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The Role of International Criminal Court in Preventing Genocide Crime

A Case Study of Rwanda, Former Yugoslavia and Burma

دور المحكمة الجنائية الدولية في منع جريمة الإبادة الجماعية

دراسة حالة رواندا ويوغسلافيا السابقة وبورما

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DECLARATION

I, **UMAR ISAH DODO**, declare hereby that this study which entitled “The Role Of International Criminal Laws in Preventing Genocide Crime: A Case Study of Rwanda, Former Yugoslavia and Burma” is a true reflection of my own research, and this work or part of it has not been submitted for a Masters degree in any other institution of higher education. I also declare that I have fully cited and referenced all materials that are original to this work.

DEDICATION

This work is dedicated to my late son and daughter, Muhammad Umar Dodo and Bilkisu (Ilham) Ma'azu as well as my beloved father, Justice Isah Muhammadu Dodo (Retired Grand Khadi) OON and my lovely mother, Hajiya Hussaina Muhammad and all the other families of Dodo's for their support and prayers.

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all

ABSTRACT

This research aims to investigate the role of international criminal laws in preventing genocide crime through a case study of Rwanda, former Yugoslavia and Burma. The study adopted the descriptive, analytical, historical and documentary method. The data were collected from published records, documents and information related to genocide crime. The research consisted of five chapters. Chapter one is the introduction which included the reasons for choosing the topic, aims and objectives of the research, statement of the problem, research questions, hypotheses, scope, significance and methodology of the research in addition to some previous studies concerning genocide crime. Chapter two dealt with the theoretical framework. It defined genocide in language, scholars convention and in Islamic jurisprudence, the legal definition, history of the crime of genocide, its types, elements, factors, stages and previous studies related to genocide crime. Chapter three expressed the role of international laws in preventing genocide crime. It represented the international conventions and courts established to prevent the crime of genocide. Chapter four discussed genocide as an international crime and a crime against humanity through a case study of Rwanda, Former Yugoslavia and Burma Genocides. Chapter five included the most important findings and recommendation. Among the findings are that the international community have put much consideration to combat genocide crime by creating The Convention on the Prevention and Punishment of the Crime of Genocide in (1948). The international criminal laws succeeded in limiting genocide crimes through the procedures conducted to stop the crimes that committed in Rwanda,

Former Yugoslavia and Burma and punishing their offenders by the establishment of some tribunals such as The International Criminal Tribunal for the former Yugoslavia (ICTY) 1993, The international criminal tribunal for Rwanda (ICTR) 1994 and activating the conventions concerning human rights to prevent genocide process in Burma. Another finding is that there is a lack of uniform organized approach to dealing with crimes against humanity and specifically genocide among the international community. Also the international criminal tribunal for Rwanda and former Yugoslavia genocides have laid the foundations for conflict resolution and proved that efficient and transparent international justice is possible. Among the most important recommendations are that the international community should criminalize genocide and practices related to it, especially in respect against the minorities in the countries of severe conflicts. Also it is recommended that radical amendments to the International Criminal Court (ICC) statute should be made so that the court can be capable of preventing genocide crimes and punishing the offenders without obstacles. The research concluded with the references and appendices.

المستخلص

هدف هذا البحث لدراسة دور القوانين الجنائية الدولية في منع جريمة الإبادة الجماعية عبر دراسة ثلاثة من حالات الإبادة الجماعية والتي ارتكبت في كل من رواندا ويوغسلافيا السابقة وبورما. وتناول البحث المحاكم والإجراءات التي اتخذتها القوانين الدولية لإيقاف ومنع هذه الجرائم ومعاينة مرتكبيها. اتبع البحث المنهج الوصفي التحليلي والمنهج التاريخي الوثائقي. وتم جمع البيانات عن طريق السجلات المنشورة والوثائق والمعلومات المتعلقة بجريمة الإبادة الجماعية. تكون البحث من خمسة فصول. الفصل الأول احتوى على مقدمة البحث والتي اشتملت على أسباب اختيار موضوع البحث وأهدافه ومشكلته وأسئلته وافتراضاته وحدوده وأهميته ومنهجه مع سرد لعدد من الدراسات السابقة المتعلقة بجريمة الإبادة الجماعية. تناول الفصل الثاني الإطار النظري للبحث، حيث عرف مفهوم الإبادة الجماعية في اللغة والاصطلاح ثم تحدث عن تاريخ جريمة الإبادة الجماعية عبر العصور المختلفة، وأنواعها، ومكوناتها، والعوامل المؤدية لارتكابها، ومراحلها. أما الفصل الثالث فقد تحدث عن الجهود الدولية في التصدي لجريمة الإبادة الجماعية، حيث بين المحاكم والمعاهدات والاتفاقات الدولية التي وضعت للحد من جريمة الإبادة الجماعية. وفي الفصل الرابع تناول البحث جريمة الإبادة الجماعية باعتبارها جريمة دولية وجريمة ضد الإنسانية من خلال عرض حالات جرائم الإبادة الجماعية التي ارتكبت في كل من رواندا ويوغسلافيا السابقة وبورما. واشتمل الفصل الخامس على أهم النتائج والتوصيات. ومن أهم النتائج التي توصل لها البحث أن المجتمع الدولي قد وضع اعتباراً كبيراً لمكافحة جريمة الإبادة الجماعية بوضع معاهدة منع والمعاينة على ارتكاب جريمة الإبادة الجماعية عام 1948م، كما أن المجتمع الدولي نجح في الحد من جرائم الإبادة الجماعية من خلال الإجراءات التي تمت لإيقاف تلك الجرائم التي ارتكبت في كل من رواندا ويوغسلافيا السابقة وبورما ومعاينة مرتكبيها بإنشاء بعض المحاكم مثل المحكمة الجنائية الدولية ليوغسلافيا السابقة عام 1993م والمحكمة الجنائية الدولية لرواندا عام 1994م مع تفعيل المعاهدات المتعلقة بحقوق الإنسان لمنع عملية الإبادة الجماعية في بورما. ومن النتائج الأخرى أنه ليس هنالك منهج موحد ومنظم لدى المجتمع الدولي للتعامل مع الجرائم ضد الإنسانية وخاصة جريمة الإبادة الجماعية، وأيضاً اتضح أن المحاكم الجنائية الدولية لكل من رواندا ويوغسلافيا السابقة قد وضعت الأساس لفض النزاعات وأثبتت أن العدالة الدولية الفعالة والشفافة أمر ممكن. وتمثلت أهم التوصيات في أن على المجتمع الدولي تجريم عملية الإبادة الجماعية والممارسات المتعلقة بها وخاصة تلك التي ترتكب ضد الأقليات في الدول ذات الصراعات الحادة. كما أوصى البحث بإجراء تعديلات جذرية في نصوص المحكمة الجنائية الدولية حتى تصبح قادرة على منع جرائم الإبادة الجماعية ومعاينة مرتكبيها دون عوائق. وزيل البحث بالمراجع والملاحق.

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CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND

Praise be to Allah, prayer and peace be upon His Prophet Mohammed (SAW) bin Abdullah.

The policy of the international criminal laws take killing, or Murder of human beings as genocide, not only the killing of one person but killing a particular group of people or sections of people as well as putting fear into them by way of ethnic cleansing from one tribe to another, or religion or any political group which will be in the form of terrorism between and within nations as crimes against humanity and also unlawful as far as 20th Century is concern.

This is what makes the United Nation (UN) to organise a conference in 1948 and it makes clear the date and time by which rules and regulations it came up with during the conference will take effect, as it can be seen in the treaty of the UN in 1951 which was signed by about Twenty countries.¹

In the sitting of the UN treaty, Article 2 talks about Genocide, crimes against humanity, war crimes and inhuman treatment among which are:

(a) Genocide which leads to the killing of all the people.

¹-¹Lemkin, R. (1944): Axis Rule in Occupied Europe: Laws of Occupation: Analysis of Government; Proposals for Redress, Washington, DC: Carnegie Endowment for International Peace.

¹ Ibid

- (b) Genocide of killing a particular group of people or tribe.
- (c) Tribalism, ethnicity, and religious differences.
- (d) Killing leaders of another group or another country.
- (e) Any form of inhuman and degrading treatment to the human race.
- (f) Underrating a group of people by denying them their fundamental human right.
- (g) Stealing and trafficking of children from one country to another.

The history of human being is full of killing and murder of people from one generation to another which ranges from one society to the other and from one country to another as a result of enmity and political differences.

As a result of Genocide and other war crimes, the committee of UN in the 19th and 20th Century make effort to codify rules and Laws which affect countries so that it will bring an end and solutions to this impunity.

The mass murder in organization's policy by the governments of the day is called genocide and only to individuals against various groups committed during the attempted genocide of the communities and peoples on the basis of national, racial, religious or political, classified as

an international crime in the United Nations Convention approved unanimously in 1948 and put into force in 1951 after being ratified by twenty countries and now 133 countries have ratified the Convention.

In this Convention, under Article II, genocide means any of the following acts committed with intent to destroy, in whole or part, a national group or ethnic, racial or religious group, as such:¹

- Members of the group killed,
- Causing serious bodily or mental harm to members of the group seriously,
- Inflicting on the group, deliberately, living conditions for the intended physical destruction in whole or in part,
- imposing measures intended to prevent births within the group,
- transferring children of the group, forcibly, to another group.

Human history has witnessed several cases of mass murder, but spin the debate on the use of the term genocide by her around inadvertently destroy, in whole or in part of a group because this intent is the core part in the genocide, but it is difficult to demonstrate. So the term genocide and the organization is not used by the legal sense of some of the spaces to cause mass murder and use or not to use political struggle in some

¹--¹Lemkin, R. (1944): Axis Rule in Occupied Europe: Laws of Occupation: Analysis of Government; Proposals for Redress, Washington, DC: Carnegie Endowment for International Peace.

¹ Ibid

other of spaces. The genocide in Rwanda Former Yugoslavia and Burma were among the most severe genocides ever committed in the world.

1.2 REASONS FOR CHOOSING THE TOPIC

1) The importance of International Criminal laws in bringing an end to Genocide and other inhuman treatment by Nations through the International Law.

2) The committee of International Criminal Tribunal also made an important explanation as well as create public awareness on how to educate countries on the dangers of Genocide and other war crimes.

3) To increase knowledge of United Nations efforts which has adopted to combat the policies and practices of crimes against humanity.

4) To educate the community and clarify pole of the international criminal laws in preventing the serious threats affecting international peace and security such as genocide.

5) To highlight and clarify an international convention for the suppression of the crime of genocide in order to prevent it and punish the perpetrators.

1.3 AIMS AND OBJECTIVES OF THE RESEARCH

This research has broad objectives that will investigate the activities of the international criminal laws with a view to ascertain its

roles regarding genocide, war crimes, and crime against humanity. From this road objectives, the following specific aims and objectives are derived:

(a) To examine the role of International Criminal laws as regard to genocide, war crime, and crime against humanity.

(b) To examine the functions and jurisdictions of the international criminal court.

(c) To identify the problems encountered in the course of discharging its functions effectively.

(d) To examine the fundamental dynamics of international court procedures concerning the prevention of genocide crime and proffer solutions.

1.4 STATEMENT OF THE PROBLEM

As good as the fundamental human right tends to be, a close analysis shows that it has been grossly abused and bastardized and therefore leading to human suffering as a result of genocide, war crime, and crime against humanity such as extermination, enslavement, deportation and other inhuman acts committed against civilian population as this can clearly be seen during wars.¹

¹--Lemkin, R. (1944): Axis Rule in Occupied Europe: Laws of Occupation: Analysis of Government; Proposals for Redress, Washington, DC: Carnegie Endowment for International Peace.

However, the issues of ethnic cleansing and unrestrained act of war on a small group or minorities in different political nations tends to be the order of the day in many part of the world, this is because for many centuries these killings were carried out with impunity and usually transcend the national boundaries.

Where an offence is committed by the citizen of the country within the soil of the country, it is expected that the laws and courts of the country should operate to bring justice to the offender. It is curious that an operation of the International Criminal Tribunalhas scuttled the principles of national sovereignty.

1.5 QUESTIONS OF THE RESEARCH

The problem of the study can be summarized in the form of the following questions:

Question (1)

Haveinternational criminal laws been able to prosecute successfully in combating genocide crimes and specifically that committed in Rwanda, Former Yugoslavia and Burma?

Question (2)

Have international criminal laws been able to meet up its mandate in prosecuting offenders of genocide crimes?

¹ Ibid

Question (3)

Have international criminal laws been able to define what constitute crimes against humanity to cover all loopholes?

Question(4)

Have international criminal laws succeeded in combating genocide crimes by putting decisive laws for the prevention of genocide crime?

1.6 HYPOTHESES

The study aims to test the following hypotheses:

Hypothesis (1)

The international criminal laws prosecuted successfully in combating genocide crimes specifically that committed in Rwanda, Former Yugoslavia and Burma.

Hypothesis (2)

The international criminal laws enabled to meet up their mandate in prosecuting offenders of genocide crimes.

Hypothesis (3)

The international criminal laws agreed to define what constitute crimes against humanity.

Hypothesis (4)

The international criminal law succeeded in combating genocide crimes by putting decisive laws for the prevention of genocide crime.

1.7 SCOPE OF THE RESEARCH

Going by the diverse and dynamic nature of the research, it is limited and there will be no claim to have covered all that which is known about international criminal laws. The research concentrated on one serious offence which is genocide through a case study of Rwanda, Former Yugoslavia and Burma genocides.

The difficulties and the lack of references, sources, the difficulty of breaking into the Internet and shortness of time constituted major factors for limiting the present research.

1.8 SIGNIFICANCE OF THE RESEARCH

This research is an attempt to expose the roles performed by the international criminal law in curtailing issues of genocide, war crimes, and crime against humanity. These are imminent problems threatening the survival of the world communities.

In this circumstance, the study is expected to significantly contribute to individuals, government, and the society at large.

1.9 METHODOLOGY OF THE RESEARCH

The study adopts the descriptive, analytical, historical and documentary method. It can be traced to documentary research and the use of authored books which gives the historical method by reference to the references for the article of the international criminal laws, and aid the descriptive and analytical approach in explaining the precise explanation Articles.

The source of the topic can be traced to the history, by this the researcher was able to check some books, documents and TV documentations alongside the internet so that he will be able to have solutions to these problems to the satisfaction of the international law standard.

CHAPTER TWO

LITERATURE REVIEW

2.1 INTRODUCTION

The term "genocide" did not exist before 1944. It is a very specific term, referring to violent crimes committed against groups with the intent to destroy the existence of the group. Human rights, as it was laid out in the US Bill of Rights or the 1948 United Nations Universal Declaration of Human Rights, mainly concern the rights of individuals.

This chapter therefore will look into the concept of genocide, the history of the crime of genocide, types of genocide, structural elements of genocide, factors of the process of genocide, stages or steps (operational processes) of genocide, and the role of international laws in prevention of genocide.

2.2 CONCEPT OF GENOCIDE

2.2.1 Definition of Genocide in language

Genocide is a complicated social, political and psychological phenomenon. Raphael Lemkin, a Jewish lawyer who fled Poland after the German invasion in 1939, coined the word and introduced it in

1944¹(Lemkin, 1944:79)². He derived it from a Greek word “*genos*” meaning birth, kind, race and Latin word “*-cide*” meaning killing. By “genocide” Lemkin meant “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 (Lemkin, 1944:79)³. In no small part due to the efforts of Lemkin himself, his new word soon gained currency (Power, 2002:30-85)⁴. In addition there is also the International Military Tribunal held at Nuremberg, Germany, which charged the top Nazis with “crimes against humanity.” The word “genocide” was included in the indictment, but as a descriptive, not legal, term⁵. The precise etymology of the word however, is a compound of two ancient Greek words *γένος* (birth, genus, kind) and the word *κτείνω* (murder, kill, massacre). In December 1946, the General Assembly of the newly created United Nations adopted a resolution that described genocide as “a denial of the right of existence

¹⁻¹Lemkin, R. (1944): *Axis Rule in Occupied Europe: Laws of Occupation: Analysis of Government; Proposals for Redress*, Washington, DC: Carnegie Endowment for International Peace.

¹ Ibid

²Lemkin, R. (1944): *Axis Rule in Occupied Europe: Laws of Occupation: Analysis of Government; Proposals for Redress*, Washington, DC: Carnegie Endowment for International Peace.

³ Ibid

⁴Power, S. (2002): “A Problem from Hell”: *America and the Age of Genocide*, New York: Basic Books

⁵Aliyu Sberanh, *criminalization of torture in the framework of platforms and international courts*, memorandum for the Master's degree in International Law and International Relations, Faculty of Law, University of Algiers, 2011, p. 14.

of entire humangroups” that “shocks the conscience of mankind” and “affirm[ed]” that genocide is “crime underinternational law”.¹

2.2.2 Legal definition of genocide

While there are various definitions of genocide, almost all international bodies of law officially adjudicate the crime of genocide pursuant to the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG)². Genocide is defined in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG, 1948) which came into effect on 12 January 1951 (Resolution 260 (III)) as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; [and] forcibly transferring children of the group to another group."

¹The Crime of Genocide, UN General Assembly Resolution 96(I), 11 December 1946: 188–89

²Dunoff, Jeffrey L.; Ratner, Steven R.; Wippman, David (2006), International Law: Norms, Actors, Process (2nd ed.), Aspen, pp. 615–621, ISBN 978-0-7355-5735-2

Article 6 of the Rome Statute¹ provides that "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. Furthermore, Pieter N. Drost², a Dutch law professor defined genocide as "the deliberate destruction of physical life of individual human beings by reason of their membership of any human collectivity as such."

2.2.3 Definition of genocide in scholars' convention

There is a series of different definitions on genocide concept by scholars of genocide. Leo Kuper, a genocide scholar in the work of Charny³, accepts the definition of genocide given in the [UN] Convention, but does not agree with the definition. Thus, he believe a major omission to be in the exclusion of political groups from the list of groups protected. In the contemporary world, political differences are at the very least as significant a basis for massacre and annihilation as

¹Rome Statute of the International Criminal Court

²Jones, Adam(2006),"Chapter 1: The Origins of Genocide" (*PDF*), Genocide: A Comprehensive Introduction, Routledge/Taylor&FrancisPublishers, pp. 15–18, ISBN 0-415-35385-8

³Charny, Israel W. (1997), "Toward a Generic Definition of Genocide", in Andreopoulos, George J., Genocide: Conceptual and Historical Dimensions, Philadelphia: University of Pennsylvania Press, pp. 64–94, ISBN 978-0-8122-1616-5

racial, national, ethnic or religious differences. Then too, the genocides against racial, national, ethnic or religious groups are generally a consequence of, or intimately related to, political conflict. However, Leo Kuperthinksits helpful to create new definitions of genocide, when there is an internationally recognized definition and a Genocide Convention which might become the basis for some effective action, however limited the underlying conception. But since it would vitiate the analysis to exclude political groups, he refers freely...to liquidating or exterminatory actions against them.

Yehuda Bauer, an Israeli historian and Holocaust scholar in the work of Jones, 2006¹, defined genocide as the planned destruction, since the mid-nineteenth century, of a racial, national, or ethnic group as such, by the following means: (a) selective mass murder of elites or parts of the population; (b) elimination of national (racial, ethnic) culture and religious life with the intent of "denationalization"; (c) enslavement, with the same intent; (d) destruction of national (racial, ethnic) economic life, with the same intent; (e) biological decimation through the kidnapping of children, or the prevention of normal family life, with the same intent.

¹Jones, Adam (2006), "Chapter1: TheOriginsofGenocide" (PDF), *Genocide:AComprehensiveIntroduction*, Routledge/Taylor & Francis Publishers, pp. 15–18, ISBN 0-415-35385-8.

A great scholar, Bauman, 1989¹ has something unique to offer: 'Influenced by modern conceptions of inferior and superior races or exploited and exploiting classes, coupled with a proclivity for powerful, centralized, bureaucratic states to conceive of grand projects of social engineering and their capacity to implement such policies, modern states have the potential to become genocidal "gardener states."' For the gardener state, genocide is not a policy of destruction but a grand project of construction. Recalling Arendt's totalitarian everything-is-possible thesis, Bauman argues that the gardener state seeks to construct new social, economic, demographic, or political orders as a landscaper plants and tends a garden. Just as gardens inevitably grow weeds that do not belong in a meticulously designed garden, so do new racial, national, or revolutionary systems contain human beings which do not belong in the new order. As weeds are pulled by a gardener to maintain the intended design and composition of the garden, groups of human beings who do not belong to the new order must be exterminated by the gardener state. For Alvarez², genocide is "a form of state criminality that is underpinned by two constructs of belief, sovereignty and nationalism".

¹Bauman, Z. (1989): *Modernity and the Holocaust*, Ithaca, NY: Cornell University Press.

²Alvarez, A. (2001): *Governments, Citizens, and Genocide: A Comparative and Interdisciplinary Approach*, Bloomington, IN: Indiana University Press

Ayvazyan,(2012)¹, sees genocide as “the intent to eliminate or is the elimination of a victimized national, ethnical, racial or religious group within society (or societies) motivated by perpetrator group’s “highest” insular sociopolitical goals, planned and labelled by the perpetrator group’s sociopolitical elite, performed by special forces (army, militia, police, etc.) that the perpetrator group’s elite have at their disposal and by the perpetrator group itself in the form of direct participation in massacres or in the form of inaction during such a calamity”. Here the elimination can mean both physical death of victim group’s members (i.e. killing members of the group).

2.2.4 Definition of genocide in Islamic jurisprudence

The Islamic Law of qital prohibits genocide in times of war and peace. The Koran (5:32) states: ‘Whoever kills a person not in retaliation for a person killed, nor (as a punishment) for spreading disorder on the earth, is as if he has killed the whole of humankind, and whoever saves the life of a person is as if he has saved the life of the whole of humankind. Verse (5:32) has two parts: ‘prohibiting the killing’ of and ‘saving the lives of innocent persons’. The rule of prohibiting the killing of innocent persons can be relied on for preventing or punishing the crime of genocide whereas the rule of saving innocent lives can be relied

¹Ayvazyan, V. (2012): Genocide: Intent, Motivation and Types : Contemporary issues, Vol. 5, No. 1

on for humanitarian intervention. These rules are application to everyone as the word used is 'person', not a Muslim or a believer. The principle of prohibiting genocide in the law of armed conflict and the Islamic law of qital is compatible.¹

2.2.5 Genocide as a social concept

Aside from it being a crime, genocide is a subject of research by social scientists and scholars. They ask such questions as to the history of genocide, its dynamics and stages, and its conditions and causes. If we are to eradicate or reduce genocide in the world, such research is essential. It is not enough to try to deter it by legal punishment. We must also understand why it occurs. However, the legal definition of genocide in the UNCG and ICC is too broad in including very different kinds of behaviour, such as murder, mental damage, preventing births, removing children from a group, and so on.

Yet, the legal definition also is too narrow in another way. It does not include the intent to destroy political, economic, and other non-indelible groups. Much killing by governments has been for to destroy other than indelible groups. It has been manifestly murder, and the intent to commit murder is inherent in the act itself. For example, soldiers lining up civilians against a wall and shooting them to death without a

¹- Niaz, A. S. (2011).Islamic Law and the Law of Armed Conflict: The Conflict in Pakistan. N.Y: Ruotledge Taylor and Francis Group. pp.76. Retrieved from [https:// books. google. com.ng /books ?isbn=1136824685](https://books.google.com.ng/books?isbn=1136824685). Accessed 07 May, 2017.

fair trial is manifestly government murder. Such has been the mass murder of hostages by the Nazis, the murder of Kulaks during Stalin's collectivization campaign in the 1930s, Mao's killing of "counterrevolutionaries in the 1950s and 60s," "the forced disappearance of leftists by death squads in Argentina, Brazil, Colombia, El Salvador, and Honduras, among others in the 1970s and 80s; and the Cambodian Khmer Rouge's mass murder of former government military officers and officials from 1975 to 1979.¹

The progress of our knowledge of genocide depends fundamentally on the clarity and significance of our concepts. Especially, these concepts should refer to real world behaviour and events that can be clearly and similarly discriminated regardless of the observers and their prejudices. For if any area of social study is laden with predispositions and biases, it surely has to do with the who, why, when, and how of government murder.

For these reasons, genocide scholars have tried to develop their own definitions of genocide that would better fit their understanding of such government murder.

¹- Chalk, F., and K. Jonassohn (1990). *The History and Sociology of Genocide: Analysis and Case Studies*, New Haven.

For Chalk and Jonassohn¹, "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." Israel W. Charny² defines genocide as "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 defencelessness and helplessness of the victims."

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 as defined by Helen Fein³. For Katz, S. T.⁴ the "concept of genocide applies only when there is an actualized intent, however successfully carried out, to physically destroy an entire group (as such a group is defined by the perpetrators)."

In some usage and especially among some researchers (see Charny's definition, above), genocide has been so defined to fill a void in the legal and common definitions. They mean it to cover the mass

¹Chalk, F., and K. Jonassohn (1990). *The History and Sociology of Genocide: Analysis and Case Studies*, New Haven.

²Charny, W. (Ed.) (1994). *The Widening Circle of Genocide: Genocide: A Critical Bibliographic Review*, Vol. 3, New Brunswick, New Jersey.

³- Fein, H. (1993). *Genocide: A Sociological Perspective*, Newbury Park, California.

⁴- Katz, S. T. (1994). *The Holocaust in Historical Perspective: The Holocaust and Mass Death before the Modern Age*, New York.

murder of people for reasons other than their group membership, such as the mass murder of POWs, political critics, and violators of draconian rules; that during rape or sexual enslavement; that in the process of ideological purification; or that in order to simply fulfil a government death quota (as in the Soviet Union under Stalin in the 1930s, or by North Vietnam in the 1950s). None of such murders are genocide according the legal and common meanings.

The problem with the generalized meaning of genocide is that to fill one void it creates another. For if genocide refers to all government murder, there is then no name for the murder of people because of their group membership, or the intent to destroy a group in whole or in part? It is precisely because of this conceptual problem that the new term democide (from the Greek demos for "people") is useful. It means murder by government or ruling authorities, and replaces the generalized definition of genocide, thus leaving the sociological concept of genocide to specifically refer to the murder of people because of their group membership.

One of the great advances in international and humanitarian law of the International Criminal Tribunal Statute is that it now explicitly defines murder and extermination as international crimes, whether in time of war or peace. Article 7.1 of the Statute includes the intentional

"murder" and "extermination" of one or more persons as "'crime[s] against humanity' when part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." Of special importance, "extermination includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population." (Article 7.2.b) ¹

Murder and extermination by governments are within the general definition of genocide - democide. Therefore, the International Criminal Tribunal Statute meets the extensive criticism of the United Nation Council General (UNCG) that it was too narrow and should have included the murder or extermination of people for reasons other than the attempt to destroy indelible groups, although not under the crime of genocide. In effect, the ICC now covers almost all cases of democide, with the exception of the murder of political opponents or others (such as that of a pesky reporter) that is not part of the widespread or systematic attack on the population.

2.3 History of the crime of genocide

Throughout history hundreds of millions of people have been so murdered by their governments or rulers. This because they were hated;

¹- Katz, S. T. (1994). *The Holocaust in Historical Perspective: The Holocaust and Mass Death before the Modern Age*, New York

the wrong ethnic group, race, religion, or nationality; got in the way; were perceived a threat or enemy; on a whim; or for no reason at all. A conservative accounting would put the murdered as around 133 million, a number whose size was only limited by the small population of the world. By contrast, pre-20th Century war dead may have been about 40 million; the Black Plagues during the fifth to the 20th Century may have killed 102 million.¹

Just a few examples will have to suffice. In China as one emperor succeeded another and as one imperial war devastated the population, tens of millions were murdered. In the Taiping Rebellion (1851-64) alone, upwards of forty million were killed, the vast majority likely murdered. The Mongols, Jinghiz Khan a particular ruthless killer among them, devastated large sections of Persia, the Middle East, Eastern Europe, Russia and China-perhaps murdering through the 14-15th

centuries as many as 30 million people (about 13 percent of the world's population). Then, of course, there was slavery which may have accounted for the murder of about 17 million African blacks; and the murder of the Indians of the Americas, another 13 or so million. These are just the most notorious examples, but then there were the less deadly only in their lesser number of victims, such as in the murder of Christians by the Romans, the Christian Crusades, the Aztec sacrifices, the Spanish Inquisition, the witch hunts, the frequent anti-Jewish pogroms throughout Europe, and so on.²

¹- Katz, S. T. (1994). *The Holocaust in Historical Perspective: The Holocaust and Mass Death before the Modern Age*, New York

²-Katz, S. T. (1994). *The Holocaust in Historical Perspective: The Holocaust and Mass Death before the Modern Age*, New York

By the 20th Century the human population had multiplied. At the time of the Mongols the world population was about 400 million. In 1900 it was about 1.2 billion, which rose to 6.1 billion by mid-2001. With many more people to kill, governments murdered many more people. In the 20th Century alone, the toll probably exceeded all those murdered before, likely an incredible 174 million. Possibly even around 340 million. For perspective on this, it is as though the world suffered a catastrophic nuclear war in slow motion. The conservative count of 174 million murdered is four times the number killed in combat in all domestic and foreign wars during the century, including World Wars I and II. This many corpses placed head to toe would ring the earth about four times.

