

Exploring the Legal Parameters of the Crime of Genocide and Analyzing the Efficacy of the Application of the Genocide Convention

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Abstract: Genocide is often considered the height of atrocity; the worst example of what humanity can inflict on each other. After the adoption and ratification of the Genocide Convention by the United Nations in 1948 in the aftermath of the Holocaust during WWII, the international community presented a unified commitment to prevent and punish further occurrences of genocide. However, the legal definition of the crime of genocide, while comprehensive and multifaceted, has notably fallen short when invoked in rare instances by the international community, as observed in the cases of the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the current ICJ case reviewing the persecution of the Rohingya ethnic group by the state of Myanmar. There is a pressing need to critically analyze the efficacy of the Application of the Genocide Convention and explore various amendments to the legal definition of genocide, in order to bolster and reinforce the international community's duty to prevent and punish crimes of genocide as they occur, in all capacities. By reviewing literature from prominent international legal scholars and human rights activists, an expanded definition of genocide and preventive framework can be developed, which can serve to encompass and persecute the span of genocidal crimes occurring around the globe today, effectively curbing wide-scale exterminations of marginalized communities before they occur, as the Genocide Convention was intended to do.

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Introduction

“The first time it was reported that our friends were being butchered there was a cry of horror. Then a hundred were butchered. But when a thousand were butchered and there was no end to the butchery, a blanket of silence spread. When evildoing comes like falling rain, nobody calls out "stop!" When crimes begin to pile up they become invisible. When sufferings become unendurable the cries are no longer heard. The cries, too, fall like rain in summer.”

— Bertolt Brecht.

In a global community dominated by Western ideals of liberty and justice, how does a society effectively combat the greatest crime of all? Have we ever been able to? Even today, Holocaust deniers proudly preach vitriol in classrooms and political venues. The Rwandan genocide and Bosnian genocide, if known by the average citizen, are considered detached and distant, too vague to reference and learn from. The ongoing plights of the Uyghurs in China and the Rohingya in Myanmar are often explained away as the result of civil conflicts that fall within a state's domestic jurisdiction. Deference to the principle of state sovereignty leads to never-ending debates within the international community while millions suffer. Genocide has become a pervasive sore in the global psyche, visible in numerous nations across the world, with scars from historical persecutions still left unacknowledged and untreated. So, for all the talk of peace, justice, and global community, how far have we truly progressed since the advent of democracy?

Despite the adoption and ratification of the Genocide Convention by the United Nations in 1948, in the aftermath of the Holocaust during WWII, the commitment by the international community to prevent and punish genocide has fallen critically short, directly impacting millions of lives that have been persecuted throughout the world under the same crime, observable in the cases the Cambodian Genocide, the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the current ICJ case reviewing the persecution of the Rohingya ethnic group by the state of Myanmar. There is an urgent need to critically analyze the efficacy of the legal application of the 1948 Genocide Convention and explore various amendments to the legal definition of genocide, in order to bolster and reinforce the international community's duty to prevent and punish crimes of genocide as they occur, in all capacities.

Defining Genocide

The term genocide typically evokes feelings of dread and terror; trauma too cruel to properly conceptualize; crimes too heinous to discuss in civilized company. Coined by the Polish-Jewish law professor Raphael Lemkin in 1944, during the height of World War II and the Holocaust, the term is defined as a “coordinated plan of different actions aim[ed] at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.”¹ Derived from the Greek prefix *genos*, meaning race or tribe, and the Latin suffix *cide*, meaning killing, Lemkin highlighted the distinction that genocide was not merely the act of depriving life from a group of people, but also the deprivation of a people’s means of survival and preservation of their identity.² To elaborate, Lemkin identified eight distinct aspects of genocide: “1) Physical, 2) Political, 3) Social, 4) Cultural, 5) Economic, 6) Biological, 7) Religious, and 8) Moral,” which are crucial to understanding his definition of genocide as a systematic and encompassing act to fully breakdown the foundation of a group entirely, which he observed through “the atrocities of the Nazis and their methods of eradication, the objectives of such a crime hinge upon a structured disintegration of the political and social institutions of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, [and] dignity” of the individuals belonging to an identified group, in addition to their lives.”³

The eight facets of genocide identified by Lemkin can be analyzed to gain a greater awareness and recognition of the crime and how it unfolds. For example, while *physical* genocide is the easiest element of genocide to observe, such as in the case of mass killings, food rationings,

¹ Matulewska, A., Gwiazdowicz, D.J. “In Quest of Genocide Understanding: Multiple Faces of Genocide.” *Law International Journal for the Semiotics of Law* (2021) p2.

² Ibid p2.

³ Ibid p2.

or violent crimes, it is typically the final stage, that is preceded by other aspects of genocide, showcasing how there is a buildup to the process of genocide, and that responses to physical cases of genocide are often too late.⁴ It's imperative to recognize that the physical stage of genocide cannot be reached without the contributions of the other stages, such as the *political* aspect of genocide, in which governments enact policies to oppress and limit the expression and safety of a specific group, observable through policies that ban a native language or cultural practice in public spaces, or when governments deploy additional surveillance and units in efforts to hinder the progress and rights of a community.⁵ Likewise, political genocide can allow greater ease for other aspects of genocide to be initiated, such as *cultural* or *economic*, the former in which a group's cultural expressions and history specifically targeted and eradicated, and the latter aspect referencing the structural restrictions imposed upon members of a specific group in order to hinder their economic prospects, in a conscious effort to destabilize their quality of life.⁶

As the age-old adage reminds us, to solve any problem, acknowledgement is the first step. Defining genocide allows us to place labels onto the crimes, initiating the first step in the process to prevent them. As the term has developed over the decades, scholars have come to recognize that the crime of genocide is a lengthy process that consists of multiple elements and stages, which all reinforce one another to create the overarching crime; it does not occur overnight but is permeated into a society to effectively work. For example, Dr. Gregory Stanton, former Research Professor in Genocide Studies and Prevention at the George Mason University and President of the Genocide Watch, expanded on Lemkin's eight stages with an additional ten stages of genocide, identified as: "1) Classification, 2) Symbolization, 3) Discrimination, 4) Dehumanization, 5) Organization,

⁴ Ibid p3.

⁵ Ibid p3.

⁶ Ibid p3.

6) Polarization, 7) Preparation, 8) Persecution, 9) Extermination, and 10) Denial.”⁷ Published in 2016, its worth analyzing these ten stages of genocide, as visible in *Figure 1*⁸, and how the modern-day process of genocide can be observed, tracked, and ultimately prevented, before the crime ever occurs.

The first stage, *classification*, is recognized as “the division of the society into two bipolar groups,” which leads directly into the *symbolization* stage, in

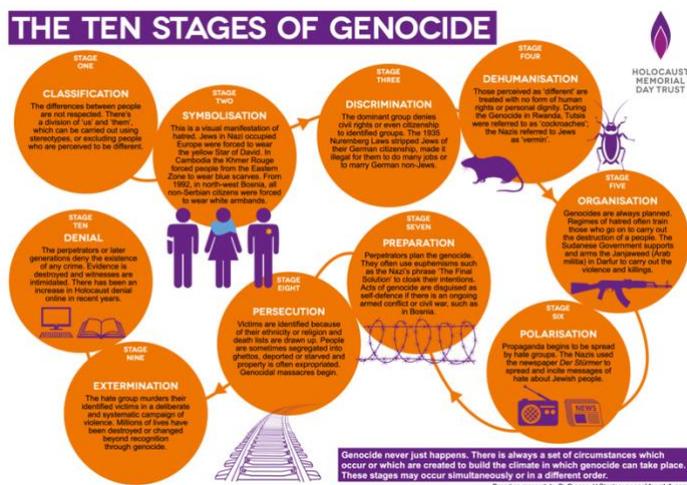


Figure 1

which labels are ascribed to the two polarized groups in an effort.⁹ The labels assigned in the symbolization stage establish a hierarchy with negative connotations and stereotypes, leading to the *discrimination* stage, which Stanton writes, “encompasses Lemkin’s political, social and economic genocides,” as “a dominant group uses law, custom, and political power to deny the rights of other groups.”¹⁰ For example, the Nuremberg Laws in Nazi Germany are a case in which discrimination was used to further propel genocide, as the Jewish population was stripped of German citizenship.¹¹ What is important to note during the discrimination stage is how a dominant group comes to deny the rights of another group through an “exclusionary ideology” that allows for society to “legitimize the victimization of weaker groups.”¹²

Once a weaker group has been identified and assigned a narrative, accompanied by institutional policies to isolate them within that rhetoric, the *dehumanization* stage can begin. This

⁷ Ibid p4.

