treaties entitle the requested State to refuse extradition on these grounds, but the principle is far from universal. International case law supports the idea that prosecution in one State for an offence where the individual has already been tried in another State does not offend the *non bis in idem* rule, set out in such instruments as the International Covenant on Civil and Political Rights.[473] The norm is also recognized in the Rome Statute of the International Criminal Court,[474] although not in the *ad hoc* statutes, which have no general prohibition on trial before the international tribunal subsequent to acquittal or conviction before national courts.

Many extradition treaties consider unfair procedure in the requesting State to be grounds for refusing extradition. Here, too, the Convention is silent. The right to a fair trial, recognized in such fundamental provisions as common article 3 to the Geneva Conventions[475] and article 11 of the Universal Declaration of Human Rights[476] is certainly a valid ground to refuse extradition. But it should be invoked only in the clearest of cases and not, for example, to deny underdeveloped countries the right to try genocide suspects simply because issues of resources mean that their courts lack the accoutrements of those in rich countries. In 2006, Amnesty International and Human Rights Watch issued statements calling upon the United Kingdom not to extradite genocide suspects to Rwanda because of their concerns about fair trials. They urged the United Kingdom to exercise universal jurisdiction as an alternative, although this was not possible under the laws of the country at the time.[477]

Most modern extradition treaties allow States to make extradition subject to an undertaking that the death penalty not be imposed. The legitimacy of such clauses, even in the case of genocide, was recognized by the Rome conference. A principal reason for the exclusion of capital

[473] Note 21 above, art. 14(7). [474] Note 1 above, art. 20. [475] Note 449 above.
[476] Universal Declaration of Human Rights, GA Res. 217A(III), UN Doc. A/810.
[477] Human Rights Watch Press Release, 1 November 2007: 'UK: Put Genocide Suspects on Trial in Britain, UK Prosecution Preferable to Extradition'; Amnesty International, '"Donapostropet extradite" Rwanda suspects', 2 November 2007.

punishment from the Rome Statute was constitutional and international legal prohibitions applicable in many States where extradition may result in capital punishment.[478] Making extradition subject to such a condition is not a refusal to extradite, and should not therefore be considered to breach article VII. A requesting State that refused to make an undertaking not to impose capital punishment would be ensuring impunity for the offender and, therefore, would itself violate articles I and VI of the Convention. At the time of ratification, Portugal made the following declaration: 'The Portuguese Republic declares that it will interpret article VII of the [Convention] as recognizing the obligation to grant extradition established therein in cases where such extradition is not prohibited by the Constitution and other domestic legislation of the Portuguese Republic.' Article 33(3) of Portugal's Constitution prohibits extradition if the death penalty is provided for the offence in the law of the requesting State.

The Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment obliges States parties to refuse extradition where there are substantial grounds for believing that the suspect would be in danger of being subjected to torture.[479] The Torture Convention adds that, in determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.[480] Hypothetically, a conflict could arise between the duty to extradite, pursuant to article VII of the Genocide Convention, and the obligation to refuse extradition when there is a suspicion that torture would be imposed upon the fugitive, pursuant to article 3 of the Torture Convention. A State that refuses extradition for this reason should be prepared to ensure that the offender is brought to trial, either before its own courts, before those of another State or before an international tribunal.

[478] *Soering* v. *United Kingdom*, Series A, No. 161, 7 July 1989.

[479] Note 21 above, art. 3(1). Note that, in the case of refugees, the principle of *non-refoulement* does not apply because the Refugee Convention is inapplicable in the case of persons with respect to whom there are serious reasons for considering that they have committed 'a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes': Convention Relating to the Status of Refugees, (1954) 189 UNTS 137, art. 1(F)(a).

[480] Note 21 above.

The Philippines formulated the following reservation at the time of accession: 'With reference to article VII of the Convention, the Philippine Government does not undertake to give effect to said article until the Congress of the Philippines has enacted the necessary legislation defining and punishing the crime of genocide, which legislation, under the Constitution of the Philippines, cannot have any retroactive effect.' Whatever the legality of the reservation, it should be noted that, while national laws may differ on this point, there is no fundamental human rights issue of retroactivity involved in the case of extradition. The Convention clarifies the fact that the crime of genocide has always existed, and the prohibition on retroactive offences does not apply where crimes are recognized at international law.[481]

State practice

In his report to the Sub-Commission, Benjamin Whitaker said that, to his knowledge, no extradition for genocide had ever occurred.[482] That was probably true at the time,[483] but there are now several precedents involving extradition to Rwanda. Probably the first such case involved Froduald Karamira, who was arrested in India and charged with participation in the Rwandan genocide. Karamira was sent back to Rwanda from India in July 1996. There was no extradition treaty in force, but the two States considered extradition a requirement of article VII of the

[481] International Covenant on Civil and Political Rights, note 21 above, art. 15(2).

[482] UN Doc. E/CN.4/Sub.2/1985/6, para. 63.

[483] Arguably, the extradition of John Demjanjuk from the United States to Israel might be considered a case of extradition to stand trial for genocide. Demjanjuk's extradition was sought for prosecution pursuant to the same Israeli statute under which Eichmann had been tried, a law whose definitions were modelled on art. II of the Genocide Convention. Art. III of the extradition treaty between the United States and Israel stated: 'When the offence has been committed outside the territorial jurisdiction of the requesting Party, extradition need not be granted unless the laws of the requested Party provide for the punishment of such an offence committed in similar circumstances . . .' As the District Court noted, although Israel's laws allowed for prosecution of murder, manslaughter and malicious wounding committed outside of Israel, United States law did not provide for trial and punishment of persons accused of murdering civilians in Nazi concentration camps. Consequently, the extradition treaty did not require extradition, but it did not prohibit it either. In such cases, extradition was discretionary and, the Court noted, the United States authorities had decided to exercise their discretion in favour of extradition of Demjanjuk, as they were entitled to under the extradition treaty. See *In the Matter of the Extradition of John Demjanjuk*, note 167 above, pp. 559–61; see also *Demjanjuk* v. *Petrovsky*, note 168 above.

Genocide Convention.[484] While en route, the International Criminal Tribunal for Rwanda attempted to exercise jurisdiction. By virtue of the rule of primacy applicable to the Tribunal, its claim took precedence over that of the Rwandan justice system. Rwanda persisted in its demand, and eventually the prosecutor of the International Tribunal dropped his competing request. Karamira was tried by Rwandan courts in January 1997 and sentenced to death. His appeal was denied and, on 22 April 1998, he was executed in public by firing squad before a packed football stadium.[485]

But Rwanda has not always been successful in obtaining extradition. In March 1996, it applied to Cameroon for the extradition of Jean-Bosco Bayaragwiza. On 21 February 1997, the Central Appeals Court of Cameroon denied the Rwandan request. It claimed that Rwanda had not filed the application through proper diplomatic channels, that the request was a copy and not an original, that the crimes listed in the request were not crimes under the law of Cameroon, and that Cameroon would not extradite to a country where the death penalty might be imposed. Cameroon is not a party to the Genocide Convention.

Israel obtained custody of Adolf Eichmann not through extradition but by a spectacular kidnap ploy. Eichmann was abducted from Argentina on 11 May 1960 where he had been living under the nom de guerre of Ricardo Klement since 1950.[486] Argentina immediately protested his capture, demanding Eichmann be returned and that those responsible for breaching Argentine law be punished. Argentina complained to the United Nations Security Council.[487] Israel answered: 'If the volunteer group violated Argentine law or interfered with matters within the sovereignty of Argentina, the Government of Israel wishes to express its regret. The Government of Israel requests that the special significance of bringing to trial the man responsible for the murder of millions of persons belonging to the Jewish people to be taken into account, and asks that due weight be given to the fact that the volunteers,

[484] Personal communication from Faustin Ntezilyayo, former Minister of Justice, Rwanda. But, in testimony before the Committee for the Elimination of Racial Discrimination, Cameroon said it had refused to extradite those charged with genocide because Rwanda had the death penalty; Cameroon said that it had sent accused to the international tribunal, however: UN Doc. CERD/C/SR.1201, para. 74.

[485] Schabas, 'Justice, Democracy and Impunity'.

[486] P. O'Higgins, 'Unlawful Seizure and Irregular Extradition', (1960) 36 *British Yearbook of International Law*, p. 279; M. H. Cardozo, 'When Extradition Fails, Is Abduction the Solution?', (1960) 55 *American Journal of International Law*, p. 127.

[487] UN Doc. S/4336 (1960).

who were themselves survivors of that massacre, placed this historic mission above all other considerations.'[488]

On 23 June 1960, the United Nations Security Council adopted a resolution in the *Eichmann* case, noting that acts such as the kidnapping of Eichmann involved 'a breach of the principles upon which international order is founded, creating an atmosphere of insecurity and distrust incompatible with the preservation of peace'. At the same time, the Council declared itself to be '[m]indful of the universal condemnation of the persecution of the Jews under the Nazis and of the concern of people in all countries that Eichmann should be brought to appropriate justice for the crimes of which he is accused'.[489] The resolution requested Israel 'to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law'.

Poland and the Soviet Union abstained, fearing that ambiguity in the resolution might favour Eichmann himself or benefit other war criminals.[490] The details of the Genocide Convention were not considered in the Security Council debate, although Tunisia suggested that Israel had 'a disquieting conception of the extension of the exercise of sovereignty both in space and in time', and expressed surprise that Eichmann could be judged in Israel.[491] On 3 August 1960, Israel and Argentina signed a joint communiqué: 'The Governments of Argentina and Israel, animated by a desire to give effect to the resolution of the Security Council of 23 June 1960, in so far as the hope was expressed that the traditionally friendly relations between the two countries will be advanced, resolve to regard as closed the incident which arose out of the action taken by citizens of Israel, which infringed the fundamental rights of the State of Argentina.'[492] At trial, Eichmann argued that his kidnapping rendered the jurisdiction of the court ineffective. Dismissing the charge, the District Court cited the Security Council resolution of 23 June 1960.[493] It also referred to various common law precedents supporting the position that, even if a fugitive is apprehended illegally, this cannot deprive the trial court of jurisdiction.[494] As the Court noted, by the 3 August 1960 statement, Argentina 'waived its claims', and Argentina was

[488] UN Doc. S/4342 (1960).

[489] This paragraph did not appear in the original draft resolution, submitted by Argentina: UN Doc. S/4345; UN Doc. S/PV.865, para. 47. It was added as the result of an amendment proposed by the United States: UN Doc. S/PV.866, para. 78.

[490] UN Doc. S/PV. 868, para. 56. [491] UN Doc. S/PV.867, paras. 76–7.

[492] Cited in *A-G Israel* v. *Eichmann*, note 150 above, para. 40. [493] *Ibid.*, para. 39.

[494] *Ker* v. *Illinois*, 119 US 436 (1886).

the wronged party, not Eichmann. Therefore, '[a]ccording to the principles of international law no doubt can therefore be cast on the jurisdiction of Israel to bring the accused to trial after 3 August 1960'.[495] The Supreme Court of Israel endorsed this reasoning, citing the Security Council resolution, and saying that, 'in bringing the appellant to trial, [Israel] has functioned as an organ of international law and has acted to enforce the provisions of that law through its own laws'. The Supreme Court distinguished the kidnapping from cases where a State was applying its laws alone.[496]

Statutory limitation

The Genocide Convention contains no provision dealing with statutory limitations. The *travaux préparatoires* have only the barest of suggestions that this was an issue. In an isolated comment, Professor Castberg of the Norwegian delegation said that the right of a State not to prosecute 'when considerable time has elapsed since the crime was committed' should be reserved.[497] Yet it can hardly now be contested that genocide could be subject to statutory limitation, even if this is not explicitly required by the Convention. A State that retained provisions of this nature in its domestic legislation would be in breach of articles V (obligation to enact legislation), VI (duty to prosecute) and VII (obligation to extradite). A teleological interpretation of these provisions compensates for the silence of the Convention.

The Charter of the International Military Tribunal had no provision on statutory limitation, but this is hardly surprising, as in the absence of a text there could be no time bar to prosecutions. In any case, the question is really academic because the Tribunal has been *functus officio* since issuing its judgment in 1946. Control Council Law No. 10 stated that: 'In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect of the period from 30 January 1933 to 1 July 1945.'[498] Like the

[495] *A-G Israel* v. *Eichmann*, note 150 above, para. 50.

[496] *A-G Israel* v. *Eichmann*, note 158 above, para. 13(8)(a).

[497] UN Doc. E/623/Add.2. Norway repeated the comments that its representative had made in the Sixth Committee of the General Assembly, in 1947, concerning prosecution of state officials.

[498] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, *Official Gazette of the Control Council for Germany*, No. 3, Berlin, 31 January 1946, pp. 50–5, art. II(5).

Nuremberg Charter, the statutes of the *ad hoc* tribunals contain no provision dealing with statutory limitations.

The Rome Statute of the International Criminal Court departs from the model. Article 29 states: 'The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.'[499] The issue was viewed as one in which national and international law might find themselves in conflict, with several States expressing the progressive position opposed to statutory limitation, and others noting that it remained part of their national law.[500] Testifying to the difficulty with the concept for some delegations, the report of the Working Group on General Principles at the Rome conference included a footnote:

> Two delegations were of the view that there should be a statute of limitations for war crimes. One delegation agreed to the above text in a show of flexibility, but stressed that there should be a possibility not to proceed if, due to the time that has passed, a fair trial cannot be guaranteed. The question of statute of limitations will need to be revisited if treaty crimes are included. There must also be a special regime for crimes against the integrity of the Court. The absence of a statute of limitations for the Court raises an issue regarding the principle of complementarity given the possibility that a statute of limitations under national law may bar action by the national courts after the expiration of a certain time period, whereas the ICC would still be able to exercise jurisdiction.[501]

Thus, the *travaux* of the statute seem to suggest a persistent ambiguity about the scope of the norm prohibiting statutory limitations on international crimes, including genocide. Yet a literal reading of article 29

[499] *Rome Statute of the International Criminal Court*, note 1 above, art. 29. See: Christine Van den Wyngaert and John Dugard, 'Non-Applicability of Statute of Limitations', in Antonio Cassese, Paola Gaeta and John R. W. D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary*, Oxford: Oxford University Press, 2002, pp. 873–88; William A. Schabas, 'Article 29', in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Baden-Baden: Nomos Verlagsgesellschaft, 2008, pp. 845–8.

[500] 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court', UN Doc. A/50/52, para. 127, p. 29; 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc. A/51/10, Vol. I, paras. 195–6, p. 45, para. 324, p. 68; *ibid.*, Vol. II, pp. 88–9; 'Decisions Taken by the Preparatory Committee at its Session Held from 11 to 21 February 1997', UN Doc. A/AC.249/1997/L.5, pp. 24–5; 'Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands', UN Doc. A/AC.249/1998/L.13, pp. 57–8; 'Draft Statute for the International Criminal Court', UN Doc. A/CONF.183/2/Add.2, pp. 62–3; UN Doc. A/CONF.183/C.1/SR.2, paras. 45–74.

[501] UN Doc. A/CONF.183/C.1/WGGP/L.4, p. 4, n. 7; UN Doc. A/CONF.183/C.1/WGGP/L.4/Corr.1, n. 7.

leads to an intriguing result. To the extent that the statute does more than simply create a court, and actually imposes obligations on States, can it not be sustained that article 29 in effect constitutes a prohibition on statutory limitations of genocide, as well as of the other crimes within the Court's subject matter jurisdiction? A State would breach the Statute if its legislation allowed genocide prosecutions to become time barred. Even if this interpretation is considered too radical, the complementarity provisions of the Statute render ineffective any attempt by national law at statutory limitation. A State party which allowed such an obstacle to a genocide prosecution would, in effect, concede jurisdiction to the International Criminal Court in such cases.

Many domestic criminal law systems provide for statutory limitation of crimes, even the most serious.[502] Under French law, for example, prosecutions for murder are time barred after ten years.[503] Codes derived from the Napoleonic model generally have similar provisions. During the 1960s, as the application of statutory limitations in national penal codes to Nazi war criminals loomed on the horizon, pressure mounted to change domestic legislation.[504] On an international level, these developments took the form of General Assembly resolutions[505] and treaties within the United Nations[506] and the Council of Europe.[507] Both conventions refer specifically to the

[502] See Anne-Marie Larosa, *Dictionnaire de droit international pénal, Termes choisis*, Paris: Presses universitaires de France, 1998, pp. 50–2.

[503] Penal Code (France), art. 7.

[504] Germany seems to have had a twenty-year limitation period on Nazi crimes. On 25 March 1965, the Bundestag extended the limitation date for murder to 31 December 1969, which was the twentieth anniversary of the establishment of the German Federal Republic. But this was inadequate, and the date was again extended until 31 December 1979. On 3 July 1979, the Bundestag voted to eliminate any limitation date for murder. See Dick de Mildt, *In the Name of the People: Perpetrators of Genocide in the Reflection of Their Post-War Prosecution in West Germany*, The Hague, London and Boston: Martinus Nijhoff Publishers, 1996, pp. 29–30; Ingo Müller, *Hitler's Justice: The Courts of the Third Reich*, Cambridge, MA: Harvard University Press, 1991, pp. 243–9; Robert A. Monson, 'The West German Statute of Limitations on Murder: A Political, Legal and Historical Exposition', (1982) 30 *American Journal of Comparative Law*, p. 605.

[505] Note 437 above.

[506] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, (1970) 754 UNTS 73. See Robert H. Miller, 'The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity', (1971) 65 *American Journal of International Law*, p. 476.

[507] European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes of 25 January 1974, ETS 82.

crime of genocide as an offence for which there shall be no statutory limitation. The instruments have not been a great success in terms of ratifications, leading some academics to contest the suggestion that this is a customary norm.[508]

The French Cour de Cassation determined, in the *Barbie* case, that the prohibition on statutory limitations for crimes against humanity is now part of customary law.[509] The United States legislation adopted to implement the Genocide Convention specifies that there is no statutory limitation for genocidal killing although, as Diane Amann and Mortimer Sellers have pointed out, 'by implication, domestic prosecution of other genocidal acts, such as the infliction of serious physical or mental harm, would have to take place within the general limitations period of five years'.[510]

Some argue that retroactive prohibition of statutory limitation violates fundamental legal principles.[511] The European Convention on the Non-Applicability of Statutory Limitations is cited in support, because it does not apply in cases where prosecution of the offence is already time barred. But this is a questionable proposition. The issue is whether the crime was known as an offence at the time it was committed. A procedural rule barring prosecution under domestic law can hardly change the fundamental truth of this proposition, and as a result it cannot be claimed that the *nullum crimen sine lege* rule is breached. A recent decision of the Hungarian Constitutional Court endorses this position.[512]

[508] Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford: Clarendon Press, 1997, p. 126.

[509] *Fédération nationale des déportés et internés résistants et patriotes et al.* v. *Barbie*, (1984) 78 ILR 125, p. 135. See also France, Assemblée Nationale, 'Rapport d'information déposéen application de l'article 145 du Règlement par la Mission d'information de la Commission de la défense nationale et des forces armées et de la Commission des affaires étrangères, sur les opérations militaires menées par la France, d'autres pays et l'ONU au Rwanda entre 1990 et 1994', Paris, 1999, p. 286.

[510] Diane Marie Amann and M. N. S. Sellers, 'The United States of America and the International Criminal Court', (2002) 50 *American Journal of Comparative Law*, p. 381 at p. 399.

[511] Jescheck, 'Genocide', p. 543.

[512] Gabor Halmai and Kim Lane Scheppele, 'Living Well is the Best Revenge: The Hungarian Approach to Judging the Past', in A. James McAdams, *Transitional Justice and the Rule of Law in New Democracies*, Notre Dame and London: University of Notre Dame Press, 1997, pp. 155–84 at pp. 160–4; Naomi Roht-Arriaza, 'Special Problems of a Duty to Prosecute: Derogation, Amnesties, Statutes of Limitation, and Superior Orders', in Roht-Arriaza, *Impunity and Human Rights*, pp. 57–70 at p. 64.

Eichmann pleaded that his prosecution was time barred, invoking a fifteen-year limitation period in force in Argentina. The District Court ruled that Argentine norms could not apply. It also noted a provision in the applicable Israeli legislation declaring that 'the rules of prescription . . . shall not apply to offences under this Law'.[513]

[513] *A-G Israel* v. *Eichmann*, note 150 above, para. 53.

9

State responsibility and the role of the International Court of Justice

The Genocide Convention is principally concerned with prosecution of individuals who perpetrate genocide. In articles II and III, the Convention defines the offence. In article IV, it eliminates the defence of official capacity for senior officials and parliamentarians. In article V, the Convention requires States parties to adopt appropriate legislation within their domestic criminal law. Article VI establishes the jurisdictional bases for such prosecutions, and article VII addresses extradition issues. The Convention imposes a number of obligations upon States, for which they can obviously be held accountable. However, it does not explicitly declare that States themselves may be responsible for genocide. Nevertheless, States have often been accused of committing genocide. In fact, given the nature of the crime, it is difficult to conceive of genocide without some form of State complicity or involvement.

According to article IX, disputes concerning 'the interpretation, application or fulfilment 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'. In its February 2007 judgment on the Bosnian application against Serbia, the Court confirmed that States as well as individuals may commit genocide, Furthermore, it held that article IX of the Convention gives the Court jurisdiction to adjudicate charges by one State that another has perpetrated genocide.

It is also possible for the International Court of Justice to exercise jurisdiction over States that are not parties to the Genocide Convention, or those that are but that have made reservations to article IX, to the extent that such States have accepted the general jurisdiction of the International Court of Justice in accordance with article 36(2) of its Statute. There are at least sixteen States that fall into this category: Botswana, Cameroon, Djibouti, Guinea-Bissau, Japan, Kenya, Madagascar, Malawi, Malta, Mauritius, Nauru, Nigeria, Somalia,

Surinam, Swaziland and Uganda. The Court could exercise jurisdiction in a case charging one of these States with genocide or violation of one of the other obligations in the Convention that is deemed to constitute customary international law.

Drafting of the Convention

During the drafting of the Convention, sharply differing views emerged about the possibility that States, in addition to individuals, could be held accountable for genocide. Three rather different conceptions of the role of the Convention were at work. Taking the middle path, the United States and the Soviet Union oriented their efforts to individual criminal responsibility. They agreed that the principal or exclusive vehicle for individual prosecutions should be national courts. While France and the United Kingdom believed national judicial systems could not be counted upon to prosecute genocide, they drew different conclusions from this observation. France considered that the future genocide convention was directed exclusively at individual responsibility. Rejecting the prospect of national trials, France viewed an international court as a *sine qua non*. On the other hand, the United Kingdom saw the convention directed at States and not individuals. It had no real interest in the details of criminal prosecution, believing firmly in mechanisms to hold States accountable. The United Kingdom said it was impossible to blame any particular individual for actions for which whole governments or States were responsible.

Debate on article IV

These issues were initially aired within the Sixth Committee during the debate about article IV and the availability of a defence of official capacity. A United Kingdom amendment introduced the concept of State, and not just individual, responsibility for genocide: 'Criminal responsibility for any act of genocide as specified in articles II and IV shall extend not only to all private persons or associations, but also to States, governments, or organs or authorities of the State or government. Such acts committed by or on behalf of States or governments constitute a breach of the present Convention.'[1] Gerald Fitzmaurice suggested the convention contain a direct reference to the type of genocide most likely

[1] UN Doc. A/C.6/236 and Corr.1.

to occur, namely, genocide committed by a State or government. He said it should be assumed that individuals acting on behalf of the State would not be punished by its courts.[2] The United Kingdom conceded that, under its somewhat ambiguous text, States and governments could not be made criminally responsible.[3] The International Court of Justice 'would not pronounce sentence but would order cessation of those acts', explained Fitzmaurice.[4]

Belgium supported the United Kingdom amendment, deeming it a valuable link with the International Court of Justice. 'The convention should provide for recourse to the International Court of Justice, which was the only international juridical body capable of rendering a mature, considered and impartial decision on the responsibility of the State', it said.[5] Noting that State liability obeyed different principles than criminal responsibility, Syria said it was important to provide for State liability and recourse to the International Court of Justice.[6] Sweden observed that, while States could not be punished as such, a clause could be included on reparations to be paid to victims.[7]

France challenged applying the concept of criminal liability to States.[8] Venezuela agreed that States could not be punished, in the sense of criminal law, and that they could only be condemned to material reparations. This would not serve as an example 'because the State would not be touched as would a private individual in a similar situation, since the taxpayers would pay the required reparations'.[9] For Panama, the convention was intended as an instrument of criminal law, not civil law.[10] The United States said the convention's aim was to ensure repression of genocide and punishment of culprits. It should not get involved in payment of reparations, a question that belonged to another branch of the law.[11] Canada saw no point in affirming that States were breaching the convention if there was no intent to punish them.[12]

[2] UN Doc. A/C.6/SR.95 (Fitzmaurice, United Kingdom).
[3] UN Doc. A/C.6/SR.96 (Fitzmaurice, United Kingdom).
[4] UN Doc. A/C.6/SR.92 (Fitzmaurice, United Kingdom).
[5] UN Doc. A/C.6/SR.95 (Kaeckenbeeck, Belgium). See also *ibid.* (Medeiros, Bolivia); UN Doc. A/C.6/SR.96 (Pescatore, Luxembourg); and UN Doc. A/C.6/SR.95 (Dihigo, Cuba).
[6] *Ibid.* (Tazari, Syria). [7] UN Doc. A/C.6/SR.92 (Petren, Sweden).
[8] UN Doc. A/C.6/SR.95 (Chaumont, France). [9] *Ibid.* (Pérez-Perozo, Venezuela).
[10] *Ibid.* (Aleman, Panama). [11] *Ibid.* (Maktos, United States).
[12] *Ibid.* (Feaver, Canada).

The United Kingdom amendment recognizing State responsibility for genocide was rejected by a margin of only two votes.[13] The numerous explanations of the vote indicate that it had failed to explain satisfactorily that the purpose was to integrate a concept of State civil liability into the convention. Several delegations may have agreed with the concept of State responsibility but found the formulation equivocal. Iran said it could not vote in favour because there was no clear distinction between criminal and civil liability.[14] The Dominican Republic had voted against the amendment because, under its law, 'legal entities could not be held guilty of committing crimes'.[15] Brazil said the United Kingdom text was 'superfluous', giving 'the impression that a State could be held guilty of the commission of a crime'.[16] Egypt explained that '[i]f States and Governments were to be mentioned, the list should have been extended to include other corporate bodies'.[17] Peru described the provision as incomplete, because there was no international tribunal to judge such cases.[18] Given the closeness of the vote, the defeat of the United Kingdom amendment should not be taken as a rejection of the idea of State responsibility. The statements and the vote indicate widespread opposition to any concept of State responsibility in a criminal law sense but an equally widespread support for State civil liability.

Debate on article VI

The issue arose again when the Sixth Committee turned to article VI, dealing with jurisdiction over genocide prosecutions. The United Kingdom attempted to add a new sentence to the provision:

> Where the act of genocide as specified by articles II and IV is, or is alleged to be the act of the State or government itself or of any organ or authority of the State or government, the matter shall, at the request of any other party to the present Convention, be referred to the International Court of Justice, whose decision shall be final and binding. Any acts or measures found by the Court to constitute acts of genocide shall be immediately discontinued or rescinded and if already suspended shall not be resumed or reimposed.[19]

[13] UN Doc. A/C.6/SR.96 (twenty-four in favour, twenty-two against).
[14] *Ibid.* (Abdoh, Iran). [15] *Ibid.* (Messina, Dominican Republic).
[16] *Ibid.* (Amado, Brazil). Similarly, UN Doc. A/C.6/SR.96 (Iksel, Turkey).
[17] *Ibid.* (Raafat, Egypt). [18] *Ibid.* (Maúrtua, Peru).
[19] UN Doc. A/C.6/236 and Corr.1. Indeed, the United Kingdom also wanted to delete reference to national courts, saying that this was already covered by article V.

The United Kingdom charged that reference to a competent international tribunal in draft article VI was 'useless' since such a tribunal did not exist, and, even if it did, it would be ineffectual because of State complicity in the crime. For that reason, the United Kingdom favoured recourse to the International Court of Justice, in order 'to enact measures capable of putting a stop to the criminal acts concerned and of awarding compensation for the damage caused to victims'.[20] Belgium proposed an amendment to the United Kingdom text:

> Any dispute relating to the fulfilment of the present undertaking or to the direct responsibility of a State for the acts enumerated in article IV [article III in the final version] may be referred to the International Court of Justice by any of the Parties to the present Convention. The Court shall be competent to order appropriate measures to bring about the cessation of the imputed acts or to repair the damage caused to the injured persons or communities.[21]

The United States opposed consideration of the United Kingdom and Belgian proposals, arguing that the substance of the issue had already been debated and decided during consideration of article IV.[22] Belgium and the United Kingdom subsequently withdrew their amendments and developed a new proposal, to be discussed in conjunction with article IX.[23]

Debate on article IX

The Secretariat draft contained a compromissory clause that is the ancestor of article IX: '[Settlement of Disputes on Interpretation or Application of the Convention] Disputes relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice.'[24] According to the Secretariat, the Court would be the appropriate body in cases where 'it is to be ascertained whether one of the parties has faithfully discharged his obligations'.[25] The Secretariat considered it essential that disputes about the interpretation and application of the convention be settled by the International Court of Justice rather than by arbitration, 'for then its decision would lack any

[20] UN Doc. A/C.6/SR.97 (Fitzmaurice, United Kingdom). [21] UN Doc. A/C.6/252.
[22] UN Doc. A/C.6/SR.99 (Maktos, United States). See also UN Doc. A/C.6/SR.99 (Morozov, Soviet Union).
[23] UN Doc. A/C.6/SR.100 (Kaeckenbeeck, Belgium). [24] UN Doc. E/447, art. XIV.
[25] *Ibid.*, p. 50.

claim to be binding on other states'.[26] Over the objections of Poland and the Soviet Union, the Ad Hoc Committee adopted the following: 'Disputes between any of the High Contracting Parties relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice.'[27] An additional clause, proposed by the United States, was also adopted: '. . . provided that no dispute shall be submitted to the International Court of Justice involving an issue which has been referred to, and is pending before or has been passed upon by a competent international criminal tribunal'.[28]

A modified version of the text withdrawn by the United Kingdom and Belgium during the debate on article VI was resubmitted: 'Any dispute between the High Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including disputes relating to the responsibility of a State for any of the acts enumerated in articles [I] and [III], shall be submitted to the International Court of Justice at the request of any of the High Contracting Parties.'[29] France supported the amendment. Although regretting that genocide should be dealt with solely on the level of disputes between States, France was not opposed to the principle of the international responsibility of States as long as it was a matter of civil, and not criminal, responsibility.[30]

Jean Spiropoulos of Greece felt that the notion of State responsibility was not very clear. 'What was meant was obviously not international responsibility for violation of the convention, which was already implicit in article I of the draft convention', he said. But Spiropoulos noted that the French delegation thought the amendment related to the civil responsibility of the State, something which seemed confirmed by the original Belgian text, which referred to reparation for damage caused. Spiropoulos said that, if this were the case, the State might well be required to indemnify its own nationals. 'But in international law the real holder of a right was the State and not private persons. The State would thus be indemnifying itself.' Spiropoulos had put his finger on

[26] *Ibid.* [27] UN Doc. E/AC.25/SR.20, p. 6 (five in favour, two against).

[28] *Ibid.* (four in favour, one against, with one abstention). It was derived from the United States draft of 30 September 1947, UN Doc. E/623: 'Article XI. Disputes between any of the High Contracting Parties relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice, provided that no dispute shall be submitted to the International Court of Justice involving an issue which has been referred to, and is pending before or has been passed upon by a tribunal referred to in Article VII.'

[29] UN Doc. A/C.6/258. [30] UN Doc. A/C.6/SR.103 (Chaumont, France).

the tautology implicit in all international human rights norms. In any case, Spiropoulos said he would vote in favour of the amendment.[31] Peru thought it difficult to see how victims could be compensated, but agreed that the Court might interpret the convention by means of advisory opinions.[32]

Indeed, there was confusion about what the article really meant. France and Belgium believed it dealt with civil liability. The Philippines thought it concerned criminal liability.[33] Haiti said the provision envisaged civil and not criminal liability, but wondered how there could be civil liability until criminal liability was established.[34] Canada noted that the Committee had earlier rejected the notion of criminal responsibility of a State, but wondered whether the United Kingdom was trying to reintroduce it.[35] In reply, the United Kingdom said that 'the responsibility envisaged by the joint Belgian and United Kingdom amendment was the international responsibility of States following a violation of the convention. That was civil responsibility, not criminal responsibility.'[36]

The original Ad Hoc Committee draft established a rule of *lis pendens* in cases where the international criminal court was seised of the question, a text originally proposed by the United States. Many delegates now felt the issue was moot, because the Committee had already dismissed the concept of an international criminal court.[37] Accordingly, the Sixth Committee agreed to delete the reference to pending proceedings before the international criminal court.[38]

The joint amendment of Belgium and the United Kingdom, which had provoked some confusion but little controversy, was then adopted.[39] The United States later said it felt the text of article IX was ambiguous and unsatisfactory. It could not agree that 'responsibility' in article IX could refer to the civil responsibility of the State for injuries sustained by its nationals. Nor, according to the United States, could it be deemed to cover the State's criminal responsibility, a concept that the

[31] *Ibid.* (Spiropoulos, Greece). [32] *Ibid.* (Maúrtua, Peru).
[33] *Ibid.* (Ingles, Philippines). [34] *Ibid.* (Demesmin, Haiti).
[35] *Ibid.* (Lapointe, Canada). [36] *Ibid.* (Fitzmaurice, United Kingdom).
[37] UN Doc. A/C.6/SR.104 (Morozov, Soviet Union). But see UN Doc. A/C.6/SR.103 (Raafat, Egypt).
[38] UN Doc. A/C.6/SR.105 (twenty-two in favour, eight against, with six abstentions).
[39] UN Doc. A/C.6/SR.105 (eighteen in favour, two against, with fifteen abstentions). There were proposed amendments to the drafting committee text, but the Commission voted not to reconsider art. IX, and as a result these were never discussed: UN Doc. A/C.6/SR.131.

Committee had earlier rejected. Finally, if it referred to treaty violations, the United States said the word added nothing to the meaning of the article.[40] The United States made a formal interpretative statement on article IX.[41]

Six months later, in presenting the Genocide Convention for advice and consent of the Senate, United States President Truman proposed an understanding 'that article IX shall be understood in the traditional sense of responsibility to another state for injuries sustained by nationals of the complaining state in violation of principles of international law, and shall not be understood as meaning that a state can be held liable in damages for injuries inflicted by it on its own nationals'. The understanding was recommended by a sub-committee of the Senate Committee on Foreign Relations although it would be nearly forty more years before the United States ratified the Convention. By then, the United States had decided to exclude entirely the application of article IX by means of a reservation.[42]

At the time of its ratification of the Convention, the Philippines said it did not consider article IX 'to extend the concept of State responsibility beyond that recognized by the generally accepted principles of international law'.

The drafting history of article IX was considered in some detail by the International Court of Justice in the *Bosnia* v. *Serbia* judgment, in February 2007. The Court noted that much of the debate had been framed in terms of the criminal responsibility of a State, and that this approach was definitively rejected. As for the final version of article IX,

[40] UN Doc. A/C.6/SR.131 (Maktos, United States).

[41] UN Doc. A/C.6/SR.133 (Gross, United States): 'Article IX stipulated that disputes between the contracting parties relating to the interpretation, application or fulfilment of the convention "including those relating to the responsibility of a State for genocide or any of the other acts mentioned in article III" should be submitted to the International Court of Justice. If the words "responsibility of a State" were taken in their traditional meaning of responsibility towards another State for damages inflicted, in violation of the principles of public international law, to the subjects of the plaintiff State; and if, similarly, the words "disputes . . . relating to the . . . fulfilment" referred to disputes concerning the interests of subjects of the plaintiff State, then those words would give rise to no objection. But if, on the other hand, the expression "responsibility of a State" were not used in the traditional meaning, and if it signified that a State could be sued for damages in respect of injury inflicted by it on its own subjects, then there would be serious objections to that provision; and the United States Government would have reservations to make about that interpretation of the phrase.'

[42] For a discussion, see Lawrence J. Leblanc, 'The ICJ, the Genocide Convention, and the United States', (1987) 6 *Wisconsin International Law Journal*, p. 43 at p. 52.

it concerned jurisdiction *simpliciter*. The Court considered that the drafting history supported the conclusion that States could be held responsible for committing genocide, and that article IX established jurisdiction to make such determinations.[43]

Litigation pursuant to article IX of the Convention

Fourteen cases have been filed before the International Court of Justice, pursuant to article IX. The first, by Pakistan in 1973, alleged that India was breaching the Convention because it proposed to transfer Pakistani prisoners of war to Bangladesh for trial. The case was discontinued following political negotiations. The second, by Bosnia and Herzegovina in 1993, charged the former Yugoslavia (Serbia and Montenegro) with genocide. Two provisional measures orders were granted by the Court. After failing to obtain the dismissal of the case based on preliminary objections, Yugoslavia filed a cross-demand charging Bosnia with genocide. Judgment on the merits was issued in February 2007. In 1999, ten applications under article IX were filed by Yugoslavia against members of the North Atlantic Treaty Organization concerning their conduct during the Kosovo bombing campaign. Two of the applications, in which Spain and the United States were respondents, were dismissed summarily. The others were rejected on the merits in 2004. In 2002, the Democratic Republic of Congo charged Rwanda with genocide. The case was dismissed in 2006 based on Rwanda's reservation to article IX of the Convention. A case filed by Croatia against Yugoslavia in 1999 is still pending.

The Pakistani Prisoners Case

Article IX of the Convention was invoked for the first time before the International Court of Justice in 1973, following civil war in Pakistan leading to the separation of Bangladesh from Pakistan. During the conflict, troops from West Pakistan reportedly killed one million East Pakistanis, provoking the flight of ten million more to India. Invoking the doctrine of humanitarian intervention, India took military action, and the Pakistani army subsequently surrendered. India detained

[43] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, paras. 175–8.

approximately 92,000 Pakistani troops. India, in co-operation with Bangladesh, contemplated trial of some of the Pakistani prisoners. For this purpose, Bangladesh adopted 'An Act to provide for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law'.[44]

Pakistan instituted proceedings against India on 11 May 1973, alleging that India intended to hand 195 Pakistani prisoners over to Bangladesh for trial for genocide and crimes against humanity.[45] Pakistan indicated several facts suggesting that Bangladesh intended to try the Pakistani prisoners for genocide, including the adoption of the Bangladesh Collaborators (Special Tribunals) Order 1972, whose preamble made reference to those who 'have aided and abetted the Pakistani armed forces in occupation in committing genocide and crimes against humanity'.[46] A number of exhibits showed Indian and Bangladeshi authorities using the term 'genocide' to describe conduct of Pakistani troops. Pakistan argued that this would breach the Genocide Convention, in that Pakistan alone had an exclusive right to try the prisoners. Pakistan declared that, by virtue of article VI, persons charged with genocide shall be tried by the courts of the territory where the act was committed. 'This means that Pakistan has exclusive jurisdiction to the custody of persons accused of the crimes of genocide, since at the time the acts are alleged to have been committed, the territory of East Pakistan was universally recognized as part of Pakistan.'[47] Pakistan cited article IX of the Convention as the basis of jurisdiction.[48]

[44] Act No. XIX of 1973, *Bangladesh Gazette* 5987, 20 July 1973. Although Bangladesh enacted national legislation for prosecution of genocide, it did not actually accede to the Genocide Convention until 1998.

[45] *Trial of Pakistani Prisoners of War (Pakistan* v. *India)*, Pleadings, Oral Arguments, Documents, pp. 3–7. Accusations of State responsibility for genocide are as old as the Convention itself. Even during the drafting of the Genocide Convention, during 1948, Pakistan accused India of genocide, notably by Sikhs and Hindus directed against Muslims: UN Doc. A/C.6/SR.63 (Ikramullah, Pakistan). See India's response (UN Doc. A/C.6/SR.64 (Sundaram, India)) and Pakistan's diplomatic refusal to reply (UN Doc. A/C.6/SR.65 (Bahadur Khan, Pakistan)).

[46] *Trial of Pakistani Prisoners of War (Pakistan* v. *India)*, Pleadings, Oral Arguments, Documents, pp. 3–7 at p. 5. There is academic support for the accusation of genocide: Fernando R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, Dobbs Ferry, NY: Transnational Publishers, 1988, pp. 181 and 187–8; Charles Rousseau, 'Chronique des faits internationaux', (1972) 76 *Revue générale de droit international public*, p. 544.

[47] *Trial of Pakistani Prisoners of War (Pakistan* v. *India)*, Pleadings, Oral Arguments, Documents, p. 6.

[48] *Ibid.*, p. 7.

Pakistan also claimed that the courts of Bangladesh could not be deemed a 'competent tribunal': 'A "Competent Tribunal" within the meaning of Article VI of the Genocide Convention means a Tribunal of impartial judges, applying international law, and permitting the accused to be defended by counsel of their choice . . . In view of these and other requirements of a "Competent Tribunal", even if India could legally transfer Pakistani Prisoners of War to "Bangla Desh" for trial, which is not admitted, it would be divested of that freedom since in the atmosphere of hatred that prevails in "Bangla Desh", such a "Competent Tribunal" cannot be created in practice nor can it be expected to perform in accordance with accepted international standards of justice.'[49]

Pakistan's suit was accompanied by an application for provisional measures, requesting the repatriation of Pakistani prisoners of war and civilian internees to proceed without interruption, and that they not be sent to Bangladesh pending the proceedings.[50] India replied, in letters dated 23 May, 28 May and 4 June 1973, that the Court was without jurisdiction. India's strongest argument was the fact that, at the time of ratification in 1959, it had formulated a reservation to article IX: 'With reference to article IX of the Convention, the Government of India declares that, for the submission of any dispute in terms of this article to the jurisdiction of the International Court of Justice, the consent of all the parties to the dispute is required in each case.'

Public hearings were held, but India did not attend. Subsequently, Pakistan informed the Court that the issues before it would soon be discussed in negotiations with India, and asked that the request for provisional measures be postponed. On 13 July 1973, the Court held that the application by Pakistan for postponement meant that there was no longer any request for interim measures, which was, by definition, an urgent matter.[51] Pakistan produced a memorial on the issue of jurisdiction on 2 November 1973. But, on 14 December 1973, Pakistan informed the Court that in order to facilitate negotiations with India it

[49] *Ibid.* [50] *Ibid.*, pp. 17–18.

[51] *Trial of Pakistani Prisoners of War (Pakistan* v. *India)*, Interim Protection Order of 13 July 1973, [1973] ICJ Reports 328. On the case, see Leblanc, 'The ICJ', p. 51; Jordan J. Paust and A. P. Blaustein, 'War Crimes Jurisdiction and Due Process: The Bangladesh Experience', (1978) 11 *Vanderbilt Journal of Transnational Law*, p. 1. See also Agreement on Repatriation of Prisoners of War, 24 August 1973, (1973) 12 ILM 1080; Charles Rousseau, 'Chronique des faits internationaux', (1972) 77 *Revue générale de droit international public*, p. 862.

would not be proceeding with the case. The following day, the President of the Court ordered that the case be removed from the docket.[52]

The Application of the Genocide Convention Case (Bosnia and Herzegovina *v.* Yugoslavia)

Bosnia and Herzegovina's application to the International Court of Justice was filed on 20 March 1993. Bosnia and Herzegovina charged that Yugoslavia had 'breached, and is continuing to breach, its legal obligations toward the People and State of Bosnia and Herzegovina under Articles I, II (a), II (b), II (c), II (d), III (a), III (b), III (c), III (d), III (e), IV and V of the Genocide Convention'. When the application was initiated, Bosnia also sought provisional measures, pursuant to article 41 of the Statute of the International Court of Justice, asking '[t]hat Yugoslavia (Serbia and Montenegro), together with its agents and surrogates in Bosnia and elsewhere, must immediately cease and desist from all acts of genocide and genocidal acts against the People and State of Bosnia and Herzegovina'. Yugoslavia promptly replied with a request that the Court order provisional measures, including leaving alone Serb towns, ceasing destruction of Orthodox churches and places of worship and of other Serb cultural heritage, and that the government of Bosnia 'put an end to all acts of discrimination based on nationality or religion and the practice of "ethnic cleansing", including the discrimination related to the delivery of humanitarian aid, against the Serb population in the "Republic of Bosnia and Herzegovina"'.[53]

[52] *Trial of Pakistani Prisoners of War (Pakistan* v. *India)*, Interim Protection Order of 15 December 1973, [1973] ICJ Reports 347.

[53] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Requests for the Indication of Provisional Measures, 8 April 1993, [1993] ICJ Reports 16. On the provisional measures orders, see: Laurence Boisson de Chazournes, 'Les ordonnances en indication de mesures conservatoires dans l'affaire relative à l'application de la convention pour la prévention et la répression du crime de génocide', (1993) 39 *Annuaire français de droit international*, p. 514; Ben Gaffikin, 'The International Court of Justice and the Crisis in the Balkans: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), 32 ILM 1599 (1993)', (1995) 17 *Sydney Law Review*, p. 458; Christine Gray, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))', (1994) 43 *International and Comparative Law Quarterly*, p. 704; Rafaëlle Maison, 'Les ordonnances de la Cour international de justice dans l'affaire relative à l'application de la Convention pour la prévention et la répression du crime de génocide', (1994) 3 *European Journal of International Law*, p. 381.

On 8 April 1993, the Court ordered provisional measures against Yugoslavia, and indicated that neither party should take action that might aggravate or extend the dispute. The Court held that article IX of the Genocide Convention appeared 'to afford a basis on which the jurisdiction of the Court might be founded to the extent that the subject-matter of the dispute relates to "the interpretation, application or fulfilment" of the Convention, including disputes "relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III of the Convention"'.[54] The Court refused to assume jurisdiction on other bases, and concluded that it had to 'proceed therefore on the basis only that it has prima facie jurisdiction, both ratione personae and ratione materiae, under Article IX of the Genocide Convention'.[55] The Court's order said that 'there is a grave risk of acts of genocide being committed'.[56]

Some months later, on 27 July 1993, Bosnia and Herzegovina applied once again to the Court, this time alleging, *inter alia*:

> 4. That the Government of Bosnia and Herzegovina must have the means 'to prevent' the commission of acts of genocide against its own People as required by Article I of the Genocide Convention;
> 5. That all Contracting Parties to the Genocide Convention are obliged by Article I thereof 'to prevent' the commission of acts of genocide against the People and State of Bosnia and Herzegovina;
> 6. That the Government of Bosnia and Herzegovina must have the means to defend the People and State of Bosnia and Herzegovina from acts of genocide and partition and dismemberment by means of genocide;
> 7. That all Contracting Parties to the Genocide Convention have the obligation thereunder 'to prevent' acts of genocide, and partition and dismemberment by means of genocide, against the People and State of Bosnia and Herzegovina;
> 8. That in order to fulfil its obligations under the Genocide Convention under the current circumstances, the Government of Bosnia and Herzegovina must have the ability to obtain military weapons, equipment and supplies from other Contracting Parties;
> 9. That in order to fulfil their obligations under the Genocide Convention under the current circumstances, all Contracting Parties thereto must have the ability to provide military weapons, equipment, supplies and armed forces (soldiers, sailors, airpeople) to the Government of Bosnia and Herzegovina at its request.[57]

[54] *Ibid.*, p. 16. [55] *Ibid.*, para. 45. [56] *Ibid.*, p. 18.

[57] *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, [1993] ICJ Reports 325, pp. 332–3.

Yugoslavia again answered with its own request for provisional measures: 'The Government of the so-called Republic of Bosnia and Herzegovina should immediately, in pursuance of its obligation under the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide against the Serb ethnic group.'[58] At the oral hearing, held on 25–26 August 1993, Yugoslavia requested the Court to dismiss Bosnia's request, *inter alia* 'because the clarification of the provisions of the Genocide Convention cannot be the subject-matter of the provisional measures' and 'because they would cause irreparable prejudice to the rights of the Federal Republic of Yugoslavia that the so-called Republic of Bosnia and Herzegovina fulfils its obligations under the Genocide Convention concerning the Serb people in Bosnia and Herzegovina'.[59]

The Court concluded, unanimously, that Yugoslavia 'should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide', and more specifically that it should 'ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group'.[60]

In the judgment on the merits, in February 2007, the Court recalled Yugoslavia's (it was by then named Serbia) obligation pursuant to the provisional measures orders. Since 1993, on two occasions the Court has held that provisional measures orders are binding upon States.[61] Concerning Serbia, the Court said it had breached the provisional measures orders of 8 April 1993 and 13 September 1993 because it did not 'take all measures within its power to prevent commission of the crime of genocide' in respect of the massacres at Srebrenica in July 1995.[62]

[58] *Ibid.*, p. 334. [59] *Ibid.*, p. 336. [60] *Ibid.*, pp. 342–3.

[61] *LaGrand (Germany* v. *United States of America)*, [2001] ICJ Reports 466; *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*, [2004] ICJ Reports 12.

[62] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 456.

Shortly after the issuance of the second provisional measures order, Bosnia declared its intention to institute proceedings against the United Kingdom, based on the latter's obligation to prevent genocide.[63] Its statement charged that the United Kingdom was 'jointly and severally liable for all of the harm that has been inflicted upon the People and State of Bosnia and Herzegovina because the United Kingdom is an aider and abettor to genocide under the Genocide Convention and international criminal law'. The United Kingdom replied, on 6 December 1993, that the application was without foundation, and on 17 December 1993 Bosnia and Herzegovina informed the Security Council of its decision not to proceed.

Yugoslavia raised a number of preliminary objections to the jurisdiction of the Court, including the construction of article IX of the Convention. These were rejected in the Court's 11 July 1996 decision, and the case was ordered to proceed.[64] One issue that proved to have great significance at the merits stage was a finding by the Court that Yugoslavia was a party to the Genocide Convention. The Court noted that, when the Federal Republic of Yugoslavia was proclaimed, on 27 April 1992, a formal declaration of succession was adopted, affirming that Yugoslavia would remain bound by the international commitments of its predecessor, the Socialist Federal Republic of Yugoslavia, which had been a party to the Genocide Convention since 1950. In 1996, this was not contested by Yugoslavia.[65] But, by 2001, after being readmitted to the United Nations, Yugoslavia changed its position, and argued that it had been neither a party to the Genocide Convention nor a member of the United

[63] 'Statement of Intention by the Republic of Bosnia and Herzegovina to Institute Legal Proceedings Against the United Kingdom Before the International Court of Justice, 15 November 1993', UN Doc. A/48/659-S/26806, 47 UNYB 465 (1993).

[64] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Preliminary Objections, [1996] ICJ Reports 595. See: Peter H. F. Bekker and Paul C. Szasz, 'Casenote: Application of the Convention on the Prevention and Punishment of the Crime of Genocide', (1997) 91 *American Journal of International Law*, p. 121; Adrian Chua and Rohan Hardcastle, 'Retroactive Application of Treaties Revisited: Bosnia-Herzegovina v. Yugoslavia', (1997) 44 *Netherlands International Law Review*, p. 414; Matthew C. R. Craven, 'The Genocide Case, the Law of Treaties and State Succession', (1997) 68 *British Yearbook of International Law*, p. 127; Sandrine Maljean-Dubois, 'L'affaire relative à l'application de la Convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie), Arrêt du 11 juillet 1996, exceptions préliminaires', (1996) 42 *Annuaire français de droit international*, p. 357.

[65] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, Preliminary Objections, Judgment, [1996] ICJ Reports 595, para. 17.

Nations, and consequently not properly before the Court, between 1992 and 2000. This was confirmed by the Court in 2004 when it dismissed eight of the applications filed by Yugoslavia against the NATO states.[66] But, in the 2007 judgment, the Court said that the issue of Yugoslavia's status with respect to the Genocide Convention had been decided in 1996 at the stage of preliminary objections. The matter was *res judicata* and it would not revisit its decision, even if there was a manifest contradiction with the 2004 ruling.[67]

In July 1997, Yugoslavia filed a counter-claim accusing Bosnia and Herzegovina of genocide against the Serbs. Bosnia and Herzegovina contested the counter-claim being joined to the principal demand, but the Court dismissed the objection.[68] Yugoslavia's counter-claim sought to cast Bosnia as guilty of 'acts of genocide against the Serbs in Bosnia-Hercegovina' and demanded that Sarajevo punish those responsible.[69] The counter-claim was withdrawn in 2001.[70]

The case continued to evolve as a result of political developments. The Dayton Agreement provided for a rotating presidency of Bosnia and Herzegovina. In 1999, Serbs in the Bosnian presidency unsuccessfully attempted to discontinue the entire case.[71] Yugoslavia rejoined the United Nations in 2000, and in 2001 it purported to accede to the Genocide Convention. It also launched a separate case before the Court seeking an interpretation of the 1996 ruling on preliminary objections. Yugoslavia asked the Court to declare that it had not been a party to the Convention at the time relevant to the litigation. This separate application was declared inadmissible in 2003.[72]

Oral argument in the case took place in March and April 2006. The final judgment, issued in February 2007, dismissed most of the Bosnian

[66] *Legality of the Use of Force (Serbia and Montenegro* v. *Belgium et al.)*, Preliminary Objections, 15 December 2004, para. 91.

[67] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, paras. 114–39. On this point, see also the dissenting opinions: Joint Dissenting Opinion of Judges Ranjeva, Shi and Koroma; *ibid.*, Declaration of Judge Skotnikov; *ibid.*, Separate Opinion of Judge *ad hoc* Kreča.

[68] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-Claims, Order of 17 December 1997*, [1997] ICJ Reports 243. The actual claims are set out at pp. 250–1.

[69] *Ibid.* [70] *Ibid.*, paras. 26–7. [71] *Ibid.*, paras. 18–24.

[72] *Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections (Yugoslavia* v. *Bosnia and Herzegovina)*, Judgment, 3 February 2003.

claims that Serbia, as it was then called, had committed or been an accomplice in the commission of genocide during the 1992–5 conflict. The Court relied heavily on the factual and legal findings of the International Criminal Tribunal for the former Yugoslavia. There was one exception to the finding that genocide had not been perpetrated during the conflict. Confirming the findings of the Yugoslavia Tribunal, the Court described the Srebrenic massacre of July 1995, in which several thousand men and boys were murdered, as an act of genocide. It said that Serbia was responsible, to the extent it failed in its duty to exercise its influence to prevent the massacre. Because there was no certainty that Serbia could have prevented the killings, the Court declined to award any damages.[73]

The Legality of Use of Force Case (Yugoslavia *v.* NATO Members)

On 25 April 1999, as bombs rained down on Yugoslavia, the Belgrade government filed ten applications in the International Court of Justice challenging NATO's use of force. Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom and the United States were named as respondents. The armed attack was a response to persecution of the Albanian population within Kosovo, a Yugoslav province. Belgrade's treatment of the Kosovar minority had been condemned in a number of Security Council resolutions, and variously described by politicians, human rights activists and journalists as ethnic cleansing and even genocide. Armed humanitarian intervention

[73] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007. See: Antonio Cassese, 'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide', (2007) *5 Journal of International Criminal Justice*, p. 875; Orna Ben-Naftali and Miri Sharon, 'What the ICJ Did Not Say About the Duty to Punish Genocide: The Missing Pieces in a Puzzle', (2007) *5 Journal of International Criminal Justice*, p. 859; Paola Gaeta, 'Génocide d'Etat et responsabilité pénale individuelle', (2007) 111 *Revue générale de droit international public*, p. 272; Andrew B. Loewenstein and Stephen A. Kostas, 'Divergent Approaches to Determining Responsibility for Genocide: The Darfur Commission of Inquiry and the ICJ's Judgment in the Genocide Case', (2007) 5 *Journal of International Criminal Justice*, p. 839; William A. Schabas, 'Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes', (2007) 2:2 *Genocide Studies and Prevention*, p. 101; William A. Schabas, 'Whither Genocide? The International Court of Justice Finally Pronounces', (2007) 9 *Journal of Genocide Research*, p. 183; Christian Tomuschat, 'Reparation in Cases of Genocide', (2007) 5 *Journal of International Criminal Justice*, p. 905.

by NATO to protect the Kosovars was opposed by Russia, making Security Council authorization impossible.

The core of the Yugoslav application was the allegation that use of force was prohibited by the Charter of the United Nations, with the two well-recognized exceptions of self-defence and Chapter VII action endorsed by decision of the Security Council. Nevertheless, Yugoslavia also invoked the Genocide Convention as a second basis for its claim. Citing article II(c) of the Convention, the application stated: 'Furthermore, the obligation contained in the Convention on the Prevention and Punishment of the Crime of Genocide not to impose deliberately on a national group conditions of life calculated to bring about the physical destruction of the group has been breached.' Yugoslavia's application was accompanied by a request for provisional measures. The Court was asked to order the respondent States to cease all use of force against Yugoslavia. The Court dismissed Yugoslavia's request for provisional measures in its ruling of 2 June 1999. According to the Court, there was not even an arguable case for violation of the Genocide Convention sufficient to justify its intervention at such a stage of the proceedings. The Court said that 'in order to determine, even prima facie, whether a dispute within the meaning of Article IX of the Genocide Convention exists, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it'.[74] At the same time, it decided to strike from the list the claims against Spain and the United States, because both had made reservations to article IX of the Convention and therefore the Court 'manifestly lack[ed] jurisdiction'.[75]

[74] *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, Provisional Measures, Order of 2 June 1999, [1999] ICJ Reports 124, para. 51; *Legality of Use of Force (Serbia and Montenegro* v. *Canada)*, Provisional Measures, Order of 2 June 1999, [1999] ICJ Reports 259, para. 47; *Legality of Use of Force (Serbia and Montenegro* v. *France)*, Provisional Measures, Order of 2 June 1999, [1999] ICJ Reports 363, para. 39; *Legality of Use of Force (Serbia and Montenegro* v. *Germany)*, Provisional Measures, Order of 2 June 1999, [1999] ICJ Reports 422, para. 38; *Legality of Use of Force (Serbia and Montenegro* v. *Italy)*, Provisional Measures, Order of 2 June 1999, [1999] ICJ Reports 481, para. 39; *Legality of Use of Force (Serbia and Montenegro* v. *the Netherlands)*, Provisional Measures, Order of 2 June 1999, [1999] ICJ Reports 542, para. 51; *Legality of Use of Force (Serbia and Montenegro* v. *Portugal)*, Provisional Measures, Order of 2 June 1999, [1999] ICJ Reports 656, para. 50; *Legality of Use of Force (Serbia and Montenegro* v. *United Kingdom)*, Provisional Measures, Order of 2 June 1999, [1999] ICJ Reports 826, para. 43.

[75] *Legality of Use of Force (Serbia and Montenegro* v. *Spain*), Provisional Measures, Order of 2 June 1999, [1999] ICJ Reports 761, para. 33; *Legality of Use of Force (Serbia and Montenegro* v. *United States of America)*, Provisional Measures, Order of 2 June 1999, [1999] ICJ Reports 916, para. 25.

By the time the remaining eight applications had proceeded to the admissibility stage, Serbia and Montenegro had adopted the view that it had not been a member of the United Nations in 1999 and therefore could not seise the Court. In effect, it was inviting the Court to strike the case that it had itself filed a few years earlier. Some of the respondents implied that Serbia and Montenegro had ulterior motives, and that its current position had been calculated to influence the suit filed by Bosnia and still awaiting a hearing. The Court said that 'it cannot decline to entertain a case simply because of a suggestion as to the motives of one of the parties or because its judgment may have implications in another case'.[76]

The Court concluded that Serbia and Montenegro had not been a member of the United Nations in 1999, and consequently was not a party to the Statute of the International Court of Justice. As a result, it did not have a right of access to the Court under article 35(1) of the Statute of the International Court of Justice.[77] The Statute also provides, in article 35(2), for access by non-members of the United Nations, if they are parties to certain treaties that contain 'special provisions'. Whether article IX of the Genocide Convention was such a 'special provision' had already arisen in the *Bosnia* v. *Yugoslavia* case, at the provisional measures stage. In its order of 8 April 1993, the Court had said that 'a compromissory clause in a multilateral convention, such as Article IX of the Genocide Convention relied on by Bosnia-Herzegovina in the present case, could, in the view of the Court, be regarded prima facie as a special provision contained in a treaty in force; whereas accordingly if Bosnia-Herzegovina and Yugoslavia are both parties to the Genocide Convention, disputes to which Article IX applies are in

[76] *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, Preliminary Objections, Judgment, [2004] ICJ Reports 279, para. 40; *Legality of Use of Force (Serbia and Montenegro* v. *Canada)*, Preliminary Objections, Judgment, [2004] ICJ Reports 429, para. 39; *Legality of Use of Force (Serbia and Montenegro* v. *France)*, Preliminary Objections, Judgment, [2004] ICJ Reports 579, para. 39; *Legality of Use of Force (Serbia and Montenegro* v. *Germany)*, Preliminary Objections, Judgment, [2004] ICJ Reports 720, para. 38; *Legality of Use of Force (Serbia and Montenegro* v. *Italy)*, Preliminary Objections, Judgment, [2004] ICJ Reports 865, para. 30; *Legality of Use of Force (Serbia and Montenegro* v. *the Netherlands)*, Preliminary Objections, Judgment, [2004] ICJ Reports 1011, para. 39; *Legality of Use of Force (Serbia and Montenegro* v. *Portugal)*, Preliminary Objections, Judgment, [2004] ICJ Reports 1160, para. 39; *Legality of Use of Force (Serbia and Montenegro* v. *United Kingdom)*, Preliminary Objections, Judgment, [2004] ICJ Reports 1307, para. 38.

[77] E.g. *Legality of Use of Force (Serbia and Montenegro* v. *Belgium*), *ibid.*, para. 91.

any event prima facie within the jurisdiction *ratione personae* of the Court.'[78] The Court never returned to the issue in the Bosnian litigation. In its 2004 ruling on the Yugoslav application against the NATO States, the Court held that article 35(2) of its Statute only applied to treaties in force at the time the Statute was adopted, in 1945, and therefore could not be interpreted so as to apply to article IX of the 1948 Genocide Convention.[79]

Croatia *v.* Yugoslavia

In early July 1999, Croatia invoked article IX of the Convention in an application directed against Yugoslavia. No request for provisional measures accompanied the suit. Croatia charged Yugoslavia with responsibility, through its armed forces, intelligence agents and paramilitary groups, for 'ethnic cleansing' in the Knin region, including the 'ethnic cleansing' of 'Croatian citizens of Serb ethnicity':

> By directly controlling the activity of its armed forces, intelligence agents and various paramilitary detachments, on the territory of the Republic of Croatia, in the Knin region, eastern and western Slavonia, and Dalmatia, the Federal Republic of Yugoslavia is liable for the 'ethnic cleaning' of Croatian citizens from these areas – a form of genocide which resulted in large numbers of Croatian citizens being displaced, killed, tortured or illegally detained, as well as extensive property destruction – and is required to provide reparation for the resulting damages. In addition, by directing, encouraging, and urging Croatian citizens of Serb ethnicity in the Knin region to evacuate the area in 1995, as the Republic of Croatia reasserted its legitimate governmental authority (and in the face of clear reassurance emanating from the highest level of the Croatian government, including the President of the Republic of Croatia, Dr Franjo Tudjman, that the local Serbs had nothing to fear and should stay), the Federal Republic of Yugoslavia engaged in conduct amounting to a second round of 'ethnic cleaning' in violation of the Genocide Convention.[80]

The claim, then, was based on an equation between 'ethnic cleansing' and genocide. The Croatian application referred to the General

[78] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Requests for the Indication of Provisional Measures, 8 April 1993, [1993] ICJ Reports 16, para. 19.

[79] E.g. *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, Preliminary Objections, Judgment, [2004] ICJ Reports 279, para. 114.

[80] *Application by the Republic of Croatia Instituting Proceedings Against the Federal Republic of Yugoslavia*, 2 July 1999, para. 2 (reference omitted). See also para. 24.

Assembly resolution of 1992 as support for such a premise.[81] Croatia sought reparations, 'in its own right and as parens patriae for its citizens', for damages to persons and property, including harm to the economy and environment.

The case has yet to be heard by the Court. Given the Court's judgment in the Bosnian application against Serbia, in which a rather strict construction of genocide was adopted and a clear distinction made with the phenomenon of ethnic cleansing, the Croatian arguments would appear to have little chance of success on the merits. In the Bosnian case, the Court relied heavily on the case law and prosecutorial practice of the International Criminal Tribunal for the former Yugoslavia. There have been no genocide indictments at the International Criminal Tribunal for the former Yugoslavia in cases involving the 1991 conflict in Croatia.[82]

Democratic Republic of Congo *v.* Rwanda

In May 2002, the Democratic Republic of Congo filed a claim against Rwanda invoking several international treaties as a basis of jurisdiction, including the Genocide Convention.[83] The substance of the claim addressed a number of massacres that had taken place during the war in eastern Congo. In its application, Congo conceded that Rwanda had made a reservation to article IX of the Convention at the time of its ratification in 1975, but suggested that this had in some way become inoperative because Rwanda had subsequently accepted 'l'application intégrale de la Convention sur le genocide dans le cadre du Tribunal penal international pour le Rwanda d'Arusha', adding that the Convention imposed obligations that were 'objective et opposable *erga omnes*'.[84] During hearings on an application for provisional measures, Congo developed this argument, objecting to the reservation as being contrary to norms of *jus cogens* and incompatible with the object and purpose of the Convention. Congo invited the Court to revisit its 1951 advisory

[81] *Ibid.*, para. 34. On the General Assembly resolution, see pp. 224–5 above. On the issue of 'ethnic cleansing' generally as an act of genocide, see pp. 221–35 above.

[82] See e.g. *Prosecutor* v. *Milošević et al.* (Case No. IT-01-50-I), Indictment, 2001; *Prosecutor* v. *Strugar* (Case No. IT-01-42), Judgment, 31 January 2005; *Prosecutor* v. *Mrkšić et al.* (Case No. IT-95-13/1-T), Judgment, 27 September 2007.

[83] An earlier application against Rwanda that did not invoke the Genocide Convention was discontinued: *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Rwanda)*, Application Instituting Proceedings, 23 June 1999.

[84] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo* v. *Rwanda*), Application, 28 May 2002, pp. 22–3.

opinion on reservations to the Genocide Convention in light of an evolution in international law.[85]

Dismissing Congo's arguments, the Court noted that, while the rights set out in the Genocide Covnention are *erga omnes*, 'the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things', and that 'it does not follow from the mere fact that rights and obligations *erga omnes* are at issue in a dispute that the Court has jurisdiction to adjudicate upon that dispute'.[86] It continued:

> Whereas the Genocide Convention does not prevent reservations; whereas the Congo did not object to Rwanda's reservation when it was made; whereas that reservation does not bear on the substance of the law, but only on the Court's jurisdiction; whereas it therefore does not appear contrary to the object and purpose of the Convention . . .[87]

Can States commit genocide?

The Nuremberg Tribunal said that '[c]rimes against international law are committed by men, not by abstract entities'.[88] This oft-cited phrase in the judgment[89] was an answer to some defendants who argued that they were mere instruments of the State, and could not be convicted as individuals for what amounted to State crimes. Sometimes, it tends to distort discussions about international criminality in its suggestion that the role of the State is not relevant. In fact, international crimes in general, but genocide in particular, are virtually inconceivable without the involvement of the State.

Arguably, article IX of the Convention does nothing more than give the International Court of Justice jurisdiction for disputes arising between States parties about the 'interpretation, application or fulfilment' of the various obligations that arise with respect to the specific obligations set out in the Convention, that is, prosecution, extradition and enactment of domestic legislation. Article IX of the Convention makes explicit reference to State responsibility. Many remarks in the *travaux préparatoires* indicate that civil liability for genocide was being addressed.

[85] *Ibid.*, para. 22. [86] *Ibid.*, para. 71. [87] *Ibid.*, para. 72.
[88] *France et al.* v. *Goering et al.*, (1946) 22 IMT 203, p. 466.
[89] E.g. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 172.

The suggestion that article IX involved a form of criminal liability was rather convincingly rejected by the drafters.[91] According to the 1998 report of the International Law Commission: 'It was true that the Convention on the Prevention and Punishment of the Crime of Genocide envisaged the international trial of individuals for the crime of genocide, but it did not envisage State crime or the criminal responsibility of States in its article IX concerning State responsibility.'[92]

Nevertheless, the idea that a State can be liable for committing the crime of genocide finds some support in the work of the International Law Commission. The 1976 version of the draft principles on State responsibility contemplate a form of State crime, defined in article 19 as 'an internationally wrongful act which resulted from the breach by a State of an international obligation so essential for the protection of the fundamental interests of the international community that its breach was recognized as a crime by that community as a whole'. According to article 19, 'an international crime may result, inter alia, from . . . a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting . . . genocide'.[93] Special Rapporteur James Crawford called this '[t]he single most controversial element in the draft articles on State responsibility'.[94] The Commission reconsidered the issue of State crimes at its 1998 session, eventually deciding that it should be 'put to one side'[95] because of the many conceptual problems that arise and the lack of general consensus among its members on the subject.

Part of the difficulty in the International Law Commission codification was terminological. The 1976 draft articles distinguished between

[91] 'First Report on State Responsibility by Mr James Crawford, Special Rapporteur', UN Doc. A/CN.4/490/Add.2, para. 61.

[92] 'Report of the International Law Commission on the Work of Its Fiftieth Session, 20 April–12 June 1998, 27 July–14 August 1998', UN Doc. A/53/10 and Corr.1, para. 249.

[93] 'Draft Articles on State Responsibility', *Yearbook . . . 1980*, Vol. II (Part 2), p. 30, art. 19(3)(c).

