THE INTERNATIONAL LEGAL ADJUDICATION OF THE CRIME OF GENOCIDE

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I. INTRODUCTION

Andreopoulos notes that no crime matches genocide in the moral opprobrium that it generates. Constituting a criminal intent to destroy or cripple permanently a human group, acts of genocide shock the collective conscience of the world's community perhaps like no other act. While the commission of genocide dates to antiquity, it is in response to the atrocities

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committed by Nazi Germany during the Second World War that the international community undertook the development of international laws designed to both prevent and punish acts of genocide. The authoritative legal statement on the issue of genocide is the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which entered into force in 1951. The Convention’s nineteen articles define genocide and establish the offense as an international crime. The product of a politicized codification process, the Genocide Convention has been criticized by legal scholars as a compromise convention that fails to both fully define the crime of genocide and provide the necessary legal institutions for its adjudication. The fact that no international prosecution for acts of genocide took place for more than four decades after the Convention’s entry into force was viewed by many as an indication of the treaty’s ineffectiveness. Since 1993, however, the international adjudication of both individuals and states alleged to have committed acts of genocide has taken place. As such, the impact of the Genocide Convention has increased significantly.

The focus of this article is the international adjudication of the crime of genocide. Cases brought before the International Criminal Tribunal for Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Court of Justice (ICJ) are presented. First, however, the concept of genocide is reviewed, followed by an assessment of the Genocide Convention.

II. THE CONCEPT OF GENOCIDE

The act of genocide is ancient, while the concept itself is contemporary. Chalk and Jonassohn note that we have no historical evidence of acts of genocide during the hunting and gathering stage of early man.\(^2\) Genocide emerged only after the world was divided into nomads and settlers, when conflicts over agriculture became increasingly destructive. In order to end the cycle of war, recuperation, and war seeking to avenge defeats, the victors began to adopt strategies of annihilation. After battle, the victors killed, sold into slavery, or dispersed the defeated populations. With the centralization of power in the hands of the state, along with an increased capacity to kill associated with revolutions in military technologies, the ability to commit mass murder on an unprecedented scale became more common, including acts targeted at individuals due to their group characteristics. Since 1900 most destructive acts of genocide have taken place, ranging from the Armenian genocide to the Holocaust to the killing fields of Cambodia. To state that genocide is a

twenty-first century phenomenon is misleading; however, to label the 1900s the century of genocide is accurate.

A. Typologies

A number of typologies have been used by scholars for analytical and comparative studies of genocide. Lemkin offered the first typology, differentiating incidents of genocide based on the intent of the perpetrator. Accordingly, the first type of genocide, which emerged in antiquity and continued until the Middle Ages, was the total, or near total, destruction of victim groups and nations. The second type of genocide, characteristic of the modern age, was aimed at the destruction of a culture without an attempt to physically destroy its bearers. Lemkin’s third type of genocide is reflected in the Nazi-style genocide of the 1930s, which combined ancient and modern forms of genocide in targeting some groups for immediate annihilation and others for ethnic assimilation.

Others have offered typologies based on the type of society. Horowitz, for example, articulates eight types of societies, ranging from permissive to genocidal societies. Additional typologies of genocide are based on the type of perpetrators, the type of victims, the type of groups, the types of accusation, the types of results for the perpetrator society, and the scale of casualties. Chalk and Jonassohn, similar to Lemkin, provide a typology that classifies genocide according to the motives of the perpetrators. Motives, according to Chalk and Jonassohn, can be differentiated according to the following desires:

1) to eliminate a real or potential threat;
2) to spread terror among real or potential enemies;
3) to acquire economic wealth; or
4) to implement a belief, a theory, or an ideology.

Recognizing that more than one of the aforementioned motives may be at work, Chalk and Jonassohn categorize acts of genocide by determining which of the four motives was the dominant one. In their analysis, Chalk and Jonassohn conclude that while the first three types of genocide date to antiquity, the fourth type is more reflective of modern times. The commission of the act of genocide in order to implement a belief, a theory, or an ideology is clearly

3. RAPHAEL LEMKin, AXIS RULE IN OCCUPIED EUROPE (1944).
4. JESSIE BERNARD, AMERICAN COMMUNITY BEHAVIOR (1949); IRVING LOUIS HOROWITZ, TALKING LIVES: GENOCIDE AND STATE POWER (1980).
5. HOROWITZ, supra note 4, at 13-14.
6. CHALK & JONASSOHN, supra note 2.
7. LEMKin, supra note 3.
8. CHALK & JONASSOHN, supra note 2.
9. Id.
10. Id.
distinct from types I-III. First, type IV genocides are targeted toward citizens of the perpetrator state instead of aliens. Second, while genocide to eliminate a threat (type I), spread terror among enemies (type II), or acquire economic wealth (type III) produce tangible benefits to the perpetrator state, ideological genocide (type IV) is carried out in spite of tremendous costs to the perpetrator state. Chalk and Jonassohn11 note that such costs to the state can be measured in economic, political, and development terms.

