

# The international legal regime on genocide

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## Introduction

Andreopoulos (1994, p 1) notes that no crime matches genocide in the moral opprobrium that it generates. Constituting a criminal intent to destroy or cripple permanently a human group, acts of genocide shock the collective conscience of the world's community perhaps like no other act. While the commission of genocide dates to antiquity, it is in response to the atrocities committed by Nazi Germany during World War II that the international community undertook the development of international laws designed to both prevent and punish acts of genocide.

Over the course of the past quarter-century, genocide has come under increasing scrutiny from legal experts, scholars, statespersons, and citizens for a variety of reasons. Acts of genocide in a number of states, including Cambodia, Bosnia and Rwanda, have captured international attention. Legal developments, principally in the form of the establishment of two *ad hoc* tribunals, three genocide cases brought before the International Court of Justice, and the establishment of the International Criminal Court with jurisdiction over cases involving the crime of genocide, have encouraged scholars to revisit the provisions codified in the 1948 Genocide Convention. Efforts by Spain to secure the extradition of Augusto Pinochet, the former head of state of Chile, on charges of genocide and the prosecution of Yugoslav President Slobodan Milosevic in the International Criminal Tribunal for the former Yugoslavia (ICTY) on numerous counts, including genocide, further elevated the debate on the issues of immunity, jurisdiction and extradition as they relate to the adjudication of the crime of genocide. At the same time, these events along with fundamental changes in the international system associated with the end of the Cold War have resulted in greater expectations from the international community that the legal regime on genocide will succeed in its ambitious aims of both preventing and punishing acts of genocide. Thus, it is within an atmosphere of renewed optimism and unparalleled expectations that studies of genocide and the legal prohibitions against it have been undertaken.

The focus of this article is the contemporary legal status of the international regime on genocide. In order to assess its current status, the evolution of the regime is examined. Central to the regime's current status are the provisions codified in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which are analyzed on an article-by-article basis. While the

authoritative legal statement on the issue of genocide remains the Genocide Convention, it was the emergence of human rights law after World War I, and especially in the drafting of the United Nations Charter and the activities of the UN in its early years, that made the convention possible. It was through the efforts by the United Nations General Assembly and Economic and Social Council in providing both the legal framework and the political support of nations for a prohibition on acts of genocide that made the codification of the Genocide Convention attainable. Recent developments in the form of the two *ad hoc* tribunals and ICJ rulings are then examined, followed by a discussion of the newly established International Criminal Court with jurisdiction over crimes of genocide.

### **The concept of genocide**

The act of genocide is ancient, while the concept itself is contemporary. Chalk and Jonassohn (1990, p 32) note that there is no historical evidence of acts of genocide during the hunting and gathering stage of early man. Genocide emerged only after the world was divided into nomads and settlers, when conflicts over agriculture became increasingly destructive. In order to end the cycle of war, recuperation, and war seeking to avenge defeats, the victors began to adopt strategies of annihilation. After battle, the victors killed, sold into slavery, or dispersed the defeated populations. With the centralization of power in the hands of the state, along with an increased capacity to kill associated with revolutions in military technologies, the ability to commit mass murder on an unprecedented scale became more common, including acts targeted at individuals due to their group characteristics. It is since 1900 that the most destructive acts of genocide have taken place, ranging from the Armenian genocide to the Holocaust to the killing fields of Cambodia. To state that genocide is a twentieth century phenomenon is misleading; however, to label the 1900s the century of genocide is accurate.

### *Typologies*

A number of typologies have been used by scholars for analytical and comparative studies of genocides. Lemkin (1944, pp 79–82) offered the first typology, differentiating incidents of genocide based on the intent of the perpetrator. Accordingly, the first type of genocide, which emerged in antiquity and continued until the Middle Ages, was the total or nearly total destruction of victim groups and nations. The second type of genocide, characteristic of the modern age, was aimed at the destruction of a culture without an attempt to physically destroy its bearers. Lemkin's third type of genocide is reflected in the Nazi-style genocide of the 1930s, which combined ancient and modern forms of genocide in targeting some groups for immediate annihilation and others for ethnocidal assimilation. Others (Bernard, 1949; Horowitz, 1980) have offered typologies based on the type of society. Horowitz (1980, pp 13–14), for example, articulates

eight types of societies, ranging from permissive to genocidal societies. Additional typologies of genocide are based on the type of perpetrators, the type of victims, the type of groups, the types of accusation, the types of results for the perpetrator society, and the scale of casualties. Chalk and Jonassohn (1990, p 29), similar to Lemkin (1944), provide a typology that classifies genocide according to the motives of the perpetrators. Motives, according to Chalk and Jonassohn (1990) can be differentiated according to the following aims:

- to eliminate a real or potential threat;
- to spread terror among real or potential enemies;
- to acquire economic wealth; or
- to implement a belief, a theory, or an ideology.