[94] 'First Report on State Responsibility by Mr James Crawford, Special Rapporteur', UN Doc. A/CN.4/490/Add.1, para. 43. See M. Spinedi, 'International Crimes of State: The Legislative History', in A. Cassese and M. Spinedi, eds., *International Crimes of State*, Berlin: de Gruyter, 1989, pp. 45–79.

[95] 'Report of the International Law Commission on the Work of Its Fiftieth Session, 20 April–12 June 1998, 27 July–14 August 1998', note 92 above, para. 331(a). See Nguyen Quoc Dinh, Patrick Daillier and Alain Pellet, *Droit international public*, 6th edn, Paris: LGDJ, 1999, pp. 784–6.

'crimes' and 'delicts', stating in draft article 19 that all 'internationally wrongful acts' that are not 'crimes' are to be labelled 'delicts'. These terms appear in penal codes derived from the Napoleonic model, where they describe degrees of offences: misdemeanours (*contraventions*), delicts (*délits*) and crimes (*crimes*). The practical significance of the distinction in the national law models relates mainly to applicable penalties and statutory limitations. Yet the terms suggest another legal classification, that between delictual responsibility (civil liability or torts, in common law jargon) and criminal responsibility.

Members of the Commission, as well as States submitting comments on the earlier draft, disagreed on whether the very concept of 'State crimes' belonged within a regime of State responsibility. Compelling arguments were expressed in support of the view that 'criminal liability' could not be extended by analogy from individuals to States. It suggests a concept of collective guilt, and there are difficulties with respect to sanctions as well as in establishing the mental element of the crime. The majority of the International Law Commission appeared to recognize the problems inherent in applying criminal law analogies to the area of State responsibility, and took the view that, even if the notion of 'State crimes' were retained, it more correctly defined a particularly serious form of liability within a civil sense. It was common ground that there was an absence of relevant State practice on the subject, suggesting that States saw no role for the concept of 'State crimes' within the framework of State responsibility.[96]

In comments submitted to the Commission, Denmark, on behalf of the Nordic countries, took the view that States could indeed commit genocide:

> If, for instance, one looks at the crime of genocide or the crime of aggression, such crimes are, of course, perpetrated by individual human beings, but at the same time they may be imputable to the State insofar as they will normally be carried out by State organs implying a sort of 'system criminality'. The responsibility in such situations cannot in our view be limited to the individual human being acting on behalf of the State. The conduct of an individual may give rise to responsibility of the State he or she represents. In such cases the State itself as a legal entity

[96] 'Report of the International Law Commission on the Work of Its Fiftieth Session, 20 April–12 June 1998, 27 July–14 August 1998', note 92 above, paras. 247–50. According to the Commission's report (*ibid.*, para. 248), the war guilt clause in the Treaty of Versailles is the closest that international law has come to the recognition of criminal responsibility of States.

> must be brought to bear responsibility in one forum or another, be it through punitive damages or measures affecting the dignity of the State . . . If the term 'crime' used in relation to a State is, however, regarded as too sensitive, consideration may be given to using other terminology such as 'violations' and 'serious violations' (of an international obligation). It must be essential though to establish particularly grave violations of international law by a State, such as aggression and genocide, as a specific category, where the consequences of the violations are more severe.[97]

Ireland, on the other hand, said that, '[w]hile States bear international responsibility for a breach of [the obligation to prevent and punish genocide], there is no question of the responsibility being criminal in character'.[98]

The provision on state crime was ultimately dropped from the version of the Articles on State Responsibility adopted by the International Law Commission in August 2001.[99] It cannot be said that the concept of state criminality was entirely rejected, however. James Crawford's commentary on the Articles notes that there is 'embryonic' practice with respect to 'one or two crimes which are committed mainly or only by State agencies', and he gives aggression and genocide as examples.[100]

Whether a State could actually perpetrate genocide, and engage its responsibility for doing so pursuant to the Convention, remained at the heart of the *Bosnia* v. *Serbia* case. The preliminary rulings in that case hinted at the answers, but left many questions unresolved. Yugoslavia (Serbia and Montenegro) challenged the jurisdiction of the Court, arguing for a conservative interpretation of article IX of the Convention. This objection was dismissed by a majority of the Court, eleven to four, on 11 July 1996.[101] When Bosnia subsequently argued that the issue was already *res judicata*, the Court replied that the question had not been settled definitively in the 1996 ruling.[102]

[97] 'State Responsibility, Comments and Observations Received from Governments', UN Doc. A/CN.4/488, pp. 53–4. See also 'First Report on State Responsibility by Mr James Crawford, Special Rapporteur', note 94 above, paras. 43 and 53–9.

[98] 'State Responsibility, Comments and Observations Received from Governments', note 97 above, para. 52.

[99] *Yearbook . . . 2001*, Vol. II(2).

[100] James Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge: Cambridge University Press, 2002, p. 19.

[101] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Preliminary Objections, note 65 above, paras. 32–3.

[102] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment,

The Court said that the obligation on States 'not to commit genocide themselves' was 'not expressly imposed by the actual terms of the Convention'. This was a question better addressed from the angle of article I than article IX, which is essentially a jurisdictional provision, it explained. Although article I does not '*expressis verbis* require States to refrain from themselves committing genocide . . . the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as "a crime under international law": by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described.'[103] The Court added that this conclusion also flowed from the obligation to prevent genocide set out in article I:

> It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.[104]

Therefore, said the Court, parties to the Convention are bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them. It added that this also applied to the other acts enumerated in article III of the Convention, even though several provisions of article III appeared to be especially tailored to the system of individual criminal liability.[105] This conclusion, said the Court, was confirmed by an 'unusual feature' of article IX, namely, the phrase 'including those [disputes] relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III'. The Court said that the word 'including' tended to confirm that disputes relating to State responsibility were part of a broader group of disputes relating to the interpretation, application or fulfilment of the Convention.[106]

26 February 2007, paras. 150–2. For discussion in the International Law Commission on the 1996 ruling of the Court, see: 'Report of the International Law Commission on the Work of Its Fiftieth Session, 20 April–12 June 1998, 27 July–14 August 1998', note 92 above, paras. 261–4; 'First Report on State Responsibility by Mr James Crawford, Special Rapporteur', note 95 above, para. 63.

[103] *Ibid.*, para. 166. [104] *Ibid.* [105] *Ibid.*, para. 167. [106] *Ibid.*, para. 169.

Serbia argued that international law had rejected the concept of State crimes and State criminal responsibility. To this, the Court answered that 'the obligations in question in this case, arising from the terms of the Convention, and the responsibilities of States that would arise from breach of such obligations, are obligations and responsibilities under international law. They are not of a criminal nature.'[107] There is a 'duality of responsibility', explained the Court, reflected in such legal provisions as article 25(4) of the Rome Statute of the International Criminal Court: 'No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.'[108]

In determining that States as well as individuals can commit genocide, the Court insisted that the regime of State responsibility was quite distinct and that it was not criminal in nature. Nevertheless, the close relationship between State and individual responsibility for genocide cannot be gainsaid. One manifestation of this is in the Court's discussion of the burden of proof. Rejecting the arguments of Bosnia and Herzegovina that the Court should apply the ordinary standard of proof, of 'balance of probabilities' or 'preponderance of evidence', it said: 'In respect of the Applicant's claim that the Respondent has breached its undertakings to prevent genocide and to punish and extradite persons charged with genocide, the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation.'[109] This is not identical to the 'beyond a reasonable doubt' norm generally applied in international criminal law,[110] but there is certainly a family resemblance.

The close relationship between State responsibility and individual responsibility for genocide also manifests itself in the discussion of intent. In order to apply the definition of genocide set out in article II of the Convention, it is necessary to determine that the State acted 'with intent'. The concept of intent is well developed in criminal law, both domestic and international, but it does not fit well with State responsibility. The problem is not very different from that addressed in domestic criminal law systems where corporate criminal liability is recognized. Among the solutions envisaged in domestic criminal law is one by which the 'intent' of the corporation is merged with the 'intent' of its guiding

[107] *Ibid.*, para. 170. [108] *Ibid.*, para. 173. [109] *Ibid.*, para. 210.

[110] Rules of Procedure and Evidence [of the International Criminal Tribunal for the former Yugoslavia], UN Doc. IT/32, Rule 87(A); Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, art. 66(c).

mind or *alter ego*. This might work well in a closely held corporation, or an extreme form of dictatorship. It is less easy to apply in a complex body, such as a modern State.

The better approach may be to examine State 'intent' from the standpoint of State policy, which is much more logical and easier to apply. Indeed, the decisions on genocide, even those concerning individual criminal liability, are replete with references to 'plan' or 'policy'. When it examined the individual guilt of General Krstić for the Srebrenica massacre, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia asked whether the accused had knowledge of the 'execution plan'.[111] The same phenomenon can be seen in the report of the International Commission of Inquiry on Darfur which, when asked by the Security Council whether Sudan had committed genocide, looked for a State plan or policy rather than 'intent'.[112] This issue is discussed in greater detail in chapter 5, which deals with the mental element or *mens rea* of genocide.

Allegations of State responsibility for genocide have also been made before international human rights tribunals and treaty bodies. At the height of the Guatemalan civil war, in 1982, government troops massacred several hundred people in the village of Plan de Sánchez, one of hundreds of such attacks on local populations. The victims were mainly aboriginal peoples, members of the Maya achí people. A petition alleging that Guatemala had committed genocide was declared admissible by the Inter-American Commission on Human Rights in 1999. In its report, the Commission said the massacre took place 'within the framework of a genocidal policy of the Guatemalan State carried out with the intention of totally or partially destroying the Mayan indigenous people'.[113] The Commission's application to the Inter-American Court said: 'The [Plan de Sánchez] massacre was perpetrated in the context of a policy of genocide of the State of Guatemala carried out with the intention of totally or partially destroying the Mayan indigenous people. The violations were on such a scale that they represented massive and multiple violations of the American Convention on Human Rights.'[114]

[111] *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Judgment, 19 April 2004, para. 101.

[112] 'Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur', UN Doc. S/2005/60, para. 518.

[113] *Case of Plan de Sánchez Massacre* v. *Guatemala*, Judgment of 29 April 2004 (Merits), para. 3.

[114] *Case of Plan de Sánchez Massacre* v. *Guatemala*, Judgment of 29 April 2004 (Merits), Separate Opinion of Judge A. A. Cançado-Trindade, para. 2.

The Inter-American Court of Human Rights declined taking a position, explaining that in adjudicatory matters it is only competent to find violations of the American Convention on Human Rights.[115]

[115] *Case of Plan de Sánchez Massacre* v. *Guatemala*, Judgment of 29 April 2004 (Merits), para. 51.

10

Prevention of genocide

Although the Genocide Convention's title speaks of both prevention and punishment of the crime of genocide, the essence of its provisions is directed to the second limb of that tandem. The concept of prevention is repeated in article I: 'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish.' Of course, punishment and prevention are intimately related. Criminal law's deterrent function supports the claim that prompt and appropriate punishment prevents future offences.[1] Moreover, some of the 'other acts' of genocide imply a preventive dimension. Prosecution of conspiracy, attempts and above all of direct and public incitement are all aimed at future violations. But the drafters of the Convention resisted going further upstream, rejecting efforts to criminalize 'preparatory acts' such as hate speech and racist organizations.

Article I of the Genocide Convention is not merely 'hortatory or purposive', insisted the International Court of Justice in its February 2007 ruling on the Bosnian application against Serbia. The undertaking to prevent and punish genocide is unqualified, said the Court. 'It is not to be read merely as an introduction to later express references to legislation, prosecution and extradition . . . Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles. That conclusion is also supported by the purely humanitarian and civilizing purpose of the Convention.'[2] The Court explained that the *travaux préparatoires* of the Convention confirm the 'operative and non-preambular character of Article I'.[3]

[1] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, 26 February 2007, para. 426.

[2] *Ibid.*, para. 162. [3] *Ibid.*, para. 164.

Describing the obligation to prevent genocide as being 'normative and compelling', the Court said it cannot be regarded as simply a component of the duty to punish. The Court noted that the Genocide Convention is not the only international instrument to provide for duties of prevention.[4] It said it was not laying down any general principles concerning a duty of prevention under international law, and that its conclusions were specific to the case of genocide. The Court explained that 'the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide'.[5] However, responsibility is incurred 'if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide'.[6] The Court said it was 'irrelevant' whether the State claims that, if it had employed all means reasonably at its disposal, they would not have been sufficient to prevent genocide.

A State's obligation to prevent, 'and the corresponding duty to act', arise when the State 'learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit. Nevertheless, the obligation to prevent genocide is only breached if genocide is in fact committed, the Court noted.[7]

The obligation to prevent genocide 'varies greatly from one State to another', the Court explained, depending upon the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of political and other links between the authorities of that State and the main actors in the events. The State's

[4] *Ibid.*, para. 429. The Court provided four examples: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1987) 1465 UNTS 85, art. 2; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, (1977) 1035 UNTS 167, art. 4; Convention on the Safety of United Nations and Associated Personnel, UN Doc. A/RES/49/59, annex, art. 11; International Convention on the Suppression of Terrorist Bombings, UN Doc. A/RES/52/164, annex, art. 15.

[5] *Ibid.*, para. 430. [6] *Ibid.* [7] *Ibid.*, para. 431.

capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position *vis-à-vis* the situations and persons facing the danger, or the reality, of genocide.[8]

The Court placed emphasis upon the distinction between breach of the duty to prevent genocide and complicity in the crime itself. Complicity involves furnishing aid or assistance with knowledge that the principal perpetrators are engaged in genocide, whereas violation of the obligation to prevent results from inaction. As the Court explained, 'this is merely the reflection of the notion that the ban on genocide and the other acts listed in Article III, including complicity, places States under a negative obligation, the obligation not to commit the prohibited acts, while the duty to prevent places States under positive obligations, to do their best to ensure that such acts do not occur'.[9] In the case of complicity, there is a knowledge requirement, whereas, with respect to the failure to prevent, it is enough that there existed a 'serious danger that acts of genocide would be committed'.[10]

In the specifics of the Bosnian application, the Court had decided that genocide had not been committed during the 1992–5 war, with the exception of the Srebrenica massacre of July 1995. The Srebrenica events had already been identified as genocide by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia,[11] and the Court said it could see no reason to disagree with that finding.[12] Serbia could not be linked directly to the crimes, said the majority of the Court, and as a result it could not be deemed an accomplice. Nevertheless, the duty to prevent remained, and here Serbia was in default.

> In view of their undeniable influence and of the information, voicing serious concern, in their possession, the Yugoslav federal authorities should, in the view of the Court, have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have

[8] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, 26 February 2007, para. 430.
[9] *Ibid.*, para. 432. [10] *Ibid.*
[11] *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Judgment, 19 April 2004.
[12] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, 26 February 2007, para. 296.

> been surmised. The [Federal Republic of Yugoslavia] leadership, and President Milošević above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region. As the Court has noted in paragraph 423 above, it has not been shown that the decision to eliminate physically the whole of the adult male population of the Muslim community of Srebrenica was brought to the attention of the Belgrade authorities. Nevertheless, given all the international concern about what looked likely to happen at Srebrenica, given Milošević's own observations to Mladić, which made it clear that the dangers were known and that these dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there was a serious risk of genocide in Srebrenica. Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed. It must therefore be concluded that the organs of the Respondent did nothing to prevent the Srebrenica massacres, claiming that they were powerless to do so, which hardly tallies with their known influence over the [Army of the Republika Srpska]. As indicated above, for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them.[13]

Because Serbia could not necessarily have prevented the crimes, no reparation or damages were assessed. According to the Court, a required nexus for an award of compensation could only be considered 'if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations. However, the Court clearly cannot do so.'[14]

This fascinating conclusion seems pregnant with potential for the promotion of human rights and the prevention of atrocities. As the Court explained, '[t]he obligation to prevent the commission of the crime of genocide is imposed by the Genocide Convention on any State party which, in a given situation, has it in its power to contribute to restraining in any degree the commission of genocide. [T]he obligation to prevent genocide places a State under a duty to act which is not dependent on the certainty that the action to be taken will succeed in preventing the commission of acts of genocide, or even on the likelihood of that outcome.'[15] Do these powerful words not also apply to

[13] *Ibid.*, para. 438. [14] *Ibid.*, para. 462. [15] *Ibid.*, para. 461.

France and Belgium, and even the United States, with respect to Rwanda in 1994? And what of Darfur, in 2007? As for Srebrenica itself, there is much support within the judgment for the view that, if Belgrade should have anticipated the impending atrocities in Srebrenica in July 1995, then so too should others. As Judge Keith noted in his individual opinion:

> Coming closer to the time of the atrocities, not just the leadership in Belgrade but also the wider international community was alerted to the deterioration of the security situation in Srebrenica by Security Council resolution 1004 (1995) adopted on 12 July 1995 under Chapter VII of the Charter. The Council expressed grave concern at the plight of the civilian population 'in and around the safe area of Srebrenica'. It demanded, with binding force, the withdrawal of the Bosnian Serb forces from the area and the allowing of unimpeded access for international humanitarian agencies to the area to alleviate the plight of the civilian population.[16]

Certainly, the Serbs in Belgrade were not the only ones who might have done more, and who could have done more, to protect the Muslims of Srebrenica.

On this important point, the International Court of Justice reinforced the 'responsibility to protect' set out in the 2005 'Outcome Document' of the Summit of Heads of State and Government.[17] But it went further, elevating the duty to a treaty obligation, and one that is actionable before the International Court of Justice for those States that have ratified the Genocide Convention without reservation to article IX. Even for those States that have not accepted article IX of the Convention, to the extent that they have otherwise embraced the jurisdiction of the Court, through a declaration under article 36 of its Statute, they would be liable to the extent that the duty set out in article I of the Genocide Convention is also a duty under customary international law.

The Court did not insist upon any distinction between genocide committed within a State's own territory and genocide committed outside its borders. Nevertheless, this is an important component of its findings. In the past, many States have argued that their obligation to prevent genocide, however nebulous it might have been, was confined to their own territory. It is now clear that this is not the case. To the extent

[16] *Ibid.*, Declaration of Judge Keith, para. 11.
[17] 'Outcome Document of the 2005 World Summit', UN Doc. A/RES/60/1, paras. 138–9. Also: UN Doc. S/RES/1674 (2006), para. 4.

that the obligation arises abroad, the Court quite explicitly affirms that a State must act within the confines of international law, 'while respecting the United Nations Charter and any decisions that may have been taken by its competent organs'.[18] The Court does not provide comfort for the view that the obligation to prevent genocide is so potent that it trumps the Charter of the United Nations, and authorizes military intervention even when the Security Council does not act. Its findings on these points are entirely consistent with the formulation of the 'responsibility to protect' doctrine by the General Assembly of the United Nations.

Responsibility to protect and humanitarian intervention

That the pronouncement of the International Court of Justice on the duty to prevent genocide represented a legal watershed can only be appreciated with reference to previous discussion of the question. At the first session of the United Nations Commission on Human Rights, in 1947, René Cassin remarked that it was essential to ensure the protection of the right to life in what was to become the Universal Declaration of Human Rights. He said that it 'certainly was not as elementary a right as one might believe for in 1933, when Germany violated those principles, there were many countries in the world who asked themselves whether they had a right to intervene'.[19] In 1947, referring to General Assembly Resolution 96(I), Raphael Lemkin wrote that: 'By declaring genocide a crime under international law and by making it a problem of international concern, the right of intervention on behalf of minorities slated for destruction has been established.'[20] But the matter was only addressed tangentially during the drafting of the Genocide Convention, in the debate concerning article VIII, a provision watered down in the final version to remove specific mention of the Security Council, the logical candidate for such activity.

The concept of humanitarian intervention with respect to genocide was largely forgotten for several decades, reflecting a general malaise on the subject prevailing during the Cold War. Academic writers occasionally addressed the subject, but found no significant echo in the

[18] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, 26 February 2007, para. 426.

[19] UN Doc. E/CN.4/SR.13, p. 7.

[20] Raphael Lemkin, 'Genocide as a Crime in International Law', (1947) 41 *American Journal of International Law*, p. 145 at p. 150.

activity of international organizations.[21] Only in the late 1980s was the suggestion of international intervention in the case of humanitarian disasters, a notion dating back centuries, beginning to win acceptance in the international community. Carefully crafted resolutions were adopted by the General Assembly in 1988 and 1990, although their scope was apparently limited to humanitarian crises of natural origin.[22] Then, in 1991, the Security Council authorized military activity to prevent atrocities directed against the Kurdish minority in Iraq.[23] If intervention could be justified in such circumstances, *a fortiori* the precedent ought to apply in cases of genocide, especially given the term 'prevention' in the title of the Convention and the obligation 'to prevent' set out in article I.

With the outbreak of war in Bosnia, it was argued that there was a duty to prevent genocide, imposed by the Convention as well as by customary law.[24] No longer was it merely a question of whether States individually or the international community as a whole could intervene – the argument submitted in the case of Iraq in 1991 and, subsequently, in Somalia – but rather that they must intervene. There were even charges that the Security Council, in imposing an arms embargo, was preventing the victims of genocide from defending themselves and that the Council was, at least indirectly, an accomplice in the crimes. Malaysia invoked article I of the Genocide Convention, saying: 'the Contracting Parties have not upheld their Convention obligations to prevent the crime from being committed and therefore are in violation of the Convention themselves. It has been argued that the Security Council's failure to take

[21] Barbara Harff, *Genocide and Human Rights: International Legal and Political Issues*, Denver: Graduate School of International Studies, University of Denver, 1984; Malcolm N. Shaw, 'Genocide and International Law', in Yoram Dinstein, ed., *International Law at a Time of Perplexity (Essays in Honour of Shabtai Rosenne)*, Dordrecht: Martinus Nijhoff, 1989, pp. 797–820 at pp. 814–15.

[22] GA Res. 43/131; GA Res. 45/100; GA Res. 46/182.

[23] UN Doc. S/RES/688 (1991). See Kelly Kate Pease and David P. Forsythe, 'Human Rights, Humanitarian Intervention, and World Politics', (1993) 15 *Human Rights Quarterly*, p. 290; Olivier Corten and Pierre Klein, 'L'assistance humanitaire face à la souveraineté des états', [1992] *Revue trimestrielle de droits de l'homme*, p. 343; Payam Akhavan, 'Lessons from Iraqi Kurdistan: Self-Determination and Humanitarian Intervention Against Genocide', (1993) 1 *Netherlands Quarterly of Human Rights*, p. 41; Mona Fixdal and Dan Smith, 'Humanitarian Intervention and Just War', (1998) 42 *Mershon International Studies Review*, p. 283; Roger Williamson, *Some Corner of a Foreign Field: Intervention and World Order*, New York and London: Macmillan Press, 1998.

[24] For debate within the United States administration, see: 'Information Memorandum Regarding Yugoslavia, Bosnia: Actions Contributing to Genocide', Department of State Declassified Doc. (11 January 1993), at www.foia.state.gov/Documents/foiadocs.pdf.

enforcement action and to lift the arms embargo against the Government of Bosnia and Herzegovina has made some of its members, which are also Contracting Parties to the Genocide Convention, accomplices to the crime of genocide.'[25] Bosnia put the question to the International Court of Justice in March 1993, when it filed its claim against Serbia.[26] In late 1993, Bosnia threatened to sue the United Kingdom on the same basis.[27] The argument seemed more tenuous, because the United Kingdom was not a combatant and its role was, at best, indirect. The 2007 judgment of the International Court of Justice suggests that it might actually have had a chance of success. Bosnia argued that the United Kingdom had violated the Convention through its activities in the Security Council. But Bosnia never filed the case, and subsequently declared that it would not proceed.[28] As for Bosnia's argument against Yugoslavia, it found a warm echo in the individual opinion of *ad hoc* Judge Elihu Lauterpacht in the Court's ruling on preliminary measures.[29]

Judge Lauterpacht, who was appointed by Bosnia, wrote that '[t]he duty to "prevent" genocide is a duty that rests upon all parties and is a duty owed by each party to every other'. This is the concept of the prohibition of genocide as an *erga omnes* obligation, something already recognized by the International Court of Justice in the *Barcelona Traction* case.[30]

[25] Craig Scott, 'A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council's Arms Embargo on Bosnia and Herzegovina', (1994) 16 *Michigan Journal of International Law*, p. 1.

[26] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Requests for the Indication of Provisional Measures, 8 April 1993, [1993] ICJ Reports 16; *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, [1993] ICJ Reports 325.

[27] 'Statement of Intention by the Republic of Bosnia and Herzegovina to Institute Legal Proceedings Against the United Kingdom Before the International Court of Justice, 15 November 1993', UN Doc. A/48/659-S/26806, (1993) 47 UNYB, p. 465.

[28] See Francis A. Boyle, *The Bosnian People Charge Genocide: Proceedings at the International Court of Justice Concerning Bosnia v. Serbia on the Prevention and Punishment of the Crime of Genocide*, Amherst, MA: Aletheia Press, 1996.

[29] *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, 13 September 1993, Separate Opinion of Judge Lauterpacht, [1993] ICJ Reports 407.

[30] *Barcelona Traction, Light and Power Company (Belgium* v. *Spain)*, [1970] ICJ Reports 3, p. 32. See also *Application of the Convention on the Prevention and Punishment of the*

Looking at the provisions of the instrument, Judge Lauterpacht observed that it 'strongly suggests that the Convention does no more than establish for the Contracting States duties that are to be implemented by legislative action within their domestic legal spheres'. But he said that such a narrow view must be rejected:

> The statement in Article I that the Contracting Parties undertake 'to prevent and to punish' genocide is comprehensive and unqualified. The undertaking establishes two distinct duties: the duty 'to prevent' and the duty 'to punish'. Thus, a breach of duty can arise solely from failure to prevent or solely from failure to punish, and does not depend on there being a failure both to prevent and to punish. Thus the effect of the Convention is also to place upon States duties to prevent and to punish genocide on the inter-State level. This is the plain meaning of the words of Article I and is confirmed to some extent by Article VIII and most clearly by Article IX.[31]

But, when Judge Lauterpacht turned to State practice, even he was equivocal. He cited the Whitaker report, which discussed the massacre of Hutu in Burundi in 1965 and 1972, of Aché Indians in Paraguay prior to 1974, the mass killings by the Khmer Rouge in Kampuchea between 1975 and 1978, and killings of the Bahai in Iran. 'The limited reaction of the parties to the Genocide Convention in relation to these episodes may represent a practice suggesting the permissibility of inactivity', was Judge Lauterpacht's discouraging assessment. 'In contrast with the position that I have taken on other debatable aspects of this case that have not been fully argued by the Parties, I do not feel able, in the absence of a full treatment of this subject by both sides, to express a view on it at this stage – sympathetic though I am in principle to the idea of an individual and collective responsibility of States for the prevention of genocide wherever it may occur.'[32]

The matter returned to centre stage in April 1994, as genocide raged in Rwanda. The situation was clearer, in some respects. The

Crime of Genocide (Bosnia and Herzegovina v. *Yugoslavia (Serbia and Montenegro))*, Preliminary Objections, 11 July 1996, [1996] ICJ Reports 595, para. 31; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Counter-Claims, Order of 17 December 1997, [1997] ICJ Reports 243, p. 258; *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo* v. *Rwanda)*, 3 February 2006, para 64.

[31] *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, [1993] ICJ Reports 325, p. 443.

[32] *Ibid.*, p. 445.

existence of full-blown genocide was more obvious than in the former Yugoslavia. Moreover, this was a case of pure internal conflict, and there was no question of laying blame at the door of a foreign belligerent. Many asked whether the obligation to prevent genocide imposed a duty upon States parties to intervene militarily in order to stop the killings.

What is known is that several members of the Security Council, and in particular the permanent members, were extremely reluctant to use the word 'genocide' in a resolution directed to the Rwandan crisis.[33] In the view of many, including the Secretary-General Boutros Boutros-Ghali, this was because a finding of genocide would impose an obligation to act to prevent the crime. The United States was foremost among those who were uncomfortable with the word genocide. A 1 May 1994 discussion paper prepared within the Office of the Secretary of Defense counselled: 'Be Careful. Legal at State was worried about this yesterday – Genocide finding could commit [the United States] to actually "do something".'[34] At a press briefing on 10 June 1994, State Department spokeswoman Christine Shelley said that the United States was not prepared to declare that genocide was taking place in Rwanda because 'there are obligations which arise in connection with the use of the term'.[35] Four years later, in a speech at Kigali airport, on 25 March 1998, President William Clinton said, contritely: 'We did not immediately call these crimes by their rightful name: genocide.'[36]

Clinton's comments about Rwanda reflected a more general soul-searching within the international community about the failure to act in Rwanda. There was more readiness to acknowledge a duty to act in the face of atrocity. The first legal obstacle was fitting military intervention in an internal conflict within the mandate of the Security Council.

[33] According to the 'Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda', issued 15 December 1999 by the United Nations, '*The delay in identifying the events in Rwanda as a genocide was a failure by the Security Council.* The reluctance by some States to use the term genocide was motivated by a lack of will to act, which is deplorable' (emphasis in the original).

[34] Quoted in Samantha Power, 'Bystanders to Genocide', *The Atlantic*, September 2001, p. 84 at p. 96.

[35] Cited in Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families: Stories from Rwanda*, New York: Farrar Straus and Giroux, 1998, p. 153.

[36] 'Clinton's Painful Words of Sorrow and Chagrin', *New York Times*, 26 March 1998, p. A-10.

By the late 1990s, it was well accepted that internal crises fell within the ambit of Security Council responsibility for international peace and security. But soon, many were suggesting that, pursuant to this responsibility to prevent genocide and other atrocities, military intervention was not only permitted but actually required by international law, even in the absence of Security Council authorization. There had been isolated, and controversial, examples of allegedly humanitarian interventions that did not have the imprimatur of the Security Council: India in Bangladesh in 1971, Tanzania in Uganda in 1979, Vietnam in Cambodia in 1978–9. The latter had not been cloaked in Security Council resolutions and could not be justified under the Charter of the United Nations, although the international community tended to look the other way much as cinema-goers cheer when an aggressive policeman tortures a brutal criminal, despite their general abhorrence of police brutality and recognition that it is fundamentally illegal.[37]

In March 1999, the United States and its NATO allies undertook military intervention in the Kosovo crisis in the name of protecting the Kosovar minority from persecution by the central government of Yugoslavia. Security Council approval was impossible because of the Russian veto. In the early days of the bombardments, NATO leaders, including United States President William Clinton, spoke of genocide.[38] Even the United Nations Secretary-General referred to 'the dark cloud of the crime of genocide'. It was argued that the duty to prevent genocide was a peremptory or *jus cogens* norm, and that consequently it trumped any incompatible obligation, even one dictated by the Charter of the United Nations. In a sense, this is what Judge Lauterpacht had argued at the provisional measures stage in the Bosnia application. When operation of a Security Council resolution imposing an arms embargo on Bosnia began to make members of the United Nations 'accessories to genocide', he said it ceased to be valid and binding, and members were free to disregard it.

[37] Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force*, London and New York: Routledge, 1993, p. 129.

[38] John M. Broder, 'In Address to the Nation, Clinton Explains Need to Take Action', *New York Times*, 25 March 1999. See also Francis X. Clines, 'NATO Refocuses Targets to Halt Serbian Attacks on Albanians in Kosovo', *New York Times*, 30 March 1999; interview with David Scheffer on CNN, 18 April 1999, referring to 'clear indications of genocide', adding: 'I'm sure that the prosecutor [of the International Criminal Tribunal for the former Yugoslavia] will have to start looking at that charge as she proceeds with her investigation.'

In the aftermath of NATO intervention in Kosovo, in 1999, a prestigious unofficial body, the Independent International Commission on Kosovo, concluded that the NATO military intervention was illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council. However, the Commission considered that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.[39]

The expression 'responsibility to protect' as the centrepiece of a doctrine of humanitarian intervention in the case of genocide and other atrocities began to circulate. In its most extreme form, it held that intervention would be justifiable even without authorization of the Security Council. But many partisans of bypassing the Security Council under certain circumstances began to lose their enthusiasm when the United States and the United Kingdom invaded Iraq, in 2003. The pendulum began to swing back towards recognition of the central and unavoidable role of the United Nations Security Council in any humanitarian intervention, even if this meant that in some cases there might be a failure to act appropriately because one or more of the permanent members was threatening to invoke the veto.

In December 2004, the High Level Panel on Threats, Challenges and Change wrote:

> Under the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), States have agreed that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish. Since then it has been understood that genocide anywhere is a threat to the security of all and should never be tolerated. The principle of non-intervention in internal affairs cannot be used to protect genocidal acts or other atrocities, such as large-scale violations of international humanitarian law or large-scale ethnic cleansing, which can properly be considered a threat to international security and as such provoke action by the Security Council.
>
> The successive humanitarian disasters in Somalia, Bosnia and Herzegovina, Rwanda, Kosovo and now Darfur, Sudan, have concentrated attention not on the immunities of sovereign Governments but their responsibilities, both to their own people and to the wider international

[39] *The Kosovo Report: Conflict, International Response, Lessons Learned*, Oxford: Oxford University Press, 2000.

> community. There is a growing recognition that the issue is not the 'right to intervene' of any State, but the 'responsibility to protect' of *every* State when it comes to people suffering from avoidable catastrophe – mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease. And there is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international community.
>
> **We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other largescale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent**.[40]

The following September, the 'responsibility to protect' doctrine was firmly implanted in international law in the 'Outcome Document' of the Summit of Heads of State and Government, convened on the occasion of the sixtieth anniversary of the United Nations. The concept is developed in two paragraphs of the Outcome Document:

> **Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity**
>
> Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and should support the United Nations to establish an early warning capability.
>
> The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapter VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the UN Charter, including Chapter VII, on a case by case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly failing to protect their populations from genocide,

[40] 'A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change', UN Doc. A/59/565, paras. 200–3 (bold face in the original).

> war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity and its implications, bearing in mind the principles of the Charter of the United Nations and international law. We also intend to commit ourselves, as necessary and appropriate, to help states build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assist those which are under stress before crises and conflicts break out.[41]

As formulated in the Outcome Document, the responsibility to protect is derived from customary international law rather than the Genocide Convention. But in reality the duty to prevent genocide affirmed by the International Court of Justice in its judgment in the Bosnian case is essentially the same. The parameters of this duty are very much a work in progress. That the International Court of Justice has applied this in a practical case should make it clear that the scope of the obligation is not simply an issue left to the discretion of diplomats and politicians. The duty to prevent genocide is a legal responsibility, subject to application and sanction by the courts. In the case of each State, it has both an individual and a collective dimension. Nevertheless, the duty to prevent genocide may not be invoked by States as a pretext for going beyond the bounds of the Charter of the United Nations.

Article VIII of the Convention

In article VIII of the Convention, States parties are authorized to 'call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III'. Article VIII provides the only substantive guidance within the Convention for the role of prevention. In the Bosnian case, the International Court of Justice described article VIII as a 'particular case' of the duty to prevent genocide, adding that, even if and when the organs of the United Nations have been called upon, it does not mean that States parties are relieved of the general obligation of prevention.[42] The Court described the place of article VIII

[41] UN Doc. A/RES/60/1, paras. 138–9.

[42] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, 26 February 2007, para. 427.

within the Convention scheme 'as completing the system by supporting both prevention and suppression, in this case at the political level rather than as a matter of legal responsibility'.[43]

Drafting of article VIII of the Convention

The Genocide Convention is, of course, an autonomous treaty with a life of its own. It creates no independent treaty body with responsibility for implementation. In the area of prevention, the only hint of a mandate is that accorded the 'competent organs of the United Nations', pursuant to article VIII. Perfunctory references to prevention in the Convention are all that remain of considerably more substantial provisions in the Secretariat draft. Article XII of that text was entitled 'Action by the United Nations to Prevent or to Stop Genocide'. It stated that: 'Irrespective of any provision in the foregoing articles, should the crimes as defined in this Convention be committed in any part of the world, or should there be serious reasons for suspecting that such crimes have been committed, the High Contracting Parties may call upon the competent organs of the United Nations to take measures for the suppression or prevention of such crimes. In such case the said Parties shall do everything in their power to give full effect to the intervention of the United Nations.' Commenting on the provision, the Secretariat noted that all criminal law has a preventive effect. 'The fact that there is a law tends to deter and prevent action by persons who might be tempted to commit a crime', it said. 'Experience shows, however, that the preventive effect of threats is limited, since these do not stop certain criminals.'[44] Consequently, continued the Secretariat commentary, 'if preventive action is to have the maximum chances of success, the Members of the United Nations must not remain passive or indifferent. The Convention for the punishment of crimes of genocide should, therefore, bind the States to do everything in their power to support any action by the United Nations intended to prevent or stop these crimes.'[45]

Experts consulted by the Secretariat, Vespasian V. Pella and Raphael Lemkin, believed the Secretary-General should have the duty to inform competent organs of the United Nations of threats of genocide because governments might hesitate to do this themselves.[46] But could a convention attribute powers or duties to the Secretary-General that were

[43] *Ibid.*, para. 159. [44] UN Doc. E/447, p. 45. [45] *Ibid.*, pp. 45–6. [46] *Ibid.*, p. 46.

not mandated by the Charter of the United Nations?[47] Member States had mixed reactions to these ambitious proposals.[48]

The United States proposed a text that was both more timid and more general: 'The High Contracting Parties, who are also Members of the United Nations, agree to concert their actions as such Members to assure that the United Nations takes such action as may be appropriate under the Charter for the prevention and suppression of genocide.'[49]

The Soviet Union pushed for a stronger formulation, considering that it should be an obligation upon States to report genocide to the Security Council so that measures could be taken in accordance with Chapter VI of the Charter.[50] It seems the Soviets were concerned not so much with the powers of the Security Council, where they held a veto, as with the alternative, which was litigation before the International Court of Justice. Making the Council the principal body could, conceivably, obstruct the role of the Court. China's proposal, which sought the middle ground, came closest to the final result: 'Any Signatory to this Convention may call upon any competent organ of the United Nations to take such action as may be appropriate under the Charter for the prevention and suppression of genocide.'[51]

In the Ad Hoc Committee, Poland supported the Soviet proposal: 'the convention should stipulate that the crime of genocide leads to international friction and endangers the maintenance of peace and security and that that could make the intervention of the Security Council necessary.'[52] France did not object to an obligation to report genocide to the Security Council, but said the Security Council alone could decide whether to take up the matter.[53] The United States and others thought other United Nations bodies, such as the Trusteeship

[47] *Ibid.*, p. 46. The powers of the Secretary-General are defined in arts. 97–101 of the Charter.

[48] See the Haitian amendment, UN Doc. A/401: 'Irrespective of any provisions in the foregoing article, should the crimes as defined in this Convention be committed in any part of the world, or should there be serious reasons for suspecting that such crimes have been committed, the High Contracting Parties or the human groups affected may call upon the competent organs of the United Nations to take measures for the suppression or prevention of such crimes. In such case the said Parties shall do everything in their power to give full effect to the intervention of the United Nations.' See also UN Doc. E/623/Add.3 (the Netherlands); and UN Doc. E/623/Add.4 (Siam).

[49] 'United States Draft of 30 September 1947', UN Doc. E/623, p. 24.

[50] 'Basic Principles of a Convention on Genocide', UN Doc. E/AC.25/7.

[51] 'Draft Articles for the Inclusion in the Convention on Genocide Proposed by the Delegation of China on 16 April 1948', UN Doc. E/AC.25/9.

[52] UN Doc. E/AC.25/SR.8, p. 17. [53] *Ibid.*, p. 19.

Council, might be more appropriate fora. The United States preferred a provision saying that cases of genocide should 'be referred to the various organs of the United Nations competent to deal with them'.[54] It also felt strongly about specifying that the reporting obligation only concerned acts of genocide, and not all breaches of the obligations imposed by the convention.[55] The United States cautioned about the danger of 'devious ways' to refer matters to the Security Council rather than to the international court.[56] The Ad Hoc Committee rejected a rule of mandatory notification of the Security Council.[57] Eventually, a re-amended version of the Chinese text was adopted: 'Any Signatory to this Convention may bring to the attention of any competent organ of the United Nations any cases of violation of the Convention to take such action as may be appropriate under the Charter for the prevention and suppression of genocide.'[58] A final Soviet attempt to revive the proposal requiring reference to the Security Council was rejected.[59]

In the Sixth Committee, both the United Kingdom[60] and Belgium[61] urged deletion of article VIII, explaining that its concerns were already dealt with under the Charter of the United Nations. The rationale for the provision was explained by the chair of the Ad Hoc Committee, the American John Maktos, as a compromise formulation adopted as a response to the Soviet proposal requiring Security Council referral. Maktos told the Sixth Committee that the legal reason for the Ad Hoc Committee's rejection of the Soviet amendment was the impossibility of amending the Charter of the United Nations or of enlarging the powers of the Security Council by subsequent conventions.[62] The Soviet delegate answered:

> Any act of genocide was always a threat to international peace and security and as such should be dealt with under Chapters VI and VII of the Charter . . . Chapters VI and VII of the Charter provided means for the prevention and punishment of genocide, means far more concrete and effective than anything possible in the sphere of international

[54] *Ibid.*, p. 20. [55] *Ibid.*, p. 22. [56] *Ibid.*, p. 27.
[57] UN Doc. E/AC.25/SR.9, p. 5 (four in favour, three against).
[58] UN Doc. E/AC.25/SR.20, p. 5 (five in favour, one against, with one abstention).
[59] *Ibid.*, p. 4 (five in favour, two against).
[60] UN Doc. A/C.6/236 and Corr.1: 'Delete. Note. These matters are already provided for in the Charter of the United Nations.'
[61] UN Doc. A/C.6/217: 'Delete. Redundant. What is permitted under the Charter should not be permitted in different terms in a convention.'
[62] UN Doc. A/C.6/SR.101 (Maktos, United States).

> jurisdiction . . . The obligation to bring a case of genocide to the attention of the Security Council would ensure that States did not evade their obligations.[63]

Poland's Manfred Lachs gave an example of enlargement of Security Council powers by treaty.[64] Jean Spiropoulos agreed that there was a precedent for conferring new powers on the Security Council, but said that, in such cases, the Council would have to be asked if it accepted.[65] Lachs thought the powers of the Security Council could be increased without it even being asked.[66] The United States agreed with the United Kingdom and Belgium that article VIII should be dropped, 'but objected in advance to any effort which might be made to reintroduce a provision to the effect that cases could be brought before the Security Council only'.[67] This is precisely what happened. The Sixth Committee initially voted to delete article VIII.[68] Then new proposals along similar lines were tabled, one from the Soviet Union,[69] another from France,[70] followed by a compromise text from Iran, France and the Soviet Union. 'The High Contracting Parties may call the attention of the Security Council or, if necessary, of the General Assembly to the cases of genocide and of violations of the present Convention likely to constitute a threat to international peace and security, in order that the Security Council may take such measures as it may deem necessary to stop that threat.'[71] Put to a vote, the amendment was rejected.[72]

Australia revived the question with an amendment that said essentially what the Ad Hoc Committee had decided.[73] The chair declared the

[63] *Ibid.* (Morozov, Soviet Union). [64] *Ibid.* (Lachs, Poland).
[65] *Ibid.* (Spiropoulos, Greece). [66] *Ibid.* (Lachs, Poland).
[67] UN Doc. A/C.6/SR.94 (Maktos, United States).
[68] UN Doc. A/C.6/SR.101 (twenty-one in favour, eighteen against, with one abstention).
[69] UN Doc. A/C.6/215/Rev.1: 'replace paras 1 and 2 with "The High Contracting Parties undertake to report to the Security Council all cases of genocide and all cases of a breach of the obligations imposed by the Convention so that the necessary measures may be taken in accordance with Chapter VI of the United Nations Charter." '
[70] UN Doc. A/C.6/259: 'The High Contracting Parties may call the attention of the Security Council to the cases of genocide and of violations of the present Convention likely to constitute a threat to international peace and security in order that the Security Council may take such measures as it deems necessary to stop the threat.'
[71] UN Doc. A/C.6/SR.102 (Chaumont, France).
[72] *Ibid.* (twenty-seven in favour, thirteen against, with five abstentions).
[73] UN Doc. A/C.6/265: 'With respect to the prevention and suppression of acts of genocide, a Party to this Convention may call upon any competent organ of the United Nations to take such action as may be appropriate under the Charter of the United Nations.'

Australian proposal out of order, as it had already been decided, but was overruled on a vote by the Committee. Given that the substance of the Australian proposal had been discussed at length, there was no real debate. Clearly, a deal had been struck. The new text of article VIII was adopted.[74] The United Kingdom declared it had voted for the Australian amendment because, although unnecessary to confer powers already possessed by virtue of the Charter, there should be no doubt that the convention did not imply the only recourse was to the International Court of Justice.[75]

Some twenty years later, the General Assembly thought sufficiently highly of the role of article VIII to include the same text, *mutatis mutandis*, in the International Convention on the Suppression and Punishment of the Crime of Apartheid.[76] Yet most commentators have tended to dismiss article VIII as relatively insignificant. Nehemiah Robinson observed that the 'low value' the drafters gave to the provision is shown by the fact that it was originally deleted.[77] Benjamin Whitaker wrote that article VIII adds nothing new to the Convention.[78] But Hans-Heinrich Jescheck made the useful observation that, by allowing for recourse to the organs of the United Nations, article VIII of the Convention presents an obstacle to any State that might invoke article 2(7) of the Charter of the United Nations and claim that a genocide-related matter is essentially within its domestic jurisdiction.[79] According to Special Rapporteur Nicodème Ruhashyankiko:

> [A]rticle VIII of the Convention, while adding nothing to the Charter, is of some importance in that it states explicitly the right of States to call upon the United Nations with a view to preventing and suppressing genocide and the responsibility of the competent organs of the United Nations in the matter.
>
> Furthermore, as has been pointed out, it is the only article in the Convention for the Prevention and Punishment of the Crime of

[74] UN Doc. A/C.6/SR.105 (twenty-nine in favour, four against, with five abstentions). Canada, Peru and India declared that they had voted against, and Greece said that it had abstained.

[75] *Ibid.* (Fitzmaurice, United Kingdom). [76] GA Res. 3068(XXVIII), art. VIII.

[77] Nehemiah Robinson, *The Genocide Convention: A Commentary*, New York: Institute of Jewish Affairs, 1960, p. 90.

[78] 'Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide', UN Doc. E/CN.4/Sub.2/1985/6, para. 66.

[79] Hans-Heinrich Jescheck, 'Genocide', in Rudolph Bernhardt, ed., *Encyclopedia of Public International Law*, Vol. II, Amsterdam: North-Holland Elsevier, 1995, pp. 541–4 at p. 542.

> Genocide which deals with the prevention of that crime, referring to the possibility of preventive action by the United Nations called upon by Parties to the Convention. It should be noted, further, that such action by United Nations organs is action of a particularly humanitarian nature, the need and justification for which should not be underestimated. It would be desirable for the organs of the United Nations, in pursuance of article VIII of the Convention, to exercise their powers in this field actively.[80]

Academic writers have also considered article VIII to be important in that it allows States parties that are non-members of the United Nations to appeal to its bodies.[81] While of interest historically, this point can only be of marginal significance at a time when virtually all States now belong to the United Nations.

Action by United Nations organs

At the very least, article VIII of the Convention invites States parties to call upon the appropriate organs of the United Nations to take action that they deem appropriate to prevent and suppress genocide. Article 7 of the Charter of the United Nations defines the term 'organs', and distinguishes between the principal and subsidiary organs of the organization. The principal organs are the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice and the Secretariat. The term 'subsidiary organs' is not defined, although provisions in the Charter entitle the General Assembly[82] and the Security Council[83] to create them. The Economic and Social Council is empowered to establish commissions, including the Commission on Human Rights, but these bodies are not designated 'subsidiary organs'.[84]

Nehemiah Robinson said that the only competent organs contemplated by article VIII are the General Assembly and the Security Council because they are the only ones to which reference was made during the debates. Robinson said that, *prima facie*, the Economic and Social

[80] 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur', UN Doc. E/CN.4/Sub.2/416, para. 304.
[81] Robinson, *Genocide Convention*, p. 94.
[82] Charter of the United Nations, art. 22. See Meinhard Hilf, 'Article 22', in Bruno Simma, ed., *The Charter of the United Nations*, Oxford: Oxford University Press, 1995, p. 380.
[83] Charter of the United Nations, art. 29. [84] *Ibid.*, art. 68.

Council has no competence in such cases.[85] These propositions are questionable, given that 'organs' is a technical term, and that the Charter clearly refers to the Economic and Social Council as a United Nations organ.[86] The involvement of the United Nations in the Rwandan genocide indicates the wide range of organs, both principal and subsidiary, that may be called upon. The Security Council, the General Assembly, the Secretariat and the Economic and Social Council all took action in Rwanda, either in their own right or through their subsidiary bodies.

General Assembly

The General Assembly appears to have addressed the issue of genocide for the first time in 1982, when it qualified the massacres at the Sabra and Shatila refugee camps in Beirut as genocide.[87] On 18 September 1982, hundreds of Palestinian refugees in those camps were massacred. Israel, which had invaded much of southern Lebanon during the summer months of 1982, was blamed for the atrocity. Its security forces had taken control of the camps, leaving Christian militias with a free hand to carry out the carnage. The Security Council promptly condemned 'the criminal massacre of Palestinian civilians in Beirut',[88] following a report submitted by the Secretary-General.[89] The Soviet Union, on 21 September 1982, said: 'The word for what Israel is doing on Lebanese soil is genocide. Its purpose is to destroy the Palestinians as a nation.'[90] In a General

[85] Robinson, *Genocide Convention*, p. 98.

[86] Whether the ECOSOC was a 'competent organ' within the meaning of art. VIII of the Convention was debated when it considered a request from the Soviet Union to include in the agenda of its thirty-ninth session the following item: 'Policy of Genocide Which is Being Pursued by the Government of the Republic of Iraq Against the Kurdish People' (UN Doc. E/3809).

[87] However, this was not the first time that allegations of genocide had been made before the General Assembly. For example, in the 1959 debate on Tibet, there were charges that China had committed genocide: UN Doc. A/PV.812, para. 127 (El Salvador); UN Doc. A/PV.831, para. 13 (Malaya), para. 126 (Cuba); and UN Doc. A/PV.833, para. 8 (El Salvador), para. 28 (Netherlands). The accusations were sparked by a report from the International Commission of Jurists, *The Question of Tibet and the Rule of Law*, Geneva: International Commission of Jurists, 1959, pp. 68–71. In June 1963, Mongolia requested the General Assembly to include in its provisional agenda the item: 'The Policy of Genocide Carried out by the Government of the Republic of Iraq Against the Kurdish People'. See UN Doc. A/5429 (1963).

[88] SC Res. 521 (1982). [89] UN Doc. S/15400 (1982).

[90] UN Doc. S/15419 (1982). See also the statements of Surinam: UN Doc. S/15406 (1982); Madagascar: UN Doc. A/37/489, annex (1982); Mongolia: UN Doc. A/37/480, annex

Assembly debate a few days later, the German Democratic Republic claimed the events proved irrefutably that Israel had decided genocide was the answer to the Palestinian question.[91] Cuba, on behalf of sixteen sponsors, proposed a General Assembly resolution declaring the massacres to be an 'act of genocide'.[92] Speaking in support, Chamorro Mora of Nicaragua declared: 'It is difficult to believe that a people that suffered so much from the Nazi policy of extermination in the middle of the twentieth century would use the same fascist, genocidal arguments and methods against other peoples.'[93] Nicaragua added that its people had relevant experience, because of 'the genocidal massacre of 50,000 of their sons under the Somoza dictatorship' which 'was effected with Israeli and United States weapons'.[94]

There was little discussion of the scope of the term genocide,[95] which had obviously been chosen to embarrass Israel rather than out of any concern with legal precision. Of interest in terms of the scope of article VIII were suggestions that the General Assembly was not the appropriate organ to address the issue of genocide. For example, according to Singapore:

> [M]y delegation regrets the use of the term 'an act of genocide' as we feel that the determination of an act of genocide should be made by the appropriate legal bodies, in accordance with article VIII of the Convention on the Prevention and Punishment of the Crime of Genocide. In the Convention, the term 'genocide' is used to mean acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group. My delegation regrets the tendency in the Assembly to engage in the use of loose and casual language when referring to issues with a precise legal definition.[96]

Canada said 'the term "genocide" cannot, in our view, be applied to this particular inhuman act'. Echoing Singapore, it said: 'We also

(1982); Vietnam: UN Doc. A/37/489, annex (1992); and Pakistan: UN Doc. A/37/502, annex (1992).

[91] UN Doc. A/37/PV.92.

[92] UN Doc. A/37/L.52 and Add.1; UN Doc. A/37/PV.108, para. 58.

[93] UN Doc. A/37/PV.96, para. 29. See also UN Doc. A/37/PV.96, para. 41; UN Doc. A/37/PV.92, para. 50; UN Doc. A/37/PV.92, para. 95.

[94] UN Doc. A/37/PV.96, para. 37.

[95] Antonio Cassese, *Violence and Law in the Modern Age*, Princeton, NJ: Princeton University Press, 1988, pp. 82–4; Antonio Cassese, 'La Communauté internationale et le génocide', in *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally*, Paris: Pedone, 1991, pp. 183–94 at pp. 191–2.

[96] UN Doc. A/37/PV.108, para. 121.

question whether the General Assembly has the competence to make such a determination.'[97] The United States said that, while the criminality of the massacre was beyond question, it was 'a serious and reckless misuse of language to label this tragedy genocide as defined in the 1948 Convention . . . Indeed, in a very real sense, the reckless use of hyperbole tends to cheapen a tragic event.'[98] Finland regretted that the term had prevented the General Assembly from giving unanimous expression 'to the universal outrage and condemnation which are shared by the whole international community with regard to the massacre at Sabra and Shatila'.[99] Sweden said that, despite its revulsion at the massacre, the term genocide was 'not correct'.[100] The resolution was adopted by 123 to none, with twenty-two abstentions.[101] Paragraph 2, which '[r]esolve[d] that the massacre was an act of genocide', was adopted by ninety-eight votes to nineteen, with twenty-three abstentions, on a recorded vote.[102]

A reference to the Genocide Convention in the preamble to the General Assembly's 1992 'Declaration on the Rights of Persons Belonging to National or Ethnic Religious and Linguistic Minorities'[103] emphasized the close relationship between the prohibition of genocide and the protection of minorities. Article 1(1) of the Declaration begins: 'States shall protect the existence . . . of minorities . . .'. In December 1993, a General Assembly resolution dealing with the situation in the former Yugoslavia cited the Genocide Convention in its preamble.[104] It also endorsed a resolution of the Commission on Human Rights adopted at its special session of August 1992, 'in particular its call for all States to consider the extent to which the acts committed in Bosnia and Herzegovina and in Croatia constitute genocide, in accordance with the Convention on the Prevention and Punishment of the Crime of Genocide'.[105] Another important resolution described 'ethnic cleansing' as a form of genocide.[106] But the Assembly was hardly consistent, because at the same session another

[97] *Ibid.*, para. 197. [98] *Ibid.*, para. 164. [99] *Ibid.*, para. 171. [100] *Ibid.*, para. 178.
[101] GA Res. 37/123 D; UN Doc. A/37/PV.108, para. 152.
[102] UN Doc. A/37/PV.108, para. 151. [103] UN Doc. A/RES/48/138.
[104] Initial resolutions on the Bosnian crisis spoke of 'ethnic cleansing' but stopped short of using the term 'genocide': 'The Situation in Bosnia and Herzegovina', UN Doc. A/RES/46/242.
[105] 'Situation of Human Rights in the Territory of the Former Yugoslavia', UN Doc. A/RES/47/147.
[106] 'The Situation in Bosnia and Herzegovina', UN Doc. A/RES/47/121.

resolution entitled '"Ethnic cleansing" and racial hatred' did not even employ the term genocide or mention the Convention.[107] Since 1992, a number of General Assembly resolutions relating to the Bosnian crisis have referred to the Genocide Convention or cited the importance of preventing genocide.[108] In 1996, the Assembly went a step further, stating that rape, under certain circumstances, could constitute an act of genocide.[109]

During its 1994 session, the Assembly adopted several resolutions on the Rwandan crisis,[110] although only one that spoke of genocide. On 23 December 1994, it condemned the acts of genocide that had taken place in Rwanda, especially following the events of 6 April 1994.[111] The resolution also expressed 'deep concern at the reports from the Special

[107] '"Ethnic Cleansing" and Racial Hatred', UN Doc. A/RES/47/80. See also 'Third Decade to Combat Racism and Racial Discrimination', GA Res. 48/91.

[108] 'The Situation in Bosnia and Herzegovina', UN Doc. A/RES/48/88; 'Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia', UN Doc. A/RES/48/143; 'Situation of Human Rights in the Territory of the Former Yugoslavia: Violations of Human Rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)', UN Doc. A/RES/48/153; 'The Situation in Bosnia and Herzegovina', UN Doc. A/RES/49/10; 'Situation of Human Rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)', UN Doc. A/RES/49/196; 'Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia', UN Doc. A/RES/49/205; 'Situation of Human Rights in Kosovo', UN Doc. A/RES/49/204; 'Situation of Human Rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)', UN Doc. A/RES/50/193; 'Situation of Human Rights in Kosovo', UN Doc. A/RES/50/190.

[109] 'Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia', UN Doc. A/RES/50/192, para. 3. See also 'Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia', UN Doc. A/RES/51/115, para. 3; 'The Rights of the Child', UN Doc. A/RES/51/77, para. 28; 'The Rights of the Child', UN Doc. A/RES/52/107, para. 12. The Economic and Social Council made a similar pronouncement: 'Elimination of Violence Against Women', ESC Res. 1996/12. The language was drawn from the 'Beijing Declaration and Platform for Action', UN Doc. A/CONF.177/20, para. 147(e). See also 'Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia, Report of the Secretary-General', UN Doc. A/51/557, para. 2.

[110] 'Emergency Assistance for a Solution to the Problem of Refugees, the Restoration of Total Peace, Reconstruction and Socio-Economic Development in War-Stricken Rwanda', UN Doc. A/RES/49/23; 'Special Assistance to Countries Receiving Refugees from Rwanda', UN Doc. A/RES/49/24; 'Emergency Assistance for the Socio-Economic Rehabilitation of Rwanda', UN Doc. A/RES/49/211.

[111] 'Situation of Human Rights in Rwanda', UN Doc. A/RES/49/206.

Rapporteur and the Commission of Experts that genocide had been committed in Rwanda'.[112]

The General Assembly's 1997 resolution on human rights in Cambodia used the term genocide in a preambular paragraph: 'Desiring that the United Nations respond positively to assist efforts to investigate Cambodia's tragic history including responsibility for past international crimes, such as acts of genocide and crimes against humanity.'[113]

Periodically, the General Assembly has adopted resolutions on the status of the Convention, calling upon non-party States to ratify the instrument.[114] On 2 December 1998, upon a proposal from Armenia, the Assembly resolved to mark the fiftieth anniversary of the Convention.[115] In the debate, many delegations emphasized the adoption of the Rome Statute of the International Criminal Court[116] five months earlier as an historic development in the law of genocide. Several addressed issues of particular concern, declaring openly or suggesting implicitly that acts of genocide were involved. Thus, Cyprus described the 'ethnic cleansing' of the northern portion of the island, occupied by Turkey since 1974. The Cypriot delegate referred to 'massive colonization and systematic destruction of the religious and cultural heritage in the territory occupied by the Turkish army and by the inhumane conditions of life imposed on the few Greek Cypriots and Maronites still living in the occupied part of the island'. The United States discussed the situation in the Great Lakes region of Africa, the crisis in Kosovo, and the efforts to prosecute the leaders of the Khmer Rouge in Cambodia. Ukraine addressed the 1932–3 famine, describing it as 'a conscious and deliberate genocide undertaken by the Soviet regime'. The Ukraine delegation said it was necessary 'to take a fresh look at the substance of the Convention', proposing that 'the definition of genocide should be expanded to include all groups targeted by policies which led to the destruction or any delineation of humanity'. The delegations of Armenia and Rwanda discussed the phenomenon of denial of genocide and the importance of 'countering intellectually crafted obscurantism and revisionism, which sought to hide, diminish or belittle the past relating to genocide'. Israel

[112] GA Res. 49/206, adopted without a vote.
[113] 'Situation of Human Rights in Cambodia', GA Res. 52/135.
[114] GA Res. 795(VIII); GA Res. 40/142; GA Res. 41/147; GA Res. 42/133; GA Res. 43/138; GA Res. 44/158; GA Res. 45/152; GA Res. 47/108.
[115] UN Doc. A/53/L.47.
[116] Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90.

warned that the Convention definition was being 'recruited to serve controversial political and cultural aims and contexts'. Accordingly, while it might be appropriate to expand the definition of genocide to include gender and political groups, this should be accomplished 'by using the international treaty mechanism rather than misinterpreted contemporary legal definitions'. Cuba described the blockade by the United States as 'a genocidal policy that targeted a people with extermination through hunger and disease'.

Recently, the most important references to genocide in the resolutions of the General Assembly have concerned the 'responsibility to protect',[117] and the endorsement of the work of the Special Adviser for the Prevention of Genocide.[118] The General Assembly has proclaimed forms of commemoration of two of the great genocides of the twentieth century. Acting on an initiative of the African Union, it declared 7 April 2004 to be the International Day of Reflection on the 1994 Genocide in Rwanda.[119] The following year, it adopted a resolution on assistance to survivors of the 1994 genocide in Rwanda. The resolution recognized the difficulties faced by survivors of the genocide, particularly orphans, widows and victims of sexual violence, many of whom have HIV or AIDS. In the resolution, the General Assembly requested the Secretary-General to establish a programme of outreach entitled 'The Rwanda Genocide and the United Nations'.[120]

In 2005, the General Assembly established 27 January as International Day of Commemoration in memory of the victims of the Holocaust, to be marked annually. The resolution also '[r]ejects any denial of the Holocaust as an historical event, either in full or part', and '[c]ommends those States which have actively engaged in preserving those sites that served as Nazi death camps, concentration camps, forced labour camps and prisons during the Holocaust'. The Secretary-General was requested

[117] UN Doc. RES/60/1, paras. 138–9.

[118] *Ibid*., para. 140. The Special Adviser or Special Representative on Prevention of Genocide is discussed under a distinct heading later in this chapter.

[119] UN Doc. A/RES/58/234. See: A/58/PV.78, pp. 16–17.

[120] 'Assistance to Survivors of the 1994 Genocide in Rwanda, Particularly Orphans, Widows and Victims of Sexual Violence', UN Doc. A/RES/60/225; UN Doc. A/60/PV.69, pp. 7–8. The outreach programme was the result of a proposal from the United States: UN Doc. A/60/L.35. For the report of the Secretary-General on the outreach programme, see: 'Information and Outreach Programme Entitled "The Rwanda Genocide and the United Nations"', UN Doc. A/60/863. A resolution along similar lines was proposed in 2007: UN Doc. A/62/L.26.

to establish a programme of outreach on the subject of the 'Holocaust and the United Nations'.[121]

Security Council

The first Security Council action to prevent and punish genocide can be dated to 1992, with its initial intervention in the war in Bosnia and Herzegovina. The Commission of Experts established by the Council did not have an explicit mandate to investigate the crime of genocide, but the members undoubtedly considered it within the ambit of their work. The preliminary report of the Commission to the Council addressed the application of the Convention to the events in Bosnia and Herzegovina.[122] The work of the Commission led, in short order, to the Council's establishment of an international tribunal having subject matter jurisdiction over the crime of genocide.[123] Implicitly, at the very least, the Council was taking action to prevent genocide. However, it stopped short of declaring that genocide had been committed. The resolution creating the *ad hoc* Tribunal for the former Yugoslavia, adopted on 8 May 1993, did not refer to genocide, although the Tribunal's statute recognized genocide as part of its subject matter jurisdiction.[124] The word 'genocide' had appeared in its resolutions for the first time a few weeks earlier, on 16 April 1993, when the Council took note of the order of the International Court of Justice of 8 April 1993, requiring Yugoslavia to 'take all measures within its power to prevent the commission of the crime of genocide'.[125] But here too the Council avoided adopting any position of its own on the subject.

[121] UN Doc. A/RES/60/7. For debate on its adoption, including a number of statements by national delegations, see: UN Doc. A/60/PV.42. Adoption of the resolution provoked an exchange of notes between Iran and Israel: 'Note verbale dated 20 January 2006 from the Permanent Mission of the Islamic Republic of Iran to the United Nations addressed to the President of the General Assembly', UN Doc. A/60/655; Letter dated 31 January 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General, UN Doc. A/60/661. For the first report by the Secretary-General on the outreach programme, see: 'Programme of Outreach on the "Holocaust and the United Nations", Report of the Secretary-General', UN Doc. A/60/882. A second resolution was adopted in early 2007: UN Doc. A/61/L.53; UN Doc. A/61/PV.85, p. 3.

[122] 'Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)', UN Doc. S/35374 (1993); M. Cherif Bassiouni, 'The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia', (1994) 5 *Criminal Law Forum*, p. 279.

[123] UN Doc. S/RES/827 (1993). [124] *Ibid.* [125] UN Doc. S/RES/819 (1993).

At about the same time, there were reports of an initiative before the Security Council that it take 'necessary measures to end the genocide in Bosnia and Herzegovina'. The origin, apparently, was a proposal emanating from the June 1993 Vienna World Conference on Human Rights. There is no trace of this in the Vienna Declaration and Programme of Action, however, which carefully expressed 'dismay at massive violations of human rights especially in the form of genocide, "ethnic cleansing" and systematic rape of women in war situations, creating mass exodus of refugees and displaced persons'.[126] At no point did the Vienna Declaration refer either to Bosnia or to the Security Council. A United States official described the approach to the Security Council as 'not really an official act of the Conference', and it was not pursued.[127]

The Security Council first employed the term 'genocide' to characterize a situation at the height of the Rwandan crisis, and then only after weeks of vacillation and debate. In its initial response to the genocide, the Security Council actually authorized a reduction in the forces of the United Nations Assistance Mission for Rwanda, in service in the country since late the previous year.[128] By the end of April 1994, slightly more than two weeks after the beginning of the massacres, some elected members of the Council – New Zealand, Spain, Czech Republic and Argentina – took the view that genocide was being committed.[129]

[126] 'Vienna Declaration and Programme of Action', UN Doc. A/CONF.157/24 (1993), UN Doc. A/RES/48/141, para. 28(I).

[127] Jon Western, 'US Policy and Human Rights in Bosnia', in Debra Liang-Fenton, ed., *Implementing US Human Rights Foreign Policy*, Washington: United States Institute of Peace Press, 2003, pp. 242–3.

[128] UN Doc. S/RES/912 (1994), para. 8 *in fine*. See Fatsah Ougergouz, 'La tragédie rwandais du printemps 1994: Quelques considérations sur les premières réactions de l'Organisation des Nations Unies', (1996) 100 *Revue générale de droit international public*, p. 149; Tara Sopra, 'Into the Heart of Darkness: The Case Against the Foray of the Security Council Tribunal into the Rwandan Crisis', (1997) 32 *Texas International Law Journal*, p. 329.

[129] Linda Melvern, 'Genocide Behind the Thin Blue Line', (1997) 28 *Security Dialogue*, p. 333 at p. 341. See also Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda*, New York, Washington, London and Brussels: Human Rights Watch, Paris: International Federation of Human Rights, 1999, pp. 638–40; Boutros Boutros-Ghali, *Unvanquished, A US–UN Saga*, New York: Random House, 1999, pp. 129–40. Pope John Paul II was apparently the first major international personality to use the term 'genocide' to describe the situation in Rwanda, in a general audience on 27 April 1994, reported by *Osservatore Romano*, 3 May 1994. Roméo Dallaire has written that the United Kingdom-based NGO Oxfam first used the term on 24 April: Roméo Dallaire, *Shake Hands with the Devil*, Toronto: Random House, 2003, p. 333.

New Zealand's Colin Keating, then the president of the Council, was convinced that the Council must recognize that genocide was ongoing because he believed this would compel the body, of which all but three members had ratified the Convention, to take action.[130] At an informal Council meeting on 28 April 1994, Czech ambassador Karel Kovanda stated that genocide was taking place in Rwanda.[131] But some permanent members strenuously objected to the term. The United Kingdom permanent representative, Sir David Hannay, said that, if the Council used the word 'genocide', it would become a laughing stock.[132] As for the United States, its representative was operating pursuant to instructions that the word 'genocide' was not to be used in the context of the Rwandan debacle.[133] The African members of the Council were also uncomfortable with a reference to genocide, and they were backed by other non-aligned States. On 30 April 1994, the Council finally agreed upon a presidential statement that echoed the terms of articles I and II of the Genocide Convention but did not use the term 'genocide'. The statement said: '[T]he Security Council recalls that the killing of members of an ethnic group with the intention of destroying such a group in whole or in part constitutes a crime punishable by international law.'[134] A 1999 report of the French National Assembly described this use of the definition of genocide while avoiding the term itself as 'l'hypocrisie la plus totale'.[135]

[130] *Ibid.* The three non-parties were Djibouti, Nigeria and Oman.

[131] According to Kovanda, United States officials put pressure on his superiors to compel him to support the withdrawal of United Nations troops from Rwanda: 'The Triumph of Evil', in Frontline, Public Broadcasting Service, 26 January 1999, www.pbs.org/wgbh/pages/frontline/shows/evil/etc/script.html (consulted 29 April 1999).

[132] Melvern, 'Genocide'.

[133] Tim Weiner, 'Clinton Admits US Ignored Warnings of '94 Genocide in Rwanda', *New York Times*, 26 March 1998, p. A-10; Douglas Jehl, 'Officials Told to Avoid Calling Rwanda Killings Genocide', *New York Times*, 10 June 1994, p. A-8; Holly Burkhalter, 'The Question of Genocide: The Clinton Administration and Rwanda', *World Policy Journal*, Winter 1994–5, p. 44; Samantha Power, 'Bystanders to Genocide', *The Atlantic*, September 2001, p. 84.