Kuper, as well, clusters genocide according to motive.12 His three categories of modern genocide include:

1) genocides designed to settle religious, racial, and ethnic differences;
2) genocides intended to terrorize a people conquered by a colonizing empire; and
3) genocides perpetrated to enforce or fulfill a political ideology.13

Later, Kuper divides genocide into two main groups: domestic genocides carried out by a state on its territory against its own citizens and genocides arising in the course of international warfare.14 The four types of domestic genocide adopted by Kuper are:

1) genocides against indigenous peoples;
2) genocides against hostage groups;
3) genocides following upon decolonization of a two-tier structure of domination; and
4) genocide in the process of struggles by ethnic or racial or religious groups for power or secession, greater autonomy, or more equality.15

The inability of scholars to reach a consensus on the most appropriate typology of acts of genocide underscores both the issue's complexity and the scholarly community's continued effort to reveal its primary sources. The lack of consensus also reflects diverging views on the very definition of genocide, a problem that continues to hamper the international adjudication of the crime of genocide.

B. Definitions

The term genocide became part of legal terminology only after World War II, although scholars note its first use by jurist Raphael Lemkin during the latter stages of the war.16 The term genocide was derived from the Greek word *genos*,

11. Id. at 37.
13. Id.
14. Id.
15. Id.
16. See generally Arthus Jay Klinghoffer, The International Dimension of Genocide in Rwanda (N.Y. Univ. Press 1998); Alain Destexhe, Rwanda and Genocide in the Twentieth Century
which translates to race or tribe, and the Latin *cide*, which translates to killing. Lemkin explained the concept as follows:

\[ \text{[G]enocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be the disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.}^{17} \]

The inclusion of "nonlethal acts" such as actions aimed at the destruction of essential foundations of the life of national groups\(^{18}\) makes Lemkin's definition extremely broad, resulting in the articulation of several alternative definitions of the term. However, as Chalk and Jonassohn note, there is no generally accepted definition of genocide in the literature.\(^ {19}\) Fein focused her attention on developing a broader and deeper sociological definition of genocide, as follows: "genocide is sustained purposeful action by a perpetrator to physically destroy a collectivity directly or indirectly, through interdiction of the biological and social reproduction of group members, sustained regardless of the surrender or lack of threat offered by the victim."\(^ {20}\) Like Remkin, Fein does not limit acts of genocide to activities carried out by the state, as many other scholars do. Horowitz defines genocide as: "A structural and systematic destruction of innocent people by a state bureaucratic apparatus."\(^ {21}\)

Horowitz's definition does limit the range of perpetrators of acts of genocide to state bureaucratic apparatus. His definition expands the range of victims, which are defined in terms of their perceived innocence, making no reference to their collective characteristics. Harff and Gurr recognize that such a definition fails to differentiate state-sponsored murder for reasons other than

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17. LEMKIN, *supra* note 3.
19. *Id.* at xvii.
group characteristics, termed politicides, from acts of genocide. Their definition, provided below, accepts Horowitz's limitation to state activities:

"[G]enocides and politicides are the promotion and execution of policies by a state or its agents which result in the deaths of the substantial portion of a group. The difference between genocides and politicides is in the characteristics by which members of the group are identified by the state. In genocides the victimized groups are defined primarily in terms of their communal characteristics, i.e., ethnicity, religion, or nationality. In politicides the victim groups are defined primarily in terms of the hierarchical position or political opposition to the regime and dormant groups."

Chalk and Jonassohn define the term as follows: "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." This definition expands the range of perpetrators, limited by Horowitz and Harff and Gurr to a state's bureaucratic apparatus, by including other authorities. This definition fails, however, to include actions by individuals aimed at the destruction of groups based upon characteristics associated with the group. Charny defines genocide in such a way that allows for actions by non-state agencies to qualify. His definition reads as follows: "Genocide in the generic sense is the mass killing of substantial numbers of human beings, when not in the course of military forces of an avowed enemy, under conditions of the essential defenselessness and helplessness of the victims." Charny's definition, however, is exceptionally broad with no reference to either the intentions of the perpetrator or the group characteristics of the victims, issues of central concern to Lemkin and the Genocide Convention.

What is clear from this review of the leading definitions of genocide is that both the range of perpetrators and the range of victims are as important as, if not more important than, the manner in which the destruction takes place. A result of the divergent views on the proper definition of genocide is an inability of the scholarly community to arrive at a consensus of what actions constitute genocide and the number of victims of genocide. Walliman and Dobkowski estimate, for example, that between nineteen and twenty-eight million people...
during the twentieth century were victims of genocide while Smith calculates that number to be sixty million. Undoubtedly, the debate over the proper definition of genocide will continue unabated. Any acceptable definition of the term, however, must include both the “intent to destroy” motive of the perpetrator as well as the “group characteristic” of the victims.

