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A Study of the Duty to Prevent Genocide in the Context of International Law

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Abstract

This thesis will attempt to uncover what the law surrounding the prevention of genocide amounts to. The provisions of Genocide Convention and duties under customary law will be examined in detail. It will be argued that the law to prevent genocide only requires a territorial basis of jurisdiction, but this does envelop some practical means of domestic prevention, as well as criminal law and civil law elements. Although beneficial, universal jurisdiction does not exist for the crime of genocide. States do however have the opportunity to take action to prevent genocide in other countries, but that is only if the offending State allows for it or non military action is invoked. Early warning systems and State monitoring may be the best means to prevent genocide. Forcible action may also be taken, but only with Security Council authorisation. The United Nations is in a favourable position to help prevent genocide and it has the option, but again no duty, to do so. Resolutions, peace keeping forces and diplomatic measures are effective means which can be employed by the United Nations to prevent genocide. These measures for prevention will then be examined in relation to the current situation in Darfur as well as determining whether there is sufficient evidence to assert that genocide is occurring there.

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Introduction

It is the purpose of this thesis to uncover what the duties on States are to prevent genocide. Genocidal episodes continue to recur and after every atrocity States assert that they will ensure that it will never happen again. This was the attitude after World War Two, when the Genocide Convention was drafted, then again after the killings in Cambodia, Yugoslavia and in Rwanda. Yet these atrocities happen again and again and they are not adequately prevented.

It is submitted that States will continue to not do enough to prevent genocide, unless they know exactly what their legal duties of prevention entail; if their obligations are set out clearly then there is little room for them to avoid their duties. There is a lot of literature surrounding the prevention of genocide, with many scholars drawing different conclusions about why genocide occurs and what adequate prevention encompasses. This thesis will attempt to uncover what the duty to prevent genocide involves today and the problems associated with that duty. Necessary analysis will be given to the differing theories on the causes and prevention of genocide, at the same time suggesting methods which can be employed by States to abide by their legal duty to prevent. This will separate the legal obligations from the moral, and although the moral obligations may seem more empowering, it is necessary to remember that they cannot be enforced. Linked to this, discussion will be given to what States can do to ensure other States adhere to their obligations to prevent genocide.

Any conclusions drawn will then be able to be tested against what is currently occurring in Darfur. Although the promise never to allow genocide to happen again

looms in the air, the response of States to Darfur has been somewhat limited. Chapter five will look at whether there is sufficient evidence to suggest that genocide is occurring in Darfur and whether the international community's response to what is going on there is inline with any obligations arising to prevent genocide.

Chapter one discusses in some detail the back ground to the Genocide Convention and the subsequent developments in the law of genocide. Now with two *ad hoc* tribunals and one permanent court able to try crimes of genocide, the law has come some way from 1943, at which part genocide was not yet defined.

Chapter two takes an in-depth look at the Conventions provisions and shows how the drafter's national interests played a fundamental role in weakening the prevention for genocide. The domestic jurisdiction given for genocide is evidence of this reluctance to put domestic sovereignty aside for the greater good of the prevention of genocide.

Chapter three discusses what the exact obligations are to prevent genocide. By breaking down the possible forms of jurisdiction onto six sections it is shown that national criminalisation plays an extremely influential role in preventing genocide and this is what is required by the Genocide Convention and through customary law. The tort of genocide is explained and so are the problems with the victims actually being able to receive their compensation. Chapter three shows further that although the obligations to prevent genocide may be territorially limited, they do require some practical steps to be taken to satisfy the States legal requirements. Of particular importance in this section is the recent ICJ Judgement in the *application of the*

genocide convention.¹ The ICJ in this case concluded that States must take measures to prevent genocide within their own territory. This judgement raises many questions in respect of what and how much action is required to satisfy the law relating to genocide. This shall be analysed further in chapter four. Further scrutiny is given to whether the obligations to prevent genocide apply not only to the territory of the single State a party to the Convention, but whether the duty applies to all States parties to the Convention, to prevent genocide in each others States. Although this is what the ICC has adopted in its genocide legislation and what has been advocated by some judges, this is not what was intended for the Genocide Convention. This chapter then goes on to discuss the customary status of genocide, showing that is clearly established, but again territorially limited. The last two section's of this chapter look at the possibility of universal jurisdiction for genocide. It is concluded that an *erga omnes* right to prevent genocide is possible, although universal jurisdiction would be favourable for the prevention of genocide, the current *opinion juris* and State practice does not allow universal jurisdiction at present. What can be derived from the Genocide Convention is that all States parties to the Convention are under an obligation to prevent, through a territorial basis of jurisdiction and in a practical way, with a right to take non military action to help prevent outside of the States own territory.

Chapter four discusses the practical duties which States must take in order to satisfy their treaty and customary law obligations. This incorporates the recent judgement of the ICJ, by which States parties to the genocide Convention were authoritatively told

¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 26 Feb 2007, at <http://www.icj-cij.org/docket/files/91/13685.pdf>, accessed on 5 May 2007.

that all practical measures must be taken to prevent genocide within their territory.²

All States must prevent genocide nationally in a practical way, by providing monitoring, education and warnings. This chapter then goes on to discuss the options available for action by the non-offending State, if the offending State allows peaceful intervention. The main methods able to be employed are State monitoring and early warning. The duties of the United Nations are expounded upon and finally the right to intervene militarily is discussed. The context of section four is that military intervention should be a last resort, but one which can be justified given the necessary conditions and legal specificities.

Chapter five puts any conclusions made in the previous chapters into the practical realm. By analysing the situation in Darfur it is clear to see what needs to be done to prevent genocide. The question is whether what needs to be done to prevent genocide corresponds to what is required to be done legally to prevent.

This thesis analyses the legal duties on States to prevent genocide which flow from the Genocide Convention and from customary international law. Genocide is an exceptionally atrocious crime and as such unanimous opinion is that it should be heavily regulated and punished. This goal however, often clouds the reality of the current legal situation and the law is sometimes stretched beyond its reasonable limits.

When interpreting the law relating to genocide it is useful to remember that international law is not static, but rather an evolving practice of standards and directives which must be interpreted and applied in a manner suitable to that era. This must not blind a realistic interpretation of what the law actually is, but it does allow

² *Ibid.*

the possibility that in the future the prevention of genocide may amount to more than what it does at present.

Chapter One: Background to the Law against Genocide

I. Introduction

This thesis has the aim to uncover the legal obligations to prevent genocide. The Genocide Convention, the customary norm of genocide and the Statute of the ICC provide the primary legal obligations to prevent and punish genocide. The enforcement mechanism for the prevention of genocide is weak, but this does not mean there is no obligation to prevent the crime.

This chapter will focus on the background to the Genocide Convention and describe in detail the international law mechanisms which exist for the purpose of preventing genocide.

II. The Historical and Political Background to the Prevention of Genocide

Raphael Lemkin was the Polish Jew and international lawyer, who, in 1943, coined the term genocide. He derived the word genocide from the Greek word *genos*, referring to race or tribe, and the Latin word *cide*, referring to murder. Genocide was first used in a published text in 1944, in Lemkin's book "Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress"¹. Since then, it has had widespread acceptance and has been used in countless books

¹ 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. 670.



and journal articles, in addition to being incorporated into numerous international law instruments and national legislation.

Lemkin wrote that genocide was realised:

“...through a synchronized attack on different aspects of life of the captive peoples: in the political ...social ... cultural ... economic ...and biological [field] ...and in the field of physical existence...in the religious field... [and] in the field of morality...”²

He defined genocide as occurring in two stages: first, the destruction of the national pattern of the oppressed group; and second, the imposition of the national pattern of the oppressor.³ The way Lemkin described genocide as being realised, and how he defined the term, was to become the basis of the future legal definition and prohibition of genocide.

During the period leading up to the Second World War, Lemkin rallied support for the prevention of genocide.⁴ At the same time, an unofficial body, called the League of Nations Union (LNU), was meeting to discuss issues of international law. The LNU was making a determined attempt to solve the problems which were arising due to a lack of international mechanisms for the prosecution of crimes against humanity and war crimes. Prior to the Second World War national sovereignty took precedence over international law. The result being that any international instruments and intuitions which actually existed at that time were not able to confer any legal consequences on

² *Ibid*, pp. xi-xii.

³ *Ibid*.

⁴ Samantha Power, *A Problem From Hell: America and The Age of Genocide*, New York, Basic Books, 2002.

States. At the time it was hoped that the work of the LNU would change attitudes and develop the international legal system, in order to remedy those problems.

The LNU established the London International Assembly (LIA). This international body generated the necessary ideas and momentum to begin work on the international prosecution of war crimes and crimes against humanity. In addition, the LIA researched into the possibility of establishing an international criminal court, for the prosecution of crimes against humanity and war crimes.⁵

Although their research was valuable, it should be noted that the LIA and LNU were both non-governmental organisations, and so their output had no consequence beyond the moral. In addition, the LNU was at this time riddled with division and inaction as a world body, and as a consequence was largely ineffective. These divisions were born of political tensions (over the Japanese invasion of Manchuria, the Italian invasion of Abyssinia, and the Spanish Civil War) and this contributed the world's political divisions conspiring to prevent concerted action to eliminate genocide, until after the Second World War.

In the months and years following the Second World War attitudes modified and this provided the necessary political, legal, and moral environment to enact the genocide legislation, for which Lemkin had been advocating. On 1 January 1942, representatives of the 26 Allied nations fighting against the Axis Powers, met to pledge their support for the Atlantic Charter by signing the "Declaration by United

⁵ At this stage genocide was not classed as an international crime.

Nations”.⁶ The Moscow Declaration of 1 November 1943 promised international collaboration in the prosecution of the Nazi war criminals.⁷ The Governments of the Soviet Union, the United Kingdom, the United States and China, called for the early establishment of an international organisation to maintain peace and security. That goal was reaffirmed at the meeting of the leaders of the United States, the USSR, and the United Kingdom at Teheran on 1 December 1943.⁸

A big development in terms of international collaboration was taken with the establishment of the United Nations Commission for the Investigation of War Crimes.⁹ The Commission had no power to prosecute the war criminals, but it was able to investigate and report back to governments, who could take action to establish their own tribunals to prosecute those criminals. Further to this, the London Conference, which was held in the summer of 1945, established “The Agreement for The Prosecution and Punishment of Major War Criminals of the European Axis...” and created the “Charter of the Charter of the International Military Tribunal”.¹⁰ The International Military Tribunal (IMT) was born from this agreement.

Representatives from the Allied nations, and other countries, came together in a groundbreaking way from 21 September to 7 October 1944, when the first blueprint of the United Nations (UN) was prepared.¹¹ On 25 April 1945, the Charter of the

⁶ History of the United Nations, at <http://www.un.org/aboutun/unhistory/>, accessed on 19 August 2006.

⁷ The Moscow Declaration of 1943: “Declaration on German Atrocities”, Department of State Publication 2298, Washington: Government Printing Office, 1945, pp. 7-8.

⁸ History of the United Nations, *op cit*.

⁹ Now called The United Nations War Crimes Commission.

¹⁰ “The Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis and Establishing the Charter of the Charter of the International Military Tribunal”, 82 UNTS 279, 1951.

¹¹ This took place at a conference at Dumbarton Oaks in Washington, D.C.

United Nations was drawn up, and on 24 October 1945 was ratified and came into force.¹²

The terrible events of the Holocaust seemed to galvanise the world into action against genocide. During that period over five million Jews were systematically slaughtered as well as countless other minorities being targeted and eliminated.¹³ This was the first mechanised genocide, industrial in its inception and design, and executed in a fanatical way. Following the Second World War, the world was determined never to let atrocities such as the holocaust happen again and as such the prevention of genocide was high on the international agenda.

The Allied nations at this time were keen to talk in terms of international and European cooperation, and be seen to be taking positive steps towards peace.¹⁴

Although government officials were enthusiastic about signing many of these international instruments, perhaps at the time they did not anticipate the significant binding effect; they wanted to tie other governments to keeping peaceful promises, but were not so keen to bind themselves. Some of these agreements were reached at a surface level in an attempt to hide the divisions which were surfacing between the different Allied nations. By adopting international instruments they were forced to negotiate, compromise and work together.

¹² History of the United Nations, *supra* note 6.

¹³ Donald L Niewyk, *The Columbia Guide to the Holocaust*, Columbia University Press, 2000, p.45; Yad Vashem, *How many Jews were murdered in the Holocaust? How do we know? Do we have their names?*, at http://www1.yadvashem.org/about_holocaust/faqs/answers/faq_3.html, accessed 19 August 2006.

¹⁴ Perhaps because they wanted to achieve moral high-ground, or to absolve some of the guilt for not doing more to stop Hitler before the war.

It is critical to remember that the Allies (principally the UK, the USA and the USSR) were nothing more than allies of convenience. They entered the war against Nazi Germany at different points and for very different reasons, and this became apparent when they were trying to reach agreements.¹⁵ Before the war, the three countries displayed a lack of trust in one another, and the war altered none of these suspicions.

The correspondence between Roosevelt, Churchill and Stalin as the war turned in their favour in the close of 1942, highlighted that all three recognised that as the imperatives of war were now abridged, it would allow their countries to drift apart once again.¹⁶ This was one of the fundamental reasons for founding the United Nations; the major powers of the time did not trust one another so they considered that an international body (and its various attendant agreements) might help to regulate their differences. However, the absolute ascendancy of the USA after the war, the strength of the USSR in Eastern Europe, the Chinese Revolution in 1949 and the rapid (much more so than expected) decline in strength of Great Britain, ushered in a period of Realpolitik in which the superpowers turned to the UN when they thought it would serve their aims, but largely ignored it for the rest of the time.¹⁷

While the work on establishing an international genocide treaty was underway, the Nuremberg cases were brought to trial at the IMT between 1945 and 1949. The Major War Criminals Trial¹⁸ tried 24 of the most important captured Nazi leaders.

Defendants were charged with Conspiracy to Wage Aggressive War, Waging

¹⁵ Britain was at war from 1939, the Soviet Union became involved in June 1941 and the USA in December 1941.

¹⁶ Richard Overy, *Interrogations: The Nazi Elite in Allied Hands 1945*, Penguin Books, 2002.

¹⁷ *Ibid.*

¹⁸ Indictment of the International Military Tribunal, In the Case of the Trial of the Major War Criminals 1945, at <http://www.ess.uwe.ac.uk/genocide/indictment1.htm>, accessed on 21 April 2006.

Aggressive War, or Crimes against Peace, war crimes and Crimes against Humanity.¹⁹

Many of the guilty were sentenced to death or served life imprisonments. This was the first trial of its kind to take place.

The IMT heavily indicated that genocide had occurred against the Jews but the Chief Prosecutor was unsuccessful in his attempt to include genocide as a charge in the indictment at Nuremberg.²⁰ The defendants could not actually be indicted with genocide because it was not established as an international crime at that point; it was not until 12 January 1951 when the Genocide Convention came into force.

Nonetheless, a lot of reference was made to genocide during the trial, with the British Prosecutor using it in his summation, and the final judgement of the IMT describing in great detail what amounted to genocide, but without actually using the word.²¹

During the first 1946 General Assembly (GA) meeting, the delegates raised this issue and suggested the adoption of genocide as an international crime.²² The content of Resolution 96(1) was first proposed by Panama, Cuba and India who expressed frustration with the lack of power of the IMT to charge only crimes against humanity. This matter was referred to the Sixth Committee, which in turn produced Draft Resolution 96(1). The Resolution was prepared by the sub-committee, and on 11 December 1946 it was approved unanimously without any amendment.²³

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ William A. Schabas, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, 2000, p.38.

²² General Assembly Resolution 96(1), 55th Plenary Meeting, 11 December 1946, at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/033/47/IMG/NR003347.pdf?OpenElement>, accessed on 19 July 2006.

²³ *Ibid.*

Resolution 96(1) declared genocide as an international crime, which the civilised world condemned.²⁴ The resolution is not however a binding source of law, because the Assembly did not (and still does not) have the power under the United Nations Charter to take legally binding decisions (unless the views, resolutions and recommendations of the General Assembly make their way into international customary law).²⁵ The impact of Resolution 96(1) was however, substantial, and it has proven to be a very influential document. The International Court of Justice (ICJ) has expressed the opinion that although binding legal effects cannot be produced, GA Resolutions can provide important evidence for the establishment of *opinio juris* for customary law, and they do have some “normative value”.²⁶ It is widely accepted that Resolution 96(1) has made its way into customary international law and as a result of this all countries of the world must abide by its provisions.

As part of Resolution 96(1) the Economic and Social Council (ECOSOC) was given the mandate to draw up an international convention to prevent and punish genocide.²⁷ The ECOSOC turned to the Secretary General (SG) for advice on the substance of such a treaty. The SG sequentially called upon the Secretariat to draw up a draft convention.²⁸ Member States were asked to make comments on the substance of the Secretariat’s draft, but only seven made such replies.²⁹ At the Second Session of the GA³⁰, the Sixth Legal Committee was asked to comment on whether the ECOSOC

²⁴ See Appendix 1 for the text of Resolution 96(1).

²⁵ Charter of the United Nations, Chapter IV, at <http://www.un.org/aboutun/charter/>, accessed on 20 August 2006.

²⁶ *Legality of the Threat or Use of Nuclear Weapons (Request by the United Nations General Assembly for an Advisory Opinion)*, [1996] ICJ Reports 226, para. 70.

²⁷ “It is desirable that the Economic and Social Council should study the question of the preparatory work to be done for a convention on crimes against any particular race”. UN Doc. A/C.6/83.

²⁸ UN Doc. E/447; Draft Convention : UN Doc. A/AC.10/41; UN Doc. A/362, Appendix II.

²⁹ Schabas, *supra* note 21. p.56, footnote 34: Including France (UN Doc. A/401/Add. 3), China (UN Doc. E/AC. 25/9) and United States (UN Doc. A/401).

³⁰ September to December 1947, New York.

should continue drafting the convention, without further State comment.³¹ Taking on board its advice, the GA Resolution 180(II) entrusted the ECOSOC to continue with the drafting.³² The ECOSOC set up an *ad hoc* Committee,³³ which began work on another draft convention on genocide. The Secretariat and Committee both submitted draft conventions to the Secretary General, which detailed the specificities for the prevention and punishment of genocide.

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

The Genocide Convention was adopted by the United Nations General Assembly (GA) on 9 December 1948. Within three years, it had gained the required twenty ratifications for entry into force.³⁴ Now, in July 2007 there are 140 parties to the Genocide Convention and a further 41 signatories.³⁵ Those parties who have ratified and acceded to the Genocide Convention are bound under international law to abide by its provisions. As the Genocide Convention is a treaty instrument, in order for States to be bound by it, they must voluntarily become parties to it.³⁶

³¹ UN Doc.A/C.6/39-42.

³² General Assembly Resolution 180(II), 21 November 1947, at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/038/87/IMG/NR003887.pdf?OpenElement>, accessed on 20 August 2006.

³³ Consisting of China, France, Lebanon, Poland, the Soviet Union, the US and Venezuela; ESC Res. 117(VI). *ad hoc* Draft Convention at UN Doc. E/AC. 25/12; UN Doc. E/794.

³⁴ The Convention on the Prevention and Punishment of the Crime of Genocide, 1948, Article XIII, at <http://www.preventgenocide.org/law/convention/text.htm>, accessed on 20 August 2006.

³⁵ Office of the United Nations High Commissioner on Human Rights, at <http://www.ohchr.org/english/countries/ratification/1.htm>, accessed on 29 July 2007.

³⁶ This is a general principle of the law relating to treaties. For further information see Shaw, *International Law*, Cambridge University press, 2003.

Most of the Genocide Convention's text was a drafting compromise, resulting from State national interests playing a highly prominent role in their decision making. With the wartime coalitions dissolving, national State interests were once again at the forefront of decision making. Many States were uncomfortable with the relatively new concepts of human rights and international legal relations; these ideas contradicted the highly regarded norms of State sovereignty and domestic jurisdiction. The result is a somewhat weaker instrument for prevention, than the more recent human rights treaties.

Since the implementation of the Genocide Convention, genocide has still occurred across the globe, and the Convention has not done enough in the suppression of the crime. Genocide Watch, a non-governmental organisation (NGO), details 151 incidents of genocide, over 73 countries, occurring since 1945.³⁷ Although not all of these may be legally recognisable genocides, this does show that genocide is still occurring throughout the world.

In recent history, two situations of genocide have provoked the necessary action, to have tribunals established to punish the crimes. The atrocities in Yugoslavia in 1992 to 1995, and in Rwanda in 1994, pricked the world's conscience and temporary international penal tribunals were established to punish the perpetrators committing those crimes.³⁸

The legal meaning of genocide is generally accepted as being defined by the Genocide Convention, that is committing any of the following acts committed with

³⁷ Genocide Watch, at <http://www.genocidewatch.org/>, accessed on 19 August 2006.

³⁸ S/RES/955 (1994) establishing the ICTR; S/RES/808 (1993) establishing the ICTY.

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; or e. Forcibly transferring children of the group to another group.³⁹

Scholars from different disciplines argue over the definition of genocide and for many of them the legal definition is not adequate. However, for the purpose of this thesis the legal definition is what is important because it is that which enables States to be bound to prevent and punish the crime.

IV. Genocide as a customary norm

Since the adoption of the Genocide Convention the prevention and punishment of genocide has made its way into customary law. Customary law is established through the practice or customs of States, together with judicial opinion (*opinio juris*). The practice of States should be “consistent and uniform”⁴⁰ and “generally adopted”⁴¹ in order to be established as custom. It is generally accepted that certain laws or norms mature into customary law. For States to be bound they do not need to adopt any legislation; they are bound automatically by the nature of customary law.

³⁹ The Genocide Convention, Article II.

⁴⁰ *The Case of the SS Lotus (France v Turkey)*, 4 ILR 153; PCIJ Reports Series A no.10.

⁴¹ *Anglo Norwegian Fisheries Case, United Kingdom v. Norway*, [1951] ICJ Reports 116 –278.

The definition of genocide which is accepted under customary law is subject to some debate. Some argue that Resolution 96(1), with its wider definition of crimes of genocide, has been established as custom.⁴² This argument is advanced by Beth van Schaak, who proposes that there is now a parallel *jus cogens* definition of genocide which covers those groups protected under General Assembly Resolution 96(1).⁴³ Others suggest that it is the definition given in the Genocide Convention's text, which has acquired customary law status. William Schabas makes this argument in his book "Genocide in International Law".⁴⁴ Schabas' view seems to be more appropriate because it more accurately reflects the current State practice and *opinion juris*. This will be discussed in more detail in Chapter Three.

The jurisdiction of genocide under customary international law is also a highly debated topic. Some scholars advocate that the territorial basis of jurisdiction given in the Genocide Convention is also the customary law obligation. Others suggest that the jurisdiction is broader and may even amount to universal jurisdiction over genocide.⁴⁵

Theodor Meron explains that:

"it is increasingly recognised by leading commentators that the crime of genocide (despite the absence of a provision on universal jurisdiction in the Genocide Convention) may also be cause for prosecution by any State".⁴⁶

⁴² For example, social and political groups were included in the Resolution definition.

⁴³ Beth van Schaak, "The Crime of Political Genocide: Repairing the Genocide Conventions Blind Spot", 106 *Yale LJ*, 1996-7, p.2259.

⁴⁴ Schabas, *Genocide in International Law*, *supra* note 21.

⁴⁵ Kenneth C. Randall, "Universal Jurisdiction under International Law", 66 *Tex. L. Rev.* 785, 814, 1988, p. 131; "Restatement of the Law (Third), Foreign Relations of the United States", *American Law Institute*, 1987, para 404; "universal jurisdiction to punish genocide is widely accepted as a principle of customary law."

⁴⁶ Theodor Meron, "International Criminalisation of the Internal Atrocities", *American Journal of International Law*, 89, 1995, p.554, at p.570.

The *ad hoc* tribunals have asserted the universal customary nature of genocide; the ICTY Appeals Chamber held that “universal jurisdiction [is] nowadays acknowledged in the case of international crimes.”⁴⁷ It is accepted that genocide falls under the umbrella of international crimes. The court in the *Prosecutor v. Ntuyahaga* advanced on this argument when it held that universal jurisdiction exists for the crime of genocide.⁴⁸

It is however difficult to make a reasonable legal argument that there is sufficient State practice which recognises universal jurisdiction. During the recent Rwandan and Yugoslav genocides, even when it was realised that genocide was occurring, the parties to the Genocide Convention were extremely slow in their reactions to help stop the crimes.⁴⁹

What the comments and judgements do seem to legally imply, is that there is discretion for States to uphold a customary universal jurisdiction. This is not disputed, but whether or not the States have taken this duty and exercised it is more controversial. The view taken in this thesis is that the lack of State action to prevent genocide speaks volumes about the lack of customary universal jurisdiction; the international State practice is not adequate to enable a clear legally defined universal jurisdiction for Genocide under customary law.

⁴⁷ *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, Case No. IT-94-1-AR72, para. 62.

⁴⁸ *Prosecutor v. Ntuyahaga*, Decision on the Prosecutor’s Motion to withdraw the Indictment, March 18, 1999, Case No. ICTR-90-40-T.

⁴⁹ For further information see Guénél Mettraux, *International Crimes and the ad hoc Tribunals*, Oxford University Press, 2005.

Although what it entails is unclear, it is certain that genocide has established the status of customary norm. Genocide has also acquired the status of a *jus cogens* norm. In the *Application of the Genocide Convention, Request for Provisional Measures*, it was said that:

"[T]he prohibition of genocide . . . has generally been accepted as having the status not of an ordinary rule of law but of *jus cogens*. Indeed, the prohibition of genocide has long been regarded as one of the few undoubted examples of *jus cogens*."⁵⁰

The domestic court of Australia has reached the same conclusion. In *Nulyarimma v. Thompson*:

"It [was] accepted by all parties that under customary international law there is an international crime of genocide, which has acquired the status of *jus cogens* or a peremptory norm."⁵¹

Among with other judicial opinion and State practice, it can now be accepted that the prevention of genocide is a peremptory norm of general international law which, as recognised in Article 53 of the Vienna Convention of the Law of Treaties, 1969, cannot be modified or revoked by treaty (unless it is also a treaty of a fundamental peremptory character).⁵² This will be discussed in more detail in chapter three.

⁵⁰ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Further Requests for the Indication of Provisional Measures*, Order of 13 September 1993, ICJ Rep, separate opinion of *ad hoc* Judge Elihu Lauterpacht, para. 100; dissenting opinion of *ad hoc* Judge Kreca, para. 101.

⁵¹ *Nulyarimma v. Thompson*, [1999], Federal Court of Australia, 1192, 1 September 1999, available at, http://www.austlii.edu.au/au/cases/cth/federal_ct/1999/1192.html), accessed on 2 July 2006. Opinion by Whitlam, J., para. 36; opinion of Merkel, J., para. 81.

⁵² Vienna Convention on the Law of Treaties 1969, signed at Vienna on 23 May 1969, entry into force 27 January 1980.

Under international law genocide is also classed as an *erga omnes* right.⁵³ The ICJ has expressly stated that⁵⁴ and some national courts have also reached the same conclusion.⁵⁵ The legal obligation *erga omnes* is owed to each State across the world as a whole.⁵⁶ This gives States the right to implement non forcible measures in an attempt to prevent genocide.

V. The International Tribunals

A. The Creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY)

After the adoption of the Convention, and as the Cold War intensified there was a shift in focus back to national political interests and away from the suppression of genocide. It was not until after the atrocities in the Yugoslav wars that international interest revived in the prevention of genocide. The Yugoslav genocide took place during the war between 1992 and 1995. The authorities of Republika Srpska and its Army killed thousands of Bosnian Muslims, who were mainly male. During the Srebrenica massacre of July 1995 at least 8,000⁵⁷ Bosnian males, ranging in age from teenagers to the elderly, were systematically slaughtered. This massacre was the

⁵³ Maurizio Ragazi, *The Concept of International Legal Obligations Erga Omnes*, Oxford University Press, 1997, p. 95.

⁵⁴ *Barcelona Traction, Light and Power Company Ltd.*, Judgment, 1972 ICJ Rep., para. 34; *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Preliminary Objections, Order of 11 July 1996, 1996 ICJ Rep, para. 31, at, <http://www.icj-cij.org>, accessed on 20 August 2006; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)) Requests for the Indication of Provisional Measures*, *supra* note 50, dissenting opinion of *ad hoc* Judge Kreca, para. 101-2.

⁵⁵ *Nulyarimma v. Thompson*, *supra* note 51.

⁵⁶ *Re Pinochet*, 93 *American Journal of International Law*, 700, 702, 703, 1999. (English Translation).

⁵⁷ Federal Commission for Missing Persons; "Preliminary List of Missing and Killed in Srebrenica", 2005, at <http://www.srebrenica-zepa.ba/srebrenica/spisak.htm>, accessed on 22 July 2007.

largest mass murder in Europe since the Second World War and it is the first legally established case of genocide in Europe⁵⁸

In similar vein to the creation of the Nuremberg IMT, the creation of the ICTY began with the public denunciation of the atrocities.⁵⁹ The international programme of action then intensified, prompting the Security Council to issue a series of Resolutions demanding the parties comply with international law and abstain from further violence.⁶⁰ When the violence continued, the Security Council took the step to issue investigations into the breaches of humanitarian law occurring in the former Yugoslavia.⁶¹

Following reports from the Commission of Experts,⁶² the Security Council took revolutionary action by establishing a penal tribunal for the prosecution of the atrocities which had unfolded in Yugoslavia.⁶³ The Secretary General was asked to report back within sixty days on the possibility of establishing an international criminal tribunal.⁶⁴ His report included a draft statute for a tribunal and this was adopted unanimously, creating the first international court specifically mandated to try crimes of genocide.⁶⁵

⁵⁸ "Institute for War and Peace Reporting, Tribunal Update", TU No 398, 18 March 2005; *The Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgement, ICTY TC, 2 August 2001.

⁵⁹ John C. O'Brien, "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia", 77 *AJIL* 639, 1996, p. 639-42; and Virginia Morris and Michel P. Scharf, *An Insiders Guide to the International Criminal Tribunal for the Former Yugoslavia*, Ardsley: Transnational, 1995.

⁶⁰ UN Doc. S/RES/764; UN Doc. S/RES/771; UN Doc. S/RES/780.

⁶¹ UN Doc. S/RES/771.

⁶² UN Doc. S/RES/780.

⁶³ UN Doc. S/RES/808.

⁶⁴ "Report of the Secretary General Pursuant to Security Council Resolution 808", UN Doc. S/25704.

⁶⁵ UN Doc. S/RES/827.

The SG suggested that although an international court should normally be established by treaty, in the urgent circumstances this process would take too long, and there would be no guarantee of ratifications.⁶⁶ It was considered that the best course of action was for the Security Council to use its powers under Chapter VII to establish an *ad hoc* tribunal.⁶⁷ Brazil and China both questioned the authority of the Security Councils Chapter VII powers for establishing an international tribunal, but their reservations did not equate to a vote against the resolution.⁶⁸ The legality of the ICTY has created some controversy, and was actually challenged by the defendant in *Tadic*,⁶⁹ but it is now widely accepted that the ICTY has legal validity and was created lawfully.

B. The Creation of the International Criminal Tribunal for Rwanda (ICTR)

The response to the atrocities in Rwanda was somewhat more modest than the international action which created the IMT and ICTY. The genocide in Rwanda was perpetrated in full view of the UN, yet it struggled to take enforcement action to prevent the genocide from occurring. Following the deaths of ten UN Peacekeepers, the UN peacekeeping force in Rwanda was significantly reduced from 1,500 to 270 people.⁷⁰ This was the start of a sorrowful course of action which left thousands of Tutsis in the genocidal hands of the Hutus.

⁶⁶ *Op.cit.*, para. 19.

⁶⁷ *Ibid.*, para. 22.

⁶⁸ Robert Cyrer, *Prosecuting International Crimes: Selectivity and the International Law Regime*, Cambridge University Press, 2005, p. 53, footnote 335: S/PV.3217, pp.20-22.

⁶⁹ *Prosecutor v. Tadic*, *supra* note 47.

⁷⁰ UN Doc. S/RES/912. The United Nations Assistance Mission for Rwanda (UNAMIR) was a relief mission instituted by the United Nations. UNAMIR was established on 5 October 1993 by Security Council Resolution 872 (1993).

The violence in Rwanda began after a plane carrying President Habyarimana and President Cyprien Ntaryamira of Burundi was shot down near Kigali. The already unstable Rwandan peace was destroyed and the genocide began. From April 6th through mid July 1994, two extremist Hutu militia groups, the Interahamwe and the Impuzamugambi, slaughtered between 800,000 and 1,071,000 Tutsis and moderate Hutus.⁷¹

Initially the atrocities were condemned by the Security Council, but not by resolution, as in Yugoslavia, rather by a Presidential Statement.⁷² This did not have a powerful enough effect to spark the required international action to control the events in Rwanda. Despite intelligence provided before the killing began, and international news media coverage reflecting the large scale of violence as the Genocide unfolded, most countries declined to take any effective action to help the Rwandan Tutsi's.

