LEBANESE AMERICAN UNIVERSITY

GENOCIDE

UNDER INTERNATIONAL LAW

INA 899

A thesis submitted to
The Faculty of the Social Science Division
In candidacy for the Degree of
Masters of Arts

BY
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Byblos, Lebanon
February, 2002

LEBANESE AMERICAN UNIVERSITY
SCHOOL OF ARTS AND SCIENCES
Division of Social Sciences and Education

Graduate Studies / Thesis approval Form

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Thesis Title : GENOCIDE UNDER INTERNATIONAL LAW

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Program Authorized To Offer Degree INTERNATIONAL AFFAIRS

Date February, 2002

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CHAPTER ONE

Introduction: The framework of analysis

> "History and the mission of future no longer mean the struggle of class against class, the struggle of church dogma against church dogma, but the clash between blood and blood, race and race, people and people" (Alfred Rosenberg)

The first half of the 20th century recorded two major acts of genocide that claimed the lives of around one million Armenians and six million Jews, Poles and Gypsies. The decades that followed, although were in the midst of human rights development, have witnessed a significant increase in mass butcheries. Partial statistical evidence reveals that in 1967, three million Ibos were victims of a Nigerian assault. More than a million Bengalis were slaughtered at the hands of the Pakistani army in 1971. In 1975, up to two million Cambodians were put to death by the Pol Pot regime.[1] Around 200.000 Croats and Bosnians were killed by ethnic Serbs between 1991 and 1995.[2] In 1994, some 800.000 Tutsis lost their lives as a result of a genocidal Hutu attack, while in 1999, thousands of kosovars were destroyed by Serbs and statistics are still to be confirmed.[3]

What is of interest in accounting for the reasons behind these events is that most of the victims that perished during those calamities and many others were not destroyed only as a result of acts of war. Rather they were singled out for physical elimination due to their race, ethnicity and nationality. From here stems the word genocide, a word coined

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[1] Michael Dobkowski & Isodor Walliman, ed. Genocide in our time: An annotated bibliography with analytical introductions. MI: Ann Arbor, 1992. p. 121

[2] James Kellas. The politics of nationalism and ethnicity. NY: St Martin's Press, 1991, p. 1

[3] For more information about the Rwandan crisis, *see* Charles Freeman, Crisis in Rwanda. TX: Raintree Steck Vaughnn, 1999.

by the jurist Raphael Lemkin after WW2. It was added to the dictionary of crimes against humanity and defined as an act committed with the intent to destroy in whole or in part a national, ethnic or religious group. This crime has become more frequent in the last few decades, a fact which led many observers to consider the reasons behind its occurrence in this century. While Camus called the 20th century an age of murder, political scientist Roger Smith considered the 20th century as an age of genocide. "In terms of the number and range of victims, the variety of forms that genocide has taken, the urge toward total destruction of whole groups, the elaborate technology that facilitates death and eases conscience, the concentration camp, and the radical evil that is inseparable from it, it is a unique age of genocide".[4]

It is quite perplexing to mark such an increase in genocide and other mass murders in an era of human rights, for the 20th century, unlike previous epochs, has registered a considerable development in human right concepts and an abundance of legal instruments for the protection of such rights. Then how can such a ghastly and barbaric crime like genocide occur in the midst of law and civility? Many factors have lead to this phenomenon. A framework of analysis will help put such contradictory factors in proper perspective.

A. The parallelism of nationalism/identity conflicts and globalization

1. Nationalism as a factor of disintegration.

The second half of the 19th century and the early decades of the 20th century witnessed a sharp rise of nationalism and the pan movements. The Italian and German unifications in the 19th century represented great national mergers .The Meiji restoration in Japan in the second half of the 19th century fed on a strong upsurge of Japanese nationalism centering on the emperor. The rise of the young Turks and Pan Turanianism, represented in the early 20th century the emergence of Turkish nationalism with its

[4] Michael Dobkowski & Isodor Walliman, ed. Genocide and the Modern age. NY: Greenwood Press, 1987. p. 35

implications on the constituent parts of the Ottoman Empire. Likewise the South Slav movement in the Balkans with the ensuing Balkan wars in 1912 and 1913 were also illustrative of this upsurge. The Fascist and Nazi movements in the 1920's and 1930's were illustrative of a strong rise of radical nationalism in Western Europe, a region considered to be the cradle of democracy. The collapse of the Soviet Empire in the 1990's ushered the resurgence of nationalism in a number of its former constituent parts with at times, disturbing consequences[5].

Nationalism as an ideology and as a state of mind emanates from the concept of national exclusiveness. The concept asserts that the members of a national group that possess common cultural and perhaps racial features constitute one nation, which makes it different and separate from other groups that possess different cultural and racial characteristics. As Kellas describes it, "Nationalist behavior is based on the feeling of belonging to a community which is the nation. Those who do not belong to the nation are seen as different, foreigners or aliens, with loyalties to their own nations".[6] Allegiance of people became more horizontal and extended beyond the boundaries of the existing state to people of the same kind, who happened to live within the jurisdiction of other states, thus providing fertile grounds for inter-state conflicts and wars. The Pan movements were political expressions of this kind of allegiance. Religions or sectarian factors, although not intrinsic to the ideology of nationalism as it emerged and developed in the West did play a segregating role as well, mainly in the Balkans, the Middle East and other areas in Asia and Africa.[7]

The notion of national exclusiveness which is fundamental to the ideology of nationalism (and the segregating forces inherent in religious and ethnic differences) does not stop at dividing human societies into different forms of enclaves, including states. When effectively manipulated by charismatic leaders and demagogues, it can easily foster in a group the illusion of superiority thus ushering in the radical stage of

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[5] James Kellas. The politics of nationalism and ethnicity. NY: St Martin's Press, 1991, pp 92-94. Also attended seminars in Concepts in International Relations with professor Adnan Fawaz.
[6] Op.cit, p.4
[7] Attended seminar in Concepts of international relations, with professor Adnan Fawaz.

nationalism. This illusion will necessarily govern the manner by which the group relates to other groups. The surge of nationalism especially in the Balkans and Eastern Europe had to take concrete geopolitical expression through the creation of new states, notably after the disintegration of the Ottoman and Austro- Hungarian empires. This process was justified through the concept of self-determination of nations enunciated by President Woodrow Wilson in his 14 points and enforced by superior Western military power.

The new world order established by the victorious Western powers after WW1 was predicated on confused principles and political objectives that were not always harmonious or in certain respects realistic. While the drawing of boundaries of the states in the Balkans, Eastern Europe and the Middle East aimed at the creation of nation states, nations and states in these regions did not always correspond or coincide. A number of the newly created or revised states contained substantial minorities, (whether ethnic, racial, national, or religious), that did not possess a sense of common identity with the national majority and often did not give complete allegiance to the state. Here are situations where human rights are easily and readily violated. However, the spread of the Marxist ideology and the rise of communist regimes during the cold war had acted to mitigate the forces of contending nationalisms and dampened the sharpness of ethnic divides. That was because of the universalism of the ideology in terms of its salient hypothesis as well as its scope. The demise of Marxism as a result of the fall of the major communist state-the Soviet Union, caused a resurgence of nationalism and ethnicities and brought in inter-group conflicts in many parts of the world that had temporarily been hidden and stifled by Marxist ideology.[8] As Samuel Huntington puts it, "The illusion of harmony at the end of the cold war was soon dissipated by the multiplication of ethnic conflicts and ethnic cleansing, the breakdown of law and order, the emergence of new patterns of alliance and conflict among states .In this new world the most pervasive, important, and dangerous conflicts will not be between social classes, rich and poor, or other economically defined groups, but between peoples belonging to different cultural

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[8]Attended seminar in International law of human rights with professor Adnan Fawaz.
For an elaborate study of nationalism, *see* Christopher Dandeker, ed. Nationalism and violence. NJ: Transaction Publishers, 1998

entities. In the five years after the Berlin wall came down, the word GENOCIDE was heard far more often than any five years of the cold war".[9]

2. Political and legal factors

The rise of nationalism deeply spurred the concept of sovereignty, which had already become a basic feature of the territorial state since Westphalia (1648). The state then evolved further in the 19th century into the territorial nation state-the type of state of the present international community. The concept of sovereignty since its inception had two manifestations or levels of application: internal and external. Internally sovereignty meant that the legitimate government (in the early phase, the king) was the highest law making law enforcing and law adjudicating authority in the state. Externally, (again in the early phases), the state acted through the monarch who was a free agent and whose domain was immune from intervention from the outside, provided he respected the domains of other monarchs. At that time, sovereignty had a personal manifestation. The honor and glory of the state corresponded to the honor and glory of the monarch. With the rise of nationalism, the exercise of sovereignty on the internal level shifted from king to cabinet or in the case of an autocracy, to dictator. In a democracy, sovereignty became identified with the will of the people although exercised on their behalf by elected government.

On the external level, nationalism caused sovereignty to be identified with the nation state, with the state legally considered as a juristic person. Now the honor and glory of the state became the honor and glory of the nation itself. The notion of the exclusiveness of the nation had a strong bearing on the concept of sovereignty. It was here that sovereignty assumed accentuated forms and occasionally eccentric forms. The domestic jurisdiction of the powerful states, (including the democracies), reached the level of sacro- sanctity. The powerful states however, interpreting the concept of sovereignty on the external level to mean that the state was almost a totally free agent,

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[9] Samuel Huntington. The clash of civilizations and the remaking of world order. Touchstone Books, 1998, p. 32

felt free to intervene in the internal affairs of other weaker states. The power factor on the other hand, acted to deter the powerful states from intervening in each other's internal and external affairs, thus giving the conception of sovereignty a practical dimension.[10]

However, the accentuation of the power struggle among the powerful states at different points in time often lead to the violation of state sovereignty and the outbreak of disastrous wars. Violations of human rights including genocide were a natural by product of the strife between nations, races, and religions. The major Western powers, looking after their interests and moved by the tenets of the values of their own political and social systems, which had to spread with the impelling inertia of globalization, started to pay more attention to the question of human rights.

B. Globalization and human rights

The trend towards globalization came as a result of the development and spread of Western technology, as well as economic, political and military power. The phenomenal improvement in the means of communication and transportation, the tremendous augmentation of the volume of international trade and commerce, the increasing exchange of tourists and seekers of knowledge and other phenomena of this nature demanded that international law be expanded and developed to cope with such changes. Western Europe went ahead of other regions into a process of economic, political, and judicial integration. With such a trend, it is imperative that the question of human rights will figure prominently in the process for both political practical as well as ideological reasons.

The concept of humanitarian intervention came to light in the 19th Century. It allowed intervention by states in the domestic jurisdiction of other states committing atrocities against their own people of such a nature as to shock the conscience of mankind. This doctrine was occasionally used to justify intervention against the

[10] Attended seminars in Concepts of International relations with professor Adnan fawaz.

Ottomans in 1827 on behalf of the Greek people and in 1860 in Syria and Lebanon on behalf of the Christians[11].

Trespassing on the domestic jurisdiction of states continued although timidly after WW1 with the help of the League of Nations. The new world organization provided the framework for the protection of linguistic and ethnic minorities within the territories of the new states created by the treaties of Versailles and Saint Germain.[12]

Along side these developments, international collaboration for the promotion of human rights started. The Berlin conference on Central Africa resulted in the General Act abolishing the slave trade. Subsequently, the Hague conventions and Geneva conventions introduced rules to humanize the treatment of prisoners of war. The International Labor Organization created in 1915 sponsored a number of international conventions that aimed at the protection of industrial workers from exploitation and improving their working conditions. In the 1920's, the League of Nations carried the process of promotion of human rights legislation further by highlighting matters pertaining to human rights and sponsoring a convention on slavery in 1927, which was considered to be the first true international human rights treaty[13].

The end of WW2 ushered the rise of a number of intergovernmental organizations that contributed their shares in promoting the cause of human rights. The United Nations organization being truly global with a scope of functions that was extremely broad was well equipped to promote the cause of human rights. Other structures more limited in scope such as the Council of Europe and the OAS, while mainly dealing with relations between governments, ventured to reach out for citizens in certain areas. Of course, the major legal international documents that directly addressed the general issue of human rights were the Universal Declaration on Human Rights adopted in 1948, and the more focused international convention, which treated the crimes of genocide in the year1948[14].

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[11] Ben Whitaker. Minorities: A question of human rights? Pergamon Press, 1984, p.71
[12] Paul Sieghart. The International law of human rights. Clarendon press, 1983 p. 13
[13] Ibid, pp 13-14
[14] Ibid, pp 13-14

On the practical level, the record of the international community combating violations of human rights, principally genocide, is significant, although still far below the expectations of human right activists. The Nuremberg trials established at the end of WW2 brought the major Nazi war criminals to justice. The UN ICJ constituted yet another forum for genocide trials. Any state that has signed the genocide convention may raise a claim against another state signatory to the convention accused of committing genocide against its people. UN ad hoc tribunals were established in Rwanda and Yugoslavia to punish war crimes, genocide and crimes against humanity. Other crimes have been prosecuted in domestic courts, mainly those that occurred in Rwanda and Burundi, and domestic courts in a number of countries are asserting their jurisdiction to take up cases of international crimes irrespective of the place of occurrence.

The record looks impressive, but at close scrutiny one could see failures, shortcomings, inadequacies, and negligence in the treatment of human rights violations. The issue of international law and human rights (particularly the issue of genocide) seems perplexing and paradoxical. While the expansion of the scope of the Law of Nations in the 20th century in this area as we have established is real, Roger Smith estimated the number of victims of genocide, i.e. on grounds of race, ethnicity or religion, in the 20th century to be 60 million.[15] It looks as if there exists a lost link between the Law of Nations and the crimes it is trying to contain. Here a number of legitimate questions can be raised: Why are some criminals brought to trial while others are not? Why did not the Genocide Convention properly apply on the Rwandan genocide while it was unleashing? Why did the International Community wait until 800.000 Rwandans were butchered before even acknowledging that what went on there fell within the scope of genocide? Why are the Armenians still seeking recognition that their mass liquidation in 1915 was an act of genocide that they had actually endured? Why has not the Armenian case ever been brought to the ICJ? Why is a significant number of human rights violators and perpetrators of acts of genocide still at large? Does the problem lie in the Genocide Convention itself or is it due to other factors? To what extent do political power and

[15] Michael Dobkowski an Isodor Walliman. Genocide in our time: An annotated bibliography with analytical introductions. MI: Ann Arbor, 1992, p.121

ideological factors outweigh legal moral considerations? While these and other legitimate questions of this nature will have to be addressed in the course of this work, probing the nature of the international community may shed more light on the matter and pave the way for the elaboration of the study.

C. The international community and international human rights law

The notion of the international community as a community of sovereign sates was conceived in Westphalia and reasserted in Vienna (1815). It was further emphasized in the League Covenant and United Nations Charter and numerous other international treaties. The reassertion of the notion of state sovereignty was fundamentally a reassertion of the concept of national exclusiveness and an acknowledgment that the state system continues to produce a loose and fragmented international community.

Any legal system presupposes the existence of a community and its nature is determined by the nature of that community. Thus, a domestic legal system is created to serve a certain human community (or society) institutionalized as a state, and its primary rules are supposed to embody the important norms and values (unless different norms are imposed from the outside or by a dictator) of that community. The making, application, and adjudication of the community's rules of law are undertaken by the apparatus of the state. The operationality of a domestic legal system is affected by the extent of the cohesiveness and cultural homogeneity of that community. In a culturally cohesive community, rules of law in their procedural and substantive aspects are necessarily less controversial and easier to adjudicate and enforce.[16]

International law is the law of the community of territorial sovereign states and is reflective of the cultural, racial, ethnic, religious diversity and heterogeneity of that community. Its primary rules are bound to be vague, difficult to introduce and change, difficult to adjudicate, and difficult to enforce. It has a different nature than domestic law

[16] Attended seminar in Introduction to International law with professor Adnan Fawaz

because it serves a different type of community.[17] Are we saying here that international law, which has endured these weaknesses, is bound to endure them indefinitely? The answer is a qualified no. It's here that the parallelism indicated above is manifested. Although this parallelism (of nationalism and globalization) seems dichotomous, it did at times behave dialectically, producing change without however being able to compose the dichotomy.[18]

It was more difficult for international law governing human rights to develop at the same pace and to the same efficacy as international rules governing and regulating other aspects of international relations such as international trade, diplomatic relations, health, civil aviation, postage, copy rights, the slave trade, drug trafficking, the high seas, outer space and similar aspects of globalization. Human rights, if strongly upheld, will encroach on state sovereignty and power. This is one of the areas where the parallelism of nationalism and power on the one hand, and globalization on the other hand is dichotomous. Progress in this area would naturally be obstructed by states traversing the state of ardent nationalism or pursuing a policy of expansion, and by states ruled by dictatorial regimes. What makes this issue more complex and paradoxical is that the principal super power, the United States, which has, since Woodrow Wilson, been the major champion of the idea of world government and human rights, has also been a staunch guardian of its sovereignty and domestic jurisdiction. It would not hesitate to stand against the evolvement of international rules of law that would impinge on its sovereignty or domestic jurisdiction (A number of issues other than human rights continue to confront the international community with difficulties because their promotion may touch US interests and domestic law and jurisdiction. Examples are global warming and the trade in small arms)[19]

Moreover, the United States, together with other states proponents of human rights, has not always kept in its foreign relations a righteous balance between power and morality. United States acquiescence to or even support of dictators whose human rights

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[17] Paul Sieghart. The International law of human rights. Clarendon Press, 1983, pp. 9-11
[18] Attended seminar in International law of human rights with professor Adnan fawaz
[19] ibid

records were quite poor was not infrequent, especially during the various phases of the cold war.

D.The gist of the matter

The substance of what has been discussed in this opening chapter can be stated as follows:

- Nationalism, power, and dictatorship together with cultural, ethnic, and racial heterogeneity, as well as the lack of correspondence between nation and state, have been and continue to be the major cause of human rights violations including genocide.

- The incessant surge toward globalization and the spread of Western norms as a result of Western global hegemony have been the major factors behind the international drive to spread human rights values and confront, combat and arrest human rights violations including genocide. This has contributed to the development, for that purpose, of appropriate international rules of law.

- The attitude of nationalistic and/or dictatorial regimes has been obstructive to international efforts to promote human rights.

- The frequent imbalance between power/interest and morality in the conduct of US foreign relations and its insistence, together with the vast majority of the states of the world (exceptions include member states of the European community and a few others), on the sanctity of state sovereignty and domestic jurisdiction has delayed the efforts of the international community to effectively cope with the human rights issue.

Along these factors lies the ambiguity of the law governing the crime itself. As mentioned earlier, international law suffers vagueness and is often hard to enforce. The lack of consensus on what the law means or should mean, generated by the diverse nature

of the international community has acted to perpetuate the vagueness which has characterized many aspects of the law of nations. Thus, for example, although the Genocide Convention has given a definition of genocide, jurists continue to disagree over its true meaning and scope. Therefore, the determination whether a certain act is a crime of genocide continues to be a difficult task. Other types of international crimes such as war crimes and crimes against humanity can easily overlap with crimes of genocide thus introducing an element of confusion and uncertainty in the international judicial process. What may add further to this confusion is the difficulty of distinguishing an international crime from a legitimate state policing or war act. For example: were the devastating effects on human civilian life of the Bremen raid and the annihilation of the cities of Hiroshima and Nagasaki acts of genocide or legitimate acts of war?

The disagreement over the exact meaning of different types of international crimes and their confusion with legitimate state policing or war acts may influence decisions to bring violators of international criminal law to justice. This confusion allows political power considerations to manifest themselves in the international judicial process. This explains the selectivity in bringing human rights (including genocide) violators to justice. Moreover, the actual apprehending of human rights violators even after they have been identified and their preliminary indictment determined is subject to the cooperation of their state of residence. Here state sovereignty is again manifested. Various types of pressures can be exercised against the state concerned but invariably subject to political power considerations.

The enforcement of international criminal law will also have to account for the power factor when military intervention is contemplated. Thus, while NATO's military intervention against Serbia on the grounds of its violation of human rights was feasible, military intervention would definitely not be feasible against Russia for its record in Chechnya, or on china for the famous Tianmen square massacre.

The impact of globalization on International Human rights law, confronted by the forces of nationalism and power has therefore been mixed. On the one hand, it gave a

boost to that law, but that boost is not strong enough to close all the gaps and therefore remove the grounds for the kinds of questions raised at the beginning of this chapter.

It is under the conditions and factors discussed above that international criminal law can be conceived. The future of international law and human rights, therefore, depends on whether the forces of globalization will increasingly manifest themselves on the world scene in ways that would mitigate the sharpness of nationalism, power and state sovereignty. There is some evidence to show that this tend is slowly unfolding.

Chapter 2

The definition of genocide

> "This contamination of our blood, which hundreds of thousands of our people blindly ignore, is used by the Jew today according to plan. These black parasites of the peoples deliberately violate our inexperienced, young blond girls and thereby destroy something that cannot be replaced in this world".[20] (*Mein Kampf*, 1925, Volume 2, pp. 629-30.)

Ever since the national socialist movement seized power in Germany in 1933, there was an abiding abhorrence for Jews who formed 0.76 % of the total German population. They were convicted of stabbing Germany in the back and depriving it of victory in WW1. As national awakening became intensified at the beginning of 1933, anti-Semitism deepened radically and proliferated to become an official doctrine. It focused on degrading and the Jewish minority, who according to Nazi philosophy, were sub human, and constituted a threat to the Arian race. It was, thus, used as one of the major instruments to bolster the power of the Nazi party.[21] As a result, between 1933 and 1939 Jews were subjected to constant hardships and persecutions. It was during that period that the Nazis passed several laws to slowly but surely erase Jewish identity. All Jewish public servants were removed from service, while Jewish students were no longer allowed to attend German schools. Jews were removed from jobs within the media, expelled from the army, forbidden to marry non-Jews and turned into second-class citizens. Jewish families were denied financial assistance as they were also prohibited to work in the public service. They were denied doctoral studies at universities while Jewish doctors lost their accreditation and their license to practice medicine. Lawyers and

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[20] Adolph Hitler. Mein Kempf Vol: 2 (1925) p. 629-630

[21] Wolfgang Benz. The holocaust: A German historian examines the genocide. Columbia University Press. 1999. P. 15

professional groups got the same fate in their own fields. In 1938 Jews were stigmatized by having a red J imprinted on their passports.[22]

Upon Hitler's invasion of Poland in late 1939, Poland's Jews faced further adversity and aggression. However, the final solution to the Jewish question came about in mid 1941 when Germany invaded the Soviet Union. It was then that the genocidal hatred of the Nazis exploded on Jews and the populations of the east. Poles, Slovenes, checks, Russians and other "inferior" Slav people were severely humiliated while Soviet prisoners of war died of mass executions, exposure and starvation. However, the Nazi expansion over the vast new territories, including Eastern Poland, offered Hitler the occasion to execute his "final solution" to the "Jewish problem" in Europe.

The genocide was ordered by the Nazi government, under the initiation of Hitler and administered by the SS and SD and other anti Semitic followers. It was executed under the cover of warfare. According to Gordon, several factors merged to produce the holocaust: "Radical anti-Semitism of the Nazi type; transformation of that anti-Semitism into the practical policy of a powerful, centralized state; that state being in command of a huge, efficient bureaucratic apparatus; an extraordinary wartime condition, which allowed that government and the bureaucracy it controlled to get away with things which could, possibly, face more serious obstacles in time of peace; and the non-interference and passive acceptance of those things by the population at large".[23] Techniques, such as murder, mass starvation and burning, mass burials, mass extermination in gas chambers, deportation, exposure to disease and exhaustion, were used by the Nazis to execute their crime. By the end of the war an estimated number of 5 to 6 million Jews were killed while millions of poles, communists, and gypsies lost their lives.[24]

1. The status of minorities

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[22] Ibid, pp. 30-40

[23] Zygmunt Baumann. Modernity and the holocaust. Cornell University Press, 1999. P. 94

[24] For a more detailed study of the Jewish holocaust, *see* Seven katz. The holocaust in historical context. NY: Oxford University Press, 1994

The acts performed by the Nazi party during the course of WW2 registered a salient event in modern history. The Jews, just like the Armenians before them, were both minorities. They were subjected to brutality because in the eyes of the ruling elite, they, having different racial, national, or religious attributes, could not be assimilated into the ruling majority; therefore, it was imperative that they be eliminated.

