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Protected Groups under the Genocide Convention: - The Trends and Prospects

BY

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Approval Sheet by the Board of Examiners

Protected Groups under the Genocide Convention;-The Trends and Prospects

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DECLARATION

I, DEJENE TESHOME, do hereby declare that the thesis **'Protected Groups under the Genocide Convention: the Trends and Prospects'** is my original work and that it has not been submitted for any degree or examination in any other university. Whenever other sources are used or quoted, they have been duly acknowledged.

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“The law must be stable, but it must not stand still" -

Roscoe Pound,

Introduction to the Philosophy of Law, 1922

Abbreviations and Acronyms

Art	Article
Doc.	Document
ECOSOC	Economic and Social Council
ed.	Editor
eds.	Editors
et. al.	Et Cetera
GA	General Assembly
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICCPR	International Covenant on Civil and Political Rights
ILC	International Law Commission
IMT	International Military Tribunal
Id	The same source but different page
Ibid	The same page
JIL	Journal of International Law
mtg.	Meeting
No.	Number
p.	Page
para	Paragraph
paras	Paragraphs
Res.	Resolution
SC	Security Council
T.CH	Trial Chamber
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNCESCR	United Nations Convention on Economic Social and Cultural Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization.

US	United States
V.	Versus
Vol.	Volume
Pow	Prisoners of Wars
WPE	Worker Party of Ethiopia
OSP	Office of Sponsored Program

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Abstract

Genocide is regarded as the most heinous crime that humans are capable of committing against fellow humans. This is because it targets for extermination of specific groups rather than individuals. In all periods of history, millions of people have been exterminated across the world on account of their national, ethnic, racial, religious background and other group identities, affiliations or relationships.

Yet conceptualizing the term genocide is proving problematic, elusive and controversial; and genocidal killings are sometimes disputed or denied, whereas more and more cases of genocidal killings continue to multiply. The entrenchment of legal and institutional frameworks to deal with this crime has not recorded concomitant success.

Using doctrinaire and non-doctrinaire methods, this research has found that genocide can be planned and/or executed by state actors and non-state actors alike, though today, increasingly, non-state actors are in the forefront of perpetuating this crime. Genocidaires mobilize, elevate and manipulate group identities and ideological leanings to breed or exacerbate their crimes. Genocide can be aggressor-based, or bi-lateral; it can be systematically planned, or can occur in the flash of rage. Economic factors also underline genocidal conflicts.

Hence, in this thesis I will seek to shed some light on the nature, the reason for and the consequences of this conceptual divide between the narrow legal concept of genocide and the broader popular understanding. I will examine whether this challenge of conceptions in fact being addressed by the Courts and Tribunals with jurisdiction on genocide by changing the criteria of group determination to broaden the legal concept of genocide, and if there are other ways this challenge should be met.

In conclusion, I will contend that the scope of protected groups under the Genocide Convention shall be revisited in order to ensure an inclusive legal protection to those vulnerable unprotected groups.

CHAPTER ONE

Introduction and Overview of the Study

1.1. Background of the Study

Until the Second World War, genocide was a "crime without a name," in the words of British Prime Minister Winston Churchill.[1] The man who named the crime placed it in a global-historical context, and demanded intervention and remedial action was a Polish-Jewish jurist, a refugee from Nazi-occupied Europe, named Raphael Lemkin. In the early 1940s he made an attempt to define the term genocide by putting together the Greek word for tribe, "*Genos"*, and the Latin word from killing "*cide"* to create a word to cover the atrocities towards peoples that he had witnessed in his life time.[2]

In his seminal work called *Axis Rule of Occupied Europe* which he defining the term genocide in a broader way than today's legal conception. It includes the concept such as Cultural, Economic and Political Genocide. He defined genocide as follows:

> "*Generally speaking, 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 individuals belonging to such groups."*[3]

What was important to Lemkin about genocide was the idea of protecting groups' plurality in itself. Nations are essential elements of the world community. The world represent only so much culture and intellectual vigor as are created by its component national group, essentially the idea of nation signify constructive cooperation and original contributions based upon genuine

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[1] -----, Prevent Genocide.org, "A Crime without a Name," Available at http://www.preventgenocide. org/genocide/crime without a name.htm, p.2

[2] ----, What is in a name? Where the legal definition of Genocide clashes with the popular understanding, University of Oslo, Faculty of Law,(25-04-2004), p.1

[3] Raphael Lemkin, Axis Rule in Occupied Europe: Laws of Occupation Analysis of Government Proposals for Redress, Washington, D.C.; Carnegie Endowment for International Peace (1944) p. 79 -95.

tradition, culture and a well developed national psychology. Therefore, the destruction of nature results in the loss of its culture contribution to the world.[4] Thus individuals are not important in themselves to the definition of genocide and simply they will come to picture if they are a member of those protected group.

As David Luban also eligibly put groups represent the way of life which can be seen as good collective social impact over the course of generation. Groups represent the many forms of human societies and, important aspects of human transcendence of our finite individually. For that reason to annihilate a group is a crime that diminishes humanity over and above the loss of slaughtered individuals.[5]

The idea of Lemkin has been supported by subsequent Genocide Convention even enough it was limited to certain protected groups. Article II of the convention has been summed by the legal scholar Antonio Cassese as; Genocide is the intentional destruction, thought one of the five well specified categories of conduct of one of some group as such.[6] So genocide is in essence, the crime of destroying an individual's of specific group just because they belong to that specific group.

The drafter of the convention stayed too close to the Lemkin's ideas of protecting group pluralism when they provide the two main features that a crime of genocide differs from other atrocities such as crime against humanity; the special intent that required and the requirement that the victim belongs to one of the four protected groups.[7]

In 1948, the international community unequivocally stated that genocide is a crime under international law, though such criminal act was known at that time, the international community failed to provide a name for such act. Even the Charter of the International Military Tribunal (IMT), which tried Nazi leaders for their crime committed during the 2nd World War used a wording (murder, extermination, enslavement, deportation and other inhumane act committed against any civilian population and prosecution on political, racial or religious groups) that in

[4] Id.,p.90
[5] Luban, David, "Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report," Journal of International Law, Vol. 7, No. 1, Chicago, (2006) p.309
[6] Cassese, Antonio, International Criminal Law, 2nd edition ,Oxford; Oxford University Press, (2008) p 127
[7] Luban, supra note 5, p.310

compassed large scale massacres of ethnic, racial or religious groups.[8]But with the 1948 Genocide Convention was for the first recognized as its own category of crime, separate from crime against humanity. It was for the first time the international community of states considered genocide as a separate crime and promised to prevent and to punish it shouldn't ever occur again.[9]

The prohibition on genocide is held to be a peremptory norm under international law known as *Jus Cogens* norm.[10]Meaning that it is a norm accepted and supported by the community of states and norms by which all state are bound and form which no derogation is allowed. Any rule whether its origin is a treaty or customary not keeping with a peremptory norm is thus void and invalid, unless that rule itself represents a new peremptory norm.[11]

The definition of genocide enjoys widespread acceptance among states as a codification of the *Jus Cogens* prohibition on genocide crime which is further evidenced by the fact that its meaning and wording is repeated in the statutes of the national courts and tribunals that have a jurisdiction over genocide as a crime. This makes the Convention the legal and practical authority on the matter. Article II of the convention which sets out the central definition and deals with the protected groups is repeated practically verbatim in the statutes of International Criminal Tribunal for Rwanda,[12] the International Criminal Tribunal for Former Yugoslavia,[13]the Extraordinary Chambers of the Court of Cambodia[14] and the International Criminal Court.[15]

There aren't many exceptions from the wording chosen in the Convention in the national legislations implementing the prohibition on genocide but they do exist. The notable examples are the French criminal code,[16] the criminal code of Burkinafaso and the criminal code of Ethiopia which go considerably further in the group they offer protection to than the Convention

[8] Cassese. A, supra note 6, p. 127
[9] Convention on the Prevention and Punishment of the Crime of Genocide (1948) , Art.1
[10] Ben-Naftali, Orna, The Obligations to Prevent and to Punish Genocide' in 'The UN Genocide Convention: A Commentary, by Gaeta, Paolo (ed.) Oxford publisher; Oxford University Press (2009) , p. 36
[11] Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Art 53
[12] The Statute of International Criminal Tribunal For Rwanda, 1994, Art 2
[13] The Statute of International Criminal Tribunal For Former Yugoslavia, 1993, Available at http://www.un.org/icty/legaldoc/index.htm Accessed 2013-08-24, Art 4
[14] Extraordinary Statute of Cambodia ,2004, Art 4
[15] International Criminal Court Statute, 1998, Art 6 ,
[16] Penal Code French Journal Official July 1992, Art 211(1)

does. The Canadian prohibition on genocide protects an identifiable group of persons widening the scope even further and there are also a few examples of criminal laws that include political and social groups in their protected groups.[17]However these exceptions are not nearly widespread to represent a customary norm replacing the Convention's article II which really departed from and this seems clear that Article II is indeed what needs to be tracked when it comes to determining the exact nature of the group protection from genocide.

The 'depersonalization of the victim" is one of the most important aspects of genocide; - genocide is not a crime of just the individual but, rather a crime against the group.[18]In Kristic, the ICTY contrasted genocide with prosecution and focused on the fact that the victim in genocide is the group, whereas in prosecution it is the individual.[19]In genocide the victimization of the group members in their individual capacities takes second place.

In *Akayesu* the Trial Chamber argued that the group and individuals are joint victim, as the act criminalizes the individual, because of the special intent, the victimization extends to the group as a whole.[20]In *Rutaganda*, though, the Trial Chamber agreed with the assertion that the group was in fact the ultimate victim of genocide.[21] This latter position articulated the preferable view as a general intent element affects the individual, but the special intent the element that makes genocide; genocide is what victimizes the group. Genocide is a crime against the group and therefore the victim is the group as a whole.

Since genocide is a crime with a group as its victim, it is essential to identify what constitutes a protected group. Accordingly the traditional treaty interpretation principle a protected group must fall under one of the four enumerated groups; national, ethnical, racial or religious groups.

[17] Martin F., The Notion of protected group in the Genocide Convention and its Application in the UN Genocide Convention a commentary, Oxford,(2009)pp 113-114;(referred The penal code of Burkinafaso Art 313, the Canada Crime against Humanity and War Crime Act Subsection 4(3), the Ethiopian Criminal code Art 268 ,the Peruvian penal code Art 319)

[18] Antonio Cassese, supra note 6,at p. 127

[19] Prosecutor vs. Radislav Kristic IT 19-23 Trial Judgment (2 August 2001) , para. 553 (ICTY Trial Chamber) or http/www.icty.org

[20] Nin Jorgensen, The Definition of Genocide ;Joining the Dots in the Light of Recent Practice, International Criminal Law Review 285, Madeline Morris, (2001) , p. 304

[21] Prosecutor vs. George Rutaganda ICTR-96-3 Trial Judgment (6 Dec 1999), at para 59, or http/www.ictr.org

This approach was problematic for the ICTR Trial Chamber; the Tutsis of Rwanda did not clearly fit in to any of the four enumerated groups.[22]

ICTR jurisprudence suggests two main issues to be determined in defining the protected group under the Genocide Convention and ICTR Statute. The first issue is defining what was intended by four enumerated group terms. The second issue is whether an objective or subjective approach should be taken in identifying these groups. And then the ICTY also generally suffice these elements by taking judicial notice of the fact that in Rwanda in 1994 the Tutsis were recognized as an ethnic group.[23]Nevertheless looking the work of ICC, it is clear that the test of understanding and interpreting these terms will be essential for the effective proceeding of the courts.

But the work of handling genocide is not helped by the gap that seems to have opened up between the narrow legal definition of the crime, and the much broader understanding of it in the popular mind. Several times in recent years these two conceptions have clashed, derailing the public discussion from the crimes happening on the ground, to whether or not to label them genocide. The widespread crimes that took place in the Darfur region of Sudan after 2003 give an example of such a clash and the consequences this chasm of conception can have. Therefore this research will look at those clashing ideas as to the conception of protected group in Genocide Convention and possibly provide the way forward.

1.2. Statement of the Problem

Between 1894 and 1918, thousands of Armenians were massacred by Ottoman Turks. Anti-Semitism against the Jewish race transcended centuries, culminating in the Holocaust in the 1940s where over 6 million Jews and others were annihilated by Hitler's Nazi Germany. The devastating massacres of Bosnian Serbs in the 1990s and of the Tutsis and moderate Hutus in 1994, among other atrocities, have raised serious cause for concern. And it would be better to remind the Darfur crisis even though the UN report shows as extermination rather than genocide due to the unclear understanding of the term genocide.

[22] Alexanderia Miller, From the ICTR to ICC Expanding the Definition of Genocide to Include Rape; Penn state Law Review 349,Dickinson School of Law , (2003) ,P.360

[23]William A. Schabas, The United Nations International Criminal Tribunal; The Former Yugoslavia, Rwanda and Sierra Leone, Cambridge ,Cambridge University Press (2006) , p. 168

The drafting stage of the 1948 Genocide Convention reveals the intention of the drafters of the definition of genocide. They intended a flexible and progressive definition that will meet the evolving demands of the time.[24] The unprotected victim groups, such as social and political were included in the original draft of the Convention. However the former U.S.S.R. opposed the inclusion of these groups. The Russian representative argued that the inclusion of political groups was not in conformity with the scientific definition of genocide and would in practice, distort the perspective in which the crime should be viewed and impair the efficacy of the Convention, giving the notion an extension of meaning contrary to the fundamental conception of genocide as recognized by science.[25]

Not all delegates accepted the Russian delegation's contention, although it ended up being the adopted definition under the Genocide Convention. The Haitian representative cautioned the delegates on the consequences of excluding social and political groups in the definition by stating that, "Since it was established that genocide always implied the participation or complicity of Governments, that crime would never be suppressed. The government which is responsible for committing genocide would always be able to allege that the extermination of any group had been dictated by political considerations such as the necessity for quelling an insurrection or maintaining public order."[26]

Thus the present narrow definition of the victim groups which lies at the heart of the Genocide Convention was the direct result of a political compromise based on the fear that the inclusion of social and political groups would expose nations to external intervention in their domestic concerns, and might endanger the future of the Convention because many States would be unwilling to ratify it. Therefore there was a sense that the defined groups under Article II would not provide the necessary intended purpose, that is, to protect all victims.

The exclusion of targeted groups such as sexual, social and economic class, political and cultural group undermine the adjudication of the crime of genocide and hence catalyzing impunity in preventing genocide which is the gravest crime against humanity and which aimed at the systematic extermination of human groups.

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[24] United Nations Report on the Study of the Question of the Prevention and Punishment of the Crime of Genocide, E/CN.4/Sub. 2/416 (July 4, 1978) pp. 13 – 24 particularly paras. 46 – 91

[25] Kuper, L. Genocide: Its Political Use in the Twentieth Century, Harmandsworth; Penguin (1981) p.25

[26] Id., p.28

The first obvious defects in the protected group is limited to national, ethnical, racial or religious and do not include other groups such as social and political groups and even those protected group were not defined. The second defect is the element of intent which requires special intent (dolus specialis) a standard that is ambiguous difficulty to meet.

Though there are interpretive debate over the meaning of its main elements the text is unlikely to change any time soon, its definition of the crime has been adopted directly in to the statutes of the International Criminal Court, the ICTY and ICTR as well.

Despite the existence of international instruments and national legislations intended to deal with genocide, this crime remains a major challenge to the protection of human rights globally. The right to life is fundamental and, in fact, indispensable to the enjoyment of other rights; hence where life is threatened or killed, especially if this is targeted at a specific group, be it a national, ethnical, racial, religious or other group, it puts that group at the risk of extinction. Yet, sometimes, incidents of genocide denied in some quarters; and the conceptual question itself remains unsettled, elusive and controversial.[27]Hence, genocide has come to mean different understanding to different persons or groups.

1.3 Research questions

With respect to the discussing issues, this research raised the following questions for which solutions should be found:

- ✓ What is the meaning and scope of genocide as a Crime under International Criminal Law and the elements of the crime?
- ✓ Who are protected group?
- ✓ What are criteria's for the determination of groups that are protected under Genocide Convention?
- ✓ Is the issue of groups well addressed in the Convention?
- ✓ What kind of critique has been raised against the protected group's definition and what are the defenses for the current definition?
- ✓ How the protected group definition is interpreted in the ICTY and the ICTR and is their interpretations consistent with the demands of the general principles of International Criminal Law?

[27] Harris, David, J., Cases and Materials on International Law, London: Sweet & Maxwell, (1998), p. 678

- ✓ What is the reflection of selected national laws and practice in relation to protected group?
- ✓ What is the status of the Genocide Convention in international law?
- ✓ Who are unprotected groups who need protection? Why?
- ✓ What should international law do to address the grey areas of the legal instruments for genocide?

1.4 Objective of the study

The fact remains that although the Convention has been in force since 12 January 1951, any ascertainable effect of it is difficult to quantify, whereas all too much evidence continues to accumulate that acts of genocide are still being committed in various parts of the world. Certainly in its present form, the Convention therefore must be judged to be not enough. The exhaustive list of protected group has to be expanded since the limited minority protection of the then time has been changed. The new emerged group needs the same protection as that of the former. Accordingly, the objectives of the research are to:

(a) Examine the nature, scope and place of the concept of genocide as a crime under international law as well as the elements of the crimes including the conceptual basis

(b) Highlight the Trends of genocide prosecution at international as well as at national level in relation to understanding protected group;

(c) Outline the main challenges on the interpretation of protected group in the Genocide Convention;

(d) Identify the major international instruments for crime of genocide with a view to suggesting reforms that will fill any lacunae or bring the instruments in consonance with present-day realities;

1.5 Scope of the Study and Limitation

In order to offer satisfied answers to the research questions the thesis has a limited scope which will devote only to the definition of protected group in the Convention. The concepts of national, ethnical, racial and religious groups are not clearly defined in international law and it will better to look in to different definitions offered in various instruments in international law. To put the

Genocide Convention into its proper historical and social context there is also a need to analyze a background that describes the creation of the Convention.

The cases chosen from the ICTY and ICTR have been included because they show all-important interpretations of concern to the protected groups' definition and the practical problem while interpretation has been done. Each of them has brought something new to the interpretation of the Genocide Convention and is frequently cited by commentators in International Criminal Law.

The issue of to what extent the protected group in the convention is understood and how the lacunae in the international instruments on protected group has to be solved is the main theme of the research and it will discussed in briefly. Since the concept of genocide is too broad the thesis is limited to the issue of protected group in genocide and the remaining issue other than the definitional elements of genocide has been left out and which can be raised as a limitation of the paper.

1.6 Significance of the study

This research examined and explained the definitional contents of the Genocide Convention on the protected group as a focal point of discussion and an attempt shall made by International Tribunals on how they interpret those terms in light of the purpose and object of the Convention.

In particular it give emphasis to the protected group and it is the theme of the research that dealing on the debatable issue of the excluded group from the Convention and the emerged need to be included in the Convention, so that they can assure their protection under this international core crime legal instrument. Since the final attempt of the research is producing the way that the Convention has to be amended, it will have significant contribution to different stakeholders.

First and foremost the Genocide Convention does not have a detailed and illustrative provision as to protected group, and with growing phenomena of numerous groups seek to be included in the Convention.

Then this research will provide basic guidance to the international legislative body while amending the Convention on the specific agenda of protected group. Moreover it will also serve as a guideline for various national states to expand those protected group in their domestic

legislations. For non state actors and individuals, it will offer a chance to appreciate the current legal regimes pertaining to the protected group and the challenge as well. It would also serve as a base for the future research on the issue of protected group in the Convention.

1.7 Research Methodology

This researcher has employed predominantly the doctrinal, historical and descriptive methods of research. Accordingly, primary sources have been utilized, notably International Legal Instruments and Judicial Decisions. Secondary sources have also been used: works of jurists and scholars as expressed in books and Journals, Dictionaries and Encyclopedias as well as periodicals.

This methodology is justified by the significantly and typically historical and topical nature of the research. Since genocide is not only exclusive refers to law; it also involves history, politics, economy and human rights generally; hence the non-doctrinal approach has also been fairly used in this work in appropriate cases to express ideas or phenomena that are related to the topic.

1.7 Organization of the Thesis

To achieve the objectives of this paper, the research paper consists of six chapters. The First chapter deals with Introductory matters such as objectives, statement of the problem, methodology and significance of the study.

In the Second chapter an attempt has been made to show, the conceptual foundation of genocide in general and the definitional elements in the Genocide Convention in particular. This chapter also highlights the status of genocide crime under international law.

The Third chapter is dedicated to the discussion of the views of international legal instruments and scholars on protected group in genocide.

The Fourth chapter analyzes the Trends of genocide crime prosecution in some selected International Criminal Tribunal which deals on the particular issue of understanding protected group in the convention. Additionally the practice of national courts will be highlighted.

The Fifth chapter is devoted to presenting the challenges made against the protected group in the Genocide Convention. And also this chapter inculcated the prospective view which directly

targeted on redefining the Genocide Convention so that it will help the Convention have an inclusive place for protected group and that will avert the current debate on the issue at hand.

Finally, the last chapter contains a conclusion and the way forward is indicated through recommendations which in the view of the writer are points worth admiring.

CHAPTER TWO

A General Overview of the Genocide Convention

2.1. The Concept of Genocide

The nature of the term's conception strongly suggests that genocide, the destruction of "human groups,"[28] is a violation of Customary International Law, which international Convention confirms.[29] In other words, the concept of genocide is not an invention of international legislation. At early period genocide has been described as "contrary to moral law"[30] and its translation into the legal positivist sphere has involved a continuous struggle to devise a universal definition that has practical application.

The crime has been prevalent "at all periods of history"[31] and the term "genocide" was not popularized until after the 20th century atrocities in Nazi Germany. The "crime without a name"[32] was first labeled "genocide" in print in 1944 by Raphael Lemkin in *Axis Rule in Occupied Europe*.[33] The term subsequently gained universal recognition by way of the prosecutions of responsible Nazi members at the International Military Tribunal, which led to the codification of its legal prohibition by the United Nations.[34]

The fact that the origin and subsequent defining of genocide as a crime prevalent in all periods of history in the 1940s was influenced primarily by a single historical event raises questions at the present time regarding the definition of genocide, given the prevalence of widespread atrocities in the contemporary world. Indeed, the *travaux-preparatoires* of the Genocide

[28] General Assembly Resolution.96 (I), U.N. Doc. A/64/Add.1 ,Dec. 11, 1946
[29] Ibid
[30] Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion of International Court of Justice , I.C.J. 15, 23 ,(May 28, 1951)
[31] Genocide Convention, supra note 9, Art. II,
[32] Sergey Sayapin, Raphael Lemkin: A Tribute, European Journal of International Law ,Vol.20,No.4,Oxford,(2009), pp. 1157 and 1159
[33] William A. Schabas, Genocide in International Law ,2nd ed., Cambridge, Cambridge University Press (2009), pp31-34
[34] Raphael Lemkin, Genocide as a Crime under International Law, Journal of International Law, Vol. 41(1):No.145-151 (1947) ,p.145 and 147

Convention confirm that the drafters used the events of the Jewish Holocaust as guidance in devising the legal definition.[35]

Max Du Plessis notes that the definition of genocide provided in Article II of the Genocide Convention reflects "a preoccupation among the drafters of the Convention with the Nazi extermination of the Jews in World War II."[36] David Nersessian suggests the possibility that, in becoming protected groups under conventional law, racial and religious groups in particular may have benefited from the convenience of the historical context provided by the Jewish Holocaust.[37]

If accepted that the genocide is contrary to "moral law," then its legal prohibition is an evolving concept influenced by a continuous effort to address the truest sense of the crime. Since the Genocide Convention is a codification of Genocide Law as it existed in customary law[38] half a century ago, customary law today may define genocide more broadly. As John Quigley notes, "a conclusion that a particular situation involves genocide is not tantamount to equating it with the Holocaust of World War II."[39]

Taking this into consideration the author is interested to discuss in this chapter mainly the concept of genocide from the understanding of nameless crime up to the global legal frame of the Genocide Convention in brief so that it will help the reader to have a general knowhow on genocide Crime.

2.1.1 Crime without a name

While attempts to destroy groups has been very much a part of human history, such were usually identified, if at all, either as by a description of the action or by subsuming the act under some very general concept, such as massacres, mass murder, put to the sword, barbarism, or inhumanity.[40] Even the attempts by the international community to develop humanitarian law

[35] "Basic Principles of a Convention on Genocide" Proposed by the Delegation of the Union of Soviet Socialist Republics on 5 April 1948, Ad Hoc Comm. on Genocide, Art. I, U.N. Doc. E/AC.25/7 (1948)
[36] Max Du Plessis International Criminal Court in the Prosecution of International Crimes, Ben Brandon & Max du Plessis eds., (2005), p 35, 36.
[37] David Nersessian, Genocide and Political Groups, Oxford, Oxford University Press,(2010), p62
[38] I.C.J. Advisory Opinion, supra note 3, p. 12 ("the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.").
[39] John Quigley, Genocide in Cambodia, Howard , De Nike et al. eds.,(2000), p 1, 2
[40] R.J Rummel, Death by Government, New Brunswich N.J; Translation Publishers, Available at www.hawaii.edu/powerkills/genocide,(1994), p.2

during the 19th and early 20th Centuries wholly focused on war crimes and crimes against humanity during war.

Various Hague treaties and the Geneva Conventions, for example, made it an international crime to murder POWs, indiscriminately kill or target noncombatants, sink unarmed passenger ships, and the like.[41] Moreover, there were occasions when states applied pressure or threatened military actions against other nations to stop massacring their nationals or coreligionists, as when the major European Powers in the late 19th Century threatened action against the Ottoman Empire because of its massacres of Christians[42].

None of the Hague treaties or Geneva conventions neither mentioned genocide, nor was the massacres the powers tried to prevent called genocide. On 24 August 1941, nine weeks after Germany invaded the Soviet Union Churchill made a radio broadcast in which he lauded the Russians from their resistance to Germany's east ward advance, said Churchill;-

> *"The aggressors ....retaliates by the most frightful cruelties, as his armies advance whole district are being exterminated. Scores of thousands literally scores of thousands of executions in cold blood are being perpetrated by the German police troops up on the Russian patriots who defend their native soil. Since the Mongol interventions of Europe in the 16thc, there has never been methodical, merciless butchery of such a skill or approaching such a scale and this is but the beginning. Famine and pestilence have yet to follow in the bloody ruts of Hitler's tanks. We are in the presence of a crime without a name."*[43]

Mean while jurist Raphael Lemkin, a Polish scholar of international law, came upon Plato's use of the Greek word *Genos* for a "race," or "tribe." The idea naturally occurred to Lemkin to add the Latin *"cide"*, which means "killer" or "act of killing" in Latin, as in homicide or suicide. Thus was born "*genocide*." The term genocide was invented for the crime that Churchill couldn't name.