⁸ “The Ten Stages of Genocide” *Holocaust Memorial Day Trust*, 2022.

⁹ Matulewska. “In Quest of Genocide Understanding.” p5.

¹⁰ Ibid p5.

¹¹ Ibid p5.

¹² Ibid p5.

stage, Stanton emphasized, is one of the most critical steps to instigating genocide. The dehumanization stage helps a society “overcome the normal human revulsion against murder,” as the targeted group is “equated with animals, vermin, insects or diseases,” through propaganda and concentrated campaigns in an effort to justify the following stages in the genocide process.¹³ The role of the dehumanization stage cannot be understated in the process of genocide, nor can it be combined with the preceding stages. While the classification, symbolization, and discrimination stages are integral to establishing a foundation from which genocide can be propelled, without the dehumanization stage the construction of a narrative diminishing a “weaker” group and the concentrated policy efforts to deprive them of essential resources would not gain the level of traction required to justify the continuous oppression and systematic persecution that genocide is defined to do.¹⁴

Following the dehumanization stage is the stage of *organization*, which is when groups are established and trained to both formally and informally carry out acts of genocide in organized units, whether that be governmentally funded military units, extremist volunteers, or guerilla troops, coming together in training on how to further destroy and exterminate a population.¹⁵ The next stage, *polarization* can be viewed as a heightened and institutionalized version of the dehumanization stage, with the aim of elevating the narrative that was established in the first three stages, to ensure that the societal view towards the targeted group will remain hateful and limit opposition to the follow stages of the genocide process.¹⁶ Following polarization is the *preparation stage*, which Stanton describes as “the prelude to the final act of killing.”¹⁷ This stage can be

¹³ Ibid p5.

¹⁴ Ibid p5.

¹⁵ Ibid p5.

¹⁶ Ibid p5.

¹⁷ Ibid p5.

considered the culmination of the institutionalized efforts leading up to the heinous acts themselves, as during this step weapons are distributed to the groups that were made during the organization step, propaganda against the targeted group has become entrenched in the society's psyche, and there is a palpable anticipation for the persecution to begin.

In the *persecution* stage, Lemkin's eight aspects of genocide are much more visible as the targeted group is subjected to a systematic and organized campaign of abuses, ranging from biological warfare to destruction of the group's cultural spaces and artifacts. The stage of persecution often occurs with little outcry from society, due to the steps taken to ensure a collective consensus surrounding the "necessity" of the persecution, as Stanton writes, the targeted group "are no longer members of society. They are put on the blacklist of pests. They become pariahs, vermin that need to be eliminated," which then occurs during the *extermination* stage.¹⁸ In the extermination stage the targeted group faces eradication, as described in Lemkin's *physical* aspect of genocide. While one might expect that the extermination stage of genocide is the final act, Stanton argues against the assumption, claiming instead that the *denial* stage is the final step, which, despite often being overlooked, holds the central piece in understanding why genocides are still able to occur, decade after decade. This stage allows the crime to be swept under the rug, as the perpetrators and witnesses shift blame, diminish the atrocities, shirk responsibility for the consequences, or all-together deny the occurrence of the crime in the first place.¹⁹

Stanton's definition serves as a notable augment to Lemkin's introduction of genocide, in particular, when acknowledging the historical contexts of both these definitions. While Lemkin's construction of the concept occurred in response to the horrors of the Holocaust, Stanton's modern analysis of genocide allows a greater and more developed lens with which to observe the crime,

¹⁸ Ibid p5.

¹⁹ Ibid p5.

after the numerous and unfortunate occurrences of genocide since World War II. Additionally, a critical element to Stanton's theory is the understanding that while the ten stages in the genocide process are predictable, the process is not linear, nor is it inexorable.²⁰ Rather, identifying the various stages, which can occur slightly out of order or simultaneously, is a means to enact preventive measures to impede the full process of genocide before it passes through all steps. The concept of genocide, though it has gained numerous nuances and interpretations by scores of academics, has an established universal definition, which is just as largely agreed upon as being the most unethical act humans could inflict on others. However, despite the unending theories and moral discourse surrounding the crime, responding to the process of genocide requires a greater deal of legal acrobatics, a flaw that has been present since the international community's recognition and ratification of genocide as a crime worthy of prosecution.

Establishment of the Genocide Convention

Discussing the establishment of the Convention on the Prevention and Punishment of the Crime of Genocide cannot be done without referencing the Holocaust and the atrocities committed during WWII. The word holocaust itself is derived from the Greek *holos*, meaning whole, and *kaustos*, meaning burned, and was historically used to describe "a sacrificial offering burned on an altar."²¹ However, the history of human affairs has given the term a much more tragic definition, and the word Holocaust today is recognized by most global citizens as the genocidal persecution and mass murder of millions of European Jews by the German Nazi regime between 1933 and 1945.²² The Nazi Party, known also as the National Socialist German Workers' Party (NSDAP),

²⁰ Ibid p5.

²¹ "The Holocaust" 2022. *HISTORY*.

²² Ibid.

came to power in Germany in 1933 under Adolf Hitler's leadership and governed by totalitarian methods until 1945.²³ Both Lemkin's and Stanton's definitions and stages of genocide are easily visible when examining the Holocaust, as Hitler and the Nazi party utilized the various stages of genocide, such as in the case of the 1935 Nuremberg Laws, which were a political measure to dehumanize and deprive Jews of civil and social rights.²⁴ Hitler and the Nazi party would go on to institute a brutal, racist dictatorship, spark a world war that claimed the lives of around 50 million people, and commit campaigns of mass murder, through which the international community first came to terms with the crime of genocide and its impacts.

Lemkin's definition of genocide served as the foundational basis for the United Nations' (UN) drafting of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), which occurred three years after the conclusion of World War II in 1948, during which the Nazi party's widespread actions to "systematically exterminate" the Jewish population, along with other minority "pariah" groups in Nazi occupied lands, had given the international community a crime from which "they could no longer avert their eyes."²⁵ It's noteworthy to recognize that the history of the UN and international law is largely steeped in the construction of the institution after WWII, as the world desperately wanted to avoid another global crisis and genocide the likes of which was witnessed during the Holocaust. Acknowledging this context is integral to understanding how the Genocide Convention legally works, historically and presently, as well as recognizing how dated it truly is.

Renowned as the first human rights treaty adopted by the UN General Assembly, the Convention largely focuses on the protection of four core groups, "national, racial, ethnic and

²³ "Nazi Party." *Encyclopedia Britannica*, September 21, 2021.

²⁴ Berenbaum, Michael. "Nürnberg Laws". *Encyclopedia Britannica*, 13 May. 2020.

