

The ‘Odious Scourge’: Evolving Interpretations of the Crime of Genocide

by William A. Schabas*

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WHEN hundreds of thousands of Armenians living within the Ottoman Empire perished in 1915,¹ the governments of France, Great Britain and Russia responded with an unprecedented declaration. Dated 24 May 1915, it asserted that ‘[i]n the presence of these new crimes of Turkey against humanity and civilization, the allied Governments publicly inform the Sublime Porte that they will hold personally responsible for the said crimes all members of the Ottoman Government as well as those of its agents who are found to be involved in such massacres’.² It has been suggested that this constitutes the first use, at least within an international law context, of the term ‘crimes against humanity’.³

According to the *Treaty of Sèvres*, signed 10 August 1920, Turkey recognized the right of trial ‘notwithstanding any proceedings or prosecution before a tribunal in Turkey’ (art. 226), and was obliged to surrender ‘all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by rank, office

* Professor of Human Rights Law, National University of Ireland, Galway and Director, Irish Centre for Human Rights.

¹ Richard G. Hovannisian, ed., *The Armenian Genocide, History, Politics, Ethics*, New York: St. Martin’s Press, 1991; R. Melson, *Revolution and Genocide: on the Origin of the Armenian Genocide and of the Holocaust*, Chicago: University of Chicago Press, 1992.

² English translation quoted in: United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London: His Majesty’s Stationery Office, 1948, p. 35.

³ This initial use of the term ‘crimes against humanity’ was noted in some of the first judgments of the International Criminal Tribunal for the former Yugoslavia (*Prosecutor v. Tadić* (Case No. IT-94-1-T), Opinion and Judgment, 7 May 1997, para. 618, fn. 87) and the International Criminal Tribunal for Rwanda (*Prosecutor v. Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 29). The concept of crimes against humanity, however, had been in existence long before 1915. During debates in the National Assembly, French revolutionary Robespierre described the King, Louis XVI, as a ‘[c]riminal against humanity’: Maximilien Robespierre, *Œuvres, IX*, Paris: Presses universitaires de France, 1952, p. 130. In 1890, an American observer, George Washington Williams, wrote to the United States Secretary of State that King Leopold’s regime in Congo was responsible for ‘crimes against humanity’: Adam Hochschild, *King Leopold’s Ghost*, Boston & New York: Houghton Mifflin, 1998, p. 112.

or employment which they held under Turkish authorities’.⁴ This formulation was similar to the war crimes clauses in the *Treaty of Versailles*.⁵ But the *Treaty of Sèvres* contained a major innovation, contemplating prosecution for the massacres committed within Turkey by the Turkish regime, as well as of war crimes committed against allied soldiers or civilians within occupied territories. Pursuant to article 230,

The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on the 1st August, 1914. The Allied Powers reserve to themselves the right to designate the Tribunal which shall try the persons so accused, and the Turkish Government undertakes to recognise such Tribunal. In the event of the League of Nations having created in sufficient time a Tribunal competent to deal with the said massacres, the Allied Powers reserve to themselves the right to bring the accused persons mentioned above before the Tribunal, and the Turkish Government undertakes equally to recognise such Tribunal.⁶

Though signed by the parties, including Turkey, the Treaty of Sèvres was never ratified and never, therefore, came into force. As Kay Holloway wrote, the failure of the signatories to bring the treaty into effect ‘resulted in the abandonment of thousands of defenceless peoples – Armenians and Greeks – to the fury of their persecutors, by engendering subsequent holocausts in which the few survivors of the 1915 Armenian massacres perished’.⁷ The *Treaty of Sèvres* was replaced by the *Treaty of Lausanne* of 24 July 1923⁸, an instrument that contained a ‘Declaration of Amnesty’ for all offences committed between 1 August 1914 and 20 November 1922.

⁴ [1920] UKTS 11, DeMartens, *Recueil général des traités*, 99, 3e série, 12, 1924, p. 720 (French version).

⁵ *Treaty of Peace between the Allied and Associated Power and Germany* (“Treaty of Versailles”), [1919] TS 4, arts. 228-230. There were similar penal provisions in the other peace treaties adopted in Paris at the same time: *Treaty of St. Germain-en-Laye*, [1919] TS 11, art. 173; *Treaty of Neuilly-sur-Seine*, [1920] TS 5, art. 118; *Treaty of Trianon*, (1919) 6 LNTS 187, art. 15.

⁶ *Ibid.*

⁷ Kay Holloway, *Modern Trends in Treaty Law*, London: Stevens & Sons, 1967, pp. 60-61.

⁸ *Treaty of Lausanne Between Principal Allied and Associated Powers and Turkey*, (1923) 28 LNTS 11.