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[41] Ibid
[42] Ibid
[43] Atlantic Charter 24August 1941 Broadcast London Winston Churchill His complete speech 1987-1983, Vol. 6. (1935-1942) p.647

2.1.2 Raphael Lemkin and Genocide

The Polish scholar Raphael Lemkin coined the term genocide in 1944.[44] His book *Axis Rule in Occupied Europe* was an analysis of the Nazis practice of extermination. According to Lemkin, the aim of genocide was the destruction of "national groups".[45] This aim and intent to destroy a group is still what distinguishes genocide from other crimes. Lemkin's analyses and definition of genocide was applicable to the acts of the Nazis, which required that people be treated not as individuals but as members of a specific group.[46]

After the publication of '*Axis Rule in Occupied Europe*' he then waged a successful campaign to persuade the new United Nations to draft a Convention against genocide; another successful campaign to obtain the required number of signatures; and yet another to secure the necessary national ratifications.[47]

According to Lemkin by "genocide" mean the destruction of a nation or an ethnic group. Generally speaking, 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 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.[48]

Hence according to Lemkin genocide has two phases: one, destruction of the national pattern of the oppressed group; the other one is the imposition of the national pattern of the oppressor. This imposition, in turn, may be made upon the oppressed population which is allowed to remain or

[44] Diane Marie Amann, Group Mentality, Expressivism and Genocide, International Criminal Law Review;Vol.2.2,University of Georgia School of Law, ,(2003),pp.93-143
[45] Lemkin Raphael, supra note 3, p. 79,
[46] Amann. Supra note 44, p. 97
[47] Leo Kuper, supra note 25 , p. 8
[48] Lemkin, supra note 3, p. 79

upon the territory alone, after removal of the population and the colonization of the area by the oppressor's own nationals.''[49]

It is probably true that Lemkin's formulation had its old elements. It is certainly the case that subsequent scholarly interpretations of "Lemkin's word" have tended to be more capacious in their framing. What can be defended is Lemkin's emphasis on the collective as a target. One can philosophize about the relative weight qualified to collectives over the individual, as Holmes does; but the reality of modern times is that the vast majority of those murdered *were killed on the basis of a collective identity – even if only one imputed by the killers*. The link between collective and mass, then between mass and large-scale extermination, was the defining dynamic of the twentieth century's unprecedented violence.[50]

In his historical studies, Lemkin appears to have read this correctly. Many or most of the examples he cites would be uncontroversial among a majority of genocide scholars today.[51] He saw the Nazis' assaults on Jews, Polish, and Polish Jews for what they were, and labeled the broader genre for the ages.

In any instance Lemkin played an important role in the Nuremberg International Military Tribunal trials of Nazi war criminals. He also lobbied at the UN during its debate on genocide, which concluded with the General Assembly resolution that "genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices are punishable."[52]

2.1.3 The General Assembly Resolution 96 (I)

In the post war Nuremberg trials, genocide was mentioned by the prosecutors as a crime but the judgments omitted the word itself, although they described acts that would now be defined as genocide as criminal acts. Extermination of national and racial groups was however conceptualized as a category of crimes against humanity. In later trials against lower rank

[49] Ibid
[50] Ibid
[51] Helen Fein, Genocide; A Sociological Perspective, sage publications, American Research Center Collection of University of Michigan,(1993),p.11
[52] R.J. Rummel, supra note 40, p.2

Germans, such as The Justice case, genocide was mentioned in the judgments. The Justice case was distinguished as the first international decision to discuss and explicitly convict defendants of genocide.[53]

Although the word appears in the drafting history of the Charter of the International Military Tribunal, the final text of that instrument uses the cognate term "crimes against humanity" to deal with the persecution and physical extermination of national, ethnic, racial and religious minorities. Prosecutors also used the term occasionally in their submissions to the Nuremberg Tribunal, but "genocide" does not appear in the final judgment, issued on 30 September 1 October 1946.[54]

The failure of the International Military Tribunal to condemn what some called "peacetime genocide" prompted immediate efforts within the United Nations General Assembly.[55] In effect, the Tribunal had confined the scope of crimes against humanity to acts perpetrated after the outbreak of war, in September 1939. At the first session of the General Assembly, in late 1946, Cuba, Panama and India presented a draft resolution that had two objectives: a declaration that genocide was a crime that could be committed in peacetime as well as in time of war, and recognition that genocide was subject to universal jurisdiction (that is, it could be prosecuted by any State, even in the absence of a territorial or personal link).[56]

General Assembly Resolution 96 (I), adopted on 11 December 1946, affirmed "that genocide is a crime under International Law which the civilized world condemns". It was silent as to whether the crime could be committed in peacetime, and although it described genocide as a crime "of international concern", it provided no clarification on the subject of jurisdiction. Resolution 96 (I) mandated the preparation of a draft Convention on the crime of genocide.

The Resolution[57] affirmed that genocide is a crime under International Law and those principals and accomplices, whether the crime is committed on religious, racial, political or any other ground, are punishable. The crime of genocide was defined by the resolution as a "denial of the

[53] Lippmann Mathew, The Convention on the Prevention and Punishment of the Crime of Genocide, Fifty Years Later" Arizona, Journal of International Law and Comp. L. 415,Vol.15 (1998). Pp 435-439
[54] William A. Schabas, Convention for the Prevention and Punishment of the Crime of Genocide, United Nations Audiovisual Library of International Law, (2008), p.1
[55] Ibid
[56] Ibid
[57] General Assembly Resolution 96 (I),supra note 28

right of existence of entire human groups". The Resolution further requested the Economic and Social Council to prepare a draft Convention on the crime of genocide.[58] Resolution 96 (I) has been used and cited frequently, in both subsequent instruments and judicial decisions, and can therefore be seen as codified customary principles of international law.

2.1.4 Drafting the Convention

Drafting of the Convention proceeded in three main stages.[59] First, the United Nations Secretariat composed a draft text which was prepared with the assistance of three experts, Raphael Lemkin, Vespasian Pella and Henri Donnedieu De Vabres, It was actually a compendium of concepts meant to assist the General Assembly rather than any attempt to provide a workable instrument or to resolve major differences.[60] Second, the Secretariat draft was reworked by an Ad Hoc Committee set up under the authority of the Economic and Social Council. Finally, the Ad Hoc Committee draft was the basis of negotiations in the Sixth Committee of the General Assembly, in late 1948, which agreed upon the final text of the Convention, submitting it for formal adoption to the plenary General Assembly.

The draft contained definitions of protected groups, acts of genocide and punishable offences. The acts of genocide were divided into three groups: physical genocide (acts causing death or injuring health or physical integrity), biological genocide (restriction of birth) and cultural genocide (destroying the special characteristics of the groups).[61] The protected groups in this draft were racial, national, linguistic, religious or political groups of human beings.[62]

The draft was not adopted as the final Convention text though it could be used in a comparison to the Genocide Convention and the Resolution 96 (I). The Sixth Committee's draft Convention was unanimously adopted by the General Assembly on 9 December 1948.[63]

[58] Ibid
[59] William A. Schabas, supra note 54, p.2
[60] Ibid
[61] Robinson Nehemiah. The Genocide Convention; A Commentary, New York: Institute of Jewish Affairs, World Jewish Congress, (1960) p 19
[62] William A. Schabas, Genocide in International law ,a Crime of Crime, Cambridge, Cambridge university press,(2009),p.59
[63] Id., p.71-80

2.2 Introduction and a short overview on the Genocide Convention

Any evaluation of a humanitarian crisis must begin with a reading of the Genocide Convention. Article I of the Convention states that acts constituting genocide under Article II are international crimes, which all parties agree to prevent and punish: "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."[64] The language of Article I, and indeed the Convention as a whole reflects an intent to apply the convention wherever and whenever possible.[65]

Article II of the Convention defines the crime itself: "genocide means one of 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."[66]

Article III imposes criminal liability to five acts: (1) "genocide;" (2) "Conspiracy to commit genocide;" (3) "Direct and public incitement of genocide;" (4) "Attempted genocide;" and (5) "Complicity in genocide."[67]Article IV states that; - "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."[68] Further, Article VI provides that those charged with genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed . . . ."[69] In Article V, the Convention further states that each

[64] Genocide Convention, supra note 9, Art. I.
[65] Nersessian, supra note 37, at 298,(he describes Article I as "contemplating worldwide application of the Genocide Convention in all possible circumstances . . . .")
[66]Genocide Convention, supra note 9, Art. II
[67] Id., Art. III
[68] Id., Art. IV
[69] Id., Art. VI

signatory must enact "the necessary legislation to give effect to the . . . Convention . . . ."[70] The United States, for example, ratified the Convention in 1988 and that year enacted the Proxmire Act, which included a definition of genocide almost identical to that of the convention.[71] Currently, more than 130 nations are parties to the Convention.[72] It remains the major international definition of genocide.

Generally looking in to the definitional part on genocide would result the drawn of three basic requirement to construed the given act is genocide. These are the existence of an identifiable national, ethnical, racial or religious group, the intent to destroy such a group in whole or in part *(mense rea)* and the commission or any of the listed acts in conjunction with identifiable group *(actus reus).*

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

2.2.1 Criminal elements in Genocide

2.2.1.1 Material element

Not every act committed with the intention to destroy, in whole or in part, a protected group will lead to a conviction for genocide. Only those which are mentioned in Article II of the Genocide Convention may form the *actus reus* of genocide. So that in the following few pages the author needs to look one of the basic notion(*actus reus*) that construed in genocide crime that have a legal framework under the Genocide Convention in the highlighted way.

Killing is one of element to constitute the given act tantamount to genocide act. Article II (a) covers what is the paradigmatic conduct that amounts to genocide: killing members of the group.

[70] Id., Art. 5

[71] Proxmire Act, 18 U.S.C.A. par 1091,Cited in William Reisinger, Beyond De-Nile the United Nations Genocide Problem in Darfur, Tounto Law Review, Vol.23 West 2006 & Supp.(2007) ,p.695

[72] The Office of the United Nations High Commission of Human Rights, ratifications and reservation on the Convention on the Prevention and Punishable on the Crime of Genocide http://www.ohchr.org/english/countries/ratification/1.htm#N2 (last visited Sept. 18, 2013).

The act must be intentional but not necessarily premeditated.[73] If there is doubt about the intention to kill, rather than the intention to cause serious harm, it is of course possible to charge the defendant pursuant to Article II (b) of the Convention for the conduct that led to the death.

The second prohibited act under the convention is causing serious bodily or mental harm to members of the group.[74] In spite of the popular understanding of genocide as being confined to conduct causing death, the drafters of the Genocide Convention were not so limited in their understanding of the crime. Article II (b) of the Convention also criminalizes the causing of serious bodily or mental harm to victims. In the Eichmann case, the District Court of Jerusalem said that serious bodily and mental harm could be caused 'by the enslavement, starvation, deportation and persecution of people . . . and by their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings and to suppress them and cause them inhumane suffering and torture'.[75] The ICTR in the Akayesu case brought new ground in deciding that acts of sexual violence and rape can constitute genocide; sexual violence was found to be an integral part of the process of destruction in the Rwanda genocide.[76] In Kayishema, it was held that decisions on what is meant by serious bodily or mental harm should be made on a case-by-case basis.[77]

Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part is the third element that has been mentioned in the Convention.[78] This category of prohibited acts comprise methods of destruction whereby the perpetrator does not immediately kill the members of the group, but which seek to bring about their physical destruction in the end.[79] The ICC Elements of Crimes interpret the term 'conditions of life' as including but 'not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes'.[80] Unlike the

[73] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, Original: United Nation, English Case No. IT-97-24-T, Stakic ICTY T. Ch. II 31.7(2003) para. 515
[74] Genocide Convention, supra note 9,Art 2(b)
[75] Attorney General of Israel v Eichmann: Trial Court Decision 36 Intl. L. Rep. 5 (Israel, Dist. Ct. Jerusalem (1968), more at: http://www.enotes.com/topics/eichmann#sthash.wUrC1wew.d puf.
[76] Prosecutor v. Akayesu, lCTR Trial Chamber, Judgment, ICTR T. Ch. I 2.9. (1998) para. 731.
[77] Id., para. 110
[78] Genocide convention, supra note 9,Art 2(c)
[79] Akayesu, supra note 75, para. 505.
[80] International Criminal Court, Art. 6(c)

two previous categories, this is not a result-based form of the crime[81] but it requires that the conditions are 'calculated' to achieve the result.[82]

The question of the forced migration of people, commonly known by the ugly neologism 'ethnic cleansing', has been addressed under this subparagraph of Article II. This practice, when committed by the Serbs to eliminate the Muslim presence in large parts of Bosnia- Herzogovina, was regarded by ad hoc Judge Lauterpacht in the ICJ provisional measures ruling of 13 September 1993 as constituting genocide,[83] though his view was not shared by the majority. But here we can understand that the fact of forced migration alone is not enough for a court to deduce the special intent of destruction of the group and other subsequent conditions like the mental elements has to take in to consideration.

The fourth act is imposing measures intended to prevent births within the group. This provision was inspired by the Nazis' practice of forced sterilization before and during the Second World War. Examples of these measures given by the ICTR Trial Chamber in Akayesu are sexual mutilation, sterilization, and forced birth control, separation of the sexes and prohibition of marriages.[84]

The last but not the least act is forcibly transferring children of the group to another group is another prohibited act under the Convention. This is a form of genocide which has received little judicial consideration.[85] Probably the most authoritative interpretative source on the point is to be found in the ICC Elements of Crimes, defining children as being those below 18 and noting that 'the term "forcibly" is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment'.[86]

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[81] Prosecutor v. Milomir Stakic, 31 July 2003, IT-97-24, para. 517.
[82] Claus Kreb, The Crime of Genocide, Netherland, International Criminal Law Review 6:461-502,(2006) p. 481, 'calculated' and 'physical destruction' are difficult concepts.
[83]The Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), ICJ Rep. 325,[1993], pp. 431–2.
[84]Akayesu, supra note 76, para. 507.
[85]Akayesu, supra note76, para. 509.
[86] Schabas, supra note 62, at p. 205

2.2.1.2 Mental element

The mental elements of genocide comprise both the requisite intention to commit the underlying prohibited act (such as killing) and the intent special to genocide. It is the special intent 'to destroy in whole or in part (a protected group) as such' that distinguishes genocide from other crimes.[87] But the meaning to be attributed to this intent requirement is a matter of some difficulty.

One of the most controversial and unique element in Genocide Convention is the existence of an intent to destroy. The destruction specified here is physical or biological, although the means of causing the destruction of the group may be by acts short of causing the death of individuals.[88] Other forms of destruction, for example, the social assimilation of a group into another, or attacks on cultural characteristics which give a group its own identity, do not constitute genocide if they are not related to physical or biological destruction.

The intent to destroy according to the Convention it might be 'in whole or in part' there must be intent to destroy the protected group in whole or in part. This aspect of the intention is one which has caused considerable controversy.[89] This is because the ambit of the protections granted by the prohibition of genocide is quite heavily dependent on how broadly or narrowly the relevant group is conceptualized. The first issue is a geographical one. To take an example from a clear case of genocide Rwanda the Hutu Genocidaires did not appear to want to destroy all Tutsis everywhere, but only in Rwanda.[90] The relevant group could be conceived of as Tutsis everywhere, in which case Rwandan Tutsis were protected only as a 'part' of that group. Or it could be thought that the relevant group was the Rwandan Tutsis. This difference matters as, in the latter instance, an intention to destroy all the Tutsis in part of Rwanda could fulfill this aspect of the mental element of genocide. In the former, it could not. According to the ICJ, 'it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area'.[91]

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[87] Kambanda ICTR T. Ch. I 4.9. (1998) para. 16; Kayeshema ICTR T. Ch. II 21.5., (1999) para. 91.
[88] Id., para. 95.
[89] It is worth emphasizing that this part of the offence is a part of the mental element, not the material elements of Genocide it is not necessary to establish whether all or part of a group was actually destroyed to prove Genocide.
[90] Prosecutor v Radislav Krstic, Case No: IT-98-33-,(19 April 2004), para. 13
[91] Bosnian Genocide case ICJ, Available at http://metamedia.stanford.edu/projects/CulturesofContact/ visited on 30 August 20013 para. 199.

A further issue is the meaning of 'part' of a group. The case law of the Tribunals has established that it is not genocide if the intention is to target a part which is less than 'substantial'[92] and this has been confirmed by the ICJ: . . . the intent must be to destroy at least a substantial part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole.[93]

What is the 'as such' clause implies in the Convention is another issue that has to be looked in to. During the negotiation of the Convention there were those who wanted to include motive as a necessary element of genocide. Others did not. The compromise which allowed agreement to be reached was to exclude any explicit reference to motive, but to include the words 'as such'.[94] While these words are therefore relied upon by some as evidence for the need for motive[95] the *travaux preparatoires* disclose that was not the meaning that all the negotiators attached to the words. Their understanding were the wording of such as under article II which stipulate that in order to be characterized as genocide ,the crimes against a number of individuals must be directed as their collective character or capacity.[96]

It is worth noting that, unlike the crime of aggression, genocide is not a crime that may be committed only by those who lead and plan the campaign of destruction. The rank and file may also be principal perpetrators of genocide, provided they have the requisite intent.[97] The special intent required for genocide necessitates each individual perpetrator, whether leader or foot soldier, having the intention to destroy the group or part of it when committing any of the prohibited acts.[98] Therefore one thing that makes genocide unique from other international crime

[92] Kayeshema ICTR T. Ch. II 21.5. (1999) para. 96; Bagilishema ICTR T. Ch. I 7.6. (2001) para. 64
[93] Bosnian Genocide case ICJ ,supra note 91,para.198
[94] Alexander k. A. Greenawalt, Rethinking Genocidal Intent: The case for a Knowledge-Based Interpretation , Columbia Law Review 99, pace University, Pace Law Faculty Publication, ,(1999) PP.2274–9
[95] Quigley, supra note 39, p.120–126.
[96] B.whitaker, Revised and updated report on the Question of the Prevention and Punishment of the crime of Genocide ,United Nation Economic and Social Council ,38th Session, item 4 of the provisional Agenda, (2 July 1985), p 19
[97] Kayeshema ICTR, supra note 92, para. 170.
[98] Akayesu ICTR, supra note 76, para.164.

is that *mens rea* requires *dolus speciallis.*[99] Thus it is quite common and frequent to take the term *dolus speciallis* to explain the level of *mens rea* required proving guilty for Genocide.[100]

The intent is a mental factor of the commission of genocide which is difficult to testify.[101] It needs to be proved by the prosecutor showing the direct evidence or indirect or circumstantial evidence.[102] According to the Genocide Convention, the ICTY,[103] the ICTR[104], and the Rome Statute,[105] it is sufficient if the accused person intends to destroy a group in whole or in part.

The level of proving those who alleged committed genocide is general standard of ordinary crime that the accused has to be proved beyond reasonable doubt that he intend to destroy wholly or partly the selected group. The perpetrator would be examined their intent by relevant evidence.[106]

Since genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent, convictions for genocide can be entered only where that intent has been unequivocally established. The basic issue that many scholars raised is that how to proof the existence of special intent. Direct evidence of genocidal intent may not be available. In the absence of such, the Tribunals have been prepared to deduce intent from circumstantial evidence including the actions and words of the perpetrator.

Hence, Prosecutors who are not sure of being able to prove the special intent are likely to charge such lesser modes of liability rather than genocide as a principal perpetrator.

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[99] C.than and E.Shorts, International criminal law and Human Rights, 1st ed., London, sweet and Maxwell, (2003), p73

[100] William A.Schabas, The Jelistic Case and the *Mens rea* of the Crime of Genocide, Leiden Journal of International Law 125, Vol.14, (2001),p.128

[101] P.Gaeta, and J.R.W.D Jones(eds.),The Rome statute of the International Court, Oxford; Oxford University Press,p.346

[102] O.Trifferer, Genocide ;Its Particular Intent to Destroy in Whole or in Part the Group as such, Leiden Journal International Law of International Law 339, Vol.14 (2001), p. 126

[103] The Rome Statute see at http/www.icc-cpi.int/menus/ICC/legal text and tools/ last visit 23 sep 2013

[104] A. Cassese ,International Criminal Law,2nd ed, Oxford, Oxford University Press,(2008), p.132

[105] The ICTR statute see at http//www.ictr.org/default htm last visit on 23 sep 2013

[106] Suriyan Hongvilai, Genocide; Time to Change Its Current Formulation, COJ Comparative Law Journal, p. 36

2.3. Genocide as a Core International Crime and its status under International Law

2.3.1 Definition of 'Core International Crimes'

Prior to identifying 'Core International Crimes', it is appropriate to take one step back and to determine what crimes can be categorized as 'International Crimes' in the first place. An agreed formulation of International Crimes has been quite elusive for decades and continues to be so.[107]An attempt was made at a single definition of the term 'International Crimes' in Article 19 of the International Law Commission's "Draft Articles on Responsibility of States for Internationally Wrongful Acts 1996, However, the category of International Crimes in draft Article 19, and the consequences attaching to it made a contention and didn't appeared for international community as a binding document.[108]

This is especially interesting because of the prolific use of such term by scholars and in particular, because none of the International Instruments which are generally accepted to concern 'International Crimes', define nor, in most instances, even use such term. Bassiouni, who has made the only comprehensive scholarly investigation into this subject, has identified ten penal characteristics, any one of which, if found in a multilateral Convention, is sufficient to characterize the conduct prohibited by such Convention as constituting an international crime.

On the basis of these 10 penal characteristics, Bassiouni's research has identified 28 categories of "international crimes" which includes Aggression, Genocide, crimes against humanity, and war crimes on the first line.[109]

The categories of International Crimes identified by Bassiouni are based on five criteria identified by him as applicable to the policy of international criminalization:[110] (i) the prohibited conduct affects a significant international interest, in particular, if it constitutes a threat to international peace and security; (ii) the prohibited conduct constitutes an egregious conduct deemed offensive to the commonly shared values of the world community, including conduct deemed shocking to the conscience of humanity; (iii) the prohibited conduct involves more than one state (transnational implications) in its planning, preparation or commission either through

[107] Ciara Damgaard, Individual criminal responsibility for the Core International Crimes Selected Pertinent Issues, University of Copenhagen, The Law Faculty,(2008), p 57
[108]Ibid
[109] Ibid
[110]Ciara Damgaard, supra note 107, p.59

the diversity of nationality of its perpetrators or victims, or because the means employed transcend national boundaries; (iv) the conduct is harmful to an internationally protected person or interest; and (v) the conduct violates an internationally protected interest but it does not rise to the level required by (i) or (ii), however, because of its nature, it can best be prevented and suppressed by international criminalization.[111]

Antonio Cassese explains that the classification of a crime as an International Crime depends on the values intended to be protected by criminalizing such conduct and whether such values are considered important by the whole international community.[112] Applying this criterion, he insists that even though Bassiouni considered piracy, illicit trafficking in narcotic drugs and psychotropic substances, and apartheid are international crimes he disagreed with this list to be included in the rest list as international core crime.[113] Irrespective of this disagreement, one issue on which there is accord is that the crimes which can be categorized as Core International Crimes are Genocide, crimes against humanity, War crimes and the crime of Aggression. These crimes are considered to be Core International Crimes as they are the "most serious crimes of concern to the international community as a whole".[114]

2.3.1 Prohibition of Genocide as Part of Customary International Law

As we know that not all States are parties to the Genocide Convention,[115]the question of its relationship to Customary International Law is of obvious significance to national, ethnical, racial and religious groups in countries not parties to the Convention. These States that are not parties are quite as heterogeneous as the States parties and do not present themselves as a group of particular outstanding politically stable countries. Their minorities live under the same conditions of insecurities as minorities in any other modern State. Thus, the principles of the Genocide Convention are just as important and desirable in those countries.

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[111] Ibid
[112] Antonio Cassese, supra note 104, pp. 23-25
[113] Ibid
[114] ICC Statute, supra note 103, Article 5(1)
[115] By 18th of February there were 135 States parties to the Genocide Convention has ratified the Convention, Available at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty1. asp accessed 2013-02-19

As seen in the foregoing section, Resolution 96 (I) has been an argument for commentators to support the view that genocide was condemned by Customary International Law independent of the Genocide Convention. This is reflected in Article I of the convention where the parties "confirm that genocide, whether committed in time of peace or war, is a crime under international law". Normally General Assembly Resolutions have only a recommendatory force.

However, they can be the best possible statement of Customary International Law provided that certain conditions are fulfilled. Resolution 96 (I) clearly deals with a legal issue and claims to be a declaration of existing law rather than creating a new law. According to Thornberry the Resolution is an important piece of evidence of a rule which is accepted as law. An US Military Tribunal observed this when stating that: "The General Assembly is not an international legislature, but it is the most authoritative organ in existence for the interpretation of world opinion."[116]

The drafters of the convention had different views on the matter of genocide as a crime under International Law. The representative of Poland argued that Resolution 96 (1) recognized genocide as crime under international law and the United Kingdom regarded physical Genocide as already a crime so that the proposed convention would make no significant contribution to international law.[117] Other countries doubted the criminality of Genocide under international law in time of peace. They were doubtful whether the Resolution 96 (I) be legally binding upon the States. This is a valid point since, as seen above, General Assembly resolutions are recommendatory nature. The doubters did not address the issue whether a principle of Customary Law could none the less have been created.[118] Article I of the Genocide Convention declared genocide to be a crime under International Law and thereby made a statement to the issue of genocide as Customary International Law.

In the *Reservations case*[119] the ICJ stated that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, *even without any conventional obligation"*.[120] Thus it is clear that the ICJ considered Genocide to be a crime under

[116] Thornberry Patrick, International Law and the Rights of the Minorities, Oxford: Clarendon. (1992),p. 92
[117] GAOR, 3rd Session, Part I, 6th Committee, 64th meeting
[118] Ibid
[119] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, supra note 30
[120] Id., P.15.

Customary International Law. The Secretary General has in a report concerning the competence of the ICTY, stated that the Genocide Convention is beyond doubt part of customary international law.[121] The Genocide Convention binds only States and the prohibition of genocide in Customary International Law should therefore also bind only States. It imposes no duties and no responsibility directly on the individual, only a State exercising its jurisdiction under national legal systems could normally prosecute an individual.

However there is the concept of "universal jurisdiction". Universal jurisdiction applies to a limited number of crimes which any State, even absent personal[122] or territorial[123] links to the crime.

According to Schabas these crimes in International Customary Law are piracy, slave trade and traffic in women and children. Some multilateral treaties also recognize universal jurisdiction for particular offences among others hijacking and other threats to air travel.[124] The Genocide Convention does not provide for universal jurisdiction over the crime of genocide.[125] He added that there is no universal jurisdiction accepted for the crime of genocide either in Customary Law or under the Genocide Convention.[126] It seems as if there is no individual responsibility for the crime of genocide under International Law.

However, the concept of "International Crimes", that is, crimes that States are not only obligated to prosecute but are also universally binding to individuals, establishes this individual responsibility for persons committing genocide. That individuals can be responsible for committing crimes under international law was established in the Nuremberg Principles. There, the responsibility of the individual for crimes against humanity (including genocide), war crimes and crimes against peace is established.[127] The question that arises is how to identify such crimes.