²⁵ Karazsia, Zachary A. "An Unfulfilled Promise: The Genocide Convention and the Obligation of Prevention." *Journal of Strategic Security* 11, no. 4 (2019) p20.

religious minorities,” from “threats to their very existence.”²⁶ The drafting of the Convention occurred in three main stages. The first stage required the UN Secretariat to provide a draft text of the Convention, which was prepared with the assistance of three leading experts: Raphael Lemkin, the Polish lawyer who coined the term genocide; Vespasian Pella, a Romanian legal expert who was vocal during the interwar period about the need for establishing international criminal proceedings for State officials who committed crimes against humanity; and Henri Donnedieu de Vabres, a French jurist who was the primary judge in the Nuremberg trials after World War II.²⁷ The initial draft was largely a “compendium of concepts” aimed to assist the General Assembly for further development and was forwarded to an *ad hoc* committee under the authority of the Economic and Social Council to be reworked into a formal legal instrument.²⁸ This second draft was then utilized as the basis of negotiations in the General Assembly in late 1948, during which “the final text of the Genocide Convention was agreed upon and submitted for formal adoption to the plenary General Assembly.”²⁹

Article II in the Genocide Convention provides a formal legal definition for the crime, condemning any actions committed with “the intent to exterminate, in whole or part, a national, ethnical, racial, or religious group.”³⁰ Expanding on this definition, the Convention recognizes the following as acts of genocide under international law: “(a) Killing of 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 part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children

²⁶ Schabas, William A. “Convention on The Prevention and Punishment of the Crime of Genocide.” *Legal UN*, 2022.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Karazsia. “An Unfulfilled Promise.” p20.

of the group to another group.³¹ Additionally, the Genocide Convention emphasized, in Article I, that the crime of genocide could take place in “the context of an armed conflict, international or non-international, but also in the context of a peaceful situation,” establishing a critical precedent that genocide could occur and be condemned during times of peace as well as violence; the crime was not simply a product of war.³² Furthermore, the Genocide Convention established a *dual mandate* among its signatories, emphasizing that all States would take proactive actions to both “prevent” and “punish” the crime of genocide.³³ Despite this structure of accountability, the Genocide Convention was deliberately drafted to reject universal jurisdiction, with Article VI only recognizing territorial jurisdiction.³⁴

The legal criminal definition of genocide falls under two universal categories of international law: *obligatio erga omnes* and *jus cogens*.³⁵ *Obligatio erga omnes*, derived from the Latin phrase *erga omnes* meaning “towards all,” is the legal concept that acknowledges crimes that “supersede any individual state’s borders,” as they represent a threat to all humankind.³⁶ Likewise, *jus cogens*, often referred to as *jus cogens* norms, derived from the Latin meaning “compelling law,” encompasses crimes that are always prohibited for States and individuals regardless of any circumstances, such as genocide, slavery, and piracy, as crimes of such magnitude constitute actions that threaten the “welfare of all states.”³⁷ Genocide was quickly incorporated into international legal vocabulary after WWII, as the Allied forces held an International Military Tribunal (IMT) in 1945 in Nuremberg to pass judgement on Nazi crimes.³⁸

³¹ Ibid p20-21.

³² Ibid p20-21.

³³ Ibid p20.

³⁴ Schabas. “Convention on the Crime of Genocide.” *Legal UN*, 2022.

³⁵ Karazsia. “An Unfulfilled Promise.” p21.

³⁶ Ibid p21.

³⁷ Ibid p21.

³⁸ Strandberg Hassellind, Filip. “Groups Defined by Gender and the Genocide Convention,” *Genocide Studies and Prevention: An International Journal*: Vol. 14: Iss. 1 (2020) p62.

In accordance with Articles 6(a)-(c) of the London Charter, the IMT was granted jurisdiction over three separate crimes committed by the Nazis; “crimes against peace, war crimes, and crimes against humanity.”³⁹ It’s critical to note that since genocide was not a formal legal crime at the time of the Nuremberg Trials, nor part of the IMT Charter, the term did not appear in the judgments. It was, however, utilized in the indictments and the prosecutors’ arguments, as well as invoked as an explanatory term; therefore, even though none of the defendants were officially convicted of the crime of genocide in the Nuremberg trials, the judgments served as the precedent for what would be defined as genocide under international law, setting the stage for “the evolution of genocide into a separate criminal offence.”⁴⁰

Addressing “Intent” In the Genocide Convention

French philosopher Jean-Paul Sartre once commented that the “fact of genocide is as old as humanity,” despite the rather recent arrival of genocide as an international crime. The abuses and crimes listed in the Genocide Convention have been committed since antiquity, long before the Convention was established. However, the universal legal definition adopted by the international community in the Genocide Conventions employs a deliberate use of the word “intent” when establishing the parameters of the crime: “Any of the following acts committed with *intent* to destroy, in whole or in part...”⁴¹ This usage of intent references the mental element of the crime in substantive law, effectively dividing the crime into two elements, “the material or objective element (*actus reus*) and the mental or subjective element (*mens rea*).”⁴² *Mens rea* is a

³⁹ Ibid p62.

⁴⁰ Ibid p62.

⁴¹ UN General Assembly, “Convention on the Prevention and Punishment of the Crime of Genocide,” *United Nations*, 1948.

⁴² Aydin, Devrim. “The Interpretation of Genocidal Intent under the Genocide Convention and the Jurisprudence of International Courts.” *The Journal of Criminal Law* 78, no. 5 (October 2014) p429.

requisite for criminality in modern criminal law and one of the foundational concepts of substantive criminal law, meaning that “the existence of an act inflicted by the perpetrator is not on its own enough to make the conduct criminal and to punish the offender—the conduct must also be the result of the perpetrator’s guilty mind (conscious will).”⁴³ *Mens rea* is also referred to as culpability, which can be identified as “intention” (*dolus*) or “negligence” (*culpa*), and then *dolus* can be further specified as either “direction intention” (*dolus directus*) or “recklessness” (*dolus eventualis*).⁴⁴ The intent outlined in the Genocide Convention is considered a form of “special intent” (*dolus specialis*), which can only encompass *dolus directus*, as the definition outlines entails “direct and special intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”⁴⁵

The necessity of intent to commit the crime of genocide was also referenced in the 1993 International Criminal Tribunal for the Former Yugoslavia (ICTY), with the declaration that, “for the purpose of this case, the Chamber will therefore adhere to the characterization of genocide which encompass only acts committed with the goal of destroying all or part of a group,” meaning that if the act was not done with a provable guilty mind, it did not constitute a crime.⁴⁶ In legal jurisdictions surrounding the crime of genocide, the interpretation and intention has come to mean that, “the perpetrator must have committed the crime knowingly and willfully... The ‘knowing’ element required for the existence of the intent is different from awareness that the act constitutes a crime—it expresses accurate knowledge that the committed act is an offense.”⁴⁷

⁴³ Ibid p430.

⁴⁴ Ibid p430.

⁴⁵ Ibid p430.

⁴⁶ Ibid p430.

⁴⁷ Ibid p430.

Furthermore, the interpretation of the International Law Commission on the crime of genocide is that the acts outlined in the Genocide Convention, “killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life, calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; [and] forcibly transferring children of the group to another group,” cannot occur by accident or negligence, and therefore require special intent or *dolus specialis* to occur.⁴⁸ This interpretation attests the view that the five outlined acts require a *mens rea* for the *actus reus* to be recognized and labeled as the crime of genocide, with *dolus specialis* being a required constituent element that perpetrators must showcase for the offense to be charged as the crime of genocide.⁴⁹ The necessity of intent for the crime of genocide is not without its flaws and will be addressed further when analyzing reform suggestions and methods. By the current standing, the Genocide Convention allows perpetrators to eschew the crime of genocide if intent to “destroy the whole group or in part” is not proven, revealing a troubling gap through which perpetrators can evade accountability and victims are deprived of justice.

⁴⁸ Ibid p432.

⁴⁹ Ibid p431.