When the Armenian massacres took place, the term ‘genocide’ did not yet exist. It was not devised until three decades later, in 1944, by a Polish-Jewish law professor, Raphael Lemkin, by then living in exile in the United States, in his book *Axis Rule in Occupied Europe*.⁹ Rarely has a neologism had such rapid success.¹⁰ Within little more than a year of its introduction into the English language,¹¹ the word ‘genocide’ was being used in the indictment of the International Military Tribunal, and within two, it was the subject of a United Nations General Assembly resolution.¹² But the resolution spoke in the past tense, describing genocide as crimes which ‘have occurred’. By the time the General Assembly had completed its initial standard setting in this area, with the 1948 adoption of the *Convention on the Prevention and Punishment of the Crime of Genocide*, ‘genocide’ had a detailed and quite technical definition as a crime against the law of nations. The preamble of that instrument recognizes ‘that at all periods of history genocide has inflicted great losses on humanity’. Genocide is described as ‘the odious scourge’.¹³

‘Crimes against humanity’ or ‘genocide’

When the term ‘crimes against humanity’ was initially used by the allies in 1915 to describe the Armenian massacres, it had no recognized definition. In 1945, the London Conference, composed of the four victorious powers, the United States, France, the United Kingdom and the Soviet Union, codified the term as a basis of prosecution of Nazi criminals. They defined it as follows:

CRIMES AGAINST HUMANITY: namely, murder,
extermination, enslavement, deportation, and other

⁹ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington: Carnegie Endowment for World Peace, 1944.

¹⁰ Lemkin later wrote that ‘[a]n important factor in the comparatively quick reception of the concept of genocide in international law was the understanding and support of this idea by the press of the United States and other countries’: Raphael Lemkin, ‘Genocide as a Crime in International Law’, (1947) 41 *Am. J. Int’l L.* 145, at p. 149, fn. 9.

¹¹ And French as well: Raphael Lemkin, ‘Le crime de génocide’, [1946] *Rev. dr. int.* 213.

¹² GA Res. 96(I).

¹³ *Convention for the Prevention and Punishment of the Crime of Genocide*, (1951) 78 UNTS 277. On the Convention generally, see: William A. Schabas, *Genocide in International Law*, Cambridge: Cambridge University Press, 2000; William A. Schabas, *Genozid im Völkerrecht*, Hamburg: Hamburger Edition, 2003.

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 court where perpetrated.¹⁴

The term was meant to cover atrocities committed within Germany against Germans, in distinction with war crimes, which were committed against non-German combatants or civilians in occupied territories. The concept of 'war crimes' had long been recognized at customary international law, and codified in the regulations annexed to the fourth Hague Convention of 1907.¹⁵ It was more than adequate to deal with the atrocities committed by the Nazis in occupied territories. But the idea that a government and its own officials could be held responsible for atrocities committed within their own borders against their own nationals was a bold leap forward in international law. This helps us to understand the guarded remarks of United States Secretary of State Robert Lansing who, in 1915, admitted what he called the 'more or less justifiable' right of the Turkish government to deport the Armenians to the extent that they lived 'within the zone of military operations'. But, he said, '[i]t was not to my mind the deportation which was objectionable but the horrible brutality which attended its execution. It is one of the blackest pages in the history of this war, and I think we were fully justified in intervening as we did on behalf of the wretched people, even though they were Turkish subjects.'¹⁶

In 1945, although the victorious great powers accepted that the post-war prosecutions should include crimes committed within Germany against German civilians, they were nervous about the extent of the concept of 'crimes against humanity', because in recognising that application of international law to atrocities committed against a state's own civilian population, they left themselves vulnerable to eventual prosecution too. At the time, lynching of African-Americans was relatively widespread within the United States of America, and

¹⁴ *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (I.M.T.)*, (1951) 82 UNTS 279, art. VI(c).

¹⁵ *International Convention Concerning the Laws and Customs of War by Land*, [1910] BTS 9.