The worst murdering government was that of the Soviet Union, where Lenin, Stalin, and their successor may have killed around 62 million citizens and foreigners. Beginning in 1923, the Communist Party of China under Mao Tse-tung and his successors may have accounted for 39 million Chinese. The Nazis under Hitler carried out the Holocaust against the Jews, which everyone knows about, but lesser known is their other murders, which including the Jews amount to about 21 million murdered. Virtually unknown is that the Chinese Nationalist government, while in power from 1928 to 1949 under Chiang Kai-shek, murdered some 10 million Chinese. There were

lesser murdering governments that while they killed a million or more people, managed to keep the total under 10 million. Just to name them, with the years and approximate millions murdered in parenthesis: Japan (1937-45: 6), Cambodia Khmer Rouge (1975-79: 2), Turkey (1909-18: 1.9), Vietnam (1945-87: 1.7), North Korea (1948-2002: over 2), Poland (1945-48: 1.6), Pakistan (1958-87: 1.5), Mexico (1900-20: 1.4), Russia (1900-17: 1.1), and Yugoslavia under Tito (1944-87:1). Well over a hundred other governments murdered their share in the tens or hundreds of thousands in this 20th century blood bath. All of this killing would now be a crime under the ICC.¹

How much of this is the crime of genocide, however? Those cases that most clearly would be such crimes are the Holocaust costing 5-6 million Jews killed, of course. Both the UN Tribunals for Rwanda (overall about, 500-750 thousand Tutsi killed in 1994) and Yugoslavia (about 25,000-100,000 murdered in Bosnia-Herzegovina) have found that genocide had occurred and have meted out punishment. Some other major cases the fit or come close, with murdered in parenthesis are the 1909-23 mass murder of Armenians, Greeks, and other Christians by the Turkish regimes (about 2.1 million Armenians and 347 thousand Greeks), Cambodian Khmer Rouge 1975-79 murder of Buddhist monks, Cambodian-Vietnamese, Muslims, and other minorities (541,000); 1904-07 German murder of Hereros, Hottentots, and Berg-Damaras of

¹- Katz, S. T. (1994). *The Holocaust in Historical Perspective: The Holocaust and Mass Death before the Modern Age*, New York

Namibia (72,000), 1967-87 Burundi murder of Hutus (150,000), World War II Croatia's murder of Serbs and Jews (655,000), Iraq's 1966-88 murder of Kurds and southern Shiites (over 100,000).

If we use the common definition of genocide, then there are many more cases that added to those that fit the legal definition, may amount to around eighty million murdered by governments. Some of the major cases would be Stalin's forced 1932-33 famine in Ukraine that murdered about 5 million; Communist China murder of 375,000 Tibetans, Sinkiang Muslims, and other minorities; West Pakistan's 1971 mass murder of over a million Bengalis and Hindus in East Pakistan (now Bangladesh); Indonesia's 1965 mass murder of 509,000 communists and ethnic Chinese and 1975-98 murders of over 150,000 in East Timor; and throughout the world the mass murder of tens of millions of indigenous people and colonial natives¹.

2.3.1 Genocide in the ancient ages

It is not clear when the first genocide occurred. It seems unlikely that early man engaged in genocide during the hunting and gathering stage. While we have no direct evidence, this seems a reasonable assumption because men lived in quite small groups and overall population densities were extremely low (1 per 10 km² of habitable terrain according to the estimates of McEvedy and Jones)².

2.3.2 Genocide in the middle ages

¹ -Colin McEvedy and Richard Jones, (1978). Atlas of World Population History (New York: Penguin Books, 1978), p. 13

² Colin McEvedy and Richard Jones, (1978). Atlas of World Population History (New York: Penguin Books, 1978), p. 14.

After the discovery of agriculture, the world divided into nomads and settlers. This marked the start of systematic conflict in the form of food raiding by the nomads. The nomads quickly learned to raid their settled neighbours at harvest time for their food stores; however, they had no interest in exterminating them because they planned to repeat their raids in subsequent years. The settlers may have had much better reason to do away with the nomads, but they had neither the means nor the skills to do so.

As the settlers improved their agricultural techniques and produced significant surpluses, they were able to support cities, rulers, and armies. They accumulated wealth and engaged in significant trade. With these developments, the scene changed dramatically. Conflicts arose over wealth, trade, and trade routes. Wars were fought over the access to wealth and over the control of transportation networks (to use a modern term). At first, these conflicts were probably in the nature of brigandage and robbery. Soon they escalated to wars between city states. However, these warring peoples soon discovered that their victories were mostly temporary: the defeated peoples withdrew long enough to rebuild their resources and their armies, and then tried to recoup their losses and to avenge their defeat. This pattern became so common that it soon appeared that the only way to assure a stable future was to eliminate the defeated enemy once and for all. People that

were not killed during or after the battle were sold into slavery and dispersed. This elimination of a potential future threat appears to be the reason for the first genocides in history.

Genocides of this first type seem to have been common throughout antiquity, especially in the Middle East, where trade routes between Asia, Africa, and Europe crossed. The Assyrians were expert practitioners; about a number of the peoples whom they vanquished we know little more than their names¹. When the empire of the Hittites was destroyed, it was done so efficiently that not even the location of their capital was known until an inspired German archaeologist unearthed it almost by accident in the nineteenth century². Perhaps the best-known example of this type of genocide is the destruction of Carthage³. These so-called Punic Wars between Carthage and Rome lasted well over a century (264-146 B.C.) and were fought mostly over the control of the Mediterranean trade and economy. These wars were incredibly costly in terms of material and lives, even by modern standards. After Rome just barely won the Second Punic War (218-201 B.C.), it decided that Carthage had to be eliminated once and for all. Those who were not killed in the Third Punic War (149-146 B.C.) were sold into slavery, and the city was destroyed. Looking at the available evidence from

¹ - Morris, J. (1971). *The Civilization of Babylonia and Assyria*. Benjamin Blom, New York.

² - Gurney, O. R. (1975). *The Hittites*. Book Club Associates, London.

³ - Warmington, B. H. (1960). *Carthage*. Robert Hale. London.

antiquity, one might even develop a hypothesis that most wars at that time were genocidal in character.

2.3.3 Genocide in the modern ages

2.3.3.1 Genocide in the colonial period

In the 16th century, the expansion of European empires led to the conquering of the Americas, Africa, Australasia and Asia. This period of expansion resulted in several instances of massacres, and genocide.

Many indigenous peoples, such as the Yuki, the Pallawah and Herero, were brought to the brink of extinction. In some cases, entire tribes were annihilated.

(a) Genocide of Armenians

The first non-colonial genocide of the twentieth-century was the Armenian catastrophe in the Ottoman Empire during World War I. It started in early 1915, when the Young Turk regime rounded up hundreds of Armenians and hanged many of them in the streets of Istanbul, before beginning the genocidal deportation of most of the Armenian population to the desert, in which up to a million died or were murdered en route.

The Armenian minority in Ottoman Turkey had been subject to sporadic persecutions over the centuries. In 1894-96, these were stepped up with pogrom-like massacres. With the outbreak of the First World War, the Young Turk government proceeded far more

radically against the Armenians. From 1915, inspired by rabid nationalism and secret government orders, Turks drove the Armenians from their homes and massacred them in such numbers that outside observers at the time described what was happening as ‘a massacre like none other,’ or ‘a massacre that changes the meaning of massacre.’ Although we do not have reliable figures on the death toll, many historians accept that between 800,000 and one million people were killed¹, often in

unspeakably cruel ways, or marched to their deaths in the deserts to the south. Unknown numbers of others converted to Islam or in other ways survived but were lost to the Armenian culture. At the time a number of influential people spoke out against these atrocities, most notably the distinguished historian Arnold J. Toynbee, but it has only been since the 1970s that scholars have devoted anything like sustained attention to this human catastrophe. There is more than enough evidence to suggest that the mass murder of the Armenians was a case of genocide, as that crime was subsequently defined in the United Nations Genocide Convention of 1948. Surviving perpetrators of the Armenian genocide could certainly have been held to account in an international criminal court.

¹- Warmington, B. H. (1960). Carthage. Robert Hale. London

(b) Genocide of Jewish

Between the ascension of the Nazi regime to power in Germany in 1933 and the defeat of the German army in 1945, over six million civilians perished at the hands of German forces, their military allies, and their civilian associates. The word “Holocaust,” with Greek roots meaning “destruction of life by fire” and a common translation of the Hebrew word “Shoah,” is nearly universally understood to refer to these events.¹

The murderous effort rested on an ideology of racial superiority and aspirations of racial “purity.” Jews were by far the largest component of the victims. Roma and Sinti (both commonly – but sometimes derogatorily – referred to as “Gypsies”) were also targeted, as were the physically disabled, the mentally disabled, and members of several religious minorities. Political opponents, as well as Slavic and Russian civilians, were also murdered in large quantities, although whether these mass atrocities constituted part of a genocide is less certain.

The Holocaust unfolded over time. When the Nazi regime came to power, it was already imbued with an ideology of racial ideology – which happened to comport with its own sense of its political enemies. It began establishing concentration camps shortly after coming to power. The regime also systematically discriminated against Jews (and other groups it perceived to be racially inferior) in the economic, political, and

¹- Warmington, B. H. (1960). Carthage. Robert Hale. London

civic realms. November 1938 pogroms known as “Kristallnacht” demonstrated that the German police would tolerate (and, indeed, encourage) violence against Jews and their property¹. Once World War II broke out the following year, the German government expanded its concentration camp system, and soon converted them into an infrastructure for mass killing. Meanwhile, an even greater number of Jews and other civilians would be killed outside of the camps, either through the Nazi SS Einsatzgruppen (mobile paramilitary units) or the actions of Nazi supporters on either side of the front lines in Eastern Europe.

The Holocaust is undoubtedly the seminal event for the field of genocide studies. Even as scholars examine new and different cases from a variety of perspectives, the foundation of the field lies in effort to understand the organization, behavior, and psychology of different actors – those who killed, those who stood by, those who perished, those who attempted to help, and those who survived – the Holocaust. Many of the field’s most important scholars continue to address these issues today.

(c) Genocide of Algerian

On 8 May 1945, French army troops with machine guns opened fire on a crowd, killing hundreds of people. This was followed by intense

¹ - Warrington, B. H. (1960). Carthage. Robert Hale. London

bombing by French aircrafts in Setif, neighbouring Guelma and nearby villages. According to Algerian sources, by the end of the massacre on 22 May, 45,000 Algerian civilians had been killed.¹

Upon seizing an Algerian city in 1830, the French embarked on a campaign to colonise the entire country. This marked the beginning of 130 years of Algerian enslavement.

In response to French colonization efforts, the Algerians established several anti-colonisation resistance organisations. The most important of which being the resistance movement of Abdelkader El Djézairi. However, in an attempt to break down Algerian resistance and pro-independence support, French occupation forces placed the Algerians under military, political, religious, cultural and economic pressures.

Cultural pressure was applied with the intention of eliminating Muslim and Arab identities. Attempts were made to replace Arabic and Berber -the official languages of Algeria-with French. Religious pressure was applied with the intention of replacing Islam with Christianity via an increase in Christian missionary activities. Land belonging to tribes who were deemed 'anti-occupation', was confiscated in a bid to apply economic pressures and non-transferable properties belonging to foundations that were set up to serve the society were seized. Europeans

¹-Omer Aymali. Algerian Genocide: The Setif Massacre. World Bulletin. History. 28 June 2014 Saturday.<http://www.worldbulletin.net/filebox/139653/algerian-genocide-the-setif-massacre>. Accessed May 8, 2017.

migrants were also settled into colonial settlements in the country's most beautiful regions. In order to encourage such migration, land was seized from native tribes and distributed, without cost, to European migrants¹.

Algerian rebellion against political repression and massacre led to brutal suppression at the hands of the 400,000 French soldiers whom had been deployed to the country. Hundreds of thousands of people were killed. Following the genocidal massacre, France gained entire control of Algeria. Although this was only achieved in the 1900's, from this point onwards, hundreds of thousands of French citizens settled in Algeria.

The massacre witnessed in Algeria led to an increasingly violent reaction amongst its citizens. During this period, pro-independence movements began to emerge once again. Between the years of 1948-52 preparations for revolt against the occupation took place. The Movement for the Triumph of Democratic Liberties (MTLD) was founded under the leadership of MessaliHadj and in 1950, the movement was active against French rule. However, discontent amongst members with regards to the leadership of MessaliHadj and his peaceful democratic methods resulted in the formation of a breakaway group named National Liberation Front (Front de Libération Nationale-FLN). On 1 November 1954 FLN militants launched a series of attacks on military facilities,

¹ - Omer Aymali. Algerian Genocide: The Setif Massacre. World Bulletin. History. 28 June 2014 Saturday.<http://www.worldbulletin.net/filebox/139653/algerian-genocide-the-setif-massacre>. Accessed May 8, 2017

warehouses, communication systems and public enterprises across Algeria¹.

(d) Genocide of Palestinian

While there has been recent criticism of those taking the position that Israel is committing genocide against Palestinians, there is a long history of human rights scholarship and legal analysis that supports the assertion. Prominent scholars of the international law crime of genocide

and human rights authorities take the position that Israel's policies toward the Palestinian people could constitute a form of genocide. Those policies range from the 1948 mass killing and displacement of Palestinians to a half-century of military occupation and, correspondingly, the discriminatory legal regime governing Palestinians, repeated military assaults on Gaza, and official Israeli statements expressly favouring the elimination of Palestinians.²

With respect to the creation of the Israeli state in 1948, there has been a robust scholarly debate about whether the settlement of Jews and the expulsion of Palestinians in Mandate Palestine could be described as genocide. Sociologist Martin Shaw, one of the most

¹-Omer Aymali. Algerian Genocide: The Setif Massacre. World Bulletin. History. 28 June 2014 Saturday. <http://www.worldbulletin.net/filebox/139653/algerian-genocide-the-setif-massacre>. Accessed May 8, 2017

² See Article from Centre for Constitutional Rights. (2016). *The Genocide of the Palestinian People: An International Law and Human Rights Perspective*. <https://ccrjustice.org/sites/default/files/attach/2016/08/Background%20on%20the%20term%20genocide%20in%20Israel%20Palestine%20Context.pdf>. Retrieved May 6, 2017.

distinguished modern scholars of genocide, has written, We can conclude that pre-war Zionism included the development of an incipiently genocidal mentality towards Arab society.”¹ “Israel entered without an overarching plan, so that its specific genocidal thrusts developed situationally and incrementally, through local as well as national decisions. On this account, this was a partly decentred, networked genocide, developing in interaction with the Palestinian and Arab enemy, in the context of war.”²

2.3.3.2 Genocide in the internal conflicts

(a) Genocide in former Yugoslavia

Over the first half of the 1990s, the nation-state of Yugoslavia (formally, the Socialist Federal Republic of Yugoslavia) experienced the secession of three its component republics: Slovenia, Croatia, and Bosnia. The latter two of these were bitterly fought over, both by regular troops and against civilians suddenly resistant to living in ethnically mixed settings. In 1991 and 1992, as Croatia’s military fought Yugoslavia’s, Croat and Serb civilians in both realms undertook campaigns of “ethnic cleansing” – efforts by one group to rid certain areas of the other. As they did echoes resounded of World War Two-era

¹ Shaw, M. (2010). *Palestine In An International Historical Perspective On Genocide*, 9 Holy Land Studies 1, 13 (2010), noting the comments of the President of the Zionist Organization Chaim Weizmann’s comment in 1941 “if half a million Arabs could be transferred, two million Jews could be put in their place.”

²- Id. at 19.

conflicts in which the Croatian, Nazi-allied Ustashe and Serbian, Russia-allied Chetniks fought each other and targeted their respective opposites civilian bases.

After both sides drew back (and Croatia's independence received recognition), similar dynamics began to unfold in Bosnia involving Bosnians as well as Serbs and Croats who had lived in Yugoslavia's most diverse and integrated republic. The conflict most intensely involved civilian populations in the eastern and western areas of Bosnia, where Serb militias fought to negate Bosnian independence – and, failing that, to eradicate the Bosnian population of those regions. The international response to this campaign was create “Safe Areas” in which Bosnian civilians were to be protected from Serbian militias. The militias, however, targeted the Safe Areas anyway. Most notoriously, a Serbian militia overran the Safe Area of the town of Srebrenica. The mostly Bosnian civilian population sought refuge at the United Nations' base nearby. There, however, forces led by the militia leader Ratko Mladic convinced the United Nation (UN) forces to allow them to separate the men from the women and children. The latter were deported to the zone controlled by Bosnian forces. The former, numbering over 7,000, were massacred. Subsequent jurisprudence, both from the

International Criminal Court for Yugoslavia and the International Court of Justice, determined that the massacre constituted genocide.¹

Later, the remaining Yugoslav republics of Macedonia and Montenegro seceded, as did the former autonomous province of Kosovo. In each case, violence against civilians defined along identity-based lines existed, most intensely so in Kosovo. In 1999, a multilateral force conducted a ten-week-long bombing campaign against Serbian forces, whom Western leaders feared were set to wage another campaign of ethnic cleansing in Kosovo as a response to Kosovo's independence aspirations.

(b) Bosnian (Kosovo) genocide

The Kosovo genocide was part of the Kosovo conflict (1998 - 99), in which ethnic Albanians opposed ethnic Serbs and the Yugoslavian government in Kosovo. Part of the Serbs' strategy was a major ethnic cleansing of Albanians. The intervention of the North Atlantic Treaty Organization (NATO) ultimately resolved the conflict.

In 1989 Ibrahim Rugova, leader of the ethnic Albanians in the Serbian province of Kosovo, initiated a policy of nonviolent protest against the abrogation of the province's constitutional autonomy by Slobodan Milošević, then president of the Serbian republic. Milošević and members of the Serbian minority of Kosovo had long objected to the

¹ - Id. At 20

fact that Muslim Albanians were in demographic control of an area held sacred to the Serbs. (Kosovo was the seat of the Serbian Orthodox Church as well as the site of the Turkish defeat of the Serbs in 1389 and the Serbian victory over the Turks in 1912.) Tensions increased between the two ethnic groups, and the international community's refusal to address the issue lent support to Rugova's more radical opponents, who argued that their demands could not be secured through peaceful means¹. The Kosovo Liberation Army (KLA) emerged in 1996, and its sporadic attacks on Serbian police and politicians steadily escalated over the next two years.

By 1998 the KLA's actions could be qualified as a substantial armed uprising. Serbian special police and, eventually, Yugoslav armed forces attempted to reassert control over the region. Atrocities committed by the police, paramilitary groups, and the army caused a wave of refugees to flee the area, and the situation became well publicized through the international media. The Contact Group—an informal coalition of the United States, Great Britain, Germany, France, Italy, and Russia—demanded a cease-fire, the withdrawal of Yugoslav and Serbian forces from Kosovo, the return of refugees, and unlimited access for international monitors. Milošević, who had become president of Yugoslavia in 1997, agreed to meet most of the demands but failed to

¹ - Id. At 21

implement them. The KLA regrouped and rearmed during the cease-fire and renewed its attacks. The Yugoslav and Serbian forces responded with a ruthless counteroffensive and engaged in a program of ethnic cleansing. The United Nations (UN) Security Council condemned this excessive use of force and imposed an arms embargo, but the violence continued.¹

Diplomatic negotiations began in Rambouillet, France, in February 1999 but broke down the following month. On March 24

NATO began air strikes against Serbian military targets. In response, Yugoslav and Serbian forces drove out all of Kosovo's ethnic Albanians, displacing hundreds of thousands of people into Albania, Macedonia, and Montenegro. The NATO bombing campaign lasted 11 weeks and eventually expanded to Belgrade, where significant damage to the Serbian infrastructure occurred. In June NATO and Yugoslavia signed a peace accord outlining troop withdrawal and the return of nearly one million ethnic Albanians as well as another 500,000 displaced within the province. Most Serbs left the region, and there were occasional reprisals against those who remained. UN peacekeeping forces were deployed in Kosovo, which came under UN administration.

¹ - Id. At 22

Tensions between Albanians and Serbs in Kosovo continued into the 21st century. Sporadic violence occurred, as when anti-Serb riots broke out in March 2004 in numerous cities and towns in the Kosovo region. The riots claimed some 30 lives and resulted in the displacement of more than 4,000 Serbs and other minorities. In February 2008 Kosovo declared its independence from Serbia (Yugoslavia had ceased to exist in 2003, giving way to the federation of Serbia and Montenegro, which itself dissolved in 2006). Although the United States and several¹ influential members of the European Union chose to recognize Kosovo's independence, Serbia did not.²

(c) Genocide in Rwanda

The genocide in 1994 was perhaps the most clear-cut case of genocide since the Holocaust: as certain actors made clear the intent to destroy the Tutsi population, hundreds of thousands were killed. Hundreds of thousands more were raped, maimed, or otherwise traumatized. As much as 90% of Rwanda's pre-1994 Tutsi population (which was estimated to comprise about 14% of the country's total population) was murdered. The extermination effort took place within the context of a renewed civil war, but much of the carnage involved civilians far away from the front lines. Indeed, the government of

¹ - Id. At 23

²The Editors of Encyclopædia Britannica. *Kosovo conflict: Balkanhistory* [1998–1999]. <https://www.britannica.com/event/Kosovo-conflict>. Accessed May 05, 2017.

Rwanda appeared to have diverted substantial military resources from the front lines to the effort to slaughter civilians.

The basic contours of the genocide are well-known. A three-year civil war pitting the predominantly Tutsi Rwandan Patriotic Army (RPA) against the predominantly Hutu government (the Rwandese National Movement for Democracy and Development, or MRNDD) and its forces had ended in a peace agreement, The Arusha Accord, in August of 1993. The accord called for the creation of a transitional government incorporating elements of the incumbent regime, the Rwandan Patriotic Front (the political wing of the RPA), and the mixed ethnic domestic opposition. It also provided for a UN force to oversee the transition. However, after months of negotiations and false starts, the parties failed to agree on the specific make-up of the transitional regime. When a plane carrying the president of Rwanda, Juvenal Habyarimana, was shot down from the sky as it returned from negotiations over the transitional government on April 6, 1994, organized street violence quickly ensued. Hardliners –i.e., those who had most resisted partnership with the rebels – maneuvered to gain control of the government, not least by assassinating the incumbent, Agatha Uwilingiyimana, a Hutu who had favoured the implementation of the accord. Soon, government forces (including the army and the presidential guard), along with non-governmental allies (generally affiliated with political parties, such as the infamous interahamwe – the youth wing of MRNDD) were targeting both political rivals and Tutsi civilians. Many of the intended targets congregated in places where

they believed they would be safe, such as churches, government buildings, and factories. Instead, those locales became massacre sites, as government forces, militia members, and other members of the civilian population attacked them en masse¹.

The genocide only ended when the RPA rebels, who had abandoned the peace agreement themselves on April 8, gained control of

Kigali and all government offices in July of 1994. Hundreds of thousands of RPA supporters began to enter the country from Uganda and other neighbouring areas, meaning that a substantial portion of the Tutsi population that had been killed was “replaced” by a Tutsi population returning from exile. For its part, the interim government that had overseen the genocidal effort tried to flee to neighbouring Zaire, while bringing over a million, mostly Hutu refugees with it.²

Among the issues that Rwanda has had to deal with since the genocide are the status of ex-government forces and refugee populations in neighbouring countries, the pursuit of justice for crimes committed during (and as part of) the genocide, and the political, economic, and social reconstruction of a country devastated by intense conflict.

¹- Mironko,C.(2004).*Social and Political Mechanisms of Mass Murder: An Analysis of Perpetrators of the Rwandan Genocide*, Yale University, Department of Anthropology

²Mironko,C.(2004).*Social and Political Mechanisms of Mass Murder: An Analysis of Perpetrators of the Rwandan Genocide*, Yale University, Department of Anthropology.

2.4 Types of genocide

It is evident that genocide is a broader concept, which involves social, political, psychological, economic, and ethnic features in it that is why to give its typology is a difficult undertaking. Furthermore, all genocides happen in complicated conditions which are difficult to gauge, and sometimes take us to misleading points because of the lack of information and evidences. Despite of the aforementioned complications, many authors suggest various types of genocides.

Historically, a number of typologies of genocide have been presented in literature, some of which include actions involving indigenous peoples specifically. Dadrian (1975)¹, for example, identified five types of genocide: (a) cultural genocide, in which assimilation is the perpetrators aim; (b) latent genocide, the result of activities with unintended consequences (for example, the spread of diseases during an invasion); (c) retributive genocide, that designed to punish a segment of a minority that challenges a dominant group; (d) utilitarian genocide, the using of mass killing to obtain control of economic resources; and (e) optimal genocide, which is characterized by the slaughter of a group to achieve its obliteration.

¹- Dadrian, V.N., (1975), A Typology of Genocide, *International Review of Sociology*, 5, 2: 201-212

Conversely, Chalk and Jonassohn (1990: 12-15)¹ identified four types, namely genocide designed (a) to eliminate a potential or future threat; (b) to acquire economic wealth; (c) to create terror; and (d) to implement a belief, theory, or ideology.

Historically the following twentieth century cases of atrocity have been labelled as genocide by many scholars of genocide (Totten et al, 2004)²: genocide of the Hereros; the Armenian genocide; the Soviet man-made famine in Ukraine; the Nazi genocide of Jew, Gypsies, Russians, disabled persons and homosexuals; the Indonesian massacres of suspected Communists; the genocide in East Timor; the Bangladesh genocide; the genocide of the Hutu in Burundi; the Cambodian genocide; the Iraqi genocide of the Kurds in the late 1980s; the 1994 Rwandan genocide; the genocide perpetrated in the former Yugoslavia in the 1990s; the genocide in Sudan. However, few of the foregoing cases are definable as genocide in terms of article II of the Convention on the Prevention and Punishment of Genocide (1948).

Even if one was to refer solely to those cases deemed to constitute genocide in terms of the United Nations Genocide Convention (UNGC), there is still no crime in the twentieth century that has been more costly,

¹- Chalk, F., and Jonassohn, K., (1990), *The History and Sociology of Genocide: Analyses and Case Studies*, New Haven, Yale University Press

²- Totten, S., (2002), *A Matter of Conscience*, in Totten, S., and Jacobs, S., (Eds) *Pioneers of Genocide Studies*, New Brunswick, NJ, Transaction Publishers

more devastating, and more global in its impact. Genocide undoubtedly presents one of the most complete and conspicuous illustrations of state crime in violation of international criminal law.¹

It is important to note that genocide is by no means a simple or unified phenomenon. Genocide represents systematic efforts to destroy collectivities, many of which are minorities. Lemkin in *Axis Rule in Occupied Europe*, a seminal text on Nazi race policy described eight dimensions of genocide—political, social, cultural, economic, biological, physical, religious, and moral—each targeting a different aspect of a group’s existence. Of these, the most commonly recognized are physical, biological, and cultural².

2.4.1 Physical genocide

Physical genocide is the tangible annihilation of the group by killing and maiming its members, either directly or through what the International Criminal Tribunal for Rwanda recognized as “slow death” techniques such as concentration camps.

Physical genocide include those in which the killing of members of a collectivity threatens the survival of the group as a whole. In practice, however, genocidal acts usually do not result in total

¹-Totten, S., (2002), *A Matter of Conscience*, in Totten, S., and Jacobs, S., (Eds) *Pioneers of Genocide Studies*, New Brunswick, NJ, Transaction Publishers

²Nersessian, D. (2005). *Rethinking Cultural Genocide Under International Law*. *Human Rights Dialogue: "Cultural Rights"*. Retrieved May, 9 2017.

annihilation of the population. Groups that have been subjected to genocidal treatment often end up being victimized in other ways as well; they are sometimes raped, enslaved, deprived of their property, and forcibly removed to new places. Some groups have died out as a result of indirect impacts genocide, including starvation and disease.

2.4.2 Biological genocide

Biological genocide consists of imposing measures calculated to decrease the reproductive capacity of the group, such as involuntary sterilization or forced segregation of the sexes.