The members of the UN, particularly the representatives in the Council, were reluctant to call the situation genocide. The United States specifically was very adamant not to use the word genocide to describe the Rwandan situation. They perceived that use of the term would have the connotation of giving them obligations to act.⁷³

Some years later, on 25 March 1998, then President William Clinton said: "We did not call these crimes by their rightful name: genocide".⁷⁴ The Security Council,

⁷¹ Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families, Stories from Rwanda*, New York: Farrar Straus and Giroux, 1998, p.153.

⁷² UN Doc. S/PRST/1994/21.

⁷³ *Op.cit.*

⁷⁴ Cited in Schabas *supra* note 21, p. 496. 'Clinton's Painful Words of Sorrow and Chagrin', *New York Times*, 26 March 1998, p.A10.

pursuant to Resolution 925, finally broke the ongoing taboo when it finally acknowledged that genocide had occurred in Rwanda.⁷⁵ A Commission of Experts was then established which researched into the possibility of creating a further international penal tribunal, this time to prosecute the crimes which had taken place in Rwanda during 1 January 1994 and 31 December 1994.⁷⁶ Due to growing international pressures on the Security Council, the ICTR was established between the commission's interim and final reports.⁷⁷ The Statute of the ICTR was drafted by New Zealand and the United States, with some input from the new Rwandan government.⁷⁸

As with the ICTY, the legal authority for the commission of the ICTR was the Security Council Chapter VII powers. Doubts over the legal validity were once again voiced but not vote was made against the resolution.⁷⁹ The reason why the use of the Chapter VII powers caused controversy was because these powers were not originally intended to be used to create legal instruments.

C. The *ad hoc* Tribunals' Power over Genocide

The Statutes of the two tribunals provide concurrent jurisdiction with the national courts for serious violations of human rights, including genocide.⁸⁰ A further paragraph on the jurisdiction of the tribunals adds that each tribunal has primacy over national courts.⁸¹ This was necessary in both cases to overcome the problems that may have arisen over issues of fair trial in the national courts, and the weaknesses of the

⁷⁵ UN Doc. S/RES/925.

⁷⁶ ICTR Statute, <http://www.un.org/ict/statute.html>, accessed on 14 August 2006.

⁷⁷ UN Doc. S/RES/955.

⁷⁸ Roy S. Lee, "The Rwandan Tribunal", 9 *LJIL* 37, 1996, p.39.

⁷⁹ Cryer, *supra* note 68.

⁸⁰ Article IV, Statute of the ICTY; Article II, Statute of the ICTR.

⁸¹ Article IX of the ICTY Statute and Article VIII of the ICTR

judicial systems in those countries. The *ad hoc* tribunal judges established the principle that cases could only be sent to national courts for prosecution, if the international tribunal judges deemed it to be appropriate.⁸²

The Statutes of both tribunals give a more clear and detailed explanation of genocide than any of the other the acts within the jurisdiction of the courts.⁸³ The definition of genocide, which is taken *verbatim* from the Genocide Convention, is exhaustive in nature.

The ICTY did not make a finding of genocide until January 2001⁸⁴, after being established for almost eight years. The ICTR is a rather divergent situation; it was specifically established to determine the occurrence of genocide in Rwanda. In the *Akeyesu* case in 1998, it was authoritatively determined that genocide did occur against the Tutsi group.⁸⁵

In accordance with SC Resolutions 1503 and 1534, the tribunals are required to strive to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010.⁸⁶ As a result if this, the tribunals are no longer issuing indictments for new prosecutions.

⁸² Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, p.349.

⁸³ Ilias Bantekas, Susan Nash and Mark Mackerel, *International Criminal Law*, London: Cavendish Publishing Limited, 2001, at p.102.

⁸⁴ *The Prosecutor v. Krstić*, *supra* note 58.

⁸⁵ *The Prosecutor v Akeyesu*, Judgement, 2 September 1998, Case No. ICTR-96-4-T, para 126.

⁸⁶ Press Release, SC/8040: "Security Council Calls on Tribunals for Yugoslavia, Rwanda to Review Caseloads and Take Other Steps to Complete Trial Activities by 2008", Resolution 1534 (2004), at <http://www.un.org/News/Press/docs/2004/sc8040.doc.htm>, accessed on 20 August 2006.

D. The International Criminal Court (ICC)

The idea of establishing a specific court to try international crimes dates back to the aftermath of the Second World War, but it was not until 2002 that the ICC Statute came into force (almost 55 years after the ILC first looked into this possibility). The international political, legal and economic environment, did not provide the appropriate circumstances to establish an international court until recently. It is the nature of such a court that it goes against the oldest established and highly regarded principles, of territoriality, and national sovereignty. Until recently States were not willing to compromise on these issues.

In 1948, the GA asked the ILC to “study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes”.⁸⁷ GA Resolution 260 started the practical mechanisms for the establishment of such an organ.⁸⁸ Two years later, in 1950, two Special Rapporteurs gave conflicting advice about the desirability of establishing an international criminal tribunal.⁸⁹ After this, the question was passed to a committee of seventeen State representatives in the General Assembly, which produced two draft statutes, one in 1951, and the other in 1953.⁹⁰ During this period international legal relations were such, that it was considered very unlikely that an international criminal court would amount to anything more than GA draft statutes.⁹¹

⁸⁷ UN Doc. A/RES/280B (1948) 9 December 1948.

⁸⁸ Resolution 260 of 9 December 1948.

⁸⁹ “Report of the ILC on the question of International Criminal Jurisdiction”, UN GAOR, 5th Session, UN Docs. A/CN.4/ 15 and 20.

⁹⁰ “Report of the Committee on International Criminal Jurisdiction”, UN Doc. A/2136; “Report of the 1953 Committee on International Criminal Jurisdiction”, UN Doc. A/2638.

⁹¹ Ian Brownlie *Principles of Public International Law*, Oxford: Clarendon Press, 4th edn., 1990, pp. 563-4: “in spite of extensive consideration of the problem in committees of the general assembly, the likelihood of setting up an international criminal court is very remote”.

The idea of an international criminal court was briefly taken off the General Assembly agenda, but in the 1980's the possibility of establishing such a tribunal was popular once more. Academic opinion started to look favourably on the idea of an international criminal court.⁹² This was coupled with the ILC being asked once again to consider the possibility of establishing an international criminal tribunal.⁹³ The process was slow,⁹⁴ and although by 1992 the ILC had begun to work on a draft statute⁹⁵ the debates were still "going around in circles and getting nowhere".⁹⁶

The ILC completed its draft Statute by 1994⁹⁷ and the Preparatory Committee for an International Criminal Court (PCICC), was set up.⁹⁸ The PCICC was mandated by the General Assembly to create a consolidated set of proposals for the establishment of an international criminal tribunal. The culmination of this work was the Rome Conference on the International Criminal Court,⁹⁹ at which the Rome Statute of the ICC was adopted.¹⁰⁰ In accordance with Article 126, the Rome Statute came into force on 1 July 2002, following its sixtieth ratification.

⁹² John Dugard, "Obstacles in the Way of an International Criminal Court", *56 Cambridge Law Journal*, 329, 1997, p. 330.

⁹³ GA Res. 44/39, UN Doc. A/RES/44/39. The reason for looking into establishing an international court was to create a collaborative measure for the enforcement of the Vienna Convention Against the Illicit Trafficking in Narcotic Drugs and Psychotropic Substances, 1988, (1019 UNTS 175). It was hoped that an international court would take some weight off the national legal systems which could not cope with the enforcement of this convention.

⁹⁴ Benjamin Ferencz, "An International Criminal Code and Court: Where They Stand and Where They're Going", *30 CJTL*, 1992, p.375

⁹⁵ James Crawford, "The Work of the International Law Commission", in *The Rome Statute of the International Criminal Court: A Commentary*, Edited by Antonio Cassese, Paola Gaeta and John R.W.D. Jones, Oxford University Press, 2002, 3 volumes.

⁹⁶ Ferencz, *op sit*, p. 390

⁹⁷ "Report of the ILC on the Work of Its Forty-Sixth Session", UN Doc. A/49/10.

⁹⁸ GA Resolution 49/53; UN Doc. A/RES/49/53.

⁹⁹ The conference took place in June-July 1998.

¹⁰⁰ A/CONF.183/9.

Over the past half a century that it has taken to establish the ICC, the international legal order has changed dramatically. With the establishment of the EU and the ICJ more national autonomy had eroded, and many countries started to accept the idea of international jurisdiction over certain crimes.¹⁰¹ With an increase in acceptance of extra-territorial jurisdiction, and the creation of the SC *ad hoc* tribunals, the international legal environment was in the right position in 1998 for the major international legal and political players to come together and adopt the statute which formed the basis of the first permanent international criminal court.¹⁰²

E. The Jurisdiction of the ICC over Genocide

The Genocide Convention, Article VI, provides for jurisdiction of an international tribunal to try crimes of genocide. Article VI of the ICC Statute defines genocide in almost the same terms as Article II of the Genocide Convention. The jurisdiction of the ICC is “territorial as to the parties”.¹⁰³ This means that the ICC has jurisdiction over crimes of genocide committed on the territory of any State party to the ICC as well as States who have accepted the jurisdiction of the court. This brings States who accept jurisdiction on an *ad hoc* basis in accordance with paragraph 3 of Article 12. In addition, States parties to the ICC can refer matters of genocide to the ICC, even if the crimes were not committed on their territory, so long as they were committed on the territory of a State party to the ICC. Articles 12 to 14 must be read together in order to get the full scope of the right of referral by States.

¹⁰¹ Scharf noted that the United States in particular seemed to take a more flexible approach. Michael P. Scharf, “Getting Serious About an International Criminal Court”, 6 *Pace ILR*, 1994, 103, pp. 106-7.

¹⁰² “United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court”, Rome, 15 June - 17 July 1998.

¹⁰³ M. Cherif Bassiouni, “The History of Universal Jurisdiction and its place in International Law”, in *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*, ed. Stephen Macedo, Philadelphia: University of Philadelphia Press, 2004. pp. 39-63, at p. 53.

After an arrest warrant is issued the custodial State comes under certain obligations of cooperation and judicial assistance under Part 9. The basic requirement of surrender is that the accused is found on its territory. The question of nationality however comes in where there is a competing request of extradition by another State which may or may not be a State party to the Rome Statute, but of course for the same conduct/crime. Where the requesting State is a party to the Statute, the court shall be given priority for prosecution provided certain conditions provided in Article 90, paragraph 2 are met. Where the requesting State is not a party, then again the court gets priority provided the court determines that the case is admissible. However, this priority depends on whether there is an existing international obligation to extradite the accused to the requesting non-Party State. Hence if there is a bilateral extradition treaty between the custodial State and the non-Party requesting State then the court has no built-in priority. In this kind of case, the custodial requested State has the right to consider both requests and take a decision, and in making this decision, the Statute obliges that State to consider various facts, one of which is the nationality of the accused. Hence, the nationality of the accused, and indeed that of the victims of genocide and other listed crimes triable by the court, can play its part.

The benefit of this principle is that it mostly allows for ICC jurisdiction in situations when the State is unable or unwilling to proceed with an investigation, or where the State investigation is conducted in bad faith, for example, when it is used to shield the person from criminal responsibility.

Many countries which have enacted legislation to give effect to the ICC Statute have taken jurisdiction beyond what is required to satisfy complementarity¹⁰⁴; some States have gone so far as to allow universal jurisdiction over the crimes provided for in the Rome Statute.¹⁰⁵ This is a huge step forward in the suppression of genocide, but should not be confused with a legal obligation to give this jurisdiction to genocide.

Unlike the two *ad hoc* tribunals, the ICC is a permanent court, established by treaty. It is an independent body, related to the UN by agreement. Various authors suggest that this is an advantageous position, particularly with the Security Council playing such an important role in referring cases.¹⁰⁶ State parties can refer matters to the prosecutor of the ICC for investigation but individuals cannot.¹⁰⁷ Andreopoulos suggests that this is disadvantageous because States will generally protect their own interests and not refer matters, whereas individuals from the offending State would be a better position to inform the ICC of breaches of human rights.¹⁰⁸ This disadvantage is countered somewhat by the ability for any State party to refer a matter occurring in the territory of any party to the ICC.

The ICC has not yet issued any prosecutions for genocide. This is primarily because it has not found any evidence of genocide since its adoption. It is hoped that if, and

¹⁰⁴ Although they are not required to implement the statute into national law, many have done so. Primarily this is to ensure that the principle of complementarity, on which the ICC operates, is given full accord.

¹⁰⁵ A Hays Butler, "The Growing Support for Universal Jurisdiction in National Legislation", in *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, ed. Stephen Macedo, Philadelphia: University of Philadelphia Press, 2004, pp.67-76, at p.67; UK ICC Cooperation Act 2001, Pt 5.

¹⁰⁶ Ilias Bantekas, Susan Nash and Mark Mackerel, *International Criminal Law*, London: Cavendish Publishing Limited, 2001, at p.122.

¹⁰⁷ Article XIV, Rome Statute of the International Criminal Court.

¹⁰⁸ George J. Andreopoulos, "Introduction the Calculus of Genocide", in George J. Andreopoulos (ed), *Genocide: Conceptual and Historical Dimensions*, University of Pennsylvania Press, 1994, pp. 1-28.

when, genocide does occur, the ICC prosecutor has the strength of conviction to issue prosecutions for the criminals who perpetrate any such acts.

VI. Conclusions

What in 1942 started as a “crime without a name”¹⁰⁹ is now required to be prevented and punished by every State in the world. The Genocide Convention was the first international human rights treaty of its kind and was considered of such fundamental importance that it was established one day prior to the Universal Declaration of Human Rights.

The prevention of genocide has subsequently been established as a customary norm which all countries must obey. What the exact customary law of genocide is, has been subject to some debate. At the very least it is those obligations which are contained within the Genocide Convention.

Two international tribunals have been established specifically to try and punish perpetrators of genocide. The ICTY and ICTR were established shortly after the genocides in Yugoslavia and Rwanda. Although the legal authority for setting up those tribunals has been questioned, they have both successfully indicted genocidists and punished them for their crimes.

¹⁰⁹ Winston Churchill, August 24, 1941, “...we are in the presence of a crime without a name...”, available at Prevent Genocide, at <http://www.preventgenocide.org/genocide/crimewithoutaname.htm>, accessed on 20 August 2006.

Recently the ICC has been established with jurisdiction for genocide. Those parties which have implemented the Rome Statute are legally obliged to prevent and punish genocide but as of yet there have not been any indictments or trials of persons accused of genocide, by the ICC.

Together these instruments and concepts provide the backbone for the prevention of genocide but what must be explored in more detail is what effect these instruments have had in reality and what can be done to bolster their results.

Chapter Two: A Detailed Explanation of the Provisions of the Genocide Convention

I. Introduction

This chapter is concerned with explaining why the provisions of the Genocide Convention amount to what they do and how they have been interpreted since the Convention's implementation. It is necessary to explore what these provisions require State parties to do to successfully prevent genocide.

A. The Preamble

The preamble to the Genocide Convention is used to introduce the Convention and give a preliminary explanation of the reasons why it is required. It explains that the aim of the Genocide Convention is to prevent genocide from reoccurring and to provide a means of punishment. The preamble also details the historical facts which were pertinent to the issue of genocide at the time of drafting. It explains that although genocide has been committed through all periods of history, "it is contrary to the spirits and aims of the United Nations and is condemned by the civilised world"¹.

¹ Preamble to the Convention on the Prevention and Punishment of the crime of genocide, *adopted* 9 December 1948, by Resolution 260 (III) A of the United Nations General Assembly, 78 U.N.T.S. 277. Entered into force 12 January 1951 U.N.T.S. No. 1021, vol. 78, 1951.

Although the word genocide was relatively new at the time of drafting, what it stood for, and what it described, was something that was “as old as mankind.”² One of the primary reasons for drafting the Genocide Convention was to try to ensure that the recent atrocities of the Second World War would never reoccur. Although it had only recently been named, Hitler’s Final Solution was a clear example of what genocide constituted.³ Weitz has suggested that:

“[g]enocides have occurred since the earliest recorded history, from the Israelite destruction of numerous communities in Canaan, depicted in the book of Joshua, to the Roman annihilation of Carthage and its population. But beginning with the Armenians, genocides have become more extensive, more systematic, and more thorough.”⁴

The atrocities that occurred against the Jews, Armenians⁵, Circassians⁶ and Ukrainians⁷ influenced what was understood by genocide, and what the drafters of the Convention thought was necessary in order to prevent it and punish those guilty of it. The preamble makes it clear that international cooperation is required to rid the world of genocide:

² Jean-Paul Sartre, *Genocide*, *New Left Review* 1/48, March to April 1968.

³ Prior to this over one million Jews had already been killed, but the plan to systematically wipe out the entire race in 1942 constituted what would now be classed genocidal intent.

⁴ Eric D. Weitz, *A Century of Genocide: Utopias of Race and Nation: Introduction: Genocides in the Twentieth Century*, Princeton University Press, 2003, p. 8.

⁵ It is subject to debate whether the atrocities suffered by the Armenians was legally genocide. The Ottoman Empire from 1915 to 1923, murdered 1,500,000 people and implemented 500,000 forced displacements: “Affirmation of the United States Record on the Armenian Genocide Resolution (Introduced in House of Representatives)”, 109th Congress, 1st Session, H.RES.316; Richard G. Hovannisian (ed), *The Armenian genocide in perspective*, New Brunswick [N.J.] U.S.A, Transaction Books, 1986.

⁶ Antero Leitzinger, “The Circassian Genocide,” *The Eurasian Politician* - Issue 2, October 2000 (originally published in *Turkistan News*). Leitzinger suggests the Circassian nation by Czarist Russia in the 1800s was the biggest genocide of the nineteenth century, yet it is almost entirely forgotten by later history.

⁷ By various estimates 7,000,000 to 15,000,000 people, mostly Ukrainians, died during Stalin’s famine. It is subject to debate whether this was genocide engineered by the Soviet government, or a famine which struck an area significantly larger than Ukraine so not classed as genocide by the Convention’s definition of a group.

“The Contracting Parties, Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world, Recognizing that at all periods of history genocide has inflicted great losses on humanity, and Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required.”⁸

The preamble acknowledges the previous resolution declaring genocide a crime under international law, which was adopted following the Nuremberg judgements.⁹

Although the IMT was not trying genocide *eo nomine*, the truth is that in some of the cases the facts disclosed a crime, which by today's standards, would be seen as genocide. *Kaltenbrunner*¹⁰ was one of the accused in the Nuremberg IMT and his charge and conviction of crimes against humanity was consistent with genocide as we see it today.

The Preamble provides useful guidance for the interpretation of the main body of the Convention, but it does not impose specific rights and duties as such. Article 31(1) of the Vienna Convention on the Law of Treaties, 1969, requires that the texts of treaties be interpreted in the light of their object and purpose. The ECHR has used its Preamble to identify its object and purpose: the effective protection of individual human rights.¹¹ In the past domestic preambles have also had significant legal consequences, which were unforeseen by their drafters. Although not international treaty documents, the following constitutional acts are relevant to show the way in

⁸ Preamble to the Genocide Convention.

⁹ General Assembly Resolution 96(1), 55th Plenary Meeting, 11 December 1946, available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/033/47/IMG/NR003347.pdf?OpenElement>, accessed on 19 July 2006.

¹⁰ Indictment of the International Military Tribunal, In The Case Of The Trial Of The Major War Criminals 1945, at <http://www.ess.uwe.ac.uk/genocide/indictment1.htm>, accessed on 21 April 2006.

¹¹ *Golder v UK*, Judgment of 21 February 1975, Series A, No 18.

which the preamble to a legal document guides in the interpretation of its provisions. In Canada, the preamble to the Constitution Act, 1867 was cited by the Supreme Court of Canada in support of a judgement.¹² Also in India, the Supreme Court has ruled that amendment to the Constitution is unconstitutional because it violates the preamble to basic structure of the Constitution.¹³ The preamble to the Genocide Convention refers to the requirement of international cooperation to prevent genocide. In this way, it may be possible to use the preamble to the Genocide Convention to show that it was the object and purpose of the drafters to provide a practical approach to preventing genocide and a real means of enforcing punishment. This is likely to enhance the protection against genocide.

It is too much of a tenuous argument to suggest that it may also be possible for the Preamble to be interpreted to include extra-territorial action in order to protect the population of another State: in other words, a duty to intervene in the territory of a State to prevent genocide in that country. This would be a rather far stretched interpretation, especially because territorial jurisdiction is actually specified in the Convention. A more realistic interpretation may involve cooperation for non-interventionist measures, for example legal cooperation, involvement of domestic police and assistance in the form of custody. By inserting this provision, the drafters left open the possibility of interpreting the provisions of the Genocide Convention in a liberal way, based on international cooperation to prevent genocide, what ever that may entail.

¹² The *Provincial Judges Reference* [1997] 3 S.C.R. 3.

¹³ The Constitution of India was passed by the Constituent Assembly of India on November 26, 1949, and came into effect on January 26, 1950.

B. Article I

“The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.¹⁴

Article I of the Convention has been described as rather “preambular” in nature¹⁵ because it repeats some provisions of the preamble and is also rather vague and ambiguous. Despite this criticism when Article I was drafted it was a groundbreaking provision. It went further than the previous General Assembly Resolution, because it was a binding treaty obligation, and it went further than the preamble to the Convention, which provided more of a context to the treaty. It was made clear that genocide was crime of international law and signatories were required to prevent and punish it as such. This was hugely advantageous when compared to other international legal mechanisms at the time, which were weak with little binding effect.¹⁶

It is advantageous that the Convention applies equally in times of peace and war; prior to this, particularly following the Nuremberg legacy, crimes against humanity could only be committed during armed conflict.¹⁷ When devising the final draft of the Genocide Convention, the United Kingdom suggested the inclusion of the words “in

¹⁴ The Genocide Convention, Article I.

¹⁵ William A. Schabas, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, 2000, p. 71

¹⁶ Such as the 13 Sectoral Conventions on Terrorism.

¹⁷ The requirement of armed conflict is still an integral part of the definition of crimes against humanity for the ICTY. The issue was recently debated in the ICTY in *Tadic* with the court concluding that it is necessary to have a “nexus” between the crimes against humanity and armed conflict. The Genocide Convention does not require this: *Prosecutor v Dusko Tadic a/k/a “Dule”*, Judgement 20 October 1995, IT-94-1.

peace or war”.¹⁸ This amendment was adopted without any controversy because the benefits of such a provision were clear.¹⁹ It is often the case that genocide is committed during civil war and in fact the war is used as a disguise for what is really going on. This was the situation with both the Bosnian and Rwandan genocides. Although not as common, genocide can also occur when war is not taking place, as is clear from the Ukraine genocide. The inclusion of the protection against genocide during peace is vital for completeness.

The Article I application to prevent, as well as punish genocide, was a highly debated issue during drafting.²⁰ The inclusion of both elements demonstrated an attitude of responsibility on behalf of the drafters. They were determined to stop genocidal acts from happening again. The drafters were clear in their aim to never allow the Holocaust to reoccur, so prevention was deemed to be an essential element of the Convention. Nevertheless, the desire to punish the criminals responsible for the Holocaust was also extremely influential. It was clear that following the lack of genocide prosecutions at Nuremberg the new Convention needed to adequately deal with the punishment of genocidists. Perhaps because of these relatively recent events, the focus of the Convention concentrated on the side of punishment. The text has much to say about the punishment of genocide, but neither the text, nor the drafting debates shed much more light on the issue of prevention, except for what is specifically mentioned. Leo Kuper describes the preventative provisions as “much neglected and abused in the past”.²¹ It is the purpose of the following chapters of this

¹⁸ UN Doc. A/C.6/SR. 68.

¹⁹ *Ibid.*

²⁰ Schabas, *supra* note 15, p. 71.

²¹ Leo Kuper, “Theoretical Issues Relating to Genocide: Uses and Abuses, in Genocide: Conceptual and Historical Dimensions”, in George J. Andreopoulos (ed), *Genocide: Conceptual and Historical Dimensions*, University of Pennsylvania Press, 1994, p. 31-46.

thesis to unfold the obligations which rest upon States in respect of preventing genocide, and explain in practical terms what these obligations entail.

Although the Convention had revolutionary provisions for the prevention of genocide, it still did not go quite far enough to provide the necessary protection against genocidists. This can be understood nonetheless, given the circumstances of the time, the relative youth of international law and the limited international law instruments which were present at the time of drafting. What was finally drafted into the Genocide Convention was still a huge leap forward in terms of the international political and legal arena of the time.

C. Article II

Article II defines genocide and details the means by which it can be committed:

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

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.²²

This Article changed at the final stage of drafting to include the words “as such” before detailing the ways in which genocide could be committed. This had the

²² *Ibid.*

significant effect of separating genocide from other forms of mass killing; from then on genocide could only be committed with the requisite intent (which is extremely difficult to prove),²³ in the aforementioned ways and against the four groups specified. With other forms of mass killing what was essential was the act of killings, rather than the way by the killings were perpetrated. This limits what can amount to genocide, to what was then (and arguably now) considered the most heinous activities.

It would seem reasonable that if genocide is the worst of all crimes, then the action taken to prevent it should be the strongest of all action. However, the restrictive nature of the definition of genocide provided in this provision has actually meant that the range of protection against genocide is limited, and arguably insufficient. In practice it has limited significantly what can amount to genocide, but this is not necessarily a bad thing. If genocide is restricted to only the most serious crimes and this is given a very tight definition it will be much clearer whether a situation amounts to genocide (not taking into account the obvious evidential difficulties of proving the crime). If this is so, then any action to prevent genocide will be able to be more easily justifiable, or as the case may be, any action not taken will be more glaringly obvious.

i. Definition of the Groups Protected

Under the Genocide Convention, the definition of the word group is confined to physical and biological existence and does not include cultural or social groups. This was a highly controversial issue prior to the adoption of the final text, and remains to

²³ For example see: *Prosecutor v. Akayesu*, ICTY, Trial Chamber, Judgement 2 September 1998, para. 523; *Prosecutor v. Kayishema and Ruzindana*, ICTR, Trial Chamber, Judgement of 21 May 1999, paras. 93, 527; *Prosecutor v. Bagilishema*, ICTR, Trial Chamber, Judgement of 7 June 2001, para. 63; *Prosecutor v. Jelusic*, ICTY, Appeals Chamber, judgement of 5 July 2001, para. 97.

be a highly debated topic. The groups which are protected from genocide by the Genocide Convention are: racial, religious, ethnic and national groups. The ICTY and ICTR differ in their views as to whether the group is a subjective or objective entity. ICTR judgements alone are quite divided on this issue, with some judges suggesting the objective existence of a group, and others suggesting that the group is subjectively defined by the perpetrator. The ICTY favoured this subjective approach in *Jelisić*²⁴ and it was further endorsed in *Krstić*²⁵.

According to the ICTR the term national group refers to “a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties”.²⁶ It seems correct to follow the ICTR’s interpretation because it correlates with the original intention for national group and broadens the scope somewhat of the groups protected. Although not concerned with genocide, the ICJ interpreted a national group to mean nationality, rather than a group of national people.²⁷ “Oppenheim’s International Law” has subsequently clarified that a national group and a group based on nationality are distinct.²⁸

At the time of drafting the term racial group caused no interpretive problems. This meant that years later, when the ICTR was attempting to clarify whether the Tutsi were a racial group, the *Travaux Préparatoires* provided little help. The ICTR classed a racial group, as a group “based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious

²⁴ *Prosecutor v. Jelisić, ibid.*

²⁵ *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, ICTY Appeals Chamber, April 19, 2004.

²⁶ *Ibid.*, para. 511.

²⁷ *Nottebohm Case (Second Phase)*, Judgement of 6 April [1955], ICJ Reports, p.24.

²⁸ Robert Jennings and Arthur Watts, *Oppenheim’s International Law*, Volume II, 9th Edition, London and New York: Longman, 1996, p.857.

factors.”²⁹ The United States interpretation was broadly similar.³⁰ This modern interpretation is different to what was understood by a racial group when drafting. The Oxford English Dictionary definition, at the period in time when the Genocide Convention was implemented, referred to “[a] group of persons, animals, or plants, connected by common descent or origin”; “[a] group or class of animals, persons, or things, having some common feature or features.”³¹ This is a much broader interpretation, and more connected with the other groups protected. It would be favourable for the courts to follow Schabas’ view in respect to what should be classed as a racial group. He suggests that the courts should adopt the 1948 interpretation over the more modern restrictive sense, because it provides extended protection against genocide in the way originally intended.³²

Ethnic groups were included for protection under the Convention after a proposition from Sweden to ensure that the interpretation of the other groups was clear and so it was understood that the protection of national groups related to race, ethnicity and religion, rather than any political meaning which may have developed.³³ Special Rapporteur Doudou Thian suggested that the term ethnic related more to cultural values, ways of life and thinking.³⁴ The US legislation defines an ethnic group as a set of individuals whose identity is indicative of common cultural traditions or heritage.³⁵ Schabas suggests that it is better to take the concept as largely synonymous with the

²⁹ *Akayesu*, *supra* note 23, para. 513.

³⁰ Genocide Convention Implementation Act of 1987, (Proxmire Act) S. 1851 s. 1093.

³¹ R. W. Burchfield, ed., *The compact edition of the Oxford English Dictionary*, Volume II, Oxford: Clarendon Press, 1971, p. 2400. Referenced in Schabas, *supra* note 15, p. 121.

³² Schabas, *supra* note 15.

³³ *Ibid.*

³⁴ “The Draft Code for Offences against the Peace and Security of Mankind by Mr Doudou Thian Special Rapporteur”, UN Doc A/CN.4/398, para 58.

³⁵ Genocide Convention Implementation Act of 1987, *supra* note 30.

other elements of enumeration, encompassing elements of the national, racial and religious groups within in its scope.³⁶

Nowadays it is difficult to distinguish between racial and ethnic groups. The tribunal in *Akayesu* said that an ethnic group can generally be defined as a group whose members share a common language or culture.³⁷ Race is generally speaking a broader concept than ethnic groups and essentially has a hereditary element, less culture and language facets. One racial group can include many ethnic groupings. If these terms work together there could be good protection against genocide.

Religious groups were the first groups to be protected under the first Draft Resolution 96(1).³⁸ The United Kingdom argued that this group should be included with caution, because people are free to join and leave this group, so they are not necessarily permanent.³⁹ The Human Rights Committee gave a rather broad interpretation of religious groups.⁴⁰ It suggested that religious groups should not be limited to only traditional religious, but it should be ensured that the definition avoids being so wide to encompass radical quasi-religions, such as potentially dangerous sects and cults.⁴¹ The opinion of Malcolm Shaw strikes the appropriate balance of which religious groups should be protected under the Convention:

³⁶ Schabas, *supra* note 15, p.71.

³⁷ *Akayesu*, *supra* note 23, para 512.

³⁸ General Assembly Resolution 96(1), *supra* note 9.

³⁹ UN Doc. A/C. 6/SR.75.

⁴⁰ Schabas, *supra* note 15.

⁴¹ UN Doc. CCPR/C/21/Rev.1/Add.4, para. 2 1993. For further interpretations see Theo van Boven, "Elimination of all forms of Intolerance and Discrimination based on Religion or Belief", UN Doc. E/CN.4/Sub.2/1989/32, para.5.

“An overly restrictive definition ought to be avoided, provided that a coherent community based upon a concept of a single, divine being is concerned and that such a community is not engaged, for example, in criminal practices.”⁴²

Lemkin said that the groups protected from genocide should mean “any entity which deserves protection”.⁴³ He also suggested that any group protected from genocide is synonymous with a minority group. Schabas does not agree with this interpretation because, among other reasons, it could be the case that a majority population becomes victim to genocide.⁴⁴

It is frequently argued that the Genocide Convention does not go far enough in its protection of other groups. For example, no protection is given to the elderly, mentally disordered, homosexuals, women, or social or political groups. Some commentators have proposed definitions to enlarge the scope of groups protected.⁴⁵ The most extensive view suggests that the Genocide Convention should protect any and all groups of people.⁴⁶ GA Resolution 96(1) suggested that there could be genocide against other groups, but gave no guidance on which groups were included.⁴⁷ Many have argued that the ICTR’s difficulty in fitting the Tutsi group into any of the groups specified in the Convention confirmed two things: firstly, that the Genocide Convention does not go far enough in its protection of groups, and;

⁴² Malcolm Shaw, *International Law*, Cambridge University press, 2003.

⁴³ 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. 670.

⁴⁴ Schabas, *supra* note 15.

⁴⁵ For example Israel W. Charney, “Towards a Generic Definition of Genocide” in George J Andreopoulos, ed, *Genocide, Historical and Conceptual Dimensions*, Philadelphia: University of Philadelphia Press, 1994, pp.64-94 at p.75; Vahakn Dadrian, “A Typology of Genocide”, 1975, 5 *International Review of Modern Sociology*, p.201; Frank Chalk, “Redefining Genocide” in Andreopoulos, ed, *Genocide, Historical and Conceptual Dimensions*, Philadelphia: University of Philadelphia Press, 1994.