¹⁶ Quoted in: Vahakn N. Dadrian, 'Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications', (1989) 14 *Yale J. Int'l L.* 221, at p. 228.

several American jurisdictions imposed a form of *apartheid* whose features are well-known. The British and the French, with their colonial territories in Africa and Asia, and the Soviets, who had just deported millions from Chechnya and Ingushetia, were similarly exposed. For this reason, the four parties at the London Conference imposed what has come to be known as the *nexus*, namely, a requirement that crimes against humanity be committed ‘in connection with any crime within the jurisdiction of the Tribunal’. Consequently, crimes against humanity, as defined at Nuremberg, could only be committed within the context of war crimes or crimes against peace. They could not, pursuant to the definition, be committed in peacetime.¹⁷

Robert Jackson, the head of the United States delegation at the London Conference, speaking of the proposed crime of ‘atrocities, persecutions, and deportations on political, racial or religious grounds’ (this was how the concept of ‘crimes against humanity’ was first identified in the debates), revealed the lingering concerns of his government:

[O]rdinarily we do not consider that the acts of a government toward its own citizens warrant our interference. We have some regrettable circumstances at times in our own country in which minorities are unfairly treated. We think it is justifiable that we interfere or attempt to bring retribution to individuals or to states only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved. We see no other basis on which we are justified in reaching the atrocities which were committed inside Germany, under German law, or even in violation of German law, by authorities of the German state.¹⁸

The International Military Tribunal, sitting at Nuremberg in 1945 and 1946, confirmed the limited scope of crimes against humanity in its final judgment. Although there was frequent reference to the preparations for the war and for the Nazi atrocities committed in the early

¹⁷ Recent advances in human rights and humanitarian law have now eliminated the *nexus* between crimes against humanity and international armed conflict: *Prosecutor v. Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 78, 140, 141; *Prosecutor v. Kordić & Čerkez* (Case No. IT-95-14/2-T), 26 February 2001, para. 33; ‘Rome Statute of the International Criminal Court’, UN Doc. A/CONF.183/9, art. 7.

¹⁸ *Ibid.*, p. 333.

years of the Third Reich, no conviction was registered for any act committed prior to 1 September 1939.¹⁹

Defining genocide

Dissatisfaction and frustration with the limited concept of 'crimes against humanity' emerged in the final months of 1946, within days of the judgment at Nuremberg. The initiatives came from States in what would later be called the 'third world', specifically India, Cuba, Panama and Saudi Arabia. Unlike the great powers, who feared that a broad scope for the term 'crimes against humanity' might ultimately rebound to challenge repressive acts committed by them within their far-flung empires, the vulnerable emerging states of the underdeveloped world contemplated an instrument that would protect them. For the latter, it was a priority to recognize international criminalisation of atrocities in peacetime, that is, applicable during the banal everyday reality of colonial and post-colonial societies. They sought and obtained this recognition, but only for a more narrowly described form of crime against humanity, genocide. Article II of the 1948 *Genocide Convention* defined genocide as follows:

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

- (a) Killing members of the 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.

This was not the first attempt to define the term. In 1944, Lemkin had proposed the following definition:

¹⁹ *France et al. v. Goering et al.*, (1946) 22 IMT 203.

[A] co-ordinated 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 objective of such a plan would be 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 individuals belonging to such groups. Genocide is directed against 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.²⁰

In a sense, Lemkin's definition was narrow, in that it addressed crimes directed against 'national groups' rather than against 'groups' in general. At the same time, it was broad, to the extent that it contemplated not only physical genocide but also acts aimed at destroying the culture and livelihood of the group.

When Cuba, India and Panama proposed that the question of genocide be put on the agenda of the first session of the United Nations General Assembly, in late 1946,²¹ they did not have a full-blown definition to suggest. Their draft resolution said that 'genocide is a denial of the right to existence of entire human groups in the same way as homicide is the denial of the right to live for individual human beings'.²² The result of this initiative, Resolution 96(I), which was adopted on 11 December 1946, went somewhat further in defining the crime: 'Genocide is a 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 human 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...'²³

²⁰ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington: Carnegie Endowment for World Peace, 1944, p. 79.

²¹ UN Doc. A/BUR.50. For a summary of the history of the resolution, see UN Doc. E/621.

²² *Ibid.*. The General Assembly decided to include the point in its agenda (UN Doc. A/181), and the matter was referred to the Sixth Committee (UN Doc. A/C.6/64).

²³ GA Res. 96(I).

These efforts at definition were taken into account during the subsequent work of drafting the *Convention for the Prevention and Punishment of the Crime of Genocide*, but none was adopted. Lemkin’s emphasis on what would be called ‘cultural genocide’, that is, the destruction of the group’s institutions rather than of its physical existence, was bluntly dismissed,²⁴ although a shadow of the idea reappeared in the final version which lists the forcible transfer of children from one group to the other as a punishable act.²⁵ As for the 1946 resolution of the General Assembly, its inclusion of political groups was not reaffirmed. The result, in article II of the 1948 Convention, is a definition that is exceedingly narrow. Arguably, it only covers physical (and biological) destruction, with the minor exception of transferring children. Moreover, the enumeration of political groups is limited to four cognate concepts, race, religion, ethnicity and nationality. For example, political and ‘other’ groups are excluded, a tragic ‘blind spot’ according to some critics.²⁶ Other commentators have proposed new definitions in order to enlarge the scope of the term, especially the list of protected groups; among them are Stefan Glaser,²⁷ Israel W. Charny,²⁸ Vahakn Dadrian,²⁹ Helen Fein,³⁰ and Frank Chalk and Kurt Jonassohn.³¹ The most extreme position applies the

²⁴ UN Doc. A/C.6/232/Rev.1. Also: UN Doc. A/C.6/233; UN Doc. A/C.6/223.