[121] Report of the Secretary General Pursuant to paragraph 2 of Security Council, Resolution 808, UN Doc. S/25704, para. 35
[122] The offender is a national of the prosecuting State.
[123] The crime was committed on the territory of the prosecuting State
[124] Schabas, supra note 54, p. 354
[125] Genocide Convention, supra note 9, article VI
[126] Schabas. Supra note 54,P. 367
[127] Broomhall Bruce, International Justice and the International Criminal Court, Oxford: Oxford University Press. (2003) p. 20

Today a good source to find out which crimes can be seen as international crimes is the Rome Statute of the ICC. That a crime is under the jurisdiction of the ICC is a good indication that the international community considers the crime to be an international crime. Genocide is a crime in the Rome Statute of the ICC.[128]

But ICJ never clearly defined the scope of the customary law prohibiting genocide. Some writers argue that it is broader than the Genocide Convention itself. The definition of genocide in Article II of the Genocide Convention forms a minimum, which is probably reflected also in the customary law that outlaws genocide. Of all the States that have ratified the Convention none have made reservations to the first Articles that define the crime. Thornberry describes this as an "undisputed core of genocide".[129] Still there is nothing that prevents the customary law of genocide to be broader than the Convention. Most writers though seems to be of the notion that the definition of genocide in Article II is also the definition of genocide in customary law and that there is no opinio juris among States for the notion that the definition of genocide in customary law is expanded beyond the scope of the Convention.[130]

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

Hence, substantive provisions of the Genocide Convention, including the classification of genocide as a crime under international law, are now considered to be part of Customary International Law, binding on all states. And the above mentioned core international crimes are just also *jus cogens* crimes from which, it has been asserted,[131] no derogation is permitted and which are subject to universal jurisdiction.[132]

[128] ICC, supra note103, Art. 6
[129] Thornberry, supra note 116, pp. 104-105
[130] Thornberry, supra note 116, p 105.
[131] John F. Murphy ,Civil Liability for the Commission of International Crimes as An Alternative to Criminal Prosecution, Harvard Human Rights Journal ,Vol.12,No 7, (1999) p.341
[132] M. Shaw, What is Genocide? Cambridge UK, Cambridge University Press,(2007), p.146,

CHAPTER THREE

Protected Groups in Genocide Convention

3.1 Criteria of the protected Groups

It is group members and group members only which are protected by the Genocide Convention. If the victim lacks membership in a protected group, genocide has not occurred, even if the actor's ultimate intention is to facilitate the destruction of a protected group. Nersessian by making a reference to Akayesu case mentioned the instance that the killing and maiming of moderate Hutus during the Rwanda hostilities cannot constitute genocide under the Convention[133], even though many of these atrocities were an essential part of the overall scheme to destroy Tutsis as a group.

Article II makes it abundantly clear that the protected groups are central to the concept of genocide. Indeed, it's not possible to characterize a certain crime as committed genocide if ones criminal behavior is not directed towards a group protected by the Convention; 'the existence of the 'group' is the protected value that justifies criminalization and makes genocide a crime of special intent'.[134] The list is exhaustive, and at this time there is not any agreement in the international legal community on definitions of the four categories.

Given the importance of these groups to the concept of genocide, it is striking that the drafters of the Convention chose only to enumerate four groups, arguably relatively vague, categories, and left the drawing of more precise lines of protection to subsequent interpreters. William Schabas suggests that the possible explanation for this might be that the meaning of the terms chosen, or at least the core of the protection, was fairly clear to the drafters, who didn't find these terms nearly as vague or outdated as they might appear to a 21st century reader.[135]

Be that as it may, for a modern reader, the place to start interpretation of any treaty is with the 'ordinary meaning to be given to the terms of the treaty in their context and in the light of its

[133] David L.Nersessian, The counter of Genocide Intent ;Trabling Jurisprudence from the International Criminal Tribunals ,Texas International Law Journal , Vol 37;231,(2001) p 260

[134] Martin, F., 'The Notion of Protected Group' P.112

[135] William A. Schabas, 'Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda' , Journal of International and Comparative Law, vol. 6, (1999-2000), P.384

object and purpose'[136], as stated in the Vienna Convention on the Law of Treaty. This interpretative rule is 'declaratory of Customary International Law on the construction of both treaties and, arguably, other written rules as well'[137], and can thus authoritatively be relied on to govern the interpretation of the Genocide Convention, even though the Convention itself does not make a reference to the rule. The Vienna Convention also sets out what 'context' means for the sake of interpretation.

In addition, any subsequent agreement between the parties on how the Convention should be interpreted would also be taken into account. With regards to Article II, there is no other agreement between the parties, neither entered into at the time of the treaty conclusion or afterwards, that can be of assistance when one is to draw the lines of the protected groups. Scholars of international law have suggested different methods for understanding Article II.

The most common approach is to tackle each of the four categories in turn an effort to pin down the exact meaning of each term[138]. This method has been done by the ICTR[139] and the ICTY as well, though they do not always feel bound to place the group in question in the case before them into a specific protected group[140]. Others claim this delimitation is not in keeping with the object and purpose of the Convention. Several of the categories are overlapping, and William Schabas sees this as evidence that what the categories are meant to be are 'four corner posts that delimit an area within which a myriad of groups covered by the Genocide Convention.

The drafters viewed the four groups in a dynamic and synergistic relationship, each contributing to an understanding of the meaning of the other.'[141] Schabas goes even further, and suggests that pinning down the exact meaning would not only be fruitless, but would risk distorting the sense that comes from seeing the four terms as a whole. He receives some support for his view from the ICTY Trial Chamber in the *Krstic* case:

[136] Vienna Convention on the Law of Treaties, Article 31(1)
[137] Cassese Antonio, supra note 104, p.17
[138] Kress, C., The Crime of Genocide under International Law, International Criminal Law Review ,vol. 6,(2006), P.476-479
[139] Prosecutor v. Akayesu, supra note 76, para.512-515
[140] Prosecutor v. Krstic, supra note 90,para 231-233
[141] William A.Schabas, Genocide Law in a Time of Transition, Rurgaers Law Review, Vol. 61:1 , University of Oxford (2008), p. 167

"*The preparatory work of the Convention shows that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what was recognized, before the Second World War, as national minorities, rather than to refer to several distinct prototypes of human groups. To attempt to differentiate between each of the named groups on the basis of scientifically objective criteria would thus be inconsistent with the object and purpose of the Convention"*[142]

This approach is interesting for several reasons. The task of setting out exact boundaries for terms is vague as the ones used in the Convention can be a frustrating and obscure one. In addition, the intentions behind the protection of groups, the reason why genocide is a separate crime in the first place, are similar for all the four categories, making judging them in relation to each other a sensible approach. What was meant to be protected were groups that had a permanence and stability to them, that were not in flux, and whose members could not easily step outside of the group by choice? This was highlighted by the ICTR already in *Akayesu*[143], which was the first time the tribunal addressed genocide. In *Akayesu*, the Trial Chamber referred to the discussions in the Sixth Committee[144] during the drafting of the Convention:-

"*…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 more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the 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*."[145]

3.1.1 Stability and permanency as criteria for the determination of the protected groups

From the lesson of international criminal prosecution the first judicial interpretation of the enumeration of groups protected by the Genocide Convention dates to September 1998, fifty years after the Convention's adoption have been taken in Rwanda. The prosecutor v. Akayesu, a trial chamber of the international criminal court for Rwanda wrestled with the application of

[142] Krstic ICTY, supra note 90 ,para 556
[143] Akayesu, supra note76, para 701
[144] The Sixth Committee of the General Assembly, meeting 21 September – 10 December 1948
[145] Akayesu, supra note 76, para.511

enumeration to the Tutsi victim of the 1994 genocide in Rwanda.[146] Perplexed by difficulties in determining how to categorize the Tutsi group, the trial chamber ultimately ruled that article II of the Genocide Convention should be interpreted to apply to all stable and permanent groups, whether or not the Tutsi could be neatly fit within the scope of terms national ethnic, religious, or racial. Months later, a second trial chamber of the same tribunal, in prosecutor v. kayeshema and Ruzindana, took a very different approach to the issue, ruling that the Tutsi were an ethnic group not because they met the definition in any objective sense but because Rwanda laws had define the term as such.[147]

The trial chamber of the International Criminal Tribunal for Rwanda, in its September 2, 1998 decision in Akayesu, considered the enumeration of protected groups in article II of the Genocide Convention, to be too restrictive. The categorization of Rwanda's Tutsi population clearly vexed the tribunal. For the tribunal, the word ethnical came closest, yet it too was troublesome because the Tutsi could not be meaningfully distinguished, in terms of language and culture, from the majority Hutu population.[148]

The Rwandan Tutsis are, it is widely believed, descendants of Nilotic herders, whereas the Rwandan Hutus are considered to be of Bantu origin from the south and central Africa.[149] Historically, their economies were different, the Tutsis raising cattle while the Hutus tilled the soil. There are also genetic differences, a typical Tutsi being tall and slender, with a fine, pointed nose, a typical Hutu being shorter with a flatter nose.[150] These differences are visible in some, but not in many others. Rwandan Tutsi and Hutus speak the same language, practice the same religions, and have essentially the same culture. Mixed marriages are common. Distinguishing a system of identity cards, and determined what Rwanda law calls ethnic origin based on the number of cattle owned by a family.[151]

Confronted with the prospect that none of the four terms of the definition might apply; the tribunal concluded that the Convention could still extend to certain other groups, although their

[146]Akayesu, supra note 76,para 512
[147] Prosecutor vs.Kayeshema and Runzindana, supra note 92,para 511
[148] Prosecutor vs. Akayesu , supra note 76, para 693
[149] Schabas, supra note 135, p.378
[150]Ibid
[151] G.Prunier, The Rwanda Crisis 1959-1994,History of Genocide, London: Hurst & Co. Chicago (1995),p45

precise definition was elusive. Pledging fidelity to the conventions drafters, the Akayasu judgment declared;-

> *"On reading through the travaux preparatoires 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 economic and political groups. Therefore, a common element in the 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. moreover, the chamber considered whether the groups protected by the Genocide Convention, echoed in article II of the statute, should be limited to only the four group 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 raises is whether it could 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 preparatoires, was patently to ensure the protection of any stable and permanent group."*[152]

The three of the four categories in the Convention enumeration, national groups, ethnic groups, and religious groups seem to be neither stable nor permanent.[153] Only racial groups, when they are defined genetically, can lay claim to same relatively prolonged stability and permanence.[154] The day after the General Assembly Adopted the Genocide Convention it approved the

[152] Akayasu, supra note 76, para,515
[153]Schabas, supra note 135, p382
[154] Ibid

Universal Declaration of Human Rights, which proclaimed the fundamental right to change both nationality and religion, thereby recognizing that they are far from permanent and stable.[155]

National groups are modified dramatically as borders change and as individual and collective conceptions of identity evolve. Nationality may be changed, sometimes for large groups of individuals where, for example, two countries have joined or secession has occurred.

Religious groups may come into existence and disappear within a single life time. Individuals are free to leave a religious group and embrace another one, although they might be less malleable than political groups.

As far as ethics groups is concerned , individual members may also come and go, although there will often be formal legal rules associated with this ,determining ethnicity as a result of marriage or in the case of children whose parents belongs to different ethnic groups.

Furthermore, it is not at all clear from a reading of the *travaux preparatoires* of the convention that the intent of the drafters, was patently to ensure the protection of any stable and permanent group as the Rwandan tribunal claimed. In fact, reference to groups which are stable and permanent occurred only infrequently during the drafting, and other, complex justifications for the choices of the general assembly were also given in the course of the debates.[156]

What the review of the drafting history reveals is that political groups perhaps the best example of the group that is not stable and permanent was actually included. The debate leaves little doubt that the decision to exclude political groups was mainly an attempt to rally a minority of member states, in order to facilitate rapid ratification of the Convention, and not a principled decision based on some philosophical distinction between stable and more ephemeral groups.[157]

Nor is there any support for the stable and permanent hypothesis in national legislation introducing the crime of genocide in domestic penal codes. It is true that several states have departed from the Convention definition but none has been taken stable and permanent approach.

[155] Universal Declaration of Human Rights, G.A.Res.217 A (3), UN.docA/810, art 15(1)
[156] UN .doc A/C.6/SR.96(Amado ,Brazil)
[157] Schabas, supra note 135, p382

3.1.2 Minorities and protected groups

In various international law literature review on the issue of who are those protected groups the term minorities has been raised time and again. And it would be better to look the highlight concept of minorities under UN umbrella. The General Assembly Adopted by consensus in 1992, the United Nations Minorities Declaration in its Article 1 refers to minorities as based on national or ethnic, cultural, religious and linguistic identity, and provides that States should protect their existence.[158] There is no internationally agreed definition as to which groups constitute minorities.[159] It is often stressed that the existence of a minority is a question of fact and that any definition must include both objective factors (such as the existence of a shared ethnicity, language or religion) and subjective factors (including that individuals must identify themselves as members of a minority).

The difficulty in arriving at a widely acceptable definition lies in the variety of situations in which minorities live. Some live together in well-defined areas, separated from the dominant part of the population. Others are scattered throughout the country. Some minorities have a strong sense of collective identity and recorded history; others retain only a fragmented notion of their common heritage.

According to a definition offered in 1977 by Francesco Capotorti, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, a minority is:-

> "*A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.*"[160]

[158] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities A/RES/47/135,92nd plenary meeting (18 December 1992), Art. 1

[159] Minority rights: International Standards and Guidance for Implementation, Office of the United Nations Higher Commissioner for Human Rights, new York and Geneva,(2010),pp.2-3

[160] Id., p2-3

Even though many scholars explicitly provides their opinion that those protected group by the then selected on the basis of their minorities and by the need to have a legal guarantee, nothing in the Genocide Convention says that a group must be in minority to be victim of genocide. The main objective of the Genocide Convention is to prevent and punish the crime of genocide and not to protect minorities.

3.2 Who are the protected groups?

By definition genocide can occur only against individuals who are members of protected national, ethnic, racial or religious groups.[161]The possible issues that could be raised here is that who are protected groups under the Genocide Convention? Is the term group and those protected group well addressed in the Convention? And how the international community tackles the problem in relation to understanding or interpretation of those protected group is the main theme of this section that has to be well addressed by the author.

3.2.1 Racial groups

Racial groups are identified primarily by the physical appearance of their members. The Proxmire Act defines them as a set of individuals who identify as such is distinctive in terms of physical characteristics or biological descent.[162] The ICTR defined them in terms of the hereditary physical traits often associated with a geographical region, irrespective of linguistic, cultural, national or religious factors.[163]Both of these conceptions accords with prior academic commentary. Drost for example, notes that the word racial refers mainly to external, physical features and appearance.[164]

In the *travaux preparatoires* of the Genocide Convention there are no discussions on whether to include this term or not, whereas the terms ethnical, religious and national at least were discussed to some extent. Schabas therefore interprets that as an indicator that this term was close to the core of what was intended in the drafting of the Convention.[165]The original definition of the term was that of a broad general concept. Fifty years ago the concept of race was understood to

[161] The Genocide convention , supra note 9, Article 2
[162] Proxmire Act, supra note 71, act 18, USC1093(6)
[163].Prosecutor vs. Rutaganda, supra note 21
[164] David L.Nersessian, supra note 133 ,p231
[165] Schabas, supra note 135, p. 120

encompass national, ethnical and even religious groups.[166]The International Convention for the Elimination of All Forms of Racial Discrimination defines racial discrimination as: "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin."[167] This supports the notion of "race" as a broad concept not limited to physical traits.

Scientists have long disagreed about which, if any, genetic differences exist between races and about how many human races there are in the world. The numbers proposed can vary from three to sixty-three. Indeed the idea of biologically distinct human races is not scientific but historical.[168]Of course genocide can still be committed on racial groups although the concept of race is dismissed by modern science. In the words of Schabas: "Surely an individual who sought to destroy the "Negroid" or "Mongoloid" race or part of it would be committing Genocide under the terms of the Convention, even though modern science disputes the validity of such designations from an objective standpoint."[169]

Akayesu Trial Chamber defined a racial group as a group with common hereditary physical traits.[170] This definition is not satisfactory since physical differences among "races" are seldom consistently apparent.[171] However if a subjective approach is used this definition would suffice. The Tutsi of Rwanda would be a race since the perpetrators considered them to have certain hereditary physical traits.[172]

There is indeed a confusion concerning the terms, national, ethnical and racial in the Genocide Convention. The report of Special Rapporteur Ruhashyankiko illustrates this as well. He does not draw any conclusions or propose any definition of the term racial. The report simply shows that these terms merge into each other and are almost impossible to distinguish between.[173] It is

[166] Id., p. 121
[167] International Convention for the Elimination of All Forms of Racial Discrimination, (1969), Art. 2(2) and (7)
[168] Cornell, Stephen & Hartmann, Douglas, Ethnicity and Race: Making Identities in a Changing World, Thousand Oaks, California: Pine Forge. (1998) p. 21
[169] Schabas, The Genocide Convention at Fifty, United States Institute of Peace Report 41 found at http://www.usip.org/pubs/specialreports/sr990107.html#genocide ,accessed 08-16-2013
[170] Akayesu, supra note 76, para. 514
[171] Cornell, Hartmann, supera note 168, p. 23
[172] Akayesu, supra note 76, para. 118, (one witness is quoted saying " their children, later on , would not know what a Tutsi looked like, unless they referred to history books"
[173] Ruhashyankiko Nicodeme, Study of the Question of the Prevention and Punishment of the Crime of Genocide, UN Doc. E/CN.4/Sub.2/416 4 July 1978, p 15-16

clear though that the term "racial" has become less relevant and the term "ethnical" is used more frequently now than when the Genocide Convention was created.

While the concept of race is outdated, its definition does bring us very close to the idea of protection that the Convention was built upon. As Claus Kress reflects, 'an individual cannot escape from the racial group as so defined, and this understanding therefore reflects most directly the idea of the specific vulnerability of the group members.'[174] However, it is a term that invokes a lot of discomfort, which might explain why the ICTR chose to label the Rwandan Tutsis as an ethnic group instead of a racial group.[175]

Race is no longer a term used in the social sciences, but it does nonetheless have a meaning in the Genocide Convention. In contrast to ethnicity, race is determined by physical characteristic. Hence, in many international and national instruments race is a subgroup to ethnic or vice versa.

3.2.2 Ethnic groups

The Soviet Union supported the Swedish proposal by stating that the ethnical group was a sub group of national group, it is a smaller collective than the nation, but one whose existence could nevertheless be of benefit to humanity.[176] This view is rejected by Thornberry, in his opinion ethnic seems to be the broadest term available. Thus, it is broader than both racial and national. In fact "racial" and "national" are to be included in the term "ethnic."[177]Several states said they saw no difference between ethnical and racial groups.[178]

Remarking the confusion between the terms, Haiti observed that ethnic group might well apply where racial is problematic.[179] But the motion to add ethnical to the enumeration succeeded in the 6th committee by the only barest minorities. The International Law Commission in its code of Crime against Peace and Security of Mankind of 1996 changed the word ethnical in the definition of genocide to ethnic to reflect the modern English usage without affecting the

[174] Kress, supra note 138, p.478
[175] Schabas, supra note 33, P. 140
[176] Id., p.113
[177] Thornberry, supra note 116, p. 160-161
[178] UN.DOC.A/C.6.SR.75(Raafat of Egypt) , UN.DOC.A/C.6.SR.75(Manini y Rios Uruguay) UN.DOC.A/C.6.SR.75(Kaechenbeack Belgium) as cited in William Schabas, Genocide In International Law; the Crime of Crime ,Cambridge University Press Amazon.com, p.113
[179] UN.DOC.A/C.6.SR.75(Demsemin Haiti)

substance of the provision.[180] But in the Rome Statute of definition of genocide, the diplomatic conference returned the ethnical out of the fidelity of the Convention,[181] although the word ethnic appears elsewhere in the instrument.[182] The word ethnical was used by the International Court of Justice as recently as 1993 and it also appears in article 7 of the International Convention for the Elimination of all Racial Discrimination.

Ethnic origin is not a prohibited group of discrimination listed in the Universal Declaration of Human Right, on the International Covenant on Civil and Political Right, implying that it must be covered by other terms such as race, colour and nationality. However article 27 of the International Covenant on Civil and Political Right asserted that persons belonging to ethnic minorities have the right to enjoy their own culture. Article 13 of the International Covenant on Economic, Social and Cultural Right contains phrase racial, ethnic, or religious groups. The International Convention on the Elimination of all Forms of Racial Discrimination speaks of race, colour, descent, or national or ethnic origin.

The Oxford English Dictionary provides a guide to contemporary usage of the term. In its 1933 edition ethnical is defined as of the ethnic character. Ethnic receives two meaning; pertaining to nations not Christians or Jewish; gentile, heathen, pagan and pertaining to race peculiar to race or national; ethnological.[183]

According to Classical theorist Max Weber viewed the ethnical group as one whose members entertain a subjective beliefs in their common descent because of similarities of physical type or the customs or both, or because of memories of colonization.[184]

Stefar Glaser wrote that ethnic as employed in Article II of the Genocide Convention was larger than racial and designated a communality of people bound together by the same customs, the same language and race.[185] According to Malcom Shaw it is also rather difficult to distinguish between ethnical and racial groups….it is preferable to take the two concepts together to cover

[180] Report of the International Law Commission on work of its 48th session,6 may 1996,UN.DOC.A/51 10 P.89
[181] The Rome statute, supra note 103, Art.6
[182] The Rome statute, supra note 103, Art. 7(1)(h) , 7 (2)(f) and (21)
[183] R.W.Burchfeild ed. The Compact Edition of Oxford English Dictionary , Oxford, Oxford Clarendon press, vol 1,(1987), p.901
[184] Max Weber, What is an Ethnic group?, In Montserrat Guibernau and John Rex, The Ethnical reader, Nationalism, Multiculturalism and Migration; ,Malden MA policy press (1997), p.575
[185] Glaser,Droit, International Law,p.111-112 translated in English by Whitaker revised report note 52, p.15-16

relevant cases rather than attempting to distinguish between these so than unfortunate gap appears.[186]

The term "ethnical" in the Genocide Convention has also been described as larger than "racial" and determined a community of people bound together by the same customs, the same language and the same race.[187] In Swedish legislation against discrimination ethnic affiliation is used as a concept that covers ethnic and national origin, race or colour. It seems that a subjective belief in common culture, language, customs and religion are indicators of ethnical groups. According to Weber also attributes of the groups as clothing, style of housing, food and eating habits, the division of labour between the sexes has affected the belief of an ethnic affiliation. Of course in different parts of the world some of the above mentioned indicators points of ethnic affiliation more than others. When applying the concept of ethnic groups in the Genocide Convention it must be in the proper context of the specific case.

The ICTR specified that an ethnic group is generally defined as a group whose members share a common language and culture.[188]This views accord with both the *travaux-preparatoires* and prior academic writing, which indicate that the term ethnical incorporate the social, linguistic and cultural aspects of the group at issue.[189]

Though overlapping to a certain extent with the other groups listed in Article 2, ethnicity is understood to have a meaning outside of the concept of nationality, and also of that of race. The author also share the assertion made by Doudou Thiam, Special Rapporteur to the UN, who is quoted by ICL scholar David Nersessian: 'The difference between the terms 'ethnic' and 'racial' is perhaps harder to grasp. It seems that the ethnic bond is more cultural. It is based on cultural values and is characterized by a way of life, a way of thinking and the same way of looking at life and things. On a deeper level, the ethnic group is based on a cosmogony.'[190]

[186] Malcom Shaw, Genocide, Dinstein (ed), International Law at a Time of Perplexity, Nijhoff, (1989), p.807
[187] Whitaker, supra note 96, p. 15-16
[188] Prosecutor vs. Rutaganda supra note 21
[189] UN.GAOR 6th comm...3rd sess.73th mtg at 97-98(1948)
[190] Doudou Thiam, Special Rapporteur, Fourth Report on the Draft Code of Offenses against the Peace and Security of Mankind, U.N. Doc. A/CN.4/Ser.A/1986/Add.1 (1986), as quoted in 'The Razor's Edge' by Nersessian

3.2.3 Religious Groups

The word "religion," meaning to bind fast, comes from the Western Latin word 'religare'.[191] It is commonly, but not always, associated with traditional majority, minority or new religious beliefs in a transcendent deity or deities. In human rights discourse, however, the use of the term usually also includes support for the right to non-religious beliefs.

Religions and other beliefs bring hope and consolation to billions of people, and hold great potential for peace and reconciliation. They have also, however, been the source of tension and conflict. These complexities, and the difficulty of defining "religion" and "belief," are illustrated by the still developing history of the protection of freedom of religion or belief in the context of International Human Rights.

In order to enhancing and insuring such right under the legal arena the international community attempt have been made to included in varies international treaties such as the United Nation Charter(1945), the Covenant on Civil and Political Right(1966), the Convention on Elimination on all Forms of Racial Discrimination(1965), Convention on the Right of the Child(1989), Convention on Economic, Social and Cultural Right(1966), Convention against Discrimination in Education(1960),Convention relating to the Status of Stateless Persons(1954), Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief(1981) and other numerous International and Regional Instruments have been put a wide place to this right.

Not an exception but it is a point of discussion that the Convention on Prevention and Punishment of Genocide also in its exhaustive protected group list included the religious group. Since it is common failure of the convention on defining those terms it would be better to rely on the work of scholars and International Criminal Tribunals.

Religious groups were part of the list of protected groups in the General Assembly Resolution 96(1).In the early drafts of the Genocide Convention as well as in the final text of the Convention. In the 6th committee the United Kingdom questioned the inclusion of religious

[191] Study Guide Freedom of Religion and Belief , University of Minnesota Human Right Center, (2003),p 1

groups. The United Kingdom delegate argued that people are free to join and leave religious groups and therefore they should be omitted in the Genocide Convention.

However, there are convincing historical reasons why religious groups should be included in the Convention. The groups protected in the Genocide Convention are closely connected to the post-First World War minority protection system and religious groups were part of and protected in this system. In fact, although religious groups are theoretically voluntary and free to join and leave they are in reality often just as permanent and stable as racial or ethnic groups. The Soviet Union argued that religious groups are not targeted because of their religious affiliation but because of their ethnic, national or racial affiliation. Thus the expressed protection of religious groups would be unnecessary.[192]

It is true that for some groups religion and race is one and the same thing. Jews, for example belong to a racial group as well as a religious group. Another example would be the Sikhs.[193] However, there are examples from history that show that religious groups can be targeted because of their religious affiliation. The European wars ending in 1648 and the St. Barthelemew massacres in France are examples from European history.[194]And in Asia between Hindus and Muslims in India.[195] In these cases it is more appropriate to label the targeted groups religious groups than ethnic, national or racial groups.

Religious groups should not be interpreted only to encompass worshippers of well-known or well-established religions. Schabas argues that religious groups are to be understood in a broad sense without clearly explaining the boundaries for this broad interpretation.[196]

The General Assembly's 3rd Committee stated in a draft Convention on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, that the expression religion or belief should include theistic, non-theistic and atheistic beliefs.[197] The UN Human Rights Committee has said that religion should not be limited to traditional religions or to beliefs

[192] Schabas, supra note 33 , p. 127
[193] Nsereko, p. 132
[194] Ibid
[195] Ibid
[196] Schabas. supra note 33, p.128
[197] UN Doc. A/8330 para. 16-20

with institutional characteristics analogous to those of traditional religions.[198] In 1994 the same Committee decided that a Canadian group called the "Assembly of the Church of the Universe" could not be protected under the ICCPR art 18 because "a belief consisting primarily or exclusively in the worship and distribution of a narcotic drug cannot conceivably be brought within the scope of article 18 of the Covenant (freedom of religion and conscience)."[199]

The word "belief" should be interpreted strictly in connection with the term religion. It does not refer to belief in general; therefore political, cultural or scientific beliefs are not protected since these are not normally conceived to belong to the sphere described as religion.[200]

Thus, religion and belief are broad concepts. Religious groups as understood in the Genocide Convention should also be interpreted broadly. One writer states that "religious groups as referred to in the Genocide Convention include any religious community united by a single spiritual ideal.[201] This definition makes it difficult to encompass atheists into the scope of the Genocide Convention. What distinguishes atheists is the lack of a spiritual ideal.