III. THE GENOCIDE CONVENTION

Codified in 1948, the legal framework for the Genocide Convention was provided by the United Nations General Assembly and the Economic and Social Council. The General Assembly, at its 47th plenary meeting on November 9, 1946, referred to the Sixth, or Legal, Committee a draft resolution submitted by the representatives of Cuba, India and Panama inviting a study of the possibility of declaring genocide an international crime. At its 24th meeting on November 29, 1946, the Sixth Committee decided to entrust a Sub-Committee with the task of drafting a unanimously acceptable resolution on the basis of various proposals submitted. The Sixth Committee, at its 32nd meeting on December 9, 1946, unanimously adopted the draft resolution. On the recommendation of the Sixth Committee, the General Assembly, at its 55th plenary meeting on December 11, 1946, unanimously adopted Resolution 96(I), which reads:

Genocide is the denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these groups, and is contrary to moral law and to the spirit and aims of the United Nations. Many instances of such crimes of genocide have occurred, when racial, religious, political and other groups have been destroyed, entirely or in part. The punishment of the crime of genocide is a matter of international concern.

The General Assembly, therefore, Affirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices - whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or other grounds - are punishable; Invites the Members States to enact the necessary


legislation for the prevention and punishment of this crime; Recommends that international co-operation be organized between States with a view to facilitate the speedy prevention and punishment of the crime of genocide, and, to this end, Requests the Economic and Social Council to undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly.29

The General Assembly reaffirmed the 1946 resolution on November 21, 1947 by resolution 180(II) and requested the Economic and Social Council to continue its work on the subject. The Council, empowered by the General Assembly to prepare a draft convention on the prevention and punishment of the crime of genocide, felt that the necessary studies should be undertaken in consultation with the Committee for the Codification of International Law and with the Commission on Human Rights. In view of the urgency of the question, the Economic and Social Council enlisted the services of the Secretary General, who was asked to enlist the assistance of Member States of the United Nations in preparing the draft convention. In 1948, the Economic and Social Council appointed an ad hoc committee consisting of seven members, including Raphael Lemkin, to revise the original draft. The ad hoc committee met from April 5-August 26, 1948.

When the drafting project was completed, the Council, after a general debate, decided by resolution 153(VII) on August 26, 1948, to send the draft to the General Assembly Third Committee for study and action. The General Assembly then referred the report to its Sixth Committee for consideration. The Sixth Committee devoted fifty-one meetings during two months to an examination and discussion of the draft convention. On December 9, 1948, the General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide. On December 11, 1948 the representatives of twenty states signed the convention, which entered into force in 1951. To date, 127 states have ratified the treaty.

A. Preamble to the Genocide Convention

The Genocide Convention's preamble reflects both the accomplishments of the prior General Assembly resolution and sets the normative stage for the Convention's binding articles. The preamble states:

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The Contracting Parties

Having considered the declaration made by the General Assembly of the United Nations in the resolution 96(I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world;

Recognizes that at all periods of history genocide has inflicted great losses on humanity; and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required.

Hereby agree as hereinafter provided.  

B. Articles of the Genocide Convention

The Convention's preamble is followed by nineteen articles which can be divided into three categories, as follows: substantive articles (I-IV); procedural articles (V-IX); and technical articles (X-XIX). Since it is the first nine articles of the Convention that are directly related to the adjudication of acts of genocide, those articles are reiterated and analyzed here.

Article I. The Contracting Parties confirm that genocide whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.  

The first article establishes the fact that acts of genocide, regardless of the presence or not of war, constitute international crimes and also commits Parties to the Convention to undertake actions to both prevent and punish the acts. The recognition that an act of genocide constitutes a crime against humanity is rooted in Lemkin's insistence that: "[T]o treat genocide as a crime that only concerns an individual nation makes no sense because by its very nature the author is either the state itself or powerful groups backed by the state . . . . By its legal, moral and human nature, genocide must be regarded as an international crime."  

Article I was targeted for criticism by many, including the Committee on Peace and Law Through the United Nations, which concluded that "what is left
of the Convention is a code of domestic crimes which are already denounced in all countries as common law crimes." While it may be true that acts of genocide are criminal on the domestic plane, the contribution that Article I makes is significant. Acts that the Convention defines or lists in the two articles that follow (Articles II and III), which hitherto if committed by a government in its own territory against its own citizens have been no concern to international law, are made a matter of international concern and are, therefore, taken out of the "matters essentially within the domestic jurisdiction of any state." While genocide by a state against its own citizens was morally condemned prior to the Convention, it was "generally recognized that a state is entitled to treat its own citizens at its discretion and that the manner in which it treats them is not a matter with which international law . . . concerns itself." Elevating the status of the crime of genocide to the international plane, therefore, is an important contribution of the Convention's first article.

The provisions codified in Article I, importantly, provide legal bases for third party intervention to prevent and punish the crime of genocide. The Convention does not, however, obligate states to intervene in response to the commission of the act of genocide as is commonly assumed.

Article II. In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.