[134] 'Statement by the President of the Security Council Condemning the Slaughter of Civilians in Kigali and Other Parts of Rwanda', UN Doc. S/PRST/994/21 (30 April 1994).

[135] France, Assemblée nationale, 'Rapport d'information déposé en application de l'article 145 du Règlement par la Mission d'information de la Commission de la défense nationale et des forces armées et de la Commission des affaires étrangères, sur les opérations militaires menées par la France, d'autres pays et l'ONU au Rwanda entre 1990 et 1994', Paris, 1999, p. 307.

The High Level Panel on Threats, Challenges and Change described the events, in its December 2004 report, as follows:

> Too often, the United Nations and its Member States have discriminated in responding to threats to international security. Contrast the swiftness with which the United Nations responded to the attacks on 11 September 2001 with its actions when confronted with a far more deadly event: from April to mid-July 1994, Rwanda experienced the equivalent of three 11 September 2001 attacks every day for 100 days, all in a country whose population was one thirty-sixth that of the United States. Two weeks into the genocide, the Security Council withdrew most of its peacekeepers from the country. It took almost a month for United Nations officials to call it a genocide and even longer for some Security Council members. When a new mission was finally authorized for Rwanda, six weeks into the genocide, few States offered soldiers. The mission deployed as the genocide ended.[136]

The High Level Panel said that the Security Council was 'bowing to United States pressure'.[137]

Now challenged to take measures to prevent genocide, and in effect called upon to act by the Czech Republic in accordance with article VIII of the Convention, the Security Council dawdled as hundreds of thousands were killed. On 6 May 1994, the non-permanent members presented a resolution aimed at reinforcing the Assistance Mission with 5,500 new troops. But only Ethiopia offered a unit ready for immediate service. Other offers came from Congo, Ghana, Malawi, Nigeria, Senegal, Zambia and Zimbabwe, but all required United Nations equipment and none had any airlift capability. The United States magnanimously offered to provide fourteen armoured personnel carriers on a lease for US$14 million. The debates wore on. As ambassador Keating later recalled: 'It was almost surreal. While thousands of beings were hacked to death every day, ambassadors argued fitfully for weeks about military tactics.'[138] On 17 May 1994, the Council adopted a resolution authorizing an expansion of the Mission, as proposed, to 5,500 troops. Again borrowing the definition of genocide but without the word itself, the preamble to the resolution 'recalled' that 'the killing of members of an ethnic group with the intention of destroying such a group, in whole or in part, constitutes a crime punishable under international law'.[139]

[136] 'A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change', UN Doc. A/59/565, para. 41.
[137] *Ibid.*, para. 87. [138] Melvern, 'Genocide'. [139] UN Doc. S/RES/917 (1994).

Finally, on 8 June 1994, the dreaded 'g-word' graced the lips of the Council, when a resolution noted 'with the gravest concern the reports indicating that acts of genocide have occurred in Rwanda and recall[ed] in this context that genocide constitutes a crime punishable under international law'.[140] The reports had come, *inter alia*, from the Secretary General who, on 31 May 1994, informed the Security Council that 'there can be little doubt that it constitutes genocide, since there have been large-scale killings of communities and families belonging to a particular ethnic group'.[141] The resolution extended the mandate of the Assistance Mission and decreed the deployment of two additional battalions.

On 22 June 1994, the Council authorized a form of humanitarian intervention that became known as 'Operation Turquoise'.[142] This followed an announcement two days earlier of France's intent to deploy a force in the region whose aim would be to protect civilians. Suspiciously, the word 'genocide' had again dropped out of the Council's vocabulary. Operation Turquoise was a French-run mission establishing a 'safe humanitarian zone' in the south-west corner of Rwanda. The philosophy behind the effort seemed to reject the qualification of genocide directed against an ethnic group and instead approached the crisis as an armed conflict between two warring parties in which civilians in general required protection. France's contingent included forces that had previously been garrisoned in Rwanda to assist the former regime in fighting the Rwandese Patriotic Front. The French Assemblée nationale commission conceded in its 1999 report that use of such troops 'without doubt created a source of ambiguity and encouraged mistrust and scepticism'.[143] In her history of the Rwandan genocide, Alison Des Forges spoke of the 'indifference to the genocide' of French policy-makers involved in Operation Turquoise, but admitted that

[140] UN Doc. S/RES/925 (1994), preamble. The report of the inquiry commissioned by the Secretary-General concluded: '*The delay in identifying the events in Rwanda as a genocide was a failure by the Security Council.* The reluctance by some States to use the term genocide was motivated by a lack of will to act, which is deplorable.' 'Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda', issued 15 December 1999 by the United Nations (emphasis in the original).

[141] 'Report of the Secretary-General on the Situation in Rwanda, Reporting on the Political Mission He Sent to Rwanda to Move the Warring Parties Towards a Cease-fire and Recommending That the Expanded Mandate for UNAMIR Be Authorized for an Initial Period of Six Months', UN Doc. S/1994/640 (1994), para. 36.

[142] UN Doc. S/RES/929 (1994).

[143] Note 135 above, p. 321.

many Tutsi lives were in fact saved by the efforts of individual soldiers.[144]

Three weeks later, the Security Council established a Commission of Experts, like the one created for the former Yugoslavia.[145] The Commission was to study indications of grave violations of international humanitarian law, 'including the evidence of possible acts of genocide'.[146] The Council also called upon States and 'international humanitarian organizations' to collate substantial information relating to breaches of the Genocide Convention during the conflict in Rwanda.[147] The Commission confirmed that genocide had taken place:

> After careful deliberation, the Commission of Experts has concluded that there is overwhelming evidence to prove that acts of genocide against the Tutsi group were perpetrated by Hutu elements in a concerted, planned systematic and methodical way. Abundant evidence shows that these mass exterminations perpetrated by Hutu elements against the Tutsi group as such, during the period mentioned above, constitute genocide within the meaning of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948.[148]

Drawing on this report, on 8 November 1994 the Security Council created the International Criminal Tribunal for Rwanda. Like its Yugoslav counterpart, it had subject matter jurisdiction over the crime of genocide. In addition, however, and in contrast with the Yugoslav Tribunal, the text of the resolution actually referred to genocide. The Council 'express[ed] once again its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda'. The first operative paragraph declared the tribunal had 'the sole purpose of prosecuting persons responsible for genocide and other

[144] Des Forges, *Leave None To Tell*, p. 689. See also Gérard Prunier, 'Operation Turquoise: A Humanitarian Escape from a Political Dead End', in Howard Adelman and Astri Suhrke, ed., *The Path of a Genocide: The Rwanda Crisis from Uganda to Zaire*, New Brunswick, NJ, and London: Transaction, 1999, pp. 281–306.

[145] UN Doc. S/RES/935 (1994). See Mutoy Mubiala, 'Le Tribunal international pour le Rwanda: Vraie ou fausse copie du Tribunal pénal international pour l'ex-Yougoslavie?', (1995) 99 *Revue générale de droit international public*, p. 929 at pp. 935–6.

[146] UN Doc. S/RES/935 (1994), para. 1. [147] *Ibid.*, para. 2.

[148] UN Doc. S/1994/924, annexes (preliminary report of 1 October 1994). See also 'Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)', UN Doc. S/1994/1405, annex.

serious violations of international humanitarian law'.[149] The word 'genocide' also figured in the Tribunal's full title: 'The 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'.

Since then, the Security Council has mentioned genocide in a number of resolutions,[150] several of them dealing with the situation in Rwanda. Three of these, all adopted in 1995, did little more than repeat earlier pronouncements.[151] A fourth, adopted on 9 April 1998, addressed preventive measures directed to the threat of future genocide. The resolution noted, in its preamble, 'the need for renewed investigation of the illegal flow of arms to Rwanda, which is fuelling violence and could lead to further acts of genocide, with specific recommendations for the Security Council for action'. In an operative paragraph, the Council '[u]rges all States and relevant organizations to co-operate in countering radio broadcasts and publications that incite acts of genocide, hatred and violence in the region'.[152] Two other resolutions referring to genocide concern neighbouring Burundi. On 25 August 1995, the Security Council took note of the fact that the parties in Burundi had agreed that 'genocide' accurately characterized the massacres which followed the assassination of President Melchior Ndadaye on 21 October 1993.[153] In 1996, the Council expressed its deep concern 'at the support extended to certain groups in Burundi by some of the perpetrators of the genocide in Rwanda and the threat this poses to the stability of the region', and 'at

[149] UN Doc. S/RES/955 (1994).

[150] Many resolutions use the word genocide because it is part of the long formal name of the International Criminal Tribunal for Rwanda. These resolutions are not considered here because they do not use the word in a substantive sense.

[151] UN Doc. S/RES/978 (1995): 'Expressing once again its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda'; UN Doc. S/RES/1011 (1995): 'Stressing the need for representatives of all sectors of Rwandan society, excluding those political leaders suspected of planning and directing the genocide last year, to begin talks in order to reach an agreement on a constitutional and political structure to achieve lasting stability'; UN Doc. S/RES/1029 (1995): 'Recalling its resolution 955 (1994) of 8 November 1994, establishing the International Tribunal for Rwanda, and its resolution 978 (1995) of 27 February 1995, concerning the necessity for the arrest of persons suspected of committing genocide in Rwanda.'

[152] UN Doc. S/RES/1161 (1998). [153] UN Doc. S/RES/1012 (1995).

the continued incitement to ethnic hatred and violence by radio stations and the growth of calls for exclusion and genocide'.[154] In 1996, the Security Council mandated a Commission of Inquiry to examine recent events in Burundi.[155] The three-person Commission concluded that genocide had taken place in 1993.[156]

The Security Council also referred to genocide, in a general sense, in an untitled resolution dealing with the prevention of armed conflict. The resolution 'stress[ed] the fundamental responsibility of Member States to prevent and end impunity for genocide, crimes against humanity and war crimes'.[157] It also 'acknowledg[ed] the lessons to be learned by all concerned from the failure of preventive efforts that preceded such tragedies as the genocide in Rwanda . . . and the massacre in Srebrenica'.[158] The resolution has been cited by the Secretary-General as the basis of the mandate of the Special Adviser on the Prevention of Genocide.[159] The word 'genocide' is also used in Resolution 1738 (2006), which deals with the protection of journalists in armed conflict. It indicates the willingness of the Security Council 'when authorizing missions, to consider, where appropriate, steps in response to media broadcast inciting genocide'.[160]

Genocide returned to the Security Council agenda in September 2004, when United States Secretary of State Colin Powell invoked article VIII of the Genocide Convention with respect to the crisis in Darfur, in the western portion of Sudan. The debate was launched by Powell, in a 9 September 2004 statement to the Senate Foreign Relations Committee:

> And, Mr Chairman, there is, finally, the continuing question of whether what is happening in Darfur should be called genocide. Since the United States became aware of atrocities occurring in Sudan, we have been reviewing the Genocide Convention and the obligations it places on the Government of Sudan and on the international community and on the state parties to the genocide convention . . . When we reviewed the evidence compiled by our team, and then put it beside other information available to the State Department and widely known throughout the international community, widely reported upon by the media and by others, we concluded, I concluded, that genocide has been committed in Darfur and that the Government of Sudan and the Jingaweit bear responsibility – and that genocide may still be occurring . . . We believe

[154] UN Doc. S/RES/1049 (1996). [155] UN Doc. S/RES/1012 (1995).
[156] UN Doc. S/1996/682. [157] UN Doc. S/RES/1366 (2001), preambular para. 18.
[158] *Ibid.*, preambular para. 19.
[159] 'Outline of the Mandate for the Special Adviser on the Prevention of Genocide', UN Doc. S/2004/567, annex.
[160] UN Doc. S/RES/1738 (2006), para. 4.

> in order to confirm the true nature, scope and totality of the crimes our evidence reveals, a full-blown and unfettered investigation needs to occur. Sudan is a contracting party to the Genocide Convention and is obliged under the Convention to prevent and to punish acts of genocide. To us, at this time, it appears that Sudan has failed to do so.[161]

Powell's statement appears to be the only formal invocation of article VIII of the Convention since its adoption.

Before the Security Council, the United States representative stated: 'These are indiscriminate acts of violence and terror. Secretary of State Powell recently told Congress that this evidence leads the United States to conclude that the Government of the Sudan may be condoning and perpetrating genocide.'[162] The result of the debate was a resolution calling for the establishment of a commission of inquiry whose mandate included determining 'whether or not acts of genocide have occurred'.[163] Established by the Secretary-General,[164] the Commission reported to the Security Council in January 2005 that it could not conclude genocide had been committed. The Commission preferred to characterize the atrocities as crimes against humanity.[165] It proposed that the situation in Darfur be referred to the Security Council, in accordance with article 13(b) of the Rome Statute of the International Criminal Court.[166] On 31 March 2005, the Security Council referred the situation in Darfur to the Court. The resolution did not use the word genocide.[167]

A June 2006 Presidential Statement of the Security Council declared:

> The Security Council emphasizes the responsibility of States to comply with their obligations to end impunity and to prosecute those responsible for genocide, crimes against humanity and serious violations of international humanitarian law. The Council reaffirms that ending

[161] Secretary Colin L. Powell, Testimony Before the Senate Foreign Relations Committee, Washington, 9 September 2004. A Department of State report on Darfur issued in September 2004 did not use the term genocide, but said: 'The non-Arab population of Darfur continues to suffer from crimes against humanity. A review of 1,136 interviews shows a consistent pattern of atrocities, suggesting close coordination between GOS forces and Arab militia elements, commonly known as the Jingaweit (Janjaweed).' See: 'Documenting Atrocities in Darfur', State Publication 11182, September 2004.

[162] UN Doc. S/PV.5040, p. 6. Also: UN Doc. S/PV.5158, p. 3.

[163] UN Doc. S/RES/1564 (2004).

[164] 'Letter dated 4 October 2004 from the Secretary-General addressed to the President of the Security Council', UN Doc. S/2004/812.

[165] 'Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur', UN Doc. S/2005/60, para. 518.

[166] *Rome Statute of the International Criminal Court*, (2002) 2187 UNTS 90, art. 13(b).

[167] UN Doc. S/RES/1593 (2005).

> impunity is essential if a society in conflict or recovering from conflict is to come to terms with past abuses committed against civilians and to prevent future such abuses. The Council intends to continue forcefully to fight impunity with appropriate means and draws attention to the full range of justice and reconciliation mechanisms to be considered, including national, international and 'mixed' criminal courts and tribunals and truth and reconciliation commissions.[168]

Sub-Commission on the Promotion and Protection of Human Rights

Because of its important responsibilities in the field of human rights, the Economic and Social Council and its subsidiary bodies have been the focal point of much activity concerning genocide within the United Nations. It was ECOSOC that launched an important study, in the late 1960s, of what was then an essentially dormant instrument. Following a 1967 decision by the Sub-Commission on the Promotion and Protection of Human Rights,[169] the Economic and Social Council called for the preparation of a report on genocide and the appointment of a Special Rapporteur of the Sub-Commission.[170] Nicodème Ruhashyankiko, a Rwandan, was designated Special Rapporteur in 1971.[171] He filed a series of preliminary reports[172] before producing a final text of nearly 200 pages in 1978.[173] Besides studying the academic writing, case law and relevant official documents, Ruhashyankiko sent a series of requests to governments for information about domestic implementation of the Convention and for their views on related matters.

[168] UN Doc. S/PRST/2006/28.

[169] SCHR Res. 8(XX). Until July 1999, it was known as the Sub-Commission for the Prevention of Discrimination and Protection of Minorities. For the rather limited work of the Sub-Commission on the subject prior to 1967, see 'Genocide, Note by the Secretary-General', UN Doc. E/CN.4/Sub.2/259/Rev.1; UN Doc. E/CN.4/Sub.2/SR.456/Add.1, pp. 9–15; UN Doc. E/CN.4/Sub.2/SR.469, pp. 5–12; UN Doc. E/CN.4/Sub.2/SR.470, pp. 3–7; and UN Doc. E/CN.4/Sub.2/SR.471, pp. 3–4.

[170] ECOSOC Res. 1420 (XLVI).

[171] SCHR Res. 7(XXIV).

[172] 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Preliminary Report by Mr Nicodème Ruhashyankiko, Special Rapporteur', UN Doc. E/CN.4/Sub.2/L.565; 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Progress Report by Mr Nicodème Ruhashyankiko, Special Rapporteur', UN Doc. E/CN.4/Sub.2/L.583; 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Progress Report by Mr Nicodème Ruhashyankiko, Special Rapporteur', UN Doc. E/CN.4/Sub.2/L.597; UN Doc. E/CN.4/Sub.2/L.623.

[173] 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur', note 172 above.

Ruhashyankiko was late coming to the 1978 meeting of the Sub-Commission, prompting the chair to describe the situation as 'a report without a rapporteur'.[174] The summary records reveal considerable tension, with members of the Sub-Commission calling for his replacement and predicting that he would not attend in any case.[175] But, a few days later, Ruhashyankiko unexpectedly appeared in Geneva to present his report.

When the debate began, the source of the malaise in the Sub-Commission became apparent. In his preliminary study, Ruhashyankiko had written of the genocide of Armenians in Turkey during the First World War,[176] only to remove the reference in the final version, prompting fierce criticism.[177] Only one member of the Sub-Commission defended Ruhashyankiko on the Armenian omission.[178] He was, predictably, also supported by the Turkish Government's observer.[179] Ruhashyankiko explained that 'it had been decided to retain the massacre of the Jews under Nazism, because that case was known to all and no objections had been raised; but other cases had been omitted, because it was impossible to compile an exhaustive list, because it was important to maintain unity within the international community in regard to genocide, and because in many cases to delve into the past might re-open old wounds which were now healing'.[180] He said that, if the Sub-Commission wanted to put the Armenian case in the final report, it should so decide, but '[h]e would, however, need to have the necessary evidence'.[181]

Ruhashyankiko's unpardonable wavering on the Armenian genocide cast a shadow over what was otherwise an extremely helpful and well-researched report. He explained that 'it would be a mistake to interpret the 1948 Convention in broader terms than those envisaged by the signatories, and . . . it would be better to adhere to the spirit and letter of the Convention and to prepare new instruments as

[174] UN Doc. E/CN.4/Sub.2/SR.816, para. 68. [175] *Ibid.*, paras. 68–70.

[176] 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Progress Report by Mr Nicodème Ruhashyankiko, Special Rapporteur', UN Doc. E/CN.4/Sub.2/L.583, para. 30.

[177] UN Doc. E/CN.4/Sub.2/SR.822, paras. 8–14, 16, 20, 21, 24 and 30. See also 'The Turkish Genocide Against the Armenians and the United Nations Memory Hole', in Leo Kuper, *Genocide, Its Political Use in the Twentieth Century*, New Haven: Yale University Press, 1981, pp. 219–20.

[178] *Ibid.*, paras. 33–4. [179] *Ibid.*, paras. 38–9. [180] *Ibid.*, para. 46. [181] *Ibid.*, para. 47.

appropriate; this would avoid raising any difficulties for the States parties'.[182]

Ruhashyankiko also urged the establishment of an *ad hoc* committee on genocide, the creation of an international criminal court, and the recognition of universal jurisdiction over the crime.[183] The Sub-Commission showed little interest in the important legal issues raised by the report. In addition to the debate on the Armenian genocide, there were isolated criticisms about the treatment of other specific cases. One member said that all references to the *Eichmann* trial should be removed because of the circumstances of his abduction.[184] Another complained that mention of the genocide of the Palestinian people had been omitted.[185]

The Sub-Commission transmitted Ruhashyankiko's report to the Commission on Human Rights, recommending it be given the widest possible distribution, and the Commission so resolved.[186] Although a mimeographed version can usually be found in major university research libraries after considerable effort, the promised dissemination never took place. The hostile reaction to Ruhashyankiko's report on the Armenian issue led the Sub-Commission to consider revising the report.

In 1982, the Sub-Commission asked the Commission on Human Rights to request the Economic and Social Council to mandate a new Special Rapporteur, with instructions to revise and update the study.[187] Authorization was obtained,[188] and Sub-Commission member Benjamin Whitaker of the United Kingdom appointed.[189] His final report was accepted by the Sub-Commission in 1985.[190] Whitaker corrected the omission of the Armenian genocide, although the

[182] UN Doc. E/CN.4/Sub.2/SR.822, para. 5; 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur', note 172 above, para. 618.

[183] UN Doc. E/CN.4/Sub.2/SR.822, paras. 5 and 45; 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur', note 172 above, paras. 614, 626 and 627.

[184] UN Doc. E/CN.4/Sub.2/SR.822, para. 15.

[185] *Ibid*., para. 30; see also *ibid*., para. 32 (Sadi).

[186] CHR Decision 9 (XXXV).

[187] SCHR Res. 1982/2.

[188] ECOSOC Res. 1983/33; CHR Res. 1983/24.

[189] SCHR Res. 1983/2.

[190] Whitaker, 'Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide', UN Doc. E/CN.4/Sub.2/1985/6. A year earlier, Whitaker presented a preliminary report: UN Doc. E/CN.4/Sub.2/1984/40; UN Doc. E/CN.4/Sub.2/1984/SR.3, pp. 2–4, UN Doc. E/CN.4/Sub.2/1984/SR.4, pp. 2–12.

controversy did not go away. Some of the experts at the 1985 session of the Sub-Commission argued that Ruhashyankiko had been right to hesitate. The Sub-Commission's final report contained an equivocal paragraph: 'Turning specifically to the question of the massacre of the Armenians, the view was expressed by various speakers that such atrocities indeed constituted genocide, as was well documented by the Ottoman military trials of 1919, eyewitness reports and official archives. Objecting to such a view, various participants argued that the Armenian massacre was not adequately documented and that certain evidence had been forged.'[191] A decade later, a French court referred to the Whitaker report as an official United Nations pronouncement recognizing the Armenian genocide in the libel trial of American historian Bernard Lewis![192]

Whitaker's report made a number of innovative and controversial conclusions, contrasting sharply with the conservatism of the Ruhashyankiko document. For example, Whitaker wanted to amend the Convention in order to include political groups and groups based on sexual orientation, to exclude the plea of superior orders, to extend the punishable acts to those of 'advertent omission' and to pursue consideration of cultural genocide, 'ethnocide' and 'ecocide'. At the conclusion of the debate in the Sub-Commission, two resolutions were proposed.[193] The first endorsed Whitaker's proposals, including amendment of the Convention;[194] the second merely received and took note of the study, thanking the Special Rapporteur for his efforts.[195] Opinions about Whitaker's conclusions so divided the Sub-Commission[196] that even the more modest of the two resolutions could only be adopted with difficulty. A paragraph was added to note 'that divergent opinions have been expressed about the content and proposals

[191] UN Doc. E/CN.4/Sub.2/1985/57, para. 42.

[192] *Union d'associations dite 'Forum des associations armeniennes de France' et al.* v. *Lewis*, 21 June 1995.

[193] UN Doc. E/CN.4/Sub.2/1985/SR.35/Add.1, pp. 5–7.

[194] 'Draft Resolution Submitted by Mr Deschênes and Mr Mubanga-Chipoya', UN Doc. E/CN.4/Sub.2/1985/L.15.

[195] 'Draft Resolution Submitted by Mr Deschênes, Mr George and Mr Mubanga-Chipoya', UN Doc. E/CN.4/Sub.2/1985/L.16.

[196] One member, Sofinsky, said he had 'thrown the ship's compass overboard' by attempting to enlarge the concept unreasonably. For the debates, see UN Doc. E/CN.4/Sub.2/1985/SR.17, pp. 2–10; UN Doc. E/CN.4/Sub.2/1985/SR.18, pp. 3–10; UN Doc. E/CN.4/Sub.2/1985/SR.19, pp. 2–7; UN Doc. E/CN.4/Sub.2/1985/SR.20, pp. 2–17; UN Doc. E/CN.4/Sub.2/1985/SR.21, pp. 2–16; UN Doc. E/CN.4/Sub.2/1985/SR.22, pp. 2–5.

of the report'.[197] An attempt to strengthen the resolution by expressing the Sub-Commission's thanks and congratulations for 'some' of the proposals in the report was rather resoundingly defeated.[198] The resolution thanking Whitaker, as amended, was eventually adopted.[199] The second resolution was eventually withdrawn by its sponsors.[200]

The Sub-Commission resumed consideration of genocide in 1993.[201] The next year, the Sub-Commission recommended that the statute of an international court be prepared quickly so as to facilitate prosecution of genocide. The Sub-Commission also asked that article VIII of the Convention be applied and a committee created charged with examining State party reports on their respect of undertakings pursuant to article V of the Convention.

Furthermore, the Sub-Commission proposed that the Convention be improved by including a clause creating universal jurisdiction.[202] In 1995, the Sub-Commission examined incitement to hatred and genocide, particularly by the media. Its resolution cited specifically the case of 'Radio Démocratie – La Voix du Peuple', transmitting from the Uvira region of Zaire, which was responsible for 'stirring up genocidal hatred' in Burundi. Referring to both the International Convention for the Elimination of All Forms of Racial Discrimination[203] and the Genocide Convention, the Sub-Commission urged the authorities of Zaire, as a party to those instruments, 'to take steps to close down this radio station, prosecute its sponsors and "reporters", order an investigation and, in that connection, place under seal all materials and recording which may serve as evidence, and to bring the "reporters" and their sponsors before the competent courts'.[204] The Sub-Commission also concluded, in another resolution adopted in 1995, 'that a veritable genocide is being committed massively and in a systematic manner against the civilian population in Bosnia and Herzegovina, often in the presence of United Nations forces'.[205]

[197] UN Doc. E/CN.4/Sub.2/1985/SR.36/Add.1, para. 21. [198] *Ibid*., para. 32.
[199] *Ibid*., para. 57. [200] UN Doc. E/CN.4/Sub.2/1985/SR.37, paras. 2–14.
[201] 'Punishment of the Crime of Genocide', SCHR Res. 1993/8.
[202] 'Strengthening the Prevention and Punishment of the Crime of Genocide', SCHR Res. 1994/11.
[203] (1969) 660 UNTS 195.
[204] 'Prevention of Incitement to Hatred and Genocide, Particularly by the Media', SCHR Res. 1995/4. See also 'Situation of Human Rights in Burundi', SCHR Res. 1996/4.
[205] 'Expression of Solidarity with the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Territory of the Former Yugoslavia, Mr Tadeusz Mazowiecki', SCHR 1995/1.

Aside from perfunctory references to the Genocide Convention in resolutions of a general nature,[206] and acknowledgment of the role of the Special Advisor on Genocide with respect to indigneous peoples,[207] the Sub-Commission did not return to the issue of genocide. It was abolished in 2007 by the new Human Rights Council, which had itself replaced the Commission on Human Rights a year earlier.

Commission on Human Rights

The Sub-Commission's work percolated up to the Commission on Human Rights, which began, in 1986, adopting a series of resolutions on genocide.[208] Only three special sessions of the Commission have ever been convened. In each case, they related to allegations of genocide. The first was held in August 1992 to consider the situation in the former Yugoslavia.[209] The Commission '[c]ondemn[ed] absolutely the concept and practice of "ethnic cleansing"'.[210] It stopped short of using the term 'genocide', although the question was clearly on its mind, as can be seen from the reference to 'destruction of national, ethnic, racial or religious groups' in the preamble to the resolution, a phrase obviously borrowed from article II of the Genocide Convention. The Commission's resolution was subsequently endorsed by the Economic and Social Council.[211] The second special session, convened on 30 November 1992, repeated the allusion to article II of the Convention, adding an express reference to the title of the Convention in the preamble and, in the dispositive paragraphs, '[c]all[ing] upon all States to consider the extent to which the acts committed in Bosnia and Herzegovina and in Croatia

[206] 'Question of the Violation of Human Rights and Fundamental Freedoms in All Countries', SCHR Res. 1999/2, preambular para. 5; 'Systematic Rape, Sexual Slavery and Slavery-Like Practices', SCHR Res. 2002/29, para. 3; 'Systematic Rape, Sexual Slavery and Slavery-Like Practices', SCHR Res. 2003/26, para. 4; 'Systematic Rape, Sexual Slavery and Slavery-Like Practices', SCHR Res. 2004/22, para. 4; 'Transfer of Persons', SCHR Res. 2005/12, para. 9.

[207] 'Protection of Indigenous Peoples in Time of Conflict', UN Doc. E/CN.4/2005/2, p. 10.

[208] CHR Res. 1986/18; CHR Res. 1987/25; CHR Res. 1988/28; CHR Res. 1989/16; CHR Res. 1990/19.

[209] Payam Akvahan, 'Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for the New World Order', (1993) 15 *Human Rights Quarterly*, p. 262 at pp. 265–8.

[210] 'The Situation of Human Rights in the Territory of the Former Yugoslavia', CHR Res. 1992/S-1/1, para. 2.

[211] UN Doc. E/1992/22/Add.2/Rev.1.

constitute genocide, in accordance with the Convention on the Prevention and Punishment of the Crime of Genocide'.[212]

The Commission was again convened on an emergency basis in May 1994, at the request of Canada,[213] to deal with the ongoing genocide in Rwanda.[214] The principal result was appointment of a Special Rapporteur, René Degni-Segui, dean of the law faculty at the University of Abidjan and a member of a fact-finding commission of non-governmental organizations that warned of genocide more than a year earlier.[215] He visited Rwanda immediately, promptly issuing a report on the scope of the genocide:

> 14. From the definition of the crime of genocide given in article II of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, it is apparent that this crime has three constituent elements which might be summarized as follows: a criminal act, 'committed with intent to destroy, in whole or in part,' a particular group 'as such'.
>
> 15. There does not seem to be any doubt about the first condition, in view of the massacres perpetrated and even the cruel, inhuman and degrading treatment. The second is not difficult to establish either, since such a clear and unambiguous intention is contained in the constant incitements to murder put out by the media (particularly [Radio-télévision libre mille collines]) and reproduced in leaflets. And even if that were not so, the intention could have been deduced from the facts themselves, on the basis of a variety of concordant indications: preparations for the massacres (distribution of firearms and training of members of the militias), number of Tutsi killed and the result of a policy of destruction of the Tutsi. The third condition, on the other hand, requiring that the ethnic group should be targeted as such, raises a problem, because the Tutsi are not the only victims of the massacres, in which Hutu moderates have not been spared. But the problem is more apparent than real, for two reasons: firstly, many witnesses confirm that the screening carried out at roadblocks to check identities was aimed essentially at the Tutsi. Secondly, and above all, the main enemy, identified with the [Rwandese Patriotic Front], is still the Tutsi, who is the

[212] 'The Situation of Human Rights in the Territory of the Former Yugoslavia', CHR Res. 1992/S-2/1, para. 10.

[213] UN Doc. E/CN.4/S-3/2.

[214] See Marc Bossuyt, 'La Commission des Nations Unies des droits de l'homme et la crise en Afrique centrale', (1998) 75 *Revue de droit international et droit comparé*, p. 104.

[215] International Federation of Human Rights, Inter-African Union of Human Rights, Africa Watch, International Centre for Human Rights and Democratic Development, *Report of the Commission of Inquiry into Human Rights Violations in Rwanda since 1 October 1990*, Brussels, New York, Montreal and Ouagadougou: 1993.

> inyenzi (cockroach), to be crushed at all costs. The Hutu moderate is merely a supporter of the main enemy, and is targeted only as a traitor to his ethnic group, which he dares to oppose.
>
> 16. The conditions laid down by the 1948 Convention are thus met, and Rwanda having acceded to it on 16 April 1976, is required to respect its principles, which would be binding upon it even without any treaty obligation, since they have acquired the force of customary law. In the Special Rapporteur's view, the term 'genocide' should henceforth be used as regards the Tutsi. The situation is different in the case of the assassination of Hutu.[216]

Degni-Segui continued to study the Rwandan genocide in the course of his three-year mandate. In 1997, the Commission on Human Rights designated a 'Special Representative' instead of a Special Rapporteur, more a change in terminology than in substance, replacing Degni-Segui.[217] The mandate of the Special Representative was terminated in 2001.[218] The Commission, in its annual resolutions on Rwanda, condemned 'genocidal activities perpetrated in Rwanda by former members of the Rwandan armed forces, interahamwe and other insurgent groups'. Besides general condemnation, the resolutions express concerns about the suffering of the victims and affirm the duty to bring perpetrators to justice.[219]

References to genocide and to the Genocide Convention have figured in several other resolutions of the Commission over the years. An annual resolution dealing with Cambodia referred, in the preamble, to 'efforts to investigate Cambodia's tragic recent history, including responsibility for past international crimes, such as acts of genocide and crimes against humanity'.[220] Following the *Akayesu* judgment of the

[216] UN Doc. E/CN.4/1995/7 and Corr.1. Degni-Segui confirmed his findings of genocide on subsequent visits to Rwanda later the same year: UN Doc. E/CN.4/1995/12 and UN Doc. E/CN.4/1995/70.

[217] 'Situation of Human Rights in Rwanda', CHR Res. 1997/66, para. 20; ESC Res. 1997/66.

[218] 'Situation of Human Rights in Rwanda', UN Doc. E/CN.4/RES/2001/23, para. 5.

[219] 'Situation of Human Rights in Rwanda', UN Doc. E/CN.4/RES/1995/91; 'Situation of Human Rights in Rwanda', UN Doc. E/CN.4/RES/1996/76; 'Situation of Human Rights in Rwanda', UN Doc. E/CN.4/RES/1997/66; 'Situation of Human Rights in Rwanda', UN Doc. E/CN.4/RES/1998/69; 'Situation of Human Rights in Rwanda', UN Doc. E/CN.4/RES/1999/20; 'Situation of Human Rights in Rwanda', UN Doc. E/CN.4/RES/2000/21; 'Situation of Human Rights in Rwanda', UN Doc. E/CN.4/RES/2001/23.

[220] 'Situation of Human Rights in Cambodia', UN Doc. E/CN.4/RES/1997/49, preambular para. 6; 'Situation of Human Rights in Cambodia', UN Doc. E/CN.4/RES/1998/60, preambular para. 5; 'Situation of Human Rights in Cambodia', UN Doc. E/CN.4/RES/1999/76, preambular para. 5; 'Situation of Human Rights in Cambodia', UN Doc. E/CN.4/RES/2000/79, preambular para. 5; 'Situation of Human Rights in Cambodia',

International Criminal Tribunal for the former Yugoslavia,[221] several resolutions noted that rape, 'under certain circumstances', constitutes 'an act of genocide'.[222] The danger of genocide perpetrated against indigenous peoples was highlighted in a 2005 resolution of the Commission calling upon the Secretary-General to ensure that the newly appointed Special Adviser for the Prevention of Genocide take into consideration the need to protect indigenous peoples and their territories.[223] It also called upon the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people to liaise with the Special Adviser with regard to 'the protection of indigenous peoples from genocide'.[224]

In 1998, the Commission adopted a resolution on the fiftieth anniversary of the adoption of the Genocide Convention. It has little interest from a substantive point of view, and did not much more than call upon States that had not ratified or acceded to the Convention to take this step.[225] A resolution the following year on the Genocide Convention stressed the importance of adoption of the Rome Statute of the International Criminal Court and declared the conviction of the Commission 'that the United Nations High Commissioner for Human Rights and the Commission can contribute to preventing situations in which the crime of genocide could be committed'.[226] A roll-call vote was requested, and

UN Doc. E/CN.4/RES/2001/82, preambular para. 5; 'Situation of Human Rights in Cambodia', UN Doc. E/CN.4/RES/2002/89, preambular para. 5.

[221] *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998.

[222] 'Rights of the Child', UN Doc. E/CN.4/RES/1997/78, para. 13(a). Also: 'The Elimination of Violence Against Women', UN Doc. E/CN.4/RES/1998/52, para. 9(j); 'Rights of the Child', UN Doc. E/CN.4/RES/1998/76, para. 13(a); 'Rights of the Child', UN Doc. E/CN.4/RES/1999/80, para. 15(b); 'Impunity', UN Doc. E/CN.4/RES/2004/72, para. 6; 'Impunity', UN Doc. E/CN.4/RES/2005/81, para. 7.

[223] 'Protection of Indigenous Peoples in Time of Conflict', UN Doc. E/CN.4/RES/2005/52, para. 1(a).

[224] 'Protection of Indigenous Peoples in Time of Conflict', UN Doc. E/CN.4/RES/2005/52, para. 2(a); 'Human Rights and Indigenous Issues', UN Doc. E/CN.4/RES/2005/51, para. 10.

[225] 'Fiftieth Anniversary of the Convention on the Prevention and Punishment of the Crime of Genocide', UN Doc. E/CN.4/RES/1998/10.

[226] 'Convention on the Prevention and Punishment of the Crime of Genocide', UN Doc. E/CN.4/RES/1999/67. Also: 'Convention on the Prevention and Punishment of the Crime of Genocide', UN Doc. E/CN.4/RES/2001/66; 'Convention on the Prevention and Punishment of the Crime of Genocide', UN Doc. E/CN.4/RES/2003/66; 'Convention on the Prevention and Punishment of the Crime of Genocide', UN Doc. E/CN.4/RES/2005/62.

there were five abstentions.[227] The most substantial resolution in this series was adopted in 2005. It noted the appointment of the Special Adviser on the Prevention of Genocide, and called upon the Secretary-General to make available to the Commission at its sixty-second session a report on the implementation of his Action Plan on Genocide and on the activities of the Special Adviser, 'and invited the Special Adviser to address the Commission at the same session and at the sixty-third session on the progress made in discharging his duties'.[228] Although no substantive work was undertaken at the sixty-second session of the Commission, a report was submitted by the Secretary-General pursuant to the resolution.[229]

Several of the special rapporteurs have addressed genocide-related issues. Foremost among them is the Special Rapporteur on extrajudicial, summary or arbitrary executions. A list of standards underlying the mandate of the Special Rapporteur, published by the Commission in a 1992 resolution, did not mention the Genocide Convention, although it suggested enlarging the mandate by adding the word 'extrajudicial'.[230] In his first report, in 1993, Special Rapporteur Bacre Waly Ndiaye listed the Genocide Convention as one of the instruments he considered applicable to his mandate.[231] Since then, the topic of genocide has featured in his own activities and those of his successors, Asma Jahangir and Philip Alston. In a 2005 resolution, the General Assembly noted that extradjudicial, summary or arbitrary executions may 'under

[227] UN Doc. E/CN.4/1999/SR.58, paras. 89–95. Pakistan, Qatar, Romania, Sri Lanka, Sudan. Pakistan called for the vote because 'the draft resolution had omitted to mention the genocide which had occurred in the Great Lakes region of Africa, Bosnia and Herzegovina, and Kosovo'.

[228] 'Convention on the Prevention and Punishment of the Crime of Genocide', UN Doc. E/CN.4/RES/2005/62, para. 9.

[229] 'Report of the Secretary-General on the Implementation of the Five Point Action Plan and the Activities of the Special Adviser on the Prevention of Genocide', UN Doc. E/CN.4/2006/84.

[230] 'Extrajudicial, Summary or Arbitrary Executions', UN Doc. E/CN.4/RES/1992/72.

[231] 'Extrajudicial, Summary or Arbitrary Executions, Report by the Special Rapporteur, Mr Bacre Waly Ndiaye, Submitted Pursuant to Commission on Human Rights Resolution 1993/71', UN Doc. E/CN.4/1994/7, p. 9. His predecessor, Amos Wako, did not consider genocide as a human rights violation within the mandate of the Special Rapporteur: 'Summary or Arbitrary Executions, Report by the Special Rapporteur, Mr S. Amos Wako, Pursuant to Commission on Human Rights Resolution 1991/71', UN Doc. E/CN.4/1992/30.

certain circumstances, result in genocide'.[232] The General Assembly also '[u]*rge*[d] the Special Rapporteur to continue, within his mandate, to bring to the attention of the United Nations High Commissioner for Human Rights and, as appropriate, the Special Adviser to the Secretary-General on the Prevention of Genocide, situations of extrajudicial, summary or arbitrary executions that are of particularly serious concern or in which early action might prevent further deterioration'.[233]

A Resolution adopted earlier in the year by the Commission on Human Rights '[a]cknowledges the importance of the special procedures of the Commission, in particular the Special Rapporteur on extrajudicial, summary or arbitrary executions, in their role as early warning mechanisms in preventing the crime of genocide and crimes against humanity, and encourages them to cooperate towards this end'.[234] The Resolution urged the the Special Rapporteur to continue to draw to the attention of the United Nations High Commissioner for Human Rights and, as appropriate, the Special Adviser to the Secretary-General on the Prevention of Genocide of such situations of particularly serious concern to him or where early action might prevent further deterioration.[235]

In April 1993, Special Rapporteur Bacre Waly Ndiaye visited Rwanda, accompanied by the Special Rapporteur on torture, Nigel Rodley, following allegations of genocide by the NGO fact-finding commission in which Degni-Segui had participated.[236] Ndiaye confirmed its conclusions, writing: 'The cases of intercommunal violence brought to the Special Rapporteur's attention indicate very clearly that the victims of the attacks, Tutsis in the overwhelming majority of cases, have been targeted solely because of their membership of a certain ethnic group, and for no other objective reason. Article II, paragraphs (a) and (b)

[232] 'Extrajudicial, Summary or Arbitrary Executions', UN Doc. A/RES/59/197, para. 3; also: 'Extrajudicial, Summary or Arbitrary Executions', UN Doc. E/CN.4/RES/2005/34, para. 2. Preambular para. 7 of the same resolution says such executions 'can amount to genocide'.

[233] *Ibid*., para. 8; also: 'Extrajudicial, Summary or Arbitrary Executions', UN Doc. E/CN.4/RES/2005/34, para. 18.

[234] 'Extrajudicial, Summary or Arbitrary Executions', UN Doc. E/CN.4/RES/2005/34, para. 10.

[235] *Ibid*., para. 18.

[236] See Boutros Boutros-Ghali, 'Introduction', in *The United Nations and Rwanda, 1993–1996*, New York: United Nations Department of Public Information, 1996, pp. 1–111 at p. 20.

[of the Genocide Convention], might therefore be considered to apply to these cases.'[237]

In 1996, he considered the crisis in Burundi, warning that '[t]he failure to take concrete measures with immediate effect by either the Burundian authorities or the international community in order to put an end to this violence and prevent its degeneration into genocide has also contributed to shaping the situation'.[238] In 1997, the Special Rapporteur noted 'a great reluctance in the international community to use the term "genocide", even when reference is made to situations of grave violations of the right to life which seem to match clearly the criteria contained in article II of the Convention on the Prevention and Punishment of the Crime of Genocide'.[239] The Special Rapporteur again focused on Burundi, saying it was characterized by a long series of massacres and acts of genocide,[240] and on the situation in eastern Zaire.[241] He noted that the prevention of genocide had not gained the attention it deserved from the international community, and called for the establishment of a system of rapid alert in regions where political situations are identified as being volatile.[242] In addition, the Special Rapporteur urged governments to ratify the Convention and to act pursuant to article VIII as required.[243] Finally, he recommended the establishment of a monitoring mechanism to supervise the application of the Convention.[244]

[237] 'Report by the Special Rapporteur on Extrajudicial, Summary Arbitrary Executions on His Mission to Rwanda, 8–17 April 1993, Including as Annex II the Statement of 7 April 1993 of the Government of Rwanda Concerning the Final Report of the Independent International Commission of Inquiry on Human Rights Violations in Rwanda Since 1 October 1990', UN Doc. E/CN.4/1994/7/Add.1, paras. 78–80. See also 'Extrajudicial, Summary or Arbitrary Executions, Note by the SecretaryGeneral', UN Doc. A/51/457, para. 70.

[238] UN Doc. E/CN.4/1996/4, para. 90. See also 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mr Bacre Waly Ndiaye, Submitted Pursuant to Commission Resolution 1995/73, Addendum, Report of the Special Rapporteur on his Mission to Burundi from 19 to 29 April 1995', UN Doc. E/CN.4/1996/4/Add.1.

[239] UN Doc. E/CN.4/1997/60, para. 42. See also 'Extrajudicial, Summary or Arbitrary Executions, Note by the Secretary-General', UN Doc. A/51/457, para. 68.

[240] UN Doc. E/CN.4/1997/60, para. 43.

[241] 'Extrajudicial, Summary or Arbitrary Executions, Note by the Secretary-General', UN Doc. A/51/457, para. 73.

[242] UN Doc. E/CN.4/1997/60, para. 110.

[243] UN Doc. E/CN.4/1997/60, paras. 127–8.

[244] UN Doc. E/CN.4/1997/60, para. 130; 'Extrajudicial, Summary or Arbitrary Executions, Note by the Secretary-General', UN Doc. A/51/457, para. 56.

Ndiaye resigned in 1998 and was replaced by Pakistani human rights lawyer Asma Jahangir. Her first report to the Commission confirmed an intention to pursue Ndiaye's work on genocide. She cautioned that:

> the frequent and at times casual use of the term 'genocide' in everyday political discourse . . . risks eroding some of its weight as a legal term. This underscores the importance of using the term 'genocide' with precision and in accordance with the criteria set out in article II of the Convention on the Prevention and Punishment of the Crime of Genocide. However, she notes with concern the reluctance on the part of the international community to use the term 'genocide', even when the situations referred to constitute grave and systematic violations of the right to life which seem to match these criteria.[245]

In her final report, in 2004, Special Rapporteur Jahangir called for establishment of early-warning mechanisms for genocide.[246]

Special Rapporteur Philip Alston, in his first report in 2005, spoke of

> excessive legalism which manifests itself in definitional arguments over whether a chronic and desperate situation has risen to the level of genocide or not. In the meantime, while some insist that the term is clearly applicable and others vigorously deny that characterization, all too little is done to put an end to the ongoing violations. At the end of the day the international community must be judged on the basis of its action, not on its choice of terminology.[247]

The Special Rapporteur may have been referring to the controversy over Darfur. In 2004, his predecessor had conducted a mission to the region that concluded there were 'strong indications that the scale of violations of the right to life in Darfur could constitute crimes against humanity for which the Government of the Sudan must bear responsibility'. The word genocide was not used.[248]

Several other special rapporteurs of the Commission on Human Rights have also addressed genocide issues. In his initial reports, the Special Rapporteur on Burundi, Paolo Sergio Pinheiro, cited the

[245] 'Report of the Special Rapporteur, Ms Asma Jahangir, Submitted Pursuant to Commission on Human Rights Resolution 1998/68', UN Doc. E/CN.4/1999/39, para. 29.
[246] UN Doc. E/CN.4/2004/7, para. 96.
[247] UN Doc. E/CN.4/2005/7, para. 36. A footnote reads: 'In this respect it is relevant to recall the situation of Rwanda in 1994 when United Nations officials did not use the term until one month after massive killings had begun and some Security Council members continued to resist use of the term for a considerable time thereafter.'
[248] UN Doc. E/CN.4/2005/7/Add.2, para. 57.

perpetration of 'deliberate genocidal acts'[249] and the activities of extremists subscribing to a 'genocidal ideology'.[250] Pinheiro said it was inappropriate to ask when genocide would occur in Burundi, saying it might be more fitting to speak of 'genocide by attrition'.[251] He also described the massacres of Hutus in 1972 as a 'selective genocide'[252] and those of Tutsi following the assassination of President Melchior Ndadaye in October 1993 as 'genocide'.[253] In later reports, Pinheiro was more cautious with the term, perhaps betraying an awareness of its potentially inflammatory consequences within the ethnic conflict of Burundi.[254]

The Special Rapporteur on the Congo, Roberto Garreton, made controversial remarks charging genocide in mid-1997,[255] but he too, in

[249] 'Report of the First Meeting of the Special Rapporteurs of the Commission on Human Rights on the Human Rights Situation in Burundi, Rwanda and Zaire', UN Doc. E/CN.4/1996/69, para. 6.

[250] 'Initial Report on the Human Rights Situation in Burundi Submitted by the Special Rapporteur, Mr Paolo Sergio Pinheiro, in Accordance with Commission Resolution 1995/90, Addendum', UN Doc. E/CN.4/1996/16/Add.1, para. 11; also para. 70.

[251] *Ibid.*, para. 50; 'Interim Report on the Human Rights Situation in Burundi Submitted by the Special Rapporteur of the Commission on Human Rights, Pursuant to Commission on Human Rights Resolution 1996/1 and Economic and Social Council Decision 1996/254, Annex', UN Doc. A/51/459, para. 25.

[252] 'Interim Report on the Human Rights Situation in Burundi Submitted by the Special Rapporteur of the Commission on Human Rights, Pursuant to Commission on Human Rights Resolution 1996/1 and Economic and Social Council Decision 1996/254, Annex', *Ibid.*, paras. 17 and 19.

[253] *Ibid.*, paras. 28 and 49. On this point, Pinheiro confirmed the findings of the International Commission of Inquiry appointed by the Security Council: UN Doc. S/1996/682, para. 483.

[254] See 'Interim Report on the Human Rights Situation in Burundi Submitted by the Special Rapporteur of the Commission on Human Rights, Pursuant to Economic and Social Council Decision 1997/280, Annex', UN Doc. A/52/205, para. 32; 'Third Report on the Human Rights Situation in Burundi Submitted by the Special Rapporteur, Mr Paolo Sergio Pinheiro, in Accordance with Commission Resolution 1997/77', UN Doc. E/CN.4/1998/72, para. 37. In a 1995 resolution, the Committee for the Elimination of Racial Discrimination referred to 'a critical situation that has the potential for genocide': CERD Res. 1(4), preamble.

[255] 'The joint mission's preliminary opinion is that some of these alleged massacres could constitute acts of genocide. However, the joint mission cannot issue a precise, definitive opinion on the basis of the information currently available to it': 'Report of the Joint Mission Charged with Investigating Allegations of Massacres and Other Human Rights Violations Occurring in Eastern Zaire (now Democratic Republic of the Congo) Since September 1996', UN Doc. A/51/942, para. 80. See also 'Report on Allegations of Massacres and Other Human Rights Violations Occurring in Eastern Zaire (now the Democratic Republic of the Congo) Since September 1996, Prepared by Mr Roberto Garreton, Special Rapporteur on the Situation of Human Rights in the Democratic

later reports, steered gingerly around the word.[256] The Special Rapporteur on violence against women, Radhika Coomaraswamy, has studied the impact of the Rwandan genocide on women in Rwanda, noting how systemic discrimination against women exacerbates the consequences for genocide survivors.[257]

Human Rights Council

The Human Rights Council was established in 2006 to replace the Commission on Human Rights. The Council inherited the responsibilities and commitments of the Commission on Human Rights, including its request to the Secretary-General to provide an updated report on the work of the Special Adviser on the Prevention of Genocide contained in a resolution adopted by the Commission during its final year of activity.[258] In December 2006, at its third session, the report on the Five Point Action Plan to prevent genocide was presented,[259] followed by an interactive dialogue with the Special Adviser on the Prevention of Genocide.[260]

International Court of Justice

The International Court of Justice is the principal judicial organ of the United Nations. Its involvement in prevention of genocide, although

Republic of the Congo, Mr Bacre Waly Ndiaye, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, and Mr Jonas Foli, Member of the Working Group on Enforced or Involuntary Disappearances, Pursuant to Paragraph 6 of Commission on Human Rights Resolution 1997/58', UN Doc. E/CN.4/1996/64, para. 6; 'Decision 4(53) of the Committee for the Elimination of Racial Discrimination', para. 1.

[256] 'Report on the Situation of Human Rights in the Democratic Republic of the Congo (Former Zaire), Submitted by the Special Rapporteur, Mr Roberto Garreton, in Accordance with Commission Resolution 1997/58', UN Doc. E/CN.4/1998/65; 'Report on the Situation of Human Rights in the Democratic Republic of the Congo, Submitted by the Special Rapporteur, Mr Roberto Garreton, in Accordance with Commission Resolution 1998/61', UN Doc. E/CN.4/1998/31.

[257] 'Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms Radhika Coomaraswamy, Addendum, Report of the Mission to Rwanda on the Issues of Violence Against Women in Situations of Armed Conflict', UN Doc. E/CN.4/1998/54/Add.1.

[258] UN Doc. A/HRC/6/SR.22, para. 36, adopting 'Prevention of Genocide', UN Doc. A/HRC/6/L.14.

[259] UN Doc. E/CN.4/2006/84. [260] UN Doc. A/HRC/3/SR.2, paras. 60–80.

theoretically contemplated by article VIII, is set out in a special provision, article IX. Fourteen cases have been taken before the Court based on alleged breaches of the Convention, the application by Pakistan against India in 1972 concerning the threatened prosecution of Pakistani prisoners of war for genocide; the application by Bosnia and Herzegovina in 1993 against Yugoslavia for its role in the war (and the Yugoslav counter-claim of 1997); the applications by Yugoslavia against ten members of the North Atlantic Treaty Organization in 1999; that of Croatia against Yugoslavia in 1999; and the Democratic Republic of Congo's application against Rwanda filed in 2002.[261] On all of these occasions, the parties to the dispute relied essentially on article IX, although, in the second case, Bosnia and Herzegovina also invoked article VIII. The Court said that, even assuming article VIII applied to the Court as one of the competent organs of the United Nations, it 'appears not to confer on it any functions or competence additional to those provided for in its Statute'.[262] The overlap between the provisions was not considered during drafting of the Convention.

The Court first considered the Genocide Convention in the advisory opinion requested by the General Assembly concerning the validity of reservations to the Convention, a question on which the text of the instrument is silent. The Court was divided on the question, with a majority concluding that reservations were permitted to the extent that they were compatible with the object and purpose of the Convention. The Court also noted 'that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation'.[263] The Court has also touched on the issue of genocide in other decisions. In the *Barcelona Traction* case, it made its oft-cited remark about the *erga omnes* nature of the prohibition of genocide.[264] In the *Nuclear Weapons* case, some

[261] The contentious cases filed pursuant to art. IX of the Convention are discussed in detail in chapter 9, pp. 499–512 above.

[262] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Requests for the Indication of Provisional Measures, 8 April 1993, [1993] ICJ Reports 16, pp. 22–3, para. 47.

[263] *Reservations to the Convention on Genocide, Advisory Opinion*, [1951] ICJ Reports 14, p. 24. For discussion of the advisory opinion, see pp. 616–19 below.

[264] *Barcelona Traction, Light and Power Co. Ltd (Belgium* v. *Spain)*, [1970] ICJ Reports 3, p. 32: 'By its very nature, the outlawing of genocide, aggression, slavery and racial discrimination are the concern of all States. In view of the importance of the rights

States had contended that the prohibition of genocide, set out in the Convention, was a relevant rule of customary law applicable to the question of nuclear weapons. They argued that, because of the high number of victims in the case of nuclear attack, and because they would in certain cases be members of a protected group, the intent to destroy the group could be inferred. According to the ruling of the Court, 'the prohibition of genocide would be pertinent in this case if the recourse to nuclear weapons did indeed entail the element of intent, towards a group as such, required by the provision quoted above. In the view of the Court, it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case.'[265]

Secretariat

To the extent that the other United Nations organs are involved in the prevention and punishment of the crime of genocide, the Secretariat is inevitably a part of any activity of the organization. During the Rwandan genocide, the Secretariat was the first to be informed of the threats of genocide in messages coming not from States parties but from its own representatives in the field. Four months prior to the assassination of President Habyarimana and the real beginning of the massacres, on 11 January 1994, the commander of the UNAMIR, Canadian general Roméo Dallaire, sent a coded cable to the Department of Peacekeeping Operations of the Secretariat warning of a plan for the extermination of the Tutsi population.[266]

Years later, Iqbal Riza, who was Assistant Secretary-General for peacekeeping at the time, said: 'We did not give that information the importance and the correct interpretation that it deserved. We realized that only in hindsight.'[267] Riza said he eventually accepted the fact that this mistake had led to loss of life. Dallaire had asked for permission to

involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.'

[265] *Legality of the Threat or Use of Nuclear Weapons (Request by the United Nations General Assembly for an Advisory Opinion)*, [1996] ICJ Reports 226, para. 26.

[266] Philip Gourevitch, 'The Genocide Fax', *New Yorker*, 11 May 1998, pp. 42–6. See also Des Forges, 'Genocide'.

[267] 'UN Erred in Rwanda, Official Says', *Globe and Mail*, 8 December 1998, p. A-15 (Reuters).

raid arms caches that had been identified by the informer, but Riza, acting on behalf of Annan, denied such authority.[268]

It is often stated that, with a proper mandate, the United Nations peacekeeping forces could have prevented genocide in Rwanda. General Dallaire claimed that with an appropriately equipped force of 5,000 soldiers he could have stopped the killings. A study by United States military experts confirms his assessment.[269] But, because of instructions from the Secretariat in New York, Dallaire's forces did not take aggressive steps to intervene. Later, as the crisis unfolded, the Secretariat fought with the Security Council in order to maintain the strength of the Mission. Boutros Boutros-Ghali challenged the Security Council, saying it was afraid to use the word 'genocide' in presidential statements and resolutions because this would require it to act to prevent the crime being committed. Eventually, Boutros-Ghali acknowledged that the United Nations was slow to warn of plans for the 1994 genocide, saying major world powers should have been given an explicit warning about General Dallaire's message.

Since 1994, the Secretariat has been deeply involved in issues relating to ethnic conflict in the Great Lakes region of Africa and thus, necessarily, in questions of genocide. Much of its work has been directed by the High Commissioner for Human Rights, a position established in 1994 following the World Conference on Human Rights. Indeed, the first issue tackled by the incoming High Commissioner was the Rwandan genocide.[270] In Burundi, a special representative of the Secretary-General has been actively involved in conflict prevention since the putsch of October 1993. In 1996, the Secretary-General reported to the Security Council that 'the international community must allow for the possibility that the worst may happen and that genocide could occur in Burundi'. He said that 'military intervention to save lives might

[268] See interview with Iqbal Riza on the television documentary 'The Triumph of Evil', in *Frontline*, Public Broadcasting Service, 26 January 1999, www.pbs.org/wgbh/pages/frontline/shows/evil/etc/script.html (consulted 29 April 1999).

[269] Scott R. Feil, *Preventing Genocide: How the Early Use of Force Might Have Succeeded in Rwanda*, Washington: Carnegie Commission on Preventing Deadly Conflict, 1998.

[270] 'Report of the United Nations High Commissioner for Human Rights on His Mission to Rwanda of 11–12 May 1994', UN Doc. E/CN.4/S-3/3; Ian Martin, 'After Genocide: The UN Human Rights Field Operation in Rwanda', in Alice Henkin, ed., *Honoring Human Rights: From Peace to Justice*, Washington: Aspen Institute, 1998, pp. 97–132; Todd A. Howland, 'Mirage, Magic, or Mixed Bag? The United Nations High Commissioner for Human Rights' Field Operation in Rwanda', (1999) 21 *Human Rights Quarterly*, p. 1.

become an inescapable imperative'.[271] The Secretariat was an important player in eastern Congo, after the Special Rapporteur of the Commission on Human Rights, Roberto Garreton, warned of genocide in 1997.[272] The Secretariat has also been involved in establishing the Extraordinary Chambers of the Courts of Cambodia, with jurisdiction over genocide,[273] and the International Commission of Inquiry which investigated charges of genocide in Darfur in 2004 and 2005.[274] The importance of the issue to the work of the Secretariat became even more apparent with the establishment of the position of Special Adviser on the Prevention of Genocide.

Special Adviser on the Prevention of Genocide

In January 2004, the Swedish government hosted the Stockholm International Forum on the theme of 'preventing genocide: threats and responsibilities'. Secretary-General Kofi Annan attended the Forum and announced his intention to establish a position of Special Adviser to the Secretary-General on the Prevention of Genocide. In March 2004, the Secretary-General circulated the draft mandate of the Special Adviser to the Security Council. On 7 April 2004, he spoke in Geneva to the Commission on Human Rights on the occasion of the International Day of Reflection on the 1994 Genocide in Rwanda, unveiling his Action Plan to Prevent Genocide. The Action Plan had five components: (a) preventing armed conflict, which usually provides the context for genocide; (b) protection of civilians in armed conflict including a mandate for United Nations peacekeepers to protect civilians; (c) ending impunity through judicial action in both national and international courts; (d) early and clear warning of situations that could potentially degenerate into genocide and the development of a United Nations capacity to analyse and manage information; and (e) swift and decisive action along a continuum of steps, including military action.

[271] UN Doc. S/1996/660, para. 49. [272] See note 258 above.

[273] 'Report of the Secretary-General on Khmer Rouge Trials', UN Doc. A/57/759 (31 March 2003); 'Report of the Secretary-General on Khmer Rouge Trials', UN Doc. A/59/432 (12 October 2004).

[274] 'Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur', 25 January 2005, UN Doc. S/2005/60.

In July 2004, the Secretary-General announced that he had appointed Juan Mendez to the position.[275] Annan explained that the mandate was derived from Security Council Resolution 1366 (2001), in which the Council acknowledged the lessons to be learned from the failure of preventive efforts that preceded such tragedies as the genocide in Rwanda and resolved to take appropriate action within its competence to prevent any recurrence. The Security Council also said it was willing to give prompt consideration to early warning or prevention cases brought to its attention by the Secretary-General. The mandate states:

> The Special Adviser will (a) collect existing information, in particular from within the United Nations system, on massive and serious violations of human rights and international humanitarian law of ethnic and racial origin that, if not prevented or halted, might lead to genocide; (b) act as a mechanism of early warning to the Secretary-General, and through him to the Security Council, by bringing to their attention potential situations that could result in genocide; (c) make recommendations to the Security Council, through the Secretary-General, on actions to prevent or halt genocide; (d) liaise with the United Nations system on activities for the prevention of genocide and work to enhance the United Nations capacity to analyse and manage information relating to genocide or related crimes. The methodology employed would entail a careful verification of facts and serious political analyses and consultations, without excessive publicity. This would help the Secretary-General define the steps necessary to prevent the deterioration of existing situations into genocide. The Special Adviser would not make a determination on whether genocide within the meaning of the Convention had occurred. The purpose of his activities, rather, would be practical and intended to enable the United Nations to act in a timely fashion.[276]

The 'mission' of the Special Adviser was endorsed by the Summit of Heads of State and Government in the 'Outcome Document'.[277]

Almost immediately upon his appointment, the Special Adviser was being asked to make determinations about whether specific atrocities, some of them ongoing and some of them far in the past, should be described as genocide. Wisely, he refused to engage in such discussions, declaring that this was outside his mandate.[278] 'If I wait until all the

[275] 'Letter dated 12 July 2004 from the Secretary-General addressed to the President of the Security Council', UN Doc. S/2004/567. See also: 'Letter dated 13 July 2004 from the President of the Security Council addressed to the Secretary-General', UN Doc. S/2004/568.

[276] *Ibid.*, annex. [277] UN Doc. A/RES/60/1, para. 140.

[278] UN Doc. A/HRC/3/SR.2, para. 60. Also: UN Doc. CERD/C/SR.1665/Add.1, para. 19.

elements of genocide are in place according to international law, then by definition I have not prevented it. From the start I have said I am not in a position to "certify" or not certify that genocide has happened', he told one questioner.[279]

In September 2004, the Special Adviser visited Darfur accompanied by the High Commissioner for Human Rights. The two reported directly to the Security Council on their mission.[280] A year later, he conducted a follow-up visit to the region.[281] This time, his request to present the report to the Security Council was denied, dispelling a broad perception that the prestige of his position meant that he had more or less direct access to the body. In late 2005, the Special Adviser visited Côte d'Ivoire, and prepared a report outlining a number of important human rights issues but making no reference to genocide.[282] But much of the work of the Special Adviser was behind the scenes, consisting of quiet diplomacy and the drafting of confidential notes containing recommendations for the Secretary-General and, ultimately, the Security Council. The Special Adviser has also assisted units within the United Nations by counselling on issues relating to genocide prevention, such as guidelines on hate speech and incitement.[283]

An Advisory Committee on Genocide Prevention was appointed by the Secretary-General in May 2006 to assist the Special Adviser. Chaired by David Hamburg, President Emeritus of the Carnegie Corporation of New York, the Committee is composed of distinguished international personalities including Roméo Dallaire of Canada, Canadian Senator and former Force Commander of the United Nations Assistance Mission for Rwanda, Gareth Evans of Australia, President, International Crisis Group and former Minister for Foreign Affairs of Australia, Sadako Ogata of Japan, co-Chair of the Commission on Human Security and former High Commissioner for Refugees, and Archbishop Desmond Tutu of South Africa, winner of the Nobel Peace Prize and former Chairman of the Truth and Reconciliation Commission of South

[279] 'Press Conference, Mr Juan Mendez, the Special Advisor of the Secretary-General on the Prevention of Genocide, 26th September 2005, UNMIS HQ, Khartoum'.

[280] The meeting was held in private and there is no public record: UN Doc. S/PV.5046.

[281] 'Press Conference, Mr Juan Mendez, the Special Advisor of the Secretary-General on the Prevention of Genocide, 26th September 2005, UNMIS HQ, Khartoum'.

[282] 'Press Conference Briefing, Visit to Côte d'Ivoire by the Special Adviser to the Secretary-General on the Prevention of Genocide, Abidjan, 3 December 2005'.

[283] 'Report of the Secretary-General on the implementation of the Five Point Action Plan and the activities of the Special Adviser on the Prevention of Genocide', UN Doc. E/CN.4/2006/84, para. 32.

Africa. It submits its own report, which is apparently confidential, to the Secretary-General.

The Advisory Committee recommended that the title of the Special Adviser be changed by adding 'mass atrocities', so as 'to make it broader in scope without the need to determine first whether a specific situation has a "genocidal" character'.[284] The Secretary-General proposed to adjust the title slightly, to 'Special Representative', 'to better reflect the role and scope of his mandate', to upgrade the position to the rank of Under-Secretary-General from Assistant Secretary-General, and to make it a full-time job.[285] Juan Mendez completed his term in 2007, and was replaced by Francis Deng.[286] In August 2007, the Security Council indicated its support for the 'crucial role' played by the Special Adviser.[287]

From the time of Deng's appointment, the Secretary-General described Deng as his Special Adviser on the Prevention of Genocide and Mass Atrocity. Unusually, the Security Council took several months to respond to a letter from the Secretary-General informing it of the proposed changes.[288] The Security Council requested 'further details from you on the implications of the change in title for Mr Deng's post set out in your letter'.[289] In February 2008, the General Assembly authorized the upgrading of the position to that of Under-Secretary-General level, but continued to refer to it as 'Special Adviser on the Prevention of Genocide'.[290] Interpreting this as discomfort with his initial proposal, the Secretary-General withdrew to the initial title of 'Special Adviser on the Prevention of Genocide' that had been adopted in 2004.

At the same time as the Secretary-General appointed Francis Deng, he announced that he would establish a complementary position within the Secretariat of 'Special Adviser on the Responsibility to Protect'. He named Edward Luck to the post.[291] The mandate was closely related to that of the Special Adviser on the Prevention of Genocide. The Security Council 'took note' of the Secretary-General's intent to establish the

[284] 'Letter dated 31 August 2007 from the Secretary-General addressed to the President of the Security Council', UN Doc. S/2007/721.
[285] *Ibid.* [286] *Ibid.* [287] UN Doc. S/PRST/2007/31.
[288] 'Letter dated 31 August 2007 from the Secretary-General addressed to the President of the Security Council', UN Doc. S/2007/721.
[289] 'Letter dated 7 December 2007 from the President of the Security Council addressed to the Secretary-General', UN Doc. S/2007/722.
[290] 'Special Subjects Relating to the Proposed Programme Budget for the Biennium 2008–2009', UN Doc. A/RES/62/238, Part V, para. 10.
[291] 'Letter dated 7 December 2007 from the President of the Security Council addressed to the Secretary-General', UN Doc. S/2007/722.

position,[292] but the Fifth Committee of the General Assembly did not initially confirm the budget requisition for this position. In February 2008, the Secretary-General announced the appointment as 'Special Adviser' but with nothing more, nevertheless indicating that he would 'focus on the responsibility to protect populations from genocide, ethnic cleansing, war crimes and crimes against humanity'.[293]

Committee for the Elimination of Racial Discrimination

The Committee for the Elimination of Racial Discrimination is a treaty body established by virtue of the International Convention for the Elimination of All Forms of Racial Discrimination.[294] Its principal responsibilities consist in evaluating reports from States parties and considering petitions by individuals alleging breaches of the Convention. Although there is no reference to genocide in the International Convention for the Elimination of All Forms of Racial Discrimination, the Committee has begun to take a special interest in the subject.

Following a thematic dialogue on the subject of genocide with NGOs and other relevant actors within the United Nations and other international organizations, including the Special Adviser on Genocide,[295] on 11 March 2005 the Committee adopted a Declaration on the Prevention of Genocide.[296] The document was directly inspired by proposals in the Secretary-General's presentation at the Stockholm International Forum in January 2004.[297] The preamble to the Declaration noted that 'genocide is often facilitated and supported by discriminatory laws and practices or lack of effective enforcement of the principle of equality of persons'. It said that 'the international community had failed to prevent the genocides in Rwanda and Srebrenica because of lack of will'. The Declaration placed strong emphasis on the use of force to prevent genocide, the responsibility of developed countries to contribute to peace operations in order to facilitate rapid deployment.

[292] *Ibid.*

[293] 'Secretary-General Appoints Special Adviser to Focus on Responsibility to Protect', UN New Service, 21 February 2008.

[294] (1969) 660 UNTS 195, art. 8.

[295] UN Doc. CERD/C/SR.1683.

[296] UN Doc. CERD/C/SR.1700/Add.1; UN Doc. CERD/C/SR.1701. For the text of the Declaration, see: 'Report of the Committee on the Elimination of Racial Discrimination, Sixty-Sixth Session (21 February-11 March 2005), Sixty-Seventh Session (2–19 August 2005)', UN Doc. A/60/18, para. 459.

[297] UN Doc. CERD/C/SR.1700/Add.1, para. 1.