Recognizing that more than one of the aforementioned motives may be at work, Chalk and Jonassohn (1990) categorize acts of genocide by determining which of the four motives was the dominant one. In their analysis, they (Chalk and Jonassohn, 1990) conclude that while the first three types of genocide date to antiquity, the fourth type is more reflective of modern times. The commission of the act of genocide in order to implement a belief, a theory, or an ideology is clearly distinct from types I–III. First, type IV genocides are targeted towards citizens of the perpetrator state instead of aliens. Second, while genocide to eliminate a threat (type I), spread terror among enemies (type II), or acquire economic wealth (type III) produce tangible benefits to the perpetrator state, ideological genocide (type IV) is carried out in spite of tremendous costs to the perpetrator state. Chalk and Jonassohn (1990, p 37) note that such costs to the state can be measured in economic, political, and developmental terms.

Kuper (1985), as well, clusters genocide according to motive. His three categories of modern genocide include:

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

Later, Kuper (1985) divides genocide into two main groups: domestic genocides carried out by a state on its territory against its own citizens and genocides arising in the course of international warfare. The four types of domestic genocide adopted by Kuper are:

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

The inability of scholars to reach a consensus on the most appropriate typology of acts of genocide underscores both the issue's complexity and the scholarly

community's continued effort to reveal its primary sources. The lack of consensus, as well, reflects diverging views on the very definition of genocide, an issue at the center of scholarly debate.

### *Definitions*

The term genocide became part of legal terminology only after World War II, although scholars (Klinghoffer, 1998; Destexhe, 1995; Totten *et al.*, 1995; Andreopoulos, 1994; Staub, 1989; Kuper, 1985) note its first use by jurist Raphael Lemkin during the latter stages of the war. The term genocide was derived from the Greek word *genos*, which translates to race or tribe, and the Latin *cide*, which translates to killing. Lemkin (1944, p 77) explained the concept as follows:

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

The inclusion of “nonlethal acts” such as actions aimed at the destruction of essential foundations of the life of national groups (Chalk and Jonassohn, 1990, p 9) makes Lemkin's definition extremely broad, resulting in the articulation of several alternative definitions of the term. However, as Chalk and Jonassohn (1990, p xvii) note, there is no generally accepted definition of genocide in the literature. Fein (1990, pp 23–25) focused her attention on developing a broader and deeper sociological definition of genocide, as follows:

Genocide is sustained purposeful action by a perpetrator to physically destroy a collectivity directly or indirectly, through interdiction of the biological and social reproduction of group members, sustained regardless of the surrender or lack of threat offered by the victim.

Like Lemkin, Fein does not limit acts of genocide to activities carried out by the state, as do many other scholars. Horowitz (1980, p 17) defines genocide as

A structural and systematic destruction of innocent people by a state bureaucratic apparatus.

Horowitz's definition does limit the range of perpetrators of acts of genocide to state bureaucratic apparatus. His definition expands the range of victims, which are defined in terms of their perceived innocence, making no reference to their collective characteristics. Harff and Gurr (1988) recognize that such a definition fails to differentiate state-sponsored murder for reasons other than group characteristics, termed *politicides*, from acts of genocide. Their definition, provided below, accepts Horowitz's limitation to state activities.

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

Chalk and Jonassohn (1990) define the term as follows:

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

This definition expands the range of perpetrators, limited by Horowitz and Harff and Gurr to a state's bureaucratic apparatus, by including other authorities. This definition fails, however, to include actions by individuals aimed at the destruction of groups based upon characteristics associated with the group. Charny (1988a, 1982) defines genocide in such a way that allows for actions by non-state agencies to qualify. His definition reads as follows:

Genocide in the generic sense is the mass killing of substantial numbers of human beings, when not in the course of military forces of an avowed enemy, under conditions of the essential defenselessness and helplessness of the victims.

Charny's definition, however, is exceptionally broad with no reference to either the intentions of the perpetrator or the group characteristics of the victims, issues of central concern to Lemkin.

What is clear from this review of the leading definitions of genocide is that both the range of perpetrators and the range of victims are as important as the manner in which the destruction takes place. A result of the divergent views on the proper definition of genocide is an inability of the scholarly community to arrive at a consensus of what actions constitute genocide and, related to this, the number of victims of genocide. Wallimann and Dobkowski (1987, p ix), for example, estimate that between 19 and 28 million people during the twentieth century were victims of genocide while Smith (1987, p 21) puts that number at 60 million. Undoubtedly, the debate over the proper definition of genocide will continue. Any acceptable definition of the term, however, must include both the 'intent to destroy' motive of the perpetrator as well as the 'group characteristic' of the victims.

### **The legal regime on genocide**

The legal regime on genocide is premised upon a perceived international responsibility to both criminalize the act and to expand the jurisdictional rights of the world's community such that prosecution of offenders is more likely. A recognition that an act of genocide constitutes a crime against humanity is rooted in Lemkin's (1944) insistence that:

to treat genocide as a crime that only concerns an individual nation makes no sense because

by its very nature the author is either the state itself or powerful groups backed by the state. ... By its legal, moral and human nature, genocide must be regarded as an international crime.