As stated in Article II, the Convention's approach is that of individual crime and not of persecutions instigated by governments. For this and other reasons, the Convention's definition of genocide has sparked a heated scholarly debate over its utility and completeness. Andreopoulos articulates some of the shortcomings of the Convention's definition of genocide. First, the definition excludes political and social groups from those deemed worthy of protection. In addition, economic groups are not provided explicit protection under Article II. With the

35. LASSA OPPENHEIM & LAUTERPACH HERSH, INTERNATIONAL LAW: VOLUME I (7th ed. 1948).
36. 1948 Genocide Convention, supra note 30, at art. II.
38. ANDREOPOULOS, supra note 1, at 2.
establishment of anti-capitalist ruling parties this century, the prospect of states liquidating property owners and others who believe in private enterprise was very real during the Convention’s drafting. The failure to include political, social and economic groups in Article II, therefore, is a serious omission, which can be explained only with reference to the political debate process by which the Convention was drafted. Also absent from the Convention’s provisions is a reference to “cultural genocide,” which Dadrian includes in his five types of genocide. 39

Second, the exact meaning of the intentionality clause in Article II remains evasive. Intent represents the psychological element of crimes of genocide, and is central to the term’s definition and application. By not providing a clearer guideline for the determination of intent, the Convention leaves to the judge and jury the subjective responsibility of doing so. Also of note in this regard, the article’s reference to “serious mental harm,” which was proposed by China, is vague and subject to wide degrees of interpretation.

Article III. The following acts shall be punishable:
(a) genocide;
(b) conspiracy to commit genocide;
(c) direct and public incitement to commit genocide;
(d) attempt to commit genocide;
(e) complicity in genocide. 40

In its third article, the Convention expands the domain of acts that fall within its legal parameters, reflecting the complexity of the acts that contribute to genocide. In the first verdict ever handed down by an international court on charges of genocide, delivered against Jean Paul Akayesu by the International Criminal Tribunal for Rwanda (ICTR) in 1998, the defendant was found guilty of not only genocide but also public incitement to commit genocide. 41 Two days later, the same court convicted Rwanda’s former Prime Minister, Jean Kambanda, of genocide, conspiracy to commit genocide, and incitement of genocide. 42 By criminalizing related acts of genocide, the Convention expands the domain of prosecution into important areas.

Rather than providing a definition of the acts other than genocide that are deemed criminal, Article III simply lists them. The inclusion of sub-paragraph c, which lists “direct and public incitement to commit genocide” raised concerns

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40. 1948 Genocide Convention, supra note 30, at art. III.
in the United States, in particular, about the dividing line between incitement and the constitutionally guaranteed freedom of speech.

Article IV. Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.\(^{43}\)

The fourth article both reflects the historical tendency of complicity at the highest levels of state office in the commission of genocide and seeks to undermine sovereign immunity defenses of leaders. Traditionally, the application of international law to state officials has been undermined by the principle of immunity, which is granted internationally to heads of state and domestically to other state officials. By clearly stating in Article IV that criminal responsibility extends not only to private individuals but also to rulers and public officials, the Convention expands the range of culprits that can be held accountable for their genocidal actions. This article could have been strengthened by an explicit rejection of the plea of superior command. A Soviet amendment to specifically exclude the plea, however, was rejected at the convention’s drafting.\(^{44}\)

Article V. The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.\(^{45}\)

The fifth article seeks to internalize the prohibition on genocide into the national laws of Parties to the Convention. The drafting of Article V reflects a recognition that genocide often takes place within the boundaries of the state and that the municipal criminalization of such acts is essential to the effectiveness of the legal regime.

Article VI. Persons charged with genocide or any of the other acts enumerated Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.\(^{46}\)

\(^{43}\) 1948 Genocide Convention, supra note 30, at art. IV.


\(^{45}\) 1948 Genocide Convention, supra note 30, at art. V.

\(^{46}\) Id. at art. VI.
The original draft of the convention provided for universal jurisdiction, permitting the state whose authorities had arrested those charged with the crime to exercise jurisdiction regardless of the nationality of the accused or of the place where the offense was committed. After heated debate, it was concluded that universal jurisdiction would not be incorporated into the final convention. As a result, the first part of Article VI only recognizes the jurisdiction of the state in the territory of which the act of genocide was committed. To expand jurisdiction over crimes of genocide, the second part of Article VI extends jurisdiction to an international penal tribunal, as long as the contracting parties have accepted that tribunal's jurisdiction. Since no such international tribunal existed at the time of the Convention's drafting, this provision did little to expand jurisdiction as it relates to crimes of genocide. The establishment in the 1990s of criminal tribunals for the former Yugoslavia and Rwanda, along with the drafting of the Statute for an International Criminal Court, however, greatly increases the impact of Article VI's reference to an international penal tribunal.

**Article VII.** Genocide and other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition. The Contracting Parties pledge themselves in accordance with their laws and treaties in force. 47

The ability to secure the extradition of international criminals is central to prosecution when the state seeking prosecution does not physically possess the accused. While states have entered into extradition agreements that include a wide range of acts deemed criminal, modern extradition treaties specifically exclude political offenses. A political offense is defined as an overt act, in support of a political rising that is connected with a struggle between two groups in a state for control of the state. Since states complicit in genocidal acts may easily escape their legal obligation to extradite an individual or individuals accused of genocide on the grounds that the offense is political in nature, Article VII closes a legal loophole that otherwise would greatly undermine the Convention's effectiveness.