In 1993 the Human Rights Committee, the comment under paragraph 3 provides Article 18 of the Convention on Civil and Political Right protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.[202]

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[198] General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights (1993) UN Doc. CCPR/C/21/Rev.1/Add.4, para. 2

[199] Report of the Human Rights Committee, Vol. II, General Assembly Official Records, Forty-ninth Session Supplement No. 40. UN Doc. A/49/40, p.369-370

[200] John & Van Der Vyver, John David, Religious Human Rights in Global Perspective- Legal Perspectives, Martinus Nijhoff Publishers,Amazon.com, the Hague, Boston, London, Kluwer Law International (1996) p.70

[201] Diane Marie Amann, supra note 44, p 20

[202] UN Human Rights committee, CCPR General Committee No.22:Article 18,Freedom of Thought Conscience or Religion30July1993, CCPR/C/21/Rev.1/Add.4

According to Lippman the term religious groups encompasses theistic, non–theistic and atheistic communities united by a single spiritual ideal.[203] He seems to have no problem to fit atheistic and non-theistic communities. It is in the very nature of atheists to not organize in communities united by a spiritual ideal. Atheism unlike the affiliation to a traditional religion are most often based on an active individual choice and not brought upon persons as part of ethnic or racial affiliation. However, attacks targeting atheists should obviously be within the scope of the Genocide Convention. Thus, a better definition of the term religious groups in the Genocide Convention would be people sharing the same religion or belief. As stated above, the term religion and belief should be interpreted broadly. Nsereko offers a similar definition. According to him a religious group refers to people who adhere to a particular religious persuasion, be it theistic or non-theistic.[204]

The Akayesu trial chamber defined a religious group as one whose members share the same religion denomination or mode of worship.[205] This appears to be a functional definition grounded in the objective practices of the group members. In contrast Proxmire Act additionally accounts for subjective belief system of a group member and defines a religious group as one whose members have a common religion creed, beliefs doctrine, practice or rituals.[206]

Even though there is a room of controversy over whether a nonreligious of an atheistic group qualifies for protection under the Convention, an atheistic group presumably could be comprised of individuals from varieties of faith who reject their religious heritage. In this light, atheists are hardly a homogeneous group. Nevertheless they appear to share common practice and a similar belief system. It seems that both definitions are sufficient to include groups of atheists, agonistics and other non atheistic person targeted for genocide either based on their internal beliefs or their functional mode of worship.[207]This view accords with the general trends of international thought on the issue.[208]

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[203] Lippman Mathew, The Convention on the Prevention and Punishment of the Crime of Genocide: fifty years later, Arizona Journal of International Law and Company Limited ,Vol.15.(1998),p.415
[204] Nsereko, supra note 193 p. 132
[205] Prosecutor vs. Rutaganda, supra note 21, para.515
[206]Proxmire Act 18, supra note 71, USC1093(7), 1988
[207] Prosecutor vs. Rutaganda, supra note 21, para.515
[208] AG.Res.36/55,UN.GAOR 73 plen mtg art.1 (1) UN Doc. A/36/684,1981

3.2.4 National Groups

The term national has no clear and undisputed definition. Therefore I will try to show some proposed definitions and then make a suggestion on how to interpret this term in the context of Genocide Convention. The convention's reference to national group implies a definition grounded in nationality or citizenship. The Proxime Act defines a national group as one whose identity as such is distinctive in terms of nationality or national origins.[209].The implication of this formulation is that any individual can belong to at least two national groups simultaneously; the nation of both origin and notion of a current citizenship.

In Akayesu, the ICTR defined a national group as a collection of people who are perceived to share a common legal bond based on common citizenship, coupled with reciprocity of rights and duties.[210]

Thus, group members' personal occupation of their own nationality (whether by artificial or otherwise) is not dispositive. The focus on the legal aspect of nationality (or rights and duties and a common legal bond) indicates that a collection of individuals organized on the basis of political beliefs is insufficient to establish nationality without some additional legal interest tying them together.[211]This is according to the intent of the Convention's drafters to distinguish national groups from political groups.

According to Schabas, the main concern of the Genocide Convention was to protect what was in Europe known as national minorities. Schabas considers that the drafting history and the context of the adoption of the Genocide Convention make this clear.[212]After World War I a system was created in Europe under the protection of the League of Nations for the protection of national minorities. Minority schools were established in several countries and minorities could play a role in the political affairs of countries like Czechoslovakia and Latvia. The system was built up with three kinds of instruments: (1) five treaties with particular states involving minority problems; (2) provisions on minorities in general peace treaties with four countries, and (3) declarations made by several states as a condition for their admission to the League of Nations.

[209] Proxmire Act 18,supra note 71, USC1093(6), 1988
[210] Prosecutor vs. Rutaganda, supra note 21
[211] UN.GAOR.6TH comm..,3rd sess.,75th mtg. pp. 113,115,U.N.doc.A/C 6/SR.75(1948)
[212] Schabas ,supra note 23, P.116

In addition bilateral and multilateral agreements were made to protect minorities in the concerned countries. The aim for these instruments and agreements was in general to grant legal equality to individuals belonging to a minority and to make it possible for minorities to preserve the characteristics and traditions of the group.[213]

In an advisory opinion in 1930 the PICJ defined communities[214] as "a group of persons living in a given country or locality, having a race, religion, language and traditions of their own."[215]

According to the International Tribunals for Rwanda the term national group refers to a collection of people who are perceived to share a legal bond based on common citizenship coupled with the reciprocity of rights and duties.[216] As authorities of this statement, the tribunal cited the Nottabohm decision of the international court of justice.[217] However in Nottabohm the court was interested in establishing nationality not membership in a national group.[218] The difference is significant, because the international court of justice focused on the correspondence between a formal grant of nationality rather than the reality of the bond of linkage an individual and his/her state of nationality. Nottabohm does not address the situation of national minorities who, while sharing culture and other bonds with a given, may actually hold the nationality of another states, or who may even be stateless.[219] Thus the Rwanda tribunal's reference to Nottabohm is incomplete.

The latest edition of Oppenheim International Law says nationality in the sense of citizenship of a certain state, must not be confused with nationality as meaning membership in a certain in the sense of race.[220]In his commentary on the Genocide Convention Stefan Glaser observed that what characterized a nation is not only a community of political destiny but, above all a

[213] Lippman Mathew, supra note 53, p.12
[214]Jackson Preece, Jennifer. National Minorities and the European nation-States System. Oxford: Clarendon Press. 1998, (Communities was used synonymous with national minorities) p. 16
[215] Greco-Bulgarian Communities Case, PICJ series B, No. 17 p 24
[216] Prosecutor vs. Akayesu, supra note 76, phara.511
[217] Nottabohm case (second phase), Judgment of 6 April 1955 ICJ report. p. 24
[218] J.F Rezar le, Droit International De La Nationalities, (1986) P. 335
[219]Malcolm N.Shaw, Genocide and International law, in Yoram Dinstein ed. International Law at a Time of a Perplexity, Martinus Nijhoff, Dordrecht ,(1989), p.797-820
[220] Robert Tenning and Arthur Watts; Oppenheim's International Law, vol 2, 9th ed, London and New York , long man 1996, p.857

community marked distinct historical and cultural links or features. On the other hand a territorial or state link (with the state) does not appear to me to be essential.[221]

Nicodeme Ruhashyankiko referred to the drafting of the International Convention for the Elimination of all Forms of Racial Discrimination for guidance as to ascertaining the meaning of national group in the Genocide Convention.[222] He noted discussion between the political legal senses of the term, which refers the citizenship the ethno-graphical or sociological sense of the term, which refers to origins.[223]

The United States legislation to implement the Genocide Convention expresses a similar although somewhat narrower view, defining national group as a set of individuals who's identified as such as distinctive in terms of nationality or national origins.

On discussing the definition of Genocide, International Law Commission Special Rapporteur Doudou Thiam noted that national groups often comprise several ethnic groups particularly in Africa ,where territories were divided without looking them in to account; with rare exceptions Somalia for example ,almost all Africans states have ethnically mixed population ,on other continents, migrations, trade, the vicissitudes of war and conquests have created such mixtures that the concept of the ethnic groups is only relative or may no longer have any meaning at all. The nation therefore does not coincide with the ethnic group but is characterized by a common wish to live together, a common idea, a common goal and common aspirations.[224]

In attempting the imposed contemporary usage on a term whose meaning was different to 1948, it has the curious result of narrowing the Convention's scope. Set within the context of 1948 and the writing of Raphael Lemkin, the term national group, dictates in reality is large scope corresponding to the concept of minority or national minority, one that in reality is broad enough to encompass racial, ethnic and religious group as well.

[221] Whitaker B. supra note 96,p.43
[222] Ruhashyankiko Nicodeme, supra note 173, p 15-16
[223] Genocide Convention Implementation Act of 1987,1093(5)
[224] 4th report on the Draft Code of Offence against the Peace and Security of mankind by Mr.Doubou Thiam, special Repporteur, UN,DOC,A/N.4/398, p. 57

To sum up this section it is better to point out that the potential overlapping between protected groups, for example, political groups were deliberately excluded from the final version of the Convention.[225]Drost's point in technically accurate but should not be taken as extending the Genocide Convention to cover political groups. Political affiliations, as noted above, are insufficient to establish nationality in and of them-selves. In truth the tag along political or social character of a protected group is irrelevant. The only proper inquiry under the convention is whether the group qualifies as a protected group, not whether it has additional characteristics that fall outside the Convention.

The general understanding is that Group status is not always easy to determine. As the Rutaganda trial chamber held; the concepts of national, ethical, racial and religious groups have been researched extensively and at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social and cultural context.[226]

[225] Ibid
[226] Prosecutor vs. Rutaganda, supra note 21 ,case no ICTR-96-3-T

CHAPTER FOUR

The Trends of Genocide prosecution on Protected Groups under the International Criminal Tribunals, ICC and Domestic Courts

The aim of this chapter is to analyze the Trends of the Ad Hoc International Criminal Tribunals, the ICC and the national courts with regard to the understanding of the notion of the protected groups against genocide. According to the Convention on the Prevention and Punishment of the Crime of Genocide, only national, ethnic, racial, and religious groups are protected. But the Tribunals developed the understanding of the notion in a creative way and contributed to its dynamic application. Especially on the one hand by way of introducing the concepts of stable and permanent groups being protected as well as the concepts objective/subjective notions of the targeted group and on the other hand states are using an expanding approach by incorporating in their domestic legislation which had not been enclosed by the Genocide Convention as far as the list of protected group is concerned.

4.1 Genocide Prosecution under the ICTY and ICTR

From the very outset it should be indicated that the trends of the International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY) and the International Criminal Tribunal for Rwanda (hereinafter ICTR) significantly contribute a great role for the understanding of the crime of genocide and its particular elements such as the protected groups (national, ethnic, racial, or religious one), the special intent to destroy the group, the term ‘in whole or in part’, and finally the specific genocidal acts enumerated in the genocide definition. It is significant that the functioning of the Tribunals sends a very important and strong message that there will be no impunity and any person is responsible for international crimes irrespective of the official post that he/she assume or irrespective of his/her political influence.

The ICTY was created by the Security Council Resolution 827 (1993), and the ICTR by the SC Resolution 955 (1994).[227] According to the ICTY Statute the Tribunal has the power to prosecute persons responsible for serious violations of International Humanitarian Law committed in the territory of the former Yugoslavia since 1991.

On the other hand the ICTR Statute states that the Tribunals 'shall have the power to prosecute persons responsible for serious violations of International Humanitarian Law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring States between 1 January 1994 and 31 December 1994'.[228] Article II regulates genocide and it is identical to Article IV of the ICTY Statute. Article III, pertaining to Crimes against Humanity, lists the same crimes as the ICTY Statute. Lastly, Article IV of the Statute relates to violations of Article III common to the Geneva Conventions and of Additional Protocol II (in other words, War Crimes committed in Non-International Armed Conflict).[229]

Unlike ICTY proceedings, the majority of the indictments confirmed by the ICTR contain charges of genocide, in this way expressing the common feeling that the situation in Rwanda was first and foremost genocide.[230]

In the next few pages the author is interested in analyzing the two major Ad Hoc International Criminal Tribunals Prosecutions that laid down a significant contribution to the understanding of the protected groups in Genocide Conviction in practice shortly and in a brief way so that it helps to substantiate the matter at hand under consideration on the practical lesson from these two tribunals. Additionally in the same tribunal the understanding of protected group is varied due to the lack of objective definition of the Genocide Convention.

[227] UN.SC.Res.827,(1993),and955,(1994) respectively available at: http://daccessdds.un.org/doc/UNDOC/GEN/N93306/28/IMG/N9330628. pdf.
[228] The Statute of the ICTR, supra note 12
[229] Ibid
[230] Catherine Cisse, the End of a Culture of Impunity in Rwanda? Prosecution of Genocide and War Crimes before Rwandan Courts and the International Criminal Tribunal for Rwanda, Year1 book, International Humanitarian Law161, (1998), p.166–167.

4.1.1 The Jurisprudence of the ICTR

In 1996 the government of Rwanda undertook prosecutions for genocide for the mass killing of the majority Tutsi population that took place in Rwanda in 1994. The background to this violence was the tension between the majority Hutu population and the minority Tutsi population that had in earlier years already led to atrocities.[231] In 1994, a Hutu-led-government was trying to suppress a Tutsi insurgency. In that context the Hutus killed up to one million Tutsis in the spring of 1994, in what was probably the most concentrated mass killing ever seen.

Unlike most episodes of mass killing which find soldiers, police, or other officials as the perpetrator, the 1994 episode of killing in Rwanda saw ordinary citizens engaging in killing, along with government personnel.[232] It ended when the Tutsi insurgency military in June 1994, overthrowing the Hutu-led-government. Prosecutors working under the new Tutsi-led-government initiated genocide prosecutions against Hutu perpetrators.

On this instance the Rwanda trial on genocide and other crime that has been committed during the atrocities were entertained by the special chamber provisions which were centered on those International Core Crimes and by domestic courts to those crimes that were not been covered by the special provision and which has been covered by the domestic penal law, what they call it organic law which were enacted by the National Assembly of Rwanda.

But for the issue at hand, the author wants to look into the basic trials and their outcome that has been entertained by the special chamber on genocide and other International Core Crime, so that it will help to substantiate lessons and the challenges from these trials. To address the issue at hand from the various genocide prosecutions I select the Akayasu and Rutaganda from the ICTR trial.

[231] John Quigley, supra note 39, p.33
[232] Ibid

A. *The* Akayesu *Case*

Jean-Paul Akayesu was charged with Genocide, Crimes against Humanity, and violations of common Article 3 and Additional Protocol II.[233] Before his election as Mayor of Taba, he was first a teacher, then education inspector.[234] Akayesu's criminal responsibility was based on both his direct and indirect participation in the 1994 genocide.[235]

The Trial Chamber of the ICTR analyzed the definition of national, ethnic, racial, and religious group. It provided a new definition to each of those protected groups under the Genocide Convention. A genocidal act must have been committed against one or several individuals because such individual or individuals were members of a specific group, and specifically because they belonged to this group.[236]

In other words, the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnic, racial, or religious group. The victim of the act is therefore a member of a group, chosen as such, which hence means that the victim of the crime of genocide is the group itself and not just the individual. In such a case it is important to state the special intent. Such intent is a mental factor, which is difficult, or even impossible, to determine.

A strictly positivistic approach might lead to the conclusion that only persons falling precisely within any of the categories mentioned by name in the Genocide Convention could be victims of the crime of genocide as perceived by international law. The ICTR Trial Chamber in the Akayesu case rightly did not recognize this narrow concept. Scholars indicate that Tutsi *prima facie* fit into the ethnic group. This, however, is rather problematic as Rwanda's Tutsi and Hutu share the same language and culture. To solve this dilemma, the ICTR used another factor to define Tutsi as an ethnic group, namely their stability.[237]

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[233] Prosecutor v. Akayesu, supra note 76,para524
[234] Ibid
[235] Ibid
[236] Id., paras 521–523
[237] A. Klip and G. Sluiter (eds), Annotated Leading Cases of International Criminal Tribunals, The International Criminal Tribunal Rwanda 1994–1999 Utrecht University, Volume II, (2001), p. 541–543.

According to the ICTR, on reading through the *travaux preparatoires* of the Genocide Convention it appears that the crime of genocide was allegedly perceived as targeting only 'stable' groups, constituted in a permanent fashion; groups the 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 four types of groups protected by the Genocide Convention is that membership of such groups would seem to be normally not challengeable by their members, who belong to it automatically, by birth, in a continuous and often irremediable manner.[238] This distinction is aimed at emphasizing the freedom of change in the membership of a particular group as is typical for groups regarded as mobile, and at emphasizing the lack of this freedom in the case of groups recognized as stable.

It might also be emphasized that there were many differences between the Hutu and the Tutsi, differences of social rather than ethnic character. They pertained to the social status of the two tribes: the Hutu were farmers whereas the Tutsi were cattle breeders. The Tutsi were taller, lankier, and thin-lipped, whereas the Hutu were shorter and thick-lipped. Belgium, the former colonial power ruling in Rwanda, had adopted a system of division between the Tutsi and the Hutu based on their wealth. According to the law of 1931, to be regarded as Tutsi one must have owned more than nine head of cattle. Eventually when genocide was being committed in Rwanda, ethnicity was judged by the identity cards that divided Rwandans along ethnic lines between the Tutsi and the Hutu.[239]

During the colonial regime the Tutsi minority constituted the more educated part of the society; its elite wielded the power. The Hutu, being in the majority, were subordinated to them. Moreover, Belgian colonizers used the divide rule and in this way deepened the conflict. By favoring the Tutsi, the Belgians contributed to creating resentment among the Hutu for the Tutsi.

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[238] Akayesu, supra note 76, at para. 511.

[239] Kingsley Moghalu, International Humanitarian Law from Nuremberg to Rome: The Weight Precedents of the International Criminal Tribunal for Rwanda, Pace International Law Review. 273 vol.14, (2002), p. 9–11

Scholars indicated that although the ICTR proceeded on the assumption that the Hutu and the Tutsi constituted different ethnic groups, it must have been well aware that this assumption was contradicted by the Tribunal's own definition of ethnicity. Perhaps for that reason, it decided in the negative the question whether the four categories mentioned in its Statute (which are identical to those in the Genocide Convention and the ICC Statute) constituted a *numerous clausus.*

Taking into account the difficulties with classifying some groups as protected by the Genocide Convention, it is from time to time stressed that the list of protected groups is too restrictive, and that in fact it should include any coherent collectivity which is subject to persecution, including political groups and possibly women, homosexuals, and economic and professional classes,[240] who very often fall victim to attacks, including genocidal attacks.[241]

Moreover, there is some inconsequence clearly visible with regard to religious groups as it is arguable that religious affiliation is in fact involuntary but is rather a conscious decision made by every individual. As S.B. Shah asks, is not religious affiliation considered to entail voluntary group membership just like political convictions?[242] A person may change his or her religion or faith and stop being a member of a certain religious group.

In this context J.D. van der Vyver suggests, however, that a customary-law concept of genocide is much broader than the definition of that crime contained in the Genocide Convention. Acts of the kind mentioned in the convention targeting a group not falling within the narrow categories expressly mentioned or impliedly included in the convention's definition of genocide would nevertheless be genocide under Customary International Law, provided that genocidal intent could be demonstrated. However, the jurisdiction of *Ad Hoc* International Criminal Tribunals is limited to the Genocide

[240] Feindel, Reconciling Sexual Orientation: Creating a Definition of Genocide That Includes Sexual Orientation, Michigan State Journal of International Law 197 Vol.13, (2005),p.82

[241] J.D. van der Vyver, Prosecution and Punishment of the Crime of Genocide, Fordham International Law Journal, 286, vol. 23, (1999–2000), P. 304–305.

[242] Ibid

Convention's definition of genocide; therefore this conclusion has no practical meaning.[243]

The interpretation of the protected group's definition in the Akayesu case has been strongly criticized. One argument against the "stable and permanent group" concept is that the Tribunal's interpretation hardly can be compatible with the principle of strict construction in penal law.[244]The Akayesu Trial Chamber interpreted a treaty that defines a criminal offence, and the interpretation should therefore be subject to a restrictive interpretation and respect the rule of no law no crime. If the 'stable and permanent' approach is to be sustained, it must rely on a construction of the actual words that appear in Article II. If the drafters meant to protect all stable and permanent groups they could easily included that in the convention itself.[245] The *travaux preparatoires* can be used to assist in clarifying ambiguous or obscure terms in a treaty, or terms that are manifestly absurd and unreasonable.[246]

Jorgensen is of the opinion that the Akayesu Trial Chamber's interpretation constitutes an "unjustifiably liberal interpretation both of the terms of the convention and of the intention of the drafters" and thus rejects the reasoning of the Tribunal.[247]The argument seems to be that there is nothing in the wording of the Genocide Convention that suggests that all stable and permanent groups are protected.

Verdirame agrees with Jorgensen when stating that the Trial Chamber had to "force an interpretation of the convention that seems remote from the text of Article II and from the intention of the drafters."[248] He suggests that the Akayesu Trial Chamber felt itself bound by precedents in international law when not adhering to the subjective approach.[249]

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[243] Vyver, supra note 200, P.306.

[244] Schabas, William A., "Commentary" in Klip André & Sluiter Goran (eds.), Annotated Leading Cases of International Criminal Tribunals-The International Criminal Tribunal for Rwanda,(1999), p. 543

[245] Schabas A. supra note 62, p. 132

[246] Vienna Convention, supra note 11, Art. 32

[247] Jorgensen, Nina H. B., The Definition of Genocide: Joining the Dots in the Light of Recent Practice, International Criminal Law Review 285, Vol.1(2001), p. 288

[248] Verdirame, Guglielmo, The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals, International and Comparative Law Quarterly 578, vol.49 (2000) p. 592

[249] Id. p. 689

Schabas also criticizes the Tribunal for misinterpreting the intention of the drafters and the *travaux preparatoires*. The groups enumerated in the Genocide Convention are neither stable nor permanent. Only racial groups when defined genetically can claim to be a stable and permanent group for a longer period of time. National groups are modified as borders change and as conceptions of identities evolve, both individually and collectively. Members can also come and go in ethnic groups although there are often legal rules for this, determining ethnicity as a result of marriage or in the case of children whose parents belong to different ethnic groups. Religious groups can start to exist and disappear within a short period of time.[250] The Universal Declaration of Human Rights, approved shortly after the Genocide Convention, recognizes the fundamental right to change both nationality and religion.[251]

The Akayesu Trial Chamber used the omission of political groups in the Genocide Convention as an argument for using the "stable and permanent groups" concept.[252] Political groups were however excluded in the last stages of negotiation, and the decision is described by Schabas as "not a principled decision based on some philosophical distinction between stable and more ephemeral groups." He interprets the *travaux preparatoires* and finds that political groups were excluded to make it possible also for a minority of the countries to accept the Genocide Convention thus securing a rapid ratification.[253]

However, the Trial Chamber concluded that since the enumerated groups are permanent and stable all groups that can be seen as permanent and stable are protected. The Akayesu Trial Chamber claimed to have support in that view from the *travaux preparatoires* while for example Schaba's interprets the same sources differently. Thus, it is obvious that the Akayesu trial chamber takes the objective approach since it was looking the stable and permanency parameter but it deviate from the interpretation of protected group under the Genocide Convention.

[250] Schabas. ,supra note 62, p. 133
[251] Universal Declaration of Human Rights, Art. 15(1) and 18
[252] Akayesu case, supra note 76, para. 515
[253] Schabas, supra note 62, p. 133

B. The Rutaganda case

The Rutaganda case was the first occasion on which the ICTR used the subjective approach. Georges Rutaganda was an Agricultural Engineer and a businessman.[254] He acted as the chairman of his own limited liability company, named after him, which imported food and beverages.[255] Georges Rutaganda was also a member of the national and the regional committee of the National Republican Movement for Development and Democracy (hereinafter MRND) and a shareholder in Free Radio and Television of the Thousand Hills (hereinafter RTLM).[256] On 6 April 1994 he occupied the post of second vice-president of the national committee of the *Interahamwe* (an extremist Hutu militia of the MRND). In carrying out this function he was said to have encouraged and participated in several killings of civilians in Rwanda.[257]

When analyzing the definition of a protected group, the Trial Chamber noted that the concepts of national, ethnic, racial, and religious groups had been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social, and cultural context. Moreover, the Trial Chamber stated that for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to that group.[258]

On the Rutaganda's case scholars reflect different views which some of them favoring the way that the tribunal made an effective way of interpretation while the others seriously criticized. As G. Verdirame wrote, the adoption of a subjective approach to the definition of the four protected groups breathed new life into the Genocide Convention and ensured a healthy interplay between the norms and the socio-cultural context in which they are applied.[259] In other words, the subjective approach offers protection to a

[254] Prosecutor v. Rutaganda, supra note 21, para. 56
[255] Ibid
[256] Ibid
[257] Ibid
[258] Ibid
[259] Verdirame, supra note 248, p. 598.

larger number of genocide victims: not just persons actually belonging to the protected national, ethnic, racial, or religious groups but also to those perceived as members of those groups.

However, a purely subjective approach does not seem to be satisfying as it would cause unacceptable expansion of the notion of a protected group dependent only on the perpetrator's state of mind. As D. Nersessian notes, 'taken to its logical conclusion, a purely subjective approach could lead to group definitions that bear no relation at all to the established pre-genocidal existence of the group in society. This disconnect is inconsistent with the manifest object and purpose of the convention, which is to protect certain categories of pre-existing human groups from physical and biological destruction.'[260]

With reference to a subjective element, it should be added that in the case of genocide sometimes what is more relevant than real differences is the perception of some features as differences. Consequently, the genocide perpetrator's state of mind is relevant. We may conclude that the perception of the perpetrator is more relevant than self-identification by the group members, the latter also reflecting the subjective approach.

4.1.2 The Jurisprudence of the ICTY

The ICTY proceedings are governed by the ICTY-Statute[261] and by Rules of Procedure and Evidence adopted by the judges themselves. The task of the ICTY is to prosecute persons responsible for grave breaches of the Geneva Convention of 1949, violations of the Laws or Customs of War, Genocide and Crimes against Humanity.[262] The Security Council set no time limit for the Tribunal's existence. The ICTY consisted of Trial Chamber, an Appeals Chamber, a prosecuting organ and a registry. Judges are elected by the General Assembly from a list of candidates submitted by the Security Council.[263]

[260] David Nersessian, The Razor's Edge: Defining and Protecting Human Groups under the Genocide Convention, Cornell Journal of International Law 293 vol. 36, No. 2 (2003–2004), p. 296.
[261] Adopted by Security Council Resolution 827 (1993), Amended by Resolution 1166 (1998), Resolution 1329 (2000) and Resolution 1411 (2002)
[262] Statute of the ICTY, supra note 13, Art. 2-5
[263] Ratner StevenR.,Abraham Jason S., Accountability for Human Rights Atrocities and International Law; Beyond the Nuremberg Legacy, Oxford: oxford university press,(2001),p192-193

Form the various cases of the Tribunal proceedings the author select two of the most famous cases which were entertained with the genocide concept in practice.