At the same time as it adopted the Declaration, the Committee considered the specific case of Darfur. Records of the Committee suggest it was divided about the legal description of the atrocities.[298] Its decision on Darfur, adopted only weeks after presentation of the report of the Commission of Inquiry,[299] spoke of 'war crimes, crimes against humanity and the risk of genocide'.[300]

Following adoption of the Declaration, the Committee prepared a list of indicators relevant to the prevention of genocide, although it entitled them 'indicators of patterns of systematic and massive racial discrimination'. These include: lack of a legislative framework and institutions to prevent racial discrimination; systematic official denial of the existence of particular distinct groups; systematic exclusion – in law or in fact – of groups from positions of power, employment in State institutions and key professions; compulsory identification against the will of members of particular groups, including the use of identity cards indicating ethnicity; grossly biased versions of historical events in school textbooks and other educational materials as well as celebration of historical events that exacerbate tensions between groups and peoples. Many of the factors feature in all discussions about racial discrimination. To an extent, one or more of them is present in most countries. The Committee cautioned that 'as these indicators may be present in States not moving towards violence or genocide, the assessment of their significance for the purpose of predicting genocide or violence against identifiable racial, ethnic or religious groups should be supplemented' by consideration of other indicators, including a prior history of genocide or violence against a group, a policy or practice of impunity, and the 'existence of proactive communities abroad fostering extremism and/or providing arms'.[301]

[298] E.g. UN Doc. CERD/C/SR.1701, paras. 18–40; UN Doc. CERD/C/SR.1714, paras. 31–46.

[299] 'Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur', 25 January 2005, UN Doc. S/2005/60.

[300] 'Decision 2 (66), Situation in Darfur', UN Doc. CERD/C/DEC/SDN/1.

[301] 'Decision on Follow-up to the Declaration on the Prevention of Genocide: Indicators of Patterns of Systematic and Massive Racial Discrimination', UN Doc. CERD/C/67/1; 'Report of the Committee on the Elimination of Racial Discrimination, Sixty-Sixth Session (21 February–11 March 2005), Sixty-seventh session (2–19 August 2005)', UN Doc. A/60/18, para. 20.

Preventive measures not included in the Convention

The laconic references to the prevention of genocide in articles I and VIII of the Convention are all that remain of considerably more extensive proposals aimed at attacking the origins of the crime. The further 'upstream' that international law was prepared to go in preventing genocide, the more likely it was that it would trench upon 'matters which are essentially within the domestic jurisdiction of any state', to borrow the language of article 2(7) of the Charter of the United Nations. The failure to adopt these more far-reaching provisions highlights the still relatively underdeveloped condition of international human rights law in 1948, when the Convention was adopted. While the drafters of the Convention were prepared to admit, albeit with great caution, international intervention when genocide had in fact been committed, they were loathe to accept such activity when it was only threatened because of hate propaganda and the activities of racist organizations. The exclusion of these provisions from the Convention was, to a large extent, corrected in subsequent human rights instruments. Ironically, these more recent obligations are not only more complete than what had been proposed in 1948, they are also presently more widely ratified than the Convention itself.

Hate propaganda

The Secretariat draft of the Genocide Convention contained a provision addressed to hate propaganda: 'All forms of public propaganda tending by their systematic and hateful character to promote genocide, or tending to make it appear as a necessary, legitimate or excusable act shall be punished.' The Secretariat noted that this differed from direct and public incitement to commit genocide, listed elsewhere in the draft as an act of genocide. In cases contemplated by article III, 'the author of the propaganda would not recommend the commission of genocide, but would carry on such general propaganda as would, if successful, persuade those impressed by it to contemplate the commission of genocide in a favourable light'.[302] According to the Secretariat, '[s]uch propaganda is even more dangerous

[302] UN Doc. E/447, p. 32.

than direct incitement to commit genocide. Genocide cannot take place unless a certain state of mind has previously been created.'[303]

The United States proposed deletion of article III of the Secretariat draft, the first of its many initiatives to ensure that measures dealing with hate propaganda be excluded. The United States said that '[u]nder Anglo-American rules of law the right of free speech is not to be interfered with unless there is a clear and present danger that the utterance might interfere with a right of others'. According to the United States, this requirement of 'clear and present danger' would only be met in the case of incitement, something that was already covered as an act of genocide.[304] The Soviet Union was diametrically opposed, taking the view that the convention should make it a punishable offence to engage in any form of propaganda for genocide ('the press, radio, cinema, etc., aimed at inciting racial, national or religious enmity or hatred').[305]

In the Ad Hoc Committee, the United States challenged a Soviet proposal to include reference to 'public propaganda ... aimed at inciting racial, national or religious enmities or hatreds',[306] afraid 'that any hostile statement regarding a group of human beings might be denounced as incitement to genocide. This would hamper freedom of speech and in particular the freedom of the press, to a considerable extent.'[307] The United States 'agree[d] that action should be taken against the press and other media of information when they were guilty of direct incitement to commit acts of genocide'.[308] But it threatened to withdraw such agreement in principle if the convention conflicted with its Constitution with respect to freedom of the press.[309] The United States was not alone in its reluctance to deal with hate propaganda falling short of direct and public incitement to genocide. Lebanon noted that campaigns undertaken during wartime to arouse hatred for the enemy should not be mistaken for genocide. 'It was clear that such campaigns which helped to raise the morale of its citizens should not be considered as propaganda for the incitement of genocide', said Lebanon.[310] The Soviet amendment dealing with hate speech was eventually rejected.[311]

[303] *Ibid.* [304] UN Doc. A/401.
[305] 'Basic Principles of a Convention on Genocide', UN Doc. E/AC.25/7. [306] *Ibid.*, p. 6.
[307] *Ibid.*, p. 7. [308] *Ibid.* [309] *Ibid.*, p. 10. See also UN Doc. E/AC.25/SR.6, p. 3.
[310] UN Doc. E/AC.25/SR.5, p. 10.
[311] UN Doc. E/AC.25/SR.16, p. 11 (five in favour (of rejection), two against).

In the Sixth Committee, the Soviet Union again proposed a paragraph to prohibit hate propaganda: 'All forms of public propaganda (press, radio, cinema, etc.) aimed at inciting racial, national or religious enmities or hatreds or at provoking the commission of acts of genocide.'[312] This went much further than 'direct incitement', which had already been accepted.[313] The Soviets argued that a similar proposal had been earlier rejected because the Ad Hoc Committee felt the matter was covered by the incitement provision. The Soviets wanted to deal with all hate propaganda, which they said was 'the cause of acts of genocide'. Hitler's infamous book, *Mein Kampf*, was cited as an example of the type of work that would be prohibited by the additional provision.[314] France was supportive, offering a reworded provision: 'All forms of public propaganda which inflame racial, national or religious enmities or hatreds, with the object of provoking the commission of crimes of genocide.'[315] Haiti, too, supported the amendment.[316]

Inevitably, the United States was opposed, on the ground this would infringe upon freedom of the press.[317] Jean Spiropoulos of Greece said the Soviet proposal was out of place in the convention. He noted that, if the purpose was to suppress propaganda 'aimed at inciting racial, national or religious enmities or hatreds', this was not genocide, because there was no intent to destroy a group.[318] Gerald Fitzmaurice of the United Kingdom said that he would have supported the amendment 'if the world situation were different'. However, given the current context, the provision 'might become a pretext for serious abuses' by governments which did not like 'criticism, particularly newspaper criticism', he said.[319] Cuba,[320] Uruguay,[321] Syria[322] and Egypt[323] also spoke against the amendment.

It should be borne in mind that, during debate, delegates believed political groups were to be protected by the convention. The Sixth Committee had already so decided, and only later in the session would this be reversed. This undoubtedly influenced the attitudes of some

[312] UN Doc. A/C.6/215/Rev.1.
[313] For a discussion of the debate, see 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur', UN Doc. E/CN.4/Sub.2/416, paras. 117–19.
[314] UN Doc. A/C.6/SR.86 (Morozov, Soviet Union). [315] *Ibid.* (Chaumont, France).
[316] *Ibid.* (Demesmin, Haiti). [317] *Ibid.* (Maktos, United States).
[318] *Ibid.* (Spiropoulos, Greece). [319] *Ibid.* (Fitzmaurice, United Kingdom).
[320] *Ibid.* (Dihigo, Cuba). [321] *Ibid.* (Manini y Ríos, Uruguay). [322] *Ibid.* (Tarazi, Syria).
[323] *Ibid.* (Raafat, Egypt).

delegations towards repressing hate propaganda. For example, Iran invoked the spectre of 'punishment of propaganda aimed at stirring up political hatred. The result might be that political strife between parties could be interpreted as propaganda.'[324] Sweden said it was nervous about the prohibition of hate propaganda being extended to political groups and thought it best to abstain.[325] The Soviet amendments were rejected by convincing majorities.[326] Subsequently, the Soviet Union unsuccessfully attempted to revive the issue, with a new modification to article V, concerning obligations to enact legislation to prevent and punish genocide.[327]

The lacuna in the Convention on hate propaganda has been filled by other instruments of international human rights law. Article 7 of the Universal Declaration of Human Rights, adopted the day after the Genocide Convention, states that: 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.' Moreover, the right to freedom of expression, enshrined in article 19 of the Declaration, is deemed subject 'to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society'.[328]

The International Convention on the Elimination of All Forms of Racial Discrimination, adopted in 1965, contains quite extensive obligations with respect to the prevention of hate propaganda.[329] Article 4 of the Convention declares:

> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote

[324] *Ibid.* (Abdoh, Iran). [325] UN Doc. A/C.6/SR.86 (Petren, Sweden).

[326] UN Doc. A/C.6/SR.87. The first part of the Soviet amendment, dealing with propaganda aimed at inciting enmities or hatred, was rejected by twenty-eight to eleven, with four abstentions. The second, concerning propaganda aimed at provoking genocide, was rejected by thirty to eight, with six abstentions. For academic criticism of the rejection of the Soviet proposal, see Jean Graven, 'Sur la prévention du crime de génocide: Réflexions d'un juriste', (1968) 14–15 *Etudes internationales de psychosociologie criminelle*, pp. 9–11; and Antonio Planzer, *Le crime de génocide*, St Gallen, Switzerland: F. Schwald, 1956, pp. 113–14.

[327] UN Doc. A/C.6/SR.93.

[328] Universal Declaration of Human Rights, GA Res. 217 A (III), UN Doc. A/810, art. 29(2).

[329] UN Doc. E/CN.4/Sub.2/1985/SR.36/Add.1.

racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Essentially similar obligations, at least with respect to hate propaganda, are set out in the International Covenant on Civil and Political Rights. The Covenant recognizes the right to freedom of expression, but subjects its exercise to special duties and responsibilities. According to article 19(3): 'It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.' Legislation prohibiting hate propaganda in its various forms, including denial of genocide, is thus sheltered from attack. But the Covenant takes this a step further, imposing an obligation upon States parties to prohibit by law '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.[330] As in the case of the Convention for the Elimination of Racial Discrimination, there is a periodic reporting obligation to the Human Rights Committee in order to supervise compliance with these obligations as well as a widely accepted individual petition mechanism.

In 1990, France adopted the *Loi Gayssot* to repress denial of the Holocaust. The legislation made it an offence to contest the existence of crimes against humanity as defined in the Charter of the International

[330] International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, art. 20(2). See *JRT and WGP* v. *Canada* (No. 104/1981), (1990) 2 SD 25, 4 *Human Rights Law Journal*, p. 193.

Military Tribunal of 8 August 1945, on the basis of which Nazi leaders were tried and convicted at Nuremberg in 1945–6. The French legislation was challenged in an individual communication before the Human Rights Committee filed by Robert Faurisson, who had been convicted under the law in 1992. Faurisson based his complaint on article 19 of the Covenant, which protects freedom of expression. In views issued in December 1996, the Committee dismissed the communication, although stopping short of fully endorsing the French legislation. This leaves open the hypothesis that the Loi Gayssot might, under certain circumstances, run foul of the Covenant.[331]

Although the European Convention on Human Rights does not include an obligation to prevent hate propaganda, many States parties have taken such initiatives. The European Commission of Human Rights has ruled that hate propaganda is not protected by article 10 of the Convention, which enshrines freedom of expression.[332] In 1995, it dismissed an application from an Austrian who had been successfully prosecuted for denying the Holocaust, saying 'the applicant is essentially seeking to use the freedom of information enshrined in Article 10 of the Convention as a basis for activities which are contrary to the text and spirit of the Convention and which, if admitted, would contribute to the destruction of the rights and freedoms set forth in the Convention'.[333]

In the *Jersild* case, a Danish journalist was prosecuted under hate propaganda provisions not for his own words but because he had provided a platform for racist extremists during a television interview. The European Court of Human Rights agreed that the freedom of expression provisions of the European Convention on Human Rights should be interpreted, 'to the extent possible, so as to be reconcilable with its obligations' under the International Convention for the Elimination of All Forms of Racial Discrimination. Denmark argued its legislation had been enacted to give effect to these treaty commitments.[334] The Court

[331] *Faurisson* v. *France* (No. 550/1993), UN Doc. CCPR/C/58/D/550/1993. See S. J. Roth, 'Denial of the Holocaust as an Issue of Law', (1993) 23 *Israel Yearbook of Human Rights*, p. 215.

[332] *Künen* v. *Federal Republic of Germany* (App. No. 9235/81), (1982) 29 DR 194; *Kühnen* v. *Federal Republic of Germany* (App. No. 12194/86), (1988) 56 DR 205; *Glimmerveen and Hagenbeek* v. *Netherlands* (App. No. 8348/78 and 8406/78), (1979) 18 DR 187; *Remer* v. *Germany* (App. No. 25096/94), (1995) 82-A DR 117.

[333] *Honsik* v. *Austria* (App. No. 25062/94), (1995) 83-A DR 77 at p. 84. See also *Walendy* v. *Germany* (App. No. 21128/92), (1994) 80-A DR 94. See E. Stein, 'The New German Law Against the "Auschwitz" – and Other – "Lies"', (1986) 85 *Michigan Law Review*, p. 277.

[334] *Jersild* v. *Denmark*, Series A, No. 298, 23 September 1994, para. 30.

noted that the remarks made by the extremists during the interview were not themselves protected by the Convention. Nevertheless, it was the journalist who had been prosecuted. Concluding that there was a violation of article 10, the Court laid considerable emphasis on the fact that the purpose of the journalist was not racist.[335]

The freedom of expression provision in the American Convention on Human Rights is broader than the other international models.[336] The Inter-American Court has noted that: 'A comparison of Article 13 with the relevant provisions of the European Convention (article 10) and the Covenant (article 19) indicates clearly that the guarantees contained in the American Convention regarding freedom of expression were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas.'[337] However, despite its large vision of freedom of expression, the provision also contemplates the case of racist propaganda. Article 13(5) of the Convention is more or less identical to article 20 of the International Covenant, and requires that, where propaganda for war or advocacy of racial hatred constitute incitements to violence, they are to be considered as offences punishable by law. This provision was added to the Convention upon the recommendation of the rapporteur of the Inter-American Commission on Human Rights in order to bring the text into accordance with the International Covenant.[338]

Hate speech falling short of incitement to genocide may also fall within the scope of international criminal law. There is no particular legal difficulty or novelty about convicting a person for hate speech that actually incites atrocities. In this manner, Julius Streicher was held liable at Nuremberg: 'Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial gounds

[335] *Ibid*., para. 36. See also *Lehideux and Isorni* v. *France*, (1999) 38 ILM 32, paras. 53–5.
[336] American Convention on Human Rights, (1979) 1144 UNTS 123, OASTS 36.
[337] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 ACHR)*, OC-5/85, 13 November 1985, Series A, No. 5, para. 50. Also: *Clark* v. *Grenada* (Case No. 10.325), Report No. 2/96, Inter-Am. CHR, OAS Doc. OEA/Ser.L/V/II.91 Doc. 7 at p. 113 (1996); *Martorell* v. *Chile* (Case No. 11.230), Report No. 11/96, Inter-Am. CHR, OAS Doc. OEA/Ser.L/V/II.95 Doc. 7 rev. at p. 234 (1997).
[338] 'Comparative Study of the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and of the Draft Inter-American Conventions on Human Rights', OAS Doc. OEA/Ser.L/V/II.19 Doc. 18, para. 67.

in connection with War Crimes as defined by the Charter, and constitutes a Crime against Humanity.'[339]

The International Criminal Tribunal for Rwanda has developed an approach to crimes against humanity by which 'hate speech' is considered as the crime against humanity of persecution.[340] In *Nahimana*, a Trial Chamber of the Rwanda Tribunal said:

> The Chamber considers it evident that hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches this level of gravity and constitutes persecution under Article 3(h) of its Statute. In *Ruggiu*, the Tribunal so held, finding that the radio broadcasts of [Radio télévision libre des mille collines], in singling out and attacking the Tutsi ethnic minority, constituted a deprivation of 'the fundamental rights to life, liberty and basic humanity enjoyed by members of the wider society'. Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm.[341]

Although the cases appear similar at first glance, this is quite different from prosecuting incitement to the crime against humanity of murder, as in the Streicher case. On this aspect, the *Nahimana* Trial Chamber misread the Nuremberg judgment.[342] Although Streicher's hate-mongering in the pre-war period was referred to in the Nuremberg judgment's narrative, as a question of law none of the accused was actually convicted for acts committed prior to the outbreak of the war.[343] The Nuremberg judgment is not authority for the proposition that hate speech not constituting incitement to murder that actually occurs is punishable under international law. In reaching its conclusion, the Trial Chamber of the Rwanda Tribunal reviewed authorities from international human rights law as well as national legislation prohibiting hate speech, concluding that hate speech that expresses ethnic and other forms of discrimination violates the norm of customary international law

[339] *France et al.* v. *Goering et al.*, (1946) 22 IMT 203, p. 549.
[340] *Prosecutor* v. *Ruggiu* (Case No. ICTR-97-32-I), Judgment and Sentence, 1 June 2000, paras. 18–24.
[341] *Prosecutor* v. *Nahimana et al.* (Case No. ICTR-99-52-T), Judgment, 3 December 2003, para. 1072.
[342] *Ibid.*, para. 1073. [343] *France et al.* v. *Goering et al.*, (1946) 22 IMT 203, p. 498.

prohibiting discrimination'.[344] For the Trial Chamber, the crime of persecution by hate speech could be committed even where there is no call to violence, or where violence does not actually result.

The Appeals Chamber was more nuanced. It agreed with the Trial Chamber that hate speech violated human dignity and was a form of discrimination, but it said it was not convinced that taken on its own hate speech amounted to a violation of life, liberty and physical integrity. 'Thus other persons need to intervene before such violations can occur; a speech cannot, in itself, directly kill members of a group, imprison or physically injure them', said the Appeals Chamber.[345] Without overruling the pronouncement of the Trial Chamber explicitly, the Appeals Chamber found it unnecessary to determine whether hate speech alone amounted to the crime against humanity of persecution, given that in the case of Rwanda the various acts imputed to the media were part of a broad campaign of persecution that should be considered as a whole.[346] The Appeals Chamber held that broadcasts made after the beginning of the genocide on 6 April 1994 were part of this campaign and therefore constituted the crime against humanity of persecution.[347]

The Appeals Chamber was clearly divided, and this is reflected in the equivocal language of its judgment. In an individual opinion, Judge Pocar said that the judgment was not sufficiently clear in stating that hate speech on its own could constitute persecution, the Rwandan case providing a perfect example of this.[348] Judge Shahabuddeen appeared to share much the same perspective.[349] On the opposite end of the spectrum, Judge Meron wrote a strong dissent in which, with reference to the drafting history of the Genocide Convention, he argued that 'Mere Hate Speech is Not Criminal'.[350]

Disbanding of racist organizations

Nothing in the Secretariat draft concerned disbanding of racist organizations. During the Ad Hoc Committee sessions, the Soviet

[344] *Prosecutor* v. *Nahimana et al.* (Case No. ICTR-99-52-T), Judgment, 3 December 2003, para. 1076.
[345] *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007, para. 986.
[346] *Ibid.*, para. 988. [347] *Ibid.* paras. 988 and 995.
[348] *Ibid.*, Partially Dissenting Opinion of Judge Fausto Pocar, para. 3.
[349] *Ibid.*, Partly Dissenting Opinion of Judge Shahabuddeen, paras. 7–20 and 74.
[350] *Ibid.*, Partly Dissenting Opinion of Judge Meron, paras. 5–8.

Union argued for a provision requiring States to disband racist organizations.[351] China felt this went too far. 'The convention should be as simple as possible and should represent the smallest common denominator of all the drafts', said Lin. He noted that each State party should be free to act as it saw fit.[352] The United States warned of 'cumbersome burdens which States might seek to evade'.[353] France agreed, adding that Member States were already bound to dissolve such organizations as a result of General Assembly Resolution 96(I).[354] The concept, contained in the Soviet Basic Principles, was rejected.[355] But, subsequently, Venezuela's Pérez-Perozo said he had voted against the text, not the principle, and would 'favour a clause whereby States agreed to take legislative national measures for the prevention or suppression of genocide'.[356]

In the Sixth Committee, the Soviet Union once again urged a provision pledging parties to disband and prohibit organizations that incite racial hatred or the commission of genocidal acts.[357] It gave the Nazi party as an example, noting that it had existed long before the Holocaust.[358] The United States argued this 'could lead only to an increase in international tension, and would merely serve as pretexts to harass States parties to the convention'.[359] The United Kingdom invoked problems with its domestic law, which recognized 'the right of any organization, whether political or not, to hold meetings and to express its opinions freely, unless it advocates the use of violence and unless its activities were subversive'.[360] Egypt called the Soviet proposal 'dangerous' because the disbanding of the organization did not depend on the judicially established fact of the crime.[361]

France attempted to salvage the Soviet proposal, saying that the convention would be incomplete if it did not strike at organizations. It suggested that the Soviets accept a proposal similar to one in the Secretariat draft[362] and proposed an amendment: 'The High Contracting Parties pledge themselves to take the necessary measures with a view

[351] 'Basic Principles of a Convention on Genocide', UN Doc. E/AC.25/7, Principle VIII.
[352] UN Doc. E/AC.25/SR.6, p. 8. [353] *Ibid.*, p. 13. [354] *Ibid.*, p. 8.
[355] *Ibid.*, p. 14 (four in favour, three against). [356] *Ibid.*, p. 15.
[357] UN Doc. A/C.6/215/Rev.1: 'The High Contracting Parties pledge themselves to disband and prohibit any organizations aimed at inciting racial, national or religious hatred or the commission of acts of genocide.'
[358] UN Doc. A/C.6/SR.105 (Morozov, Soviet Union).
[359] *Ibid.* (Maktos, United States). See also *ibid.* (Davin, New Zealand).
[360] *Ibid.* (Fitzmaurice, United Kingdom). [361] *Ibid.* (Raafat, Egypt).
[362] UN Doc. E/447, art. XI.

to disbanding groups or organizations which have participated in acts of genocide.'[363] The Netherlands also said it did not like the Soviet proposal, because the criteria were not clear enough, but expressed willingness to accept another formula, such as that proposed by France.[364] The Soviets stubbornly refused to accept the French proposal, because it depended on genocide being committed. Consequently, it did not prevent, it punished.[365] France withdrew its amendment,[366] and the Soviet article was rejected.[367] The Soviets unsuccessfully returned to the issue in the plenary General Assembly with a similar amendment.[368]

Although this issue is addressed rather more summarily in human rights instruments than the obligation to prohibit hate propaganda, article 4(b) of the International Convention for the Elimination of All Forms of Racial Discrimination requires that States parties shall 'declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law'.[369]

Preparatory acts

Domestic criminal law systems generally consider mere preparatory acts insufficient to incur criminal liability. At a certain point, 'mere' preparatory acts segue into behaviour that becomes punishable as an attempt.[370] Attempted genocide is covered by article III(d) of the Convention as an 'other act'. A more far-reaching provision dealing with preparatory acts was included in the Secretariat draft convention on genocide.[371] 'As a rule preparatory acts do not fall under criminal law

[363] UN Doc. A/C.6/SR.106 (Chaumont, France).
[364] *Ibid.* (de Beus, Netherlands). [365] UN Doc. A/C.6/SR.107 (Morozov, Soviet Union).
[366] *Ibid.* (Chaumont, France).
[367] *Ibid.* (twenty-five in favour, seven against, with six abstentions).
[368] UN Doc. A/766: 'The High Contracting Parties undertake to disband and to prohibit in future the existence of organizations aimed at the incitement of racial, national and religious hatred and at provoking the commission of crimes of genocide.' The amendment was rejected (UN Doc. A/PV.179), ten in favour, thirty-one against, with fourteen abstentions.
[369] UN Doc. E/CN.4/Sub.2/1985/SR.36/Add.1.
[370] Attempts are discussed in chapter 6, pp. 334–9 above.
[371] UN Doc. E/447: 'I. The following are likewise deemed to be crimes of genocide; . . . 2. The following preparatory acts: (a) studies and research for the purpose of developing the technique of genocide; (b) setting up of installations, manufacturing, obtaining, possessing or supplying of articles or substances with the knowledge that

because the agent is unable to carry out his schemes', explained the Secretariat. 'But it is different in the case of certain crimes against society.'[372] The Secretariat said preparatory acts should be punishable because genocide was an extremely grave crime; because, once committed, it is irreparable; and because it requires the support of a comparatively large number of individuals. Nevertheless, because of the exceptional nature of punishment of preparatory acts, the Secretariat believed that, if they were to be criminalized, they should be clearly defined.[373] The following was suggested: 1. studies and research for the purpose of developing the technique of genocide; 2. setting up of installations, manufacturing, or training, possessing or supplying of articles or substances with the knowledge that they are intended for genocide; and 3. issuing instructions or orders, and distributing tasks with a view to committing genocide.

The United States opposed the provision, stating 'these acts may be too far removed from what is generally regarded as the commission of the offence'.[374] On the other hand, the Soviets keenly desired such provisions. A Secretariat memorandum explained that: 'This prevention may involve making certain acts punishable which do not themselves constitute genocide, for example, certain material acts preparatory to genocide, agreements or plots with a view to committing genocide, or systematic propaganda inciting to hatred and thus likely to lead to genocide. Prevention may take other forms than penal measures.'[375] But the United States remained adamantly opposed to the word 'preparing' or any other reference to 'preparatory acts'.[376] In an initial vote, the Ad Hoc Committee decided that 'preparing' should be included.[377] But, returning to the issue in a subsequent session, some members explained that the issue could be adequately covered by the crime of attempt and by adding a reference to the word 'complicity'.[378] A proposal to omit preparation was ultimately adopted.[379]

In the Sixth Committee, the Soviet Union submitted a further paragraph dealing with 'acts in preparation for the commission of

they are intended for genocide; (c) issuing instructions or orders, and distributing tasks with a view to committing genocide.'

[372] UN Doc. E/447, p. 29. [373] *Ibid.*, p. 30.
[374] UN Doc. A/401; 'United States Draft of 30 September 1947', UN Doc. E/623.
[375] UN Doc. E/AC.25/3. [376] UN Doc. E/AC.25/SR.15, p. 2.
[377] *Ibid.*, p. 3 (four in favour, three against). [378] UN Doc. E/AC.25/SR.17, p. 1.
[379] *Ibid.*, p. 7 (four in favour, two against, with one abstention).

genocide'.[380] Its text closely followed the previous Secretariat draft: 'The preparatory acts for committing genocide in the form of studies and research for the purpose of developing the technique of genocide: setting up of installations, manufacturing, obtaining, possessing or supplying of articles or substances with the knowledge that they are intended for genocide; issuing instructions or orders and distributing tasks with a view to committing genocide.'[381] The Soviet delegate explained that preparatory acts should be punished when they constituted 'direct preparation'. The object of the text was 'to avoid broadening unduly the concept of preparatory acts, in order that it might be acceptable to States whose internal legislation provided for the punishment of preparatory acts only in certain specified cases'.[382]

The Netherlands enthusiastically supported the Soviet proposal, noting it had intended to submit a similar amendment but changed its mind after seeing the Soviet version. The Netherlands felt that a related gap in the draft convention was the failure to prohibit the promulgation of laws directed towards the perpetration of genocide, and it proposed an oral amendment to the Soviet amendment, adding 'promulgating laws' before the words 'issuing instructions'.[383] Yugoslavia joined the supporters, noting that there was little or nothing in the draft convention about the prevention of genocide. It felt the Ad Hoc Committee had concentrated on measures of punishment, yet the convention should focus on prevention: 'to that end, all preparatory acts must be punished'.[384] It was pointed out that there was a precedent in international law for such a provision, in the Convention for the Suppression of Counterfeit Currency.[385]

Opposition came from States that felt mere preparation should not constitute a crime. 'It was, indeed, extremely difficult to establish the criminal intent of the author of a preparatory act unless he made a confession – which was unlikely, as he could always claim that his act was harmless in intention and not unlawful – or unless drastic measures

[380] On the debate in the Sixth Committee, see 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur', note 317 above, paras. 113–15.
[381] UN Doc. A/C.6/215/Rev.1, art. IV(e).
[382] UN Doc. A/C.6/SR.86 (Morozov, Soviet Union).
[383] *Ibid.* (de Beus, Netherlands). The amendment was accepted by the Soviet representative.
[384] *Ibid.* (Bartos, Yugoslavia).
[385] (1931) 112 LNTS 371. Noted by the Czech representative: UN Doc. A/C.6/SR.86 (Zourek, Czechoslovakia).

were employed to make him speak', said Venezuela. The United Kingdom argued the text would be unenforceable under its law because of evidentiary difficulties: 'a preparatory act could not be condemned on vague presumptions; if, however, such presumptions were substantiated, there would be conspiracy or attempt, which crimes were already provided for in the convention'.[386] As the tone sharpened, the United States delegate said 'he could predict that the USSR delegation would vote against the text' of the convention as a whole, adding that States 'that had no intention of ratifying the convention should not create difficulties for those which sincerely desired to do so'.[387] The United States said that 'by permitting some States to prevent others from possessing certain products or objects, the amendment might give them a pretext for arriving by indirect means at the solution of certain problems which had been the subject of discussion for two years and which were not in the same category as genocide'.[388] The Committee decided against a provision dealing with preparatory acts in the convention,[389] and defeated the Soviet amendment, as amended by the Netherlands.[390]

The failure to include a provision dealing with preparatory acts was criticized by Jean Graven, who wrote that: 'Covering such acts does not mean "getting away from the crime itself"; on the contrary, it means getting nearer to it, grasping it more closely, going to the heart of it . . . There must be ways to lay hold of a crime and if possible prevent it as soon as it is embarked upon, without waiting for it to be committed.'[391] But, in contrast to the hate propaganda provision, which was deleted by the drafters but then adequately covered by human rights norms, the concept of punishing acts preparatory to genocide seems to have been forgotten by both international and domestic law-makers. There is nothing, either in international treaties or in national criminal codes, to authorize criminal repression of acts preparatory to genocide until they reach the threshold of attempts.

[386] *Ibid.* (Fitzmaurice, United Kingdom).
[387] *Ibid.* (Maktos, United States). In fact, the Soviet Union voted in favour of the Convention, and ratified the instrument in 1954. The United States did not ratify the Convention until 1988.
[388] *Ibid.* (Maktos, United States).
[389] *Ibid.* (eleven in favour, thirty-one against, with five abstentions).
[390] *Ibid.* (eight in favour, thirty against, with five abstentions).
[391] Graven, 'Sur la prévention'. See also Planzer, *Le crime de génocide*, p. 118.

11

Treaty law questions and the Convention

Articles X to XIX of the Genocide Convention are protocolar clauses. They address such issues as the authentic language versions of the Convention, the procedures for signature, ratification and accession, denunciation and amendment. These questions, while secondary to the Convention as a whole, were considered at all stages of the drafting. Work on this subject was largely conducted by a three-member sub-committee of the Ad Hoc Committee, whose conclusions received perfunctory approval by the plenary Committee and were subsequently endorsed by the Sixth Committee.[1] Most of these protocolar clauses are deemed to take effect from the date of adoption of the Convention, and not from the date of entry into force of the Convention, in accordance with article 24(4) of the Vienna Convention on the Law of Treaties: 'The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.'[2]

Languages of the Convention

There are five authentic versions of the Convention: Chinese, English, French, Russian and Spanish. Article XI says that all of the texts are equally authentic. A Secretariat draft provision dealt with the subject but did not specify the languages.[3] The Ad Hoc Committee decided that the Convention should be drafted in the five official languages of the United Nations.[4]

[1] UN Doc. E/AC.25/10.
[2] Vienna Convention on the Law of Treaties, (1979) 1155 UNTS 331.
[3] UN Doc. E/447, art. XV: '[Language – Date of the Convention] The present Convention, of which the . . ., . . ., . . ., . . . and . . . texts are equally authentic, shall bear the date of . . .' See also 'United States Draft of 30 September 1947', UN Doc. E/623, art. XII.
[4] UN Doc. E/AC.25/SR.23, p. 11.

The Ad Hoc Committee draft provision was adopted by the Sixth Committee without discussion.[5] The five authentic versions are published in the *United Nations Treaty Series*.[6] The Vienna Convention on the Law of Treaties sets out the principles of interpretation for treaties authenticated in more than one language. As a codification of customary rules, these should apply to the Genocide Convention. Article 33 of the Vienna Convention declares:

> 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
> 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
> 3. The terms of the treaty are presumed to have the same meaning in each authentic text.
> 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

When the United States Senate was considering ratification of the Convention, a number of questions were asked of administration representatives concerning discrepancies in the different language versions. The State Department and Justice Department said they detected no substantive differences in the five versions.[7]

Date of the Convention

Pursuant to article X, the Convention bears the date 9 December 1948, that of its adoption by the United Nations General Assembly.[8] This

[5] UN Doc. A/C.6/SR.107.

[6] (1951) 78 UNTS 277.

[7] *United States of America, Hearing Before the Committee on Foreign Relations, United States Senate, 5 March 1985*, Washington: US Government Printing Office, 1985, pp. 169–71. See, however, John Quigley, *The Genocide Convention: An International Law Analysis*, Aldershot: Ashgate Publishing, 2006, where a number of linguistic differences in the various versions are highlighted.

[8] See UN Doc. E/447, art. XV: '[Language – Date of the Convention] The present Convention, of which the . . ., . . ., . . ., . . . and . . . texts are equally authentic, shall bear the date of . . . ' See also 'United States Draft of 30 September 1947', note 3 above, art. XII.

should not be confused with other dates relevant to the application of the Convention, notably the date of entry into force, which is governed by article XIII.

Signature, ratification and accession

Article XI sets out the rules applicable to signature, ratification and accession:

> The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.
>
> The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.
>
> After 1 January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

The terms 'ratification' and 'accession' describe the international act by which a State establishes on the international plane its consent to be bound by a treaty.[9] Although signature of a treaty may also, under certain circumstances, constitute a means of indicating its acceptance,[10] article XII of the Convention specifies that it is to be only a preliminary step, necessarily followed by ratification. Signature indicates an intention to become a State party. According to the International Court of Justice in its advisory opinion on reservations to the Convention, 'signature constitutes a first step to participation in the Convention'.[11] The Secretariat considered the question of signature to be relatively secondary, given that Member States of the United Nations would also vote on the text in the General Assembly. It proposed two alternatives, one of which eliminated signature altogether.[12] The United States urged the more traditional approach, allowing for a short period following adoption when Member States would be entitled to sign the

[9] Vienna Convention on the Law of Treaties, note 2 above, art. 2(1)(b).
[10] *Ibid.*, arts. 11–12.
[11] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, [1951] ICJ Reports 16, p. 28.
[12] UN Doc. E/447, p. 54.

Convention. Non-Member States could also sign if invited by the Economic and Social Council. Subsequently, signatory States would be allowed to ratify the Convention. Also, any Member State, as well as non-Member States invited by the Economic and Social Council, could accede to the Convention.[13]

The Sub-Committee of the Ad Hoc Committee adopted a text based on the United States draft, except that it left unsettled the question of the body entitled to invite non-State parties to sign and accede. The Sub-Committee felt this could be either the General Assembly or the Economic and Social Council. In plenary session, the Ad Hoc Committee decided the General Assembly was the appropriate organ.[14]

In the Sixth Committee, the Soviet Union urged that the responsibility be given to the Economic and Social Council rather than the General Assembly.[15] Platon Morozov explained this was preferable because ECOSOC met twice a year, whereas the General Assembly met only once.[16] In reply, the United States insisted the same argument had been rejected by the Ad Hoc Committee, which noted that the General Assembly was a sovereign body whereas the ECOSOC had to submit its decisions to the General Assembly.[17] Iran added that this was a political decision, best left to the General Assembly.[18] The Soviet proposal was defeated[19] and article XI adopted by the Sixth Committee without a vote.[20]

Because only Member States are entitled to sign, ratify and accede to the Convention, subject to invitation from the General Assembly to non-Member States, the provision has been called discriminatory.[21] The German Democratic Republic, Mongolia and Vietnam formulated

[13] 'United States Draft of 30 September 1947', note 3 above, art. XIII.
[14] UN Doc. E/AC.25/SR.23, p. 7 (four in favour, three against).
[15] UN Doc. A/C.6/215/Rev.1.
[16] UN Doc. A/C.6/SR.107 (Morozov, Soviet Union).
[17] *Ibid.* (Maktos, United States). But apparently there was a precedent for this. The Syrian delegate, Tarazi, noted that the Sixth Committee, at its 89th meeting, had decided to transfer powers of the League of Nations under the International Convention Relating to Economic Statistics, and accorded ECOSOC the authority to invite ratifications.
[18] UN Doc. A/C.6/SR.107 (Abdoh, Iran).
[19] UN Doc. A/C.6/SR.107 (twenty-one in favour, five against, with twelve abstentions).
[20] *Ibid.*
[21] See 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur', UN Doc. E/CN.4/Sub.2/416, paras. 334–42.

statements to this effect at the time of ratification. In contrast, a treaty such as the Apartheid Convention is open to all States.[22]

According to article XI, the Convention was open for signature until the end of 1949. Nineteen States signed the Convention on 11 December 1948,[23] and twenty-four more before the end of 1949, more than two-thirds of the organization's membership.[24] Despite the clear terms of article XI, Montenegro is reported to have signed the Convention on 19 July 2006.

General Assembly Resolution 368(IV) of 3 December 1949 requested the Secretary-General to invite non-member States to sign the Convention, as authorized by article XI.[25] Twenty non-Member States were invited to sign: Albania, Austria, Bulgaria, Ceylon, Finland, Hungary, Ireland, Italy, Korea, Monaco, Portugal, Romania, Switzerland, Jordan, Indonesia, Liechtenstein, Cambodia, Laos, Vietnam and the Federal Republic of Germany. Seven responded before the deadline for signature expired: Bulgaria, Jordan, Korea, Monaco, Cambodia, Ceylon and Vietnam. Now that virtually all States are members of the United Nations, the provision is no longer of any practical significance.

For the Convention to bind a State, signature must be perfected by filing an instrument of ratification. If a State did not sign prior to 31 December 1949, it must formulate an instrument of accession. Only one State has signed the Convention but never ratified, the Dominican Republic, although Bolivia and Paraguay took more than fifty years to confirm their signatures with ratification, and the United States took virtually forty. Customary law, as codified in the Vienna Convention on the Law of Treaties, requires that between the time of signature and ratification a State is obliged to refrain from acts which would defeat the object and purpose of a treaty, until it shall have made its intention clear not to become a party to the treaty.[26]

[22] International Convention on the Suppression and Punishment of the Crime of Apartheid, (1976) 1015 UNTS 243, art. 14(1).

[23] Australia, Bolivia, Brazil, Chile, Dominican Republic, Ecuador, Ethiopia, France, Haiti, Liberia, Norway, Pakistan, Panama, Paraguay, Peru, the Philippines, the United States, Uruguay and Yugoslavia.

[24] Belgium, Burma, Byelorussia, Canada, China, Colombia, Cuba, Czechoslovakia, Denmark, Egypt, El Salvador, Greece, Guatemala, Honduras, Iceland, India, Iran, Israel, Lebanon, Mexico, New Zealand, the Soviet Union, Sweden and Ukraine.

[25] See Yuen-Li Liang, 'Who Are the Non-Members of the United Nations?', (1951) 49 *American Journal of International Law*, p. 314; Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations*, Oxford: Oxford University Press, 1963, p. 271.

[26] Vienna Convention on the Law of Treaties, note 2 above, art. 18.

By the time the Convention came into force, on 11 January 1951, twenty-five States had either ratified or formulated instruments of accession. Over the next seven years, they were joined by another twenty-eight States. Then the pace slowed considerably. There were only fourteen from 1958 to 1968, eight from 1968 to 1978 and eighteen from 1978 to 1988. From 1988 to 1998, the number of ratifications and accessions swelled to thirty. This might suggest a revival of interest in the Convention, but that would be to overlook the fact that fourteen of the ratifications came from new states resulting from the breakup of the Soviet Union and Yugoslavia. Over the nine years since 1998, only thirteen states became parties to the Convention, three of them former units of the Soviet Union and Yugoslavia. Periodically, the General Assembly has urged States to accede to or ratify the Convention.[27]

By far the most public process of ratification was that of the United States.[28] Under the United States Constitution, signature of treaties is an executive act. The United States signed the Convention on 11 December 1948. Ratification, however, requires the consent of the Senate. President Harry S. Truman submitted the Convention to the Senate in June 1949. It was discussed in 1950 but failed to obtain enough support.[29] The administration changed in 1953, and the new Secretary of State, John Foster Dulles, openly opposed ratification.[30] Presidents periodically resubmitted the Convention to the Senate, leaving an extensive published record of the deliberations. Eventually, on 19 February 1986,

[27] For example, GA Res. 795(VIII).

[28] William Korey, 'America's Shame: The Unratified Genocide Treaty', in Jack Nusan Porter, *Genocide and Human Rights: A Global Anthology*, Lanham, MD, New York and London: University Press of America, 1982, pp. 280–96; Christopher C. Joyner, 'The United States and the Genocide Convention', (1987) 27 *Indian Journal of International Law*, p. 411; Jay Rosenthal, 'Legal and Political Considerations of the United States' Ratification of the Genocide Convention', (1985) 3 *Antioch Law Journal*, p. 117; Lawrence J. Leblanc, *The United States and the Genocide Convention*, Durham, NC: Duke University Press, 1991; Lawrence J. Leblanc, 'The ICJ, the Genocide Convention, and the United States', (1987) 6 *Wisconsin International Law Journal*, p. 43; Richard L. Sussman, 'The Genocide Convention: A New Case for Ratification', (1983) 2 *Boston University International Law Journal*, p. 241; 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur', note 21 above, paras. 557–66.

[29] *United States of America, Hearings Before a Subcommittee of the Committee on Foreign Relations, United States Senate, 23, 24, 25 January and 9 February 1950*, Washington: United States Government Printing Office, 1950.

[30] L. H. Woolsey, 'The New Policy Regarding US Treaties', (1953) 47 *American Journal of International Law*, p. 449.

the Senate consented to ratification on the condition that legislation be enacted to implement the treaty.[31] The legislation is officially known as the Proxmire Act to honour Senator William Proxmire, who had doggedly urged ratification in the Senate every day for nineteen years.[32] The United States became a party to the Convention on 25 November 1988, forty years less two weeks from the date of signature.

The Convention was ratified by the Republic of China on 19 July 1951. In 1971, the General Assembly decided the People's Republic of China was the only legitimate representative of China to the organization.[33] The People's Republic of China undertook to examine the multilateral treaties to which the Republic of China was a party and to indicate its position. On 18 April 1983, the People's Republic of China ratified the Convention, making the following declaration: 'The ratification to the said Convention by the Taiwan local authorities on 19 July 1951 in the name of China is illegal and therefore null and void.'

Succession to the Convention

The Convention says nothing about the rules applicable to State succession, creating a degree of uncertainty on the subject. Some of the applicable rules of customary international law have been codified in the Vienna Convention on Succession of States in Respect of Treaties.[34]

The Convention defines 'succession of States' as 'the replacement of one State by another in the responsibility for the international relations of territory'.[35] International law distinguishes between the creation of newly independent States and succession with respect to a part of a State's territory. In the case of newly independent States, the general rule is that the new State is not bound by the treaties contracted on its behalf by the previous rulers. It has been posited that there is an exception in the case of treaties setting out fundamental human rights, a category to which the Genocide Convention surely belongs. In the litigation before

[31] *Congressional Record* S1355-01 (daily edition, 19 February 1986).
[32] Genocide Convention Implementation Act of 1987 (the Proxmire Act), S. 1851.
[33] GA Res. 2758(XXVI).
[34] Vienna Convention on Succession of States in Respect of Treaties, (1996) 1946 UNTS 3. See V.-D. Degan, 'La succession d'Etats en matière de traités et les Etats nouveaux (issus de l'ex-Yougoslavie)', (1996) 42 *Annuaire français de droit international*, p. 206; Vaclav Mikulka, 'The Dissolution of Czechoslovakia and the Succession in Respect of Treaties', (1996) 12 *Development and International Cooperation*, p. 45 at p. 47.
[35] Vienna Convention on Succession of States in Respect of Treaties, note 34 above, art. 2(1)(b).

the International Court of Justice, when Serbia questioned whether Bosnia and Herzegovina was a State party, the latter answered that the Genocide Convention belonged to a category of international human rights instruments to which a rule of 'automatic succession' applied. In such cases, no special declaration of succession was required. Although the Court seemed keen on the idea, it declined to take a formal position, considering this unnecessary for the outcome of the debate.[36] The Secretary-General's practice is not to consider successor States as being automatically parties to the Genocide Convention.

Newly independent States have two choices: to formulate declarations of succession; or to accede to the Convention. At the time of decolonization, some States that were entitled to succeed to the treaty obligations of the colonizer chose instead to formulate their own instruments of accession.[37] Several States made specific declarations of succession to the Genocide Convention at the time of or shortly after independence: Antigua and Barbuda, Bahamas, Bosnia and Herzegovina, Croatia, the Czech Republic, the Democratic Republic of the Congo, Fiji, Slovakia, Slovenia and the former Yugoslav republic of Macedonia. Others have made general declarations of succession applicable to all treaties ratified by the predecessor State.[38] The principal interest of the distinction concerns the date the Convention will apply to the new State. In the case of a declaration of succession, the Convention continues to apply without interruption, whereas, in the case of accession, the Convention itself imposes a three-month waiting period before entry into force for the acceding State. A ruling of the International Court of Justice in the litigation between Bosnia and Herzegovina and Serbia suggests the practical significance of the distinction may not

[36] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Preliminary Objections, 11 July 1996, paras. 21–3.

[37] For example, in the years following independence in 1962, Rwanda issued a number of declarations providing for its succession to obligations contracted on its behalf by Belgium in such areas as dangerous drugs, highway traffic, humanitarian law and labour standards. It made no such declaration about the Genocide Convention, however, and instead filed new instruments of accession in 1975. Burundi might also have succeeded to the Convention, because Belgium made a declaration on its behalf in 1952. Burundi's formal accession to the Convention was only registered by the Secretary-General in 1997.

[38] For example, the Federal Republic of Yugoslavia (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Requests for the Indication of Provisional Measures, 8 April 1993, [1993] ICJ Reports 16, p. 15, para. 22.

really be that great.[39] On 29 December 1992, Bosnia and Herzegovina transmitted a notice of succession, adding that this was to have retroactive effect to 6 March 1992.[40] On 18 March 1993, the Secretary-General informed the parties to the Convention of Bosnia and Herzegovina's notice of succession.[41] Yugoslavia argued that the notice filed by Bosnia and Herzegovina in December 1992 was one of accession, not of succession, and that as a result it did not take effect for ninety days.

Bosnia and Herzegovina had become a member of the United Nations because of a decision adopted on 22 May 1992 by the Security Council and the General Assembly. According to the Secretary-General, as depository of the Convention, Bosnia was entitled to accede to the Convention with effect from 22 May 1992.[42] The Court concluded that Bosnia and Herzegovina was entitled to succeed to the Convention, and that therefore the notice it filed would be treated as effecting succession to the Convention, although it did not rule on whether or not this could be retroactive. According to the Court, Bosnia and Herzegovina was certainly a party at the time of filing of the application, and this was sufficient to dispose of Yugoslavia's objection.[43]

On 15 June 1993, Yugoslavia filed the following statement with the Secretary-General:

> Considering the fact that the replacement of sovereignty on the part of the territory of the Socialist Federal Republic of Yugoslavia previously comprising the Republic of Bosnia and Herzegovina was carried out contrary to the rules of international law, the Government of the Federal Republic of Yugoslavia herewith states that it does not consider the so-called Republic of Bosnia and Herzegovina a party to the [said

[39] See Matthew C. R. Craven, 'The Genocide Case, the Law of Treaties and State Succession', (1997) 68 *British Yearbook of International Law*, p. 127. See also the comments of Judge Mohammed Shahabuddeen in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Preliminary Objections, note 36 above, Separate Opinion of Judge Shahabuddeen.

[40] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Requests for the Indication of Provisional Measures, note 38 above, para. 23; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Preliminary Objections, note 36 above, para. 18.

[41] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Requests for the Indication of Provisional Measures, note 38 above, p. 15, para. 23.

[42] *Ibid.*, p. 16, para. 25. [43] *Ibid.*, para. 23.

> Convention], but does consider that the so-called Republic of Bosnia and Herzegovina is bound by the obligation to respect the norms on preventing and punishing the crime of genocide in accordance with general international law irrespective of the Convention on the Prevention and Punishment of the Crime of Genocide.

In a separate opinion to the 1996 preliminary objections, Judge Parra-Aranguren said that Serbia had admitted Bosnia and Herzegovina was a party to the Convention when it applied, on 10 August 1993, for provisional measures against Bosnia and Herzegovina alleging breach of its obligations under the Convention.[44] The Constitution of Bosnia and Herzegovina, which is incorporated in the Dayton Agreement, states that the Genocide Convention is 'to be applied in Bosnia and Herzegovina'.[45]

The Federal Republic of Yugoslavia claimed before the International Court of Justice that, as of 1992, it was not a party to the Genocide Convention. Consistent with this position, on 12 March 2001, the Federal Republic of Yugoslavia filed a notice of accession to the Convention, accompanied by a reservation to article IX. In a manoeuvre aimed at dismissal of the application by Bosnia and Herzegovina, it argued that it had only become a new member of the United Nations in November 2000, and that as a result it did not remain bound, through rules of State succession, by article IX of the Genocide Convention.[46] On 22 September 1992, acting pursuant to a recommendation of the Security Council, the United Nations General Assembly had declared that the 'Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations.'[47] Invoking article XI of the Convention, Yugoslavia said that, prior to its admission to the United Nations in 2000, the only way in which it could have become a party to the Convention would be as a result of an invitation

[44] *Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections (Yugoslavia* v. *Bosnia and Herzegovina)*, [2003] ICJ Reports 7, paras. 19 and 66.

[45] UN Doc. A/RES/47/1.

[46] *Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections (Yugoslavia* v. *Bosnia and Herzegovina)*, Application Instituting Proceedings Filed in the Registry of the Court on 24 April 2001, p. 48, para. 31.

[47] *Ibid.*, para. 70.

by the General Assembly.[48] Dismissing the argument, the International Court of Justice concluded that the 1992 General Assembly resolution did not affect the position of the Federal Republic of Yugoslavia in relation to the Genocide Convention.[49]

The issue of membership of the Federal Republic of Yugoslavia (Serbia and Montenegro) in the United Nations from 1992 to 2000 and, by ricochet, its status as a party to the Genocide Convention, returned to the Court in 2004, when it declared inadmissible the application by Serbia and Montenegro against Belgium and several other NATO members because 'Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application' in 1999.[50] But, as the Court noted later, '[n]o finding was made in those judgments on the question whether or not the Respondent was a party to the Genocide Convention at the relevant time'.[51] Invoking the doctrine of *res judicata*, the Court recalled that in 1996 it had held that 'Yugoslavia was bound by the provisions of the [Genocide] Convention on the date of the filing of the Application in the present case',[52] and that article IX of the Genocide Convention applied to the proceedings.[53] The Court said that it would not revisit the issue.[54]

Yugoslavia's accession in 2001 provoked responses from several States who contested its validity. Croatia submitted a declaration to the depositary contending that 'the Federal Republic of Yugoslavia is already bound by the Convention since its emergence as one of the five equal successor states to the former Socialist Federal Republic

[48] *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, Preliminary Objections, Judgment, [2004] ICJ Reports 311, para. 79.

[49] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 83.

[50] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment, [1996] 2 ICJ Reports 610, para. 17.

[51] *Ibid.*, para. 47(2)(a).

[52] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Preliminary Objections, note 36 above, Separate Opinion of Judge Parra-Aranguren, para. 1.

[53] General Framework Agreement for Peace in Bosnia and Herzegovina, annex 4, Constitution of Bosnia and Herzegovina, annex I, Additional Human Rights Agreements to be Applied in Bosnia and Herzegovina, para. 1, (1997) 18 *Human Rights Law Journal*, p. 309; see also *ibid.*, annex 6, Agreement on Human Rights, art. 1, annex.

[54] Vienna Convention on Succession of States in Respect of Treaties, note 34 above, art. 15.

of Yugoslavia'. Bosnia and Herzegovina made a declaration along similar lines. Both Croatia and Bosnia and Herzegovina cited the 1996 ruling of the International Court of Justice to support their positions. Sweden also declared that it 'regards the Federal Republic of Yugoslavia as one successor state to the Socialist Federal Republic of Yugoslavia and, as such, a Party to the Convention from the date of the entering into force of the Convention for the Socialist Federal Republic of Yugoslavia'.

Where only part of a State's territory is concerned, the treaties in effect in the successor State apply to the new territory, and the treaties in effect in the former territory cease to apply.[55] The Government of South Vietnam acceded to the Genocide Convention in 1950. It took effect in the south but not in the north. When the Democratic Republic of Vietnam was victorious over the Saigon regime in 1975, the southern portion of the country ceased to have any independent existence. As a result, the Genocide Convention no longer applied even to the south. On 9 June 1981, Vietnam acceded to the Convention.

On 1 January 1998, sovereignty over Hong Kong was transferred from the United Kingdom to China. The United Kingdom had extended the application of the Genocide Convention to Hong Kong in 1970 without reservation. On 6 June 1997, China submitted the following statement to the depositary:

> In accordance with the Declaration of the Government of the People's Republic of China and the United Kingdom of Great Britain and Northern Ireland on the question of Hong Kong signed on 19 December 1984, the People's Republic of China will resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997. Hong Kong will, with effect from that date, become a Special Administrative Region of the People's Republic of China and will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibility of the Central People's Government of the People's Republic of China.
>
> The [said Convention], which the Government of the People's Republic of China ratified on [18] April 1983, will apply to Hong Kong Special Administrative Region with effect from 1 July 1997.

[55] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 123.

The notification also contained the following declaration:

> The reservation to article IX of the said Convention made by the Government of the People's Republic of China will also apply to the Hong Kong Special Administrative Region.
>
> The Government of the People's Republic of China will assume responsibility for the international rights and obligations arising from the application of the Convention to Hong Kong Special Administrative Region.

A few days later, the United Kingdom notified the Secretary-General of the United Nations as follows:

> In accordance with the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong signed on 19 December 1984, the Government of the United Kingdom will restore Hong Kong to the People's Republic of China with effect from 1 July 1997. The Government of the United Kingdom will continue to have international responsibility for Hong Kong until that date. Therefore, from that date the Government of the United Kingdom will cease to be responsible for the international rights and obligations arising from the application of the [said Convention] to Hong Kong.

The United Kingdom made no comment about the Chinese reservation to article IX. The United Kingdom has been one of the most strenuous opponents of reservations to article IX of the Convention. Its objections usually declare that it has 'consistently stated' its opposition to reservations to article IX. This was the first episode of inconsistency. China made a similar reservation when sovereignty over Macao reverted from Portugal, in 1999.

Application to 'sovereign territories'

Article XII allows a party to extend the application of the Convention to sovereign territories for which it is responsible. The provision resulted from a United Kingdom proposal in the Sixth Committee.[56] Gerald Fitzmaurice said that the insertion of such clauses in multilateral treaties had been customary for the past twenty or thirty years, and that only recently had there been objections 'based on purely political motives

[56] UN Doc. A/C.6/236 and Corr.1: 'Any High Contracting Party may, at any time, by notification addressed to the Secretary General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that High Contracting Party is responsible.'

and designed to create difficulties for the colonial powers'. He added that, without such a clause, there would be a considerable, if not indefinite, delay before adherence by the United Kingdom to the Convention. Fitzmaurice pointed out that many of its territories were self-governing and would have to be consulted first.[57] For the United States, such a provision was unnecessary, because in any case it intended to extend the protection of the Convention to its territories. But John Maktos recognized that the United Kingdom's arguments were 'extremely reasonable'.[58]

Fitzmaurice was correct in anticipating that the new article might provoke some anti-colonialist sentiment. Ukraine proposed an amendment making it mandatory to extend the Convention to dependent territories.[59] Egypt liked the spirit of the Ukrainian amendment, and suggested that the word 'may' in the United Kingdom amendment be changed to 'shall undertake'.[60] Iran proposed that the issue be resolved by means of a resolution, to be adopted at the same time as the Convention, in which the General Assembly would recommend that States with dependent territories take 'such measures as are necessary and feasible' to extend the Convention to those territories as soon as possible.[61]

The Ukrainian amendment was defeated[62] and the United Kingdom proposal adopted.[63] The Iranian resolution was also adopted.[64] In the plenary General Assembly, the Soviet Union unsuccessfully proposed an amendment requiring automatic application of the Convention to non-self-governing territories.[65] The General Assembly resolution recommended that States parties to the Convention which administer dependent territories 'take such measures as are necessary and feasible

[57] UN Doc. A/C.6/SR.107 (Fitzmaurice, United Kingdom).
[58] *Ibid.* (Maktos, United States). [59] UN Doc. A/C.6/264.
[60] UN Doc. A/C.6/SR.107 (Raafat, Egypt).
[61] UN Doc. A/C.6/268. The words 'and feasible' were added upon the suggestion of Fitzmaurice, who agreed to support the Iranian amendment if the changes were made: UN Doc. A/C.6/SR.107 (Fitzmaurice, United Kingdom). Iran agreed: UN Doc. A/C.6/SR.107 (Abdoh, Iran).
[62] *Ibid.* (nineteen in favour, ten against, with fourteen abstentions).
[63] *Ibid.* (eighteen in favour, nine against, with fourteen abstentions).
[64] UN Doc. A/C.6/SR.108 (twenty-two in favour, with nine abstentions).
[65] UN Doc. A/766: 'The application of the present Convention shall extend equally to the territory of any Contracting Party and to all territories in regard to which such a State performs the functions of the governing and administering Authority (including Trust and other Non-Self-Governing Territories).' The amendment was rejected (UN Doc. A/PV.179), nineteen in favour, twenty-three against, with fourteen abstentions.

to enable the provisions of the Convention to be extended to those territories as soon as possible'.[66]

Australia, Belgium, the United Kingdom and Portugal are the only States to have applied article XII of the Convention. In 1949, Australia declared the Convention in force for all territories for which Australia assumed responsibility for the conduct of foreign relations. In 1952, Belgium declared the Convention applicable to the Belgian Congo and to the Trust Territory of Rwanda-Urundi, both of which became independent within a decade. In 1970, the United Kingdom declared that the Convention applied to several of its territories, some of which have since become independent.[67] The last country to enter such a declaration was Portugal, in 1999, at the time of its ratification of the Convention. Immediately prior to the transfer of sovereignty over Macao to the People's Republic of China, Portugal informed the Secretary-General that the Genocide Convention would apply to Macao.

In a reference to the United Kingdom's statement concerning the Falkland Islands and Dependencies, Argentina announced that '[i]f any other Contracting Party extends the application of the Convention to territories under the sovereignty of the Argentine Republic, this extension shall in no way affect the rights of the Republic'. Following the 1982 war with the United Kingdom, it made a further objection: '[The Government of Argentina makes [a] formal objection to the [declaration] of territorial extension issued by the United Kingdom with regard to the Malvinas Islands (and dependencies), which that country is illegally occupying and refers to as the "Falkland Islands". The Argentine Republic rejects and considers null and void the [said declaration] of territorial extension.' The United Kingdom replied: 'The Government of the United Kingdom of Great Britain and Northern Ireland have no doubt as to their right, by notification to the Depositary under the relevant provisions of the above-mentioned Convention, to extend the application of the Convention in question to the Falkland Islands or to the Falkland Islands Dependencies, as the case may be. For this reason alone, the Government of the United Kingdom are unable to regard the Argentine [communication] under reference as having any legal effect.'

[66] UN Doc. A/C.6/SR.132 (twenty-nine in favour, seven abstentions).

[67] Channel Islands, Isle of Man, Dominica, Grenada, St Lucia, St Vincent, Bahamas, Bermuda, British Virgin Islands, Falkland Islands and Dependencies, Fiji, Gibraltar, Hong Kong, Pitcairn, St Helena and Dependencies, Seychelles, Tonga, and the Turks and Caicos Islands.

Special Rapporteur Ruhashyankiko observed 'that article XII no longer reflects current United Nations practice with respect to multilateral conventions or the progress of international reality towards completion of the decolonization process'.[68] In declarations formulated at the time of ratification or accession, several States have indicated their rejection of article XII. They consider that all provisions of the Convention should also extend to non-self-governing territories, including trust territories.[69] The precise legal significance of these statements is unclear. Use of the word 'should' indicates that the States concerned do not consider the Convention to be automatically applicable to non-self-governing territories, in the absence of a declaration. Rather, these are political statements that do not affect the rights and obligations arising from the Convention. Ecuador has said it 'is not in agreement' with the reservations made to article XII, and that as a result 'they do not apply to Ecuador'. Because Ecuador has no non-self-governing territories, the legal consequence of this statement is mysterious.

Coming into force

Article XIII of the Convention announces that, on the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General is to prepare a procès-verbal and to transmit it to all Member States and to all non-Member States who have been invited to sign, ratify or accede to the instrument. The Convention is to come into force on the ninetieth day following deposit of the twentieth instrument of ratification or accession. Ratification or accession effected subsequent to the coming into force becomes effective on the ninetieth day following deposit of the relevant instruments.

The only significant issue in the drafting of this provision was the number of contracting States required for entry into force. The Secretariat noted that, to the extent the Convention could apply even to non-States parties, this question was 'of special importance'.[70] Siam

[68] 'Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur', note 21 above, para. 356.

[69] Albania, Algeria, Belarus, Bulgaria, Czechoslovakia, German Democratic Republic, Mongolia, Poland, Romania, the Russian Federation, Ukraine and Vietnam. Hungary reserved its rights 'with regard to the provisions of article XII which do not define the obligations of countries having colonies with regard to questions of colonial exploitation and to acts which might be described as genocide'.

[70] UN Doc. E/447, p. 19.

(Thailand) proposed that this should not be less than half the total number of Member States of the United Nations, which had fifty-eight members at the time.[71] The United States proposed the number be set at twenty States,[72] a view shared by the Sub-Committee of the Ad Hoc Committee[73] and confirmed by the Ad Hoc Committee.[74] The issue was not subsequently debated.

Ethiopia was the first State to ratify the Convention, on 1 July 1949. Over the next fifteen months, eleven more States ratified the Convention (Australia, Norway, Iceland, Ecuador, Panama, Guatemala, Israel, Liberia, the Philippines, Yugoslavia and El Salvador) and seven acceded to it (Monaco, Jordan, Saudi Arabia, Bulgaria, Turkey, Vietnam and Sri Lanka), for a total of nineteen. On 14 October 1950, two States ratified (France and Haiti) and three acceded (Cambodia, Costa Rica and the Republic of Korea), bringing the total to twenty-four contracting States.

This was a godsend for the Secretariat, because at the time of ratification or accession both the Philippines and Bulgaria had made reservations which were met with objections from Australia, Ecuador and Guatemala. The law on reservations was even more unclear then than it is today. Because of the possible illegality of the reservations as well as the uncertain effect of the objections, the Secretary-General was not sure whether or not to consider the Philippines and Bulgaria as contracting States.[75] Nevertheless, there were, as of 14 October 1950, at least twenty-two unquestionably valid ratifications or accessions, and the Secretary-General proceeded to draft the procès-verbal required by article XIII.[76] Three months later, on 12 January 1951, the Genocide Convention entered into force.

The three-month delay for entry into force of the Convention with respect to individual States was invoked by Portugal in the *Legality of the Use of Force* case. Portugal deposited its instrument of accession on 9 February 1999, and consequently the Convention entered into force for Portugal on 10 May 1999. Yugoslavia's application against Portugal was filed in late April 1999, prior to the entry into force of the

[71] UN Doc. E/623/Add.4. [72] UN Doc. E/623. [73] UN Doc. E/AC.25/10.
[74] UN Doc. E/AC.25/SR.23, p. 7.
[75] The issue was considered the following year by the International Court of Justice in its advisory opinion. See pp. 616–18 below.
[76] The text of the procès-verbal is reproduced in 'Written Statement of the Secretary-General of the United Nations', *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951*, [1951] ICJ Reports, Pleadings, Oral Arguments, Documents, pp. 112–13.

Convention for Portugal. Portugal invoked the argument in oral argument on the application for provisional measures on 10 May 1999, and again two days later, at a time when the Convention had in fact entered into force for Portugal.[77] When the case was judged on the merits, the International Court of Justice found that Yugoslavia did not have access to the Court, and that it therefore did not need to address the Portuguese objection to jurisdiction.[78]

Denunciation of the Convention

The Convention may be denounced by written notification to the Secretary-General, pursuant to article XIV. No State has ever availed itself of this privilege. The same provision declares that the Convention remains in effect for a period of ten years from its date of coming into force, that is, 11 January 1951, and then for successive periods of five years for those States parties that have not denounced it at least six months before the expiration of the five-year period. The terms of article XIV indicate that denunciation takes effect only at the expiration of the five-year periods. Thus, if a State were to denounce the treaty on 12 January 2001, it would remain bound by the Convention for five more years less a day.[79]

During the drafting, the Secretariat noted some States considered that, 'in the interests of the progress of international law, States should not be allowed to relieve themselves of their obligations, once they have contracted them, in the case of Conventions serving a purpose of general interest and having universal application'.[80] The Secretariat favoured a denunciation clause, however. It observed that, if governments were to stop supporting the Convention, it would become practically nugatory.[81] The Secretariat believed such an escape clause would help to promote accession.[82] It proposed a text that is not very different from the final version of article XIV. The United States took a similar position,[83] as did the Ad Hoc Committee.[84] In the Sixth

[77] *Legality of Use of Force (Yugoslavia* v. *Portugal)*, Verbatim Record, 10 May 1999 (José Maria Teixeira Leite Martins); *Legality of Use of Force (Yugoslavia* v. *Portugal)*, Verbatim Record, 12 May 1999 (José Maria Teixeira Leite Martins).
[78] *Legality of Use of Force (Serbia and Montenegro* v. *Portugal)*, Preliminary Objections, Judgment, [1994] ICJ Reports 1160, paras. 94–5 and 117.
[79] *United Nations Juridical Yearbook 1981*, UN Doc. ST/LEG/SER.C/19, p. 153.
[80] UN Doc. E/447, p. 57. [81] *Ibid.* [82] UN Doc. E/447, p. 58. [83] UN Doc. E/623.
[84] UN Doc. E/AC.25/SR.23, p. 8.

Committee, Uruguay,[85] the United Kingdom[86] and Belgium[87] all submitted amendments aimed at deleting the denunciation provision. China said it would have preferred the Convention to be permanent, but recognized that present international practice made that impossible.[88] The Soviet Union had the most conservative proposal, allowing for denunciation at any time, subject to a one-year notice period.[89]

The United States argued that making the Convention permanent, without reserving the right to denounce the Convention, would constitute an obstacle to ratification. Therefore, it would vote to restrict validity and would accept the Chinese proposal. If the Chinese proposal failed, the United States would accept the Soviet proposal.[90] Subsequently, Belgium,[91] the United Kingdom[92] and Uruguay[93] all withdrew their amendments. The Soviet amendment was rejected,[94] and the provision, as amended by China,[95] was adopted.[96]

Article XV provides that, if denunciations reduce the number of States parties below a certain point, the Convention shall cease to be in force. Several amendments in the Sixth Committee proposed deletion of this provision,[97] but they were based on the assumption that the preceding article, dealing with denunciation of the Convention, would be eliminated altogether. Once the Committee agreed to allow denunciation, it became necessary to anticipate the eventuality. The amendments were withdrawn at the outset of the debate for this reason.[98] There was no discussion, and the article was adopted.[99] In a published legal opinion, the Secretariat suggested that denunciation would be the technique by which a State could withdraw reservations and formulate new ones.[100]

[85] UN Doc. A/C.6/209. [86] UN Doc. A/C.6/236 and Corr.1. [87] UN Doc. A/C.6/217.
[88] UN Doc. A/C.6/SR.108 (Ti-tsun Li, China).
[89] UN Doc. A/C.6/215/Rev.1: 'The present Convention may be denounced by a written notification addressed to the Secretary-General of the United Nations. Such notification shall take effect one year after the date of its receipt.'
[90] UN Doc. A/C.6/SR.108 (Maktos, United States). [91] *Ibid.* (Kaeckenbeeck, Belgium).
[92] *Ibid.* (Fitzmaurice, United Kingdom). [93] *Ibid.* (Pratt de María, Uruguay).
[94] *Ibid.* (fourteen in favour, eight against, with eighteen abstentions).
[95] *Ibid.* (thirty-one in favour, with ten abstentions).
[96] *Ibid.* (thirty-eight in favour, with three abstentions).
[97] UN Doc. A/C.6/209 (Uruguay); UN Doc. A/C.6/236 and Corr.1 (United Kingdom); UN Doc. A/C.6/217 (Belgium).
[98] UN Doc. A/C.6/SR.108 (Pratt de María, Uruguay; Kaeckenbeeck, Belgium; Fitzmaurice, United Kingdom).
[99] UN Doc. A/C.6/SR.108 (thirty-four in favour, with two abstentions).
[100] *United Nations Juridical Yearbook 1981*, UN Doc. ST/LEG/SER.C/19, p. 153.