The status of racial, ethnic, and religious minorities has been critical ever since humans began to live in groups. The reason behind such a phenomenon is that minority groups usually possess different racial, ethnic or cultural characteristics from the majority of the nation in which they exist. While some minorities could be easily integrated into the ruling national group, others are considered outsiders, deprived of their basic human rights, and in extreme situations, killed. What also characterizes the status of minorities is that they possessed no means of protection. States, in persecuting their minority groups, stood behind the shields of their sovereignty, territorial integrity and domestic jurisdiction. The calamities and sufferings that minority groups have repeatedly endured throughout history have in recent decades caused a perennial question to be raised: Shouldn't the international Community squeeze the scope of the notion of domestic jurisdiction and non- intervention in favor of better human rights and minority protection? Two schools contested this issue: The non-intervention school advocated by Italian and Latin American scholars including Mamiani, Carnazza, Amari, Pradier Fodere, Pereira and Halleck, contented that "internal oppression however odious and violent it may be, does not affect, either directly or indirectly external relations and does not endanger the existence of other states. Accordingly, it cannot be used as a legal basis for the use of force and violent means" [25] The intervention school on the other hand, which included Creasy de martens, Wheaton Woosley and Arntz advocates that intervention is justified "on behalf of a grievously oppressed group, which has never amalgamated with its oppressors as one nation, and which its oppressors have systematically treated as an alien race, subject to the same imperial authority, but in other respects distinct"[26] These opposing principles gave rise to a controversy in the sphere of

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[25] Patrick Thornberry. International law and the rights of minorities. Oxford University Press, 1994. P. 36
[26] Ibid, p. 36

international law concerning intervention. While there have been a few interventions under customary international law for the protection of oppressed groups, intervention by a state in the territory of another has up until the end of WW1 been considered illegal.

The League of Nations established the post war minority protection framework, and consequently the concept of minority rights became internationalized. However, this concept was misapplied for the main reason that "the international imposition of measures on behalf of minorities was perceived as a threat to the national sovereignty of newly created states. Under international law, states are supposed to be equal to each other in their sovereignty. The fact that some states were subject to minority rights doctrines while others were exempted was offensive to the sensitivities of certain leaders".[27] Thus, intervention by a state in the territory of another without that state's approval remained prohibited by international law up until 1945. In that same year, this prohibition was further reaffirmed under article 2(4) of the UN charter, which provides that "the "threat or use of force against the territorial integrity or political independence of any state" is forbidden under the charter. This prohibition applies "regardless of the political democratic or less than democratic ideology or the moral virtue of the government of the target state or of either side in the internal war." Apart from war, it was generally understood that the charter forbids any intervention even for humanitarian purposes.[28]

The failure of the league did not however prevent the reappraisal of the issue of minority protection. It was the destruction of the European Jewry executed by the National Socialist Government of Germany during WW2 that brought up again the urgency for the reassessment of certain rules of international law governing this matter. The main issue considered was whether a government by devastating its own citizens was performing a purely domestic act, or one that concerned the international community as a whole, thus making humanitarian intervention rightful. If intervention to protect

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[27] Jay Sigler, Minority rights. Greenwood Press, 1983. P. 75

[28] Louis Henkin. "Editorial comment: NATO's Kosovo intervention. Kosovo and the law of humanitarian intervention. American journal of International law, Vol 93 (1999) p.828. For a study on intervention , see Ben Whitaker. Minorities: A question of human rights? Pergamon press, 1984.

vulnerable groups against inhuman acts was to be allowed then such acts would have to be considered "crimes under the law of nations" and every state just like condemning piracy, should "be able to take jurisdiction over such acts irrespective of the nationality of the offender and of the place where the crime was committed".[29]. The attempted destruction of the European Jews by the Nazi regime was, perhaps the major factor that prompted the post WW2 international community to consider an international instrument for the suppression of serious crimes against humanity. The result was the UN convention on genocide.

2. Lemkin and the conception of genocide

In 1940, Winston Churchill, in reaction to the horrors perpetrated by the Nazis in Poland, affirmed that the world was witnessing a crime without a name. Four years later, an eminent jurist by the name of Raphael Lemkin gave this crime a name by coining the word genocide. The word originates from the Greek word Genos, meaning clan family or people and the Latin suffix occidio, meaning total extinction or extermination. Eleven years earlier, Lemkin had already requested for an international convention to outlaw mass executions of peoples. The result was the summoning of the fifth international conference on unification of penal law, which was "the first international body to recognize extermination of racial, religious, or social groups as an offence against the law of nations".[30]

In 1944, Raphael lemkin published *Axis Rule in Occupied Europe,* which was in essence a study on genocide. Lemkin defined genocide as

> " A coordinated plan aimed at destruction of the essential foundations of the life of national groups so that these groups wither and die like plants that have suffered a blight. The end may be accomplished by the forced disintegration of political and social institutions, of the culture of the people, of their language, their national feelings and their religion. It may be accomplished by wiping out all bases of personal security, liberty, health and dignity. When these means fail the machine gun can always be utilized as a last resort. Genocide is directed against a national group

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[29] Raphael Lemkin "Genocide as a crime under international law". American Journal of International Law. Vol: 41 (1947) p. 145-151.
[30] Warren freedman. Genocide: A people's will to live. NY: William S Hein & Co INC, 1992, p. 13

as an entity, and the attack on individuals is only secondary to the annihilation of the national group to which they belong."[31]

The reason why Lemkin chose the word genocide was because other words, such as Germanization or denationalization for instance, could not apply. Words as such meant simply "the substitution of the national pattern of the oppressor for the original national pattern, but not the destruction of the biological and physical structure of the oppressed group". Mass murder could not apply either since it did not denote the motive behind the crime, particularly when such motive serves racial, national, or religious considerations.[32]

According to Lemkin, the word genocide was new to the dictionary because new conceptions of human destruction came to light. The Nazis prepared and initiated a campaign of systematic destruction, not against states or their armies, but against a people. They could well execute their genocidal plan by using war as a pretext. However, the Nazis did not want to eliminate Jews as enemies of war. Rather they strove to eradicate them as a national group. Therefore the aim and means used for this task bypassed the concepts of war crimes elaborated by the authors of the Hague conventions. The laws of The Hague did impose limits on state sovereignty when terrible breaches of humanitarian law were evident, but remained silent regarding the preservation of the integrity of peoples. Hence, as Lemkin suggested, it was essential to include genocide in international law, and to amend the Hague conventions in order to prohibit this crime in any future war.[33]

Lemkin further noted that genocide might also occur in times of peace. It was a problem particularly important in Europe, where national differentiation was so pronounced, and despite principles of political and territorial self- determination, certain national groups were obliged to live as minorities within the frontiers of other states. Since the legal system for the protection of such minorities adopted in the past and founded on international treaties and on state constitutions proved insufficient, genocide

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[31] Raphel Lemkin. "Genocide" American Scholar Vol: 15 (1946)
[32] Ibid
[33] Yves Ternon. L'etat criminel: Les genocides au 20eme siecle. Editions Du Seuil, 1977. p. 17. For a better understanding of the Hague conventions, refer to Annex

would not be prevented or punished unless the protection of minorities was assured by international law, and by the constitution and penal code of every nation. The best way to reach this objective is to define an international penal code, which the member signatories include in their constitutions and hence become disposed to guarantee the protection of minorities against national, religious or racial oppression. They must include measures that sanction genocide acts as well as put responsibility both on the superior order behind the crime as well as those and who execute it. Genocide criminals must be severely punished due to the impact that their crime would entail upon humanity, just as those guilty of slavery, child abuse, piracy, drug trafficking, and pornography.[34]

3. From Nuremberg to the genocide convention

The year 1945 registered a salient event in history. The four major allied powers concluded the London Agreement according to which a tribunal was to be established in Nuremberg in order to prosecute the Nazi war criminals.[35] The result was the creation of an ad hoc tribunal that had jurisdiction over three major crimes, namely: war crimes, crimes against peace and crimes against humanity and were defined as follows:

- War crimes: "Violations of the laws or customs of war. Such violations shall include but are not limited to murder, ill treatment or deportation to slave labor or any other purpose, of a civilian population of or in any occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."

- Crimes against peace: Namely," planning, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing"

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[34] Ibid, pp 17-19

[35] Robert Woetzel. The Nuremberg trials in International law. Stevens & Sons, 1960, pp.5-6. Also included in this reference is a thorough description of the trials of the Nazi war criminals.

- Crimes against humanity: Namely, "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in 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"[36]

The prosecutions came to be known as the Nuremberg trials, which succeeded in bringing most of the Nazi war criminals to justice. According to Lauterpacht, the recognition of the Nuremberg charter and the tribunal over crimes against humanity had a direct connection to the question of human rights under international law. Acts against humanity were considered so offending to the degree "as to make irrelevant reliance upon the law of the state, which ordered them". And to ordain that crimes against humanity are punishable is to affirm that laws governing such crimes are "superior to the law of the state. Thus upon analysis, the enactment of crimes against humanity in an international instrument signifies the acknowledgment of fundamental rights of the individual recognized by international law".[37]

The Nuremberg trials were followed by the Tokyo trials conducted by the International Military Tribunal of the Far East, founded on January 19 1946. The creation of the Nuremberg and Tokyo tribunals was considered a breakthrough in the post WW2 era. However, it was only as a result of a world war and a victory of one party and the defeat of another that such tribunals were created. It was the allies, the victors of the war, who founded the tribunals. The judges who conducted the trials were representatives of the governments of the allied powers, rather than some neutral authority, which had no connection with the war. Moreover, crimes against humanity, as defined in the charter, were punishable only if they were in connection with a war. It was imperative to create an instrument that would emphasize more on the question of human rights, to conduct

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[36] Gerhard Von Glahn. Law Among Nations. NY: Macmillan publishing company, 1996, p. 707
[37] H. Lauterpacht. International law and human rights. London: Stevens and sons, 1950, p.36

impartial and unbiased justice and to cover crimes that may occur in time of peace as in times of war.

By that time, the term genocide had already been coined. Although it was still not used officially, it was referred to for the first time during the trials. The crimes at Nuremberg were described as

"Intended and systematic 'genocidio;' The perpetrators were accused of having conducted deliberate and systematic genocide viz the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, poles and Gypsies"[38]

Despite reference to the substance of the crime at Nuremberg, the Tribunal had not used the term genocide as a clearly defined concept. However, in 1946, in a trial by the National Tribunal of Poland, the defendants were charged with the crime of genocide, since the brutal extermination of Jews and poles fit well the characteristics of genocide. In the meantime, with the lobbying of Raphael Lemkin, the issue of the punishment and prevention of genocide had become one of the main priorities of the UN.[39]

On December 11 1946, genocide was declared a crime under international law, upon a general assembly resolution adopted unanimously, and which provided the following:

> "Genocide is the denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings. Such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these groups, and is contrary to moral law and to the spirit and aims of the UN. Many instances of such crimes of genocide have occurred, when racial, religious, political, and other groups have been destroyed, entirely or in part. The punishment of the crime of genocide is a matter of international concern general assembly therefore affirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices-whether private individuals, public officials or statesmen, and

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[38] Israel Charny. Genocide: A critical bibliographic review. Institute of International conference on the holocaust and genocide. P. 2

[39] Leo Kuper. Genocide: Its political use in the 20th century. Yale University Press , 1981, p.22

whether the crime is committed on religious, racial, political, or any other grounds- are punishable".[40]

A project for making a treaty that would draw the scope of the crime was therefore assumed. Being asked to submit a draft treaty on the matter, Lemkin, and after two years of laborious work, presented the general assembly with the necessary material. On December 9 1948, the Convention on the Prevention and Punishment of the Crime of Genocide came into existence. The final definition of the crime agreed upon was as follows: "Genocide means an act committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group". By 1951, all the required signatures were obtained and the laws governing genocide became part of domestic and international law.[41]

The creation of the UN convention on genocide was a breakthrough in international human rights law, for it was the first real instrument created for the protection of vulnerable minority groups. It brought about a definition to a new crime, which although alluded to during one of the Nazi prosecutions, was not defined in the Nuremberg charter. Unlike the charter, it did not limit the crime to a situation of war. Moreover, it distinguished between genocide on the one hand war crimes and crimes against humanity on the other. Yet, since its inception, the definition of genocide provided by the UN has been continuously disputed. More recently, it has become subject to criticism by scholars who detected serious limitations in it and proposed several definitions of their own.

4. Review of the literature

Among the scholars who have conducted research on genocide are Frank Chalk and Kurt Jonassohn. They regard the definition given by the convention as unsatisfactory for the main reason that it excludes important groups who are as vulnerable to genocidal

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[40] Frank Chalk, and Kurt Jonassohn. The history and sociology of genocide: Analyses and case studies. Published in cooperation with the Montreal institute for genocide studies. Yale University Press, 1990, p.9

[41] Warren Freedman. Genocide: A people's will to live. NY: William S. Hein & Co, 1992, p. 13

assaults as the ones mentioned. They have supported their view by giving examples of genocides that occurred in Bangladesh, Burundi, Indonesia, East Timor and Ethiopia. Article II of the U.N. Convention limits the term genocide to "acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group". Does this mean other social political and economic groups brutishly destroyed do not qualify as genocidal victims? In line with this reasoning, both scholars suggested a re-evaluation of the convention definition to include such groups, proposing a substitute definition as follows:

> "Genocide is a form of one-sided mass killing in which a state or other authority intends to destroy a group, as that group and membership in it are defined by the perpetrator". [42]

Pieter N. Drost in evaluating the genocide convention underscored the exclusion of the political factor from the genocide definition. He foresaw that the loophole in the definition "would cunningly be used by governments to their advantage". Drost proposed a redefinition of genocide to include political groups rather than be restricted to racial, national and ethnic groups.

Horowitz's major contribution to the study of genocide was his book "Taking lives; genocide and state power". He viewed genocide as a tool used by a state to secure compliance to its ideology and proposed an amendment to the to the UN definition emphasizing that genocide was "a structural and systematic destruction of innocent people by a state bureaucratic apparatus. In 1984, Horowitz wrote another essay under the title of "genocide and the reconstruction of social theory", where he stressed that culture, although an insufficient determinant, is an important factor to the preconditions of genocide. A totalitarian society would therefore be considered more favorable ground for the genocidal process than a democratic one. Horowitz advanced the hypothesis that certain national cultures are conducive to genocide. "A totalitarian ideology may make class, race, or religion ineradicable sins, thus increasing the potential for genocide, but

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[42] Helen Fein, ed. Genocide watch. Yale University Press, 1992.p, 19

that the decision to eradicate these sins by committing genocide is largely a function of national culture". [43]

Vahakn Dadrian, whose works are a major contribution to this field of study, proposed another definition of genocide. In line with Lemkin's conception of the importance of the intent factor of the perpetrator, Dadrian believes that

> " Genocide is the successful attempt by a dominant group, vested with formal authority and/or with preponderant access to the overall resources of power, to reduce by coercion or lethal violence the number of a minority group whose ultimate extermination is held desirable and useful and whose respective vulnerability is a major factor contributing to the decision of genocide"[44]

Helen Fein views genocide as

> "A calculated murder of a segment or all of a group defined outside the universe of obligation of the perpetrator by a government, elite, staff or crowd representing the perpetrator in response to a crisis or opportunity perceived to be caused or impeded by the victim",

While Yehuda Bawer defines it as

> "The planned destruction, since the mid nineteenth century of a racial, national, or ethnic group as such, by the following means of 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, e) biological decimation through the kidnapping of children, or the prevention of normal family life, with the same intent." [45]

Lyman Letgers whose study focused on the application of the UN definition to the Soviet mass killings, suggested a broadening of the definition to include socio- economic classes. According to Letgers,

> "If the term genocide is to be universal in its import, it must take account of other than ethnic and religious styles of classification. If an allegedly socialist society, whose primary form of classification is that of class, either targets or invents a lass with extermination in prospect, that

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[43] Frank Chalk & Kurt Jonassohn. The history and sociology of genocide: Analyses and case studies. Yale University Press, p. 1990. pp. 12-14
[44] Ibid, p.14
[45] Ibid, p. 20

program must count as genocide lest the term lose its continuing pertinence for the contemporary world in all its variety".[46]

Leo Kuper, a prominent scholar on the subject, tackled an array of aspects of genocide. One is designed to resolve religious, racial, and ethnic differences, while another would be to terrorize a people conquered by a colonizing empire. A third aspect would be to enforce or fulfill a political ideology. Kuper contested the exclusion of political groups and economic classes from the scope of the convention. He gave examples of the killing of peasants, party elites and ethnic minorities in Stalin's Russia. He also spoke of the butcheries of communists in Indonesia in 1965, and the eradication of the Kampuchean government by the Khmer rouge in 1975. [47]

As seen above, there is a large and puzzling array of views and definitions that one encounters in the sphere of genocide research, and no consensus has yet been reached on the exact definition of this crime. This controversy over the meaning of genocide rendered the law governing the crime ambiguous and only partially effective in coping with atrocities perpetrated in the second half of the 20th century. However, despite the disagreements over the definition of genocide, an accord over features and characteristics common to genocidal crimes may be discerned.

5. Characteristics of genocide

1. Genocide is generally carried out by governments and for their own purposes. The elite that rule a state either calculatingly destroys a group, or allows sub-national groups to massacre other sub-national groups.[48]
2. Genocide usually occurs in a non- democratic country where the government conceives of the group targeted for destruction as a barrier or threat to its power.

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[46] Ibid, p. 22
[47] Michael Dobkowski and Isodor Walliman. Genocide and the modern age. NY: Greenwood Press, 1987. pp. 9-10
[48] Ibid, p.101

The group is portrayed as sub human and is expelled from the universe of obligation of the perpetrator. [49]

3. Although it may occur in times of peace, genocide frequently occurs during a crisis, such as war, an uprising or an insurgency and the breakdown of the state apparatus. The perpetrators take advantage of the conditions of crisis to commit the crime.[50]
4. Genocide is often prompted by psychological, ideological, religious or other radical considerations or beliefs. It first appeared in the middle ages, but has become markedly pronounced in the twentieth century. In previous eras, victims used to be destroyed by conquest, as result of religious wars, or during the course of colonialism. In the 20th century, victims have become targets of genocide mainly because of their identity; in the eyes of their oppressors they are not worthy of life. [51]. Ideologies are most significant in countries undergoing a change in regime whereby rulers, often insecure about consolidating their power, fanatically target groups that are, considered potential enemies. The primary task of these fanatics would be to shape a dehumanized image of the targeted groups in the minds of their people. Cases in point are the Ittihadists in Turkey and the Nazis in Germany.[52]

   Implementing an ideology requires careful planning. Propaganda is the major instrument of the plan because it largely contributes either to the success of the genocide or its failure. By portraying the target as a hateful and dehumanized group, the conditions are set for genocide.[53] In a study of the massacres of the Proud Ibos in Northern Nigeria, Colin Lemkin describes the evil propaganda that was unleashed especially in the 1964 elections against the Ibos, making them more vulnerable to genocide. They were described as "vermin, criminals, money grabbers, and sub human without genuine culture". The result of that hate campaign was 600.000 refugees of orphans, widows and traumatized were "hacked, slashed, mangled, stripped, naked, and robbed of their possessions".

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[49] Helen Fein. "Defining genocide". Encyclopedia Encarta. December 21, 1999
[50] Ibid
[51] Op.cit p. 32
[52] Christopher Simpson. The Splendid blond beast. Monroe: Common Courage Press, 1995, p.4
[53] Israel charny, ed. Encyclopedia of genocide. Institute of Holocaust Studies, 1999, p. 387.

Colin maintains further that the accusations showered at the alien minority could be real or imaginary. The disastrous persecution is intensified when the targeted group becomes imaged as non-human and its members perceived as dangerous animals.[54]

Mobilization of important elements of society is deemed essential for genocide to be effectively carried out. The holocaust in Germany would not have succeeded had it not been for the intensive mass mobilization of various elements of society and state apparatus including courts and administrative agencies, university scholars, religious institutions, and the participation of many Germans and Nazis, whether active or tacit in the crime due to the financial rewards promised to them by the Nazi party.[55] Hitler and his associates used euphemisms such as "special treatment, evacuation, and cleansing" to motivate his followers and thus undertake his crime. In fact the suffix cide is used to designate products which function is to destroy or hamper the development of germs, animals, or harmful plants. They are referred to as bactericide, pesticide, insecticide, and herbicide. Ternon maintains that in order to destroy a group, perpetrators of genocide find it indispensable to denaturalize or dehumanize the group to the point that it is compared to animals or objects. While Charny adds that people usually obey to the demands of their leaders because they feel it's their duty to do so to preserve the honor of the nation. Thus, the killing becomes legitimate and a national duty because the out-group is inhuman and pose a threat to the nation.[56]

5. Advances in Technology have undoubtedly helped perpetrators in finding more efficient and radical means for performing genocidal mass crimes. Yet, it has become well known that as Jonassohn states: "discipline among the killers seems considerably more important than technology". Perpetrators have mostly relied on rather primitive means, which are less costly for the execution of their crime.

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[54] Leo Kuper. Genocide: Its political use in the 20th century. Yale University Press, 1981, p. 85
[55] Christopher Simpson. The Splendid blond beast. Common Courage Press, 1995, pp 4-5
[56] Israel Charny. Encyclopedia of Genocide. Institute of the holocaust and genocide, 1999, p.389

> Regardless of the nature of the means used, genocide is often directed against large groups, and the number of casualties is considerably high.[57]

The conditions that are conducive to the crime of genocide have thus been established. The section that follows comprises selected genocide cases (Genocides in Armenia, Cambodia, Rwanda an the former ygoslavia) that are illustrative of the principles discussed above and are intended to demonstrate the achievements of the law of nations so far realized and its ability to cope with this menacing crime. The legal and political loopholes and factors that have at times been obstructive to the course of justice will also be alluded to. The third part that follows tackles with scrutiny the international law of genocide and the political conditions and limitations to its effective development.

[57] Helen Fein ed. Genocide watch. Yale University Press, 1992, pp. 22-23

CHAPTER 3

Case studies

CASE STUDY#1 : ARMERNIA

A. The Armenian genocide

The genocide of the Armenians during WW1 represents the first case of mass annihilation in the 20th century. Between 1915 and 1918 The Turkish government ordered the systematic extermination of the Armenian minority of the Ottoman Empire. While most of the male subjects were murdered, the rest of the population comprising women, children and elderly were deported. Many lost their lives as a result of exposure, starvation, disease, and assaults by Turkish and Kurdish gangs. By 1919, an estimated number of 1.5 million Armenians perished. Nothing then was done to prevent the crime. The Turks continue to deny that it actually happened.