**Article VIII.** Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III. 48

47. *Id.* at art. VII.
48. *Id.* at art. VIII.
Article VIII places at the disposal of states seeking to prevent or punish genocide the institutions and organs of the United Nations. Several United Nations bodies, including the General Assembly, the Economic and Social Council, the Security Council, the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities have played a constructive role in the prevention and punishment of the crime of genocide. On several occasions, these bodies have qualified acts as genocide, publicly proclaimed states complicit in genocidal acts, and established tribunals for the prosecution of accused. Mendlovitz and Fousek argue that Article VIII may serve as the basis for creating innovative preventive mechanisms, such as the United Nations Constabulary that they propose.\textsuperscript{49}

Article IX. Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.\textsuperscript{50}

While Article IX was weakened by reservations submitted by several states, which declared that they were not bound by the article's provisions unless all parties to the dispute agreed to submit the issue to the International Court of Justice, the ICJ has been called upon to adjudicate genocide cases and to provide advisory opinions upon request by the General Assembly and Parties to the Convention. In 1951, the General Assembly requested an advisory opinion from the Court regarding the impact of reservations made by Parties to the Genocide Convention that were objected to by other Parties to the Convention. The Court ruled that Parties registering reservations, which are subsequently objected to by other Parties to the Convention, remain Parties to the Convention. The Court's ruling, contrary to some legal opinion, worked to strengthen the Genocide Convention, since the complete exclusion from the Convention of one or more States would not only restrict the scope of its application but would detract from the authority of the moral and humanitarian principles which are its basis. On three occasions during the 1990s, states initiated proceedings in the International Court of Justice on the charge of genocide, as provided for in Article IX.


\textsuperscript{50} 1948 Genocide Convention, \textit{supra} note 30, at art. XI.
IV. THE INTERNATIONAL ADJUDICATION OF THE CRIME OF GENOCIDE

If the decade of the 1940s was characterized by the international effort to codify the legal regime on genocide, the decade of the 1990s was characterized by international efforts to adjudicate the crime of genocide. During the 1990s several instances of international adjudication of the crime of genocide have taken place. Numerous cases against individuals have been adjudicated by the two ad hoc tribunals established in response to the conflicts in Yugoslavia and Rwanda, and three genocide cases against States were adjudicated by the International Court of Justice. These cases represent the first international legal adjudications of the crime of genocide.

A. The International Criminal Tribunal for Yugoslavia (ICTY)

The massive violence and brutality in the war that erupted in the former Yugoslavia, with an unprecedented scale of mass killings in Europe since 1945, the implementation of genocidal “ethnic cleansing” policies, the existence of concentration camps, murder, organized torture, rape, and other atrocities, drew international attention and condemnation. As the situation deteriorated, the United Nations Security Council received requests from some of its members to convene a meeting and take action in the Yugoslav conflict. On September 25, 1991 the Council responded to those requests and met to discuss the unfolding situation in Yugoslavia. In response to the failed sanctions to halt the conflict and atrocities committed on all sides, the Security Council adopted Resolution 780 in 1992, requesting the establishment of a Commission of Experts to report on the grave breaches of international law in the former Yugoslavia. The Secretary General, at the request of the Security Council, compiled and submitted a report recommending the creation of a criminal court expressly for the conflict in Yugoslavia. By Resolution 827 (1993) the Council established the United Nations International Criminal Tribunal for the Former Yugoslavia (ICTF). A statute of the tribunal was drafted and approved by the Council, setting into motion the creation of the tribunal.

Seated in The Hague, Netherlands, the ICTF is mandated to prosecute and try persons responsible for serious violations of international humanitarian law committed on the territory of the former Yugoslavia since 1991. The Tribunal enjoys jurisdiction over four clusters of offenses:

1) grave breaches of the 1949 Geneva Conventions;
2) violations of the laws or customs of war;
3) genocide; and
4) crimes against humanity.

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To date, the Yugoslav Tribunal has indicted ninety-four individuals, with sixty-seven public indictments outstanding, including nine indicted for the crime of genocide. To date, however, the Yugoslav Tribunal has adjudicated only one case involving genocide.

1. The Goran Yelisic Case

The trial of Goran Jelisic before Trial Chamber I of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 opened on November 30, 1998 and ended on November 25, 1999. The indictment of Goran Jelisic included thirty-two distinct counts of genocide, violations of the laws or customs of war, and crimes against humanity. The first count of the indictment pertains to genocide and reads as follows:

In May 1992, Goran Jelisic, intending to destroy a substantial or significant part of the Bosnian Muslim people as a national, ethnical or religious group, systematically killed Muslim detainees at the Laser Bus Co., the Brcko police station and Luka camp. He introduced himself as the "Serb Adolf" said that he had come to Brcko to kill Muslims and often informed the Muslim detainees and others of the numbers of Muslims he had killed. In addition to killing countless detainees, whose identities are unknown, Goran Jelisic personally killed the victims in paragraphs 16-25, 30, and 33. By these actions, Goran Jelisic committed or aided and abetted:

Count 1: Genocide, a crime recognized by Article 4(2)(A) of the Tribunal’s Statute.