Revision

Article XVI allows for revision of the Convention: 'A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.' The General Assembly is then to decide upon the steps, if any, to be taken with respect to such a request for revision of the Convention. The question has never arisen, although there have been frequent suggestions that the Convention be amended. There was even talk, in 1998, of a review conference to commemorate the fiftieth anniversary of the Convention.

The original Secretariat draft was quite similar to the final text, except that the Economic and Social Council, and not the General Assembly, was to rule on requests for revision.[101] The United States draft was more rigorous, requiring written communication from one-quarter of all contracting parties.[102] This proposal was submitted by the Ad Hoc Committee, although it took no formal decision on the matter.[103] The Ad Hoc Committee draft said the General Assembly would decide upon the steps to be taken, 'if any'. In the Sixth Committee, Belgium urged deletion of the proposal,[104] but subsequently withdrew this suggestion because the question of establishing an international tribunal was unresolved and had been referred to the International Law Commission.[105] The Soviet Union presented an amendment assigning responsibility for consideration of requests for revision to the Economic and Social Council.[106] France[107] and the United States[108] said they preferred such matters to be addressed by the General Assembly. France then introduced amendments to the Soviet proposal, which the Soviets accepted. The first paragraph of the Ad Hoc Committee draft was replaced by the first paragraph of the Soviet text, while the second paragraph remained unchanged.[109] The only real difference between the Soviet text and the Ad Hoc Committee draft was the elimination of the words 'if any'. Article XVI was then adopted, as amended.[110]

[101] UN Doc. E/447, art. XXI. [102] UN Doc. E/623. [103] UN Doc. E/AC.25/10.
[104] UN Doc. A/C.6/217. [105] UN Doc. A/C.6/SR.108 (Kaeckenbeeck, Belgium).
[106] UN Doc. A/C.6/215/Rev.1: 'A request for the revision of the present Convention may be made at any time by any State signatory to the Convention by means of a notification in writing addressed to the Secretary-General. The Economic and Social Council will decide what action should be taken regarding such a request.'
[107] UN Doc. A/C.6/SR.108 (Chaumont, France). [108] *Ibid.* (Maktos, United States).
[109] *Ibid.* (twenty-five in favour, eleven against, with four abstentions).
[110] *Ibid.* (twenty-eight in favour, with ten abstentions).

The Convention provides no details on the rules applicable to amendment or revision. Assuming that the principles set out in articles 39–41 of the Vienna Convention on the Law of Treaties apply, as a codification of customary norms, an amended Convention would in reality be a new Convention.[111] Thus, existing States parties would be able to accept or reject the amended version. International practice in the field of human rights treaties has tended to approach revision or amendment by developing additional protocols, to which States are free to contract if they are willing to accept additional obligations,[112] although there are examples of successful amendment where all States to a human rights treaty have agreed.[113]

Deposit and the functions of the depositary

The original of the Convention is deposited in the archives of the United Nations, in accordance with article XVIII. The same provision states that a certified copy of the Convention is to be transmitted to each Member State of the United Nations and to each of the non-Member States contemplated in article XI, presumably by the Secretary-General of the United Nations.

The Secretary-General, as depositary of the treaty, and pursuant to article XVII of the Convention, is required to notify Member States as well as non-Member States in accordance with article XIX of the following: signatures, ratifications and accessions received in accordance with article XIX; notifications of application to non-self-governing territories received in accordance with article XII; the date of entry into force in accordance with article XIII; denunciations received in accordance with article XIV; abrogation of the Convention in accordance with article XV; and notifications received in accordance with article XVI.

Articles XVII and XVIII of the Convention are virtually identical to the texts in the original Secretariat draft,[114] and to those proposed by the United States.[115] They were adopted without incident.

[111] Yuen-Li Liang, 'The Question of Revision of a Multilateral Treaty Text', (1953) 47 *American Journal of International Law*, p. 263.

[112] For example, the Optional Protocol to the International Covenant on Civil and Political Rights, (1976) 999 UNTS 171.

[113] For example, Protocol No. 11 to the European Convention on the Protection of Human Rights and Fundamental Freedoms, (1994) ETS 155.

[114] UN Doc. E/447, arts. XXIII and XXIV. [115] UN Doc. E/623.

Besides the notification function, other issues relating to deposit and to the responsibilities of depositaries are set out in articles 76–80 of the Vienna Convention on the Law of Treaties.[116] Among the functions of the depositary are impartial verification of formal requirements of signature, ratification, accession or other communication.[117]

It was as depositary of the Genocide Convention in 1950 that the Secretary-General reported to the General Assembly that certain procedural problems had arisen concerning the practice of reservations.[118] The Secretary-General noted that his practice had been adapted from that of the League of Nations. Upon receipt of a signature or instrument of ratification or accession subject to a reservation, the Secretary-General would notify all contracting States and States that might become parties to the Convention. They were informed that subsequent ratification or accession without express objection would be deemed tacit acceptance of the reservation. Once in force, States parties would also be given a reasonable time to object, failing which their acceptance would be presumed.[119] The Secretary-General's practice was officially endorsed by the General Assembly, which invited him to continue with it pending the advisory opinion of the International Court of Justice.[120]

Registration

Article XIX states that the Convention is to be registered by the Secretary-General of the United Nations on the date of its coming into force. The provision appeared in the original Secretariat draft and was never really debated.[121] Registration of treaties is a requirement of the Charter of the United Nations.[122]

[116] Note 2 above.

[117] For a discussion of the practice of the depositary, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Preliminary Objections, note 36 above, Dissenting Opinion of Judge *ad hoc* Kreca, paras. 90–8.

[118] The depositary had previously solicited the opinions of States as to their positions on the reservations made at the time of signature. The Soviet Union contested this as going beyond the powers assigned to the Secretary-General by art. XVII of the Convention: 'Written Statement of the Secretary-General of the United Nations', note 76 above, p. 104.

[119] UN Doc. A/1372 (1950). [120] GA Res. 478(V), para. 3.

[121] See UN Doc. E/AC.25/SR.23, p. 10. [122] Charter of the United Nations, art. 102.

Reservations to the Convention

A reservation is 'a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State'.[123]

Drafting of the Convention

No provision in the Secretariat draft addressed the permissibility of reservations, but the accompanying commentary said: 'At the present stage of the preparatory work, it is doubtful whether reservations ought to be permitted and whether an article relating to reservations ought to be included in the Convention.'[124] For the Secretariat, reservations of a general scope had no place in a convention that did not deal with the private interests of a State, but rather the preservation of an element of international order. The Secretariat considered it 'unthinkable' that, for example, States could pick and choose among the groups to be protected under the Convention. But the Secretariat did not rule out the hypothesis of certain limited reservations. It envisaged two possibilities: 'either reservations which would be defined by the Convention itself, and which all the States would have the option to express, or questions of detail which some States might wish to reserve and which the General Assembly might decide to allow.'[125] The United States draft proposed omitting the subject of reservations altogether.[126] The Sub-Committee of the Ad Hoc Committee agreed that there should be no text on reservations. Its report said: 'The Sub-Committee saw no need for any reservations.'[127] This suggests silence on the subject means prohibition of reservations. The conclusions of the Sub-Committee were endorsed by the Ad Hoc Committee.[128] There were no proposals on reservations in the Sixth Committee.[129] But following adoption of the draft text of the Convention by the Committee,

[123] Vienna Convention on the Law of Treaties, note 2 above, art. 2(1)(d). For a slight variant, see the draft guidelines proposed by Special Rapporteur Alain Pellet, 'Report of the International Law Commission on the Work of Its Fiftieth Session, 20 April–12 June 1998, 27 July–14 August 1998', UN Doc. A/53/10 and Corr.1, para. 340, art. 1.1.

[124] UN Doc. E/447, p. 55. [125] *Ibid.* [126] UN Doc. A/401/Add.2, p. 15.

[127] UN Doc. E/AC.25/10, p. 5. [128] UN Doc. E/AC.25/SR.23, p. 7.

[129] See the discussion of the subject in 'Written Statement of the Secretary-General of the United Nations', note 76 above, p. 88.

some delegations made explanatory statements. When the Dominican Republic asked that its 'reservations' be included in the report, a brief exchange about their significance ensued. It appears the Sixth Committee believed that, while reservations could be made upon signature, ratification or accession, the reserving State could not become a party to the instrument until its reservations had been accepted by the other contracting parties, either expressly or tacitly.[130]

In the advisory opinion on reservations to the Genocide Convention,[131] the judges of the International Court of Justice divided on how to interpret the *travaux préparatoires*. According to the majority:

> Although it was decided during the preparatory work not to insert a special article on reservations, it is none the less true that the faculty for States to make reservations was contemplated at successive stages of the drafting of the Convention. In this connection, the following passage may be quoted from the comments on the draft Convention prepared by the Secretary General: '(1) it would seem that reservations of a general scope have no place in a convention of this kind which does not deal with the private interests of a State, but with the preservation of an element of international order . . . ; (2) perhaps in the course of discussion in the General Assembly it will be possible to allow certain limited reservations.' Even more decisive in this connection is the debate on reservations in the Sixth Committee at the meetings (December 1st and 2nd, 1948) which immediately preceded the adoption of the Genocide Convention by the General Assembly. Certain delegates clearly announced that their governments could only sign or ratify the Convention subject to certain reservations . . . The Court recognizes that an understanding was reached within the General Assembly on the faculty to make reservations to the Genocide Convention and that it is permitted to conclude therefrom that States becoming parties to the Convention gave their assent thereto.[132]

[130] UN Doc. A/C.3/SR.133.

[131] Article 2(1)(d) of the Vienna Convention on the Law of Treaties, note 2 above, defines a reservation as 'a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State'.

[132] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, note 11 above, pp. 22–3. Much has been published on the advisory opinion: William B. Bishop, 'Reservations to the Convention on Genocide', (1951) 45 *American Journal of International Law*, p. 579; Manley O. Hudson, 'The Thirtieth Year of the World Court, Reservations to the Genocide Convention', (1952) 46 *American Journal of International Law*, p. 1; Manley O. Hudson, 'The Twenty-Ninth Year of the World Court, Reservations to the Genocide Convention, Jurisdiction under the Genocide Convention', (1951) 45 *American Journal of International Law*, p. 1;

The majority's reference to the *travaux préparatoires* seems incomplete and inaccurate. It only cites the Secretariat commentary, hardly an indication of the views or intent of the parties. The only real signal from national delegations is the report of the Sub-Committee of the Ad Hoc Committee, the gist of which is to prohibit reservations altogether, and this document was not even mentioned by the majority of the Court.

The only serious argument based on the drafting history flows from the 'reservations' some States made in their oral interventions at the time the entire text of the Convention was adopted. But the statements it refers to were not, on closer scrutiny, typical reservations at all. The Dominican Republic said that the vote in favour of the draft convention should not imply that the Dominican Republic repudiated its reservations expressed during discussion of the draft, particularly with regard to the articles against which it had voted.[133] Here, the Dominican Republic was protecting its comments during the drafting process, not formulating a reservation to the treaty or even suggesting that it had the right to do so. The other State to make 'reservations' at the time of adoption was the United States. It was concerned with State responsibility and the interpretation of article IX. The United States said:

> Article IX stipulated that disputes between the contracting parties relating to the interpretation, application or fulfilment of the convention 'including those relating to the responsibility of a State for genocide or any of the other acts mentioned in article III' should be submitted to the International Court of Justice. If the words 'responsibility of a State' were taken in their traditional meaning of responsibility towards another State for damages inflicted, in violation of the principles of public international law, to the subjects of the plaintiff State; and if, similarly, the words 'disputes . . . relating to the . . . fulfilment' referred to disputes concerning the interests of subjects of the plaintiff State, then those words would give rise to no objection. But if, on the other hand, the expression 'responsibility of a State' were not used in the traditional meaning, and if it signified that a State could be sued for damages in respect of injury inflicted by it on its own subjects, then there would be serious objections to that provision;

Lawrence J. Leblanc, 'The International and Comparative Law Quarterly, the Genocide Convention, and the United States', (1987) 6 *Wisconsin International Law Journal*, p. 43 at pp. 56–64; Lord McNair, *The Law of Treaties*, Oxford: Clarendon Press, 1961, pp. 163–8; G. Fitzmaurice, 'Reservations to Multilateral Treaties', (1953) 2 *International and Comparative Law Quarterly*, p. 1.

[133] UN Doc. A/C.6/SR.133 (de Marchena Dujarric, Dominican Republic).

> and the United States Government would have reservations to make about that interpretation of the phrase.[134]

The threat that the United States might have 'reservations to make about that interpretation' is, again, not a true reservation or even a suggestion that reservations are permissible to the Convention. The United States also made a comment concerning article VII:

> With regard to article VII, relating to extradition, the United States representative declared that, until the United States Congress had passed the legislative measures necessary to bring the convention into force, the United States Government could not hand over any person accused of a crime by virtue of which he was not already liable to extradition under the terms of the existing laws. Moreover, the provisions of the United States Constitution relating to the non-retroactivity of laws were such as to prevent the United States Government from extraditing any person accused of a crime committed before the promulgation of the law defining the new crime.[135]

This is most certainly not a reservation. The majority of the International Court of Justice seems to have exaggerated the significance of these statements. The minority – four judges out of twelve – interpreted the Secretariat commentary differently. 'It is evident from the final paragraph that what the Secretary-General had in mind was that it was open to the delegates either to define any permissible reservations in the Convention itself or to obtain for them the express permission of the General Assembly, that is to say that, in accordance with a not infrequent practice, the permitted reservations should be agreed in advance.'[136] The minority cited the conclusions of the Ad Hoc Committee, noting that no further proposal was entertained in either the Sixth Committee or the plenary sessions of the General Assembly. The minority said that the discussions were inconclusive and that it could not therefore be assumed that the drafters agreed to allow reservations.[137]

In hindsight, the minority's assessment of the *travaux préparatoires* may well be more compelling. Nevertheless, it is unquestionable that the advisory opinion settled the issue of the permissibility of reservations, as confirmed by State practice since that time. Prior to the issuance of the

[134] *Ibid.* (Gross, United States).
[135] *Ibid.*
[136] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, note 11 above, p. 40.
[137] *Ibid.*, pp. 41 and 43.

advisory opinion, some States had indicated in the form of objections that they deemed all reservations to the Convention to be prohibited.

Since the advisory opinion, the principle of the permissibility of reservations seems to be well accepted. Only Greece, in an old objection,[138] and Cyprus, in a more recent one,[139] consider all reservations to the Convention to be unacceptable. However, some States, specifically the United Kingdom and the Netherlands, take a dim view of the advisory opinion and object more or less systematically to reservations, especially those concerning article IX, although they do not exclude the possibility that some reservations may be acceptable.[140]

Subsequent practice

Of the approximately 140 States parties to the Convention, thirty have formulated reservations. Nine of these have since been withdrawn. Most of the reservations to the Convention have concerned article IX and the jurisdiction of the International Court of Justice. Reservations to article IX have been made by the following States: Albania, Algeria, Argentina,[141] Bahrain, Bangladesh, Belarus, Bulgaria, China, Czechoslovakia, Democratic Yemen, German Democratic Republic,

[138] On 8 December 1954, Greece made the following statement: 'We further declare that we have not accepted and do not accept any reservation which has already been made or which may hereafter be made by the countries signatory to this instrument or by countries which have acceded or may hereafter accede thereto.'

[139] On 18 May 1998, Cyprus made the following statement: 'The Government of the Republic of Cyprus has taken note of the reservations made by a number of countries when acceding to the [said Convention] and wishes to state that in its view these are not the kind of reservations which intending parties to the Convention have the right to make. Accordingly, the Government of the Republic of Cyprus does not accept any reservations entered by any Government with regard to any of the Articles of the Convention.'

[140] For a more recent affirmation of the United Kingdom's position, see its comments on the 'genocide' article in the 'Draft Code of Crimes Against the Peace and Security of Mankind': UN Doc. A/CN.4/466, para. 60. The United Kingdom appears to have missed Bahrain, which ratified the Convention in 1990. At the time of its ratification, in 1966, the Netherlands made a general objection to most of the art. IX reservations (it overlooked the Philippines and Argentina, for no apparent reason). It made a second general objection in 1989, this time including the Philippines and Argentina, as well as other States that had objected since 1966. Like the United Kingdom, it seems to have missed Bahrain in 1990. A new objection was formulated in 1996 to the reservations by Singapore and Malaysia.

[141] Argentina made a limited reservation to art. IX, saying that it does not apply only in so far as it concerns 'any dispute relating directly or indirectly' to the Falkland Islands. On the illegality of territorial exceptions to the application of human rights treaties, see

Hungary, India, Malaysia, Mongolia, Montenegro, Morocco, Poland, Romania, Rwanda, Serbia, Singapore, Soviet Union, Spain, Ukraine, United Arab Emirates, United States of America, Venezuela, Vietnam and Yemen.

After admission to the United Nations in 2000, the Federal Republic of Yugoslavia (now Serbia) acceded to the Genocide Convention with a reservation to article IX. Three States submitted declarations contesting the accession and with it the reservation. According to Croatia, Sweden and Bosnia and Herzegovina, the Federal Republic of Yugoslavia was the successor State to the Socialist Federal Republic of Yugoslavia, and was therefore a party to the Convention from the date of the original ratification. Given that a reservation must be made at the time a State becomes a party to an international instrument, the 2000 reservation to article IX was simply too late, they said. Besides article IX, States have formulated reservations to articles II,[142] IV,[143] VI,[144] VII[145] and VIII.[146]

The broadest and the most controversial reservation to the Convention was made by the United States.[147] At the time of ratification in 1988, the United States declared: 'That nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.'[148]

Loizidou v. *Turkey* (Merits and Art. 50), Reports 1996-IV, 16 December 1996 (European Court of Human Rights).

[142] United States (understandings). [143] Philippines and Finland (since withdrawn).

[144] Algeria, Morocco, Myanmar, Philippines, United States and Venezuela.

[145] Malaysia, Philippines, United States and Venezuela. [146] Myanmar.

[147] See Nicholas F. Kourtis and Joseph M. Titlebaum, 'International Convention on the Prevention and Punishment of the Crime of Genocide: United States Senate Grant of Advice and Consent to Ratification', (1988) 1 *Harvard Human Rights Yearbook*, p. 227; Jordan Paust, 'Congress and Genocide: They're Not Going to Get Away With It', (1989) 11 *Michigan Journal of International Law*, p. 90; Lawrence J. Leblanc, 'The ICJ, the Genocide Convention, and the United States', (1987) 6 *Wisconsin International Law Journal*, p. 43 at pp. 64–9; Louis Henkin, 'US Ratification of Human Rights Conventions: The Ghost of Senator Bricker', (1995) 89 *American Journal of International Law*, p. 341.

[148] The reservation is in the same spirit as other reservations formulated with respect to human rights treaties: reservations (1) and (3) to the International Covenant on Civil and Political Rights, (1976) 999 UNTS 17, reservations (1) and (2) to the International Convention on the Elimination of All Forms of Racial Discrimination, (1969) 660 UNTS 195, and reservation (1) to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, (1987) 1465 UNTS 85. On the United States reservations to human rights treaties, see Richard Lillich, ed., *US Ratification of the Human Rights Treaties: With or Without Reservations?*, Charlottesville,

States occasionally formulate what they describe as declarations or understandings. Even when a State uses the term 'declaration' or 'understanding', where the statement attempts to modify or limit the obligations of the ratifying State, it may be deemed a reservation.[149] Malaysia's 'understanding' concerning article VII looks more like a reservation: 'That the pledge to grant extradition in accordance with a state's laws and treaties in force found in article VII extends only to acts which are criminal under the law of both the requesting and the requested state.' The same may be said of Portugal's declaration concerning article VII: 'The Portuguese Republic declares that it will interpret article VII of the Convention on the Prevention and Punishment of the Crime of Genocide as recognizing the obligation to grant extradition established therein in cases where such extradition is not prohibited by the Constitution and other domestic legislation of the Portuguese Republic.' Usually such statements merely indicate the interpretation that a State considers appropriate for a provision of the Convention. The United States made three such 'understandings' with respect to article II,[150] one with respect to article VI[151] and one with respect to article VII.[152] Sometimes, declarations do no more than affirm the views of the ratifying State about some inadequacy in the Convention. Three

VA: University Press of Virginia, 1981; David Weissbrodt, 'United States Ratification of the Human Rights Covenants', (1978) 63 *Minnesota Law Review*, p. 35; William A. Schabas, 'Is the United States Still a Party to the International Covenant on Civil and Political Rights?', (1995) 21 *Brooklyn Journal of International Law*, p. 277.

[149] *Belilos* v. *Switzerland*, Series A, No. 132, 29 April 1988, para. 55. See Ronald St John Macdonald, 'Reservations under the European Convention on Human Rights', (1988) 21 *Revue belge de droit international*, p. 428 at p. 444; Susan Marks, 'Reservations Unhinged: The Belilos Case before the European Court of Human Rights', (1990) 39 *International and Comparative Law Quarterly*, p. 300 at pp. 308–9.

[150] '(1) That the term "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such" appearing in article II means the specific intent to destroy, in whole or in substantial part, a national, ethnical, racial or religious group as such by the acts specified in article II; (2) That the term "mental harm" in article II(b) means permanent impairment of mental faculties through drugs, torture or similar techniques; . . . (4) That acts in the course of armed conflicts committed without the specific intent required by article II are not sufficient to constitute genocide as defined by this Convention.'

[151] '(3) That . . . nothing in article VI affects the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside a state.'

[152] '(3) That the pledge to grant extradition in accordance with a state's laws and treaties in force found in article VII extends only to acts which are criminal under the laws of both the requesting and the requested state . . .'

States, the German Democratic Republic,[153] Mongolia and Vietnam, attacked article XI as being discriminatory for failing to allow all States to become parties to the Convention on an equal basis. Similarly, twelve States have expressed their disagreement with article XII, concerning the extension of the Convention to non-self-governing territories.[154] The United Kingdom has reacted to some of these statements with its own declaration saying that it does not accept them. Ecuador stated that the 'reservations' to article XII 'do not apply' to it. The most extravagant such declaration is that of Democratic Kampuchea, formulated when Vietnam acceded to the Convention. Kampuchea said Vietnam's accession was without legal force, because it was 'no more than a cynical, macabre charade intended to camouflage the foul crimes of genocide committed by the 250,000 soldiers of the Vietnamese invasion army in Kampuchea'.[155]

During discussions in the Sixth Committee following adoption of the Convention, it was suggested that reservations could be made at the

[153] The German Democratic Republic no longer exists.

[154] Albania, Algeria, Belarus, Czechoslovakia, German Democratic Republic, Hungary, Mongolia, Poland, Romania, the Russian Federation, Ukraine and Vietnam.

[155] The full text states: 'The Government of Democratic Kampuchea, as a party to the Convention on the Prevention and Punishment of the Crime of Genocide, considers that the signing of that Convention by the Government of the Socialist Republic of Viet Nam has no legal force, because it is no more than a cynical, macabre charade intended to camouflage the foul crimes of genocide committed by the 250,000 soldiers of the Vietnamese invasion army in Kampuchea. It is an odious insult to the memory of the more than 2,500,000 Kampucheans who have been massacred by these same Vietnamese armed forces using conventional weapons, chemical weapons and the weapon of famine, created deliberately by them for the purpose of eliminating all national resistance at its source. It is also a gross insult to hundreds of thousands of Laotians who have been massacred or compelled to take refuge abroad since the occupation of Laos by the Socialist Republic of Viet Nam, to the Hmong national minority in Laos, exterminated by Vietnamese conventional and chemical weapons and, finally, to over a million Vietnamese "boat people" who died at sea or sought refuge abroad in their flight to escape the repression carried out in Viet Nam by the Government of the Socialist Republic of Viet Nam. This shameless accession by the Socialist Republic of Viet Nam violates and discredits the noble principles and ideals of the United Nations and jeopardizes the prestige and moral authority of our world Organization. It represents an arrogant challenge to the international community, which is well aware of these crimes of genocide committed by the Vietnamese army in Kampuchea, has constantly denounced and condemned them since 25 December 1978, the date on which the Vietnamese invasion of Kampuchea began, and demands that these Vietnamese crimes of genocide be brought to an end by the total withdrawal of the Vietnamese forces from Kampuchea and the restoration of the inalienable right of the people of Kampuchea to decide its own destiny without any foreign interference, as provided in United Nations resolutions 34/22, 35/6 and 36/5.'

time of signature, and that their effect was to protect a State's freedom of action with respect to ratification.[156] The significance of reservations at the time of signature was not discussed by the Court in its advisory opinion, and is not addressed in the Vienna Convention on the Law of Treaties. Identical reservations at the time of signature of the Convention, in December 1949, were made to articles IX and XII by the Soviet Union, Byelorussia, Ukraine and Czechoslovakia.[157] The Secretary-General wrote to contracting States inquiring as to their position with respect to these reservations made at signature, saying 'that it would be his understanding that all States which had ratified or acceded to the Convention had accepted these reservations unless they had notified him of objections thereto prior to the day on which the first twenty instruments of ratification or accession, necessary to bring the Convention into force, had been deposited'.[158] The Secretary-General also took the position that, if States were to object to the reservations at the time of signature, 'the Secretary-General would not be in a position to accept for deposit instruments of ratification' by the reserving States.[159] Australia, which had ratified the Convention on 8 July 1949, was the only State to object formally to these reservations made at the time of signature. Australia said it would not regard as valid any ratification of the Convention maintaining reservations that had been made on signature.[160] In a letter to the Secretary-General, Ecuador stated that 'it had

[156] UN Doc. A/C.3/SR.133.

[157] 'As regards Article IX: The Soviet Union [the Byelorussian SSR, the Ukrainian SSR, Czechoslovakia] does not consider as binding upon itself the provisions of article IX which provides that disputes between the Contracting Parties with regard to the interpretation, application and implementation of the present Convention shall be referred for examination to the International Court at the request of any party to the dispute, and declares that, as regards the International Court's jurisdiction in respect of disputes concerning the interpretation, application and implementation of the Convention, the Soviet Union [the Byelorussian SSR, the Ukrainian SSR, Czechoslovakia] will, as hitherto, maintain the position that in each particular case the agreement of all parties to the dispute is essential for the submission of any particular dispute to the International Court for decision. As regards Article XII: The Union of Soviet Socialist Republics [the Byelorussian SSR, the Ukrainian SSR, Czechoslovakia] declares that it is not in agreement with Article XII of the Convention and considers that all the provisions of the Convention should extend to non-self-governing territories, including trust territories.' See 'Written Statement of the Secretary-General of the United Nations', note 76 above, pp. 97–8; see also (1950) 44 *American Journal of International Law*, p. 128.

[158] 'Written Statement of the Secretary-General of the United Nations', note 76 above, p. 98.

[159] *Ibid.*, p. 105. [160] *Ibid.*, p. 107.

no objection to make regarding the submission of such reservations, but expressed its disagreement with their content'.[161] Subsequently, Ecuador said that 'it was not in agreement with the reservations and that therefore they did not apply to Ecuador, which had accepted without any modification the complete text of the Convention'.[162]

Withdrawal of reservations

Albania, Belarus, Bulgaria, Czechoslovakia, Hungary, Mongolia, Poland, Romania, the Soviet Union and Ukraine have withdrawn their reservations to article IX, reflecting a gradual reassessment of the legitimacy of the International Court of Justice following its ruling against the United States in the *Nicaragua* case.[163] Ironically, the *Nicaragua* case prompted the United States to enter a reservation to article IX, after initially opposing such a measure precisely because it had been so popular among the Soviet bloc countries.[164]

In the aftermath of genocide, Rwanda enacted legislation withdrawing its reservation to article IX,[165] giving effect to a commitment made by its president and prime minister in their reply to a critical report by a commission of non-government organizations[166] and an undertaking in the Arusha Peace Agreement of 3 August 1993.[167] But, although Rwanda's *décret-loi* was a noble gesture, the International Court of Justice did not consider this sufficient. In an application filed against Rwanda by the Democratic Republic of Congo in 2002, based upon jurisdiction established pursuant to article IX of the Convention, the Court declared:

[161] *Ibid.*, p. 103.
[162] *Ibid.*
[163] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Merits, [1996] ICJ Reports 14.
[164] *United States of America*, note 7 above, pp. 22–6. Compare with *United States of America, Hearing Before the Committee on Foreign Relations, United States Senate, 12 September 1984*, Washington: US Government Printing Office, 1984, pp. 62–3.
[165] Decree-Law 014/01 of 15 February 1995 (Rwanda), s. 1.
[166] International Federation of Human Rights, Inter-African Union of Human Rights, Africa Watch, International Centre for Human Rights and Democratic Development, 'Report of the Commission of Inquiry into Human Rights Violations in Rwanda Since 1 October 1990', Brussels, New York, Montreal and Ouagadougou: 1993.
[167] Protocol of Agreement on Various Questions and Final Provisions (Arusha Peace Agreement), 3 August 1993, art. 15.

> It is a rule of international law, deriving from the principle of legal security and well established in practice, that, subject to agreement to the contrary, the withdrawal by a contracting State of a reservation to a multilateral treaty takes effect in relation to the other contracting States only when they have received notification thereof. This rule is expressed in Article 22, paragraph 3 (a), of the Vienna Convention on the Law of Treaties, which provides as follows:
>
> 3. Unless the Treaty otherwise provides, or it is otherwise agreed: (a) the withdrawal of a reservation becomes operative in relation to another Contracting State only when notice of it has been received by that State.
>
> Article 23, paragraph 4, of that same Convention further provides that '[t]he withdrawal of a reservation or of an objection to a reservation must be formulated in writing'.
>
> . . .
>
> In the Court's view, the adoption of that *décret-loi* and its publication in the Official Journal of the Rwandese Republic cannot in themselves amount to such notification. In order to have effect in international law, the withdrawal would have had to be the subject of a notice received at the international level.[168]

Finland withdrew its reservation to article IV in 1998.

Objections

Other States party to a treaty may signal their disagreement about the acceptability of a reservation by means of objection. The right to object is virtually unlimited, and is not confined only to reservations deemed incompatible with the object and purpose of the treaty.[169] According to the Vienna Convention on the Law of Treaties, States parties have a period of twelve months in which to object to a reservation.[170] If they object, then they too are not bound by the reserved provision, at least with respect to their obligations *vis-à-vis* the reserving State. The technique of objections was developed in the context of multilateral treaties not concerned with human rights, and is aimed at preserving the reciprocity of obligations between contracting States. Suitable as this mechanism may be in the case of some multilateral treaties, its significance

[168] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, Judgment, 3 February 2006, paras. 41–2.

[169] 'Eleventh Report on Reservations to Treaties by Mr Alain Pellet, Special Rapporteur', UN Doc. A/CN.4/574, para. 66.

[170] Note 2 above, art. 20(5).

appears reduced when human rights provisions are concerned. Moreover, as Judge Higgins and four of her colleagues noted, the role for objections anticipated by the Court in its 1951 advisory opinion 'has turned out to be unrealized: a mere handful of States do this. For the great majority, political considerations would seem to prevail.'[171]

Most reservations to the Convention have provoked objections. There was an initial spate of objections following the reservations made upon accession by Bulgaria and ratification by the Philippines, in addition to the objections made to the reservations formulated by several States at the time of signature. Australia, Belgium, Ecuador, Norway and Sri Lanka made general objections to some or all of these reservations. The advisory opinion of the International Court of Justice established that objections would not prevent the coming into force of the Convention for the reserving State, providing the reservation was otherwise legal.[172]

The Vienna Convention on the Law of Treaties requires that objections be made within a year of notification of the reservation by the depositary.[173] Not all objections to reservations to the Convention have been formulated within this delay. When it objected to the Rwandan reservation, the United Kingdom also made a late objection to the East German reservation. It seemed to indicate in the text that it understood that because of the delay this would not produce the legal effects of an objection formulated within the one-year period.[174]

Greece and the Netherlands have made what may be called 'pre-emptive' or 'precautionary' objections. In 1954, Greece objected to all present and future reservations to the Convention. The objection by the Netherlands concerning reservations to article IX, dated 20 June 1966, was intended to have a prospective effect ('The Government of the Kingdom of the Netherlands therefore does not deem any State which has made or which will make such reservation a party to the Convention'), as the Netherlands recalled in objections filed against reservations by the United States, in 1989, and Singapore and Malaysia, in 1996. In 1998, Cyprus formulated a general objection that is in many respects

[171] *Armed Activities on the Territory of the Congo (New Application: 2000) (Democratic Republic of Congo* v. *Rwanda)*, Joint Separate Opinion of Judge Higgins, Judge Kooijmans, Judge Elaraby, Judge Owada and Judge Simma, 3 February 2006, para. 11.

[172] *Reservations to the Convention on the Prevention of Genocide (Advisory Opinion)*, note 11 above.

[173] Vienna Convention on the Law of Treaties, (1979) 1155 UNTS 331, Art. 20(5).

[174] See the discussion of the reservation in: 'Eleventh Report on Reservations to Treaties by Mr Alain Pellet, Special Rapporteur', UN Doc. A/CN.4/574, para. 140.

similar to the Greek objection, but it does not explicitly have any effect on future reservations. According to the Special Rapporteur of the International Law Commission, there is nothing to prevent a State or international organization from formulating pre-emptive or precautionary objections, before a reservation has been formulated or, in the case of reservations already formulated, from declaring its opposition, in advance, to any similar or identical reservation.[175]

The reservation that has inspired the greatest number of objections is the general one (reservation (2)) made by the United States. Denmark, Estonia, Finland, Greece, Ireland, Italy, Mexico, the Netherlands, Norway, Sweden and the United Kingdom objected, for varying reasons, to the United States suggestion that its Constitution came before the Convention. Three arguments were submitted in the various objections: the reservation was incompatible with the object and purpose of the Convention;[176] it was inconsistent with the principle by which States may not invoke provisions of domestic law as a reason for non-compliance with international obligations, a norm which is codified in article 27 of the Vienna Convention on the Law of Treaties;[177] and the reservation created uncertainty as to the obligations assumed by the United States.[178] Spain did not formally object, but issued a statement saying it 'interprets' the reservation 'to mean that legislation or other action by the United States of America will continue to be in accordance with the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide'. Germany also stopped short of an objection, but stated that: 'The Government of the Federal Republic of Germany interprets paragraph (2) of the said declarations as a reference to article V of the Convention and therefore as not in any way affecting the obligations of the United States of America as a State Party to the Convention.'

Australia, Belgium, Brazil, China (Republic of),[179] Cuba,[180] Cyprus, Ecuador, Greece, the Netherlands, Norway, Sri Lanka, Taiwan and the United Kingdom have objected to the reservations to article IX of the Convention, concerning the jurisdiction of the International Court of Justice. Sweden, Croatia and Bosnia and Herzegovina objected to Yugoslavia's reservation to article IX, formulated in 2001, but because it

[175] *Ibid.*, para. 134. [176] Netherlands and Mexico.
[177] Denmark, Estonia, Finland, Greece, Ireland, Mexico, Netherlands, Norway and Sweden.
[178] Estonia, Italy, Mexico and the United Kingdom.
[179] The Republic of China is no longer a State party: see p. 599 above.
[180] In 1982, Cuba withdrew its objections to the reservations to art. IX by Belarus, Czechoslovakia, Poland, Romania, the Soviet Union and Ukraine.

was made too late rather than because it was incompatible with the object and purpose of the Convention. In 1996, Norway, which had been silent for decades on the subject, used the occasion of reservations by Singapore and Malaysia to article IX to express its objections: 'In [the view of the Government of Norway], reservations in respect of article IX of the Convention are incompatible with the object and purpose of the said Convention.' According to the United Kingdom, reservations to article IX are 'not the kind of reservation which intending parties to the Convention have the right to make'. The Netherlands is even more aggressive on the subject, stating that such reservations are incompatible with the object and purpose of the Convention. Furthermore, the Netherlands 'does not deem any State which has made or which will make such reservation a party to the Convention'.[181] However, the Netherlands considers States that have withdrawn their reservations to be parties to the Convention.

When Spain and the United States invoked their reservations to article IX in response to the application filed by Yugoslavia,[182] the International Court of Justice noted that the applicant had failed to object to the reservations at the time they were formulated.[183] In its representations before the International Court of Justice, the United States has pointed to the large number of reservations to article IX as evidence that these are not contrary to the object and purpose of the Convention, although it said nothing about the objections that have been formulated.[184]

Article 21(3) of the Vienna Convention on the Law of Treaties explains the legal effect of objections: 'When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the

[181] Recognizing the Netherlands' objection to its reservation to art. IX, the United States has said: 'the ensuing lack of a treaty relationship between the United States and the Netherlands under the Convention is the result prescribed by international law if States do not accept a reservation': *Legality of Use of Force (Yugoslavia* v. *United States)*, Verbatim Record, 11 May 1999, para. 3.9 (Michael Matheson).

[182] *Legality of Use of Force (Yugoslavia* v. *Spain)*, Provisional Measures, Oral Argument of Counsel for Spain, 11 May 1999; *Legality of Use of Force (Yugoslavia* v. *Spain)*, Provisional Measures, Oral Argument of Counsel for the United States, 11 May 1999.

[183] *Legality of Use of Force (Yugoslavia* v. *United States)*, Provisional Measures, Order of 2 June 1999, [1999] ICJ Reports 916, para. 24; *Legality of Use of Force (Yugoslavia* v. *Spain)*, Provisional Measures, Order of 2 June 1999, [1999] ICJ Reports 761, para 32.

[184] *Legality of Use of Force (Yugoslavia* v. *United States)*, Verbatim Record, 11 May 1999, paras. 2.18 and 2.19 (John R. Crook).

reservation.' But, while this rule may have considerable significance in the case of some multilateral treaties, its role with respect to the Genocide Convention is unclear. For example, a State that formulates a reservation to article IX has established its refusal to participate in litigation before the International Court of Justice. It can be neither applicant nor respondent. In other words, article IX simply does not apply with respect to the reserving State, irrespective of whether there are objections. The legal effect of objections is equally mysterious when the substantive provisions of the Convention are the subject of reservations, because such norms are not addressed to the reciprocal rights of the reserving and the objecting State, but rather to the rights of groups *vis-à-vis* the objecting State.

States very rarely withdraw objections.[185] The only two examples in treaty practice both appear to concern the Genocide Convention. In 1982, Cuba withdrew its objection to the reservations to articles IX and XII by Bulgaria, the Byelorussian Soviet Socialist Republic, Czechoslovakia, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Soviet Union. In 1996, the Netherlands withdrew its objection with respect to Hungary, Bulgaria and Mongolia, following the withdrawal by those States of their reservations to article IX. The Netherlands said that, as a result, it considered those States to be parties to the Convention.

Assessing the legality of reservations

In accordance with the advisory opinion of the International Court of Justice, any reservations must be compatible with the object and purpose of the Convention:

> The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. 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. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such a result. But even less could the contracting parties have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as

[185] 'Eleventh Report on Reservations to Treaties by Mr Alain Pellet, Special Rapporteur', UN Doc. A/CN.4/574, paras. 145–80.

> possible. The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation.[186]

The Court continued:

> Any other view would lead either to the acceptance of reservations which frustrate the purposes which the General Assembly and the contracting parties had in mind, or to recognition that the parties to the Convention have the power of excluding from it the author of a reservation, even a minor one, which may be quite compatible with those purposes. It has nevertheless been argued that any State entitled to become a party to the Genocide Convention may do so while making any reservation it chooses by virtue of its sovereignty. The Court cannot share this view. It is obvious that so extreme an application of the idea of State sovereignty could lead to a complete disregard of the object and purpose of the Convention.[187]

The Court itself did not, however, pronounce on the specific reservations that had provoked the General Assembly's request for an advisory opinion. The real thrust of the Court's advisory opinion was to confirm the permissibility of reservations consistent with the object and purpose, and to establish that, if the reservation was otherwise acceptable, objections could not prevent the entry into force of the Convention for the reserving State.[188]

When it struck out the applications by Yugoslavia against Spain and the United States based upon reservations to article IX, the International Court of Justice only summarily considered the question of the legality of such reservations. It noted that Yugoslavia had submitted no argument on the issue, and that 'the Genocide Convention does not prohibit reservations', and that 'in consequence Article IX of the Genocide Convention cannot found the jurisdiction of the Court to entertain a dispute between Yugoslavia and [Spain and the United States] alleged to fall within its provisions'.[189] As five judges of the Court subsequently

[186] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, note 11 above, p. 24.
[187] *Ibid.*, p. 24. [188] *Ibid.*, pp. 24 and 26.
[189] *Legality of Use of Force (Yugoslavia* v. *United States)*, Provisional Measures, Order of 2 June 1999, [1999] ICJ Reports 916, para. 25; *Legality of Use of Force (Yugoslavia* v. *Spain)*, Provisional Measures, Order of 2 June 1999, [1999] ICJ Reports 761, para. 33.

observed, the judgment did not really pronounce on the issue of the legality of the reservations.[190]

The issue was more thoroughly aired in 2006, when the Court dismissed the application by the Democratic Republic of Congo against Rwanda. The Democratic Republic of Congo argued that the reservation to article IX was invalid because it was contrary to the object and purpose of the Convention. In its application, Congo conceded that Rwanda had made a reservation to article IX of the Convention at the time of its ratification in 1975, but suggested that this had in some way become inoperative because Rwanda had subsequently accepted 'l'application intégrale de la Convention sur le genocide dans le cadre du Tribunal penal international pour le Rwanda d'Arusha', adding that the Convention imposed obligations that were 'objective et opposable *erga omnes*'.[191] During hearings on an application for provisional measures, Congo developed this argument, objecting to the reservation as being contrary to norms of *jus cogens* and incompatible with the object and purpose of the Convention. The Democratic Republic of Congo invited the Court to revisit its 1951 advisory opinion on reservations to the Convention in light of evolution in international law.[192]

Dismissing Congo's arguments, the Court noted that, while the rights set out in the Convention are *erga omnes*, 'the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things', and that 'it does not follow from the mere fact that rights and obligations *erga omnes* are at issue in a dispute that the Court has jurisdiction to adjudicate upon that dispute'.[193] It continued: 'Whereas the Genocide Convention does not prevent reservations; whereas the Congo did not object to Rwanda's reservation when it was made; whereas that reservation does not bear on the substance of the law, but only on the Court's jurisdiction; whereas it therefore does not appear contrary to the

[190] *Armed Activities on the Territory of the Congo (New Application: 2000) (Democratic Republic of Congo* v. *Rwanda)*, Joint Separate Opinion of Judge Higgins, Judge Kooijmans, Judge Elaraby, Judge Owada and Judge Simma, 3 February 2006, para. 18.

[191] *Armed Activities on the Territory of the Congo (New Application: 2000) (Democratic Republic of Congo* v. *Rwanda)*, Application, 28 May 2002, pp. 22–3.

[192] *Armed Activities on the Territory of the Congo (New Application: 2000) (Democratic Republic of Congo* v. *Rwanda)*, Provisiona1 Measures, Order of 10 July 2002, [2002] ICJ Reports 219, para. 22.

[193] *Armed Activities on the Territory of the Congo (New Application: 2000) (Democratic Republic of Congo* v. *Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, Judgment, 3 February 2006, para. 71.

object and purpose of the Convention . . .'[194] As concurring Judge John Dugard explained, relying upon the unquestioned claim that the prohibition of genocide was a norm of *jus cogens*, the Court was being asked

> to overthrow an established principle that the basis of the Court's jurisdiction is consent which is founded in its Statute (article 36), endorsed by unqualified State practice and backed by *opinio juris*. It is, in effect, asked to invoke a peremptory norm to trump a norm of general international law accepted and recognized by the international community of States as a whole, and which has guided the Court for over eighty years. This is a bridge too far.[195]

Although they did not dissent, five judges of the Court, in an opinion penned by Judge Rosalyn Higgins, said it was time to revisit the 1951 advisory opinion concerning article IX of the Convention: 'It is thus not self-evident that a reservation to Article IX could not be regarded as incompatible with the object and purpose of the Convention and we believe that this is a matter that the Court should revisit for further consideration.'[196] Noting a slight distinction in the wording between the final judgment of February 2006 and the order concerning the request for provisional measures of May 2002 in the same case, Judge Higgins said 'it is now clear that it had not been intended to suggest that the fact that a reservation relates to jurisdiction rather than substance necessarily results in its compatibility with the object and purpose of a convention'.[197] She continued:

> It is a matter for serious concern that at the beginning of the twenty-first century it is still for States to choose whether they consent to the Court adjudicating claims that they have committed genocide. It must be regarded as a very grave matter that a State should be in a position to shield from international judicial scrutiny any claim that might be made against it concerning genocide. A State so doing shows the world scant confidence that it would never, ever, commit genocide, one of the greatest crimes known.[198]

Judge Koroma was prepared to go even further. He dissented from the majority, taking the view that article IX was central to the object and purpose of the Convention and could not therefore be subject to reservation. Judge Koroma attached particular significance to the fact that

[194] *Ibid.*, para. 72. [195] *Ibid.*, Separate Opinion of Judge *ad hoc* Dugard, para. 13.
[196] *Armed Activities on the Territory of the Congo (New Application: 2000) (Democratic Republic of Congo* v. *Rwanda)*, Joint Separate Opinion of Judge Higgins, Judge Kooijmans, Judge Elaraby, Judge Owada and Judge Simma, 3 February 2006, para. 29.
[197] *Ibid.*, para. 21. [198] *Ibid.*, para. 25.

the respondent State, Rwanda, had itself called upon the United Nations to assist in the enforcement of the Genocide Convention.[199]

States do not have consistent positions about the determination of an illegal reservation, and there are conflicting views among scholars. One theory, which is favoured by the Special Rapporteur of the International Law Commission, Alain Pellet, approaches the question from a contractual standpoint, and adheres strictly to the text of the Vienna Convention. It holds that States parties alone are the arbiters of the legality of reservations.[200] They authorize reservations by their failure to object, and they reject them by formulating objections. Another view, one favoured by human rights tribunals and treaty bodies,[201] views the question of the legality of reservations as being independent of the will of the States parties. Accordingly, even where the States parties are silent, a reservation deemed incompatible with the object and purpose of the Convention could be challenged as being invalid.[202] Judge Higgins and her four colleagues, in their separate opinion in the *Democratic Republic of Congo* v. *Rwanda* case, indicated sympathy with this view.[203] The *ad hoc* judge appointed by Yugoslavia, Milenko Kreca, devised an original argument by which the United States reservation was illegal and inoperative because it was not severable from the questionable understandings formulated by the United States at the same time.[204] Kreca's imaginative remarks found no echo among his colleagues.

The consequences of an illegal reservation are also uncertain. The issue is one of severability or separability. If the illegal reservation cannot be 'severed' from the ratification or accession as a whole, then the latter ought to be invalid altogether, and the State determined not to be a party to the Convention. If, on the other hand, the reservation is

[199] *Armed Activities on the Territory of the Congo (New Application: 2000) (Democratic Republic of Congo* v. *Rwanda)*, Dissenting Opinion of Judge Koroma, 3 February 2006.

[200] UN Doc. A/CN.4/470 and Corr.1.

[201] *Loizidou* v. *Turkey*, note 141 above; 'General Comment No. 24 (52)', UN Doc. CCPR/C/21/Rev.1/Add.6/.

[202] *The Effect of Reservations on the Entry into Force of the American Convention (Arts. 74 and 75)*, Advisory Opinion OC-2/82, 24 September 1982, Series A, No. 2, paras. 29–30; *Belilos* v. *Switzerland*, note 149 above, para. 47; 'General Comment No. 24 (52)', UN Doc. CCPR/C/21/Rev.1/Add.6/, para. 17.

[203] *Armed Activities on the Territory of the Congo (New Application: 2000) (Democratic Republic of Congo* v. *Rwanda)*, Joint Separate Opinion of Judge Higgins, Judge Kooijmans, Judge Elaraby, Judge Owada and Judge Simma, 3 February 2006, paras. 15–16. Also: *ibid.*, Dissenting Opinion of Judge Koroma, para. 28.

[204] *Legality of Use of Force (Yugoslavia* v. *United States)*, Request for the Indication of Provisional Measures, Order, 2 June 1999, Dissenting Opinion of Judge Kreca, para. 10.

considered invalid but severable, can this mean that the State is a party to the Convention with the exception of the reserved provision? This would mean that there is no real difference in effect between a legal and an illegal reservation. As Ronald St John MacDonald has written, '[t]o exclude the application of an obligation by reason of an invalid reservation is in effect to give full force and effect to the reservation'.[205]

Nevertheless, this was precisely what the United States argued before the International Court of Justice in answer to the Yugoslav request for provisional measures in the *Legality of the Use of Force* case. The agent for the United States pointed out that its reservation to article IX was an obstacle to the Court's exercise of jurisdiction, noting that Yugoslavia had never objected to the reservation within the twelve-month period provided by article 20 of the Vienna Convention on the Law of Treaties. But the agent went on to speculate about the 'one or two' legal consequences that could result in the hypothesis that Yugoslavia had formulated an objection. He said that an objection would have either stopped the Convention as a whole from coming into force between the United States and Yugoslavia, or it would have prevented article IX from coming into force between the two States.[206]

In formulating objections to reservations, States sometimes indicate the consequences they attach, although the practice is quite inconsistent. According to the Vienna Convention on the Law of Treaties: 'When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.'[207] Sweden chose to make this explicit in its objection to the general reservation formulated by the United States: 'This objection does not constitute an obstacle to the entry into force of the Convention between Sweden and the United States of America.' Mexico made a similar statement. What neither Sweden nor Mexico clarified in their objections was whether they considered the reservation to be effective. In other words, in the treaty relations between Sweden (or Mexico) and the United States, is the entire Convention operative or is the Convention as amended by the United States reservation the applicable law? The Netherlands, on the other hand, expressly declared

[205] Macdonald, 'Reservations', p. 449.
[206] *Legality of Use of Force (Yugoslavia* v. *United States)*, Verbatim Record, 11 May 1999, para. 2.1.2 (John R. Crook).
[207] Note 2 above, art. 21(3).

that it does not consider the United States, or for that matter other reserving States, to be parties to the Convention. China (Taiwan) made a comparable declaration in 1954, at the time of its accession to the Convention. Brazil has stated that it 'reserves the right to draw any such legal consequences as it may deem fit' from its objection to reservations. Ecuador has said that certain objectionable reservations 'do not apply to Ecuador'.

Interpretation of the Convention

Several principles of interpretation, not all of them entirely compatible, may be brought to bear on problems raised by the Genocide Convention. The Vienna Convention on the Law of Treaties codifies rules of interpretation applicable to treaties in general. In *Krstić*, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia said it would interpret article 4 of its Statute, drawn from the Genocide Convention, in accordance with the principles of the Vienna Convention.[208] Article 31 of the Vienna Convention sets out a '[g]eneral rule of interpretation': 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'[209] The scope of the 'context' of a treaty is explained in article 31(2) of the Vienna Convention. For the purposes of interpretation, the 'context' of a treaty includes its preamble and annexes, 'any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty', and 'any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty'.

There are several examples of literal interpretation in the case law. In determining whether the Genocide Convention imposed a duty upon States not to commit genocide, the International Court of Justice referred to an 'unusual feature' of the text of article IX. The provision contains the phrase 'including those [disputes] relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III'. According to the Court, use of the word 'including' tended

[208] *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 541.

[209] Note 2 above. For an application of article 31(1) to the Genocide Convention, see *Prosecutor* v. *Sikirica et al.* (Case No. IT-95-8-I), Judgment on Defence Motions to Acquit, 3 September 2001, para. 63.

to confirm that State responsibility was comprised within a 'broader group of disputes relating to the interpretation, application or fulfilment of the Convention'.[210]

The Genocide Convention includes a short preamble, but no annexes. The preamble contains a number of important ideas that do not appear elsewhere in the Convention, including the reference to General Assembly Resolution 96(I), the idea that genocide has existed 'at all periods of history', and the requirement of international cooperation 'in order to liberate mankind from such an odious scourge'. The preamble has been cited by the International Criminal Tribunal for Rwanda in its sentencing decisions in the *Kambanda*[211] and *Serushago* cases.[212] Adoption of the Convention was accompanied by two related resolutions, one calling for the establishment of an international criminal court[213] and the other concerning extension of the provisions of the Convention to dependent territories.[214]

The Vienna Convention states that, in addition to the context, account is to be taken of any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.[215] There have been none. Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation is also to be considered. In his individual opinion on the application for provisional measures by Bosnia and Herzegovina against Yugoslavia, Judge *ad hoc* Elihu Lauterpacht referred to the subsequent practice of States parties to the Genocide Convention in concluding that they did not appear to consider that the duty to prevent genocide included an obligation to intervene militarily.[216]

[210] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 161.

[211] *Prosecutor* v. *Kambanda* (Case No. ICTR-97-23-S), Judgment and Sentence, 4 September 1998, para. 16.

[212] *Prosecutor* v. *Serushago* (Case No. ICTR-98-39-S), Sentence, 2 February 1999, para. 15. Also: *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment, 27 January 2000, para. 981.

[213] 'Study by the International Law Commission of the Question of an International Criminal Jurisdiction', GA Res. 216B(III).

[214] 'Application with Respect to Dependent Territories, of the Convention on the Prevention and Punishment of the Crime of Genocide', GA Res. 216C(III).

[215] Vienna Convention on the Law of Treaties, note 2 above, art. 31(3)(a).

[216] *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, [1993] ICJ Reports 325, p. 445.

Finally, the Vienna Convention also says that any relevant rules of international law applicable in the relations between the parties should be considered.

Article 32 of the Vienna Convention says that 'supplementary means of interpretation' may also be applied where the rules set out in article 31 leave the meaning ambiguous or obscure, or lead to a result which is 'manifestly absurd or unreasonable'. The Convention cites 'the preparatory work of the treaty and the circumstances of its conclusion' as supplementary means, although it indicates that this is not an exhaustive enumeration of possible sources. In the advisory opinion on reservations to the Genocide Convention, both majority and minority examined the *travaux préparatoires* in assessing whether the drafters of the Convention had intended to allow reservations. The two opinions express different conclusions as to the meaning of the *travaux*.[217] The *travaux* also played an important role in the interpretative analysis undertaken by the International Court of Justice in the *Bosnia* v. *Serbia* judgment.[218] In *Akayesu*, the International Criminal Tribunal for Rwanda relied on the debates in the Sixth Committee in ruling that the list of protected groups in article II of the Convention includes all groups that are 'stable and permanent'.[219] There are many other examples of reference to the *travaux* in the case law of the International Criminal Tribunals.[220]

There is a danger that reliance on the *travaux préparatoires* will tend to freeze the interpretation of the Convention, preventing it from evolving by constantly returning to the benchmark of the 1947 and 1948 debates. Human rights tribunals have had to come to terms with this issue, adopting an 'evolutive' or 'dynamic' approach to interpretation.[221] They rationalize this by explaining that the drafters themselves intended such a result. Judge Alvarez, in his lone dissenting judgment in the advisory

[217] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, note 11 above, pp. 22–3 (majority), p. 40 (minority).

[218] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, paras. 163–5, 175–9, 194 and 344.

[219] *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998.

[220] *Prosecutor* v. *Stakić* (Case No. IT-97-24-T), Judgment, 31 July 2003, paras. 518 and 521; *Niyitegeka* v. *Prosecutor* (Case No. ICTR-96-14-A), Judgment, 9 July 2004, para. 49; *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007, paras. 496, 678 and 690; *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Partially Dissenting Opinion of Judge Meron, 28 November 2007, para. 6; *Prosecutor* v. *Stakić* (Case No. IT-97-24-A), Judgment, 22 March 2006, paras. 22–3.

[221] *Soering* v. *United Kingdom*, Series A, No. 161, 7 July 1989.

opinion of the International Court of Justice, warned of the dangers of excessive reference to the drafting history of the Convention. Conventions like the Genocide Convention 'have acquired a life of their own', he said. 'They can be compared to ships which leave the yards in which they have been built, and sail away independently, no longer attached to the dockyard. These conventions must be interpreted without regard to the past, and only with regard to the future.'[222] In his dissenting opinion in *Krstić*, Judge Shahabuddeen wrote:

> The *travaux préparatoires* relating to the Genocide Convention are of course valuable; they have been and will be consulted with profit. But I am not satisfied that there is anything in them which is inconsistent with this interpretation of the Convention. However, if there is an inconsistency, the interpretation of the final text of the Convention is too clear to be set aside by the *travaux préparatoires*.[223]

Because of its nature as a human rights or humanitarian law treaty, other rules of interpretation are also said to apply to the Genocide Convention. In their joint dissenting opinion in the advisory opinion, Judges Guerrero, McNair, Read and Mo of the International Court of Justice said 'the enormity of the crime of genocide can hardly be exaggerated, and any treaty for its repression deserves the most generous interpretation'.[224]

The *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda have drawn upon comparative law in the interpretation of provisions of their Statutes and Rules.[225] Neither Statute is an international treaty in the strict sense, although both are legal norms derived from the Charter of the United Nations and arguably it is the Vienna Convention rules and not canons of interpretation from national law that should be used. Among the rules derived from domestic law by the tribunals is that of strict construction of penal statutes, a 'rule which has stood the test of time'.[226] According to a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia:

[222] *Reservations to the Convention on the Prevention of Genocide (Advisory Opinion)*, note 11 above, p. 53.

[223] *Prosecutor* v. *Krstić* (Case No. IT-98-33-A), Partial Dissenting Opinion of Judge Shahabuddeen, 19 April 2004, para. 52.

[224] *Reservations to the Convention on the Prevention of Genocide (Advisory Opinion)*, note 11 above, p. 47.

[225] *Prosecutor* v. *Delalić et al.* (Case No. IT-96-21-T), Judgment, 16 November 1998, paras. 158–71.

[226] *Ibid.*, para. 408.

> A strict construction requires that no case shall fall within a penal statute which does not comprise all the elements which, whether morally material or not, are in fact made to constitute the offence as defined by the statute. In other words, a strict construction requires that an offence is made out in accordance with the statute creating it only when all the essential ingredients, as prescribed by the statute, have been established.[227]

In *Kayishema et al.*, a Trial Chamber of the International Criminal Tribunal for Rwanda found there was ambiguity in the definition of genocide, and said 'that if a doubt exists, for a matter of statutory interpretation, that doubt must be interpreted in favour of the accused'.[228] This approach to interpretation is not fully consistent with the Vienna Convention and, in practice, it has not been systematically followed by the *ad hoc* tribunals. For example, the International Criminal Tribunal for Rwanda indulged in judicial 'gap-filling' in an effort to satisfy itself that the Tutsi were contemplated by article II of the Genocide Convention.[229] However, the Rome Statute of the International Criminal Court mandates strict construction of the definitions of crimes, including genocide.[230] The International Criminal Tribunal for Rwanda has applied a related rule, by which the version most favourable to the accused should be adopted. A Trial Chamber of the Tribunal said this rule resulted from the principle of the presumption of innocence.[231]

Temporal application of the Convention

According to article 28 of the Vienna Convention on the Law of Treaties, '[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party'.[232] Article 28 of the Vienna Convention codifies customary law. There is nothing in the Genocide Convention to suggest 'a different

[227] *Ibid.*, para. 411.
[228] *Prosecutor* v. *Kayishema et al.* (Case No. ICTR-95-1-T), Judgment, 21 May 1999, para. 103.
[229] *Prosecutor* v. *Akayesu*, note 219 above. This is discussed at length in chapter 3, pp. 151–3 above.
[230] *Rome Statute of the International Criminal Court*, (2002) 2187 UNTS 90, art. 22(2).
[231] *Prosecutor* v. *Akayesu*, note 219 above, para. 500.
[232] Note 2 above.

intention'. Therefore, '[t]he simple fact is that the Genocide Convention is not applicable to acts committed before its effective date'.[233]

This does not mean that genocide cannot have been committed prior to 12 January 1951, when the Convention came into force. The preamble to the Convention makes this quite clear when it declares that 'at all periods of history genocide has inflicted great losses on humanity'. Nevertheless, the operative clauses of the Convention, including article IX, can only apply to genocide committed subsequent to its entry into force with respect to a given State party.

[233] Jacob Robinson, *And the Crooked Shall be Made Straight*, New York: Macmillan, 1965, p. 82.

Conclusions

Nine years ago, when the first edition of this book went to press, there were a handful of judgments at first instance by the international criminal tribunals for Rwanda and the former Yugoslavia concerning interpretation of the crime of genocide, and some decisions reflecting the preliminary skirmishing in cases filed at the International Court of Justice pursuant to article IX of the Genocide Convention. There was also a small body of case law from national courts, a useful and authoritative report from the United Nations Sub-Commission on the Promotion and Protection of Human Rights, two very old monographs, and a modest volume of periodical literature. The concluding chapter of the first edition of this book began:

> Many of the conclusions suggested in this study may soon find themselves challenged by judicial decisions. Important cases are pending before the trial and appeals chambers of the two *ad hoc* international tribunals, and before the International Court of Justice, and these may well clarify the lingering interpretative issues that have wallowed in obscurity over the half-century since the adoption of the Genocide Convention in 1948. The academic's dilemma is whether to await judicial pronouncements or to anticipate them. The second course has been more compelling because of the existence of published commentaries on the Convention that set out different hypotheses than those presented here. The judges who will have the final say on these matters in the years to come should be exposed to a range of views. What today remain nebulous and arcane disputes will, probably in short order, be taught and studied as conventional wisdom, established by this or that decision of the International Court of Justice, the *ad hoc* tribunals for Rwanda and the former Yugoslavia, and the International Criminal Court.

With the exception of the International Criminal Court, whose first trials are only just beginning, and which has had no charges for genocide laid pursuant to article 6 of the Rome Statute, this has indeed all come to pass. There are now scores of Trial Chamber and Appeals Chamber decisions of the *ad hoc* tribunals, numbering in the thousands of pages, a seminal judgment of the International Court of Justice as well as some

shorter and more incidental decisions, a robust body of national case law, and a flourishing academic commentary. As a result, the legal parameters of the crime of genocide are immensely clearer than they were not quite a decade ago.

The horrors of Auschwitz, Dachau and Treblinka set the context for the development of human rights law in the years following the Second World War. Prosecution of war crimes perpetrated against civilians had hitherto been confined to cases where the victims resided in occupied territories. What a country did to its own citizens had been deemed a matter that did not concern international law and the international community. Nuremberg appeared to take this bold step forward, but strings were attached. Although the Nazi persecution of Jews, even those within the borders of Germany, was deemed an international crime, the drafters of the Nuremberg Charter insisted upon a nexus between the crime against humanity and the international conflict. In effect, they were holding the Germans accountable for atrocities committed against Germans but resisting a more general principle that might hold them responsible for atrocities perpetrated within their own borders or in their colonies. This imperfect criminalization of crimes against humanity mirrored the ambiguities of the Charter of the United Nations, adopted in June 1945, that pledged to promote and encourage respect for human rights yet at the same time promised that the United Nations would not intervene in matters which were 'essentially within the domestic jurisdiction of any state'.

The recognition of genocide as an international crime by the United Nations General Assembly in December 1946 and the adoption of the Genocide Convention two years later were a reaction to dissatisfaction with the restrictions on crimes against humanity imposed at Nuremberg. It is impossible to understand the codification of the crime of genocide, and the interest it created in international law, without appreciating this situation. If the law of Nuremberg had recognized what Raphael Lemkin called 'peacetime genocide', there would probably have been no General Assembly resolution and no Convention. Neither would have been necessary. There would have been no legal gap to fill.

Two streams converged in December 1948, at the General Assembly of the United Nations: the standard-setting of international human rights manifested in the Universal Declaration of Human Rights, and the individual accountability for violations of human rights, of which the Convention for the Prevention and Punishment of the Crime of Genocide was the modest beginning. Both instruments were adopted, within

hours of each other, by the General Assembly on 9–10 December 1948, meeting in the Palais de Chaillot in Paris. The Genocide Convention established that in the case of a particular form of strictly defined atrocity there was no longer any nexus, and that the crime could be committed in time of peace as well as in wartime. The Universal Declaration laid the groundwork for steady progress in both standard-setting and a growing recognition of the right of the international community in general and United Nations bodies such as the Commission on Human Rights in particular to breach the wall of the *domaine reservé* by which States historically sheltered atrocities from international scrutiny.

Then the accountability component of the movement stalled, and was only revived as the Cold War came to an end. During this period, the only instrument with any real potential, at least theoretically, to compel accountability for human rights violations remained the Genocide Convention. When gross violations were committed – in Vietnam, Bangladesh, Cambodia, Indonesia, Lebanon, to give a few examples – the international community turned inexorably towards the Genocide Convention in the hope that it might govern. In fact, its application was almost never clear because of the very strict definition of the crime of genocide. As Georg Schwarzenberger noted cynically, 'the convention is unnecessary when applicable and inapplicable when necessary'.[1] The obligations assumed by States in the Genocide Convention were a radical departure from the past. But, in so doing, they had made it clear that the scope would be confined to a very narrow range of violations, indeed, the most extreme and rare of the catalogue of human rights breaches.

Two factors emerged to change this situation and, in a sense, to take the pressure off the Genocide Convention as the vital weapon in the battle to protect human rights. First, new law developed to enhance accountability for human rights violations. No longer was the Genocide Convention indispensable. The case law of international human rights bodies directed States to enforce the prosecution of human rights violations, even when committed by non-State actors.[2] The clouds surrounding the concept of crimes against humanity, which arguably fills the gaps left by the Genocide Convention, began to dissipate, in particular with the recognition that they could be committed in the absence

[1] Georg Schwarzenberger, *International Law*, Vol. I, 3rd edn, London: Stevens & Sons, 1957, p. 143.

[2] *Velasquez Rodriguez* v. *Honduras*, Judgment of 29 July 1988, Series C, No. 4.

of armed conflict.[3] New instruments were developed dealing with international crimes such as apartheid[4] and torture,[5] imposing obligations largely similar to those set out in the Genocide Convention. Eventually, the International Criminal Court was created, with jurisdiction over both crimes against humanity and genocide.

Thus, the first of Schwarzenberger's objections, namely, that the Convention never seemed to apply when it was needed, became less significant, because there were other norms, both customary and conventional, to take its place. Secondly, the growth of ethnic conflict brought with it circumstances that seemed to correspond exactly to what the Convention's drafters had in mind, of which the clearest and most horrific manifestation was the massacres in Rwanda in mid-1994.

Schwarzenberger's other objection, that when the Convention applied it was not needed, had been overtaken by events. In the last decade of the twentieth century, after more than four decades of marginalization, the Convention became an imperative legal tool for prosecution of individual offenders in situations where its applicability was unchallengeable.

The conclusions to the first edition of this book said:

> Perhaps the greatest unresolved question in the Convention is the meaning of the enigmatic word 'prevent'. The title of the Convention indicates that its scope involves prevention of the crime, and, in article I, States parties undertake to prevent genocide. Aside from article VIII, which entitles States parties to apply to the relevant organs of the United Nations for the prevention of genocide, the Convention has little specific to say on the question. The obligation to prevent genocide is a blank sheet awaiting the inscriptions of State practice and case law. A conservative interpretation of the provision requires States only to enact appropriate legislation and to take other measures to ensure that genocide does not occur. A more progressive view requires States to take action not just within their own borders but outside them, activity that may go as far as the use of force in order to prevent the crime being committed. The debate on this is unresolved, and is likely to remain so, at least until the next episode of genocide, if there is no insistence that

[3] *Prosecutor* v. *Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, (1997) 105 ILR 453, 35 ILM 32; Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, (1998) 37 ILM 999, art. 7.

[4] International Convention on the Suppression and Punishment of the Crime of Apartheid, (1976) 1015 UNTS 243.

[5] Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, (1987) 1465 UNTS 85.

> the subject be clarified. The sad reality is that, five years after the Rwandan genocide, and despite professions of guilt about their inertia while the crimes were taking place, States are hardly more prepared today to intervene to prevent genocide in central Africa. Military action in Kosovo in early 1999 was sometimes defended as being founded in a desire to correct the tragic errors committed while genocide raged in Rwanda in 1994. But the Kosovo intervention fit within a context of strategic interests of the North Atlantic Treaty Organization. Moreover, the tragic ethnic cleansing in Kosovo in March, April and May 1999 fell short of the requirement in article II of the Convention that the intent be to destroy physically a protected group. In any case, NATO never claimed that it was required to intervene in Kosovo, only that it was entitled to. The missing piece here, the one that is relevant if genocide recurs, particularly in Africa, is the view that humanitarian intervention to prevent genocide is not so much a 'right' as a duty.
>
> Short of an amendment to the Convention that could develop the content of the duty to prevent genocide – an unlikely prospect – a number of other less dramatic mechanisms might be considered. A commitment by States to the use of force in order to prevent genocide might take the form of a General Assembly resolution. Statements to the same effect could be adopted by regional bodies, such as the Organization for Security and Cooperation in Europe, the Organization of American States and the Organization of African Unity. These would amount to authentic interpretation of the obligation to prevent genocide set out in the Convention, and might also be deemed to create binding law as a manifestation of subsequent State practice.

But there is now considerably more clarity about the importance of the duty to prevent, and the scope of this obligation. Probably the best dimension of the February 2007 judgment of the International Court of Justice in the *Bosnia* v. *Serbia* case is its development on the subject of the duty to prevent genocide.[6] The Court's ruling dovetails very neatly with the 'responsibility to protect', affirmed by the summit of heads of State and government in September 2005.[7]

Article I of the Convention declares genocide to be a crime under international law, specifying that it can be committed in time of peace or war. This was an important factor in 1948, when the prevailing view of crimes against humanity was that they could only take place in relationship with an armed conflict. The law has now removed the

[6] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, paras. 428–38.

[7] 'Outcome Document of the 2005 World Summit', UN Doc. A/RES/60/1, paras. 138–9.

distinction, and genocide can be readily admitted as a subset or category of crimes against humanity. Affirming genocide to be a crime under international law was an answer to those who pleaded that it was a retroactive offence. The point had already been made by the General Assembly two years previously, in Resolution 96(I).