2.4.3 Cultural genocide

Cultural genocide or cultural cleansing is a concept that lawyer Raphael Lemkin distinguished in 1944 as a component of genocide. The term was considered in the 2007 United Nations Declaration on the Rights of Indigenous Peoples and juxtaposed next to the term "ethnocide," but it was removed in the final document, and simply replaced with "genocide". The precise definition of "cultural genocide" remains unclear. Some ethnologists, such as Robert Jaulin, use the term "ethnocide" as a substitute for "cultural genocide"¹, although this usage

¹Robert Jaulin (1970). *La paix blanche : introduction à l'ethnocide* (in French). Éditions du Seuil.

has been criticized as engendering a risk of confusing ethnicity with culture¹.

In practice, cultural genocide involves the eradication and destruction of cultural artefacts, such as books, artworks, and structures, and the suppression of cultural activities that do not conform to the destroyer's notion of what is appropriate. Motives may include religious ones (e.g., iconoclasm), as part of a campaign of ethnic cleansing in order to remove the evidence of a people from a specific locale or history, as part of an effort to implement a Year Zero, in which the past and its associated culture is deleted and history is "reset", the suppression of an indigenous culture by invaders and colonisers, along with many other potential reasons.

Cultural genocide takes place under conditions of state imposition of educational programs, modernization efforts, and nation building. Throughout the world, indigenous peoples have been coerced or cajoled into giving up their cultural traditions. Sometimes this is done in the name of “national reconciliation” after decolonization. States as diverse as Turkey, Somalia, and Russia have required their citizens to learn national languages. Even countries with positive human rights records, such as Botswana, have implemented national educational systems that

¹Delanty, G., Kumar, K. (2006). *The SAGE Handbook of Nations and Nationalism*. SAGE. p. 326. ISBN 978-1-4129-0101-7. Retrieved 28 April, 2017.

fail to instruct indigenous students in their own customs and languages (Biesele and Hitchcock, 2000)¹.

As late as the mid-twentieth century our planet was blessed with great cultural diversity with thousands of distinct languages, hundreds of unique religions, and thousands of variations in traditions and ways of life.

This cultural genocide is in far too many cases unethical and in others downright evil. Cultural genocide is in most cases terrible and cruel. Alcoholism, disease, poverty, depression, suicide, domestic violence, crime, and a loss of identity and self-worth are legacies of cultural genocide.

Cultural genocide extends beyond attacks upon the physical and/or biological elements of a group and seeks to eliminate its wider institutions. This is done in a variety of ways, and often includes the abolition of a group's language, restrictions upon its traditional practices and ways, the destruction of religious institutions and objects, the persecution of clergy members, and attacks on academics and intellectuals. Elements of cultural genocide are manifested when artistic, literary, and cultural activities are restricted or outlawed and when

¹-Biesele, M. and Hitchcock, R. K. (2000). Ju/'hoan Language Education in Namibia and Its Relevance for Minority Language Education in Botswana. In Botswana: The Future of the Minority Languages, Herman Batibo and BirjitSmieja, eds. Pp. 237-265. Frankfurt and Bern: Peter Lang.

national treasures, libraries, archives, museums, artefacts, and art galleries are destroyed or confiscated.

2.5 Structural elements of genocide

2.5.1 The legal element

Article II of the Genocide Convention, and the corresponding rule of customary law, clearly defines the conduct that may amount to genocide:¹

(a) killing members (hence more than one member) of what we could term a ‘protected group’, namely a national or ethnical, racial, or religious group;

(b) causing serious bodily or mental harm to members of a ‘protected group’;

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

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

(e) forcibly transferring children of the group to another group.

While the definition of the four classes of group is an intricate problem that requires serious interpretative efforts, the various classes of action falling under genocide seem to be relatively clear.

¹- Biesele, M. and Hitchcock, R. K. (2000). Ju/'hoan Language Education in Namibia and Its Relevance for Minority Language Education in Botswana. In Botswana: The Future of the Minority Languages, Herman Batibo and BirjitSmieja, eds. Pp. 237-265. Frankfurt and Bern: Peter Lang.

2.5.2 The mental element

Normally, the material elements of the crime must be committed with intent and knowledge, although lower standards of proof may apply to certain kinds of genocidal acts, e.g., killing.

In addition, the perpetrator must act with the specific intent to destroy a protected group as such in whole or in part¹.

2.5.3 The physical element

The physical corner Actus reus genocide in one constituent behaviour acts these specific acts exclusively, is the definition of genocide in various international instruments concerning this crime, there is no requirement for this crime that is already committed to the total or partial destruction of the community, it is sufficient that the mens rea when the perpetrator commits such crime will result to get this result.

A hallmark of culpable conduct in genocide breadth widespread violations resulting from performing. A feature not only genocide, but shared by crimes against humanity. The physical element is generally a statement constituting an offence culpable behaviour, photos and the breadth of the criminal behaviour. This are discussed below.

¹-Bieseke, M. and Hitchcock, R. K. (2000). Ju/'hoan Language Education in Namibia and Its Relevance for Minority Language Education in Botswana. In Botswana: The Future of the Minority Languages, Herman Batibo and BirjitSmieja, eds. Pp. 237-265. Frankfurt and Bern: Peter Lang.

2.5.3.1 Causing serious bodily or mental harm

The perpetrator must have caused serious bodily or mental harm to at least one member of the group. This can encompass (psychological) torture, mutilation or other serious damage. It is not required that the harm is permanent or irreversible; a merely temporary physical or mental impairment, however, is not sufficient. These elements as stated in Article 6(b) of the ICC statute¹ are:

1. The perpetrator caused serious bodily or mental harm to one or more persons. This conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

¹- International Criminal Court (2011). Elements of Crime. ISBN No. 92-9227-232-2. ICC-PIDS-LT-03-002/11_Eng. PrintPartners Ipskamp, Enschede.

2.5.3.2 Living conditions meant wilfully destroying material community

This subparagraph mainly criminalizes what is generally referred to as slow death measures (such measures do not immediately kill the victims, but they ultimately seek their physical destruction on a long-term basis) imposed on the group as such. Such measures may include long-term forced labour or physical exertion; deportation; subjecting a group to a subsistence diet; imprisonment in concentration and extermination camps; and deliberate deprivation of resources indispensable for survival of the group (such as food, medical services, clothing and shelter).¹

The elements as stated in Article 6(c) of the ICC statutes are:

1. The perpetrator inflicted certain conditions of life upon one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conditions of life were calculated to bring about the physical destruction of that group, in whole or in part. The term “conditions of life” may include, but is not necessarily restricted to, deliberate deprivation of

¹-International Criminal Court (2011). Elements of Crime. ISBN No. 92-9227-232-2. ICC-PIDS-LT-03-002/11_Eng. PrintPartnersIpskamp, Enschede

resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.

5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.¹

2.5.3.3 Imposing measures intended to prevent births within the group

Such measures, which must be forcible, threaten the biological existence of the group by limiting or destroying its capability to reproduce. Relevant incriminated conduct includes enforced sterilization, forced birth control or restriction (e.g., sterilization and/or compulsory abortion), segregation of sexes, prohibition on or erecting obstacles to marriages. Rape committed with the purpose of changing or modifying the ethnic composition of the targeted group is also included in this category of measures. However, public policy measures of general application adopted by densely populated countries (such as China or India) to lower the birth rate for social or economic reasons do not reflect genocidal intent.

The elements are:

1. The perpetrator imposed certain measures upon one or more persons.

¹ - International Criminal Court (2011). Elements of Crime. ISBN No. 92-9227-232-2. ICC-PIDS-LT-03-002/11_Eng. PrintPartnersIpskamp, Enschede

2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The measures imposed were intended to prevent births within that group.
5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.¹

2.5.3.4 Forcibly transferring children to another group

The word ‘forcibly’ may be interpreted to include actual acts of forceful physical transfer or threats of force or coercion. The intention behind such transfer is to destroy the group’s existence. The assumption underlying this prohibition is that when transferred to another group, children lose the cultural identity of the group to which they originally belong. However, legally transferring children for any other reason (social, economic, protection, etc.) would not violate the present provision.

The elements are:

1. The perpetrator forcibly transferred one or more persons. The term “forcibly” is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear

¹-International Criminal Court (2011). Elements of Crime. ISBN No. 92-9227-232-2. ICC-PIDS-LT-03-002/11_Eng. PrintPartnersIpskamp, Enschede

of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.

2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The transfer was from that group to another group¹.

2.5.4 The international element

Crimes of genocide and crimes against humanity, crimes are of two international nature due to the nature of the rights that are attacked in these crimes against man, murder of persons as a crime against humanity and killing members of the group is an attack on the human right to life, and is prohibited in national laws and in international law, Article 44 of the Geneva international Convention on the banned murder against the civilian population, and that the crime of slavery is an assault on the freedom of movement and banned them from working all international treaties and conventions. These are examples of the images and the crimes are considered. And reference to the Sixth articles and seventh, we find that the acts that constitute crimes of genocide in Article sixth are crimes against humanity in Article VII which must be

¹ - International Criminal Court (2011). Elements of Crime. ISBN No. 92-9227-232-2. ICC-PIDS-LT-03-002/11_Eng. PrintPartnersIpskamp, Enschede

committed to build on the political plan drawn by the state and implemented or satisfied by both governors or senior officials or employees or private individuals on another State or nationals of another country, Vbergua seventh paragraph of Article 1 states that crimes against humanity must be committed in the context of a widespread or systematic attack directed against any civilian population.¹

And conclude from the terms widespread and systematic scale that there is a directed court policy against a group of civilians to eliminate Alehm O. Ki is therefore assumed the availability of a range of possibilities and means do not exist in the state or organizations of a particular kind and is the same corner that we find in the crimes of genocide, and on that basis is a corner policy is at stake in the jurisdiction which works to convert these crimes from the crime and national to an international crime, it is a fundamental requisite and necessary.

For crimes against humanity, it is stated in Article 7(2) as the "Attack directed against any civilian population," a course of conduct involving the multiple commission of acts referred to in the first paragraph against any civilian population in accordance with the policy of the State or organization to commit this attack, or in furtherance of this policy. This act, not spend contents of a military attack, which means that commit such attack policy requires that the State or the

¹ -International Criminal Court (2011). Elements of Crime. ISBN No. 92-9227-232-2. ICC-PIDS-LT-03-002/11_Eng. PrintPartnersIpskamp, Enschede

organization is actively encouraged by the attack against the civilian population.

Although Drs Gahwage and MontasserHamouda agree that crimes against humanity are international so and did not fall with premeditation on the part of the state against a group of people with a particular faith has the nationality of this state with the same Festua then that group will be carrying the nationality of the first bear no equal, that the victim is a national or a foreigner.¹

2.5.5 Intent to destroy a group

The genocide offence has two separate mental elements, namely a general one that could be called ‘general intent’ or *dolus*, and an additional ‘intent to destroy’.

A general intent normally relates to all objective elements of the offence definition (*actus reus*) and has now been defined in international criminal law by Article 30 of the Statute of the International Criminal Court (ICC) as basically encompassing a volitional (intent) and/or a cognitive or intellectual (knowledge) element. In the case of genocide, the general intent relates to the opening paragraph as well as to the acts listed in the offence² and directed against one of the protected groups.¹

¹ -International Criminal Court (2011). *Elements of Crime*. ISBN No. 92-9227-232-2. ICC-PIDS-LT-03-002/11_Eng. PrintPartnersIpskamp, Enschede

² See Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277 (hereinafter Genocide Convention), now the identical Art. 6(a)-(e) of the ICC Statute.

The perpetrator must, for example, know that his actions target one of the protected groups, since the group element is a factual circumstance as defined by Article 30(3) of the ICC Statute. In contrast, the ‘intent to destroy’ constitutes an additional subjective requirement that complements the general intent and goes beyond the objective elements of the offence definition.² One should therefore speak more precisely of an ulterior intent³ (“surplus” of intent⁴) characterized by an extended – with regard to the actus reus – mental element or a transcending internal tendency (*‘überschießende Innentendenz’*).⁵ Indeed genocide, thus understood, is a crime of ulterior intent or a goal-oriented crime (*Absichts-oder Zieldelikt*).⁶ In practical terms, this means that the genocidaire may intend more than he is realistically able to accomplish. A case in point would be a white racist who intends to destroy the group of black people in a large city but, acting alone, will only be able to kill a few members of this group. Taking seriously the specific-intent-crime structure of genocide, his genocidal intent would suffice to fulfil the offence elements if only one of the underlying acts, in case the ‘killing

¹ Otto Triffterer (2001). ‘Genocide, its particular intent to destroy in whole or in part the group as such’, *Leiden Journal of International Law (LJIL)*, No. 14, pp. 399–408, at pp. 400ff.

² Otto Triffterer, (2001). ‘Genocide, its particular intent to destroy in whole or in part the group as such’, *Leiden Journal of International Law (LJIL)*, No. 14, pp. 402–403.

³ Itzhak Kugler, *Direct and Oblique Intention in the Criminal Law*, Ashgate, Aldershot, 2002, p. 3.

⁴ Prosecutor v. Milomir Stakić, Trial Judgement, Case No. IT-97-24-T, 31 July 2003, para. 520.

⁵ Prosecutor v. Radoslav Brđjanin, Trial Judgement, Case No. IT-99-36-T, 1 September 2004, para. 695: specific intent ‘characterises the crime of genocide’.

⁶ Alicia, G. G. (1999). *Derecho penal internacional: Especial consideración del delito de genocidio*, Tecnos, Madrid, pp. 178ff., 231ff., 258ff.

[of] members' of the said group (ICC Statute, Art. 6(a)), were to be accomplished.

As for crimes against humanity, on the one hand genocide essentially constitutes such a type of crime in its similarity to persecution for particular discriminatory reasons (ICC Statute, Art. 7(1)(h)).¹ The 'intent to destroy' requirement turns genocide into 'an extreme and the most inhumane form of persecution.'² On the other hand, the ulterior intent distinguishes genocide from persecution and all other crimes against humanity and contributes to its particular wrongfulness and seriousness. Yet while genocide may then be qualified as a special intent crime, this does not answer the question as to the concrete meaning and degree of this intent.

2.6 Factors of the process of genocide

There is no single explanation for what causes genocide. Rather, there are multitudes of reasons that are instrumental to the destruction of ethnic and minority groups. However, there are three major contributing factors to post-twentieth century genocide: modernisation and the ideology of social purification; psychological dehumanisation of unwanted populations; and extreme nationalism towards 'outsiders'

¹Prosecutor v. Goran Jelusic, Trial Judgement, Case No. IT-95-10-T, 14 December 1999, para. 68

² Prosecutor v. Zoran Kupreskić et al., Trial Judgement, Case No. IT-95-16-T, 14 January 2000, para. 636: '... genocide is an extreme and most inhumane form of persecution.' See also Kirk Gabrielle Swaak-Goldmann, 'Persecution', in Kirk Gabrielle McDonald and Olivia Swaak-Goldman, above note 10, pp.247ff., on the elements of the offence of persecution.

(Gellately, 2003¹; Vaes et al., 2012²). Various compositions of these three factors are strongly present within 20th century genocide case studies in Cambodia, the Nazi Holocaust, Rwanda, the Ottoman Empire and colonial Australia. However, other reasons for genocide, such as the idleness of international institutions and racial superiority, proved secondary to these main arguments of modernity, dehumanisation and nationalism. According to the Convention on the Prevention and Punishment of Genocide, genocide occurs when there is an intent to destroy – in whole or part – a national, ethnic, racial or religious group through various physical and psychological methods (1948, Article 2).

2.6.1 Modernisation and the ideology of social purification

George Cuvier's Theory of Extinction in 1796 inspired Charles Darwin's Theory of Evolution and Natural Selection in 1871. Darwin (1871, p. 200)³ argued civilised races would certainly seek to exterminate the 'savage races' due to their natural higher order thinking and consciousness. Here Darwin proposes two phenomena: race as a hierarchy, and the duty of 'civilised races' to replace the 'savage' or 'underdeveloped' races. This theory can be seen as the beginning of

¹Gellately, Robert, eds. 2003. *The Specter of Genocide: Mass Murder in Historical Perspective*. New York: Cambridge University Press.

²Vaes, Jeroen, Jacques-Philippe Leyens, Maria Paola Paladino and Mariana Pires Miranda . 2012. 'We are human, they are not: Driving forces behind outgroup dehumanisation and the humanization of the in-group'. *European Review of Social Psychology*. 23 (1): 64-106.

³Darwin, Charles. 1871. *The Descent of Man*. Accessed 05 May 2017. Available at <https://www.andrew.cmu.edu/user/jksadegh/A%20Good%20Atheist%20Secularist%20Skeptical%20Book%20Collection/%28e-book%29Darwin%20%20THE%20DESCENT%20OF%20MAN%20%281%29.pdf>

mass extermination and genocide as a natural by-product in the process towards a more civilised modernity. Polish sociologist Zygmunt Bauman (1989, pp.90-91)¹ described genocide to be a case of social engineering, which stems from the ideology of modernity, and comes about due to desires to create a more ‘cleansed’ and perfect society.

Throughout history we can see examples of regimes imposing revolutionary ideas upon populations. Regimes which often sought to eliminate ‘unclean’ populations and re-define pre-existing social structures to achieve the ‘perfect society’ by ridding their society of minority groups which they saw as not belonging. Gellately (2003, pp.244-246)² argues that the Nazi regime sought to reverse Jewish emancipation and bring about the final solution to the existence of this ‘problem population’ by wiping out the Jewish presence from society. Similarly in Cambodia, the Khmer Rouge instilled fundamentalist communist ideologies upon the Cambodian population, by methods of population control and mass extermination of intellectuals who sought to rise against their regime. Therefore, hoping to eliminate the present

¹ Bauman, Z. (1989). *Modernity and the Holocaust*. Ithaca, New York: Cornell University Press.

²Gellately, R. eds. (2003). *The Specter of Genocide: Mass Murder in Historical Perspective*. New York: Cambridge University Press.

society and impose a new social and cultural era, entirely 'clean' of the old Khmer culture (Weitz 2003, pp.154)¹.

Weitz (2003, p.158)² argues that an ideology of superiority alone is not a sufficient precondition to genocide. Nor are ideological theories sufficient for explaining the occurrence of genocide. Therefore, to further understand the depths of these various issues that contribute to genocide, I will now explore the factors of dehumanisation and nationalistic thought.

2.6.2 Psychological dehumanisation of unwanted populations

Different human groups have always distinguished themselves from another through the categorisation of in- and out-groups (Weitz2003, p.17³). In extreme cases, this can lead to dehumanisation of the out-group. Dehumanisation is the denial of an out-group's humanity (Kuper 1981, p. 87⁴). Research into dehumanisation of inter-group contact revealed how outside group members are psychologically perceived as less 'human like' than those within the same group (Vaes

¹Weitz, E. (2003). 'The Modernity of Genocides: War, Race and Revolution in the Twentieth Century'. In *The Specter of Genocide: Mass Murder in Historical Perspective*. Ed. R. Gellately. New York: Cambridge University Press.

² Ibid, p.158.

³Weitz, E. (2003). 'The Modernity of Genocides: War, Race and Revolution in the Twentieth Century'. In *The Specter of Genocide: Mass Murder in Historical Perspective*. Ed. R. Gellately. New York: Cambridge University Press.

⁴Kuper, L. (1981). *Genocide: its political use in the twentieth century*. New York: Penguin Books.

2012, p.66¹). Social-neuro-scientific investigations by Harris and Fiske (2006², 2007³) confirmed that members of certain groups fail to process other group members as being fully human and sociable individuals (cited in Buckels and Trapnell 2013, p.772⁴). This psychological detachment and dehumanisation is a necessary precondition of genocide, as it psychologically facilitates their destruction. Dehumanisation is achieved over time through sustained propaganda, segregation and discrimination.

Some historical examples of dehumanisation preceding genocide are the genocides in Rwanda and settler Australian. In Rwanda, the Hutu majority sought to first dehumanise and then destroy their fellow Tutsi, whom they had lived with for hundreds of years. This was done by distributing propaganda via radios and talk shows, characterising the Tutsi as ‘cockroaches’ and constructing them as a threat to all Hutu. Another example is the segregation of Indigenous Australians from settlers during the time of colonisation of white Australia. Aboriginal people were identified as savages and as no more valuable than animals

¹Vaes, J., Jacques-Philippe, L., Maria, P. P. and Mariana, P. M. (2012). ‘We are human, they are not: Driving forces behind outgroup dehumanisation and the humanization of the in-group’. *European Review of Social Psychology*. 23 (1): 64-106.

²Harris, L. and Fiske, S. (2006). ‘Dehumanizing the lowest of the low: Neuroimaging responses to extreme out-groups’. *Psychological Science*. 17: 847–853.

³Harris, L. and Fiske, S. (2007). ‘Social groups that elicit disgust are differentially processed in MPFC’. *Social Cognitive and Affective Neuroscience*. 2:45–51.

⁴Buckels, E. and Trapnell, P. (2013). ‘Disgust facilitates outgroup dehumanization’, *Group Processes & Intergroup Relations* 16 (6): 771-780.

(Moses, 2002¹). Anthropologists at the time identified Aboriginal people as a dying race, who were best aided by hastening their extinction through segregation and forced removal of children (Moses, 2002²).

2.6.3 Extreme nationalism towards ‘outsiders’

Nationalism is considered an instrumental method for power-seeking individuals to justify violence against those outside of their status quo (Pamir, 1997³). ‘Nations’ within themselves are a subjective idea of community and culture within a specific geographical location, and over time have developed to become exclusive populations of sovereign people (Visvanathan, 2006⁴). Seeds of ambivalence and violence have become rooted within this exclusionary process and threaten fixed ideas of identity, therefore leading to exclusion and methods of purification to exclude outsiders (Visvanathan, 2006⁵).

It is difficult to pin-point where nationalism and genocidal ideologies intertwine, as they both appear to develop simultaneously. Breaches to nationalistic ideals and identity are often accompanied by assimilation, elimination and suppression of unwanted cultural

¹Moses, D. A. (2002). ‘Conceptual blockages and definitional dilemmas in the racial century: genocides of indigenous people and the Holocaust’ *Patterns of Prejudice*. 36 (4): 1atel-36 Accessed May 07, 2017. Available at <http://www.kooriweb.org/foley/resources/pdfs/93.pdf>

² Ibid, p.2.

³Pamir, P. (1997). Nationalism, Ethnicity and Democracy: Contemporary Manifestations. *International Journal of Peace Studies*. Vol 2 (2). Accessed 10 February 2016. Available at http://www.gmu.edu/programs/icar/ijps/vol2_2/pamir.htm

⁴Visvanathan, Shiv. 2006. ‘Nation’. *Theory, Culture and Society*.23 (2-3): 533-549.

⁵ Ibid.

minorities. The imposing measures to sustain or reclaim congruency of national image is often conducted through military mobilizations. The Armenian genocide is an example of how a nationalistic force (the Young Turks in the Ottoman Empire) worked to remove a specific unwanted cultural minority. The forced removal of the Armenian population by military mobilization stemmed in part from the Young Turks' intention to reclaim dominance for the Ottoman Empire and recreate a 'pure' national image.

The relationship between citizen and 'outsider' is not just developed through identification of ethnicity, but emerges also from structures of majority and minority political powers (Visvanathan, 2006¹). The Rwandan genocide was caused by an underlying struggle during the lead up to the country's first democratic elections between the Tutsi and Hutu, which eventuated in the annihilation of one group against the other. Mahmood Mamdani (2001²) argues that the Rwandan genocide was inevitable due to unstable political majority-minority relations, where both parties believed it to be impossible to implement a stable political regime with the other present.

A strength of this argument lies in the comparison of modern democracies to their genocidal pasts. Modern powerful democracies like

¹ Visvanathan, S. (2006).Op.cit. p.535

²- Mamdani, M. (2001). *When Victims Became Killers: Colonialism, Nativism and the Genocide in Rwanda*. Princeton, NJ: Princeton University Press.

Germany, the United States and Australia were created through many years of violence, assimilation, forced migration and genocide (Mann, 2005¹). SinisaMalesevic (2013²) furthers this claim arguing that nationalist ideologies are rarely a cause of violence. His main argument captures how even though sustained and organised violent acts of nationalism are difficult to oversee, these contemporary acts of violence support nationalism as a preposition to violence and violent behaviour towards out groups. What is important to consider is that even though violence is an important aspect of genocide, nationalism is an instrumental method for instigating violence.

2.7 Stages or steps (Operational Processes) of genocide

Prevention of genocide requires a structural understanding of the genocidal process. Several genocide scholars and organizations have proposed models through which we can gain a clearer understanding of the mechanisms of genocide, and therefore be more equipped to prevent it. For this work we have chosen to adopt Gregory Stanton's 10 Stages of Genocide model, in which genocide is conceptualized as a process of ten distinct --yet overlapping-- stages. The stages are each processes themselves. Genocide is therefore essentially a process (genocide) of

¹- Mann, M. (2005). *The Dark Side of Democracy: Explaining Ethnic Cleansing*. Cambridge: Cambridge University Press.

²- Malesevic, S. (2013). 'Is Nationalism Intrinsicly Violent?' *Nationalism and Ethnic Politics*. 19 (1): 12-37.

processes (Classification, Symbolization, Discrimination, Dehumanization, Organization, Polarization, Preparation, Persecution, Extermination and Denial). "The stages are predictable but not inexorable," says Stanton, who emphasizes that while the process of genocide is not linear "later stages must be preceded by earlier stages."¹The first stages precede later stages, but continue to operate throughout the genocidal process. Each stage reinforces the other. These processes are discussed below.

2.7.1 Classification

All languages and cultures require classification - division of the natural and social world into categories. We distinguish and classify objects and people. All cultures have categories to distinguish between "us" and "them," between members of our group and others. We treat different categories of people differently. Racial and ethnic classifications may be defined by absurdly detailed laws -- the Nazi Nuremberg laws, the "one drop" laws of segregation in America, or apartheid racial classification laws in South Africa. Racist societies often prohibit mixed categories and outlaw miscegenation. Bipolar societies are the most likely to have genocide. In Rwanda and Burundi, children

¹- Stanton, G.H. (2013). *The Ten Stages of Genocide*. Genocide Watch. Originally presented as a briefing paper, "The Eight Stages of Genocide" at the US State Department in 1996. Discrimination and Persecution have since been added to the 1996 model. [http:// www. genocidewatch.org / genocide/tenstagesofgenocide.html](http://www.genocidewatch.org/genocide/tenstagesofgenocide.html). Retrieved 4th May, 2017.

are the ethnicity of their father, either Tutsi or Hutu. No one is mixed. Mixed marriages do not result in mixed children¹.

2.7.2 Symbolization

We use symbols to name and signify our classifications. We name some people Hutu and others Tutsi, or Jewish or Gypsy, or Christian or Muslim. Sometimes physical characteristics - skin colour or nose shape - become symbols for classifications. Other symbols, like customary dress or facial scars, are socially imposed by groups on their own members. After the process has reached later stages (dehumanization, organization, and polarization) genocidal governments in the preparation stage often require members of a targeted group to wear an identifying symbol or distinctive clothing -- e.g. the yellow star. The Khmer Rouge forced people from the Eastern Zone to wear a blue-checked scarf, marking them for forced relocation and elimination.

2.7.3. Discrimination

A dominant group uses law, custom, and political power to deny the rights of other groups. The powerless group may not be accorded full civil rights or even citizenship. Examples include the Nuremberg Laws of 1935 in Nazi Germany, which stripped Jews of their German citizenship, and prohibited their employment by the government and by universities. Denial of citizenship to the Rohingya Muslim minority in

¹- Malesevic, S. (2013). 'Is Nationalism Intrinsicly Violent?' *Nationalism and Ethnic Politics*. 19 (2): 12-37.

Burma is another example. Prevention against discrimination means full political empowerment and citizenship rights for all groups in a society. Discrimination on the basis of nationality, ethnicity, race or religion should be outlawed. Individuals should have the right to sue the state, corporations, and other individuals if their rights are violated.¹

2.7.4 Dehumanization

Classification and symbolization are fundamental operations in all cultures. They become steps of genocide only when combined with dehumanization. Denial of the humanity of others is the step that permits killing with impunity. The universal human abhorrence of murder of members of one's own group is overcome by treating the victims as less than human. In incitements to genocide the target groups are called disgusting animal names - Nazi propaganda called Jews "rats" or "vermin"; Rwandan Hutu hate radio referred to Tutsis as "cockroaches." The targeted group is often likened to a "disease", "microbes", "infections" or a "cancer" in the body politic. Bodies of genocide victims are often mutilated to express this denial of humanity. Such atrocities then become the justification for revenge killings, because they are evidence that the killers must be monsters, not human beings themselves.²

¹-Malesevic, S. (2013). 'Is Nationalism Intrinsicly Violent?' *Nationalism and Ethnic Politics*. 19 (2): 12-37.