The Issue with Ethnic Cleansing

If the intent element of the crime of genocide was not frustrating enough to acknowledge, the addition of ethnic cleansing has only further hindered the usage of the Genocide Convention and its mission to prevent and punish crimes of genocide. The term first surfaced during the 1990s conflict in the former Yugoslavia, with the United Nations defining ethnic cleansing to be the process of, “rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area.”⁵⁰ While pinpointing the exact roots of the origin is difficult, the expression has been used in resolutions of both the UN Security Council and General Assembly, as well as judgments and indictments of the ICTY.⁵¹ The UNSC had also established a Commission of Experts to investigate the “violations of international humanitarian law committed in the territory of the former Yugoslavia.” The Commission revealed that coercive practices were used to carry out ethnic cleansing, such as, “murder, torture, arbitrary arrest and detention, extrajudicial executions, rape and sexual assaults, severe physical injury to civilians, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, etc....,” and that these practices constituted “crimes against humanity” and were comparable to the crimes outlined in the Genocide Convention.⁵²

Just like genocide, the act of ethnic cleansing has been present in human history since antiquity, such as “the removal of the Jews from Palestine to Babylon in the sixth century BCE,” or the “[resettlement] of the members of the Paulician religious sect from Armenia to the Balkans by the Byzantine army,” or more notably, “the forceful relocations of Indigenous Americans between the 1820s and 1880s to reservations in the West.”⁵³ But can’t one say that the methods

⁵⁰ “Ethnic Cleansing.” *United Nations Office on Genocide Prevention and the Responsibility to Protect*, 2022.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ Kamusella, T. “Ethnic Cleansing:” *Value Inquiry Book Series* 276 (August 2014) p193.

that require the process of ethnic cleansing to be organized and carried out align with the definitions of genocide, both in theory and legal criminal literature? It is fair to say that all ethnic cleansings are, essentially, genocides, though, not all genocides are ethnic cleansings, as will be acknowledged in the case of the Cambodian Genocide in the following section. The very term ethnic cleansing defies any sort of moral or legal justification, as the concept that a specific group of people can be forcefully moved or exterminated in order to “cleanse” an area of land and render it ethnically homogenous reeks of the same rhetoric used by the Nazi party during WWII, and countless perpetrators before and after them. So then, why the necessity for the term anyways, if the Genocide Convention was established to prevent and punish these ideologies and the crimes they generate in the first place?

Unfortunately, there is a necessary distinction to note when discussing ethnic cleansing: it is not considered a crime under international law.⁵⁴ This allows the international community to largely eschew accountability and the responsibility to prevent and protect victims from these atrocities, as outlined in the Genocide Convention. Recalling that to qualify as a crime of genocide the actions of the perpetrators must be done with clear intent to persecute and eliminate an entire group of people, however, when intent is not able to be proven for such a clause, as has been the case for most genocides that have occurred since the establishment of the Convention, the term ethnic cleansing is then trotted in as a label for the human rights violations and mass murders, without any of the legal culpability that invoking the term genocide would cause. This essentially means that groups or individuals can be found guilty for “crimes against humanity” or “ethnic cleansing” but not genocide, as tribunals historically have struggled to establish a legal standard for genocidal intent, with few perpetrators cleverly evading the documentation of explicit plans

⁵⁴ Quran, Layla. “What’s The Difference Between Genocide and Ethnic Cleansing?” *PBS Newshour*, 2017.

that declare intent to eradicate groups for reasons outlined in the Genocide Convention.⁵⁵ Using the term genocide has political implications while ethnic cleansing does not.

What's even more problematic is the conscious shift the international community has chosen to make when referring to these atrocities, as the usage of ethnic cleansing has only grown since the 1990s, often used in substitution for the term genocide. This has rendered the term genocide to be used sparingly by official institutions in the past decades, reserved for "serious" cases and concerns of genocide, planting a dangerous divide between what crimes are considered "real" enough to be acknowledged as genocide or not. For example, Freedom House, a prominent nonprofit and think tank that publishes reports on global democratic trends and civil liberties and is utilized by scholars and governments alike, published an article in 2019 entitled, "As Global Democracy Retreats, Ethnic Cleansing is on the Rise."⁵⁶ This article, though informative, fell into the very trap that the Genocide Convention was created to avoid, failure to label crimes of genocide by the appropriate name in order to invoke legal responses. The authors addressed the Rohingya crackdown and murder campaign as ethnic cleansing, along with the atrocities committed against civilians in South Sudan and the repression of Shiite freedoms in Bahrain.⁵⁷

Ironically, the article referenced the origin of the term ethnic cleansing during the 1990s due to the cases of the Balkan wars and Rwanda, and even addressed the Responsibility to Protect (R2P) doctrine endorsed by the UN and international community to oblige states to "protect all populations from genocide and ethnic cleansing, and to intervene before the killing begins," which came into effect after acknowledgment of the global community's delayed responses to the

⁵⁵ Ibid.

⁵⁶ Abramowitz, Michael and Arch Puddington. "As Global Democracy Retreats, Ethnic Cleansing is on the Rise." *Freedom House*, 2019.

⁵⁷ Ibid.

Bosnian and Tutsi genocides.⁵⁸ Despite the recognition that the term was used to avoid labeling genocides by genocides, and the subsequent establishment of the R2P doctrine, Freedom House's choice to label current genocides with the term ethnic cleansing is a frustrating pattern that bodes for history to rhyme once again, to the detriment of millions of victims. The international community has continuously evaded the responsibilities enshrined in the Convention to protect and preserve the ideals of safety, democracy, and liberty for all. The term ethnic cleansing will be referenced frequently throughout the section outlining the failures of the Genocide Convention, as the very existence of the term is a contradiction against everything the Convention stands for and hopes to uphold.

⁵⁸ Ibid.

Failures of the Genocide Convention

“The list of genocides committed on Earth are endless, the fact that we never learned or know about them does not mean they did not exist.”

— Mwanandeke Kindembo.

Having inspected the origins of genocide's definition and construction as an international legal crime, the question remains; has the Genocide Convention truly been effective in preventing and punishing occurrences of genocide that have occurred since its inception? Effectiveness in this context can be quantified by reviewing the timelines of past and present genocides, the number of victims that have faced persecution and torture, and the responsive and judicial measures taken by the international legal community, if any, to prevent and punish the crime of genocide, as outlined in the Genocide Convention. To preface, one should recognize that the core failures of the Genocide Convention lie in the existence of the genocides that occurred after its establishment, as any genocide that occurred already highlights the Convention's failure to prevent. Furthermore, by reviewing case studies of genocides after the establishment of the Genocide Convention, such as the Cambodian Genocide, the Bosnian Genocide, the Rwandan Genocide, and the ongoing genocide against the Rohingya ethnic group in Myanmar, one can trace the patterns of this crime throughout history, as well as discern fully the actions, or lack thereof, by the international community in response to these heinous and structured exterminations. This case analysis aims to allow greater clarity surrounding shortcomings in the Genocide Convention and the legal definition of the crime of genocide in order to prompt critical discussion regarding methods to reinforce and strengthen the Convention and international legal structures to more effectively prevent and punish the crime of genocide before it occurs. If the phrase "Never Again" is ever going to mean anything, the reform must begin immediately, which can only occur once the international community acknowledges and accepts that a problem exists and that the Genocide Convention does not work as it was intended to do so, allowing genocides to occur and torment the global community with little retribution or prevention.