The indictment was issued against the accused on June 30, 1995, and Goran Jelisic was arrested on January 22, 1998 in accordance with the arrest warrant issued by the Tribunal and transferred to its Detention Unit in The Hague. At his initial appearance before the Tribunal, the accused plead not guilty to all the counts on which he was charged, including the count of genocide. The indictment was amended on October 19, 1998 when Goran Jelisic plead guilty to all counts except the charge of genocide.

In its prosecution of Goran Jelisic on the charge of genocide, the Trial Chamber focused upon the two key elements of the crime, the material effect and the mens rea of the offense. To prove material effect the prosecution first

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53. Id.
established that the actions of the accused, namely the murder of members of a group at the Luka camp in Brcko in May 1992, constitute the crime evoked by the Prosecutor in support of the genocide charge. Associating the acts of murder with the accused was not problematic, since Goran Jelisic had earlier admitted to having committed thirteen murders at the Luka camp. Next, the Trial Chamber addressed the \textit{mens rea} element of the charge. Accordingly, the underlying crime or crimes must be characterized as genocide when committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group. The Trial Chamber concluded that the Prosecutor had not established beyond all reasonable doubt that genocide was committed, since the accused appeared to have killed arbitrarily rather than with the clear intention to destroy a group. As such, the Trial Chamber concluded that it had not been proved beyond all reasonable doubt that the accused was motivated by the \textit{dolus specialis} of the crime of genocide.

\textbf{B. The International Criminal Tribunal for Rwanda (ICTR)}

In Rwanda, ethnic violence was unleashed in the aftermath of the sudden death in a plane crash of Rwanda’s president. In shocking speed, as many as one million Rwandans were massacred in a brutal one-hundred-day period. The clear ethnic division between victims and perpetrators indicated that crimes of genocide were taking place. Having failed to prevent the human destruction, the Security Council took action to prosecute those believed responsible for the killings. In July of 1994, the Security Council adopted Resolution 935, establishing a Commission of Experts to investigate human rights violations in Rwanda. Next, following the Yugoslav model, the Security Council decided to establish the United Nations International Criminal Tribunal for Rwanda (ICTR).\textsuperscript{54}

The ICTR was established for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between January 1, 1994 and December 31, 1994. It may also deal with the prosecution of Rwandan citizens responsible for such acts in the territory of neighboring states during the same period. The Tribunal has secured the arrest of over forty individuals accused of involvement in the 1994 genocide in Rwanda, and convicted several prominent members of the former Rwandan government, including its prime minister. At present, the Tribunal is holding forty-three detainees for trial. While an exhaustive review of genocide cases completed by the ICTR is not possible in this article, a review of three cases illustrates the Tribunal’s adjudication powers.

1. The Jean-Paul Akayesu Case⁵⁵

Jean-Paul Akayesu was arrested in Zambia on October 10, 1995, and charged by the International Criminal Tribunal for Rwanda on February 16, 1996, with thirteen counts⁶⁶ of genocide, crimes against humanity and violations of the Laws and Customs of War. Jean-Paul Akayesu made his first appearance before the Chamber on May 30, 1996, where he plead not guilty to all counts against him. During the trial, which opened on January 9, 1997, the Chamber heard forty-two witnesses and entered into evidence 125 documents, generating more than 4,000 pages of transcripts. While acknowledging that massacres aimed mainly at the Tutsi took place in 1994 Taba commune, where the accused held a prominent position as bourgmestre,⁵⁷ the defense claimed that its client did not commit, order to be committed, or in any way aid and facilitate the acts with which he was charged. In fact, the defense continued, Akayesu was himself the target of harassment, as evidenced by his decision to flee to neighboring Zambia.

In its ruling, the Trial Chamber established the material effect in view of the widespread killings of victims of which were mainly Tutsi. In demonstrating the mens rea element of the charge of genocide, the Trial Chamber referenced many facts showing that the intention of the perpetrators of the killings was to cause the complete disappearance of the Tutsi people. In this connection, Alison DesForages, a specialist historian on Rwanda who appeared as an expert witness, stated as follows:

[O]n the basis of the statements made by certain political leaders, on the basis of songs and slogans popular among the interahamwe, I believe that these people had the intention of completely wiping out the Tutsi from Rwanda so that - as they said on certain occasions - their children, later on, should not know what a Tutsi looked like, unless they referred to history books.⁵⁸

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⁵⁶. In the course of the trial on June 17, 1997, the Chamber granted the Prosecutor leave to amend the Indictment in order to add three new counts relating to allegations of rape and sexual violence, to which several witnesses had testified earlier during the appearance before the Chamber. The accused plead not guilty to these three additional counts. Id.

⁵⁷. The structure of the executive branch, and the authority of the members therein, is set forth in the laws of Rwanda. In the Prefecture, the Prefect is the highest local representative of the government, and is the trustee of the State Authority. In each commune within a Prefecture there exists the council of the commune, which is led by the Bourgmestre of that commune. The Bourgmestre is nominated by the Minister of the Interior and appointed by the President. While subject to the hierarchical authority of the Prefect, the Bourgmestre is in charge of governmental functions within his commune, including shared authority over the Gendarmerie Nationale in his commune.