A. The Jelisic Case

The Jelisic case of 14 December 1999 was the first genocide case tried by the ICTY. Goran Jelisic was charged with genocide, violations of the Laws and Customs of War, and Crimes against Humanity. He confessed to all the charges except for genocide.[264]

Jelisic's actions were undertaken in the following context: on 1 May 1992, the Muslim and Croatian population in the town of Broko, a municipality in Bosnia and Herzegovina, was told by radio to surrender its arms. Immediately after this announcement the Serb forces, which included soldiers, paramilitary forces, and policemen, took over control of the town. The Serb forces expelled the Muslim and Croatian people from their homes and grouped them together in assembly camps. The Muslim and Croatian men, aged between 16 and 60 (at an age to bear arms), as well as a few women, were then transferred to the camp at Luka. Based on his own statements made during his guilty plea, Goran Jelisic arrived at the Brcko camp on about 1 May 1992.

Between 7 and 21 May 1992, the prisoners in the Luka camp were the subject of a systematic campaign to eliminate them. On numerous occasions, with help from the camp guards, Goran Jelisic chose groups of detainees to be interrogated before being beaten and, very often, executed. On 19 October 1999, the Trial Chamber issued an oral verdict in which it acquitted Goran Jelisic on the count of genocide. On the other hand, it found him guilty of all the other counts with which he had been charged. On 14 December 1999, the Trial Chamber delivered its verdict and sentenced Jelisic to 40 years' imprisonment for War Crimes and Crimes against Humanity. On 5 July 2001, the Appeals Chamber confirmed the sentence.[265]

When analyzing the notion of a group targeted by genocide, the ICTY Trial Chamber stated that the preparatory work of the Genocide Convention demonstrated that a wish

[264] Prosecutor v. G. Jelisic, paras 8 and 12

[265] The profile of the accused and the factual details have been taken from the website: www.trial-ch.org/ (Trial: Track Impunity Always, visited: 2 Sep 2013) and from the ICTY case information sheets available at the Tribunal's official website: www.icty.org/.

had been expressed to limit the field of application of the convention to protecting 'stable' groups objectively defined, to which individuals belonged regardless of their own desires.[266] The Trial Chamber noted that, although the objective determination of a religious group still remains possible, to attempt to define a national, ethnic, or racial group today using objective and scientifically irreproachable criteria would be a perilous exercise, the result of which would not necessarily correspond to the perception of the persons concerned by such categorization.[267]

Therefore it is more appropriate to evaluate the status of a national, ethnic, or racial group from the point of view of those who wish to single out that group from the rest of the community. The Trial Chamber consequently decided to evaluate membership of a national, ethnic, or racial group using a subjective criterion. It is the 'stigmatization of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators'.[268]

The ICTY Trial Chamber in the Jelisic case pointed on the two possible concepts of defining a protected group: using positive or negative criteria. According to the positive approach, the perpetrators of the crime distinguish a group by the characteristics which they deem to be particular to a national, ethnic, racial or religious group. A negative approach would consist of identifying individuals as not being part of the group to which the perpetrators of the crime consider themselves to belong and which to them displays specific national, ethnic, racial, or religious characteristics. Thereby, all individuals thus rejected would, by exclusion, make up a distinct group. In this case the targeted group was the Bosnian Muslim population.[269]

It seems, however, that such a vague approach (the negative one) to a protected group is too far reaching and makes it possible to claim the existence of genocide on the basis of actions which would not qualify as genocide when using the narrow approach to the

[266] Jelisic, supra note 264, para. 69.
[267] Ibid
[268] Id., para. 70.
[269] Id., paras 71–72.

group. Taking into consideration the circumstance that genocide is called the Crime of Crimes, its scope should not be unduly expanded by defining the notion of a protected group too broadly. As a matter of fact, it is possible to accept the negative meaning of the protected group suggested by the Trial Chamber only on the condition that the group is characterized as having certain national, ethnic, racial, or religious features. In other words, the Jelisic case does not provide an answer to the question of how the protected group should be understood, and a deeper analysis of the group brings us back to square one, i.e., defining the group by its national, ethnic, racial, or religious features.

The interpretation of the Trial Chamber concerning the positive and negative approaches was later criticized and rejected by an ICTY Trial Chamber in the Stakic Case. According to the Stakic Trial Chamber "a targeted group may be distinguishable on more than one basis and the elements of genocide must be considered in relation to each group separately, e. g. Bosnian Muslims and Bosnian Croats."[270]Thus it would not be possible to define a protected group as, for example, non-Serbs.

B. The Krstic Case

General Radislav Krstic was charged with genocide in the context of the Srebrenica massacres committed in July 1995.[271] From October 1994 to 12 July 1995, Radislav Krstic was the Chief of Staff/Deputy Commander of the Drina Corps of the Army of the Serb Republic of Bosnia-Herzegovina. He was promoted to the rank of Major-General in June 1995 and assumed command of the Drina Corps on 13 July 1995. The factual allegations refer to the widely documented and known facts of the fall of the Srebrenica enclave in July 1995, when 7,000–8,000 men of military were slaughtered. At the time of the related events, Srebrenica was located in the zone placed under the responsibility of the Drina Corps, one of the corps of the Army of the Republika Srpska. Krstic was Chief of Staff of the Army of the Republika Srpska and Commander of the Drina Corps.[272]

On 2 August 2001, the Trial Chamber found Krstic guilty of genocide, persecution and murder, cruel, and inhumane treatment, terrorizing the civilian population, forcible

[270] Prosecutor v. Milomir Stakic, 31 July 2003, IT-97-24, para. 512
[271] Prosecutor v. R. Krstic, supra note 90, para. 3,
[272] Ibid

transfer and destruction of the personal property of Bosnian Muslim civilians, and murder as a violation of the laws and customs of war, and sentenced him to 46 years' imprisonment.[273]

On 4 April 2004, the Appeal Chamber handed down its judgment confirming the finding that acts of genocide had taken place in Srebrenica. It nevertheless held that Krstic was a mere accomplice to genocide. According to the judgment, his participation consisted in aiding and abetting acts of genocide rather than instigating such acts. The Appeal Chamber consequently unanimously sentenced Krstic to 35 years in prison.[274]

In the Krstic case the Trial Chamber confirmed that Article 4 of the ICTY Statute characterizes genocide by two already mentioned constitutive elements: the *actus reus* of the offence, which consists of one or several of the acts listed in Article 4(2) and the *mens rea* of the offence, which is described as the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such.[275] It referred to UN GA Resolution 96(I), which defined genocide as 'a denial of the right of existence of entire human groups'.[276] The Trial Chamber in the Krstic case invoked conclusions from the *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1951)* where the ICJ stated that the aim of the Genocide Convention is 'to safeguard the very existence of certain human groups and to confirm and endorse the most elementary principles of morality'.[277]

The Trial Chamber added that the Genocide Convention seeks to protect the right to life of human groups as such. This characteristic makes genocide an exceptionally grave crime and distinguishes it from other serious crimes, in particular persecution, where the perpetrator selects his victims because of their membership of a specific community but does not necessarily seek to destroy the community as such.[278]

[273] Ibid
[274] Ibid
[275] Id., para. 542.
[276] UN GA Res. 96(I), supra note 28
[277] Ibid
[278] Prosecutor v. Radislav Kristic, supra note 90, para. 553.

The ICTY Trial Chamber in the Krstic case stressed that the Genocide Convention does not protect all types of human groups. Its application is confined to national, ethnic, racial, or religious groups.[279] A group's cultural, religious, ethnic, or national characteristics must be identified within the socio-historic context which it inhabits. This may be regarded as the recognition of the objective criterion in the process of qualifying a group protected against genocide.

Furthermore, to identify the relevant protected group it is possible to use as a criterion the stigmatization of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnic, racial, or religious characteristics. In the latter case what is decisive is the subjective perception of the group as national, racial, ethnic, or religious.[280] In other words, this stigmatization is equivalent to the subjective perception of the protected group by the perpetrator.

In the Krstic case, the Trial Chamber used this mixed concept (subjective-objective) and recognized Bosnian Muslims as a national group protected by Article 4 of the ICTY Statute.[281] As a justification it noted that, originally viewed as a religious group, the Bosnian Muslims were recognized as a 'nation' by the Yugoslav Constitution of 1963. The evidence tendered at the trial also showed very clearly that the highest Bosnian Serb political authorities and the Bosnian Serb forces operating in Srebrenica in July 1995 viewed the Bosnian Muslims as a specific national group.[282]

From the above analysis of the trends of the Ad Hoc International Criminal Tribunals some common conclusions may be drawn. First, there are two approaches to defining the notion of a national, ethnic, racial, or religious group: objective (the Akayesu case) and subjective (Ruzindana). In accordance with the first approach, the group should be regarded as a social fact, a reality regarded as stable and permanent. Individuals are members of the group automatically and irreversibly by way of being born within the group. The subjective approach presupposes in turn that the group exists as much as its

[279] Id., para. 554.
[280] Id., para. 557.
[281] Id., para. 560.
[282] Id., para. 559.

members perceive themselves as belonging to that group (self-identification) or are as such perceived by the perpetrators of the genocide (identification by others). The Krstic case is the exception, as the ICTY used the mixed approach (subjective and objective).

Taking into account the ICTY judgments in Krstic and Jelisic as well as the ICTR judgment in Akayesu and Ruzindana, it must be noted that the definition of the protected group to which the intent relates has not been set in a definite and clear manner. However, it is possible to point out some elements common to the jurisprudence of both Tribunals with regard to the understanding of the definition of national, ethnic, racial, or religious groups. Such elements include the impossibility of defining the group in a negative way and the stable character of that group. In other words, a protected group must be defined by showing certain features it possesses: national, ethnic, racial, or religious; or supplementary by indicating the stable nature of the group and automatic membership of it.

4.2 The ICC and the Trend on the application of Genocide Convention

4.2.1 Introductory Remark

During the drafting and adoption of the Genocide Convention there were opinions raised for establishing an International Tribunal that would try people charged with genocide.[283] However the International Community waited until 1989 to start planning for and discussing an International Criminal Tribunal. The question was raised by Trinidad and Tobago in the UN General Assembly resolution directing the ILC to consider the subject within the ongoing project of the draft Code of Crimes against the Peace and Security of mankind.[284]The Special Rapporteur to the ILC noted that some crimes, among them genocide, must come within the jurisdiction of an International Court because of their gravity.[285]

In 1994 the ILC submitted a draft statute for an International Criminal Court to the General Assembly. The General Assembly established an Ad Hoc Committee on the

[283] "Study by the International Law Commission of the Question of an International Criminal Jurisdiction", General Assembly Resolution 260 B(III)
[284] General Assembly Resolution 44/89
[285] Schabas, supra note 62, p. 90

Establishment of an International Criminal Court, which met twice in 1995. After the General Assembly considered the Committee's report it created the preparatory Commission for the International Criminal Tribunal to prepare a widely acceptable consolidated draft text for submission to a diplomatic conference.[286] This draft was then discussed in the diplomatic conference where the final version of the Rome Statute was adopted. The Rome Statute entered into force 1 July 2002 after the 60th country had ratified the Statute.[287]

In the preamble of the Rome Statute the State Parties recognize that the crimes under the Statute threatens the peace and security and well-being of the world and are determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes. The main feature of the Rome Statute is the principle of complementarity. This principle governs the basic relation between the ICC and national proceedings. The ICC shall deem a case inadmissible if:

> *"(A) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (B) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute…"*[288]

In its proceedings the ICC shall firstly, apply the Statute, the Elements of Crimes, and its Rules of Procedure and Evidence. Secondly, applicable treaties and the principles and rules of international law shall, where appropriate, be applied. Also principles derived from national laws and national laws can be applied. The ICC does not have to follow principles or rules as interpreted in previous decisions.[289]

[286] http://www.un.org/law/icc/general/overview. htm accessed: 28-09-2013
[287] Ibid
[288] Rome Statute, supra note 103, Article 17 (1)
[289] Id., Art. 21

4.2.2 The Rome Statute and the Genocide Prosecution

As outlined in the Statute, situations may be referred to the ICC in one of three ways: by a state party to the Statute, the ICC Prosecutor, or the United Nations Security Council. Currently, four cases have been publicly referred to the Prosecutor.[290] The governments of three countries (all parties to the ICC) Uganda, the Democratic Republic of Congo, and the Central African Republic have referred situations to the Prosecutor.[291] The U.N. Security Council has referred one situation (Darfur, Sudan) to the Prosecutor.[292] One situation, Kenya, is under investigation following an application by the ICC Prosecutor.[293] At least six others remain under consideration.[294]

The ICC is as considered a court of last resort that will only investigate or prosecute cases of the most serious crimes perpetrated by individuals (not organizations or governments), and then, only when national judicial systems are unwilling or unable to handle them. This principle of admissibility before the Court is known as "complementarity."[295] Although many domestic legal systems grant sitting heads of state immunity from criminal prosecution, the Statute grants the ICC jurisdiction over any individual, regardless of official capacity.[296]

The crime of genocide is defined in the Rome Statute Article VI. Like in the ICTY and the ICTR the Rome Statute has the same definition as in the Genocide Convention, Thus the Rome Statute protects national, ethnical, racial and religious groups. The Statute is a multilateral treaty and shall be interpreted according to the principles in the Vienna Convention. Since the definition of genocide is taken from the Genocide Convention the

[290] Silvia A. Fernandez de Gurmendi, The Role of the International Prosecutor, , The International Criminal Court ,Chapter 6,(1999) p. 180.
[291] Ibid
[292] Ibid
[293] Ibid
[294] Stephanie Hanson, Global Policy Forum, "Africa and the International Criminal Court," Council on Foreign Relations, July 24, 2008.(Reportedly, the ICC has received 1,700 communications about alleged crimes in 139 countries, but 80 percent have been found to be outside the jurisdiction of the court. The Prosecutor has received self referrals only from African countries.)
[295] The Rome Statute, supra note 103, Art 17
[296] The Rome Statute, supra note 103, Art 27

travaux preparatoires of the Convention can be used for interpretation of the Statute's definition as well.

4.2.3 The ICC and Other International criminal Tribunals

The post-World War II Nuremberg and Tokyo tribunals to prosecute Nazi and Japanese leaders for crimes against peace, War Crimes, and Crimes against Humanity established precedent for other Ad Hoc International Courts and Tribunals, such as the International Criminal Tribunals for the former Yugoslavia[297] and for Rwanda.[298] In addition, the United Nations authorized the creation of a Special Court for Sierra Leone to prosecute those with the greatest responsibility for serious violations of International Humanitarian Law and Domestic Law committed in the territory of Sierra Leone since November 30, 1996.[299] Separate judicial mechanisms have also been set up for cases involving East Timor (Timor-Leste) and Cambodia. Further, the U.N. Security Council authorized establishment of a Special International Tribunal for Lebanon in 2007, which began functioning in March 2009.

These courts and tribunals are distinct from the ICC. While established by the U.N. Security Council to address allegations of Crimes against Humanity in various countries, these tribunals were case-specific, limited in jurisdiction, and temporary. By contrast, the ICC was established by multilateral treaty and is a Permanent, International Criminal Tribunal and it is not a U.N. body.[300]

4.3 The application Genocide Crime in Domestic Criminal Codes

As clearly stated under the Genocide Convention, the major route for prosecutions was to be through the penal codes of the ratifying states. Although Article VI of the Convention mentioned the potential creation of an International Criminal Tribunal, the only method

[297] On May 25, 1993, U.N. Security Council Resolution 827 (1993) established the International Criminal Tribunal for the former Yugoslavia (ICTY).

[298] On November 8, 2004, the Security Council, in Resolution 955, established the International Criminal Tribunal for Rwanda (ICTR).

[299] The Special Court for Sierra Leone (SCSL), A Hybrid International-Domestic Court based in Sierra Leone's capital, Freetown, was set up jointly by the Government of Sierra Leone and the United Nations under Security Council Resolution 1315 (2000)

[300] The creation of the ICC is the culmination of a decades-long effort to establish an International Court with the jurisdiction to try individuals for the Commission of Crimes against Humanity. For a General Background and Discussion of the ICC

of implementation possible as of 1948 was domestic courts. Article VI required states to prosecute if genocide was committed in their territory.[301] Article V required states to penalize genocide in their own law; 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 of any of the other acts enumerated in Article III.[302]

States who ratified the Convention would make genocide a local crime. Many of the ratifying states have done so, but by no means all of them. Article V prescribed no penalty for genocide, leaving that choice to each state. The provisions on penalty vary widely. States typically provide a substantial term of years as the penalty, while some call for capital punishment. Some differentiate the various acts by which genocide can be committed, providing more serious penalties for, say, killing group member, than for transferring children to other group. Hence, the following pages dedicated to show the national legislations and their application on genocide matters.

4.3.1 The Crime of Genocide under the Domestic Legislation

Not all states that have codified genocide have used the same method of the adoption. Some have enacted a penalty and referred to Article II as the definition of genocide. The UK took this approach when it first codified genocide; a person commits an offence of genocide if he commits an act falling within the definition of genocide in article II of the Genocide Convention.[303] Ireland took the same approach.[304] More commonly, parliaments have written their own text, but many have been copied Article II verbatim, or with only stylistic modification. This approach has been taken by, among others, Germany,[305] Israel,[306] Hungary,[307] and Austria.[308] The UK latter switched to this approach.

[301] Genocide Convention , supra note 9, Art 6
[302] Genocide Convention, supra note 9, Art. 5
[303] Genocide Act 1969, Halsbury's Statutes of England and Wales (4th ed.),vol.12, p.530
[304] Ireland, Genocide Act, No.28/1973
[305]Germany Strafgesetzbuch,220a, superseded by the Code of Crimes against International Law ,sec.6,Fedrel Gazette 1 , p.2254(2002), translated in criminal form,vol.13,no.2, p.214(2002) as cited by John Quigley, the Genocide Convention an International Law Analysis,2006, p.16
[306] Crime of Genocide Prevention and Punishment Law, laws of State of Israel (1950) ,p.101

A number of states have altered the definition in Article II definition, an approach that creates ambiguity as to whether the state is complying with its obligation to incorporate genocide domestically. To date, no controversy has arisen as a result of such variances. The most common variance has been the addition of additional act committed against members of a group, and the addition of more type of protected groups.

Some states are focused on expanding the acts for genocide Crime. For instance, in Spain the statutory definition includes two acts not specified in II of the Genocide Convention; i.e. sexual assault on a member of a group, and forced removal of the groups of a members.[309] The addition of these items was attributed to the fact that Spain's parliament acted shortly after Bosnian war, in which sexual assault and forced removals against groups were widely practiced.[310] A number of other states included forcible deportation; Italy,[311] Estonia,[312] Lithuania,[313] and Yugoslavia.[314] In Russia the genocide provision includes forced resettlement or other creation of conditions of life inculcated to achieve the physical elimination of members of the groups.[315]

John Quigley argue that, it is unclear that when a parliament adds a new term whether it intended to broaden the definition over article II, or whether it is providing specification of an act that, in the view of the parliament, is already implied by article II.[316] Russia's formulation for the inclusion of forced resettlement by the virtue of use of the term other appears to deem forced resettlement a sub category within the category creation of conditions of life. Spain's parliament may have considered sexual assault a sub category of serious bodily or mental harm.[317]

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[307]Hungary ,Act 4 of 1978 on Criminal Code ,Art155 (ministry of justice of the Hungarian people's Republic,Budapest,1983
[308] Austria, Strafgesetzbuch. No 321
[309] Spain penal code, Art. 607
[310] Offence against the International Community According to the Spanish penal code ,Spanish year book of International Law, Madrid, 1999p.3
[311]The law of Italy, 9 October 1967, No 962
[312] Estonia, criminal code , Art 611,Eriosa,9 November 1994
[313] Lithuania ,Seimas, Law 8-1968, Codified as Criminal Code, Art 99
[314] Yugoslavia Criminal Code of 1961, Collection of Yugoslav Laws ,vol.11,Institute of Comparative Laws , Belgrade ,1964, Art 124
[315] The Criminal Code of the Russian Federation, Art 354
[316] John Quigley, supra note 39, p.17
[317] Ibid

But other states by taking the qualified act under the Genocide Convention as it is, they rely on adding the protected group under their domestic statutes. A number of parliaments have modified the designation of the type of groups listed in article II. Ethiopia added political groups, providing whosoever, with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group.[318] Estonia added the category of the group which is resisting an occupation regime.[319] Estonia,[320] Latvia,[321] Lithuania[322] and Spain[323] include social groups in addition to those listed groups under Article II of the Genocide Convention. According to the note on the official publication of the Spain's penal code, the term were not intended as addition of the new group but was to be construed in line with article II. On the other hand, the term could be read for more inclusively. In the Estonian code, it apparently means groups in addition to the others listed, because it appeared at the end of the list, with the phrasing or any other social group. Thus the term social is used to refer to all the previously listed groups, but presumably to others as well. In the latter edition the term social has been deleted from the list by the parliament of Spain.[324]

On the other scenario a few states have devised formulations about groups that are potentially quite expansive. France refers to the total or partial destruction of national, ethnic, racial, or religious groups, of a group based on any other arbitrary criterion.[325] The term arbitrary criterion has yet been construed by the French court. Romanians described the protected groups as a collectivity or national, ethnic, racial or religious groups.[326] Collectivity is not further defined. Canada's penal code genocide definition is typically in omitting a list of protected groups. Genocide in Canada defined as;-

[318] Negarit Gazeta, Proclamation No. 158 of 1957, Extraordinary no.1 of 1957,Penal code of the Empire of Ethiopia ,Art 281,(and the New Revised Criminal Code of 1997 add other group as well to be included as protected group, see Art 269 of the new Revised Criminal Code)
[319] Estonia Criminal Code , Eriosa,9 November 1994, Art 611
[320] Ibid
[321] Latvia Criminal Code, as Amended 6 April 1993, Art 68(1),
[322] Lithuania ,Seimas, law 8-1968, Codified as Criminal Code, Art 99
[323] Spain Penal Code , Art 607
[324] Ibid
[325] France , Penal Code 1992 Art 211(1),Dalloz, Paris
[326] Penal Code of the Rumanian Socialist Republic, Fred B. Rothman, Hackensack N.J and sweet and Maxwell Ltd. London,(1976), Art 357

"an act or omission committed with the intent to destroy, in whole or in part an identifiable group of a persons, such as, that, at the time and in the place of the commission constitute genocide according to the Customary International Law or Conventional International Law or by virtue of its being criminal according to the general principles of law recognized by the community of the nations, whether or not its constitute a contravention of the law in force at the time and in the place of the commission."[327]

The phrase an identifiable group of persons is quite open ended, referring to the International Law of genocide. Conventional International Law is a reference to the Genocide Convention. The reference to genocide in Customary International Law may be broadening the definition over the Genocide Convention. General principle of laws recognized by the community of a nation refers to the norms extracted from domestic law for use by International Tribunals. It is unclear that genocide could be used on this fashion.

In contrast of the above states experience other states used the narrower approach on modifying the terms under II of the Genocide Convention. In the US law, the federal congress enacted a penal code based on Article II of the Genocide Convention, by taking the entire element they give a modification to the mental element by adding specific intent and on the destroying part the term 'in part' has been changed by the term 'substantial'.[328] In addition to the penal code US gave more emphasis on the genocide crime and adopt certain sanction in their subsidiary laws. For instance the immigration law of US provides a precondition that any immigrant who committed a Genocide crime is not allowed to inter in to the US territory.[329]

In US law, genocide is relevant to foreign assistance programs. The US congress has mandated that the secretary of state report annually on human right violation in countries

[327] Consolidated statutes of Canada, S.C,2013
[328] US Code 18,Limitation on Detention; Control of Prisons, Cornell University Law School, legal Information Institution, No 1891,1992
[329] US Code 8, Inadmissible Aliens, Cornel University Law School, Legal Information Institution No 1182(a)(3)(E)(2),1992

receiving development of military aid from the US.[330] The secretary must include certain specific categories of right violations in these reports. One such category is the commission of the genocide crime. the legislation on military aid states; such report shall include consolidated information referring the Commission of the War Crimes, Crimes against Humanity, and evidence of acts that may constitute genocide as defined under Article II of the Genocide Convention and as modified by the US instrument of ratification to the convention and section 2(a) the Genocide Convention Implementation Act 1987.[331]The legislation on the development assistance includes identical language.[332] The secretary of the state is to decide whether genocide as defined in the Genocide Convention has been committed.

4.3.2 Genocide crime under Domestic prosecution

The prohibition against genocide would carry out without some means of enforcement. The drafters feared that Genocide Convention may be a dead letter. Governments were not likely to investigate themselves for genocide, and many potential violators would be power full enough to ensure their own immunity.

Having various reasons States have conducted domestic prosecutions for genocide. The prosecutions have fallen into three categories, in terms of their legal basis. These are prosecution made on the basis of the Genocide Convention, prosecution conducted on the basis of statute prepared for the specific incident like that of the Rwanda and Yugoslavia and prosecution on the basis of domestically enacted genocide Statute.[333]

As John Quigley argued and the author also shared genocide charges have not been brought with great frequency in domestic courts, a fact is not surprising, given the seriousness of the genocide as an offence. In all instances, the charge has evoked killings, and the convictions carrying significant punishment could have been gained for murder. Given the proof difficulties with genocide, one may inquire why genocide was charged.

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[330] John Quigley, supra note 39, p 20
[331] US Code 22,Human Right and Security Assistance , Cornel University Law School, Legal Information Institution , No 2304(b),1992
[332] Id., No 2151n9(d)(8)
[333] John Quigley, supra note 39, p 24

In order to convict genocide, a prosecutor must prove both the specific act and genocidal intent. This may be difficult to prove against an accused. The specific act will almost certainly be one that is found in the penal code, such a murder or assault, whose prove would not require showing genocidal intent. Thus, genocide involves proving a common crime plus intent directed at the group of which the victim or victims were members.

Despite the difficulties of proof, charging genocide is attractive to prosecuting authorities because of the seriousness that the term evokes. Convicting of genocide discredits a person more thoroughly than convicting of murder. Perhaps not surprisingly, genocide has been charged most frequently at the domestic level following a regime change.[334] A new government prosecutes officials of the prior government for genocide. A genocide charge may provide a way of demonstrating to the public that violence used by the prior government was directed to the individuals, but also against the entire group. A new government may thus seek to enhance its own legitimacy, particularly if it has taken the power by non constitutional means.

As it has been mentioned earlier most domestic prosecutions for genocide has been under genocide provisions in the local penal code. The states are the Genocide Convention ratifiers that have written a genocide provision in to domestic law prior to the time of the acts alleged as genocide.

In the following few pages I will try to show these selected prosecutions. One thing that has to be remarked here is that the aim is not to assess these prosecutions for fairness, although a number of them might justifiably criticized. The aim rather is to examine how the domestic legislation on genocide was applied and how the additional group under the domestic legislation can be implemented in light of the Genocide Convention.

4.3.2.1 Ethiopia; political groups

Ethiopia, without the external involvement and unlike the Rwanda, Yugoslavia or the special court of sera Leone, has undertaken the domestic Genocide prosecution by its own court. The Transitional Government of Ethiopia said the reason for this approach is based on Ethiopia's duty to prosecute mass violations of Human Rights as embedded on

[334] Id , p 24

Customary International Law.[335] However, this was not the only reason for the decision. Since the Transitional Government was at the helm of power, fresh from the victories it enjoyed on the Derg and with little or no experience in governing a country, it wanted to use the trials to show to the people that the new leaders are up to the task.[336] The officials of the Derg regime were charged with mainly 'genocide'[337] as defined under the Ethiopian Penal Code and later under the Revised Criminal Code.