Cambodian Genocide

“I see ... a pile of skulls and bones. For the first time since my arrival, what I see before me is too painful, and I break down completely. These are my relatives, friends and neighbors, I keep thinking ... It is a long time before I am calm again. And then I am able, with my bare hands, to rearrange the skulls and bones so that they are not scattered about.” – Dith Pran.⁵⁹ Only twenty years after the tragedies of Holocaust, the world saw another wide-scale campaign of mass violence and execution take place but averted their gazes and left millions to suffer at the hands of a tyrannical regime. The Cambodian Genocide lasted four years, from 1975 to 1979, and was an “explosion of mass violence,”⁶⁰ with over two million Cambodians killed, hundreds of thousands tortured, and millions displaced. The tragedy has left deep-rooted scars that are affecting the nation and the concept of genocide many decades later, as nearly a quarter of the Cambodian population was exterminated by the Khmer Rouge regime, with little action from the international community both during and after the atrocities to prevent and punish the crime of genocide. Analyzing the Cambodian Genocide, the crimes of the Khmer Rouge during the genocide, and the subsequent actions taken to prevent and punish the crime will showcase clear failings in the Genocide Convention and its power to effectively function in response to cases of genocide.

Khmer Rouge

The Khmer Rouge, French for the “Red Khmer,” were a radical communist regime that ruled the Southeast Asian nation of Cambodia from 1975 to 1979, after obtaining power through a guerrilla war.⁶¹ The Khmer Rouge had been set up in 1967 as an armed wing of Cambodia’s communist movement, the Communist Party Kampuchea, which had been formed in 1951.⁶² For

⁵⁹ Dith Pran is a refugee and survivor of the Cambodian Genocide.

⁶⁰ University of Michigan. “Cambodia.” *Holocaust and Genocide Education* | College of Liberal Arts. 2022.

⁶¹ Britannica, Editors of Encyclopedia. “Khmer Rouge.” *Encyclopedia Britannica*, July 30, 2021.

⁶² Ibid.

most of the 50s and 60s the communist movement made little headway, and it wasn't until a right-wing military coup overthrew the ruling Norodom Sihanouk in 1970 that the Khmer Rouge found an opportunity to enter into a political collation with Sihanouk and increase support for the communist movement, as well as garner receiving substantial aid from North Vietnam, which had withheld its support during the earlier years of Sihanouk's rule.⁶³ In the following civil war, the Khmer Rouge expanded their control throughout the Cambodia countryside, securing enough forces and momentum to mount an attack on the capital city of Phnom Penh in 1975, gaining them control of the Cambodian national government for the next four years.⁶⁴

The military leader of the Khmer Rouge, Pol Pot, a highly educated Marxist–Leninist ideologist, would become the nation's new prime minister, transitioning Cambodia to a one-party communist state, and spearheading the Cambodian genocide, unleashing a continuous wave of persecution and murder.⁶⁵ After gaining power, Pol Pot and the Khmer Rouge set about “remaking” Cambodia, first renaming it Kampuchea, “in the model of rural tribes, with the hopes of creating a communist-style, agricultural utopia,” and “declaring 1975 ‘Year Zero’ in the country,” to emphasize the restart.⁶⁶ Not only did the Khmer Rouge isolate the country from the global community, they also resettled “hundreds of thousands of the country's city-dwellers in rural farming communes and abolished the country's currency,” as well as outlawing the “ownership of private property and the practice of religion.”⁶⁷ The resettlement efforts were done in order to achieve what Pol Pot and the Khmer Rouge deemed to be the “ideal communist model,” meaning reverting the nation back to an agrarian model, in which all of society would

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ “Khmer Rouge.” *HISTORY*. 2022.

⁶⁷ Ibid.

work as laborers on farms, and any opposition would be swiftly eliminated, consistent with Pot's infamous and chilling lines, "To spare you is no profit, to destroy you is no loss."⁶⁸

Another infamous legacy from the Khmer Rouge's regime was the "killing fields," as seen in *Figure 2*, in which millions of people were killed through organized execution, starvation, torture, and overwork.⁶⁹ The list of targets largely consisted of individuals who opposed the new communist and agrarian shift of the nation, such as, "intellectuals, educated people, professionals, monks, religious enthusiasts," and did not factor in religious or ethnic divides, meaning everyone, "Buddhists, Muslims, Christians, ethnic Chinese, Vietnamese, Thai, and Cambodians with Chinese, Vietnamese, or Thai ancestry," were vulnerable to the Khmer Rouge's persecutions, even members of the Khmer Rouge themselves were frequently execution on "suspicious of treachery."⁷⁰

The Cambodian Genocide saw horrific

tragedies and a complete upheaval of Cambodian society, almost following the definition of genocide to the letter with the atrocities committed by the Khmer Rouge and Pol Pot, such as, forcing Cambodians from their homes and villages, forcibly removing children from their families and placing them in labor camps, shutting down all factories, schools, hospitals, and institutions designed to preserve a community's quality of life, burning religious buildings and materials, and

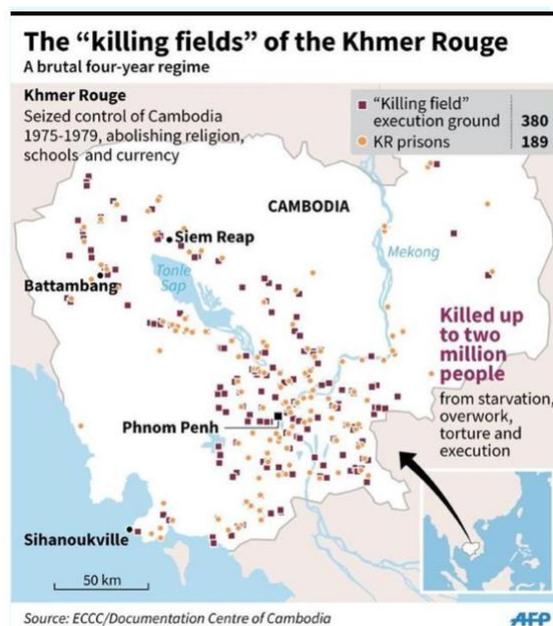


Figure 2

⁶⁸ "Cambodian Genocide." *World Without Genocide*, 2022.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

capturing hundreds of thousands of prisoners to serve as victims of horrendous torture and medical experiments.⁷¹ Mass graves have continuously been found, decades after the horrors, with



thousands of victims slain and buried, as shown in *Figure 3*. For this level of structured persecution, with about 30% of the Cambodian population killed at around 2.8 million people, with millions more displaced and tortured,⁷² to occur so shortly

Figure 3 after the crimes of the Holocaust the establishment of the Genocide Convention reveals a severe flaw in the Conventions legal methodology and authority to actually prevent and punish instances of genocide as they occur.

The Khmer Rouge were finally overthrown in 1979 with the invasion of the Vietnamese Army, in response to Pol Pot's efforts to exert influence into the newly unified Vietnam.⁷³ Despite the removal of the Khmer Rouge, Cambodians largely continued to suffer even under the new communist Vietnamese control, with countless Cambodians fleeing the nation or succumbing to starvation.⁷⁴ The following ten years under Vietnamese control remained strife with conflict and hostility, and it wasn't until 1989 that the foreign forces left, followed by a peace treaty in 1991, with the nation's first democratic elections were held in 1993.⁷⁵ Reviewing the decades of persecution and civil upheaval in Cambodia, so soon after the horrors of the Holocaust and the establishment of the Genocide Convention, begs the question, why was this able to happen? Why

⁷¹ Ibid.

⁷² University of Michigan. "Cambodia."

⁷³ "Khmer Rouge." *HISTORY*. 2022.

⁷⁴ Cambodian Genocide." *World Without Genocide*, 2022.

⁷⁵ Ibid.

was the promise of the Genocide Convention so easily discarded and the millions of victims largely ignored and left to the tyranny of the Khmer Rouge? Why has justice still evaded Cambodia, decades after the massacres and torture? Analyzing the measures taken after the Cambodian Genocide reveal intrinsic flaws in the Genocide Convention and the legal definition of genocide as it currently stands.