⁴⁶ Drost advocates this view: Pieter Nicolaas Drost, *The Crime of State, Volume 2, Genocide*, Laden, A.W. Sijthoff, 1959, pp. 22-3.

⁴⁷ General Assembly Resolution 96(1), *supra* note 9.

secondly, that amendment is required to afford other groups protection. The Tutsis were clearly the type of group which the Convention was intended to protect, but even this group struggled to fit under the restrictive interpretation contained in the Convention.⁴⁸

Although the groups protected are limited only to four, the view taken here is that this is beneficial for more comprehensive prevention. The interpretation of the Convention provides that its parties should take active steps in order to prevent the worst crime. In order to gain State support and have binding consequences it is right to limit the type of group which should be protected to those groups which are the most vulnerable to genocide. Although these closed categories have provided some difficulty in interpretation and in allowing a group to be encompassed within them, the court has been able to give wide interpretations of the categories to allow for more adequate protection.

Despite proposals for the expansion of the groups protected, amendment has proven to be out of the question.⁴⁹ This was reinforced June/July 1998 when States were given the opportunity to renew the Convention at the Rome Conference.⁵⁰ They instead chose to reaffirm the text verbatim.

The concern over the limited types of groups protected under the Convention is reducing somewhat in light of other international human rights treaties which have

⁴⁸ Although now the issue seems to have shifted towards concern that the treaties only protect individuals as opposed to groups.

⁴⁹ John Quigley, *The Genocide Convention: An International Law Analysis*, Ashgate Publishing Ltd, 2006, pp.83-4.

⁵⁰ Rome Conference on the International Criminal Court. Statute of the International Criminal Court, at <http://www.un.org/law/icc/index.html>, accessed on 21 August 2006.

emerged in recent years. For example: The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; The International Covenant on Economic, Social and Cultural Rights; The International Covenant on Civil and Political Rights; The International Convention on the Elimination of All Forms of Racial Discrimination; The International Convention on the Suppression and Punishment of the Crime of Apartheid; The Convention on the Rights of the Child; and, The Convention on the Elimination of All Forms of Discrimination against Women.⁵¹ Although these treaties require voluntary ratification by States, they may still afford protection to those who have fallen short of the protection of the Genocide Convention, providing that States are parties to these Conventions.⁵²

The *ad hoc* tribunals have further clarified and enlarged the definition of groups protected. In the *Akayesu* case, the First Trial Chamber assessed whether the Tutsi's were a group by using the test of whether they were "stable" and "permanent".⁵³ This judgement was open to criticism, first because it went directly against the Convention; if the drafter had meant stable and permanent to be included in the definition, surely they would have said this. Further, the role of the *travaux preparatoires* is to assist and clarify ambiguous or obscure terms, not manifest new elements into the Convention. Finally, when put under closer scrutiny, three of the groups afforded protection by the Convention do not appear to be stable or permanent.

⁵¹ International Human Rights Mechanisms, at <http://www.unhchr.ch/html/intlinst.htm>, accessed on 20 July 2006.

⁵² This help includes, but is not limited to the Conventions mentioned above.

⁵³ *Akayesu*, *supra* note 23.

The ICTY in *Krstić* has also expanded the limits on the groups protected, but has done so rather differently.⁵⁴ The ICTY used the *travaux préparatoires* to show a more general definition of group, targeting national minorities, rather than several distinct prototypes of human groups.⁵⁵ Schabas says this case is more appropriate in striking the correct balance of what was intended by the *travaux préparatoires*, and what is needed for a functional definition.⁵⁶ *Krstić* was able to extend the protection under the Convention by affirming that an attack on a part of a group was enough to amount to genocide.⁵⁷ As a result of rather broad interpretations, and new international law instruments, much of the so called “lacunae”⁵⁸ of the Genocide Convention has been filled.⁵⁹

ii. Mens Rea

The “intent to destroy in whole or in part” requirement of Article II is the *mens rea* of genocide. The intent to destroy the group does not require that the whole group be killed, nor even a high proportion of that group. Intent, in the context of the Genocide Convention, means simply an aim to achieve a result, and an acknowledgement that genocide will follow.⁶⁰ Intent is made out if the perpetrator desires the destruction of a group, or if his actions or words imply the desire.⁶¹ Quigley suggests that it may not be this straightforward, and because neither conduct nor consequence is defined, it is

⁵⁴ *Prosecutor v Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004.

⁵⁵ *Ibid.*

⁵⁶ Schabas, *supra* note 15.

⁵⁷ *Krstić*, *supra* note 54.

⁵⁸ Schabas, *op.cit.*, pp. 9, 103, 104.

⁵⁹ Lori Lyman Brun, “Beyond the 1948 Convention-Emerging Principles of Genocide in Customary Law”, 1993, *17 Maryland Journal of International Law and Trade*, p.193, pp.210-218; Beth van Schaack, “The Crime of Political Genocide: Repairing the Genocide Conventions Blind Spot”, 1997, *106 Yale Law Journal*, p.2259, at pp. 2280-2.

⁶⁰ Otto Triffterer, “Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such”, *Leiden Journal of International Law*, 1, p.399, at p. 406.

⁶¹ Quigley, *supra* note 49, p. 111.

still rather unclear as to what the intent to destroy means.⁶² Despite these criticisms by Quigley, it does seem that if the Convention is put into context, the consequence is likely to be killing, and that itself is clear enough.

Many academics argue that the required intent is too restrictive.⁶³ Others offer explanations which give an expanded scope of intent by suggesting that intent does encompass knowledge of the consequences of one's act.⁶⁴ Leo Kuper interpreted intent to be even broader, suggesting that intent is satisfied if it seems likely, or if the foreseeable consequence is the destruction of the group.⁶⁵

The ILC considered that it is not necessary to intend to complete the annihilation of a group from every corner of the globe, but by the very nature of genocide it is necessary to have the intent to destroy at least a substantial part of a group. Nehemiah Robinson, one of the first academics to comment on the Convention, agreed with the use of the word substantial in front of in whole or in part.⁶⁶ The ICTY in *Jelisić*⁶⁷ and *Sikirica*⁶⁸ favoured the approach which entailed the destruction of a number of the social strata, which results in a threat to the group's survival as a whole; the significant part approach.

⁶² *Ibid.*

⁶³ Roger Clark, "Does the Genocide Convention Go Far Enough? Some Thoughts On The Nature Of Criminal Genocide In The Context Of India's Invasion Of Eastern Timor", *Ohio Northern University Law Review* 8, p. 321, at pp. 327-8.

⁶⁴ Alexander Greenawalt, "Rethinking Genocidal Intent: The Case for Knowledge Based Interpretation", *Columbia Law Review* 99, p. 2259, at p. 2288.

⁶⁵ Leo Kuper, *The Prevention of Genocide*, Yale University Press, New Haven, 1985, p. 12.

⁶⁶ Nehemiah Robinson, *The Genocide Convention: Its Origins and Interpretation*, Institute of Jewish Affairs, New York, 1949; Nehemiah Robinson, *The Genocide Convention: A Commentary*, Institute of Jewish Affairs, New York, 1960.

⁶⁷ *Jelisić*, *supra* note 23.

⁶⁸ *Prosecutor v. Sikirica et al*, Case Number 95-8-I, Indictment 21 July 1995.

The *ad hoc* tribunals have complicated the issue of genocidal intent. They have used the term *dolus specialus*, or special intent, to describe the *mens rea*. This includes where the perpetrator knew or should have known the group would be destroyed by his or her acts.⁶⁹ Although it is clear that the mental element must be to destroy, the Convention does not give an adequate explanation of what destroy means.

The word destroy denotes committing any of the acts in the subsection of Article II. Quigley suggests that destruction may also involve forced removal, forced assimilation, intent to injure and intent to destroy the group's social identification.⁷⁰

Both the *Akeyesu*⁷¹ trial chamber and the District Court of Jerusalem interpreted destroy to mean immediate harm against the victims who form a part of a group.⁷²

The most adequate view seems to be that only conduct which is truly genocide in the legal sense, is able to successfully prosecuted as such. This is beneficial because if the legal definition of genocide can be confined to the narrowest possible sense, allowing genocide only to occur in the more serious circumstances with the most deadly intent, then States will be more willing to act in those rare circumstances when genocide is actually occurring.

This issue of the intent for genocide is a highly controversial issue and a much debated topic, which is beyond the scope of this thesis. Above provides an oversight of the problems, but it is not the aim of this work to delve further into the intent to commit genocide. Rather, this thesis will focus on what can be done to stop genocide from occurring.

⁶⁹ *Akeyesu*, *supra* note 23.

⁷⁰ Quigley, *supra* note 49, p.101.

⁷¹ *Akeyesu*, *op. cit.*, 39.

⁷² Quigley, *op. cit.*, p. 107.

D. Article III

When drafting Article III, the stark differences of interpretation, and of substantive law, between the Romano-Germanic law and Anglo-American law, became very apparent. It took some debate in order to reach a coherent definition of the inchoate or incomplete offences because different national legislatures interpreted these offences in very different ways. A compromise was reached on what the *ad hoc* committee called “punishable acts”.⁷³

“The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.⁷⁴

These provisions embrace not only those who actually perpetrate the physical acts of genocide, but also those who conspire to do so, incite others to do so, help in committing the crime, or even make an attempt to commit the crime. The punishable acts (b) to (e) are sometimes deemed to be lesser acts and attract a lower stigma level and punishment. Nonetheless, these acts may be just as dangerous as genocide itself, and the persons perpetrating them may be the real criminal masterminds behind the genocide. Schabas gives the example of the complicity of the accomplice who may in

⁷³ “*Ad Hoc* Draft Convention”, at UN Doc. E/AC. 25/12; UN Doc. E/794.

⁷⁴ Genocide Convention, Article III.

fact be the person who gives the orders to carry out genocide.⁷⁵ The subordinate is the one who carries out the instructions, often under a chain of military command, but it would seem that they receive the greater punishment and stigma. The Convention attempts to punish of both equally.

It is easy to see how the other offences of genocide are essential for the adequate prevention of the crime. The offences described in Article III are inchoate in their nature, which means that they can be committed, even if genocide itself does not actually occur. For example, conspiracy to commit genocide is still a crime under the Genocide Convention, even if the physical killing of the groups protected does not take place. This is really beneficial for the protection against genocide, because if those planning to commit genocide can be stopped before the acts actually take place, they can still be punished under the Convention.

Direct and public incitement to commit genocide was the most controversial inclusion in Article III. This was because there was the concern that this provision would encroach upon citizens' freedom of expression. This caused particular disquiet for the United States, who had freedom of expression as a guaranteed right, and to undermine this would be unconstitutional.⁷⁶ However, other countries realised the importance of this provision and rallied for its inclusion.⁷⁷ The *travaux preparatoires* give little guidance on the meaning of direct and public, but other bodies have proven to be more useful. The ILC has suggested that public incitement "requires communicating the call for criminal action to a number of individuals in a public space, or to

⁷⁵ Schabas, *supra* note 15, see discussion pp.285-303.

⁷⁶ United States Constitution, at http://www.archives.gov/national-archives-experience/charters/constitution_transcript.html, accessed on 22 August 2006.

⁷⁷ Particularly Saudi Arabia, who actually wanted to take the provision further to include hate crimes.

members of the general public at large.”⁷⁸ In relation to the genocide in Rwanda, the ILC also asserted that this could be by means of mass communication like radio or television.⁷⁹ If in private this would be a form of complicity.⁸⁰

Although the United States interpreted the meaning of direct differently,⁸¹ the Rwandan tribunal followed the reasoning of the ILC, adding a causal link with the crime committed. This is peculiar because direct and public incitement is an inchoate offence, which means that it is an offence in itself without genocide actually being committed. The Rwandan tribunal seemed to ignore the inchoate nature of the crime in its interpretation.⁸² Importantly, the inclusion of the direct and public incitement provision helps in the practical prevention of genocide, because it places States parties under a duty to regulate their public media broadcasting to ensure they are not inciting genocide.

There is a difficulty inherent in proving direct and public incitement because the leaders of genocide often speak in euphemisms, making it difficult to be sure what they are saying was intended to make others commit genocide. This was when the Rwandan’s were told over the radio to “go to work”⁸³ which was interpreted (as intended), by the Hutus to mean draw their machetes and kill their Tutsi neighbours.

For reasons such as this, the ICTR interpreted the direct and public incitement

⁷⁸ “Report of the International Law Commission on the work of its Forty-Eighth Session, 6 May-26 July 1996”, UN Doc. A/51/10, art.17, pp.26-7. available at, http://untreaty.un.org/ilc/documentation/english/A_51_10.pdf, accessed on 21 August 2006.

⁷⁹ *Ibid.*, p.22 footnote 50: “The tragic events in Rwanda demonstrated the even greater effect of communicating the call for criminal action by technological means of mass communication which enable an individual to reach a much larger number of people and to repeat the message of incitement. See final report of the Commission of Experts established pursuant to Security Council Resolution 935 (1994) (document S/1994/1405, annex).”

⁸⁰ *Ibid.*, p. 22.

⁸¹ Schabas, *supra* note 15, p. 94.

⁸² Akayesu, *supra* note 23.

⁸³ For further information see History of Rwanda at <http://foi.missouri.edu/newsmgmtabroad/jsentenced.html>, accessed on 22 August 2006.

provision in light of the cultural and linguist dynamics of Rwanda. It is hoped that this principle will be generally applied in the future.

Attempt, as defined under the Convention, must be more than “mere preparatory acts”⁸⁴ but what exactly this entails is unclear. It is not clear at what point is the line drawn between a preparatory act and an attempt at genocide. The *travaux préparatoires* provide no extra guidance, and the issue has never been raised before a competent tribunal. It is hoped that if this question did arise, the courts would continue to follow a rather liberal reading, taking into account the circumstances of the time, and what they considered was actually intended by the drafters of the Convention.

Conspiracy to commit genocide is a crime that is made out when two or more offenders agree on a common plan to commit genocide.⁸⁵ Conspiracy can be difficult to establish as meetings will often take place in secret and with no documentary evidence. As such, prosecutions under this limb of the Convention have been limited. Nonetheless, it is useful for protecting citizens against future genocide, because if those capable of these thoughts are found, they can be punished without any physical genocide taking place.

A person is complicit in genocide, when he or she aids, abets, counsels or procures in genocide, even if not as the primary perpetrator.⁸⁶ As has been suggested above, the

⁸⁴ Schabas, *supra* note 15, p. 283.

⁸⁵ The Rome Statute makes it clear that there is not an inchoate form of conspiracy, and although it was trying to incorporate the Genocide Convention into its statute this oversight was probably a result of exhausted drafters. See Schabas, ‘Developments in the Law of Genocide’, Ankara Bar Association, Ankara, 5 January 2006.

⁸⁶ *United Kingdom v. Schonfeld et al.*, (1948) 11 LRTWC 64, British Military Court, pp. 69-70.

accomplice may often be the real mastermind behind the genocide and so prosecution is essential.

E. Article IV

Article IV of the Convention eliminates any defence of act of State:

“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.”⁸⁷

This Article deals with responsibility for genocide, reflecting the Nuremberg finding that a high official status was not a bar to international criminal liability. It means that no matter who plans, commits or incites genocide, they are able to be prosecuted.

Article IV is significant because it allows for, and indeed anticipates that genocide may be committed with State consent or with the knowledge of its officials. At the time of drafting, and currently, this was thought to be the most probable way that genocide would be perpetrated. In fact, in Rwanda, high government officials, including the Prime Minister, have been convicted of genocide.⁸⁸ It was not anticipated however that individuals would be able to commit these crimes without support or knowledge of government and it was not thought that governments would not be able to stop genocide within their territory. This meant that no further provisions to enable third party States to help prevent genocide in another State were

⁸⁷ Genocide Convention, Article IV.

⁸⁸ See for example, *The Prosecutor v. Kambanda*, ICTR-97-23-S, Judgement and Sentence, 4 Sept. 1998,

included in the Convention. This is arguably the biggest drawback for the prevention of genocide and will be discussed in some detail in the next chapters.

F. Article V

Article V requires that States provide effective penalties for the crimes detailed in the Genocide Convention. This is the essential criminal law element of the text which requires domestic implementation of the Conventions provisions. This provision gives the Genocide Convention most of its strength for the prevention and punishment of genocide:

“The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III⁸⁹

National legislatures may develop the criminalisation of genocide further than what is required by the Convention but the very minimum requires that genocide be made a crime within the domestic legal system and various practical measures which result from this be implemented. States must also not commit genocide themselves and pledge to grant extradition and prosecute any individual reasonably suspected of genocide. This provision will be discussed in some detail in the following chapter.

⁸⁹ Genocide Convention, Article V.

G. Article VI

Article VI restricts national jurisdiction granted for genocide, to the territory of the State on which the act was committed. It also gives jurisdiction to an international criminal court:

“Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction⁹⁰

Territorial jurisdiction means that the crime of genocide, and any of the other acts of genocide, must be tried in the State in which they were committed. Territory is recognised as encompassing acts which took place outside of States actual territory, so long the acts had a direct effect upon it and that part of the offence took place within the territory.⁹¹ Schabas says that this jurisdiction is an “unfortunate compromise” because the very reason for the drafting of the Convention was because the States where the crime took place failed to prevent and punish genocide.⁹²

When drafting the Convention, States were unwilling to accept a more far reaching jurisdiction. At this time national sovereignty was of paramount importance and States were unwilling to allow anything to compromise this. As a result of this they

⁹⁰ Genocide Convention, Article VI.

⁹¹ *United States v. Noriega*, 746 F Supp. 1506, SD Fla 1990; *R v. Jacobi and Hiller*, 1881 46 LR 595n; *Libman v. The Queen*, 1985 21 CCC (3d) 206 (SC); Lynden Hall, “Territorial Jurisdiction and the Criminal Law”, [1972], *Criminal Law Review*, p.276.

⁹² Schabas, *supra* note 15, p.547.

were not prepared to include in the Convention any jurisdiction which would encroach on national sovereignty.

Furthermore, at the time of drafting it was not seriously anticipated that individuals would be capable of committing genocide. Generally those with high levels responsibility in the government would be involved in the genocide, so national courts would be in a difficult situation in trying their own leaders. Also, following the Nuremberg legacy States were not thought to be capable of incurring guilt, and as such any basis of jurisdiction which would allow this could not be accepted.

In addition, the Genocide Convention was the first major treaty dealing with international issues of concern. So to allow for a broader base of jurisdiction at this point in time was considered too radical. Rather than taking the big step of allowing a broader basis of jurisdiction, the drafters toyed with the possibility of an international court to play a role in the prevention of genocide.

At the time of drafting it was anticipated that an international criminal court would shortly be established and this would reduce the dependency on the national legal system for prosecution. The problem was that this international court did not materialise until half a century after the Convention. There were various factors in play which hampered a quick move towards an international court. The effects of the Cold War, as well as the fact that there was at the time no Code of Crimes meant that States ran into a lot of difficulty. Once Code of Crimes was complete the foundations of an international court moved along towards completion. As a result of this, until 2002 the main form of prosecution for genocide was through national courts. The

creation of the ICC was discussed the Chapter one and its ability to prevent genocide further will be discussed in the following chapters.

H. Article VII

Article VII states the following:

“Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition. The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.”⁹³

There is no general duty of *aut dedere aut iudicare* under the convention,⁹⁴ but it may be possible to interpret provisions I, IV, V, VI, and VII to extend to this general duty.⁹⁵ Territoriality generally involves prosecution of the offence where the act took place. If the State cannot prosecute they must extradite the perpetrator.⁹⁶ It is accepted by treaty and customary law that if genocide was classed as a political crime, offending States would not be obliged to extradite the perpetrator. But it is extremely difficult to conceive genocide as a political crime; if terrorism is not a political crime anymore primarily because it involves violence and bloodshed, it is impossible to argue that genocide, a far greater crime, can be seen as a political crime. In principle if a crime is a political crime then extradition can be blocked. For example, crimes such as betraying official secrets and secretly taping conversations of the Head of

⁹³ Genocide Convention, Article VII.

⁹⁴ The Duty to Extradite or Prosecute in International Law. For further information see, M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Brill Academic Pub, 1995.

⁹⁵ Lee A. Steven, “Genocide and the duty to extradite or prosecute: why the United States is in Breach of its International Obligations”, 1999, 39, *Virginia Journal of International Law*, p.425 at pp.460-1.

⁹⁶ Although the provisions do not say that outright, this was a development of the Sectoral Terrorist Conventions.

government and then leaking them to the media, are motivated by political considerations but do not entail violence.⁹⁷

Under the Convention if a suspect is in the custody of a State where the act did not take place, it must extradite him to the State where the genocide took place. This closes what would effectively be a gap in the legislation for the prosecution of genocide, and envelops the protection against the crime; Article VII *requires* States parties to comply with extradition requests by other States without limiting the obligation to requests from States where the act of genocide took place.⁹⁸ It would be contrary to the undertakings of the Convention if State parties were to harbour a person suspected, without trying that person, where the crime is committed in the territory of that State, or without extraditing that person, if no territorial jurisdiction arose.⁹⁹

Extradition is granted in accordance with law and treaties in force. The current interpretation and application of the rules of the laws and treaties do not allow extradition to countries where the death penalty or any degrading treatment may be a punishment.¹⁰⁰ Not to extradite to these countries would not amount to a breach of the Convention.

⁹⁷ UN Doc. A/C.6/217.

⁹⁸ Article VII provides in part: "The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force." Genocide Convention, Article VII.

⁹⁹ That is of course taking on board the inability to prosecute if the accused is too old, infirm or mentally deranged. In these cases it is not a breach of the obligation.

¹⁰⁰ The Vienna Convention on the Law of Treaties, 1969.

In 1996, the ICJ explained that there are no territorial limitations to the obligation on all States to prevent and punish genocide.¹⁰¹ This conclusion is reinforced by the Security Council calling upon all States to prosecute, or to surrender to the Rwanda Tribunal, all found within their territory against whom there is sufficient evidence of responsibility for genocide in Rwanda.¹⁰² Since the phrase "appropriate national authorities" is not limited to Rwandan authorities, it is clear that the Security Council envisaged prosecution by the courts of other States, which would necessarily have included prosecutions based on universal jurisdiction. As this is not specified under the Convention this assertion is not binding, but rather an option for States if they choose to comply.

I. Article VIII

Article VIII gives contracting parties the right to call upon organs of the UN to take appropriate measures to attempt to suppress acts of genocide:

“Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III¹⁰³

Parties can call upon the General Assembly, the Security Council, the Secretariat (particularly the Special Rapporteur on Genocide), the Economic and Social Council,

¹⁰¹ *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment of 11 July 1996, Int'l Ct. Justice, para. 31.

¹⁰² S.C. Res. 978 (1995) of 27 February 1995.

¹⁰³ Genocide Convention, Article VIII.

Agencies of the United Nations, the Human Rights Council or any subsidiary body to inform them of a suspected genocide situation.

States are best advised to call upon the Security Council because of its obligation-creating powers and ability to authorise the use of force to intervene if a situation breaches the peace and security of mankind.¹⁰⁴ The SC has used its powers for the prevention and suppression of genocide in the recent years by creating the *ad hoc* tribunals of Yugoslavia and Rwanda.

It may also be beneficial for States to initially call upon the Human Rights bodies, as these agencies are the most well equipped organs to understand the issues and come up with practical solutions to solve any genocidal crisis. However their ability to go further, and provide practical help beyond the realm of theory is limited. The UN is in an excellent position to exert moral pressure on governments to push them to stop committing breaches of human rights. The General Assembly is also useful for the suppression of genocide because it can make Resolutions to urge States to cease their human rights breaches.¹⁰⁵

The downside to this provision is that States cannot require the UN bodies to take any action. Nonetheless, the political message of informing the UN may exert the necessary pressure to take action to prevent a situation which is, or might amount to genocide. Member States of the United Nations do have this right as part of their

¹⁰⁴ Chapter VII Powers, see Charter of the United Nations, at www.un.org/aboutun/charter/, accessed on 21 August 2006.

¹⁰⁵ This was the start of concerted action in Yugoslavia and Rwanda which led to the establishment of *ad hoc* tribunals and the eventual punishment of the perpetrators of genocide.

membership of the UN, but this provision extends the right to non-UN parties. The role of the UN in preventing genocide is discussed in Chapter 4.

J. Article IX

Article IX provides the ICJ with jurisdiction to resolve disputes between contracting parties in relation to the Convention:

“Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute¹⁰⁶

In essence this provision is self explanatory; if there are any disputes regarding terms of the Convention’s duties, the ICJ is given jurisdiction to hear such cases. The United States among others has made a reservation to this provision. But this reservation is not accepted by most of the other states parties.¹⁰⁷

This provision has been invoked by States parties, and most recently the ICJ gave a decision in the *Application of the Genocide Convention* judgement.¹⁰⁸ This decision will be discussed in some detail in the following chapters.

For a brief discussion of Articles X- XIX see Appendix 2.

¹⁰⁶ Genocide Convention, Article IX.

¹⁰⁷ Prevent Genocide, at www.preventgenocide.org, accessed on 22 August 2006. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Adv. Op.), 1951 I.C.J. Rep. 15; *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 101.

¹⁰⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 26 February 2007. paras., 459-470.

II. Conclusions

The Genocide Convention provides the basis of protection against genocide. The Preamble may be interpreted in light of the Convention's meaning and purpose and could provide a duty on States to prevent genocide. The groundbreaking Article I provision is important because it ensures that States parties prevent genocide as well as punish the crime, and that this may be done either in peace or war. Articles II and III are the substance of the Convention as they provide the definition of genocide, which is now the accepted legal meaning. Article IV is particularly important because it ensures leaders can be held to be responsible for genocide. Article V and VI stipulate the domestic law prosecution requirement which ensures effective domestic prevention. Article VII does not allow genocide to be used as a political crime for the purpose of defeating extradition. This means that there is a more far reaching punishment of all offenders of genocide. Importantly for non United Nations members of the Genocide Convention, Article VIII allows all parties to call upon the UN. Also this provision may be used to exert pressure on the United Nations in order to ensure they do as much as they can to prevent and punish genocide. Article IX to XIX are essential provisions which are necessary for the effectiveness of the Convention. They do not add anything to the prevention and punishment of the crime, but they are necessary practical terms.

The Convention is undoubtedly the original and main basis for the prevention of genocide. Bearing in mind the date on which it was established, it is a groundbreaking document which is accepted and applied by many States throughout the world. In fact

its provisions have made their way into customary law and must be abided by all States, this will be discussed in the following chapter.

Chapter Three: What Might the Duty to Prevent Genocide

Amount to?

I. Introduction

The Genocide Convention utilises national and international criminal law as the primary means to prevent and punish genocide. The requirement that States make genocide a crime, allows the deterrent effect of the criminal law to do its work in preventing (some) genocides. The punishment of officials, when deterrent fails, allows the preventative effect to be reinforced for the future, by ensuring those capable of committing these acts will always be punished.

Genocide is prohibited by both the Convention and customary international law, which is established by national practice and *opinio juris*. There are six legal frameworks, or interpretations of the law, which may provide different levels of duties to prevent genocide: i. in the narrowest sense, States must prevent genocide by making genocide a national criminal wrong; ii. in order to comply with the Genocide Convention States must make genocide a national tort; iii. a broader interpretation under the Genocide Convention may entail States taking active steps to prevent genocide within their own territory and areas of control; iv. an even broader reading of the Convention may require the prevention of genocide, not only within the States' territory, but also wherever genocide may occur within the territory of any State that is a party to the Convention; v. all States in the world are under a duty to abide by the customary rule to prevent genocide within the States own territory and areas of

control; vi. on the widest reading of customary law, all States may be required to prevent genocide wherever it may occur; universal jurisdiction for genocide.

Before concluding this chapter, some consideration is given to the duty to punish genocide universally. This topic raises a lot of questions, and academics have many differing views about whether it exists, and if it does what it entails. The view taken here is that although it would be beneficial, there is not enough evidence to support a universal punishment for genocide.

II. The Duty to Give Effect to the Terms of the Genocide Convention by Making Genocide a National Crime

A. Incorporation

The Genocide Convention specifies a territorial principle of jurisdiction (Article VI). This has been given a broad scope, and taken to encompass acts outside of State's physical territory, so long as it had a direct effect on it.¹ Territoriality is inherent in State sovereignty² in that it means that national borders and authority are respected above allowing other States to have jurisdiction over a crime within a different State. In relation to the prevention of genocide this means that genocide must be criminalised and prosecuted on the territory of the State where the act occurred, whatever the nationality of the victim or offender.³ At this minimalist level, the Convention requires that State parties must prevent genocide by incorporating the

¹Lynden Hall, "'Territorial' Jurisdiction and the Criminal Law, [1972], *Criminal Law Review*, p.276

²*Island of Palmas Case* (1932) 2 RIAA 829, 838.

³Treaty of International Penal Law, 23 January 1889.

Convention's provisions into national law.⁴ These Conventional obligations require that State parties must firstly, not commit genocide themselves; and secondly, make genocide a crime within their national legal systems.

The important provisions for the prevention of genocide, which must be incorporated, are: the punishment of genocide whether in peace or war;⁵ the territorial nature of jurisdiction;⁶ the overturning of any barriers to liability of constitutionally responsible rulers, public officials or private individuals;⁷ and, not allowing genocide to be classed as a political crime for the purposes of extradition.⁸ The definition of genocide which is integrated into the national mechanisms must, at the minimum level, be the definition provided in Article II. Together these provisions require that criminal proceedings be brought against any perpetrator of genocide.

The incorporation of international legal provisions into domestic law is essential for their success.⁹ In States where ratified treaties are not automatically incorporated into domestic law, such as the UK, implementing domestic legislation is particularly important to ensure the crime is given national protection in accordance with the standards of the international treaty. In countries where international treaties are automatically incorporated, it is still important to ensure that the national mechanisms comply with the full scope of the treaty obligations; States must make sure the domestic law, court and policing procedures are adequate.

⁴ Article V, Convention on the Prevention and Punishment of the crime of genocide, *adopted* 9 December 1948, by Resolution 260 (III) A of the United Nations General Assembly, 78 U.N.T.S. 277. Entered into force 12 January 1951 U.N.T.S. No. 1021, vol. 78, 1951.

⁵ *Ibid.*, Article I

⁶ *Ibid.*, Article VI

⁷ *Ibid.*, Article IV

⁸ *Ibid.*, Article VII

⁹ Lemkin, Raphael, *Axis Rule in Occupied Europe, Analysis of Government, Proposals for Redress*, Washington: Carnegie Endowment for World Peace, 1944, pp. 93-4.

In order to make genocide a crime in the national legal system the prosecutor must be given the authorisation to prosecute genocide. The police must also have the powers to arrest and detain any person suspected of genocidal behaviour. Legislation should define the crime and the penalties to be imposed on conviction, designate the competent courts, and establish the basis of the exercise of territorial jurisdiction.

Bassiouni details what he considers to be the eight essential mechanisms for domestic incorporation:

“extradition, legal assistance, execution of foreign penal sentences, recognition of foreign penal judgements, transfer of criminal proceedings, freezing and seizing of assets deriving from criminal conduct, intelligence and law enforcement sharing and regional and sub-regional “judicial spaces””.¹⁰

His view authoritatively defines what it is necessary for States to do to prevent genocide. This provides a useful guide for what action should be taken by states to abide by their obligations to prevent genocide.

Although this theory has major limitations, the punishment of genocide may have a preventative function.¹¹ Perpetrators may be deterred if they think that they are likely to be punished for their acts of genocide. In order for this to act as a deterrent it is assumed that the genocidists are rational human beings with a common moral value system. However, because the perpetrators do not often conform to the latter assumptions, the idea of the punishment of genocide does not hold the same weight.

¹⁰ M. Cherif Bassiouni, *Introduction to International Criminal Law*, Transnational Publishers, Inc., Ardsley, New York, 2003, p.333.

¹¹ William A. Schabas, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, 2000, p. 447.

Many sociopsychological theories suggest that genocide is seen by criminals as a rational object employed in a rational way.¹² However, the recent genocidists, such as Hitler and the Rwandan Hutus, were blinded by irrational thought and as such any legal provisions preventing genocide would not, and did not stop them from committing genocidal acts. They believed that what they were doing was right, moral and often what was intended by God.¹³ The presence of law has had little preventative effect on genocidists.

In order to achieve more substantial prevention of genocide States could utilise their interpretation of the customary international law relating to genocide, to lay claim to a broader concept of jurisdiction over genocide.¹⁴ When defining genocide in their national law, some States have already included a more detailed definition or a broader jurisdiction for genocide.¹⁵ For example Spain expands the qualifying acts to include sexual assaults on members of a group and forced removals of members of the group.¹⁶ A number of other States have included the forced deportation of a group.¹⁷ Ethiopia has added the category of political groups to receive protection.¹⁸ Estonia,¹⁹ Latvia,²⁰ Lithuania,²¹ and Spain²² also include social groups. There are jurisdictional

¹² Leo Kuper, *The Prevention of Genocide*, Yale University Press, New Haven, 1985, p.196. See also Chapter four.