Ethiopia was well equipped legally for genocide prosecution. Ethiopia was one of the first countries to ratify the 1948 Convention on the Prevention and Punishment of the Crime of genocide.[338]After ratifying it, it has included it under the 1957 Penal Code of the Empire of Ethiopia under Art. 281. According to this article, committing killings, bodily harm or serious injury to physical or mental health in any way whatsoever, or imposing measures to prevent the reproduction or the continued survival of the members of the group or their children, compulsively moving or dispersal of peoples or their children or placing them in conditions calculated to bring about their death or disappearance against national, ethnic, racial, religious or political group, whether in time of war or in time of peace, is considered as genocide and is punishable with rigorous imprisonment of five up to life and exceptionally up to death.[339] According to this same article, planning, organizing and engaging in the above illustrated acts results in the same kind of punishment.[340]

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[335]Girmachew Alemu Aneme, Apology and Trials: The Case of the Red Terror Trials in Ethiopia, African Human Rights Law Journal, vol. 6:64, 64-84 Suffolk:UK, James Currey Publishers,(2009),P. 75 (E/CN 4/1994/103, Letter to the Assistant Secretary-General for Human Rights, letter dated from the permanent representative of the Transitional Government to the UN office in Geneva

[336]Kjetil Tronvoll, "The Quest for Justice or the Construction of Political Legitimacy?: The Political Anatomy of the Red Terror Trials," in The Ethiopian Red Terror Trials: Transitional Justice Challenged, eds. Kjetil Tronvoll, Charles Scaefer & Girmachew Alemu Aneme, 84-97, African Issues, Suffolk:UK, James Currey Publishers,(2009) p. 86-88

[337] Frode Elgesem & Girmachew Alemu Aneme, The Rights of the Accused: A Human Rights Appraisal in The Ethiopian Red Terror Trials: Transitional Justice Challenged, eds. KjetilTronvoll, Charles Schaefer & Girmachew Alemu Aneme,33-50, Suffolk:UK, James Currey,(2009) p.38

[338]http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en accessed 23 November, 2013.

[339]Ibid, Art.281 (Note this Article's Caption says 'Genocide and Crimes against Humanity' but the definition is close to that of Genocide under the Convention.)

[340] Ibid

However, this was later repealed in 2004 by the new Criminal Code of the Federal Democratic Republic of Ethiopia.[341] With the exception of adding nation, nationality and 'color' to the list of protected group, 'causing members of the group to disappear' to the list of underlying offences and shortening the default punishment to rigorous imprisonment of five to twenty five years and adding life imprisonment to the punishment of more serious cases, it largely retained the elements listed above.[342]

As Yacob Haile-mariam stated because of the scope of the prosecution work contemplated, Ethiopia's council of representatives in 1992 established an office of special public prosecutor, with the power to conduct investigation and institute proceedings in respect of any person having committed or responsible for the commission of an offence by abusing his position in the party, the government or mass organizations under the Dreg workers party of Ethiopia (WPE) regime.[343]He added that the need for the establishment of the special prosecutor's office to make the facility be suitable for conducting the trial in the ordinary court of Ethiopia.[344]

Indictments for genocide charge killing or other physical violence against the intellectuals, religious and political figures, and labor union leaders who opposed the Dergue's political program.[345]

When the Trials finally concluded, there was a dissenting opinion on the issue of whether the mass killings perpetrated by the Derg against its rival political groups constitute genocide. The dissenting Judge, Judge Nuru Seid, said that the issuing of Proclamations 1/74, 110/77 and 129/77 by the regime has removed the 'protection' given under Art.281 for 'political' groups.[346]He further argued that since the Genocide Convention to which Ethiopia is a signatory does not include 'political groups' under the list of protected

[341] Federal Negarit Gazeta, Proclamation No 414/2004,The Criminal Code of the Federal Democratic Republic of Ethiopia, promulgated on 9 May,(2005), p.5

[342] Id, Art.269

[343] Yacob Haile-mariam , The Quest for Justice and Reconciliation; the International Criminal Tribunal for Rwanda and the Ethiopian high court ,Hastings International Comparative Law Review Vol.22,No.4, (1999), p.667,pp689-690

[344] Ibid

[345] Ibid

[346] Office of the Special Prosecutor Vs. Colonel Mengistu Haile-mariam et et.al., First Division Criminal Bench, Verdict, Judges Medhin Kiros, Nuru Said and Solomon Emiru., File No 1/87, 12 December, 2006. Pp.745-6.

groups, the Defendants could not be judged to commit genocide.[347] Hence, he held that the defendants should not have been charged with genocide rather with Crimes against Humanity of Murder, Bodily Injury and Torture.[348]

The author, however, concurs with the opinion of the Majority because there is no express repeal of Art.281 and because the intention of those laws are not with the intention of repealing Art.281 rather to restore 'order' and 'security.'

Finally, the Court delivered its judgment in the case twelve years later since the start of the Trial and sixteen years later since the defendants were detained.[349] The Court later delivered its sentence ranging from 23 years to life in Prison on 11 January, 2007.[350] The OSP, however, appealed to the Supreme Court for the imposition of a death penalty claiming that the High Court's assessment of extenuating circumstances was without legal basis.[351] After examining the requirements for the imposition of the Death penalty under the law thoroughly, the Supreme Court rendered its decision on 26 May, 2008.[352] The Court amended the sentence to that of Death for the 18 of the respondents.[353]

Regarding the extension of the law to include the political group, George J.A Ndreopalos has written a consensus has emerged among students in genocide and among the leader of International Human Right groups… a consensus urging protection of political and social groups by the Genocide Convention and supporting further research on attempts to destroy such groups. This leads us to conclude that the penal code of Ethiopia in extending the protection to political groups has enriched the principles of Human Right protection and can be taken as a good example in the further encouraging the protection of social, economic and other groups as Genocide in its serious form is the deliberate

[347] Ibid
[348] Ibid
[349] Firew Kebede Tiba, The Mengistu Genocide Trial, Journal of International Criminal Justice, p.513-528
[350] Ibid
[351] Kjetil and Girmachew , supra note 336, p.143
[352] Id., p. 144
[353] Id., p. 149

destruction on physical life of the individual human being by reason of their membership of any human collectivity as such.[354]

4.3.2.2 Romania; destroying a collectivity

Romania has already inserted a genocide provision in to its penal code at the overthrow in 1989 of a time ruler Nicolae Ceausescu.[355] In the 1989 and 1990, four genocide trials were held in Romania, on charges stemming from force used by Romanian police.[356] In the first proceeding Nicolae Ceausescu was charged with genocide and other offences, along his wife Elena Ceausescu, who was also accused of instigating the police actions.[357] The charge was lead under the provision of Romanian penal code.

As John Quigley explained, the genocide charge against the Nicolae Ceausescu was based on the killing of several hundred civilians by the Romanian security police in Timisoara, and then in Bucharest, during street action that, within a few days, lead to Ceausescu's fall from power.[358] He refused to respond to any charges or to cooperate to appointed defense counsel.[359] They were convicted on genocide, sentenced to death, and executed within a few hours.[360] Of all genocide prosecutions that have been conducted domestic courts, this was the most summary.

In 1990, three trials were held against Ceausescu associate with the charges of genocide. Four former officials were convicted of genocide for being party to the decisions made in December 1989 about the method to force suppress the uprising in the street.[361] Capital punishment was abolished in January 1990 in Romania, and the four men received life sentences.[362]

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[354] Iran Brownlie, Principles of International Criminal Law ,4th ed, Oxford University. Press Grotius Publications Ltd., (1990), p. 561
[355] John Quigley, supra note 39, p. 38
[356] Ibid
[357]John Quigley, supra note 39, p 26
[358]John Quigley, supra note 39,p.38
[359] Ibid
[360] Ibid
[361]Cartner ,H, A rush to appease and the conceal, 1990,Human right watch /Helsinki 2, Issue No .6, p.5
[362] Ibid

The demonstrating civilians shot in Timisoara included ethnic Romania's, but Hungarians, Serbs, and other minorities as well.[363] The ethnic identity of the victims was not stressed by the prosecution in this case. Romania included collectivity as a protected category in its genocide article in addition to the protected group listed under the Genocide Convention.

Article 356 Genocide of the Romanian penal code clearly stated that:-

> "*The commission of any of the following acts for the purpose of completely or partially destroying a collectivity or a national, ethnic, racial, or religious group: murder of the members of the collectivity or group; severe injury to the physical or mental integrity of the members of the collectivity or group; the act of forcing the collectivity or group to submit to conditions of existence or to treatment which cause physical harm; the taking of measures to prevent births within a collectivity or group; forced transfer of the minors belonging to a collectivity or group to another collectivity or group, is punishable by death and total confiscation of property, or by fifteen to twenty years' imprisonment, prohibition of the exercise of certain rights, and partial confiscation of property shall be punishable by death.*[364] *And if the act is committed during wartime, the penalty is death and total confiscation of property.* "[365]

From this we can understand that even though this category of identification of the protected group contains a broader way of understanding the Convention, it clearly shows that there is no difficulty on the application of the term collectivity when practical case happened. Ruther it gives more power for the realization of the collective human right protection.

To conclude the discussion of this chapter, the prosecution of Genocide is not solely a matter of international courts. States still bear the primary responsibility in the fight

[363] Codrescu, The Hole in the Flag ; a Romanian Exile's Story of Return and Revolution, William Morrow, New York, (1990), p.27

[364] The penal code of the Romanian Socialist Republic, English South Hackensack,N.J:F.B.Rothman,1976 Art.356,available at info@preventgenocide.org last visited 19 July 2013

[365] Id, Art 357

against international crimes. They are under an international obligation to provide for effective domestic measures, including the adoption of criminal laws to prevent and punish genocide. Most States have implemented the Genocide Convention by drafting specific laws criminalizing genocide under the influence of International Courts. Sometimes they have gone beyond what is required by the Convention in a way that expanding the act or the protected group, but often they have faithfully implemented it. The practice of States helps to clarify some issues of the crime of genocide.

In this respect, National Law in relation with international criminal law helps us to better understand certain aspects of the crime. Furthermore, National Legislation and case law also impact upon the obligations contained in the Genocide Convention: whereas Article VI was initially interpreted as providing for exclusive territorial jurisdiction, subsequent practice has indicated that the meaning of the provision has changed. The contemporary interpretation of Article VI holds that States are obliged to prosecute the crime of genocide committed on their territory, but also permitted to initiate criminal proceedings on the basis of extraterritorial jurisdiction, including universal jurisdiction. National practice has not only clarified the law of genocide, it has also shaped it further.

By this the author does not mean to underestimate the importance of the work of International Tribunals. They have spurred states to prosecute genocide more actively, and often their case law was the only one available. I couldn't neglect the contribution of the International Criminal Tribunal of Rwanda and former Yugoslavia on solving the practical problem even that failed to be addressed by the Genocide Convention. Even it gives a lesson for the coming problem in relation to defining the protected group the technique that has been used. But this does not mean that the way that the two tribunals used on the interpretation of the Genocide Convention was inclusive, rather it pave the way for further clarification that the world community to make an effort on having single comprehensive genocide instrument so that the justice on Genocide prosecution become universal. As far as the domestic prosecution is concerned even though there is no common understanding as to the application of the Convention even as it is, some state further expand the enumerated protected group under the Genocide Convention with the view to giving more attention to the human right protection.

CHPTER FIVE

Challenges against the protected groups and the prospects

5.1 Introduction

After review of legal documents and literatures of multiple scholars, the generally accepted definition of the 1948 Convention exposes two central inadequacies, which include (1) the "intent" requirement that decides the fate of a Genocidal crime, and (2) the provision of protection for only "a national, ethnical, racial, or religious group."

As far as the element of intention is concerned it has been well discussed in chapter two and in this chapter the critiques rely on the challenge of protected group under the Convention and the prospect to look as an alternative mechanism to include the unprotected group so that the Convention will contain a broad coverage. The law is said to protect these specific groups because they share the common characteristic that individuals are usually born into such groups. Therefore, targeting a national, ethnical, racial, or religious group means that a perpetrator attempts to destroy a people not because of what they have done, but because of who they are.

But unlike the above assertion there are also some groups which need protection and due to various reasons they are excluded. One of the most likely candidates for inclusion in a more comprehensive definition of genocide is the protection of political groups. Political groups are excluded due to a person's ability to change their political persuasion and the lack of stability in the classification, meaning that political groups are often changing. Many cases can be presented as a challenge to the lack of protection for political groups. Saddam Hussein's campaign against the Iraqi Kurds was defended as non-genocidal due to its characterization as action against a political opposition group, whose members also happened to be Kurds.[366]

There also is the exclusion of social groups from the protection offered by the Convention's definition. While it is true that a person can more easily abandon such a group, it may not be an easy case if an individual is attempting to change their association

[366] Haley Wright, Crimes that go Unpunished: Expanding the Definition of Genocide, Baylor University available at http//www 6.miami.edu/ maia , visited on December 06/2013, p8

with a social class. One example of how the exclusion of social groups allows perpetrators to sidestep accountability is Stalin's liquidation of kulaks in the late 1920s.[367] Millions of lives were lost but there is still debate as to whether his intent was to physically exterminate all kulaks as individuals or rather their confiscate their property and thus eliminate them as a social class.

Generally, a considerable number of commentators on the Convention have criticized its omission to protect political, economic and social, cultural, sexual groups. Despite the inclusion in the examples of genocide cited in resolution 96/1/ of the destruction of "racial, religious, political and other groups".[368] While good intentions are evident, it must be noted that in the future, other groups will need to be protected, and that cannot be accomplished unless a way is made to do so. Among many critics as to the excluded group the author select the following group on the basis of current necessity to be seen.

5.1.1 The Omission of Political groups

After considerable debate, the Sixth Committee decided not to include political groups among those protected by the Convention.[369] Opposition to the proposal was forcefully led by the Soviet Union's representative. The arguments advanced against the inclusion of political groups were, in essence, that : (a) a political group had no stable, permanent and clear cut characteristics in that it did not constitute an inevitable and homogeneous grouping, being based on the will of its members and not on factors independent of that will ; (b) the inclusion of political groups would preclude the acceptance of the Convention by the greatest possible number of States and the acceptance of an International Criminal Jurisdiction, because it would involve the United Nations in the internal political struggles of each country ; (c) such inclusion would create difficulties for legally established governments in their preventive actions against subversive elements ; (d) the protection of political groups would raise the question of protection under the Convention for economic and professional groups ; and (e) the protection of

[367] Graziosi, Andrea, The Great Soviet Peasant War, Bolsheviks and Peasants, 1917-1933, Harvard: Harvard University Press, 1996.p83

[368] Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 69th, 74th, 75th and 8th meetings.

[369] Ibid

political and other groups should be ensured outside the Convention, under national legislation and the Universal Declaration of Human Rights.[370]

In addition the travaux preparatoires of the Genocide Convention demonstrate that political groups lacked wide international support from the beginning of codification of genocide law. Delegates such as those from Egypt, Iran, Uruguay, and the United States feared the inclusion of political groups among the protected groups would result in a lower number of ratifications and therefore a less forceful Convention.[371] While much of the discussion surrounding the inclusion of political groups was over the appropriateness of including political groups among more permanent and stable protected groups, the committee was certainly mindful of the practical consequences of including these groups. The United States delegation explicitly distinguished between drafting a Convention "founded on just principles" and one "ratified by the greatest possible number of governments"[372] and suggested that both interests should be reconciled.

Nersessian comments that the reason for adding political groups in the drafting of the resolution is unknown, and that the committee's report contains no discussion on the matter.[373] It is especially curious since Lemkin originally defined genocide as the destruction of "a nation or of an ethnic group"[374] and purposely left out political groups, as later confirmed by his opposition to their inclusion during the drafting of the Convention.

Despite their exclusion from the Genocide Convention, political groups have found explicit protection in several domestic codes prohibiting genocide.[375] While these states represent a clear minority, as most states have excluded political groups,[376] the states demonstrate that the protection of political groups under genocide law is not a dead

[370] The proposal (A/C .6/214) to include Economic groups at the 69th meeting was withdrawn at the 75th meeting.
[371] U.N.GAOD,6th comm..,3rd sess.,128mtg.,UN.DOC.A/C.6/SR,128 Nov. 29,1948, p 661-662
[372] Ibid
[373] Nersessian, supra note 37, p.101
[374] Lemkin, supra note 3, p 79
[375] David Nersessian, supra note 37, (listing political groups in their domestic code Bangladesh, Cambodia, Columbia, Costa Rica, Cote Divoire ,Ecuador, Ethiopia ,Lithuanian, Panama, Poland and Slovenia as state found to overtly recognize,) p. 112
[376] Id., p. 112-113

concept. Nersessian further notes that “no state has objected to the broader formulations,” although there is no evidence of *opinio juris*; the inclusion of political groups in these instances demonstrates nothing more than utilizing an optional feature of domestic law.[377] As Nersessian concedes, the survival of political groups in domestic protection is at best an “emergent” norm of Customary International Law.[378]

In support of the inclusion of political groups it was and is argued that it is logical and right for them to be treated like religious groups, a distinguishing mark of both types of group being the common beliefs which unite their members. Specific examples picked from the recent history of Nazism prove that political groups are perfectly identifiable and, given the persecution to which they were subjected in an age of ideological conflict, their protection is essential.

During the debate the French representative presciently argued that "whereas in the past crimes of genocide had been committed on racial or religious grounds, it was clear that in the future they would be committed mainly on political grounds", and this view received strong support from other representatives . In the era of different ideology, people are killed for ideological reasons.[379] Many observers find difficulty in understanding why the principles underlying the Convention should not be equally applicable in the case of mass killings intended to exterminate, for instance, communists.[380]

In addition, in some cases of horrendous massacre it is not easy to determine which of the overlapping political, economic, national, racial, ethnical or religious factors was the determinant one. Is, to take but two examples, the crime of apartheid primarily racial, political or economic? Or was the selective genocide in Burundi intrinsically political or ethnic in its intent? Most genocide has at least some political shade, and a considerable number of the Nazis' mass-killings were political. It has been argued that leaving political and other groups beyond the purported protection of the Convention offers a wide and

[377] Id.,p. 128-129
[378] Ibid
[379] United Nations Economic and Social Council and United Nations Legal Committee, Bolivia, Haiti, Cuba. 14 October 1948, p .723
[380] B. Whitaker, supra note 95, p.35

dangerous loophole which permits any designated group to be exterminated, ostensibly under the excuse that this is for political reasons.[381]

The French representative added that by leaving political and other groups beyond the purported protection the authors of the Convention also left a wide and dangerous loop-hole for any government to escape the human duties under the Convention by putting genocide into practice under the cover of executive measures against political or other groups for reasons of security, public order or any other reason of state.[382] If perhaps political reasons cannot be adduced as proper excuse for the genocidal measures against a group protected under Article II, then very likely such governmental policy will be defended on economic, social or cultural grounds.[383]

Additionally, omission of political and other groups from the definition of the genocide would create the loophole in the Genocide Convention which state would take this opportunity to commit other groups' destruction.[384] As happened in the case of the dead of Hindu in Pakistan, when the officials tried to claim that they did not kill members of a religious group, but they killed the enemies of the state instead.[385] Drost, then, called for redefining term of genocide by focusing the destruction of individual physical life by reason of their membership of any human group as such.[386] Savon endorsed this wide definition by suggesting that genocide was a structural and systematic destruction of innocent people by a state bureaucratic apparatus.[387] Furthermore, Shaw states that there are possibilities of existence of social groups that need to be protected by the International Law of the Crime of Genocide, such as political, or gender group.[388] Therefore, it seems that only four types of groups in the context of genocide are not enough.

The political group may be a proper example in order to rectify the concept as a whole. Significantly, the addition of the political group has long been the central to genocide

[381] Id.,p81
[382] Ibid
[383] Ibid
[384] Id.,p.125
[385] Id., p 51
[386] Ibid
[387] Suriyan Hongvilai, supra note 106, p.45
[388] M.Shaw, supra note 132, pp63-78

debate.[389] The significant difference between political group and the four types of protected groups is that the members these protected groups are born in to them, the member of political group, on the other hand, choose to belong to it.[390] Lemkin argued against the inclusion of political group that they lacked the permanency and specific characteristics of the other groups.[391] Fein opposed by her own definition which included the political and social groups as a victim of genocide.[392] Shaw quests that if the political group is targeted for destruction in the same way as other kinds of groups, and then surely this is, likewise, genocide?[393] He is right in the current situation that the massacre will happen frequently to the political elites and activists.

It cannot deny that if taking the concept of stability and permanence is taken in to account, the political group will never and ever be asserted as a group protected. Nevertheless, if it is not concerned that the members of political group might change their mind and move to be the members of another side of politic arena in the future, the time period during the elimination process of the perpetrator would be enough in order that their lives are targeted to destroy for impacting the existence of the political group. Most importantly, the victims are not the one who chose to be killed but they are chosen to be killed.

Furthermore, the perpetrator is the person who targets the group to be destroyed including the members of that group. It can be noted that the group and membership are defined by the perpetrator.[394] It seems that he is the one who groups the people and give them the atrocities. It is shown by Khmer rouge commander Pol Pot, when he wanted, according to Steve hedre's discovery, to implement Marxist – Leninist policy.[395] In order to create the new society by destroying Cambodian society and social organizations including separated many of Cambodian's families, destroyed Buddhism religion along side with other religious and folk groups, left around 1.5 million of people from nearly eight

[389] Id, at p 69
[390] Schabas , supra note 33, pp134-145
[391] Id, p.134
[392] H.Fein, supra note 51, pp 23-25
[393] Ibid
[394] F.Chalk and K.Jonassohn, The History and Sociology of Genocide ;Analysis and Case Studies, New Haven ;Yale University Press,(1990), p.23
[395] S.Heder, Racism ,Marxism, Labeling and Genocide in Ben Kicrnan's the Pol Pot regime, in the south east Asia research vol.5, no.2, pp.101-153

million of population to death and massacred.[396] He was not only killed the members of religious groups such as Buddhist, or members of ethnic groups including the Vietnamese, the Muslim cham and the Thai, but also targeted to eliminate the political opposition in eastern zone bordering Vietnam.[397] The groups of people in eastern zone were governed by the U.S backed general, Lon Nol was the opposition political leaders of Pol Pot. Thus, Kuper concludes that this group is political group and need to be concluded in the genocide definition.[398]

Moreover, the evidence shows that the omission of just only political group from the Genocide Convention definition has led the massacres happened all over the world such as the killing of around 500,000 Indonesian communist in 1965-1966, the murder of members of the Awami league 1970-71 during the break way of Bangladesh, the destruction of opposition political group in Cambodia by the khamer rouge from 1975-1978.[399]

Therefore, if we take our view from the word stable and permanent, there are members of social groups including political group would be protected by the International Criminal Law. Thus, it may be noted that the generic definition of genocide is needed as Chamy considers that any kind of mass murder amounts to genocide and any kind of human groups can be victim including racial, national, ethnic, biological, cultural, religious and political groups or even a totally mixed groupings of any and of the foresaid groups.[400] He proposes this broad definition to avoid exclusion of any group from the definition of Genocide.[401]The author agreed on this assertion that protecting the political group by the broader understanding of the Convention, in effect it reflects the commitment of international community to the human right protection.

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[396] B.Kiernan, The Cambodian Genocide ;Issues and Responses; in G.Angreopoulos, ed, Genocide ; Conceptual and Historical Dimensions, Philadelphia; University of Pennsylvania Press,(1994),p.191
[397] Id., p. 197-202
[398] L.Kuper, supra note 25, p. 45
[399] Id., p. 54
[400] I.Charny, Toward a Generic Definition of Genocide', in G.Andropoulos ed, ,Genocide Conceptual and Historical Dimensions, Philadelphia, university of Pensalvinia press, (1994),p 74
[401] J.Semlin ,Purify and Destroy, The Political Uses of Massacres and Genocide, London C.Hurst and co. publishers Ltd,(2007), p 313

5.1.2 The Omission of Economic and Social groups

During the drafting of the Convention, there were associated proposals to add economic and social groups to the enumeration. Genocide of economic groups was suggested by the United States.[402] But latter dropped. In the sixth committee, the Netherlands said this could be going too far; it would lead to the absurd results that certain professions, when threaten by the economic measure which were required in the interest of the country might involve the Convention to protect their own interest.[403]

Lemkin had written about the Genocide Convention, but by this he meant not the destruction of economic groups, but instead the destructions of the foundations of the economic life a notion or national minority.[404] Lemkin's philosophy was picked up in the 1946 Saudi Arabia draft planned disintegration of the political, social or economic structure of a group, people or nation.[405]

Considerable academic literatures tend to favor the inclusion of economic and social groups within the scope of the crime of genocide. The prosecution of rich peasants or kulaks during collectivization in the Soviet Union[406] and the massacres associated with various social changes that the khmer Rouge attempted to effect in Cambodia during the late 1970's[407] are given as examples. In draft legislation directed at the prosecution of Khmer Rouge leaders, prepared in August 1999, the Cambodian government enlarged the Convention definition of genocide to include wealth, Level of education, sociological environment urban/rural, and allegiance to a political system or a regime old people/new people, social class or social category (merchants, civil servants etc).[408]

Commenting the Cambodian proposal, a United Nation delegation headed by the legal officer Ralph Zacklin noted the discrepancy with the Convention definition and changed

[402] UN.DOC.A/C.6/214 cited in William Schabas, Genocide in International Law ;The Crime of Crime p.145
[403] UN.DOC.A/C.6/SR.74(De Beus, Netherlands), UN .DOC.A/C.6/SR/69(perez-perozo,venzuwella);and UN.DOC.A/C.6/SR/72(Rafat Egypt)
[404] Lemkin, supra note 3,pp85-86
[405] Ibid
[406] Chalk and Jonassohn, supra note 396, pp290-322
[407] Id., pp. 398-407
[408] Schabas, supra note 33, p 146

that any such provision would violate the prohibition of retroactive offences.[409] It noted, however, the categories not covered by the Convention would be captured under crime against humanity.[410] The United Nation counter proposal confined itself in to the text of Article II of the Convention, as well as, as to the definition of crime against humanity contained in the statute of the International Criminal Tribunal for Rwanda.[411]

There were proposals to include economic and social groups in the genocide provision of the Rome statute for International Criminal Court, Peru,[412] Paraguay,[413] and Lithuania,[414] include social groups within their legislation prohibiting genocide.

When Spain enacts a crime of genocide in 1971, it defined with reference to national, ethnic, social or religious group. However, the legislation was changed in 1983 and Spain returned to enumerated list of the Genocide Convention. Portugal's 1982 penal code also included social groups within the definition of genocide.[415] However, the code was revised in 1995 and Portugal reverted to the Convention definition.