The definition of the crime of genocide, set out in articles II and III of the Convention, has stood the test of time. A source of great controversy when it was adopted, debate continued to rage as to whether or not the enumeration of groups should be expanded, principally to include political groups, as well as about extension of the punishable acts of genocide. But, when given the opportunity, at the Rome conference in 1998, the international community showed no inclination to amend or revise the definition of genocide. With due respect for views to the contrary, of which there are many, this study concludes that the definition of genocide is not an unfortunate drafting compromise but rather a logical and coherent attempt to address a particular phenomenon of human rights violation, the threat to the existence of what we would now call 'ethnic' groups and what the drafters conceived of essentially as 'national minorities'.

As for extending the scope of punishable acts, this would be desirable if the Convention's full preventive mission is to be enhanced. Experience has shown that the inability to address preparatory acts such as the dissemination of hate propaganda, by radio and print media in particular, contributes mightily to the extent of the crime and the difficulty in its suppression. Some of the Convention's shortcomings in this respect have been corrected by provisions of widely ratified human rights instruments. We continue the debate about where to draw the line between matters deserving of international criminal prosecution and those that are better addressed by human rights bodies. But there is also ongoing controversy about the prohibition of hate propaganda altogether, and many fear the possible encroachments on another important value, freedom of expression.[8] Similarly, the political bargain that resulted in the Convention's exclusion of cultural genocide is to be regretted. However, the normative protection of ethnic and national minorities against cultural persecution remains an underdeveloped zone within the overall scheme of international human rights.

[8] See e.g. *Nahimana et al.* v. *Prosecutor* (Case No. ICTR-99-52-A), Partly Dissenting Opinion of Judge Meron, 28 November 2007.

Legal developments of the past decade indicate that the definition of genocide is unlikely to change or evolve much in the foreseeable future. Calls for its enlargement to cover additional protected groups, or to contemplate forms of destruction falling short of physical extermination, such as ethnic cleansing, are unlikely to prosper. Not only have opportunities for amendment been missed or avoided, prestigious international courts and other bodies have adopted a relatively narrow interpretation of the Convention definition. None of this is due to any conservatism in the international community. The dramatic expansion in the concepts of both war crimes and crimes against humanity, as reflected in the provisions of the Rome Statute, should dispel any doubts about general willingness to cover a broad range of atrocities through the medium of international criminal law. Rather, the definition has remained and should continue to remain relatively stable precisely because the definition of crimes against humanity has evolved so dramatically in recent years. To be sure, before the 1990s there was a major 'impunity gap' waiting to be filled, and many looked to an enlarged concept of genocide as the remedy. Instead, it has been crimes against humanity, not genocide, that has filled the lacuna.

Several of the provisions of the Convention contemplate the obligations assumed by States in matters of criminal law legislation, jurisdiction and extradition. Scrutiny of the domestic law provisions by which States introduce the crime of genocide in their own penal codes shows that many States have enacted the crime of genocide, although there are some notable exceptions, including the tragic example of Rwanda, which acceded to the Convention and then neglected to amend its Penal Code. There are also significant and relatively widespread shortcomings in terms of the legal rules that accompany the crime itself. This indicates that the introduction of the crime of genocide in domestic penal legislation is often rather perfunctory. Incorporation of the provisions of the Rome Statute in national legislation has provided the opportunity to enact the crime of genocide in the legislation of States that had not previously done so.

The Convention's failure to recognize universal jurisdiction is one of its historic defects, but one that is now resolved by the evolution of customary international law. Article VI, which declares that offenders are to be tried by the courts of the State where the crime took place (or by an international court), was a pragmatic compromise reflecting the primitive condition of international law at the time the Convention was adopted. Although universal jurisdiction, and the related concept of

aut dedere aut judicare, had been long recognized for certain crimes, committed by individual outlaws, few in 1948 wanted to extend it to crimes which would, as a general rule, involve State complicity. The Israeli courts, in the *Eichmann* case, attempted to manoeuvre around the obstacle of article VI, but their reasoning was unconvincing. Nevertheless, it was gradually recognized that States could exercise universal jurisdiction over genocide without any amendment to the Convention or other authorization by some normative document. Today, there can be little doubt that genocide is a crime subject to universal jurisdiction.

Extradition is another area where the provisions of the Convention seem insufficient. States undertake to 'grant extradition in accordance with their laws and treaties in force', but article VII might be deemed inapplicable if there is no treaty between the two States concerned. Extradition ought to be mandatory, even if there is no treaty. Arguably, when article VII is combined with the obligation to punish set out in article I, this is implicit in the Convention. Practice is so limited that it is hazardous to attempt much in the way of conclusions as to how States view the scope of article VII.

Parallel to the Genocide Convention there exists a body of customary international law, and some have argued that it is in some respects more complete than the instrument itself. This was the position of the Israeli courts in *Eichmann*, where the judgment found that customary law had enlarged the scope of jurisdiction under the Convention. The definition of the crime of genocide is undoubtedly part of international custom, as are the basic obligations to punish and prevent genocide. The very consistent State practice in introducing the crime of genocide, in conformity with the Convention definition, and the reaffirmation of that definition in contemporary instruments, attests to the customary status of articles II and III of the Convention. Demonstrating that some of the more specific rules set out in the Convention, such as a duty to extradite and a prohibition of the defence of official capacity, are also customary norms is a somewhat more difficult undertaking. Since the 2002 ruling of the International Court of Justice in the *Arrest Warrant* case, it is settled that heads of State and government, and other senior officials such as foreign ministers, benefit from immunity with respect to courts of other States as well as certain international tribunals, even when they are charged with genocide.

The Convention, while relatively widely ratified, lacks the universal scope of treaties like the Geneva Conventions or the Convention on the Rights of the Child, which have laid claim to status as a codification of

customary norms by virtue of their general acceptance within the international community. As of 1 January 2008, there were only 140 States parties to the Genocide Convention.[9] Why this is the case remains somewhat of a mystery. In 2006, in an effort to research this question, I wrote to those States that had not ratified the Convention asking for an explanation. Only a few replied, invoking rather abstruse problems caused by possible conflicts with their national legislation. One of the few respondents, Andorra, responded that it had deposited its instrument of accession a few weeks earlier. Perhaps the letter inquiring into the status of the Convention had jogged the memories of some foreign ministry officials.

The relatively low number of ratifications and accessions is all the more paradoxical, given that the norms contained in the Genocide Convention are regularly cited as examples *par excellence* of customary international law. If nothing else, the Genocide Convention seems to show a difficulty in identifying customary international legal norms with reference to treaty law. It may be true to say that a very widely ratified treaty provides evidence that its norms are customary in nature. This is often said about the Geneva Conventions and the Convention on the Rights of the Child. The Genocide Convention demonstrates that the same reasoning may not necessarily work in the opposite direction.

A very useful mechanism to help resolve some of these problems would be to create a reporting system, similar to those developed by the International Labour Organization and the major human rights treaties. States parties to the Convention would be expected to submit periodic reports on their compliance with the Convention in which they would address the unresolved interpretative issues. In this way, a form of 'practice' could be established. The reports would be presented to an expert committee that would ensure some control over the sincerity and accuracy of the reports, challenging the State to explain omissions or to

[9] The following States are not parties to the Genocide Convention: Angola; Benin; Bhutan, Botswana, Brunei Darussalam, Cameroon, Cape Verde, Central African Republic, Chad, Congo (Republic of the), Djibouti, Dominica, Dominican Republic, Equatorial Guinea, Eritrea, Grenada, Guinea-Bissau, Guyana, Indonesia, Japan, Kenya, Kiribati, Madagascar, Malawi, Malta, Marshall Islands, Mauritania, Mauritius, Micronesia, Nauru, Niger, Nigeria, Oman, Palau, Qatar, Saint Kitts and Nevis, Saint Lucia, Samoa, San Marino, Sao Tome and Principe, Sierra Leone, Singapore, Solomon Islands, Somalia, Suriname, Swaziland, Tajikistan, Thailand, Timor-Leste, Turkmenistan, Tuvalu, Vanuatu, Yemen and Zambia.

provide justifications.[10] Such a committee could also monitor the early signs of genocide, alerting the State itself as well as the international community to potential dangers. In 1994, the Sub-Commission on Prevention of Discrimination and Protection of Minorities proposed the creation of a treaty committee along these lines, including a system of periodic reports, and a role for the High Commissioner for Human Rights:

> Requests the States Parties to the Convention on the Prevention and Punishment of the Crime of Genocide . . . to encourage – or even undertake – the drafting and adoption of a control mechanism in the form of a treaty committee charged in particular with monitoring compliance of States Parties with the commitments which they undertook . . . through the assessment of the reports submitted by the States Parties and, on a preventive basis, to draw the attention of the High Commissioner for Human Rights to situations which may lead to genocide.[11]

A similar proposal was made by the Special Rapporteur on extrajudicial, summary and arbitrary executions of the Commission on Human Rights.[12] While ideally a mechanism along these lines would be established by an additional protocol to the Convention, that option may be rather too ambitious, at least in the short term. But it could also be created by resolution of the General Assembly; a similar body was created by the Economic and Social Council, charged with monitoring respect of the International Covenant on Economic, Social and Cultural Rights, although no provision to this effect was made in the treaty itself. It is true that some States might fail to co-operate, but this is also the case with many who have ratified the treaties. In other words, the existence of a binding legal obligation to submit reports is probably not

[10] The idea of a treaty body may first have been proposed by Arcot Krishnaswami, in the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, in 1965 (UN Doc. E/CN.4/Sub.2/SR.456). It was picked up with enthusiasm by Special Rapporteur Nicodème Ruhashyankiko ('Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur', UN Doc. E/CN.4/Sub.2/416, paras. 479–96). His suggestion met with a generally favourable response from States parties. See also 'Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide', UN Doc. E/CN.4/Sub.2/1985/6, para. 85. See also the comments of Louis Joinet, UN Doc. E/CN.4/Sub.2/1984/SR.4, p. 4, who urged the creation of an 'international fact-finding body'.

[11] UN Doc. E/CN.4/Sub.2/1994/L.4, para. 2.

[12] UN Doc. E/CN.4/1997/60, para. 130; 'Extrajudicial, Summary or Arbitrary Executions, Note by the Secretary-General', UN Doc. A/51/457, para. 56.

that essential, at least for those States that are in good faith. If the resolution creating such a mechanism reflects genuine consensus, and if the members of the committee are credible and prestigious, its success will be likely even in the absence of a treaty obligation.

In his speech to the Stockholm International Forum: Preventing Genocide, Threats and Responsibilities, in January 2004, the United Nations Secretary-General suggested that 'the States parties to the Genocide Convention should consider setting up a committee on the prevention of genocide, which would meet periodically to review reports and make recommendations for action'.[13] The United Nations Secretariat sent *notes verbales* to States parties to the Genocide Convention requesting their views on this proposal. Of the eleven States that responded, including the European Union, most replies were favourable in principle to the idea. Only Russia and the United States were negative, both explaining that they felt such a committee would merely duplicate other existing mechanisms.[14] Canada said it considered that article VIII of the Convention provided a sufficient legal basis for the initiative; a State party could request one of the organs of the United Nations to establish the committee.[15]

Early warning of genocide has often been mentioned as a necessary element in its prevention. It is hard to quarrel with any efforts to anticipate crimes before they are committed. The proposals have sometimes involved sophisticated models employing computer databases and modern technology. In his report to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Benjamin Whitaker said that, once warning was provided, subsequent steps could be taken to prevent genocide:

> the investigation of allegations; activating different organs of the United Nations and related organizations, both directly and through national delegations, and making representations to national Governments and to interregional organizations for active involvement; seeking support of the international press in providing information; enlisting the aid of other media to call public attention to the threat, or actuality, of genocidal massacre; asking relevant racial, communal and religious

[13] 'Views of States Parties to the Convention on the Prevention and Punishment of the Crime of Genocide on the Secretary-General's Proposal That They Consider Setting up a Committee on the Prevention of Genocide', Note by the Secretariat', UN Doc. E/CN.4/2005/46, para. 1.

[14] *Ibid.*, pp. 8–9. [15] *Ibid.*, p. 6.

> leaders, in appropriate cases, to intercede, and arranging the immediate involvement of suitable mediators and conciliators at the outset.[16]

Early warning of genocide requires an ability to identify and recognize the initial symptoms. The real challenge is distinguishing between garden-variety ethnic conflict, of which there is no shortage in the modern world, and genuine signs of possible genocide. In January 1994, the United Nations peacekeeping mission learned of the planning of the Rwandan genocide from a well-placed informer. Yet even direct information of preparations was not enough to sound alarm bells at United Nations headquarters in New York. Other signs, however, confirmed the report, and ought to have been taken more seriously. The principal external indicator in Rwanda, as in Nazi Germany, was the tone of hate propaganda directed against the targeted group. Speeches by prominent political personalities, print media and radio all pointed to a campaign intended, at a minimum, to lay the groundwork for public acceptance of genocide and, possibly, provoke public participation in the crimes. While early warning of genocide involves assessment of a range of factors, the presence of such propaganda is the real common denominator.

The first edition of this book was subtitled 'the crime of crimes'. Used by the Rwandan representative to the Security Council in 1994, the term also featured in one of the earliest judgments of the International Criminal Tribunal for Rwanda.[17] The obvious suggestion is that genocide sits at the apex of a pyramid of criminality,[18] and that it is even more serious and grave than the other 'core crimes' of international criminal law, namely, war crimes, crimes against humanity and aggression. Despite their initial acceptance of genocide as the crime of crimes, and a more general thesis that there was at least an implied hierarchy even within international crimes, the *ad hoc* tribunals have shifted their position. The prevailing opinion of the Appeals Chambers

[16] UN Doc. E/CN.4/Sub.2/1985/6, para. 84.

[17] *Prosecutor* v. *Kambanda* (Case No. ICTR-97-23-S), Judgment and Sentence, 4 September 1998, para. 16. Also: *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Sentencing Judgment, 2 October 1998; *Prosecutor* v. *Rutaganda* (Case No. ICTR-96-3-T), Judgment and Sentence, 6 December 1999, para. 451; *Prosecutor* v. *Serushago* (Case No. ICTR-98-39-S), Sentence, 5 February 1999, para. 15; *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment and Sentence, 27 January 2000, para. 981.

[18] Judge Wald, of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, said 'genocide is at the apex': *Prosecutor* v. *Jelisić* (Case No. IT-95-10-A), Partial Dissenting Opinion of Judge Wald, 5 July 2001, para. 13. Also: *Prosecutor* v. *Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, paras. 699–700.

of the two tribunals now is that genocide, crimes against humanity and war crimes are all of equal gravity. It is only by looking at the specifics of an individual case that differentiation can be made.[19] In 2005, the International Commission of Inquiry on Darfur wrote along the same lines: '[G]enocide is not necessarily the most serious international crime. Depending upon the circumstances, *such international offences as crimes against humanity or large scale war crimes may be no less serious and heinous than genocide*.'[20]

The Darfur Commission was anticipating critics, and there were many, who claimed that, in categorizing atrocities as crimes against humanity rather than as genocide, it was in some way trivializing their scale and insulting the victims. Much the same phenomenon occurred when the International Court of Justice ruled that genocide had not taken place during the war in Bosnia and Herzegovina, with the exception of the Srebrenica massacre. There could be no real argument that crimes against humanity had occurred during the conflict, but the Court had no jurisdiction to pronounce on that question. Both the Darfur Commission and the International Court of Justice presented clearly reasoned and accurate analyses, but that did not silence those who view the matter of a genocide as a political rather than a legal determination.

Recalling that crimes against humanity are of comparable gravity to genocide helpfully addresses these emotional charges. If labelling genocide the 'crime of crimes' has contributed to the difficulty in explaining the terrible seriousness of crimes against humanity which, after all, formed the basis of the 1915 allegations against the Ottomans as well as the judgments at Nuremberg, then there are solid grounds to abandon the expression.

Nevertheless, instead of bringing genocide and crimes against humanity closer together, the case law has tended to maintain the distinction between them. Crimes against humanity encompasses a range of acts of persecution falling short of physical destruction, and it applies to many other victim categories in addition to the national, ethnic, racial and religious groups contemplated by the Convention. Genocide is focused on the right to life, and on racial discrimination. To that extent,

[19] *Prosecutor* v. *Furundžija* (Case No. IT-95-17/1-A), Judgment, 21 July 2000, para. 247; *Prosecutor* v. *Tadić* (Case No. IT-94-1-A*bis*), Judgment in Sentencing Appeals, 26 January 2000, para. 69.

[20] 'Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur', UN Doc. S/2005/60, para. 522 (emphasis in the original).

the prohibition of genocide is at the heart of the values that underpin modern international human rights law. Although its direct origins are closely associated with the Holocaust directed against European Jews in the 1940s, it must surely reflect something more general in the public consciousness at the time of its adoption. The Holocaust was the most contemporary and appalling manifestation of a cancer of racism that had gnawed at humanity for many centuries, and that was manifested in such phenomena as the slave trade and colonialism. That is what makes genocide the 'crime of crimes'. The subtitle remains unchanged in this second edition.

The three principal drafts of the Convention

Secretariat draft

Preamble

The High Contracting Parties proclaim that Genocide, which is the intentional destruction of a group of human beings, defies universal conscience, inflicts irreparable loss on humanity by depriving it of the cultural and other contributions of the group so destroyed, and is in violent contradiction with the spirit and aims of the United Nations.

1. They appeal to the feelings of solidarity of all members of the international community and call upon them to oppose this odious crime.
2. They proclaim that the acts of genocide defined by the present Convention are crimes against the Law of Nations, and that the fundamental exigencies of civilization, international order and peace require their prevention and punishment.
3. They pledge themselves to prevent and to repress such acts wherever they may occur.

Article I

Definitions

I. [Protected groups] The purpose of this Convention is to prevent the destruction of racial, national, linguistic, religious or political groups of human beings.
II. [Acts qualified as genocide] In this Convention, the word 'genocide' means a criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying it in whole or in part, or of preventing its preservation or development.

Such acts consist of:

1. Causing the death of members of a group or injuring their health or physical integrity by:

(a) group massacres or individual executions; or
(b) subjection to conditions of life which, by lack of proper housing, clothing, food, hygiene and medical care, or excessive work or physical exertion are likely to result in the debilitation or death of the individuals; or
(c) mutilations and biological experiments imposed for other than curative purposes; or
(d) deprivation of all means of livelihood, by confiscation of property, looting, curtailment of work, denial of housing and of supplies otherwise available to the other inhabitants of the territory concerned.

2. Restricting births by:
(a) sterilization and/or compulsory abortion; or
(b) segregation of the sexes; or
(c) obstacles to marriage.

3. Destroying the specific characteristics of the group by:
(a) forcible transfer of children to another human group; or
(b) forced and systematic exile of individuals representing the culture of a group; or
(c) prohibition of the use of the national language even in private intercourse; or
(d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or
(e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship.

Article II

I. [Punishable offences] The following are likewise deemed to be crimes of genocide:
1. Any attempt to commit genocide;
2. The following preparatory acts:
(a) studies and research for the purpose of developing the technique of genocide;
(b) setting up of installations, manufacturing, obtaining, possessing or supplying of articles or substances with the knowledge that they are intended for genocide;

(c) issuing instructions or orders, and distributing tasks with a view to committing genocide.

II. The following shall likewise be punishable:
1. wilful participation in acts of genocide of whatever description;
2. direct public incitement to any act of genocide whether the incitement be successful or not;
3. conspiracy to commit acts of genocide.

Article III

[Punishment of a particular offence] All forms of public propaganda tending by their systematic and hateful character to promote genocide, or tending to make it appear as a necessary, legitimate or excusable act shall be punished.

Article IV

[Persons liable] Those committing genocide shall be punished, be they rulers, public officials or private individuals.

Article V

[Command of the law and superior orders] Command of the law or superior orders shall not justify genocide.

Article VI

[Provisions concerning genocide in municipal criminal law] The High Contracting Parties shall make provision in their municipal law for acts of genocide as defined by Articles I, II, and III, above, and for their effective punishment.

Article VII

[Universal enforcement of municipal criminal law] The High Contracting Parties pledge themselves to punish any offender under this Convention within any territory under their jurisdiction, irrespective of the nationality of the offender or of the place where the offence has been committed.

Article VIII

[Extradition] The High Contracting Parties declare that genocide shall not be considered as a political crime and therefore shall be grounds for extradition.

The High Contracting Parties pledge themselves to grant extradition in cases of genocide.

Article IX

[Trial of genocide by an international court] The High Contracting Parties pledge themselves to commit all persons guilty of genocide under this Convention for trial to an international court in the following cases:

1. When they are unwilling to try such offenders themselves under Article VII or to grant their extradition under Article VIII.
2. If the acts of genocide have been committed by individuals acting as organs of the State or with the support or toleration of the State.

Article X

[International court competent to try genocide] Two drafts are submitted for this section:

1st draft: The court of criminal jurisdiction under Article IC shall be the International Court having jurisdiction in all matters connected with international crimes.

2nd draft: An international court shall be set up to try crimes of genocide (vide Annexes).

Article XI

[Disbanding of groups or organizations having participated in genocide] The High Contracting Parties pledge themselves to disband any group or organization which has participated in any act of genocide mentioned in articles I, II, and III, above.

Article XII

[Action by the United Nations to prevent or to Stop genocide] Irrespective of any provision in the foregoing articles, should the crimes as

defined in this Convention be committed in any part of the world, or should there be serious reasons for suspecting that such crimes have been committed, the High Contracting Parties may call upon the competent organs of the United Nations to take measures for the suppression or prevention of such crimes.

In such case the said Parties shall do everything in their power to give full effect to the intervention of the United Nations.

Article XIII

[Reparations to victims of genocide] When genocide is committed in a country by the government in power or by sections of the population, and if the government fails to resist it successfully, the State shall grant to the survivors of the human group that is a victim of genocide redress of a nature and in an amount to be determined by the United Nations.

Article XIV

[Settlement of disputes on interpretation or application of the Convention] Disputes relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice.

Article XV

[Language – Date of the Convention] The present Convention, of which the . . ., . . ., . . ., . . . and . . . texts are equally authentic, shall bear the date of . . .

Article XVI

[What States may become Parties to the Conventions. Way to become Party to it]

(First Draft)

1. The present Convention shall be open to accession on behalf of any Member of the United Nations or any non-member State to which an invitation has been addressed by the Economic and Social Council.
2. The instruments of accession shall be transmitted to the Secretary-General of the United Nations.

(Second Draft)

1. The present Convention shall be open until 31 . . . 1948 for signature on behalf of any member of the United Nations and of any non-member State to which an invitation has been addressed by the Economic and Social Council.
   The present Convention shall be ratified, and the instruments of ratification shall be transmitted to the Secretary-General of the United Nations.
2. After 1 . . . 1948 the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State that has received an invitation as aforesaid.
   Instruments of accession shall be transmitted to the Secretary-General of the United Nations.

Article XVII

[Reservations] No proposition is put forward for the moment.

Article XVIII

[Coming into force]

1. The present Convention shall come into force on the ninetieth day following the receipt by the Secretary-General of the United Nations of the accession (or ratifications and accession) of not less than . . . Contracting Parties.
2. Accessions received after the Convention has come into force shall become effective as from the ninetieth day following the date of receipt by the Secretary-General of the United Nations.

Article XIX

[Duration of the Convention]

(First Draft)

1. The present Convention shall remain in effect for a period of five years dating from its entry into force.
2. It shall remain in force for further successive periods of five years for such Contracting Parties that have not denounced it at least six months before the expiration of the current period.

3. Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

(Second Draft)

The present Convention may be denounced by a written notification addressed to the Secretary-General of the United Nations. Such notification shall take effect one year after the date of its receipt.

Article XX

[Abrogation of the Convention]

Should the number of Members of the United Nations and non-member States bound by this Convention be less than . . . as a result of denunciations, the Convention shall cease to have effect as from the date on which the last of these denunciations shall become operative.

Article XXI

[Revision of the Convention}

A request for the revision of the present Convention may be made at any time by any State which is a party to this Convention by means of a written notification addressed to the Secretary-General.

The Economic and Social Council shall decide upon the measures to be taken in respect of such a request.

Article XXII

[Notifications by the Secretary-General]

The Secretary-General of the United Nations shall notify all members of the United Nations and non-member States referred to in article XVI of all accessions (or signatures, ratifications and accessions) received in accordance with articles XVI and XVIII, of denunciations received in accordance with Article XIX, of the abrogation of the Convention effected as provided by article XX and of requests for revision of the Convention made in accordance with article XXI.

Article XXIII

[Deposit of the original of the Convention and transmission of copies to governments]

1. A copy of the Convention signed by the President of the General Assembly and the Secretary-General of the United Nations shall be deposited in the Archives of the Secretariat of the United Nations.
2. A certified copy shall be transmitted to all members of the United Nations and to non-member States mentioned under article . . .

Article XXIV

[Registration of the Convention]

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

Ad Hoc Committee draft

Preamble

The High Contracting Parties

Declaring that genocide is a grave crime against mankind which is contrary to the spirit and aims of the United Nations and which the civilized world condemns;

Having been profoundly shocked by many recent instances of genocide;

Having taken note of the fact that the International Military Tribunal at Nürnberg in its judgment of 30 September–1 October 1946 has punished under a different legal description certain persons who have committed acts similar to those which the present Convention aims at punishing; and

Being convinced that the prevention and punishment of genocide requires international co-operation,

Hereby agree to prevent and punish the crime as hereinafter provided:

[Substantive Articles]

Article I

[Genocide a crime under international law]

Genocide is a crime under international law whether committed in time of peace or in time of war.

Article II

['Physical and biological' genocide]

In this Convention genocide means any of the following deliberate acts committed with 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:

1. Killing members of the group;
2. Impairing the physical integrity of members of the group;
3. Inflicting on members of the group measures or conditions of life aimed at causing their deaths;
4. Imposing measures intended to prevent births within the group.

Article III

['Cultural' genocide]

In this Convention genocide also means 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 the religious belief of its members such as:

1. Prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;
2. Destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.

Article IV

[Punishable acts]

The following acts shall be punishable:

(a) Genocide as defined in Articles II and III;
(b) Conspiracy to commit genocide;
(c) Direct incitement in public or in private to commit genocide whether such incitement be successful or not;
(d) Attempt to commit genocide;
(e) Complicity in any of the acts enumerated in this article.

Article V

[Persons liable]

Those committing genocide or any of the other acts enumerated in Article IV shall be punished whether they are heads of State, public officials or private individuals.

Article VI

[Domestic legislation]

The High Contracting Parties undertake to enact the necessary legislation in accordance with their constitutional procedures to give effect to the provisions of this Convention.

Article VII

[Jurisdiction]

Persons charged with genocide or any of the other acts enumerated in Article IV shall be tried by a competent tribunal of the State in the territory of which the act was committed or by a competent international tribunal.

Article VIII

[Action of the United Nations]

1. A party to this Convention may call upon any competent organ of the United Nations to take such action as may be appropriate under the Charter for the prevention and suppression of genocide.
2. A party to this Convention may bring to the attention of any competent organ of the United Nations any case of violation of this Convention.

Article IX

[Extradition]

1. Genocide and the other acts enumerated in Article IV shall not be considered as political crimes and therefore shall be grounds for extradition.
2. Each party to this Convention pledges itself to grant extradition in such cases in accordance with its laws and treaties in force.

Article X

[Settlement of disputes by the International Court of Justice]

Disputes between the High Contracting Parties relating to the interpretation or application of this Convention shall be submitted to

the International Court of Justice provided that no dispute shall be submitted to the International Court of Justice involving an issue which has been referred to and is pending before or has been passed upon by a competent international criminal tribunal.

[Final Clauses]

Article XI

[Language, date of the Convention]

The present Convention of which the Chinese, English, French, Russian and Spanish texts are equally authentic shall bear the date of . . .

Article XII

[States eligible to become parties to the Convention. Means of becoming a party]

1. The present Convention shall be open until 31 _____ 194__[1] for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.
   The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.
2. After 1 _____ 194__, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.
   Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article XIII

[Coming into force of the Convention]

1. The present Convention shall come into force on the ninetieth day following the receipt by the Secretary-General of the United Nations of not less than twenty instruments of ratification or accession.

[1] The dates for the time limits will have to be filled in according to the date of the adoption of the Convention by the General Assembly.

2. Ratification or accession received after the Convention has come into force shall become effective on the ninetieth day following the deposit with the Secretary-General of the United Nations.

Article XIV

[Duration of the Convention. Denunciation]

1. The present Convention shall remain in effect for a period of five years dating from its entry into force.
2. It shall remain in force for further successive periods of five years for such Contracting Parties that have not denounced it at least six months before the expiration of the current period.
3. Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

Article XV

[Abrogation of the Convention]

Should the number of parties to this Convention become less than sixteen as a result of denunciations, the Convention shall cease to have effect as from the date on which the last of these denunciations shall become operative.

Article XVI

[Revision of the Convention]

1. Upon receipt by the Secretary-General of the United Nations of written communications from one-fourth of the number of High Contracting Parties, requesting consideration of the revision of the present Convention and the transmission of the respective requests to the General Assembly, the Secretary-General shall transmit such communications to the General Assembly.
2. The General Assembly shall decide upon the steps, if any, to be taken in respect of such requests.

Article XVII

[Notification by the Secretary-General]

The Secretary-General of the United Nations shall notify all Members of the United Nations and non-member States referred to in Article XII

of all signatures, ratifications and accessions received in accordance with Articles XII and XIII, of the date upon which the present Convention has come into force, of denunciations received in accordance with Article XIV, of the abrogation of the Convention effected as provided by Article XV, and of requests for revision of the Convention made in accordance with Article XVI.

Article XVIII

[Deposit of the original of the Convention and transmission of copies to governments]

The original of this Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to all Members of the United Nations and to the non-member States referred to under Article XII.

Article XIX

[Registration of the Convention]

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

Convention on the Prevention and Punishment of the Crime of Genocide [final text]

Preamble

The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world,

Recognizing that at all periods of history genocide has inflicted great losses on humanity, and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,

Hereby agree as hereinafter provided:

Article I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(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 births within the group;
(e) Forcibly transferring children of the group to another group.

Article III

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.

Article IV

Persons 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.

Article V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

Article VI

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article VII

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article VIII

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

Article IX

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment 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.

Article X

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

Article XI

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any

non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article XII

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

Article XIII

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a procès-verbal and transmit a copy thereof to each Member of the United Nations and to each of the non-member States contemplated in article XI.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected, subsequent to the latter date, shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

Article XIV

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

Article XV

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

Article XVI

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

Article XVII

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in article XI of the following:

(a) Signatures, ratifications and accessions received in accordance with article XI;
(b) Notifications received in accordance with article XII;
(c) The date upon which the present Convention comes into force in accordance with article XIII;
(d) Denunciations received in accordance with article XIV;
(e) The abrogation of the Convention in accordance with article XV;
(f) Notifications received in accordance with article XVI.

Article XVIII

The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to each Member of the United Nations and to each of the non-member States contemplated in article XI.

Article XIX

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

BIBLIOGRAPHY

Abrams, Jason, 'The Atrocities in Cambodia and Kosovo: Observations on the Codification of Genocide', (2001) 35 *New England Law Review*, p. 303

Afflitto, Frank M., 'Victimization, Survival, and the Impunity of Forced Exile: A Case Study from the Rwandan Genocide', (2000) 34 *Crime, Law and Social Change*, p. 77

Akçam, Taner, *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility*, New York: Holt, 2007

Akhavan, Payam, 'Enforcement of the Genocide Convention Through the Advisory Opinion Jurisdiction of the International Court of Justice', (1991) 12 *Human Rights Law Journal*, p. 285

'Lessons from Iraqi Kurdistan: Self-Determination and Humanitarian Intervention Against Genocide', (1993) 11 *Netherlands Quarterly of Human Rights*, p. 41

'Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for the New World Order', (1993) 15 HRQ, p. 262

'Enforcement of the Genocide Convention: A Challenge to Civilization', (1995) 8 *Harvard Human Rights Journal*, p. 229

'The International Criminal Tribunal for Rwanda: The Politics and Pragmatism of Punishment', (1996) 90 *American Journal of Human Rights*, p. 501

'Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda', (1997) 7 *Duke Journal of Comparative and International Law*, p. 325

'Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal', (1998) 20 *Human Rights Quarterly*, p. 737

'The Crime of Genocide in the ICTR Jurisprudence', (2005) 3 *Journal of International Criminal Justice*, p. 990

Allain, John, and Jones, John R. W. D., 'A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes Against the Peace and Security of Mankind', (1997) 8 *European Journal of International Law*, p. 100

Allen, Beverley, *Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia*, Minneapolis: University of Minnesota Press, 1996

Alonzo-Maizlish, David, 'In Whole or in Part: Group Rights, the Intent Element of Genocide, and the "Quantitative Dimension"', (2002) 77 *New York University Law Review*, p. 1369

Alvarez, A., *Governments, Citizens and Genocide*, Bloomington: Indiana University Press, 2001

Alvarez, José E., 'Crimes of State/Crimes of Hate: Lessons from Rwanda', (1999) 24 *Yale Journal of International Law*, p. 365

Amann, Diane Marie, 'Prosecutor v. Akayesu', (1999) 93 *American Journal of International Law*, p. 195

'Group Mentality, Expressivism, and Genocide', (2002) 2 *International and Comparative Law Quarterly*, p. 93

Ambos, Kai, 'General Principles of Criminal Law in the Rome Statute', (1999) 10 *Criminal Law Forum*, p. 1

Ambos, Kai, and Wirth, S., 'Sentencing, Cumulative Charging, Genocide and Crimes against Humanity', in A. Klip and G. Sluiter, eds., *Annotated Leading Cases of International Criminal Tribunals*. Vol. II *The International Criminal Tribunal for Rwanda 1994–1999*, Antwerp: Intersentia, 2000, pp. 701–8

Anacleti, Odhiambo, 'The Regional Response to the Rwandan Emergency', (1996) 9 *Journal of Refugee Studies*, p. 300

Andreopoulos, George J., ed., *Genocide: Conceptual and Historical Dimensions*, Philadelphia: University of Pennsylvania Press, 1994

Annas, George J., and Grodin, Michael A., *The Nazi Doctors and the Nuremberg Code: Human Rights in Human Experimentation*, New York and London: Oxford University Press, 1992

Anzulovic, Branimar, *Heavenly Serbia: From Myth to Genocide*, New York: New York University Press, 1998

Aptel, Cécile, 'The International Criminal Tribunal for Rwanda', (1997) 321 *International Review of the Red Cross*, p. 675

'The Intent to Commit Genocide in the Case Law of the International Criminal Tribunal for Rwanda', (2002) 13 *Criminal Law Forum*, p. 273

Arendt, Hannah, *Eichmann in Jerusalem: A Report on the Banality of Evil*, New York: Penguin Books, 1994

Arens, Richard, *Genocide in Paraguay*, Philadelphia: Temple University Press, 1976

'The Ache of Paraguay', in Jack Nusan Porter, ed., *Genocide and Human Rights: A Global Anthology*, Lanham, MD, New York and London: University Press of America, 1982, pp. 218–37

Arnold, Roberta, 'The Mens Rea of Genocide under the Statute of the International Criminal Court', (2003) 14 *Criminal Law Forum*, p. 127

Aroneanu, Eugène, *Le crime contre l'humanité*, Paris: Dalloz, 1961

Aronson, Shlomo, 'Preparations for the Nuremberg Trial: The OSS, Charles Dworak, and the Holocaust', (1998) 12 *Holocaust and Genocide Studies*, p. 257

Ascensio, Hervé, and Maison, Rafaëlle, 'L'activité des tribunaux pénaux internationaux pour l'ex-Yougoslavie (1995–1997) et pour le Rwanda (1994–1997)', (1997) 43 *Annuaire français de droit international*, p. 368

Baade, H. W., 'The Eichmann Trial: Some Legal Aspects', (1961) *Duke Law Journal*, p. 400

Bakker, Christine A. E., 'Universal Jurisdiction of Spanish Courts over Genocide in Tibet: Can it Work?', (2006) 4 *Journal of International Criminal Justice*, p. 595

Balakian, Peter, *Burning Tigris*, New York: HarperCollins, 2003

Bardakjian, Kevork B., *Hitler and the Armenian Genocide*, Cambridge, MA: Zoryan Institute, 1985

Barnett, M. N., *Eyewitness to a Genocide: The United Nations and Rwanda*, Ithaca, NY: Cornell University Press, 2002

Bassiouni, M. Cherif, 'Has the United States Committed Genocide Against the American Indian?', (1979) 9 *California Western International Law Journal*, p. 271

'International Law and the Holocaust', (1979) 9 *California Western International Law Journal*, p. 202

'International Law and the Holocaust', in Byron Sherwin, ed., *Encountering the Holocaust*, New York: Hebrew Publishing Co., 1979, pp. 146–88

'United States Involvement in Vietnam', (1979) 9 *California Western International Law Journal*, p. 274

A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal, Dordrecht and Boston: Martinus Nijhoff, 1987

'Genocide, the Convention, Domestic Laws and New Responsibilities: Prospects for Implementation of the Genocide Convention Under State Laws', (1989) 83 *Proceedings of the American Society of International Law*, p. 314

'Commentary on the International Law Commission's 1991 Draft Code of Crimes against the Peace and Security of Mankind', (1993) 11 *Nouvelles études pénales*, p. 233

'The History of the Draft Code of Crimes Against the Peace and Security of Mankind', (1993) 27 *Israel Law Review*, p. 247

'"Crimes Against Humanity": The Need for a Specialized Convention', (1994) 31 *Columbia Journal of Transnational Law*, p. 457

'The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia', (1994) 5 *Criminal Law Forum*, p. 279

'From Versailles to Rwanda: The Need to Establish a Permanent International Criminal Court', (1996) 10 *Harvard Human Rights Journal*, p. 1

'International Crimes: Jus Cogens and Obligatio Erga Omnes', (1996) 59 *Law and Contemporary Problems*, p. 63

Crimes Against Humanity, 2nd edn, Dordrecht, Boston and London: Martinus Nijhoff, 1999

Bassiouni, M. Cherif, and Manikas, Peter, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, Irvington-on-Hudson, NY: Transnational Publishers, 1995

Bauer, Yehuda, 'Whose Holocaust', in Jack Nusan Porter, *Genocide and Human Rights: A Global Anthology*, Lanham, MD, New York and London: University Press of America, 1982, pp. 35–45

Bauman, Zygmunt, *Modernity and the Holocaust*, Ithaca, NY: Cornell University Press, 1989

Becker, Peter H. F., 'Current Developments: The 1995 Judicial Activity of the International Court of Justice', (1996) 90 *American Journal of International Law*, p. 328

Bedau, Hugo Adam, 'Genocide in Vietnam?', in V. Held, S. Morgenbesser and T. Nagel, eds., *Philosophy, Morality, and International Affairs*, New York: Oxford University Press, 1974, pp. 3–46

Behrens, Paul, 'A Moment of Kindness? Consistency and Genocidal Intent', in Ralph Henham and Paul Behrens, eds., *The Criminal Law of Genocide*, Aldershot: Ashgate, 2007, pp. 119–34

Bekker, Peter H. F., and Szasz, Paul C., 'Casenote: Application of the Convention on the Prevention and Punishment of the Crime of Genocide', (1997) 91 *American Journal of International Law*, p. 121

Bell-Fialkoff, Andrew, 'A Brief History of Ethnic Cleansing', (1993) *Foreign Affairs*, Summer, pp. 110–21

Ben-Naftali, Orna, and Miri Sharon, 'What the ICJ Did Not Say About the Duty to Punish Genocide: The Missing Pieces in a Puzzle', (2007) 5 *Journal of International Criminal Justice*, p. 859

Benavides, Luis, 'Introductory Note to Supreme Court of Spain: Judgment on the Guatemalan Genocide Case', (2003) 42 *International Legal Materials*, p. 683

Berat, Lynn, 'Genocide: The Namibian Case Against Germany', (1993) 5 *Pace International Law Review*, p. 165

Beres, Louis René, 'After the Gulf War: Iraq, Genocide and International Law', (1991) 69 *University of Detroit Mercy Law Review*, p. 13

'After the Gulf War: Prosecuting Iraqi Crimes Under the Rule of Law', (1991) 24 *Vanderbilt Journal of Transnational Law*, p. 487

'Genocide, Death and Anxiety: A Jurisprudential/Psychiatric Analysis', (1996) 10 *Temple International and Comparative Law Journal*, p. 281

'Genocide, Law and Power Politics', (1988) 10 *Whittier Law Review*, p. 329

'Justice and Realpolitik: International Law and the Prevention of Genocide', (1988) 33 *American Journal of Jurisprudence*, p. 123

'Genocide, State and Self', (1989) 18 *Denver Journal of International Law and Policy*, p. 37

'International Law, Personhood and the Prevention of Genocide', (1989) 11 *Loyola International and Comparative Law Journal*, p. 25

Berle, A. A., 'Mise hors de loi du genocide', (1950) 21 *Revue internationale de droit public*, p. 147

Bettati, Mario, 'Biafra, Bengal, and Beyond: International Responsibility and Genocide Conflict: A Panel Discussion', [1972] *Proceedings ASIL*, p. 89

Le droit d'ingérence, Mutation de l'ordre international, Paris: Editions Odile Jacob, 1996, pp. 284–305

Bilder, Richard J., 'Can Minority Treaties Work?', (1990) 20 *Israel Yearbook of Human Rights*, p. 71

Billig, Joseph, *L'Allemagne et le genocide: plans et realisations nazis*, Paris: Editions du Centre, 1950

Bishop, William B., 'Reservations to the Convention on Genocide', (1951) 45 AJIL, p. 579

Blischenko, Igor P., 'Modern International Law and Genocide', (1969) 16–17 *Etudes internationales de psycho-sociologie criminelle*, p. 15

Bloxham, Donald, *The Great Game of Genocide*, Oxford: Oxford University Press, 2005

Boisson de Chazournes, Laurence, 'Les ordonnances en indication de mesures conservatoires dans l'affaire relative à l'application de la convention pour la prévention et la répression du crime de génocide', (1993) 39 *Annuaire français de droit international*, p. 514

Boot, Machteld, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, Antwerp, Oxford and New York: Intersentia, 2002

Boyle, Francis A., *The Bosnian People Charge Genocide: Proceedings at the International Court of Justice Concerning Bosnia v. Serbia on the Prevention and Punishment of the Crime of Genocide*, Amherst, MA: Aletheia Press, 1996

Braeckman, Colette, *Rwanda, Histoire d'un génocide*, Paris: Fayard, 1994

Terreur africaine, Paris: Fayard, 1996

'Incitement to Genocide', in Roy Gutman and David Rieff, eds., *Crimes of War: What the Public Should Know*, New York: Norton, 1999, pp. 192–4

Brauman, Rony, *Devant le mal: Rwanda, un genocide en direct*, Paris: Arlea: Diffusion Le Seuil, 1994

Broadcasting Genocide: Censorship, *Propaganda and State-Sponsored Violence in Rwanda 1990–1994*, London: Article 19, 1996

Browne, Marjorie Ann, *The Genocide Convention: A Background Report on the United Nations Convention on the Prevention and Punishment of the Crime of Genocide*, Washington: Congressional Research Service, Library of Congress, 1976

Browning, Christopher R., *The Path to Genocide: Essays on Launching the Final Solution*, Cambridge: Cambridge University Press, 1992

Brownlie, Ian, 'Eichmann: A Further Comment', [1962] *Criminal Law Review*, p. 817

Bruun, Lori Lyman, 'Beyond the 1948 Convention – Emerging Principles of Genocide in Customary International Law', (1993) 17 *Maryland Journal of International Law and Trade*, p. 193

Bryant, B., and Jones, R., 'Codification of Customary International Law in the Genocide Convention', (1975) 16 *Harvard International Law Journal*, p. 686

'The United States and the 1948 Genocide Convention', (1975) 16 *Harvard International Law Journal*, p. 683

Burkhalter, Holly, 'The Question of Genocide: The Clinton Administration and Rwanda', (1994–5) *World Policy Journal*, Winter, p. 46

Burleich, Michael, *Ethics and Extermination: Reflections on Nazi Genocide*, Cambridge: Cambridge University Press, 1997

Burnette, Weston D., 'Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra', (1985) 107 *Military Law Review*, pp. 71–189

Buti, Tony, 'Kruger and Bray and the Common Law', (1998) 21 *University of New South Wales Law Journal*, p. 231

Byamukama, Shivon, and Kapranos Huntley, John A., 'Criminal Justice in the Aftermath of the 1994 Rwanda Genocide', in Ralph Henham and Paul Behrens, eds., *The Criminal Law of Genocide*, Aldershot: Ashgate, 2007, pp. 221–34

Byron, Christine, 'The Crime of Genocide', in D. McGoldrick, P. Rowe and E. Donnelly, eds., *The Permanent International Criminal Court*, Oxford: Hart, 2004, pp. 143–77

Cardozo, M. H., 'When Extradition Fails, Is Abduction the Solution?', (1960) 55 *American Journal of International Law*, p. 127

Carzou, Jean-Marie, *Un génocide exemplaire, Armenie 1915*, Paris: Flammarion, 1975

Cassese, Antonio, *Violence and Law in the Modern Age*, Princeton, NJ: Princeton University Press, 1988

'La Communauté internationale et le génocide', in *Le droit international au service de la paix, de la justice et du développement, Mélanges Michel Virally*, Paris: Pedone, 1991, pp. 183–94

'The International Tribunal for the Former Yugoslavia and the Implementation of International Humanitarian Law', in Luigi Condorelli, Anne-Marie La Rosa and Sylvie Scherrer, eds., *Les Nations Unies et le droit international humanitaire*, Paris: Editions Pedone, 1997, pp. 229–48

International Criminal Law, Oxford: Oxford University Press, 2000

ed., *The Rome Statute of the International Criminal Court*, Oxford: Clarendon Press, 2000

'Genocide', in Antonio Cassese, Paola Gaeta and John R. W. D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, Oxford: Oxford University Press, 2002, pp. 335–51

'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide', (2007) 5 *Journal of International Criminal Justice*, p. 875

Cayci, Sadi, 'Armenian Genocide Claims: A Contextual Version of the 1915 Incidents', in Ralph Henham and Paul Behrens, eds., *The Criminal Law of Genocide*, Aldershot: Ashgate, 2007, pp. 15–27

Ceterchi, Ioan, 'La répression du crime de génocide dans le droit de la République socialiste de Roumanie', (1969) 16–17 *Etudes internationales de psychosociologie criminelle*, p. 21

Chalandon, Sorj, and Nivelle, Pascale, *Crimes contre l'humanité; Barbie Touvier Bousquet Papon*, Paris: Plon, 1998

Chaliand, Gerard, and Ternon, Yves, *Le génocide des Arméniens*, Paris: Editions Complexe, 1980

Chalk, Frank, 'Definitions of Genocide and Their Implications for Prediction and Prevention', (1989) 4 *Holocaust and Genocide Studies*, p. 149

'Redefining Genocide', in George J. Andreopoulos, *Genocide, Conceptual and Historical Dimensions*, Philadelphia: University of Pennsylvania Press, 1994, pp. 47–63

'Hate Radio in Rwanda', in Howard Adelman and Astri Suhrke, eds., *The Path of a Genocide: The Rwanda Crisis from Uganda to Zaire*, New Brunswick, NJ, and London: Transaction, 1999, pp. 93–110

Chalk, Frank, and Jonassohn, Kurt, 'The Conceptual Framework', in Frank Chalk and Kurt Jonassohn, eds., *The History and Sociology of Genocide*, New Haven and London: Yale University Press, 1990, pp. 3–43

The History and Sociology of Genocide: Analyses and Case Studies, New Haven: Yale University Press, 1990

Chamberlain, Mike, 'The People of East Timor', in Jack Nusan Porter, ed., *Genocide and Human Rights: A Global Anthology*, Lanham, MD, New York and London: University Press of America, 1982, pp. 238–43

Charny, Israel W., 'A Genocide Early Warning System', in Jack Nusan Porter, ed., *Genocide and Human Rights: A Global Anthology*, Lanham, MD, New York and London: University Press of America, 1982, pp. 297–305

ed., *Toward the Understanding and Prevention of Genocide, Proceedings of the International Conference on the Holocaust and Genocide*, Boulder, CO, and London: Westview Press, 1984

ed., *Genocide – A Critical Bibliographic Review*, New York: Facts on File, 1988 and 1991

ed., *The Widening Circle of Genocide*, New Brunswick, NJ, and London: Transaction Publishers, 1994

'Toward a Generic Definition of Genocide', in George J. Andreopoulos, ed., *Genocide: Conceptual and Historical Dimensions*, Philadelphia: University of Pennsylvania Press, 1994, pp. 64–94

Charny, Israel W., and Rapaport, Chanan, *How Can We Commit the Unthinkable?: Genocide, the Human Cancer*, Boulder, CO: Westview Press, 1982

Chaumont, Jean-Michel, *La concurrence des victimes: génocide, identité, reconnaissance*, Paris: La Découverte, 1997

Chorbajian, Leon A., 'Massacre or Genocide: An Essay in Personal Biography', in Jack Nusan Porter, ed., *Genocide and Human Rights: A Global Anthology*,

Lanham, MD, New York and London: University Press of America, 1982, pp. 116–28

Chrétien, Jean-Pierre, *Le défi de l'ethnisme; Rwanda et Burundi: 1990–1996*, Paris: Karthala, 1997

Chrétien, Jean-Pierre, Dupaquier, J.-F., Kabanda, M., and Ngarambe, J., *Rwanda: les médias du génocide*, Paris: Karthala, 1995

Chrisopoulos, Paul John, 'Giving Meaning to the Term "Genocide" as It Applies to US Immigration Policy', (1995) 17 *Loyola of Los Angeles International and Comparative Law Journal*, p. 925

Chua, Adrian, and Hardcastle, Rohan, 'Retroactive Application of Treaties Revisited: Bosnia-Herzegovina v. Yugoslavia', (1997) 44 *Netherlands International Law Review*, p. 414

Cigar, Norman, *Genocide in Bosnia: The Policy of Ethnic Cleansing*, College Station, TX: Texas A&M University Press, 1995

Cisse, Catherine, 'The End of a Culture of Impunity in Rwanda? Prosecution of Genocide and War Crimes before Rwandan Courts and the International Criminal Tribunal for Rwanda', (1998) 1 *Yearbook of International Humanitarian Law*, p. 161

Clark, Roger S., 'Does the Genocide Convention Go Far Enough? Some Thoughts on the Nature of Criminal Genocide in the Context of Indonesia's Invasion of East Timor', (1981) 8 *Ohio Northern University Law Review*, p. 321

'Crimes Against Humanity at Nuremberg', in G. Ginsburgs and V. N. Kudriavstsev, eds., *The Nuremberg Trial and International Law*, Dordrecht and Boston: Martinus Nijhoff, 1990, pp. 177–212

Cohen, Roger, 'Ethnic Cleansing', in Roy Gutman and David Rieff, eds., *Crimes of War: What the Public Should Know*, New York: Norton, 1999, pp. 136–8

Cohn, Norman, *Warrant for Genocide*, New York: Harper & Row, 1967

Colmenares Vargas, Octavio, *El delito de genocidio*, Mexico City: Editorial Stylo, 1951

Combs, Nancy Amoury, 'Copping a Plea to Genocide: The Plea Bargaining of International Crimes', (2002) 151 *University of Pennsylvania Law Review*, p. 1

Comer, J. D., 'Eichmann Trial: Historic Justice', (1961) 23 *Georgia Bar Journal*, p. 491

Conot, Robert E., *Justice at Nuremberg*, New York: Harper & Row, 1983

Cooper, Belinda, ed., *War Crimes: The Legacy of Nuremberg*, New York: TV Books, 1999

Cousineau, Marc, 'L'établissement de l'état de droit au Rwanda: un but irréalisable', (1996–97) 28 *Ottawa Law Review*, p. 171

Cox, Marcus, 'The Right to Return Home: International Intervention and Ethnic Cleansing in Bosnia and Herzegovina', (1998) 47 *International and Comparative Law Quarterly*, p. 599

Craven, Matthew C. R., 'The Genocide Case, the Law of Treaties and State Succession', (1997) 68 *British Yearbook of International Law*, p. 127

Crawford, James, 'The ILC's Draft Statute of an International Tribunal', (1994) 88 *American Journal of International Law*, p. 140

'The ILC Adopts a Statute for an International Criminal Court', (1995) 89 *American Journal of International Law*, p. 404

Cronin, D., 'Bosnia-Serb Leader May be Found Personally Liable for Acts of Genocide, War Crimes and Crimes against Humanity', (1997) 10 *New York International Law Review*, p. 215

Cushman, Thomas, and Stjepan, G., eds., *This Time We Knew: Western Responses to Genocide in Bosnia*, New York: New York University Press, 1996

Dadrian, Vahakn N., 'A Typology of Genocide', (1975) 5 *International Review of Modern Sociology*, p. 201

'The Comparative Aspects of the Armenian and Jewish Cases of Genocide: A Reinterpretation of the Concept of Holocaust', (1988) 3 *Holocaust and Genocide Studies*, p. 151

'Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications', (1989) 14 *Yale Journal of International Law*, p. 221

'The Documentation of the World War I Armenian Massacres in the Proceedings of the Turkish Military Tribunal', (1991) 23 *International Journal of Middle East Studies*, p. 549

German Responsibility in the Armenian Genocide, Watertown, MA: Blue Crane Books, 1996

'The Turkish Military Tribunal's Prosecution of the Authors of the Armenian Genocide: Four Major Court-Martial Series', (1997) 11 *Holocaust and Genocide Studies*, p. 28

'The Historical and Legal Interconnections Between the Armenian Genocide and the Jewish Holocaust: From Impunity to Retributive Justice', (1998) 23 *Yale Journal of International Law*, p. 504

Warrant for Genocide: Key Elements of Turko-Armenian Conflict, New Brunswick, NJ: Transaction, 1999

Daes, E. A., 'Protection of Minorities under the Genocide Convention', in *Xenion, Festschrift für Pan J. Zepos*, Vol. II, Athens: Katsikalis Verlaf, 1973

Dallaire, Roméo, and Manocha, Kishan, 'The Major Powers and the Genocide in Rwanda', in Ralph Henham and Paul Behrens, eds., *The Criminal Law of Genocide*, Aldershot: Ashgate, 2007, pp. 57–68

D'Amato, Anthony, 'Defending a Person Charged with Genocide', (2000) 1 *Chicago Journal of International Law*, p. 459

Dana, Shahram, 'Genocide, Reconciliation and Sentencing in the Jurisprudence of the ICTY', in Ralph Henham and Paul Behrens, eds., *The Criminal Law of Genocide*, Aldershot: Ashgate, 2007, pp. 249–65

Daniels, Mike, 'Assessing the Genocide and Political Mass Murder Framework: The Case of Uzbekistan', (2005) 37 *George Washington International Law Review*, pp. 917–48

Dautricourt, J. Y., 'La prévention du génocide et ses fondements juridiques', (1969) 14–15 *Etudes internationales de psycho-sociologie criminelle*, p. 20

Daverat, G., 'Réflexion sur une tentative de "génocide économique"', [1984] *Gazette du palais (doct.)*, p. 84

David, Eric, *Principes de droit des conflits armés*, 2nd edn, Brussels: Bruylant, 1999

Davidson, Eugene, *The Trial of the Germans*, New York: Macmillan, 1966

Davies, Norman, *Europe, A History*, London: Pimlico, 1997

Dawidowicz, Lucy S., *The War Against the Jews, 1933–1945*, New York: Holt, Rinehart & Winston, 1975

The Holocaust and the Historians, Cambridge: Cambridge University Press, 1977

de Asua, Luis Jimenez, Pella, Vespasien, and Arroyo, Manuel Lopez-Rey, eds., *Ve Conférence internationale pour l'unification du droit pénal, Actes de la Conférence*, Paris: Pedone, 1935

de Azcarate, P., *The League of Nations and National Minorities*, Washington: Carnegie Endowment, 1945

de Londras, Fiona, 'Telling Stories and Hearing Truths: Providing an Effective Remedy to Genocidal Sexual Violence against Women', in Ralph Henham and Paul Behrens, eds., *The Criminal Law of Genocide*, Aldershot: Ashgate, 2007, pp. 107–17

de Mildt, Dick, *In the Name of the People: Perpetrators of Genocide in the Reflection of Their Post-War Prosecution in West Germany, the 'Euthanasia' and 'Aktion Reinhard' Trial Cases*, The Hague, London and Boston: Martinus Nijhoff Publishers, 1996

De Nike, Howard J., Quigley, John, and Robinson, Kennetth J., *Genocide in Cambodia: Documents from the Trial of Pol Pot Ieng Sary*, Philadelphia, University of Pennsylvania Press, 2000

De Weese, G. S., 'The Failure of the International Court of Justice to Effectively Enforce the Genocide Convention', (1998) 26 *Denver Journal of International Law and Policy*, p. 625

De Zayas, A., 'International Law and Mass Population Transfers', (1975) 16 *Harvard International Law Journal*, p. 207

Nemesis at Potsdam: The Expulsion of the Germans from the East, Lincoln, NE: University of Nebraska Press, 1989

Deehr, Maya S., 'A Proposal for the International Monitoring of Potential Genocide Conditions', (1991) 9 *Wisconsin International Law Journal*, p. 491

Des Forges, Alison, 'Documenting Horror: The Administration of the Rwandan Genocide', in Belinda Cooper, ed., *War Crimes: The Legacy of Nuremberg*, New York: TV Books, 1999, pp. 139–53

Leave None to Tell the Story: Genocide in Rwanda, New York, Washington, London and Brussels: Human Rights Watch; and Paris: International Federation of Human Rights, 1999

Destexhe, Alain, *Rwanda, essai sur le genocide*, Brussels: Editions Complexe, 1994

Rwanda and Genocide in the Twentieth Century, New York: New York University Press, 1995

Destexhe, Alain, and Boutros-Ghali, Boutros, *Rwanda and Genocide in the Twentieth Century*, New York: New York University Press, 1995

Diessenbacher, Harmut, 'Explaining the Genocide in Rwanda', (1995) 52 *Law and State*, p. 59

Diez de Velasco, Manuel, 'El sexto dictamen des Tribunal internacional de Justicia: Las reservas a la Convencion sobre el genocidio', (1951) 4 *Revista Espanola de Derecho Internacional*, p. 1029

Dobkowski, Michael N., and Wallimann, Isidor, *Genocide in Our Time: An Annotated Bibliography with Analytical Introductions*, Ann Arbor: Pierian Press, 1992

Donnedieu de Vabres, Henri, 'La répression du "génocide"', [1948] *Recueil Dalloz*, p. 145

Donnelly, Jack, 'Genocide and Humanitarian Intervention', (2002) 1 *Journal of Human Rights*, p. 93

Drost, Pieter Nicolaas, *Genocide: United Nations Legislation on International Criminal Law*, Leyden: A. W. Sythoff, 1959

Drumbl, Mark A., 'Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials', (1998) 29 *Columbia Human Rights Law Review*, p. 545

'Punishment, Postgenocide: From Guilt to Shame to *Civis* in Rwanda', (2000) 75 *New York University Law Review*, p. 1221

Atrocity, Punishment and International Law, Cambridge: Cambridge University Press, 2007

Dubois, Olivier, 'Rwanda's National Criminal Courts and the International Tribunal', (1997) 321 *International Review of the Red Cross*, p. 717

Dunn, James, 'The Cambodian Genocide: Issues and Responses', in George J. Andreopoulos, ed., *Genocide: Conceptual and Historical Dimensions*, Philadelphia: University of Pennsylvania Press, 1994, pp. 171–90

Dupaquier, J.-F., ed., *La justice internationale face au drame rwandais*, Paris: Karthala, 1996

Dzubow, Jason A., 'The International Response to the Civil War in Rwanda', (1994) 8 *Georgetown Immigration Law Journal*, p. 513

Eboe-Osuji, Chile, '"Complicity in Genocide" versus "Aiding and Abetting Genocide": Construing the Difference in the ICTR and ICTY Statutes', (2005) 3 *Journal of International Criminal Justice*, p. 56

Edwards, Richard W., 'Contributions of the Genocide Convention to the Development of International Law', (1981) 8 *Ohio Northern University Law Review*, p. 300

Ehard, Hans, 'The Nuremberg Trial Against the Major War Criminals and International Law', (1949) 43 *American Journal of International Law*, p. 223

Eltringham, Nigel, *Accounting for Horror: Post-Genocide Debates in Rwanda*, London: Pluto, 2004

Evans, Glynne, *Responding to Crises in the African Great Lakes*, Oxford: Oxford University Press, 1997

Falk, Richard A., 'Ecocide, Genocide and the Nuremberg Tradition of Individual Responsibility', in V. Held, S. Morgenbesser and T. Nagel, eds., *Philosophy, Morality, and International Affairs*, New York: Oxford University Press, 1974, pp. 123–37

Fawcett, J. E. S., 'The Eichmann Case', (1962) 38 *British Yearbook of International Law*, p. 181

Feil, Scott R., *Preventing Genocide: How the Early Use of Force Might Have Succeeded in Rwanda*, Washington: Carnegie Commission on Preventing Deadly Conflict, 1998

Fein, Helen, *Accounting for Genocide: National Responses and Jewish Victimization During the Holocaust*, New York: Free Press, 1979

'On Preventing Genocide', in Jack Nusan Porter, ed., *Genocide and Human Rights: A Global Anthology*, Lanham, MD, New York and London: University Press of America, 1982, pp. 269–79

'Scenarios of Genocide: Models of Genocide and Critical Responses', in Israel W. Charny, ed., *Toward the Understanding and Prevention of Genocide*, Boulder, CO: Westview Press, 1984, pp. 3–31

'Genocide: A Sociological Perspective', (1990) 38 *Current Sociology*, p. 1

'Discriminating Genocide from War Crimes: Vietnam and Afghanistan Reexamined', (1993) 22 *Denver Journal of International Law and Policy*, p. 29

Genocide: A Sociological Perspective, Newbury Park, CA: Sage Publications, 1993

ed., *Genocide Watch*, New Haven: Yale University Press, 1991

'Genocide, Terror, Life Integrity, and War Crimes', in George J. Andreopoulos, ed., *Genocide, Conceptual and Historical Dimensions*, Philadelphia: University of Pennsylvania Press, 1994, pp. 95–107

ed., *The Prevention of Genocide: Rwanda and Yugoslavia Reconsidered*, New York: Institute for the Study of Genocide, 1994

Feinberg, Nathan, *La question des minorités à la Conférence de la paix de 1919–1920 et l'action juive en faveur de la protection internationale des minorités*, Paris: Librairie Arthur Rousseau, 1929

Ferstman, Carla J., 'Rwanda's Domestic Trials for Genocide and Crimes Against Humanity', (1997) 5 *Human Rights Brief*, p. 1

Ficowski, Jerzy, 'The Fate of Polish Gypsies', in Jack Nusan Porter, ed., *Genocide and Human Rights: A Global Anthology*, Lanham, MD, New York and London: University Press of America, 1982, pp. 166–78

Finch, George A., 'The Genocide Convention', (1949) 43 *American Journal of International Law*, p. 732

'La Convention sur le génocide', (1950) 21 *Revue internationale de droit public*, p. 153

Finkielkraut, Alain, *L'avenir d'une négation: réflexion sur la question du génocide*, Paris: Seuil, 1982

Fisher, Siobhan K., 'Occupation of the Womb: Forced Impregnation as Genocide', (1996) 46 *Duke Law Journal*, p. 91

Fletcher, George P., *Re-thinking Criminal Law*, Boston: Little, Brown, 1978

Basic Concepts of Criminal Law, New York: Oxford University Press, 1998

Fletcher, George P., and Ohlin, Jens, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', (2005) 3 *Journal of International Criminal Justice*, p. 539

Fletcher, L., 'Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence', (2001) 19 *Berkeley Journal of International Law*, p. 428

Flynn, M., 'Genocide: It's a Crime Everywhere, But Not in Australia', (2000) 59 *University of Western Australia Law Review*, p. 29

Fournet, Caroline, 'Reflection on the Separation of Powers: The Law of Genocide and the Symptomatic French Paradox', in Ralph Henham and Paul Behrens, eds., *The Criminal Law of Genocide*, Aldershot: Ashgate, 2007, pp. 203–14

France, Assemblée Nationale, *Rapport d'information déposé en application de l'article 145 du Règlement par la Mission d'information de la Commission de la défense nationale et des forces armées et de la Commission des affaires étrangères, sur les opérations militaires menées par la France, d'autres pays et l'ONU au Rwanda entre 1990 et 1994*, Paris, 1999

Frankowska, M., 'The United States Should Withdraw its Reservations to the Genocide Convention: A Response to Professor Paust's Proposal', (1990) 12 *Michigan Yearbook of International Law*, p. 141

Freedman, Warren, *Genocide: A People's Will to Live*, Buffalo, NY: W. S. Hein, 1992

Friedman, Philip, 'The Extermination of the Gypsies', in Jack Nusan Porter, ed., *Genocide and Human Rights: A Global Anthology*, Lanham, MD, New York and London: University Press of America, 1982, pp. 151–7

Fry, James D., 'Terrorism as a Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction', (2002) 7 *UCLA Journal of International Law and Foreign Affairs*, p. 169

Gaeta, Paola, 'Génocide d'Etat et responsabilité pénale individuelle', (2007) 111 *Revue générale de droit international public*, p. 272

Gaffikin, Ben, 'The International Court of Justice and the Crisis in the Balkans: Case Concerning Application of the Convention on the Prevention and

Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), 32 ILM 1599 (1993)', (1995) 17 *Sydney Law Review*, p. 458

Gales, R. R., 'Genocide, Israeli Law', (1968) 42 *North Dakota Law Review*, p. 418

Gallagher, Hugh Gregory, 'Holocaust: The Genocide of Disabled Peoples', in Samuel Totten, William S. Parsons and Israel W. Charny, eds., *Genocide in the Twentieth Century*, New York and London: Garland Publishing, 1995, pp. 265–98

'Genocide: A Commentary on the Convention', (1949) 58 *Yale Law Journal*, p. 1142

Gallavin, Chris, 'ICC Investigations and a Hierarchy of Referrals: Has Genocide in Darfur Been Predetermined?', in Ralph Henham and Paul Behrens, eds., *The Criminal Law of Genocide*, Aldershot: Ashgate, 2007, pp. 157–66

Gattini, Andrea, 'Evidentiary Issues in the ICJ's Genocide Judgment', (2007) 5 *Journal of International Criminal Justice*, p. 889

Gellately, Robert, and Kiernan, Ben, *The Specter of Genocide: Mass Murder in Historical Perspective*, Cambridge: Cambridge University Press, 2003

German War Trials, *Report of Proceedings before the Supreme Court in Leipzig*, London: His Majesty's Stationery Office, 1921

Gil Gil, Alicia, *El Genocidio y otros crímenes internacionales*, Valencia: Centro Francisco Tomás y Valiente, 1999

Gillet, Eric, 'Le génocide devant la justice', (1995) *Les temps modernes*, No. 583, July–August, pp. 228–71

'La compétence universelle est-elle applicable?', in A. Destexhe and M. Foret, eds., *De Nuremberg à la Haye et Arusha*, Brussels: Bruylant, 1997, pp. 113–20

Glaser, Stefan, *A l'étude du droit international pénal*, Brussels: Bruylant; Paris: Sirey, 1954

Droit international pénal conventionnel, Brussels: Bruylant, 1970

Goldhagen, Daniel Jonah, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust*, New York: Alfred A. Knopf, 1996

Gollancz, Victor, *The Case of Adolf Eichmann*, London, 1961

Golsan, Richard J., *Memory, the Holocaust and French Justice: The Bousquet and Touvier Affairs*, Hanover, NH, and London: University Press of New England, 1996

Gopalini, Ameer E., 'International Standard of Direct and Public Incitement to Commit Genocide: An Obstacle to US Ratification of the International Criminal Court Statute?', (2001) 32 *California Western International Law Journal*, p. 87

Gordon, Melissa, 'Justice on Trial: The Efficacy of the International Tribunal for Rwanda', (1995) 1 *ILSA Journal of International and Comparative Law*, p. 217

Gordon, William C., 'International Law – Self-Executing Treaties – The Genocide Convention: Examination of Arguments of Opponents of the Convention', (1950) 48 *Michigan Law Review*, p. 852

Gorove, Stephen, 'The Problem of "Mental Harm" in the Genocide Convention', (1951) 4 *Saskatchewan University Law Quarterly*, p. 174

Gourevitch, Philip, 'The Genocide Fax', *New Yorker*, 11 May 1998, pp. 42–6

We Wish to Inform You That Tomorrow We Will Be Killed with Our Families: Stories from Rwanda, New York: Farrar Straus and Giroux, 1998

Gouri, Haim, *Facing the Glass Booth: The Jerusalem Trial of Adolf Eichmann*, Detroit: Wayne State University Press, 2004

Gowland-Debbas, Vera, 'The Right to Life and Genocide: The Court and an International Public Policy', in Philippe Sands and Laurence Boisson de Chazournes, eds., *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge: Cambridge University Press, 1999, pp. 315–37

Grant, Thomas D., 'Territorial Status, Recognition, and Statehood: Some Aspects of the Genocide Case (Bosnia and Herzegovina v. Yugoslavia)', (1997) 33 *Stanford Journal of International Law*, p. 305

Graven, Jean, 'Les crimes contre l'Humanité', (1950) 76 *Recueil des cours de l'académie du droit international de la Haye*, p. 427

Gray, Christine, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))', (1994) 43 *International and Comparative Law Quarterly*, p. 704

Green, L. C., 'The Eichmann Case', (1960) 23 *Modern Law Review*, p. 507

'Political Offences, War Crimes and Extradition', (1962) 11 *International and Comparative Law Quarterly*, p. 329

'Aspects juridiques du Procès Eichmann', (1963) 9 *Annuaire français de droit international*, p. 150

'Legal Issues of the Eichmann Trial', [1963] *Tulane Law Review*, p. 641

'Superior Orders and the Reasonable Man', (1970) 8 *Canadian Yearbook of International Law*, p. 61

'International Crimes and the Legal Process', (1980) 29 *International and Comparative Law Quarterly*, p. 567

'Superior Orders and Command Responsibility', (1989) 27 *Canadian Yearbook of International Law*, p. 167

'The Defence of Superior Orders in the Modern Law of Armed Conflict', (1993) 31 *Alberta Law Review*, p. 320

'Command Responsibility in International Humanitarian Law', (1995) 5 *Transnational Law and Contemporary Problems*, p. 319

'Crimes under the ILC 1991 Draft Code', in Yoram Dinstein and Mala Tabory, eds., *War Crimes in International Law*, The Hague, Boston and London: Martinus Nijhoff Publishers, 1996, pp. 19–40

'Drazen Erdemović: The International Criminal Tribunal for the Former Yugoslavia in Action', (1997) 10 *Leiden Journal of International Law*, p. 363

Greenawalt, Alexander, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation', (1999) 99 *Columbia Law Review*, p. 2288

Guichaoua, Andre, ed., *Les crises politiques au Burundi et au Rwanda, 1993–1994: analyses, faits et documents*, Villeneuve d'Ascq: Université des sciences et technologies de Lille, Faculté des sciences économiques et sociales; Paris: Diffusion Karthala, 1995

Haas, Michael, *Genocide by Proxy: Cambodian Pawn on a Superpower Chessboard*, New York: Praeger, 1991

Hagan, J., Rymond-Richmond, W., and Parker, P., 'The Criminology of Genocide: The Death and Rape of Darfur', (2005) 43 *Criminology* p. 525

Hampsch, George H., *Preventing Nuclear Genocide: Essays on Peace and War*, New York: P. Lang, 1988

Hannum, Hurst, 'International Law and Cambodian Genocide: The Sounds of Silence', (1989) 11 *Human Rights Quarterly*, p. 82

Harff, Barbara, *Genocide and Human Rights: International Legal and Political Issues*, Denver: Graduate School of International Studies, University of Denver, 1984

'Recognizing Genocides and Politicides', in Helen Fein, ed., *Genocide Watch*, New Haven: Yale University Press, 1991, pp. 27–41

Harff, Barbara, and Gurr, Ted Robert, 'Victims of the States: Genocides, Politicides and Group Repression Since 1945', (1989) 1 *International Review of Victimology*, p. 23

Harhoff, Frederik, 'The Rwanda Tribunal: A Presentation of Some Legal Aspects', (1997) 321 *International Review of the Red Cross*, p. 665

Hausner, Gideon, *Justice in Jerusalem*, New York: Schocken Books, 1966

Henham, Ralph, 'The Normative Context of Sentencing for Genocide', in Ralph Henham and Paul Behrens, eds., *The Criminal Law of Genocide*, Aldershot: Ashgate, 2007, pp. 235–48

Hieronymi, Otto, 'The Evasion of State Responsibility and the Lessons from Rwanda: The Need for a New Concept of Collective Security', (1996) 9 *Journal of Refugee Studies*, p. 230

Hirsh, David, *Law Against Genocide: Cosmopolitan Trials*, London, Sydney and Portland, OR: Glasshouse Press, 2003

Hirsch, Herbert, *Genocide and the Politics of Memory: Studying Death to Preserve Life*, Chapel Hill, NC: University of North Carolina Press, 1995

Honig, Jan Willem, *Srebrenica: Record of a War Crime*, New York: Penguin Books, 1997

Horowitz, Irving Louis, *Taking Lives: Genocide and State Power*, 4th edn, New Brunswick, NJ: Transaction Publishers, 1997

Hoss, Christina, and Miller, Russell A., 'German Federal Constitutional Court and Bosnian War Crimes: Liberalizing Germany's Genocide Jurisprudence', (2001) 44 *German Yearbook of International Law*, p. 576

Housepian, Marjorie, 'The Unremembered Genocide', in Jack Nusan Porter, ed., *Genocide and Human Rights: A Global Anthology*, Lanham, MD, New York and London: University Press of America, 1982, pp. 99–115

Hovannisian, Richard G., *The Armenian Genocide in Perspective*, New Brunswick, NJ: Transaction, 1986

ed., *The Armenian Genocide: History, Politics, Ethics*, New York: St Martin's Press, 1991

Howland, Todd A., 'Mirage, Magic, or Mixed Bag? The United Nations High Commissioner for Human Rights' Field Operation in Rwanda', (1999) 21 *Human Rights Quarterly*, p. 1

Howland, Todd A., and Calathes, William, 'The UN's International Criminal Tribunal: Is It Justice or Jingoism for Rwanda? A Call for Transformation', (1998) 39 *Virginia Journal of International Law*, p. 134

Hudson, Manley O., 'The Twenty-Ninth Year of the World Court: Reservations to the Genocide Convention, Jurisdiction under the Genocide Convention', (1951) 45 *American Journal of International Law*, p. 1

'The Thirtieth Year of the World Court: Reservations to the Genocide Convention', (1952) 46 *American Journal of International Law*, p. 1

Human Rights Watch/Middle East, *Iraq's Crime of Genocide: The Anfal Campaign against the Kurds*, New Haven: Yale University Press, 1995

Hurlock, William L., 'The International Court of Justice: Effectively Providing a Long Overdue Remedy for Ending State-Sponsored Genocide (Bosnia-Herzegovina v. Yugoslavia)', (1997) 12 *American University Journal of International Law and Policy*, p. 2

Isenberg, Beth Ann, 'Genocide, Rape and Crimes Against Humanity: And Affirmation of Individual Accountability in the Former Yugoslavia in the Karadžić Actions', (1997) 60 *Albany Law Review*, p. 1051

Jack, Toby N., 'Sudan's Genocide: Punishment Before Prevention', (2006) 24 *Penn State International Law Review*, p. 707

Jacobs, N., 'A propos de la définition juridique du génocide', (1969) 16–17 *Etudes internationales de psychologie-sociologie criminelle*, p. 56

Jaulin, Robert, *La paix blanche; introduction à l'ethnocide*, Paris: Editions du Seuil, 1970

ed., *L'ethnocide à travers les Amériques, Textes et documents*, Paris: Fayard, 1972

La Décivilisation: politique et pratique de l'ethnocide, Brussels: Editions Complexe, 1974

Jensen, S. L. B., *Genocide: Cases, Comparisons and Contemporary Debates*, Copenhagen: Danish Centre for Holocaust and Genocide Studies, 2003

Jescheck, Hans-Heinrich, 'Die internationale Genocidium-Konvention vom 9 Dezember 1948 und die Lehre vom Vö lkerstrafrecht', (1954) 66 *Völkerstrafrecht, Zeitschrift für die gesamte Strafrecht swissenschaft*, p. 193

'Genocide', in Rudolph Bernhardt, ed., *Encyclopedia of Public International Law*, Vol. II, Amsterdam: North-Holland Elsevier, 1995, pp. 541–4

Johnson, D. H. N., 'Draft Code of Offenses Against the Peace and Security of Mankind', (1955) 4 *International and Comparative Law Quarterly*, p. 445

Jonassohn, Kurt, 'What is Genocide?', in Helen Fein, ed., *Genocide Watch*, New Haven: Yale University Press, 1991, pp. 17–26

Jonassohn, Kurt, and Björnson, Karin Solveig, *Genocide and Gross Human Rights Violations*, Brunswick, NJ: Transaction, 1998

Jones, Adam, 'Gendercide and Genocide', (2000) 2 *Journal of Genocide Research*, p. 185

Gendercide and Genocide, Nashville, TN: Vanderbilt University Press, 2004

Jones, John R. W. D., '"Whose Intent is it Anyway?" Genocide and the Intent to Destroy a Group', in L. C. Vohrah *et al.*, eds., *Man's Inhumanity to Man*, The Hague: Kluwer Law International, 2003, pp. 467–80

Jones, Robert H., 'Jurisdiction and Extradition under the Genocide Convention', (1975) 16 *Harvard International Law Journal*, p. 696

Jørgensen, Nina H. B., 'The Definition of Genocide: Joining the Dots in the Light of Recent Practice', (2001) 1 *International Criminal Law Review*, p. 285

'The Genocide Acquittal in the Sikirica Case Before the International Criminal Tribunal for the Former Yugoslavia and the Coming of Age of the Guilty Plea', (2002) 15 *Leiden Journal of International Law*, p. 389

Joseph, Sarah, 'Kruger v. Commonwealth: Constitutional Rights and the Stolen Generations', (1998) 24(2) *Monash Law Review*, p. 486

Joyner, Christopher C., 'The United States and the Genocide Convention', (1987) 27 *Indian Journal of International Law*, p. 411

Kabatsi, Freda, 'Defining or Diverting Genocide: Changing the Comportment of Genocide', (2005) 5 *International Criminal Law Review*, p. 3

Kader, David, 'Law and Genocide: A Critical Annotated Bibliography', (1988) 11 *Hastings International and Comparative Law Review*, p. 381

Kagan, Joshua M., 'The Obligation to Use Force to Stop Acts of Genocide: An Overview of Legal Precedents, Customary Norms and State Responsibility' (2006) 7 *San Diego International Law Journal*, p. 461

Karagianakis, Magdalini, 'The Definition of Rape and its Characterization as an Act of Genocide – A Review of the Jurisprudence of the International Criminal Tribunal for Rwanda and the Former Yugoslavia', (1999) 12 *Leiden Journal of International Law*, p. 479

Karnavas, Michael G., 'Is the Emerging Jurisprudence on Complicity in Genocide before the International Ad Hoc Tribunals a Moving Target in Conflict with the Principle of Legality?', in Ralph Henham and Paul Behrens, eds., *The Criminal Law of Genocide*, Aldershot: Ashgate, 2007, pp. 91–106

Keeler, Joseph A., 'Genocide: Prevention Through Nonmilitary Measures', (2002) 171 *Military Law Review*, p. 135

Kelly, Michael J., 'Can Sovereigns be Brought to Justice? The Crime of Genocide's Evolution and the Meaning of the Milosevic Trial', (2002) 76 *St. John's Law Review*, p. 257.