²- Malesevic, S. (2013). 'Is Nationalism Intrinsicly Violent?' *Nationalism and Ethnic Politics*. 19 (3): 12-37.

2.7.5 Organization

Genocide is always collective because it derives its impetus from group identification. It is always organized, often by states but also by militias and hate groups. Planning need not be elaborate: Hindu mobs may hunt down Sikhs or Muslims, led by local leaders. Methods of killing need not be complex: Tutsis in Rwanda died from machetes; Muslim Chams in Cambodia from hoe-blades to the back of the neck ("Bullets must not be wasted," was the rule at Cambodian extermination prisons, expressing the dehumanization of the victims.) The social organization of genocide varies by culture. It reached its most mechanized, bureaucratic form in the Nazi death camps. But it is always organized, whether by the Nazi SS or the Rwandan Interahamwe. Death squads may be trained for mass murder, as in Rwanda, and then force everyone to participate, spreading hysteria and overcoming individual resistance. Terrorist groups will pose one of the greatest threats of genocidal mass murder in the future as they gain access to chemical, biological, and even nuclear weapons.¹

2.7.6 Polarization

Genocide proceeds in a downward cycle of killings until, like a whirlpool, it reaches the vortex of mass murder. Killings by one group may provoke revenge killings by the other. Such massacres are aimed at

¹- Malesevic, S. (2013). 'Is Nationalism Intrinsicly Violent?' *Nationalism and Ethnic Politics*. 19 (1): 12-37.

polarization, the systematic elimination of moderates who would slow the cycle. The first to be killed in a genocide are moderates from the killing group who oppose the extremists: the Hutu Supreme Court Chief Justice and Prime Minister in Rwanda, the Tutsi Archbishop in Burundi. Extremists target moderate leaders and their families. The centre cannot hold. The most extreme take over, polarizing the conflict until negotiated settlement is impossible.

2.7.7 Preparation

Preparation for genocide includes identification. Lists of victims are drawn up. Houses are marked. Maps are made. Individuals are forced to carry ID cards identifying their ethnic or religious group. Identification greatly speeds the slaughter. In Germany, the identification of Jews, defined by law, was performed by a methodical bureaucracy. In Rwanda, identity cards showed each person's ethnicity. In the genocide, Tutsis could then be easily pulled from cars at roadblocks and murdered. Throwing away the cards did not help, because anyone who could not prove he was Hutu, was presumed to be Tutsi. Hutu militiamen conducted crude mouth exams to test claims of Hutu identity. Preparation also includes expropriation of the property of the victims. It may include concentration: herding of the victims into ghettos, stadiums, or churches. In its most extreme form, it even includes construction of extermination camps, as in Nazi-ruled Europe, or conversion of existing buildings – temples and schools – into extermination centers in Cambodia. Transportation of the victims to these killing centers is then organized and bureaucratized.¹

¹-Malesevic, S. (2013). 'Is Nationalism Intrinsicly Violent?' *Nationalism and Ethnic Politics*. 19 (1): 12-37.

2.7.8 Persecution

Victims are identified and separated out because of their ethnic or religious identity. Death lists are drawn up. In state sponsored genocide, members of victim groups may be forced to wear identifying symbols. Their property is often expropriated. Sometimes they are even segregated into ghettos, deported into concentration camps, or confined to a famine-struck region and starved. Genocidal massacres begin. They are acts of genocide because they intentionally destroy part of a group.

At this stage, a Genocide Emergency must be declared. If the political will of the great powers, regional alliances, or the U.N. Security Council can be mobilized, armed international intervention should be prepared, or heavy assistance provided to the victim group to prepare for its self-defense. Humanitarian assistance should be organized by the U.N. and private relief groups for the inevitable tide of refugees to come.

2.7.9 Extermination

The seventh step, the final solution, is extermination. It is considered extermination, rather than murder, because the victims are not considered human. They are vermin, rats or cockroaches. Killing is described by euphemisms of purification: “ethnic cleansing” in Bosnia,

“ratonade” (rat extermination) in Algeria. Targeted members of alien groups are killed, often including children. Because they are not considered persons, their bodies are mutilated, buried in mass graves or burnt like garbage.¹

2.7.10 Denial

Every genocide is followed by denial. The mass graves are dug up and hidden. The historical records are burned, or closed to historians. Even during the genocide, those committing the crimes dismiss reports as propaganda. Afterwards such deniers are called “revisionists.” Others deny through more subtle means: by characterizing the reports as

“unconfirmed” or “alleged” because they do not come from officially approved sources; by minimizing the number killed; by quarrelling about whether the killing fits the legal definition of genocide (“definitionalism”); by claiming that the deaths of the perpetrating group exceeded that of the victim group, or that the deaths were the result of civil war, not genocide. In fact, civil war and genocide are not mutually exclusive. Most genocides occur during wars.

2.8 Previous studies in genocide crime

A considerable amount of researches have been done in different parts of the world to investigate genocide crimes and the role of international criminal tribunals in preventing and combating it. Ng² (2014) investigated the Transfer Cases of the ICTR to the Republic of Rwanda: The challenges of implementing Rule 11bis. This thesis addresses the complex process of transferring cases from the International Criminal Tribunal for Rwanda (ICTR) to Rwanda. After a decade of prosecuting

¹- Malesevic, S. (2013). ‘Is Nationalism Intrinsicly Violent?’ *Nationalism and Ethnic Politics*. 19 (1): 12-37.

²Ng, L. (2014). *The Transfer Cases of the ICTR to the Republic of Rwanda: The challenges of implementing Rule (11) bis*. Master’s Thesis. University of Helsinki. Faculty of Law. Public International Law.

the leaders and organizers of the 1994 Rwandan Genocide. The thesis aims to determine whether the transfer cases to Rwanda were decided with the appropriate fair trial standards. To determine this, this thesis examines the decisions of the ICTR, relevant legislation, Reports of the Monitor as well as academic discussions. Further this thesis demonstrates the importance of capacity building efforts as well as legal reform to improve standards. Improvement of fair trial and penalty standards in Rwanda has involved the creation of new witness protection programs. The thesis concludes that, from the creation of new witness protection programs, video link technology, building of new prisons, judicial training and reforms in legislation, Rwanda has developed the capacity to hold a fair trial.

Etienne¹ (2014) conducted a study on the Prevention of Genocide under International Law: An analysis of the obligations of States and the United Nations to prevent genocide at the primary, secondary and tertiary levels. The study investigates the role of international law in attempts to effectively prevent genocide crime. The field of prevention of genocide in international law has suffered from embarrassing insufficiencies of clarity on what the obligation to prevent genocide entails. There is actually no existing of theories in international law on how to prevent genocide. The aim in this work is to contribute to the clarification of the international legal regime applicable to the prevention of genocide. It intends to establish whether and to what extent states and the United Nations have the obligation to prevent genocide. The findings

¹Etienne, R. (2014). *The Prevention of Genocide under International Law: An analysis of the obligations of States and the United Nations to prevent genocide at the primary, secondary and tertiary levels*. PhD thesis. University of Groningen. Conducted at the department of Constitutional Law and International Law at the University of Groningen. Printed by: Grafimedia Facilitair Bedrijf RUG.

of the study have proved that the ordinary meaning of prevention and its scope dictate that it be carried out in a structured way: primary, secondary and tertiary levels. This structure is not only applicable to the prevention of genocide in international law but also indispensable. Another result is that preventing genocide being a continuous process, it requires not only to stop the harm from starting but also to halt it when it has started. Prevention of genocide is therefore a process not limited to what must be done before the symptoms. It continues to address those symptoms and to address the perpetration of genocide. Prevention is a continuous process, it requires not only to stop the harm from starting but also to halt it when it has started. Prevention of genocide is therefore a process not limited to what must be done before the symptoms. It continues to address those symptoms (after they appear) and to address the perpetration of genocide. It concludes that preventing genocide requires that international law be applied through the primary-secondary-tertiary-based approach.

Another study has been carried by Alemayhu¹(2010) concerning Prosecution of Crimes against Humanity and Genocide in Africa: A comparative Analysis. It studies the legal frameworks or systems upon which the prosecutions took place, the challenges they faced or will face in the future and recommend the best system for prosecuting crimes against humanity and genocide in Africa by selecting five legal frameworks; the ICC, the Special Court for Sierra Leone, the Ethiopian Legal framework for the prosecution of

¹- Alemayhu, F. (2010). *Prosecution of Crimes against Humanity and Genocide in Africa: A Comparative Analysis*. A thesis submitted for the Degree of LLM (Public International Law). Addis Ababa University. Law School. Graduate Program. Ethiopia.

crimes against humanity and genocide, Senegal legal framework for the Prosecution of Hissene Habre, and the Rwandan Legal framework, including the ICTR. These all efforts show the lack of uniform organized approach to dealing with crimes against humanity and genocide.

A more recent study has been carried out by Bachman¹(2013) to investigate The Genocide Convention and the Politics of Genocide Non-Prevention. The study tries to find out why, despite its universal condemnation and international legal prohibition, has genocide continued to be perpetrated and, in particular, why has the international community failed to take the necessary measures to prevent it? An analysis of the text of the Genocide Convention and the scholarly literature revealed that the Convention includes weaknesses that diminish its preventive efficacy. The findings supported the thesis that the Genocide Convention's preventive efficacy was intentionally weakened. The purposeful weakening of the Genocide Convention's preventive efficacy, while based in plausible reasons for doing so, demonstrates a lack of commitment to the prevention of genocide. The weaknesses combine to relegate the Genocide Convention to a form of symbolic legislation. Because there have been multiple failed attempts to amend the Genocide Convention, the future of genocide prevention likely lies elsewhere. Three recent developments in international law provide some promise for the future. The development of the Responsibility to Protect, the establishment of the International Criminal Court, and the International Court of Justice's ruling in the case of Bosnia v. Serbia, were analyzed to determine their potential to improve on the record of

¹ - Bachman, J. (2013). *The Genocide Convention and the Politics of Genocide Non-Prevention*. PhD dissertation. Law and Public Policy. Northeastern University. Boston, Massachusetts

genocide prevention. It was concluded that each offers promise and each contains practical limitations.¹

From the above (4) previous studies one can conclude with the following:

1- From the creation of new witness protection programs, video link technology, building of new prisons, judicial training and reforms in legislation, countries could develop the capacity to hold a fair trial for offenders of genocide.

2- The field of prevention of genocide in international law has suffered from embarrassing insufficiencies of clarity on what the obligation to prevent genocide entails.

3- All efforts to prevent genocide show the lack of uniform organized approach to dealing with crimes against humanity and genocide.

4- The Convention on the Prevention and Punishment of the Crime of Genocide includes weaknesses that diminish its preventive efficacy.

The mentioned previous studies agree with the present study in that:

a) The international criminal laws agreed in defining what constitute crimes against humanity and what genocide is.

b) The international community failed in finding suitable methods for fighting and preventing genocide crimes.

c) Much efforts to prevent genocide show the lack of uniform organized approach to dealing with crimes against humanity and specifically genocide.

d) There are several features of weakness in the international criminal laws concerning the prevention of genocide crime all over the world.¹

¹ - Bachman, J. (2013). *The Genocide Convention and the Politics of Genocide Non-Prevention*. PhD dissertation. Law and Public Policy. Northeastern University. Boston, Massachusetts

CHAPTER THREE

THE INTERNATIONAL EFFORTS TO PREVENT GENOCIDE CRIME

3.1 The role of international laws in prevention of genocide

3.1.1 Prevention in the process to genocide

While it may appear that mass violence, whether committed in the name of colonialism, fascism, imperialism, religion, self-interest or other rationales, is an inevitable result of the human “survival of the fittest,” this is an inaccurate perception. Indeed there are many steps that can be taken to reduce mass hatred, violence, and genocide. Such atrocities are by no means an inevitability of human interaction. However, for prevention to really be successful an integrated approach must be taken and levels of prevention as well as intervention must be discussed. Unfortunately, when most individuals discuss prevention, they are really focusing on intervention given the flames of genocide are already burgeoning if not engulfing a region or people. Prevention can be broken down into three distinct phases: primary prevention, secondary

¹-Bachman, J. (2013). *The Genocide Convention and the Politics of Genocide Non-Prevention*. PhD dissertation. Law and Public Policy. Northeastern University. Boston, Massachusetts

prevention, and intervention(sometimes referred to as tertiary prevention).¹

3.1.1.1 Primary prevention of genocide

If we truly want to work toward building cultures of peace it is imperative that coordinated efforts in four broad areas be undertaken. First, historic animosities and patterns of disparity must be addressed. Without efforts to address historic injustices, tensions and long-held prejudices will continue to fuel inter-group animosities. One of the primary reasons for this ongoing division is the magnitude gap as discussed by Baumeister (1997)². A difference in perception of harm exists between victims and perpetrators. Victims perceive the extent of the harm as greater than the perpetrator and view all actions on the part of the perpetrator, including those resulting in accidental outcomes, as being intentional. In addition, victims also feel the reverberations of the harm extending over a much longer period of time and occasionally intergenerationally. Ironically, perpetrators tend to perceive themselves as victims in a reversal of morality. Because of these differences in perception, victims' retaliatory responses tend to be viewed as out of proportion by the original perpetrators, thus enhancing the perpetrators perception that they are in fact being victimized. This may result in

¹ - Baumeister, R. F. (1997) *Evil: Inside Human Violence and Cruelty* (New York: W. H. Freeman).

² - Baumeister, R. F. (1997) *Evil: Inside Human Violence and Cruelty* (New York: W. H. Freeman).

further aggression directed towards the original victims which ultimately escalates the cycle of violence. For groups to move beyond this pattern or at best a violence stalemate, each group must come together to understand the partisan perceptions of the “other.” Additionally, each group, particularly the dominant group, must acknowledge the harm caused and make efforts towards restorative justice.

Concomitantly with the process of addressing historic patterns and animosities, the second component of building a culture of peace involves the promotion of positive relationships between groups. There is an extensive body of literature that suggests simple contact between groups does little to reduce negative intergroup relations (Amir, 1976)¹. While there is little support for the notion that contact, in and of itself, will decrease the likelihood of inter-group conflict, there is a growing body of literature that suggests that contact, if coupled with tactics such as increasing personalization, celebrating the differences between groups, and introducing stereotype-disconfirming evidence, can enhance intergroup relations (Hewstone, 1996)². In addition, relationships that are developed out of the necessity for inter-group cooperation to achieve a goal have been found to reduce prejudice and promote positive

¹ Amir, Y. (1976). “The role of intergroup contact in change of prejudice and ethnic relations,” in P. A. Katz, ed., *Towards the Elimination of Racism* (Elmsford, NY: Pergamon Press), pp 245–308.

² Hewstone, M. (1996) “Contact and categorization: social psychological interventions to change intergroup relations,” in C. Macrae, C. Stangor and M. Hewstone, eds, *Stereotypes and Stereotyping* (New York: Guilford Press), pp 323–368.

relationships (Gaertner et al.,1990)¹. The key is the development of deep and meaningful relationships and not just superficial or incidental contact (Staub, 2003)².

It is important to note that the process of inter-group exchange is facilitated by knowledge and preparation prior to inter-group contact (Staub, 1989)³. Education is the third primary element involved in creating a culture of peace. Educational efforts need to focus on peace education including the teaching of non-violent conflict resolution skills. Conflict is a necessary and vital component of life; violent conflict resolution is not. Therefore, individuals, particularly children and adolescents, need to be taught the difference between various conflict resolution styles and the promotion of congruent problem-solving skills. Additionally, children need to be taught both independent and critical thinking skills. This is needed to counter the tendency in humans towards blind obedience to authority and conformity in situations supporting the promotion of intra- and inter-personal violence.

As a component of peace education, children and indeed communities need to become more familiar with and develop a value for fundamental human rights and the extension of these rights to all

¹Gaertner, S. L., Mann, J. A., Dovidio, J. F., Murrell, A. J. and Pomare, M. (1990) "How does cooperation reduce intergroup bias?" *Journal of Personality and Social Psychology*, Vol 59, No 4, pp 692-704.

²Staub, E. (2003) *The Psychology of Good and Evil* (New York: Cambridge University Press).

³Staub, E. (1989) *The Roots of Evil: The Origins of Genocide and Other Group Violence* (New York: Cambridge University Press).

peoples. According to the Honourable MaryRobinson (2003)¹, former UN Commissioner for Human Rights, there is a strong correlation between economic development and human rights in every region of the world. While the direction of causality is unclear, Robinson argues that the promotion of universal human rights within a culture advances economic development. If Robinson's observations are correct, human rights education would serve a twofold purpose. First, the adoption of universal human rights would promote peaceful coexistence and respect across cultures and peoples. Second, it would assist in combating the difficulties associated with economic crisis as a precursor to mass violence and genocide.

Education related to the teaching of tolerance and particularly an appreciation of diversity must be provided in schools, religious institutions, and other community organizations. Children who develop prejudicial attitudes and biases are more likely to become adults with these same belief systems. Thus, schools and universities are natural environments for education about hate, tolerance, and diversity. Programs such as A World of Difference are a good place to begin for schools unfamiliar with diversity education (Anti-Defamation League,

¹Robinson, M. (2003) Public lecture, St. Louis, MO, Webster University's Community Music School, April 29.

2002)¹. It is important to note that teens and young adults are particularly susceptible for recruitment into organizations of hate and violence. Thus, diversity educations need to include “inoculation” against potential recruitment. Researchers have successfully inoculated children to resist attacks on cultural truisms such as brushing one’s teeth (McGuire, 1964)², refusing to give in to peer pressure to smoke (McAlister et al., 1980)³, and engaging in drug use (Ellickson and Bell, 1990)⁴. Finally, for children to value others, they must value themselves. However, while it is important that positive self-esteem be developed in children and youth, one must ensure that the self-esteem is grounded in actual accomplishments and demonstrated abilities. Baumeister (1997)⁵ argues that inflated self-esteem when threatened is a source of potential violence as often evidenced in gangs and other destructive groups. Our schools and community must focus on teaching prosocial behaviour and movement along a path of caring, contribution, and social action/justice. Just as individuals can begin and move down a path of hate, violence, and destruction, research has demonstrated that individuals can just as

¹ Anti-Defamation League (2002) World of Difference Program, available online at: http://www.adl.org/education/edu_awod/default_awod.aspl (accessed May 25, 2004).

² McGuire, W. J. (1964) “Inducing resistance to persuasion,” in L. Berkowitz, ed., *Advances in Experimental Social Psychology*, Vol 1 (New York: Academic Press), pp 192–229.

³ McAlister, A., Perry, C., Killen, J., Slinkard, L. A. and Maccoby, N. (1980) “Pilot study of smoking, alcohol and drug abuse prevention,” *American Journal of Public Health*, Vol 70, No 7, pp 719–721.

⁴ Ellickson, P. L. and Bell, R. M. (1990) “Drug prevention in junior high: a multi-site longitudinal test,” *Science*, Vol 247, No 4948, pp 1299–1305.

⁵ Baumeister, R. F. (1997) *Evil: Inside Human Violence and Cruelty* (New York: W. H. Freeman).

easily move down a path of benevolence (Staub, 1989)¹. Finally, cultures must move toward the development of democratic forms of government and accepting pluralistic cultures. Ample evidence exists demonstrating the dangers associated with authoritarian forms of government and cultures characterized by homogeneity of peoples and beliefs (Rummel, 1996).²

3.1.1.2 Secondary prevention of genocide

Secondary prevention is necessary when situational factors predictive of genocide or other forms of mass violence are present. As noted previously, crisis can be very destabilizing both for individuals and cultures. Thus, the international community needs to be more responsive to the needs of societies during times of crisis whether economic, political, or environmental. Such aid may not only assist in the stabilization of a community but also decrease the likelihood that an authoritarian form of government will emerge as a reaction to such strife. Additionally, when nations have already begun to move down the path to mass violence and genocide, the international community must not remain a passive bystander. Political pressure needs to be brought to bear upon those governments with potentially destructive agendas. Such destructive agendas may be apparent through the loss of civil rights of a

¹Staub, E. (1989) *The Roots of Evil: The Origins of Genocide and Other Group Violence* (New York: Cambridge University Press).

²- Rummel, R. (1996) *Death by Government* (New Brunswick, NJ: Transaction).

target group within a nation-state (e.g. new restrictive laws or deportations) or the development of an infrastructure with a high probability of destructive goals (e.g. creation of the concentration camps or Hutu militants purchase of vast quantities of machetes). Alternative strategies for internal national development need to be provided so as to entice governments to move from authoritarian to more democratic forms of governmental structures. Boycotts and sanction have the potential to affect change in oppressive governments if used judiciously bearing in mind the nature of partisan perceptions. However, such efforts are more effective early on in the development of a pre-genocidal state. Unfortunately, such efforts will be less effective if authoritarian leaders perceive themselves to have reached a point of no return where change increases the potential for their own national or international prosecution and punishment.

Given the powerful influence the media has in the long-term development of a pre-genocidal state, alternate forms of media and media transmission must be disseminated within the at-risk country. In the absence of counter information, individuals are more likely to believe the existing propaganda. Consequently, individuals within pre-genocidal states need to be exposed to alternative voices to allow individuals to more critically evaluate their perspectives. Additionally, the strategies

outlined under primary prevention need to be implemented to further reduce the risk for mass violence and genocide.¹

3.1.1.3 Tertiary prevention of genocide

When individuals and groups within a culture begin to be deprived of basic civil and human rights, direct intervention becomes necessary. Unfortunately, the twentieth century represented a chronicle of non-involvement. Therefore, clear-cut strategies and mechanisms for intervention have not yet been developed. The Universal Declaration of Human Rights and the Convention on Genocide provide a framework for the identification of pre-genocidal and genocidal cultures. What is needed now is a formula for action when such cultures have been identified. While the presence of international special envoys and advisory teams has been useful in quelling the growth of violence, there have been times when military action should have been implemented (Carnegie Commission on the Prevention of Deadly Violence, 1997)². Consequently, Fein (1994b)³, Mendlovitz and Fousek (1996)⁴, and others have called for the creation of a permanent UN or other international force to intervene and enforce the Genocide Convention. It should be

¹ - Rummel, R. (1996) *Death by Government* (New Brunswick, NJ: Transaction).

² - Carnegie Commission on the Prevention of Deadly Conflict (1997) *Preventing Deadly Conflict: Final Report* (New York: Carnegie Corporation).

³ - Fein, H. (1994b). *The Prevention of Genocide* (New York: City University of New York).

⁴ - Mendlovitz, S. and Fousek, J. (1996) "The prevention and punishment of the crime of genocide," in C. B. Strozier and M. Flynn, eds, *Genocide, War and Human Survival* (Lanham, NJ: Rowman & Littlefield), pp 137–152.

noted that in addition to the development of specific strategies and mechanisms for intervention, the UN and the global community must be invested in action. The long-term benefit of such an investment is the reduction of future violence due to a decreased number of victimized individuals whose trauma may promote future violence, a reduction in number of perpetrators whose actions may lead to a further commitment to violence, and the elimination of the atmosphere of impunity that promotes violence. The United Nations and international governments are not alone in identifying at-risk, pre-genocidal, or genocidal nation-states. Critical support can be provided by NGOs such as Amnesty International and Human Rights Watch.

The UN and others can use these organizations to make informed decisions relative to intervention. Additionally, there are organizations specifically focused on the identification of pre-genocidal and genocidal states that alert policy makers and others to atrocities being committed around the globe. Genocide Watch, the International Campaign to End Genocide, and the Committee on Conscience all work to alert policy makers and focus on the agenda of eliminating genocide. Of course,

these policy makers must be committed to a pattern of action to reduce violence and increase efforts aimed at restorative justice.¹

When gross human rights violations, crimes against humanity, or genocide have been identified, extreme political pressure must be placed upon the responsible governments or quasi-governmental states. Boycott and sanction may be attempted first. However, if such actions are ineffective, then armed intervention may be the only recourse to save lives and prevent further destruction. However, it should be stressed that such actions may only be necessary if attempts at primary and secondary prevention have not been undertaken.

3.2 The United Nations and the obligation to prevent genocide under international law

3.2.1 The obligation of the United Nations to prevent genocide

It is recorded on history that on 6 April 1994, the airplane of the Rwandan president exploded in the skies above Kigali. Belgian peacekeepers reported seeing two rockets fired toward his plane from the vicinity of a camp belonging to the Rwandan Presidential Guard and army commandos. Within hours of the plane crash, the Presidential Guard, the army, the Interahamwe, and the Impuzamugambi mounted roadblocks and killings spread quickly throughout the whole country,

¹ - Mendlovitz, S. and Fousek, J. (1996) "The prevention and punishment of the crime of genocide," in C. B. Strozier and M. Flynn, eds, *Genocide, War and Human Survival* (Lanham, NJ: Wovman & Littlefield), pp 137–152.

ordered and commanded by the Government through its army, Gendarmerie, militias, and individuals.¹

Ever since the so-called revolution of 1959 has happened, there had been propaganda against the Tutsi population. It increased in 1990 with the invasion of the RPF. The propaganda against Tutsis increased much more in the 1993 by the “Radio-television Libre de Milles Collines” (RTL) whose shareholders included the President

Habyarimana as the largest one.² This Radio began broadcasting shortly before the signing ceremony of Arusha Accords between the then government and the Rwandese Patriotic front. Some other weekly newspapers like Kangura supported by the government and military figures carried open hate-propaganda against Tutsis. It had published in 1990 the famous ten Hutu commandments which were instructions to mistreat and discriminate Tutsis, and later in December 1993, the same Kangura newspaper, predicted that President Habyarimana would be assassinated not by a Tutsi but by a Hutu.³

The international community was early informed by some reliable persons such as the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions in March 1993.

¹ - Mendlovitz, S. and Fousek, J. (1996) “The prevention and punishment of the crime of genocide,” in C. B. Strozier and M. Flynn, eds, *Genocide, War and Human Survival* (Lanham, NJ: Wovman& Littlefield), pp 137–152.

²Melvem, L. (2000). *A people betrayed: the role of the west in Rwanda's Genocide*, 2nded, Zed Books, London and New York, p. 71

³Melven, L., *op.cit.* p.72

The genocide against the Tutsi in Rwanda as well as that of Srebrenica and some other genocides happened while the Convention on the Prevention and Punishment of Genocide and other international legal instruments were in force. Yet, as it was later stressed by the ICJ, this Genocide Convention was manifestly adopted for a purely humanitarian and civilizing purpose since its object was on the one hand to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality.¹ It is in this context that this convention imposed to all contracting parties, the obligation to prevent genocide. In explaining the scope of this convention and particularly its article I, the ICJ clarified that “*Article I does impose distinct obligations over and above those imposed by other Articles of the Convention. In particular, the Contracting Parties have a direct obligation to prevent genocide*”.²

However, while this Genocide Convention imposes the obligation on contracting parties the direct obligation to prevent genocide it did not provide mechanisms to implement this obligation. In fact, this Genocide Convention was adopted three years after the adoption of the UN Charter. Article 2(4) of this UN Charter states that: “All members shall

¹*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J.Reports 1951*, p. 23, quoted in International Court of Justice, Case concerning the application of the convention on the prevention and punishment of the crime of genocide, (Bosnia-Herzegovina v, Serbia-Montenegro), (case No. 91) Judgment, 26 February 2007, para. 161.

²International Court of Justice, Case concerning the application of the convention on the prevention and punishment of the crime of genocide, (Bosnia-Herzegovina v. Serbia- Montenegro), (Case No. 91) Judgment, 26 February 2007, para. 162.

refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, in any other manner inconsistent with the purposes of the United Nations.”¹

One year after the adoption of the Genocide Convention, the UN General Assembly adopted Resolution 375 (1949) on the right and duties of states in which it is stated that: “Every state has the duty to refrain from intervention in the internal affairs of any other state...”² A similar provision was included in Resolution 2131(1965) on the inadmissibility of intervention: “No state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state”.³

The UN General Assembly Resolution 2625 (1970) on Friendly Relations followed and repeated article 2(4) but also prohibited the intervention in internal affairs by stating that: “No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the Stateare in violation

¹Charter of the United Nations of June 26,1945 at WWW, < <http://www.un.org/>>,(Consulted on 28 April 2017).