⁵⁸. Summary of the Judgement in Jean-Paul Akayesu Case: ICTR-96-4-T Delivered on 2 September
Two prosecution witnesses, who testified separately before the Tribunal, confirmed the testimony.

The Trial Chamber found that the accused, Jean-Paul Akayesu, in his capacity as bourgmestre, was responsible for maintaining law and public order in the commune of Taba and that he had effective authority over the communal police. Moreover, as "leader" of Taba commune, of which he was one of the most prominent figures, the inhabitants respected him and followed his orders. Akayesu himself admitted before the Chamber that he had the power to assemble the population and that they obeyed his instructions. The Chamber ruled that Akayesu was present during the acts of violence and killings, and sometimes gave orders himself for bodily or mental harm to be caused to certain Tutsi, and endorsed and even ordered the killing of several Tutsi. Absent of a confession from the accused, the Chamber was required to infer the intent of Akayesu from his actions. The Chamber ruled on September 2, 1998, that Jean-Paul Akayesu was guilty of commission of the crime of genocide. On the charge of complicity in genocide, the Chamber ruled that the same person could not be both the principal perpetrator of, and accomplice to, the same offense. As such, the Chamber ruled not guilty on the charge of complicity in genocide.

2. The Jean Kambanda Case

Jean Kambanda, the former Prime Minister of Rwanda, was arrested by the Kenyan authorities, on the basis of a formal request submitted to them by the Prosecutor on July 9, 1997, in accordance with the provisions of Rule 40 of the Rules of Procedure and Evidence. After being transferred to the Detention Facility of the Tribunal an indictment was filed on October 16th, charging:

1) genocide,
2) complicity in genocide,
3) conspiracy to commit genocide, and
4) crimes against humanity.

On May 1, 1998, during his initial appearance before the Trial Chamber, the accused plead guilty to the six counts contained in the indictment. As such, the Trial Chamber moved directly to the sentencing phase of the proceedings.


3. The Clement Kayishema and Obed Ruzindana Case

Clement Kayishema and Obed Ruzindana were indicted by the Prosecutor on April 11, 1997, on charges of genocide and crimes against humanity stemming from their alleged participation in a series of massacres that took place between April 10 and June 30, 1994. During this period, at several sites which included two churches, a stadium, and other public domains, the indictment alleges that thousands of men, women and children were killed and injured by the accused. Clement Kayishema was charged with twenty-four counts, including four counts of genocide. Obed Ruzindana was charged with four counts, including one count of genocide.

On May 21, 1999, the Trial Chamber rendered its judgment, finding each defendant guilty on all counts of genocide but not guilty on all other counts. In so ruling, the Chamber accepted the defense argument that the alleged crimes were based on the same conduct and therefore a concur d’infraction, or concurrence of violations, prevented guilty verdicts for both genocide and crimes against humanity. The Chamber ruled that it is only acceptable to convict an accused of two or more offenses in relation to the same set of facts where the offenses have differing elements or where the laws in question protect the same social interests.

C. The International Court of Justice

The International Court of Justice (ICJ) superceded the Permanent Court of International Justice (PCIJ) following the Second World War. Described by the United Nations Charter as the principal judicial organ of the Organization, the ICJ is, in essence, a continuation of the Permanent Court with virtually the same statute and jurisdiction. Composed of fifteen judges elected by the General Assembly and Security Council, the ICJ is empowered to rule on cases brought by nation-states against other nation-states. A second, and more limiting, restriction on the Court’s jurisdiction is its consent requirement. Unless states accept the Court’s compulsory jurisdiction clause, in essence an a priori commitment to appear before the Court when a case has been filed against them, the Court’s jurisdiction is contingent upon the expressed consent


61. Clement Kayishema was found not guilty on four counts each of crimes against humanity, violation of Article 3 common to the Geneva Conventions, and violation of Additional Protocol II of the Geneva Conventions. Id. Obed Ruzindana was found not guilty on one count of each of the aforementioned charges. Id.

62. Notwithstanding the restriction on the Court’s jurisdiction limiting it to interstate cases, the ICJ is capable of rendering “advisory opinions” requested by certain principal organs of the United Nations.
of states party to a dispute. The ICJ's dismissal of the Yugoslav cases brought against Spain (1999) and the United States (1999), in which the crime of genocide was charged, illustrate this weakness. During the 1990s, three genocide cases were filed by states in the International Court of Justice.

1. The Bosnia v. Yugoslavia Case

In 1993, the ICJ heard its first case regarding genocide, brought by Bosnia and Herzegovnia versus Yugoslavia. In its application, Bosnia claimed that the Serb effort to create a "Greater Serbia" resulted in the systematic bombing of Bosnian cities and the intentional targeting of its Muslim citizens. The Bosnian application also contends that the Serb policy of driving out innocent civilians of a different ethnic or religious group from their homes, so-called "ethnic cleansing," was practiced by Yugoslav/Serbian forces in Bosnia on a scale that dwarfs anything seen in Europe since Nazi times. The application declared that the evidence indicates a prima facie case of genocide against Bosnia, and requested that all appropriate actions be taken by the Court in accordance with the standards of the Genocide Convention.

