

**GENOCIDE LAW IN A TIME OF TRANSITION:  
RECENT DEVELOPMENTS IN THE LAW OF GENOCIDE**

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Since the adoption of the Convention for the Prevention and Punishment of the Crime of Genocide (Genocide Convention) by the United Nations General Assembly on December 9, 1948, there have been more or less incessant calls to amend the definition of the crime set out therein. Article II says the crime of genocide consists of

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.<sup>1</sup>

The definition is narrow in two important respects. It protects four enumerated groups, in contrast, for example, with the cognate concept of crimes against humanity which contemplates “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.”<sup>2</sup> Moreover, it is essentially confined to the physical destruction or extermination of a group, as contrasted with crimes against humanity, which extends to various forms of “persecution,” meaning “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”<sup>3</sup>

The explanation for this curious legal situation is rooted in the history of international criminal law. Both genocide and crimes against humanity were forged in the crucible of post-Second World

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1. Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

2. Rome Statute of the International Criminal Court art. 7, ¶ (1)(h), July 17, 1998, 2187 U.N.T.S. 90.

3. *Id.* art. 7, para. (2)(g).

War efforts to prosecute Nazi atrocities.<sup>4</sup> The architects of the Nuremberg trial, that is, the four “great powers,” opted for the term crimes against humanity.<sup>5</sup> They treated it as a species of war crime, requiring a link or *nexus* with aggressive war.<sup>6</sup> The International Military Tribunal refused to convict Nazi leaders for atrocities perpetrated prior to the outbreak of the war.<sup>7</sup> It was in reaction to the failure at Nuremberg to deal with what some called “peacetime genocide” that the 1948 Genocide Convention was born.<sup>8</sup> Until the 1990s, the two concepts existed in parallel: genocide was narrowly defined but acts committed in peacetime were subject to prosecution, whereas crimes against humanity was defined more broadly, but it was shackled to the link with aggressive war.

In the 1990s, international criminal law went through its greatest period of dynamism since the post-Second World War years. The definition of crimes against humanity evolved dramatically, most significantly in the recognition that there was no longer any *nexus* with armed conflict.<sup>9</sup> In contrast, the definition of genocide remained unchanged, although not for want of opportunity. The adoption of the Rome Statute of the International Criminal Court (Rome Statute) in 1998 was the ideal forum for developments in the definition of genocide in response to the many proposals that had been made over the years. But at the Rome Conference, when the Rome Statute was adopted, Cuba was the only State to suggest a modification in the definition, and its proposal fell on deaf ears.<sup>10</sup>

The context indicates that this should not in any sense be taken as proof of resistance to progressive development of the law concerning atrocities. At the same time as they insisted on retaining the classic definition of genocide, the drafters of the Rome Statute embraced a broad and innovative concept of crimes against humanity, capable of addressing a range of atrocities in peacetime committed against groups and individuals. The international community simply made a choice about how to fill the legal gap that had existed since the 1940s. It chose to enlarge the definition of crimes against human-

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4. Diane F. Orentlicher, *The Law of Universal Conscience: Genocide and Crimes Against Humanity* 7, Presentation at the Committee on Conscience Conference at the United States Holocaust Memorial Museum, (Dec. 9, 1998), <http://www.ushmm.org/conscience/analysis/details/1998-12-09/orentlicher.pdf>.

5. Nuremberg Trial Proceedings Vol. 1, Charter of the Int'l Military Tribunal, art. 6(c), <http://avalon.law.yale.edu/imt/imtconst.asp>.

6. *See id.*

7. Orentlicher, *supra* note 4, at 11-13.

8. *See id.* at 18.

9. *Id.* at 13.

10. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15-July 17, 1998, ¶ 100, U.N. Doc. A/CONF.183/C.1/SR.3 (Nov. 20, 1998).

ity rather than the definition of genocide.

Such a development might well have pushed the concept of genocide into a period of stagnation and atrophy. But this was not the case. Rather, in the late 1990s and in the first years of the twenty-first century, the law concerning genocide has itself passed through a period of unprecedented dynamism, as concepts and principles have been explored and clarified. Such developments are the subject of this article.

## I. GROUPS PROTECTED BY THE GENOCIDE CONVENTION

The introductory paragraph of Article II of the Genocide Convention states that the intent to destroy must be directed against one of four enumerated groups: national, racial, ethnical or religious.<sup>11</sup> The limited scope of the Genocide Convention definition has led many academics and human rights activists in two distinct directions. There have been frequent attempts to stretch the Genocide Convention definition, often going beyond all reason, in order to fit particular atrocities within the meaning of Article II. Sometimes this is presented as the argument that the lacunae in the definition are filled by customary norms.<sup>12</sup> Other commentators have proposed new definitions in order to enlarge the scope of the term, among them Israel W. Charny,<sup>13</sup> Vahakn N. Dadrian,<sup>14</sup> Helen Fein,<sup>15</sup> and Frank Chalk and Kurt Jonassohn.<sup>16</sup> Some States, in introducing offences of geno-

11. Genocide Convention, *supra* note 1, art. 2.

12. Beth Van Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L.J. 2259, 2280-82 (1997).

13. Israel W. Charny, *Toward a Generic Definition of Genocide*, in GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS 64, 75 (George J. Andreopoulos ed., 1994) ("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.").

14. Vahakn N. Dadrian, *A Typology of Genocide*, 5 INT'L REV. MOD. SOC. 201, 201 (1975) ("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 of genocide.").

15. Helen Fein, *Genocide, Terror, Life Integrity, and War Crimes: The Case for Discrimination*, in GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS 95, 97 (George J. Andreopoulos ed., 1994) ("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.") (citations omitted).