²UN General Assembly Resolution 375 (1949) of 6 December 1949 on the rights and duties of states at WWW < http://www.un.org>, (Consulted on 28 April 2017)

³UN General Assembly Resolution 2131(1965) of 21 December 1965 on the inadmissibility of intervention at WWW < http://www.un.org>, (consulted, May 02, 2017)

of international law”¹. This was confirmed by the ICJ in Nicaragua case: “The principle forbids all states or groups of states to intervene directly or indirectly in internal or external affairs of other states.”²

3.2.2 The legal basis for the UN obligation to prevent genocide

As implied in its official title (‘The Convention on the Prevention and Punishment of the Crime of Genocide’), the 1948 Genocide Convention was envisaged by its drafters with the objective of ‘prevention’ very much in mind.³ Despite their intentions, however, the text itself focused mainly on punishment, with only two references to ‘prevention’, in Articles I and VIII. Article I read:

*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.*⁴

The article established the only legal basis for states parties’ duty to prevent genocide. Unfortunately, those who drafted the Convention did very little to clarify what specific measures states had to take to comply with the duty. The second and only other occurrence of the word was in Article VIII that stated: ‘Any contracting party may call upon the

¹UN General Assembly res.2625, 24 October 1970 on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the UN, at WWW <<http://www.un.org>>, (Consulted, May 02, 2017)

²International Court of Justice, Case concerning the military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, 27 June 1986, para 205, at WWW <<http://www.icj-cij.org>>, (Consulted, May 02, 2017)

³ See General Assembly’s instructions to the drafting Committees in United Nations, GA Resolution 96 (I), 11 November 1946.

⁴ United Nations, The Convention on the Prevention and Punishment of the Crime of Genocide, 1948, Art. 1. Emphasis added.

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'.¹

Most scholars have supported the view that the directive in the Article VIII does not extend in significant ways beyond reaffirming states parties, right to refer a situation (deemed by them as genocidal) to the 'competent' organs of the UN (i.e. mainly the UN Security Council and the ICJ).² Here also, the drafters did not specify what actions would have to be taken, if at all, by these organs.³ Third parties' obligations to prevent genocide thus remained ambiguous and in need of further interpretation.

3.2.3 The derivation of the UN obligation to prevent genocide

Between 1948 and the early 1990s, the international community's response to the Genocide Convention was characterised by neglect.⁴ During these decades of the Cold War, no serious efforts were made to use the convention for rescuing the millions who perished in outbreaks of

¹UN, Genocide Convention, Art. 8.

² See discussions in David Luban, 'Calling genocide by its rightful name: Lemkin's Word, Darfur, and the UN Report', *Chicago Journal of International Law*, Vol. 303, No. 7, 2006, p. 305n; Julie Flint and Alex De Waal, *Darfur: a short history of a long war* (New York: Zed Books, 2006), pp. 131; Straus, 'Rwanda and Darfur', p. 51; William A. Schabas, *Genocide in international law: the crime of crimes*, 2nd edn. (Cambridge; New York: Cambridge University Press, 2009), p. 85.

³ The drafting committees left these decisions to political negotiations. See, in relation to the UNSC discussion, Mark Toufayan, 'Deployment of troops to prevent impending genocide: a contemporary assessment of the UN Security Council's powers', *Canadian Yearbook of International Law*, Vol. 40, 2002, pp. 222, 226–227.

⁴ Review updated to 1985 in Benjamin Whitaker, *Revised and updated report on the question of the prevention and punishment of the crime of genocide (the 'Whitaker Report')* (United Nations, ECOSOC, UN Doc E/CN.4/Sub.2/1985/6, 2 July 1985), for example, paras. 55, 65.

genocide, or hardly even to address the legal ambiguities in the Convention's text.¹ The first major turning point took place in 1993. In March of that year, eleven months into the civil war in Bosnia, the government of Bosnia-Herzegovina took the Federal Republic of Yugoslavia (Serbia and Montenegro, hereafter FRY) to the ICJ² on charges of violations of the genocide convention, in order to request provisional measures for protecting its citizens.³ In addition to charges of genocide, the FRY was also charged with a failure to prevent genocide under Article I of the Convention. In a separate opinion⁴ on the case (13 September, 1993), ad hoc judge Elihu Lauterpacht, who was appointed by Bosnia, made a number of observations concerning the obligation of third parties to prevent genocide.

In relation to the scope of the duty to prevent, the judge concluded that it is one that 'rests upon all parties and is . . . owed by each party to every other' (thereby clarifying its *erga omnes* character).⁵ However, he

¹ See critique in Toufayan, 'The World Court's Distress', pp. 233–262. Exceptions include *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ 15 1951 (28 May).

² Article IX of the Genocide Convention specifies the ICJ as the competent organ to discuss civil disputes between states. All other international courts and tribunals that deal with cases of genocide are tasked with criminal prosecutions of individuals.

³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case* (Bosnia and Herzegovina vs. Yugoslavia (Serbia and Montenegro)), 1993 ICJ 3 (Request for the Indications of Provisional Measures Order of 8 April).

⁴ 'Separate opinion' allows ICJ judges to add non-binding declarations to a court's decisions without having to dissent from them.

⁵ *Application of the Genocide Convention* (Order of 13 Sept.), para. 86 (separate opinion of judge Lauterpacht). An *erga omnes* obligation is owed by states toward the community of states as a whole, as all states have a legal interest in its performance. See on the duty to prevent genocide as *erga omnes*, Toufayan, 'The World Court's distress', pp. 249–250; Marko Milanovic, 'State responsibility for genocide', *The European Journal of International Law*, Vol. 17, No.3, 2006, p. 570.

shied away from making amore explicit determination, citing State practice. ‘The limited reaction of the parties to the Genocide Convention in relation to these episodes may represent a practice suggesting permissibility of inactivity’, the judge argued.¹ He concluded that the absence of a full treatment of this subject by both sides prevented him from expressing a final view on the matter, ‘sympathetic though [he was] in principle to the idea of individual and collective responsibility of States for the prevention of genocide, wherever it may occur’.²

The judge was also hesitant to in relation to Bosnia-Herzegovina’s claim that the imposition of a weapons embargo on all parties to the conflict by the Security Council (UNSC Resolution 713 of September 1991) conflicted with and undermined Bosnia’s duty to prevent genocide of its own people. While responding positively to the argumentation,³ he refrained from taking a decisive position, invoking the procedural difficulty of the court to express its views on a matter involving third parties in a bilateral litigation. The judge then commented: ‘The position would, of course, have been somewhat different if, invoking the obligation resting upon all parties to the Genocide Convention to prevent genocide, the Applicant had started proceedings against one or more of

¹*Application of the Genocide Convention* (Order of 13 Sept.), para. 115 (separate opinion of judge Lauterpacht). See critique in Toufayan, ‘The World Court’s distress’, pp. 237–241.

² *Ibid.*, pp. 237–241.

³*Application of the Genocide Convention* (Order of 13 Sept.), paras. 100–104 (separate opinion of judge Lauterpacht).

other parties to the Convention challenging their failure to meet this commitment'.¹ Soon after, Bosnia filed a statement of intent to commence proceedings against the United Kingdom, amongst other things, for failing in its affirmative obligation to prevent genocide through its actions in the UNSC.² It ultimately decided, however - allegedly under duress³ - not to institute the proceedings.⁴ Since then, no other attempts have been made to pursue this potentially significant question before the ICJ.

Thus, while initial steps were taken before the ICJ International Criminal Court of Justice during 1993 to address the legal ambiguities concerning the duty to prevent, much of the detail remained open and waiting for future interpretation. Later developments in the case, mainly in 1996,⁵ did little to resolve the uncertainties. These persisted and continued to affect the political debate concerning responses to genocide.

The activation of the obligation was long believed to require a legal determination of genocide. However, 'proving genocide' is not only difficult but involves also a long and time-consuming process. It requires either a ruling by the ICJ (as part of a civil litigation between states) or a

¹Ibid, para. 105

² Letter dated 24 November 1993 from the Permanent Representative of Bosnia and Herzegovina to the United Nations addressed to the Secretary-General (UN doc: A/48/659)

³See allegation by Bosnia-Herzegovina's legal advisor, Francis A. Boyle (in his CV) at: <http://www.law.illinois.edu/faculty/profile/FrancisBoyle>.

⁴Schabas, *Genocide in International Law*, 2nd edn., p. 527.

⁵ See Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosnia and Herzegovina vs. Yugoslavia (Serbia and Montenegro)), 1996 ICJ 3 (Preliminary Objections, Judgement, 11 July).

criminal conviction of individual(s) in a national or international court/tribunal. David Scheffer thus wrote:

It has become folly of the most profound character to insist that a government, or the UN Security Council, must first take the time and effort to determine, under international criminal law, that the crime of genocide has been committed before taking military action or, if it can work quickly enough, diplomatic or economic measures to stop what might be, but may turn out not to be, genocide.¹

In its 2007 verdict the ICJ argued: ‘[To suggest] that the obligation to prevent genocide only comes into being when perpetration of genocide commences . . . would be absurd since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act’.²

It therefore determined that ‘[a] State’s obligation to prevent, and the corresponding duty to act arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed’.³

From that moment on, a state that has means which are likely to have a deterrent effect on would-be perpetrators is under the duty to

¹Scheffer, D. (2006). ‘Genocide and atrocity crimes,’ *Genocide Studies and Prevention*, Vol. 1, No. 3, p. 231.

² Application of the Genocide Convention, para. 431. Emphasis added. See similar argument in Scheffer, ‘Genocide and atrocity crimes’, p. 231.

³- *Application of the Genocide Convention*, para. 431. Emphasis added. See also para. 432.

make use of them ‘as the circumstances permit’.¹ Importantly (and perhaps unavoidably), the definition of what a ‘serious risk’ is, was left open to case by case interpretations of states (and possibly of courts) based on the circumstances.

3.3 The competence of organs of the United Nations to prevent genocide and when and how they can act

3.3.1 The General Assembly

The United Nations General Assembly (UNGA/GA) is one of the six principal organs of the United Nations and the only one in which all member nations have equal representation. Its powers are to oversee the budget of the United Nations, appoint the non-permanent members to the Security Council, receive reports from other parts of the United Nations and make recommendations in the form of General Assembly Resolutions. It has also established a wide number of subsidiary organs.²

3.3.2 The Security Council

The United Nations Security Council (UNSC) is one of the principal organs of the United Nations and is charged with the maintenance of international peace and security. Its powers, outlined in the United Nations Charter, include the establishment of peacekeeping operations, the establishment of international sanctions, and the

¹ - Ibid, para. 432.

² - Ibid, para. 432.

authorization of military action. Its powers are exercised through United Nations Security Council resolutions.

There are 15 members of the Security Council, consisting of five veto-wielding permanent members (China, France, Russia, the United Kingdom, and the United States) and 10 elected non-permanent members with two-year terms. This basic structure is set out in Chapter V of the UN Charter. Security Council members must always be present at UN headquarters in New York so that the Security Council can meet at any time.

If the scope of powers of General Assembly is defined in the negative, it is better to define the Security Council's powers in the positive, since it is the powers of the Security Council that narrow the powers of the General Assembly. The UN Charter gives explicit powers to the Security Council in article 24. Under this article, the Security Council has the primary responsibility of maintenance of international peace and security of which preventing genocide is paramount. Even though it is a primary responsibility, it is not exclusive. The General Assembly also has powers in this regard. In chapters VI, VII, VIII and XII the specific powers are set out, which are granted to the Security Council. These are exclusive, but the list is neither conclusive nor final. Apart from the specific powers, the Security Council also has

general¹ powers deriving from the purposes and principles of the organisation as a whole.²

3.3.3 The Secretariat

The United Nations Secretariat is headed by the United Nations Secretary-General, assisted by a staff of international civil servants worldwide. It provides studies, information, and facilities needed by United Nations bodies for their meetings. It also carries out tasks as directed by the UN Security Council, the UN General Assembly, the UN Economic and Social Council, and other U.N. bodies. The United Nations Charter provides that the staff to be chosen by application of the "highest standards of efficiency, competence, and integrity," with due regard for the importance of recruiting on a wide geographical basis.

The Charter provides that the staff shall not seek or receive instructions from any authority other than the UN. Each UN member country is enjoined to respect the international character of the Secretariat and not seek to influence its staff. The Secretary-General alone is responsible for staff selection.

¹ - Ibid, para. 432

² - Charter of the United Nations, 26 June 1945, <http://www.un.org/aboutun/charter/> (accessed 05 May 2017), arts, 93.

3.3.4 The International Court of Justice

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations.¹ It is based in the Peace Palace in The Hague, Netherlands. Its main functions are to settle legal disputes submitted to it by states and to provide advisory opinions on legal questions submitted to it by duly authorized international organs, agencies, and the UN General Assembly. All UN member states are parties to the Statute of the Court, which is integrated within the Charter of the United Nations, and are eligible to nominate judges. The ICJ does not have automatic jurisdiction to hear cases involving states. Though a state can only be sued by another state before the ICJ if it has formally accepted ICJ jurisdiction. States may do this by making a general declaration, pursuant to article 36(2) of the Statute of the International Court of Justice. The working principle of the ICJ is guided by some 300 specific treaties which also provides that the ICJ is the venue for settlement of disputes concerning those treaties. Of these, perhaps the best known is the Convention for the Prevention and Punishment of the Crime of Genocide (UNCG), art. 9 of which states,

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the

¹- Charter of the United Nations, 26 June 1945, <http://www.un.org/aboutun/charter/> (accessed 05 May 2017), arts. 92, 93.

*responsibility of a State for genocide or for any of the other acts enumerated in article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.*¹

The ICJ has shown its competence in its February 2007 ruling,² where the ICJ adopts a relatively narrow and conservative approach to the scope of the crime of genocide. It clearly distinguishes genocide from the cognate concept of “ethnic cleansing,” following the general approach taken by the International Criminal Tribunal for the former Yugoslavia (ICTY) in its practice and judicial determinations. Also the court has made a major pronouncement on the duty to prevent genocide, declaring that this obligation, set out in exceedingly laconic terms both in the title and in art. 1 of the 1948 UNCG, requires states to take action when genocide is threatened outside their own territory, to the extent that they may be able to exercise some influence. It is a powerful message; with tremendous implications going well beyond the narrow finding that Serbia might have done more to avert the 1995 Srebrenica massacre. The court’s approach to the duty to prevent genocide dovetails neatly with recent developments in the political bodies of the United Nations recognizing a “responsibility to protect,”

¹- Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277, http://www.unhcr.ch/html/menu3/b/p_genoci.htm (accessed 9 May 2007), art. 9.

²- Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Judgment, 26 February 2007 [Bosnia v. Serbia 2007 Judgment].

and it provides further support for the entrenchment of this doctrine within customary international law.

3.4 The role of international laws and courts in genocide prevention

3.4.1 Courts before 1984 treaty

There have been several attempts to draw precedents from the International Criminal Court or more appropriately the international military tribunals which preceded it in Nuremberg and Yugoslavia, the dream of international criminal jurisdiction albeit too ad-hoc was realized and with the establishment of this tribunal, the international Criminal Tribunal of Yugoslavia (ICTY) was empowered to determine individual criminal responsibility in trial for crimes under the ICTY statute its restricted to crimes committed on the territory of the former Yugoslavia.

The Nuremberg and Tokyo trials after the Second World War immediately represented progress towards the creation of a body with truly international criminal jurisdiction. But they were greatly influenced by their origin and in effect applied the law and justice of the Victims rather than those of the universal community of state.¹

And for over 45 years, the international community represented by United Nations endeavoured to use the lesson drawn from Nuremberg to

¹ -Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Judgment, 26 February 2007 [Bosnia v. Serbia 2007 Judgment].

establish a permanent international criminal court, operating on the basis of international criminal code, but its efforts proved abortive the debates of the international law commission which was entrusted with the task of drawing up a code of offences against the peace and security of mankind and a statute for international court.¹

The tragic events in the former Yugoslavia the international community at least made aware of the atrocities committed and alerted the courageous report of Tadevz Mazowicki agreed to the establishment of an international criminal tribunal for the former Yugoslavia which was instituted by resolution 808 and 827 of the United Nations Security Council adopted in Tokyo from some historical dating to as far back as 6th century BC.²

The outbreak of a Second World war and wide spread concern over the atrocities in nazi Germany were factors that reawakened interest in the concept of an international panel tribunal, by 1942, a special body constituted by another non-governmental organizations the commission on panel reconstruction was able to report that while there was evidence of growing acceptance of the concept, many states still favoured trial of war crime by domestic counts.³

¹Kittch al-savee, K. International Criminal Law, Oxford University Press, 2001 p.35

² Channel J. Progress in International Criminal Law" American Journal of International Law, A.J.I.L/1947/93/2. p452-464

³U.N War Crimes and Development of the Law of War 1948, pp.95-99.

In what is famously referred to as the Moscow declarations of 1st November 1943, the allied powers affirmed their resolve to prosecute and try Nazis for war crimes. The stage for evolving the mechanism for this was set a month earlier at the London Conference of the Allied powers, which established the United Nations Commission for the investigation of war crimes. This commission mandated its committee on enforcement to consider the establishment of an international court for the trial of war criminals.

By 1944, the commission had elaborated a draft convention for the establishment of a United Nations war crimes court basing its text largely on the 1937 treaty prepared by the league and inspired by the efforts of bodies such as the London International Assembly.

The allies on 8th August 1945 activated an interim solution in the form of an Agreement for the prosecution and punishment of major war criminals for the European axis and the establishment of the charter of the international military tribunal. This treaty was eventually adopted by nineteen other states, which sought to expose their support for the concept¹.

The Nuremberg trials commenced in October 1945 with indictment served on 24 Nazi leaders and were concluded in less than a year. Under the charter, the tribunals were competent to try three broad

¹ - Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Judgment, 26 February 2007 [Bosnia v. Serbia 2007 Judgment].

categories of crimes namely crimes against peace, crimes against humanity and war crimes.

The first two categories were in traversal. Since the alleged crimes were committed before the charter was adopted the arguments of *exposit fact criminality* and the legality of retroactive criminal liability were canvassed before the tribunal. It was also argued that the charter being a source of conventional international law was binding only on the parties who are the proper subjects of international law and not individuals. The tribunals rejected those contentions outright.

In the judgement of the Nuremberg international military tribunal on the 30th of September 1946, one of the judges Mr. Justice Birket made the following remarks.

*The charges in the indictment that the defendants planned and waged aggressive wars are charged of the utmost gravity. War is essentially an evil thing. Its consequence are not confined to the belligerent states alone but affect the world.*¹

But still it considered the prohibition of retroactive criminality as a principle of justice and that justice required that nazi atrocities be punished.² These objectives were of course not new having been canvassed with equal vigour by the American delegates at the allied

¹- Forencz, Hmsc, Comd 6964 (1964) 13, 14 Amj. Int. (1947) B.186

²- Schabas, W. An Introduction to the International Criminal Court. Cambridge Press, London (2004) 2nd Edition. p.6

commission on the responsibility for authors of war constituted to determine the liability of German officials for war crime after the First World War. The difference here however was the decisive shift of international opinion and a willingness to confer jurisdiction on an international tribunal.¹

The significance of the Nuremberg and Tokyo war crimes tribunals to the subsequent evolution of the international criminal court cannot be overemphasized. It was admittedly an interim measure pending the completion of the draft embarked upon by Committee II of the United Nations Commission for the investigation of International Crimes.

However, the trials firmly established the notion of individual criminal responsibility for international crimes.²

a. Nuremberg Court

The Nuremberg trials were a series of trials held between 1945 and 1949 in which the Allies prosecuted German military leaders, political officials, industrialists, and financiers for crimes they had committed during World WarII.

¹McCormark, *Fro Su Tzu to the Sixth Committee, The Evolution of an International Criminal Regime*, Kluwar, 1997 at p.32.

²Nuremberg Trial Proceedings Vol. 1 Charter of the International Military Tribunal.

The first trial took place in Nuremberg, Germany, and involved twenty-four top-ranking survivors of the National Socialist German Workers' Party (Nazi Party). The subsequent trials were held throughout Germany and involved approximately two hundred additional defendants, including Nazi physicians who performed vile experiments on human subjects, concentration camp commandants who ordered the extermination of their prisoners, and judges who upheld Nazi practices.

The Nuremberg trials made three important contributions to international law. First, they established a precedent that all persons, regardless of their station or occupation in life, can be held individually accountable for their behaviour during times of war. Defendants cannot insulate themselves from personal responsibility by blaming the country, government, or military branch for which they committed the particular war crime.

Second, the Nuremberg trials established that individuals cannot shield themselves from liability for war crimes by asserting that they were simply following orders issued by a superior in the chain of command. Subordinates in the military or government are now bound by their obligations under international law, obligations that transcend their duty to obey an order issued by a superior. Orders to initiate aggressive (as opposed to defensive) warfare, to violate recognized rules and¹

¹- Schabas, W. An Introduction to the International Criminal Court. Cambridge Press, London (2004) 2nd Edition. p.6

customs of warfare, or to persecute civilians and prisoners are considered illegal under the Nuremberg principles.

Third, the Nuremberg trials clearly established three discrete substantive war crimes that are punishable under international law: crimes against peace, crimes against humanity, and crimes in violation of transnational obligations embodied in treaties and other agreements. Before the Nuremberg trials, these crimes were not well defined, and persons who committed such crimes had never been punished by a multinational tribunal. For these reasons the Nuremberg convictions have sometimes been criticized as ex post facto justice.¹

The Nuremberg trials have also been criticized as "victor's justice." Historians have observed that the Allied nations that tried and convicted the leading Nazis at Nuremberg did not come to the table with clean hands. The Soviet Union had participated in Germany's invasion and occupation of Poland and had been implicated in the massacre of more than a thousand Poles in the Katyn forest. Bombing raids conducted by the United States and Great Britain during World War II left thousands of civilians dead in cities like Dresden, Germany, and Nagasaki and Hiroshima, Japan. President Roosevelt had implemented a relocation program for more than 100,000 Americans of Japanese

¹- Schabas, W. An Introduction to the International Criminal Court. Cambridge Press, London (2004) 2nd Edition. p.7

descent that confined them to concentration camps around the United States.

The Nuremberg trials were not typical partisan trials, though. The defendants were afforded the right to counsel, plus a full panoply of evidentiary and procedural protections. The Nuremberg verdicts demonstrate that these protections were taken seriously by the tribunal. The International Military Tribunal completely exonerated three defendants of war crimes and acquitted most of the remaining defendants of at least some charges. Thus, the Nuremberg trials, while not perfect, changed the face of international law, both procedurally and substantively.¹

b. Tokyo Court (International Military Court for far East)

The mechanisms employed to deal with Japan's war responsibility were the Tokyo Trials, or the International Military Tribunal for the Far East, the purge of military and political leaders, and the bilateral reparation policies. On the one hand, the Trials and the purge were imposed by the Allies for the purpose of punishment as well as the transformation of Japan into a more democratic state. On the other hand, the reparations programs were initiated by the Japanese authorities as a part of policies of war settlement after its independence in 1952. With

¹-Schabas, W. An Introduction to the International Criminal Court. Cambridge Press, London (2004) 2nd Edition. p.9

respect to the reconciliation aspect, as mentioned above, the Allies obviously had was intention of nurturing reconciliation between Japan and the victim countries. Furthermore, there was no initiative from the Japanese government to ask for reconciliation.

The Tokyo Trials were established in 1946 by the allies to try the Japanese imperial leaders. 28 Japanese military and political leaders were charged with Class A crimes, alleging crimes against peace. Class A charges were applied to the top leaders who had planned and directed the war. Seven of them were sentenced to hanging including the former Prime Minister Hideki Tokyo. Meanwhile, 5700 military personnel and Japanese civilian personnel were charged with Class B and C crimes, alleging war crimes and crimes against humanity. About 920 Class B and C war criminals were executed for these crimes. Class B and C trials were established outside Japan. Therefore, the Japanese population at the time had little chance to know about these trials abroad.

While the Tokyo Trials are believed to have contributed to the development of international criminal law,¹ there was a lot of criticism directed towards the trials. Many scholars have maintained that the Trials were flawed by procedural misconduct, omissions and hypocrisy.² In particular, many scholars criticized the United States' political decision

¹ See Yuma Totani (2008). *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Harvard University Asia Center.

² Jennifer Lind (2008). *Sorry States: Apologies in International Politics*, Cornell University Press, 30.

not to try the Emperor and to condone certain crimes such as the notorious medical experiments conducted by of Unit 731. However, the most controversial aspect of all was to prosecute individuals for the wrongful acts of an entire country, which arguably was retroactive in nature.¹In many aspects, the Trials cannot escape from the criticism that they were a form of victor's justice.

3.4.2 Courts after 1984 treaty

(a) International Criminal Tribunals for the former Yugoslavia (ICTY)

The characteristics of the legal and institutional structure of the International Criminal Tribunal for the Former Yugoslavia (ICTY) -as well as those of the International Criminal Tribunal for Rwanda (ICTR) - cannot be properly understood without taking into consideration the circumstances in which the Security Council decided that an international tribunal should be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.

By the end of February 1993, the focus of the conflict ravaging the former Yugoslavia for more than 18 months had shifted from Slovenia to Croatia and then to Bosnia. Although the conflict was characterized from

¹- John W. Dower, *Haiboku wo Dakishimete*, Vol.2, 259-261, (translated from Embracing Defeat: Japan in the Wake of World War II, 1999).

the very beginning by acute ferocity (particularly in Vojvodina and Eastern Slavonia), it was in Bosnia that the first signs of systematic ethnic cleansing (e.g., deportations, mass executions, mass sexual assaults and rapes, and concentration camps) leaked. In order to pressure the conflicting parties to comply with their obligations under international humanitarian law, in October 1992, the Security Council asked the UN Secretary General to establish a Commission of Experts to report on evidence of grave breaches of international humanitarian law in the former Yugoslavia. The results of the investigation spurred public outrage, especially among European countries, where memories of Nazi horrors were still alive, compelling their governments to call for the establishment of a new Nuremberg.

The prodigious effort to establish the ICTY and its significance in the development of international law and the international judicial system cannot be overestimated. On February 22, 1993, with Resolution 808 the Security Council decided that an international criminal tribunal should be established and asked the UN Secretary General, Boutros Boutros Ghali, to prepare a report. In only 60 days, the Secretary General reported back to the Security Council with the Statute of the future ICTY, which was adopted without changes on May 25, 1993, by the Security Council, acting under Chapter VII of the UN Charter.¹

¹ - John W. Dower, *Haiboku wo Dakishimete*, Vol.2, 259-261, (translated from *Embracing Defeat: Japan in the Wake of World War II*, 1999).

Although the Secretary General benefited in his work from the suggestions and drafts proposed by States, intergovernmental and non-governmental organizations, individuals, and the experience of the two military tribunals established in the aftermath of the second World War (the International Military Tribunal in Nuremberg and the International Military Tribunal for the Far East), the expeditiousness with which a brand new international jurisdiction was created was unprecedented. No international criminal code existed (although various drafts and proposals had been circulated for several decades) and the few precedents could provide minimal guidance, at least because, unlike in the case of the Nuremberg and Tokyo tribunals, it was not a matter of victor's justice. War was (and largely still is) being waged and the tribunal would have to function without effective control over the territories in which the evidence and the perpetrators of the crimes were to be found.

The Statute of the ICTY eventually left a deep imprint first and foremost on that of the ICTR (which was established in a like manner 18 months later), and then on that of the ICC, although several aspects differentiate the latter from the former tribunals. The structural similarities between the ICTY and the ICTR are numerous, including the fact the ICTY and the ICTR share the same Chief Prosecutor and the same Appeal Chamber. The affinity of the two institutions, often called¹

¹ - John W. Dower, *Haiboku wo Dakishimete*, Vol.2, 259-261, (translated from *Embracing Defeat: Japan in the Wake of World War II*, 1999).

the twin tribunals, also set them apart from all other international judicial bodies surveyed in this matrix.

Unlike all other bodies included in this compilation, the ICTY and the ICTR are ad hoc in nature. As enforcement measures under Chapter VII, the life span of each is linked to the restoration and maintenance of international peace and security in the territories of former Yugoslavia and Rwanda. Once the Security Council decides that peace and security have been re-established, they will be dissolved. Their establishment by a Security Council resolution (as opposed to an international agreement, as in the case of all other international judicial bodies) has three further consequences. Firstly, all member States of the United Nations are bound to comply with the requests and decisions of the tribunals (which makes them the fora with the largest footing and avoids the issue of States' consent, which cripples fora like the ICJ and the ITLOS). Secondly, unlike the Nuremberg and Tokyo tribunals, neither the ICTY nor the ICTR possess the means to bring an accused to trial of its own. However, non-compliant or even non-collaborative States can be referred to the UN Security Council for sanction. Thirdly, the ICTY and the ICTR are subsidiary organs of the Security Council within the terms of article 29 of the Charter. As such they are dependent on the UN in administrative and financial matters, although as judicial institutions¹,

¹ - John W. Dower, *Haiboku wo Dakishimete*, Vol.2, 259-261, (translated from *Embracing Defeat: Japan in the Wake of World War II*, 1999).

they are independent of any one State or group of States, including their parent body, the Security Council.