1. The road to genocide

The continuous shrinking of the Ottoman Empire during the reign of Sultan Abdul Hamid, as a result of military defeats and economic backwardness, and the resulting humiliation to the Ottoman Turks led to the overthrow of the Turkish government in 1908, by a group of reformists known as the young Turks. The Young Turks, organized under the committee of union and progress, sought to fortify the Ottoman Empire and to "disinfect" the nation through a rigorous process of turkification involving language, customs, and religion. For this process to succeed it was imperative that the new regime rid the nation of Christian Armenians who, according to the ottoman Turks, could not be absorbed into the Turkish nation. The eruption of WW1 provided the Turks with a favorable occasion to purge the country of Armenians subjects who became conceived as

a "canker, a malignance which looked like a small pimple from the outside, which if not removed by a skilful surgeon's scalpel would kill the patient."[58]

The loss of Turkish territory during the Balkan War (1911-1913), and Turkey's subsequent early defeat in WW1, together with the disrepute of the Committee of Union and Progress, acted to further activate the upsurge of Turkish Nationalism. It was the ideology of Pan Turkism or pan Turanianism that burst open; a nationalism that focused on Anatolia- the cradle of Turkism, and the last bastion after the loss of European turkey. Turkish nationalist ideologies concentrated on two main themes: The "exclusion of non Muslims from the nation" and " the construction of the modern Turkish identity". The grounds for this was already prepared in the "pre-existing widespread prejudice against those groups, that were considered traitors, of which Ottoman idioms, sayings and proverbs best suggest the scope and virulence"[59] In fact, signs of radical Turkish nationalism were already explicit at the time of Abdul Hamid. When European powers called for the protection of the Christian minorities, namely the Armenians, Abdul Hamid considered such outside intervention a threat to sovereignty and retaliated with a massive slaughter targeting around 200000 Armenians between 1894 and 1896. The massacres occurred as a result of Turkish fear and suspicion of Armenian nationalism. Their aim was to terrify Armenians whose political activities, that were spreading ideas about civil rights and autonomy, threatened the stability of the empire and the supremacy of Turkish nationalism.[60]

2. A genocide based on systematic guidelines

The Armenian genocide was the result of a well-studied plan based on systematic guidelines, with the purpose of extirpating a whole race. Theoretically not a single Armenian should live, and Talat pasha had repeatedly ordered that not a single Armenian

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[58] Leo Kuper. Genocide: Its political use in the 20th century. Yale University Press, 1981, p. 91
[59] Richard Havonissian, ed. Remembrance and denial: The case of the Armenian genocide. DT: Wayne state University Press, p.23
[60] Rouben Adalian. "Encyclopedia entries on the Armenian genocide." From The Armenian National Institute.

was supposed to remain to remember and testify. It was the final solution of the Armenian question.

According to Ternon, the plan of annihilation was to proceed along specific rules, on which either the failure or success of the crime in great part depended.

First of all, in order for the crime to be perfectly executed, it was necessary that the smoke of fires, the torrents of blood, the shrieks, fire shots, and the wounded who were expected to seek refuge in missions and embassies, which could all be evidence for the crime, be concealed. The genocide must be undertaken silently, and deportation was the best technique for that matter.

Secondly, the situation of war presented the Turks with the propitious time to undertake their crime. The Turkish government would hide behind the smoke of war, and would justify its action as a measure taken by a sovereign state to quell insurgencies occurring under its jurisdiction, protecting itself by the principle of non-intervention in the domestic affairs of a sovereign state. However, it was essential that all means of information be blocked, all photography forbidden, and all documents of the Turkish government pertaining to the crime destroyed. Furthermore, the probability of any possible Armenian revolt developing must as well be removed for the success of the operation depended on the element of surprise. On the day of the deportation, the Armenians should wake up deprived of chiefs, soldiers, and weapons.[61]

Finally, the political benefit of the operation was to be assorted with economic recompense. The belongings of the Armenians were to be submitted to the government, which could also appropriate their bank accounts and shares. The money and some of the things of the deportees would be given to the assassins, as salaries and rewards.[62]

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[61] Yves Ternon. Les Armeniens: Histoire d'un genocide. Editions Du Seuil, 1977, p. 214
[62] Ibid, p. 215

3. The execution of the crime

In line with the guidelines outlined above, the genocide was performed on three stages: The execution of the leading politicians, religious authorities and intellectuals of the Armenian population, the liquidation of the Armenian draftees of the Ottoman army, and finally the deportation of the remainder of the population composed of women, children, and elderly people. It was the Triumvirate Government, of Talaat, Enver and Jemal with its secret organization, operated by highest government officials, who commanded the genocidal process. Criminals were released from jail and acted as assassins under the immediate direction of the Ittihad Party. [63]

Despite the endeavor to bury all traces of the extermination process, the butchery was partly revealed. Military and diplomatic representatives of governments allied with the Ottoman State, including Germany, as well as certain neutral powers such as the USA, were all witnesses to the genocide. Nearly all evidence shows that the Turks used 'barbaric' techniques in carrying out their crime.

According to the New York Times issue of Friday September 24 1915,

> " Turkish authorities drove the Gregorian Armenians out of their homes, ordered them to proceed to distant towns in the direction of Bagdad, which could only be reached by crossing long stretches of desert. During the exodus of Armenians across the deserts they have been fallen upon by Kurds and slaughtered, but some of the Armenian women and girls in considerable numbers have been carried off into captivity by the Kurds"[64].

The issue of the New York Times of October 7, 1915 quoted viscount Bryce, former British ambassador to the US, to have said:

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[63] Isodor Walliman and Michael Dobkowski. Genocide and the modern age. NY: Greenwood press, 1987, pp 204-205.

[64] "500.000 Armenians said to have perished: Washington asked to stop the slaughter of Christians by Turks and Kurds". The New York Times, September 24, 1915.

"The customary procedure was to round up the whole of the population of a designated town. A part of the population was thrown into prison, and the remainder was marched out of town and in the suburbs. The men were separated from the women and children. The men were then taken to a convenient place and shot or bayoneted. The women and children were then put under a convoy of the lower kind of soldiers and dispatched to some distant destination. They died of hunger, for no provisions were furnished them. They were robbed of all they possessed and in many cases the women were stripped naked and made to continue the march in that condition. Many of the women went mad and threw away their children. The caravan route was marked by a line of corpses. Comparatively few of the people ever reached their destination.".[65]

In fact, it was a well-studied policy to separate the men from the women in order to render the Armenian community totally helpless. Vakhan Dadrian argues:

Though the mobilization had many other objectives, it served a major purpose for the swift execution of the plan of genocide. By removing all able-bodied Armenian males from their cities, villages, hamlets, and by isolating them in conditions in which they virtually became trapped, the Armenian community was reduced to a condition of near-total helplessness, thus an easy prey for destruction. It was a masterful strike as it attained with one blow the three objectives of the operation of trapping the victim population: a) dislocation through forcible removal, b) isolation, c) concentration for easy targeting. .[66]

In a graphic description of the genocides, Toynbee further writes:

"They were driven by the soldiers day after day. Many fell by the way, and many died of Only a third of the two million Armenians in Turkey have survived, and that at the price of apostatizing to Islam or else of leaving all they had and fleeing across the frontier. The refugees saw their women and children die by the roadside, and apostacy too, for a woman, involved the living death of marriage to a Turk and inclusion in his harem. The other two thirds were deported that is, they were marched away from their homes in gangs, with no food or clothing for the journey, in fierce heat and bitter cold, hundreds of miles over rough mountain roads. They were plundered and tormented by their guards and by subsidized bands of brigands, who descended on them in the wilderness, and with whom their guards fraternized. Parched with thirst, they were kept away from the water with bayonets. They died of hunger and exposure and exhaustion, and in lonely places the guards and robbers tell upon them and murdered them in batches some at the first halting place after the start, others after they had endured weeks of this agonizing journey. About half the deportees and there were at least 1,200,000 of them in all perished thus on their journey, and the other half

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[65] " 800.000 Armenians counted destroyed" The New York Times October, 7, 1915
[66] Vakhahn Dadrian. The history of the Armenian genocide. Bergham Books, 1995, p.226

have been dying lingering deaths ever since at their journey's end; for they have been deported to the most inhospitable regions in the Ottoman Empire: the malarial marshes in the Province of Konia; the banks of the Euphrates where, between Syria and Mesopotamia, it runs through a stony desert; the sultry and utterly desolate track of the Hedjaz Railway. The excites who are still alive have suffered worse than those who perished by violence at the beginning [67]

4.Death tolls:

The estimated number of victims of the Armenian genocide was 1.5 million out of a population of two to three million Western Armenians. Of those who remained alive, around 150 000 either converted to Islam, or were robbed, while some were protected by Turks. Those who survived in Western Armenia, however, remained without any national or religious identity. Around 400 000 fled to Russian Armenia, the Caucasus and Iran, while around 400 000 sought refuge southern or Arab provinces of the Ottoman empire.[68]

The end of the war, resulting in the defeat of Turkey and Germany, brought with it the dissolution of the Committee of Union and Progress and the establishment of a new government. The organizers of the deportations and massacres were tried in absentia, and were all found guilty. However, no execution of sentences was possible due to their absence from the country. However, during the ordeal of the Armenian minority of the Ottoman Empire, the Allies remained bystanders and did nothing to help. The Turks, on their part, after regaining sovereignty over Anatolia, displayed a similar attitude of total disinterest in the face of the Armenians. No reparations from the Turkish authorities that continue until the present day to deny that genocide had even taken place.[69]

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[67] Arnold Toynbee. The Murderous tyranny of the Turks. London: Hodder &Soughton, 1917, pp.15-17
[68] Isodor Walliman and Michael Dobkowski. Genocide and the modern age. Greenwood Press, 1987, p.206
[69] Rouben Adalian. "Encyclopedia entries on the Armenian genocide." From The Armenian National Institute

B .The Armenian genocide under International law

Ever since the conclusion of the UN Convention on Genocide, Armenians have endeavored to bring up their cause before world justice, but with little results. The Turks have been continuously denying that genocide had occurred, and the Armenian efforts failed to mobilize international support behind their cause. The failure of the international community to address the Armenian genocide poses a major question. Is the failure to recognize the Armenian genocide due to the non-applicability of the Law of genocide on the crime that was committed in 1915, 33 years before the Genocide Convention came into existence? In other words, did the events that happened in Armenia, constitute genocide within the purview of the Convention? If the answer is no, then the problem lies in the laws governing genocide. If the answer is yes, then obviously, there are obstacles that are preventing justice from taking its course.

1. Were the acts of 1915 crimes against humanity?

The main issue raised regarding the Armenian 'genocide' is that the law that was supposed to govern it was a law promulgated after the crime had already occurred. Under international law, applying an *ex post facto* law is a fundamental breach of natural justice. In this respect, some may argue that the atrocities against the Armenians in 1915 could not be considered genocide since they occurred long before the law on genocide was created. In reply to this line of reasoning, Toriguian offers an account on the Armenian genocide and international law viewed through another perspective.

As indicated in the previous section, the word genocide was mentioned at the Nuremberg trials under the category of crimes against humanity, which were defined as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, on racial or religious grounds". The laws of Nuremberg were issued after the Nazis had already committed their crime. The German defense at Nuremberg focused on this illegality of such laws being of an expos facto nature. However in response to the German claim, the tribunal declared:

"The charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the tribunal... it is the expression of international law existing at the time of the creation [70]

This statement on the part of the tribunal means that it was not creating a new law but was reaffirming a customary international law that had already existed. Since crimes against humanity, according to Nuremberg tribunal, existed at the time of the perpetration of the crime, and since the Nuremberg trials reaffirmed a reference to an already existing customary law, then, the crimes committed by the Nazi war criminals fall under the crimes covered by international law and are therefore punishable. The same principle applies to the Armenian case. During the years of the genocide, and well before, there was a form of customary international law, which had been developing ever since the 19th century. The Hague conventions and the various humanitarian interventions on the part of European states in certain territories indicated that certain crimes committed by a state against its people were crimes against humanity, and that outside intervention for the purpose of punishing the perpetrators of such crimes was necessary.[71]

2. How did the acts of 1915 constitute a crime of genocide?

Toriguian maintains that even if the genocide happened before the convention came to existence, genocide is already a crime under customary international law and this is clear in the preamble of the genocide convention and the Nuremberg trials. The convention would simply be asserting an existing rule of international law.

"This act of genocide committed by the Turkish authorities constituted a crime under international law since it has been shown that the definition of genocide as a crime against humanity, punishable under international law, is a long established rule firmly incorporated into the body of international law".[72]

Therefore Toriguian affirms that the Turkish liquidation of the Armenians conforms to the Nuremberg conception of 1945 and is therefore a crime under international law. The Turks had to solve the Armenian question in order to realize their

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[70] Shavarsh Toriguian. The Armenian question under International Law. Hamaskain Press, 1973, p.51
[71] Ibid, pp 49-50
[72] Ibid, p. 51

pan-Turanian dream and used barbaric means that transcend human imagination to achieve that aim. A large number of the Turkish crimes fall under the headings of articles 2 and 3 of the genocide convention and in this sense "the Armenian genocide at the hands of the Turkish authorities constitutes probably the most complete act of genocide ever perpetrated in human history". [73]

The most important argument Toriguian gives in support of his contention is the fact that the UN passed a resolution on November 26 1968 that "refused to apply the principle of limitation to crimes against humanity and decided on their imprescriptibility." This means that crimes against humanity are punishable under international law no matter when or where committed. Even if a crime happened long ago and the government of the country where the crime was perpetrated has been replaced, the current authorities are considered responsible for the acts of their predecessors.

Equally applicable to the Armenian case are the provisions on human rights in the UN charter as well as the Universal Declaration on Human Rights, both of which are binding on all signatory states. Therefore all states that champion human rights and have endorsed a UN stipulation on the matter, have, according to Toriguian, to take action "to stop the continuing genocide caused by Turkey by doing justice to the Armenians and to ask Turkey to undo the wrong it committed in 1915 and has continued to commit since, by forcing the Armenians to lead a life outside their historic lands and thus be doomed to perdition". [74]

3.Between recognition and denial.

In the light of the interpretation indicated above, it appears that the events that occurred in 1915 constitute genocide within the purview of the convention whether they are taken to apply to the destruction of an ethnic or religious group as defined by Lemkin, or to the meaning given at Nuremberg, or to the criteria enunciated by the UN. One can

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[73] Ibid, p. 54
[74] Ibid, p.56

see that the various conceptions of genocide do overlap and the physical liquidation of a large number of Armenians in 1915 was an act that constituted genocide and is thus punishable under international law.

Appeals for recognition of the Armenian genocide have started since the adoption of the UN convention on genocide in 1948, and continues unabated. In Soviet Armenia, as well as in the diaspora, hope was high that a convention on genocide might bring the chances for justice and redress. Turkey in turn, has, ever since the end of the war, been denying that genocide had occurred. It has taken the side of the allies and exhibited a solid engagement to the West by joining NATO. During the cold war, Turkey's geographical location served as an important observation post for NATO, and its resources have attracted Western capital. Turkey knew how to exploit Western interests in order to forestall intervention in its regional and domestic affairs. Turkey got away with its invasion of Cyprus and occupation of its northern part. Neither NATO nor UN measures were even taken against it. The Turks have been relentlessly striving to suppress any Armenian or other efforts to bring about the recognizing of the genocide. Turkey's crusade against recognition was especially intensified when the sub-commission on the Prevention of Discrimination and Protection of Minorities started its research concerning the genocide in 1972. [75]

During the 26th cession of the Sub Commission in 1973, Mr Nicodemde Ruhashyankiho, a Rwandan expert, was assigned the task of commencing a study on the Armenian genocide. Paragraph 30 of the completed research findings of the sub-commission stated: "Passing to the modern era, one may note the existence of relatively full documentation dealing with the massacres of Armenians, which have been described as "the first case of genocide in the 20th century".[76] During the next cession of the sub commission, the report was appraised in the absence of the rapporteur. In the course of evaluation, the Turkish delegate intervened to criticize paragraph 30 of the document, and demanded its removal under the pretext that it was based on the myth of the Armenian

[75] Varoujian Attarian. Le genocide des Armeniens devant L'ONU. Editions Complexe, 1997, pp56-57
[76] Ibid, p. 58

genocide. A number of delegations supported the Turkish delegate including Pakistan, Italy, Irak, France, Tunisia, Nigeria, USA, Austria, Iran, and Romania. Turkey succeeded through its diplomatic tactics to remove the said paragraph from the report.[77] The final version of the report was presented in 1978. The historical section, which was supposed to cover the Armenian genocide, was replaced by the Jewish genocide. The final responsibility for the study rested with the rapporeur, who explained the matter in the following terms:

"Concern had been expressed that the study on genocide might be diverted from its intended course and lose its essential purpose. Consequently, it had been decided to retain the massacre of the Jews under Nazism, because that case was known to all, and no objections had been raised ; but other cases had been omitted because it was important to maintain unity within the international community in regard to genocide, and in many cases to delve into the past might reopen old wounds which were now healing" [78]

One of the milestones of the issue of the Armenian genocide was what the Whitaker report disclosed. The special rapporteur Ben Whitaker who was asked to "revise as a whole and update the study on the question of the prevention and punishment of the crime of genocide". In his report Whitaker recognized the genocide of the Armenians. The report " backed charges that at least a million Armenians died this century in an act of genocide. Whitaker said the genocide charge was corroborated by reports in US, German and British archives and by diplomats serving in the Ottoman Empire at the time". The report was accepted by 14 votes, one against, and four abstentions. However, the decision contained no request that the study be passed on to the UN human rights commission.[79]

The struggle between recognition and denial continues. Only recently the French parliament passed a bill in which Turkey was formally accused of committing genocide in 1915. Turkey angrily responded by recalling its ambassador from Paris, and its Minister of State Rustu Kazim Yucelen accused France of having "made a mistake in the face of history" in unanimously passing the bill, and contended that "the vote will cause

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[77] Ibid, p. 59
[78] Leo Kuper. Genocide: Its political use in the 20th century. Yale university press, 1981, p.220
[79] Israel Charny. Encyclopedia of Genocide. Institute of the Holocaust and Genocide, 1999, p. 581

great and lasting harm to relations between Turkey and France...it opens a road to a serious crisis in our relations". In addition Yecelan stressed on the damage the bill will cause to the economic ties between the two countries and to regional peace.1 Taking concrete measures, Turkey announced that it had cancelled a 149 million satellite contract with France based Alcatel and may exclude French state owned arms maker GIAT from a tank tender, worth 7.1 billion.[80]

Some Turkish bureaucrats are anxious that confession of any sort of responsibility for the Armenian genocide would expose Turkey to the three Rs – recognition, reparations, and perhaps even the restitution of territory.[81] Therefore, the denial is ongoing. Turkey continues to claim that the death of the Armenians resulted from partisan killing during the collapse of the Ottoman Empire.[82]

The US State Department under several administrations has continuously referred to the crime as an "alleged genocide" and has stood against commemorative events bout the genocide, due to the US important political and economic interests with Turkey. According to Charny: " The executive branch of the US government has several times devoted its full energies to diverting the congress from passing legislation that would have created a ceremonial day of remembrance of the victims of the Armenian genocide"[83] 74. More recently, the US Congress abandoned a genocide resolution promoted by Armenian pressure groups as a result of the intervention of US president Bill Clinton.[84]

In Britain, the Armenian community has accused the British government of placing politics above principle when it failed to give a more central place to Armenian suffering in the newly-declared Holocaust commemoration.[85] The Foreign Office accepts that the massacres took place, but insists that they do not qualify as genocide.[86]

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[80] "Turkish warning over genocide claims" CNN News, January 24, 2002
[81] "Debating genocide" TIME Europe, 2001
[82] "Turkey takes action in genocide row" CNN News, January, 18, 2001
[83] Israel Charny. Genocide: A critical bibliographic review. P.74
[84] "Turkish warning over genocide claims" CNN news, January, 14, 2002
[85] "Debating genocide" TIME Europe, 2001
[86] "Turkey prepares for diplomatic row" The Times, January 25, 2001

There have also been continuing efforts on the part of the Turkish government to channel funds into research in order to discredit scholarship on the Armenia genocide. An institute of Turkish studies has been established in Washington in 1982 for that purpose. The institute supported by the Turkish government, has been funding American scholars to revise the literature on the Armenian genocide and bring new interpretations to historical facts in order deny the occurrence of genocide.[87]

[87] Roger Smith and Robert Lifton. "Professional ethics and the denial of the Armenian genocide. Genocide and Holocaust Studies. Vol: 9:1 (1995)

CASE STUDY#2: CAMBODIA

A. The Cambodian genocide

Subsequent to its independence from French colonial rule in 1954, Cambodia was governed by prince Norodom Sihanouk, a dictator who strove skillfully to keep Cambodia in a neutral position regarding its neighbors and the superpowers. However, the war in the neighboring Vietnam was soon to haul Cambodia into a thorny crisis. By the mid 1960's parts of Cambodia's eastern provinces were serving as bases for North Vietnamese Army and Vietcong (NVA/VC) forces operating against South Vietnam. No soon had the Americans intervened in South Vietnam, than American and South Vietnamese armies trespassed over Cambodian territory. The Americans launched their first attack on North Vietnamese sanctuaries in Cambodia in 1969. The following year, one of Sihanouk's US backed generals, Lon Nol, overthrew him.[88]

Between 1970 and 1973 Cambodia was subject to massive US bombardments, resulting in the death of 150 000 Cambodians. From within rural Cambodia emerged the communist party of Kampuchea, formed by a group of leftists including Son Sen, Ieng Sary and Saloth Sar, the latter became subsequently known as Pol Pot and assumed the primary command of the party. These insurgents called themselves the Khmer Rouge and were supported by North Vietnam. Within months, the Khmer rouge developed into quite a formidable force and less dependent on the North Vietnamese. The independently assumed the fighting against the US backed Lon Nol government, and South Vietnam[89]. In April 1975, the Khmer rouge destroyed the Khmer republic of Lon Nol and became the ruling power in Cambodia. The new regime they imposed became known as Democratic Kampuchea. (No longer Cambodia) However, once in power, the Khmers undertook one of the severest atrocities in human history, before being overthrown by the Vietnamese military invasion in December 1978.

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[88] "Cambodia: Background notes". Bureau of East Asian Affairs. January, 1996

[89] George Andreopoulos, ed. Genocide: Conceptual and historical dimensions. University of Pennsylvania Press, 1994, p. 194
For a recent account of the present politics in Cambodia, see Marven C, Ott. "Cambodia: Between hope and despair." Current History. Vol; 96 (1997)

1.Khmer ideology

Khmer ideology professed the creation of a socialist Cambodia. Accordingly, Pol Pot and his colleagues sought to implement utopian policies, which were believed to lead democratic Kampuchea to socialism the fastest way possible. A four- year plan agricultural work was launched. It was to be achieved through the combined efforts of all peasants with the aim of doubling the agricultural production, especially in rice, as well as doubling exports to have the resources for industrialization.[90] Staub, in *Cambodia: genocide to create a better world* provides an account of the Khmer ideology: In his words,

> The major tenets of the Khmer Rouge ideology were to create a society organized around the soil, a peasant society in which life was to be communal. Neither private property, knowledge, nor pleasure was to differentiate people or separate the individual from the community. Social leveling was one aim of the evacuation of cities. Life was to be simple and ascetic. Everyone was to have the status of a simple peasant.[91]

The communists also tried to establish a purely barter economy. People were supposed to despise wealth and money. Upon their victory in Phnom Penh, the communist troops destroyed money. Technology was mistrusted and destroyed, except for some factories producing goods deemed absolutely essential, mainly for agriculture. The Pol Pot group mistrusted everyone: the people, especially the "new" people; communists with a background or beliefs different from their own, and other countries, especially Vietnam.[92]

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[90] Ian Mabbet & David Chandler. The Khmers. Blackwell Publishers, 1995, p.248
[91] Ervin Staub. The roots of evil: The origin of genocide and other group violence. Cambridge University Press, 1989, p. 194
[92] Ibid, p. 195

2.The execution of the crime

1.The partial destruction of the national group.