²⁵ See UN Doc. A/C.6/SR.82.

²⁶ Beth Van Schaack, ‘The Crime of Political Genocide: Repairing the Genocide Convention’s Blind Spot’, (1997) 106 *Yale L.J.* 2259. Also: Lawrence J. Leblanc, ‘The United Nations Genocide Convention and Political Groups: Should the United States Propose an Amendment?’, (1988) 13 *Yale J. Int’l L.* 268; Stefan Glaser, *Droit international pénal conventionnel*, Brussels: Bruylant, 1970, p. 112; Stanislaw Plawski, *Etude des principes fondamentaux du droit international pénal*, Paris: Librairie générale de droit et de jurisprudence, 1972, p. 114; ‘Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study prepared by Mr. Nicodème Ruhashyankiko, Special Rapporteur’, UN Doc. E/CN.4/Sub.2/416, para. 87.

²⁷ Stefan Glaser, *ibid.*, para. 83.

²⁸ Israel W. Charny, ‘Toward a Generic Definition of Genocide,’ in George J. Andreopoulos, *Genocide, Conceptual and Historical Dimensions*, Philadelphia: University of Pennsylvania Press, 1994, pp. 64-94, at p. 75: ‘Genocide in the generic sense is the mass killing of substantial numbers of human beings, when not in the course of military action against the military forces of an avowed enemy, under conditions of the essential defenselessness and helplessness of the victims.’

²⁹ Vahakn Dadrian, ‘A Typology of Genocide’, (1975) 5 *Int’l Rev. Modern Sociology* 201: ‘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 for genocide.’

³⁰ Helen Fein, ‘Genocide, Terror, Life Integrity, and War Crimes,’ in George J. Andreopoulos, *supra* note 28, pp. 95-107, at p. 97: ‘Genocide is sustained purposeful action by a perpetrator to physically destroy a collectivity directly or through interdiction of the biological and social reproduction of group members.’

³¹ Frank Chalk & Kurt Jonassohn, ‘The Conceptual Framework’, in Frank Chalk & Kurt Jonassohn, eds., *The History and Sociology of Genocide*, New Haven & London: Yale University Press, 1990, pp. 3-43,

term genocide to any and all groups. According to Pieter Drost, one of the early advocates of this view, ‘[a] convention on genocide cannot effectively contribute to the protection of certain described minorities when it is limited to particular defined groups... It serves no purpose to restrict international legal protection to some groups; firstly, because the protected members always belong at the same time to other unprotected groups.’³²

This is not, however, the course that international law has followed. The 1948 definition has stood the test of time. Recently, it was included without significant change in such instruments as the statutes of the *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda,³³ the International Law Commission’s Code of Crimes Against the Peace and Security of Mankind,³⁴ and the Rome Statute of the International Criminal Court.³⁵ Implementing legislation of the Rome Statute adopted in many countries has confirmed the dominance of the 1948 definition in national criminal law as well. To a large extent, the push to amend the definition became less important with the parallel evolution in the definition of crimes against humanity, principally in its extension to atrocities committed during peacetime. But if the definition of genocide has remained unchanged, in recent years its interpretation has gone through a process of considerable dynamism and radical evolution.

at p. 23: ‘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 members in it are defined by the perpetrator.’ Also, Frank Chalk, ‘Redefining Genocide’, in George J. Andreopoulos, *supra* note 28, pp. 47-63, at p. 52; Frank Chalk, ‘Definitions of Genocide and their Implications for Prediction and Prevention’, (1989) 4 *Holocaust & Genocide Studies* 149. Chalk and Jonassohn’s proposed definition is endorsed by Irving Louis Horowitz: Irving Louis Horowitz, *Taking Lives: Genocide and State Power*, 4th ed., New Brunswick, New Jersey: Transaction Publishers, 1997, pp. 12-13.

³² Pieter Nicolaas Drost, *The Crime of State, Vol. 2, Genocide*, Leyden: A.W. Sijthoff, 1959, pp. 122-123.