The single most important element that sets the ICTY and the ICTR apart (and for that matter also the ICC) from all other international judicial bodies, is that they are criminal courts. This has multiple implications. Firstly, it means that the parties to the judicial process are always, on the one hand individuals, as indicted, and on the other hand the Prosecutor. Secondly, unlike in the case of all other international judicial bodies, States and international organizations do not have standing. Individuals convicted of crimes of genocide or crimes against humanity are subject to criminal sanctions (i.e., serving jail periods up to life-sentencing). Accordingly, unlike all other international judicial fora, the ICTY and the ICTR have a special detention unit located at the Hague and in Arusha, respectively. Their statutes and rules of procedure and evidence provide elaborate protective measures for victims and witnesses, especially in cases of rape or sexual assault.¹

Finally, it should be mentioned that the jurisdiction of the ICTY and the ICTR is not exclusive but concurrent with that of national courts. However, both have primacy over national courts (something the ICC does not have). At any stage of the procedure, the two ad hoc

¹ -John W. Dower, *Haiboku wo Dakishimete*, Vol.2, 259-261, (translated from *Embracing Defeat: Japan in the Wake of World War II*, 1999).

international criminal tribunals may formally request the national courts to defer competence.

(b) International criminal court for Rwanda

It is a notorious fact that decades of ethnic tension, which culminated in the genocide in Rwanda in 1994 had created a climate of instability affecting all states in the Great Lakes region of central Africa. Fighting did break out in Northern Rwanda in 1990 between the mainly Hutu government and the Tutsi led Rwanda Patriotic Front (RPF). While peace talks brokered by Tanzania and the OAU led to a peace agreement in 1993, which agreement provided for a transitional government and for election in April 1994 and in 8th November 1994, the international criminal tribunal for Rwanda (ICTR) was established by the United Nations Security Resolution 955 of November, 1994. The purpose was to prosecute persons responsible for serious violation of international crimes in the territory of Rwanda and the Rwandan citizens responsible for Genocide and other such violations committed in the territory of neighbouring state between 1st January and 31st December 1994. At the same time, the Security Council adopted the statute of the tribunal and requested the Secretary General to make arrangement for its effective functioning.¹

¹ -John W. Dower, *Haiboku wo Dakishimete*, Vol.2, 259-261, (translated from *Embracing Defeat: Japan in the Wake of World War II*, 1999).

The International Criminal Tribunal for Rwanda (ICTR) was set up by the United Nations Security Council following the recognition of the international conflict in Rwanda as a threat to international peace and security at that time the Prime Minister and Cabinet Ministers and United Nations Peacekeepers were among the first victims. The killings were mainly carried out by the armed forces and on 22 February, 1995 the Security Council passed resolution 977 designating the town of Arusha in the United Republic of Tanzania as the seat of the Tribunal.

The tribunal which has a relatively wide Jurisdiction is mandated to prosecute persons responsible for genocide and other serious violation of international humanitarian law. The statute of the tribunal more or less follows the genocide convention of 1948. The ICTR published its first indictment on 28 November 1995 against eight people.

Opening a completely new area for tribunals of this nature, Article 4 of the statute empowers the tribunal to prosecute persons who committed or are to be committed serious violations of Article 3 common to the Geneva convention of 1949 for the protection of war victims and of 1977 additional protocol II relating to the protection of victims of non-international armed conflicts¹.

¹ - John W. Dower, *Haiboku wo Dakishimete*, Vol.2, 259-261, (translated from *Embracing Defeat: Japan in the Wake of World War II*, 1999).

The Rwanda Tribunal has been the object of criticism; the Rwandan government opposed the creation of the tribunal in the first place citing

two main reasons. That the most severe punishment to be meted out by the tribunal would-be imprisonment but death penalty supposed to be the punishment for those proved to have been involved in the genocide.

Secondly, the Rwandan government argued that it was unrealistic to limit the tribunal jurisdiction to the period 1 January to 31 December 1993. Other reasons includes the likelihood that judges from countries which have been in one way or another involved in the war would show bias, and the fact that those found guilty would serve their sentence in countries offering prison facilities and not in Rwandan jails.¹

In the eye of the Rwandan government, therefore the tribunal would be ineffective; moreover, it would serve no useful purpose since it would not meet the expectations of the Rwandan people. The government has confirmed to take a very hostile attitude towards the tribunal whose personnel in Kigali have reportedly been subjected to harassment and even manhandled in the course of their work.

¹ Tavernier Poul, 'The experience of International Criminal Tribunal for the Former Yugoslavia and Rwanda' published in <http://www.ico.org/corceng/nsf/c12>

Despite the initial criticism and seemingly lack of cooperation with the tribunal acting on their request by the tribunals president before the seminar on the international criminal tribunal and the enforcement of the international humanitarian law, jointly organized by the OAU and the ICRC, the OAU secretary general recommended in his report of 25 May 1997 that African heads of state discussed the difficulties encountered by the tribunal in carrying out its mandate and give it their full cooperation.¹

For the first time in history, the OAU raised the issue of penal sanctions for war crime and serious violations of international humanitarian law committed within the context of international conflicts in Africa. The heads of state agreed to cooperate with tribunal.

The meaningful political support was subsequently matched by deed with some states namely (Gabon, Kenya and Cameroon) decided to transfer some criminals sought by the Tribunal to Arusha.

In the final analysis, it is clear that the significance of tribunals like the international criminal tribunal of Rwanda does not lie in number of persons who appear before them, but is the signals set out by their creation. As Meron say:

No matter how many atrocities cases those international tribunals may eventually try their very existence sends a powerful message. Their statute

¹*Prosecuting Genocide in Rwanda: ICTR and national trials* Lawyer committee for Human Rights Washington CT, July, 1997.

*rules of procedure and evidence and practice stimulate to the development of the law. The possible fear by the state that activities of such tribunals might pre-empt national prosecution could also have the beneficial effort of spurring prosecutions before the nation court for serious violations of international crimes”.*¹

The creation of the International Criminal Court for Rwanda marks a refusal to accept impunity. It also signals the international community to ensuring respect of international criminal law and trying those responsible for seriously violating it.

3.4.3 International Criminal Court 1984 treaty (Rome)

The crime of genocide is defined in the Rome Statute’s article 6. Like in the ICTY and the ICTR, the Rome Statute has the same definition as in the Genocide Convention, thus the Rome Statute protects national, ethnical, racial and religious groups. The Statute is a multilateral treaty and shall be interpreted according to the principles in the Vienna Convention. Since the definition of genocide is taken from the Genocide Convention the *travaux préparatoires* of the Convention can be used for interpretation of the Statute’s definition as well.

3.4.4 International Criminal Court (ICC)

The international criminal court (ICC) is an independent treaty based on permanent judicial institution with jurisdiction over persons

¹ Introductory note to the report by the OAU Secretary General to the 3rd Ordinary of the conference of heads of states and government and sixty – sixth ordinary session of the Council of Minister, Harare, Zimbabwe, 26 May 1992 (not published).

who commit the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes. The court is intended to contribute to the deterrence of such crimes as well as to the maintenance of international peace, security and respect of international justice. It is complementary to national jurisdictions and its statute and rules of procedure and evidence guarantee fair and public trials consistent with international recognised human rights.¹

The adoption of the statute of an international criminal court has been widely welcomed as an important building block in ensuring international accountability. Now that the statute has received the necessary 60 ratifications for its entry into force, it is the first time the world has a permanent mechanism for prosecuting genocide, crimes against humanity and war crimes.² Past attempts to deal with international atrocities have been ad-hoc in nature. The international military tribunal for Nuremberg and Far East and the recent military tribunal for the former Yugoslav and Rwanda have temporal and territorial restrictions on the jurisdiction.³

The International Criminal Court (ICC) will not face those limits, the ICC will be a permanent institution with jurisdiction over core crimes

¹Co-operation agreement between OAU and ICRC 4 May 1992 (Not published).

²Hafner-Gerhard; "A Response to American view as presentation by Ruth Wedgewood" published in European. Journal of International Law (1999) vol. 10 p.115

³Rome Statute, Article 5

of genocide, crimes against humanity, war crimes and aggression once it defined and once a state ratifies the ICC treaty or consents to jurisdiction on ad-hoc basis.¹

The court is also meant to guarantee lasting respect for and the enforcement of international justice, as a judicial institution, it is to conduct fair, impartial and efficient investigations, prosecutions and trials.

The ICC statutes rules of procedure, evidence and other supplementary texts provide safeguards to ensure the integrity of the court's proceedings. At all stages of proceedings the rights of the accused and other actors are guaranteed through both substantive law and procedural mechanisms. In addition, the statute contains innovative provision permitting victims to participate in proceeding and to obtain reparations from the court.

The principle of complementarity established the boundaries of the court's jurisdiction. Unlike the ad-hoc tribunals which take primacy over the national courts. The International Criminal Court (ICC) proceed on the opposite assumption. Complementarity, as established in the statute's preamble and in article 1 and 17 to 20 assumes that national courts will assume jurisdiction.

¹Ibid Article 12, (3)

These provisions create a presumption in favour of action at the level of states. In other words, the ICC does not enjoy primacy over national courts but should only step in when competent domestic prosecutor or court fails or are unwilling or unable to act. The Rome Statute make it clear that states judicial authorities have the primary responsibility of prosecuting and punishing international crimes. This should be their normal task and the ICC can only deal with cases where national judicial systems do not prove to be up to the assignment.

Although the ICC gives priority to national prosecuting of crimes under its statutes, the court can determine the admissibility of a case. Accordingly, the court may carry out the prosecution of a case, which has been prosecuted by a state with jurisdiction, if the standards stipulated in Article 1 are not met.

The ICC has the power to determine the competence of the national investigations and court's proceeding and where appropriate brings a decision in order to achieve its goal of eliminating impunity for international crimes.¹

It is submitted that, with these laudable achievements of the adoption of the Rome statute and its coming into effect with the ratification of 60 signatory states on 1st July 2002 that landmark provisions and machinery to halt culture of impunity and exact

¹ -Ibid Article 12, (3)

compliance and violations of international criminal court law of justice will be achieved.

3.5 The Convention on the Prevention and Punishment of the Crime of Genocide (1948).

Following a UN General Assembly resolution 96(I) of 11 December, 1946 mandating the UN to prepare a convention on genocide, which process was completed two years later, in December 1948, the Sixth Committee of the UN General Assembly created the Convention on the Prevention and Punishment of the Crime of Genocide in 1948 (hereinafter Genocide Convention), which came into force on 12 January 1951.¹ The definition of genocide, as stated in Article II of the Genocide Convention,² became the standard definition. It states as follows:

“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 groups;*
- (b) causing serious bodily or mental harm to members of the group;*
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- (d) imposing measures intended to prevent births within the group;*
- (e) forcibly transferring children of the group to another group.”*

Article III states further thus:

¹Convention on the Prevention and Punishment of the Crime of Genocide (9 Dec 1948) 78 UNTS 227.

²Ibid Article II.

“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.”*

The Genocide Convention endorsed Lemkin’s pledge that it is important ‘not to overlook the fact that genocide is a problem not only of war but also of peace’.¹ In Article I of the Genocide Convention, the contracting parties also agreed with Lemkin 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’.² This point underscores the fact that genocide can also occur outside the realm of armed conflicts.³ The Genocide Convention therefore extends to mass murder and extermination of a civilian population by its own government, whether committed in time of war or peace.⁴

The following articles in the convention deal, inter alia with issues like implementation of the Convention in domestic law,⁵ trials by competent tribunals,⁶ the role of the United Nations⁷ and disputes relating

¹Lemkin R. (1944). *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress* (Carnegie Endowment for International Peace, Washington)93.

² Article I of the Convention on the Prevention and Punishment of the Crime of Genocide (9 Dec 1948) 78 UNTS 227.

³ Cryer, R. et al. (2007). *An Introduction to International Criminal Law and Procedure*. CUP, Cambridge. p.167.

⁴ Jones, J.R.W.D. and Powles, S. (2003). *International Criminal Practice*. 3rd ed OUP, Oxford. p.144.

⁵The Genocide Convention Article V.

⁶ Ibid, Article VI

⁷ Ibid, Article VIII

to the interpretation of the convention¹. The definition of genocide in the convention is apparently narrower than the one in the Resolution 96 (I). A reason for this can be that a resolution does not have the same legally binding effect as a convention and countries therefore are more willing to accept a broad definition in a resolution.

Ratner and Abrams states that the genocide convention is today regarded as the authoritative codification of the basic legal principles relating to genocide.²

¹ Ibid, Article IX

²Ratner, S. R.and Abrams, J. S. (2001).*Accountability for Human Rights Atrocities and International Law.: Beyond the Nuremberg Legacy*.Oxford: Oxford University Press. p. 28.

CHAPTER FOUR

GENOCIDE AS AN INTERNATIONAL CRIME

A case Study of Rwanda, Former Yugoslavia and Burma Genocides

4.1 GENOCIDE AS AN INTERNATIONAL CRIME

4.1.1 Definition of International Crime

What constitutes an international crime is one of those concepts so difficult to define that most writers and even international conventions such as Red Cross Conventions of 1948 and their protocols of (1977) and the statute of the international criminal court, avoid defining it. Nevertheless some efforts have been made.

According to Professor Quincy Wright a crime against international law is an act committed with intent to violate a fundamental interest protected by international law or with knowledge that the act will probably violate such an interest and which may not be adequately punished by the exercise of the normal jurisdiction of any state.¹

And, “The Osborn’s Concise Law Dictionary defines a crime as “an act, default or conduct prejudiced to the community, the commission of which by law renders the person responsible liable to punishment by fine or imprisonment in special proceedings...”² perhaps the most comprehensive effort so far made at defining international crimes was the one made by the international law commission in its draft articles on the origin of state responsibility (1996).

Article 19 of the international crimes and international delicts of International Law Commissions in its draft articles (1990).

¹ Gledhiu, Allen *The Penal Codes of Northern Nigeria and Sudan*” 1963 (London) quoted in Chukkol, Law of Crime in Nigeria

² I.E. Sagay, SAN *The Nature and Characteristics of International Criminal Justice and Administration*, NAILS, Lagos, 20th May, 2006.

1. An act of state, which constitutes a breach of an international obligation, is an internationally wrongful act regardless of the subject matter of the obligation in breach.
2. An international wrongful act which results from the breach by a state of an international obligation so essential for the protection of fundamental interest of the international community that its breach is recognized as a crime by that community as a whole constitute an international crime.
 - i. There must be a serious breach of an international obligation
 - ii. That international obligation must itself be essential to an aspect of human existence.

In this definition; (a) the maintenance of international peace and security and the prohibition of aggression, (b) the right to self-determination and the prohibition of colonial domination (c) the safeguarding of the human being such as the prohibition of slavery, genocide, apartheid and presumably war crimes, crimes against humanity and terrorism are illustrative of what constitutes an international crime.¹

It is clear that the act constituting the offence must be grave in the sense in which the scourge of war was described in the preamble to the charter of the United Nations as having brought untold sorrow to mankind.²

The gravity of the type of offences currently characterized as international crime is also fully captured in the opening paragraphs of the

¹ "The Law of Nuremberg Trial" 41 American Journal of International Law (1947)

² Ibid

preamble to the statute of the international criminal court otherwise known as the Rome Statute (1998) which states inter alia that;

During the twentieth century, millions of children, women and men had been victims of unimaginable atrocities that deeply shocked the conscience of humanity and that such grave crime threatened the peace, security and well-being of the world". It affirmed that most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation. It also states that "the determination of the parties to put an end to impunity of the perpetrators of those crimes and thus to contribute to their prevention".¹

Arguably the First International crime was the prosecution of Pater Von Hogenbacch in 1474 for atrocities committed during an attempt to compel Breisach to submit to Burdandian rule by a tribunal comprising judges drawn from states and principalities. Article 27 of the Treaty of Versailles provided that German Emperor William II should be tried in an International Court to answer charge for flagrant offence against international morality and the sacred authority of the treaties. But since Netherlands refused to give up the accused, the trial never took place and William II died in exile in Holland in 1941.

With the established of the International Criminal Court, with an extensive list of what constitute International Crime, the true nature and characteristics of an international crime has been revealed. As has been

¹ Article 19 of the Draft Constitution Article on the Origin of State Responsibility.

observed in Digest of International Law by White¹ the question of the existence of international crime has been brought more sharply into focus as a result of the programmes example war crimes following the Second World War, the signing of the genocide convention and the step being taken by the General Assembly of the UN towards establishing a code of International Crimes. ‘What acts should be classified as a crime under international law in the last analysis is intimately connected with the question of the machinery by which such acts should be dealt with’. The machinery, the international crime court and its statute have been established with the singular exception what constitute an international crime is no longer difficult to answer, nor is an act constituting such an offence any longer difficult to identify.²

4.1.2 Characteristics of International Crime

Which features of international crimes set it apart from ordinary crimes? Obviously, one can think of their particularly heinous, inhumane character that shocks the conscience of humanity,³ but there are more possibilities. While there is no consensus here either, several attempts have been made by legal scholars to define the key characteristics of international crimes. In the second edition of his book *Principles of International Criminal Law*, Werle identified three cumulative conditions for an offence to fall within the scope of international criminal law: “First, it must entail individual responsibility and be subject to punishment. Second, the norm must be part of the body of international law. Third, the offense must be punishable regardless of

¹Majorie Whiteman *Digest of International Law*. Vol. II p.835 published Cambridge Press, London, 1968.

²McCarmack, T.LH and Simpson, G.J. (eds) (1997). *The Law of Crimes: National and International* Hague/London. p.37

³Ferdinandusse, W.N. (2006). *Direct Application of International Criminal Law in National Courts*, T.M.C. Asser Press: The Hague, pp. 177-178.

whether it has been incorporated into domestic law.”¹ Cassese, on the other hand, identifies four cumulative elements. With respect to the requirement mentioned by Werle - that the rule must be part of international law - Cassese explicitly adds that the violated rule should have customary status in international law and should intend to protect values considered important by the whole international community.² Moreover, a universal interest in repressing these crimes should exist, in the sense that, subject to certain conditions, alleged perpetrators may in principle be prosecuted and punished by any state.³ Finally, Cassese explains that if the perpetrator has acted in an official capacity, the state on whose behalf he has performed the prohibited act is barred from claiming immunity (with the exception for a serving head of state, foreign minister, or diplomatic agent).⁴ Naqvi mentions, in the context of the exercise of jurisdiction, even a list of eight features that would appear to characterise an international crime:

- It is a norm of such a fundamental character that its violation attracts the criminal responsibility of individuals;
- Individual criminal liability exists at international law;
- The act is universally recognised as criminal and is considered a grave matter of international concern, i.e., it is recognised under customary law;
- The enforcement of this norm requires universal jurisdiction because it is not sufficient to leave it to the forum of primary jurisdiction;

¹Werle, G. (2009). *Principles of International Criminal Law*, 2nd edn. T.M.C. Asser Press: The Hague 2009, p. 29.

² Cassese, A. (2003). *International Criminal Law*, Oxford University Press. p.23.

³*Ibid.*

⁴*Ibid.*

- Such an act endangers international relations (peace and security). In this sense, the exercise of jurisdiction is not just for prosecution's sake, but to fulfil the broader objectives of contributing to international peace and security;
- The act breaches a moral obligation fixed by international law;
- There is a collective responsibility to enforce such rules;
- International crimes are violations of *jus cogens* norms.¹

General the characteristics of international crime are:

- i. crimes which violate or threaten fundamental values or interests protected by international law and which are of concern to the international community as a whole;
- ii. criminal norms emanating from an international treaty or from customary international law, without requiring intermediate provision of domestic law;
- iii. criminal norms which have direct binding force on individuals and therefore provide for direct individual criminal responsibility;
- iv. crimes which may be prosecuted before international or domestic criminal courts in accordance with the principle of universal jurisdiction;
- v. a treaty provision or a rule of customary international law establishing liability for an act as an international

¹ Naqvi, Y.Q. (2010). Impediments to Exercising Jurisdiction over International Crimes, T.M.C. Asser Press: The Hague, p. 31.

crime binds all (or a great majority of) States and individuals.¹

4.1.3 Crimes against humanity

Crime against humanity is a term in international law, which refers to acts or murderous prosecutions against a body of people. Those are acts so grave, on a scale so large, that their very execution diminishes the human race. The Allied powers in 1915 issued a statement explicitly charging Turkey of committing a crime against humanity.

The modern concept of crimes so heinous that they offend the laws of humanity and civilisation began to appear in international discourse in the early 20th century. The 1899 and 1907 Hague Conventions provided that even in war, the inhabitants and belligerents remained under the protection of ‘the laws of humanity’ and ‘the dictates of public conscience’.² Following the Turkish massacres of the Armenian population, the French, British and Russian governments issued the Declaration of 28 May 1915, declaring that the Turkish authorities would be ‘held responsible’ for its ‘crimes against humanity and civilisation’. This declaration was not, however, followed by further action.³

The 1919 Report of the Commission on the Responsibility of the Authors of the War and Enforcement of Penalties formulated by representatives from several States and presented to the Paris Peace Conference also referred to “offences against . . . the laws of

¹ Bantekas, I. and Nash, S. (2007). *International Criminal Law*. 3rd ed. Routledge, Oxford. p. 6.

² See Martens Clause included in Preamble of the 1899 Hague Conventions (II) with Respect to the Laws and Customs of War on Land and the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, reprinted in Schindler, D and Toman, J. (1988). *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and other Documents* (3rd ed Nijhoff, Dordrecht), p.63–98.

³ See Dadrian, V. (1995) *The History of the Armenian Genocide: Ethnic Conflict from the Balkans to Anatolia to the Caucasus*. Berghahn Books, Oxford.

humanity.”¹ However, although the concept of crimes against humanity was recognised long before Nuremberg, it was first prosecuted as a punishable individual criminal offence following the Second World War. Article 6(c) of the Nuremberg Charter provided the first definition of crimes against humanity as:²

“Crimes against humanity: murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian populations, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.”

Article 5(c) of the Tokyo Charter defined crimes against humanity in identical terms to Article 6(c) of the Nuremberg Charter.³

However, the Nuremberg Tribunal did not treat crimes against humanity as a self-standing crime, since Article 6(c) of the Nuremberg Charter required that crimes against humanity be committed in connection with another crime within the jurisdiction of the tribunal – that is war crimes or crimes against peace.

It should be noted that Article II(1)(c) of Control Council Law No 10, which defined crimes against humanity, no longer linked the concept of crimes against humanity with an armed conflict and did not require that the crimes against humanity be committed in execution of or in connection with war crimes or crimes against peace:

¹ Report of the Commission to the Preliminary Peace Conference, reprinted in 14 AJIL 95 (1920).

² Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (8 Aug 1945) 82 UNTS 279 (Annex).

³ Charter of the International Military Tribunal for the Far East (19 Jan 1946).

“Crimes against Humanity, Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.”

Crimes against humanity truly took hold as a separate basis of individual criminal responsibility with the new definition in Article 5 of the ICTY Statute and its subsequent judicial elaboration.¹ Article 5 of the ICTY statute provides as follows:

“The International Tribunal shall have power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character and directed against any civilian population.

- a. Murder*
- b. Extermination;*
- c. Enslavement;*
- d. Deportation;*
- e. Imprisonment;*
- f. Torture;*
- g. Rape;*

¹ Statute of the International Criminal Tribunal for the former Yugoslavia, annexed to SC Resolution 827, UN SCOR, 48th Session, 3217th Meeting, UN Doc S/RES/927 (1993) (hereinafter ICTY Statute).

- h. *Prosecution on political, racial and religious grounds;*
- i. *other inhuman acts.*”

Although the ICTY Statute restricted crimes against humanity to those ‘committed in armed conflict, whether international or internal in character’, thus retaining a link to armed conflict, crimes against humanity nonetheless took on an independent existence as a distinct category of crime.

The definition of crimes against humanity in the ICTR Statute follows the ICTY Statute, with the following modifications:¹

- there is no requirement of an armed conflict;
- there is an explicit requirement that the attack be ‘widespread or systematic’;
- there is an additional requirement that the underlying crimes be committed on discriminatory grounds.

Article 3 of the ICTR statute provides thus:

“The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

- a) murder;*
- b) extermination;*
- c) enslavement;*

¹ICTR Statute, annexed to SC Resolution 955, UN SCOR, 49th Session, 3453rd Meeting, UN Doc S/RES/955 (1994).

- d) *deportation;*
- e) *imprisonment;*
- f) *torture;*
- g) *rape;*
- h) *persecutions on political, racial and religious grounds;*
- i) *other inhumane acts.*”

The definition of crimes against humanity in Article 2 of the SCSL closely tracks ICTR Article 3, albeit without the reference in the latter to the attack being ‘on national, political, ethnic, racial or religious grounds’. The Law on the Establishment of the ECCC closely tracks the definition in the ICTR Statute, despite the fact that the Agreement between the UN and the Government of Cambodia provides that the subject matter of the ECCC shall be ‘crimes against humanity as defined in the 1998 ICC Statute of the International Criminal Court’.¹

The most recent, and arguably the most comprehensive, definition of crimes against humanity appears in Article 7(1) of the Statute of the ICC as follows:

“1. For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- a) murder;*
- b) extermination;*

¹-Article 9 of the Agreement between the UN and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (6 June 2003) 2329 UNTS 117 (Annex); Article 5 of the Law on the Establishment of the ECCC.

- c) *enslavement;*
- d) *deportation or forcible transfer of population;*
- e) *imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;*
- f) *torture;*
- g) *rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity;*
- h) *persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;*
- i) *enforced disappearance of persons;*
- j) *the crime of apartheid;*
- k) *other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”*

The ICC Statute expanded the list of acts by adding forced transfer of population, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, sexual violence, enforced disappearance and the crime of apartheid. The ICC Statute did not include the requirement of armed conflict and the requirement of discriminatory grounds. Article 7(2) of the ICC Statute also included further definitions in an attempt to clarify the elements of particular offences.¹

¹Article 9 of the Agreement between the UN and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (6 June 2003) 2329 UNTS 117 (Annex); Article 5 of the Law on the Establishment of the ECCC.

Article 7(2)(a) of the ICC Statute is as follows:

“Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack;”

The notion of an ‘attack’ is not used in the same terms as in the law of war crimes. The attack does not have to be a part of the armed conflict and it does not need to involve the use of armed force. An attack rather encompasses any mistreatment of the civilian population.¹ An attack may consist of non-violent acts, such as instituting apartheid or exerting pressure on the population to act in a particular way.²

An ‘attack directed against any civilian population’ is defined in Article 7(2)(a) of the ICC Statute as ‘a course of conduct involving the multiple commission of acts [enumerated in Article 7(1)] against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack’.³ The reference to ‘the multiple commission of acts’ in Article 7(2)(a) indicates that an attack may consist of either the repeated commission of the same type of act, or the commission of different types of acts, such as murder, rape and deportation.⁴

¹*Prosecutor v Kunarac et al.* (ICTY) IT-96-23 and IT-96-23/1-A, Appeal Judgment (12 June 2002) para (86).

²*Prosecutor v Akayesu* (ICTR) Case No ICTR-96-4-T, Trial Judgment (2 September 1998) para (582); *Prosecutor v Rutaganda* (ICTR) (n310) para (70); *Prosecutor v Musema* (ICTR) Case No ICTR-96-13-T, Trial Judgment (27 January 2000) para (205).

³Article 7(2)(a) of the ICC Statute.

⁴*Prosecutor v Kayishema & Ruzindana* (ICTR) Case No ICTR-95-1-T, Trial Judgment (21 May 1999) para (122).

The ICC Elements of Crimes explain that ‘the acts need not constitute a military attack’. In addition, it is understood that ‘policy to commit such attack’ requires that the State or organisation actively promote or encourage such an attack against a civilian population.¹ It can therefore be concluded that random acts of individuals do not constitute crimes against humanity, but that there must be some underlying State or organisational policy directing, instigating or encouraging the crimes in order for the crimes to constitute crimes against humanity.

4.1.4 Genocide as an International Crime

In view of the fact that not all States are parties to the Genocide Convention, the question of its relationship to customary international law is of obvious significance to national, ethnical, racial and religious groups in countries not parties to the Convention. These States that are not parties are quite as heterogeneous as the States parties and do not present themselves as a group of particularly outstanding politically stable countries. Their minorities live under the same conditions of insecurity as minorities in any other modern State. Thus, the principles of the Genocide Convention are just as important and desirable in those countries.

As seen in the foregoing chapter, Resolution 96 (I) has been an argument for commentators to support the view that genocide was condemned by customary international law independent of the Genocide Convention. This is reflected in Article I of the Convention where the parties “confirm that genocide, whether committed in time of peace or war, is a crime under international law” (emphasis added).

¹See Article 7 of the ICC Elements of Crimes (Introduction) 5, para (3).