Undoubtedly, the authoritative legal statement on genocide is the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which defines the term, establishes it as an international criminal offence, and includes provisions to both prevent its occurrence and punish those responsible for its commission. The legal framework for the Genocide Convention was provided by the United Nations General Assembly and Economic and Social Council. Critical to the ability of the international community to construct a legal regime on genocide, however, was the development of international human rights laws following the First World War.

*Human rights law: eroding state sovereignty*

The ability to hold states legally responsible for their actions aimed at their own citizens has been traditionally limited by the statist legal doctrine that espouses complete state sovereignty within a country's borders. Protections provided to innocents have long been relegated to moral, and not legal, statements. Before the twentieth century, the virtually universal belief prevailed that the treatment of its citizens by a state fell outside the province of international law, inasmuch as the individual, alone or collectively, was merely an object and not a subject of the laws of nations. The realization of the need to safeguard individuals with minimal rights translated after the First World War into the emergence of human rights law. While the concept of human rights was not included in the League of Nations Covenant, actions taken by the League, in the form of formal Council resolutions and admission's criteria, affirmed individual rights to, *inter alia*, equality without reference to ethnicity, race, religion or language. The effect of the resulting "minority clauses," which were placed under the guarantee of the League of Nations, was consistently undermined by a conviction among states that the prohibitions laid down in the minority clauses represented intolerable intrusions into the domestic jurisdictions of sovereign states.

While efforts to provide legal protections to individuals against actions by their own state were less than conclusive after the First World War, a political and legal foundation had been laid down from which modern human rights law emerged. The preamble to the Charter of the United Nations establishes a commitment that the members of the organization are

determined ... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person ...

UN Charter articles, most notably 1, 13, and 55, reaffirm the preamble's commitment to human rights, assign to the General Assembly the task of initiating and making recommendations to accomplish these purposes, and commit the United Nations to promote "universal respect for, and observance of,

human rights and fundamental freedoms.” Through a series of initiatives, the United Nations established the Commission on Human Rights and drafted the Universal Declaration of Human Rights, the latter of which was adopted by the General Assembly one day before the Genocide Convention. The 1948 Universal Declaration of Human Rights established, *inter alia*, the basic rights of life, liberty, protection against torture, and equality of rights without discrimination. Thus, political and legal efforts to construct a legal regime on genocide took place within the context of a much larger global effort to assure basic rights of individuals in the broader form of international human rights.

### *General Assembly*

The General Assembly at its 47th plenary meeting on November 9, 1946, referred to the Sixth, or Legal, Committee a draft resolution, which Kunz (1949) notes was written by Lemkin, submitted by the representatives of Cuba, India and Panama inviting a study of the possibility of declaring genocide an international crime. At its 24th meeting on November 29, 1946, the Sixth Committee decided to entrust a Sub-Committee with the task of drafting a unanimously acceptable resolution on the basis of various proposals submitted. The draft resolution was unanimously adopted by the Sixth Committee at its 32nd meeting on December 9, 1946. On the recommendation of the Sixth Committee the General Assembly at its 55th plenary meeting on December 11, 1946, unanimously adopted Resolution 96(I), which reads:

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

*The General Assembly Therefore,*

*Affirms* that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices—whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or other grounds—are punishable;

*Invites* the Members States to enact the necessary legislation for the prevention and punishment of this crime;

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

The General Assembly reaffirmed the 1946 resolution on November 21, 1947

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

When the drafting project was completed, the Council, after a general debate, decided by resolution 153(VII) on August 26, 1948, to send the draft to the General Assembly Third Committee for study and action. The General Assembly then referred the report to its Sixth Committee for consideration. The Sixth Committee devoted 51 meetings during two months to an examination and discussion of the draft convention. On December 9, 1948, the General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide. On December 11, 1948 the representatives of 20 states signed the convention, which entered into force in 1951. To date, 133 states have ratified the treaty.

### *The Genocide Convention*

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

#### *The Contracting Parties*

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

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

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

*Hereby agree as hereinafter provided*

The Convention's preamble is followed by 19 articles which can be divided into three categories, as follows: substantive articles (I–IV); procedural articles (V–IX); and technical articles (X–XIX).

*Substantive articles.*

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

The first article establishes the fact that acts of genocide, regardless of the presence or not of war, constitute international crimes and also commits Parties to the Convention to undertake actions to both prevent and punish the acts. Article I was targeted for criticism by many, including the Committee on Peace and Law Through the United Nations, which concluded that “what is left of the Convention is a code of domestic crimes which are already denounced in all countries as common law crimes.” While it may be true that acts of genocide are criminal on the domestic plane, the contribution that Article I makes is significant. Acts that the Convention defines or lists in the two articles that follow (Articles II and III), which hitherto if committed by a government in its own territory against its own citizens have been no concern to international law, are made a matter of international concern and are, therefore, taken out of the “matters essentially within the domestic jurisdiction of any state” (Article II, paragraph 7, United Nations Charter). While genocide by a state against its own citizens was morally condemned prior to the Convention, it was “generally recognized that a state is entitled to treat its own citizens at its discretion and that the manner in which it treats them is not a matter with which international law ... concerns itself” (Oppenheim and Lauterpacht, 1948, p 583). Elevating the status of the crime of genocide to the international plane, therefore, is an important contribution of the Convention’s first article. Further, by committing states to “undertake to prevent and punish genocide,” the Convention’s first article can be interpreted as a right to intervene by outside parties. The traditional state sovereignty defense against intervention is called into question by Falk (1999, p 847), who states that “genocidal behavior cannot be shielded by claims of sovereignty.” Simma (1999, p 2) extends this argument by concluding that “in the face of genocide, the right of states, or collectivities of states, to counter breaches of human rights most likely becomes an obligation.” There is, however, no legal obligation to intervene.