'The Tricky Nature of Proving Genocide Against Saddam Hussein before the Iraqi Special Tribunal', (2005) 38 *Cornell International Law Journal*, p. 983

Kiernan, Ben, ed., *Genocide and Democracy in Cambodia: The Khmer Rouge, the United Nations and the International Community*, New Haven, CT: Yale University Press, 1993

'The Cambodian Genocide: Issues and Responses', in George J. Andreopoulos, ed., *Genocide: Conceptual and Historical Dimensions*, Philadelphia: University of Pennsylvania Press, 1994, pp. 191–228

'The Cambodian Genocide, 1975–1979', in Samuel Totten, William S. Parsons and Israel W. Charny, eds., *Genocide in the Twentieth Century*, New York and London: Garland Publishing, 1995, pp. 429–82

The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975–1979, New Haven, CT: Yale University Press, 1996

'Genocide and "Ethnic Cleansing"', in Robert Wuthnow, ed., *The Encyclopedia of Politics and Religion*, Vol. I, Washington: Congressional Quarterly, 1998, pp. 294–9

Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur, New Haven, CT: Yale University Press, 2007

Kindiki, Kithure, 'Prosecuting the Perpetrators of the 1994 Genocide in Rwanda: Its Basis in International Law and the Implications for the Protection of Human Rights in Africa', (2001) 1 *African Human Rights Law Journal*, p. 64

King, Henry T., Jr, 'Genocide and Nuremberg', in Ralph Henham and Paul Behrens, eds., *The Criminal Law of Genocide*, Aldershot: Ashgate, 2007, pp. 27–34

Kissi, Edward, 'Rwanda, Ethiopia and Cambodia: Links, Faultlines and Complexities in a Comparative Study of Genocide', (2004) 6 *Journal of Genocide Research*, p. 131.

Klein, Eckart, 'Genocide Convention (Advisory Opinion)', in Rudolph Bernhardt, ed., *Encyclopedia of Public International Law*, Vol. II, Amsterdam: North-Holland Elsevier, 1995, pp. 544–6

Kochavi, Arieh J., 'The British Foreign Office Versus the United Nations War Crimes Commission During the Second World War', (1994) 8 *Holocaust and Genocide Studies*, p. 28

Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment, Chapel Hill, NC, and London: University of North Carolina Press, 1998

Korey, William, 'America's Shame: The Unratified Genocide Treaty', in Jack Nusan Porter, ed., *Genocide and Human Rights: A Global Anthology*, Lanham, MD, New York and London: University Press of America, 1982, pp. 280–96

Kourtis, Nicholas F., and Titlebaum, Joseph M., 'International Convention on the Prevention and Punishment of the Crime of Genocide: United States Senate Grant of Advice and Consent to Ratification', (1988) 1 *Harvard Human Rights Yearbook*, p. 227

Kremnitzer, Mordechai, 'The Demjanjuk Case', in Yoram Dinstein and Mala Tabory, eds., *War Crimes in International Law*, The Hague, Boston and London: Martinus Nijhoff, 1996, pp. 321–49

Kress, Claus, 'The Darfur Report and Genocidal Intent', (2005) 3 *Journal of International Criminal Justice*, p. 578

'The Crime of Genocide under International Law', (2006) 6 *International Criminal Law Review*, p. 461

'The International Court of Justice and the Elements of the Crimes of Genocide', (2007) 18 *European Journal of International Law*, p. 619

Kressel, Neil Jeffrey, *Mass Hate: The Global Rise of Genocide and Terror*, New York: Plenum Press, 1996

Kuhn, Arthur K., 'The Genocide Convention and State Rights', (1949) 43 *American Journal of International Law*, p. 498

Kunz, Josef L., 'The UN Convention on Genocide', (1949) 43 *American Journal of International Law*, p. 732

Kuper, Leo, *Genocide*, Harmondsworth, and New York: Penguin Books, 1981

Genocide, Its Political Use in the Twentieth Century, New Haven: Yale University Press, 1981

International Action Against Genocide, London: Minority Rights Group, 1982

'Other Selected Cases of Genocide and Genocidal Massacres: Types of Genocide', in Israel Charny, *Genocide – A Critical Bibliographic Review*, New York: Facts on File, 1988 and 1991, pp. 155–71

The Prevention of Genocide, New Haven and London: Yale University Press, 1985

'Reflections on the Prevention of Genocide', in Helen Fein, ed., *Genocide Watch*, New Haven: Yale University Press, 1991, pp. 135–61

'Theoretical Issues Relating to Genocide: Uses and Abuses', in George J. Andreopoulos, ed., *Genocide: Conceptual and Historical Dimensions*, Philadelphia: University of Pennsylvania Press, 1994, pp. 31–46

Kutner, Luis, 'A World Genocide Tribunal – Rampart Against Future Genocide: Proposal for Planetary Preventive Measures Supplementing a Genocide Early Warning System', (1984) 18 *Valparaiso University Law Review*, p. 373

Laplaza, F., *El delito de genocidio*, Buenos Aires: Ediciones Arayu, 1953

Larios, Eligio Sanchez, *El Genocidio: Crimen contra la Humanidad*, Mexico City: Ediciones Botas, 1966

Lasok, D., 'The Eichmann Trial', (1962) 11 *International and Comparative Law Quarterly*, p. 355

Leblanc, Lawrence J., 'The Intent to Destroy Groups in the Genocide Convention', (1984) 78 AJIL, p. 370

'The ICJ, the Genocide Convention, and the United States', (1987) 6 *Wisconsin International Law Journal*, p. 43

'The United Nations Genocide Convention and Political Groups: Should the United States Propose an Amendment?', (1988) 13 *Yale Journal of International Law*, p. 268

The United States and the Genocide Convention, Durham, NC: Duke University Press, 1991

Lee, Steven A., 'Genocide and the Duty to Extradite or Prosecute: Why the United States Is in Breach of Its International Obligations', (1999) 39 *Virginia International Law Journal*, p. 286

Legters, Lyman H., 'The Soviet Gulag: Is It Genocidal?', in Israel W. Charny, ed., *Toward the Understanding and Prevention of Genocide: Proceedings of the International Conference on the Holocaust and Genocide*, Boulder, CO, London: Westview Press, 1984, pp. 60–6

Lejmi, Mohamed Ali, 'Prosecuting Genocide, Problems Caused by the Passage of Time Since the Alleged Commission of Crimes', (2006) 4 *Journal of International Criminal Justice* 300

Lemarchand, René, 'The Hutu–Tutsi Conflict in Burundi', in Jack Nusan Porter, ed., *Genocide and Human Rights: A Global Anthology*, Lanham, MD, New York and London: University Press of America, 1982, pp. 195–218

'Burundi: The Politics of Ethnic Amnesia', in Helen Fein, ed., *Genocide Watch*, New Haven: Yale University Press, 1991, pp. 70–86

Burundi: Ethnic Conflict and Genocide, Washington and New York: Woodrow Wilson Press and Cambridge University Press, 1995

'Genocide in the Great Lakes: Which Genocide? Whose Genocide?', Yale Center for International and Area Studies Working Paper Series, 1998

Lemarchand, René, and Martin, David, *Selective Genocide in Burundi*, London: Minority Rights Group, 1974

Lemkin, Raphael, 'Terrorisme', in Luis Jimenez de Asua, Vespasien Pella and Manuel Lopez Rey Arrojo, eds., *Actes de la Ve Conférence Internationale pour l'Unification du Droit Pénal*, Paris: Pedone, 1935, pp. 48–56

Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress, Washington: Carnegie Endowment for World Peace, 1944

'Genocide – A Modern Crime', (1945) 9 *Free World*, p. 39

'Genocide', (1946) 15 *American Scholar*, p. 227

'Le crime de génocide', [1946] *Revue de droit international*, p. 213

'Le génocide', [1946] *Revue internationale de droit pénal*, p. 25

'Genocide as a Crime in International Law', (1947) 41 *American Journal of International Law*, p. 145

'Genocide', (1947) 41 *American Journal of International Law*, p. 145

Lerner, Nathan, *Group Rights and Discrimination in International Law*, Dordrecht, Boston and London: Martinus Nijhoff, 1990

'Ethnic Cleansing', (1994) 24 *Israel Yearbook of Human Rights*, p. 103

'Ethnic Cleansing', in Yoram Dinstein and Mala Tabory, eds., *War Crimes in International Law,* The Hague: Boston and London: Martinus Nijhoff, 1996, pp. 107–22

Levasseur, Georges, 'La prophylaxie du génocide', (1968) 8 *Revue de la Commission international de juristes*, p. 84

'The Prevention of Genocide', (1968) 8 *Journal of International Criminal Justice*, p. 74

Levene, M., *Genocide in the Age of the Nation State*, London: IB Tauris, 2005

Levie, Howard S., 'Legal Aspects of the Continued Detention of the Pakistani Prisoners of War by India', (1973) 67 *American Journal of International Law*, p. 512

'The Indo-Pakistani Agreement of 28 August 1973', (1974) 68 *American Journal of International Law*, p. 95

Libaridian, Gerard J., *A Crime of Silence: The Armenian Genocide*, London: Zed Books, 1965

Lippman, Matthew, 'The Trial of Adolf Eichmann and the Protection of Universal Human Rights under International Law', (1982) 5 *Houston Journal of International Law*, p. 1

'The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide', (1985) 3 *Boston University International Law Journal*, p. 1

'The Nazi Doctors Trial and the International Prohibition on Medical Involvement in Torture', (1993) 15 *Loyola of Los Angeles International and Comparative Law Journal*, p. 395

'They Shoot Lawyers Don't They? Law in the Third Reich and the Global Threat to the Independence of the Judiciary', (1993) 23 *California Western International Law Journal*, p. 257

'The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later', (1994) 8 *Temple International and Comparative Law Journal*, p. 1

'The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later', (1998) 15 *Arizona Journal of International and Comparative Law*, p. 415

'Genocide', in M. Cherif Bassiouni, ed., *International Criminal Law*, Vol. I, Ardsley, NY: Transnational Publishers, 1999, pp. 589–616

'Genocide: The Crime of the Century: The Jurisprudence of Death at the Dawn of the New Millennium', (2001) 23 *Houston Journal of International Law*, p. 467

'Darfur: The Politics of Genocide Denial Syndrome', (2007) 9 *Journal of Genocide Research*, p. 193

Loewenstein, Andrew B., and Kostas, Stephen A., 'Divergent Approaches to Determining Responsibility for Genocide: The Darfur Commission of Inquiry and the ICJ's Judgment in the Genocide Case', (2007) 5 *Journal of International Criminal Justice*, p. 839

Lord Russell of Liverpool, *The Trial of Adolf Eichmann*, London: Heinemann, 1962

Luban, David, 'Calling Genocide by its Rightful Name: Lemkin's Word, Darfur, and the UN Report', (2006) 7 *Chicago Journal of International Law*, p. 303

Lyons, M. A., 'Hearing the Cry Without Answering the Call: Rape, Genocide and the Rwandan Tribunal', (2001) 28 *Syracuse Journal of International Law and Commerce*, p. 99

MacDermot, Niall, 'Crimes Against Humanity in Bangladesh', (1973) 7 *International Lawyer*, p. 476

Mace, James E., 'Soviet Man-Made Famine in Ukraine', in Samuel Totten, William S. Parsons and Israel W. Charny, eds., *Genocide in the Twentieth Century*, New York and London: Garland Publishing, 1995, pp. 97–137

Mackinnon, Catherine A., 'Rape, Genocide and Women's Human Rights', (1994) 17 *Harvard Women's Law Journal*, p. 5

'Rape, Genocide, and Women's Human Rights', in Alexandra Stiglmayer, ed., *Mass Rape: The War against Women in Bosnia-Herzegovina*, Lincoln, NE, and London: University of Nebraska Press, 1994, pp. 185–191

Magnarella, Paul J., *Justice in Africa: Rwanda's Genocide, Its Courts, and the UN Criminal Tribunal*, Aldershot: Ashgate, 2000

'The Background and Causes of the Genocide in Rwanda', (2005) 3 *Journal of International Criminal Justice*, p. 801

Maison, Rafaëlle, 'Les ordonnances de la Cour international de justice dans l'affaire relative à l'application de la Convention pour la prévention et la répression du crime de génocide', (1994) 3 *European Journal of International Law*, p. 381

'La décision de la Chambre de première instance no. 1 du Tribunal pénal international pour l'ex-Yougoslavie dans l'affaire Nicolic', (1996) 7 *European Journal of International Law*, p. 284

Maitra, Neelanjan, 'A Perpetual Possibility? The International Criminal Tribunal for Rwanda's Recognition of the Genocide of 1994', (2005) 5 *International Criminal Law Review*, p. 573

Maljean-Dubois, Sandrine, 'L'affaire relative à l'application de la Convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie), Arrêt du 11 juillet 1996, exceptions préliminaires', (1996) 42 *Annuaire français de droit international*, p. 357

Mälksoo, L., 'Soviet Genocide? Communist Mass Deportations in the Baltic States and International Law', (2001) 14 *Leiden Journal of International Law*, p. 757

Malone, Linda A., 'The Kahan Report, Ariel Sharon and the Sabra–Shatila Massacres in Lebanon: Responsibility under International Law for Massacres of Civilian Populations', (1985) 2 *Utah Law Review*, p. 373

'Sharon v. Time: The Criminal Responsibility under International Law for Civilian Massacres', (1986) 3 *Palestine Yearbook of International Law*, p. 41

Mamdani, Mahmoud, *When Victims Become Killers: Colonialism, Nativism and the Genocide in Rwanda*, Princton: Princeton University Press, 2002

Marable, Manning, *The Question of Genocide*, Dayton, OH: Black Research Associates, 1982

Marks, Stephen P., 'Elusive Justice for the Victims of the Khmer Rouge', (1999) 52 *Journal of International Affairs*, p. 691

Martin, Ian, 'After Genocide: The UN Human Rights Field Operation in Rwanda', in Alice Henkin, ed., *Honoring Human Rights: From Peace to Justice*, Washington: Aspen Institute, 1998, pp. 97–132

Mathew, Jamie A., 'The Darfur Debate: Whether the ICC Should Determine that Atrocities in Darfur Constitute Genocide', (2006) 18 *Florida Journal of International Law*, p. 517

Mazian, Florence, *Why Genocide?: The Armenian and Jewish Experiences in Perspective*, Ames: Iowa State University Press, 1990

McDougal, Myers, and Arens, Richard, 'The Genocide Convention and the Constitution', (1950) 3 *Vanderbilt Law Review*, p. 705

Meernik, James, 'Proving and Punishing Genocide at the International Criminal Tribunal for Rwanda', (2004) 4 *International Criminal Law Review*, p. 65

Mehrish, B. N., *War Crimes and Genocide*, New Delhi: Bherati Printing Press, 1972

Melson, R., *Revolution and Genocide: On the Origins of the Armenian Genocide and of the Holocaust*, Chicago: University of Chicago Press, 1992

Melvern, Linda, 'Genocide Behind the Thin Blue Line', (1997) 28 *Security Dialogue*, p. 333

A People Betrayed: The Role of the West in Rwanda's Genocide, London: Zed Books, 2000

Conspiracy to Murder: The Rwandan Genocide, New York: Verso, 2004

'The Security Council in the Face of Genocide', (2005) 3 *Journal of International Criminal Justice*, p. 847

Mendez, Juan E., 'The United Nations and the Prevention of Genocide', in Ralph Henham and Paul Behrens, eds., *The Criminal Law of Genocide*, Aldershot: Ashgate, 2007, pp. 215–20

Meron, Theodor, 'International Criminalization of Internal Atrocities', (1995) 89 AJIL, p. 5

Mettraux, Guénaël, *International Crimes and the Ad Hoc Tribunals*, Oxford: Oxford University Press, 2005

Metzl, Jamie Frederic, 'Rwandan Genocide and the International Law of Radio Jamming', (1997) 91 *American Journal of International Law*, p. 628

Miaja de la Muela, Adolfo, 'El genocidio, delito internacional', (1951) 4 *Revista Espanola de Derecho Internacional*, p. 363

Milanović, Marko, 'State Responsibility for Genocide', (2006) 17 *European Journal of International Law*, p. 553

Minow, Martha, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Boston: Beacon Press, 1998

Mirkovic, Damir, 'Ethnic Cleansing and Genocide: Reflections on Ethnic Cleansing in the Former Yugoslavia', (1996) 548 *Annals of the American Academy of Political and Social Science*, p. 191

Mitchell, Andrew D., 'Genocide, Human Rights Implementation and the Relationship Between International and Domestic Law: Nulyarimma v. Thompson', (2000) 24 *Melbourne University Law Review*, p. 15

Morris, Madeline, 'Justice in the Wake of Genocide: The Case of Rwanda', (1997) 3 *ILSA Journal of International and Comparative Law*, p. 689

'The Trials of Concurrent Jurisdiction: The Case of Rwanda', (1997) 7 *Duke Journal of Comparative and International Law*, p. 349

'Justice in the Wake of Genocide: Rwanda', in Belinda Cooper, ed., *War Crimes: The Legacy of Nuremberg*, New York: TV Books, 1999, pp. 211–28

Morris, Virginia, and Scharf, Michael P., *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, New York: Transnational Publishers, 1995

An Insider's Guide to the International Criminal Tribunal for Rwanda: A Documentary History and Analysis, New York: Transnational Publishers, 1998

Morton, Jeffrey S., 'The International Legal Adjudication of the Crime of Genocide', (1999) 7 *ILSA Journal of International and Comparative Law*, p. 329

Mosheim, Berthold, 'Die Arbeiten der Vereinten Nationen zur Frage der Rechte des Individuums und des Verbrechens der Genocide', (1949–50) 2 *Archiv des Völkerrechts (Tübingen)*, p. 180

Mouton, Jean-Denis, 'La crise rwandaise de 1994 et les Nations Unies', (1994) 40 AFDI, p. 214

Mubiala, Mutoy, 'Le Tribunal international pour le Rwanda: Vraie ou fausse copie du Tribunal pénal international pour l'ex-Yougoslavie?', (1995) *Revue générale de droit international public*, p. 929

Mugwanya, George William, *The Crime of Genocide in International Law: Appraising the Contribution of the UN Tribunal for Rwanda*, London: Cameron May, 2007

Murphy, M. P., 'A Statement of Moral Purpose: The 1948 Genocide Convention', (1978–9) 2 *Fordham International Law Forum*, p. 45

Murphy, Sean D., 'Department of State Legal Analysis of 1994 Genocide in Rwanda', (2002) 96 *American Journal of International Law*, p. 258

Neave, A. M. S., 'Le procès des SS à Nuremberg', (1946) 17 *Revue internationale de droit pénal*, p. 290

'The Trial of the SS at Nuremberg', (1946) 17 *Revue internationale de droit pénal*, p. 277

Neier, Aryeh, *War Crimes; Brutality, Genocide, Terror, and the Struggle for Justice*, New York: Times Books, 1998

Ng'arua, Paul, 'Specificity of Indictments in ICTR Genocide Trials', in Ralph Henham and Paul Behrens, eds., *The Criminal Law of Genocide*, Aldershot: Ashgate, 2007, pp. 167–76

Nsereko, Daniel D. Ntanda, 'Genocide: A Crime Against Mankind', in Gabrielle Kirk McDonald and Olivia Swaak-Goldman, eds., *The Law and Enforcement of International Offenses: The Experiences of International and National Courts*, Vol. I, The Hague: Kluwer Law International, 2000, pp. 113–40

Obote-Odora, Alex, 'Complicity in Genocide as Understood through the ICTR Experience', (2002) 2 *International Criminal Law Review*, p. 375

O'Halloran, Patrick J., *Humanitarian Intervention and the Genocide in Rwanda*, London: Research Institute for the Study of Conflict, 1995

O'Higgins, P., 'Unlawful Seizure and Irregular Extradition', (1960) 36 *British Yearbook of International Law*, p. 279

Ohlin, Jens David, 'Applying the Death Penalty for Crimes of Genocide', (2005) 99 *American Journal of International Law*, p. 747

Orentlicher, Diane F., 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', (1991) 100 *Yale Law Journal*, p. 2537

'International Criminal Law and the Cambodian Killing Fields', (1997) 3 *ILSA Journal of International and Comparative Law*, p. 705

'Genocide', in Roy Gutman and David Rieff, eds., *Crimes of War: What the Public Should Know*, New York: Norton, 1999, pp. 153–7

Ougergouz, Fatsah, 'La tragédie rwandaise du printemps 1994: Quelques considérations sur les premières réactions de l'Organisation des Nations Unies', (1996) 100 *Revue générale de droit international public*, p. 149

Palombina, Fulvio Maria, 'Should Genocide Subsume Crimes Against Humanity?', (2005) 3 *Journal of International Criminal Justice*, p. 780

Papadatos, Peter, *The Eichmann Trial*, London: Stevens & Sons, 1964

Parker, Karen, and Neylon, Lyn Beth, 'Jus Cogens: Compelling the Law of Human Rights', (1989) 12 *Hastings International and Comparative Law Review*, p. 411

Parks, W. Hays, 'Command Responsibility for War Crimes', (1973) 62 *Military Law Review*, p. 1

Patterson, William Lorenzo, ed., *We Charge Genocide! The Crime of Government Against the Negro People*, New York: International Publishers, 1961

Paust, Jordan J., 'My Lai and Vietnam', (1972) 57 *Military Law Review*, p. 99

'Aggression Against Authority: The Crime of Oppression, Politicide and Other Crimes Against Human Rights', (1986) 18 *Case Western Reserve Journal of International Law*, p. 283

'Congress and Genocide: They're Not Going to Get Away With It', (1989) 11 *Michigan Journal of International Law*, p. 90

'Content and Contours of Genocide, Crimes Against Humanity, and War Crimes', in Sienho Yee and Wang Tieya, *International Law in the Post-Cold War World*, London and New York: Routledge, 2001, pp. 289–306

Paust, Jordan J., and Blaustein, A. P., 'War Crimes Jurisdiction and Due Process: The Bangladesh Experience', (1978) 11 *Vanderbilt Journal of Transnational Law*, p. 1

Pearlman, Moshe, *The Capture and Trial of Adolf Eichmann*, London: Weidenfeld and Nicolson, 1963

Pechota, Vratislav, 'Establishing Criminal Responsibility and Jurisdiction for Genocide', in Helen Fein, ed., *Genocide Watch*, New Haven: Yale University Press, 1991, pp. 197–204

Pella, Vespasien V., 'Plan d'un code repressif mondial', (1935) 12 *Revue internationale de droit pénal*, p. 348

La codification du droit international, Bucharest: Imprimerie de la Prison 'Nacaresu', 1938

L'Union interparlamentaire et le droit pénal international, Dijon: Imprimerie Darantière, 1939

La guerre-crime et les criminels de guerre: Réflexions sur la justice pénale internationale, ce qu'elle est et ce qu'elle devrait être, Paris: Pedone, 1946

'Considérations sur un code des crimes contre la paix et la sécurité de l'humanité', (1950) 28 *Revue de droit international, de sciences diplomatiques et politiques*, p. 101

'La codification du droit pénal international', (1952) 56 *Revue générale de droit international public*, p. 398

Perlin, J., 'The Guatemalan Historical Clarification Commission Finds Genocide', (2000) 6 *ILSA Journal of International and Comparative Law*, p. 389

Perlman, Philip B., 'The Genocide Convention', (1951) 30 *Nebraska Law Review*, p. 1

Peter, Chris Maina, 'The International Criminal Tribunal for Rwanda: Bringing the Killers to Book', (1997) 321 *International Review of the Red Cross*, p. 695

Petera, A. Rohan, 'Towards the Establishment of an International Criminal Court', (1994) 20 *Commonwealth Law Bulletin*, p. 298

Peters, Sean, 'The Genocide Case: Nulyarimma v. Thompson', [1999] *Australian International Law Journal*, p. 233

Petrovic, Drazen, 'Ethnic Cleansing – An Attempt at Methodology', (1994) 5 *European Journal of International Law*, p. 342

Planzer, Antonio, *Le crime de génocide*, St Gallen, Switzerland: F. Schwald, 1956

Porter, Jack Nusan, ed., *Genocide and Human Rights: A Global Anthology*, Washington: University Press of America, 1982

'What is Genocide? Notes Toward a Definition', in Jack Nusan Porter, ed., *Genocide and Human Rights: A Global Anthology*, Lanham, MD, New York and London: University Press of America, 1982, pp. 2–33

'Why Didn't the Jews Fight Back?', in Jack Nusan Porter, ed., *Genocide and Human Rights: A Global Anthology*, Lanham, MD, New York and London: University Press of America, 1982, pp. 83–97

Post, Jennifer, 'The United States and the Genocide Treaty: Returning Genocide to Sovereignty Concerns', (1988–9) 12 *Suffolk Transnational Law Journal*, p. 686

Power, Samantha, *A Problem from Hell – America and the Age of Genocide*, London: Flamingo, 2003

Preece, Jennifer Jackson, 'Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms', (1998) 20 *Human Rights Quarterly*, p. 817

Procida, Nicole M., 'Ethnic Cleansing in Bosnia-Herzegovina, A Case Study: Employing United Nations Mechanisms to Enforce the Convention on the Prevention and Punishment of the Crime of Genocide', (1995) 18 *Suffolk Transnational Law Review*, p. 655

Prunier, Gérard, *The Rwanda Crisis: History of a Genocide*, New York: Columbia University Press, 1995

'Operation Turquoise: A Humanitarian Escape from a Political Dead End', in Howard Adelman and Astri Suhrke, eds., *The Path of a Genocide: The Rwanda Crisis from Uganda to Zaire*, New Brunswick, NJ, and London: Transaction, 1999, pp. 281–306

Darfur: The Ambiguous Genocide, New York: Cornell University Press, 2005

Pulos, Michael, 'Hiding Corpses Within Sovereign Borders: Why the World Fails to Prosecute Genocide', (2006) 11 *UCLA Journal of International Law and Foreign Affairs*, p. 161

Quayle, Peter, 'The Legislative Limitations of the Genocide Convention', (2005) 5 *International Criminal Law Review*, p. 364

Quigley, John, 'State Responsibility for Ethnic Cleansing', (1999) 32 *University of California Davis Law Review*, p. 341

The Genocide Convention – An International Law Analysis. Aldershot: Ashgate, 2006

Railsback, Kathryn, 'A Genocide Convention Action Against the Khmer Rouge: Preventing a Resurgence of the Killing Fields', (1990) 5 *Connecticut Journal of International Law*, p. 457

Rappoport, Leon, 'Scarcity, Genocide, and the Postmodern Individual', in Michael N. Dobkowski and Isidor Wallimann, eds., *The Coming Age of Scarcity: Preventing Mass Death and Genocide in the Twenty-First Century*, Syracuse, NY: Syracuse University Press, 1998, pp. 269–82

Ratner, Steven R., 'The Genocide Convention After Fifty Years', (1998) 92 *Proceedings of the American Society of International Law*, p. 277

Ratner, Steven R., and Abrams, Jason S., *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford: Clarendon Press, 1997

Reisman, W. Michael, 'Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination', (1971) 1 *Journal of International Law and Policy*, p. 29

'Legal Responses to Genocide and Other Massive Violations of Human Rights', (1996) 59 *Law and Contemporary Problems*, p. 75

Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, Washington: US Government Printing Office, 1949

Reydams, Luc, 'Universal Jurisdiction over Atrocities in Rwanda: Theory and Practice', (1996) 1 *European Journal of Crime, Criminal Law and Criminal Justice*, p. 18

Reyntjens, Filip, *L'Afrique des Grande Lacs en crise*, Paris: Karthala, 1994

'Rwanda: Genocide and Beyond', (1996) 9 *Journal of Refugee Studies*, p. 240

Richard, Guy, ed., *L'histoire inhumaine, massacres et génocides des origines à nos nours*, Paris: Armand Collin, 1992

Roberge, Marie-Claude, 'Jurisdiction of the Ad Hoc Tribunals for the Former Yugoslavia and Rwanda over Crimes Against Humanity and Genocide', (1997) 321 *International Review of the Red Cross*, p. 651

Robinson, Jacob, Karbach, Oscar, Laserson, Max M., Robinson, Nehemiah, and Vichniak, Marc, *Were the Minorities Treaties a Failure?*, New York: Institute of Jewish Affairs, 1943

Robinson, Nehemiah, *The Genocide Convention: A Commentary*, New York: Institute of Jewish Affairs, 1960

Roch, Michael P., 'Forced Displacement in the Former Yugoslavia: A Crime under International Law?', (1995) 14 *Dickinson Journal of International Law*, p. 1

Roht-Arriaza, Naomi, ed., *Impunity and Human Rights in International Law and Practice*, New York and London: Oxford University Press, 1995

Rosenbaum, Alan S., 'The Genocidal Universe', in Jack Nusan Porter, ed., *Genocide and Human Rights, A Global Anthology*, Lanham, MD, New York and London: University Press of America, 1982, pp. 46–58

Is the Holocaust Unique?: Perspectives on Comparative Genocide, Boulder, CO: Westview Press, 1996

Rosenthal, Jay, 'Legal and Political Considerations of the United States' Ratification of the Genocide Convention', (1985) 3 *Antioch Law Journal*, p. 117

Rotberg, Robert I., and Weiss, Thomas G., *From Massacres to Genocide: The Media, Public Policy, and Humanitarian Crises*, Washington: Brookings Institution, 1996

Roth, S. J., 'The Netherlands and the "Are Jews a Race?" Issue', (1983) 17 *Patterns of Prejudice*, Issue 4, p. 52

'Denial of the Holocaust as an Issue of Law', (1993) 23 *Israel Yearbook of Human Rights*, p. 215

Rückert, Wiebke, and Witschel, Georg, 'Genocide and Crimes Against Humanity in the Elements of Crimes', in H. Fischer *et al.*, eds., *International and National Prosecution of Crimes under International Law*, Berlin: Berlin Verlag, 2001, pp. 59–94

Rummel, Rudolph J., *Lethal Politics: Soviet Genocide and Mass Murder Since 1917*, New Brunswick, NJ: Transaction Publishers, 1990

China's Bloody Century: Genocide and Mass Murder Since 1900, New Brunswick, NJ: Transaction Publishers, 1991

Democide: Nazi Genocide and Mass Murder, New Brunswick, NJ: Transaction Publishers, 1992

Russell-Brown, Sherrie L., 'Rape as an Act of Genocide', (2003) 21 *Berkeley Journal of International Law*, p. 350

Saeedpour, Vera Beaudin, 'Establishing State Motives for Genocide: Iraq and the Kurds', in Helen Fein, ed., *Genocide Watch*, New Haven: Yale University Press, 1991, pp. 59–69

Safferling, Christoph J. M., 'Public Prosecutor v. Djajic', (1998) 92 AJIL, p. 528

Salomon, Tonja, 'Freedom of Speech v. Hate Speech: The Jurisdiction of "Direct and Public Incitement to Commit Genocide", in Ralph Henham and Paul Behrens, eds., *The Criminal Law of Genocide*, Aldershot: Ashgate, 2007, pp. 135–45

Sarkissian, Raffi, 'The Armenian Genocide: A Contextual View of the Crime and Politics of Denial', in Ralph Henham and Paul Behrens, eds., *The Criminal Law of Genocide*, Aldershot: Ashgate, 2007, pp. 1–14

Sartre, Jean-Paul, 'On Genocide', in Richard A. Falk, Gabriel Kolko and Robert Jay Lifton, eds., *Crimes of War*, New York: Random House, 1971, pp. 534–49

Sassoli, Marco, 'Le génocide rwandais, la justice militaire suisse et le droit international', (2002) 2 *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, p. 151

Saul, Ben, 'The International Crime of Genocide in Australian Law', (2000) 22 *Sydney Law Review*, p. 527

'Was the Conflict in East Timor Genocide, and Why Does it Matter?', (2002) 18 *Melbourne Journal of International Law*, p. 477

Saunders, William L., and Mantilla, Yuri G., 'Human Dignity Denied: Slavery, Genocide, and Crimes against Humanity in Sudan', (2002) 51 *Catholic University Law Review*, p. 715

Sautman, Barry, 'Cultural Genocide and Tibet', (2003) 38 *Texas International Law Journal*, p. 173

Schabas, William A., 'Le Rwanda, le Burundi, et la maladie d'impunité', in Raymond Verdier, Emmanuel Decaux and Jean-Pierre Chrétien, eds., *Rwanda: Un génocide du XXe siècle*, Paris: Editions L'Harmattan, 1995, pp. 115–24

'L'affaire Mugesera', (1996) 7 *Revue universelle des droits de l'homme*, p. 193

'Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems', (1997) 8 *Criminal Law Forum*, p. 523

'Article 6', in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Baden-Baden: Nomos Verlagsgesellschaft, 1999, pp. 107–16

'L'affaire Akayesu', in Katia Boustany and Daniel Dormoy, eds., *Génocide(s)*, Brussels: Editions Bruylant, Editions de l'Université de Bruxelles, 1999, pp. 111–30

'Les droits des minorités: Une déclaration inachevée', in *La Déclaration universelle des droits de l'homme 1948–98: Avenir d'un idéal commun*, Paris: La Documentation française, 1999, pp. 223–42

'Mugesera v. Minister of Citizenship and Immigration', (1999) 93 *American Journal of International Law*, p. 529

'Barayagwiza v. Prosecutor', (2000) 94 *American Journal of International Law*, p. 638

'Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda', (2000) 6 *ILSA Journal of International and Comparative Law*, p. 375

'Hate Speech in Rwanda: The Road to Genocide', (2000) 46 *McGill Law Journal*, p. 141

'Le génocide', in Hervé Ascencio, Emmanuel Decaux and Alain Pellet, eds., *Droit international pénal*, Paris: Editions A. Pedone, 2000, pp. 319–32

'Genocide and Crimes Against Humanity in the Rome Statute', in ELSA International, ed., *International Law as We Enter the 21st Century*, Berlin: Arno Spitz GmbH, 2001, pp. 153–62

'Problems of International Codification: Were the Atrocities in Cambodia and Kosovo Genocide?', (2001) 35 *New England Law Review*, p. 287

'Prosecutor v. Akayesu: Commentary', in André Klip and Goran Sluiter, eds., *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 1994–1999*, Vol. 2, Antwerp: Intersentia, 2001, pp. 539–54

'The Crime of Genocide in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda', in Horst Fischer, Claus Kress and Sascha Rolf Lüder, eds., *International and National Prosecution of Crimes Under International Law: Current Developments*, Berlin: Arno Spitz GmbH, 2001, pp. 447–72

'The Jelisic Case and the Mens Rea of the Crime of Genocide', (2001) 14 *Leiden Journal of International Law*, p. 125

'Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia', (2001) 25 *Fordham International Law Journal*, p. 23

'Developments in the Law of Genocide', (2002) 5 *Yearbook of International Humanitarian Law*, p. 131

'The Rwanda Case: Sometimes It's Impossible', in M. Cherif Bassiouni, ed., *Post-Conflict Justice*, Ardsley, NY: Transnational, 2002, pp. 499–522

'Barayagwiza v. Prosecutor, Commentary', in André Klip and Goran Sluiter, eds., *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 2000–2001*, Vol. 6, Antwerp: Intersentia, 2003, pp. 261–6

'"Ethnic Cleansing" and Genocide: Similarities and Distinctions', (2003/4) 3 *European Yearbook of Minority Issues*, p. 109

Genozid im Völkerrecht, Hamburg: Hamburger Institute, 2003

'National Courts Finally Begin to Prosecute Genocide, the "Crime of Crimes"', (2003) 1 *Journal of International Criminal Justice*, p. 89

The Abolition of the Death Penalty in International Law, 3rd edn, Cambridge: Cambridge University Press, 2003

'The Crime of Genocide: Recent Problems of Interpretation', in John Carey, William V. Dunlap and John Pritchard, eds., *International Humanitarian Law: Origins*, Ardsley, NY: Transnational Publishers, 2003, pp. 239–82

'The Crime of Genocide', in Kalliopi Koufa, ed., *The New International Criminal Law*, Athens-Thessaloniki: Sakkoulas Publications, 2003, pp. 467–502

'Genocide and Crimes Against Humanity: How Are They Related?', in *The International Criminal Court and Enlarging the Scope of International Humanitarian Law*, Damascus: International Committee of the Red Cross/ Damascus University Faculty of Law, 2004, pp. 199–219

'The International Legal Prohibition of Genocide Comes of Age', (2004) 5 *Human Rights Review*, p. 46

'Cultural Genocide and the Protection of the Right of Existence of Aboriginal and Indigenous Groups', in Joshua Castellino and Niamh Walsh, eds., *International Law and Indigenous Peoples*, The Hague: Martinus Nijhoff Publishers, 2005, pp. 117–32

'Darfur and the "Odious Scourge": The Commission of Inquiry's Findings on Genocide', (2005) 18 *Leiden Journal of International Law*, p. 871

'Genocide, Crimes Against Humanity and Darfur: The Commission of Inquiry's Findings on Genocide', (2005) 27 *Cardozo Law Review*, p. 101

'Genocide Trials and *Gacaca* Courts', (2005) 3 *Journal of International Criminal Justice*, p. 879

'The International Legal Prohibition of Genocide Comes of Age', in Samuel Totten, ed., *Genocide at the Millennium: A Critical Bibliographic Review*. New Brunswick, NJ: Transaction Publishers, 2005, pp. 169–84

La prévention des génocides et des massacres de masse: un défi pour les Nations unies, London: Minority Rights Group International, 2006

'Preventing Genocide and Mass Killing: The Challenge for the United Nations', Minority Rights Group International Report, January 2006

'Recent Developments in the Law of Genocide', in Alice Yotopoulos-Marangopoulos, ed., *L' état actuel des droits de l'homme dans le monde: Défis et perspectives*, Paris: Editions A. Pedone, 2006, pp. 125–46

'The "Odious Scourge": Evolving Interpretations of the Crime of Genocide', (2006) 1 *Genocide Studies and Prevention*, p. 93

The UN International Criminal Tribunals: Former Yugoslavia, Rwanda, Sierra Leone, Cambridge: Cambridge University Press, 2006

'Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes', (2007) 2(2) *Genocide Studies and Prevention*, p. 101

'Has Genocide Been Committed in Darfur? The State Plan or Policy Element in the Crime of Genocide', in Ralph Henham and Paul Behrens, eds., *The Criminal Law of Genocide: International, Comparative and Contextual Aspects*, Aldershot: Ashgate, 2007, pp. 35–44

Introduction to the International Criminal Court, 3rd edn, Cambridge: Cambridge University Press, 2007

'Semantics or Substance: David Scheffer's Welcome Proposal to Strengthen Criminal Accountability for Atrocities', (2007) 2 *Genocide Studies and Prevention*, p. 31

'Whither Genocide? The International Court of Justice Finally Pronounces', (2007) 9 *Journal of Genocide Research*, p. 183

Schabas, William A., and Imbleau, Martin, *Introduction to Rwandan Law*, Cowansville, Quebec: Editions Yvon Blais, 1998

Schaefer, Michael, 'The Stolen Generations – In the Aftermath of Kruger and Bray', (1998) 21 *University of New South Wales Law Journal*, p. 247

Scharf, Michael P., 'Responding to Rwanda: Accountability Mechanisms in the Aftermath of Genocide', (1999) 52 *Journal of International Affairs*, p. 621

Schiller, Barry M., 'Life in a Symbolic Universe: Comments on the Genocide Convention and International Law', (1977) 9 *Southwestern University Law Review*, p. 47

Schwabach, Aaron, 'Ecocide and Genocide in Iraq: International Law, the Marsh Arabs, and Environmental Damage in Non-International Armed Conflicts', (2004) 15 *Colorado Journal of International Environmental Law and Policy*, p. 1

Schwelb, Egon, 'Crimes Against Humanity', (1946) 23 *British Yearbook of International Law*, p. 178

'The International Convention on the Elimination of All Forms of Racial Discrimination', (1966) 15 *International and Comparative Law Quarterly*, p. 1007

Scott, Craig, 'A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council's Arms Embargo on Bosnia and Herzegovina', (1994) 16 *Michigan Journal of International Law*, p. 1

Semelin, Jacques, *Purify and Destroy: The Political Uses of Massacre and Genocide*, New York: Columbia University Press, 2007

Seymour, Jillaine, 'Jurisdiction by Necessary Implications: Genocide in Bosnia', (2007) 66 *Cambridge Journal of International Law*, p. 249

Shah, Sonari B., 'The Oversight of the Last Great International Institution of the Twentieth Century: The International Criminal Court's Definition of Genocide', (2002) 16 *Emory International law Review*, p. 351

Shamsey, J., '80 Years Too Late: The International Criminal Court and the 20th Century's First Genocide', (2002) 11 *Journal of Transnational Law and Policy*, p. 327

Shaw, Malcolm N., 'Genocide and International Law', in Yoram Dinstein, ed., *International Law at a Time of Perplexity (Essays in Honour of Shabtai Rosenne)*, Dordrecht: Martinus Nijhoff, 1989, pp. 797–820

Shaw, Martin, *What is Genocide?*, London: Polity Press, 2007

Shawcross, William, 'Persecutions on Political, Racial, or Religious Grounds', in Roy Gutman and David Rieff, eds., *Crimes of War: What the Public Should Know*, New York: Norton, 1999, pp. 272–5

Shelton, Dinah, Adelman, Howard, Chalk, Frank, Kiss, Alexander, and Schabas, William, eds., *Encyclopedia of Genocide and Crimes Against Humanity*, Detroit: Thompson Gale, 2005

Silving, Helen, 'In re Eichmann: A Dilemma of Law and Morality', (1961) 55 AJIL, p. 307

Simon, Thomas W., 'Defining Genocide', (1996) 15 *Wisconsin International Law Journal*, p. 243

Skloot, Robert, 'Theatrical Images of Genocide', (1990) 12 *Human Rights Quarterly*, p. 185

Slade, Tuiloma Neroni, 'The Prohibition of Genocide under the Legal Instruments of the International Criminal Court', in Ralph Henham and Paul Behrens, eds., *The Criminal Law of Genocide*, Aldershot: Ashgate, 2007, pp. 147–56

Sloane, Robert D., 'Sentencing for the "Crime of Crimes": The Evolving "Common Law" of Sentencing of the International Criminal Tribunal for Rwanda', (2006) 5 *Journal of International Criminal Justice* 713

Smith, David Norman, 'Postcolonial Genocide', in Michael N. Dobkowski and Isidor Wallimann, eds., *The Coming Age of Scarcity: Preventing Mass Death and Genocide in the Twenty-First Century*, Syracuse, NY: Syracuse University Press, 1998, pp. 220–44

Smith, Roger W., 'Scarcity and Genocide', in Michael N. Dobkowski and Isidor Wallimann, eds., *The Coming Age of Scarcity, Preventing Mass Death and Genocide in the Twenty-First Century*, Syracuse, NY: Syracuse University Press, 1998, pp. 199–219

Sopra, Tara, 'Into the Heart of Darkness: The Case Against the Foray of the Security Council Tribunal into the Rwandan Crisis', (1997) 32 *Texas International Law Journal*, p. 329

Southwick, Katherine G., 'Srebrenica as Genocide? The Krstić Decision and the Language of the Unspeakable', (2005) 8 *Yale Human Rights and Development Law Journal*, p. 188

Spinedi, M., 'International Crimes of State: The Legislative History', in A. Cassese and M. Spinedi, eds., *International Crimes of State*, Berlin: de Gruyter, 1989, pp. 45–79

'On the Non-Attribution of the Bosnian Serbs' Conduct to Serbia', (2007) 5 *Journal of International Criminal Justice*, p. 829

Stanton, Gregory H., 'The Kampuchean Genocide and the World Court', (1987) 2 *Connecticut Journal of International Law*, p. 341

'The Cambodian Genocide and International Law', in Ben Kiernan, ed., *Genocide and Democracy in Cambodia: The Khmer Rouge, the United Nations and the International Community*, New Haven, CT: Yale University Press, 1993

Starkman, Paul, 'Genocide and International Law: Is There a Cause of Action?', (1984) 8 *ASILS International Law Journal*, p. 1

Staub, Erwin, *The Roots of Evil: The Origins of Genocide and Other Group Violence*, New York: Cambridge University Press, 2005

Stein, E., 'The New German Law Against the "Auschwitz" – and Other – "Lies"', (1986) 85 *Michigan Law Review*, p. 277

Steinberg, Maxime, 'Le Génocide au XXe siècle: Lecture juridique ou historique?', in A. Destexhe and M. Foret, eds., *De Nuremberg à la Haye et Arusha*, Brussels: Bruylant, 1997, pp. 49–64

Stephens, Beth, and Green, Jennifer, 'Suing for Genocide in the United States: The Case of Jane Doe v. Radovan Karadžić', in Belinda Cooper, ed., *War Crimes: The Legacy of Nuremberg*, New York: TV Books, 1999, pp. 265–71

Stern, Brigitte, 'La compétence universelle en France: le cas des crimes commis en ex-Yougoslavie et au Rwanda', (1997) 40 *German Yearbook of International Law*, p. 280

Steven, Lee A., 'Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations', (1999) 39 *Virginia Journal of International Law*, p. 425

Storey, Matthew, 'Kruger v. The Commonwealth: Does Genocide Require Malice?', (1998) 21 *University of New South Wales Law Journal*, p. 224

Stover, Eric, and Geltman, Paul, 'Genocide and the Plight of Children in Rwanda', (1997) 227 *Journal of the American Medical Association*, p. 289

Strickland, R., 'Genocide-at-Law: An Historic and Contemporary View of the North American Experience', (1986) 34 *University of Kansas Law Review*, p. 713

Strozier, Charles B., and Flynn, Michael, *Genocide, War, and Human Survival*, Lanham, MD: Rowman & Littlefield Publishers, 1996

Sunga, Lyal S., 'The First Indictments of the International Criminal Tribunal for Rwanda', (1997) 18 *Human Rights Law Journal*, p. 329

Sussman, Richard L., 'The Genocide Convention: A New Case for Ratification', (1983) 2 *Boston University International Law Journal*, p. 241

Sychold, Martin M., 'Ratification of the Genocide Convention: The Legal Effects in Light of Reservations and Objections', [1998] *Revue suisse droit international et européen*, p. 533

Tashjian, James H., 'Genocide, the United Nations and the Armenians', in Jack Nusan Porter, ed., *Genocide and Human Rights: A Global Anthology*, Lanham, MD, New York and London: University Press of America, 1982, pp. 129–49

Tatz, Colin, *With Intent to Destroy – Reflecting on Genocide*, London: Verso, 2003

Tennant, C. C., and Turpel, M. E., 'A Case Study of Indigenous Peoples: Genocide, Ethnocide and Self-Determination', (1990–1) 59–60 *Nordic Journal of International Law*, p. 287

Ternon, Yves, *Les Arméniens: Histoire d'un génocide*, Paris: Seuil, 1977

The Armenians: History of a Genocide, 2nd edn., Delmar, NY: Caravan Books, 1990

L' état criminel, Paris: Seuil, 1995

The United Nations and Rwanda, 1993–1996, New York: United Nations Department of Public Information, 1996

Thornberry, Patrick, *International Law and the Rights of Minorities*, Oxford: Clarendon Press, 1991

Thornton, Brenda Sue, 'An International Criminal Tribunal for Rwanda: A Report from the Field', (1999) 52 *Journal of International Affairs*, p. 639

Thwaites, N. L. C., 'Le concept de genocide dans la jurisprudence du TPIY: avancées et ambiguities', [1997] *Revue belge de droit international*, p. 565.

Tiba, Firew Kebede, 'The Mengistu Genocide Trial in Ethiopia', (2007) 5 *Journal of International Criminal Justice*, p. 513

Timmermann, Wibke Kristin, 'The Relationship between Hate Propaganda and Incitement to Genocide: A New Trend in International Law Towards Criminalization of Hate Propaganda?', (2005) 18 *Leiden Journal of International Law*, p. 257

'Incitement in International Criminal Law', (2006) 86 *International Review of the Red Cross*, p. 823

Tomuschat, Christian, 'Le Code des crimes contre la paix et la sécurité de l'humanité et les droits intangibles ou non susceptibles de dérogation', in Daniel Premont, Christina Stenersen and Isabelle Oseredczuk, eds., *Droits intangibles et états d'exception*, Brussels: Bruylant, 1996, pp. 91–7

'Reparation in Cases of Genocide', (2007) 5 *Journal of International Criminal Justice*, p. 905

Toriguian, Shavarsh, *The Armenian Question and International Law*, Beirut: Hamaskaine Press, 1973

Torres, L. W., *Crimes de guerra o genocidio*, San Paolo: Fulgor, 1967

Totten, Samuel, William S. Parsons and Israel W. Charny, eds., *Genocide in the Twentieth Century*, New York and London: Garland Publishing, 1995

Century of Genocide: Eyewitness Accounts and Critical Views, New York: Garland Press, 1997

Toufayan, M., 'The World Court's Distress When Facing Genocide: A Critical Commentary on the Application of the Genocide Convention Case (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))', (2005) 40 *Texas International Law Journal*, p. 233

Tournaye, Cécile, 'Genocidal Intent before the ICTY', (2003) 51 *International and Comparative Law Quarterly*, p. 447

Treves, V. E., 'Jurisdictional Aspects of the Eichmann Case', (1963) 47 *Minnesota Law Review*, p. 557

Triffterer, Otto, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such', (2001) 14 *Leiden Journal of International Law*, p. 3

Tskhovrebov, Zelim, 'An Unfolding Case of a Genocide: Chechnya, World Order and the "Right to Be Left Alone"', (1995) 64 *Nordic Journal of International Law*, p. 501

Udombana, Nsongurua J., 'An Escape from Reason: Genocide and the International Commission of Inquiry on Darfur', (2006) 40 *International Lawyer*, p. 41

United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London: His Majesty's Stationery Office, 1948

Van den Herik, Larissa, *The Contribution of the Rwanda Tribunal to the Development of International Law*, Delft: Brill, 2005.