Normally General Assembly Resolutions have a recommendatory force only. However they can be the best possible statement of customary international law provided that certain conditions are fulfilled. Resolution 96 (I) clearly deals with a legal issue and claims to be a declaration of existing law rather than creating a new law. According to Thornberry the Resolution is an important piece of evidence of a rule which is accepted as law. An US Military Tribunal observed this when stating that: “The General Assembly is not an international legislature, but it is the most authoritative organ in existence for the interpretation of world opinion.”¹

The drafters of the Convention had different views on the matter of genocide as a crime under international law. The representative of Poland argued that Resolution 96 (1) recognised genocide as crime under international law and the United Kingdom regarded physical genocide as already a crime so that the proposed convention would make no significant contribution to international law.² Other countries doubted the criminality of genocide under international law in time of peace. They were doubtful whether the Resolution 96 (I) be legally binding upon the States. This is a valid point since, as seen above, a General Assembly resolutions are of recommendatory nature. The doubters did not address the issue whether a principle of customary law could none the less have been created.³ Article I of the Genocide Convention declared genocide to be a crime under international law and thereby made a statement to the issue of genocide as customary law.

¹ Thornberry, P. (1992). *International Law and the Rights of the Minorities*. Oxford: Clarendon. p. 92

² GAOR, 3rd Session, Part I, 6th Committee, 64th meeting

³ Ibid. 63rd meeting

In the Reservations case¹ the ICJ stated that “the principles underlying the Convention are principles which are recognised by civilised nations as binding on States, even without any conventional obligation”.² Thus it is clear that the ICJ considered genocide to be a crime under international customary law. The Secretary- General has in a report concerning the competence of the ICTY, stated that the Genocide Convention is beyond doubt part of international customary law.³ The Genocide Convention binds only States and the prohibition of Genocide in international customary law should therefore also bind only States. It imposes no duties and no responsibility directly on the individual, only a State exercising its jurisdiction under national legal systems could normally prosecute an individual.

However there is the concept of “universal jurisdiction”. Universal jurisdiction applies to a limited number of crimes which any State, even absent personal or territorial links to the crime. According to Schabas these crimes in international customary law are piracy, slave trade and traffic in women and children. Some multilateral treaties also recognise universal jurisdiction for particular offences among others hijacking and other threats to air travel.⁴ The Genocide Convention does not provide for universal jurisdiction over the crime of Genocide.⁵ According to Schabas there is no universal jurisdiction accepted for the crime of genocide either in customary law or under the Genocide Convention.⁶

It seems as if there is no individual responsibility for the crime of genocide under international law. However, the concept of “international

¹Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory opinion of 28 May 1951, ICJ Reports 1951

²Ibid. 15.

³Report of the Secretary- General Pursuant to paragraph 2 of Security Council Resolution 808, UN Doc. S/25704, para. 35

⁴Schabas, W.A. (2000). *Genocide in International law*. Cambridge: Cambridge University Press.

⁵The Genocide Convention Article VI

⁶Schabas, W.A. *Op. cit.* p. 367

crimes”, that is, crimes that States are not only obligated to prosecute but are also universally binding to individuals, establishes this individual responsibility for persons committing genocide. That individuals can be responsible for committing crimes under international law was established in the Nuremberg Principles. There, the responsibility of the individual for crimes against humanity (including genocide), war crimes and crimes against peace is established.¹ The question that arises is how to identify such crimes. Today a good source to find out which crimes can be seen as international crimes is the Rome Statute of the ICC. That a crime is under the jurisdiction of the ICC is a good indication that the international community considers the crime to be an international crime. Genocide is a crime in the Rome Statute of the ICC.²

The ICJ never clearly defined the scope of the customary law prohibiting genocide. Some writers argue that it is broader than the Genocide Convention itself. The definition of genocide in Article II of the Genocide Convention forms a minimum, which is probably reflected also in the customary law that outlaws genocide. Of all the States that have ratified the Convention none have made reservations to the first Articles that define the crime. Thornberry describes this as an “undisputed core of genocide”.³ Still there is nothing that prevents the customary law of genocide to be broader than the Convention. Most writers though seems to be of the notion that the definition of genocide in Article II is also the definition of genocide in customary law and that there is no *opinio juris* among States for the notion that the definition of genocide in customary law is expanded beyond the scope of the

¹ Broomhall, B. (2003). *International Justice & the International Criminal Court*. Oxford: Oxford University Press. p. 20

² Rome Statute of the International Criminal Court. 1998. Article 6

³ Thornberry, P. (1992). *International Law and the Rights of the Minorities*. Oxford: Clarendon. p. 104-105

Convention.¹ The fact that the Convention's definition of genocide has been transferred in its exact wording to the Statutes of the ICTY, ICTR and the ICC is evidence that supports the view that this definition is also what constitutes the customary law prohibiting genocide and the international crime of genocide.

4.1.5 Intent in Genocide (*actus reus* and *mens rea*)

The crime of genocide is comprised of material elements (*actus reus*) and mental elements (*mens rea*) which can be divided into:

- The common physical element: victims must belong to a particular national, ethnical, racial or religious group;
- An additional contextual element with regard to the ICC: the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect the group's destruction;
- The common mental element: specific intent of the crime of genocide. The perpetrator intended to destroy, in whole or in part, the national, ethnical, racial or religious group, as such;
- The physical (*actus reus*) and mental (*mens rea*) elements required for each specific or so-called underlying offence.

The specific or underlying offences in Article II of the Genocide Convention do not constitute international crimes alone, but require the specific intent, that is 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'. This is what differentiates and elevates genocide in relation to other international crimes. To prove the prerequisite of specific intent, it is necessary to show that the perpetrator clearly intended the result, indicating a psychological

¹Ibid, p 105

connection between the physical outcome and the perpetrator's mental state.¹

In Akayesu, the first international judgment involving charges for genocide, the ICTR explained the concept as follows:²

Special intent is a well-known criminal law concept in the Roman-continental legal systems. It is required as a constituent element of certain offences and demands that the perpetrator have the clear intent to cause the offence charged. According to this meaning, special intent is the key element of an intentional offence, which offence is characterised by a psychological relationship between the physical result and the mental state of the perpetrator.

In concrete terms, for any of the acts charged under Article 2 (2) of the [ICTR] Statute to be a constitutive element of genocide, the act must have been committed against one or several individuals, because such individual or individuals were members of a specific group, and specifically because they belonged to this group. Thus, the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual.

A question that has not been clearly resolved in the jurisprudence of the tribunals is whether it could amount to genocide when an isolated individual acts with the intent to destroy a group in the absence of any wider plan or context. Although the definition of genocide 'contains no

¹Payam A. (2005). 'The Crime of Genocide in ICTR Jurisprudence.' 3J Intl Crim Justice, 989, 992

²*Prosecutor v Akayesu, Op. cit* paras (518), (521)

formal requirement that the punishable acts be committed as part of a widespread or systematic attack, or as part of a general or organised plan to destroy the group', it seems, however, that this would 'be an implicit characteristic of the crime of genocide'.¹

However, in *Jelisić*, the Trial Chamber stated that killings committed by a single perpetrator could amount to genocide:

*Such a case is theoretically possible. The murders committed by the accused are sufficient to establish the material element of the crime of genocide and it is a priori possible to conceive that the accused harboured the plan to exterminate an entire group without this intent having been supported by any organisation in which other individuals participated. In this respect, the preparatory work of the Convention of 1948 brings out that premeditation was not selected as a legal ingredient of the crime of genocide, after having been mentioned by the ad hoc committee at the draft stage, on the grounds that it seemed superfluous given the special intention already required by the text and that such precision would only make the burden of proof even greater. It ensues from this omission that the drafters of the Convention did not deem the existence of an organisation or a system serving a genocidal objective as a legal ingredient of the crime. In so doing, they did not discount the possibility of a lone individual seeking to destroy a group as such.*²

¹Schabas, W.A.(2007).*An Introduction to the International Criminal Court*. 3rd ed CUP, Cambridge.P.94–95.

²*Prosecutor v Jelisić* (ICTY) Case No IT-95-10-5, Trial Judgment (14 December 1999) para (100)

This view has been broadly criticised. The critics of this view argue that ‘to include in the scope of genocide an isolated crime, committed in the absence of any attack or genocidal context, even if legally possible, risks overly expanding the concept of genocide, and effacing the profound stigma and mobilising power of the term’.¹ The Trial Chamber in *Krstić* confirmed that it is assumed that several protagonists were involved in the crime of genocide:

*As a preliminary, the Chamber emphasises the need to distinguish between the individual intent of the accused and the intent involved in the conception and commission of the crime. The gravity and the scale of the crime of genocide ordinarily presume that several protagonists were involved in its perpetration. Although the motive of each participant may differ, the objective of the criminal enterprise remains the same. In such cases of joint participation, the intent to destroy, in whole or in part, a group as such must be discernible in the criminal act itself, apart from the intent of particular perpetrators. It is then necessary to establish whether the accused being prosecuted for genocide shared the intention that a genocide be carried out.*²

This view was also shared by the ICTR Trial Chamber in *Kayishema & Ruzindana* which stated that:

[i]t is also the view of the Chamber that although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without such a plan, or organisation. Morris and Scharf note that ‘it is virtually impossible for the crime of genocide

¹ Cryer *et al.* Op. cit. p.168.

² *Prosecutor v Krstić. Op cit.* para (549).

to be committed without some or indirect involvement on the part of the State given the magnitude of this crime'. They suggested that 'it is unnecessary for an individual to have knowledge of all details of the genocidal plan or policy'. The Chamber concurs with this view.¹

In *Jelisić*, the ICTY Appeals Chamber confirmed that 'the existence of a plan or policy is not a legal ingredient of the crime'. However, the Appeals Chamber held that 'in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence and the existence of a plan or policy may facilitate proof of the crime'.²

The collective nature of genocide can be examined in the context of the special intent requirement. According to this view, there must be an organised and widespread plan to exterminate a group and the perpetrator must act with knowledge that the commission of the individual act would, or would be likely to, further the implementation of the plan. In other words, the special intent requirements should be satisfied if the accused participated in the implementation of a plan to exterminate a group by committing any of the underlying offences with intent and the knowledge that the commission of those acts would further the implementation of the genocidal plan.³

The critical element of the special intent in the crime of genocide is typically proven by inference from the material acts perpetrated.

¹*Prosecutor v Kayishema & Ruzindana*. (ICTR) Case No ICTR-95-1-T, Trial Judgment (21 May 1999) para (94)

²*Prosecutor v Jelisić* (ICTY) Case No IT-95-10-A, Appeal Judgment (5 July 2001) para (48); *Prosecutor v Krstić* (ICTY), Case No IT-98-33-A, Appeal Judgment (19 April 2004), para (225).

³ John R W D Jones, 'Whose Intent is it Anyway?', in Lal Chand Vohrah *et al.* (eds), *Man's Inhumanity to Man: Essays in Honour of Antonio Cassese* (Kluwer Law International, The Hague 2003) 469.

Therefore, it will be easier to infer a genocidal intent where there has been a greater destruction of members of a group. If there are only a few victims, the inference may not be so clear. In the latter situation, the prosecution may not be able to rely on the quantity of victims as a proof of genocidal intent and may instead have to rely on other evidence.¹

Alternatively, this issue can be covered by adding another element to *actus reus*, referred to as ‘the contextual element’. The contextual element was adopted by the ICC Elements of Crimes and it requires that the conduct for which the defendant is on trial takes place in the context of ‘a manifest pattern of similar conduct’ or is of itself capable of destroying the group or part of it.²

In the introduction to Article 6, Genocide, the ICC Elements of Crimes provide the following explanation of the terms appearing in the ‘contextual element’:³

Introduction

With respect to the last element listed for each crime:

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

¹Schabas, W.A. (2000). *Genocide in International Law*. CUP, Cambridge 2000. p.234.

²Cryer *et al.* *Op. cit.* p.169.

³Article 6 of the ICC Elements of Crimes (Introduction), 2.

The first part of the element therefore envisages a situation where an individual accused is acting within a broader context in which others are also committing acts of genocide against the targeted group. The second branch contemplates a situation where the conduct could itself effect such destruction. This alternative captures situations where a group is particularly small or where the accused has access to powerful means of destruction, such as nuclear or biological weapons, which could be used with genocidal intent. It can also be relevant for the prosecution of ringleaders and instigators.¹

4.2 Genocide in Rwanda

4.2.1 Background

By the early 1990s, Rwanda, a small country with an overwhelmingly agricultural economy, had one of the highest population densities in Africa. About 85 percent of its population is Hutu; the rest is Tutsi, along with a small number of Twa, a Pygmy group who were the original inhabitants of Rwanda. Part of German East Africa from 1894 to 1918, Rwanda came under the League of Nations mandate of Belgium after World War I, along with neighbouring Burundi. Rwanda's colonial period, during which the ruling Belgians favoured the minority Tutsis over the Hutus, exacerbated the tendency of the few to oppress the many, creating a legacy of tension that exploded into violence even before Rwanda gained its independence. A Hutu revolution in 1959 forced as many as 300,000 Tutsis to flee the country, making them an even smaller minority. By early 1961, victorious Hutus had forced Rwanda's Tutsi monarch into exile and declared the country a republic. After a U.N. referendum that same year, Belgium officially granted independence to Rwanda in July 1962.

¹Cryer *et al.* *Op. cit.* p.177–178.

Ethnically motivated violence continued in the years following independence. In 1973, a military group installed Major General Juvenal Habyarimana, a moderate Hutu, in power. The sole leader of Rwandan government for the next two decades, Habyarimana founded a new political party, the National Revolutionary Movement for Development (NRMD). He was elected president under a new constitution ratified in 1978 and re-elected in 1983 and 1988, when he was the sole candidate. In 1990, forces of the Rwandese Patriotic Front (RPF), consisting mostly of Tutsi refugees, invaded Rwanda from Uganda. A ceasefire in these hostilities led to negotiations between the government and the RPF in 1992. In August 1993, Habyarimana signed an agreement at Arusha, Tanzania, calling for the creation of a transition government that would include the RPF. This power-sharing agreement angered Hutu extremists, who would soon take swift and horrible action to prevent it.

4.2.2 Factors causing the genocide

The single most important cause of the genocide is existence and/or creation of a conflict between two ethnic groups (Hutu and Tutsi) about access to scarce resources in general and land in particular. It needs to be stressed that the ethnic conflict was to a considerable extent created since, in the period 1990-1993, the majority group (which was in charge of the government) manipulated public opinion and falsely accused the minority group of offences it had not committed.¹

In addition, several other contributory factors were mentioned which can be grouped in several categories: characteristics and actions of the government (e.g., its authoritarian rule and its “culture of impunity” or absence of actions by the government against perpetrators of crimes aimed at the minority group), characteristics and actions of the population

¹- Prunier, G., (1995). *The Rwanda Crisis: 1959-1994*, Hurst, London.

(e.g., tradition of obedience to authorities), external events and conditions (e.g., land tenure arrangements, lack of non-agricultural employment opportunities and unfavourable economic conditions in 1985-1994) and, last but not least, the impact of the violence that occurred in neighbouring Burundi in 1990-1993 on the government and public opinion in Rwanda.

4.2.3 The Genocide Act

On April 6, 1994, a plane carrying Habyarimana and Burundi's president Cyprien Ntaryamira was shot down over Kigali, leaving no survivors. Within an hour of the plane crash, the Presidential Guard together with members of the Rwandan armed forces (FAR) and Hutu militia groups known as the Interahamwe ("Those Who Attack Together") and Impuzamugambi ("Those Who Have the Same Goal") set up roadblocks and barricades and began slaughtering Tutsis and moderate Hutus with impunity. Among the first victims of the genocide were the moderate Hutu Prime Minister Agathe Uwilingiyimana and her 10 Belgian bodyguards, killed on April 7. This violence created a political vacuum, into which an interim government of extremist Hutu Power leaders from the military high command stepped on April 9.

The mass killings in Rwanda quickly spread from Kigali to the rest of the country, with some 800,000 people slaughtered over the next three months. During this period, local officials and government-sponsored radio stations called on ordinary Rwandan civilians to murder their neighbours. Meanwhile, the RPF resumed fighting, and civil war raged alongside the genocide. By early July, RPF forces had gained control over most of country, including Kigali. In response, more than 2 million people, nearly all Hutus, fled Rwanda, crowding into refugee camps in the Congo (then called Zaire) and other neighbouring countries¹.

¹- Prunier, G., (1995). *The Rwanda Crisis: 1959-1994*, Hurst, London.

4.2.4 The role of international law in prevention of the genocide

October 1994 saw the establishment of the International Criminal Tribunal for Rwanda (ICTR), located in Tanzania, it was an extension of the International Criminal Tribunal for the former Yugoslavia (ICTY) at The Hague, the first international tribunal since the Nuremburg Trials of 1945-46 and the first with the mandate to prosecute the crime of genocide. In 1995, the ICTR began indicting and trying a number of higher-ranking people for their role in the Rwandan genocide; the process was made more difficult because the whereabouts of many suspects were unknown. In September 1998, the International Criminal Tribunal for Rwanda (ICTR) issued the first conviction for genocide after a trial, declaring Jean-Paul Akayesu guilty for acts he engaged in and oversaw as mayor of the Rwandan town of Taba. The trials continued over the next decade and a half, including the 2008 conviction of three former senior Rwandan defence and military officials for organizing the genocide.¹

4.2.5 The Rwandan Criminal Court

The United Nations Security Council established the International Criminal Tribunal for Rwanda to "prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighbouring States, between 1 January 1994 and 31 December 1994". The Tribunal is located in Arusha, Tanzania, and has offices in Kigali, Rwanda. Its Appeals Chamber is located in The Hague, Netherlands.

Since it opened in 1995, the Tribunal has indicted 93 individuals whom it considered responsible for serious violations of international

¹- The Rwandan Genocide. <http://www.history.com/topics/rwandan-genocide>. Access Date: May 14, 2017.

humanitarian law committed in Rwanda in 1994. Those indicted include high-ranking military and government officials, politicians, businessmen, as well as religious, militia, and media leaders.

With its sister international tribunals and courts, the ICTR has played a pioneering role in the establishment of a credible international criminal justice system, producing a substantial body of jurisprudence on genocide, crimes against humanity, war crimes, as well as forms of individual and superior responsibility.

The ICTR is the first ever international tribunal to deliver verdicts in relation to genocide, and the first to interpret the definition of genocide set forth in the 1948 Geneva Conventions. It also is the first international tribunal to define rape in international criminal law and to recognise rape as a means of perpetrating genocide.

Another landmark was reached in the "Media case", where the ICTR became the first international tribunal to hold members of the media responsible for broadcasts intended to inflame the public to commit acts of genocide.

The ICTR delivered its last trial judgement on 20 December 2012 in the Ntirabatware case. Following this milestone, the Tribunal's remaining judicial work now rests solely with the Appeals Chamber. As of October 2014, only one case comprising six separate appeals is pending before the ICTR Appeals Chamber. One additional appeal from ICTR trial judgement was delivered in December 2014 in the Ntirabatware case by the appeals chamber of the Mechanism for International Criminal Tribunals, which started assuming responsibility for the ICTR's residual functions on 1 July 2012.¹

¹ - The Rwandan Genocide. <http://www.history.com/topics/rwandan-genocide>. Access Date: May 14, 2017.

One key function assumed by the Mechanism is the tracking and arrest of the three accused who remain fugitives from justice. The ICTR indicted Félicien Kabuga, Protais Mpiranya, and Augustin Bizimana on charges of genocide and crimes against humanity, but the accused have to date evaded justice. The continued cooperation of national governments and the international community as a whole is of paramount importance to the successful apprehension of these fugitives. When apprehended, the Mechanism will conduct their trials and supervise any sentence imposed along with all of the sentences previously imposed by the ICTR.

The ICTR's formal closure is scheduled to coincide with the return of the Appeals Chamber's judgement in its last appeal. Until the return of that judgement in 2015, the ICTR will continue its efforts to end impunity for those responsible for the Genocide through a combination of judicial, outreach, and capacity-building efforts. Through these efforts, the ICTR will fulfil its mandate of bringing justice to the victims of the Genocide and, in the process, hopes to deter others from committing similar atrocities in the future.¹

4.3 Genocide in Former Yugoslavia

4.3.1 Background

Over the first half of the 1990s, the nation-state of Yugoslavia (formally, the Socialist Federal Republic of Yugoslavia) experienced the secession of three its component republics: Slovenia, Croatia, and Bosnia. The latter two of these were bitterly fought over, both by regular troops and against civilians suddenly resistant to living in ethnically mixed settings. In 1991 and 1992, as Croatia's military fought Yugoslavia's, Croat and Serb civilians in both realms undertook campaigns of "ethnic cleansing" – efforts by one group to rid certain

¹-United Nations Mechanism for International Criminal Tribunals: ICTR in Brief. <http://unictr.unmict.org/en/tribunal>. Accessed date: 14th May, 2017.

areas of the other. As they did echoes resounded of World War Two-era conflicts in which the Croatian, Nazi-allied Ustashe and Serbian, Russia-allied Chetniks fought each other and targeted their respective opposites civilian bases.

After both sides drew back (and Croatia's independence received recognition), similar dynamics began to unfold in Bosnia involving Bosniaks as well as Serbs and Croats who had lived in Yugoslavia's most diverse and integrated republic. The conflict most intensely involved civilian populations in the eastern and western areas of Bosnia, where Serb militias fought to negate Bosnian independence – and, failing that, to eradicate the Bosniak population of those regions. The international response to this campaign was create “Safe Areas” in which Bosniak civilians were to be protected from Serbian militias. The militias, however, targeted the Safe Areas anyway. Most notoriously, a Serbian militia overran the Safe Area of the town of Srebrenica. The mostly Bosniak civilian population sought refuge at the United Nations' base nearby. There, however, forces led by the militia leader Ratko Mladic convinced the UN forces to allow them to separate the men from the women and children. The latter were deported to the zone controlled by Bosniak forces. The former, numbering over 7,000, were massacred. Subsequent jurisprudence, both from the International Criminal Court for Yugoslavia and the International Court of Justice, determined that the massacre constituted genocide.¹

Later, the remaining Yugoslav republics of Macedonia and Montenegro seceded, as did the former autonomous province of Kosovo. In each case, violence against civilians defined along identity-based lines

¹ - United Nations Mechanism for International Criminal Tribunals: ICTR in Brief. <http://unictr.unmict.org/en/tribunal>. Accessed date: 14th May, 2017.

existed, most intensely so in Kosovo. In 1999, a multilateral force conducted a ten-week-long bombing campaign against Serbian forces, whom Western leaders feared were set to wage another campaign of ethnic cleansing in Kosovo as a response to Kosovo's independence aspirations.

4.3.2 Factors causing the genocide

Bosnia-Herzegovina, Serbia, Montenegro, Slovenia, Croatia, and Macedonia were all part of Yugoslavia after WW2. Because of the expanding tension of nationalism, Slovenia, Croatia, and Macedonia voted to leave Yugoslavia. They successfully gained independence in 1991. In Bosnia the government very shortly ended up being a coalition between the three ethnicities before problems started occurring. One of the most deadly genocide wars post WW2 was the Bosnian conflict and Genocide. Many people were taken from their homes, with horrible atrocities being done to them that went as far as mass murder. Politically, socially, and geographically were among the several factors that lead to the ultimate genocide.¹

Politically, there were many occurrences that took place in contributing to the expanding conflict. Josip Broz Tito was the president of Yugoslavia before the outbreak happened. Yugoslavia contained a number of diverse religious and ethnic groups, so there had always been tension between the factions. Tito was the leader that held Yugoslavia together. He kept all the adversary national groups in a durable association. With the death of Tito, the regions political leader, the fall of civility began. Another significant political cause of the Bosnian conflict

¹ - The Referendum on Independence in Bosnia-Herzegovina, p.6

stemmed from the leadership of Slobodan Milosevic. Milosevic became the leader after the death of Tito took place and wanted political control over all these factions such as the Muslims, Croats, and Bosniaks. He enforced nationalism on the Serbs, attacking other countries to get power. In addition to these two, all of these newly separated countries continuously failing at gaining control over each other, resulted in killing.

Melosovic's nationalist ideas reached further than wanting political control over the people in the region. His idea was to establish "Greater Serbia". Because of this idea the Muslims and Bosnian Croats feared their land would be lost. This caused them to want independence. One of the key cities in the regional conflict for land was the city of Sarajevo. Bosnian Serbs were responsible for the siege of Sarajevo. Residents including Muslims, Croats and Serbs that did not believe in Melosovic's "Greater Serbia" were isolated from necessities of life.¹

Although the people of these lands were of the same race and spoke the same language, religion was still a still significant social cause of the war. The majority of the Bosnian people were Muslim. Serbians under the leadership of Milosevic used religious differences as a motive for their killings. In fact over 200,000 Muslims were killed at the hands of Serbian rebels. Religion was not the only social factor of the war. The social network of the various factions was clan-like. Each group had their own traditions and ideologies. These differences were just enough to overcome the similarities and create conflict with their neighbours. Looking back on this war you can see that it was because of their differences in ideology, it was a tinderbox waiting for a spark. That spark came from the unrest of the Serbian leadership. Ultimately the

¹ -The Referendum on Independence in Bosnia-Herzegovina,p7

social similarities between the groups was not enough to temper the uprising conflict from their differences.¹

4.3.3 The Genocide Act

Far from seeking independence for Bosnia, Bosnian Serbs wanted to be part of a dominant Serbian state in the Balkans—the “Greater Serbia” that Serbian separatists had long envisioned. In early May 1992, two days after the United States and the European Community (precursor to the European Union) recognized Bosnia’s independence, Bosnian Serb forces with the backing of Milosevic and the Serb-dominated Yugoslav army launched their offensive with a bombardment of Bosnia’s capital, Sarajevo. They attacked Bosniak-dominated town in eastern Bosnia, including Zvornik, Foca, and Visegrad, forcibly expelling Bosniak civilians from the region in a brutal process that later was identified as “ethnic cleansing.”

On July 11, 1993 in Srebrenica, Serbian forces subsequently separated the Bosniak civilians, putting the women and girls on buses and sending them to Bosnian-held territory. Some of the women were raped or sexually assaulted, while the men and boys who remained behind were killed immediately or bussed to mass killing sites. Estimates of Bosniaks killed by Serb forces at Srebrenica range from around 7,000 to more than 8,000. It was the worst act of genocide since the Nazi regime’s destruction of some 6 million European Jews during World War II.

The Bosnian Genocide took place mainly in Bosnia. However it also took place wherever the Bosnian Serb Army controlled. It took place from the year 1991 until 1995. This is right when the Bosnian war was

¹- Causes of the Bosnian conflict and genocide edited by Grace Korthuis-Smith. https://infoagr.am/causes_of_the_bosnian_conflict_and_genocide. Accessed date: 14th May, 2017.

happening. The Genocide was carried out by the Bosnian Serbs with support from the Yugoslavian Army (who are mostly Serbians) and aimed towards the Bosnian people, who were Bosniak (Bosnian Muslim) and Croatian civilians for atrocious crimes resulting in the deaths of some 100,000 people (80 percent Bosniak).

4.3.4 The role of international law in prevention of the genocide

The International Criminal Tribunal for the former Yugoslavia (ICTY) is a United Nations court of law dealing with war crimes that took place during the conflicts in the Balkans in the 1990's. Since its establishment in 1993, it has irreversibly changed the landscape of international humanitarian law and provided victims an opportunity to voice the horrors they witnessed and experienced.

In its precedent-setting decisions on genocide, war crimes and crimes against humanity, the Tribunal has shown that an individual's senior position can no longer protect them from prosecution.

It has now shown that those suspected of bearing the greatest responsibility for atrocities committed can be called to account, as well as that guilt should be individualised, protecting entire communities from being labelled as "collectively responsible".

The Tribunal has laid the foundations for what is now the accepted norm for conflict resolution and post-conflict development across the globe specifically that leaders suspected of mass crimes will face justice. The Tribunal has proved that efficient and transparent international justice is possible.¹

The Tribunal has contributed to an indisputable historical record; combating denial and helping communities come to terms with their recent history. Crimes across the region can no longer be denied. For

¹ - Causes of the Bosnian conflict and genocide edited by Grace Korthuis-Smith. https://info.gr.am/causes_of_the_bosnian_conflict_and_genocide. Accessed date: 14th May, 2017.

example, it has been proven beyond reasonable doubt that the mass murder at Srebrenica was genocide.

Judges have also ruled that rape was used by members of the Bosnian Serb armed forces as an instrument of terror, and the judges in the Kvočka et al. trial established that a “hellish orgy of persecution” occurred in the Omarska, Keraterm and Trnopolje camps of northwestern Bosnia.