The Khmer Rouge's agricultural plan was launched by a forced evacuation of all cities and towns. Over 2 million men, women and children were dispatched to take up agricultural work in the villages. The Khmers believed that only peasants and manual workers were worthwhile members of society. Workers had to produce three tons per hectare of threshed rice. It was foolhardy to think of such a yield, knowing that the country had just come out of a devastating war, and was extremely poor.[93] Moreover, the workers had no incentive for working without rewards. What came about of Pol pot's four –year plan was a disaster since surpluses were drawn off by the state, and those who produced them starved to death. At the end of 1976, a large number of party members were purged for being suspected of affiliating with foreign influence and undermining the revolution. Others died due to ill conceived and poorly built irrigation works.[94]

The genocidal campaign was aimed at all "those who fit into certain social and political categories". After eradicating civilian and military establishments, Khmers targeted all those tainted by education as civil servants, doctors, lawyers, soldiers and teachers. They were said to have killed a large number of soldier's wives and children. "Their lives must be annihilated down to he last survivor". This was the Khmer slogan most commonly used.[95]

The Khmers used heavy propaganda mostly on the radio in their genocidal campaign. They used the radio to broadcast slogans and inculcate abhorrence against those who were not of peasants stock. A sample of their slogans was "*What is infected must be cut out,*" "*what is rotten must be removed*", *and* "*what is too long must be*

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[93] Op.cit, p. 247
[94] Ibid, p. 249
[95] Frank Chalk and Kurt Jonassohn. The history and sociology of genocide: Analyses and case studies. Yale University Press, 1990, p. 404

shortened and made the right length." They conceived of certain groups as "legally prohibited, sociologically dissolved, and as necessary, physically liquidated". To justify the failure of their economic reform program, the Khmers laid the blame on their own cadres, convicting them of sabotage with foreign agents. Thus, many were forced to confess false accusations as agents of the soviet KGB or the American CIA. Those falsely accused were many. A list found at Tuol sleng, one killing center, reveals that around 1000 Khmer rouge soldiers, 324 workers from various factories, 206 officers of the pre revolution army, 113 teachers and professors, 87 foreigners, 148 intellectuals, 194 students, doctors, and engineers, were all liquidated under this pretext.[96]

Sociological dissolution for the Khmer rouge was translated in words such as *khacha tkhnchay osroling* meaning "scatter them out of sight or scatter them to the least one". [97] Family members were forced to watch as their husbands and sons and daughters were killed. The government incited children to spy on their parents and neighbors. In some way it was a policy aimed at breaking the nuclear family. The aim was to kill all enemies or any body who did not blindly follow Khmer vision of their new world[98].

Thousands of Cambodians perished due to hard labor, chronic malnutrition and lack of sanitary equipment and medical care. The Khmers prohibited the peasants from collecting the agricultural produce and allowed them to starve to death. Along these were the daily executions performed by the Khmers. Any one who deviated from Khmer's orders was instantly murdered. The Khmers established interrogation prisons and execution centers all around the country to "identify those to be eliminated". The S21 was an extermination center where 20 000 were killed and from which only 7 survived[99].

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[96] Ibid, p. 407
[97] Israel Charny. Genocide: A critical bibliographic review. Institute of international conference on the holocaust and genocide, p.9
[98] Ervin Staub. The roots of evil: the origin of genocide and other group violence. Cambridge University Press, 1989, pp. 188-193
[99] Op.cit, p. 140

2. The complete destruction of a religious group;

Pol Pot's group sought to purify democratic Kampuchea from all the imperfections that were conceived incompatible with the Khmer ideology. They destroyed Buddhist temples or turned them into places for secular use namely warehouses, animal stables, prisons and execution centers. All aspects of Buddhist culture including statutes, literature, religious handcraft and other remnants were obliterated. Buddhist language as well as prayer and worship were forbidden. For the Khmers, Monks were "leeches, and bloodsuckers". The Khmers forced monks to "disrobe" thus denying them monkshood. Those who refused to do so were executed. They also forced other monks to carry out manual labor, something a monk is not entitled to do". In 1975 the number of monks in Cambodia was estimated at 6000. By 1979 only 3000 survived. Some were executed, others starved, while others were forced to marry.[100]

3. The substantial destruction of an ethnic group:

The minority groups that were most brutally treated by the Khmer rouge were the Vietnamese, the Chinese and the Muslim Chams. These minorities combined made up more than 15 % of the Cambodian population. However, the Pol Pot regime, unlike other communist regimes, strove to deny such groups the right even to exist. More than 100000 Vietnamese were deported from the country while the rest were killed. It was "a campaign of systematic extermination"[101]

As for the Chinese, only 215 000 out of 430 000 survived the disaster. Since ethnic Chinese were mostly urban dwellers, they were targeted as prisoners of war, not to be executed because of their race. However, they were forced to work harder than urban

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[100] Ibid, p. 138

[101] George Andreopoulos, ed. Genocide: Conceptual and historical dimensions. University of Pennsylvania Press, 1994, p. 198

For a thorough study of the events in Cambodia during the PolPot regime, *see* Ben Keirnan. The Pol Pot Regime: Race, power, and genocide in Cambodia under the Khmer Rouge. NH: Yale University Press, 1996

dwellers. As a result, many Chinese died out of hunger and disease. Their language was banned and their cultural and distinctive traits erased. According to kieman, this persecution could be described as genocide. Smaller ethnic minorities also got their share of the annihilation plan. Among the 20 000 Thais, only 8 thousands survived. While out of the 1800 Laos families only 800 remained alive. [102]

The Muslim Chams, who numbered around 250 000 in the year 1975, were a truly distinct group. They had a totally different religion and language. The distinctiveness of the Chams was perceived by Pol Pot as dangerous on Khmer ideal society. Once the Khmers were in power, the cham minority was subjected to all sorts of discrimination and maltreatment. All aspects of Islamic culture including religion, education and language were banned. Korans were collected while many Moslems were forced to eat pork, and in case of refusal, murdered. On a number of occasions, chams were massacred and their homes pillaged. 113 cham villages were emptied of their inhabitants. Around 100 000 Chams were butchered, while others became homeless and destitute[103].

4. Tolls

According to a study undertaken by the Documentation Center of the Cambodia genocide program funded by the US government and administered by Yale university, 1.7 to 2 million (24% of a population of 7 million) were eradicated as a result of execution, torture, starvation and disease.[104]

B. The Cambodian genocide under international law

It has not been clear whether the acts committed by the Khmer Rouge in Cambodia in 1975 fit properly into the purview of the Convention on Genocide. At the same time, although it was known to the world at the time that the Pol pot group had committed terrible crimes against humanity in Cambodia, action to bring perpetrators to

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[102] Ibid, pp 198-199
[103] Ibid, p. 199
[104] "Death tolls vary, but all are staggering". The New York Times, April 17, 1998

justice was taken only a few years ago. One may ask: Is it the ambiguity of the law on genocide that was a major factor in hampering the course of justice or is it cold war power politics? It is very likely that both factors account for the delinquency of the international community to bring justice to the Cambodian people.

1.Diverse views

According to Chalk and Jonasasohn,

> "The Genocide in Cambodia represents an explosion of virulent ideologically motivated killing. The world cannot afford to ignore this form of genocide simply because most of its victims were not selected as members of racial, religious, or ethnic groups. The definition of genocide must be broad enough to encompass the case of the Khmer Rouge in Kampuchea."[105]

Ratner, on the other hand, views the events in Cambodia as fitting perfectly into the UN genocide definition. "The Khmer rouge subjected the people of Cambodia to almost all of the facts enumerated in Article 2 (a) through (e) of the genocide convention during their rule."[106]

Ratner further maintains that the available literature shows that the Khmers carried out genocide against the Cham minorities, the ethnic Vietnamese, Chinese, and Thais as well as the Buddhist monks, as part of religious groups. Although there is diversity of opinion regarding this matter, Ratner argues that proof of the Khmer rouge intent to eradicate these groups is available in Khmer rouge records and statements, eye witness accounts and the nature and number of victims in each groups. As for the Buddhist monks, the explicit Khmer open hostility towards religion, was apparent in their statements as well as in the acts of disrobing and killing monks as a policy for eradicating

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[105] Frank Chalk and Kurt Jonassohn. The history and sociology of genocide. Analysis and cases studies. Yale University Press, 1990, p. 407

[106] Steven Ratner. Accountability for human rights atrocities in international law: Beyond the Nuremberg legacy. Oxford University Press, 1997, p. 244

their identity. Each of the groups enumerated finds legal coverage, since their plight falls within the scope of the convention and is therefore protected.[107]

The problem, however, lies in the interpretation of the Convention with respect to the Cambodian national group itself. It has been commonly observed that the Khmers committed atrocities against other Khmer without intending to destroy the national group as such. Some contend that the Khmers only killed those Khmers who did not profess their philosophy or ideology. These victims did not qualify as either political or economic groups. Rather, they were a segment that simply did not fit the vision of Khmer nation. [108]

According to Ratner, the Khmers constituted a national group within the meaning of the Convention. However this categorization lends itself to two suppositions: The first is that the Khmers killed could have been targeted as a result of their affiliation with a certain political economic or professional group, or secondly, simply lost their lives as a result of random harsh treatment imposed on the society as a whole. Ratner sees that the crime of genocide fits the second supposition, not the first.

Ratner maintains that the fault lies in the ambiguity of the convention itself. Its drafters created it in the context of WW2, and it was formed to incriminate the perpetrators of the Jewish holocaust. It failed to address the mass killing of one segment of a group by another segment of that same group. In the case of the Cambodian genocide, therefore, a court would have a hard task applying the genocide convention, for it will have to stretch the interpretation of the convention considerably. [109]

Within its narrow scope, it is quite hard, Ratner explicates, to confirm that the Khmer Rouge committed genocide against the Khmer national group, for the available evidence is not enough to show it. What has been revealed in the available literature on the matter was that Khmer killed only those Khmers that fit into certain social and

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[107] Ibid, p. 244
[108] Ibid, p. 245
[109] Ibid, p. 246

political classes that could not be absorbed into Khmer vision, and are not protected by the convention.[110]

2. Bringing the perpetrators to justice

Despite the controversy over the applicability of the Convention on Genocide in Cambodia, attempts at prosecuting the perpetrators of the genocide had started upon the invasion of Cambodia by Vietnam, and continues till our present day. However, the issue of bringing the initiators of the genocide to justice oscillated in different directions, and the positions of the United Nations and the United states have changed parallel to changes of the climate of power relations.

On January 10 1979, Vietnam invaded Cambodia, brought down the Pol Pot regime, and established the People's Republic of Kampuchea. The new government did keep some of the old Khmer rouge cadres who were against Pol Pot and who fled purges by seeking refuge in Vietnam. Pol Pot and Ieng Sary were tried in absentia and found guilty of genocide. They were both sentenced to death. Meanwhile the Vietnamese armies pursued Khmer Rouge forces, which eluded Vietnamese troops and established themselves in remote regions. However, the PRK resolved to bring the Khmer criminals to justice. It was a way of consolidating its political and legal power. The Vietnamese accused the Khmer rouge of committing genocide, irrespective of the genocide convention. Yet, the Khmers remained unpunished for the main reason that there was no international recognition of the genocide that happened. The main violator of international law was considered to be Vietnam, not the Khmer rouge. That was the American interpretation of justice at the time. Hence, "The Khmers retained their seat in the UN general assembly and had the support of the US and China who used Khmer Rouge forces as a proxy for opposing its cold war adversaries, the Vietnamese and their main supporter, the former Soviet Union." The US with the support of its allies strove to

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[110] Ibid, p. 246

keep the PRK as isolated as possible from the international community while supporting the Khmer Rouge. [111]

According to Kiernan,

> "Along with china which supplied arms and Thailand which supplied sanctuary, the US was instrumental in rescuing the Khmer Rouge after its 1979 defeat by Hanoi. From 1979 to 1981, the US led western nations in voting for the Khmer Rouge to represent heir Cambodian victims in the UN. In 1982, Washington helped prod two pro-American into a Khmer rouge dominated alliance and for more than a decade the US has rejected all opportunities to take individual or collective action against the Khmer rouge" [112]

In its turn, the International Community did not exert much effort to bring the perpetrators of the mass killings in Cambodia to justice. During the session of the Commission on Human Rights in 1979, a report on Kampuchea was presented by Mr. Boudhiba, chairman of the Sub Commission on Prevention of Discrimination and Protection of Minorities. The committee described the events in Cambodia as auto genocide and were the "most serious that had occurred anywhere in the world since Nazism". A proposal was tabled by the Australian, Canadian, Swedish, and English representatives, which registered the Commission's view that blatant violations of human rights took place in Cambodia and that the commission would review the case again in 1980.[113]

Despite the agreement that there were gross violations of human rights in Kampuchea, the case was not aggressively pursued. Yugoslavia, acting on behalf of (Benin, Egypt Pakistan, Senegal, Syria and Yugoslavia) could convince a large majority to shelf the Cambodian case to a later date. Kuper was of the opinion that "the issue was rather one of real politics connected with the invasion of Cambodia by Vietnam. In any event, whatever the motivation of the members, the commission had succeeded in

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[111] Georges Chigas. "Concerning the Khmer Rouge" Bangkok Post, March 19, 2000
[112] George Andreopoulos, ed. Genocide: Conceptual and historical dimensions. University of Pennsylvania press, 1994, p.207
[113] Leo Kuper. Genocide: Its political use in the 20th century. Yale University Press, 1981, p. 173

evading even a mildly phrased condemnation of the Cambodian regime. Once again the commission had risen above principle". [114]

Pol pot's government in exile retained American recognition while severe sanctions were imposed on Vietnamese occupied Cambodia.[115] American support to the Khmer Rouge continued until 1989. The break up of the Soviet Union brought new perspectives to American foreign policy. Now the Americans resolved to prosecute the Khmer Rouge for their crimes committed in 1975.

The Vietnamese occupation of Cambodian ended in September 1989. That same year, the UN Secretary General met with the representatives of 18 countries along with Cambodian parties to discuss some sort of arrangement in order to verify the withdrawal of remaining Vietnamese troops from Cambodia, contain Khmer rouge remnants and help Cambodian people achieve self-determination. This was followed by the Paris Agreement concluded by the Cambodian parties and 18 foreign ministers. The agreement paved the way for the establishment of the UN Transitional Authority in Cambodia UNTAC on October 23, 1991. UNTAC's task was to "supervise a ceasefire, repatriate the displaced Khmers along the border with Thailand, disarm and demobilize the factional armies, and prepare the country for free and fair elections". However it was not given a mandate to pursue trials of the former Khmer Rouge criminals.[116]

UNTAC sponsored national elections in 1993. As a result, a constitutional monarchy, known as the Royal Cambodian Government, or RCG was established, headed by king Norodom Sihanouk, and Norodom Ranarigh and Hun Sen as first and second prime ministers. The general assembly was formed of 120 members representing four political parties. The Khmer Rouge were outlawed in 1994, while retaining positions within the government, through the party of Democratic Kampuchea, in exchange for their defection from Khmer Rouge forces. A trial of the Khmer rouge was now supported

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[114] Ibid, p. 173
[115] Seth Mydans. "Death of Pol Pot: A smiling face couldn't disguise a million deaths". The New York Times. April 10, 1998
[116] George Chigas. "Concerning the Khmer rouge" Bangkok Post, March 19, 2000

by the US on moral grounds. It was also encouraged by the International Donor Community as an index for assessing the reliability of the Cambodian government's legal and economic institutions.[117]

3. The US resolve to pursue Khmer rouge

On April 30 1994, the US Congress passed the Cambodian Genocide Justice Act, which "asserts the policy of the United States to support efforts to bring to justice members of the Khmer Rouge for their crimes against humanity committed in Cambodia between April 17, 1975, and January 7, 1979." American efforts for that purpose were sustained until 1998 when the Clinton Administration resolved to bring the perpetrators of the Cambodian genocide to justice. The first step in that direction was to ask the Cambodian government not to give amnesty to senior Khmer rouge officials and to proceed with eth establishment of a tribunal to prosecute the 10 responsible perpetrators of the genocide. The second task proved somewhat problematic.[118]

One of the options the Americans proposed was the expansion of the jurisdiction of the tribunal for the former Yugoslavia to cover the Cambodian case. However, this possibility was challenged by China, a Khmer Rouge ally. Other alternatives were either to find a country which laws allow universal jurisdiction, or conduct trials in Cambodia itself.[119]

In June 1997, (even before the US resolve was translated into action) the Cambodian government had asked for UN assistance in "bringing to justice those persons responsible for genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979". In August of that same year Cambodian officials met with a

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[117] Ibid
[118] The Cambodian Justice Act
[119] Steven Erlanger. "US steps up effort to bring Khmer Rouge officials to trial". The New York Times. April 18, 1998.

UN team of legal experts to discuss the establishment of an international tribunal to try the offenders.[120]

At some point the options regarding the projected tribunal were narrowed to a UN tribunal or a Cambodian court. Some legal experts argued that the UN has more experience and resources for such a task. However, the fact that the UN hosted Khmer Rouge representatives for over 13 years after the genocide was committed and did not attempt to prosecute the perpetrators put the organization in an embarrassing position. On its part, the Cambodian government insisted that the trials be conducted in Cambodian courts. The UN could either provide legal experts to work with Cambodian lawyers in a Cambodian run trial, or provide legal experts without taking part in the trial. The UN may also stay entirely out of the picture, leaving the entire process to the Cambodian courts. [121]

A number of suspects are put on the accusation list. Nuo Chea, second in command to Pol Pot, Ta Mok, the military commander known as the butcher who was responsible for committing mass murder; khiew Samphan, formal president of the regime and close ally to Pol Pot, Ieng Sary, foreign minister and Keo pok, responsible for executing collaborators with lon Nol and thousands of Muslim Chams and other crimes.[122]

The year 1998 registered the death of Pol Pot as a result of a presumed heart attack. Later, keo Pauk fell ill, Nuon Che and khiew samaphan surrendered themselves, and Ieng Sary was given amnesty.[123]

Despite the developments mentioned above, the UN persisted in its efforts to pursue the case of Cambodia of Pol Pot. But the case of Sary posed a problem with implications. Cambodia's prime minister Hun Sen has repeatedly proclaimed that

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[120] Sharon Sok. "New momentum for Khmer Rouge trial." Bangkok Post, August 5, 2001
[121] Ibid
[122] Steven Erlanger. "US steps up efforts to bring Khmer Rouge criminals to justice." The New York Times, April 18, 1998
[123] Suzan Cook and George Chigas. "Putting the Khmer Rouge on trial" Bangkok Post, October 31, 1999

"prosecuting other khmer rouge leaders is not a problem but prosecuting Ieng Sary is", for Ieng Sary is "the Khmer Rouge's key point man in its relations with China who was responsible of overseeing the provision of Chinese financial and military support for the Khmer rouge". Apparently as observed by Nayan chanda, editor of the Far Eastern Economic Review, "Chinese diplomats have been trying to undermine American diplomats over this issue of the Khmer rouge tribunal. If the US diplomats were pushing for Ieng Sary's prosecution, there is an equally likely chance that the Chinese diplomats are doing the exact opposite".[124]

Despite the fact that power politics hampered the course of justice in the case of the Khmer Rouge, justice can still be served. The present mood of the international climate is conducive to the prosecution of the Khmer Rouge. However, in pursuing this objective, the perseverance of the international community, particularly the US, France, Australia, ASEAN and others, who have so far mostly been involved in the process, is central. The concerted efforts of nongovernmental organizations such as Amnesty International, Human Rights Watch, International Lawyers for Human Rights and Cambodian human rights groups, will also have to be brought to hear on the national and international decision makers to bring forth the course of justice.[125]

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[124] Sharon Sok "New momentum for Khmer Rouge trial" Bangkok Post, August 5, 2001
[125] Suzan Cook and George Chigas."Putting the Khmer Rouge on trial" Bangkok Post. October 31, 1999

CASE STUDY#3:RWANDA

A. The Rwandan genocide

The Rwandan genocide illustrates one of the most infamous and exhaustive carnages in human history. However, it is quite difficult to understand its courses, for the massacres that occurred between the two main groups namely, the Hutu and the Tutsi, were not the result of cultural or religious cleavages between them. In fact, it is hard to describe the Hutu and the Tutsi as two distinct ethnic groups, for they both share common customs and a common language. One could however, point to social class differences in the country, but classes in Rwanda did not correspond to ethnic or racial differences. A number of scholars on African affairs maintain that hatred between Hutu and Tutsi was the fruit of colonial influence, whose makers spurred hatred between the two communities by supporting one against the other, and consequently instigating the outburst of several genocidal episodes. In 1994, hatred reached its peak and culminated in the most horrendous genocide Rwandan history has ever recorded.[126]

1. The effect of colonialism

Prior to Belgian colonialism, the Rwandan sects lived in relative peace. The Hutu majority were farmers, while the Tutsi minority was the ruling aristocracy who collected tribute from other groups. Although there was a class disparity between the two major groups, yet they could peacefully coexist. It was possible for an enriched Hutu to attain the rank of a Tutsi and vice versa. Hutus were also allowed to prevail in their localities. When the Belgians colonized Rwanda, however, matters changed. They ruled through a local Tutsi elite. They confirmed and extended the Tutsi hegemony to districts primarily under Hutu leadership. In 1929, the Belgians reformed the provincial administration that

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[126] Alain Dexte. Rwanda and genocide in the 20th century. London: Pluto Press, 1995, p. 9

had reserved one third of the posts to Hutu chiefs and revoked them to Tutsis. Belgians used to issue mandatory identity cards that would help eliminate fluid movements between castes and fix the identity of each individual with his family as either Hutu or Tutsi. This facilitated the tasks of the architects of the 1994 genocide as they sought to isolate their Tutsi victims.

Upon consolidating more power, the Belgians allowed increased Tutsi exploitation of the Hutus. When the Belgians were pressured by the UN to grant independence to Rwanda in the 1950's, they shifted their policy and started giving the Hutu majority access to education. What this turnabout in policy did was alarming the Tutsis without satisfying the Hutu. Consequently, fearing each other, both groups were eager to defend their interests. Their fears turned into a militant confrontation. The real communal violence erupted in 1959 as a result of an assault by a Tutsi extremist on a Hutu leader. In December 1963, 10 000 Tutsis were slaughtered by Hutus, while 130000-150000 were driven out of their homes and forced to flee to Uganda and Burundi. Events of this nature persisted to culminate in the disastrous genocide of 1994.[127]

2. The road to genocide

In 1990 the Tutsis launched an offensive and succeeded in occupying the North Eastern areas of Rwanda, which caused the Hutus to react with intensity against their rivals. The RPF (Rwandan Patriotic Front, the Tutsi military movement that attacked the Hutu) had already started forming in 1986 in the neighboring Uganda. It aimed at invading Rwanda and overthrowing the Hutu regime of president Habyarimana. After three years of ongoing battle between the two groups, there were peace efforts in order to bring an end to the crisis. Habryarima was proposed to sign peace accords with the RPF, which would grant the latter a share of political power and military presence in the capital Kigali. Despite the opposition by many Hutu extremists, including high level government officials and military personnel, Habyiriama succumbed to international pressures and signed the accords. This step angered Hutu extremists who accused him of betrayal, and

[127] Yahya Sadowski. "Ethnic conflict." Foreign Policy. Summer 1998, N:111

led to his assassination on April 6 1994. That act was the direct cause of the eruption of the genocide.[128]

3. The genocide

- The parties involved

As soon as Habryama'a plane was shot down on April 6 1994, genocidal hatred exploded and the butchery began. It developed over the next four months targeting thousands of Tutsis and moderate Hutus. The genocide was directed by the Hutu-led government with its parties, armies and militias.

The Hutu parties involved in the massacres were a wing of the *"Mouvement Republique National pour le Development"* (MRND), and the Coalition for the Defense of the Republic (CDR), both of which sponsored a racist ideology against the Tutsis. The two parties, with the help of the army and those in power, maintained control through "the formation of militias and manipulation of the media" which became instruments in genocide. The militias involved in the killing were the *Interhamwe*(those who attack together) and the (*Impuzamugamb*, (those who only have only one aim). Together with members of the MRND and CDR, they spread terror and undertook "punitive expeditions" against the terrified Tutsi and moderate Hutus. [129] The parties and militias were commanded by a group of Rwandan government officials under the leadership of a retired army colonel, by the name of Theoneste Bagosora, who was posted as an acting defense minister following Habriyama's death. He organized the genocide and formed an inter-government to sustain it. Bagosora worked hand in hand with the wife of Habriyama, who was one of the main architects of the genocide.[130] Thus, just like in Armenia and Nazi Europe, the crime was planned, organized and directed from above and executed with the help of passively obedient citizens[131].