³³ ‘Statute of the International Criminal Tribunal for the former Yugoslavia’, U.N. Doc. S/RES/827, annex, art. 4; ‘Statute of the International Criminal Tribunal for Rwanda’, U.N. Doc. S/RES/955, annex, art. 2.

³⁴ ‘Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996’, U.N. Doc. A/51/10, pp. 86-87.

³⁵ ‘Rome Statute of the International Criminal Court’, U.N. Doc. A/CONF.183/9, (1998) 37 I.L.M. 999, see: William A. Schabas, ‘Article 6’, in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article*, Baden-Baden: Nomos Verlagsgesellschaft, 1999, pp. 107-116.

The evolving definition of genocide

The decisions of the Israeli courts in *Eichmann* were the only significant judicial interpretations of the definition in 1948 *Genocide Convention* for nearly five decades.³⁶ On 4 September 1998, the International Criminal Tribunal for Rwanda issued its first major judgment, convicting the *bourgmestre* of Taba commune of genocide for his role in the 1994 slaughter of Tutsi civilians, including the systematic rape of women and girls.³⁷ Many similar judgments were to follow, as one by one the architects of the 1994 genocide were brought to book. The case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) developed more slowly, to a large extent because of a cautious policy of the Prosecutor in the indictment of suspects for genocide, in addition to the ubiquitous counts of crimes against humanity and war crimes. The hesitation was not misguided, because of the handful of ICTY prosecutions that proceeded in which genocide has been alleged, the majority have resulted in acquittals on that count.³⁸ But even the acquittals provided important judicial guidance as to the parameters of the concept. In August 2001, an ICTY Trial Chamber registered a first conviction for genocide, condemning a Bosnian Serb general who had participated, albeit in a secondary role, in the massacre of 7,000 Muslim men and boys at Srebrenica in July 1995.³⁹ The judgment was subsequently upheld on appeal.⁴⁰ In January 2005, an ICTY Trial Chamber issued the second conviction for genocide in what is arguably the most expansive interpretation yet.⁴¹ This now relatively rich reservoir of judicial interpretation of the definition of genocide indicates a tendency to enlarge the scope of the crime, so as to cover cases of ‘ethnic cleansing’ that some jurists might think is better described under the rebric of ‘crimes against humanity’. This trend towards large and liberal interpretation may ultimately dilute the terrible stigma that is attached to the crime of

³⁶ *A.-G. Israel v. Eichmann*, (1968) 36 ILR 18 (District Court, Jerusalem); *A.-G. Israel v. Eichmann*, (1968) 36 ILR 277 (Israel Supreme Court).

³⁷ *Prosecutor v. Akayesu*, *supra* note 3.

³⁸ *Prosecutor v. Jelisić* (Case no. IT-95-10-T), Judgment, 14 December 1999; *Prosecutor v. Sikirica et al.* (Case No. IT-95-8-I), Judgment on Defence Motions to Acquit, 3 September 2001; *Prosecutor v. Stakić* (Case No. IT-97-24-T), Judgment, 31 July 2003; *Prosecutor v. Brđanin* (Case No. IT-99-36-T), Judgment, 1 September 2004.

³⁹ *Prosecutor v. Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001.

⁴⁰ *Prosecutor v. Krstić* (Case No. IT-98-33-A), Judgment, 19 April 2004.

⁴¹ *Prosecutor v. Blagojević et al.* (Case No. IT-02-60-T), Judgment, 17 January 2005.

genocide. At the same time, it can only complicate the attempts of those who attempt to challenge use of the term ‘genocide’ to characterise the 1915 massacres of the Armenian minority within Turkey.

State plan or policy. It may seem self-evident that genocide cannot be committed without the existence of a State plan or policy to physically exterminate the group. Certainly, in the cases of all three of the major genocides of the twentieth century - those of the Armenians in the Ottoman Empire, the Jews in occupied Europe and the Rwandan Tutsi – there is ample evidence and little argument about the role played by the State. Nevertheless, if implicit in the definition in the 1948 *Convention*, nothing in the text actually requires this. The ICTY has ruled that proof of a plan or policy is not a legal ingredient of the crime of genocide. The Appeals Chamber noted, nevertheless, that ‘in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime.’⁴² Thus, at least theoretically, an individual acting alone without any State involvement may still perpetrate the crime of genocide, provide he or she intends to destroy a protected group in whole or in part.