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

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

As stated in Article II, the Convention’s approach is that of individual crime and not of persecutions instigated by governments (Finch, 1949, p 733). For this and

other reasons, the Convention's definition of genocide has sparked a heated scholarly debate over its utility and completeness (Chalk and Jonassohn, 1990, p 23; Charny, 1984, p 65; Dadrian, 1975, p 123; Drost, 1959; Fein, 1990, pp 23–25; Horowitz, 1980). Andreopoulos (1994, p 2) articulates some of the shortcomings of the Convention's definition of genocide. First, the definition excludes political and social groups from those deemed worthy of protection. In addition, economic groups are not provided explicit protection under Article II. With the establishment of anti-capitalist ruling parties this century, the prospect of states liquidating property owners and others who believe in private enterprise was very real during the Convention's drafting. The failure to include political, social and economic groups in Article II, therefore, is a serious omission, which can be explained only with reference to the political debate process by which the Convention was drafted. Also absent in the Convention's provisions is a reference to "cultural genocide," which Dadrian (1975) includes in his five types of genocide.

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

Article III. The following acts shall be punishable:

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

In its third article, the Convention expands the domain of acts that fall within its legal parameters, reflecting the complexity of the acts that contribute to genocide. In the first verdict ever handed down by an international court on charges of genocide, delivered against Jean Paul Akayesu by the International Criminal Tribunal for Rwanda (ICTR) in 1998, the defendant was found guilty of not only genocide but also public incitement to commit genocide, a charge that as well has been adjudicated in Rwandan national courts against individuals who used public radio to incite violence against Tutsis. Two days later, the ICTR convicted Rwanda's former Prime Minister, Jean Kambanda, of genocide, conspiracy to commit genocide, and incitement of genocide. By criminalizing related acts of genocide, the Convention expands the domain of prosecution into important areas.

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

in the United States, in particular, about the dividing line between incitement and the constitutionally guaranteed freedom of speech.

Article IV. Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

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

#### *Procedural articles.*

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

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

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

The original draft of the Convention provided for universal jurisdiction, permitting the state whose authorities had arrested those charged with the crime to exercise jurisdiction regardless of the nationality of the accused or of the place where the offense was committed. After heated debate, it was concluded that universal jurisdiction would not be incorporated into the final convention. As a result, the first part of Article VI only recognizes the jurisdiction of the state in the territory of which the act of genocide was committed. To expand jurisdiction over crimes of genocide, the second part of Article VI extends jurisdiction to an international penal tribunal, as long as the contracting parties have accepted that tribunal's jurisdiction. Since no such international tribunal existed at the time of the convention's drafting, this provision did little to expand jurisdiction as it relates to crimes of genocide. The establishment in the 1990s of criminal

tribunals for the former Yugoslavia and Rwanda, along with the establishment in 2002 of the International Criminal Court, however, greatly increases the impact of Article VI's reference to an international penal tribunal.

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

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

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

Article VIII places at the disposal of states seeking to prevent or punish genocide the institutions and organs of the United Nations. Several United Nations bodies, including the General Assembly, the Economic and Social Council, the Security Council, the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities, have played a constructive role in the prevention and punishment of the crime of genocide. On several occasions, these bodies have qualified acts as genocide, publicly proclaimed states complicit in genocidal acts, and established tribunals for the prosecution of accused. Mendlovitz and Fousek (2000, p 112) argue that Article VIII may serve as the basis for creating innovative preventive mechanisms, such as the United Nations Constabulary that they propose.

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

While Article IX was weakened by reservations submitted by several states, which declared that Parties were not bound by the article's provisions unless all Parties to the dispute agreed to submit the issue to the International Court of Justice, the ICJ has been called upon to adjudicate genocide cases and provide advisory opinions to the General Assembly and Parties to the Genocide Convention. In 1951, the General Assembly requested an advisory opinion from the

Court regarding the impact of reservations made by Parties to the Genocide Convention that were objected to by other Parties to the Convention. The Court ruled that Parties registering reservations, which are subsequently objected to by other Parties to the Convention, remain Parties to the Convention. The Court's ruling, contrary to some legal opinion, worked to strengthen the Genocide Convention, since the complete exclusion from the Convention of one or more States would not only restrict the scope of its application but would detract from the authority of the moral and humanitarian principles which are its basis. On three occasions during the 1990s states initiated proceedings in the International Court of Justice on the charge of genocide, as provided for in Article IX.