16. Frank Chalk & Kurt Jonassohn, *The Conceptual Framework*, in THE HISTORY AND SOCIOLOGY OF GENOCIDE 3, 23 (Frank Chalk & Kurt Jonassohn eds., 1990) ("Genocide is a form of one-sided mass killing in which a state or other authority intends to destroy a group, as that group and membership in it are defined by the perpetrator.").

cide into their own domestic law, have deviated from the Genocide Convention terminology, adopting original and occasionally idiosyncratic formulations. For example, in place of the term “group,” the Portuguese penal code of 1982 uses “community,” although the word disappeared in the 1995 revision when lawmakers decided to return to the letter of the Genocide Convention definition.<sup>17</sup> 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 Genocide Convention, not to modify it.<sup>18</sup> The Canadian legislation adopted in 2000 for implementation of the Rome Statute 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.”<sup>19</sup> Because the Canadian legislation deems the definition in the Rome Statute to be consistent with customary international law, the Canadian Parliament was simply leaving room for future evolution of the definition of genocide so as to comprise groups other than those enumerated in the 1948 Genocide Convention.

Generally, it is the perpetrator of genocide who defines the individual victim’s status as a member of a group protected by the Genocide Convention. 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 *Anti-Semite and Jew*: “The Jew is one whom other men consider a Jew: that is the simple truth from which we must start. In this sense the democrat is right as against the anti-Semite, for it is the anti-Semite who *makes* the Jew.”<sup>20</sup> In Rwanda, Tutsis were betrayed by their identity cards, for in many cases there was no other way to tell.

The debate has been framed as one between objective and subjective approaches to the identification of targeted groups. One Trial Chamber of the International Criminal Tribunal for Rwanda has said that “membership [in an ethnic] group is . . . a subjective rather than an objective concept.”<sup>21</sup> Indeed, it concluded that the Tutsi were an

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17. See William A. Schabas, *Genocide in International Law* 108 (2000).

18. *Id.*

19. Crimes Against Humanity and War Crimes Act, 2000 S.C., ch. 19, § 4(3) (Can).

20. JEAN-PAUL SARTRE, *ANTI-SEMITE AND JEW* 69 (George J. Becker trans., Schocken Books, Inc. 1948) (1946).

21. *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment and Sentence, ¶ 56 (Dec. 6, 1999). However, in the same judgment, the Trial Chamber said that a “subjective definition alone is not enough to determine victim groups, as provided for in the

ethnic group based on the existence of government-issued official identity cards describing them as such.<sup>22</sup> Another Trial Chamber wrote that “[a]lthough membership of the targeted group must be an objective feature of the society in question, there is also a subjective dimension.”<sup>23</sup> It 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 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.<sup>24</sup>

A similar approach has been taken by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia. In *Jelisić*, 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.”<sup>25</sup> In *Brđanin*, a Trial Chamber indicated that

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.<sup>26</sup>

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.”<sup>27</sup> The Commission noted that

[t]he various tribes that have been the object of attacks and killings

Genocide Convention.” *Id.* ¶ 57.

22. *Id.* ¶ 374.

23. Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment, ¶ 65 (June 7, 2001) (footnote omitted); see also Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment and Sentence, ¶¶ 161-162 (Jan. 27, 2000).

24. *Bagilishema*, Case No. ICTR-95-1A-T, ¶ 65.

25. Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 70 (Dec. 14, 1999).

26. Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 683 (Sept. 1, 2004) (citations omitted).

27. U.N. Security Council [SCOR], *Report of the International Commission of Inquiry on Darfur to the Secretary-General*, ¶ 509, U.N. Doc. S/2005/60 (Feb. 1, 2005) [hereinafter *International Commission of Inquiry*].

(chiefly the Fur, Masalit 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 (Islam).<sup>28</sup>

Nevertheless, although “objectively the two sets of persons at issue do not constitute two distinct protected groups,”<sup>29</sup> over recent years “a self-perception of two distinct groups” has emerged.<sup>30</sup> 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.<sup>31</sup>

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 Judgements do not suggest that target groups may only be defined subjectively, by reference to the way the perpetrator stigmatises victims. The Trial Judgment 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.”<sup>32</sup>

Therefore, determination of the relevant protected group should be made on a case-by-case basis, referring to both objective and subjective criteria.<sup>33</sup> At the International Court of Justice, in the case filed by Bosnia and Herzegovina against Serbia, 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.<sup>34</sup> In practice, however, the subject-

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28. *Id.* ¶ 508.

29. *Id.* ¶ 509.

30. *Id.* ¶ 511.

31. *Id.* ¶ 510.

32. Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶ 25 (Mar. 22, 2006).

33. Prosecutor v. Brđanin, Case No. IT-99-36-T, ¶ 684 (Sept. 1, 2004); *see also* Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment and Sentence, ¶ 317 (May 15, 2003) (“[T]he target of an accused’s genocidal intent is to be determined by objective and subjective criteria. . . .”); Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment and Sentence, ¶ 811 (Dec. 1, 2003) (“[M]embership of a group is . . . a subjective rather than objective concept. . . .”).

34. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), ¶ 191 (Feb. 26, 2007), <http://www.icj->

tive 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 four terms in the Genocide Convention not only overlap,<sup>35</sup> they also help to define each other, operating as four corner posts that delimit an area within which a myriad of groups covered by the Genocide Convention find protection. This was certainly the perception of the drafters. For example, they agreed to add the term “ethnic” so as to ensure that the term “national” would not be confused with “political.”<sup>36</sup> On the other hand, they deleted the reference to “linguistic” groups, “since it is not believed that genocide would be practiced upon them because of their linguistic, as distinguished from their racial, national or religious, characteristics.”<sup>37</sup> The drafters viewed the four groups in a dynamic and synergistic relationship, each contributing to an understanding of the meaning of the other.

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 September 2, 1998 judgment of the International Criminal Tribunal for Rwanda in the *Akayesu* case,<sup>38</sup> as well as in the definitions accompanying the genocide legislation adopted by the United States,<sup>39</sup> both of which dwell on the individual meanings of the four terms. Deconstructing the enumeration risks distorts the sense that belongs to the four terms, taken as a whole.