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[128] "Rwanda: Accountability for was crimes and genocide." From the United States Institute of peace.
[129] Alain Dexte Rwanda and genocide in the 20th century. Pluto Press, 1995, p. 29
[130] Gerard Prunier. The Rwanda crisis: History of a genocide. Columbia University Press, 1995, p.261.
[131] "Au Rwanda, le genocide tel qui s'est produit" Monde Diplomatique, 1999

The role of propaganda

Propaganda played a significant role in adding to the intensity of the genocide. Although the information infrastructure in Rwanda was quite defective, the perpetrators executed their crime in a highly premeditated and systematic way. The criminals broadcasted anti Tutsi messages through *the Mille et une colline* Radio and TV station,(RTLM), established by Hutu radicals in 1994. The station was directed at a large Hutu audience, with the aim of mobilizing them against the Tutsis who were repeatedly labeled as vile conspirators against the Hutus.[132] One of the main inciters to genocide was monsieur Georges who ran a program on the *Mille et une colline* station in which he publicly described the Tutsis as cockroaches, and "used the radio to tip off rampaging Hutus to the whereabouts of fleeing Tutsis"[133]

According to the RTLM broadcasts, "a person who did not have his identity card should be arrested and may lose his head". Specific vehicles, such as red vans allegedly "full of accomplices," were identified, and license numbers indicated. The red van, which was carrying François Ncunguyinka, a former prefect of Gisenyi prefecture, and his family, was halted at a roadblock and all its passengers were killed. Hutu listeners were praised by the RTLM for their "heroic efforts", and incited the slayers to murder.[134]At the end of April 1994, *Radio mille et une colline* repeatedly broadcasted the following: 'By may 5, the country must be completely cleansed of Tutsi, we will not repeat the mistake of 1959. The children must be killed too." The monthly journal Kangura had also been promoting a racist ideology against the Tutsis ever since the 1990's.[135]

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[132] Jamie Metzel. "Rwandan genocide and the international law of radio jamming" American Journal of International law. Vol: 91:4 (1997), p. 628
[133] Thomas Omestad. "The voice of the hate radio" US News and World Report. December, 2, 2000
[134] Alain Dexte. Rwanda and genocide in the 20th century. Pluto Press, 1995, p.33
[135] Ibid, pp. 33-34

The execution of the crime

Death lists had already been circulating prior to the public announcement of Habryama's death. They were distributed to "facilitate the identification of Hutu opponents, mostly those who supported the democratic movement or promoted human rights" Identity cards were demanded by the militias at roadblocks in order to identify Tutsis, and made sure that not a single Tutsi could escape. For that purpose, they assigned each of their men households in order to point out the Tutsis. In this fashion every Tutsi family could be denounced by somebody who knew the members personally; "pupils were killed by their teachers, shop owners by heir customers, neighbor killed neighbor and husbands killed wives in order to save them from a more terrible death." [136]

The criminals separated Tutsis from Hutus and slaughtered them with machetes. Not only Tutsis were murdered, but also moderate Hutus. They were all chopped and thrown on the roadsides. From Kigali the genocide reached the countryside. Tutsis were lured by government radio to assemble in churches, schools and stadiums, since those could serve as safe havens. It was a ploy used by the Hutus to easily target the Tutsis. Thus, after they would all concentrate in one place, Hutus would viciously attack the helpless Tutsis and moderate Hutus. If by chance the targets resisted, they were shot later by the Rwandan army and presidential guards.[137]

Death tolls

Due to the severity of the situation as well as international neglect, the genocide extended over 4 months with casualties mounting to 800 0000 Tutsi and moderate Hutu killed. The killing was "vicious, relentless, and incredibly brutal". Unlike the holocaust,

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[136] Ibid, p. 31

[137] Philip Gourevitch. We wish to inform you that tomorrow we will be killed with our families: Stories from Rwanda. Farra, Straus, and Giroud, 1998, p.3

the killing took place in the daylight .The architects of genocide undertook their crimes feeling secure that outside interference would be minimal.[138]

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B. The Rwandan genocide under international law

The genocide convention, being the major international legal instrument governing the crime of genocide may, in the eyes of some critics, exclude the Rwandan massacres from the scope of that crime. This view stems from the way the Rwandan society and the events that led to the massacres are conceived. To some, the conflict was not generated by purely and originally ethnic or racial causes. It was according to Dexte, the ethnic classification introduced by the Belgians that served as the basic instrument for the genocide of the Tutsi people who were guilty on three counts: " They were a minority, they were a reminder of the federal system, and they were regarded as colonizers in their own country". Thus, he ongoing debates the Rwandan communities appear to have political overtones".[139]

If political factors may be the fundamental cause of the massacres, would not that place the Rwandan events outside the scope of the genocide convention? This interpretation did not seem to carry much weight, for the UN and international community persisted in their view that the Rwandan massacres were actually genocidal. In the trial of Jean Paul Akayesu, who was the first to be accused of the crime of genocide ever since the creation of the genocide convention, the tribunal declared that the Hutus and Tutsis shared nationality, race and religion and could hardly be described as separate ethnic groups. Therefore, they are not technically protected groups under the convention. However, the tribunal could further distinguish the "intent to protect not just the four enumerated groups but any group similar ... in terms of stability and permanence. Such group membership must be determined by birth, in a continuous and often irremediable manner, in contrast with the more mobile groups which one joins through individual voluntary commitment, such as political and economic groups." It was thus

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[138] Linda Melvirn. A people betrayed; The Role of the West in Rwanda's genocide. London: Zeb Books, pp. 5-6

[139] Alain Dexte, Rwanda and genocide and in 20th century, p. 36

declared, however, that "decades of discrimination –by custom of patrinileal descent and by laws, such as the requiring cards that identified each person by the ethnie, or ethnic group, of Hutu or Tutsi-had led the Tutsi to be regarded as a distinct stable, permanent group". Victims were selected in 1994 not as individuals, but because of this perceived ethnic difference. In particular, Akayesu, through his speeches, orders and actions, had demonstrated a specific intent to destroy Tutsi as an ethnic group".[140] Despite that the whole world knew about the massacres in Rwanda, nothing was done to stop them.

1. The failure to take action

All evidence shows that action could have been taken to prevent genocide, but was not. Documents found in Rwanda as well as unpublished evidence disclosed in Security Council debates in NY, together with first hand witnesses, all revealed that there were people who watched and stood by while others contributed to events, and others helped mask the truth. The UN's central task was to prevent a reoccurrence of genocide, but it failed to do so. The only action the Security Council thought of was "to create a committee of experts to evaluate the evidence". The evidence was included in a report, in October 1994,which stated that the extermination of the Tutsi and the moderate Hutu was planned in advance, before government troops and Hutu militia undertook the genocide. Criminal acts that were "concerted, planned, systematic, and methodical" in nature. According to the proof the Security Council had, the genocide convention was undeniably infringed between 6 April and 15 July. [141]

The international community was supplied with information about the Tutsi massacres as well as the provocative RTLM broadcasts, mainly through international news agencies such as the CNN, yet no significant preventive or punitive measures were taken. France and Belgium sent troops to evacuate foreign nationals from Kigali, but themselves lost ten of their soldiers while protecting the Hutu moderate Prime Minister

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[140] Diane Marie Amman. "Prosecutor vs Akayesu". American Journal of International Law Vol: 93:1 (1999) pp 195-199. Another famous case is "Prosecutor vs Kambada." American Journal of International law, Vol: 95:3 (1999), pp. 656-661

[141] Linda Melver, A people betrayed: The role of the West in Rwanda's genocide. London: Zeb books, p. 5

Agathe Uwilimgiyamana. Belgium ordered its soldiers to return home, while the UN decreased the number of troops from 4000 to 450 after the butchery mounted. The UN activities were now restricted to the bare minimum. After the UN troops had evacuated their base at a school, where thousands of Tutsi and moderate Hutu had sought refuge, the "interahamwe militia and the presidential guard stormed the compound and viciously slaughtered the refugees".[142]

Moreover, in order not to be faced with the challenge of applying the Genocide Convention on the Rwanda case, the US did not refer to the tragedy as genocide. It replaced the legal word "genocide" – "with its potential to create treaty obligations" – with the phrase "systematic, widespread and flagrant violations of international humanitarian law". This took shape in a May resolution of the Security Council. After being beleaguered by human rights groups demanding action, U.S. Secretary of State Warren Christopher "agreed that the situation might amount to genocide, the administration was quick to point out that the genocide Convention, in its view, "enables" governments to address cases of genocide, but does not require them to do so".[143] In Europe, the events in Rwanda were seen in a way not very different than the way they were seen in the US. The same thing happened elsewhere. The word genocide was barely used over the Rwandan case. English and French press described events as part of a civil war. They flashed headlines such as "Rwanda on fire", "fierce clashes", "slaughter", "massacre", "civil war', "bloody horror", "Rwanda anarchy" "fall of Kigali imminent". It was only three weeks after the massacres started that the CNN referred to the events in Rwanda as genocide even comparable to the Jewish holocaust.[144] Still nothing concrete was done to stop the carnage. No measures were even taken to jam the radio, which was inciting killers to carry out the genocide. Defense department officials considered that such action as illegal and technically unfeasible.[145]

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[142] Rkiyya Omar and Alex Dewal. "US complicity by silence." Covert action Quarterly, 1998
[143] Op.cit, p. 229
[144] Alain Dexte, Rwanda and genocide in the 20th century, p. 32
[145] Op.cit, p. 230

2. Who bears the burden of responsibility?

Former UN secretary general Boutros Guali held the Americans accountable for what came about. Ghali divulged that he had several meetings with both US Madeleine Albright and British ambassador David Hannay in which he insisted on taking action to discontinue the horrible calamity. They would answer: "come on Boutros, relax...Don't put us in a difficult position ....the mood is not for intervention , you will obtain nothing... we will not move."[146]

According to Guali, the Security Council was properly notified: "Every body knew that the people were Hutu and that it was a war between Hutu and Tutsi. We did not need to tell them that. It was evident". Yet, the Council had submissively followed US guidance. "Had the Council created a UN stand-by force which Ghali had suggested earlier, then genocide might have never taken place", so he said. Guali obviously failed to convince member governments to act.[147]

Failure in halting the genocide is due in part, to an American disinclination to allow the UN to dispatch appropriate peacekeeping missions. American disinclination to allow the UN to act was also due to the American reluctance to foot the bill for such intervention. Boutros Guali's proposal to dispatch 4000 UNAMIR troops to Rwanda was opposed by the US, and the force was downsized to 850. This impeded Belgian and Tanzanian efforts to stop the Rwandan calamity. Even that small force took five weeks to be deployed allowing the death of more than 200000 Rwandans. After the US was asked to provide the armed personnel carriers, APC's, it made conditions even harder. The pentagon "raised its price for leasing 60 APC's and then insisted that the UN also pay for returning the vehicles to their base in Germany". This would cost 15 million with 11 million for transport. When the vehicles reached Uganda and training for their use began,

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[146] Ibid, p. 228
[147] Ibid, p.228

the RPF had held power and brought the massacre to an end. This happened after up to 1 million Rwandans were butchered. [148]

Some believe that the US reluctance to rescue Rwanda from genocide was due to their fear of another Somalia. Africa lost its importance to the US especially after the end of the cold war. Somalia taught Americans that intervention carried with it severe risks, and there were no votes campaigning to help that neglected African state. An observer said that US secretary of state Warren Christopher did nothing but deform the reality of Rwanda. On July 24, 1994, he sated publicly that there has been " tremendous civil war in Rwanda, and that the US had done all it could to try to support the UN, but that it was not a time for the USA to try to intervene."[149]

Deputy assistant secretary of defense James woods said "I think it was sort of formal of the US in disarray and retreat, leading the international community away from doing the right thing and I think that every body was perfectly happy to follow our lead, in retreat." Also upon his visit to Kigali in 1998, Clinton announced: "All over the world there were people like me sitting in offices, day after day, who did not fully appreciate the depth and speed with which you were being engulfed by this unimaginable terror. The international community, together with nations in Africa, must bear share of responsibility for this tragedy, as well. We did not act quickly enough after the killing began... we did not immediately call these names by their rightful name, genocide. Never again must we be shy in the face of the evidence." [150]

Britain, on its part, was also no concerned. David Hannay, the UK permanent representative in the UN explained that the British had no interests in Rwanda and did not even have an embassy there. The British were overwhelmed by the problems in Bosnia and Iraq and did not have enough time and resources to consecrate to Rwanda. Nevertheless, Hanny declared that the UN could have done nothing to prevent genocide,

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[148] Ibid, p.228
[149] Ibid, 230
[150] Ibid, 230

"not with a Hutu led government intent upon it". Britain, however, became more generous after the end of the genocide.[151]

International law was not invoked with respect to the Rwanda case. The Genocide Convention was not even mentioned, as if it did not exist. However international law was mentioned as "the primary justification for America's refusal to jam the radio broadcasts in informal discussions with human rights organizations." Ambassador to Rwanda, David Rawson, in a statement made in May 1994, considered radio jamming as against the principles of international and therefore, practicing it was legally and ethically unfeasible. Administration officials in Washington, D.C communicated the same excuse to human rights groups.[152]

In reiteration of what has been said earlier, the Rwandan tragedy happened after the existence of the law and not before it. So no ex post facto situation could be used as a justification for inaction. Yet, the major signatory states, including the US did practically nothing to prevent it. How could the world flaunt an international law designed to never again allow a holocaust to happen while the world stood by? [153]

3. The International Criminal tribunal for Rwanda

Although nothing was done to prevent the genocide from unfolding, yet action was taken after the genocide ended, in order to bring the perpetrators to justice. It was the magnitude of the crime that urged the international community to act. In July 1994, The ICTR was established in Arusha, Tanzania. It had jurisdiction over war crimes, crimes against humanity and genocide. One of the most important trials conducted by the tribunal was that of Jean kambada, the former interim prime minister, who in may 1998 pleaded guilty to genocide and was sentenced to life imprisonment. Another famous trial was that of Jean Paul Akayesu who was found guilty of nine charges of genocide and was sentenced to 15 yeas in prison. Others are also either prosecuted or awaiting trial namely,

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[151] Ibid, 231

[152] Jamie Metzel. "Rwandan genocide and the international law of radio jamming" American Journal of International Law. Vol 91: 4 (1997)

[153] Rkiyya Omar and Alex Dewal. "US complicity by silence" Cover action Quarterly, 1998

clement Kayishema, former prefect of Kibuye, and his co defendant, businessman Obed Ruzindana, colonel Bagosora , CDR leader Barayagwiza, propagandist and RLTM head Ferdinand Nahimana, MRND president Mathieu Ngirumpatse and former minister Pauline Nyiramasuhuku and her son Shalom Ntahobali". In Rwanda itself, some 120000 people were jailed for participating in the genocide while in late 1998, 22 criminals were executed by the Rwandan government.[154]

[154] Human rights watch., 1999. Leave none to tell the story. p. 744 For a follow up of the tribunal's trials refer to hhtp://www.un.org/incr

CASE STUDY#4: THE FORMER YUGOSLAVIA

The Balkan region has for the last decade been undergoing a sharp resurgence of nationalism and ethnic reawakening. Ever since the demise of communist rule, the area has witnessed the resurgence of ethnic rivalries, accompanied by flares of aggression. The outburst of violence in the former Yugoslavia was the result of quest for independence on the part of the various constituent republics. As Julie Mostor put it

"It was a struggle for national identity, which was tied to presumed common ethnic descent as well as common language, religion, myths and culture. The nation was/is understood as a kind of super family. Such a conception excludes those who are nor members of the dominant national group, and relegates all others to second class citizenship".[155]

The majority claiming autonomy refused to integrate the different minorities into the national body and feared their aspiration for power. Minorities in turn have become radicalized as a result of such refusal. The result was inter- communal conflict, bloodshed, and genocide.[156]

1.Background

The Socialist Federal Republic of Yugoslavia came to existence after WW1. It was formed of six republics namely Slovenia, Croatia, Serbia, Bosnia-Herzegovina, Montenegro, and Macedonia. It also comprised Kosovo and Vodvodina as two autonomous provinces within Serbia. The three major ethnic groups who spread over the constituencies of the federation, namely, the Catholic Croats, the Bosnian Moslems and the orthodox Serbs, could peacefully coexist for over 70 years as a result of balanced government policy imposed by Marshall Tito. After Tito's death in 1980, the country

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[155] Larry Diamond and Marc Plattner. Nationalism, ethnic conflict and democracy. John Hopkins University press, 1994, pp. 132-133
[156] Ibid, p. 104

faced economic decline and political problems. The ruling communist party, weakened as a result of inter-ethnic disputes within its own cadres, called in 1990, for multiparty elections in the several republics, hoping to consolidate its power. The outcome was the termination of communist rule in Slovenia, Croatia, Macedonia, and Bosnia-Herzegovina.

By then, separatist movements in Croatia and Slovenia sought to achieve autonomy from the federation. As a result, civil war broke out between the Serbs and Slovenians. It developed to include the Bosnian Muslims and Croats in Croatia, and then intensified between the Serbs and Bosnians in Bosnia Herzegovina. After peace was reestablished in all republics by the summer of 1992, conflict continued in Bosnia, where Muslims with the support of Croatian allies continued to struggle against ethnic Serbs. The clashes eased in 1995 as a result of the Dayton peace accords concluded under the auspices of NATO and with the supervision of a UN peacekeeping force.[157]

Before and during the period of the conflict, there had been blatant propaganda extensively used by the conflicting parties aimed against one another. The Serbs in particular repeatedly brought up memories of their suffering at the hands of Croats during WW2. Bosnians Muslims were also accused of fighting as collaborators with the Ushtashas against the Serbs.[158] While nationalism was the main force behind the conflict, the religious factor was partially significant. Religious leaders in each region strove to protect religious and cultural traditions against their adversaries. Catholic bishops declared in 1991 that the communist and Serbian nationalists (including the Serbian orthodox church who opposed western cultural tradition and democratic aspirations) threatened Croatia and Slovenia, which were in the midst of democratization. The Croatians and Slovenians did not only fear the Serbs. Their hatred turned against the Bosnians in 1996, where in Bosnia Herzegovina they had become suspicious of the Islamization of the government. Although the Catholic Church was not engaged in

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[157] Lucas Andrews. "Sailing around the flat earth". Emory International Law Review. Vol: 11 (1997):2

[158] *See* Michael A. Sells. The bridge betrayed: Religion and genocide in Bosnia. University of California Press, 1996, pp. 60-61

propaganda to defend Christianity against Islam, yet there were priests like reverend Anti Maric who spread slogans such as "the Muslims have a holy war with us". [159]

In Bosnia, Moslems emphasized the cultural divide and blamed the West for leaving them to their fate. This, they argued, was due to western stereotyping Islam and the fear of the creation of a Moslem state inside Europe. Serb and Croat nationalists exploited this theme to undertake, with impunity their ethnic cleansing campaign.[160]

The war incorporated genocidal features as was reported by journalists and by films and photographs. Evidence shows that Serbs had violated treaties and customs of international humanitarian law. According to reports from the UN special rapporteur, there was "widespread torture of civilians and prisoners of war, systematic rape of Muslim women, destruction of churches and civilian homes, deprivation of children, forced transfer of populations, and harassment of humanitarian relief convoys. The ongoing atrocities, according to the report, "were part of a deliberate and systematic plan to achieve ethnic homogeneity in particular areas, and that the effort had been largely successful."[161]

No sooner had the conflict subsided in Bosnia that, by 1998, tensions mounted in Kosovo. Under Tito, Kosovo was given the status of an autonomous province within Serbia. 90% of the 2 million inhabitants of Kosovo are ethnic Albanians. Serb emigration from KOSOVO to other parts of Serbia as well as their low birth rates made them a minority constituting only 7 % of the total population of Kosovo. [162]

As the Yugoslav federation started to fragment after Tito's death, Serbian president Slobodan Milosevic launched a nationalistic campaign defaming Albanian Kosovars. His objective was to strip Kosovo of its autonomy. Serb nationalists have always envied the status given to Kosovo and feared that any independent Kosovo republic (which started to be claimed by Kosovars) would seek to merge with Albania. In

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[159] Gerard Powers. "Religion, Conflict, and prospect for reconciliation in Bosnia, Croatia ,and Yugoslavia". Journal of International Affairs Vol: 5:1 (1996) pp 226-236
[160] Ibid, pp 226-236
[161] Lucas Andrews." Sailing around the flat earth." Emory International Law Review. Vl: 11 (1997) :2
[162] Kosovo violence (Refer to bibliography)

1989, Kosovo's constitutional autonomy was terminated. Consequently, ethnic Albanians were purged from the province's civil service, and government funding of public institutions and schools was reduced. This was accomplished by a propaganda campaign against Kosovars, accusing them of committing genocide against Serbs in 1986. Serbian propaganda also regarded the high Albanian birth rate as a genocidal plan. Albanians were also blamed for plotting to destroy Serbian culture in by attaching Serb monasteries. This led to the emergence of anti Moslem or anti Albanian stereotypes. [163] Friction between the two communities intensified in 1998 and escalated into armed confrontation between Serbian militias and armed forces, and ethnic Albanians led by the Kosovo Liberation Army (KLA).

Throughout the confrontations, the Serbs were recorded of having committed several atrocities, such as displacing civilian populations, obstructing the transportation of food supplies, killing detainees, impeding aid distribution, for the purpose of depopulating the western zone of Kosovo to separate the Kosovo from Albania. By late 1998, more than 300 000 were forced to leave their homes to seek refuge in the mountains and forests. Thousands of Kosovars are reported to have lost their lives, although final figures are still to be confirmed. [164]

2.International action

The Yugoslav conflict, unlike previous similar events, attracted a measure of world attention. This was mainly the result of continuous media reports describing the continuous atrocities perpetrated mainly by ethnic Serbs. Although intervention was not carried out without flaws, yet it acknowledged that the international community under the leadership of the US and the UN did try to settle the conflict by sponsoring peace talks, and using NATO's coercive force first timidly in Bosnia and later more aggressively in Kosovo.

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[163] Michael A. sells. The bridge betrayed: Religion and genocide in Bosnia. University of California Press, 1996, pp. 54-58

[164] Op.cit

3. The International tribunal for the former Yugoslavia

What came out of the Balkan conflict was the creation of a tribunal to try perpetrators of the atrocities. It was the first tribunal created after Nuremberg and Tokyo.

The Ad Hoc Tribunal for the Former Yugoslavia was established on May 25 1993 by a Security Council resolution, partially due to strong appeals made by the secretary general Boutros Gali. It was in response to the horrendous atrocities that occurred in the region including summary executions, torture, rape, arbitrary mass internment, deportation and displacement, hostage taking, inhuman treatment of prisoners, indiscriminate shelling of cities and unwarranted destruction of private property. The aim of the tribunal was to prosecute all guilty of war crimes, and crimes against humanity as well as genocide, and promote international humanitarian law. The tribunal was a continuation and a reaffirmation of the Nuremberg legacy yet it differed from Nuremberg in that it was established while the war was still unfolding while the IMT was constituted after WW2 was over. In principle, therefore, it should have acted to arrest the a deterrent effect for the remainder of the conflict.[165]The tribunal is still operating and is located in the Hague, but could be set up elsewhere if necessary. No limit to the duration of the tribunal's jurisdiction was fixed, for it was expected to continue to function as long as the for it remained. The tribunal has jurisdiction over all the crimes in the former Yugoslavia particularly Bosnia Herzegovina and KOSOVO. The first indictment of the tribunal, which dates May 7, 1996, was against Dusco tadic famous for his crimes in Bosnia Herzegovina. [166]

Tadic was found guilty on five counts of violations of laws and customs of war and 6 counts of crimes against humanity. Accordingly he was sentenced to 20 years of prison, on July 1997. However, while the case proceeded after an appeal, Tadic was charged on nine additional counts on July 15 1999: 7 counts on breaches of 1949 Geneva

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[165] Theodor Meron. "The Hague was tribunal has reaffirmed the spirit of Nuremberg, but can it survive the Balkans?" Foreign Affairs vol: 6 :1, 1997

[166] Steven Ratner. Accountability for human rights violations in international law" Beyond the Nuremberg legacy. Oxford University Press, 1997, p. 168

Conventions, 1 for violations of the laws and customs of war, and 1 for crimes against humanity. After increasing his sentence to 25 years, the court decided to reduce it back to 20 years as a result of an appeal made by the defendant. On November 31st 2000, Tadic was transferred to Germany to serve his sentence.[167]

There are other alleged criminals in the Bosnian crisis, who have been identified, either by the US government or by the International Tribunal for the Former Yugoslavia. Three categories of criminals can be identified; 1. "Those who actually committed the murder, rape, or torture, 2. "Those who encouraged, directed, and commanded the murderers, rapists, and torturers, and 3 "Those with political or command responsibility who failed to stop the crimes despite an obligation under international law to do so."[168]

Among the criminals considered directly involved in the command of atrocities are Rodovan Karadzic, political leader of the Bosnian Serbs, and Ratco Mladic, the military commander. They both fall under the second and third categories, and are accused of crimes against humanity and genocide. The tribunal does not have custody of the suspects yet. It has been argued that, "there has not been the political will to arrest them. The international community feared their arrest would further destabilize the Balkans, the US in particular bulked at the prospect of potential casualties"[169].