In its 1994 ruling, the Court did not issue a finding on whether genocide was being committed in Bosnia; however, it did ask the government of the Federal Republic of Yugoslavia to:

[e]nsure that any military, paramilitary or irregular armed units which may be directed or supported by it...do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovena or against any other national, ethnical, racial or religious group.64

2. The Yugoslavia v. N.A.T.O. Case

On April 29, 1999 the Federal Republic of Yugoslavia instituted proceedings before the Court against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom, and the United States, accusing those states of bombing Yugoslav territory in violation of their international obligations, including the obligation not to deliberately inflict

64. Id.
conditions of life calculated to cause the physical destruction of a national group. The reference to the "physical destruction of a national group" caused by the North Atlantic Treaty Organization (N.A.T.O.) bombing campaign constituted a charge by Yugoslavia of the commission of the crime of genocide.

By a vote of eleven to four, the Court ruled in Yugoslavia v. the Netherlands that the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention. The Court further ruled that it does not appear at the present stage of the proceedings that the bombings which form the subject of Yugoslavia's Application "indeed entail the element of intent, towards a group" as required by the Convention's provisions.

3. The Croatia v. Yugoslavia Case

On July 2, 1999, the Republic of Croatia instituted proceedings before the Court against the Federal Republic of Yugoslavia for alleged violations of the Genocide Convention between 1991 and 1995. In its application Croatia contends that acts of genocide were committed on Croatian soil by Yugoslav armed forces, intelligence agents, and various paramilitary detachments. Croatia's application goes on to state that "in addition, by directing, encouraging, and urging Croatian citizens of Serb ethnicity, Yugoslavia engaged in conduct amounting to a second round of ethnic cleansing." The Croatian case against Yugoslavia is currently under consideration by the Court, with a ruling expected in 2001.

V. CONCLUSION

Several conclusions can be reached concerning the international adjudication of the crime of genocide. First, the establishment of ad hoc tribunals, particularly in the Rwandan case, has greatly increased the number of genocide cases adjudicated at the international level. Without the Security Council decisions to establish these tribunals, adjudication of the perpetrators

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66. In two cases (Yugoslavia v. Spain and Yugoslavia v. United States) the Court concluded that it manifestly lacked jurisdiction and it accordingly ordered that those two cases be removed from its docket.
67. Id.
69. Id.
70. This is not to say, however, that the Yugoslav and Rwandan tribunals have been wholly effective in adjudicating instances of genocide. Each tribunal has faced difficulties relating to the apprehension, arrest and transfer of indicted criminals to face trial. In Yugoslavia, cooperation from N.A.T.O. forces in apprehending indicted war criminals has been minimal, while in Rwanda the ICTR competes with Rwandan national courts over the prosecution of the perpetrators of the 1994 genocide.
of the crime of genocide would have remained at the municipal level. Second, as a result of the Bosnian war and the Kosovo air campaign, the International Court of Justice has emerged as a potentially useful legal arena for the international adjudication of the crime of genocide. The limitations of the ICJ, namely its jurisdictional limitations to hear only consensual cases brought by nation-states against other nation-states, however, continues to limit the utility of the Court in the adjudication of genocide cases.

The international adjudication of genocide cases by ad hoc tribunals and the International Court of Justice is possible as a result of two forces, one legal and the other political. The legal force is the emergence of the legal regime on genocide, in the form of General Assembly resolutions, the 1948 Genocide Convention, and the parallel development of human rights laws. Without the Genocide Convention as a legal cornerstone, which both criminalized acts of genocide on an international plane and provided a working legal definition of genocide, the international community’s basis for adjudicating genocide cases would be weak. The political force that made international adjudication of the crime of genocide increasingly possible is the monumental changes in the international environment following the end of the cold war. The dissolution of the Soviet Union and the subsequent reordering of world politics translated into a concerted interest by the Security Council to address matters historically considered to fall within the domestic affairs of states. The Security Council took no legal action, for example, in response to Pol Pot’s genocidal reign of terror in Cambodia or Idi Amin’s massacre of rival tribes in Uganda. But with the cold war’s end came a consensus in the Security Council that the destructive internal affairs of states fell within the parameters of the Council’s authority. As a result, the tribunals were established for the conflicts in Yugoslavia and Rwanda.

The limitations of prosecuting the crime of genocide by both ad hoc tribunals and the International Court of Justice, however, indicate the utility of establishing a permanent international criminal tribunal with far-reaching jurisdictional powers. With an international criminal court the ability of the international community to prosecute individuals for acts of genocide would be greatly enhanced. While an international criminal court does not presently exist, positive steps have been taken to establish such a court. In 1998, the Statute for an International Criminal Court (ICC) was completed in Rome. While the proposed court’s jurisdiction is severely limited both in terms of the crimes that it may adjudicate and its relationship to the Security Council, the court’s statute does include genocide as one the “core crimes” that can be adjudicated.