The 1996 *Report of the International Law Commission on the Draft Code of Crimes Against the Peace and Security of Mankind* considered “tribal groups” to fall within the scope of the definition of genocide,<sup>40</sup> although the 2005 Darfur Commission report disagreed,

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[cij.org/docket/files/91/13685.pdf](http://cij.org/docket/files/91/13685.pdf) [hereinafter Application of Convention on Prevention and Punishment].

35. Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, ¶ 56, U.N. Doc. A/CN.4/398 (Mar. 11, 1986) (prepared by Doudou Thiam).

36. U.N. GAOR, 3d Sess., 73d mtg. at 97-98, U.N. Doc. A/C.6/SR.73 (Oct. 13, 1948); U.N. GAOR, 3d Sess., 74th mtg. at 98-109, U.N. Doc. A/C.6/SR.74 (Oct 14, 1948).

37. The Secretary-General, *Report of Communications Reviewed by the Secretary-General on the Draft Convention on the Crime of Genocide, delivered to the General Assembly*, U.N. Doc. A/401/2 (Oct. 18, 1947).

38. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶¶ 510-516 (Sept. 2, 1998).

39. Genocide Convention Implementation Act of 1987 (Proxmire Act), 18 U.S.C. § 1093 (2006).

40. *Report of the International Law Commission on the Work of Its Forty-Eighth Session* art. 17(9), U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996).

stating that “tribes as such do not constitute a protected group.”<sup>41</sup> The Commission looked to anthropological textbooks for the meaning of “tribe” or “tribal.” The *Shorter Oxford English Dictionary* defines a tribe as “[a] group of (esp. primitive) families claiming descent from a common ancestor, sharing a common culture, religion, dialect, etc., and usually occupying a specific geographical area and having a recognized leader.”<sup>42</sup> Certainly, tribal groups are cognates of the four terms used in Article II of the Genocide 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.<sup>43</sup> Thus, a tribe that is perceived as a racial or ethnic group falls within the scope of the Genocide 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.”<sup>44</sup>

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. The theory had first been mooted by the Commission of Experts for the former Yugoslavia.<sup>45</sup> 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,”<sup>46</sup> but the opinion has since been rejected by another Trial Chamber<sup>47</sup> whose views were upheld on appeal.<sup>48</sup> The conclusions of the Appeals Chamber were subsequently 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.”<sup>49</sup> According to the court, genocide “requires an intent to destroy a collection of people who have a particular group identity. It

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41. *International Commission of Inquiry*, *supra* note 27, ¶ 496.

42. 2 THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 3387 (Lesley Brown ed., 1993).

43. *International Commission of Inquiry*, *supra* note 27, ¶ 498.

44. Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶ 21 (Mar. 22, 2006) (emphasis added).

45. U.N. Security Council [SCOR], *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, ¶ 96, U.N. Doc. S/1994/674 (May 27, 1994).

46. Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 71 (Dec. 14, 1999).

47. Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 512 (July 31, 2003).

48. Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶¶ 20-28 (Mar. 22, 2006).

49. Application of Convention on Prevention and Punishment, *supra* note 34, ¶ 66.



is a matter of who those people are, not who they are not.”<sup>50</sup> 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.”<sup>51</sup> According to the International Court of Justice, the drafters of the Genocide 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.”<sup>52</sup>

The International Criminal Tribunal for Rwanda, in its September 2, 1998 decision in *Akayesu*, considered the enumeration of protected groups in the Genocide Convention, as well as in Article II of the Tribunal’s Statute, to be too restrictive.<sup>53</sup> The categorization of Rwanda’s Tutsi population clearly vexed the Tribunal.<sup>54</sup> It was visibly uncomfortable with use of the rather outmoded concept of “racial group,” but could not figure how else to describe the Tutsi.<sup>55</sup> The Trial Chamber concluded that the drafters of the 1948 Genocide Convention meant to encompass all “stable” and “permanent” groups.<sup>56</sup> It was a somewhat extravagant reading of the *travaux préparatoires*, 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.<sup>57</sup> According to Guénaél 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.”<sup>58</sup> 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 sug-

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50. *Id.* ¶ 193.

51. *Id.* ¶ 194.

52. *Id.*

53. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 510-516 (Sept. 2, 1998).

54. *See id.* ¶¶ 510-526.

55. *See id.* ¶¶ 514-516.

56. *Id.* ¶ 516.

57. *Id.* ¶¶ 516, 653, 661, 671.

58. GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS 230 (2005).

gest a contrario that the Convention was presumably intended to cover relatively stable and permanent groups.<sup>59</sup>

The “stable and permanent” theory put forward by Trial Chamber I of the International Criminal Tribunal for Rwanda had been effectively forgotten until it was revived by the Darfur Commission of Inquiry in its February 2005 report.<sup>60</sup> 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).”<sup>61</sup> The Commission suggested that the theory had been generally accepted by both Tribunals, adding that “perhaps more importantly, this broad interpretation has not been challenged by States.”<sup>62</sup> “It may therefore be safely held that that interpretation and expansion has become part and parcel of international customary law.”<sup>63</sup>

In fact, the *Akayesu* Trial Chamber’s approach was never affirmed by the Appeals Chamber of the International Criminal Tribunal for Rwanda, and has been ignored by other Trial Chambers.<sup>64</sup> 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 could not 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 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.<sup>65</sup> This approach indicates a quite different view of the philosophical basis for the crime of genocide than the “stable and permanent groups” theory initially ad-

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59. Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, ¶ 57 (Dec. 6, 1999); see also Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment and Sentence, ¶ 162 (Jan. 27, 2000).

60. *International Commission of Inquiry*, supra note 27, ¶ 501.

61. *Id.*

62. *Id.*

63. *Id.*

64. GEORGE WILLIAM MUGWANYA, *THE CRIME OF GENOCIDE IN INTERNATIONAL LAW, APPRAISING THE CONTRIBUTION OF THE UN TRIBUNAL FOR RWANDA* 67 (2007).

65. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶¶ 555-556 (Aug. 2, 2001); see also Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 682 (Sept. 1, 2004).

vanced in the *Akayesu* ruling. The Darfur Commission surely 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.”<sup>66</sup> The Commission said this could be “safely held,” but the opposite is the better view.

## II. CULTURAL GENOCIDE

Raphael Lemkin’s seminal work, *Axis Rule in Occupied Europe*, attached great attention to the cultural aspects of genocide.<sup>67</sup> Destruction of a people often began with a vicious assault on culture, particularly language, religious, and cultural monuments and institutions.<sup>68</sup> 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 “elimination and suppression of national characteristics.”<sup>69</sup> But there is not doubt that the drafters of the Genocide Convention intentionally excluded cultural genocide from the scope of the instrument.<sup>70</sup>

In his dissenting opinion in the 2004 decision in *Prosecutor v. Krstić*, Judge Shahabuddeen of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia 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.<sup>71</sup> He explained:

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.<sup>72</sup>

Judge Shabuddeen acknowledged the generally accepted view that cultural genocide was excluded from the Genocide Convention, but said, “[t]he intent certainly has to be to destroy, but, except for the listed act, there is no reason why the destruction must always be

66. *International Commission of Inquiry*, *supra* note 27, ¶ 501.

67. RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* 84-85 (Howard Fertig ed., 1973) (1944).

68. *Id.* at 84.

69. *United States v. Greifelt (RuSHA Trial)*, 5 T.W.C. 1, 89 (1948).

70. *See* SCHABAS, *supra* note 17, at 185 n.216.

71. *Prosecutor v. Krstić*, Case No. IT-98-33-A, ¶ 50 (Apr. 19, 2004) (partial dissenting opinion of Judge Shahabuddeen).

72. *Id.*

physical or biological.”<sup>73</sup> He said that if there was 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*.”<sup>74</sup> 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.<sup>75</sup>

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 of the Yugoslavia Tribunal in a subsequent case,<sup>76</sup> and found an echo in a judgment of another Trial Chamber, in *Krajisnik*:

“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.<sup>77</sup>

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

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73. *Id.* ¶ 51.

74. *Id.* ¶ 52.

75. *Id.* ¶ 53.

76. Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgment, ¶¶ 659-660 (Jan. 17, 2005).

77. Prosecutor v. Krajisnik, Case No. IT-00-39-T, Judgment, ¶ 854 (Sept. 27, 2006) (citations omitted).

has occasionally been said.<sup>78</sup>

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*.<sup>79</sup> Several months after these words were written, the conviction of Blagojević for complicity in genocide was reversed by the Appeals Chamber.<sup>80</sup>

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 is limited to those seeking the physical or biological destruction of a group.”<sup>81</sup> 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.”<sup>82</sup> 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.”<sup>83</sup>

### III. “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.<sup>84</sup> But if this is the case, the language is the direct descendant of expressions used by the Nazis in their racial “hygiene” programmes.<sup>85</sup> The latter had a term, *säuberung*, and their goal was to make Germany territory *judenrein*, that is, free of Jews.<sup>86</sup> The expression “ethnic cleansing” resurfaced in 1981 in Yugoslav media accounts of the establishment of “ethnically clean territories” in Kosovo.<sup>87</sup> It entered the international vocabulary in 1992, used to describe policies being

78. *Id.* ¶ 854 n.1701.

79. *Id.* ¶ 854.

80. Prosecutor v. Blagojević, Case No. IT-02-60-A, Judgment, ¶ 124 (May 9, 2007).

81. Application of Convention on Prevention and Punishment, *supra* note 34, ¶ 344 (citing Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 580 (Aug. 2, 2001)).

82. *Id.*

83. *Id.* (quoting *Krstić*, Case No. IT-98-33-T, ¶ 580).

84. Mark Kramer, *Introduction to REDRAWING NATIONS: ETHNIC CLEANSING IN EAST-CENTRAL EUROPE, 1944-1948*, at 1, 1 (Philipp Ther & Ana Siljak eds., 2001).

85. *Id.*

86. *Id.*

87. Drazen Petrovic, *Ethnic Cleansing - An Attempt at Methodology*, 5 EUR. J. INT’L LAW 342, 343 (1994).

pursued by the various parties to the Yugoslav conflict aimed at creating ethnically homogeneous territories.<sup>88</sup>

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."<sup>89</sup> This definition proposed by the Commission of Experts was accepted by the International Court of Justice in its important ruling on February 26, 2007.<sup>90</sup>

The term "ethnic cleansing" was unknown to the drafters of the Genocide Convention. It certainly never figured in any of their debates.<sup>91</sup> 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.<sup>92</sup> 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 XII of the 1945 Potsdam Protocol.<sup>93</sup> It was to be conducted "in an orderly and humane manner," according to Article XII of the Agreement, but in practice was associated with much hu-

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88. See NORMAN CIGAR, GENOCIDE IN BOSNIA: THE POLICY OF "ETHNIC CLEANSING" 71-72 (1995); Andrew Bell-Fialkoff, *A Brief History of Ethnic Cleansing*, FOREIGN AFFAIRS, 110, 110-21 (1993); Nathan Lerner, *Ethnic Cleansing*, 24 ISRAEL YEARBOOK HUM. RTS. 103 (1994); Damir Mirkovic, *Ethnic Conflict and Genocide: Reflections on Ethnic Cleansing in the Former Yugoslavia*, 548 ANNALS AM. ACAD. POL. & SOC. SCI. 191, 196-97 (1996); John Webb, Note, *Genocide Treaty - Ethnic Cleansing - Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia*, 23 GA. J. INT'L & COMP. L. 377, 379-80 & n.13 (1993).

89. U.N. Security Council, Commission of Experts, *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, ¶ 55, U.N. Doc. S/35374 (Feb. 10, 1993); see also M. CHERIF BASSIOUNI WITH PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 608 (1996).

90. Application of Convention on Prevention and Punishment, *supra* note 34, ¶ 191.

91. See, e.g., Webb, *supra* note 88, at 402 (discussing how acts of "ethnic cleansing" fit within meaning of Genocide in Article II of Genocide Convention).