Groups protected. In *Akayesu*, the ICTR provided an imaginative and somewhat radical construction of the groups protected by the 1948 definition, which uses the adjectives ‘national, ethnic, racial or religious’. Concerned that none of the four terms of the definition might apply to Rwanda’s Tutsi minority, the principal victim of the 1994 atrocities, the Tribunal concluded that the *Convention* could still extend to certain other groups, although their precise definition was elusive. Pledging fidelity to the *Convention*’s drafters, the *Akayesu* judgment declared: ‘On reading through the travaux préparatoires of the Genocide Convention (Summary Records of the meetings of the Sixth Committee of the General Assembly, 21 September - 10 December 1948, Official Records of the General Assembly), it appears that the crime of genocide was allegedly perceived as targeting only ‘stable’ groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more ‘mobile’ groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the

⁴² *Prosecutor v. Jelisić* (Case No. IT-95-10-A), Judgment, 5 July 2001, para. 48.

four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner’. The Trial Chamber continued:

Moreover, the Chamber considered whether the groups protected by the Genocide Convention, echoed in Article 2 of the Statute, should be limited to only the four groups expressly mentioned and whether they should not also include any group which is stable and permanent like the said four groups. In other words, the question that arises is whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention, if the said group, although stable and membership is by birth, does not meet the definition of any one of the four groups expressly protected by the Genocide Convention. In the opinion of the Chamber, it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the travaux préparatoires, was patently to ensure the protection of any stable and permanent group.⁴³

The same Trial Chamber, in a subsequent decision, seemed to hedge its remarks somewhat: ‘It appears from a reading of the *travaux préparatoires* of the Genocide Convention that certain groups, such as political and economic groups have been excluded from the protected groups, because they are considered to be ‘mobile groups’ which one joins through individual, political commitment. That would seem to suggest *a contrario* that the Convention was presumably intended to cover relatively stable and permanent groups.’⁴⁴

This interpretation appeared to many at the time to be creative and progressive, but it has not been confirmed by the Appeals Chambers of the tribunals, and looks increasingly idiosyncratic as time goes by. Nevertheless, other authorities confirm that the list of groups in the *Convention* definition should receive a large and liberal interpretation. In January 2005, a non-judicial commission of inquiry established by the United Nations to investigate allegations of genocide in Darfur, in western Sudan, wrote that ‘the principle of interpretation of international rules whereby one should give such rules their maximum effect (principle of

⁴³ *Prosecutor v. Akayesu*, *supra* note 3, para. 515.

⁴⁴ *Prosecutor v. Rutaganda* (Case No. ICTR-96-3-T), Judgment, 6 December 1999 (reference omitted). Also: *Prosecutor v. Musema* (ICTR-96-13-T), Judgment, 27 January 2000, para. 162.

effectiveness, also expressed by the Latin maxim *ut res magis valeat quam pereat*) suggests that the rules on genocide should be construed in such a manner as to give them their maximum legal effects’.⁴⁵

‘In whole or in part’. The 1948 definition of genocide speaks of destruction of a group ‘in whole or in part’. It was a noble attempt by the drafters to reach consensus, but in reality the General Assembly used ambiguous terms and left their clarification to judges in subsequent prosecutions. The 1995 Srebrenica massacre confronted the ICTY with the need to expound upon the meaning of ‘in whole or in part’. According to the ICTY Appeals Chamber, a perpetrator of genocide must intend to destroy a *substantial* part of the group. It explained:

The determination of when the targeted part is substantial enough to meet this requirement may involve a number of considerations. The numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial.⁴⁶

The Appeals Chamber noted that the Bosnian Muslim population in Srebrenica, or the Bosnian Muslims of Eastern Bosnia, a group estimated to comprise about 40,000 people, met this definition. Though numerically not very significant when compared with the Bosnian Muslim population as a whole, it occupied a strategic location, and was thus key to the survival of the Bosnian Muslim nation as a whole.⁴⁷

Ethnic cleansing. The expression ‘ethnic cleansing’ may have first been used immediately following the Second World War by Poles and Czechs intending to ‘purify’ their countries of Germans and Ukrainians. But if this is the case, the language is the direct

⁴⁵ ‘Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005’, para. 494.

⁴⁶ *Prosecutor v. Krstić*, *supra* note 40, para. 12.