While the most significant number of cases heard at the Tribunal have dealt with alleged crimes committed by Serbs and Bosnian Serbs, the Tribunal has investigated and brought charges against persons from every ethnic background. Convictions have been secured against Croats, as well as both Bosnian Muslims and Kosovo Albanians for crimes committed against Serbs and others.

While its judgements demonstrate that all parties in the conflicts committed crimes, the Tribunal regards its fairness and impartiality to be of paramount importance. It takes no side in the conflict and does not attempt to create any artificial balance between different groups. Evidence is the basis upon which the Prosecution presents a case. The Judges ensure a fair and open trial, assessing the evidence to determine the guilt or innocence of the accused.

Established as an ad hoc court, the Security Council endorsed the Tribunal’s completion strategy for a staggered and ordered closure.

Since 2003 the court has worked closely with local judiciaries and courts in the former Yugoslavia, working in partnership as part of a continuing effort to see justice served.¹

It was the first international tribunal since the Nuremberg Trials in 1945-46 and the first to prosecute genocide, among other war crimes.

¹ - Causes of the Bosnian conflict and genocide edited by Grace Korthuis-Smith. https://infoagr.am/causes_of_the_bosnian_conflict_and_genocide. Accessed date: 14th May, 2017.

Radovan Karadzic and the Bosnian Serb military commander, General Ratko Mladic, were among those indicted by the ICTY for genocide and other crimes against humanity.

Over the better part of the next two decades, the ICTY charged more than 160 individuals of crimes committed during conflict in the former Yugoslavia. In 2001, Serbian General Radislav Krstic, who played a major role in the Srebrenica massacre was convicted of genocide and sentenced to 46 years in prison. Brought before the tribunal in 2002 on charges of genocide, crimes against humanity and war crimes, Slobodan Milosevic served as his own defence lawyer; his poor health led to long delays in the trial until he was found dead in his prison cell in 2006. In 2007, the International Court of Justice issued its ruling in a historic civil lawsuit brought by Bosnia against Serbia. Though the court called the massacre at Srebrenica genocide and said that Serbia “could and should” have prevented it and punished those who committed it, it stopped short of declaring Serbia guilty of the genocide itself.

Undoubtedly, the Tribunal’s work has had a major impact on the states of the former Yugoslavia. Simply by removing some of the most senior and notorious criminals and holding them accountable the Tribunal has been able to lift the taint of violence, contribute to ending impunity and help pave the way for reconciliation¹.

4.4 Genocide in Burma

4.4.1 Background

The Rohingya Muslim are amongst the most persecuted minority group in the world. According to Amnesty International, the Rohingya Muslim people have continued to suffer from human rights violations under the Burmese junta since 1978, and many have fled to neighbouring

¹ - Causes of the Bosnian conflict and genocide edited by Grace Korthuis-Smith. https://infoagr.am/causes_of_the_bosnian_conflict_and_genocide. Accessed date: 14th May, 2017.

Bangladesh as a result.¹ However, the reality is that the Rohingya people have been oppressed for many years prior to 1978, though arguably not as significant. They have lived in Myanmar for centuries but tensions with Myanmar's Buddhist majority have caused discrimination and harassment. Cases of rape, torture, arbitrary detention, and violence against Rohingya are commonplace, with many incidents going unreported as enforcement officers turn a blind eye. These perpetrators are not solely confined to the local population, but also include the authorities and law enforcers themselves. Tensions increased in 2012, when three Rohingya Muslim men were convicted of raping a local Rakhine Buddhist woman, which led to the 2012 Rakhine State riots.² There are currently over a million Rohingya people living in Myanmar, however, systemic oppression has led to an increase in migrations. In early 2015 alone, around 25,000 asylum-seekers, consisting of Rohingyas and Bangladeshis, sailed out of the Rakhine State to seek refuge in neighbouring countries.³ Aside from Bangladesh, majority of asylum-seekers also set out to other South-east Asian countries such as Thailand, but also to Malaysia and Indonesia, which are predominantly Muslim countries. Mass exoduses due to persecution and mass violence, such as the one in 2012, has happened before in 1978 and 1992, with many of the fleeing Rohingya people being marginalised and excluded in host States. They are often not recognised and not protected as refugees,

¹Muslims in Burma's Rakhine state 'abused' – Amnesty, 20 July 2012. <http://www.bbc.com/news/world-asia-18921960> Accessed May 14, 2017.

²Myanmar: Three Muslims Sentenced to Death for Rape and Murder of Buddhist Woman, 19 June 2012. <http://www.ibtimes.co.uk/death-sentences-muslims-accused-rape-murder-sparked-353800> Accessed May 14, 2017.

³"The Rohingyas: The most persecuted people on Earth?"The Economist. <http://www.economist.com/news/asia/21654124-myanmars-muslim-minority-have-been-attacked-impunity-stripped-vote-and-driven> Accessed 14May, 2015.

and as a result, they live in extreme poverty, have to resort to illegal employment and are vulnerable to exploitation.¹

4.4.2 Factors causing the genocide

The general perception about Myanmar's Rohingya conflict is that it is a religious issue. Giving answer to an interviewer, Shamil Shams², an analyst Siegfried O. Wolf, however, believes the crisis is more politically and economically driven.

When asked the following questions: *Could there be a domestic solution to the Rohingya conflict in Myanmar? What are the impediments to achieving it?* Siegfried O. Wolf, answered that the Rohingyas are a predominantly Muslim community located in Myanmar's eastern Rakhine state. They have a population of around one million people, but they are not the largest group in this state. The Rakhine, who are Buddhists, are in the majority. The Rakhine community as a whole feels culturally discriminated, economically exploited, and politically sidelined by the central government, which is dominated by ethnic Burmese. In this particular context, the Rohingyas are perceived by the Rakhine people as additional competitors for resources and a threat to their own identity, which is the main cause of tension in the state and has led to numerous armed conflicts between the two groups.

Furthermore, the Rakhines feel politically betrayed, as the Rohingyas do not vote for their parties. This has created more animosities between the two ethnic groups. The government, instead of fostering reconciliation, is supporting Rakhine Buddhist fundamentalists

¹The Equal Rights Trust & Mahidol University *Equal Only in Name: The Human Rights of Stateless Rohingyas in Malaysia* at [13].

²<http://www.dw.com/en/myanmars-rohingya-conflict-more-economic-than-religious/a-18496206>
Accessed May 24, 2017.

in order to safeguard its interests in the resource-rich state. These factors are the major reasons behind the rise of intercommunal, interethnic and interreligious conflicts, as well as the worsening of Rohingyas' living conditions and socio-political rights in the state.

In short, a domestic solution to the Rohingya problem would only be possible if Myanmar's ruling elite and decision-makers change their mindset. But the struggle over the state's resources, benefits from development projects and the exponential rise of Buddhist fundamentalism might not allow that change to happen.

He also went further to state that, Interreligious relations are very complex in Myanmar. Muslims, especially the Rohingyas, are confronted with a deeply-entrenched Islamophobia in a predominantly Buddhist society and state. The fundamentalists claim that the country's Buddhist culture and society are under siege by Muslims, even more so when Myanmar is surrounded by many Islamic countries, like Bangladesh, Malaysia and Indonesia. The Rohingyas are seen as a threat to Buddhist lifestyle and faith as well as a gateway to Myanmar's Islamization.

But there is an economic aspect to the issue, too. Rakhine state is one of the country's poorest areas, despite being rich in natural resources. The Rohingyas are thus considered an additional economic burden on the state, as they compete for the few available jobs and opportunities to do business. The jobs and businesses in the state are mostly occupied by the Burmese elite. As a result, we can say that Buddhist resentment against the Rohingyas is not only religious; it is also political and economically driven.¹

¹ - <http://www.dw.com/en/myanmars-rohingya-conflict-more-economic-than-religious/a-18496206>
Accessed May 24, 2017.

4.4.3 The Genocide Act

Despite Myanmar's commitment to some international conventions, its domestic laws severely oppresses various minority groups, especially the Rohingya. The 1982 Citizenship Law represents systemic discrimination at a policy level by the Government of Myanmar, which openly denies the Rohingya access to basic human rights such as, access to education, employment, marriage, reproduction and freedom of movement.¹[90] Rohingya people are also subjected to routine forced labour. Typically, a Rohingya man will have to give up one day a week to work on military or government projects, and one night for sentry duty. The Rohingya have also lost a lot of arable land, which has been confiscated by the military to give to Buddhist settlers from elsewhere in Myanmar.² The movement of the Rohingya people are strictly limited to only a few surrounding areas and even so, a travel pass is required.³ If they travel without permission or overstay the time allowed on their travel pass, they are open to being prosecuted and may even receive jail sentences. Also, they will be denied entry back into their village and be forced to live away from their family. Even during emergencies, they have to apply for a travel pass, which represent a serious violation to the right of Freedom of movement.⁴The quality of education and health care in the Rakhine State is undeveloped and inadequate, as compared to other parts of Myanmar. Despite this, the Rohingya severely lack basic access to these services and in addition, international humanitarian agencies are not allowed to train Muslim

¹A Briefing by Burmese Rohingya Organisation UK (January 2015).

²Jonathan Head (5 February 2009). "What drive the Rohingya to sea?". BBC. Retrieved 14May 2017.

³Chris Lewa North Arakan: *An Open Prison for the Rohingya in Burma* FMR 32 at [12].

⁴*Ibid*

health workers. As a result, the standard of health is severely lacking and the illiteracy rate amongst the Rohingyas is high, estimated at 80%.¹

There are growing concerns that a genocide is occurring against the Rohingya in Myanmar. Research done by scholars in Yale Law School found empirical evidence that the Rohingya have historically suffered serious and persistent human right abuses, and these actions have increased in frequency in recent years.² Since 2012, living conditions and human rights abuses have worsened with reports of beheadings, stabbings, killings, beatings, mass arrests and villages and neighbourhoods being burned to the ground, however, there remains a lack of justice and accountability by the Government of Myanmar, thus representing failure of state protection.³

As of 2005, the UNHCR had been assisting with the repatriation of Rohingya from Bangladesh, but allegations of human rights abuses in the refugee camps have threatened this effort.⁴ Despite earlier efforts by the UN, the vast majority of Rohingya refugees have remained in Bangladesh, unable to return because of the regime in Myanmar. Now they face problems in Bangladesh where they do not receive support from the government.⁵ Lack of support from the Bangladeshi Government and also human rights abuses in Bangladeshi refugee camps have led many asylum-seekers to risk their lives and to journey further south to other South-east Asian countries. The mass exodus in 2015 has led to an international humanitarian crisis because of the deliberate refusal and alleged inability of host States in South-east Asia to

¹Chris Lewa North Arakan: *An Open Prison for the Rohingya in Burma* FMR 32 at [13].

²Yale Law School Report *Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar's Rakhine State?*

³A Briefing by Burmese Rohingya Organisation UK (January 2015).

⁴"UNHCR threatens to wind up Bangladesh operations". New Age BDNEWS, Dhaka. 21 May 2005. Retrieved 14May 2017.

⁵"Burmese exiles in desperate conditions". Retrieved 14May 2017.

accommodate the vast number of asylum-seekers.¹ Most of them are also subjected to human trafficking by organised crime groups operating in Thailand and Malaysia. These traffickers take advantage of asylum-seekers' desperation by exploiting them for money, with many of their victims being beaten, sold, or killed if they or their families do not comply with their demands.² The 2015 Rohingya refugee crisis highlighted the flaws of the ASEAN community in responding to humanitarian crises, as the response from those countries were inadequate and delayed.³

Human rights violations against the Rohingya are not only confined to Myanmar and Bangladesh. The status of the Rohingya is unrecognised in most South-east Asian countries. Although they do not receive the same persecution in countries such as Malaysia and Thailand, than in Myanmar, they are subjected to exclusions and poverty. There are roughly 111,000 refugees housed in nine camps along the Thai-Myanmar border. There have been charges that groups of them have been shipped and towed out to open sea from Thailand, and left there. On February 2009, there was evidence of the Thai army towing a boatload of 190 Rohingya refugees out to sea. A group of refugees rescued by Indonesian authorities also in February 2009 told harrowing stories of being captured and beaten by the Thai military, and then abandoned at open sea. By the end of February, there were reports that of a group of five boats were towed out to open sea, of which four boats sank in a storm, and one washed up on the shore. On 12 February 2009

¹The Guardian *South-east Asia faces its own migrant crisis as states play 'human ping-pong'* (14 May 2015). Accessed 14 May, 2017.

²CNN Report *Myanmar's shame: Living inside Rohingya ghettos* (1 April 2016). Accessed 14 May, 2017

³The Diplomat *ASEAN's Response to Rohingya Crisis Falls Short* (2 June 2015). Accessed 14 May, 2017.

Thailand's Prime Minister Abhisit Vejjajiva said there were "some instances" in which Rohingya people were pushed out to sea.

*"There are attempts, I think, to let these people drift to other shores. [...] when these practices do occur, it is done on the understanding that there is enough food and water supplied. [...] It's not clear whose work it is [...] but if I have the evidence who exactly did this I will bring them to account."*¹

October 2015, Al Jazeera's Investigative Unit has uncovered what amounts to strong evidence of a genocide coordinated by the Myanmar government against the Rohingya people. Based on many evidences, the investigation concluded that Myanmar government agents have been involved in triggering anti-Muslim riots. An official military document shows the use of several ways, including hate speech and hiring thugs to stir hatred. The investigation stressed that in the case of the Rohingya, and Rakhine State, that could amount to the crime of genocide, several of the most powerful people in the country should reasonably be the subject of an international investigation into this situation of Rakhine State.²

The Rohingya have been subjected to a virulent and official nationwide policy and propaganda campaign which has incrementally removed them from the State's sphere of responsibility. The State's persistent and intensified 'othering' of the Rohingya as outsiders, illegal Bengali immigrants and potential terrorists has given a green light to Rakhine nationalists and Islamophobic monks to orchestrate invidious

¹Dan Rivers CNN. "Thai PM admits boat people pushed out to sea – CNN.com". Edition.cnn.com. Retrieved 10 March 2014. Accessed 14 May, 2017.

²"Exclusive: 'Strong evidence' of genocide in Myanmar". www.aljazeera.com. Retrieved 2016-08-22. Accessed 14 May, 2017.

campaigns of race and religious hatred reminiscent of those witnessed in Germany in the 1930s and Rwanda in the early 1990s. The vast majority of Rohingya, the absence of an identity card or the possession of a white or green identity card marks them out as people without citizenship and entitlement. In the Rohingya camps, villages and Aung Mingalar ghetto a deeply weakened and traumatised population endures the barest of lives and denial of basic human rights with the ever-present fear of violent attack.

The Rakhine people, who themselves have suffered decades of oppression and neglect at the hands of the Myanmar government to the point where their own culture is under threat, are particularly receptive to nationalist and religious propaganda. Myanmar's Rohingya are being slowly annihilated through sporadic massacres, mass flight, systematic weakening and denial of identity.

4.4.4 The role of international law in prevention of the genocide

Burma has ratified various international conventions on human rights and humanitarian law, and as a State party it must respect its international obligations. Burma has ratified the Geneva Conventions (ratified in 1992), Convention on the Prevention and Punishment of the Crimes of Genocide (ratified 1949), Convention for the Elimination against all form of discrimination against women (ratified 1997), Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (ratified 1957), Convention on the Rights of the Child (ratified 1991), and Convention concerning Forced or Compulsory Labour (ratified 1955) (for a list of International Conventions signed and / or ratified by Burma, see FIDH, ALTSEAN-Burma, & BLC, 2009, Appendix 1). As well as respecting its international obligations, Burma has an obligation to respect and comply¹

¹-Exclusive: 'Strong evidence' of genocide in Myanmar". www.aljazeera.com. Retrieved 2016-08-22. Accessed 14 May, 2017.

with customary norms, such as the prohibition of crimes against humanity, war crimes, and torture.

A war crime is a grave breach of Geneva Conventions and other serious violation of international humanitarian law, or the laws of war, which can give rise to individual criminal responsibility under international law¹. Under international law, crimes against humanity are acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. These include murder, enslavement, forcible transfer of population, torture and rape, enforced disappearance of persons as well as persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, or religious grounds. These definitions reflect customary international laws binding on all states, including Burma².

The United Nations stipulates that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. The Universal Declaration of Human Rights (UDHR) is a declaration adopted by the United Nations General Assembly on December 14, 1948³. The UDHR represents the first global expression of rights to which all human beings are inherently entitled. It consists of 30 articles which have been elaborated in subsequent international treaties, regional human rights instruments, national constitutions and laws. While not a treaty, UDHR forms part of customary international law. Burma voted in favour of the Declaration on December 10, 1948.

The 1949 Geneva Conventions comprise four treaties and three additional protocols that establish international standards for the

¹see *International Criminal Court*

² Ibid.

³see Universal Declaration of Human Rights, 1948

humanitarian treatment of victims of war¹. They are at the core of international humanitarian law, regulating the conduct of armed conflict and seeking to limit its effects by protecting people who are not taking part in the hostilities or who are no longer participating in the hostilities. The articles of the Geneva Conventions define the wartime rights of prisoners, and establish protections for the wounded and for the civilians in and around a war zone. Article 3 sets minimum standards for conflict not of international character, including prohibitions of torture and cruel, humiliating or degrading treatment of those taking no active part in hostilities. Burma ratified the Geneva Conventions in 1992.

The Rome Statute of the International Criminal Court (ICC) provides a measurement tool for evaluating international criminal law violations. It is the treaty that established the ICC, and is considered an authority on questions of crimes against humanity and war crimes. The Rome Statute is an important source of most of the major principles in this area of law, including prohibitions on both war crimes and crimes against humanity². The Treaty was adopted at a diplomatic conference in Rome on July 17, 1998, and entered into force on July 1, 2002. Under the Rome Statute, the ICC can investigate and prosecute core international crimes, including genocide, crimes against humanity, war crimes, and the crime of aggression (Article 5), in situations where states are unable or unwilling to do so themselves. Such crimes are also violations of customary international law. As the ICC can investigate crimes only in states that have signed the Rome Statute (unless authorised by the UN Security Council), the majority of international crimes continue to go unpunished. Burma is a prime example.

¹see Geneva Conventions of August 1949

²International Criminal Court, 2011

ASEAN Declaration is the founding document of Association of Southeast Asian Nations (ASEAN), which was signed on August 8, 1967. While ASEAN adheres to the principle of non-interference in internal affairs, the ASEAN Charter calls on member states to respect human rights and adhere to the Rule of Law. The founding charter of ASEAN lists as one of its aims and purposes “to promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter”¹. Furthermore, according to the ASEAN Charter, one of the purposes of ASEAN is “to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms”². Moreover, the aims of the ASEAN Intergovernmental Commission on Human Rights (AICHR) include “to uphold the right of the peoples of ASEAN to live in peace, dignity and prosperity” and “to uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties”³. Despite the fact that grave human rights violations continue to go unchecked inside the country⁴, Burma was handed the ASEAN chairmanship in October 2013⁵. As the chair of ASEAN in 2014, Burma should arguably be required to act in accordance with the principles enshrined within the ASEAN charter.

There is also a framework of international human rights and humanitarian law that prohibits torture and other forms ill treatment. The Rome Statute defines torture as “the intentional infliction of severe pain

¹see ASEAN aims and purposes

²Article 1 (7), ASEAN, 2008, p. 4

³AICHR, 2009, pp. 3-4

⁴see e.g. ND-Burma, 2013

⁵-Pomfret, J., October 2013

or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions”. Because the legal principles within this definition of torture have been recognised in previous international treaties, including the Geneva Conventions, State parties who are signatories of such prior treaties are obligated to adopt necessary and corresponding national legislations in conformity with these treaties; as a signatory, Burma is legally responsible for the creation of legislation that prohibits such acts. Torture is also included in the UDHR (Article 5), stating that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.

Although Burma has not ratified the UN Convention against torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the convention has been widely accepted as part of customary international law, meaning that States are required to refrain from committing torture, even if they have not signed particular international treaties. CAT requires that there must be official involvement in, or consent to, the acts of torture in order for a State to be considered to have perpetrated the crime of torture. International law requires that States take affirmative steps to prevent torture, and that they act to provide justice and accountability should torture or ill treatment take place. The prohibition of torture is recognised as a peremptory norm, known as *jus cogens*, which means that at no time can torture be justified; not in a time of war; under threat of war; when facing internal instability; or in a state of emergency. Under these international standards, the prohibition of torture is absolute and binding on all nations at all time.¹

¹-Pomfret, J., October 2013

Non-discrimination is also a well-established fundamental human rights principle, explicitly referred to in the UDHR (Article 2), as well as in the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). States should ensure that persons belonging to minorities exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.

The Convention on the Rights of the Child requires the ratifying states to respect and ensure the rights of each child, including ensuring that no child is subjected to torture or other cruel, inhuman, or degrading treatment or punishment. The government of Burma has publicly affirmed its legal commitment to protect children as evidenced by its ratification of the Convention on the Rights of the Child in August 1991, as well as its enactment of the Child Law in 1994 and rules of procedure in 2001. Burma has also ratified the Convention concerning Forced or Compulsory Labour of the International Labour Organisation (ILO) in 1955, and thus bound itself under international law to suppress the use of forced or compulsory labour in all its forms.¹

¹-Pomfret, J., October 2013

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The intention to destroy entire groups, whether national, racial, religious, cultural, and so on, is by all evidence an ancient phenomenon in the history of mankind. It seems undeniable that today's unanimous and prompt condemnation of any direct attack on international peace and security is paralleled by almost universal disapproval on the part of states towards certain other activities. The international community as a whole and not merely violates principle formally embodied in the genocide convention and even outside the scope of the convention principles which are now so deeply rooted in the conscience of mankind that they have become particularly essential rules of international criminal court.

International law has come to embrace the concept of international crimes as well as that of crime against humanity and crimes of genocide, while under international law are subsumed offences declared as such by way of treaties which requires parties to them to include such crimes in their respective criminal code, by international crimes like genocide, war crimes and crime against humanity are understood to mean offences committed against the international community as a whole which are therefore subject to trial by all states, irrespective of the nationality of the

offenders or the place of commission of the criminal acts. The attitude of the world today is one of zero tolerance for heinous acts in times of war, especially with respect to the civilian population.

The crimes jurisprudence of international criminal tribunals in former Yugoslavia and Rwanda, likewise the Burma international criminal jurisprudence has generally taken quick and serious steps against the aggressive behaviour among some human groups fuelled by a sense of superiority in order to achieve illegitimate interests. This problem has existed throughout history, to varying degrees, a restricted monotheistic religions clearly, but it soon emerged and grown as a result of colonization and geographical discoveries.

The research leads to several conclusions, including:

- 1) The international criminal laws prosecuted successfully in combating genocide crimes specifically that committed in Rwanda, Former Yugoslavia and Burma.
- 2) The international criminal laws enabled to meet up their mandate in prosecuting offenders of genocide crimes.
- 3) The international criminal laws agreed in defining what constitute crimes against humanity.

4) The international criminal law succeeded in combating genocide crimes by putting decisive laws for the prevention of genocide crime.

5) Across the continent, government is characterized by an acute disregard for liberties. The ascendance of military dictatorship on the political scene shortly after political independence only brought a new dimension to the pattern of human rights violations that had characterized the neo-colonial states in most of the countries, including countries like Rwanda, Yugoslavia and Burma.

6) Military and strategic motives genocide: The harnessing of African soldiers strong claims to superiority of strategic interests and objectives in ensuring access to important goods or raw materials necessary; or to maintain the military sites located in key global regions.

7) The international criminal tribunal for Rwanda (ICTR) 1994 was established by the United Nations Security Resolution 955 of November, 1994. The purpose was to prosecute persons responsible for serious violation of international crimes in the territory of Rwanda and the Rwandan citizens responsible for Genocide and other such violations committed in the territory of neighbouring state between 1st January and 31st December 1994

8) The International Criminal Tribunal for the former Yugoslavia (ICTY) 1993 is a United Nations court of law dealing with war crimes that took place during the conflicts in the Balkans in the 1990's and provided victims an opportunity to voice the horrors they witnessed and experienced

9) The International Criminal Tribunal for the former Yugoslavia has laid the foundations for what is now the accepted norm for conflict resolution and post-conflict development across the globe specifically that leaders suspected of mass crimes will face justice. The Tribunal has proved that efficient and transparent international justice is possible.

10) Burma has ratified the Convention concerning Forced or Compulsory Labour such as The Universal Declaration of Human Rights (UDHR), the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the UN Convention against torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),

11) The International Criminal Tribunal for Yugoslavia and Rwanda, Burma regime is the only explicit reference in this system, itself the subject of severe criticism for not contained in forced prostitution, forced pregnancy and other crimes of sexual abuse witnessed by conflict.

5.2 Recommendations

Based on the findings of this study, the following recommendations can be made.

1) The international community should criminalize genocide and practices related to it, especially in respect against the minorities in the countries of severe conflicts.

2) The international community need to fight the forms of cruel, inhuman or degrading treatment, as contrary to a number of texts on civil

and political rights, and in particular the international covenant that refer to the inadmissibility of subjecting any person to cruel, inhuman or degrading treatment, in addition to the inadmissibility exposure illegally to honour a person or his reputation.

3) The international community is to combat what emerged from the crimes committed as former Yugoslavia not need the direction of the will of the perpetrator of this attack to the satisfaction of sexual desire that many of the crimes they are part of a crime of physical and psychological torture and abuse of the victim was considered as a means to achieve other highly represented in terrorize the population and ethnic cleansing of the region and genocide.

4) The ICC statute should be amended so that, the court is no longer a barking dog, one that is capable of biting.

5) For proper implementation of International Criminal Court statute, prosecutions holding perpetrators accountable demonstrates that the principle of the rule of law should stand above political decisions. Because failure to prosecute promotes impunity and denies that some consider as the most effective insurance against future repression.

6) The state of affairs no longer hold way with the establishment of the two tribunals of this former Yugoslavia and Rwanda with mandate to prosecute and punish those guilty of atrocities perpetrated in Rwanda

and Yugoslavia, the two tribunals certainly help to stern impunity and facilitate national reconciliation and trying those responsible for serious crime.

7) The ICC must also reach out to the community with information about the ICC, its mandate and current operations. It must investigate and prosecution violations during the conflicts and ensure that the operation in the field are conducted in a manner that is sensitive to the mass poverty in the world. Above all the ICC must be mindful of the views and perspective of the people. Like some of the Arab's views whether there is real justice at ICC.

8) It is also recommended that from the fore going analysis of the procedural mechanism employed by the national and international tribunals called upon to prosecute breaches of international crimes that the accused should and must be given and accorded the right to fair trial. It must equally help victims make their voices heard.

9) It is recommended that, there was need for amendment to the ICC statute so that the court can confiscating the assets of those prosecuted under the Rome Statute.

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Appendix (1)

CHAPTER 85

GENOCIDE

An Act to create the offence of genocide.

[Commencement 19th December, 1969]

1. This Act may be cited as the Genocide Act.
2. In this Act “The Genocide Convention” means the Convention on the Prevention and Punishment of the Crime of Genocide approved by the General Assembly of the United Nations on 9th December 1948.
3. (1) A person commits an offence of genocide if he commits any act falling within the definition of “genocide” in Article II of the Genocide Convention as set out in the Schedule.
(2) A person guilty of an offence of genocide shall on conviction on information —
 - (a) if the offence consists of the killing of any person, be sentenced to death;
 - (b) in any other case, be liable to imprisonment for a term not exceeding fourteen years.
(3) Proceedings for an offence of genocide shall not be instituted except by or with the consent of the Attorney-General.

SCHEDULE (Section 3)

ARTICLE II OF THE GENOCIDE CONVENTION

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.

Appendix (2)

UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

(ADOPTED 25 MAY 1993 BY RESOLUTION 827)
(AS AMENDED 13 MAY 1998 BY RESOLUTION 1166)
(AS AMENDED 30 NOVEMBER 2000 BY RESOLUTION 1329)
(AS AMENDED 17 MAY 2002 BY RESOLUTION 1411)
(AS AMENDED 14 AUGUST 2002 BY RESOLUTION 1431)
(AS AMENDED 19 MAY 2003 BY RESOLUTION 1481)
(AS AMENDED 20 APRIL 2005 BY RESOLUTION 1597)
(AS AMENDED 28 FEBRUARY 2006 BY RESOLUTION 1660)
(AS AMENDED 29 SEPTEMBER 2008 BY RESOLUTION 1837)
(AS AMENDED 7 JULY 2009 BY RESOLUTION 1877)

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, 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 (hereinafter referred to as “the International Tribunal”) shall function in accordance with the provisions of the present Statute.

Article 1

Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

Article 2

Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.

Article 3

Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

Article 4

Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. 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.

3. 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.