¹³ Stanton, Gregory H., "Could the Rwandan Genocide have been prevented?", *Journal of Genocide Research*, June 1994, Volume 6, No.2, pp. 211-228.

¹⁴ For example Belgium has previously claimed universal jurisdiction over any crime amounting to a grave breach of the Vienna convention and over war crimes.

¹⁵ For example Switzerland.

¹⁶ Spain Penal code article 607.

¹⁷ For example, Italy: Law of 9 October 1967, no. 962; Estonia: Estonia Criminal Code, Article 611 Eriosa, 9 November 1994; Yugoslavia, Criminal Code of 1961, article.124, *Collection of Yugoslav Laws*, vol. 11, Official Gazette of the Socialist Federal Republic of Yugoslavia no. 44, 8 October 1976. Referenced in John Quigley, *The Genocide Convention: An International Law Analysis*, Ashgate Publishing Ltd, 2006, p. 16.

¹⁸ Penal Code of the Empire of Ethiopia, Article. 281, Proclamation No. 158 of 1897, Negarit Gazeta, Extraordinary Issue No. 1 of 1957.

¹⁹ Estonia Criminal Code Art. 611, Eriosa, 9 November 1994.

²⁰ Latvia, Criminal Code, Art. 68-1, 6 April 1993.

issues which arise if States do go beyond the provisions of the Convention; those States with the minimalist level of protection, still abide by the law and can rightly decide to not recognise another States extended jurisdiction or definition of the crime. States do have the authority to include other groups for protection, or widen the jurisdiction given under the Convention, so long as their expansion does not go directly against another element of the Convention. However, they ale have the option to simply lift the definition of genocide verbatim from the Convention, and this is the most common scenario.

This duty to incorporate the provisions of the Convention does not provide for comprehensive prevention of genocide. It is likely that the drafters of the Convention intended for States to go further than this and as such a more liberal reading of the Convention is required. The recent case concerning the Bosnian genocide has confirmed that States do have duties to actually prevent genocide and this amounts to a tangible duty, which is more than a mere duty to criminalise.²³ This will be discussed below.

B. The National Role of the ICC

In addition to the national criminalisation of genocide provided for in the Genocide Convention, jurisdiction is also given to an international court for prosecution (Article VI). The Convention demonstrates a preference for national prosecution in that it is

²¹ Lithuania, Seimas, Law VIII-1968; Valstybes zinios, No. 89-2741, 26 September, codified in Criminal Code, article. 99, *Lietuvos Respublikos Baudziamasis Kodeksas*, 2000, Vilnius.

²² Spain: Ley 44/1971, 15 Novemeber 1971, adding article 137bis to the Penal Code.

²³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 26 Feb 2007, at <http://www.icj-cij.org/docket/files/91/13685.pdf>, accessed on 5 May 2007.

the primary basis of jurisdiction, but it does allow for some involvement of an international court in matters of genocide.

The recent establishment of the ICC has provided an effective tool which should be utilised in the prevention of genocide. Operating on a principle of complementarity States must be given the opportunity to hold national trials prior to the ICC assuming jurisdiction. If those trials do not take place, or “sham trials”²⁴ are held, the ICC can acquire jurisdiction.²⁵ This is extremely beneficial because it gives States the ability to deal with the atrocities of their own country in their own way. However, if they are unwilling or unable to do so, it means that the perpetrators are still subject to prosecution, through the ICC. This ensures some consistency in the fight against genocide. The role of the ICC will be discussed in some more detail in the following chapter.

C. Criticisms of Domestic Criminalisation

The problem with the domestic criminalisation of Genocide Convention is two-fold. Firstly, if governmental officials are considered to be the future genocidists, a domestic method of criminalisation is weak. It is likely that this prosecution will not occur, either because those government officials are still in power and choose not to prosecute themselves, or, if a new government is in power, an impunity agreement may have been reached. This culture of impunity is major obstacle to the effective punishment of genocide. In addition, governmental perpetrators of genocide may escape punishment where a State wishes to forget the crimes of the past; big drawn

²⁴ Schabas, *supra* note 11, p.346.

²⁵ Article 17 Statute of ICC U.N. Doc. A/CONF.183/9, at <http://www.un.org/law/icc/statute/romefra.htm>, accessed on 5 May 2007.

out court cases would not be politically desirable during such a period. As a result, the domestic criminal prosecution that is contained in the Genocide Convention does not always effectively deter genocidists, or effectively punish them after the event.

The second problem with domestic criminalisation is that if individual persons are committing genocide, and they are not in collaboration with the government, they are generally out of the control of the State. This means that although the State has the powers to prevent and prosecute them, they are unable to do so because the genocidists are more powerful than the government. When drafting it was not anticipated that this scenario would come about, that is that individual actors would commit genocide. However the Rwandan genocide showed that non-governmental persons could be responsible for planning and carrying out the extermination of a population without the backing of the officials of that country. The territorial principle of jurisdiction has not been sufficient to prevent genocide in these circumstances, where non-governmental actors have been involved, because the government has been powerless and unable to implement any internal mechanism to stop such massacres. It is submitted that the only way to prevent genocide in these circumstances would be for external States and organisations to have the ability to help. However, this would be dependant on the good will of States, which would mean that international prevention almost always be for policy and influence and not uniform. As a result of this, where individuals are committing genocide, the territorial principle of jurisdiction is extremely limited.

III. The Tort of Genocide

A. The International Tort of Genocide

A tort is a civil wrong, as opposed to a crime, or contractual legal obligation. The law provides a remedy for such wrongs, in the form of financial compensation.²⁶ As well as torts existing in national law between individuals, wrongs in international law can also exist between States. It is an established principle of international law that reparations are available to States, on behalf of their injured nationals, against other wrongdoing States. Theo Van Boven considered the content of reparations to include restitution, compensation, rehabilitation and, satisfaction and guarantees of non-repetition.²⁷

Restitution refers to measures such as the ability to return to one's homeland, the restoration of liberty, family life, citizenship and the return of property and possessions. These measures seek to restore the situation that existed before to the violations of human rights.²⁸ Compensation refers to monetary reparation for any damage resulting from violations of human rights which are assessable in financial terms.²⁹ Rehabilitation includes helping the victims become integrated back into

²⁶ Rogers, W.V.H. (ed.) *Winfield and Jolowicz on Tort*, London: Sweet & Maxwell, 2002, sixteenth edition.

²⁷ Theo van Boven, Special Rapporteur of the United Nations, "Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Final Report", UN Doc. E/CN.4/Sub.2/1993/8, 2 July 1993, 7; Theo van Boven, "Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117", U.N. Doc. E/CN.4/Sub.2/1996/17, 24 May 1996, p.2.

²⁸ Orentlicher, D.F., "Addressing Gross Human Rights Abuses: Punishment and Victim Compensation" in Henkin, L., and Hargrove, J.L., (eds), *Human Rights: An Agenda for the Next Century*, Washington DC: The American Society of International Law, 1994, 425-426.

²⁹ Justice Roy, "Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?" (1961) 55 *American Journal of International Law* 863, 863

society through medical, social and psychological care.³⁰ Satisfaction and guarantees of non-repetition includes, an apology (usually including public acknowledgment of the accepted facts and responsibility) and the implementation of measures to prevent recurrence of the violations.³¹

In international law torts exist in order to compensate victims for their losses due to the actions of States. Every State:

"has a duty to make reparation in case of a breach of the obligation under international law to respect and to ensure respect for human rights and fundamental freedoms"³²

This is necessary to redress the harm suffered and promote good future international relations. It allows States to draw a line under the problem, give the compensation and start again. Although this is a rather idealistic view, this is the purpose of the tort in international law. Most damages for civil wrongs are concerned with compensation for specific losses, such as the destruction of property or buildings, or harm suffered by the individual. But the principle of reparation for loss is equally as valid to compensate families who have suffered from genocidal atrocities.³³

In order for genocide to be classed as an internationally wrongful act, it must satisfy the following criteria. First, it must be a legal obligation which is international in nature, in existence between at least two parties. Second, there must be an act or

³⁰ Tony Buti and Melissa Parke, *International Law Obligations to Provide Reparations for Human Rights Abuses*, Murdoch University Electronic Journal of Law, 1999, at http://www.murdoch.edu.au/elaw/issues/v6n4/buti64_text.htm, accessed on 21 July 2007.

³¹ For more information on satisfaction and guarantees see generally: M. Minow, *Between Vengeance and Forgiveness*, Boston: Beacon Press, 1998.

³² Theo van Boven, *supra* note 27.

³³ *Ibid.*, p.2.

omission which violates that obligation. Third, that act or omission must be imputable to the responsible State, and forth, there must be loss or damage resulting from the wrongful act.³⁴ Schabas contends that genocide, or any of the acts contained in Article II, are subject to becoming internationally wrongful acts, and that this does not require “any demonstration or justification”.³⁵

There is no legal barrier to prevent those who still suffer from the consequences of genocide to claim reparation, even if the crimes were committed against their ancestors. Whether the descendants to the victims of genocide have a right to reparation will depend on the nature of the claim being made, the immediacy of relation and the effect the crime has had on that relation. For example claims have been successfully brought by the sons and daughters of property owners whose lands were seized after the German Democratic Republic was set up.³⁶ Although there is no limitation period for claims in international law, unreasonable delay could cause a refusal of the claim, by virtue that the State has waived its rights because it did not claim for such a long period of time.

Survivors of genocides find it extremely difficult to receive their deserved compensation for the harm that they have suffered.³⁷ One of the main problems with providing compensation for genocide is that individuals are unable to make an international claim; a tort compensation claim is only able to be issued by a

³⁴ Malcolm Shaw, *International Law*, 5th edition, Cambridge: Grotius Publications, 2003, p.407.

³⁵ Schabas, *supra* note 11, p.433.

³⁶ Even though the State of Israel did not exist at the time when the Nazi regime committed its crimes against the Jews. It is also significant that West Germany, which felt obliged to meet the claim, was also a different State, territorially as well as politically, from the individuals of the German Reich, who were responsible for the atrocities.

³⁷ "Alien Tort Statute" Genocide and Crimes Against Humanity. Ed. Dinah L. Shelton. Thomson Gale, 2005. eNotes.com. 2006. <http://history.enotes.com/genocide-encyclopedia/alien-tort-statute>, accessed on 1 July 2006.

government against another government. The reason this proves difficult for genocide is because this crime is generally committed by the government against the State's own nationals, and so reparation relies on the government making a voluntary restitution to its own nationals, or a third party government making a claim on behalf of the nationals of the offending State.

B. Reparations for Wrongful Acts

There are many examples of reparations for loss suffered as a result of crimes against humanity, and some for genocide. The reparations introduced by the Federal Republic of Germany for compensating victims of Nazi persecution have been described as the most comprehensive to date.³⁸ In 1965 the Final Federal Compensation Law was implemented, which provided compensation to residents or former residents of Germany for loss of life, damage to limb or health, damage to liberty and damage to professional and economic prospects.³⁹ Where the victims lived outside of Germany global agreements were made with the other countries, for example Israel, so they received money and paid it to the individual in that country. Under this reparation those who were able to do so were reinstated into their jobs as a form of rehabilitation. Although this system has been subject to criticism because it focused too much on compensating for damage to property, rather than any emotional or physical damage to the individual, it shows that States acknowledge their duty to provide international reparations. This in turn may prevent their policies from going so far to cause this harm, or may prompt them to take action to prevent genocide against their own nationals.

³⁸ *Supra* note 30, p.50

³⁹ *Idid.*, p.45

Reparations have taken place in Chile, after Pinochet's regime, in the form of Satisfaction and Guarantees. In April 1990, Chile established the National Commission for Truth and Reconciliation, with the aim to find out the truth about the torture and forced displacements which took place, in order to give the relatives of those victims some sort of closure. In February 1990, President Aylwin formally apologised to the victims and their families on behalf of the State.⁴⁰ Nonetheless, this scheme did not punish those involved in the atrocities, and that may be the biggest downfall of the system of reparations for violations of international law. Although it allows the families to receive an apology and perhaps some money, it does not necessarily mean that the perpetrators will be brought to justice.

Further forms of reparation have included, the Austrian payments to the survivors of the Jewish holocaust in 1990 totalling £13.2 million;⁴¹ the Japanese reparations to South Korea for acts committed during the invasion and occupation of Korea by Japan;⁴² and most recently, the United Nations Security Council passing a Resolution requiring Iraq to pay reparations for its invasion of Kuwait.⁴³

States have also started to accept their responsibility to make restitution to groups of people within their own borders, whose rights have been violated. For example, in 1988 the United States Congress passed the Civil Liberties Act,⁴⁴ was designed to

⁴⁰ Hayner, P. B., "Fifteen Truth Commissions - 1974 to 1994: A Comparative Study" (1994) 16 *Human Rights Quarterly* 597, 622.

⁴¹ American Jewish Yearbook, at www.ajcarchives.org/AJC_DATA/Files/Vol_68_1967.pdf, accessed on 1 August 2006.

⁴² Japan Today, at <http://www.japantoday.com/jp/news/402428>, accessed on 5 May 2007.

⁴³ Security Council Resolution 681.

⁴⁴ On August 10, 1988, President Ronald Reagan signed the Civil Liberties Act of 1988. The Act was passed by Congress to provide a Presidential apology and symbolic payment to the internees, evacuees,

make restitution to Japanese Americans in respect of losses brought about by discriminatory acts of the US Government to Japanese Americans. In a similar way, some steps have been taken to recognise the rights to restitution of indigenous peoples whose land was plundered and occupied, and whose people were decimated, especially in the United States, Canada, and Australia. Each of these countries has made land rights settlements and/or financial payments to indigenous people.⁴⁵

C. U.S. Alien Tort Claims Act

If States are unwilling to make the voluntary restitution, third party States can intervene and ask for compensation on behalf of the nationals of the other State. The US Alien Tort Claims Act (ATCA)⁴⁶ provides an example of how a remedy could be made for the wrongs of genocide outside of the territory where the act was committed. The ATCA provides that U.S. District Courts:

"shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."⁴⁷

This provides a civil remedy allowing victims to seek damages for the wrongs inflicted on them, but does not subject defendants to criminal prosecution. The biggest drawback of this Act is that in order to make a claim under this Statute there must be some link with the U.S., for example the violator is found living there.

and persons of Japanese ancestry who lost liberty or property because of discriminatory action by the Federal government during World War II.

⁴⁵ Notes from the United Nations Permanent Forum on Indigenous Issues, 5th Session, May 2006, New York. For further information see UNPFII website, at <http://www.un.org/esa/socdev/unpfii/>, accessed on 22 August 2006.

⁴⁶ US Alien Tort Claims Act 1789, codified at 28 U.S.C.

⁴⁷ *Ibid.*, para. 1350.

An example of a case using the ATCA to gain compensation for a victim of genocide is *Kadic v. Karadzic*.⁴⁸ This case was brought against the self-proclaimed president of the Bosnian Serbs for a range of atrocities committed in the former Yugoslavia, beginning in 1992. A claim was brought by a group of Bosnian Muslims who had survived the attacks, and by family members of those who had been killed. In its decision, the Second Circuit held that the victims had suffered loss and in August 2000, the victims in the case were awarded £393 million in damages.⁴⁹ *Karadzic* was later indicted by the ICTY for acts of genocide, crimes against humanity, and war crimes.⁵⁰ This goes to show that international reparations can be used successfully to compensate the victims of genocide, which may in turn prevent genocide, and can even lead to prosecution of the perpetrators of these crimes.

D. The approach of the ICJ

Recently the ICJ considered the question of reparation for genocide.⁵¹ When making this decision the court confirmed that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it.⁵²

In the *Application of the Genocide Convention* Judgement the court found that reparation was not due. This case was distinguished because it could not be said with

⁴⁸ *Kadic v. Karadzic*, 70 F. 3d 232, 238, 2nd Cir., 1995.

⁴⁹ Case discussion at, <http://www.yale.edu/lawweb/avalon/diana/karadzic/4298-12.html>, accessed on 8 August 2006.

⁵⁰ Decision at <http://www.un.org/icty/karadzic&mladic/tdec518-e.htm>, accessed on 8 August 2006.

⁵¹ *Case Concerning the Application of the Genocide Convention*, *supra* note 23, paras., 459-470.

⁵² *Case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, 25 September 1997.

the sufficient degree of certainty required, that the genocide would have been avoided if the Respondent had taken all of the necessary measures in order to try and prevent genocide; the genocide may have happened anyway.⁵³ Without some causal nexus between the failure to prevent genocide and the genocide actually occurring then financial compensation is not appropriate. What the court considered as more appropriate was reparation in the form of satisfaction, such as a declaration admitting the failures to comply with the Genocide Convention. This outcome is not very useful for the victims of the genocide. It is very difficult to establish that if certain action had been taken a genocide would have been avoided, this requires understanding fully the policy and implementation of the plan of genocide, which in itself is a mammoth task, and often impossible as the perpetrators may be dead, or missing, or unwilling to cooperate. If this evidence cannot be brought, then the victims are left without a remedy. This shows that international prevention of genocide requires more than reparations.

IV. The Duty to take Practical Steps to Prevent Genocide within the State's Territory (and Areas of Control)

It is possible to assert that the Genocide Convention entails practical means of prevention, which amount to more than the territorial criminalisation of genocide. It is important to distinguish between the duty to criminalise genocide, which is inherent in the Genocide Convention and this duty to prevent genocide within a State's territory, which may involve wider responsibility. Together articles I and V may be taken as authority for a more practical means of prevention of genocide.

⁵³ *Op. cit.* paras., 459-470.

This section will outline that the duty to take positive steps to prevent is inherent in the Convention. Chapter Four will then discuss in some detail what that duty to prevent practically amounts to in tangible terms, this section will set out why legally this is required.

A. The Duty to Take Action

Article V of the Genocide Convention is often overlooked by academics or deemed unimportant; Pieter Drost suggests that national criminalisation of genocide is inherent in the Convention, and so Article V is superfluous.⁵⁴ However, with further investigation, it does seem possible to contend that the duty to prevent genocide may be developed by Article V of the Convention. The *travaux préparatoires* suggest that the scope of Article V is much broader than Drost anticipated. They suggest that this Article may be extended to impose obligations on States to prevent genocide in practical terms, as well as introduce the national criminalisation of genocide.⁵⁵

What this duty to prevent entails is not set out in any specific terms in the Convention. This would be impossible as all genocidal incidents will require different means of prevention. This can be seen as beneficial in that each contracting party has the ability to take action to suite its own resources and specific needs. The disadvantage of this is that it is not clear whether a State will be in compliance with its obligations, as they are not set out in any detail. What is required is that the state does everything within its means to stop the genocide. The *travaux préparatoires* make it clear that the

⁵⁴ Pieter Nicolaas Drost, *Genocide, United Nations Legislation on International Criminal Law*, Leyden: A. W. Sythoff, 1959, p.129.

⁵⁵ Schabas, *supra* note 11, pp.348-349.

drafters were not prepared to limit state sovereignty by allowing jurisdiction, but it is also clear that they were adamant to ensure genocide was stopped. Schabas contends that their intention was to have a territorial basis of jurisdiction, which as satisfied by States taking preventative measures.⁵⁶

The February 2007 judgement of the *Application of the Genocide Convention* case⁵⁷ supports the view that there is a national duty under the Genocide Convention to prevent genocide. The court asserted that the Genocide Convention (as well as customary law) provides duties for its parties to take the appropriate measures to prevent genocide. The court also asserted that this obligation is one of conduct and not result, in the sense that the State cannot be under an obligation to succeed at preventing genocide, rather it must employ all means reasonably available to prevent genocide, as far as possible. A State breaches this obligation when it does not take all reasonable measures.⁵⁸

B. What Prevention may entail

Prior to the *Application of the Genocide Convention* judgement, the UN provided some guidelines about what prevention should entail, and in 1994 Kofi Anan released an Action Plan for the Prevention of Genocide.⁵⁹ He suggested the essential steps that needed to be taken to prevent genocide should be: i. preventing armed conflict; ii. protecting civilians in armed conflict; iii. ending the culture of impunity; iv. providing

⁵⁶ *Ibid.*

⁵⁷ *Application of the Genocide Convention*, *Supra* note 23.

⁵⁸ *Ibid.*, paras., 428-438.

⁵⁹ United Nations Secretary General Kofi Annan's Action Plan to Prevent Genocide, Geneva, 07/04/2004, Press Release, SG/SM9197, AFR/893, HR/CN/1007, at <http://www.preventgenocide.org/prevent/UNdocs/KofiAnnansActionPlantoPreventGenocide7Apr2004.htm>, accessed on 6 June 2006.

clear and early warning and making swift; and v. decisive action. Although these suggestions were primarily aimed at the UN; specific countries can take note and use them as guidelines for their own prevention. These guidelines will be discussed in more detail in the following Chapter.

In order to prevent genocide in a meaningful way it is essential to understand the root causes of the crime. Many scholars have written on this subject and have provided varying reasons to explain why genocide occurs. Claire de Than and Edwin Shorts ask the fundamental question: “What makes a particular state embark on such an extreme policy as attempting to wipe-out an entire specific group or groups, usually comprising of its own citizens?”⁶⁰

The theories on why genocide occurs shall also be discussed in the next chapter, but the answers they give seem to imply the following methods should be implored to prevent genocide: State monitoring, education, mediation, economic sanctions and embargos, suspending treaty relations, withdrawal from international affairs, no fly zones and penalties, among others. However in reality genocide is often only recognised (or rather acted upon) after a number of people are already dead. The view taken here, in line with the recent *Application of the Genocide Convention case*, is that the current law needs to be moulded, or even just implemented successfully, to try and prevent this situation.

⁶⁰ Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights*, London: Sweet and Maxwell, 2003, p.65.

The duty to prevent genocide by doing all that is reasonably practicable is on a territorial basis, however there does exist a right for States to take action to prevent genocide outside of their own territory. This will be discussed below.

V. The Duty to Prevent Genocide Wherever it Occurs Within the State Parties to the Convention

Judge Lauterpacht has suggested that the obligation to prevent genocide is extended to the territory of the parties to the Genocide Convention.⁶¹ He said that “the duty to prevent is a duty that rests upon all parties [to the Convention] and is a duty owed by each party to every other.” If his interpretation is correct then all parties to the Convention must take active steps to prevent genocide in each others territory. This would amount to a much wider duty than the general duty to criminalise genocide or even domestically prevent genocide.

Judge Lauterpacht said the answer the question of whether every party to the Convention is under a duty to “individually and actively” intervene to prevent genocide outside its own territory, can only be found by looking at State practice. This is clearly suggesting that the Convention does not allow this and any duty would arise under customary law. In reality, States have not acted in this way and Judge Lauterpacht himself even accepted this. He referred to the Whitaker report,⁶² which

⁶¹ Appointed by Bosnia. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Further Requests for the Indication of the Provisional Measures*, 13 September, [1993] ICJ Reports 325.

⁶² Benjamin Whitaker ‘Revised and Updated Report on the question of the prevention and punishment of the crime of genocide’, UN Doc. E/CN.4/Sub.2/1985/6, paragraph.66.

discussed many recent killings that might have amounted to genocide.⁶³ Lauterpacht concluded rather discouragingly that the international effort to prevent events escalating further was limited to the point of inactivity.⁶⁴ This demonstrates the lack of State practice for a basis of jurisdiction between the parties to the Convention, as a separate duty.

Lauterpacht's proposition embraces an *erga omnes* duty to prevent genocide; in other words, a duty on all which is enforceable against one another. The *erga omnes* nature of the obligation to prevent genocide had previously been accepted by the ICJ⁶⁵ and Ragazzi proposes that the status of genocide as an *erga omnes* right is indisputable.⁶⁶ Some national courts have also reached the same conclusion.⁶⁷ In the context of genocide, the view taken here is that this amounts to a duty between the State parties *not to commit genocide* anywhere. It also extends to a right to take non forcible action to prevent genocide within the territory of other States to the Convention. However because this acquired a customary status it now applies equally to all States, this obligation *erga omnes* is discussed in more detail in section VII.

Lauterpacht proposed that the Convention sets out two distinct duties: to prevent genocide, and to punish genocide. A breach of Article I can arise if either obligation is

⁶³ Hutu massacre in Burundi in 1965 and 1972; Aché Indians in Paraguay prior to 1975; the mass killings by the Khmur Rouge in Kampuchea between 1975 and 1978, and the killings of Bahai in Iran.

⁶⁴ *Application of the Convention*, *supra* note 61, p.445.

⁶⁵ *Barcelona Traction, Light and Power Co. Ltd (Belgium v. Spain)*, [1970] ICJ Reports 3.

⁶⁶ Maurizio Ragazzi, *The Concept of International Legal Obligations Erga Omnes*, Oxford University Press 1997, p. 95. *Barcelona Traction, Light and Power Company Ltd.*, Judgment, 1972 ICJ Rep., para. 34; *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Preliminary Objections, Order of 11 July 1996, 1996 ICJ Rep; *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Further requests for the indication of provisional measures, Order of 13 September 1993, ICJ Rep., para. 101-2.

⁶⁷ *Nulyarimma and others v. Thompson*, Federal Court of Australia, Full Court, 1 Sept. 1999, 39 I.L.M. 20 (2000). (Merkel, J.), para. 81.

breached, it does not have to be both. He went on to suggest that this means that States have duties to prevent genocide on an extra-territorial basis as well as within their own territory. This suggests something more than an *erga omnes* duty not to commit genocide, rather this suggests a duty on all States to respond to a violation of the *erga omnes* obligation. This is taking the proposition to a maximal level, and although it would be extremely beneficial there is not sufficient evidence to support this position. It has already been noted above, that genocides have occurred and many States have sat back and not taken action. By doing this they have not breached any obligation under the Convention because the ability to react to genocide outside of a States own territory, is a right not a duty.

A further problem with Lauterpacht's interpretation is that the Genocide Convention does not give any powers of extra-territorial action to parties on the territory of other parties. The *travaux préparatoires* provide guidance on what was intended by the duties to prevent and punish. Judge Lauterpacht suggests that these records are in line with his conclusion that there is an inter-State duty to prevent genocide.⁶⁸ However, it seems clear, when reading these authorities in accordance with what was known about the political and legal circumstances of the time, that at the very most the ability to prevent genocide in another State party to the Convention would be voluntary, and would require State consent, or must only involve non-forcible measures.

The view taken here is that the Convention is quite clear about the territorial jurisdiction to prevent genocide. Lauterpacht is right to distinguish a duty to prevent genocide and a duty to punish genocide, but this does not necessarily mean that it extends to a duty to prevent outside of the States own territory.

⁶⁸ *Application of the Convention*, *supra* note 61, p.444.

VI. The Duty to Give Effect to Customary Rule within the States

Territory (and Areas Under its Control)

It is widely accepted that genocide is contrary to customary international law. Customary law is established by *opinio juris* and State practice. It is binding automatically on every State of the world by its very nature. The customary nature of genocide has been referred to above, but the legal basis for that has not yet been discussed. Below it will be demonstrated that there is a customary basis for the prevention of genocide and this mirrors the territorial nature of the Genocide Convention, with a duty to take positive action to prevent genocide incorporating right to take non military action to prevent outside of a States own territory.

A. Judicial opinion

The ICTR in the *Akayesu* case, and subsequent decisions, has held that genocide is “undeniably considered part of customary international law”.⁶⁹ The court based this conclusion on the *Reservations to the Genocide Convention Advisory Opinion* case.⁷⁰ The Chamber reasoned that when the ICJ referred to “the general principles of law recognized by civilized nations”, that should now be equated to “international custom,

⁶⁹ *Akayesu* Judgement, ICTR 96-4-T, Trial Chamber I, 2 September 1998,, para., 495; see also the Judgment in *Musema*, ICTR 96-13-A, Trial Chamber I, 27 January 2000, para., 151 and in *Rutaganda* ICTR 96-3-A, Trial Chamber I, 6 December 1999, para., 46

⁷⁰ ‘Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide’, Advisory Opinion, *ICJ Reports* 1951. It should be noted that the *Akayesu*, *Musema* and *Rutaganda* decisions also refer to the ICTY’s “Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808”, UN doc. S/25704, 1993, 45, which states: ‘The Convention is today considered part of international customary law as evidenced by the International Court of Justice in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951’. Thus, the ICTY Secretary-General’s Report also relies on the ICJ Advisory Opinion in asserting the customary law character of the prohibition against genocide.

as evidence of a general practice accepted as law” under Article 38(1)(b) Statute of the ICJ. This was on the basis that the court’s express reference to “civilised nations”⁷¹, and to a “moral law” now equating to international custom.⁷² Schabas accepted this view and considered that it would have been more appropriate for the court to describe the situation as custom previously.⁷³ Nevertheless what originated as a general principle of law may now be deemed to be customary law.⁷⁴

The ICTY⁷⁵ confirmed that it is the definition and prevention of genocide provided for in the Genocide Convention which has acquired a customary law status. If it amounted to anything further State practice would be needed, and the following section will show that no State practice provides for a duty to prevent genocide outside of the territory. Subsequent decisions by the ICTR, namely *Akayesu*⁷⁶ *Musema*⁷⁷ and *Rutaganda*⁷⁸ have referred to the ICTY’s comprehensive report as authority for the customary status of genocide.

Schabas suggests that there now seems to be a universal acceptance that the norms set out in the Convention belong to customary law.⁷⁹ This is clearly not so, because although the status of genocide as a customary norm is a generally accepted principle, the details of what this entails could be described as somewhat ambiguous. The view taken here is that current *opinio juris* and State practice makes it clear that it is the

⁷¹ *Ibid.*, p.23

⁷² *Ibid.*

⁷³ Schabas, *supra* note 11, p.4

⁷⁴ Payam Akhavan, has suggested the similar in a more explanatory way: Payam Akhavan, “The Crime of Genocide in the ICTR Jurisprudence”, *Journal of International Criminal Justice* 2005 3(4):989-1006, Oxford University Press.

⁷⁵ “Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808”, UN doc. S/25704, 1993, 45.

⁷⁶ *Akayesu*. *Supra* note 69, para. 495.

⁷⁷ *Musema*, *Supra* note 69, para. 151.

⁷⁸ *Rutaganda*, *Supra* note 69, para. 46.

⁷⁹ Schabas, *supra* note 11.

definition of genocide given in the Convention and its prevention requirement which has achieved this higher status. This has been the position of States when drafting the statutes of the ICTY, ICTR and ICC.⁸⁰

Other commentators however, suggest that the prohibition of genocide as a *jus cogens* norm extends beyond the Convention text. Ratner and Abrams⁸¹ suggest that this is evident through the broader definition given in Resolution 96(1); through the Nuremberg and Tokyo Charters containing express reference to non-exhaustive crimes against humanity; and through many of the prosecutors for Nazi war criminals using the word genocide to encompass acts, which directly under the Convention, would not constitute genocide.⁸² Further support for a broader customary norm is taken by the decision of the Rwandan tribunal on the definition of groups protected.⁸³ The tribunal held that the list of groups protected under the Convention is not exclusive and drafters actually intended to protect any “stable and permanent group”, this takes the customary status of genocide beyond the conventions text.⁸⁴

Although this extended definition would be beneficial for a more far reaching protection against genocide, the view taken here is that there is not sufficient evidence of State practice, or judicial opinion for this to be so. The Nuremberg Indictment was set out before the Genocide Convention achieved its ratified status, and the only instrument preventing genocide was Resolution 96(1). This is not evidence that Resolution 96(1) has acquired a customary law status. Further, the ICTR’s decision to

⁸⁰ All of these use the Convention’s definition of genocide

⁸¹ Steven Ratner and Jason Abrams, “Accountability for Human Rights Atrocities in International law: Beyond the Nuremberg Legacy”, *Oxford University Press*, 2001.

⁸² *Ibid.*, referencing from the Study of the Prevention and Punishment of the Crimes of Genocide, prepared by Nicodème Ruhashyami, July 4, 1978, UN Doc.E/CN.4/ Sub.2/416, at pp. 154-63

⁸³ *Akayesu*, *supra* note 76.

⁸⁴ *Ibid*, para. 156.

include the Tutsi in the group to be protected by the Convention was merely interpreting the groups already protected in a liberal manor; it was rightly thought that this was the type of group that the Convention was intended to cover.

As the ICTY commented in *Furundzija*, the Draft Code of Crimes against the Peace and Security of Mankind⁸⁵ provides an authoritative view about the status of genocide as a customary international norm it.⁸⁶

The ICTR asserted the same in *Akayesu*⁸⁷ and the ICTY confirmed this in *Krstić*.⁸⁸ The definition given in this code is synonymous to that of the text of the Genocide Convention.

B. State Practice

State practice in this area affirms that the prevention of genocide is a customary norm. Some clear evidence of this can be gleaned from the decisions and actions of the Security Council. As the SC is made up of many States its reactions and views can be deemed to be evidence of the practice of these States. The SC reaction to the Rwandan genocide is a good example. Although at the time it may have been suggested that SC inaction disproved the customary status of genocide, subsequent action surrounding this issue shows that there is a customary norm requiring the prevention of genocide.

⁸⁵ "Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May-26 July 1996", UN Doc. A/51/10.