Cambodia ECCC Tribunal

While Cambodia was dealing with decades of turmoil and tragedy, much of the Western world was deliberately averting their eyes. For example, both during the rise and reign of the Khmer Rouge, as well as the invasion of the Vietnamese, the U.S. government had “very little interest in the events that were occurring in Southeastern Asia,” even going so far as to admit that any concern extended by the United States at the time was only in relation to the Vietnam War, and not the endless massacres and genocide.⁷⁶ This meant that there was very little global response or aid to the genocide experienced by Cambodians and it wasn’t until 1994 that the UN finally called for a tribunal to investigate the crimes of the Khmer Rouge. In response the Extraordinary Chambers in the Courts of Cambodia (ECCC) was established, but trials did not start until 2007, and have been ongoing until today.⁷⁷ Both the ECCC and the UN have faced backlash and scrutiny for their methods to persecute Khmer Rouge members for the Cambodian Genocide, and the lack of involvement from the Genocide Convention and world courts in the case of Cambodia reveal frustrating flaws in the Convention’s competency.

Problems began cropping up as early as 1997, as the United Nations and the Cambodian government began negotiating the trial's terms, with concerns regarding national sovereignty,

⁷⁶ Ibid.

⁷⁷ Ibid.

corruption, and credibility, when setting up the courts process and structures.⁷⁸ Eventually a compromise was reached, and Cambodia and the UN agreed to establish a hybrid court with both Cambodian and international judges and prosecutors; with this setup, the majority of the trial judges would be Cambodian, but no decision could be reached unless at least one international judge agreed as well.⁷⁹ With these negotiations settled, the ECCC was set up with the jurisdiction to prosecute individuals for serious violations of Cambodian penal law and international humanitarian law during the period of Democratic Kampuchea from 1975 to 1979.⁸⁰ Unfortunately, the ECCC very quickly revealed itself to be a corrupt and bloated institution, content with wasting time and absorbing funds, with little concern of actually obtaining justice for the victims of the genocide.

In 2005 David Tolbert, a United Nations lawyer working at the International Criminal Tribunal for the former Yugoslavia (ICTY), was called in to review why the Court had failed to do, frankly, anything so far, revealing the magnitude of the ineptitude of the ECCC.⁸¹ Tolbert revealed that, “there was really very little judicial management in place. The Cambodian staff in charge had virtually no knowledge or experience, as most had no judicial background. And yet there were a large number of them, hundreds in fact. What's more, Cambodian human rights groups alleged that each of the Cambodian judges had paid a large bribe to get his seat on the court's bench.”⁸² These revelations were deeply frustrating and an affront to international legal affairs, however, what was even more shocking was that Tolbert's return in 2008 revealed that none of his reform suggestions had been followed, and that “very little progress had been made... Cambodia's

⁷⁸ Brinkley, Joel. “Justice Squandered : Cambodia’s Khmer Rouge Tribunal.” *World Affairs* 176, no. 3 (2013): p41.

⁷⁹ Ibid p43.

⁸⁰ Ibid p43.

⁸¹ Ibid p43.

⁸² Ibid p44.

endemic corruption had reared its head in the courthouse, where Cambodian employees were required to turn over a portion of their paychecks to their supervisors.”⁸³

The Cambodian administration’s consistent battles and negotiations with the UN over the structure and operations of the ECCC were now viewed in a new, harsher light; the ECCC had essentially been set up by the Khmer Rouge, for the Khmer Rouge; justice would be a long, laborious, uphill battle.⁸⁴ For many legal experts and scholar, the ECCC remains an embarrassment to the international legal system, as only two perpetrators have received sentences for the genocide carried out by the Khmer Rouge, despite the ECCC operating since 2007..⁸⁵ Comrade Duch, formally named Kaing Guek Eav, who ran the Tuol Sleng prison where thousands of Cambodians were tortured and murdered during the Khmer Rouge reign, was sentenced to only 30 years in prison for crimes against humanity, murder, and organized torture, a conviction that left many Cambodians and legal officials appalled with the lack of severity.⁸⁶

Additionally, several international institutions, including the Office of the Secretary Nations, have expressed serious reservations regarding the ECCC’s ability to meet “international standards of procedural fairness and judicial independence and impartiality,”⁸⁷ Cambodia is yearning for justice, which has yet to fully arrive. Even today the ECCC has four open cases, one of which is in deadlock, and rise of human rights abuses and political instability in the past decade leaves little hope for the nation to fully confront its past and distribute justice for the genocide that was committed. The process of genocide in Cambodia can be easily viewed through the outlined stages in Stanton’s definition, with the lack of justice fitting in the denial stage even, as the

⁸³ Ibid p44.

⁸⁴ Ibid p45.

⁸⁵ Ibid p47.

⁸⁶ Ibid p47.

⁸⁷ Williams, Sarah. “The Cambodian Extraordinary Chambers: A Dangerous Precedent for International Justice?” *The International and Comparative Law Quarterly* 53, no. 1 (2004): p245.

Cambodian government and ECCC has often cited fear of civil upheaval as reasons for halting progress on the persecutions, denying justice, and allowing the cycle to remain vulnerable to repetition.⁸⁸ If a crime is not appropriately acknowledged and condemned, it will fester and respawn. The case of Cambodia showcases a clear destabilization of the core ideals and motives for the establishment Genocide Convention, which was ratified with the assurances that such a tragedy would never occur again. Unfortunately, as the case studies will reveal, genocide has continuously ravaged our societies, and there is more than enough blame to go around for why.

*Notable Photos:*⁸⁹



Figure 4: A terrified prisoner is photographed inside the Tuol Sleng prison. Of the nearly 20,000 people locked in Tuol Sleng, only seven survived. (Phnom Penh)

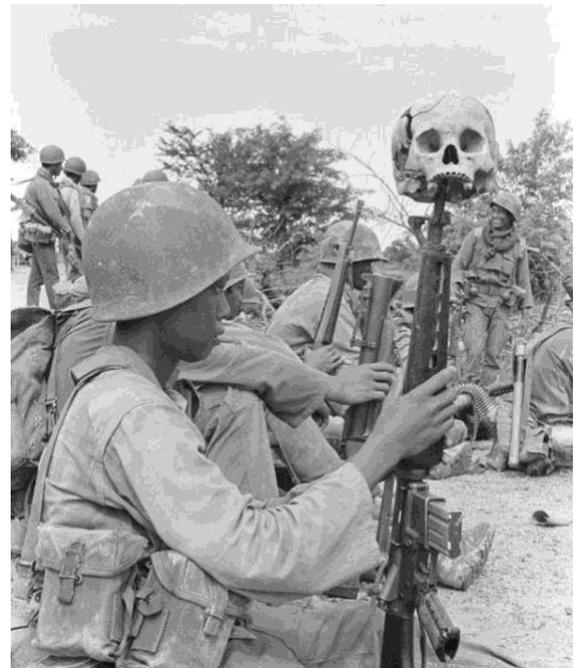


Figure 5: A child soldier with a human skull resting on top of his rifle. (Dei Kraham, Cambodia, 1973).

⁸⁸ Ibid p233.

⁸⁹ Oliver, Mark. "33 Haunting Photos from the Killing Fields of the Cambodian Genocide." *Wikimedia Commons*. 2021.

Bosnian Genocide

“I realize that what happened in Bosnia could happen anywhere in the world, particularly in places that are diverse and have a history of conflict. It only takes bad leadership for a country to go up in flames, for people of different ethnicity, color, or religion to kill each other as if they had nothing in common whatsoever.” — Savo Heleta.⁹⁰ How does one seek justice for genocide from a nation that does not exist anymore? The former Yugoslavia, meaning “Land of the South Slavs,” had a tumultuous and evolving history, which saw the change of three successive countries in Southeastern and Central Europe from 1929 until 2003.⁹¹ Notably, during World War II, the country was occupied by the Axis Powers, before being reformed into the Socialist Yugoslavia in 1946 after Partisans



Figure 6

helped liberate it from the German forces, replacing the original Yugoslavian kingdom with a federation of six equal republics: Serbia, Croatia, Slovenia, Montenegro, Bosnia & Herzegovina and Macedonia, as seen in *Figure 6*.⁹² Soon after, a communist government was established and the country was then named the Federal People’s Republic of Yugoslavia, before once again being renamed to the Socialist Federal Republic of Yugoslavia after the 1963.⁹³

Even the most elementary geopolitical theorist would recognize that Yugoslavia’s persistent political turnovers would be a breeding ground for conflict and instability, naturally paving the way for abuses and human rights violations to occur. The Bosnian Genocide would come to be one of the first cases of genocide after the Holocaust that would prompt international

⁹⁰ Savo Heleta is a survivor and refugee of the Bosnian genocide.