However, the tribunal could have custody of Slobodan Milosevic, the Serbian president, and is setting ground for his trial. Milosvic is accused of command responsibility, war crimes and crimes against humanity in Kosovo, 1999, crimes against humanity in Croatia, (1991-1992), and genocide in Bosnia Herzegovina (1992-1995)[170]

As far as Kosovo is coceried, Milosevic along four other suspects are in custody for trial. They are the following: Milam Milotenovic President of Serbia, Nikola Sainovic, Deputy Prime Minister of the Federal Republic of Yugoslavia, Dagoljub

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[167] ICTY Proceedings (Refer to bibliography)
[168] Neil Kressel. Mass hate: The global rise of genocide and terror. NY: Plenum Press, 1996 p. 33
[169] "Milosevic 's trial: Questions and answers" BBC News, December, 8, 2002
[170] Ibid

Ojdanic, Chief of the Central Saff of the armed force of the Federal Rpublic of Yugoslavia, and Vlajko stojilijhkovic, Minister of Internal Affairs of the Republic of Serbia. All five have been accused of responsibility by way of their authority in commanding atrocities, war crimes and crimes against humanity, by deporting, murdering and persecuting people on political, racial and religious grounds. It is important to note that genocide was not charged in Kosovo due to the absence of the proof of intent behind such a crime, and the fact that vast numbers of women and children of both sexes were led out of their homes and out of the country and not simply executed on the spot is a counter indication of genocide".[171]

In Bosnia Herzegovina, on the other hand, Milosevic was accused of committing genocide. He is said to be "responsible for the killing of thousands of Muslims and Bosnian Croats". The indictment also cites " the 1995 massacre at Srebrenicca and accuses Milosevic of involvement in the murder, imprisonment and mistreatment of thousands of civilians including women and the elderly". Milosevic's trial is due February 12, 2002 and will handle his crimes allegedly committed both in Bosnia Herzegovina and Kosovo.[172]

The record of the ICTY looks promising. According to the latest fact sheet on ICTY proceedings released February 6 2002, there are presently 44 defendants currently in custody, 6 defendants provisionally released, 11 transferred or released, 19 at pre-trial stage, 10 currently on trial, and 1 defendant awaiting trial chamber judgment. There are equally 31 defendants tried, among whom, 15 are at appeal, 11 received their final sentence, and 5 found not guilty.[173]

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[171] Anthony D'amato "Kosovo &Yugoslavia: Law in crisis. A brief review of the indictment against Milosevic and others" (Refer to bibliography)
[172] Op.cit
[173] For more details about ICTY proceedings, refer to http://www.un.org/icty

CHAPTER FOUR

Genocide under international law

A. The genocide convention

The UN convention on genocide as adopted by the general assembly in 1948 rested on the following articles (substantive only)

Article 1

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

Article 2

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, upon members of the group
c- Deliberately inflicting on eth 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.

Under article 3, the following acts are punishable:

a-Genocide
b-Conspiracy to commit genocide
c-Direct and public incitement to commit genocide
d-Attempt to commit genocide
e-Complicity in genocide

Article 4 specifies that "persons committing genocide or any of the other acts enumerated in article 3 shall be punished whether they are "constitutionally responsible rulers, public officials or private individuals"

Under article 5, "contracting parties undertake to enact necessary legislation to give effect to the provisions of the present convention and in particular to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article3.

It is stated in article 6 that "persons charged with genocide or any of the acts enumerated in article 3 shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction".

Article 7 provides that "genocide and all other crimes enumerated in article 3 shall not be considered political crimes for the purpose of extradition".

Under article 8, "contracting parties may call upon the competent organs of the UN to take such action under the charter of the UN as they consider appropriate for the prevention and suppression of acts of genocide".

Under article 9, "disputes between the contracting parties relating to the interpretation, application or fulfillment of the present convention including those relating to the

responsibility of a state for genocide or for any of the acts enumerated in article 3, shall be submitted to the ICJ at the request of any of the parties to the dispute"[174]

An in depth analysis and evaluation of the genocide convention would help elucidate its provisions and demonstrate its adequacies as an international legal instrument that is intended to contain the crime of genocide. The debates and arguments of the plenipotentiaries of the various contracting parties as the convention was worked out would contribute to a better understanding of this important legal instrument.

1. A commentary on the genocide convention

1. Political groups (ref: Article 2)

During the plenary meeting, the preliminary resolution that preceded the final draft of the genocide convention included besides ethnocide, "political and other groups". While some representatives brought up the idea of cultural and economic genocide, others stressed on the political motive behind the crime as was expressed by the French representative: "Even if the crime of genocide were committed for racial or religious reasons in the past, it is clear that the motivation of such crimes in the future will be political".[175] However political groups were removed from the definition on grounds that the convention would lose focus if applied on any political crime whatsoever. It was the Soviet and Eastern Bloc delegates who opposed the addition of political groups to Lemkin's list. Their contention was that " because of their mutability and lack of distinguishing characteristics, political groups did not lend themselves to the definition, which would weaken and blur the whole convention". It seems that the Great Powers had already made "a behind –the scenes compromise" to make sure that political groups be removed from the convention. According to Robinson, "the main reason was the contention that political groups were not stable enough; that their inclusion would be a serious obstacle to the ratification of the convention by a large number of states, and that

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[174] "The UN convention on genocide" For international law documents, refer to Ian Brownlie. Basic documents in International Law. Clarendon Press, 1999.
[175] Alain Dexte Rwanda and genocide in the 20th century. Pluto Press, 1995, p.33

the inclusion of political groups might enable some international authority to intervene in the domestic affair strife of a country and bring the UN into the domestic political struggle of every country".[176]

2.The intent factor (ref: Articles 2-3)

Motive was brought in as a necessary element that would characterize the crime as genocidal. According to the British representative, "The intent to commit the crime was the crucial defining characteristic, whatever the reasons the perpetrators of the crime might allege". Hence, in response to charges of genocide against the Indians in the Amazon river region, the permanent UN representative of Brazil affirmed that this could not be typified as genocide since the perpetrators of the crime did not attack the Indians for ethnic or cultural reasons, rather their main aim was economical, since they acted solely to take possession of the land of their victims.[177] Similarly, general Telford, former special assistant to the U.S. attorney general and representative at the Nuremberg trials, discarded the view that the atomic bombing of the Japanese cities of Hiroshima and Nagasaki by the United States, and the pattern bombing of Hamburg and Dresden by the Allies were genocidal. He contended that "Berlin, London and Tokyo were not bombed because their inhabitants were German, English or Japanese, but because they were enemy strong holds. Accordingly, the killing ceased when the war ended and there was no longer any enemy." Although there was intent to destroy the Japanese and German inhabitants of those cities by the fact that they were the targets of the bombing, yet the victims were nor killed because they were German or Japanese, but because they were considered enemies at that time. [178]

The question of intent, however, raised a problem. What if an intended act within the purview of article 2 was directed against a group as a result of legitimate defense? Would the killing of a group in whole or in part be considered an act of genocide if the

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[176] Nehemiah Robinson. The Genocide convention: A commentary. The Institute of Jewish affairs, 1960, p.59

[177] George Andreopoulos, ed. Genocide: Conceptual and historical dimensions. University of Pennsylvania Press, 1994, p.33

[178] Ibid, p. 33

group was accused of an illegal action against the government or a segment of the population? This issue was left to ambiguity. Generally, as Robinson stated, an act of legitimate self defense cannot be considered genocide if it does not "exceed the limits required by such action." [179]

The most significant problem regarding intent is proof. According to Article 2 of the genocide convention, the act must be committed "with the intent of destroying, in whole or in part [a protected group] as such." Therefore the crime of genocide is characterized by the intent factor, and therefore distinguished from other crimes. Thus, no matter how horrendous other crimes may be, they would not signify genocide if no proof of intent was obtained. However, evidence of intent is a difficult and complicated task, for it is rarely possible to reach data verifying its presence. The only historical case where evidence of intent was easy to procure was the Jewish holocaust. Hitler had written a book in which he planned the whole operation to be undertaken at the right moment. According to Simon Taylor, Hitler stated his intention to eradicate the Jews overtly, before the Nazis had come to power. Moreover, the successor government in Germany acknowledged the holocaust and paid reparations. [180]

The reason why evidence of planning is hard to collect is because such information is usually shattered, if ever recorded, rather than sealed in archives. Moreover, the perpetrator makes sure that truth is veiled and releases only erroneous information. In order, therefore, to reach evidence of intent, a closer inspection of the problem is necessary. If proof, even circumstantial is obtained and verified, it can be used as evidence. According to Ratner, "Evidence of written or oral orders, included by way of witness testimony, to eliminate a protected group would obviously establish the requisite intent". Also "the labeling of a protected group as an enemy of the state or a systematic and destructive pattern of behavior with respect to a group would also be highly probative". In the report accompanying the draft convention, the Secretary General offered the following guidance in connection with acts falling under Article C of

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[179] Op.cit, pp. 61-62

[180] Steven Ratner. Accountability for human rights atrocities in international law: Beyond the Nuremberg legacy. Oxford University Press, 1997, pp 32-34

the Convention (ie conditions of life) "Obviously, if members of a group of human beings are placed in concentration camps where the annual death rate is 30% to 49%, the intention to commit genocide is unquestionable. There may be borderline cases where a relatively high death rate might be ascribed the lack of attention, negligence or inhumanity, which, though highly reprehensible, would not constitute evidence of intention to commit genocide."[181]

3.The ambiguity of terms (ref: Article 2 and 3)

Another difficulty of interpretation lies in the wording of the acts enumerated in article 2. "Serious harm is a matter of interpretation to be decided in each instance on the basis of the intent and the possibility of implementing this intent by the harm done". In paragraph C, "it is impossible to enumerate in advance the conditions of life that would come within the prohibition of Article 2; the intent and the probability of the final aim alone can determine in each case whether an act of genocide has been committed or not". Furthermore, paragraph D could easily "give rise to the problem of whether the prevention of births within the whole group or only in a part was intended".[182] Also the expression "in part" is quite ambiguous and has raised a difficulty in measuring the amount of deaths, which should be considered to correspond to a situation of genocide.[183]

Other words namely conspiracy in article 3 are not used in many legal systems, while more exact terms such as incitement, attempt, complicity and others are subject to varying interpretations in different legal systems. The Swedish representative at the drafting of the convention said:

> The discussion at the beginning of this meeting seems to me to have shown that the significance of the terms corresponding to the French and English expressions here in question ie incitement-conspiracy-attempt-complicity-is subject to certain variations in many systems of criminal law represented here. When these expressions have to be translated in order to introduce the text of the convention into our different criminal codes in other languages., it will no doubt be necessary to

[181] Ibid, pp. 21-34
[182] Op.cit, p. 64
[183] "Defining genocide" BBC News. December, 10, 2001

> resign ourselves to the fact that certain differences in meaning are inevitable. It would therefore be advisable to indicate in the committee's report that article 4 of the convention does not bind signatory states to punish the various types of acts to a greater extent than the corresponding acts aimed at the most serious crimes, as for example, murder and high treason, already recognized under national law.[184]

4.The act of state doctrine(ref: Article 4)

Article 4 rejects the application of the Act of State Doctrine according to which the responsibility of acts committed by the organs of the state would be imputed to the state itself, giving immunity to heads of state and government officials. [185] According to the Convention, no head of sate is immune from prosecution, neither may an ordinary official or any human being hide under the pretext of superior orders. However, the fact that states were entitled to make reservation led some states not to accept the article, including the Philippines for instance, which made a reservation to article 4 considering that "the Philippines government does not consider article 4 as overriding the existing immunities from judicial processes guaranteed certain public officials by the constitution of the Philippines."[186]

5.The validity of the convention (ref: Article 5)

One problem related to article 5 is the extent of validity that the Convention possesses in each of the contracting states. Once the Convention is ratified, it will be incorporated into the domestic law of the ratifying state. However this incorporation depends on the specific laws regarding such transformation in the state in question. For some states the ratification of an international convention automatically becomes domestic law, while for others the process requires the enactment of new legislation regarding the implementation of the agreement. In this case, it is the domestic implementary law that becomes binding on the individual and not the international

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[184] Nehemiah Robinson. The Genocide Convention: commentary. The Institute of Jewish affairs, 1960, p. 60-70.
[185] Yves Ternon. L'etat Criminel: Les genocides au 20eme siecle. Editions Du seuil, 1995, p. 50
[186] Op.cit p, 71

convention. Therefore as the Dutch representative expressed: "it would be incorrect to state that an individual had violated the convention", is undoubtedly correct" [187]

Since it is domestic law that generally gives effect to the convention, policy makers are free to broaden the scope of the convention and apply it over cases, which are not included in it. For instances some laws encompass political groups, groups that are not included in the convention. The charging of Chilean Augusto Pinochet by a Spanish prosecutor of genocide committed in the 1970's surprised many observers. Pinochet' victims were political activists rather than belonging to a specific ethnic group. In that case, it was Spain that had chosen a broader definition of genocide, which included political and other groups. The same applied to Ethiopian law, where members of the former Dreg regimes have been prosecuted for committing political genocide.[188] In Rwanda as well, the genocide erupted for political reasons, and the Hutus and Tutsis could be easily labeled as two opposing political groups. The fact that countries are free to manipulate the terms of the convention renders the identification of the crime a complicated task. A crime may be considered genocide in some countries while in others it may not. The only countries according to Charny who have incorporated genocide within national criminal codes were Italy, Germany, Brazil and Ethiopia. The latter has concluded trials since 1994 in connection with the Mengistu regime, using among others, charges of genocide "as defined in article 281 of the 1957 Ethiopian penal code". There are other national prosecutions, which still have to be completed. Bangladesh aborted an act according to which it was to prosecute the criminals of war crimes, genocide and crimes against humanity in favor of a political settlement with India and Pakistan. Also the court established by the sultan after the Armenian genocide has not completed its trials due to the change of government and the lack of international support over the case.[189]

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[187] Ibid, p. 32
[188] William Shabbas. "The genocide convention at fifty" The US Institute for Peace, 1999
[189] Israel Charny, ed. Encyclopedia of genocide. Institute of the holocaust and genocide, 1999, p. 393

6.Criminal prosecutions: Ad hoc tribunals and the international criminal court (ref: Article 6)

A. The concept of universal jurisdiction

As far as prosecutions are concerned, criminals were to be tried in tribunals of the countries where the crimes were committed or "by such international tribunal as may have jurisdiction with respect with respect to those contracting parties which shall have accepted its jurisdiction". This article raises the issue of territoriality vs universality, an issue discussed at the time of the drafting of the convention. The question raised was whether the convention was applicable universally or restricted to the territories of the signatories. It was contended that genocide was by its nature a serious crime under international law and therefore it was mandatory that the convention should apply universally, otherwise it would fail its purpose. However, the ad hoc committee disregarded this contention on grounds that it is against the principles of international law to violate the rights of sovereign states, to allow a foreign state to prosecute criminals having committed offenses outside their territories, or by foreigners. Moreover, "since genocide involves the responsibility of a state, the principle of universal repression would result in making courts of foreign states the judge of the conduct of a of foreign government, which could provoke international tension." Finally, universal repression may lead to the abandonment of the creation of an international military tribunal. Therefore a voter of 29 to 6 led to the rejection of the principle of universality. [190]

But the fact that the prosecutions are to take place where the crime was perpetrated raises a significant problem. Since genocide is often committed by the state, how can the courts of the perpetrator government be handed out for justice? It would be possible for governments to cooperate in cases where perpetrator governments have been defeated such in Germany after WW2 or in Rwanda. But what would happen if the culprit has remained in power?[191] This problem has incited the reappraisal of the concept

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[190] Nehemiah Robinson. The genocide convention: A commentary. pp. 31-32
[191] William Shabbas. "The genocide convention at fifty" The US Institute for Peace, 1999

of universal jurisdiction. Nowadays universal jurisdiction has become more and more adopted by several national domestic systems.

In Europe, several counties adopting universal jurisdiction have undertaken cases related to conflicts in the former Yugoslavia, Rwanda, and Latin America. In 1997, a German court accused Novislav Djajic , a Bosnian Serb, of war crimes and sentenced him to five years of prison. It also convicted Nikola Jorgic in that same year of genocide and murder in the Former Yugoslavia, and sentenced him to life imprisonment. In November 1994, a Bosnian Muslim was convicted by a Danish court of war crimes in a Croat prison in Bosnia and was sentenced to 8 yeas of prison. In April 1996, a Rwandan national was convicted by a Swiss military court of war crimes committed in Rwanda. Also in Austria and Switzerland, two Bosnian Serbs were tried and acquitted. [192]

Criminal proceedings related to the conflicts of the former Yugoslavia and Rwanda are ongoing in Belgium, France, Germany and the Netherlands. "The cases show a dynamic interplay between the existing international criminal tribunals (for former Yugoslavia and Rwanda) and national courts". Domestic courts have been cooperating with international tribunals in trying suspects, such as the transfer of Tadic from Germany to the ICTY in 1994.[193] As far as AD hoc tribunals were concerned, the UN success in applying the terms of the convention was with the creation of two Ad hoc tribunals in Yugoslavia and Rwanda.

B- The International military tribunal for the former Yugoslavia

After the Nuremberg prosecutions, no trials before an international tribunal had occurred until the formation of the international tribunal for Yugoslavia. It was formed after evidence that the crimes in that area were so horrible as to constitute breaches of international peace and security and international humanitarian law. As already mentioned the tribunal is located in the Hague and has jurisdiction over, among others,

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[192] "Universal jurisdiction in Europe" Redress.
[193] Ibid

war crimes, crimes against humanity and genocide. Unlike the Nuremberg and Tokyo tribunals, the ICTY is not a military court. It was established while the conflict was unleashing and has no time limit.[194]

The tribunal, however, has faced difficulties ever since its creation. Those include the uncooperativeness of Serb, Bosnian and Croatian leaders to hand in suspects, and the reluctance of the Security Council and international community to exert pressure on countries that provide sanctuary to many criminals. Thus, suspects, such as Karadzic and Mladic, remained sheltered and protected. Since the tribunal could not obtain custody of a large number of suspects, it was sometimes tempted to undertake trials in absentia. That was against the principles of its statute and a matter that could jeopardize due process of law, and make way for error and abuse. The tribunal has resisted this temptation but with great difficulty. Another problem that he tribunal had faced was the obliteration of the sites where the crimes were supposed to have been committed. That made evidence difficult to procure, causing the judicial procedure to stumble. Budgetary problems plagued the tribunal's efficiency even more.[195]

Despite its flaws, there is no doubt that the creation of the tribunal was a breakthrough in international humanitarian law. The Tadic case sets an example in international adjudication. While handling this case, the tribunal "has advanced the state of the law governing international and internal armed conflicts, especially as it pertains to the conduct of hostilities and crimes against humanity. It has also affirmed the customary unwritten law that binds all states to international standards of behavior. Likewise, the appeals chamber's rulings on jurisdictional issues in the Tadic case have been the first judicial affirmation of international criminality and individual responsibility for violations of international humanitarian law since Nuremberg". [196]

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[194] Steven Ratner. Accountability for human rights atrocities in international law: Beyond the Nuremberg legacy. Oxford University Press, 1997, p.166

[195] Theodor Meron. "The Hague war tribunal has reaffirmed the spirit of Nuremberg but can it survive the Balkans?" Foreign Affairs, Vol: 6:1

[196] Ibid. See ICTY statute in Annex

The ICTY was the foundational framework for the ICTR established in 1994, and has triggered concerns over the establishment of an ICC. This reconsideration of international humanitarian law sponsored by the tribunal encouraged states to adopt statutes underlying universal jurisdiction, that would allow them to prosecute criminals who have committed crimes outside their jurisdiction and extradite criminals to other countries for trial[197]

C. The International Military Tribunal for Rwanda.

In May 1994, the Security Council asked the Secreary General to report on the Rwandan case where atrocities were being committed. In July, the Council went a step further and passed resolution 935 authorizing the creation of a committee of experts to examine the evidence. The Commission presented a report in which it disclosed its stark findings: "Hutu elements had committed planned and systematic genocide against the Tutsi ethnic group". Acting under chapter 7 of the charter the Security Council established the tribunal form Rwanda.