5.1.3 The Omission of Cultural Groups

Raphael Lemkin advocated a wider conception of the term genocide, that is, he considered genocide to involve three kinds of acts: physical biological and cultural.[416] The latter cultural genocide was then included in the draft so as to be discussed in further occasion.[417]

However, the inclusion of cultural genocide in the Convention's draft did not go without strong contrary opinions. When commenting on the draft, the United States as well as France made clear that they would rather such type of genocide to be excluded, leaving

[409] Id., para 3
[410] Draft law on the establishment of Tribunals for the prosecution of Khmer Rouge leaders responsible for the most serious violations of Human Rights; August 1999 cited in William Schaba's, Genocide in International Law ;the Crime of Crime, p 146
[411] Report of the preparatory committee on the establishment of an International Criminal Court,UN.DOC A/51/22, vol 1, pp.17-18, para 60
[412]Penal code of Peru 1995, Art. 129
[413] Penal code Paraguay, Art.308
[414] Criminal code of the Republic of Lithuanian, Art. 71
[415] Penal code of Portugal, 1982, Art. 189
[416] Schabas., supra note 33, p. 53
[417] Schabas, supra note 33, p. 53

the Convention's scope limited to physical and biological genocide.[418]Then, from September to December 1947, the General Assembly, through the Sixth (Legal) Committee, held its second session on the subject, where the main issue discussed relied on whether to consider genocide as a Crime against Humanity or to contemplate it as a specific criminal behavior.[419]

By following the General Assembly Resolution 180 (II) the continuation of the discussions took place through the Economic and Social Council. An Ad Hoc Committee was then established, and, among various subjects, it addressed the issue of the groups to deserve the protection of the Convention as well as the inclusion of cultural genocide.[420]

Despite strong objections towards the inclusion of cultural genocide, there were positive manifestations such as the Soviet Union. The Soviets presented a document entitled "Basic Principles of a Convention on Genocide" endorsing the coverage of cultural genocide by the Convention.[421]

The discussion relied mostly on the three kinds of genocide that should be included physical, biological and cultural being the latter the most controversial, and, therefore, central issue. In the occasion the United States and France presented strong disagreement towards cultural genocide, but, in spite of that, the remaining States adopted a positive approach towards cultural genocide, and such approach was subsequently adopted.[422]

As noted before, the drafters of the Convention have showed a clear intention to list the protected groups in an exhaustive way, and, although there had been efforts towards a non-exhaustive fashion, article II has remained the same. By specifying which groups deserve to be protected under the Genocide Convention it deliberately excluded other groups that represent a great deal of genocide victims, and then again, it did not go without major criticism.

[418] Ibid
[419] Id., p. 57
[420] Id., p. 58
[421] Id., p. 61
[422] Id., p. 63

When Raphael Lemkin first defined the crime of genocide in 1944 in his book "*Axis Rule in Occupied Europe",* he also wished to include a cultural kind of genocide, which, according to him, would consist in the deliberate destruction of a group's cultural way of life, that is, acts performed through "*drastic methods aimed at the rapid and complete disappearance of the cultural, moral and religious life of a group of human beings*".[423] Within his work he stated that the attempt to destroy the foundation of the life of groups would as well involve the annihilation of the political and social institutions of culture, language and national feelings.[424]

Following Lemkin's thoughts, Cultural genocide was strongly discussed through the drafts of the Convention. It was to be included in its Article III, which would take the following shape, as in prohibiting

> "*any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial or religious group on grounds of national or racial origin or religious belief such as: 1. Prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group; 2. Destroying, or preventing the use of, libraries museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group*; *3. Subjecting members of a group to such conditions as would cause them to renounce their language, religion or culture".*[425]

Cultural genocide was also proposed within the Universal Declaration of Human Rights draft, so as to allow minorities the right to have their own schools, cultural or religious institutions, as well as facilitate the use of their own languages in the press, public assemblies and before courts and state authorities.[426] Certain countries were of the opinion that the cultural genocide would be better dealt if included in the declaration of human rights or even into a charter for the protection of minorities.[427]

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[423] Akayesu, supra note 76, para512
[424] Draft Convention on the Crimes of Genocide, U.N. ESCOR,5th Sess., at 6-7, U.N. Doc. E/447(1947) p.27
[425] P. Condappa, Cultural Genocide in Bosnia Herzegovina; Destroying Heritage, Destroying Identity Available at http://metamedia.stanford.edu/projects/CulturesofContact/ Last accessed 30 August 2013
[426] U.N GAOR, 3rd Sess., at 842, U.N. Doc. A/810 (1948)
[427] B. Sautman, Cultural Genocide and Tibet, Texas Journal of International Law 173, Vol.38, (2003) p. 10

Back to the drafting stage the Soviet Union's opinion such argument should not proceed, once it understood that the human rights declaration would not suffice for the affective protection of cultural features of a group. According to it "*the declaration proclaimed the individual's right to life, liberty and security of person, which might be interpreted as ensuring his protection against any act of physical genocide; yet no one disputed the need for a convention on physical genocide*".[428] In fact, the Convention on genocide would be a much more effective way on dealing with cultural genocide as the obligations therein established are far more binding than those implicit in the declaration of human rights, which rely solely on its moral force.[429]

Obviously, the will to include cultural genocide in documents other than the Convention would be a result of confusing the aims of the latter with those of the above-mentioned declarations and charters. These could not take cultural genocide as a crime nor provide the necessary measures so as to prevent and punish it.[430]

Moreover, to include cultural genocide in the Human Rights Declaration or in the Minorities Protection Charter would go against the requirements of the resolution 96 (I), which took genocide to the level of a crime under International Law that had to be prevented and punished.[431] After long discussions whether or not cultural genocide should be a subject addressed in the Convention, it was excluded as a result of the General Assembly Sixth Committee discussions by 25 votes to 16, with 4 abstentions, 13 delegations being absent during the vote.[432] The ones who were contrary to the inclusion of cultural genocide in the Convention advocated either that certain factors of cultural genocide were already covered by other Conventions, i.e the one relating to the protection of minorities; or that it had been foreseen within national legislation, i.e. laws on education and protection of worship.[433]

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[428] Summary Record of Meetings, U.N General Assembly Official Records 6th Committee, 3rd Session Eighthly-Third Meeting. Continuation of the consideration of the draft Convention on Genocide [E/794]: report of the Economic and Social Council [a/633] p,194
[429] Id., p. 205
[430] Id., p. 198
[431] Id., p. 194
[432] Ibid
[433] Id, p. 206

The United States of America, for instance, presented two reasons to exclude Article III from the Genocide Convention. According to its representative, cultural genocide had no connection with the physical destruction of a group, and therefore could not be treated as such. He also advocated that the actual protection needed could be obtained from human rights.[434] If one agrees with those arguments, one might as well consider the whole Convention on genocide to be useless, once several acts that constitute Genocide can also be found within both national legislation or even in the general framework of the crimes penalized under International Criminal Law. The reality is that by including cultural genocide in the Convention, one would have facilitated international action.[435]

In spite of that, cultural genocide was not addressed as it should have been, and the significance of one people's culture was not properly recognized within the Genocide Convention. In fact, a group's culture represents its very core, it's very foundation, that is, one's people culture actively construct and re-structure society, and the extermination of a group's culture shall also imply potentially in its "de- structure".[436]

The cultural symbols of a community are the materialization, the representation of it as such and its destruction implies in the destruction of the group. As Raphael Lemkin has advocated, there is a need to protect cultural groups once they cannot do without the "spirit and moral unity" that their culture provides.[437] One people's culture represents its very core, and the international community does not turn its back to the seriousness of the subject. The UNESCO's draft Declaration on International Destruction of Cultural Heritage, for instance, recognizes that cultural heritage consists in the cultural identity and social cohesion, and that its intentional destruction shall imply in consequences on human dignity as well as in human rights.[438]

As an example one can mention the Bosnian war where there was plenty of what can be called deliberate targeting and consequent destruction of cultural, religious and historic symbols such as the National Library (Around 1.5 million books were destroyed, the

[434] Id., p. 196
[435] Id., p. 203
[436] Id. ,p. 196
[437] P. Condappa, supra note 425, p. 4
[438] Lemkin, supra note 3, pp. 90-95

largest single incident of book burning in modern history), the Regional Archives, the Academy of Music, the National Gallery, several local and national museums, among others.[439] Such cultural destruction which took place in Bosnia holds a strong link with the systematic persecution and expulsion of ethnic and religious communities, once ethnic groups are culturally defined, they can be eliminated by the disappearance of their culture, disguise the existence of their physical removal.[440] By the same token, the Ad Hoc Committee on the draft of the Genocide Convention has noted that; -

> *"The cultural bond was one of the most important factors among those which united a national group and that was so true that it was possible to wipe out a human group, as such, by destroying its cultural heritage, while allowing the individual members of the group to survive. The physical destruction of individuals was not the only possible form of genocide; it was not the indispensable condition of that crime".*[441]

In fact, cultural genocide goes further than the destruction of physical or biological element of a group. According to David Nersessian, it takes place through various ways such as; -

> *"the abolition of a group's language, restrictions upon its traditional practices and ways, the destruction of religious institutions and objects, the persecution of clergy members, and attacks on academics and intellectuals"*. He went on saying that it is characterized when "*artistic, literary, and cultural activities are restricted or outlawed and when national treasures, libraries, archives, museums, artifacts, and art galleries are destroyed or confiscated."*[442]

The USSR delegate made clear its opinion in the Sixth Committee that the destruction on one group's culture is also a way of committing genocide, once it is the intent to "destroy a group in whole or in part', and that the "*Nuremberg verdicts had shown that the*

[439] P. Condappa, supra note 425 , p. 5
[440] Id., pp. 8and 9
[441] Id., p. 12
[442] Sautman ,supra note 427

destruction of the culture of certain groups might constitute a method of destroying those groups".[443]

On the same occasion, the Czechoslovak representative, Mr. Zourek, has stated that the disappearance of groups can be either due to physical extermination or due to forcible destruction of its distinctive and permanent characteristics. He went further to illustrate his thoughts with examples of cultural genocide perpetrated by the Nazis upon Czechs and Slovaks, saying that: -

> "*Those acts were designed to pave the way for the systematic disappearance of the Czechoslovak nation as an independent national entity*", and that "*such Nazi activity had been accompanied by a thorough attempt to destroy everything that might remind the people of its national past and to prepare the way for complete Germanification*".

He concluded by noting that those acts of cultural genocide had had the exact same motives as those of the so called physical genocide, that is, the intent to destroy a racial, national or religious group.[444]

According to the Pakistani delegation, physical genocide would only represent the means by which the end cultural genocide would be reached. In other words;-

> "The *chief motive of genocide was a blind rage to destroy the ideas, the values and the very soul of a national, racial or religious group, rather than its physical existence. Thus the end and the means were closely linked together; cultural genocide and physical genocide were indivisible. It would be against all reason to treat physical genocide as a crime and not to do the same for cultural Genocide*".[445]

In fact, the concept of genocide should not be restricted to physical destruction by the Convention, once the definition presented in its Article II never specifically established that the use of physical means was condition *sine qua non* for the actual destruction of a group. If one reads Article II (e) carefully, he will note that when the Committee included as an act of genocide the "*forcibly transferring children of the group to another group*" it

[443] D. Nersessian, Rethinking Cultural Genocide under International Law, Human Rights Dialogue: 'Cultural Rights', April 22, 2005. Available at http://www.cceia. P.23
[444] Summary Record of Meetings, supra note 439,p. 206
[445] Id, p. 205 and 206

recognized that a group might as well be annihilated although its members remain living without had suffered any physical harm.[446]

Following the exact same understanding that a group may be annihilated without suffering any physical harm, David Nersessian noted that "*by limiting genocide to its physical and biological manifestations, a group can be kept physically and biologically intact even as its collective identity suffers in a fundamental and irremediable manner. Put another way, the present understanding of genocide preserves the body of the group but allows its very soul to be destroyed*." [447]

What cannot be ignored is that the exclusion of cultural genocide from the acts forbidden by the Convention is a way to act in disagreements with the General Assembly Resolution 96(I), once it mentioned that form of genocide within its preamble.[448] That is, such resolution recognized that genocide *"results in great losses to humanity in the form of cultural and other contributions represented by these human groups"*.[449] Moreover, the issues of the acts that constitute genocide - physical, biological and cultural – have been analyzed not only within the draft discussions, as we have seen, but as well within the case law that followed.

In the Krstic judgment, the ICTY Trial Chamber stated that *"the physical destruction of a group is the most obvious method, but one may also conceive of destroying a group through purposeful eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community".*[450] The Chamber's statement follows the notion of genocide as it was conceived in Lemkin's *Axis Rule in Occupied Europe*, that is, genocide as all forms of destruction of a group. By adopting such broad approach, one shall find that genocide resembles the crime of persecution.[451]

[446] Id, p. 193
[447] Id, P.195
[448] D. Nersessian, supra note 443
[449] Summary Record of Meetings, supra note 428,p.193
[450] United Nations General Assembly Resolution 96/1/,supra note 28
[451] Krstic, supra note 19, para 574

According to the Trial Chamber, there is a general opinion established so as to consider that the crime of persecution is not *"limited to the physical destruction of the group but covered all acts designed to destroy the social and/or cultural bases of a group"*.[452] By the same token, the Chamber went on by mentioning the Ad Hoc Working Group of Experts report on the human rights violation in South Africa in 1985.[453] Despite the Convention's literal coverage being restricted solely to physical or material acts, it adopted "*a broader interpretation that viewed as Genocidal any act which prevented an individual 'from participating fully in national life', the latter being understood 'in its more general; sense".*[454]

Despite all the efforts towards a broader understanding of genocide by including cultural element in the Convention, the more limited approach prevailed. Nowadays, cultural genocide plays a subsidiary role within the Convention's understanding of genocide. Cultural considerations have helped out on the establishment of the genocidal specific intent, and, also, cultural characteristics are considered so as to define the protected groups enumerated in Article II of the Convention.[455] When analyzing the discussions on article III, one notices that the main pro argument is its inclusion relied on the fact that cultural Genocide often represents a preparatory stage for the physical or biological genocide.[456] Lippman recognized that such kind of genocide shall take place only when it comes together with the intent of physically destroy a certain group, that is, there is a need of a conjunction of physical and cultural destruction.[457] Opinion which is shared by William Schabas, according to him "*it seems impossible to consider acts of cultural genocide as punishable crimes if they are unrelated to physical or biological genocide*".[458]

Of course, one cannot ignore that the world has changed a lot since the ratification of the Convention in 1948; nonetheless, we are far from reaching an additional protocol

[452]Id., para 575
[453]Id., para 575
[454] Violations of Human Rights in Southern Africa: Report of the Ad Hoc Working Group of Experts, UN Doc. E/ CN.4/1985/14, 28 January 1985, paras 56 and 57
[455] Krstic, Supra note 19,Para 575
[456] D. Nersessian, supra note 428
[457]M. Lippman, supra note 53, p. 21
[458]Id.,, p.77

prohibiting cultural Genocide.[459] Nonetheless, we can still identify the criminalization of cultural genocide as part of Customary International Law, that is, the prohibition of cultural genocide is not binding and States do not have the obligation to prosecute its perpetrators, but it still represents a violation of international law and can be considered binding in some States.[460]

Moreover, one can note that the Convention's drafters acknowledged the legitimacy of cultural genocide and suggested that the subject shall be addressed by other international documents, as it happened within the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Charter of the European Union, etc.[461] When analyzing the composition of the United Nations of the 1940s, one may have a slight sparkle of understanding towards the denial of cultural genocide being internationally criminalized, as the countries that voted against it were mainly the ones that in the past acted in a way that such an inclusion would raise charges against them.[462]

Yet in no way should one accept the denial of addressing the question of protection against the destruction of a particular culture. The justification for doing so can rely in several arguments, but mainly in the present-day history: the acts perpetrated by the Nazis against cultural or religious life of their aimed groups such as the burning of the synagogues and Jewish libraries; also, within the first World War, the burning of the University of Louvain as well as the destruction of the cathedral of Rheims.[463]

Most of all the history shows that the culture or the religion of certain groups is as eye opening and disturbing as crimes of physical genocide.[464] Cultural genocide does not lack importance, and its exclusion is surrounded by a range of very serious implications, especially on how some extreme state actions towards the annihilation of certain culture are to be characterized.[465]

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[459] Schabas ,supra note 33, p. 187
[460] M. Lippman, supra note 53, p. 47
[461] http://www.texacotoxico.org/eng/index.php?option=com_
[462] D. Nersessian, supra note 428
[463] B. Sautman, supra note 427, p. 12
[464] Summary Record of Meetings, supra note 439,p. 196
[465] Id., p. 196

The magnitude of cultural genocide can only be fully understood by the analysis of an actual situation where one's people culture is being destroyed, and, for that reason, I propose for this chapter a brief analysis of the situation that Tibet finds itself in.

The scenario in Tibet involves a great forced assimilation of its culture into mainstream communist Chinese society through several acts such as the destruction of monasteries, a public school system where Chinese propaganda, language and culture prevail, as well as the moving of a great number of Chinese into Tibetan territory.[466] The immigration process of quite a large number of Chinese individuals into Tibet took place so as to make it difficult for the Tibetans' rise, to break their unity, to spread Chinese propaganda within Tibet, and, therefore, move towards the extinction of Tibetan's culture.[467]

The charges of cultural genocide, therefore, are focused on the above-mentioned migration of Chinese individuals to Tibet, family planning, as well as political repression.[468] When it comes to culture, the focus of the acts perpetrated by the Chinese government involves mainly religion and language; and there had been said that various sorts of vices, such as drug use and prostitution, have been promoted within Tibet so as to tear its citizens away from Tibetan's culture.[469] The focus on religion would mostly concern the freedom to participate in activities, the regulation of monasteries, as well as the so-called efforts to alienate Tibetans from the Dalai Lama.[470]

According to Emigre leaders, Tibetans are no longer entitled to undertake routine religious activities, and around 6,000 monasteries have been destroyed or are being used for purposes others than religious ones.[471] Tibet has in fact been occupied by China for over five decades, and, throughout this occupation, the cultural identity of Tibet has been gradually affected, heading towards its total annihilation. The Dalai Lama finds that the Chinese authorities see in Tibet's culture and religion a source of threat of separation,

[466] Cultural Genocide, Available at http://www.historywiz.com/cultgenocide. Accessed 04 August 2013
[467] Ibid
[468] B. Sautman, supra note 427, p. 197
[469] Id., p. 207/208
[470] Ibid
[471] Id., p. 210

and, therefore, they have adopted policies so as to suppress it.[472] Such policies imply, most of all, the denial of the right of self determination for the Tibetans, that is, the Chinese government has been trying to shrink the right of Tibetans to freely determine their political, social, economic and cultural status.

The right of self-determination primarily anchored in Chapter I, Article I of the UN Charter[473], has been specially recognized by considering the particular situation of Tibet. The United Nations General Assembly Resolution 1723(XVI)[474]noted that the above right applies to Tibetans and called on the government of China to allow the latter to exercise such right.[475]

Furthermore, among the actions perpetrated by the Chinese government, one has been raising strong fear of cultural genocide within Tibetans, that is, the construction of a railway that will connect Golmud - in the west of China – to Lhasa – the capital of Tibet.[476] Tibetans consider this railway as a threat, once they are already considered to be a minority within their own territory, and Chinese migration to Tibet would increase greatly from the moment such railway becomes operational, which also means a sudden spike on the mentioned cultural annihilation process, just like it happened in Easter Turkestan and Innes Mongolia.[477]

The main objective of China towards Tibet was never the physical annihilation of its individuals; to the contrary, it aimed in its people assimilation and subordination; in the deliberated undermining of Tibetan's culture.[478]Even for those that disregard genocide without physical destruction, still one shall not find hard to recognized what is happening in Tibet as cultural genocide, once there has been limitations of births among Tibetans imposed by the Chinese government, and such act can be found in Article II(d),

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[472] Id., p. 211/212
[473] Id., p. 197
[474] Charter of the United Nations, Chapter I, Purposes and Principles, Art.1
[475] United Nations General Assembly Resolution 1723 (XVI) on Tibet, New York, (1961). The General Assembly, Recalling its resolution 1353 (XVI) of 21 October 1959 on the question of Tibet
[476] Hear Tibet; Self-Determination on the Tibetan People, Available at http://www.heartibet.org/selfdetermination. htm. Last accessed 23 August 2013
[477] T. Dargyal, Bombardier and the Tibetan Cultural Genocide, May 30th, 2006. Available at http://www.savetibet.org/ . Last accessed 8 August 20013
[478] http://www.cultdeadcow.com/cDc_files/cDc-0409.php. Last accessed 10 December 2013

according to which Genocide can also rely on acts "*imposing measures intended to prevent births within the group*".[479]

By the same token, the Dalai Lama has found that the measures imposed by China included a forced strict family planning rules so as to make the Tibetans a minority in their own land.[480] Of course, the birth control issue that takes place in Tibet does not rely on unanimous point of view, once there are scholars that strongly deny the genocidal intent within such Chinese act. Moreover, there are the people who advocate the inaccuracy of the cultural genocide claim in Tibet, and that point of view should be respected. Still, the five decades of Chinese migration, disrespect for Tibetan's religion, culture and way of life must not be seen as a simple result of the natural changes of time and humanity.

Although it ended up not being included on the final Convention on genocide, Article III of the draft recognized cultural genocide as "*any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial or religious group on grounds of national or racial origin or religious belief"*.[481] Various examples demonstrate the need to prohibit cultural genocide within an international legal document and because of the struggle that Tibet has been going through the past five decades, seeing its very soul, its identity, fading slowly in the hands of the Chinese, one must not turn his face to the opposite direction. The problem has to be dealt as its magnitude requires, neither with complacency nor with any sort of radicalism. What is needed is the simple recognition that a people can and will continue to be victimized in its own territory not necessarily through physical destruction, but mostly by the disappearance of its culture.

5.2 Darfur crisis and the debate on Genocide

The violence and death in Darfur are obvious, yet to date the world has not agreed on how to label the situation. Some have been quick to use the word Genocide to describe the crimes, while others have refused to say so. Thus far the U.N., which effectively

[479] B. Sautman , supra note 427, p. 196
[480] Id., p. 202
[481] Ibid

controls the enforcement of the Genocide Convention, has not labeled the crisis as genocide, and therefore the preventative and punitive provisions of the Convention have not been triggered.

This section dedicated to analyze the UN and the AU position that have been seen on Darfur crisis so that, it would examine the act committed there and on the same scenario I will compare the situation how the International Community's reacted on the Rwanda's genocide case.

A. The International Reactions for the Darfur Crisis

The US government on two occasions declared that Genocide was occurred in Darfur. The first declaration came from the unanimous resolution adopted jointly by the House of Representatives and by the concurring senate.[482] By looking the report of the observer group that US previously send to the area which clearly explain that the situation in targeted Darfur the Fur, Massaleit and Zagawa ethnic groups were victim of human right violation[483]and then the resolution confirmed that the situation in Darfur is genocide and urged the United States government to consider a multilateral or even unilateral intervention to prevent genocide in Darfur should the United Nation Security Council fail to take action.[484]

On 9 September 2004, based on the report and the information gathered by the above group the then US secretary of the state Colin Powell testified to the senate foreign relation committee that the human right violation amount to genocide in accordance with the 1948 Genocide Convention.[485]

The secretary conclude that the totality of the evidence from the interview conducted in July and August, and form other source available, shows that;-The Sudanese military

[482] The United States of America Congress Resolution 467, Declaring Genocide in Darfur, Sudan at its 108th Congress,2nd session ,in the House of People Representatives,24 June 2004

[483] Us department of state ,Documenting the Atrocities in Darfur ,state publication 11182,beraou of Democracy ,Human Right, Labor and office of Intelligence ,9 September 2004 ,available at http//www.state.gov/g/drl/rls/ 36028. htm ,accessed 10 October 2013

[484] Ibid

[485]Secretary of state Colin Powell, the Crisis in Darfur ,9 September 2004, available at http//www.state.gov/secretary/rm/42.htm , testify before the foreign relation committees , accessed 10 October 1013

force and its militias have been committed large scales of violence, including murder, rape and physical assault on the non-Arab individuals, Jingaweit and Sudanese military forces destroyed villages, foodstuffs, and other means of survival and the Sudanese government and its military force obstructed food, water, medicine, and other humanitarian aid from reaching affected populations, thereby leading to further death and suffering . Finally, despite having put on notice multiple times, Khartoum has failed to stop the violence.[486]

The European parliament, in September 2004, declared that the crime committed in Darfur was a War Crime and Crime against Humanity and corroborated the position that genocide was occurred in Darfur by affirming that the crimes committed in Darfur were tantamount to genocide.[487]

The African Union assembly of heads of states and governments in July 2004 addressing the situation of human rights in Darfur noted that the crisis in Darfur is grave, which unacceptable level of death, human suffering and destructions of homes and infrastructure; the situation however cannot be defined as genocide.[488] The union additionally stated that it could only determine the situation in Darfur after conducting a full investigation.[489]But the full investigation envisaged by the AU has not been conducted yet.

Despite the obvious atrocities, the U.N. has refused to label the crisis as genocide, finding that the requirements for a prima facie case of genocide, as set forth in Article II of the Convention, are not met in Darfur.[490] The Convention requires that any of the genocidal acts must be done with the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[491] Though the Arab Janjaweed are killing members of three large non-Arab African tribes, the U.N. has determined that the non-Arab victims as a

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[486] Ibid

[487] European parliament Resolution on the Darfur region in the Sudan , Humanitarian situation in Sudan B6-0065/2004,Strasbourg,Austria, 16 September 2004

[488] AU decision on Darfur ,Assembly of the African Union ,3rd ordinary session ,6-8 July Addis Ababa, Ethiopia (assembly/AU/dec.54(3))

[489] Ibid

[490] International Commission of Inquiry on Darfur; Report of the International Commission of Inquiry on Darfur to the United Nation Secretary General 160-61 (2005), available at http://www.un.org/News/dh/sudan/com_inq_o.pdf .p.4

[491] Genocide Convention, supra note 9, Art. 2.

whole do not appear to make up a clearly distinct national, ethnic, racial, or religious group.[492]But, the U.N. admits the crimes in Darfur are "no less serious and heinous" than crimes of genocide.[493]

B. Arbitrariness in Finding a Protected Group: Rwanda v. Sudan

The U.N. Commission of Inquiry failed to characterize the Fur, Masaalit, and Zaghawa tribes as distinct ethnic groups and for this reason did not find Genocide in committed Sudan. In Rwanda, however, the Hutu and Tutsi tribes were determined to be separate ethnic groups by the U.N. tribunal,[494] even though they all share the same territory, speak the same language, and have the same racial background.[495] Examining Rwanda's history, furthermore, shows that this finding was wholly arbitrary. In 1931, the groups were separated by their Belgian occupiers and given identification cards.[496] It was primarily this separation and identification, not significant racial or cultural differences, which allowed the ICTR to determine that the Tutsis were a distinct ethnic group and thus that genocide had occurred. It is perhaps because no formal division has occurred in Sudan that the Arab and non-Arab people are not considered separate ethnic groups.[497] In Rwanda, it was only an arbitrary division of the native population and the issuance of identification cards by an occupying power that allowed the ICTR to find three separate groups and conclude that genocide had occurred.

The non-Arab Africans who are the primary victims of the Janjaweed does not have identification cards to separate them from other Sudanese people, but they possess characteristics that make them a distinct ethnic group under the Genocide Convention. Though both the attackers and the victims are often Muslims, the Janjaweed are Arabs, while the villagers in Western Sudan, who are targeted by the Janjaweed, are non-Arab Africans; the differentiation between the two groups generally being the Arabic

[492] Samantha Power, Dying in Darfur, new York, Aug. 30, 2004,p 58
[493] Id., P. 4
[494] Kayishema, supra note 92, para 34.
[495] Ibid
[496] Id., para35.
[497] Toby N. Jack, Comment; Sudan's Genocide: Punishment Before Prevention, Pensalvinia International Law Review 707, 714 Vol.24, (2006).p 714

language.[498] Following the ICTR's decision, language can qualify as an ethnic identifier, establishing a prima facie case of genocide and meaning that genocide *per se* was occurred in Darfur.