92. See Jennifer Jackson Preece, *Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms*, 20 HUM. RTS. Q. 817 (1998).

93. See ALFRED M. DE ZAYAS, *NEMESIS AT POTSDAM: THE EXPULSION OF THE GERMANS FROM THE EAST* (1989); Alfred M. De Zayas, *International Law and Mass Population Transfers*, 16 HARV. INT'L L.J. 207, 228 (1975); Freiherr Von Braun, *Germany's Eastern Border and Mass Expulsions*, 58 AM. J. INT'L L. 747, 749 (1964).

man suffering.<sup>94</sup>

The drafters of the Genocide Convention quite deliberately resisted attempts to encompass the phenomenon of ethnic cleansing. In the Sixth Committee of the General Assembly, Syria proposed an amendment to the definition of genocide corresponding closely to our contemporary conception 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.”<sup>95</sup> The Syrian representative said: “[t]he 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.”<sup>96</sup> Yugoslavia supported the amendment, citing the Nazis’ displacement of Slav populations from a part of Yugoslavia in order to establish a German majority.<sup>97</sup> “That action was tantamount to the deliberate destruction of a group,” said the Yugoslav delegate.<sup>98</sup> “Genocide could be committed by forcing members of a group to abandon their homes,” he added.<sup>99</sup> But the United States argued that the Syrian proposal “deviated too much from the original concept of genocide.”<sup>100</sup> The Syrian amendment was resoundingly defeated, “by twenty-nine votes to five, with eight abstentions.”<sup>101</sup> 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 Genocide Convention.<sup>102</sup>

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

94. The Berlin (Potsdam) Conference, July 17-August 2, 1945: (a) Protocol of Proceedings, Aug. 1, 1945, *reprinted in* DEPT. OF STATE, A DECADE OF AMERICAN FOREIGN POLICY: BASIC DOCUMENTS, 1941-1949, at 28, 37 (1985).

95. *Syria: Amendment to Article II*, U.N. Doc. A/C.6/234 (Oct. 15, 1948), *amending* U.N. Econ. & Soc. Council [ECOSOC], Ad Hoc Committee on Genocide, *Report of the Draft Convention Drawn Up by the Committee*, U.N. Doc. E/794 (May 24, 1948).

96. U.N. Econ. & Soc. Council [ECOSOC], *Continuation of the Consideration of the Draft Convention on Genocide* at 184, U.N. Doc. A/C.6/234 (Oct. 23, 1948) (Statement of Mr. Tarazi of Syria).

97. *Id.* (Statement of Mr. Bartos of Yugoslavia).

98. *Id.*

99. *Id.* at 184-85.

100. *Id.* at 185 (Statement of Mr. Maktos of the United States).

101. *Id.* at 186.

102. *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, ¶ 519 (July 31, 2003); *Application of Convention on Prevention and Punishment*, *supra* note 34, ¶ 190.

been central to many of the cases as well as to the political debate. In its first years of operation the Office of the Prosecutor was extremely cautious in laying charges of genocide. Acts of ethnic cleansing carried out by the Milošević regime in Kosovo in early 1999 were addressed under the rubrics of “deportation” and “persecutions,” both of which belong within the general category of crimes against humanity.<sup>103</sup>

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.’”<sup>104</sup> The *Brđanin* 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.”<sup>105</sup> It also cited an excerpt from a closed session in the *Krstić* trial:

“[Ethnic cleansing]” was a strategy to force 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.”<sup>106</sup>

The *Brđanin* Trial Chamber noted that the underlying criminal acts of “ethnic cleansing” and genocide may often be the same.<sup>107</sup>

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.”<sup>108</sup> By recent developments, it cited the 1992 General Assembly resolution equating genocide with “ethnic cleansing”<sup>109</sup> and a 2000 judgment of the Federal Constitutional Court of Germany holding that “the intent to destroy

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103. Updated Statute of the Int’l Criminal Tribunal for the Former Yugoslavia, art. 5, ¶¶ d, h, Feb. 20, 2008, <http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb08-e.pdf>.

104. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 562 (Aug. 2, 2001).

105. Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 977 n.2455 (Sept. 1, 2004).

106. *Id.* ¶ 981 n.2465.

107. *Id.* ¶ 982.

108. *Krstić*, Case No. IT-98-33-T, ¶ 580.

109. *Id.* ¶ 578 (citing G.A. Res. 47/121, U.N. Doc. A/RES/47/121 (Dec. 18, 1992)).



the group . . . extends beyond physical and biological extermination.”<sup>110</sup>

In the 13 September 1993 provisional measures ruling of the International Court of Justice in *Bosnia v. Serbia*, ad hoc Judge Lauterpacht appended a separate opinion in which he asked “Has Genocide Been Committed?,” and 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.”<sup>111</sup> 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.<sup>112</sup>

These individual views were not, however, echoed in the majority decision.<sup>113</sup>

When the court returned to the matter, in 2007, it said that ethnic cleansing can only be a form of genocide within the meaning of the Genocide Convention if it corresponds to or falls within one of the categories of acts prohibited by Article II:

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.<sup>114</sup>

The court acknowledged that certain acts described as “ethnic cleansing” could correspond to prohibited acts under the Genocide 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

110. *Id.* ¶ 579 (citing Federal Constitutional Court, 2 BvR 1290/99, ¶ (III)(4)(a)(aa) (Dec. 12, 2000)).

111. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), 1993 I.C.J. 325, 431 (Sept. 13) (separate opinion of Judge Lauterpacht).

112. *Id.* at 447.

113. *Id.* at 325 (majority opinion).