⁸⁶ *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgement. 10 December 1998, para.227.

⁸⁷ *Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004.

⁸⁸ *Ibid.*

During the early stages of the genocide, the Security Council said everything relating to genocide apart from the actual word genocide itself. This was because the members knew that genocide would impose obligations upon them as individual member States and as members of the Security Council, to act. Furthermore, the then President of the Security Council said that they have a duty to prevent it. When President Clinton made his address at Kigali airport on 25 March 1998, he asserted that genocide had taken place in Rwanda and implied that the international community should have taken preventative action.⁸⁹ As he referred to the international community, and not States parties to the Convention it is clear that at this point in time the US view was that there was a customary norm to prevent genocide which bound the international community in its entirety.

Most recently, during the UN World Summit in September 2005, the governments acted boldly to agree collective responsibility to protect civilians facing genocide and other similar atrocities. What they agreed was largely based on the report *The Responsibility to Protect* by the International Commission on Intervention and State Sovereignty (ICISS).⁹⁰ During the Summit Government leaders agreed that the international community should invoke the United Nations to use diplomatic, humanitarian and other peaceful means to protect populations from genocide. They also supported a “United Nations Action Plan to Prevent genocide”⁹¹. This provides further evidence of international practice accepting genocide as a customary norm.

⁸⁹ Clinton Meets Rwanda Genocide Survivors, at <http://www.cnn.com/WORLD/9803/25/rwanda.clinton/>, accessed on 3 June 2006.

⁹⁰ The Responsibility to Protect, “Report of the International Commission on Intervention and State Sovereignty” pviii, available at <http://www.iciss.ca/report2-en.asp>, accessed on 4 May 2007.

⁹¹ UN Doc. “High Level Plenary Meeting of the General Assembly”, 14-16 September 2005, GA Res 60/1 paras 138-140.

The UN Secretary General has also taken the view that the substantive principles of the Genocide Convention have worked their way into customary international law.⁹² The UN Security Council has endorsed this view.⁹³ Special Rapporteur, René Degni-Seguni, in his report on the scope of the Rwandan genocide, noted that even without any treaty obligation, every country is required to respect and abide by the principles of the Genocide Convention, because it has acquired the status of customary international law.⁹⁴ In addition, the International Law Commission's work over the past half century has indicated a strong adherence to the view that the provisions of the Genocide Convention hold the status of a customary international norm.⁹⁵

The Genocide Convention has acquired the status of a customary norm, and as that specifically provides for a territorial base of practical prevention, the customary law must reflect this. The nature of customary international law is such that it tempts scholars and students to say that a rule exists without concrete evidence of the law. They want a rule to exist and as such are tempted to expand the customary status of genocide to fit this.

⁹² "Report of the Secretary-General Pursuant to Para. 2 of Security Council Resolution 808" (1993), UN Doc. S/25704, at para.45.

⁹³ *Ibid.*

⁹⁴ UN Doc. E/CN.4/1995/7 and Corr.1. Degni-Segui confirmed his finding of genocide later the same year: UN Doc. E/CN.4/1995/12 and UN Doc.E/CN.4/1995/70

⁹⁵ All of the Commission's work had used the Convention definition for genocide. See for example 1954 I.L.C Report at 151, art. 2(10); Draft Code of Offences 1996 Text adopted by the International Law Commission at its forty-eighth session, in 1996, and submitted to the General Assembly as a part of the Commission's report covering the work of that session, at para. 50. The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 1996*, vol. II, Part Two.

VII. The Duty to Prevent Genocide, wherever it occurs

Under the Genocide Convention, the duty to prevent genocide is territorial. This means that States must take active measures to stop genocide from taking place on the areas of land that are classed as being within the territory of that country. It has been shown above that the customary law against genocide follows this territorial obligation. Nevertheless, scholars frequently assert that genocide is subject to universal jurisdiction. If the two main international instruments preventing genocide are on a territorial basis how can the jurisdiction extend to a universal right or duty to prevent genocide?

A. *Erga omnes* Right to Prevent

An *erga omnes* right in international law provides all States with an interest in its prevention. It is widely accepted that the prevention of genocide has acquired the status of an *erga omnes* right. This means that all States can choose to take non-forcible measures to try and prevent genocide. There is no obligation to take action, but there is a right to do so.

According to Bassiouni the exercise of universal jurisdiction is justified on the basis that States have a legitimate interest to protect world order. Certain international crimes that reach the level of *jus cogens* place a duty upon States to prosecute the

perpetrators of these crimes and that is an obligation *erga omnes*.⁹⁶ This duty to prosecute is discussed in the following section.

The ICJ defined *erga omnes* in the *Barcelona Traction* case distinguishing between the "obligation of a state towards the international community as a whole, and those arising vis-à-vis another state."⁹⁷ The court held States have a legal interest in the protection of certain rights, which are the concern of all States. The court gave the example of obligation *erga omnes* as being part of *jus cogens*, even if not expressly mentioned, the existence of which were implied: "Such obligations derive, for example, in contemporary international law, from the outlawing of the acts of ... genocide..."⁹⁸

Through this *erga omnes* right States are given interest in preventing genocide. The right does not allow forcible intervention, but could amount to taking diplomatic action or implementing sanctions. What exactly prevention may entail in practical terms will be discussed in the next chapter.

B. State Responsibility

The report on *The Responsibility to Protect* by the International Commission on Intervention and State Sovereignty (ICISS) provides some authority that

⁹⁶ M. Cherif Bassiouni, International Crimes: "Jus Cogens" and "Obligation Erga Omnes", *Law and Contemporary Problems*, Vol. 59, No. 4, Accountability for International Crimes and Serious Violations of Fundamental Human Rights, Autumn, 1996, pp. 63-74.

⁹⁷ *Barcelona Traction, Light and Power Co. Ltd (Belgium v. Spain)*, [1970] ICJ Reports 3, p.32

⁹⁸ *Ibid.*

States are leaning towards a more collective responsibility. This work was aimed to transfer the terms of the debate away from a “right of military intervention” to a “responsibility to protect”. Its central theme was:

“the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.”⁹⁹

The report is very useful for addressing the responsibility of States to take collective action to stop genocide. It focuses on the rights and expectations of the victims, rather than the rights or justifications of potential intervening States and as such it makes a valuable contribution to the debate in this area. It also satisfactorily explains sovereignty in terms of human rights and obligations owed to citizens. No where does it assert that this is a duty which binds States.

VIII. The Duty to Punish Genocide Wherever it Occurs

The Genocide Convention provides that perpetrators of genocide must be tried by the territorial State or by an international criminal tribunal.¹⁰⁰ Nevertheless some States, academics and even some Judges have argued that universal jurisdiction is a *sine qua non* to bring perpetrators to book. If it is taken for granted that the Genocide Convention operates on a territorial basis of jurisdiction, then the view that genocide is subject to universal jurisdiction must come arise from some other legal mechanism.

⁹⁹ The Responsibility to Protect, *supra* note 90.

¹⁰⁰ The Genocide Convention, Article VI.

This section will explore whether the customary law of genocide allows for universal punishment of genocide.

Leo Kuper has suggested that just because the Convention does not provide a universal jurisdiction for genocide, it does not mean that it prohibits it.¹⁰¹ This is correct in the sense that States can choose to act beyond their Conventional obligations, but if they do, this must not involve forcible intervention, unless Security Council authorisation is given, or the other State agrees.

The view taken here is that there is currently not sufficient evidence to establish universal jurisdiction over crimes of genocide. In order to successfully assert a universal jurisdiction for genocide, it would be necessary to prove its existence under customary law and although some judicial opinion does point towards a principle of customary universal jurisdiction for genocide, there is not sufficient evidence of State practice affirming this.

Nigel Rodley proposes that “while the convention requires jurisdiction only by the State in which the genocide was committed, and also envisages a future international penal tribunal, it is reasonably certain that international law permits the exercise of jurisdiction on a universal basis”.¹⁰² Although the theme of his ultimate argument, that international law permits the exercise of jurisdiction on a universal basis, is not mandatory, his view that international law more generally may allow for a universal jurisdiction is what will be explored in this section. His argument is good in that he

¹⁰¹ Kuper, “Theoretical Issues Relating to Genocide: Uses and Abuses” in *Genocide: Conceptual and Historical Dimensions*, Ed. George J. Andreopoulos, University of Pennsylvania Press, 1994, pp.31-46, at p. 44.

¹⁰² Nigel Rodley, “The International Legal Consequences of Torture, Extra-Legal Execution and Disappearance”, in Lutz et al., *New Directions in Human Rights*, 183.

accepts the territoriality of the Convention, and also contends the possibility that customary international law may take the jurisdiction for genocide further, should States want to take the necessary action to stop genocide occurring outside of their territory.

As Judge Lauterpacht proposed, there is a difference between the punishment of genocide and the prevention of it.¹⁰³ This thesis is primarily concerned with the prevention of genocide, however this section shall also look at whether universal jurisdiction exists to punish those who have committed genocide.

A. The Nature of Universal Jurisdiction

Universal jurisdiction was coined by Cowles in 1945.¹⁰⁴ He suggested that every State had jurisdiction to punish war crimes regardless of the nationality of the victim, the time it entered into War, or the place where the offence was committed. This was because War Crimes, like piracy and brigandism, were to be regarded as offences against the conscience of the civilized world, and every nation therefore had an interest in their punishment.¹⁰⁵

This justification given for universal jurisdiction is still valid. Crimes subject to universal jurisdiction are of the most appalling, and by their nature they threaten the international legal order. There should be no place on earth where the perpetrators of

¹⁰³ *Supra* note 61.

¹⁰⁴ Willard B. Cowles, *Universal Jurisdiction over War Crimes*, 33 CAL. L. REV. 177, 1945.

¹⁰⁵ Menno T. Kamminga, "Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses", *Human Rights Quarterly* 23.4 (2001) 940-974.

those crimes should be able to reside. Domestic courts bringing these perpetrators to justice act on behalf of the international legal order.

Universal jurisdiction may also be used as a deterrent, but the effect of this should not be overstated. For example, the Allied nations during World War Two threatened the Germans with an international punishment, but it did not deter them. Or recently, crimes continued in Kosovo despite the threat from the ICTY to bring the perpetrators to book.

The principle of universal jurisdiction can often be confusing because there are eight different situations of jurisdiction which can be referred to as universal jurisdiction.¹⁰⁶

For the purpose of this thesis, universal jurisdiction will mean: there is genocide committed in State X, by State X or State Y nationals. The perpetrator is in State Z. State A has potential jurisdiction and can prosecute (providing it can obtain custody of the accused). This is the principle of true universality because there are no links to the offender, or the offending State. Under the principle of universal jurisdiction a State is entitled, or even required, to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator or the victim.¹⁰⁷ The only connection between the crime and the prosecuting State that may be required is the physical presence of the alleged offender within the jurisdiction and custody of that State.¹⁰⁸

¹⁰⁶ See Appendix 3 for an explanation of the different types of universal jurisdiction.

¹⁰⁷ Kenneth C. Randall, 'Universal Jurisdiction under International Law', 66 *Texas Law Review* (1988) 785, 788.

¹⁰⁸ In Australia, the Federal Republic of Germany and the United Kingdom, universal jurisdiction with respect to certain crimes may only be invoked against foreign nationals when they happen to be (long term) residents.

B. Academic Opinion

“Universal jurisdiction is often held out as a magic bullet on the war on impunity, an effective answer to the inability or unwillingness of States where the crime took place to bring the perpetrators to book.”¹⁰⁹

Raphael Lemkin was the first academic to voice his strong support for the principle of universal jurisdiction for genocide.¹¹⁰ Many scholars today say that universal jurisdiction exists as a *jus cogens* norm.¹¹¹ In the US there is a growing body of academic opinion with a favourable view towards universal jurisdiction for genocide. This growing practice is particularly evident within the United Nations human rights institutions. Special Rapporteur Theo van Boven expressed his support for universal jurisdiction, not only over genocide, but over all gross violations of human rights and humanitarian law.¹¹² Meron has suggested that despite the Convention allowing for only a territorial basis of jurisdiction, “genocide may also be cause for prosecution by any State”¹¹³. This would be established through customary law.

The view which is the most convincing is that genocide is arguable the most appalling crime. Other (arguably) less terrible crimes, such as piracy and torture, are subject to universal jurisdiction therefore genocide should be subject to universal jurisdiction.

¹⁰⁹ Schabas, “Developments in the Law of Genocide”, *Ankara Bar Association*, Ankara, 5 January 2006, p.161.

¹¹⁰ Lemkin, *supra* note 9 pp. 93-4

¹¹¹ Christopher C Joyner, “Arresting impunity: the case for universal jurisdiction in Bringing War Criminals to Accountability”, *Law and Contemporary Problems*. 59, 1996: 153, 159-60; Jordan J Paust “Congress and genocide: they’re not going to get away with it” *Michigan Journal of International Law* 11 (1989) 90, 91-2; Kenneth Randall “Universal Jurisdiction under International Law” *Texas law review* 66, 1988, 785, at p. 837.

¹¹² “Revised set of Basic Principles and Guidelines on the Right to Reparation for victims of Gross Violations of Human Rights and Humanitarian Law Prepared by Mr Theo van Boven Pursuant to Sub-Commission Decision 1995/117”, *supra* note 27, Article V.

¹¹³ Meron, “International Criminalization”, *American Journal of International Law*, Vol. 89, 1995, p.569.

This is a morally defensible argument, but there is not sufficient legal justification for it to hold true.

In July 2000, the International Law Association endorsed the conclusion of its Committee on Human Rights Law and Practice that:

"[g]ross human rights offences in respect of which states are *entitled* under international customary law to exercise universal jurisdiction include . . . genocide [as defined in Article 6 of the Rome Statute]".¹¹⁴

The Commission of Experts appointed to investigate the human rights situation in the former Yugoslavia, concluded that universal jurisdiction over genocide existed under international law.¹¹⁵ Amnesty International suggests that these assertions are born from State practice and judicial opinion.¹¹⁶ However the view taken in this work is that although universal jurisdiction would be extremely beneficial for punishing those who commit genocide, it does not have full legal authority to date; it is not established through customary law.

One academic who has not jumped on the universal jurisdiction train is Rosalyn Higgins.¹¹⁷ She noted that "the fact that an act is a violation of international law does

¹¹⁴ International Law Association, Res. 9/2000, adopted at the 69th Conference, London, 25-29 July 2000.

¹¹⁵ "Final Report of the Commission of Experts established pursuant to Security Council Resolution 780", 1992, U.N. Doc. S/1994/674 (Annex), 27 May 1994, para. 42 (stating, in the context of an internal armed conflict, that there was universal jurisdiction over genocide).

¹¹⁶ Universal Jurisdiction, "The duty of states to enact and enforce legislation Chapter Seven (The legal basis for universal jurisdiction)", at <http://web.amnesty.org/library/index/engior530102001?OpenDocument>, accessed on 16 August 2006.

¹¹⁷ Rosalyn Higgins, *Problems and Processes: International Law and How We Use It* 62, Oxford: Oxford University Press, 1992.

not of itself give rise to universal jurisdiction".¹¹⁸ She also stated that the fact that genocide was identified as an international crime in the International Law Commission's Draft Articles on State Responsibility was insufficient to give rise to universal jurisdiction.¹¹⁹ Her view is correct, and this will be shown below; the current *opinio juris* and State Practice necessary for universal jurisdiction is not fully made out and as such universal jurisdiction to prosecute genocide is not legally valid.

C. State Practice

By looking at actual State practice, it is difficult to contend that there is a universal jurisdictional basis for genocide. No matter how beneficial this would be, the concept of universal jurisdiction for genocide is not clearly made out, and still remains a controversial issue. In order to show universal jurisdiction over genocide the practice of any given State must be generally consistent and the practice of a group of States as a whole must be uniform and general.

States rarely deny the customary status of the prevention of genocide, but many deny it allows or requires universal jurisdiction over genocide offenders.¹²⁰ At the Rome Diplomatic Conference many States had a problem with allowing genocide to acquire universal jurisdiction and left the statutory definition un-amended. Even though they recognised the status of genocide as a crime in customary international law, this was on the basis of the Genocide Convention, and as such only allowed for territorial jurisdiction.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ Particularly France, Algeria, Burma and Morocco have been adamant that genocide through customary law has a territorial base.

In his report for the sub-commission, Nicodème Ruhashyankiko canvassed opinion on the status of genocide as an international crime.¹²¹ He asked States whether an additional protocol to the Convention was needed, which allowed for universal jurisdiction. Italy suggested that the protocol was unnecessary.¹²² Its reason for suggesting this was because Italy considered that universal jurisdiction existed already under customary international law, which all States were obliged to abide by, without the need for an additional protocol.

Other States thought an inclusion of universal jurisdiction would be favourable, but they did not acknowledge current customary practice as allowing for universal jurisdiction.¹²³ Ruhashyankiko concluded that the effectiveness of the Convention would benefit from such an additional protocol, but the view of States was generally that there was not a universal jurisdiction for genocide.¹²⁴

Three States, namely Algeria, Burma and Morocco have openly declared their opposition to universal jurisdiction for genocide.¹²⁵ The silence of other countries suggests that status of the customary law against genocide is somewhat uncertain and as such it is very unlikely that sufficient State practice could be established to show customary universal jurisdiction.

¹²¹ "Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Nicodème Ruhashyankiko, Special Rapporteur", UN Doc.E/CN.4/Sub.2/416

¹²² *Ibid.*, para. 207

¹²³ Romania, Ecuador, Finland and the Netherlands all gave favourable responses. *Ibid.*, para.202-5

¹²⁴ "Study of the Question of the Prevention and Punishment of the Crime of Genocide", *supra* note 121, para. 211.

¹²⁵ These statements were made upon accession to the Convention.

There has recently been a growing body of national practice urging for universal jurisdiction. The United States asserts that genocide is subject to universal jurisdiction under customary law¹²⁶ and Germany and Canada¹²⁷ explicitly authorise universal jurisdiction for genocide in their national legislation. German courts have in recent years convicted two Bosnian Serbs of genocide committed against Muslims in Bosnia.¹²⁸ However it is not true universal jurisdiction because there must some linkage between the defendant and Germany, such as long term residency or employment in Germany, as a condition for the exercise of universal jurisdiction by the German courts. Furthermore it is not denied that States are entitled to take action beyond their territory to prevent and punish genocide, the controversy surrounds whether this is mandatory.

Belgium has previously claimed universal jurisdiction over any crime amounting to a grave breach of the Vienna convention and over war crimes. It claimed this had been established through customary law (through the Statutes of the two Security Council Tribunals and the ICC).¹²⁹ Although not turning on the issue of universal jurisdiction, the ICJ in *The Arrest Warrant* case took the opportunity to discuss the matter and decided that it was able to assert universal jurisdiction over crimes such as genocide.¹³⁰

¹²⁶ Restatement (Third) of the Foreign Relations Law of the United States (1987).

¹²⁷ Canadian (Criminal Code), RSC, 1985, c. C-46, s.7 (3.76).

¹²⁸ Under Article 6(1) of the German Penal Code, German criminal law applies to the crime of genocide when committed abroad. There must some linkage between the defendant and Germany, such as long term residency or employment in Germany, as a condition for the exercise of universal jurisdiction by the German courts.

¹²⁹ *Case Concerning The Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, 14 February 2002, ICJ, at <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm>, accessed on 10 April 2006.

¹³⁰ *Ibid.*

Despite the minimal amount of State practice by the US, Italy, Germany, Belgium and Canada, this does not amount to enough consistent and uniform, general State practice to prove an international customary norm.

D. Opinio Juris

The District Court in *Eichmann* has suggested that universal jurisdiction was intended when the Genocide Convention was drafted.¹³¹ It suggested that the drafters of Article VI did not intend to confine the parties to the Convention to a territorial basis; rather this was a compulsory minimum for prosecution.¹³² The Supreme Court of Israel agreed with this universal jurisdiction argument.¹³³

Schabas does not accept this “flimsy” reasoning and asserts that the universal status of genocide under the Genocide Convention is not established.¹³⁴ The Convention does not provide for the exercise of universal jurisdiction by domestic courts. Many other scholars also find it difficult to contend the existence of a customary international norm in 1948 which recognised the principle of universal jurisdiction for genocide, especially because the Sixth Committee were so adamantly opposed to it and the Convention specifically provides territorial jurisdiction.¹³⁵

Recently, the ICJ was able to shed further light on this issue, in the *Application of the Genocide Convention*, judgement in February 2007, the court confirmed the

¹³¹ Universal Jurisdiction, **supra** note 116 .

¹³² *Attorney-General of the Government of Israel v Eichmann* 36 ILR 18, 1961, 5, District Court of Jerusalem, (war crimes against Jewish population), para. 24-25.

¹³³ *Attorney General of Israel vs. Eichmann, Israel Supreme Court* (1962), reprinted in 36 ILR 28.

¹³⁴ Schabas, **supra** note 11, p.367.

¹³⁵ *Ibid.*, p.362

customary status of the prevention of genocide was that which the Genocide Convention provided for.¹³⁶ This dispels any suggestion that the prevention of genocide now has universal jurisdiction.

The *Advisory Opinion Case*¹³⁷ was the first judicial recognition of the prevention of genocide as a customary international norm. The court referred to the “special characteristics”¹³⁸ of the Convention and asserted that “It was intended that the Convention would be universal in scope.”¹³⁹ In 1951, the ICJ noted the universal character both of the condemnation of genocide and of the co-operation required “in order to liberate mankind from such an odious scourge”¹⁴⁰

The appeals Chamber of the ICTY in the case of *Tadic* affirmed the universal jurisdiction of genocide when it said “universal jurisdiction [is] nowadays acknowledged in the case of international crimes”.¹⁴¹ This was subsequently confirmed by the court in *Ntuyahaga*¹⁴² when the Rwanda Tribunal called upon all States to exercise universal jurisdiction over genocide.¹⁴³ The Commission of Experts

¹³⁶ *Application of the Genocide Convention Case*, *supra* note 23.

¹³⁷ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Adv. Op.), *supra* note 70.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*, p 23. See also Bruno Simma & Andreas L. Paulus, “The Responsibility of Individuals for Human Rights Abuses in Internal Armed Conflicts: A Positivist View”, 93 *Am. J. Int’l L.* 302, 309, 2000: concluding that “the traditional triad of sources clearly confirms that individual criminal responsibility for genocide is part and parcel of international law”.

¹⁴¹ *Prosecutor v. Tadic*, Case No. IT-94-1- AR72, Decision on the defence motion for the Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 62.

¹⁴² *Prosecutor v. Ntuyahaga*, Case no. ICTR 90-40-T, Trial Chamber I, 18 March 1999. Decision on the Prosecutors motion to withdraw the indictment, 18 March 1999.

¹⁴³ It stated in the context of approving a request to withdraw an indictment, that “the Tribunal wishes to emphasize, in line with the General Assembly and the Security Council of the United Nations, that it encourages all States, in application of the principle of universal jurisdiction, to prosecute and judge those responsible for serious crimes such as genocide, crimes against humanity and other grave violations of international humanitarian law”; *Prosecutor v. Ntuyahaga, Ibid.*,. The Trial Chamber also noted that “the Tribunal does not have exclusive jurisdiction over crimes included in its mandate and that its criminal proceedings are complementary to those of national jurisdictions.” *Ibid.*

for the Former Yugoslavia also stated that universal jurisdiction exists for crimes of genocide.¹⁴⁴

Following the U.S. and German trend in *Demjanjuk v. Petrovsky*¹⁴⁵ the US asserted that there are certain crimes which are so atrocious that the perpetrators are enemies to all nations, and which ever nation has custody of such an offender may try them.¹⁴⁶

The Practice of German Courts has also been favourable towards universality for genocide in accepting that no linkage with Germany was required for the exercise of universal jurisdiction.¹⁴⁷

This practise does not amount to substantial judicial opinion when there is a significant amount of dicta to the contrary. The *Arrest Warrant Case*¹⁴⁸ casts doubt on the universal prevention of genocide. Recently *ad hoc* Judge Kreca recalled that the Convention “does not contain a principle of universal repression. It has firmly opted for the territorial principle of the obligation of prevention”.¹⁴⁹ The judge was focusing on the status of the Convention, and not the status of genocide as a separate wrong under customary international law.

In the *Bosnia case*,¹⁵⁰ Judge Lauterpacht took the entirely opposite view explaining that the crime required universal jurisdiction to prosecute acts outside of a States’

¹⁴⁴ “Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)”, UN Doc. S/1994/674, annex, at p. 13.

¹⁴⁵ 776 F. 2d 571 (6th Cir. 1985); Schabas, *supra* note 11, p. 365.

¹⁴⁶ *Demjanjuk v. Petrovsky*, 776 F. 2d 571 (6th Cir. 1985); Schabas, *supra* note 11, p. 365.

¹⁴⁷ Menno T. Kamminga, *supra* note 105, pp. 940-974.

¹⁴⁸ *Arrest Warrant case*, *supra* note 129.

¹⁴⁹ *Application of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Preliminary Objections, *supra* note 66, Dissenting Reasons of Judge *ad hoc* Kreca, p.766, para. 102.

¹⁵⁰ *Application of the Genocide Convention*, Judgement 26 Feb 2007, *supra* note 23.



territory. This blatant inconsistency shows that universal jurisdiction is not made out for genocide.

National courts have also decided inconsistently about the universal status of genocide. The French courts have consistently refused to acknowledge such a principle.¹⁵¹ They assert that customary law does not prove the existence of universality for genocide.¹⁵² Australia has recently refused to exercise jurisdiction on the basis of the universality principle in respect of the crime of genocide, (however this perhaps only because the necessary enabling legislation was lacking)¹⁵³ Swiss tribunals have refused to consider charges of genocide and crimes against humanity on the grounds that these crimes are not recognised as being subject to universal jurisdiction under Swiss law.¹⁵⁴

In some cases the courts have voiced the universal nature of the prohibition of genocide¹⁵⁵ but the practice is not consistent and cannot alone prove universal jurisdiction. Particularly when on some occasions the territorial basis has been advocated by courts and universality has been overruled.¹⁵⁶

¹⁵¹ For example *Javor et al.*, Order of the Tribunal de grande instance de Paris, 6 May 1994.

¹⁵² *Ibid.*

¹⁵³ On 1 September 1999, in *Nulyarimma v. Thompson* the Federal Court of Australia concluded that, in the absence of enabling legislation, no person may be tried for genocide before an Australian court, **supra** note 67.

¹⁵⁴ En la cause Fulgence Niyonteze, Tribunal militaire de division 2, Lausanne, 30 Apr. 1999; En la cause Fulgence Niyonteze, Tribunal militaire d'appel 1a, Geneva, 26 May 2000; Tribunal militaire de cassation, Yverdon-les-Bains, 27 Apr. 2001. See, Kamminga, **supra** note 105.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Prosecutor v. Tadic*, **supra** note 141.

IX. Conclusions

This chapter has gone into some detail discussing what the legal obligations to prevent genocide entail. It is clear that national legislatures are required at the very least to criminalise genocide. The tort of genocide, which allows victims to receive compensation from the offending State, is well established but the practical difficulties in obtaining any compensation are enormous. The difficulty with obtaining this compensation is that it must be a State which claims against another State, and genocide is often committed with State knowledge and so they are unwilling to make claims against themselves. However, some third party States have recently started to obtain compensation on behalf of the nationals of other States.

Although a duty to criminalise is paramount it is likely that the duty to prevent practically amounts to more than the territorial criminalisation of genocide. It is concluded that the duty to prevent genocide inherent in the Convention, requires that some practical steps must be taken domestically, in order to satisfy the prevention requirements of the Convention. The recent judgment of the ICJ has confirmed this view.

Whether there is some sort of duty to prevent between States parties to the Convention is somewhat more of a controversial proposition. Although Judges and scholars alike advocate for this, it does not seem to be the intention behind the legislation to allow this, nor does it seem to be what the legislation has developed into. Nevertheless there is an *erga omnes* right to take non interventionist action to prevent genocide outside of a States territory.

Perhaps the most fundamental proposition of this chapter is whether or not genocide is subject to universal jurisdiction. If it could be subject to the latter then the possibilities for prevention are enormous. However, it is been demonstrated above that the current trend of international law does not amount to a universal duty to prevent or punish genocide.

The question which must now be asked is what do these duties amount to in concrete terms?

Chapter Four: What can be done to Prevent genocide?

I. Introduction

“Such crimes cannot be reversed. Such failures cannot be repaired. The dead cannot be brought back to life. So what can we do?”¹

This chapter is concerned with the action that individual States and the United Nations are able, obliged or willing to take to prevent genocide. The statement of Kofi Annan above displays the attitude of the United Nations towards the prevention of genocide. The question which must be raised is what can the UN do in practical terms to prevent genocide, and how does that compare to the steps that it has actually taken in the past? The prevention of genocide may involve forcible humanitarian intervention, but this is not the only, nor even the primary, means which should be employed to prevent the crime. Genocide can be prevented by States in their own territory by educating citizens, monitoring potential conflicts and providing an early warning system. States outside of the territory can also monitor situations and help with aid, or barring trade, freezing assets, or imposing economic sanctions. Military intervention may be necessary to prevent genocide and this will be discussed below, but it is certainly not the only possible means for prevention.

¹ UN Secretary-General Kofi Annan, “Action Plan to Prevent Genocide”, Geneva, 7 April 2004, Press Release, SG/SM/9197, AFR/893, HR/CN/1077, at <http://www.preventgenocide.org/prevent/UNdocs/KofiAnnansActionPlantoPreventGenocide7Apr2004.htm#actionplan>, accessed on 20 March 2006.

II. What Might the Duty to Prevent Territorially Entail?

The recent judgement of the ICJ confirmed in no uncertain terms that national governments have an obligation under the Convention to take active steps to prevent genocide from occurring within their own territory and areas of control.² It is clear that the duty to prevent nationally does exist, but what is not so certain is what this may practically entail. In the *Application of the Genocide Convention case*, Serbia did not take *any* steps towards prevention, so clearly their actions were deemed to be insufficient. It is still uncertain what the outcome would be if some steps were taken towards prevention but which were insufficient to fully thwart the genocide. The court said that “all measures reasonably available” must be used.³ What exactly this entails will be subjective to each notion of genocide and so this statement still remains rather ambiguous. In the preceding chapter it was concluded that there is a duty to prevent genocide and this has a territorial limitation, but it is still uncertain what this means in practical terms of prevention. This chapter will attempt to resolve that issue to find out what can be done to prevent genocide.

There are suggested below some ways in which national authorities could prevent genocide territorially. However it is still unclear whether even if all of these steps were taken, it would be sufficient to extinguish the duty under the Convention. The duties on States to prevent genocide will not amount to anything tangible unless those duties are actually defined in concrete terms. States must know what exactly their duty to prevent entails in order for them to successfully act to prevent genocide.

² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 26 February 2007.

³ *Ibid.*, paras., 428-438.

In order to define States' duties and fully comprehend effective means to prevent genocide, it is first necessary to understand why genocide occurs. If the motives and common causes of genocide can be uncovered, then it will be easier to find practical solutions which will help in the prevention of the crime. This section will look at why genocide occurs, and then uncover the way in which States can prevent genocide within their own territory. The problem which comes to light in this section, as well as more generally throughout this work, is that if genocide is territorial and if genocide is committed by or with knowledge of the government, the action which should be taken internally is mostly not complied with. If this is the case, the question that remains is what can be done by external agencies and States to help? By looking at the action taken during the historical genocidal atrocities the answer seems to suggest that not a lot has been done. However, with the recent *Application of the Genocide Convention* judgement⁴ shedding some positive light on this issue, coupled with the ever enhancing doctrine of Collective Responsibility and the sanctions imposed by countries in relation to Darfur, it may be that the tide is changing towards a more collective helpful preventative approach against genocide, and international crimes more generally. The responsibility of other States to help prevent genocide will also be discussed below, before a final consideration of the role of the UN in preventing genocide.

⁴ *Idid.*

III. Why does Genocide Occur?

The differing levels of prevention against genocide are linked to the varying theories about the reasons why genocide occurs.⁵ Many scholars provide well researched and far reaching theories which explain the reasons why genocide occurs. An overview of the most comprehensive studies is given below.

A. Genocide as a Rational Instrument

Many sociopsychological theories suggest that genocide “is not an aberrant pathological phenomenon, but close to the nature of man”.⁶ “In most conflict analyses participants are assumed to behave rationally. Yet to an outside observer genocide appears to be irrational.”⁷ Many scholars have suggested that from the genocidists’ perspective, their acts seem rational, well thought out and the right thing to do; Roger Smith writes that “genocide is a rational instrument to achieve an end”.⁸ These theories suggest that genocidists are normally reasonable human beings and it is the strain of life which these individuals face which prompts them to commit such heinous crimes. Israel Charny suggests that people commit genocide out of fear of

⁵ For further discussion on the theories of genocide see, Leo Kuper, *The Prevention of Genocide*, New Haven: Yale University Press, 1985, Chapter 3.

⁶ *Ibid*, p.196.