There is strong evidence that genocide has indeed occurred in Darfur. That the *actus reus* criteria listed in the Convention found in Article II, subsections (a) through (e) are met in Darfur is not disputed by the U.N. or other observers. Despite the U.N. commission's findings to the contrary, the *mens rea* requirement is also met because members of racial and ethnic groups have been intentionally targeted by the Sudanese government and the Janjaweed. Non-Arab and darker-skinned African civilians in Darfur have been targeted by the Janjaweed. Meanwhile, the lighter-skinned Arab civilians have been left largely unharmed by the violence. It is this kind of subjective targeting of a specific group that satisfies the *mens rea* requirement of Article II of the U.N.'s Genocide Convention.

Luck of the understanding of the preceding decision of the International Criminal Tribunal for Rwanda as a precedent and the inadequacy of the Convention on the definition of protected group clearly leave a room for dictators to suppress the human right as they wish.

5.3 The Prospect to Expand the Genocide Convention

The conceptual gap relating to genocide is indeed a problem, both in theory and in practice, because it detracts from the real challenge facing as: Preventing and stopping genocide. What, then, can be done about the situation? Many have called for a revision of the Genocide Convention, for about as many different reasons as there are commentators. Examples such as the Cambodian atrocities and to a less extent the Darfur atrocities have led many people to argue for a change to the Genocide Convention in order to broaden its scope. Such arguments range from a complete overhaul of the Convention, to a wider use of interpretation and the use of Customary International Law. The following few pages will devote to show some of these arguments and explore possibilities for reform.

[498] Id., P. 713

5.3.1 The Use of *Jus Cogens*

The use of *jus cogens* to widen the Genocide Convention has been proposed by a number of international scholars and advocates. This approach argues that the Customary International prohibition of genocide is wider than the Convention approach. As Schaack argues, while the Genocide Convention establishes a particular regime to prohibit genocide, it does not represent the entirety of International Law on the subject.[499] Rather, the *jus cogens* prohibition of genocide, which predates the drafting of the genocide Convention, provides broader protection than the Convention itself. Political compromises, such as those that occurred during the drafting of the Genocide Convention, cannot limit *jus cogens* norms.[500]

Furthermore, this approach argues that the jus cogens norms are in fact more superior to treaty law, in accordance with the Vienna Convention,[501] and thus are binding and non-derogable.[502] Instruments such as Resolution 96(I),[503] point out the wider acceptance of political genocide in *jus cogens*: 'the full scope of the *jus cogens* prohibition finds expression in the original and unanimous General Assembly resolution condemning the crime of genocide.'[504] Proponents of this argument also point to national legislations that contain the inclusion of political groups in the definition of genocide.[505] Finally, they also point to the 'popular understanding' of the term genocide.[506]

Such an argument may be correct, however, Customary International Law is a very grey area. While this argument may be sound, it has yet been tested in an International Court. Such a debate is needed in order to clarify the position of *jus cogens* in regard to genocide. Possibly due to the prevalence of the Convention, prosecution under Customary International Law has largely been ignored.

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[499] Beth van Schaack, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot' The Yale Law Journal Vol.106 No. 2259, (1997), p 2262
[500] Ibid
[501] Vienna Convention on the Law of Treaties, supra note 11, p.344.
[502] Id,, p. 2273.
[503] General Assembly Resolution 96(I), supra note 28
[504] Schaack, supra note 499, p.2280
[505] Id,, p. 2282.
[506] Id,,p. 2284

5.3.2 Defining the protected groups on case by case approach

Defining the group(s) protected by the 1948 Genocide Convention can occur from two perspectives, or a combination of both. An objective approach gives definite criteria for the terms listed in the Convention. A subjective approach takes into account the perspective of the community, the victim(s) and/or the accused. The problem that arises is that under the Convention, there is no guidance as to whether membership of a group is an objective factor or if perception of membership is crucial.[507]

5.3.2.1 Objective Perspective

In Akayesu, the ICTR Trial Chamber undertook the monumental task of defining the four groups listed in the Convention.[508] The purpose was to create objective criteria through which a protected group could be identified. The Chamber sought to give each term its own definition: a "national group" being "a collection of people who are perceived to share a legal bind of common citizenship, coupled with reciprocity of rights and duties";[509] an "ethnic group" as a "group whose members share a common language or culture";[510] a "racial group" as a group "based on hereditary physical traits often identified with a Geographical region, irrespective of linguistic, cultural, national or religious factors";[511] and a "religious group" as a group "whose members share the same religion, denomination or mode of worship."[512] Interestingly, "national group" has a subjective element included; the other three terms are clearly defined in objective terms, allowing groups to be easily identified as either belonging to the Convention's protected groups, or not.

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An objective analysis has one very important benefit: groups are easily identified by set criteria. An analysis will not have to inquire into the same depth of Anthropological and Sociological data that is required with a subjective approach.

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[507] Ilias Bantekas & Susan Nash, International Criminal Law, 3rd ed. Cavendish UK: Routledge, (2007), P. 145.
[508] Prosecutor v. Akayesu, supra note 76,paras 521-515
[509] Id., para. 512
[510] Id., para. 513
[511] Id., para. 514
[512] Id., para. 515

Objective criteria create greater stability, consistency, and predictability in the application of the Genocide Convention. One major concern regarding a purely objective approach is its lack of flexibility, as was clearly demonstrated in Akayesu. The objective criteria that the Trial Chamber set out did not cover the Tutsi under any of the enumerated heads, even though the people of Rwanda recognized the Hutu and Tutsi as being distinctive ethnic groups. The fix that was proposed was to give an "expansive interpretation of the expression."[513]

The objective approach was unable to deal with the realities of the community by giving definitive criteria to be met for protection. Even more difficulty arises in trying to establish the objective criteria that should be used for each of the terms. There is no consensus internationally on the definition of the terms, or on how each group should be measured against the term.[514] Although the Trial Chamber in Akayesu did a systematic analysis of the definitions of the terms, at least one understanding of the word "ethnical" was not included the local, Rwandan understanding. In Jelisic, the ICTY stated, to attempt to define a national, ethnical or racial group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorization.[515]

An absence of this understanding proved to be a significant hurdle for the Akayesu Chamber. Usages of certain language in International Treaties may always be difficult, but in a case such as this, a limited, objective analysis could prove fatal to the Convention as a whole. An objective perspective does not adequately suffice in establishing the special intent of genocide.

5.3.2.2 Subjective Perspective

As have been discussed in the previous chapter, in Ruzindana, a different ICTR trial chamber adopted a purely subjective approach, noting that an ethnic group could be "a

[513] William Schabas, supra note 135, p. 168.
[514] Nin Jorgensen, supra note 248, p. 304.
[515] Prosecutor v. Goran Jelisic supra note 264, para.235.

group identified as such by others, including perpetrators of the crimes."[516] Furthermore, because of the subjective approach, the Chamber was able to find that the Tutsi were an ethnic group, based on the use of official identity cards identifying them as such.[517] The use of a subjective approach manages some of the difficulties arising out of the objective criteria; importantly, it enables the use of local understandings of the terms. In fact, the four listed terms require a degree of subjectivity because their meaning is inherently determined in a social context.

There are a number of critics that exist within the subjective approach. The most important when it comes to determining the protected groups is whether the subjective analysis should be done from the perspective of the victim, the community, the perpetrator, or a combination of these. In Bagilishema, the perpetrator's appeared to be the most important perspective: "if a victim was perceived by a perpetrator as belonging to a protected group, the victim should be considered by the Chamber as a member of the protected group, for the purposes of genocide."[518] At some level, this makes sense, as the special intent required must be that of the perpetrator.

The ICTY has also advanced this reasoning in Jelisic.[519]It is important to take into account the perspectives of the individual victim of the act, the group victim, and the community as a whole, as well. As was stated from the outset of the ICTR's existence, reconciliation is one of the key goals of the Tribunal. Recognizing the perspective of the victims and the community will assist in the healing process. Allowing the victims and the communities to play a role in group identification is as important as the perpetrator's perspective, but for very different reasons.

In practice, the subjective approach may come down to using all three of the perspectives identified. Cassese has created a two-step analysis here: first, were the people treated as belonging to one of the protected groups (community and perpetrator perspective); and second, did they consider themselves as belonging to one of the protected groups (victim

[516] Prosecutor v. Clement Kayishema supra note 92, para. 91
[517] Id., para. 523.
[518] Prosecutor v. Bagilishema, supra note 92, para. 65
[519] Prosecutor v. Goran Jelisic supra note 264, para. 70 (It is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community.)

perspective).[520] At the ICTR, this approach was identified in Rutaganda as being appropriate in some instances. The Chamber notes that for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group.[521]

There are also concerns with a purely subjective approach. Allowing individuals to determine the protected groups from a subjective perspective has the potential to extend the protection to abstract groups.[522] The drafters of the Convention intended to protect a certain type of group. Although there has been much discussion about what this group includes, it is clear that it is not boundless. Allowing a purely subjective approach could create a limitless number of protected groups. Schabas states, "The flaw is allowing, at least in theory, genocide to be committed against a group that does not have any real objective existence."[523] Kreb has gone even further, stating that, a subjective approach would not only circumvent the drafters' decision to confine the protection of certain groups, but would convert the crime of genocide to an unspecific crime of group destruction based on a discriminatory motive.[524]

Another criticism is that subjective analysis allows the perpetrator to define its own crime.[525] The law cannot permit a crime to be defined by offender alone. However, including the perspective of the community and the victim would show some consensus on the existence of a protected group.

A subjective analysis of whether a group is protected allows for the social, cultural, and political realities of a community to be considered. It also creates some difficulties in determining the groups intended to be protected by the 1948 Genocide Convention. By

[520] The Crime of Genocide, GA Res. 96(I), supra note 28
[521] Prosecutor v. George Rutaganda, supra note 21, para. 59
[522] George Mugwanya, The Crime of Genocide at International Law: Appraising the Contribution of the UN Tribunal for Rwanda, London: Cameron May Ltd, (2007) p. 73.
[523] Schabas, supra note 33, p. 10
[524] Claus Kreb, The Crime of Genocide Under International Law, International Criminal Law. Review 461, Vol.6, (2006) p. 427
[525] L.J. van den Herik, The Contribution of the Rwanda Tribunal to the Development of International Law, Netherlands: Martinus Nijhoff Publishers, (2005) P. 121.

including some element of a subjective analysis, though, it ensures a more pragmatic perspective of the crime.

5.3.2.3 Combined Perspective

Mugwanya argues that, when faced with the reality of present day conflicts where there is an interrelationship and overlap between many of the terms, a failure to consider both objective and subjective approaches could create absurd results, as could have arguably happened in Rwanda.[526] The objective criteria help to define the groups from the international perspective, while the subjective component recognizes that membership is often a product of local social or political construction.

The balance to be met between the two approaches is complicated. Van den Herik sees the objective approach as being purely complimentary.[527] Jorgensen, on the other hand, argues that the group must be defined objectively before delving into the subjective, because of a risk of getting lost amongst the subjective elements.[528] Reaching this balance is the key to creating an effective analysis. One approach is to proceed on a case-by-case basis, taking into account the evidence offered, and the context of the community, both culturally and politically. This approach does not create a law that is predictable in its application, but it is probably the best approach in order to respect the purpose and objective of the Convention. Each analysis should include both modes, allowing the local perspective to work alongside international perspectives.

The ICTR has generally followed a combination approach in determining the protected groups. The approach taken varies with the case, as well as with the individual Trial Chamber. In general though, the Trial Chambers have adopted a blending of the two from the outset of the analysis. The analysis starts from a reference to the objective particulars, moving on to the subjective perspective, most commonly of the perpetrator.[529]

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[526] George Mugwanya, supra note 522, p. 84

[527] L.J. van den Herik, The Contribution of the Rwanda Tribunal to the Development of International Law Netherlands: Martinus Nijhoff Publishers, (2005) p. 135

[528] Prosecutor v. Radislav Krstic, supra note 19, para. 553

[529] Robert Cryer, Introduction to International Criminal Law and Procedure, Cambridge: Cambridge University Press, (2007), P. 173.

However, there are some criticisms. First is the obvious exclusion in the subjective aspect of the experience of the community as a whole and the group victim, as well as the individual victim. In Kajelijeli, the Trial Chamber expressly stated that the victims either had to belong to the group objectively, or the perpetrator had to believe that the victims belonged to the group that he targeted.[530] Further, a case-by-case analysis could create a requirement for excessive, repetitive analysis. If it is the same group of people, once they have been identified as a protected group at that time, should they not continue to be a protected group for the purposes of the Convention? It is important to prove that the perpetrator targeted the individual victims because of their membership in that group, but there is no need to reprove that the group is a protected group for every case.

Although there is concern surrounding each of the perspectives, the combination approach allows for the benefits to most heavily outweigh the concerns. The best balance is reached if the two are used from the beginning of the analysis in a complementary way. Balancing the objective and subjective perspectives creates a more holistic understanding of the protected groups. The objective respects the intentions of the drafters of the Convention, while the subjective respects the experience and cultural understandings of the community.

5.3.3 Adopting Genocide provisions in a Domestic Legislation

One option for working to change the definition of genocide is to legislate nationally.[531] If enough countries pass legislation that includes economic and social, cultural, political and other groups as a protected group, such state practice could eventually blossom into Customary International Law.[532]

Moreover, if countries implement an expanded domestic definition of genocide, the restrictive international interpretation will not force local courts to use torturous reasoning to conclude that genocide occurred if criminal actors target a political group.[533]

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[530] Prosecutor v. Juvenal Kajelijeli, ICTR-98-44A, Judgment (1 December 2003) at para. 813

[531] Schabas, supra note 33, p 141-142

[532] Jeffret Dunoff.et.al., International Law; Norms, Actors, Process ,2nd ed,. Minnesota Law Reviw.org(2006), p 79-81

[533] Schabas, supra note 33, p. 141 (referencing Ethiopia as a Country that prosecuted the Crime of Genocide against a Political Group, based on the Country's Criminal code).

Multiple countries have already adopted such legislation.[534] Nonetheless, not nearly enough countries have such legislation that one could claim a new custom has formed.[535]

5.3.4 Amending the Genocide Convention

The other forwarding way is a wider Genocide Convention call for new definitions amended onto the Convention in order to expand the prohibition. The most extreme arguments argue for the Convention to apply to 'any and all groups'.[536] Drost argues that the Convention on genocide cannot contribute to the protection of certain described minorities when it is limited to particular defined groups.[537] 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.[538]

Others have argued that the purpose of the Convention is to stir up Humanitarian Intervention.[539] Such arguments point to the failure of the International Community to Intervene in Rwanda and Darfur, because of the lack of an early consensus of Genocide. As Straus argues, 'So far, the convention has proven weak. Having been invoked, it did not contrary to expectations electrify international efforts to intervene in Sudan.'[540]

Indeed, the Genocide Convention was envisioned as a tool for humanitarian intervention. As Lemkin asserted, 'By declaring genocide a crime under international law and by making it a problem of international concern, the right of intervention on behalf of minorities slated for destruction has been established.'[541]

However, some argues that as International Criminal Law now has a number of other substantive legal mechanisms, there is less need for every conflict to be labeled as

[534] Ibid. (Recognizing that the penal codes of Ethiopia, Bangladesh, Panama, Costa Rica, Peru, Slovenia, and Lithuania all include the targeting of political groups in their Domestic Legislation punishing Genocide.)
[535] Ibid
[536] Schabas, supra note 33, p.118
[537] Id., p. 122
[538] Ibid
[539] Scott Straus, Darfur and the Genocide Debate, (2008) 84 Foreign Affairs Available at users.polisci.wisc.edu/Straus%20CV%207%2008.pdf ,p.123
[540] Ibid
[541] Lemkin, supra note 34, p. 150.

genocide in order to call for international intervention. Furthermore, on a moral level, there should be no less hesitation to intervene simply because the victims being attacked do not constitute a protected group under the Convention. Even if a political, gender, age, disability or occupational group is being persecuted, the international community should not simply stand by because it does not meet the Genocide Convention. The Genocide Convention is no longer the only legal obligation for an international community to intervene, and thus shouldn't be extended for the sake of political pressure.

Contrary to the above argument a number of Academicians and Scholars insist the Genocide Convention to be expanded even by providing the proposed elements to be included. The current formulation of the definition of Genocide, in both the Genocide Convention of 1948 and the ICC's Rome Statute of 1998, reads: '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.'[542]

Larry May first proposal is to change the end of the definition so that it now reads: *"Genocide" means any of the following acts committed with intent to destroy, in whole or in part, a group,* ***such as a national, ethnical, racial or religious group, as such.***[543] Such a change will allow for other groups that are much like the four originally listed types of groups also to be the subject of genocidal harms that can be redressed in International Law.

The second change is to add a clause to indicate what the four exemplary cases of groups have in common. This is a much harder task than the first, but he provide a possible construction, as follows: *"Genocide" means any of the following acts committed with intent to destroy, in whole or in part****, a group that is relatively stable and significant for the identity of its members, such as a national, ethnical, racial or religious group, as such.***[544]Of course, the term "relatively" is meant to give some latitude here, and would actually be needed to make sense of all of the original categories with the possible

[542] Rome Statute, supra note 103, Art. 6.
[543] Larry May, Genocide: A Normative Account, Cambridge: Cambridge University Press,2010, p.212
[544] Ibid

exception of racial groups, because the others can be changed, just not easily in most cases.

Given the second change, it is possible that the third change, meant to indicate what is ruled out, may not be needed because groups that lack stability or significance are also clearly ruled out. On the supposition that a bit more guidance is needed, however, he offer the following third change: "*Genocide" means any of the following acts committed with intent to destroy, in whole or in part**, a publicly recognized group that is relatively stable and significant for the identity of its members, such as a national, ethnical, racial or religious group, as such.***[545]

Practically in the Rwandan case, the issuing of identity cards by the government to those who were Tutsis would seemingly also meet this condition because the identity cards meet the publicity condition. Otherwise, that group would not be a possible subject of genocide.

Putting his three proposed to change the existing definition and elements now to read: ***"Genocide" means any of the following acts committed with intent to destroy, in whole or in part, a publicly recognized group that is relatively stable and significant for the identity of its members, such as a national, ethnical, racial or religious group, as such***.[546]

Finally this chapter have been discussed the critics against the protected group in Genocide Convention and the prospects which include understanding the definition in the broader sense on the basis of jus cogens or incorporating the domestic legislations or applying the subjective and objective approach that made by ICTY and ICTR or by way of redefining the definition of Genocide Convention will have a broad definition so that, it will universal applicable without any controversy.

Furthermore, the writer have explored different conceptual and normative issues in how to identify groups that can be the subject of genocidal harm and that can potentially be redressed in International Law. Also, I reflect the practical proposal attempted by various

[545] Ibid
[546] Ibid

scholars on how to change the identity conditions so that those conditions better reflect careful conceptual and normative thinking about these matters.

By making a comparison on the above alternatives prospective for the future application of the Genocide Convention on universally acceptable understanding by the world community, the write provide a conclusion and possible recommendation in the subsequent chapter.

Chapter Six

Conclusion and Recommendations

In this concluding chapter attempts have been made to draw on the overall points of discussion as conclusions and the writer's final view on the research theme forwarded as recommendations.

6.1 Conclusions

The Genocide Convention was promulgated in the aftermath of World War II. The international community was appalled by the Nazi policy of extermination of "inferior" groups of people. The word genocide was created during the war to cover these policies and acts committed by the Germans. After the war genocide was defined in the Genocide Convention of 1948. The Convention's article II defines genocide as physical destruction of national, ethnical, racial or religious groups in whole or in part. The Genocide Convention also established the criminal responsibility of individuals committing genocide in time of peace. This was already recognized in time of war through the Nuremberg Principles.

The definition of genocide in the Genocide Convention is also most likely identical with the definition of genocide in the Customary International Law, which also according to the ICJ it is an International Core Crime and prohibited under International Law.

The protected groups are hard to separate from each other and all four of them have common features. One is that they are, more or less, stable and permanent groups. National and ethnical groups are particularly hard to separate from each other since both are mostly defined through a common language, culture or way of life. Racial groups are often described as having special inherited physical traits whereas religious groups are defined by their theistic, non-theistic or atheistic belief.

The definition has been strongly criticized and especially the scope of the protected groups has been not covered some of the major post-war mass murders. And also the four enumerated groups are hard to define clearly. There are no generally accepted definitions in international law of the groups and this leads to problems when the Convention is to be

applied in specific cases. This is reflected in the case law of the two UN tribunals, the ICTY and the ICTR. The statutes of the tribunals have the exact same definition of genocide as the Genocide Convention.

The ICTR had difficulties fitting the Tutsi into one of the protected groups, whereas the ICTY had an easier task to distinguish the Bosnian Muslims as a protected group under the Genocide Convention. Several Trial Chambers have so far interpreted the protected groups' definition differently and there are three clearly distinguishable approaches in the case law: the objective, the subjective and the combined or holistic approach.

Hence, in this paper, I have attempted to clarify the inadequacies of the current definition of genocide under the 1948 convention, and in the process, reveal novice observations that may provide some insight into the field.

Words can be both powerful and weak at the same time. It is the interpretation and application of words that determine which they will be. It is my opinion that the words used in the Convention's definition do not have the ability to be powerfully interpreted by the international community because they lack the force necessary to truly prosecute perpetrators of genocide in so many cases. As mentioned before the Tribunals of Yugoslavia and Rwanda ruled unfavorably that specific intent must be determined for each individual in order for them to be convicted of the crime, an example of the crucial nature of wording.

However, a surprising interpretation was offered by the Rwanda Tribunal's trial chamber, which asserted the list of groups in the Convention's definition was not exclusive insofar as the Conventions' drafters sought to protect any stable and permanent group.

The question arises whether or not future Tribunals or Trials of the International Criminal Court would interpret the Convention's definition similarly and exercise the power necessary to do so. Whether by a formal process or a continued commitment to broader interpretation of the words of the Convention's definition, a change must be made.

Why is the Prevention and Prosecution of Genocide important for our global society today? First, it is important to remember that the Convention's definition is more than

five decades old. In that time, the continuously changing political and cultural sensitivities of nations have evolved in an increasingly violent manner. The drafters of the Convention's definition contributed greatly to the world by demanding that protection against genocide be at least an option in the international community. It is now time to realize that the definition must be expanded to adequately meet the needs of those who suffer immensely at the hands of those who order and carry out mass murders.

Israel W. Charny discusses what it means to care for others outside of loyalty to one's own tribe, religion, ethnic identification, and nation. He expresses a belief that is acutely aligned with the perspective I have gathered in the process of this study on genocide. "It is entirely natural to care the most deeply about one's self and one's own people, and to care more intensely for some other peoples with whom one feels a more immediate kinship, but ultimately the challenge of human development, both for the benefit of individual mental health and happiness, and for the benefit of humanity, is for more people to care about all of human life."[547]

6.2 Recommendations

- The Genocide Convention as far as the definition of protected group is concerned should be reviewed to include a broader definition; the role of the victims in perpetrating genocide as well as the role of non state actors. This is necessary because in practice, genocide is not always a victor-verses-victim act, for some of the victims who have their way may also turn out to be genocide actors, for instance under the guise of self-defense. Accordingly, genocide could be mutual, and victims of genocide could be on both sides of the divide. Each incident, should, therefore, be considered on a case-by-case basis.

  Here I propose when review have been made to redefine the protected group rather than including some group like Political ,Social and Economic ,Sexual or Cultural group in the enumerated group in exhaustive way it will be better to provide the objective set up to include any vulnerable groups which need

[547] Samuel Totten, William S. Parson, Israel W. Charny, Century of Genocide, Garland Publishing, (1997), p.,29

protection under the Genocide Convention. For this it is preferable to use the third proposed definition of Larry which reads as ***"Genocide" means any of the following acts committed with intent to destroy, in whole or in part, a publicly recognized group that is relatively stable and significant for the identity of its members, such as a national, ethnical, racial or religious group, as such***.

- The ad hoc International criminal tribunals such as ICTR and ICTY they showed significant flexibility in their interpretation of the Genocide Convention. This is positive so far that the flexibility allows the tribunals to adapt to social and political changes and allow them to give protection to groups who do not literally fit into the four enumerated groups in the Convention. To the some ambiguity and inconsistency of the interpretation of the definition of genocide have been practiced. The appearance of confusion and inconsistency among the different trial chambers could undermine the confidence of the international community in the tribunals as competent interpreters of international criminal law. Inconsistent decisions could possibly make the tribunals appear arbitrary, incoherent and/or unfair.

  Therefore, alternatively by setting aside the critics on the varied way of interpretation made by the above mentioned tribunals, it will be the better way out to apply both of the current definition and an interpretation of it where the definition is applied in context of each case as practiced in a few of International Criminal Tribunals. It is the best method to keep the strong position of the definition of genocide in international law. This would not risk diluting the definition of genocide and would at the same time avoid the effects of a too rigid interpretation of the four enumerated groups.

- The Lack of accepted and agreed definitions in International Law of the enumerated protected groups in the convention leads to problems in specific cases. Several Trial Chambers have so far interpreted the protected groups' definition differently. Hence for existing enumerated groups there has to be a definition to each of them since they are overlapping on each other in the very nature of their meaning.

- Alternatively Countries should endeavour to enact Anti-genocide legislation and set up national courts or traditional legal mechanisms (where none already exists) to try alleged perpetrators of genocide. Therefore, other countries should take a cue from those ones who have national courts to try such offences. Under normal circumstances, a trial in a national court takes lesser time and in less expensive than that in an international court and tribunal.

- The law of genocide, like most other laws designed to define, preserve, and protect human rights, provides ample space for the judges tasked with applying it to exercise the interpretive freedom necessary to make the law locally meaningful. Thus, in their capacity as a legal interpreter, judges can apply the law of genocide like any other human rights principle so that it makes sense within the cultural norms, values, and practices of local communities. Treating the law of Genocide as a domestic law it enables the judges to acknowledge, through a practice divorced from political considerations, the changes to which the language of the law will inevitably be subjected in the transplant process. Thus, the judge-as legal interpreter can at once tailor the law of genocide to fit the local cultural framework and at the same time retain the ideas embedded in the Genocide Convention.

- The mental element which required special intent as we have seen in practice it is too difficult to proof the existence of the alleged crime has been committed. Hence, to the extent to prosecute the genocide crime in a proper way the Convention has to review in a way that the requirements of special intent should have some indicative element within it or by looking a procedural aspect provide permission to the evidence which contains the circumstance to be admissible.

Generally, the diverse understanding of international law from the academic community on the topic of genocide seems to be widening. As the gap continues to grow, more and more genocide atrocities will slip through. In order for the world to respect the human right to life, liberty and security of the person, regardless of distinctions such as race,

color, sex, language, religion, political opinion, national origin, property, birth or other status, the definition of genocide must be expanded.

Establishing and adhering to a universally accepted and expanded definition of genocide is a formidable task, but attempting to do so is essential for future justice in our global society. The urgency of this task is founded on the inexcusable and unnecessary loss of life that results from our serious neglect. Serious neglect of instances of genocide is a result of inaction at the forefront of conflict. Inaction at the forefront of conflict is the result of a current definition rife with inadequacies and the subject of so much debate.

If the international community truly believes that the right to life is a right afforded to every human being, it can no longer ignore governments, regimes, and individuals that seek to violate that right for the purpose of their own agendas. Genocide will continue in our world as long as we allow the perpetrators of these crimes to sidestep the consequences of their actions. In order to reverse the familiar pattern of serious neglect, inaction, and most importantly, loss of life, revision of the current definition is an absolute necessity. These crimes must not continue to go unpunished.

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