*Technical articles.*

Article X. The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

Article XI. The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and any non-member State to which an invitation to sign has been addressed by the General Assembly. The present Convention shall be ratified, and instruments of ratification shall be deposited with the Secretary-General of the United Nations. After 1 January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article XII. Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend to the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

Article XIII. On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a *proces-verbal* and transmit a copy thereof to each Member of the United Nations and to each of the non-member States contemplated in article XI. The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession. Any ratification or accession effected, subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

Article XIV. The present Convention shall remain in effect for a period of ten years as from the date of its coming into force. It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period. Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

Article XV. If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

Article XVI. A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-

General. The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

Article XVII. The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in article XI of the following:

- (a) Signatures, ratifications and accessions received in accordance with article XI;
- (b) Notifications received in accordance with article XII;
- (c) The date upon which the present Convention comes into force in accordance with article XIII;
- (d) Denunciations received in accordance with article XIV;
- (e) The abrogation of the Convention in accordance with article XV;
- (f) Notifications received in accordance with article XVI.

Article XVIII. The original of the present Convention shall be deposited in the archives of the United Nations.

Article XIX. The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

The three technical articles of particular interest are Articles XIV–XVI, which greatly affect the Convention’s status and applicability. According to Article XIV the Convention is not permanent, being in effect for 10 years after its date of entry into force, followed by five year subsequent terms. Article XV’s proviso, which states that in the event that enough states denounce the treaty such that its total number of Parties is less than 16 the Convention will cease to be in force, is highly unusual for a multilateral treaty. Short of denouncing the Convention, Parties possess the right, according to Article XVI, to request a revision of the treaty’s provisions at any time. The request is subject to General Assembly action.

### **Utility of the genocide convention**

The extent to which the Genocide Convention has contributed to both the prevention and punishment of acts of genocide, at least until the 1990s, is not impressive. The effectiveness of the Convention, undoubtedly, was weakened by divergent state interests and objectives at the time of its drafting, which led to a compromise accord that fell short of what proponents had envisioned. Kuper (1985, p 100) concludes that the compromises reached at the drafting stage jeopardized the Convention’s effectiveness and implementation. Indeed, more than 40 years after its completion, there was little reason to praise the Genocide Convention for its contribution to either the prevention or the punishment of the crime of genocide.

Changes in the international environment as a result of the Cold War’s end, however, have enhanced the Genocide Convention’s standing and utility. Its reference to an international penal tribunal (Article VI), viewed at the time as a weak and ineffective provision in the absence of such a tribunal, is now viewed

as prophetic with the establishment of the two *ad hoc* tribunals and the International Criminal Court.

### *Prevention of genocide*

Assessing the effectiveness of the legal regime on genocide requires a consideration of the two operative terms—prevention and punishment—located in the title of the 1948 Genocide Convention. While prevention shares an equal status with punishment in the Convention's title, there are no direct prevention provisions in the treaty's articles. The omission of prevention measures reflects both the general lack of knowledge of the cause or causes of genocide as well as the divergent political positions of states during the drafting process. The sources of genocide are argued to include, *inter alia*, human nature (see Lorenz, 1966; Koestler, 1978), fears of death and non-aliveness (Charny, 1982), material deprivation, ethnic diversity (Falk, 1979), economic system (Falk, 1979), and the presence of war (Markusen, 1996), which serves as a cover for the suppression and elimination of individuals based upon their common group characteristics. Absent of a compelling theory that reveals the necessary and sufficient causes of genocide, the treaty could not provide explicit prevention measures. As such, the prevention of genocide relies upon deterrence, principally in the form of the threat of punishment of those contemplating acts of genocide. For prevention through the threat of punishment to be credible, a consistent record of bringing perpetrators of genocide to justice must be established. Thus, while prevention remains a central aim of the genocide regime, it is contingent upon the accomplishment of the punishment aim, which is more directly addressed in the Genocide Convention.

### *Punishment of genocide*

The Genocide Convention represents an attempt to carry over into time of peace the so-called Nuremberg principle under which captured enemies were held personally liable for acts of aggression and crimes against humanity. A central problem in terms of punishment, however, is that the Nuremberg Tribunal had the physical custody of the persons whose condemnation was demanded. The punishment of the crime of genocide is provided for in the Genocide Convention at two judicial levels—municipal and international—as stated in Articles V and VI. According to Article V, Parties to the Convention are required to enact the necessary legislation to give effect to the provisions of the Convention. In particular, Parties are called upon to provide effective penalties for persons guilty of genocide. Article VI calls for persons charged with genocide to be tried by a competent tribunal of the state of whose territory the act was committed. As such, two prosecution scenarios emerge, depending on the location of the act. In instances where acts of genocide occur in the victim state's territory, international genocide, that state enjoys full rights of prosecution, as long it is

in possession of the offender. Bringing the perpetrators of genocide to justice is more likely in this scenario.