⁷ Barbara Harff, “Recognising Genocides and Politicides”, in *Genocide Watch*, ed. Helen Fein, Yale University Press, 1992, pp.27-41.

⁸ Roger W. Smith, “State Power and Genocidal Intent: On the Uses of Genocide in the Twentieth Century”, in Levon Chorbajian and George Shirinian, eds., *Studies in Comparative Genocide*, New York: St Martin’s, 1999, pp.3-14.

death and suchlike.⁹ These theories point to the idea that if the stresses and strains which cause genocide can be uncovered and eliminated, then the potential genocidists are in a position to respond rationally and refrain from committing the offence.

These ideas do not take into account the fact that genocide does not occur in all societies, even if the life conditions are similar. Nor do they go beyond explaining the rationality of genocide; they do not identify the situations when mass killing is most likely to occur. It is important for the prevention of genocide to uncover the particular circumstances in which genocide occurs, in order to find prevention methods which adequately deal with the problem of genocide.

B. The Stages of Genocide

Using Rwanda as his case study, Mukimbi¹⁰ examined the stages in which genocide occurred. These stages do not have to follow in time, may overlap, and are classed as the following: first, definition of the target group on the basis of some criteria; second, registration of the victims; third, designation or outward identification of the victims; fourth, restriction and confiscation of goods; fifth, exclusion from professions, working activities and means of transportation, among other things; sixth, systematic isolation; and finally, mass extermination.

He proposes that these stages can be generally applied to most genocides, and as such, they are a useful guide to enable effective prevention to be directed at each stage; if

⁹ Israel W. Charny, *How Can We Commit the Unthinkable? Genocide, The Human Cancer*, in collaboration with Chanan Rapaport, Westview Press, 1982, p. 207.

¹⁰ Jean Mukimbi, "The Seven Stages of the Rwandan Genocide", *Journal of International Criminal Justice* 2005 3 (4): 823 – 836, Oxford University Press, 2005, page 824.

each stage can be recognised, then methods can be employed at each level to prevent it. The problem with this theory is that it is not clear when each stage will occur and it is not definite that every stage will occur. If effort is put into preventing one stage which may not have happened anyway, this is a huge waste of resources. It is more sensible to take action before the genocidal policy is implemented.

C. Social Cleavages

“One of the factors most commonly cited as a central source or precondition for genocide, is the presence of deep divisions between different groups living in the same society.”¹¹ Ervin Staub suggests that “difficult life conditions give rise to scapegoating and ideologies that identify enemies and lead a group to turn against another”.¹² Hovannisian proposes five factors which contribute to the occurrence of genocide:

“First, the existence of a plural society with clearly defined racial religious and cultural differences; second, a sense of deprivation/danger felt by the perpetrator groups; third, the relative social and economic upward mobility of the victim group; fourth, the espousal and propagation by the perpetrators of an ideology/belief system emphasizing the mobility and distinctiveness of its own group as opposed to the exploitative nature of the intended victims; and fifth, the determination to establish a new regional order and in that process eliminate elements posing real, potential, or perceived threats.”¹³

¹¹ Benjamin A. Valentino, *Final Solutions, Mass Killings and Genocide within the Twentieth Century*, Cornell University Press, 2004, p.16

¹² Ervin Staub, “The Origins and Prevention of Genocide, Mass Killing, and Other Collective Violence”, *Peace and Conflict: the Journal of Peace Psychology*, 1999, Vol. 5, No. 4, p. 303-336.

¹³ Richard G Hovannisian, “Etiology and Squeal of the Armenian Genocide,” in *Genocide: Conceptual and Historical Dimensions*, Ed. George J. Andreopoulos, University of Pennsylvania Press, 1994, pp. 111-140.

Although it is true that social cleavages provide identity issues which cause unrest between populations, not in all of these cases does genocide ensue. This theory does not make it clear what specific problems cause genocide, perhaps, because it is not always obvious when genocide will occur. This depends on the mindset of the individuals in charge of the area with problems and to uncover this would be an almost impossible task.

D. Scapegoat Theory

Another explanation of genocide suggests that "...wars, revolutions, severe economic depressions, and other catastrophes...provide the critical spark for mass killing."¹⁴

This theory suggests that groups blame others for their impoverished situation and so target them as enemies, which over time builds towards hatred and then genocide.

This is rather simplistic reasoning, but when compared to the recent genocides it perhaps gives the most adequate reasoning for why they have occurred. Any solutions which can be uncovered to end this hatred of others would be extremely beneficial in preventing genocide.

E. Political Opportunity

The political opportunity theory suggests that the reason why genocide occurs rests with the government where the act is committed. Generally speaking, the more absolute power given to governments, the more likely they are to commit genocide.

Valentino advocates this viewpoint, suggesting that in order to understand why

¹⁴ Valentino, *supra* note 11, p.22.

genocide occurs, it is necessary to understand the plans and policies of the top political and military leaders.¹⁵ This correlates well with the above theories.

The impetus for mass killing normally originates with a small group of powerful political or military leaders. Harff suggests that these ideas sometimes lead to discriminatory practices and the denials of rights, for example, by denying certain groups rights to access to political or economic positions of authority.¹⁶

Political opportunity provides the spark required to commit genocide; with democracies being the least likely to use systematic repression, and totalitarian and authoritarian governments being the most likely to do so. Valentino provides further examples of why political opportunity can spark genocide:

“Six specific motives-corresponding to six “types” of mass killing- that, under certain specific conditions, appear to generate strong incentives to initiate mass killing. These six motives can be grouped into two general categories. First, when leaders’ plans result in the near-complete material disenfranchisement of large groups of people, leaders are likely to conclude that mass killing is necessary to overcome resistance by these groups or, more radically, that mass killing is the only practical way to physically remove these groups or their influence from society.¹⁷ Second, mass killing can become an attractive solution in military conflicts in which leaders perceive conventional military tactics to be hopeless or unacceptably costly. When leaders’ efforts to defeat their enemies’ military forces directly are frustrated, they face powerful incentives to target the civilian populations they suspect of supporting those forces.”¹⁸

¹⁵ *Ibid.*

¹⁶ Harff, *supra* note 7.

¹⁷ *Op.cit.*. Valentino refers to this general class as “dispossessive” mass killings.

¹⁸ *Ibid.*, p.69. Valentino suggests that kind of mass killing is “coercive” in nature, and refers to it as such.

However these factors are not definite, and other circumstances may influence whether or not mass killings are carried out. In order to overcome genocide which originates in this way, it is necessary to monitor these governments and their activities.

IV. What can be done Nationally to Prevent genocide?

A brief explanation is given above of the main theories which discuss why genocide occurs. It is necessary to understand why genocide occurs in order to effectively plan its prevention. Below are details of responses to the reasons why genocide occurs, which States could implement in order to make a domestic attempt to prevent genocide, as required by the Genocide Convention.

A. Education

Education is an effective tool to address the cleavages in society and any discriminatory ideas which may prompt genocide. The United States has agreed with this proposition, and it suggested that in terms of prevention, nothing replaces education.¹⁹ If different groups of people were to learn about one another, they would become more tolerant. Many NGOs already have the prevention of genocide on their agenda and education is one of their main tools, though this policy needs to be implemented domestically in order to achieve maximum success.²⁰

¹⁹ Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, U.S, Address on the issue of genocide, Stockholm International Forum, at <http://www.manskligarattigheter.gov.se/stockholmforum/2004/page1431.html>, accessed on 22 July 2007

²⁰ See for example, The Genocide Education Project, at <http://www.genocideeducation.org/aboutus.htm>, accessed on 23 August 2006; Prevent Genocide

Although divisions might not disappear entirely, if groups learn to see each other as a neighbour, rather than an enemy, their tendencies towards genocide would be reduced. This may seem rather idealistic as education may not always be effective; there may always be some tensions in certain societies and between certain people. In order to address these tensions and prevent them from developing into full-scale genocide, these areas should be monitored.

B. Monitoring

Monitoring is particularly beneficial in order to stop totalitarian governments from gaining too much political opportunity to commit genocide. Monitoring could be carried out in four different ways: firstly, national agencies from the area in question could report on events to international bodies; second, NGOs from across the globe could monitor the events occurring in the area; third, another State could send representatives to monitor, or; fourth, the UN could send its agencies to monitor an area. The type of monitoring that will be appropriate will vary depending on the severity of risk associated with the area.

If the peace and stability of a country is deteriorating, it can quickly be brought to the attention of the world media, the United Nations and parties to the Genocide Convention, who can invoke their right to prevent genocide. National governments are in a position to monitor their own people for signs of genocidal intent and this can thwart any plans to commit genocide. If they suspect persons of genocide,

International, at www.preventgenocide.org/edu/, accessed on 23 August 2006; Genocide Watch, at <http://www.genocidewatch.org/>, accessed on 23 August 2006.

proceedings could be issued against those people in the national courts. If a situation is expected to turn into genocide, the government could warn to people and make an attempt to move them away from the danger zones.

This is not an easy task and it will often be dangerous. Due to the Genocide Convention only providing a territorial basis of jurisdiction it is also extremely difficult to gain access to monitor governments who may be planning to commit genocide. The most effective way to monitor would be through United Nations Peace Committees and NGOs. Members of these organisations could be on the ground in those countries, participating in fact finding. This in itself will deter genocidists, and if those agencies discover any information, which suggests an impending atrocity, then the world media, international organisations and governments from all over the world can be alerted.

This kind of prevention begins to overlap with international extra-territorial prevention and shows that the prevention of genocide cannot exist in a territorial vacuum. Outside forms of prevention must be considered in order to give effect to the national prevention requirement of the Convention. Although the international methods of prevention may not be mandatory, with the right amount of political pressure and media attention, genocidal activity perpetrated by governments can be averted.

C. Preventing armed conflict

Preventing armed conflict in countries with fragile interactions is essential to stop those with genocidal intent, or deep stereotypes from making plans to commit genocide.²¹ Once conflict is engaged people accept that killings will take place and as such, loosen the moral taboo and restraints on killing. It is not a huge descent from this to designating whole communities as the enemy, and from that to believing that the lives of the people in those communities are of no account. From here the step to systematically and intentionally eliminating these communities (in other words committing genocide) is not too far in the distance.

One of the best ways to prevent genocide is to address armed conflict, and attempt to avert it. To do this, it is necessary to discover the root of the conflict. It is beyond the scope of this thesis to discuss all possible methods to prevent all conflict, but the view taken here is that there must be a necessary minimum in order to comply with the duty to prevent genocide. The Secretary General's Report on Prevention of Armed Conflict²² provides a more extensive detail on what needs to be done to reduce, or perhaps eliminate, such conflict. Weapons amnesties and rewards for compliance with the genocide laws could be other possible ways to deter future genocidists from taking that further step forward and carrying out their genocidal intent.

²¹ UN Secretary-General Kofi Annan, "Prevention of armed conflict: Report of the Secretary-General General Assembly", United Nations Doc. A/55/985, S/2001/574, Security Council, Fifty-fifth session, Agenda item 10, Report of the Secretary-General on the work of the Organization, Security Council, Fifty-sixth year, Prevention of armed conflict: Report of the Secretary-General, at <http://www.reliefweb.int/library/documents/2001/un-conflprev-07jun.htm>, accessed on 20 March 2006.

²² *Ibid.*

Genocide occurs for a variety of reasons and the theories for prevention must be linked to the cause. The problem is that with so many causes the ability to prevent must be tailored to each and every situation of impending genocide. The practical difficulties associated with that are enormous and as such the prevention of genocide is a colossal aim. Nonetheless, if small steps can be taken by domestic agencies then this will go some way to building an international impetus towards the prevention of genocide.

V. What Might the Duty to Prevent Genocide Extra-Territorially Entail?

If genocide cannot be prevented nationally it may be essential to call upon extra-territorial agencies for help in preventing genocide. It is clear from the 2007 judgement of the ICJ in the *Application of the Genocide Convention*²³ case that the duty under the Convention to prevent genocide does not extend to activity of other States. It has also been shown in the previous chapter that even under customary law this obligation still does not exist. Therefore, it is optional for States to help in this way, and optional for governments of the genocidal State to allow this help. Often the right political pressure, coupled with media attention, does provide for the necessary environment to enable other States to help prevent genocide.

David Scheffer, the US Ambassador for War Crimes, has suggested some measures which other States could take to help prevent genocide. These measures, along with others will be discussed below:

²³ *Application of the Genocide Convention*, *supra* note 2.

“A State party may choose from among a range of measures – diplomatic pressure, economic sanctions, judicial initiatives, or the use of military force...the States choice is necessarily discretionary.”²⁴

A. Planning and Preparation

No matter where or how the idea to commit genocide originates, planning and preparation is required in order to complete the crime. During this preparatory stage NGOs have an opportunity to investigate the situation. Although it may be a very difficult and dangerous task, if enough evidence is gathered of genocidal intent by the NGOs, prosecutions may be brought before the genocide reaches the stage of systematic slaughter. Prosecutions can be brought for inciting genocide, or conspiring to commit the crime, and both are inchoate offences, so do not require that the genocide actually be carried out.²⁵

Although in theory this may seem to be a good way of preventing genocide, in reality there are many difficulties with this approach. Primarily, it is extremely difficult to prove genocidal intent. Indeed even after the event, it has been hard to prove the requisite intent, as it is set at such a high level. Further, it would be very difficult to penetrate the network planning the genocide, and this is made even more difficult due to the limited resources and manpower of many NGO's.

²⁴ Kuper, *supra* note 10., p. 210.

²⁵ The Genocide Convention, Article III.

B. Early Warning Systems

President Clinton established the Genocide Early Warning System under the direction of the State Department and the Central Intelligence Agency,²⁶ after this concept was first developed by Israel Charny.²⁷ David J. Scheffer said that every government should view this system as an opportunity to act, but he did not suggest that this amounts to an obligation. He also made it clear that this opportunity should be taken “if and as genocide occurs”²⁸; he made no suggestion of a requirement to stop genocide occurring before it actually happens. This seems to be in contradiction to the aim of the early warning system and perhaps a more realistic insight into what the warning system meant for the Americans.

Periodic reports should be made by all involved in the prevention process, and evidence collected and brought together in a systematic and focused way, in order to draw international attention, explain complex situations and suggest solutions.

This type of prevention could be used to try to prevent armed conflict from escalating into genocide. The signs of genocide must be recognised so that it can be averted.

Again this role falls with NGOs, human rights bodies, State reporting, Special Rapporteurs, and of course, the United Nations human rights system. The treaty

²⁶ Referenced in William A. Schabas, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, 2000, p. 497: “Remarks by the President at Human Rights Day Presentation of Eleanor Roosevelt Human Rights Award”, 10 December 1998, at www.whitehouse.gov/WH/New/html/19981210-2845.html, consulted 11 December 1998. See also Dana Priest and John M. Goshko, “Genocide Early Warning Centre Established”, *Washington Post*, 11 December 1998, p.A52.

²⁷ Charny, *supra* note 9, pp.283 – 381.

²⁸ *Ibid.*

bodies and the Office of the High Commissioner, alongside the *Special Advisor* to the Secretary General on the Prevention of genocide, all have a role to play.

The UN has appointed a Special Advisor on the subject, to propose steps to prevent genocide.²⁹ The Special Advisor's duties are: firstly, to work closely with the High Commissioner and collect information on potential or existing situations or threats of genocide; secondly to act as an early-warning mechanism to the Security Council and other parts of the UN system; and thirdly, to make recommendations to the Security Council on actions to be taken to prevent or halt genocide. The successful prevention of genocide requires both early warning and early action to be taken, and the Special Advisors role is paramount in proving this. A detailed explanation of the role of the UN in preventing Genocide will be discussed below.

C. Unilateral and Diplomatic Action

“The United States believes our duty is to engage early with diplomatic and humanitarian action. We must maximize the use of diplomatic and humanitarian tools to prevent genocide from ever occurring, rather than simply trying to stop it in its course.”³⁰

Affluent or neighbouring States to a country where genocide is occurring may be in a favourable position to take action against genocidists. One way in which they can use their means in an effective way is to impose sanctions on the offending State; aid could be stopped, which may force the government to take action to help its citizens.

²⁹ Juan. E. Mendez, “The United Nations and the prevention of Genocide”, International Conference: The Criminal Law of Genocide – International, comparative and contextual aspects, Nottingham Law School, 1-2 September 2005.

³⁰ Pierre-Richard Prosper, *Supra* note 19.

However, this may backfire because the citizens will be the ones who suffer with the genocidists feeling no impact.

States could combat this by freezing any assets of the genocidists. Without external monetary means it will be much more difficult for them to commit their crimes.

Extra-territorial States could also stop any tourism, or prevent the nationals from either State from going to the other. States could also act collectively and ban the offending State from international events, such as the Olympic Games and football tournaments.³¹ This may also exert the desired political pressure. Countries should also try to ensure their national press keep reporting on the issue, and do not let these crimes be forgotten by the world.

D. Suspending Treaty Relations and Trade Sanctions

If States felt they were able to be more relentless, then they could suspend treaty relations with the offending State. This would mean stopping trading into and out of the country and not fulfilling any international obligations towards the State. This could perhaps break down the political opportunity for genocide, as described above. By not trading, States would not be able to help the genocidists, whether what they were trading was of direct or indirect use, the barring of imports and exports may put pressure on the genocidists and as a result of this they may not be able to carry out their activities.

³¹ A good example can be shown in South Africa when countries joined together to exclude South Africa from world sporting events in order to urge them to put an end to apartheid.

The problem with this is that the countries that choose to take this action will themselves breach their treaty obligations and may be subject to international penalties. If treaty relations are established between one State which is committing genocide and another State, it does not necessarily mean that those treaty relations are suspended. This means that if the non-offending State stops trading with the offending State, to try and persuade them to stop committing genocide, then the non-offending State essentially breaks the treaty and the relevant international consequences would follow. This is a huge disadvantage for the prevention of genocide, as barring trade could prove to be very effective in persuading governments to stop committing genocide.

IV. What Can The United Nations Do To Help Prevent Genocide?

Another way in which States can prevent genocide, is through their position within the United Nations. Under Article VIII of the Convention, States parties have the right to call upon competent organs of the United Nations. The organs which Article VIII refers to are generally considered to be the Security Council and General Assembly, as these were the only ones referred to in the debates.³² ECOSOC may be a useful addition to this list for tackling the root causes of genocide such as economic strain and social disunity. The bodies of ECOSOC include the Council and the Sub-Commission on the promotion and protection of human rights. As they have primary responsibility in the protection of human rights and minorities, these organs are perhaps the best equipped in the UN to understand the problems of a humanitarian

³² Nehemiah Robinson, *The Genocide Convention*, New York: Institute of Jewish Affairs, 1960, p.98.

crisis such as genocide, and may know the best solutions to resolve it, (despite not necessarily having the ability to put these solutions into action).

Most academic opinion has ignored the importance of Article VIII, or has deemed it to be of little significance.³³ However Hans- Heinrich Jescheck³⁴ critically observed that by allowing parties to the Convention to have recourse to the organs of the UN, Article VIII presents an obstacle to any State claiming that genocide is essentially a matter of domestic jurisdiction.³⁵ Article VIII can be used by States to invoke the United Nations to help. The capacity of those organs to help in the suppression of genocide will be considered below.

A. General Assembly

“The General Assembly is considered by many as merely a forum for long-winded speeches by national dignitaries. Its many actual accomplishments are usually ignored.”³⁶

The first time the General Assembly addressed the issue of genocide was to describe the massacres at the Sabra and Shatila refugee camps in Beirut.³⁷ Very little debate was given to the legal definition of the term, and it was likely to have been used to embarrass Israel rather than out of any legal precision.³⁸ Although terrible atrocities

³³ Robinson viewed it as “low value”, and Whitaker thought it had nothing new to add to the Convention. *Ibid*, p.90; Benjamin Whitaker, ‘Revised and Updated Report on the question of the prevention and punishment of the crime of genocide’, UN Doc. E/CN.4/Sub.2/1985/6, paragraph.66.

³⁴ Hans-Heinrich Jescheck, “Genocide”, in Rudolph Bernhardt, ed., *Encyclopedia of Public International Law*, Vol. II, Amsterdam: North-Holland Elsevier, 1995, pp. 541 – 4.

³⁵ *Ibid.*, p 542.

³⁶ Louis B Sohn, “Important Improvements in the Functioning of the Principal Organs of the United Nations that can be Made Without Charter Revision”, Editorial Comment, *American Journal of International Law*, October 1997

³⁷ UN Doc. A/37/L.52 and Add.1; UN Doc. A/37/PV.108, para. 58.

³⁸ Schabas, *supra* note, p.455.

were occurring, the crimes were not being carried out with the sufficient intent, nor with the view to eliminate a part or the whole of the group, to be accurately described as genocide. After this inaccurate usage of genocide, many countries felt that the General Assembly was not the appropriate organ to address the issue of genocide because to overuse the term, or use to in the wrong way would devalue its significance.³⁹

The GA also used the term too loosely and inconsistently, by using the Genocide Convention definitions in the preamble of the Declaration on the Rights of Persons Belonging to National or Ethnic Religious and Linguistic Minorities;⁴⁰ and by inconsistently describing ethnic cleansing as a form of genocide.⁴¹ It was not using the legal terminology in the correct manner, nor paying respect to the legal consequences brought with the use of such a term.

The General Assembly has only had to deal with a situation of genocide when the atrocities had already occurred. Although this may prevent further killing, its ability to address a potential genocide before it occurs has been limited. During the Rwandan genocide the GA adopted several Resolutions, only one of which included the possibility that genocide was occurring.⁴² It was only after the genocide in Rwanda had begun, and thousands had been systematically slaughtered, that the GA chose to

³⁹ Canada said “we also question whether the General Assembly has the competence...” to deal with the question of genocide, UN Doc. A/37/PV.108 para. 197. Singapore echoed this notion, UN Doc. A/37/PV.108 para. 121.

⁴⁰ UN Doc. A/RES/48/138.

⁴¹ The General Assembly considered ethnic cleansing to be a form of genocide in “The Situation in Bosnia and Herzegovina”, UN Doc. A/RES/47/121. It did not consider ethnic cleansing to be a form of genocide in other resolutions including “Ethnic Cleansing and Racial Hatred” UN Doc. A/RES/47/80.

⁴² Schabas, *supra* note 26, p. 457.

condemn the acts that had taken place, as genocide.⁴³ The General Assembly has a limited mandate and although is able to define a situation as genocide, its ability to go any further is extremely limited.

Despite these perceived drawbacks the GA has had and can continue to have some positive impact on the prevention of genocide. The Assembly has adopted Resolutions periodically on the status of the Genocide Convention, urging non-ratifying States to join.⁴⁴ This is beneficial for prevention because it sends out a continual message that any act of genocide is condemned by the UN. Further it provides an insight into the way the Convention and the prevention of genocide is moving, affording more clarity and precision.

The shortcoming of the veto system of the Security Council may allow the General Assembly to play a more active role in international peace and security. Importantly, in 1950 the General Assembly passed the Uniting for Peace Resolution⁴⁵ which resolved that if the Council could not discharge its primary responsibilities because of a veto by a permanent member then the Assembly:

“shall consider the matter immediately with a view to making appropriate recommendations to members for collective measures, including in the case of a breach of the peace or act of aggression, the use of armed forces when necessary, to restore international peace and security.”⁴⁶

⁴³ “Situation of Human Rights in Rwanda”, UN Doc. A/RES/49/206. The same was also true for Cambodia, in which the General Assembly described the tragic events as genocide, when recalling the Cambodian history. It did not describe the events in Cambodia as genocide, while they were occurring. “Situation of Human Rights in Cambodia”, GA Res. 52/153. This had the consequence of action taking place much later than if genocide had been named earlier.

⁴⁴ For example GA Res. 795 (VIII).

⁴⁵ GA Res. 337(V), 1950.

⁴⁶ *Ibid.*

This powerful Resolution has been invoked on occasion⁴⁷ and could apply to the Convention, in the sense that genocide will almost always breach international peace and security, giving the Security Council jurisdiction. If the Council fails to act due to veto, the General Assembly could be empowered.

This provision cannot allow employment of a coercive force, but it has been used as the basis of formation of a peacekeeping force in Egypt.⁴⁸ The practical possibility of the General Assembly invoking this provision to employ a force is slim. If a permanent member of the Security Council has vetoed such a Resolution, the political consequences of the Assembly overriding this would be extremely detrimental. The circumstances in which the Uniting for Peace Resolution was created were unique to the Cold War period. Following the end of the Cold War, the veto was being used in a more rational way and therefore situations when the General Assembly needed to intervene were severely reduced. Furthermore, the passing of GA resolution 3379, essentially equating Zionism with racism, caused considerable disquiet among members of the UN and many States, particularly the USA, became increasingly cautious when it came to the GA exercise of substantive power.⁴⁹ Although in no way is it suggested that individual States can control the power of the GA, these political influences are important to understand why the GA is perhaps not the best organ to deal with preventing genocide.

⁴⁷ Notably to justify its consideration of cases where force has been used unlawfully against a State, for example in Korea in 1950 and in Afghanistan in 1980.

⁴⁸ After the Suez crisis in 1956 with the State consent.

⁴⁹ General Assembly Resolution 3379.

Nonetheless, the General Assembly could legitimately and without too many problems, create a purely peacekeeping force. A peacekeeping force is essential for continuation of peace in many areas of the world, and if an appropriate force is employed it is anticipated that it would be a vital mechanism in the prevention of genocide.

The General Assembly also has the power to create subsidiary bodies under Article 22 of the Charter of the United Nations. This is extremely beneficial to the States calling on the UN for help in preventing genocide because it means the General Assembly could establish a Commission to report on a potential genocide in a given area, recommending steps to be taken for prevention of such a catastrophe. In fact, the ILC, a subsidiary body of the General Assembly, has often studied the issue of genocide in the course of its work on the draft code of Crimes against the Peace and Security of Mankind.⁵⁰

The ILC, worked on the establishment of the International Criminal Court, which has the ability to prosecute genocide. When the Convention was drafted, such a court was anticipated, but it was not until 2002 that the ICC was established. The very existence of such a court may act as a deterrent, however the problem with alluding to the presence of the crime and court as a deterrent, is that the argument assumes that genocidists are rational human beings. In fact, they are either under orders, or, as was the case of Hitler and the Rwandan genocidists, are irrational and legal provisions mean nothing to them.⁵¹ Furthermore, genocide is often perpetrated during the course

⁵⁰ "Report of the International Law Commission on the work of its forty-eighth Session, 6 May – 26 July 1996", UN Doc. A/51/10.

⁵¹ Gregory H. Stanton, "Could the Rwandan Genocide have been prevented?", *Journal of genocide Research*, June 1994, Volume 6, No.2, pp. 211-228.

of war and usually only the losing side face any form of corrective justice. As most parties to a conflict believe they will win the deterrent effect of criminal prosecution has little weight.

As has been demonstrated above the GA has some power to take action to prevent genocide, however the major player for positive action is the Security Council.

B. The Security Council

i. Article 41

The Security Council has the ability to impose economic sanctions on countries which are violating human rights, under Article 41. Such sanctions can include trade embargos and withdrawal of aid. The SC has implemented this article on numerous occasions and it has been shown that it can help in the prevention of genocide because it puts pressure on the country to comply with international law. However, the biggest criticism of such measures is that the perpetrators of the genocide are often not affected; rather, it is the victims who face further marginalisation and hardship. If the economic sanctions have little effect the task to prevent genocide remains. This is when the use of force becomes the key issue.

The Security Council's ability to create *ad hoc* tribunals,⁵² such as those in Rwanda and Yugoslavia, have been an important part of the punishment of genocide. Criminal prosecution of genocide is an important part of the action of international justice in

⁵² Through Article 41 of the Charter of the United Nations. *Prosecutor v Dusko Tadic a/k/a "Dule"*, Judgement 20 October 1995, IT-94-1.

condemning these acts. The SC allowed an extremely broad reading of their powers, to interpret “...any other action...”⁵³ to allow them to create organs to prosecute genocide under the international framework, but in the countries where the acts had occurred. This was not expected and as such it had no or little preventative effect for those particular genocides. That is not to say this would be the case now and what this does demonstrate is that when the SC is united, it has extraordinary power and resources to be able to take positive measures, unlike any other international body.

Taking into consideration what is mentioned above about the irrationality which surrounds carrying out acts of genocide, it may still be the case that *some* perpetrators of genocide will be less likely to commit the crime if they know that they will definitely be prosecuted through an international tribunal. However, this will not be true of all genocidists and perhaps it is the case that if a person wishes to carry out such an extreme activity such as genocide, the existence of legal punishment mechanisms will do nothing to deter.

The Security Council may authorise States or international organs to use force if a situation disrupts international peace and security.⁵⁴ Although it does not have the specific mandate to investigate genocide, it can establish a Commission of Experts to investigate a situation and provide methods for prevention. The SC has intervened in the case of genocide in the Bosnia and Herzegovina war, and the Commission’s work led to the establishment of an international tribunal having subject matter of the crime. This was very positive action to prevent genocide, although it actually stopped short of declaring that genocide actually occurred.

⁵³ Article 41, Chapter VII.

⁵⁴ Under Chapter VII, Article 42 states that the Security Council “may take such action by air, sea or land forces, as may be necessary to maintain or restore international peace and security”.

If the conflict cannot be prevented, the highest priority must be to protect civilians. This may require UN peacekeeping missions alongside State and NGO operations. Whether the individuals are targeted groups or otherwise “caught in the cross-fire”⁵⁵, human life needs to be protected above all else. Mendez emphasises the importance of ensuring civilians have access to basic economic, social and cultural rights.⁵⁶ Perhaps the organ most able to take the necessary steps to help fight against genocide is the Security Council.

ii. Article 42

This section will discuss the effect the Security Council can have on preventing genocide should its authority be invoked through Article VIII of the Genocide Convention. It will be shown that it has the ability to take preventative action, but that its past record demonstrates that its practical reaction is not always sufficient.

The importance of the Security Council stems from its unique combination of force and legitimacy. Only the Security Council has the power to invoke Chapter VII which authorises the use of force. Furthermore, any action taken by the Council must necessarily have the support of the permanent five, who have the resources to put theory into practice (and perhaps more importantly the veto). In addition to Article 51 (self defence), this is the only exception to the general prohibition of use of force, required by Article 2(4) of the UN Charter.⁵⁷ The only limitation on the SC’s power to authorise force is the provision that it must be in response to a “threat to international

⁵⁵ Anan, *supra* note 1.

⁵⁶ Mendez, *supra* note 29.

⁵⁷ Article 2(4) of the Charter of the United Nations.

peace and security". However, the SC has the power to interpret its own mandate and it has given this provision an increasingly wide definition. The Council has been increasingly willing to interpret internal conflicts, and more importantly human rights abuses, as sufficient in themselves to constitute such threats. There has been some consistency in what has been classed as such situation, in that mass killing, or forced displacement has been taking place. However the point in time when these situations have been described as breaching the peace and security of mankind, has been somewhat haphazard. Perhaps, it is only when sufficient political pressure is exerted, or when atrocities are well underway that the agencies of the UN take this step.

Since the end of the Cold War, there have been a number of resolutions passed in response to genocides or widespread human rights abuses. Such developments open the door to a system of Security Council response to genocide. The first significant post Cold War resolution was SC Resolution 688 in response to the mass killings of Kurds and Shiites by Iraqi government forces. The resolution defined the internal conflict as a threat to international peace and security and allowed the invocation of Chapter VII powers. Although force was not expressly authorised, the actions of the French, British and American forces to protect the civilians in Northern Iraq were justified on the basis of this resolution.

That example was followed and taken further by the Security Council in response to the situation in Somalia. Although Somalia is not universally recognised as a case of genocide it was a manufactured famine which caused the death of thousands of civilians. The principles cited in responding to the situation are comparable to those which could be invoked in reacting to genocide. Resolution 794 authorised States to

utilise “all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.”⁵⁸ This is a significant example of the SC authorising force to address human rights abuses and wide spread killings.

The final and most relevant resolution is Resolution 939 which authorised French forces to undertake Operation Turquoise in response to the genocide in Rwanda. The French force was authorised to “use all necessary means to achieve the humanitarian objectives” of the operation. This was a significant development for the prevention of genocide, as States, operating under the UN, were specifically authorised to use force to prevent genocide. Of major significance is that there was no condemnation of this action and in fact the United Nations as a whole was widely criticised for not having acted sooner. This displays clear support for Security Council authorised responses to genocide, involving force where necessary.

Schabas says that it is implicit “that gross human rights violations anywhere are a threat to peace and security everywhere.”⁵⁹ Genocide is undoubtedly covered by this broad definition. The International Law Commission gave the same proposal when it said that “the crime of genocide, even when committed primarily in the territory of a single State, could have serious consequences for international peace and security”.⁶⁰

⁵⁸ Security Council Resolution 794 of 3rd December 1992, 47 U.N. SCOR at 63, U.N. Doc. S/RES/794 (1992)

⁵⁹ Schabas, *supra* note 26, p.498.

⁶⁰ “Report of the International Law Commission”, *supra* note 50.

iii. The Difficulties with the Security Council

Despite these doctrinal developments, there have been many practical difficulties with the Security Council's use of force. It has particularly been criticised for empowering forces with insufficient mandates, for example this happened in the early stages of the Rwandan genocide.