The scope of the jurisdiction of the tribunal extended over genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Protocol II additional to the conventions. Its was assigned to prosecute persons of whatever nationality, who were involved in the Rwandan genocide, whether their crimes were committed in Rwanda or in any neighboring country. The mandate of the tribunal started on January 1, 1994, and extended to December 1, 1994. Thus, unlike the ICTY, which has no time limit, the ICTR mandate was terminated as soon as the conflict was over.[198]

Aside from the tribunal's jurisdiction over crimes, it was accorded jurisdictional precedence over national courts of UN member states. It could also ask any national jurisdiction to be transferred to its competence. Persons tried by the tribunal could not be charged for the same crime in national courts, nor vice versa, except if the national trial is deemed to have been only a charade. The statute of the tribunal sets terms for its

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[197] Ibid
[198] Human rights watch, 1999. Leave none to tell the story, p. 738

cooperation with national jurisdictions. In addition, in a resolution passed in February 1995(S/RES/978), the Security Council specifically asked member states to arrest those suspected of crimes that fell under the competence of the tribunal. Belgium, Benin, Burkina Faso, Cameroon, Cote d'ivoire, Kenya, Mali, Switzerland, Togo, and Zambia, all have arrested persons who were then transferred to the custody of the tribunal.[199] The tribunal undertook several prosecutions, notably the trial of Jean Paul Akayesu, who was found guilty of genocide. It is agreed upon that "his case was the first to put into practice the convention after ww2. After Akayesu, seven other Rwandans have been convicted of genocide".[200]

D. The International criminal court

The idea of creating a court is not new. In fact, it goes back 80 years to the League of Nations. Consequent to WW2, the idea recurred with the establishment of the Nuremberg and Tokyo tribunals. However, the courts created at the time "drew their authority less from established principles of international law than from the military occupation of Germany and Japan by the victorious Allies". With the end of the cold war, ethnic conflicts have increased and reasons for the establishment of a court have become stronger. The UN war crimes tribunals for the Yugoslavia and Rwanda were established in 1993 and 1994 respectively. Soon afterwards, talks about creating an international court have taken place until the Rome conference.[201]

Negotiations for the establishment of an ICC started in 1989 upon a General Assembly request to the International Law Commission to prepare a draft instrument for the establishment of an international criminal court. An elaborated draft by the international law commission was completed in 1994. That same year an ad hoc committee was set up by the General Assembly for the purpose of reviewing "the major substantive and administrative issues arising out of the commission's draft statute". A preparatory committee followed and met in the years 1996-1998. Its work was completed

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[199] ibid, p. 740
[200] "Defining genocide" BBC news December, 10, 2001
[201] Thomas Omestad. "The brief for a world court" US News and World Report June 19, 1997

in April. The UN diplomatic conference of plenipotentiaries on the establishment of the ICC convened in Rome from June 15 to July 17 1998. 160 states attended along with 33 intergovernmental organizations. [202]

128 articles configured in 13 parts compose the preamble of the ICC statute. It is founded on three principles: The first is that of complementarity. It provides that the court is entitled to jurisdiction only upon a disability or refusal of a national court to do so. National courts take jurisdictional precedence over the international court. This principle is based on the assumption that states possess a vital interest "in remaining responsible and accountable for prosecuting violations of their laws". Secondly, the tribunal is allowed to handle only crimes of an international scope, "that concern the international community as a whole". This would increase the focus and effectiveness of the court by not overloading it with cases that can be easily handled by national courts. The third principle is that the court should as much as possible "remain within the realm of customary international law", for the purpose of making the statute "widely acceptable" although there are crimes that cannot be considered customary international law. [203]

The negotiating parties were divided into three groups. The like-minded group strongly favored the court. It was composed of middle powers and developing countries, some of which have suffered the crimes contained in the statute. The permanent members of the Security Council constituted another group. They wanted to give a stronger role to the Security Council and the prohibition of the exclusion of nuclear weapons from the weapons prohibited by the statute. They were also concerned over the issue of the tribunal's jurisdiction over armed conflict- their concern varying according to their national perspectives. Another group included states such as India, Mexico, and Egypt

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[202] Mahnoush Arsanjani. "The Rome statute of the International criminal court" . American Journal of International Law Vol: 93(1999) p. 25

[203] Ibid, p. 25 see statute of the ICC in Annex

that opposed the p-5 group and called for the inclusion of nuclear weapons among those prohibited by the statute. They were suspicious of Security Council intentions. [204]

The crimes that fell within the jurisdiction of the tribunal were genocide, crimes against humanity and war crimes. Also included were crimes of aggression (while no specific definition of that crime was phrased.) Added to those were treaty crimes, namely, illicit trafficking in drugs and terrorism, both open for further deliberation. [205] Differing from the ICJ, which handles disputes between states, this court will indict individuals. It will be based in The Hague, along with the ICJ and the International tribunal for Yugoslavia

A final vote of 120 to 7 accepted the establishment of the court. Once upon the accession of 60 states to the ICC treaty, the court can function. The perpetrators of the afore mentioned crimes will not only be stigmatized, economically sanctioned, and publicly pressured, but will face judgment and will be individually penalized for their crimes, including political leaders and military commanders who were involved directly or indirectly in the crime. Those who were supportive of the court were, among others, Britain Canada and Germany. The US opposed the court along with enemies of human rights such as Iran, Iraq, China, Libya, Algeria, and Sudan. "It was an embarrassing low point for a government that portrays itself as a champion of human rights."[206]

No doubt that the U.S endorses the establishment of a permanent court, for it has long stove for it, as it has greatly supported the ad hoc tribunals of Yugoslavia and Rwanda. But "since 1995, the question for the Clinton administration has not been whether there should be an international court, but rather what kind of court it should be in order to operate efficiently, effectively, and appropriately within a global system that also requires constant American vigilance to protect international peace and security". [207]

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[204] Philip, Kirsh and John Holmes. "The Rome conference on an International Criminal Court: The negotiating process. American Journal of International Law Vol 93(1999) p.4

[205] Ibid, p. 6

[206] Kenneth Roth. "The court the US doesn't want" The New York Review of Books. November, 19, 1998

[207] David Sheffer. "The US and the International Criminal Court" American Journal of International Law. V01: 93(1999) p.12

Surprisingly, the US was among the very few countries that voted against the establishment of the court. While Ambassador to the United Nations Richard Holbrooke "made an impassioned plea last month to bring the rebel leaders in Sierra Leone's vicious civil was to justice by extending "the international war crimes umbrella", other U.S. diplomats were threatening to undermine a proposed international war crimes tribunal, designed to handle cases like Sierra Leone, unless negotiators at the U.N. acceded to their demands." [208]

1.The negotiations in the light of US demands

During the negotiations, Washington asked for immunity from suit for US military personnel and government officials. The reason behind the US claim was the fear that American military personnel may be pursued for political reasons. [209]

As already mentioned, the complementarity principle reflects the widely shared view that systems of national justice should remain the front-line defense against serious human rights abuse, with the ICC serving only as a backstop. (By contrast, the Yugoslav and Rwandan tribunals are empowered to supersede local prosecutorial authorities at their discretion and have done so repeatedly). According to this principle, if an American perpetrates a grave crime, he would be brought before the court only if the US national courts have failed to try him or have refused to do so. Even this version of the jurisdiction of the ICC was unacceptable to Americans, who tried to override any likelihood of "even a legitimate prosecution of an American."

In an attempt to defend its claim during the negotiations, the US contended on four counts as will be shown below. Although the delegates declined to dismiss the exemption of Americans from prosecution, they still gave considerable ground to many

[208] Kevin Withelaw. "On a matter of justice" US News and World Report. October, 7, 2000
[209] Ibid

of the US claims. The compromise reached, however, did not strengthen the court, rather it undermined it. Despite all that the Clinton administration deprecated it[210]

1.Security Council

Te first argument resolved around the Security Council's authority over cases. The US proposed that a case shall be approved by the Security Council before being brought before the court. This would allow the US to use its veto against any case that would threaten its interests or any of its allies. This would grant the other permanent members the same privilege. "As a result, only criminals from a handful of pariah states would have been likely to face prosecution."[211]

The US negotiators stood fast on the point that only the Security Council and the states party to the convention, were entitled to carry cases to the tribunal, while the draft statute authorizes the prosecutor to initiate them. With the intervention of Singapore, a compromise was reached with the US, whereby the Security Council was permitted to "call a 12-month renewable halt to investigations and prosecutions included in the text". An official of the German delegation affirmed "If states can simply opt in or out when they want, the court will be unworkable." Without an independent prosecutor "crimes will be passed over for political reasons", so he added. [212]

2. The ICC prosecutor

The second point of disagreement concerned the ICC prosecutor. Although most delegates agreed that a case might be brought before the tribunal by the Security Council or by any signatory to the statute, they realized that the Security Council could most likely hesitate to act in the face of dreadful violence. Moreover, individual governments could rarely be disposed to officially accuse each other of human rights violations. With

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[210] Kenneth Roth "The court the US doesn't want" NYRB, November, 19, 1998
[211] Ibid
[212] Brigitte O'hara Forster. " Justice goes global" Time. July, 27, 1998

these considerations, the 60 like-minded governments remained in favor of authorizing the ICC prosecutor to initiate trials single handedly. A negative American response was once again expressed. American officials still feared that the prosecutor might pursue cases thoughtlessly and involve Americans. The veto could prevent a case from being brought up against an American and US officials realized that governments would not file a complaint against an American fearing the political risks involved. What worried Washington a prosecutor who may not feel compelled to behave according to American interests.[213] The Clinton administration, however, was willing to grant the prosecutor the power to decide on the individuals to be investigated and charged but only after the court received the council's approval. "The US believed that the court would not be well served by a prosecutor with the power to initiate investigations and prosecutions of crimes falling within the jurisdiction of the court in the absence of a referral or an over all situation by either a state party to eth treaty or the security council".[214] In the end, however, American objections were overruled by the delegates.

3. The definition of crimes

The third debate centered on the issue of war crimes and their definition. The Americans were confident that they would not commit crimes against humanity or genocide, but they did not rule out the possibility of committing war crimes, such as soldiers murdering hostages, pilots intentionally bombing civilians, or artillery men shelling civilian neighborhoods. Originally, Americans have no problem prosecuting a war criminal committing acts contrary to us military doctrine. What they were concerned about were crimes of a less clear nature. The rule of proportionality under international law bans a "military attack causing an incidental loss of civilian life that is "excessive" compared to the military advantage gained. "Thus some acts that the US considers lawful may not be so under ICC rule. The Gulf bombing of Iraq's electrical grill that was alleged to have destroyed a large number of civilians as a result of loss of refrigeration, water, purification, and necessities of modern life, is an example. If the ICC, had existed at that

[213] Op.cit
[214] David Sheffer. " The US and the ICC" AJIL, Vol: 93(1999) p. 15

time would it have considered such acts unlawful? What about the death of some three hundred civilians as a result of smoldering the el Chorillo region during the US offensive on Panama?[215] Thus, "US lawyers insisted that definitions of war crimes be drawn from customary international law and that they respect the requirements of military objectives during combat and of eth requisite intent"[216]

In order to find a solution to this dilemma, American negotiators suggested a redefinition of the law of proportionality proposing the qualification that attacks that injured civilians must be ruled out only when "such injury is "clearly excessive in relation to the military advantage". The qualification was approved. A joint US-French proposal "that governments be allowed to join the ICC while specifying that their citizens would be exempted from war crimes prosecutions", was rejected. This was due to the fact that many governments could be expected to exercise this option – seeming to accept the court while essentially sidestepping its jurisdiction. However, a compromise was reached whereby governments were allowed to exempt their citizens from the court's war crimes jurisdiction for a period of seven years. "That would allow a hesitant government to reassure itself about the court's treatment of war crimes without permanently denying the court jurisdiction over its citizens. The same compromise ingeniously created an incentive to join the court, since the seven-year exemption is available only to governments that ratify the ICC treaty. France accepted this compromise. The United States rejected it."[217]

4. Universal jurisdiction

The most important issue concerned the court's jurisdiction. According to the German proposal, the jurisdiction of the court should be international irrespective of the number of further accessions to the treaty. The German proposal went further and regarded genocide, crimes against humanity, and war crimes as crimes of universal

[215] "Kenneth Roth. "The Court the US doesn't want" NYRB November 19, 1998
[216] Op.cit, p.16
[217] Kenneh Roth, "The court the US doesn't want" NYRB, November, 1999

scope, which require that perpetrators of such crimes to be tried in any court irrespective of the association between the state exercising jurisdiction and the crime.[218]

American claims on the issue of jurisdiction were strongly defended by ambassador Sheffer. The American would only want the court to act upon its authorization by the government of the suspect's nationality. This would allow The US, by not ratifying the treaty, to avert trial of Americans. This proposal would cause certain governments to refrain from ratifying the treaty, which would undermine the competence of the court. As a way out, the Americans insisted that the Security Council be given the authority to decide issues of a justiciable nature. This would allow political consideration to influence the international judicial process. [219]

The American negotiators rebuffed universal jurisdiction, a principle which enables any state to exercise jurisdiction, whether it has endorsed the ICC statute or not, subject to the tribunal's remission. On the other hand Americans conceded that the court should have "automatic jurisdiction in the case of genocide, giving it the ability to prosecute individuals of any country that had signed the treaty". They proposed the formulation of a clause that would permit countries to "opt out of the court's jurisdiction on war crimes and crimes against humanity for 10 years". The adopted text however allows states to opt out of the court's jurisdictions only on war crimes and only for seven years. It also includes the crime of "aggression" within the court's jurisdiction, subject to a precise definition of aggression.[220]

The South Korean proposal on the question of jurisdiction, which gained more support, the ICC was to have jurisdiction when "any of the four governments concerned with a crime had ratified the ICC treaty or accepted the court's jurisdiction over the crime. These were: (1) the government of the suspect's nationality; (2) the government of the victims' nationality; (3) the government of whose territory the crime took place; or (4) the government that gained custody of the suspect. In any given case, some and

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[218] Ibid
[219] Bridgitte O'hara Forster "Justice goes global" Time. July, 27, 1998
[220] Ibid

perhaps all of these governments would be the same, but each separate category increases the possibility that the court could pursue a particular suspect."

In defending American claims, Ambassador Scheffer was fervently adamant to authorize the court to act only upon acceptance of the government of the suspect's nationality of its jurisdiction. This would allow Americans, by not ratifying the treaty, to avert ICC trial of Americans. However, this possibility may put violent governments at the advantage of abstaining from signing the treaty, which would hamper the function of the court. Therefore, the Americans insisted hat the Security Council be given the authority to decide.

The Americans were especially forceful in rejecting the South Korean proposal. Sheffer alerted the delegates at the Rome conference that the US would "actively oppose a court based on the South Korean conception of jurisdiction". This American stance caused a partial shift in the position of the plenipotentiaries. Two Korean proposals were disregarded: The ratification of the treaty by the state of the victim's nationality; and that of the state that gained custody of the suspect. Even this concession would in effect compromise the ICC's competence with respect to a country that has not ratified the treaty, thus allowing criminals to escape justice.

This conciliatory attitude towards the US did not bend the US position so the Rome delegates advanced a new proposal: The ICC will have jurisdiction when the government of the suspect's nationality had ratified the treaty (the only ground acceptable to the US), and when the government on whose territory the crime occurred had also ratified it. For instance even if Saddam Hussein did not ratify the treaty, and commits war crimes during another invasion of Kuwait, he may always be convicted if Kuwait had ratified the treaty. The United States again did not support the proposal out of fear that American troops may be convicted for alleged crimes committed abroad.

The statute of the ICC that came out was a product of compromise that aimed at preventing US support for and endorsement of this pioneer international judicial body.

This, to a considerable extent, explains the limitations of its jurisdiction and scope. Yet, the aim of a significant segment of the international community to marshal the endorsement (the US and other powers) of the court was not achieved. The US position remains inflexible and the court will have to content with the obstructive policies of a super power. The Americans would not fund the court nor give it legitimacy. "The State Department said publicly it might put pressure on governments not to join the court; and it is considering renegotiating the bilateral treaties that govern the stationing of US forces overseas in order to protect them from the ICC." [221] Ironically, American goals coincided with those of China, Russia and India, as well as Libya and Algeria, but were at odds with its regular friends who were characterized as being the so-called Like-Minded Nations favoring a strong permanent independent court. Washington's U.N. ambassador, Bill Richardson declared" We are not here to create a court that sits in judgment on national systems"[222]

Finally it was consented upon that the court will have jurisdiction under either of the three following conditions: A)"The security council may refer a situation using its powers under chapter 7 regardless of where or by whom the crime in question was committed, 2) "A situation may be referred to the prosecutor by a country that has ratified the Rome statute" or 3) "The prosecutor may initiate an investigation on his or her own (but may only pursue it with the approval of the pre-trial chamber. Further more except in the case of a security council referral the ICC will only be able to exercise jurisdiction over crimes committed by nationals or on the territory of counties that have ratified the ICC." There have been so far 139 signatures and 37 ratifications to the ICC treaty. 60 ratifications are still needed in order for the ICC to be operative. [223]

After years of strenuous negotiations, the USA finally signed the ICC statute. However, ratification remains pending in the house and senate. On June 14 2001, legislation was introduced in both houses "banning any United States cooperation with the forthcoming International Criminal Court. The self-styled American Service members

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[221] Kenneth Roth. "The court the US doesn't want" NYRB November 19m 1998
[222] Bridgitte O'hara Forster. "Justice goes global" Time July 27, 1998
[223] "The International Criminal Court" The Lawyers Committee For Human Rights, January 1, 2002

Protection Act of 2000 also required the U.S. government to retaliate against countries that ratify the Statute of the Court (other than NATO members and other "major" allies) by stopping military assistance to them." The Bush administration will not send the treaty to the senate for ratification before it reviews thoroughly the US position on the ICC.[224]

7.Extradition (ref: Article 7)

Under article 7 signatories to the convention are required to extradite any person accused of committing acts of genocide having sought refuge in their country. Extradition of political offenders is not allowed in international law for the main reason that such offenders, once surrendered may not receive fair and impartial justice. However, this exception does not apply to perpetrators of genocide and genocide related acts.[225] However, parties may apply the rule of non -extradition of one 's own citizens. "The question arises whether the state which refuses to extradite is own citizens accused of an act punishable under the convention, is bound to prosecute them. Article 6 provides for punishment by the states in whose territory the act was committed, not whose citizen the accused is. It may follow that the state, refusing extradition, is not bound to prosecute the guilty, either."[226]

8. Calling upon the members of the UN (ref: Article 8)

According to article 8 of the genocide convention, the parties may call upon the organs of the UN to take such action, as they consider appropriate in order to suppress crimes of genocide. Such action was taken by NATO in its operations in the former Yugoslavia in 1995 and 1999. Operation Allied Force launched on May 24, 1999 however, faced criticism from different quarters. While it seemed to be a step towards the preservation of peace and human rights, months of bombing put the operation in jeopardy. Civilian casualties and the massive waves of refugees coupled with the

[224] *see* the Washington weekly report (Refer to bibliography)
[225] Layal Sunga. Individual responsibility in international law for serious human rights violations. Matinus Nijhoff Publishers, 1992, p. 71
[226] Nehemiah Robinson. The genocide convention: A commentary, p. 88

bombing of the Chinese embassy in Belgrade have all fed fuel to the criticism of the operation.

All what the security council could do with respect to the Yugoslav case was to impose an arms embargo on Yugoslavia on March 31, 1998 without specifying means of enforcement in case of non compliance. No Security Council support for military sanctions was provided. NATO had to act without UN cover. [227]

It is understandable that the Serbian acts against the Bosnian Moslems especially the extermination in 1996 of some 7000 Bosnian Moslems supposedly sheltered within a UN safe haven region of Srebrenicca, brought international alert and made urgent the intervention of the international community. The US realized, however, that the UN was incapable of taking effective measures, especially after its failure in Bosnia. A probable Chinese and Russian veto would render the Security Council inoperative and, therefore, other avenues for action should be solicited. NATO was favored not only for this task but also for endowing it with "renewed credibility in the emergent post cold war setting of a Europe unthreatened by an external adversary". [228]

By commissioning NATO to exercise military sanctions without a Security Council authorization is "seen as a devastating constitutional blow to the authority of the organization and to the most basic prohibition inscribed in the international law governing recourse to force". Side stepping the charter of the UN by the US marks, according to critics, its hegemonic posture, although justified on the grounds of upholding norms of international justice.[229] Besides exposing the deficiency of the UN charter in managing human right problems due to the political use of the veto, the Kosovo crisis highlights the dichotomy between humanitarian intervention and state sovereignty. In an address to the Canadian senate and House of Commons, Havel, on April 29 1999, declared the following:

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[227]" Kosovo: A good or bad war?" American Journal of International Law Vol; 93 1999, p. 843
[228] Ibid, p. 850
[229] "Kosovo, world order, and the future of international law" American Journal of International Law Vol 93: 1999, p. 853

But there is one thing no reasonable person can deny: this is probably the first war that has not been waged ion the names of national inters, but rather in the name of principles and values. If one can say that it is ethical, or that it is being waged for ethical reasons, then it is true of this war. Kosovo has no oil fields to be coveted, ; no member nation in the alliance has any territorial demands on kosovo; Milosevic does not threaten the territorial integrity of the alliance. And yet the alliance is at war. It is fighting out of a concern for the fate of others. It is fighting because no decent person can stand by and watch the systematic, state – directed murder of other people. It cannot tolerate such a thing. It cannot fail to provide assistance if it is within its power to do so.[230]

On the other hand, Robert Fisk criticized NATO's action in Kosovo.

How much longer do we have to endure the folly of NATO's war in the Balkans. In its first fifty days, the Atlantic alliance failed in everything it set out to do. It failed to protect the Kosovo Albanians from Serbian war crimes. It failed to cow Slobodan Milosevic. It failed to force the withdrawal of Serb troops from kosovo. I broke international law in attacking a sovereign sate without seeking a UN mandate. It killed hundreds of innocent Serb civilians while being too cowardly to risk a single NATO life in defense of the poor and weak for whom it meretriciously claimed to be fighting. NATO's war cannot be regarded as a mistake; it is a criminal act. [231]

9. Reference to the ICJ (ref: Article 9)

Genocide trials may also be conducted in the ICJ, the primary judicial organ of the UN. Since the court considered the principles underlying the genocide convention as "principles which are recognized by the civilized nations as binding on states even without any conventional obligation, a state may raise a claim against another (a member of the UN and signatory of the convention) having committed genocide against it or against its own people. According to Article 94 of the UN charter, each member state "undertakes to comply with the decision of the court". If a party fails to comply with the judgment of the court the other state may take the case to the Security Council, which will decide what measures to follow in order to enforce the court ruling.

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[230] Ibid, p. 848
[231] Ibid, p.848

Among the famous cases adjudicated by the ICJ is the one brought by the Republic of Bosnia Herzegovina against the Socialist Federal Republic of Yugoslavia, on March 20 1993. The grounds for the case were the latter's violation of the Genocide Convention. Bosnia accused Yugoslavia of breaching articles 1, 2a, 2c, 2d, 3a, 3b, 3c, 3d, 3e, 4 and 5 of the Convention, and solicited the court to order Yugoslavia to acknowledge its responsibility for the crime and make appropriate compensation. In an application of the court, Yugoslavia rejected the claims contending that they were irrelevant "because of the lack of an international dispute and the lack of authority of the president of Bosnia at the time of the application was filed".[232] On March 1996 Yugoslavia's application was rejected and the case proceeded to its merits. After Yugoslavia (reduced to Serbia and Montenegro) was admitted to the UN membership on November 1 2000, it raised a claim on April 24, 2001 urging that the cased be revised. Yugoslavia's claim rested on the fact that before its admission to the UN, it did not succeed to the political and legal responsibilities of the Socialist Federal republic of Yugoslavia, nor was it a member of the UN. It contended further that it was not party to the statute of the court or a party to the Genocide Convention. On these grounds, Yugoslavia considered the court as lacking jurisdiction and asked for the suspension of proceedings until the Yugoslav application was considered.[233]

Another case was raised by the Republic of Croatia against the Socialist Federal Republic of Yugoslavia, on July 2nd 1999. It was based on the claim that "by directly controlling the activity of its armed forces, intelligence agents, and various paramilitary detachments, on the territory of . . . Croatia, in the Knin region, Eastern and western Slavonia, and Dalmatia, [Yugoslavia] is liable [for] the 'ethnic cleansing' of Croatian citizens from these areas . . . as well as extensive property destruction - and is required to provide reparation for the resulting damage". Croatia goes on to claim that "in addition, by directing, encouraging, and urging Croatian citizens of Serb ethnicity in the Knin region to evacuate the area in 1995, as . . . Croatia reasserted its legitimate governmental

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[232] Peter H. Bekker. "Application on the Prevention and Punishment of the crime of Genocide (Bosnia Herzegovina v. Yugoslavia). American Journal of International Law Vol: 91 (1997), p.122

[233] http://www.icj-cij.org

authority . . . [Yugoslavia] engaged in conduct amounting to a second round of 'ethnic cleansing."

Croatia contended that Yugoslavia must be held accountable for the damages it inflicted on its territory and people. The damages include the killing of 20 000 people, and the injury of 53 000 others as well as the destruction of houses, cultural monuments, historical sites and Croatian catholic churches. By invoking article 9 of the Genocide Convention, Croatia "requests the Court to adjudge and declare that Yugoslavia has breached its legal obligations to Croatia under the Genocide Convention and that it "has an obligation to pay to . . . Croatia, in its own right and as parens patriae for its citizens, reparations for damages to persons and property, as well as to the Croatian economy and environment caused by the foregoing violations of international law in a sum to be determined by the Court". On 27 June 2000, the court ordered the extention of the time limit for the filing of a memoria by Croatia, to march 14 2001, and to extend that of Yugoslavia to September 16, 2002.[234]

Besides the above -mentioned, no other cases involving genocide have been brought before the ICJ. The only recourse so far concerned the validity of specific reservations relating to the ratification of the Convention Member states are restrained by the fact that most genocides are committed by or with the condonation of governments. This avoidance is carried to such extremes that not a single member state was prepared to sponsor a carefully prepared memorandum to the ICJ that would have declared Democratic Kampuchea breaching its obligations under articles 1-5 of the Genocide Convention.[235]

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[234] Ibid Another interesting case is the one raised by Yugoslavia vs NATO members after the Kosovo events. See Peter Bekker "Legality of use of force" American Journal of International Law, Vol: 93(1999), pp.928-933

[235] George Andreopoulos. Genocide: Conceptual and historical dimensions. University of Pennsylvania Press, 1993, p. 36

B. Genocide and other crimes

The Genocide Convention produced a definition to an old crime, which, although mentioned during the prosecutions of the Nazi war criminals, was not defined in the Nuremberg charter. Despite its distinctive definition, genocide still continues to overlap with other crimes, especially those of crimes of war, and crimes against humanity. This may not be definitely composed, yet it is still worthwhile to attempt to remove some of the blur that shrouds these crimes that are frequently intertwined.