114. Application of Convention on Prevention and Punishment, *supra* note 34, ¶ 190.

group, as distinct from its removal from the region.”<sup>115</sup> 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.”<sup>116</sup> 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.<sup>117</sup>

The court’s opinion provides an authoritative definition of “ethnic cleansing,” 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.<sup>118</sup> It usefully distinguishes ethnic cleansing 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 Genocide Convention.<sup>119</sup> To the extent these are perpetrated with a genocidal intent, they constitute acts of genocide.<sup>120</sup> 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.<sup>121</sup> 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.<sup>122</sup> The same can be said of ethnic cleansing, whose intent or purpose is “forced displacement” rather than “physical destruction.”<sup>123</sup>

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115. *Id.*

116. *Id.* (citing Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 519 (July 31, 2003)).

117. *Id.*

118. *Id.*

119. *See id.*

120. *See id.*

121. *Id.* ¶ 143.

122. *See id.* ¶ 190.

123. *Id.*

## IV. "IN WHOLE OR IN PART"

The initial sentence of Article II of the Genocide Convention says that acts of genocide must be committed with the intent to destroy a protected group "in whole or in part."<sup>124</sup> 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."<sup>125</sup> However, the notion that genocide might constitute destruction of groups "entirely or in part" appeared in the preamble of General Assembly Resolution 96(I), which was adopted in December 1946.<sup>126</sup> 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."<sup>127</sup>

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.<sup>128</sup>

There are four approaches to the scope of the term "in part."<sup>129</sup> 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.<sup>130</sup> It was advanced by the Truman administration in its failed attempt to get approval for the Genocide Convention.<sup>131</sup> Members of the Senate were concerned that Article II might apply to the lynching of African-Americans, a not infrequent occurrence in the

124. Genocide Convention, *supra* note 1.

125. LEMKIN, *supra* note 67, at 79.

126. See G.A. Res. 96(I), ¶ 1, U.N. GAOR, 1st Sess., U.N. Doc. A/64/Add.1 (Dec. 11, 1946).

127. U.N. Econ. & Soc. Council [ECOSOC], *Draft Convention on the Crime of Genocide*, at 20, U.N. Doc. E/447 (June 26, 1947); U.N. General Assembly, *Draft Convention on the Crime of Genocide*, Note by the Secretary-General, at 3, U.N. Doc. A/362 (Aug. 25, 1947). The Saudi Arabian draft expressed the same idea with the word "gradually." SCHABAS, *supra* note 17, at 43 n.164. Article 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." *Id.*

128. *Report of the International Law Commission on the Work of Its Forty-Eighth Session*, *supra* note 40, art. 17(18).

129. William A. Schabas, *The International Legal Prohibition of Genocide Comes of Age*, 5 HUMAN RIGHTS REVIEW 46, 49 (2005).

130. *Id.*

131. *Id.*

*apartheid*-like regime of the southern United States of America at the time.<sup>132</sup> Raphael Lemkin wrote the Senate Committee in 1950 that the destruction “in part” must be of a substantial nature so “as to affect the entirety.”<sup>133</sup>

The second approach adds the adjective “substantial” in order to modify “part.”<sup>134</sup> This is the interpretation that the United States eventually adopted when it ratified the Genocide Convention.<sup>135</sup> The United States formulated a declaration affirming that the meaning of Article II is “in whole or in substantial part.”<sup>136</sup> 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.”<sup>137</sup> The final draft statute of the Preparatory Committee of the International Criminal Court noted that “[t]he 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.”<sup>138</sup> The International Criminal Tribunal for

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132. *Id.*; see also Lawrence J. Leblanc, *The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding*, 78 AM. J. INT'L L. 369, 377 (1984). 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.

SCHABAS, *supra* note 17, at 238 n.169 (quoting U.S. 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, 1945-49).

133. *Genocide Convention Before Subcomm. on Genocide Convention, Comm. on Foreign Relations*, 81st Cong. (1950), reprinted in 2 EXECUTIVE SESSIONS OF THE SENATE FOREIGN RELATIONS COMMITTEE, (HISTORICAL SERIES), 81st Cong., First and Second Sessions 1949-50, at 369-70 (1976) (letter from Raphael Lemkin to Dr. Kalijarvi) [hereinafter EXECUTIVE SESSIONS]. 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*, 41 AM. J. INT'L L. 145, 147 (1947).

134. Schabas, *supra* note 129, at 49.

135. *Id.*

136. 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.” EXECUTIVE SESSIONS, *supra* note 133, at 370.

137. Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1093(8) (2006).

138. United Nations Diplomatic Conference of Plenipotentiaries on the Establish-

Rwanda, in *Kayishema and Ruzindana*, said “that ‘in part’ requires the intention to destroy a considerable number of individuals.”<sup>139</sup> 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.<sup>140</sup> In another judgment, the Tribunal referred to a “reasonably substantial number relative to” the group as a whole.<sup>141</sup> The “substantial part” interpretation is well entrenched in the case law of the ad hoc tribunals.<sup>142</sup>

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.<sup>143</sup> Similarly, the “viable entity” notion that appears in 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 defense 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?<sup>144</sup>

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.

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 geno-

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ment of an International Criminal Court, June 15- July 17, 1998, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, art. 5 n.1, U.N. Doc. A/CONF.183/2/Add.1 (Apr. 14, 1998).

139. Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶ 97 (May 21, 1999). See also Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment, ¶ 64 (June 7, 2001); Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 586 (Aug. 2, 2001).

140. Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 82 (Dec. 14, 1999); see also *Bagilishema*, Case No. ICTR-95-1A-T, ¶ 58.

141. Prosecutor v. Sikirica, Case No. IT-95-8-T, Judgment on Defence Motions to Acquit, ¶ 65 (Sept. 3, 2001).

142. See, e.g., Prosecutor v. Simba, Case No. ICTR-01-76-T, Judgment and Sentence, ¶ 412 (Dec. 13, 2005); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment and Sentence, ¶ 316 (May 15, 2003).

143. Jordan J. Paust, *Congress and Genocide: They're Not Going to Get Away With It*, 11 MICH. J. INT'L L. 90, 96 (1989).