While, the SC certainly has the authority to authorise preventative or combative action, member States do not always display the political willingness to act. Furthermore, when resolutions are passed to address genocides and human rights crises, there is often a considerable commitment gap between what States are willing to support on paper and the resources they are willing to provide. A significant example here is Resolution 939, where there was a considerable delay in obtaining the necessary troops and resources to undertake the action which the Council had authorised. During this time, a great number of Rwandans were systematically slaughtered. Part of the reason for this was the extreme reaction to the loss of U.S. troops in Somalia the previous year. Although lofty humanitarian principles had been invoked when justifying the intervention, almost all support was lost when 18 U.S. Rangers were killed. This reaction has fostered the tendency for Western powers to condemn genocide and human rights abuses in theory, but to be reluctant to provide the necessary troops to effectively respond.

This highlights the void which has been left by the failure of Article 43. The initial aim for member States to provide troops to the UN for such missions was frustrated by Cold War politics and has now become effectively a dead letter in the UN Charter.

This leaves the United Nations reliant on the willingness of member States, not only to give their support in principle, but also to contribute the necessary resources and troops for effective implementation of the resolutions.

Finally, the biggest shortcoming of the Security Council stems from its greatest strength. The collective decision making capacity of the Council gives it a weight of legitimacy possessed by no other international body, but it can also result in inactivity. The existence of the veto power has meant, on so many occasions, that a collective decision cannot be reached and the Council has been left paralysed. For instance, the Security Council has used the term genocide to describe the events in Rwanda between April and August 1994.⁶¹ However, action only came “after weeks of vacillation and debate.”⁶² While the genocide raged in Rwanda, the Security Council failed to reach unanimity as to whether what was occurring there was in fact genocide. The Security Council is only as effective as its members and to become a truly efficient tool in combating genocide, member States, and in particular the permanent five, will need to match their rhetoric with affirmative action.

At the international level, the UN must do more to ensure conflict does not spill over from one country to another. More attention must be paid to environmental issues and tensions over natural resources. Education and peaceful employment must be able to be accessed by all.

⁶¹ Timeline Rwanda, at <http://timelines.ws/countries/RWANDA.HTML>, accessed on 24 April 2006.

⁶² Schabas, *supra* note 26, p.459.

C. ECOSOC and Sub-Commission on the Promotion and Protection of Human Rights

The sub-commission has, and continues to play a vital role in the prevention of genocide and States should call upon this specific body in order to help prevent genocide. The Sub-Commission has carried out an investigation into genocide and produced a report of nearly 200 pages.⁶³ It looked at relevant academic writing, case law and official documents, in addition to sending information requests to governments about national implementation and their views on the Convention and related matters. If it has the ability to take action on this scale when genocide was not anticipated or impending, then they should also have the ability to do that if a State requests its help, via Article VIII, to prevent genocide. In particular the Sub-Commission were active in the prevention of genocide, when they urged the authorities of Zaire to close down a radio station suspected of inciting genocide.⁶⁴ This proactive policy could be used to prevent genocide, as described above by the monitoring and providing early warning.

D. Human Rights Council

The Council has convened on three special occasions to discuss genocide.⁶⁵ The outcome of these sessions has been beneficial for the prevention of the crime; they have been able to appoint Special Rapporteurs to investigate the goings on and adopt resolutions which condemn any actions pertaining to genocide. The Special

⁶³ "Study of the question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur", UN Doc. E/CN.4/Sub.2/416.

⁶⁴ "Prevention of Incitement to Hatred and Genocide, Particularly by the Media", SCHR Res. 1995/4.

⁶⁵ In August 1992 over the former Yugoslavia; in November 1992 to discuss Bosnia and Herzegovina; and in May 1994 to deal with the ongoing genocide in Rwanda. Schabas, *supra* note 26, pp. 648-649.

Rapporteurs mandated through the commission have been able to periodically address the issue of genocide and help an investigation.⁶⁶ States can also request the emergency convening of the Commission to deal with a humanitarian crisis, as Canada did in May 1994 to deal with the ongoing Rwandan genocide.

E. International Court of Justice

As the principle organ of the UN, the ICJ has an important role to play in the prevention and punishment of genocide. Although principally an organ of adjudication, it does provide a preventative dimension. In its judgements and opinions the court can set out guidelines for countries to follow. It certainly can make its legal opinion clear, which in itself can persuade States to be compliant. The ICJ can also provide valuable judicial interpretation on the status of the customary norm of genocide, with a view to promote a universal basis of jurisdiction.

The *Application of the Genocide Convention* case provides a good example of the role of the ICJ.⁶⁷ In this case the ICJ clearly set out that there is a duty to prevent genocide and this amounts to practical mechanisms which must be employed. With this case, as with all cases sent to the ICJ, the parties must accept the jurisdiction of the court. This is the major drawback of the ICJ, however under the right political circumstances, when countries do submit to its jurisdiction the court has a wide ranging power. Particularly, the ICJ has the power to order interim relief. In the Bosnia case by an Order dated 8 April 1993, the court granted interim measures against both parties to the proceedings. Although the function of the court to implement compliance with

⁶⁶ Special Rapporteur Annual Reports, UN Doc. E/CN.4/1996/4, para. 26.

⁶⁷ *Application of the Genocide Convention*, *supra* note 2.

these measures is somewhat limited, the ability to order parties to act in compliance with international law is extremely useful for the prevention of genocide.

F. The Secretariat

The Secretariat performs an administrative role so its ability to help prevent genocide is naturally limited. Nonetheless it can still play its part. The Secretariat is appropriately placed to be informed about the situations occurring around the world; in fact this organ was the first to be informed of threats of genocide during the Rwandan crisis. This, coupled with the ability to put issues before the GA, is a very useful early warning mechanism and a backbone for pushing action against genocide.

When consulted by the Secretariat, Vespasian V. Pella and Raphael Lemkin, advised that the Secretary General should be under a duty to inform competent organs of the UN of threats of genocide because States themselves might hesitate to do so.⁶⁸

Although beneficial in their outcome, such powers were not envisaged nor mandated by the Charter of the UN. As a result of this there is a doubt over the legitimacy of the Secretary General to do this. Nonetheless, this has been done in the past, and should continue to provide a mechanism for the international community to be warned about any particular situation of genocide taking place around the world.

⁶⁸ *Op. cit.*, p 46

IV. The Right to Military Intervention

Many scholars believe that genocide entails the right to humanitarian intervention.

Professor Hersh Lauterpacht said that:

“[a]cts of commission or omission in respect of genocide are no longer in any interpretation of the Charter, considered to be a matter exclusively within the domestic jurisdiction of the States concerned. For the parties expressly concede to the United Nations, the right of intervention in this sphere.”⁶⁹

Schabas takes this one step further by asserting that the “practice of States since that time suggests that this intervention may include military action, but this is viewed as a right rather than an obligation.”⁷⁰ The problem that occurs when an interest falls on the right side of this right/obligation distinction, is that national interest become intrinsically involved in deciding whether to intervene to prevent genocide. The view of Kofi Annan⁷¹ should be followed, when he suggests that military action is an extreme measure and should only be taken in extreme cases.

V. Intervention without Security Council Authorisation?

The use of the Security Council’s Chapter VII Powers has been discussed above. If the Security Council does not authorise intervention, any such humanitarian

⁶⁹ Hersh Lauterpacht, (ed), *Oppenheim’s International Law: A Treatise*, 8th ed., London: Longmans and Green, 1955, p.751.

⁷⁰ Schabas, *supra* note 26, p. 498.

⁷¹ Annan *supra* note 1.

intervention by a forcible nature violates the Charter of the United Nations.⁷²

Nonetheless a school of thought in the United States has defended a right to intervene militarily without the authorisation of the Security Council.⁷³

That view can be summarised as follows: the permanent members of the Council are all under a duty to prevent genocide because they are all parties to the Genocide Convention and obligated under the customary norm to prevent it. Although in the past Security Council members have used their veto to stop military action, it could be argued that because they are under a duty to prevent genocide, if using forcible intervention is the only way to do this, they cannot veto or they can take action to avoid giving States the opportunity to veto. If Security Council authorisation is necessary to use force, which is necessary to prevent genocide, and if the rule which requires the use of force to prevent genocide is a rule of *jus cogens*, then it is arguable that any veto would be without legal effect. This question turns on the view taken about the jurisdiction to prevent genocide. Those who advocate that there is universal jurisdiction over genocide, can rightly suggest that any veto by the SC would go against this duty. However, it has been expressed clearly in the above chapters that at present there does not exist a universal duty to prevent or punish genocide, rather the jurisdiction is territorial. Any action beyond this is not compulsory.

⁷² A. Randelzhofer, "Article 2(4)", in Bruno Simma, *Charter of the United Nations: A Commentary*, Second Edition. Oxford: Oxford University Press, 2002, pp.106-28 at pp. 23-4.

⁷³ R. B. Lillich, "Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives", in J. N. Moore, ed., *Law and Civil War in the Modern World*, Baltimore: John Hopkins, 1974, pp.229-51 at pp. 241 and 250; Fonteyne, "The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the UN Charter", 1974 *Californian Western International Law Journal*, p. 203 at p.258; Reisman, M. and McDougal, M S., "Humanitarian Intervention to Protect the Ibos", in R. B. Lillich, ed., *Humanitarian Intervention and the United Nations*, Charlottesville, VA: University of Virginia Press, 1973, pp.167 – 221 at pp.178 and 192-3.

In 1991, the military intervention to protect the Kurdish minority in Iraq was justified on the basis of an implied authorisation under Resolution 688.⁷⁴ This provided a building block for the expansion of inter-boundary intervention. Schabas suggests that although not specifically authorised in the resolution, intervention was largely accepted by the international community. He asserts that if such intervention can be justified in these circumstances, then the precedent ought to apply to genocide.⁷⁵ Although this would be beneficial, Schabas does not take into account the controversy surrounding this action. Further, it takes more than this individual set of circumstances for such a precedent to apply.

It was then argued by some that the outbreak of war in Bosnia imposed a duty through the Convention, as well as customary international law, to prevent genocide. States no longer argued whether they individually, or as an international community as a whole, should or could intervene, but rather that they must do so. Despite these assertions, as is the common trend, the Western democracies provided little support. Further, slow UN proceedings and a lack of action, provoked Malaysia to invoke Article I of the Convention. It asserted that the contracting parties had not upheld their Conventional duty to prevent genocide, and were therefore themselves in violation of the Treaty. It was further suggested that a Security Council arms embargo was preventing victims of the genocide from defending themselves. The lack of *opinio juris* and any other State action, provides evidence that there is not a duty to take such action. As has been set out in the last chapter, there is no duty to prevent genocide which arises outside of a State's own territory. Although some countries view the right to military

⁷⁴ Not a case of genocide, but rather ethnic cleansing.

⁷⁵ Schabas, *supra* note 26.

intervention to prevent genocide as a customary *jus cogens* norm, there is not sufficient evidence to back up this position.

In 1999, in Kosovo, the US and NATO allies argued that because genocide was occurring they had a duty to prevent which did not require Security Council authorisation. The NATO intervention in Kosovo is of massive significance in this regard. This intervention was the first time since the founding of the UN that a group of States explicitly justified bombing another State in the name of protecting a minority within that State. Although the Security Council had passed a resolution stating that it was “alarmed at the impending humanitarian catastrophe”, that the situation constituted “a threat to international peace and security”⁷⁶, it was clear that Russia would veto any attempt to authorise the use of force. Accordingly, NATO decided to intervene anyway, leaving the only option as a resolution to condemn the action, which would effectively reverse the burden of the veto. However, when the inevitable resolution to condemn the action was tabled by Russia, Belarus and India, it was defeated by a margin of 12-3 with no abstentions. The Council largely supported the action and the veto was not even required.

Although this did not legalise the action, it showed that the international community was largely supportive of the intervention and this started to create some State practice and *opinio juris* for the development of customary law in this arena. In order to establish this sort of customary law it is essential to show all elements of custom, including a general uniformity. It is particularly telling that during this period NATO made it clear that it did not intend to create a precedent to intervene in this way.

⁷⁶ SC Resolution 1199.

NATO asserted that intervention was limited to "...a unique combination of a number of factors that presented itself in Kosovo, without enunciating a new doctrine or theory."⁷⁷

Despite the lack of State practice and *opinion juris*, if circumstances such as this were able to take shape in Kosovo, then perhaps similar action can be taken when similar circumstances present themselves. At the very least, genocide is "the crime of crimes", and should intervention be justified in any circumstances, then it should be justified for genocide.

The situation to this day remains unclear, and the approach States and the UN have taken towards the Rwandan genocide has compounded that ambiguity. In many respects the Rwandan genocide was more clear-cut: it was more obvious as genocide; it was pure internal armed conflict; and there was no blame to be given to any foreign assailant. However the response to the question of whether States can impose military intervention to prevent the killings, remained the same, "elusive...and largely unanswered".⁷⁸

VI. Conclusion

Through these and many more means, the roots of genocide such as hatred, intolerance, racism, tyranny, and the dehumanising public discourse that denies whole

⁷⁷ Michael Matheson, "Justification for the NATO Air Campaign in Kosovo", 94 *AJIL* 301 (2000).

⁷⁸ Schabas, *supra* note 26, p. 495.

groups of people their dignity and their rights, must be attacked.⁷⁹ Genocide is not a random act, commenced without thought or planning. A climate of ecological, historical, economic, cultural and political factors contributes towards genocide. The climate needs to be right for genocide to occur. States need to know how to prevent this climate developing, in order to prevent the genocide occurring.

States can prevent genocide in their own countries by monitoring situations and by educating their nationals. They can also allow extra-territorial organisations into their jurisdiction to watch for signs of genocidal activity. States can develop early warning systems and enforce many diplomatic measures to push States into stopping their genocidal action. In addition, the United Nations can make Resolutions, provide peace keeping forces and exert a lot of political pressure on offending States. If none of the above methods worked in suppressing genocide, then military intervention could be employed.

Although there is no specific duty to prevent genocide in the territory of another State, there is a more general *erga omnes* right to be able to do so. This has the fundamental problem that States will only offer help when it is politically desirable for them to do so. That aside, the most effective action that States can take is in the form of State monitoring and diplomatic measures. However, if the governments are not involved in the genocide these measures are much less effective and the UN (in perhaps as far as sanctioning forcible intervention) may need to play a more forthcoming role.

⁷⁹ Mendez, *supra* note 29.

If the aforementioned non-interventionist steps have failed to prevent genocide from occurring then it is likely to be an extreme case, dealing with extreme people, who will stop at nothing to eliminate their desired target. In these circumstances the international community should not allow these people to continue this, merely because it is politically undesirable to use force.

Chapter Five: A Case Study of Darfur

I. Introduction

In order to test the propositions that have been made in the preceding chapters, it is necessary to apply those ideas to a case study. Darfur seems the obvious choice, as there is currently much debate about whether genocide is occurring there.

After some discussion of the background to Darfur and a legal analysis of what is happening there, it is concluded that, in the legal sense, genocide is not currently occurring in Darfur. However, it may be possible that what is going on could amount to genocide in the future, therefore it is important to test the propositions made the last chapters and see what could practically be done to prevent this situation from escalating. The questions which should be answered are whether these atrocities equate to genocide, whether the legal definition of genocide is able to be applied today, what if anything must be done to prevent any future harm, and by whom? The role of the Sudanese government, other States and the UN will then be explored.

II. Background on the Situation in Darfur

The Sudanese civil wars are the longest running conflict in Africa. They have a daily impact on the 41 million inhabitants of the Sudan, with 4.5 million people being forcibly

displaced from their homes and an estimated 2 million people being killed.¹ According to the World Health Organisation approximately 10,000 people per month were dying from starvation and disease in refugee camps which were created because of the situation of the Sudan.²

A. The Sudan

In order to fully comprehend the current problems which are occurring in Darfur, it is necessary to explore the historical and social background of the area. The Sudan is a republic with a federal system of government, with 26 States (Wilayaat) subdivided into approximately 120 localities (Mahaliyaat). The population is made up of more than 600 ethnic groups and tribes, speaking more than 400 languages and dialects.³ The Commission of Enquiry on Darfur (**the Commission**) describe the culture of Sudan as “Islamic-African-Arab”⁴. The Arabic language is now spoken throughout most of the country and constitutes a lingua franca for most Sudanese.⁵ Islam is the predominant religion, particularly in the North, while Christianity and animist traditional religions are more prevalent in the South. The Sudan is considered a Least Developed Country, and ranks 141 in the 2006 UNDP’s Human Development Index.⁶

¹ World Health Organisation Statistics, Darfur, at <http://www.who.int/hac/crises/sdn/en/index.html>, accessed on 27 July 2007. See also Appendix 4.

² UN Integrated Regional Information Networks, April 28 2006, at www.irinnews.org/, accessed on 22 July 2006; UNICEF reported of a significant increase in malnutrition rates in April 2006, at www.unicef.org/, accessed on 22 July 2006.

³ The World Guide 2005/6, New Internationalist Publications Limited, London, Tenth Edition, 2005, the Sudan. p. 518-520.

⁴ Report of the International Commission of Inquiry on Darfur Pursuant to Security Council Resolution 1564 of 18 Sept 2004 (Geneva 25 Jan 2005) p.17, para. 41.

⁵ *Ibid.*

⁶ UNDP Human Development Report 2006, at <http://www.undp.org>, accessed on 27 July 2007.

In 1955 the radical National Unionist Party, won the Parliamentary election in the Sudan and on 1 January 1956 a Declaration of Independence was announced. Prior to 1955 the Sudan had been ruled by Britain and Egypt. In 1958 the first of many coups overthrew the government and installed the Supreme Council to ensure compliance with orthodox Islamic laws and imposed the Arabic language on all inhabitants of the Sudan. These measures provoked rebellion, especially in the South, which was an area with its own system of governance with many inhabitants not following Islam. This unrest continued throughout the next thirty years with three different Prime Ministers being overthrown by military coups.

In 1998 it became apparent that the Sudan had harboured the al-Qaeda terrorist network leader, Osama bin Laden. As such the US announced an economic embargo on the Sudan and accused Khartoum of supporting international terrorism. This did nothing to improve the unrest in an already politically and economically unstable country. However, some modest improvement began in 2002 when the Chinese government, together with Malaysian and Canadian companies, agreed to finance an oil pipeline through the Sudan, which would supply the region with a net income of over £250 million.⁷

In January 2002 an allied agreement was established which marked the end of a 19 year civil war which had taken the lives of around two million people.⁸ Between April and December 2003 the SPLA and the government made a pact to combine their troops, share oil profits, draw up a new Constitution and give the South administrative autonomy. This put both groups in a more stable position with the ability to generate more income.

⁷ The World Guide, *Supra* note 3.

⁸ World Health Organisation, *supra* note 1; Oil and Sudan's civil war, BBC News, Andrew Harding, http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/1287188.stm, accessed on 3 May 2007.

On 9 January 2005 during an official ceremony, First Vice-President Taha and SPLM/A Chairman John Garang signed the Comprehensive Peace Agreement (CPA), comprising of all previously signed peace deal documents.⁹ As this peace between the North and South of the country was being brokered, the fighting and discontent in Darfur hit an all time high.

B. Darfur

The Darfur region of the Sudan comprises of both Southern and Northern jurisdictions. It is approximately 250,000 square kilometres and has an estimated population of about 6 million. It is divided into three states: North, South and West Darfur. The inhabitants of Darfur are the Masaalit, Zaghawa, Tama, Tanjur and Dajo people, who constitute the Fur ethnic group.

The economy is based mainly on subsistence farming and cattle herding with some urban centres, but with most families living in small hamlet type villages. Darfur is part of the Great Sahara region, so although it has some agricultural land, the majority is desert. Throughout history, the fight for fertile land and water has been the major source of conflict. Heavy migration from neighbouring drought ridden areas, into the Darfur region has put a strain on resources and issues of land ownership have been at the forefront of fighting.

⁹ *Ibid.*

The communal nature of property ownership in Darfur has contributed to the political unrest in the area. Until the 1970s, communal ownership of land was the norm. After that time the government provided individual title in return for governmental backing. This created friction between the original governmental supporters who were mostly Arab tribes and the local African tribes, who wanted to maintain their traditional tribal values and culture. Both groups had been politically marginalised and there were deep identity issues playing part in the conflicts. Further, the militia used terminology such as black or slave to describe some of the people, and unsurprisingly this caused even more anger amongst the natives.

The traditional tribal system in Darfur had worked well in the past for the peaceful resolution of conflicts. But with the influx of migrants, the abolishment of the tribal system and the introduction of new administration and judicial structures, the political role the State changed, causing upset for Darfunians. Unfortunately, at the same time these people were able to access dangerous weapons with more ease than previously. The result was each tribe equipping its own sort of mini army, ready to defend its own area, people and land.

The Sudanese Liberation Movement/Army (**SLM/A**) (formally known as the Darfur Liberation Movement) was formed in a response to attacks on the Fur by the Janjaweed forces. In January 1994 a major attack was launched on the SLM/A by the government. This caused huge marginalisation and attitudes towards land ownership and traditional culture intensified at this time. By 2001/2 the SLM/A and the Justice and Equality Movement (**JEM**) formed themselves as a sturdy opposition to the Khartoum Government. Both groups had a similar ideology, in that the government was the source of the problem

in Darfur because of its policy of socio-economic and political marginalisation of Darfur and its people. In 2001 the JEM published the Black Book, which made an attempt to prove the disparities in the distribution of power and wealth around Sudan.¹⁰ It showed that people from minority regions of the Sudan, particularly Darfur, were not given the opportunity to hold any influential positions of government, and they had been extremely marginalised. Importantly, the account spoke on behalf of all Darfurians, not just individual tribes, which allowed it to gain a lot of support throughout Darfur.

From late 2002 to early 2003 the rebel movements began their military activity. Attacks were aimed on a local level, directed at the community police and the looting of government armoury and chattels. The Commission's Report explained that the government were shocked by these attacks and the continued vigour of the rebels; for the government of Sudan these attacks could not have come at a worse time as they were not in any position to act, due to the peace being brokered in the South of the region.¹¹ Any further governmental military activity might have provoked more trouble in the South and the government did not want this. Sudanese troops that were called to help in the conflict were made up mainly of Darfunians, as such they were very reluctant to fight their own people.

The government decided to enlist the use of the former tribal system to try and overcome the rebels. The Commission's report suggested that this governmental action had:

¹⁰ For details of the book see, Justice and Equality Movement at <http://www.sudanjem.com/sudan-alt/english/books/books.htm>, accessed on 3 May 2007.

¹¹ Report of the International Commission of Inquiry on Darfur, *supra* note 4.

“exploited the existing tensions between different tribes... [i]n response to the Government’s call, mostly Arab nomadic tribes without a traditional homeland and wishing to settle, given the encroaching desertification, responded to the call.”¹²

The tribes found this a good opportunity to acquire the much sought after land. Those tribes which provided assistance to the government were rewarded with grants and gifts, based on how many people they recruited. They also recruited forces from neighbouring Chad, Libya and other States.¹³ Together these recruits are now referred to as the Janjaweed.

In early December 2003 a fresh round of attacks was launched by the Arab Janjaweed militias, including the burning of villages and the murder and rape of civilians. The attacks over the course of the subsequent four years have stirred strong reactions from international human rights organisations and the world media. Many have described the situation as genocide, others as ethnic cleansing and some people, including the Sudanese government, explain that this is all part of the civil war. It is subject to some debate whether what is occurring in Darfur is actually genocide and what the consequences of that would be.

C. Brokering Peace

Negotiations to broker peace began in August 2003 and on 3 September 2003 an agreement was finally signed which envisaged a 45-day cessation of hostilities. On 8 April 2004, the Government, the SLM/A and JEM signed a humanitarian ceasefire agreement,

¹² *Ibid.*, p.24 paras. 67 and 68

¹³ *Ibid.*

and in N'Djamena on 28 May 2004 they signed an agreement on ceasefire modalities.

Subsequent peace talks have taken place, when the Government, the SLM/A and the JEM agreed to sign two Protocols, the first on the improvement of the humanitarian situation and the second on the enhancement of the security situation in Darfur. Nonetheless, since that date hundreds of thousands of people from Darfur have still been killed by the Janjaweed.

The main parties in the conflict have very recently signed the Darfur accord peace agreement in Nigeria.¹⁴ This fundamental breakthrough only came on Friday 5 May 2006 and was aimed to end conflict for at least three years. It was signed by the government and the largest rebel group, but two smaller groups rejected the agreement and called for many changes before they would agree to sign. The African Union has had an indispensable role to play in getting the parties together to sign this peace agreement, primarily because the Sudan has only been willing to accept African peace forces.

On 9 May 2006 it was announced the UN was able to hold talks with Sudanese officials to attempt to further resolve the crisis and another step forward was also taken when the UN Special Rapporteur was recently been allowed access to the area.¹⁵ In April 2007, the Sudanese government eventually agreed to UN peace keeping forces. The role the UN has to play in Darfur will be discussed in some detail below.

These positive steps forward look like the start to the resolution of peace within Darfur. But it must be remembered that not all rebel groups have signed the

¹⁴ BBC News, Main Parties Sign Darfur Accord, at <http://news.bbc.co.uk/1/hi/world/africa/4978668.stm>, accessed on 3 may 2007.

¹⁵ Darfur Time Line, available at <http://www.mapreport.com/countries/darfur.html#2005>, accessed on 10 July 2007.

agreement and any peace deal is still extremely fragile. After a discussion of the Commission of Inquiry's role in Darfur, there follows an analysis of whether any international or UN action has satisfied the State's obligation under the Genocide Convention or customary law generally.

III. The Commission of Inquiry on Darfur

A. Introduction

The Commission of Inquiry on Darfur was established under Chapter VII of the United Nations Charter, through resolution 1564 and began working on its mandate on 25 October 2004.¹⁶ It had four main tasks: first, it needed to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties; second, it was to determine whether or not acts of genocide had occurred; third, it was to identify the perpetrators of violations of international humanitarian law and human rights law in Darfur; and fourth, to suggest means of ensuring that those responsible for such violations would be held accountable. As such, its findings are fundamental to answering the questions relating to whether or not genocide is occurring in Darfur and if it is, what should be done about it.

B. The Commission's Findings on Genocide

In response to the Commission's second task, to uncover whether genocide had taken place in Darfur, existing reports were examined and new factual and legal analysis

¹⁶ Commission of Inquiry, *supra* note 4.

was carried out. The Commission concluded that the government of the Sudan had not pursued a genocidal policy.

Although its findings concluded that genocide had not taken place in Darfur, the existence of some elements of the crime certainly could not be denied. The Commission argued that two elements of genocide could be drawn down from the gross violations of human rights occurring in Darfur: firstly, the *actus reus* of genocide had taken place; and secondly, there existed a protected group which was targeted by the perpetrators of criminal conduct. The events were on an extremely large scale, they were systematic killings, displacement of people and rape, as well as racially motivated statements by perpetrators that have targeted members of the African tribes only. There was evidence unfolding before the Commission that pointed towards a genocidal intent but there was not sufficient evidence to fully uncover such intent.

The Commission did not find evidence that those carrying out genocide had the specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. The view taken in this work is that the required intent is rigid, but adequate to ensure punishment of the worst crime. It seems to be the case that the situation in Darfur is a terrible atrocity, but not legally genocide. It is essential to keep the distinction between genocide and other international violations of human rights, without eroding the definition and consequences which ensue when the crime of crimes is committed. The Commission proposed that the attacks in Darfur were intended to drive people out of their homes for the purposes of counter-insurgency warfare, not to annihilate the group for the purposes of genocide. In the

numerous villages which were attacked not every member of the population had been exterminated. Rather, it was the young men, thought to be rebels, who were targeted. The Commission provided evidence of one boy being murdered when resisting the militia taking his camel, but the other brother who gave his possessions with no trouble was spared his life.

The Commission also looked into the question of whether the targeted tribes could be classified as one of the four specific groups under the Convention. Those groups protected are set out but in broad and loose terminology, so in some instances members of certain groups overlap categories. The Commission found it difficult to distinguish the groups being attacked from the groups doing the attacking. They shared similar customs, language, religion and commonplace intermarriages and coexistence made the boundaries difficult to draw. As the objective distinctions were minimal the Commission found it necessary to ask whether subjectively the tribes could be classed as distinct ethnic groups:

“If objectively the two sets of persons at issue do not make up two distinct protected groups, the question arises as to whether they may nevertheless be regarded as such subjectively, in that they perceive each other and themselves as constituting distinct groups.”¹⁷

This is inline with the view set out above, that subject interpretation is required of the groups protected is required, in order to ensure those groups which were intended to be protected are afforded that security. If a group does not fit exactly into the criteria upon one reading of the meaning of the definitions, the Courts in Rwanda proved that innovative interpretations could be used to ensure the groups could be protected.¹⁸ Because national,

¹⁷ *Ibid*, p.129. para. 509

¹⁸ *Prosecutor v. Akayesu*, ICTY, Trial Chamber, Judgement 2 September 1998.

racial, religious or ethnic groups are such subjective and changing terms the Court was able to adapt the definitions to fit modern interpretations. Due to conflicts between the tribes for land, in addition to the tribes' choice of support of the government or support for the rebels, the Commission were able to distinguish between subjective groups and provide evidence that those being persecuted could be classed as part of a group to satisfy the Genocide Convention.

The Commission discovered that the government of the Sudan did not have a policy of genocide, but they did suggest that individuals may have committed genocide and that this was for a competent Court to discover on a case by case basis. In essence, no genocidal policy had been implemented in Darfur, but this could not take away from the seriousness of the crimes committed in the region, nor from the possibility that some individuals committing these crimes may have had an individual genocidal intent. The ICC prosecutor is currently investigating into this and on 27 February 2007 presented evidence showing that Ahmad Muhammad Harun, former Minister of State for the Interior of the Government of the Sudan, and Ali Kushayb, a leader of the Militia/Janjaweed, jointly committed crimes against humanity and war crimes. Hopefully the decision to issue arrest warrants and prosecute these men in May 2007 will continue forward to the ICC for trial.¹⁹

¹⁹ Decision on the Prosecution and Arrest Warrant of Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") and Ahmad Muhammad Harun ("Ahmad Harun"), at <http://www.icc-cpi.int/cases/Darfur/c0205.html>, accessed on 28 July 2007.

C. The Commission's other findings

Most of the Commission's findings are beyond the scope of this thesis, but it is useful to look at what was found in relation to the fourth question that it posed for itself: the action that should be taken to ensure those responsible are held accountable. The Commission strongly recommended that the Security Council immediately refer the situation of Darfur to the International Criminal Court, pursuant to article 13(b) of the ICC Statute, as a situation which constituted a threat to international peace and security. This is the key finding for Article 39 purposes to allow intervention militarily. If a situation threatens international peace and security, it need not necessarily amount to genocide in order to allow the UN to intervene. In addition, the Commission's work has confirmed that serious violations of international human rights law and humanitarian law are still occurring in Darfur and that something should be done. The threshold of the Rome Statute, documented in articles 7 (1), 8 (1) and 8 (f), has been met, and the Commission found that there may be crimes against humanity currently occurring in Darfur. Even though the situation may not amount to genocide, similar action can be taken to stop these crimes from continuing. The international action which has already been taken, and what is still required is discussed below.

D. The Constraints on the Commission

The report by the Commission is an extensive document of nearly 100,000 words and it clear that a lot of time and resources were invested to ensure it was accurate.

However, the Commission's findings must be read in the appropriate context, giving

due consideration to the problems it faced. Apart from its task itself being extremely difficult, it also had time constraints and budget issues. In addition, the question of genocide was only one of four tasks it was assigned and it is possible that not enough time was spent investigating fully to discover whether the government had a genocidal policy.

Due criticism has also been made of the findings, especially because the Commission was unable to investigate all burial sites:

“the commissioners' reasoning was embarrassingly flawed and the failure to conduct forensic investigations at all sites of reported mass ethnic murders was inexcusable.”²⁰

This does dampen any conclusions which may be drawn in the report. One other fundamental issue with the report is that no where does it say in absolute direct terms that genocide did not occur. Rather, it says that the government did not have a genocidal policy or plan.

IV. Is Genocide Occurring in Darfur?

Despite the Commissions findings, many others have expressed the opinion that genocide is occurring in Darfur. The first real accusation of genocide was in 1995, when the African Rights humanitarian organisation accused the Khartoum of genocide of the Nubians.²¹ But it was not until the spring of 2004, that international attention

²⁰ Eric Reeves, “Questions and Answers on Genocide in Darfur”, at <http://www.tnr.com>, accessed on 27 July 2007.

²¹ Gérard Prunier *Darfur: The Ambiguous Genocide*, C Hurst and Co, London 2005. This book provides an analysis of NGO and media responses to the crisis.

really began to focus on the atrocities occurring in Darfur and organisations began to investigate and assert that genocide was occurring.²²

From July 2003 NGOs such as Amnesty International²³, Liberty,²⁴ International Crisis Group²⁵ and Human Rights first²⁶ have carried out substantial investigations in Darfur and still continue with their peacekeeping missions. These groups assert that grave breaches of human rights and humanitarian law have occurred. There are killings, rape, forced displacement and destruction of villages. All NGOs call upon the United Nations and competent States to take action, to invoke sanctions and employ forces to stop the atrocities in Darfur.