⁹¹ “Yugoslavia.” *Yugotour*. 2017

⁹² *Ibid.*

⁹³ *Ibid.*

response, however, even that would fall just short of adequate prevention and punishment for the crimes of genocide. It would also be during the International Criminal Tribunal for the former Yugoslavia (ICTY) that the term ethnic cleansing would first enter the international legal sphere, as mentioned above, revealing deeper shortcomings of the Genocide Convention and its overall efficacy.

Yugoslav Wars

The name Yugoslavia was developed for the concept of Yugoslavia as a single state for all South Slavic peoples, which emerged in the late 17th century and gained prominence through the Illyrian movement of the 19th century.⁹⁴ The name is a combination of the Slavic words *jug* (south) and *sloveni* (Slavs) and was introduced to unite a common people of South Slavs.⁹⁵ The first president of Yugoslavia, Josip Broz Tito, reinforced the desires for a unified Yugoslav ethnicity, however, despite these wishes, distinctions amongst ethnic groups naturally persisted, further reinforced by disparate histories of foreign occupations. While Serbs were the largest ethnic group in Yugoslavia, as of 1981, they only represented 36.3% of the population, with Croats comprising 19.7% of the population, and the Muslims, or Bosniaks, comprising 8.9% of the population.”⁹⁶

Until the 19th century, the term Bosniak would come to refer to all inhabitants of Bosnia, regardless of their religious affiliation, deriving from terms such *Boşnak milleti*, or *Boşnak taifesi*, which translate to the Bosnian people and were used in the Ottoman Empire to describe Bosnians in an ethnic or tribal sense.⁹⁷ However, after the Austro-Hungarian occupation of Bosnia and Herzegovina in 1878, the Austrian administration officially endorsed Boşnjaštvo, meaning Bosniakhood, as the basis of a “multi-confessional Bosnian nation,” with a policy that aspired to

⁹⁴ “The Yugoslav War.” *Boundless World History*, 2022.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

“isolate Bosnia and Herzegovina from its irredentist neighbors,” such as Orthodox Serbia, Catholic Croatia, and the Muslims of the Ottoman Empire.⁹⁸ These efforts were done in order to negate the concept of “Croatian and Serbian nationhood,” which had already begun to take root amongst Catholic and Orthodox communities in Bosnia and Herzegovina.⁹⁹ While a sense of Bosnian nationhood was cherished mainly by Muslim Bosnian, Serbian and Croatian nationalists fiercely opposed to concept, and even after World War II, Bosnian Muslims continued to be treated as a religious group instead of an ethnic one in the Socialist Federal Republic of Yugoslavia, so much so that in the 1948 census Bosnia and Herzegovian’s Muslims had only three options for self-identification: “Serb-Muslim, Croat-Muslim, or ethnically undeclared Muslim.”¹⁰⁰ Eventually, Muslim Bosniaks gained recognition as an ethnic group in 1961, but were still denied status as a nationality, despite their continuous insistence and yearning for Bosniakhood.¹⁰¹

These swirling tensions eventually reached a head soon after the death of Josip Broz Tito in 1980, as growing nationalism and ethnic classes between the different Yugoslav republics threatened to split their union apart.¹⁰² Yugoslavia experienced a period of “intense political and economic crisis,” that coincided with the “collapse of communism and resurgent nationalism” in Eastern Europe during the late 1980s and early 1990s, as the central government in Yugoslavia weakened while militant nationalism intensified.¹⁰³ An erosion was imminent, but it would come with deadly conflicts, ethnic clashes, and a precedent-setting genocide tribunal. While all six republics would leave the Socialist Federal Republic of Yugoslavia between 1991-2001, they experienced varying levels of conflict. The deadliest of all occurred in Bosnia and Herzegovina,

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² “The Conflicts.” International Criminal Tribunal for the Former Yugoslavia. 2022.

¹⁰³ Ibid.

for a multitude of reasons. The land that made up Bosnia and Herzegovina was in a strategic position, and both Serbia and Croatia wanted to lay claims in order expand their geography and assert greater dominance over the territory.¹⁰⁴ These motivations are compounded by the recognition that the leaders of Croatia and Serbia had secretly met in 1991 to plan their division of Bosnia and Herzegovina, with the agreement to leave a small enclave for Bosnian Muslims.¹⁰⁵

Muslims were the largest demographic in Bosnia, despite the increased migration of Serbs and Croats between the 1970s and 1990s, as a 1991 census revealed that Bosnia's population of 4 million was 44% Bosniak, 31% Serb, and 17% Croatian.¹⁰⁶ In the following year, on March 3, 1992, Bosnia was granted independence by President Izetbegovic, which was immediately followed with a rebellion by the Bosnian Serbs and Bosnian Croats, who rejected the authority of the Bosnian government and asserted control over more than 60% of the country through collective military force and systematic persecution of non-Serbs, namely, the Bosnian Muslims.¹⁰⁷ The resulting conflict became a bloody three-sided fight for power and territory, with civilians from all ethnicities becoming victims of human rights abuses and crimes of genocide.¹⁰⁸ It's estimated that "more than 100,000 people were killed and two million people, more than half the population, were forced to flee their homes as a result of the war that raged from April 1992 through to November 1995," along with systematic kidnapping and rape of thousands of Bosnian women and the construction of horrendous detention centers for civilians from all groups.¹⁰⁹

Bosnian Serbs began offensive domination with the backing of the Serb-dominated Yugoslav army and launched their offensive with a bombardment on Bosnia's capital, Sarajevo,

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

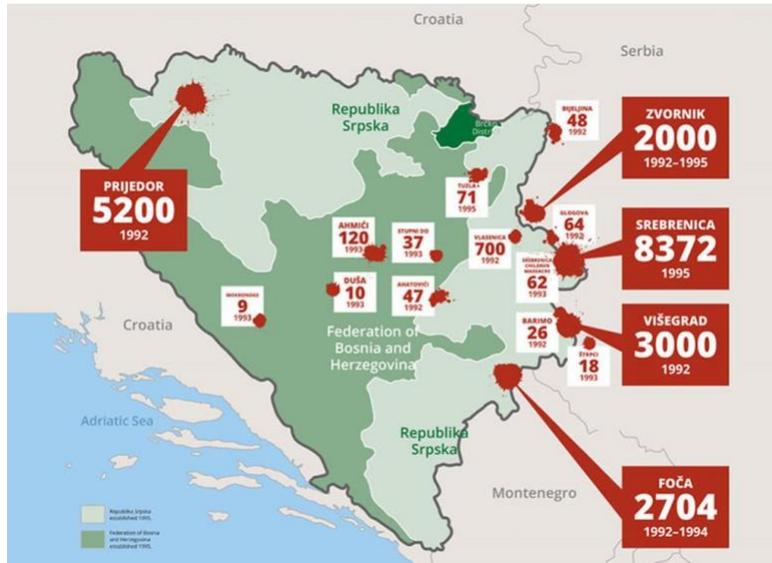
¹⁰⁶ Ibid.