The second scenario involves what Kuper (1985, pp 102–104) terms domestic genocide, genocidal acts committed within a state by citizens of that state. The chief obstacle to state prosecution of its own citizens for acts of genocide is the common complicity of states in the acts. This makes prosecution much less likely, resulting in what Kuper (1985, p 173) concludes “is that the Genocide Convention has been almost totally ineffective in securing punishment of the crime [of domestic genocide].” The unimpressive performance of national courts in the punishment of acts of genocide committed by their own citizens attests to Kuper’s statement.

If genocide is considered an *urga omnes* offense prosecution can be carried out by any national court, as jurisdiction is viewed as universal. The obstacle to third-party prosecution, however, is possession of the alleged criminal. Unless the state seeking prosecution possesses the accused, extradition is required. The history of extradition for crimes such as genocide is not impressive, even when a third state possesses the accused, as the failed extradition of Chile’s Augusto Pinochet from the United Kingdom to Spain recently illustrates.

If national level prosecution is rendered ineffectual due to state complicity in genocidal acts, the chief punishment avenue remains an international tribunal, such as the International Court of Justice, as set forth in the second half of Article VI of the Genocide Convention. Since, however, the International Court of Justice only enjoys jurisdiction over consenting states, the ICJ is limited in its ability to adjudicate genocide cases. As such, international prosecution depends upon either the creation of *ad hoc* tribunals for specific instances of genocide, as was the case with the former Yugoslavia and Rwanda, or the establishment of a permanent international criminal court. While the establishment of *ad hoc* tribunals for the prosecution of war criminals, including those accused of committing acts of genocide in the conflicts in the former Yugoslavia and Rwanda, represent historic events the problems associated with the *ad hoc* tribunal approach are too numerous to achieve a consistent and effective punishment of genocide offenders. Both *ad hoc* tribunals established in the 1990s were characterized as lethargic and slow moving. For example, by the time that the International Criminal Tribunal for Rwanda (ICTR) handed down its first verdict on a charge of genocide, Rwandan national courts had handed down more than 20,000 genocide-related indictments and verdicts.<sup>1</sup> The tendency to establish *ad hoc* international criminal tribunals only for the most celebrated cases of human destruction underscores an intrinsic problem with effective prosecution of acts of genocide by non-permanent international tribunals. A much more consistent pattern of prosecution may be achieved now with the International Criminal Court. Until the end of the Cold War there was little indication that either *ad hoc* tribunals for specific instances of genocide or the application of genocide cases by states to the International Court of Justice would avail themselves to the international effort to prevent and punish genocide. Developments since the end of the Cold

War, however, have significantly altered the nature of international prosecutions.

### ***Ad hoc tribunals***

If the decade of the 1940s was characterized by the international effort to codify the legal regime on genocide, the decade of the 1990s was characterized by international efforts to adjudicate the crime of genocide. During the 1990s two *ad hoc* tribunals were established, three genocide cases were heard by the International Court of Justice, and the Rome Convention, which provided the Statute for the International Criminal Court, was completed.

#### *Yugoslav Tribunal*

The massive violence and brutality in the war that erupted in the former Yugoslavia, with an unprecedented scale of mass killings in Europe since 1945, the implementation of genocidal “ethnic cleansing” policies, the existence of concentration camps, murder, organized torture, rape, and other atrocities, drew international attention and condemnation. As the situation deteriorated, the United Nations Security Council received requests from some of its members to convene a meeting and take action in the Yugoslav conflict. On September 25, 1991 the Council responded to those requests and met to discuss the unfolding situation in Yugoslavia.<sup>2</sup> In response to the failed sanctions to halt the conflict and atrocities committed on all sides, the Security Council adopted Resolution 780 (1992), requesting the establishment of a Commission of Experts to report on the grave breaches of international law in the former Yugoslavia. The Secretary General, at the request of the Security Council, compiled and submitted a report recommending the creation of a criminal court expressly for the conflict in Yugoslavia. By Resolution 827 (1993) the Council established the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY). A statute for the Tribunal was drafted and approved by the Council, setting into motion the creation of the first such tribunal since the close of the Second World War.

Seated in The Hague, Netherlands, the ICTY is mandated to prosecute individuals responsible for serious violations of international humanitarian law committed on the territory of the former Yugoslavia since 1991. The Tribunal is authorized to prosecute and try four clusters of offences:

- grave breaches of the 1949 Geneva Conventions;
- violations of the laws or customs of war;
- genocide; and
- crimes against humanity.

The first genocide case adjudicated by the Yugoslav Tribunal was filed in 1998.<sup>3</sup> Goran Jeliscic, the self-proclaimed “Serb Adolf,” was charged with 32 counts of serious violations of international law, including genocide, murder,

torture, crimes against humanity and other grave breaches of the laws or customs of war. On October 19, 1999, the Trial Chamber acquitted the defendant of the charge of genocide but found him guilty on 31 counts of violations of the laws or customs of war and of crimes against humanity. As a result of the ruling, Mr. Jelisic was sentenced to 40 years in prison. The Court's acquittal on the sole charge of genocide revolved around the difficulty of proving the intention behind the acts.