144. *Id.* at 97.

cide 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.<sup>145</sup>

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.<sup>146</sup>

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.<sup>147</sup>

The court described the substantiality criterion as “critical.”<sup>148</sup>

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.<sup>149</sup> Citing the Whitaker report, the Commission of Experts established by the Security Council in 1992 to investigate “violations of international humanitarian law” in

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145. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 590 (Aug. 2, 2001).

146. See *Sikirica*, Case No. IT-95-8-T, ¶ 89.

147. Application of Convention on Prevention and Punishment, *supra* note 34, ¶ 198.

148. *Id.* ¶ 201.

149. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, ¶ 29, U.N. Doc. E/CN.4/Sub.2/1985/6 (July 2, 1985) (prepared by Benjamin Whitaker).

the former Yugoslavia held that “in part” had not only a quantitative but also a qualitative dimension.<sup>150</sup>

The approach of the Commission of Experts was invoked by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia in some indictments,<sup>151</sup> and subsequently endorsed by the 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.”<sup>152</sup> 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 Bêko to the point of threatening the survival of that community.”<sup>153</sup> 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.<sup>154</sup> The victims “were taxi-drivers, schoolteachers, lawyers, pilots, butchers and café owners,” but not, apparently, community leaders.<sup>155</sup> 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.”<sup>156</sup>

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.<sup>157</sup> The intentions of the Nazis may only have

150. M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 CRIM. L.F. 279, 283, 323-24 (1994).

151. See, e.g., Prosecutor v. Karadžić and Mladić, Case Nos. IT-95-18-R61, IT-95-5-R61, Transcript of Hearing on June 27, 1996, at 24-25 (the Prosecutor (Eric Ostberg) noted that he relied on the Whitaker report); Prosecutor v. Jelisić and Cesić, Case No. IT-95-10-I, Indictment, ¶ 17 (July 21, 1995) (charging defendant with “intending to destroy a substantial or significant part of the Bosnian Muslim people”).

152. Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 82 (Dec. 14, 1999).

153. *Id.* ¶ 93.

154. Prosecutor v. Sikirica, Case No. IT-95-8-T, Judgment on Defense Motions to Acquit, ¶ 80 (Sept. 3, 2001).

155. *Id.*

156. *Id.*

157. Vahakn N. Dadrian, *The Armenian Question and the Wartime Fate of the Armenians as Documented by the Officials of the Ottoman Empire's World War I Allies:*

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.<sup>158</sup> Similarly, in 1994 the Rwandan extremists do not appear to have given serious consideration to eliminating Tutsi populations beyond the country's borders.<sup>159</sup>

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.<sup>160</sup>

In *Jelisić*, another Trial Chamber of the same Tribunal agreed that genocide could be committed in a "limited geographic zone."<sup>161</sup> And in *Krstić*, the Trial Chamber held that "the physical destruction may target only a part 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."<sup>162</sup> 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."<sup>163</sup> Recent judgments of the Federal Constitutional Court of Germany and the Bavarian Appeals Chamber also confirm this view.<sup>164</sup> Nehemiah Robinson wrote that the real point of the term "in part" is to encompass genocide where it is di-

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*Germany and Austria-Hungary*, 36 INT'L J. MIDDLE E. STUD. 59, 59 (2002).

158. *Sikirica*, Case No. IT-95-8-T, ¶ 80; see also Tobias Jersak, *Blitzkrieg Revisited: A New Look at Nazi War and Extermination Planning*, 43 THE HIST. J. 565, 571 (2000).

159. See Samantha Power, *Bystanders to Genocide: Why the United States Let the Rwandan Tragedy Happen*, THE ATLANTIC MONTHLY, Sept. 2001, at 9.

160. Transcript of Hearing on June 27, 1996, *supra* note 151, at 25.

161. Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 83 (Dec. 14, 1999).

162. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 590 (Aug. 2, 2001); see also *Sikirica*, Case No. IT-95-8-T, ¶ 68.

163. Application of Convention on Prevention and Punishment, *supra* note 34, ¶ 199.

164. Bayerisches Oberstes Landesgericht [BayObLG] [Court of Appeals for Selected Matters in Bavaria] May 23, 1997, 3 Entscheidungen des Bayerischen Obersten Landesgerichts in Strafsachen [BayObLGSt] 20 (96) (F.R.G.), excerpted in NEUE JURISTISCHE WOCHENSCHRIFT 392 (1998).



rected against a part of a country, or a single town.<sup>165</sup>

#### V. 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."<sup>166</sup> Of course, punishment and prevention are intimately related. Criminal law's deterrent function supports the claim that prompt and appropriate punishment prevents future offenses.<sup>167</sup> Moreover, some of the "other acts" of genocide imply a preventive dimension. Prosecution of conspiracy, attempts and, above all, direct and public incitement are all aimed at future violations. But the drafters of the Genocide Convention resisted going further upstream, rejecting efforts to criminalize "preparatory acts" such as hate speech and racist organizations.<sup>168</sup>

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.<sup>169</sup> The undertaking to prevent and punish genocide is unqualified, said the court.<sup>170</sup>

[I]t 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.<sup>171</sup>

The court explained that the *travaux préparatoires* of the Genocide Convention confirm the "operative and non-preambular character of Article I."<sup>172</sup>

Describing the obligation to prevent genocide as being "normative and compelling," the court said it cannot be regarded as simply a

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165. NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION: A COMMENTARY 63 (1960).

166. Genocide Convention, *supra* note 1, art. 1.

167. Application of Convention on Prevention and Punishment, *supra* note 34, ¶ 426.

168. SCHABAS, *supra* note 17, at 447.

169. Application of Convention on Prevention and Punishment, *supra* note 34, ¶ 162.

170. *Id.*

171. *Id.*

172. *Id.* ¶ 164.

component of the duty to punish.<sup>173</sup> The court noted that the Genocide Convention is not the only international instrument to provide for duties of prevention.<sup>174</sup> 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.<sup>175</sup> 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.”<sup>176</sup> 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.”<sup>177</sup> 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.<sup>178</sup>

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.<sup>179</sup>

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.”<sup>180</sup> This capacity itself is assessed, taking into consideration “the geographical distance of the State concerned from

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173. *Id.* ¶ 427.