⁴⁷ *Ibid.*, paras. 15-16.

descendant of expressions used by the Nazis in their racial ‘hygiene’ programmes. The latter had a term, *sauberung*, and their goal was to make Germany territory *judenrein*, that is, free of Jews.⁴⁸ ‘Ethnic cleansing’ resurfaced in 1981 in Yugoslav media accounts of the establishment of ‘ethnically clean territories’ in Kosovo.⁴⁹ The term entered the international vocabulary in 1992, where it was used to describe policies being pursued by the various parties to the Yugoslav conflict aimed at creating ethnically homogeneous territories.⁵⁰ There have been a number of attempts at definition. According to the Security Council’s Commission of Experts on violations of humanitarian law during the Yugoslav war, ‘[t]he expression ‘ethnic cleansing’ is relatively new. Considered in the context of the conflicts in the former Yugoslavia, ‘ethnic cleansing’ means rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area’.⁵¹ The Commission considered techniques of ethnic cleansing to include murder, torture, arbitrary arrest and detention, extra-judicial executions, and sexual assault, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian populations, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property.⁵²

In *Krstić*, the ICTY Trial Chamber said ‘there are obvious similarities between a genocidal policy and the policy commonly known as “ethnic cleansing”’.⁵³ The Trial Chamber seemed to understand that it was necessary to expand the scope of the term ‘destroy’ in the introductory sentence or *chapeau* of the definition of genocide in order to cover ‘acts that involved cultural and other non physical forms of group destruction’.⁵⁴ But it

⁴⁸ Mark Kramer, ‘Introduction’, in Mark Kramer, ed., *Redrawing Nations: Ethnic Cleansing in East Central Europe*, Boulder: Rowman & Littlefield, 2001, p. 1.

⁴⁹ Drazen Petrovic, ‘Ethnic Cleansing - An Attempt at Methodology’, (1994) 5 *Eur. J. Int’l L.* 343.

⁵⁰ See: Norman Cigar, *Genocide In Bosnia: The Policy of Ethnic Cleansing*, College Station: Texas A&M University Press, 1995; Nathan Lerner, ‘Ethnic Cleansing’, (1994) 24 *Israel Yearbook Human Rights* 103; John Webb, ‘Genocide Treaty - Ethnic Cleansing - Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia’, (1993) 23 *Georgia J. Int’l Comp. L.* 377; Damir Mirkovic, ‘Ethnic Cleansing and Genocide: Reflections on Ethnic Cleansing in the Former Yugoslavia’, (1996) 548 *Annals Am. Acad. Pol. & Soc. Science* 191; Andrew Bell-Fialkoff, ‘A Brief History of Ethnic Cleansing’, *Foreign Affairs*, Summer 1993, pp. 110-121.

⁵¹ ‘Interim report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)’, U.N. Doc. S/35374 (1993), para. 55.

⁵² U.N. Doc. S/25274 (1993), para. 56.

⁵³ *Prosecutor v. Krstić*, *supra* note 39.

⁵⁴ *Ibid.*, para. 577.

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also said: ‘Customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. An enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.’⁵⁵ The Appeals Chamber appeared to endorse this approach.⁵⁶

Nevertheless, in a very recent decision, another Trial Chamber has ruled that genocide occurs when there is deportation or some other forced displacement of populations, even in the absence of evidence of evidence of a plan for physical extermination. Although the Srebrenica massacre involved the summary execution of approximately 7,000 men and boys, the women, children and elderly were moved from the area in buses, raising questions about whether the Bosnian Serb forces really intended the physical extermination of the entire group, or whether they only sought to eliminate persons likely to be enemy combatants. A massacre of prisoners would not, in and of itself, amount to genocide. In Blagojevic, an ICTY Trial Chamber concluded that the forced displacement of women, children and elderly people amounted to genocide:

[T]he Trial Chamber is convinced that the forced displacement of women, children, and elderly people was itself a traumatic experience, which, in the circumstances of this case, reaches the requisite level of causing serious mental harm under Article 4(2)(b) of the Statute. The forced displacement began with the Bosnian Muslim population fleeing from the enclave after a five-day military offensive, while being shot at as they moved from Srebrenica town to Potočari in search of refuge from the fighting. Leaving their homes and possessions, the Bosnian Muslims did so after determining that it was simply impossible to remain safe in Srebrenica town... Having left Srebrenica to escape from the Bosnian Serbs, the Bosnian Muslim population saw that they must move farther than Potočari to be safe. As they boarded the buses, without being asked even for their name, the Bosnian Muslims saw the smoke from their homes being burned and knew that this was not a temporary displacement for their

⁵⁵ *Ibid.*, para. 580.