The ICTY presently has 75 public indictments issued, 55 of which are currently in proceedings. The Tribunal's highest profile case is that of Slobodan Milosevic, the former president of Yugoslavia, who was arrested in April 2001 and transferred to the Tribunal to face charges two months later. Milosevic has been charged with 66 counts, including 17 counts of grave breaches of the 1949 Geneva Conventions, 23 counts of violations of the laws or customs of war, 24 crimes against humanity, and two counts of genocide. Twenty individuals publicly indicted by the Tribunal remain at large, an unknown number of others are sought on sealed indictments.

### *Rwandan Tribunal*

In Rwanda, ethnic violence was unleashed in the aftermath of the sudden death in a plane crash of Rwanda's president. With shocking speed, as many as one million Rwandans were massacred in a 100-day period. The ethnic division between victims and perpetrators indicated that crimes of genocide were taking place. Having failed to prevent the human destruction, the Security Council took action to prosecute those believed responsible for the killings. In July 1994 the Security Council adopted Resolution 935, establishing a Commission of Experts to investigate human rights violations in Rwanda. Next, following the Yugoslav model, the Security Council decided to establish the United Nations International Criminal Tribunal for Rwanda (ICTR).<sup>4</sup>

The ICTR was established for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between January 1, 1994 and December 31, 1994. The Tribunal may also deal with the prosecution of Rwandan citizens responsible for such acts in the territory of neighboring states during the same period. The Tribunal has prosecuted 11 cases to completion, and currently has 52 cases in progress. Individuals convicted by the ICTR include several prominent members of the former Rwandan government, including its prime minister.

### **International Court of Justice cases**

The International Court of Justice (ICJ) superseded the Permanent Court of International Justice (PCIJ) following the Second World War. Described by the United Nations Charter as the principal judicial organ of the organization, the ICJ is, in essence, a continuation of the PCIJ with an identical Statute. Composed of 15 judges elected by the General Assembly and Security Council,

the ICJ is empowered to rule on cases brought by nation-states against other nation-states. A second, and more limiting, restriction on the Court's jurisdiction is its consent requirement. Unless states accept the Court's compulsory jurisdiction clause, an *a priori* commitment to appear before the Court when a case is filed against them, the Court's jurisdiction is contingent upon the expressed consent of states party to the dispute. The ICJ's dismissal of the Yugoslav cases brought against Spain (1999) and the United States (1999), in which the crime of genocide was charged, illustrate this weakness. During the 1990s, three states filed cases in the ICJ involving genocide.

### *Bosnia v. Yugoslavia case*

In 1993 the ICJ heard its first case regarding genocide, brought by Bosnia and Herzegovina against Yugoslavia.<sup>5</sup> In its application, Bosnia claimed that the Serb effort to create a "Greater Serbia" resulted in the systematic bombing of Bosnian cities and the intentional targeting of its Muslim citizens. The Bosnian application also contends that the Serb policy of driving out innocent civilians of a different ethnic or religious group from their homes, so-called "ethnic cleansing," was practiced by Serbian forces in Bosnia on a scale that dwarfs anything seen in Europe since Nazi times. The application declared that the evidence indicates a *prima facie* case of genocide committed against Bosnia, and requested that all appropriate actions be taken by the Court in accordance with the standards of the Genocide Convention.

In its 1994 ruling the Court did not issue a finding on whether genocide was being committed in Bosnia; however, it did ask the government of the Federal Republic of Yugoslavia to "ensure that any military, paramilitary or irregular armed units which may be directed or supported by it ... do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group."

### *Yugoslavia v. NATO cases*

On April 29, 1999 the Federal Republic of Yugoslavia instituted proceedings before the Court in 10 separate cases against Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, Spain, United Kingdom, and United States, accusing each of bombing Yugoslav territory in violation of their international obligations, including the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group.<sup>6</sup> The reference to the "physical destruction of a national group" caused by the NATO bombing campaign constituted a charge by Yugoslavia of the commission of the crime of genocide.

By a vote of 11 to four, the Court ruled in an initial decision that the threat or use of force against a State cannot in itself constitute an act of genocide

within the meaning of Article II of the Genocide Convention. The Court further ruled that it does not appear at the present stage of the proceedings that the bombings which form the subject of Yugoslavia's Application "indeed entail the element of intent, towards a group" as required by the Convention's provisions.

*Croatia v. Yugoslavia case*

On July 2, 1999 the Republic of Croatia instituted proceedings before the Court against the Federal Republic of Yugoslavia for alleged violations of the Genocide Convention between 1991 and 1995.<sup>7</sup> In its application, Croatia contended that acts of genocide were committed on Croatian soil by Yugoslav armed forces, intelligence agents, and various paramilitary detachments. Croatia's application states that "in addition, by directing, encouraging, and urging Croatian citizens of Serb ethnicity, Yugoslavia engaged in conduct amounting to a second round of ethnic cleansing."

While the International Court of Justice did not rule in any of the cases that acts of genocide had been committed, its application of the provisions in the 1948 Genocide Convention further strengthen the Convention's standing in international law. At no time did the Court question the jurisdictional powers provided to it by Article IX of the Convention, nor did the Court stray from the legal definition of genocide provided in Article II.