Sudan Human Rights, Africa Action, Justice Africa, Africa Confidential (U.K.) and Genocide Watch, among others, all corroborate on their position that genocide is occurring in Darfur. But the Sudanese government stand firm in describing the situation as a civil war, with both sides doing their share of fighting. No one can say for definite that genocide is not occurring in Darfur, because no body has sufficient authority to investigate, or adequate resources, or ability to infiltrate those in charge of the crimes to be able to draw a firm conclusion that genocide is not occurring.

The President of Nigeria, the U.S. Congress and the former Secretary of State, Colin Powell, among others, have all declared that they think genocide is occurring in

²² *Ibid.*

²³ Amnesty International, at <http://www.amnesty.org/>, accessed on 22 July 2007.

²⁴ Liberty, at <http://www.liberty-human-rights.org.uk/>, accessed on 22 July 2007.

²⁵ International Crisis Group *Sudan.s Other Wars*, June 2003, at <http://www.crisisgroup.org/home/index.cfm?>, accessed on 22 July 2007.

²⁶ Human Rights First, at http://www.humanrightsfirst.org/international_justice/icc/icc.htm, accessed on 22 July 2007.

Darfur. On 9 September 2004 Colin Powell, during his testimony to the Senate Foreign Relations Committee, said the following;

“...we concluded, I concluded, that genocide has been committed in Darfur and that the Government of Sudan and the Janjaweed bear responsibility -- and that genocide may still be occurring.”²⁷

The intelligence on which these propositions are made must be questioned. The Commission has to date had the best opportunity to investigate the situation in Darfur, but it could not find sufficient evidence. How can smaller, less powerful bodies and individuals, who have had less money and manpower to investigate, assert that they know genocide is occurring in Darfur?

On 6 April 2006 the European Parliament adopted a resolution on Darfur, by 76 votes in favour, none against and no abstentions.²⁸ In that resolution it urged the SC to meet to address the violence in Darfur, which it considered was *tantamount to genocide*, and to act on its responsibility to protect civilians by drafting a clear mandate under Chapter VII of the UN Charter, on or before 1 October 2006 (following the expiry of the mandate of the African Union mission in Darfur on 30 September 2006). It has been said that MEPs were prudent in the use of the term so as not to devalue it, but carefully underline the gravity of the crimes which are being committed.²⁹ However,

²⁷“Powell Calls Darfur Genocide - Now What”? 9 September 2004, <http://www.refugeesinternational.org/content/article/detail/3962?PHPSESSID=5ce00f92779c166324e1d>, accessed on 7 May 2006.

²⁸ Discussion of Genocide in Darfur, European Parliament, at http://www.europarl.europa.eu/news/expert/infopress_page/015-6979-096-04-14-902-20060331IPR06932-06-04-2006-2006-false/default_en.htm, accessed on 28 July 2007.

²⁹ European Parliament Website, Sudan crimes "tantamount to genocide", Motion for a resolution on the humanitarian situation in Sudan, Vote: 16.09.2004, at [www.europarl.europa.eu/.../presse/point_session_the_week/2004/en/par/DG-INFO_TW\(2004\)09-13\(PAR006\)_EN.doc](http://www.europarl.europa.eu/.../presse/point_session_the_week/2004/en/par/DG-INFO_TW(2004)09-13(PAR006)_EN.doc), accessed on 27 July 2007.

the MEP's do not make it clear what evidence they base their finding on. The view taken here is that they use the term too loosely, not saying Darfur in genocide proper, but rather implying genocide is taking place without giving it the full attention it needs. The use of the term in this unpredictable way has been described in the above chapters; when the General Assembly used genocide to describe situations of ethnic cleansing. If the European Parliament continues to act in this way, their opinion as to whether violations of human rights are occurring, will lose value, as did the General Assembly opinion.³⁰

Until these European Parliamentary statements in 2006, Western Europe had failed to follow its North American counterpart to call the events in Darfur genocide, despite internal and international pressure to do so. To date individual governments in Europe have still failed to employ the strong sentiment of the US. This may be because genocide is actually not occurring in Darfur, or because it currently would not be politically desirable for European, particularly British, interests to do so.

The Commission's inquiry is the best and most authoritative research which has investigated the situation in Darfur. The Commission had a lot of money and man power and was able to investigate better than any other body has been able to do so. It concluded that there was not sufficient evidence of genocidal intent in Darfur. No body has since then provided the sufficient evidence to prove a genocidal plan or policy. Furthermore, the main human rights NGO's, Human Rights Watch and Amnesty International, as well as the ICC Prosecutor, have not described the situation

³⁰ As set out in the previous chapter.

in Darfur as genocide. As such the view taken in this work is that there is not enough evidence to conclude genocide has occurred in Darfur.

V. The Duty of the Sudan to Prevent Genocide

As set out in a lot of detail in the above chapters, there is a duty to prevent genocide, which rests upon the territory of the State where the acts of genocide are suspected. The recent *Genocide in Bosnia Case* confirms that this is a positive duty, which amounts to tangible action by the authorities of a State.³¹ Currently, with regard to any potential genocide in Darfur, the Sudanese authorities are unable and unwilling to bring the perpetrators of these crimes to book. The UN and most other countries do not consider the situation in Darfur as genocide. But due to such fragile interrelations, it is not clear that genocide will not occur in the future. The fundamental question therefore, is whether the Sudanese government have a duty to take preventative action against genocide, to safeguard against it occurring in the future? Although genocide is not currently occurring, the obligations under international law are not fulfilled by taking action only once genocide has already begun. The question remains, at what stage is the government under a duty under international law to take preventative steps to stop genocide? Furthermore, if such steps are not taken what consequences ensue? The answers to these questions remain largely unanswered, however in the last chapters this thesis made an attempt to unravel the legal framework to provide an answer. A further attempt will be made below to provide practical answers which reflect current international law, related specifically to Darfur.

³¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 26 February 2007, para., 428-438.

The question that remains is where is the line drawn between civil war and the start of genocide, with only the later requiring the government to take preventive action.

Although not a popular response, the practical legal answer seems to be that governments are only under a duty to prevent genocide when there is enough evidence to class a situation as genocide. The problems with this are evident; namely that genocide must be occurring in order to invoke the duty to prevent genocide, which in essence does not prevent genocide at all.

As had been demonstrated above and as is evident in the case of Darfur, governments are generally unwilling to do anything to prevent genocide because they may well be backing the action or at least are aware that it is occurring and stand to loose too much by taking action to stop it. This certainly is the case with the Sudanese government, as it essentially set up Janjaweed in order to gain more support.

If the atrocities which have occurred in Darfur can be causally linked to the authorities then some form of compensation for the victims of these acts should be established. This causal link would overcome any difficulties which arose in the recent *Application of the Convention Case*.³² That case set out that redress should be given to the victims of genocide, but only if a causal link can be established. That link involved the government knowing about the situation, being able to take action to stop it, and not doing so. This is clearly relevant to Darfur, as the government have been heavily involved in the backing of the Janjaweed, and have been called upon to take action to stop the lootings, rapes and killings, but have chosen not to do so.

³² *Ibid.*

VI. International Action

International action taken in respect of Darfur can be analysed to understand the legal and political position those countries and agencies are taking towards Darfur. The use of sanctions, embargos and other diplomatic measures can show the level of attention countries are giving to Darfur and this may also show whether they view the action there as genocide, or some other international crime. This allows one to see what else could be done, if the situation did amount to genocide.

The African Union (AU) has had a vital role to play over the recent years in Darfur. The African Mission in Sudan (AMIS) has been seeking a solution to the conflict and monitoring the cease-fire through the establishment of the AU Cease-Fire Commission in Darfur, including the deployment of monitors. Despite these mechanisms to stop the fighting, there is still hostility in the area. International help is needed, but the question is what can be done when the Sudanese government is so reluctant to accept even UN help, and what must be done, if it is not genocide which is actually occurring there?

Since the declaration by Colin Powell that genocide is occurring, the United States has urged the UN to make resolutions which require the Sudanese government to take action to stop the fighting in Darfur. During the Darfur peace negotiations, Colin Powell threatened that if an agreement was not reached the US would triple its contribution to the SPLA and maintain its embargo on the Sudan.³³ This is the sort of action which is intended to exert pressure on the Sudanese government. Congress has also recommended that the Bush administration to seek a strong international resolution. President George Bush said:

³³ Darfur Time Line, *supra* note 15.

"We made our position very clear to the Sudanese government - they must stop Janjaweed (militia) violence, they must provide access to humanitarian relief for the people who suffer".

The U.S. has since imposed embargos on the Sudan, and the American people (as well as others) have held demonstrations to raise awareness surrounding the killing in Darfur.³⁴ Recently the U.S. has also imposed a new sanction against the Sudan, preventing 31 companies and four individuals from doing business in the United States or with U.S. companies. The individuals are high-ranking government officials and rebel leaders, according to the U.S. Treasury Department.³⁵ This sort of action is essential to push to government into accepting more international transparency into the Sudan.

Many countries around the world are observing what is going on in Darfur. They all condemn what is occurring there and stress that it should be stopped. However few have taken it upon themselves to put their rhetoric into practice and take action. This is demonstrative of what was expressed in the above chapters; that if States do not have political interest in helping a country, they are under no obligation to do so. However, perhaps with the doctrine of responsibility becoming more established States will start to take responsibility and take action.

Further action could be taken towards the Sudanese government, particularly, imposing no-fly zones³⁶, temporary suspension from world games and sporting

³⁴ Most recently on the 30 April 2006; Protestors around world Plead: Intervene in Darfur, CNN, at <http://www.cnn.com/2006/US/09/17/darfur.rally/>, accessed on 3 May 2007.

³⁵ Bush Orders Sanctions in Darfur Atrocities, MSNBC, at <http://www.msnbc.msn.com/id/12517916/>, accessed on 27 July 2007.

³⁶ Both the UK and USA have declared that they would back no fly zones if Sudan does not comply.

events, barring of trade and economic sanctions. The surrounding African countries are in prime position to do this and recently some positive action has been taken by them. Sudan's President, Omar al-Bashir, was bypassed in his bid to become chairman of the African Union because of the conflict in Darfur. This will have the effect of disgracing the President to his own people, which will cause political pressure on him to do something about the Janjaweed. These sorts of sanctions are the best means to put pressure on the governments to stop killing, without actually intervening using force.

VII. The Role of the UN

The Sudan has been adamant in not allowing the UN to take control of the peacekeeping force from the AU, rationalising that to do so would be an attack on its sovereignty. Nonetheless, the SC has approved plans to send a 20,000-strong force with a tough mandate and on 15 April 2007 the Sudan finally agreed to implement these plans.³⁷ It is noteworthy that prior to this the UN would send troops if the Sudanese government agreed. If the UN took the view that the situation amounted to genocide, approval to send the troops would not be required, under Chapter VII powers.

In April 2006, the UN Security Council passed a resolution imposing sanctions against four Sudanese nationals accused of war crimes in Darfur, including two rebel leaders, a former air force chief, and a Janjaweed militia leader. A dossier of evidence compiled by a UN Commission has also been passed to the ICC along with the names

³⁷ BBC News, Sudan's Darfur threat Condemned, at <http://news.bbc.co.uk/2/hi/africa/5411026.stm>, accessed on 3 May 2007.

of top war crimes suspects.³⁸ The UN is in a prime position to gather this evidence and take preventative measures to exert pressure on the Sudanese government.

On 26 May 2004, the Security Council expressed its concern over the deteriorating human rights situation in Darfur.³⁹ The Council demanded that the government disarm the Janjaweed and comply with measures of international law. This had no effect on the government, nor did Security Council Resolution 1566 of 30 July 2004. This Resolution called for the same as the May Resolution but also stated that the situation in Sudan constituted a threat to international peace and security and, acting under Chapter VII of the UN Charter, the Council demanded that:

“The Government of Sudan fulfil its commitments to disarm the Janjaweed militias and apprehend and bring to justice Janjaweed leaders and their associates who have incited and carried out human rights and international humanitarian law violations and other atrocities...”⁴⁰

The Commission threatened that non-compliance would prompt measures under Article 41 of the Charter,⁴¹ that is, measures not involving the use of armed force.

By the next session of the Security Council the Sudanese government had not done what was requested, but instead of imposing the threatened non-military obligations, the Council requested “the Secretary-General rapidly establish an international

³⁸ Q&A Sudan’s Darfur Conflict, at <http://news.bbc.co.uk/1/hi/world/africa/3496731.stm>, accessed on 5 May 2007.

³⁹ “Statement of the President of the Security Council”, 26 May 2004, UN Doc S/PRST/2004/18*: The statement followed a report of the UN High Commission for Human Rights, Situation of human rights in the Darfur region of the Sudan., UN Doc. E/CN.4/2005/3, 7 May 2004, in which the High Commissioner reported that massive and gross human rights violations were being committed in Darfur, possibly amounting to war crimes and crimes against humanity.

⁴⁰ UNSC Res 1556 (2004) UN Doc S/RES/1556 para 6.

⁴¹ Chapter VII Article 41 Charter of the United Nations.

commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable...⁴² This Commission was established and investigated the problems in Darfur, its findings are detailed below.

On 31 March 2005 the Security Council made its first referral about Darfur to the International Criminal Council (the ICC) under Security Council Resolution 1593.⁴³ The resolution had problems; it was long and seen by some “as a substitute for effective action by the United Nations to end the humanitarian crisis and systematic atrocities being committed in Darfur.”⁴⁴

The UN has formulated a three-stage plan, with the goal to strengthen the undermanned and under equipped AU peacekeeping force of 7,000 in Darfur and to culminate in the deployment of a joint AU-U.N. force with 17,000 troops and 3,000 police officers. Although the UN could not get the Sudan to agree to such a strong UN force, the Prime Minister has agreed to allow helicopters and 3,000 peacekeepers into the region. The first phase, described as “a light support package including U.N. police advisers, civilian staff and additional resources and technical support” has already been sent to Darfur.⁴⁵ On 27 December 2006, the first UN advisors headed to Darfur. The parties also agreed on a second phase on 15 April 2007, including more

⁴² UNSC Resolution 1564, 2004, UN Doc S/RES/1564, para 12.

⁴³ Acting under Chapter VII of the Charter of the United Nations, Resolution 1593 of 31 March 2005.

⁴⁴ Darfur, the Security Council and the International Criminal Court, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=914898, accessed on 10 February 2006.

⁴⁵ *Ibid.*

than 3,000 U.N. troops, police and other personnel, as well as substantial aviation and logistics equipment.⁴⁶

This fundamental breakthrough demonstrates three main things about the prevention of genocide: firstly it shows the significant action that can be taken when the right amount of pressure is exerted on governments; the internal condemnation and threats of no-fly zones and reduced trading seem to have had an impact. Secondly, it shows that action can be taken without using Chapter VII powers for prevention or controlling the situation. Thirdly, it shows how much effect the UN can have in preventing genocide with its peacekeepers.

The atrocities which occurred in Rwanda must not be forgotten. Although the peacekeepers are now in Darfur, this does not necessarily mean genocide can not now take place. The international community should still be ready to take action should the situation get worse. The world must be ready to take the necessary steps, which could eventually involve forcible intervention through the SC Chapter VII powers.

VIII. International Prosecutions in Darfur

The Commission of Inquiry considered the options available for prevention of Genocide in Darfur. It considered that the following would be the most beneficial: the establishment of an *ad hoc* international criminal tribunal; or the expansion of the mandate of an existing international criminal tribunal; or the establishment of mixed

⁴⁶ Sudan Agrees to UN Peacekeepers, BBC News, at <http://news.bbc.co.uk/2/hi/africa/6559897.stm>, accessed on 28 May 2007.

Courts. However, its conclusion was that the ICC was the only credible way of bringing alleged perpetrators to justice and it strongly advised against other measures.⁴⁷

The Commission advised against establishing a new *ad hoc* tribunal on the grounds that such tribunals have proved to be expensive and slow; reasons that it considered had particular cogency given that a permanent and fully functioning international criminal tribunal was already available. The Commission's conclusions, however, did not discourage the USA from promoting a joint United Nations/African Union tribunal for Darfur, to be based in Arusha. This, the USA argued, would have a number of advantages; it would allow the Africans and the African Union to play a continuing role for accountability, as they have played one in trying to stop the crisis in Darfur to begin with. It also has the practical advantage of building upon the existing infrastructure of the UN International Criminal Tribunal for Rwanda. That would allow the Sudan tribunal to commence more rapidly, take advantage of the expertise and lessons learned in dealing with the crimes from Rwanda.⁴⁸

Such a tribunal would also have jurisdiction over the crimes detailed in the Commission of Inquiry's report in 2001 and the first half of 2002, the jurisdiction of the International Criminal Court being limited to crimes committed after the Rome Statute's coming into force on 1 July 2002.⁴⁹ These arguments were, however, generally seen as unconvincing, not least because the underlying reason for the United States promotion of an *ad hoc* tribunal was its opposition to the International Criminal Court.

⁴⁷ Commission of Inquiry, *supra* note 4, para 573.

⁴⁸ US Department of State, Daily Press Briefing, 1 Feb 2005.

⁴⁹ Art 11(1), Rome Statute of the International Criminal Court UN Doc A/CONF.183/9, 1998.

The Prosecutor of the ICC referred to the Commission's extensive report, other documents from a variety of sources and conducted interviews with over 50 independent experts. On 6 June 2005 it was announced that the Prosecutor had decided to open an investigation into the situation in Darfur.⁵⁰ Pursuant to the invitation extended in Resolution 1593, he reported to the Security Council on 29 June 2005,⁵¹ calling for the cooperation of the government of Sudan and all other parties to the conflict.

The Prosecutor assured that the list of 51 names prepared by the International Commission of Inquiry on Darfur remained sealed, and in any event that it was no way binding on him. The investigation and conclusions of the Commission are entirely distinct from the Prosecutors tasks. It is essential to remember that this current investigation by the Prosecutor is not influenced in any way by the Commissions findings. So, it was possible that individual cases of genocide could be established and prosecuted under the ICC.

On the 13 December 2005, the Prosecutor once again addressed the Security Council pursuant to Resolution 1593. He explained that the first phase of investigation started on 1 June 1995 and since then his teams have made "good progress"⁵². The second phase focused on a selected number of criminal incidents and those persons bearing responsibility. No evidence of genocide was established through the Prosecutors investigations, but for two suspects arrest warrants have been issued and prosecutions

⁵⁰ ICC Press Release, The Prosecutor of the ICC opens investigation in Darfur, 6 June 2005, at www.icc-cpi.int/pressrelease_details&id=107&l=en.html, accessed on 22 July 2007.

⁵¹ *Ibid.*

⁵² *Ibid.*, p2.

commenced for other crimes against humanity and war crimes. On 27 February 2007 the ICC Prosecutor Luis Moreno-Ocampo presented evidence showing that Ahmad Muhammad Harun, former Minister of State for the Interior of the Government of the Sudan, and Ali Kushayb, a leader of the Militia/Janjaweed, jointly committed crimes against the civilian population in Darfur.

Based on evidence collected during the last 20 months, the Prosecution has concluded there are reasonable grounds to believe that Ahmad Harun and Ali Kushayb, (also known as Ali Muhammad Ali Abd-Al-Rahman) bear criminal responsibility in relation to 51 counts of alleged crimes against humanity and war crimes. The evidence shows they acted together, and with others, with the common purpose of carrying out attacks against the civilian populations.

These prosecutions are hugely beneficial. Firstly, it shows that the ICC is willing to take groundbreaking steps to stop future harm from occurring in Darfur. Secondly, it ensures those committing these atrocious crimes are brought to book, and finally, it starts the prevention of further crimes being committed; which may have amounted to genocide. With an arrest warrant issued, the perpetrators of these serious violations of human rights cannot continue to act in their current way, continuing with their killing, as they would be found and arrested. It shows that the international community is willing to take action and to stop the situation in Darfur from escalating into genocide.

Importantly for the Sudanese government the ICC operates on a system of complementarity to the national criminal jurisdictions. So for any allegations made the Sudanese government could claim primary jurisdiction. In accordance with article

53(2)(b) of the Statute, the legal test is specific to the cases selected for prosecution, and not the state of the Sudanese justice system as a whole. So unless the Sudan agreed to try the individuals accused, the ICC can claim jurisdiction.

IX. Conclusion

The Commission established that there was no policy on genocide in Darfur but it did find definite evidence of other human rights violations, of which their seriousness should not be diminished. The States party to the Genocide Convention have taken some preventative action with regard to Darfur, no matter whether they regard the situation as genocide, or some other violation of human rights. This action has been non-interventionist and in line with the territorial obligations arising under international law. Recently, the ICC has also found no evidence of genocide in Darfur, but has issued prosecutions for serious violations of human rights and war crimes. The UN and individual States must continue to do all they can to prevent further human rights abuses in Darfur.

If genocide is established to be occurring in Darfur, the Security Council could take military action so long as the situation amounts to a breach of the peace and security of mankind. That is avoiding the likelihood that Russia or China would veto any Security Council Resolution to invade Darfur. Russia has major investments in the Sudan region and Darfur is Chinas major oil supplier, so a veto from both States is probable. In addition both have previously abstained to resolutions against the Sudan and sanctions on the government. The political implications of such an act would be

huge. The Sudanese government have already made calls to the US and the UK to not invade and doing so may cause further disrupt within the country.

The United States and some NGOs assert that genocide is occurring in Darfur. Their opinions will no doubt weigh heavily in the minds of members to the Conventions on genocide, of which the Sudan is a recent addition.⁵³ If genocide is occurring in Darfur the Sudanese government would have an obligation to stop it. If they did not, the Security Council could act on behalf of the international community and make an attempt to prevent it. This would involve getting the civilians out of the area, holding peace negotiations and finding peace keeping forces. Political sanctions and embargos should be put on the including exclusions from international gaming events or United Nations talks. If this fails to prevent genocide a military invasion under Chapter VII in the name of humanitarian intervention would be necessary.

⁵³ The Sudan joined on 13 October 2003.

Conclusion

The purpose of this thesis was to uncover what the duties on States are to prevent genocide. It was established that the mechanism to prevent genocide is so important it has built its own niche in customary international law, as well as through Statute. 140 States are a party to the Genocide Convention and the whole world is bound by the customary obligations.

The fundamental downfall against the prevention of genocide is the international jurisdiction which it is given; under the Convention, it is undeniably true that the prevention of genocide is territorial. However, scholars are keen to view customary law in a broader context. In chapter three the basis of this jurisdiction was expounded. What can be gleaned from the current state of *opinio juris* and State practice is that the prevention or punishment of genocide does not have a universal basis of jurisdiction under the Convention or under customary international law. Although perhaps somewhat controversial, the view taken in this thesis was that this status is just not sufficiently established. Academics are of course keen for this universality to come to life under customary law, and understandably so, but in order for this to become hard law States must take more positive steps through their international actions and through their judiciary to show they stand for universal jurisdiction against genocide. Only in this way will universality be recognised.

Although many believe that the jurisdiction of genocide is limited, the view taken throughout this work was that a lot can be done to stop genocide with the powers currently available to States. Under the Convention, and arguably through custom,

States must take active measures to prevent genocide. Chapter four went into some detail about what this can entail. If States are willing to take action within their own countries to stop genocide then surely this would allow for adequate protection. The problem inherent with this view is that most of the time genocide has government backing. As such, the government will not be willing to take action to prevent people from implementing genocide, as they themselves are involved and seek the fruits from not preventing. When this is occurring other States throughout the world may or may not be aware of what is happening. But one thing is for sure, those States they are not obliged to do anything to stop it. They do have the option of course, but under the current legislation it does not seem feasible to uphold a duty to prevent genocide outside of a States own boarder. Perhaps this is the biggest shortfall in the prevention against genocide.

Although no duty exists, it is possible for States to take action to help. All of the diplomatic measures, economic sanction and peaceful means possible can be employed by States to put pressure on genocidal governments to stop what they are doing. Despite what may seem to be hopeful mechanisms, the ability to prevent genocide in this way is minimal. If nothing else, the people who are doing the acts associated with genocide probably will not be affected by a governmental action. Rather it is the victims of such crimes who suffer again.

Subsequent developments in the prevention against genocide have provided two *ad hoc* tribunals and a permanent International Criminal Court. The *ad hoc* tribunals have tried many perpetrators of genocide and given prison sentences with the aim to punish. As of yet, the ICC has not had any prosecutions for genocide brought before

it, but its provisions may in the future provide far reaching protection against genocide. These tribunals provide an effective stand against genocide and combat some of the trouble associated with territorial jurisdiction. They allow genocidists to be brought to justice.

The United Nations stands in a position like no other in its ability to prevent genocide. Although most of the bodies can be helpful, the great strength is held within the Security Councils plenary powers. The SC can intervene if a situation breaches the peace and security of mankind. Genocide almost always will. However, the exasperating chink in this armour is undoubtedly the veto system. Those countries who are adamantly against the erosion of national boundaries, will almost always veto any resolution to intervene. Some of the permanent members, namely Russia and China, are afraid that unwanted intervention beyond domestic borders will begin, or rather quicken, the erosion of sovereignty. This in their opinion must be stopped, even at the cost of thousands being systematically slaughtered by genocidal maniacs.

If, like in the example of Kosovo or by some other means, the other members of the Security Council can prevent the veto from being cast then the Security Council can put in a ground force and hopefully do something to help prevent further atrocities in the area. There are obviously many drawbacks with this cause of action, notably the length of time it takes and the ability to get resources. On the latter point, because the UN does not have a military force, intervention relies on States volunteering their own forces. With past experiences looming heavily in the background, most States are unwilling to do this. It is probably right to say that unless domestic political interests are engaged, States will be very unlikely to send troops to places where they think

genocide is occurring. Perhaps when political interests are engaged, this clouds the reality of the legality of intervention and the role countries play in helping to prevent genocide.

It is the drawback of the system of international law generally that there is no concrete enforcement mechanism. This is especially true for genocide. If States do not implement their prevention mechanisms, there is little which can be done to require them to conform. As has been suggested throughout this thesis, diplomatic action can be taken to try to get States to comply with their obligations. If this does not work the Security Council can make resolutions and implement sanctions. The ICJ can also give its judgment whether States have breached their obligations. But this requires that States submit to its jurisdiction, which in reality does not amount to an enforcement of an obligation. The ICC can also prosecute those individuals perpetrating genocide, provided they have jurisdiction. Beyond this there is no mechanism to require compliance with the Genocide Convention, and this surely is the greatest downfall to any prevention.

The best example to put the theory of the process and problems of preventing genocide into practice is to compare the conclusions of this thesis to Darfur. This was done in some detail in chapter five. The main point to note is that currently what is going on there does not seem to be genocide according to the legal definition.

Although recently there has been a UN presence in Darfur, the protracted nature of this process has meant that thousands are still being killed. Recently States have started to invoke their right to take non-interventionist measures against the Sudan. Coincidentally, or not, the government of the Sudan has recently been more willing to

talk in terms of peace. Perhaps the political nature of international law is adequate sometimes to achieve prevention of genocide, but this surely will not always be so.

The main questions which come from the work of this thesis are as follows: if a situation is genocide and the national government will do nothing to help, what then can the international community do? It does seem that they are obligated to do nothing, but are able to do a lot. Further, if a government of a State where genocide is occurring is willing to do something to help prevent, what must they do in order to fulfil their legal obligations? It seems they must do everything in their power, but this is so ambiguous it is impossible to say what exactly this will entail.

Prevent is an enigmatic word.¹ It is mentioned in the Conventions title, and its first and eighth Articles, but it is given little more attention. The main failure of the Convention was providing a domestic jurisdiction for genocide. It has meant that the prevention of genocide is not as effective as it could possibly be. The Genocide Convention and customary law requirement, and now the ICC, requires that States must not commit genocide and must take action to ensure that it does not occur in within their borders. This obligation is often not adhered to, and it would be much more beneficial if extra-territorial States were required to help in the prevention against genocide, but without having to use force. Often when States do choose to act, their national political interests play a very influential role and often guide the course of action taken against genocide. This is not acceptable and it is hoped that over time State practice and *opinion juris* will allow genocide to have a status of universal jurisdiction.

¹ William Schabas, *Genocide in International Law*, Cambridge University Press, 2000, p.543.

With a duty only to prevent nationally, and with most genocidists being part of the body who are suppose to protect, how far have we really come in preventing the crime of crimes?

Appendix 1

General Assembly Resolution 96(1):

“The General Assembly,

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

Invites the Member States to enact necessary legislation from the prevention and punishment of this crime;

Recommends that international cooperation be organized between States with a view to facilitating the speedy prevention and punishment of the crime of genocide, and, to this end,

Requests the Economic and Social Council to undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly.”

Appendix 2

Articles X- XIX

Articles X to XIX provides details of the practicalities of implementation and guidelines relating to the Convention. The Convention has five official languages all equal to one another.¹ The Convention was adopted by the more traditional method of allowing a short period after adopted for member's' signatures. Non- member states were also invited to sign on request of the ECOSOC. The Convention required that twenty States sign or ratify, before it came into force, and when those signatories were obtained, the Secretary General informed all members States and non members who were invited to join. After the first ten years, the Convention remains in force for continuous periods of five years so long as it still has the required number of signatories, which are sixteen. The final protocol provision informs contracting parties they can address the Secretary General if they want to make any suggestions about revising certain aspects of the Convention.

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

Article XI: The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

¹ Chinese, English, French, Russian and Spanish.

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

Article XIII: On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a process-verbal and transmit a copy thereof to each Member of the United Nations and to each of the non-member States contemplated in article XI.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected, subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

Article XIV: The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

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

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

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

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

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

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

A certified copy of the Convention shall be transmitted to each Member of the United Nations and to each of the non-member States contemplated in article XI.

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

Appendix 3

The following are examples of the 8 different circumstances which may amount to universal jurisdiction. The last is the principle of true universal jurisdiction.

I. Genocide is committed in State X by State X nationals. The perpetrator is in the territory of State Y. State Y has the option to bring proceedings; II. Genocide is committed in State X by State X nationals. The perpetrator is in State Y, State Y has the obligation to prosecute; III. Genocide is committed in State X by State Y nationals. The perpetrator is in State Z. State Z may choose to prosecute; IV. Genocide is committed in State X by State Y nationals. The perpetrator is in State Z. State Z must prosecute; V. Genocide is committed in State X by State X nationals, the perpetrator is in State Y. State Z may choose to prosecute; VI. Genocide is committed in State X by State X nationals, the perpetrator is in State Y. State Z must prosecute; VII. Genocide is committed in State X by State Y nationals. The perpetrator is in State Z. State A may choose to prosecute; VIII. Genocide is committed in State X by State Y nationals. The perpetrator is in State Z. State A must prosecute.

Appendix 4

The inherent problems with compiling statistics are well recognised, particularly in discovering exactly how many people have died and why they have died. As such, any statistics given in this work should be treated as a guideline only.

Appendix 5

Convention on the Prevention and Punishment of the Crime of Genocide

Approved and proposed for signature and ratification or accession by
General Assembly resolution 260 A (III) of 9 December 1948

Entry into force 12 January 1951, in accordance with article XIII

The Contracting Parties,

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

Recognizing that at all periods of history genocide has inflicted great losses on humanity, and

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

Hereby agree as hereinafter provided:

Article 1

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

Article 2

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

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

Article 3

The following acts shall be punishable:

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

(e) Complicity in genocide.

Article 4

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.

Article 5

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

Article 6

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

Article 7

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article 8

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

Article 9

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

Article 10

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

Article 11

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any nonmember State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 12

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

Article 13

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a proces-verbal and transmit a copy thereof to each Member of the United Nations and to each of the non-member States contemplated in article 11.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected, subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

Article 14

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

Article 15

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective. Article 16

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

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

Article 17

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

(a) Signatures, ratifications and accessions received in accordance with article 11;

(b) Notifications received in accordance with article 12;

(c) The date upon which the present Convention comes into force in accordance with article 13;

(d) Denunciations received in accordance with article 14;

(e) The abrogation of the Convention in accordance with article 15;

(f) Notifications received in accordance with article 16.

Article 18

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

A certified copy of the Convention shall be transmitted to each Member of the United Nations and to each of the non-member States contemplated in article XI.

Article 19

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

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Abbreviations

EU	European Community
ICC	International Criminal Court
ICJ	International Court of Justice
ICTY	International Tribunal for Yugoslavia
ICTR	International Tribunal for Rwanda
ILC	International Law Commission
IMT	International Military Tribunal
UDHR	Universal Declaration of Human Rights
UN	United Nations
GA	The General Assembly
SC	The Security Council

The Convention The International Convention on the Prevention and
Punishment of the Crime of Genocide, Dec. 9, 1948, 78
U.N.T.S. 277.

Offending State The State which is accused of genocidal activity.

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