'The Schism between the Legal and the Social Concept of Genocide in Light of the Responsibility to Protect', in Ralph Henham and Paul Behrens, eds., *The Criminal Law of Genocide*, Aldershot: Ashgate, 2007, pp. 69–90

Van den Herik, Larissa, and van Sliedregt, Elies, 'Ten Years Later, the Rwanda Tribunal Still Faces Legal Complexities: Some Comments on the Vagueness of the Indictment, Complicity in Genocide and the Nexus Requirement for War Crimes', (2004) 17 *Leiden Journal of International Law*, p. 537

van der Vyver, J. D., 'Prosecution and Punishment of the Crime of Genocide', (1999) 23 *Fordham International Law Journal*, p. 286

van der Wilt, Harmen, 'Genocide, Complicity in Genocide and International v. Domestic Jurisdiction: Reflections on the van Anraat Case', (2006) 4 *Journal of International Criminal Justice*, p. 242

Van Garse, Yvan, 'A Bibliography of Genocide, Crimes Against Humanity and War Crimes', Sint Niklas Waas, Studiecentrum voor Kriminologie en Gerechtelijke Geneeskunde, 1970

Van Schaack, Beth, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot', (1997) 106 *Yale Law Journal*, p. 2259

'Darfur and the Rhetoric of Genocide', (2005) 26 *Whittier Law Review*, p. 1101

van Sliedregt, Elies, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide', (2007) 5 *Journal of International Criminal Justice*, p. 184

Verdirame, Guglielmo, 'The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals', (2000) 49 *International and Comparative Law Quarterly*, p. 578

Verhoeven, Joe, 'Le crime de génocide, originalité et ambiguïté', (1991) 24 RBDI, p. 5

'Les spécificités du crime de génocide', in A. Destexhe and M. Foret, ed., *De Nuremberg à la Haye et Arusha*, Brussels: Bruylant, 1997, pp. 39–48

Verschave, François-Xavier, *Complicité de génocide: La politique de la France au Rwanda*, Paris: La Découverte, 1994

Vest, Hans, 'A Structure-Based Concept of Genocidal Intent', (2007) 5 *Journal of International Criminal Justice*, p. 781

Volodin, S., 'Convention on the Prevention and Punishment of the Crime of Genocide', [1954] *Sovetskoe Gosudarstvo i Pravo*, p. 125 (translated in W. W. Kulski, 'The Soviet Interpretation of International Law', (1955) 49 AJIL, p. 518)

Von Braun, Freiherr, 'Germany's Eastern Border and Mass Expulsions', (1964) 58 *American Journal of International Law*, p. 747

Wald, Patricia, 'General Radislav Krstić: A War Crimes Case Study', (2003) 16 *Georgetown Journal of Legal Ethics*, p. 445

Wallenstein, Joshua, 'Punishing Words: An Analysis of the Element of Causation in Prosecution for Incitement to Genocide', (2001) 54 *Stanford Law Review*, p. 351

Walliman, Isidor, and Dobkowski, Michael N., eds., *Genocide and the Modern Age: Etiology and Case Studies of Mass Death*, Westport, CT: Greenwood Press, 1987

Wardi, Charlotte, *Le genocide dans la fiction romanesque: histoire et representation*, Paris: Presses universitaires de France, 1986

Webb, John, 'Genocide Treaty – Ethnic Cleansing – Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia', (1993) 23 *Georgia Journal of International and Comparative Law*, p. 377

Werle, Gerhard, 'German Jurisprudence on Genocidal Intent and the European Convention of Human Rights and Fundamental Freedoms', in K. Nuotio, ed., *Festschrift in Honour of Raimo Lahti*, Helsinki: Helsinki University Print, 2007, pp. 43–59

Weisbord, Robert G., *Genocide?: Birth Control and the Black American*, Westport, CT: Greenwood Press, 1975

Weiss, G., 'The Tragedy of Ethnocide: A Reply to Hippler', in J. H. Bodley, ed., *Tribal Peoples and Development Issues: A Global Overview*, Mountain View, CA: Mayfield Publishing Co., 1988, pp. 124–33

Whitaker, Benjamin, 'Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide', UN Doc. E/CN.4/Sub.2/1985/6

Wieviorka, Annette, ed., *Les procès de Nuremberg et de Tokyo*, Paris: Editions Complexe, 1996

'Les procès de Nuremberg et d'Eichmann, en perspective', in A. Destexhe and M. Foret, eds., *De Nuremberg à la Haye et Arusha*, Brussels: Bruylant, 1997, pp. 23–38

Wilmshurst, Elizabeth, 'Genocide', in Robert Cryer, Haken Friman, Darryl Robinson and Elizabeth Wilmshurst, eds., *An Introduction to International Criminal Law and Procedure*, Cambridge: Cambridge University Press, 2007, pp. 165–86

Woetzel, Robert K., 'The Eichmann Case in International Law', [1962] *Criminal Law Review*, p. 671

The Nuremberg Trials in International Law with a Postlude on the Eichmann Case, London: Stevens & Sons, 1962

Wolfe, Robert, 'Putative Threat to National Security as a Nuremberg Defense for Genocide', (1980) 450 *Annals of the American Academy for Political and Social Science*, p. 46

'Flaws in the Nuremberg Legacy: An Impediment to International War Crimes Tribunals' Prosecution of Crimes Against Humanity', (1998) 12 *Holocaust and Genocide Studies*, p. 434

Wouters, Jan, and Panken, Heidi, eds., *De Genocidewet in international perspectief*, Ghent: Larcier, 2002

Wouters, Jan, and Verhoeven, Sten, 'The Prohibition of Genocide as a Norm of Ius Cogens and Its Implications for the Enforcement of the Law of Genocide', (2005) 5 ICLR, p. 401

'The Prosecution of Genocide – In Search of a European Perspective', in Ralph Henham and Paul Behrens, eds., *The Criminal Law of Genocide*, Aldershot: Ashgate, 2007, pp. 197–210

Wu, Yolanda S., 'Genocidal Rape in Bosnia: Redress in United States Courts under the Alien Tort Claims Act', (1993) 4 *UCLA Women's Law Journal*, p. 101

Wyler, Eric, 'Les rapports entre exceptions preliminaires et fond du litige à la lumière de l'arrêt du 11 juillet 1996 dans l'affaire du génocide', (2001) 105 *Revue générale de droit international public*, p. 25

Yarwood, Lisa, and Dold, Beat, 'Towards the End and Beyond: The "Almost" Referral of Bagaragaza in Light of the Completion Strategy of the International Criminal Tribunal for Rwanda', (2007) 6 *Chinese Journal of International Law*, p. 95

Zahar, Alexander, 'Command Responsibility of Civilian Superiors for Genocide', (2001) 14 *Leiden Journal of International Law*, p. 591

Zeiler, Jean E., 'The Applicability of the Genocide Convention to Government Imposed Famine in Eritrea', (1989) 19 *Georgia Journal of International and Comparative Law*, p. 589

INDEX

aboriginal peoples, 205, 560, 563
abortions, compulsory, 197
accession to Convention, 595–9
accomplice. *See* complicity
active personality jurisdiction, 425
actus reus, 172–240
  acts defined in Convention, 176–8
  acts not punishable under Convention, 206
  apartheid and, 236–8
  causing serious bodily or mental harm, 180–8
  cultural genocide and, 207–21
  ecocide and, 235–6
  ethnic cleansing and, 221–34
  forcibly transferring children, 201–6
  imposing measures to prevent births, 197–201
  inflicting conditions of life calculated to destroy group, 188–97
  killing, 178–80
  nuclear weapon use and, 238–40
Ad Hoc Committee (ECOSOC), 69–70
  on complicity, 341
  on cultural genocide, 209
  debates in, 72–7
  on official capacity defence, 372
  preparation for, 70–2
  on preparatory acts, 590
ad hoc tribunals. *See* International Criminal Tribunal for Rwanda; International Criminal Tribunal for the former Yugoslavia
Advisory Committee of Jurists, 27
Advisory Committee on Genocide Prevention, 575
Afghanistan, 450
African-Americans, 279
African Commission of Human and People's Rights, 466
African Union, 545
Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, 42
  See also Nuremberg cases
aiding and abetting, 349, 350, 352
  See also complicity
Akayesu case
  on *actus reus*, 179, 180
  on bodily or mental harm, 182, 183, 185–8
  on complicity, 347
  on forcible transfer of children, 202
  on groups, 131, 146, 151, 153, 168
  on incitement, 331
  interpretation of Convention in, 637
  on knowledge, 248, 254
  on measures intended to prevent births, 200
  on *mens rea* of killing, 288
  on negligence, 269
  on premeditation, 268
  on universal jurisdiction, 439
Albania, 619, 624
Alfaro, Ricardo J., 68, 101
Algeria, 430, 619
Alston, Philip, 564, 567
Alstötter case (Justice trial), 49
Amann, Diann, 489

American Convention on Human Rights, 585
Amnesty International, 204, 481
Annan, Kofi, 573, 574
Anraat, Frans van, 425
Antigua and Barbuda, 600
anti-Semitism, 45–6
apartheid, 236–8, 644
  See also Convention on the Suppression and Punishment of the Crime of Apartheid
Appeals Chambers. *See specific tribunals*
Arendt, Hannah, 468
Argentina
  Eichmann kidnapping and, 484, 485
  reservations by, 619
  on sovereign territories, 607
  territorial jurisdiction prosecutions in, 424
armed conflict, law of, 18
  See also Geneva Conventions; Hague Convention (1907)
Armenian genocide, 19, 24–6, 192, 285, 557
Army Environmental Policy Institute (US), 194
Arrest Warrant Case
  on official capacity defence, 370, 648
  on universal jurisdiction, 432
Article I of Convention
  definition of genocide in, 61
  drafting of, 80
  on prevention, 520
  on state responsibility, 516
Article II of Convention
  on *actus reus*, 177, 180
  criminal tribunals under, 115
  Draft Code of Crimes and, 91, 96
  drafting of, 62, 81, 82
  on forcible transfer of children, 203
  on groups, 117, 123
  on intent, 256
  International Criminal Court and, 108
  on measures intended to prevent births, 198
  on *mens rea*, 241, 291
  on motive, 294
Article III of Convention
  on *actus reus*, 172, 176
  on attempted genocide, 589
  on complicity, 342
  criminal tribunals under, 115
  drafting of, 62, 81, 82
  on incitement, 319, 324, 334
  International Criminal Court and, 108
  on measures intended to prevent births, 198
  on 'other acts', 307, 309
Article IV of Convention
  Draft Code of Crimes Against the Peace and Security of Mankind and, 93
  drafting of, 62, 83
  on official capacity defence, 368, 376
  on state responsibility, 492–4
Article V of Convention
  drafting of, 62, 84
  on penalties, 462
  on prosecution, 400, 403
Article VI of Convention
  criminal tribunals under, 114
  drafting of, 62, 84
  International Criminal Court and, 101, 104
  on jurisdiction, 411, 443, 461
  on prosecutions, 400
  on state responsibility, 494–5
Article VII of Convention
  drafting of, 62, 84
  on extradition, 472
  reservations to, 618
Article VIII of Convention
  on *actus reus*, 176
  drafting of, 62, 85
  on prevention, 533–9
  UN intervention and, 554
Article IX of Convention
  drafting of, 62, 85
  litigation pursuant to, 499–512
  reservations to, 605, 617, 619, 624, 627, 629

on state responsibility, 491, 495–9, 515
Article XI of Convention
drafting of, 62
on ratification and accession, 595
Article XII of Convention
on preventive action, 534
Article XIII of Convention
on date of entry into force, 595
drafting of, 62
Article XIV of Convention
on denunciation, 610
drafting of, 62
Article XV of Convention, 611
Article XVII of Convention, 613
Article XIX of Convention, 614
Articles on State Responsibility, 515
Arusha Peace Agreement (1993), 624
atrocity crimes, 15
attempt to commit genocide, 334–9, 589–92
Australia
drafting of Genocide Convention and, 85
forcible transfer of children in, 205
on motive, 303
objections by, 626, 627
on official capacity defence, 379
on preventive action, 537
on prosecution, 403
on reservations, 623
on sovereign territories, 607
Austria, 435
aut dedere aut judicare, 475–8
auto-genocide, 138, 170
Axis Rule in Occupied Europe (Lemkin)
on cultural genocide, 207
drafting of Convention and, 17, 31–4
on group definitions, 121, 132
See also Lemkin, Raphael
Azkoul, Karim, 72, 155

Bagaragaza, Michel, 408, 433
Bagilishema, Ignace, 266
Bahamas, 600
Bahrain, 619
Bangladesh
groups defined in legislation of, 162
Pakistani Prisoners case and, 499
reservations by, 619
state responsibility litigation and, 499
territorial jurisdiction prosecutions in, 417
Banton, Michael, 141
barbarie, crime of, 30
Barbie case, 489
Barcelona Traction case, 527, 570
Barsegov, Juri G., 193, 304
Basic Principles of a Convention on Genocide (Soviet Union)
on conspiracy, 310
creation of, 71, 72
on disbanding racist organizations, 588
on groups, 155
on inflicting conditions of life calculated to destroy group, 189
on 'in whole or in part' clause, 274
Bassiouni, M. Cherif, 101, 195, 282, 471
Bavarian Appeals Chamber, 286
Bayaragwiza, Jean-Bosco, 484
Belarus, 619, 624
Belgian Congo, 607
Belgium
on bodily or mental harm, 180
on complicity, 341, 343
on conspiracy, 311
on cultural genocide, 211
on denunciation, 611
drafting of Genocide Convention and, 78, 81, 85
on extradition, 474, 478, 479
on groups, 157, 160, 169
on incitement, 322, 323
on intent, 259
on international criminal tribunals, 449, 451
on 'in whole or in part' clause, 275
on jurisdiction, 415
objections by, 626, 627
on preventive action, 536
on prosecution, 402, 407

Belgium (cont.)
on revisions, 612
Rwandan genocide litigation in, 441
on sovereign territories, 607
on state responsibility, 493, 495
state responsibility litigation of, 507
on superior orders defence, 383
on universal jurisdiction, 432
Ben Gurion, David, 468
Berwick, Lord Lloyd of, 377
Best, Geoffrey, 381
biological genocide, 61, 74, 174, 197–201
births, prevention of, 197–201, 264, 293
Blagojević case
on cultural genocide, 218
as international tribunal, 456
on knowledge, 249
on specific intent, 273
Blewitt, Graham, 457
Bobu, Emil, 421
bodily harm, 180–5, 263, 290
Bolivia
on forcible transfer of children, 203
on groups, 158
groups defined in legislation of, 139
Borkum Island case, 358
Bormann, Martin, 48, 313
Bosnia and Herzegovina
ethnic cleansing in, 8, 224, 293
forcible transfer of children in, 205
objections by, 627
radiation health risks in, 194
on responsibility to protect, 526, 527
state responsibility litigation of, 499, 502–7, 570
succession to Convention, 600, 601, 602, 604
territorial jurisdiction prosecutions in, 422, 423, 454
UN intervention and, 542, 546, 559, 560
See also International Criminal Tribunal for the former Yugoslavia
Bosnia v. *Serbia*
on cultural genocide, 218
on groups, 131
on inflicting conditions of life calculated to destroy group, 193
as international tribunal, 454
on measures intended to prevent births, 199
on responsibility to protect, 645
on state responsibility, 498, 515
Botswana, 491
Boutros-Ghali, Boutros, 529, 572
Boven, Theo van, 471
Brazil
on cultural genocide, 212
on groups, 158, 160
on incitement, 322
on international criminal tribunals, 450, 454
on jurisdiction, 414
on motive, 297
objections by, 627, 635
on state responsibility, 494
territorial jurisdiction prosecutions in, 424
Brdanin case
on ethnic cleansing, 230
on groups, 127
on *mens rea* of inflicting conditions of life calculated to destroy group, 292
Brownlie, Ian, 195
Brueckner, Heintz, 50
Buber, Martin, 468
Buddhists, persecution of, 149, 150
Bulgaria
on entry into force of Convention, 609
reservations by, 619, 624
Burma, 430
Burundi
incitement in, 324, 559
political genocide in, 163
UN intervention and, 552, 566, 568, 572
Byelorussia, 623

Cairo Declaration (1995), 163
Cambodia
  auto-genocide in, 138
  economic genocide in, 166
  Khmer Rouge prosecutions in, 139
  territorial jurisdiction prosecutions in, 417, 419, 454
  UN intervention and, 544, 562, 573
Cameroon
  extradition and, 484
  on jurisdiction of International Court of Justice, 491
  Rwandan genocide litigation in, 441
Canada
  on cultural genocide, 212
  definition of genocide in legislation of, 6
  groups defined in legislation of, 130, 151
  on incitement, 328, 332
  on international criminal tribunals, 451
  on prosecution, 406, 408
  on state responsibility, 493, 497
  state responsibility litigation of, 507
  UN intervention and, 541, 561
  on universal jurisdiction, 431, 442
Canadian Royal Commission of Inquiry, 477
Cançado-Trindade, A. A., 194
capital punishment, 242, 462, 465, 469
Carter, Jimmy, 15
Cassese, Antonio
  on duress, compulsion and coercion, 391, 392
  on superior orders defence, 387
Cassin, René, 7, 525
castration, 198
Cavallo, Miguel Angel, 425
Ceausescu, Nicolae Andruta, 421
'Celebici' case, 339, 399
Chalk, Frank, 117, 118
Charette, Patrice de, 423
Charny, Israel W., 118
Chaumont, Charles, 83, 93, 462
children. *See* Convention on Rights of the Child; forcible transfer of children
Chile, 322, 451
China
  on *actus reus*, 174, 178
  on bodily or mental harm, 181
  on conspiracy, 311
  on denunciation, 611
  on disbanding racist organizations, 588
  drafting of Genocide Convention and, 68, 71, 88
  on groups, 155, 156, 159
  Hong Kong and, 604
  on inflicting conditions of life calculated to destroy group, 189
  on 'in whole or in part' clause, 274
  on measures intended to prevent births, 197
  on motive, 296
  objections by, 627
  on preventive action, 535
  on ratification, 599
  reservations by, 619
  on sovereign territories, 607
  on superior orders defence, 382
  on universal jurisdiction, 431
Churchill, Winston, 17
Cleirin, Christine, 199
Clinton, Bill, 529, 530
coercion as defence, 388–93
Colombia, 162
command responsibility
  as act of genocide, 361–6
  complicity and, 348
  negligence and, 270
  See also superior orders as defence
Commission of Experts for Rwanda, 551
Commission of Experts for the Former Yugoslavia
  on ethnic cleansing, 221, 224
  on groups, 131
  on 'in part' clause interpretation, 282, 283
  on measures intended to prevent births, 199
  on motive, 302
  on universal jurisdiction, 430
Commission of the Churches on International Affairs, 64

Commission on Human Rights
on apartheid, 236
crimes against humanity and, 60
on cultural genocide, 214
on ethnic cleansing, 222
on groups, 157
preventive actions of, 560–9
on reparations, 471
on Rwanda, 9
Commission on Narcotic Drugs (UN), 77
Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 21
Committee for the Elimination of Racial Discrimination
on denial of Holocaust, 334
on ethnic cleansing, 223
preventive actions by, 577–8
Committee on the Progressive Development of International Law and Its Codification, 63
common law approach, 311
See also customary law
common purpose complicity, 353
complicity, 339–41
drafting history, 341–3
forms of, 347–50
judicial interpretation, 345–7
mens rea of, 351–3
in other instruments, 343–5
prevention of, 522
problems of application, 355–61
territorial jurisdiction prosecutions of, 421
compulsion as defence, 388–93
compulsory abortions, 197
conditions of life calculated to destroy group, 188–97
mens rea of inflicting, 290–3
specific intent and, 264
Conference on Security and Co-operation in Europe, 112
Conferences on the Unification of Criminal Law, 29
Congo. *See* Democratic Republic of Congo
conspiracy, 310
mens rea of, 316
in Rome Statute, 109
scope of, 315–18
Consultative Council of Jewish Organizations, 64, 154, 363
continental law, 310
Control Council Law No. 10
on attempt to commit genocide, 337
on complicity, 340
prosecutions under, 48
statutory limitation and, 486
on superior orders defence, 382
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 119, 340, 482
Convention for the Elimination of All Forms of Racial Discrimination
on disbanding racist organizations, 589
freedom of expression and, 584
on groups, 123, 133, 135, 141, 144, 164
on hate propaganda, 559, 582
preventive actions of, 577, 650
See also Committee for the Elimination of Racial Discrimination
Convention for the Suppression of Counterfeit Currency, 591
Convention for the Suppression of Terrorist Bombings, 314
Convention on Rights of the Child, 122, 203
Convention on the Prevention and Punishment of the Crime of Genocide
acts defined in, 176–8
acts not punishable under, 206
adoption of, 3, 77, 642
definition of genocide in, 17
drafting of, 59–116
Ad Hoc Committee draft, 69–70
article-by-article study, 80–90
comments by member States, 64–6
General Assembly second session, 66–9

General Assembly third session, 77–8
Secretariat draft, 60–4
historical background, 17–58
preamble to, 85
sources of law for, 6
treaty law on, 593–640
See also specific articles
Convention on the Suppression and Punishment of the Crime of Apartheid
apartheid defined in, 236
on complicity, 340
on motive, 304
on preventive action, 538
on racial groups, 142
Coomaraswamy, Radhika, 569
Correll, Hans, 112
Costa Rica, 162
Côte d'Ivoire, 575
Cotler, Irwin, 236
Council of Four, 23
Council of the League of Nations, 27
Covenant on Civil and Political Rights, 122
cultural rights in, 214
on groups, 145
on hate propaganda, 583
on rights of accused, 481
Covenant on Economic, Social and Cultural Rights, 122, 145
Crawford, James, 104, 513, 515
Creutz, Rudolf, 50
crimes against humanity
defined, 11
Draft Code of Crimes and, 93, 94
drafting of Genocide Convention and, 73
in hierarchy of international crimes, 653
knowledge requirement for, 243
in Nuremberg cases, 12
prosecution of Nazis under, 36, 42
scope of, 119
Spiropoulos on, 93
in Treaty of Sèvres, 26
criminal organization. *See* joint criminal enterprise
criminal tribunals. *See specific tribunals*
Croatia
objections by, 627
state responsibility litigation of, 499, 510–11, 570
on succession, 603
succession to Convention, 600
territorial jurisdiction prosecutions in, 422
UN intervention and, 542, 560
Cuba
drafting of Genocide Convention and, 68
General Assembly Resolution 96(I) and, 52
on hate propaganda, 581
on intent, 259
on international criminal tribunals, 449
objections by, 627, 629
on UN intervention, 541, 545
cultural genocide
actus reus of, 207–21
exclusion from Convention, 646
forcible transfer of children as, 294
in Secretariat draft, 61, 74, 174, 274
Shawcross on, 79
specific intent and, 272
Whitaker on, 558
customary law
application of Convention and, 639
on extradition, 648
prosecutions under, 429–35
on ratification, 597
universal jurisdiction and, 410
Cvjetkovic, Dusko, 435
Cyprus
objections by, 626, 627
on reservations, 619
UN intervention and, 544
Czechoslovakia
on drafting of Convention, 89
on international criminal tribunals, 453
reservations by, 619, 623, 624
Czech Republic
succession to Convention, 600
on UN intervention, 549

Dadrian, Vahakn, 118
Dallaire, Roméo, 571, 575
Damjanovic, Sretko, 422
Darfur
  ethnic cleansing in, 15
  international criminal tribunal for, 460
  UN intervention in, 553, 567, 575, 578
  See also International Commission of Inquiry on Darfur
David, Eric, 476
Dayton Agreement (1995), 422, 455, 506, 602
death penalty. *See* capital punishment
Declaration on the Rights of Persons Belonging to National or Ethnic Religious and Linguistic Minorities, 542
defences, 367–99
  coercion, 388–93
  compulsion, 388–93
  duress, 385–93
  insanity, 398
  intoxication, 398
  military necessity, 396–7
  mistake of law or fact, 395–6
  official capacity, 369–80
  of property, 394
  reprisal, 396–7
  self-defence, 388–93
  superior orders, 380–5
  tu quoque, 397
Degni-Segui, René, 331, 561, 562
Demjanjuk, John, 429, 434
democide, 235
Democratic Kampuchea, 622
Democratic Republic of Congo
  international criminal tribunal for, 460
  state responsibility litigation of, 499, 511–12, 570, 624, 631, 633
  succession to Convention, 600
  UN intervention and, 568, 573
  on universal jurisdiction, 432
Democratic Republic of Vietnam, 604
Democratic Yemen, 619
denationalization
  Lemkin on, 32
  national tribunals and, 52
  prosecution of, 36
  in WW1, 21
Deng, Francis, 576
denial of Holocaust, 334, 583, 584
Denmark
  on conspiracy, 311
  drafting of Genocide Convention and, 64
  on freedom of expression, 584
  objections by, 627
  on state responsibility, 514
denunciation of Convention, 610–11
deportation, 193, 223, 229
depositary functions and responsibilities, 613–14
Der Stuermer, 45, 47
Descamps, Baron, 27
Deschênes, Jules, 477
Des Forges, Alison, 550
Dihigo, Ernesto, 52
Dinca, Ion, 421
direct and public incitement, 319, 324–6
  complicity and, 348
  'direct' defined, 329–34
  drafting history, 319–24
  hate propaganda as, 579
  judicial interpretation of, 326–8
  'public' defined, 329–34
  in Rome Statute, 109
discrimination, racial. *See* Committee for the Elimination of Racial Discrimination; Convention for the Elimination of All Forms of Racial Discrimination
District Court of Jerusalem
  on bodily or mental harm, 182
  on complicity, 345
  on ethnic cleansing, 233
  on inflicting conditions of life calculated to destroy group, 192
  on intent, 256
  See also Eichmann case
Djibouti, 491
dolus specialis. *See* specific intent

Dominican Republic
drafting of Genocide Convention and, 79
on groups, 157, 160
on incitement, 322
on ratification, 597
on reservations, 616, 617
on state responsibility, 494
on superior orders defence, 383
Donnedieu de Vabres, Henri
on cultural genocide, 207
drafting of Genocide Convention and, 60, 61, 64
on groups, 132, 154
on international criminal tribunals, 445
on official capacity defence, 371
double criminality requirement for extradition, 480
Draft Code of Crimes Against the Peace and Security of Mankind
on *actus reus*, 175
on attempt, 335
on complicity, 344
on defences, 369
drafting of, 90, 91–100
on duty to prosecute or extradite, 476
on effective penalties, 463
on groups, 130, 144, 146, 169
on incitement, 324
on knowledge, 252
on 'other acts', 308
on specific intent, 261, 263
on superior orders defence, 385
on universal jurisdiction, 433
Draft Convention for the Establishment of a United Nations War Crimes Court, 36
Drost, Pieter, 118, 164
duality of responsibility, 517
Dulles, John Foster, 598
duress as defence, 385–93
duty to act
complicity and, 358
conditions of life calculated to destroy group and, 196
preventive action and, 525–33, 645
duty to prosecute or extradite, 475–8
ecocide, 235–6, 558
Economic and Social Council (ECOSOC)
drafting of Genocide Convention and, 59, 63, 69, 77
General Assembly Resolution 96(I) and, 53, 54
preventive actions by, 555, 557
See also Ad Hoc Committee
economic groups, 165–7
Ecuador
on groups, 158
on international criminal tribunals, 450
on measures to prevent births, 293
objections by, 626, 627, 635
on reservations, 622, 623
on sovereign territories, 608
on superior orders defence, 383
on universal jurisdiction, 431
Eden, Anthony, 35
Egypt
on complicity, 343
on conspiracy, 311
on cultural genocide, 211
on disbanding racist organizations, 588
drafting of Genocide Convention and, 67, 87
on groups, 134, 148, 158, 159, 160
on hate propaganda, 581
on intent, 259
on international criminal tribunals, 452
on 'in whole or in part' clause, 275
on jurisdiction, 414
on motive, 298
on sovereign territories, 606
on state responsibility, 494
Eichmann, Adolf
'final solution' and, 47
kidnapping of, 484
knowledge of plan, 247
measures intended to prevent births used by, 201
Eichmann case
on bodily or mental harm, 182
capital punishment and, 242, 467

Eichmann case (cont.)
on complicity, 345
on duress, compulsion and coercion, 390
on ethnic cleansing, 233
on inflicting conditions of life calculated to destroy group, 192
on intent, 256
on official capacity defence, 376
on premeditation, 268
prosecution of, 426–9
statutory limitation and, 490
Eighth International Conference of American States (1938), 27, 295
Einsatzgruppen case, 386
ejusdem generis approach, 150, 169
Elements of Crimes
on *actus reus*, 179
on bodily or mental harm, 188
drafting of, 110, 111
on forcible transfer of children, 202
on inflicting conditions of life calculated to destroy group, 191
on jurisdiction, 460
on knowledge, 250, 254
on *mens rea* of killing, 289
on mistake of law or fact, 396
El Salvador, 300
England. *See* United Kingdom
Erdemović case
on duress, compulsion and coercion, 388, 391, 392
on superior orders defence, 387
Eser, Albin, 393
Estonia, 627
Etchecolatz, Miguel Angel, 424
Etcheverría, Luis, 425
Ethiopia
on entry into force of Convention, 609
groups defined in legislation of, 161
territorial jurisdiction prosecutions in, 417, 421
ethnic cleansing
actus reus of, 221–34
in Bosnia and Herzegovina, 9, 293
prevention of, 647
state responsibility litigation and, 510
ethnic groups, 133, 143–7, 646
ethnocide, 220, 558
See also cultural genocide
Europe
human rights law in, 136
Organization for Security and Co-operation in
on groups, 128
See also specific countries and organizations
European Commission for Democracy through Law, 136
European Convention on Human Rights
capital punishment and, 422
freedom of expression in, 584
on hate propaganda, 584
on self-defence, 393
on universal jurisdiction, 435, 437
European Convention on the Non-Applicability of Statutory Limitations, 489
European Court of Human Rights
on denial of Holocaust, 334
on freedom of expression, 584
on groups, 149
on universal jurisdiction, 435, 437
European Jews, 123
See also Holocaust
Evans, Gareth, 575
executions. *See* capital punishment; extrajudicial, summary or arbitrary executions
expression, freedom of. *See* freedom of speech and expression
extradition
exceptions to, 479–80
of nationals, 478
pledges to grant, 472–5
for prosecution, 472
recommendations for, 648
state practice, 483–6
extrajudicial, summary or arbitrary executions, 564, 650
Extraordinary Chambers of the Courts of Cambodia, 139, 420, 573

Falkland Islands, 607
Faurisson, Robert, 584
Federal Constitutional Court of Germany
on ethnic cleansing, 231
'in part' clause interpretation and, 286
on specific intent, 272
on universal jurisdiction, 438
Fein, Helen, 118
Fifth International Conference for the Unification of Penal Law (1933), 30
Fiji, 600
'Final Solution', 47, 247, 426
Finland
objections by, 627
on official capacity defence, 379
reservations by, 625
on UN intervention, 542
on universal jurisdiction, 431
Fitzmaurice, Gerald
on complicity, 342
drafting of Genocide Convention and, 89
on extradition, 479
on hate propaganda, 581
on incitement, 322
on international criminal tribunals, 449
on jurisdiction, 415
on *mens rea* of killing, 287
on motive, 297
on sovereign territories, 605, 606
on state responsibility, 492
Five Point Action Plan, 569, 573
Fletcher, George, 307, 368
Fomba, Salifou, 324
forced displacement, 232
See also deportation
forcible transfer of children, 205, 264, 294
France
on conspiracy, 311
on cultural genocide, 208, 209, 210
on disbanding racist organizations, 588
drafting of Genocide Convention and, 63, 64, 65, 66, 71, 73, 74, 83, 85, 89
on effective penalties, 462
on extradition of nationals, 478
General Assembly Resolution 96(I) and, 54
genocide defined in legislation of, 6
groups defined in legislation of, 169
on hate propaganda, 581, 583
on incitement, 321, 328
on inflicting conditions of life calculated to destroy group, 189
on intent, 259
on international criminal tribunals, 443, 446, 447, 451, 452, 453
on 'in whole or in part' clause, 273, 275
on jurisdiction, 412
on *mens rea* of killing, 287
on motive, 297, 299
on official capacity defence, 371
on preventive action, 535
on prosecution of Nazi war criminals, 41
on revisions, 612
Rwandan genocide litigation in, 441
on state responsibility, 492, 493, 496, 497
state responsibility litigation of, 507
on UN intervention, 550
Frank, Hans, 44, 46, 48
freedom of speech and expression
hate propaganda and, 582, 583, 584, 585
incitement and, 320, 334
freedom of the press, 321, 581
Frick, Wilhelm, 48, 313
Fritzche, Hans, 48, 332
Funk, Walter, 48
Furundžija case, 100, 359

gacaca jurisdictions, 418
Gacumbitsi case, 346
Garreton, Roberto, 568, 573
Garzon, Baltasar, 149, 170, 443

gender
crimes against women, 185
as group under Convention, 168
segregation by, 197
gendercide, 236
General Assembly (UN)
drafting of Genocide Convention and, 66–9, 77–8
genocide recognized by, 5
on groups, 137
International Criminal Court and, 105
preventive actions of, 540–6
Resolution 51/160, 100
Resolution 96(I), 52–8
on *actus reus*, 173
on complicity, 343
on cultural genocide, 210
definition of genocide in, 8
on disbanding racist organizations, 588
drafting of Genocide Convention and, 59
on groups, 117, 131, 147, 150, 153, 156, 158
groups defined in, 122
'in whole or in part' clause, 273
on official capacity defence, 371
on universal jurisdiction, 410
US Military Tribunals and, 49
Resolution 180(II), 68, 73
Resolution 368(IV), 597
general principles as source of law, 4
Geneva Conventions
on command responsibility, 362
on cultural genocide, 215
duty to try or extradite, 475
on *mens rea* of killing, 290
on rights of accused, 481
Genocide Convention Implementation Act (US), 263
George, Lloyd, 21, 23
Germany
on ethnic cleansing, 231
on extradition, 480
on reservations, 627
reservations by, 619, 622
state responsibility litigation of, 507
on UN intervention, 541
on universal jurisdiction, 436, 437
Versailles and Leipzig trials and, 23
Giraud, Henri, 296
Glaser, Stéfan, 118, 135, 140, 146
Goddard, Lord, 241
Goering, Hermann, 48
Goeth, Amon Leopold, 51, 207
Gollancz, Victor, 468
Graven, Jean, 421, 592
Great Britain. *See* United Kingdom
Greece
on forcible transfer of children, 202
objections by, 626, 627
on reservations, 619
Greek Cypriots, 544
Greifelt, Ulrich, 50, 198, 207
Greiser, Arthur, 51, 207, 417
Gros, Andre, 41
Gross, Ernest A., 79
Grotius, Hugo, 428
Group of Experts for Cambodia, 149, 150
Group Rights and Discrimination in International Law (Lerner), 122
groups, 117–71
defined, 121–4
economic, 165–7
ethnical, 143–7
gender, 168
linguistic, 167
listed in Convention, 124–33
mens rea and, 287
national, 134–9
racial, 139–43
religious, 147–50
social, 165–7
stable and permanent requirement, 151–3
Guatemala, 518
Guatemalan Commission for Historical Clarification, 193
Guerrero, José Gustavo, 638
Guinea Bissau, 491
Güney, Judge, 347

Hadley, Lord Slynn of, 377
Hadon, A. C., 145
Hague Convention (1907)
on civilians, 18
on cultural genocide, 215
Lemkin on, 33
on war crimes, 22
Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 215
Hailemariam, Mengistu, 421
Haiti
drafting of Genocide Convention and, 65
on groups, 144
on hate propaganda, 581
on intent, 259
on international criminal tribunals, 448
on state responsibility, 497
Hamburg, David, 575
Hannay, David, 223, 548
Harff, Barbara, 164
Hartmann, Michael, 424
hate crimes and speech
motive and, 295
prevention of, 579–87, 646
propaganda as, 334, 652
Herak, Borislav, 422
Hess, Rudolph, 48
Higgins, Rosalyn, 626, 632, 633
High Commissioner for Human Rights
on capital punishment, 466, 467
on Darfur, 575
preventive actions, 650
on Rwanda, 572
High Commissioner on National Minorities, 128
Higher Regional Court at Dusseldorf, 437
High Level Panel on Threats, Challenges and Change, 531, 549
Hildebrandt, Richard, 50
Himmler, Heinrich, 46, 204
Hitler, Adolf, 1, 32, 46, 234, 581
See also Nazis
Hoess, Rudolph, 47, 51
Holloway, Kay, 26
Holocaust
denial of, 334, 583, 584
International Day of Commemoration in memory of the victims of, 545
See also Nazis; Nuremberg cases
homicide
as individual crime, 131
mens rea of, 241, 288
Hong Kong, 604
Hostages case, 264
Huber, Max, 227
Huebner, Herbert, 50
Hughes, Emrys, 239
humanitarian intervention, 550
human rights
European law on, 136
international law for, 18
legal development of, 642
rights of accused, 481–3
See also freedom of speech and expression
Human Rights and Equal Opportunity Commission (Australia), 205, 303
Human Rights Chamber for Bosnia and Herzegovina, 422
Human Rights Committee
on groups, 148
on incitement, 334
preventive actions of, 569
Human Rights Watch, 481
Humphrey, John P., 29, 60, 77
Hungary
reservations by, 619, 624
on statutory limitation, 489
Hurst, Cecil, 35, 37, 38
Hussein, Saddam, 424, 425
Hutus, 125
Huxley, Julian, 145

Ieng Sary, 420
immunity, 370
IMT. *See* International Military Tribunal
inchoate acts, 307, 310
incitement. *See* direct and public incitement
Independent International Commission on Kosovo, 531

India
on bodily or mental harm, 181, 183
on cultural genocide, 211
drafting of Genocide Convention and, 64
General Assembly Resolution 96(I) and, 52
on jurisdiction, 414
on official capacity defence, 373
reservations by, 619
state responsibility litigation of, 499, 499–502, 570
territorial jurisdiction and, 417
indigenous peoples, 560, 563
indirect intent, 254
inherent jurisdiction, 103
'in part' clause interpretations, 277–86
insanity as defence, 398
instigation. *See* direct and public incitement
Institut de Droit International, 227
intent
complicity and, 351
indirect, 254
mens rea of, 256–7
proof of, 264–7
state responsibility and, 517
See also specific intent
Inter-American Commission on Human Rights, 162, 518
Inter-American Court of Human Rights, 194, 585
International Association of Penal Law, 27
International Commission of Inquiry on Darfur
on groups, 127, 130, 152, 153
on hierarchy of international crimes, 14, 653
on knowledge, 250
preventive actions of, 573
on state responsibility, 518
International Congress on Penal Law, 30
International Court of Justice
on duty to prosecute or extradite, 477
on ethnic cleansing, 222, 231
on General Assembly Resolution 96(I), 56
on groups, 131, 134
on inflicting conditions of life calculated to destroy group, 193
on 'in part' clause interpretation, 281, 285, 286
on international criminal tribunals, 450
interpretation of Convention by, 635, 637
on jurisdiction, 424
on measures intended to prevent births, 199
on *mens rea* of inflicting conditions of life calculated to destroy group, 293
on motive, 302
on nuclear weapons, 238
on objections, 626
on official capacity defence, 370
on 'other acts', 309
on peremptory norm, 4
preventive actions of, 569–71
on reservations, 3, 595, 629–35
on responsibility to protect, 524, 533, 645
sources of international law, 4
on specific intent, 260
on state responsibility, 498
state responsibility cases, 491
on succession, 599, 600, 603
on universal jurisdiction, 432
International Criminal Court
on bodily or mental harm, 184, 188
creation of, 101–12, 644
on defences, 367
establishment and practice of, 454–61
on 'in part' clause interpretation, 278
on intent, 256
jurisdiction of, 460
on knowledge, 250, 252
on negligence, 270
on 'other acts', 309

on specific intent, 262
See also Elements of Crimes; Rome Statute of the International Criminal Court
International Criminal Tribunal for Rwanda
on acts of omission, 196
on *actus reus*, 177, 179, 180
on bodily or mental harm, 182, 183, 185
on command responsibility, 364
on complicity, 343, 346, 347, 349, 352, 354, 361
on conspiracy, 316
creation of, 90, 112–16, 443, 551
on crimes against humanity, 13, 119
definition of genocide in, 5
establishment and practice of, 454–61
ethnic cleansing and, 229
extradition and, 483
on forcible transfer of children, 202
on groups, 125, 126, 131, 134, 140, 143, 151, 153, 165, 168
on hate propaganda, 586
on incitement, 326, 329, 330, 332
on inflicting conditions of life calculated to destroy group, 190
on 'in part' clause interpretation, 279
on interpretation of Convention, 639
on jurisdiction, 419
on knowledge, 248, 249, 254
on measures intended to prevent births, 200
on motive, 301, 302
on Nuremberg trial, 44
on official capacity defence, 377
on 'other acts', 308
penalties imposed by, 464
on premeditation, 268
on proof of intent, 265, 266
International Criminal Tribunal for the former Yugoslavia
Article VI of Convention and, 114
on bodily or mental harm, 183
on Bosnian Muslims as national group, 124
on command responsibility, 362, 363, 365
on complicity, 339, 340, 343, 346, 352, 354
on conspiracy, 315
creation of, 9, 90, 112–16, 443, 546
on crimes against humanity, 119
on cultural genocide, 218
definition of genocide in, 5
drafting of Elements of Crimes and, 112
establishment and practice of, 454–61
on ethnic cleansing, 229, 232
on forcible transfer of children, 206
on groups, 127, 128, 130, 153, 165
on incitement, 326
on inflicting conditions of life calculated to destroy group, 191
on 'in part' clause interpretation, 279, 280, 282
on interpretation of Convention, 638
on jurisdiction, 424
on knowledge, 243, 244, 245, 247, 249, 253, 255
on measures intended to prevent births, 199
on *mens rea* of inflicting conditions of life calculated to destroy group, 292, 293
on *mens rea* of killing, 289
on motive, 306
on official capacity defence, 377
on 'other acts', 308, 309
penalties imposed by, 464
on premeditation, 268
on preventive action, 522
on reprisal defence, 397
on specific intent, 262, 272
on state responsibility, 507, 518
on superior orders defence, 387
UN intervention and, 563
on universal jurisdiction, 438

international criminal tribunals
drafting history, 444
establishment and practice of, 454–61
prosecutions in, 443–4
See also specific tribunals
international custom as source of law, 4
International Day of Commemoration in memory of the victims of the Holocaust, 545
International Day of Reflection on the 1994 Genocide in Rwanda, 545, 573
International Law Association, 27
International Law Commission
on *actus reus*, 175
on attempt to commit genocide, 337
on bodily or mental harm, 182
on complicity, 339, 344, 356
on conspiracy, 314
on cultural genocide, 216
on defences, 369
drafting of Genocide Convention and, 78, 79
on duty to prosecute or extradite, 476
on effective penalties, 463
on forcible transfer of children, 201
on groups, 130, 144, 146, 151, 165
on incitement, 324, 329, 330
on inflicting conditions of life calculated to destroy group, 193
on 'in part' clause interpretation, 277, 280
International Criminal Court and, 108
on international criminal tribunals, 446
on knowledge, 255
on *mens rea* of killing, 288
on motive, 303
on 'other acts', 308
on reparations, 471
on revisions, 612
on specific intent, 261, 271
on state responsibility, 513, 515
on superior orders defence, 385
See also Draft Code of Crimes Against the Peace and Security of Mankind
International Military Tribunal (IMT)
charter of, 42
on conspiracy, 313
on duty to prosecute or extradite, 475
on knowledge, 247
on official capacity defence, 370
statutory limitation and, 486
on superior orders defence, 386
See also Nuremberg cases
International Military Tribunal at Nuremberg. *See* Nuremberg cases
International Military Tribunal for the Far East, 141
intervention, duty of, 358, 525–33
intoxication as defence, 398
'in whole or in part' clause, 273–86
Iran
on complicity, 342
on cultural genocide, 211
on duty to prosecute or extradite, 476
on groups, 156, 157, 158, 160
on hate propaganda, 582
on incitement, 322
on international criminal tribunals, 452
on jurisdiction, 413, 415
on ratification, 596
on sovereign territories, 606
Iraq, 424, 526
Ireland, 515, 627
Israel
capital punishment in, 467
drafting of Elements of Crimes and, 112
Eichmann kidnapping by, 484, 485
ethnic cleansing and, 227
on forcible transfer of children, 203
on groups, 124
on knowledge, 250
on superior orders defence, 384
on UN intervention, 540, 541, 544
on universal jurisdiction, 428
See also Eichmann case

Italy
objections by, 627
state responsibility litigation of, 507
on universal jurisdiction, 431

Jackson, Robert, 40, 42
Jahangir, Asma, 564, 567
Jamaica, 328
Jang Zemin, 443
Japan, 23, 141
Jelisić case
on groups, 127
on 'in part' clause interpretation, 283
'in part' clause interpretation and, 285
on knowledge, 244, 245
Jersild case, 584
Jescheck, Hans-Heinrich, 538
Jews
as group, 123
Nuremberg trial and, 44
joint criminal enterprise, 313, 353–5
Jonassohn, Kurt, 117, 118
Jorgić, Nicolai, 437
jurisdiction
active personality, 425
gacaca and, 418
inherent, 103
International Criminal Court, 103
prosecution and, 409–11
temporal, 317
See also territorial jurisdiction; universal jurisdiction
jus cogens, 4

Kaltenbrunner case, 359
Kambanda case
on *actus reus*, 177
on hierarchy of international crimes, 11
on incitement, 331
interpretation of Convention and, 636
on official capacity defence, 377
Karadžić and Mladić case
on cultural genocide, 218
on ethnic cleansing, 222, 229
on forcible transfer of children, 206
as international tribunal, 457
on knowledge, 247
on official capacity defence, 377
Karamira, Froduald, 483
Kayishema and Ruzindana case
on groups, 126, 148
on inflicting conditions of life calculated to destroy group, 190
on 'in part' clause interpretation, 279
on interpretation of Convention, 639
on knowledge, 248
on *mens rea* of killing, 288
Keating, Colin, 223, 548
Keitel, Wilhelm, 48
Kenya, 491
Khmer Rouge
auto-genocide by, 138
economic genocide by, 166
religious persecution by, 149, 150
UN intervention and, 544
killing
as *actus reus* of genocide, 178–80
mens rea of, 287–90
specific intent and, 263
See also homicide
knowledge
complicity and, 351
as *mens rea*, 243–56
Koo, Wellington, Jr., 68
Koroma, Abdul G., 239, 432, 632
Kosovo
ethnic cleansing in, 234
NATO bombing of, 499
responsibility to protect and, 530, 531
territorial jurisdiction prosecutions in, 423, 454
UN intervention and, 544
Kovanda, Karel, 548
Krajisnik case, 217
Kreca, Milenko, 633
Kremnitzer, Mordechai, 8
Kress, Claus, 242
Krstić case
on bodily or mental harm, 183

Krstić case (cont.)
on Bosnian Muslims as national group, 124
on complicity, 346, 352
on cultural genocide, 216, 218, 219
on ethnic cleansing, 230, 231
on 'in part' clause interpretation, 284, 285
as international tribunal, 456
interpretation of Convention in, 635, 638
on knowledge, 249
on premeditation, 268
on specific intent, 273
on state responsibility, 518
Krupp case, 389
Kunarac case, 206
Kuper, Leo, 281
Kurdish peoples, 424, 526

Lachs, Manfred
on *actus reus*, 177
on forcible transfer of children, 202
on groups, 158
on incitement, 322
on international criminal tribunals, 450
on preventive action, 537
on superior orders defence, 383
language
of Convention, 593–4
groups defined by, 167
Lansing, Robert, 20
Laugier, Henri, 72
Lauterpacht, Elihu
on ethnic cleansing, 223, 231
interpretation of Convention by, 636
on responsibility to protect, 527, 530
Lauterpacht, Hersh, 28, 214
Lautz, Ernst, 49
League of Nations, 27, 35, 444
Lebanon
on cultural genocide, 210
drafting of Genocide Convention and, 73
on groups, 155, 160
on hate propaganda, 580
international criminal tribunal in, 460
on measures intended to prevent births, 197
on motive, 296
on official capacity defence, 374
Special Tribunal for, 116
on superior orders defence, 382
UN intervention in, 540
Legality of Use of Force Case, 507–10, 609, 634
Leipzig trials, 21–4
Lemkin, Raphael
on *actus reus*, 173, 174, 206
drafting of Genocide Convention and, 60, 61, 62, 64
on group definitions, 119, 121, 132, 136, 154, 166
on groups, 130
influence of, 28–34
on 'in part' clause interpretation, 278
on international criminal tribunals, 445
on knowledge, 246
minorities treaties and, 28
on national legislation, 401
on Nuremberg trial, 44
on peacetime genocide, 642
on preventive action, 534
on reparations, 470
on responsibility to protect, 525
on specific intent, 270
on superior orders defence, 381
on universal jurisdiction, 57, 410
Lerner, Natan, 122
Ley, Robert, 177
liability, secondary, 307
linguistic groups, 167
Lin, Moushong
on disbanding racist organizations, 588
on groups, 155, 156
Li-Ping, 443
Lippmann, Matthew, 149, 301
Lithuania, 162, 167
litigation. *See* prosecution; *specific cases*
Loi Gayssot (France), 583, 584
London Charter, 91

London Conference, 38–42
London International Assembly, 35
Lorentz, Werner, 50
Lotus case, 409
Lubanga, Thomas, 460
Luck, Edward, 576
Luxembourg, 342

Macao, 607
MacDonald, Ronald St John, 634
Macedonia, 600
Madagascar, 491
Maktos, John
  on conspiracy, 311
  on cultural genocide, 209
  drafting of Genocide Convention and, 72, 74, 86
  on groups, 156
  on international criminal tribunals, 447
  on jurisdiction, 416
  on motive, 296
  on preventive action, 536
  on sovereign territories, 606
  on superior orders defence, 383
Malawi, 491
Malaysia
  reservations by, 619, 621, 628
  responsibility to protect and, 526
Malta, 491
Manescu, Manea, 421
marriage, obstacles to, 197
Martens clause, 18
Mauritius, 491
Mauthausen case, 359
Maxwell Fyfe, David, 41, 43
Mazowiecki, Tadeusz, 222
McDonald, Gabrielle Kirk, 387, 391
McNair, Arnold, 638
Media Case
  on groups, 165
  on incitement, 327, 330
Mein Kampf (Hitler), 32, 46, 581
Mendez, Juan, 574, 576
mens rea, 241–306
  of accomplices, 351
  of causing serious bodily or mental harm, 290
  of complicity, 351–3
  of conspiracy, 316
  drafting history, 257–60
  of forcibly transferring children, 294
  groups, 287
  of imposing measures to prevent births, 293
  of incitement, 326
  of inflicting conditions of life calculated to destroy, 290–3
  intent, 256–7
  of killing, 287–90
  knowledge, 243–56
  motive, 294–306
  premeditation, 267–8
  proof of intent, 264–7
  specific intent, 260–4, 270–7
mental element of genocide. *See mens rea*
mental harm
  as *actus reus* of genocide, 180–5
  specific intent and, 263
Meron, Theodor
  on command responsibility, 366
  on complicity, 347
  on hate propaganda, 587
  on universal jurisdiction, 430
Mettraux, Guénaël, 152
Mexico
  objections by, 627, 634
  territorial jurisdiction prosecutions in, 425
Military Court of Cassation, 439, 440, 489
military necessity as defence, 396–7
Miloševic, Slobodan, 234, 377, 458
Ministries case, 50
minorities
  as group, 122
  international protection for, 27, 28, 34
  national, 136, 646
  rights of, 60
  See also groups
mistake of law or fact as defence, 395–6
Mo, Hsu, 638
Mongolia, 619, 622, 624
Montagu, Ashley, 143

Moore, Judge, 409
Mora, Chamorro, 541
Morgan, Elystan, 347, 378
Morocco, 430, 619
Morozov, Platon D.
  drafting of Genocide Convention and, 72
  on forcible transfer of children, 202
  on groups, 155, 157
  on motive, 298
  on ratification, 596
Moscow Declaration (1943), 35
Moscow Human Dimension Mechanism, 112
Møse, Erik, 408
motive, 294–306
Moynier, Gustav, 444
Mugesera case
  on incitement, 327, 331
  on universal jurisdiction, 442
Mulka, Robert, 357
Munyaneza, Désiré, 442
Musema case
  on command responsibility, 364
  on conspiracy, 316

Nahimana case
  on command responsibility, 365, 366
  on conspiracy, 318
  on hate propaganda, 586
national groups, 134–9
national jurisdiction prosecutions, 416–25
national minorities, 136, 646
NATO. *See* North Atlantic Treaty Organization
Nauru, 491
Nazis
  convicted of crimes against humanity at Nuremberg, 12
  ethnic cleansing by, 221
  forced displacement of Jews by, 233
  groups defined by, 125
  'in part' clause interpretation and, 285
  international minorities protections and, 28
  Lemkin on, 32
  measures intended to prevent births used by, 198
  prosecution of, 35
  racial groups and, 141
  See also Nuremberg cases
Ndadaye, Melchior, 552, 568
Ndiaye, Bacre Waly, 564, 565, 567
negationism, 334, 583, 584
negligence, 196, 254, 268–70
Netherlands
  on cultural genocide, 208, 211
  on disbanding racist organizations, 589
  drafting of Genocide Convention and, 63, 66
  on groups, 158, 165
  on international criminal tribunals, 446, 451
  on motive, 302
  on nuclear weapons, 239
  objections by, 626, 627, 629, 634
  on official capacity defence, 373
  on preparatory acts, 591
  on reservations, 619, 628
  state responsibility litigation of, 507
  on superior orders defence, 383
  on universal jurisdiction, 431
New Zealand
  on cultural genocide, 212
  drafting of Genocide Convention and, 78
  on effective penalties, 466
  on ethnic cleansing, 223
  on 'in whole or in part' clause, 275
  on motive, 298
Nicaragua, 541, 624
Nigeria, 491
Nikitchenko, I. T., 48
Nikolic case, 457
Niyitegeka case, 318
Niyonteze, Fulgence, 439
non-Member signatories, 597
North Atlantic Treaty Organization (NATO)
  responsibility to protect and, 530
  state responsibility litigation of, 499, 507–10, 570

Norway
on attempt to commit genocide, 337
drafting of Genocide Convention and, 66
on 'in whole or in part' clause, 275
on motive, 297
objections by, 626, 627, 628
on official capacity defence, 371
on prosecution, 408
Nottebohm case, 134
Ntakirutimana case
on complicity, 352
on knowledge, 249
on specific intent, 351
Ntezimana, Vincent, 441
nuclear weapons, 194, 238–40
Nuclear Weapons case, 570
Nuremberg cases, 43–8
on attempt to commit genocide, 337
on complicity, 339
conspiracy and, 312–14
crimes against humanity as charge in, 12
definition of genocide in, 17, 66
drafting of Genocide Convention and, 86
ex post facto laws and, 31
on forcible transfer of children, 204
hate propaganda and, 585
on incitement, 332
as international criminal tribunal, 444
jurisdiction and, 417
limitations of charter, 12, 642
on official capacity defence, 370, 376
penalties available in, 463
pre-war crimes and, 88
prosecutions after, 48–52
on racial groups, 141
on state responsibility, 512
statutory limitation and, 486
on superior orders defence, 380, 383, 386

objections to Convention, 625–9
official capacity as defence, 369–71, 371–80
Ogata, Sadako, 575
Oman, 431
omission, crime of, 196, 269
Operation Turquoise, 550
Ordonneau, Pierre, 155
Organization for Security and Co-operation in Europe, 128
'other acts' of genocide, 307–66
attempt to commit, 334–9
command responsibility, 361–6
complicity, 339–41, 355–61
conspiracy, 310, 315–18
direct and public incitement, 319, 324–6
joint criminal enterprise, 353–5
Nuremberg legacy, 312–14
Outcome Document of Summit of Heads of State and Government (2005), 524, 532, 533, 574
Owen, Lord, 112

Pakistan
on cultural genocide, 211
on international criminal tribunals, 448
on official capacity defence, 373
state responsibility litigation of, 499–502, 570
territorial jurisdiction and, 417
Pal case, 256
Palestinian peoples
refugee camp massacre of, 286
resettlement of, 227
UN intervention and, 540, 557
Pallieri, Giorgio Balladore, 227
Panama
drafting of Genocide Convention and, 68
General Assembly Resolution 96(I) and, 52
groups defined in legislation of, 162
on motive, 298
on state responsibility, 493
Paraguay
on forcible transfer of children, 204
on groups, 167
groups defined in legislation of, 139

Paris Peace Conference (1919), 21, 36
Parra-Aranguren, Gonzalo, 602
Paust, Jordan, 184, 263
Peace of Westphalia of 1648, 18
peacetime genocide, 642
Pearson, Lester B., 183
Pell, Herbert C., 36
Pella, Vespasian V.
  on cultural genocide, 207
  on Draft Code of Crimes, 92
  drafting of Genocide Convention and, 60, 61, 62
  on groups, 154
  influence on Lemkin, 30
  on international criminal tribunals, 445
  on preventive action, 534
Pellet, Alain, 7, 633
penalties, 462–72
  See also capital punishment
People's Republic of China. *See* China
peremptory norm, 4
Pérez-Perozo, Victor M., 87
Permanent Court of International Justice
  on groups, 136, 140
  on minorities treaties, 28
  on territorial jurisdiction, 409
Peru
  on *actus reus*, 174
  on cultural genocide, 211
  drafting of Genocide Convention and, 88
  on groups, 160, 167
  groups defined in legislation of, 162
  on state responsibility, 494, 497
Philippines
  on cultural genocide, 211
  drafting of Genocide Convention and, 64, 85
  on entry into force of Convention, 609
  on groups, 160
  on incitement, 322
  on international criminal tribunals, 448
  on motive, 298
  on official capacity defence, 372, 379
  on rights of accused, 483
  on state responsibility, 498
physical element of genocide. *See actus reus*
physical genocide, 33, 61, 74, 79
Pinheiro, Paolo Sergio, 567
Pinochet, Augusto, 170, 377, 434, 442
planning as complicity, 347
Poland
  on *actus reus*, 174
  drafting of Genocide Convention and, 73, 89
  on duress, compulsion and coercion, 390
  on forcible transfer of children, 202
  on groups, 155, 158
  on incitement, 322
  on measures intended to prevent births, 198
  on preventive action, 535
  reservations by, 619, 624
  on superior orders defence, 382
  Supreme National Tribunal, 51
  territorial jurisdiction prosecutions in, 417
political genocide, 33
political groups, 121, 132
politicide, 236
Politis, Nicolas, 23
Pol Pot, 420
Portugal
  on entry into force of Convention, 609
  groups defined in penal code of, 124, 167
  reservations by, 621
  on rights of accused, 482
  on sovereign territories, 607
  state responsibility litigation of, 507
positive duty to act, 196
Postelnicu, Tudor, 421
Potsdam Protocol (1945), 226
Powell, Colin, 553
premeditation, 267–8, 288
preparatory acts, prevention of, 589–92, 646

Preparatory Committee's Working Group on the Definition of Crimes, 106, 107
press, freedom of, 321, 581
prevention, 520–92
  article VIII of Convention, 533–9
  Commission on Human Rights, 560–9
  disbanding of racist organizations, 587–9
  General Assembly actions, 540–6
  of hate propaganda, 579–87
  Human Rights Council, 569
  International Court of Justice, 569–71
  of preparatory acts, 589–92
  recommendations for, 644–52
  responsibility to protect and intervene, 525–33
  Secretariat actions, 571–3
  Security Council actions, 546–55
  Sub-Commission on the Promotion and Protection of Human Rights, 555–60
  UN actions, 539–40
procedural defences, 368
procreative rape, 205
propaganda
  incitement and, 330, 334
  of Nazis, 47
  prevention of, 579–87, 646, 652
  See also Media Case
property, defence of, 394
prosecution, 400–90
  after Nuremberg cases, 48–52
  customary law, 429–35
  duty to pursue, 475–8
  early developments in, 19–20
  of Eichmann, 426–9
  extradition for, 472–5, 478–80, 483–6
  international criminal tribunals, 443–4, 454–61
  inter-war developments, 26–8
  jurisdiction, 409–11
  by national jurisdictions, 416–25
  national legislation and, 401
  of Nazis, 35
  penalties, 462–70
  reparations, 470–2
  rights of accused, 481–3
  state practice, 403–9
  statutory limitation, 486–90
  universal jurisdiction, 426–9, 435–43
  See also specific cases
provocation, 328
  See also direct and public incitement
Proxmire Act (US), 599
public incitement. *See* direct and public incitement

Raafat, Wahid Fikry, 148
race
  groups defined by, 128, 133, 139–43
  hate crimes and, 295
  See also Committee for the Elimination of Racial Discrimination; Convention for the Elimination of All Forms of Racial Discrimination
racist organizations, disbanding of, 587–9
radiation health risks, 194
Radio Mille Collines, 333, 365
rape. *See* sexual violence
ratification of Convention, 595–9
Read, John, 638
recklessness, 254
religious groups, 147–50
reparations, 470–2
reprisal as defence, 396–7
Republic of China, 599
reservations to Convention, 615, 615–19, 624–5, 629–35
resettlement, 226
  See also deportation
res judicata doctrine, 603
Responsibilities Commission of Paris Peace Conference (1919), 36
revision of Convention, 612–13
Riad, Fouad, 229
Ribbentrop, Joachim von, 48
Ribes, Champetier de, 43
rights of accused, 481–3
right to life, 27

Riza, Iqbal, 571
Robinson, Daryl, 107
Robinson, Mary, 466
Robinson, Nehemiah
  on acts of omission, 196
  on incitement, 319
  on inflicting conditions of life calculated to destroy group, 190
  on 'in part' clause interpretation, 278
  on measures intended to prevent births, 198
  on *mens rea*, 288, 291
  on mental harm, 183
  on motive, 301
  on nuclear weapons, 239
  on preventive action, 538, 539
  on prosecution, 408
Rodley, Nigel, 565
Rodrigues, Calero, 95
Romania
  groups defined in penal code of, 124
  reservations by, 619, 624
  territorial jurisdiction prosecutions in, 417, 420
  on universal jurisdiction, 431
Rome Statute of the International Criminal Court
  on attempt, 336, 338
  on complicity, 344, 357
  on conspiracy, 314
  on crimes against humanity, 119
  crimes against humanity defined by, 12, 109
  on defences, 367, 369
  definition of genocide in, 5
  drafting of, 90, 107
  on duress, compulsion and coercion, 391
  on effective penalties, 463
  Elements of Crimes requirement of, 110
  on groups, 142, 151, 160, 167
  on incitement, 325
  on international criminal tribunals, 444
  on interpretation of Convention, 639
  on intoxication defence, 398
  on *mens rea*, 242
  on mistake of law or fact, 395
  on motive, 302
  national legislation and, 647
  on official capacity defence, 375
  on 'other acts', 308, 309
  on rights of accused, 481
  on state responsibility, 517
  statutory limitation and, 487
  on superior orders defence, 384
  on UN intervention, 544, 563
Roosevelt, Franklin D., 36
Rothaug, Oswald, 49
Roucounas, Emmanuel, 95
Rudzinski, Aleksandr, 73, 75
Ruhashyankiko, Nicodème
  on apartheid, 237
  on ecocide, 235
  on extradition, 480
  on groups, 135
  on motive, 301
  on preventive action, 538
  on prosecution, 403
  on sovereign territories, 608
  on UN intervention, 555, 556
  on universal jurisdiction, 431
Rummel, Rudolph J., 235
RuSHA case, 50, 207
Rusk, Dean, 277
Rutaganda case, 126
Ruzindana, Obed, 302
Rwanda
  capital punishment in, 242, 466, 469
  extradition efforts by, 484
  incitement in, 324, 329, 333
  intoxication defence in, 398
  legislation in, 647
  prosecutions in, 400, 405
  reservations by, 619, 624
  responsibility to protect and, 529
  state responsibility litigation of, 499, 511–12, 631, 633
  territorial jurisdiction prosecutions in, 417
  UN intervention in, 540, 543, 544, 561, 571
  warnings of genocide in, 9

See also International Criminal Tribunal for Rwanda; United Nations Assistance Mission for Rwanda
Rwandese Patriotic Front, 456

Sandström, A. E. F., 101
Sartre, Jean-Paul, 1, 125
Saudi Arabia, 53
Scelle, Georges, 227
Schaack, Beth van, 164
Schacht, Hjalmar, 48
Schirach, Baldur von, 48
Schomburg, Judge, 347, 349
Schonfeld case, 358
Schwalm, Fritz, 50
Schwarzenberger, Georg, 643, 644
Schwelb, Egon, 382
Scilingo, Adolfo, 443
secondary liability, 307
secondary participation. *See* complicity
Secretary-General (UN)
  as depositary of treaty, 613
  drafting of Genocide Convention and, 60–4, 120, 188
    on *actus reus*, 173
  Human Rights Division, 60
  on intent, 257
  on jurisdiction, 411
  preventive actions by, 571–3
  Special Adviser on Genocide and, 5
Security Council (UN)
  on *actus reus*, 176
  on Eichmann kidnapping, 485
  preventive actions of, 546–55
  on responsibility to protect, 526, 530, 531
self-defence, 388–93
Sellers, Mortimer, 489
separability of reservations, 633
Serbia and Montenegro
  international criminal tribunals and, 455
  preventive actions in, 523
  reservations by, 620
  in state responsibility litigation, 509, 517
  on succession, 599
Serushago case, 636
severability of reservations, 633
sexual violence
  as infliction of conditions of life calculated to destroy group, 195
  as measure intended to prevent births, 198
  as mental harm, 185
  procreative rape, 205
  UN intervention and, 563
Seyss-Inquart, Arthur, 48
Shahabuddeen, Mohamed
  on complicity, 346
  on cultural genocide, 216
  on drafting history, 638
  on hate propaganda, 587
  on specific intent, 272
Shaw, Malcolm
  on ecocide, 235
  on groups, 146, 149
  on incitement, 334
Shawcross, Hartley
  on criminal responsibility, 54
  on drafting of Genocide Convention, 66, 79
  on hierarchy of international crimes, 43
Sheleff, Leon, 468
Shelley, Christine, 529
Siam. *See* Thailand
Sierra Leone, 115, 459
Sikirica case
  on ethnic cleansing, 230
  on inflicting conditions of life calculated to destroy group, 191
  on 'in part' clause interpretation, 280, 284
  on specific intent, 262
Simon, Lord, 37
Singapore
  reservations by, 619, 628
  on UN intervention, 541
Slovakia, 600
Slovenia, 162, 600
social groups, 165–7
Somalia, 491
South Africa, 79, 212
  See also apartheid

South African Truth and Reconciliation Commission, 238
South Vietnam, 604
sovereign territories, 605–8
Soviet Union
  on bodily or mental harm, 180
  on conspiracy, 310
  on cultural genocide, 208, 213
  on denunciation, 611
  on disbanding racist organizations, 587, 588
  drafting of Genocide Convention and, 66, 67, 71, 74, 79, 82, 83, 84, 85, 90
  on effective penalties, 462
  on ethnic cleansing, 228
  on extradition, 479
  General Assembly Resolution 96(I) and, 53
  on groups, 144, 147, 155, 156, 157, 160, 166
  on hate propaganda, 580, 581
  on incitement, 320, 324
  on inflicting conditions of life calculated to destroy group, 189
  on intent, 259
  on International Criminal Court, 102
  on international criminal tribunals, 443, 446, 447, 452, 453, 454
  on 'in whole or in part' clause, 274, 275
  on jurisdiction, 411, 412, 414
  on measures intended to prevent births, 197
  on motive, 296, 298
  on preparatory acts, 590
  on preventive action, 535
  on prosecution, 401
  on ratification, 596
  reservations by, 619, 623, 624
  on revisions, 612
  on sovereign territories, 606
  on state responsibility, 492
  on superior orders defence, 381
  on UN intervention, 540
  See also Basic Principles of a Convention on Genocide
Spain
  on groups, 167, 170
  on reservations, 627
  reservations by, 619, 628
  state responsibility litigation of, 507
  territorial jurisdiction prosecutions in, 425
  universal jurisdiction prosecutions in, 442
Special Adviser on Genocide and Mass Atrocity
  creation of, 5, 15, 573, 574
  Five Point Action Plan, 569
  indigenous peoples and, 560, 563
  preventive actions by, 545, 573–7
Special Adviser on the Responsibility to Protect, 576
Special Court for Sierra Leone, 115, 459
Special Rapporteur on Burundi, 163
Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, 9, 650
Special Tribunal for Lebanon, 116, 460
specific intent
  actus reus and, 177
  mens rea and, 260–4, 270–7
  omission and, 196
speech, freedom of. *See* freedom of speech and expression
Speer, Albert, 252
Spiropoulos, Jean
  Draft Code of Crimes Against the Peace and Security of Mankind, 91, 92, 101
  drafting of Genocide Convention and, 88
  on ethnic cleansing, 227
  on hate propaganda, 581
  on jurisdiction, 414
  on motive, 299
  on official capacity defence, 374
  on preventive action, 537
  on state responsibility, 496
  on superior orders defence, 383
Sri Lanka, 626, 627
stable and permanent groups, 151–3

Stakic case
on bodily or mental harm, 182
on ethnic cleansing, 232
on *mens rea* of inflicting conditions of life calculated to destroy group, 292
state responsibility, 491
article IV debate, 492–4
article VI debate, 494–5
article IX debate, 495–9
drafting history, 492
litigation, 499–512
statutory limitation on prosecution, 486–90
Stephen, Ninian, 391
sterilization, 197, 198
Stockholm International Forum (2004), 573, 577
Streicher, Julius, 45, 47, 141, 333, 585
Sub-Commission on the Prevention of Discrimination and the Protection of Minorities
on cultural genocide, 214
on ethnic cleansing, 223
on groups, 161
on minority rights, 60
Sub-Commission on the Promotion and Protection of Human Rights, 555–60
substantive defences, 368
succession to Convention, 599–605
Sudan. *See* Darfur; International Commission of Inquiry on Darfur
Summit of Heads of State and Government (2005), 524, 532, 533, 574
superior orders as defence, 380–5
Surinam, 491
Swaziland, 491
Sweden
on cultural genocide, 211, 212
on groups, 144, 157, 158, 160, 168
on hate propaganda, 582
on 'in whole or in part' clause, 275
on jurisdiction, 415
objections by, 627, 634
on official capacity defence, 372, 373
on state responsibility, 493
on succession, 604
on superior orders defence, 383
on UN intervention, 542
Switzerland, 439
Syria
drafting of Genocide Convention and, 88
on ethnic cleansing, 228
on hate propaganda, 581
on international criminal tribunals, 448
on official capacity defence, 374

Tadić case
on complicity, 353, 356, 358
on ethnic cleansing, 230
as international tribunal, 457
on knowledge, 253
on measures intended to prevent births, 200
on motive, 304, 306
on universal jurisdiction, 430, 436
Taiwan, 599, 627, 635
See also China
Taylor, Telford, 46, 50
temporal jurisdiction, 317
territorial jurisdiction
drafting of Genocide Convention and, 84
prosecutions under, 412, 416–25
territories, sovereign, 605–8
Thailand
on cultural genocide, 208
on entry into force of Convention, 608
on international criminal tribunals, 446
on measures intended to prevent births, 197
on superior orders defence, 381
thefticide, 236
Thiam, Doudou
on *actus reus*, 175
on complicity, 361
on duress, compulsion and coercion, 390
on groups, 137, 146

Thiam, Doudou (cont.)
International Law Commission and, 94, 97, 102
on motive, 95, 304
Thune, Gro Hillestad, 112
Tlateloco Massacre, 425
Tokyo Tribunal, 88
Tomuschat, Christian, 99, 104, 248
torture, 644
See also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Transitional National Assembly of Rwanda, 418
Trbić, Milorad, 423
treaty law on Convention, 593–640
application to sovereign territories, 605–8
date of, 594
denunciation, 610–11
depository functions, 613–14
entry into force, 594, 608–10
interpretation, 635–9
languages, 593–4
objections, 625–9
ratification and accession, 595–9
reservations, 615–19, 624–5, 629–35
revision, 612–13
succession, 599–605
temporal application, 639–40
See also Vienna Convention on the Law of Treaties; *specific treaties*
Treaty of International Penal Law, 409
Treaty of Lausanne (1923), 26
Treaty of Sèvres, 24–6
Treaty of Versailles, 23
trials. *See* prosecution; *specific cases*
tribal groups, 130
Trinidad and Tobago, 102
Truman, Harry, 498, 598
Tudjman, Franjo, 510
tu quoque as defence, 397
Türk, Helmut, 112
Turkey
Armenian genocide and, 19, 285
UN intervention and, 544
Tutsi
as group, 9, 125, 140, 152, 565
sexual violence against, 186
Tutu, Desmond, 575

Uganda, 491
Ukraine
reservations by, 619, 623, 624
on sovereign territories, 606
on UN intervention, 544
UNESCO Declaration of San Jose, 220
UNESCO Declaration on Race and Race Prejudice, 142
United Arab Emirates, 619
United Kingdom
Armenian genocide and, 25
on bodily or mental harm, 181
on complicity, 342, 347, 358
on cultural genocide, 211
on denunciation, 611
on disbanding racist organizations, 588
drafting of Genocide Convention and, 63, 66, 67, 79, 83, 85, 89
on ethnic cleansing, 223, 228
on extradition, 473
General Assembly Resolution 96(I) and, 55
on groups, 134, 147
Hong Kong and, 604
on incitement, 322
on international criminal tribunals, 449
on 'in whole or in part' clause, 276
on jurisdiction, 414, 415
on motive, 297, 302, 306
on nuclear weapons, 239
objections by, 626, 627
on official capacity defence, 373, 377
on preparatory acts, 592
on preventive action, 536, 538
on reservations, 619, 622, 628
on responsibility to protect, 527
on sovereign territories, 606, 607
on state responsibility, 492, 494, 497, 505, 507
on superior orders defence, 380
on universal jurisdiction, 431

United Nations. *See specific conventions, offices, and organs*
United Nations Assistance Mission for Rwanda, 547, 550, 571
United Nations Mission in Kosovo, 423
United Nations War Crimes Commission, 35–8, 43
United States
on *actus reus*, 175
on bodily or mental harm, 181, 184
on complicity, 343
on conspiracy, 310
on cultural genocide, 208, 209, 211
definition of genocide in legislation of, 5
on denunciation, 611
on disbanding racist organizations, 588
on Draft Code of Crimes, 92
drafting of Elements of Crimes and, 110, 111
drafting of Genocide Convention and, 64, 65, 71, 74, 75, 79, 87
on entry into force of Convention, 609
on ethnic cleansing, 226
on extradition, 473, 474, 479, 480
on forcible transfer of children, 203, 204
on groups, 155, 156, 159, 165, 167
groups defined in legislation of, 131, 135, 138, 140, 147, 148
on hate propaganda, 580
on incitement, 320, 321, 323, 330
on inflicting conditions of life calculated to destroy group, 189
on 'in part' clause interpretation, 278
on intent, 258
on international criminal tribunals, 443, 445, 447, 448, 453
on 'in whole or in part' clause, 273
on jurisdiction, 413, 415, 416
on knowledge, 250
on measures intended to prevent births, 197
on *mens rea* of killing, 287
Military Tribunals, 48, 50
on command responsibility, 362
on complicity, 356
on measures intended to prevent births, 198
on motive, 298, 300
on preparatory acts, 590, 592
on preventive action, 535, 537
on proof of intent, 264
on prosecution, 38, 39, 401, 404
on ratification, 595, 596, 597, 598
on reparations, 471
on reservations, 617, 618, 619, 620, 621, 624, 627, 634
on responsibility to protect, 529, 531
on revisions, 612
Rwandan genocide litigation in, 441
on specific intent, 262, 263
on state responsibility, 492, 493, 495, 497, 498, 507
on statutory limitation, 489
on superior orders defence, 380, 382, 383
on UN intervention, 542, 549
on Versailles and Leipzig trials, 22
Universal Declaration of Human Rights
adoption of, 77, 642
drafting of, 60, 213
freedom of expression in, 582
Genocide Convention as application of, 7
on groups, 122, 145
on hate propaganda, 583
on responsibility to protect, 525
on rights of accused, 481
universal jurisdiction
customary law and, 410
drafting of Genocide Convention and, 84
Lemkin on, 34
need for, 647
prosecutions under, 426–9, 435–43
state sovereignty and, 2
Uruguay
on denunciation, 611
on extradition of nationals, 478
on groups, 156, 157, 158, 160
on hate propaganda, 581
on motive, 300, 301

use of force, legality of, 507–10, 609, 634

Vance, Cyrus, 112
vandalism, 30
van der Stoel, Max, 128
Venezuela
  on complicity, 342
  on cultural genocide, 211, 213
  on disbanding racist organizations, 588
  drafting of Genocide Convention and, 65, 73, 86, 90
  on groups, 155, 156, 160
  on incitement, 321, 322
  on inflicting conditions of life calculated to destroy group, 189
  on international criminal tribunals, 446, 450, 452, 453
  on 'in whole or in part' clause, 275
  on motive, 297, 298
  on preparatory acts, 592
  reservations by, 619
  on state responsibility, 493
  on superior orders defence, 382, 383
Verhoeven, Joe, 124
Versailles trials, 21–4
Vienna Convention on Succession of States in Respect to Treaties, 599
Vienna Convention on the Law of Treaties
  customary law and, 639
  on depositary responsibilities, 614
  on interpretation of intent, 272
  on languages, 594
  on national legislation, 404
  on objections, 625, 626, 627, 628
  on protocolar clauses, 593
  on reservations, 623, 634
  on revisions, 613
  on rules of interpretation, 635, 636, 637
Vienna Declaration and Programme of Action (1993), 142, 547
Vienna World Conference on Human Rights (1993), 547
Vietnam, Democratic Republic of
  accession to Convention, 604, 622
  reservations by, 619, 622
Visscher, Fernand de, 227
von Hebel, Herman, 107
Von Leeb case, 389
von Wernich, Christian, 425
Vuckovic, Miroslav, 423

war crimes
  establishment of court for, 36
  in hierarchy of international crimes, 7
  international trials for, 21–4
  WW2, 642, 653
  See also Nuremberg cases
Weber, Max, 145
Weeramantry, Christopher, 238
Whitaker, Benjamin
  on *actus reus*, 178
  on apartheid, 237
  on extradition, 474, 483
  on genocide as human rights problem, 7
  on groups, 123, 161, 164, 168
  on incitement, 334
  on 'in part' clause interpretation, 281
  on official capacity defence, 374
  on preventive action, 538, 651
  on UN intervention, 557
Wilhelm II, 23
Wilson, Woodrow, 23
Winter, Renate, 423
women
  as protected group, 168
  violence against, 185, 569
Working Group of Experts on Violations of Human Rights in Southern Africa, 237
Working Group on Elements of Crimes. *See* Elements of Crimes
World Conference on Human Rights (1993), 224, 572
World Council of Churches, 64
World Federation of United Nations Associations, 64
World Jewish Congress, 64, 160
World Movement to Outlaw Genocide, 29

Worth Matravers, Lord Phillips of, 378

Yamashita case, 362
Yemen, 619
Yugoslavia
  accession to Convention, 603
  on *actus reus*, 174
  drafting of Genocide Convention and, 89
  ethnic cleansing in, 221, 228
  on inflicting conditions of life calculated to destroy group, 194
  on intent, 259
  on 'in whole or in part' clause, 276
  on motive, 298
  on preparatory acts, 591
  reservations of, 627
  state responsibility litigation of, 499, 502–11, 570, 609, 630
  on succession, 601, 602
  territorial jurisdiction prosecutions in, 417
  UN intervention and, 560
  See also International Criminal Tribunal for the former Yugoslavia

Zacklin, Ralph, 166
Zaire, 566
Zyklon B gas manufacturer, 355