**International Criminal Court**

Scholars (Mendlovitz and Fousek, 2000; Morton, 2000; Crawford, 1994; Bifani, 1993; Baez, 1993; Gianaris, 1992) contend that an important and potentially effective means of prosecuting alleged perpetrators of the crime of genocide would be through the establishment of an international criminal court, as reflected in Article VI of the Convention. Until the end of the Cold War, however, the prospects of creating such a court were exceedingly low. With the collapse of the Soviet Union and the associated increase in legal accord among the major powers, efforts to establish such a court were revisited with renewed vigor and seriousness. Crawford (1994) notes that the combination of three crucial elements made a permanent international criminal court possible. First, the large-scale breakdown of state order in particular societies, leading to massive violations of human rights, as has been witnessed most dramatically in the former Yugoslavia and Rwanda. Second, support is found for action in the Security Council associated with an unwillingness by any permanent member to veto such action. Third, the intensive and detailed media coverage of the atrocities that have taken place has given rise to public demand that something be done to address international crimes. Prior to the convergence of these trends, efforts by the International Law Commission and the Committee on International Criminal Jurisdiction to draft a statute for an international criminal court were weakly supported by the international community (see, Morton, 2000, pp 54–73). When the issue of an international criminal court statute was referred

back to the International Law Commission by the General Assembly in December 1991, the international environment had changed to such a degree that the proposition became feasible. The work of the Law Commission, completed in 1995, became a starting point for the 1998 Rome Convention, which resulted in the drafting of a statute for the International Criminal Court. While the final document arrived at in Rome in 1998 fell short of the hopes of many in terms of its scope, jurisdiction, independence, and great power support, the crime of genocide was listed as one of four “core crimes” that the court could address. Further, in defining the crime of genocide, the drafters of the Rome Convention adopted the definition provided in the 1948 Genocide Convention. Undoubtedly, a central drive behind the effort to establish the International Criminal Court was the desire to prevent and punish the crime of genocide. In July 2002, the International Criminal Court was formally established, its statute having been ratified by a sufficient number of states for it to enter into force. To date, 139 states are signatories to the Rome Convention, 79 states have ratified the ICC Statute.

### **Conclusion: the genocide regime**

The emergence of a legal regime on genocide, comprised of actions taken by principal organs of the United Nations and its member states, the drafting and entry into force of the 1948 Genocide Convention, the establishment of two *ad hoc* tribunals, rulings by the International Court of Justice, and the establishment of the International Criminal Court, represents a watershed period in legal history. Genocide was a nameless scourge on the international community; yet, within three years of the conclusion of the Second World War the international community drafted a treaty and, within three years of its drafting the treaty entered into force. The fact that 133 states have ratified the Genocide Convention signifies its global acceptance at least in principle, and the adjudication of genocide cases by the two *ad hoc* tribunals and the International Court of Justice signifies the regime’s continued utility.

It is important to note that any assessment of the international effort to prevent and punish the crime of genocide must be considered as part of a long-term process. As such, international law involves much more than the codification of a treaty or specific instances of adjudication. Instead, international law becomes meaningful in international relations when its principals are accepted as binding upon states and states condition their policies in regard to the established principles. Legal analysis of the specific components of the genocide regime—1946 General Assembly resolution, 1948 Genocide Convention, *ad hoc* tribunals, ICJ rulings, statute of the International Criminal Court—while critically important in and of themselves, must be assessed as a whole with reference to the impact that one component has had on subsequent components. Criticizing the 1948 Convention for its limited definition of genocide or its failure to establish an international penal tribunal fails to appreciate the path-breaking contribution of the treaty. Wippman’s (2000, p 5) contention that “[f]rom the

beginning, the drive to create [the permanent international criminal] court [at the Rome Convention] rested in substantial part on the need to prevent and punish the crime of genocide” reinforces this point. The international consensus over the need to prevent and punish the crime of genocide evolved as a direct result of the early component parts of the genocide regime. The International Criminal Court, therefore, should not be viewed as a negative reaction to the shortcomings of the Genocide Convention, but rather as an extension of the ideals and provisions codified in it. By conceptualizing the international law on genocide as a regime, a series of inter-related decisions, documents, provisions and norms that must be considered as a whole, a fuller understanding and appreciation of the impact that the individual components have had on the development of international law is possible. The codification and adjudication of the genocide regime during the twentieth century will, accordingly, continue to influence the regime’s evolution during the twenty-first century.

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3. The Prosecutor Against Goran Jelusic, Case No. IT-95-10-PT, indictment filed on March 3, 1998.
4. Security Council Resolution 995, Annex, November 8, 1994.
5. International Court of Justice, *Order on Request for the Indication of Provisional Measures in Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina versus Yugoslavia), April 8, 1993.
6. In two cases (Yugoslavia v. Spain and Yugoslavia v. United States of America) the Court concluded that it manifestly lacked jurisdiction and it accordingly ordered that those two cases be removed from its docket.
7. International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia versus Yugoslavia), June 2, 1999.

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