1.Genocide and war crimes

According to Clausewitz, one difference between genocide and war crimes is the moral attribute related to them. A genocidal crime is universally conceived as evil, while a war crime is justified as being a tool to the promotion of political interests between states. Moreover, although both revert to a comparable method of destruction, which is mainly mass murder, yet the ends differ with respect to both crimes. Genocide crimes are induced by politico ideological and psychological causes, while murder in a war is, to many, a natural attribute of war itself, which aims at victory. "Had the Nazis not lost World War II, for example, they would have continued their genocide against the Jews. In contrast, the Allies immediately discontinued the practice of firebombing cities when the enemy surrendered". Lastly, an important disparity between the two crimes lies in the nature of the victims. Genocidal victims are usually subject to barbaric horrendous methods such as burning or drowning alive, as well as subjection to starvation and disease. Furthermore, as already mentioned, the oppressors are far more powerful than the oppressed.[236] However, their commonalities are often imposing, which makes it, at times difficult for an observer to distinguish between them.

There is no doubt that war creates a favorable situation or atmosphere for genocide. The psychological mood that looms at the time of war works, as Dadrian puts

[236] Michael Dobkowski and Isodor Walliamn. Genocide in our time: An annotated bibliography with analytical introductions. Ann Arbor, 1992, p. 122

it, as "a cataclysmic agent of dis-equilibrium entailing manifold crises...". The parties at war with the enemy do not conceive of one another as the only enemy to be destroyed, but sometimes blame minority groups under their jurisdiction for their adversity. Such groups are often accused of treason and "used as a scapegoat for the frustrated aggression of the dominant group, especially when the war begins to go badly".[237]

Another factor to be considered is the destructiveness of modern weapons that target non- combatants in the course of war. This is likely to haze the line between genocide and war. Moreover the mood of war acts to blunt the differences between methods of killing because "there is evidence that similar psychological and social processes operate in both forms of mass killing"[238]

According to Kuper, "International warfare, whether between 'tribal' groups or city states, or other sovereign states and nations, has been a perennial source of genocide." By alluding to the Armenian genocide of 1915 and the Jewish Holocaust, Vahakn Dadrian concludes: "It is no accident that the two principal instances of genocide of this century coincided with the episodes of two global wars." Civil wars also create the potential for genocide, as was the case with "auto-genocide" in Cambodia between 1975 and 1978". [239]

The resemblance between the two crimes also lies in the attitude of governments. Whether democratic or dictatorial, a government during crisis becomes more centralized and commanding, and would use propaganda to "increase support for its belligerent policies", a fact which would increase resistance against both internal and external enemies. The governments of states at war may exploit the military forces– men who have been trained to kill in the service of their nation – for the perpetration of genocide. This occurred in both the Armenian genocide and the Holocaust. Under war conditions, furthermore, victim groups are inclined to be, as Dadrian notes, "isolated, fragmented, and nearly totally emasculated through the control of channels of communication,

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[237] Ibid, p. 124
[238] Ibid, p.124
[239] Ibid, p.124

wartime secrecy, the various sections of the wartime apparatus, police, and secret services, and the constant invocation of national security." This leaves them defenseless against the power of the government geared for genocide. Finally, Dadrian argues that there isn't much difference between genocidal victims and war victims, for the latter are as vulnerable to genocide as the former. A large number of victims includes women, children and elderly people– "who have scant chance of escaping bombs dropped from airplanes or high explosives or chemical weapons shot from heavy artillery". [240]

Charny differentiates between "domestic" genocides and those committed in time of international war. Domestic genocides are characteristics of pluralistic societies, where internal divisions between racial, ethnic, and/or religious groups are prominent. Genocides in the course of war are the result of armed conflict between "separate states". In this case, genocide in international war, although being an exclusive category may also be a war crime, and here both crimes overlap. A clear example is the incendiary pattern bombing of Hamburg, Dresden, and Tokyo, and the atomic bombings of Hiroshima and Nagasaki. These crimes may constitute both genocides and war crimes. The distinctive feature of pattern bombing is that the entire population of a city becomes the target of annihilatory assault. Thus Lifton and Markusen comment that the "four furious assaults on Hamburg in late July and early August 1943 had resulted in the first great firestorm of the war and abandonment of even a pretense of industrial targeting in the systematic bombing of residential areas, so that any destruction of factories was only a "bonus."[241]

2.Genocide and crimes against humanity

The development of the concept of crimes against humanity has been quite disorderly. The term was used prior to ww1 in the Marten clause of he 1899 and 1907 Hague conventions. It provides that " until a more complete code of laws of war has been issued, the inhabitants and the belligerents remain under the protection and the rule of the

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[240] Ibid, p.125

[241] Israel charny. Genocide: A critical bibliographic review. Institute of International Conference on the Holocaust and genocide, p. 34

principles of the law of nations, as they result from the usages among civilized peoples, from the laws of humanity, and the dictates of the public conscience" The term was further used by France, great Britain and Russia in condemnation of the Turkish massacres of the Armenians in 1915. [242]

In 1945, the charter of the military tribunal for the punishment of the Nazi war criminals set in Nuremberg provided a new definition to the term "crimes against humanity." Article 6 of the charter defines crimes against humanity as "murder, extermination, enslavement, deportation or other inhumane acts committed against any civilian population, before or during the war, or persecution 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". [243]

The International Law Commission, on its forty- eighth session, adopted in 1996, defined a crime against humanity as "any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group:

a) Murder; b) extermination; c) torture; d) enslavement; e) persecutions on political, racial, religious or ethnic grounds; f) institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population; g) arbitrary deportation or forcible transfer of population; h) arbitrary imprisonment; i) forced disappearance of persons; j) rape, enforced prostitution and other forms or sexual abuse; k) other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm." [244]

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[242] Marie Claude Roberge. "Jurisdiction of the ad hoc tribunals for the former Yugoslavia and Rwanda over crimes against humanity and genocide" International Review of the Red Cross. N: 321 (1997) pp 651-664
[243] Ibid, pp 651-664
[244] Ibid, pp. 651-664

The charters of the international military tribunals of Rwanda and the former Yugoslavia established in 1993 and 1994 respectively also provide definitions of crimes against humanity. According to article 5 of the ICTY statute, " The tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether national or international in character, and directed against any civilian population: a) murder, b) extermination, c) enslavement, d) deportation, e) imprisonment, f) torture, g) rape, h) persecution on political racial and religious grounds, I) other inhumane acts. The same list of crimes is provided in the ICTR statute but have to be committed " as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds" [245]

The statute of the ICC adopted in 1998, gives yet another definition of crimes against humanity. Article 7 of the ICC statute defines crimes against humanity as " any of the following acts when committed as part of a widespread systematic attack directed against any civilian population, with knowledge of eth attack".[246]

As seen above, the concept of crimes against humanity is not clear, for there has not yet matured into a uniform definition. Thus, as Robege puts it, " There is undoubtedly a consensus that crimes against humanity are crimes under international law recognized under the general principles of law giving rise to universal jurisdiction, yet the exact meaning of such crimes remains unclear"[247].

No doubt that genocide is a crime against humanity. During the writing of the convention, it was proposed to link the two incriminations and start article 1 by *a crime against humanity called genocide*. But this could not work since crimes against humanity were only punishable in the course of war. The International Military Tribunal dealt only with the acts that occurred after the beginning of the war since there was a premeditated evasion from the issue of human rights. Moreover crimes against humanity covered political groups while crimes of genocide did/do not. Finally what characterizes genocide

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[245] Ibid, pp. 651-664
[246] Darryl Robinson, "Defining crimes against humanity at the Rome conference" American Journal of International Law, Vol 93: 1999, p.45
[247] Op.cit, pp 651-664

is the presence of an intention to eliminate a racial, ethnic, religious or national group, in whole or in part. A crime against humanity (as defined at Nuremberg) on the other hand, does not focus of the question of intent. Thus, as Yves Ternon concludes, Genocide is an aggravated case of crimes against humanity, characterized by strong intention. [248]

Although one can see a measure of overlap between genocide and the other crimes already mentioned, it ought not to be confused with them. Genocidal crimes such as those of the Nazis were motivated primarily by racial, national, and religious considerations and were only peripherally linked to the conduct of the war. War crimes on the other hand are punishable only because they stand in violation of the rules of war. The evil motive behind genocide to obliterate entire groups because they are of different races, color, or religion, is not a war crime; rather it is a crime against the essence of humanity. Therefore the immorality of a crime such as genocide should not be confused with the amorality of the war crime[249]. Finally, due to this convention, racial religious and other groups at least in theory were immune against genocidal assaults not only by foreign governments, but also by their own governments, in times of war as in times of peace.[250]

The differences between genocide and crimes against humanity are more difficult to discern. The precise nature of crimes against humanity has not yet definitely crystallized and it is still being explored. Perhaps one, at this stage can point out two differences in the focus of the two crimes: While crimes against humanity are said to stand more significantly during wars, there is no such condition attached to acts of genocide. The other divergence between the two types of crimes may be considered is that of intent. While the intent to destroy is a necessary and proper condition for an act of genocide, it may not be such a condition for crimes against humanity, however, the scope for interpretation here is so broad that difficulty to pin down these two crimes continues to frustrate the efforts of scholars on the filed of human rights.

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[248] Yves Ternon. "L'etat criminel: Les genocides au 20eme siecle. Editions Du Seuil, 1995, p. 46
[249] Alain Dexte Rwanda and genocide in the 20th century Pluto Press, 1995, p. 33-34
[250] Leo kuper. Genocide: Its political use in the 20th century. Yale University Press, 1981, pp. 23-24

4.Genocide and genocidal massacre

The random usage of the word genocide to describe a variety of crimes has diluted its identification. In an attempt diversify its application, Leo Kuper proposed the word genocidal massacre as a subsidiary to genocide. There have been questions raised as to whether other crimes such as the five thousand Tamils in Sri Lanka, or the massacres in Sudan during the conflict between north and south during the civil war of 1955-1972 can properly be also called genocide. According to Charny, despite being committed on political grounds these crimes are genocidal, but they are of a lesser magnitude than the Armenian victims of the 1915 genocide or those of the Jewish holocaust. Therefore such massacres may be better called "genocidal massacres rather than genocide"[251]. 64)

Israel Charny conceives of a genocidal massacre as "mass killing as defined in the generic definition of genocide, but in which the mass murder is on a smaller scale, that is, smaller numbers of human beings are killed. So in this case, genocide would not only apply to large -scale massacres but also to lesser ones. This concept has been introduced by scholars such as Charny and Kuper who are working for a generic, or wider definition of genocide- one that includes political and other groups in the definition. This proposition seems logical and some scholars would agree with it, but not all. Total consensus is still lacking as to whether crimes as the ones mentioned above are to fall within the scope of the crime of genocide. [252]

5.Genocide and ethnic cleansing

The word ethnic cleansing has become widely used particularly after the atrocities committed in Bosnia, Croatia and Kosovo between 1992 and 1999. According to the UN special Rapporteur Mazowiescki's report of November 17, 1992, ethnic cleansing "refers to the elimination by the ethnic group exerting control over a given territory of members

[251] George Andreopoulos. ed. Genocide: Conceptual and historical dimensions. University of Pennsylvania Press, 1994, p. 64
[252] Ibid, p. 77

of other ethnic groups". [253] In his sixth report the rapporteur added: "Ethnic cleansing may be equated with the systematic purge of the civilian population based on ethnic criteria, with the view to forcing it to abandon the territories where it lives".[254]

From the above definitions, one may conclude that ethnic cleansing, although may incorporate barbaric means, focuses on the act of forcible expulsion of a certain group in order to achieve ethnic homogeneity in the region from which the group was expelled. The process may or may not involve murder. As jack Kelly puts it; "There is a difference between ethnic cleansing and genocide. Ethnic cleansing is the forcible expulsion of a people from a region. Genocide is an attempt to exterminate them"[255] However, ethnic cleansing as a crime could easily overlap with crimes against humanity and genocide. According to Petrovic, "It is apparent that a policy of ethnic cleansing, aimed at the definition of a population from a given territory, without precise designation of the target group and without any clear intention of their destruction as a group, could fit into the definition of crimes against humanity. The majority of ethnic cleansing policies in the former Yugoslavia appear to correspond to crimes against humanity, given that they are a systematic and massive attack on the civilian population". As for genocide, Petrovic argues that an extreme case of ethnic cleansing could be considered genocide. He supports his view by stating the UN general assembly resolution 47/121 of December 18 1992, which stipulates in Paragraph 9 of the preamble that, "the abhorrent policy of ethnic cleansing (which.....) is a form of genocide". [256]

6.Genocide and Politicide or Democide

The word Democide was recently invented by R.J.Rummel, who has been attempting to differentiate between genocidal crimes that are perpetrated for ethnic, national racial or religious considerations, and crimes committed for political reasons. If genocide is directed against a group for ethnic, racial or religious consideration, then

[253] Drazen Petrovic. "Ethnic cleansing: An attempt at methodology" European Journal of International Law. Vol.5:3 (2002)
[254] Ibid
[255] Jack Kelly. "More killing in Kosovo" PG News, November 7, 1999
[256] Op.cit

"what about governments murdering people for other reasons than the are indelible group membership? What about organized death squads eliminating communist sympathizers, assassinating political opponents, or cleansing the population of anti revolutionaries? What about fulfilling death quota as in the Soviet Union under Stalin? None of such murders are genocide according to the legal and common meanings". Therefore Rummel has proposed a definition of democide in comparison to genocide. In his words, "Genocide should be ordinarily understood as the government murder of people because of their indelible group membership and democide as any murder by government including this form of genocide"[257]

[257] R.J Rummel. "When and why to use the term democide for genocide" IDEA journal Vol. 6:1 (2002) Also *See* Rudolf Rummel. Death by government. NJ: Transaction Publishers, 1992

CHAPTER FIVE

Findings and deductions

The record of international law in the sphere of human rights is quite tangible. The creation of many legal documents* have mostly been the product of the second half of the 20th century. Also the establishment of tribunals* as well as the adoption of universal jurisdiction by a number of countries, and the efforts of the international community to bring a number of perpetrators to justice (including Augusto Pinochet, Miloseich, and former Khmer rouge officials), are all evidence of the degree of progress that international human rights law has traversed. Professor Antonio Cassese maintains that "Human rights are increasingly becoming the main concern of world community as a whole. There is a widespread sense that they cannot and should not be trampled upon with impunity in any part of the world. The international community is increasingly intervening through international bodies in internal conflicts, where human rights are seriously in jeopardy."[258]

The way international law has handled the various genocide cases treated in this work is illustrative of the degree of progress of the laws governing human rights and particularly genocide. At the same time the uncertainty and vagueness of that law have also been revealed. The parallelism between the notions of globalization and universality

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*Documents created include the Convention on Genocide, the Universal Declaration on Human Rights, the International, Covenants on Economic Social and Cultural rights, the International Covenants on Civil and Political rights, the International Convention on the Elimination of all Forms of Discriminations, and the European Convention on Human Rights.

*Tribunals already mentioned include those of Rwanda and Yugoslavia and the permanent International Criminal Court

[258] Thomas Frank "Lessons of Kosovo" American Journal of International Law Vol: 93 (1999), p.857 For a more thorough account of the development of human rights law, see Jonathan Chaney. "Editorial Comment: Progress in International criminal Law?" American Journal of International law Vol: 93 (1999)

on the one hand and enduring and entrenched notions of nationalism and power on the other, have left their own mark on human rights with bewildering results.

As shown in this work, the controversy over the meaning of the crime of genocide has started at the time of the drafting of the Genocide Convention and continues until our present day. To many, the adequacy of the genocide convention itself is questionable. It is maintained that the Convention was mainly tailored to fit the losers of WW2, therefore, it proved hardly adequate to cope with the variety of the crimes of mass killings that have been perpetrated thereafter.

The major loophole according to the critics of the Genocide Convention lies in what constitutes a victim group. The exclusion of political and economic groups from the genocide definition has narrowed its scope to the extent that none of the mass killings that have occurred, with the exception of the Rwandan case, (and very recently the case of Milosevic in Bosnia) were denounced as genocidal. As a result, of this ambiguity, most perpetrators of mass murder have been cautious to target groups not covered by the Convention.

The proof of intent necessary for charging genocide constitutes yet another complicated issue. Unless evidence of intent to eliminate a national, religious, ethnic or racial group is obtained, there is no charge of genocide. Moreover, since it is domestic law that gives effect to the convention, its text is subject to different interpretations in various countries. Some states attempt to either narrow the meaning of genocide (by excluding political and other groups) or broaden it (by including political and other groups) as they consider appropriate. Genocide may therefore be recognized in certain countries but not in others. The reservations made by some countries to give immunity to heads of states, and the application of the rule of non- extradition to one's own citizens may prevent justice from running its course. The overlap between genocide and other crimes namely war crime, crimes against humanity, and ethnic cleansing, and the attempts to broaden the definition of genocide by using genocidal massacres for crimes of a lesser magnitude, have all rendered the law governing this crime quite blurred. Finally,

the Convention comprises no enforcement procedure, and many governments are reluctant to have its provisions put into effect.[259]

Turning to the political power factor, one can see that it, too, had its impact on the drafting of the Convention. According to Kuper, "The big powers conspired and supported one another to remove from the basic definitions events in which governments take action against their political opponents."[260] Ever-since its inception, the Convention has not been properly used mainly for political reasons. The US had maintained diplomatic recognition of the Pol Pot regime for over 11 years to counter the communist regime established by Vietnam in Cambodia, seeking to isolate it. Only recently, after the collapse of communism, have the Americans resolved to bring the Khmer Rouge criminals to justice.

The Turks have been constantly denying their perpetration of the Armenian genocide, threatening to withdraw from NATO if legislation in the US senate to acknowledge the crime, is passed. The Americans have been conceding to Turkish demands, and still refer to the Armenian genocide as "an alleged genocide". The US has not exerted any pressure on Turkey to confess the wrong it had committed.

As seen in the Rwandan case, the ICTR was created but only after more than 800.000 people had lost their lives. Neither the Americans nor the international community had made reference to the genocide convention while the carnage was ongoing. The Convention on Genocide itself remained pending in the US Senate for almost 36 years. It was only in 1986 that the Senate gave its consent for ratification, and the Convention entered into force in the US in 1989.[261]

The attempts at creating an international criminal court have been a long and strenuous process, mainly due to American pressures based on a fear that Americans may be prosecuted. The problems associated with the creation of a permanent criminal court

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[259] Gerhard Von lahn. Law among nations. NY: Macmillan Publishing Company, 1996, p. 285
[260] George Andreopulos, ed. Genocide: Conceptual and historical dimensions. University pf Pennsylvania Press, 1994, p. 70
[261] Op.cit, p.286

are, as shown above, also indicative of the dichotomy between morality and power. US pressures on the international community on the issue of the court prevented American accession and caused the delay of the court coming forth.

A provision in the genocide convention gives capacity to the ICJ to act in certain cases of genocide under certain conditions. The record does not show active involvement of the ICJ in genocide cases due to the reluctance of states to make reference to it.

Another factor that explains the weak capacity of the Genocide Convention is the nature of the UN. Since the perpetrators of genocidal killings are almost always sovereign states, it seems unlikely that the UN member countries would act against one of their own. According to Charny, "Governments have been known to rationalize their policies of playing ball with other genocidal nations on the basis of every possible consideration: business needs, protection of one's own nationals. Almost invariably the truth is that underlying these policies of collaboration with a genocidal nation we will find a value system that places cynical realism and ambition above any consideration of genuine ethical or spiritual commitments to other peoples lives, and an indifference if not contempt for the minority that is being victimized."[262]

Enforcement measures in international law have always posed problems. While enforcement in domestic law is vested in the legitimate government, international law enforcement also entails the cooperation of the sovereign states themselves. Law enforcement by supra national bodies, has increased in the last decade but continues to be hampered by political and economic considerations and, hence, remains selective. The Rwanda trials and the trials of officials of the former Yugoslavia including a former head of state were all made possible by the cooperation of the states concerned. This cooperation was manifested in terms of handing over to the courts wanted suspects and facilitating the task of the courts in procuring evidence and witnesses. Lack of cooperation from the states concerned on the other hand, would protect suspects and keep them at large. The lack of cooperation of the Bosnian Serb authorities with the ICTY had

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[262] Michael Dobkoswski and Isodor walliman. Genocide in our time: An annotated bibliography with analytical introductions. Ann Arbor, 1992, p. 150

caused the two wanted Bosnian Serb suspects, Mladic and Karadzic to remain at large. Equally, in the case of Camdodia, the lack of cooperation of the Cambodian authorities with the International Court concerned with the case caused the court to abandon the trial altogether, and the case was promised to be pursued by the courts of Cambodia itself.

The critique of the Genocide Convention and the application of the law governing this crime must not be construed as a denial of the progress achieved in the range of human rights law. The confusion that a student in the field may sense is a product of the parallelism elaborated earlier and the interplay between morality and power in international politics.

The dynamics of international power politics with all its intruding variables have, since the beginning of the 20th century, manifested a faltered display of human rights law, although edging slightly towards the positive side. It looks as if this faltered display is ushering itself into the 21st century.

While international courts are being created and international trials conducted, the tragic events of the eleventh of September in the United States have introduced an extremely disturbing and umbalancing variable into the state of equilibrium between nationalism and sovereignty on the one hand and law and universality on the other.The events of the 11th of September have had a variety of important consequences on the United States (the major super power) and the entire world. A comprehensive treatment of such consequences does not fall within the scope of this work. However, reference to certain results of those events would add more substance to the present conclusion.

One major result of the eleventh of September is an enormous resurgence and growth of the feeling of patriotism that pervaded the American society almost in its entirety. This feeling has caused many Americans to reconsider their relationship with and attitude towards groups, whether nationals, aliens or foreigners. The security phobia in the wake of those events added to the radicalization of the attitude of many Americans towards such groups, causing serious divisions and alienations. Such divisions spread to

some other Western societies, and the theory of the struggle between cultures as a major determinant of international relations became revitalized and gained a measure of credibility,

A corollary of the above changes was manifested in the introduction of the US and certain other Western states of legislation that limited the rights and movement of aliens in those countries and even edged towards limiting the liberties of the citizens themselves. Added to that are the concerns strongly voiced, especially by human rights activists, over alleged inhumane treatment of Al Qauida prisoners (whom Americans insisted are not to be considered combatants protected by the Geneva protocols) kept by American forces in concentration camps. Such measures, together with ultra security regulations and restrictions imposed on air travel and movement may have some consequences not only on human rights and liberties, but also on the future course of globalization. How can globalization flourish and bloom with restrictions imposed on the free movements of people, goods, and capital, within and between states?

Another corollary of the events of September 11th attacks was a declared global war on terrorism by the United States and some of its allies. While this war may have a positive tinge since its aim is to stamp out terrorism, one of the serious international crimes, its vibrations have already begun to leave serious marks and disturbances. For one thing, the international legal norm governing intervention has been stretched to its limits with consequences on the notions of sovereignty and domestic jurisdiction. Moreover, the lack of consensus over the meaning of terrorism (terrorists vs freedom fighters) has caused many national groups to feel victimized and accusative of Western states of harboring hegemonic aims and neo-colonial visions.

How does all this affect the international law governing genocide? Maybe a direct link between the world developments following the September 11th attacks and international law of genocide cannot be clearly discerned. However, some contradictory consequences for that law may be envisaged noting that they should not exceed the limits of speculation.

Direct and forceful intervention against terrorism may set an example for similar interventions to stop genocide and other international crimes and bring their perpetrators to justice. The party that would undertake swift intervention, its international mandate and the manner that the intervention would take place remain a mater of conjecture. American intervention to rein in terrorists was justified by its legitimate right of self-defense and was prompted by impelling security considerations. Would the US undertake similar interventions to check or quash a crime of genocide or any other international crime, when its interests and security are not directly involved? Would the international community itself take up the task and develop an effective machinery for prompt intervention? On the other hand, should the consequences of the September 11th attacks produce erratic strains in the international system, then the parallelism of globalization and morality on the one hand, and nationalism, identity conflicts and power on the other, may become dichotomous causing international human rights law to falter. The future is the best judge as to how matters would develop. However, the dynamics of international integration and universality has gained enough momentum over the years to give international human rights law a sanctuary that may prove quite difficult to invade.

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