⁵⁶ *Prosecutor v. Krstić*, *supra* note 40, para. 25.

immediate safety. Rather, this displacement was a critical step in achieving the ultimate objective of the attack on the Srebrenica enclave to eliminate the Bosnian Muslim population from the enclave.⁵⁷

The Trial Chamber concluded the discussion of this point stating that ‘the perpetrators intended that the forcible transfer, and the way it was carried out, would cause serious mental harm to the victims’, and that this fulfilled the requirements of article II of the 1948 definition (set out without significant change in article 4(2) of the ICTY Statute).⁵⁸

Complicity in genocide. The *ad hoc* tribunals have addressed cases where senior officials played a secondary role in genocidal acts, but where there were doubts that these people actually intended to destroy the group. Prosecuted as accomplices rather than principal perpetrators, the ICTY and ICTR Appeals Chambers have held that a conviction may be entered for ‘aiding and abetting’ genocide,⁵⁹ or for ‘complicity’ in genocide,⁶⁰ even in the absence of sufficient evidence that the accused person possessed criminal intent to commit genocide. These decisions are not exactly elegant in their legal reasoning, and strongly hint of compromises among a divided bench. Nevertheless, they now stand as the state of the law, and provide a further demonstration of the general trend towards enlargement of the definition of genocide that appears in the 1948 *Convention*.

The ICTY Appeals Chamber has also found that it is possible to commit genocide as part of a ‘joint criminal enterprise’. The expression ‘joint criminal enterprise’ is used to describe the liability of an individual who participates in a criminal activity with others. As a member of this ‘joint criminal enterprise’, the accused may be convicted of acts that he or she did not actually intend, to the extent that these were reasonably foreseeable consequences of the criminal activity. To some judges, it had appeared that a conviction for genocide, which requires proof that the offender committed acts ‘with intent to destroy’ the group, in whole or in part, was theoretically incompatible with the entire concept of joint criminal enterprise.⁶¹

⁵⁷ *Prosecutor v. Blagojević et al.*, *supra* note 41, para. 650.

⁵⁸ *Ibid.*, para. 654.

⁵⁹ *Prosecutor v. Krstić*, *supra* note 40, paras. 135-144.

⁶⁰ *Prosecutor v. Ntakirutimana et al.* (Cases Nos. ICTR-96-10-A and ICTR-96-17-A), Judgment, 13 December 2004, para. 500.

⁶¹ *Prosecutor v. Stakić* (Case No. IT-97-24-T), Decision on Rule 98 *bis* Motion for Judgment of Acquittal, 31 October 2002, para. 93; *Prosecutor v. Brđanin* (Case No. IT-99-36-T), Decision on Motion for Acquittal Pursuant to Rule 98 *bis*, 8 November 2003, paras. 30, 55-57.

However, the Prosecutor successfully challenged one of these rulings, and the ICTY Appeals Chamber has established that convictions for genocide are possible under the ‘joint criminal enterprise’ mode of liability.⁶²

Conclusions

The definition of genocide adopted by the United Nations General Assembly in December 1948 represented a dilution of a relatively broad concept proposed by Raphael Lemkin four years earlier. The narrowness of the definition must be appreciated in the context of the time. States were being asked to accept an unprecedented encroachment on their sovereignty, namely, the existence of international obligations with respect to their treatment of civilians of their own nationality within their own borders. The only comparable commitments with respect to human rights abuses committed in peacetime are the 1973 *International Convention on the Suppression and Punishment of the Crime of Apartheid*⁶³ and the 1984 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.⁶⁴ Both *apartheid* and torture may constitute crimes against humanity, but a more general undertaking with respect to crimes against humanity in their broad sense had to wait until 1998, with the adoption of the *Rome Statute of the International Criminal Court*.

Had the Nuremberg trial taken a larger view of crimes against humanity, by acknowledging that they could be committed in peacetime as well as in wartime, there might never have been a *Genocide Convention*. Work on the *Convention* was largely an initiative to correct the lacuna in the Nuremberg definition of crimes against humanity. But the tension that existed between genocide and crimes against humanity in the post-war years no longer exists, given recognition under contemporary international law that crimes against humanity, like genocide, may be committed in time of peace.

Debates about historic cases of genocide need to be reassessed in light of evolving case law. In a series of recent decisions, the international criminal tribunals have broadened the reach of the 1948 definition. It has been held to apply to a somewhat more expansive

⁶² *Prosecutor v. Brđanin* (Case: IT-99-36-A), Decision on Interlocutory Appeal, 19 March 2004.

⁶³ (1976) 1015 UNTS 244.

⁶⁴ (1987) 1465 UNTS 85.

category of groups than what is listed in the text of the definition. No proof of State involvement, or of a policy or plan, is necessary to establish that genocide has been committed. It may even be perpetrated by an individual, acting alone. As for those who participate in the crime of genocide, prosecutors need not establish that they actually had a genocidal intent, as long as they were in some way accomplices to the crime. Finally, and perhaps most important of all, the concept of genocide has been extended to acts that compromise the survival of a group, such as forced displacements, even when there are doubts about the intent to physically exterminate the group.

None of this can be particularly comforting to those who have tried to deny that that the massacres of Armenians within Turkey in 1915 amounted to one of the great genocides of the twentieth century.