174. *Id.* ¶ 429. The court provided four examples: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, Dec. 4, 1984, 1465 U.N.T.S. 85; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, art. 4, Dec. 4, 1973, 1035 U.N.T.S. 167; Convention on the Safety of United Nations and Associated Personnel, G.A. Res. 49/59, art. 11, annex, U.N. Doc. A/RES/49/59 (Dec. 9, 1994); International Convention on the Suppression of Terrorist Bombings, G.A. Res. 52/164, art. 15, annex, U.N. Doc. A/RES/52/164 (Dec. 15, 1997).

175. *Id.*

176. Application of Convention on Prevention and Punishment, *supra* note 34, ¶ 430.

177. *Id.*

178. *Id.*

179. *Id.* ¶ 431.

180. *Id.* ¶ 430.

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.”<sup>181</sup> “The State’s 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.”<sup>182</sup>

The court placed emphasis upon the distinction between breach of the duty to prevent genocide and complicity in the crime itself.<sup>183</sup> 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.<sup>184</sup> 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.<sup>185</sup>

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.”<sup>186</sup>

In the specifics of the Bosnian application, the court had decided that genocide had not been committed during the 1992-1995 war, with the exception of the Srebrenica massacre of July 1995.<sup>187</sup> The Srebrenica events had already been identified as genocide by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia,<sup>188</sup> and the court said it could see no reason to disagree with that finding.<sup>189</sup> 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.<sup>190</sup> Nevertheless, the duty to prevent remained, and here Serbia was in default:

In view of their undeniable influence and of the information, voic-

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181. *Id.*

182. *Id.*

183. *Id.* ¶ 432.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* ¶ 297.

188. Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶¶ 37-38 (April 19, 2004).

189. Application of Convention on Prevention and Punishment, *supra* note 34, ¶ 296.

190. *Id.* ¶ 415.

ing 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 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.<sup>191</sup>

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."<sup>192</sup>

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

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191. *Id.* ¶ 438.

192. *Id.* ¶ 462.

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.<sup>193</sup>

Do these powerful words not also apply to France and Belgium, and even the United States, with respect to Rwanda in 1994? And what about Darfur, in 2008? 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.<sup>194</sup>

Certainly the Serbs in Belgrade were not the only ones who might have done more, and who could have one 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.<sup>195</sup> 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 Genocide Convention, if they have otherwise embraced the jurisdiction of the court, through a declaration under Article XXXVI 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

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193. *Id.* ¶ 461.

194. Application of Convention on Prevention and Punishment, *supra* note 34, ¶ 11 (Feb. 26) (declaration of Judge Keith).

195. G.A. Res. 60/1, ¶¶ 138-139, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

confined to their own territory. It is now clear that this is not the case. To the extent 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."<sup>196</sup> 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.

#### CONCLUSION

The definition of the crime of genocide, set out in Article II of the 1948 Genocide Convention, has stood the test of time. For more than half a century, debate has raged as to whether or not the enumeration of groups should be expanded, principally to include political groups, as well as whether the punishable acts of genocide should be extended to include cultural genocide and ethnic cleansing. 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, the definition of genocide was 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."

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 Genocide Convention definition.<sup>197</sup>

It would be a great misunderstanding to attribute this 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 as to a general willingness to cover a broad range of atrocities

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196. Application of Convention on Prevention and Punishment, *supra* note 34, ¶ 427.

197. See generally Rome Statute of the International Criminal Court, *supra* note 2.

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 mid-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 stepped into the breach.

Genocide is often called “the crime of crimes.” Apparently used for the first time by the Rwandan representative to the Security Council in 1994, the term featured in one of the earliest judgments of the International Criminal Tribunal for Rwanda.<sup>198</sup> The obvious suggestion is that genocide sits at the apex of a pyramid of criminality,<sup>199</sup> 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.<sup>200</sup> 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 International Tribunals have muddied their position. The Appeals Chambers of the two Tribunals have said that genocide, crimes against humanity, and war crimes are all of equal gravity.<sup>201</sup> It is only by looking at the specifics of an individual case that differentiation can be made.<sup>202</sup> Nevertheless, there is also at least one recent example of using the expression “crime of crimes” to describe genocide by the Appeals Chamber.<sup>203</sup> In 2005, the International Commission of Inquiry on Darfur wrote: “[G]enocide is not necessarily the most serious international crime. Depending upon the circumstances, *such international offences as crimes against humanity or*

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198. Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence, ¶ 16 (Sept. 4, 1998); *see also* Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment and Sentence, ¶ 981 (Jan. 27, 2000); Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, ¶ 451 (Dec. 6, 1999); Prosecutor v. Serushago, Case No. ICTR-98-39-S, Sentence, ¶ 15 (Feb. 5, 1999); Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Sentencing Judgment (Oct. 2, 1998).

199. 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, ¶ 13 (July 5, 2001) (Partial Dissenting Opinion of Judge Wald). *But see* Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶¶ 699-700 (Aug. 2, 2001) (arguing against absolute classification of genocide as more severe than crimes against humanity).

200. *Krstić*, Case No. IT-98-33-T, ¶¶ 699-700.

201. *Id.*

202. Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Judgment, ¶ 249 (July 21, 2000); Prosecutor v. Tadić, Case No. IT-94-1-Abis, Judgment in Sentencing Appeals, ¶ 69 (Jan. 26, 2000).

203. Niyitegeka v. Prosecutor, Case No. ICTR-96-14-A, Judgment, ¶ 53 (July 9, 2004).

*large scale war crimes may be no less serious and heinous than genocide.*"<sup>204</sup>

The Darfur Commission was trying to preempt 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 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 labeling 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 Genocide Convention. Genocide is focused on the right to life, and on racial discrimination. To that extent, 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."

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204. *Report of the International Commission of Inquiry on Darfur*, ¶ 522, U.N. Doc. S/2005/60 (Jan. 25, 2005) (emphasis added).