¹⁰⁷ "The Conflicts." ICTY. 2022.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

along with a campaign against Bosniak-dominated towns in eastern Bosnia, including Zvornik, Foca, and Visegrad, “forcibly expelling Bosniak civilians from the region in a brutal process,” as viewed in *Figure 7*.¹¹⁰ Serb forces also attacked Bosniak culture by “destroying major institutions



and burning books, rare manuscripts, and historical archives,” all acts that align with the definitions of genocide, outlined by both Lemkin and Stanton, as well as the UN’s legal definition of genocide.¹¹¹

However, the reign of terror did not

Figure 7

stop at mere destruction of the Bosniak way of life, as the Serbs invaded the Bosnian town of Srebrenica in 1995, which had been designated a UN-declared safe area and carried out a “structured execution of more than 8,000 Bosnian Muslim men and boys by Serb forces in an act of genocide.”¹¹² Bosnian Serb forces argued that their efforts to eradicate Bosniak civilians was to “cleanse” the area and make it ethnically pure, eventually leading the way to the development of the term ethnic cleansing.

From these events it’s much clearer to discern the genocide that occurred against the Bosnian Muslims, as the level of persecution, organization, and intent align with all of the aforementioned definitions of genocide as well as the crime outlined in the Genocide Convention. While the crimes, at the time of their occurrence, were referred to as ethnic cleansing, they would

¹¹⁰ Ibid.

¹¹¹ "The Bosnian Genocide." *Montreal Holocaust Museum*. 2022.

¹¹² "The Conflicts." ICTY. 2022.

eventually come to be known as genocide, a frustrating and delayed acceptance, that diminishes the value of the Convention in the first place. Review of the International Criminal Tribunal for the former Yugoslavia (ICTY) and its proceedings reveal consistent flaws in the international legal process to condemn and persecute the crime of genocide, as discussed in the case study regarding the Cambodian Genocide.

International Criminal Tribunal for the former Yugoslavia (ICTY)

The International Criminal Tribunal for the former Yugoslavia was an *ad hoc* court set up by the United Nations after the UN Security Council passed resolution 827 on May 25, 1993, which contained, “the Statute of the ICTY which determined the Tribunal’s jurisdiction and organizational structure, as well as the criminal procedure in general terms,” establishing it as the, “first war crimes court established by the UN and the first international war crimes tribunal since the Nuremberg and Tokyo tribunals.”¹¹³ Notably, the court was established while the crisis in Yugoslavia was ongoing, which was an attempt by the UN to display commitment for the Genocide Conventions prevent and punish slogan, that ultimately fell flat. To be fair, the ICTY *was* precedent-setting, and contributed heavily to changing the “landscape of international humanitarian law,” by shifting the trend towards assigning individualizing responsibility and guilty for crimes of genocide to individuals, rather than entire communities or states.¹¹⁴ This foundational shift has meant that “leaders suspected of mass crimes will face justice,” regardless of their seniority, rank, or title.¹¹⁵

The ICTY was granted jurisdiction to review and persecute “war crimes, genocide, and crimes against humanity committed by individuals within the territory of the former Yugoslavia

¹¹³ United Nations. "About The ICTY | International Criminal Tribunal for the Former Yugoslavia." *United Nations IRMCT*. 2022.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

from 1991 onwards,” and would indict 161 individuals from 1993 to 2017, resulting in 89 convictions, 18 acquittals, and 13 referrals to a national court, however, keeping in mind that of the 161 indictments 37 have their indictments withdrawn or are now deceased.¹¹⁶ The Tribunal was given the authority to prosecute and try individuals on four categories of offences: “grave breaches of the 1949 Geneva conventions, violations of the laws or customs of war, genocide and crimes against humanity,” and only had the authority to try individuals, not states, as outlined in Article 1 of the ICTY Statute.¹¹⁷ Additionally, Article 7 of the Statute outlined that a “person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime,” would also be responsible for the crime, setting a precedent for international law and genocide criminality, as it helped shift the trend towards individualization, in the hopes that it would be easier to try individuals than states for crimes of genocide.¹¹⁸

The ICTY operated for twenty-four years, beginning in 1991 and formally closing in December 2017. During that time the UNSC established the International Residual Mechanism for Criminal Tribunals (IRMCT) in 2010 in order to continue the remaining work of the ICTY and its new counterpart, the International Criminal Tribunal for Rwanda (ICTR).¹¹⁹ The IRMCT was responsible for, “locating and arresting indicted individuals who [were] still at large; hearing appeals against judgments and sentences issued by the ICTR, ICTY, or IRMCT; reviewing judgments based on new facts; conducting retrials; and managing investigations and court proceedings in alleged cases of contempt of court and false testimony; monitoring cases referred to national courts; protecting victims and witnesses; supervising the enforcement of sentences and

¹¹⁶ “ICTY.” *International Justice Resource Center*. 2010.

¹¹⁷ United Nations. “Mandate And Crimes Under ICTY Jurisdiction.” *United Nations IRMCT*, 2022.

¹¹⁸ *Ibid.*

¹¹⁹ “ICTY.” *International Justice Resource Center*. 2010.

deciding requests for pardon, commutation, or early release; assisting national authorities in relevant prosecutions; and maintaining the ICTR, ICTR, and IRMCT archives.”¹²⁰

Reflecting on the ICTY prompts acknowledgement of the Tribunal’s central role in constructing, “a set of working practices for the developing field of international criminal law,” from scratch, as well as its efforts to accumulate “a wealth of practical knowledge and experience that is of significant value to other international criminal courts and tribunals.”¹²¹ However, that does not mean the ICTY was without its issues and problems, of which it did have many, nor that it solved the issues inherent in the Genocide Convention, or prevent further cases of genocide from occurring again, as will reflected in the numerous cases that occurred after the Bosnian Genocide and that are referenced in this section. In fact, Gabrielle Kirk McDonald, one of the former judges and President of the ICTY wrote an article outlining the “Problems, Obstacles and Achievements of the ICTY,” with an insightful first-hand account of the Tribunal’s workings and proceedings.¹²² McDonald praises, “the contributions of the *ad hoc* Tribunals... are undisputed. First, there has emerged an insistence on accountability. The culture of impunity... has been irrevocably altered... They have enriched the jurisprudence of international humanitarian law.”¹²³ However, even with these advances and achievements, Judge McDonald identified three core issues the ICTY faced during its twenty-four years of operation, non-cooperation, misinformation, and lackluster communication.

The problem of enforcement has been inherent in numerous international institutions, and the ICTY quickly experienced this very same hurdle, as it was “not part of a framework that

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Gabrielle Kirk McDonald, Problems, Obstacles and Achievements of the ICTY, *Journal of International Criminal Justice*, Volume 2, Issue 2, June 2004.

¹²³ Ibid p568.

ensures that its arrest warrants and other orders will be executed.”¹²⁴. For example, Judge McDonald attests that, “as of spring 1998 the Tribunal had issued 205 arrest warrants and only six had been executed by states,” contradicting the push against impunity the Tribunal was largely attempting to deconstruct, “the Tribunal remains a partial failure – through no fault of its own – because the vast majority of indictees continue to remain free, seemingly enjoying absolutely immunity.”¹²⁵ Additionally, with states diminishing and ignoring the Tribunal’s warrants and appeals, the violence continued to increase, with more instances of genocide and atrocities being committed despite the Tribunal’s effort to prevent and punish the crimes.¹²⁶

A large reason the Tribunal had so much difficulty achieving compliance from the nations and regions in the former Yugoslavia was largely due to a lack of communication and subsequent misinformation and distrust, discrediting the Tribunal’s legitimacy amongst the very population they were trying to help protect. Judge McDonald critiques that the tribunal was a “source of widespread misrepresentation in the former Yugoslavia... the virulent propaganda machine that enflamed the passions of victimized and fearful ethnic groups, priming them respond to the call to violence by leaders who were motivated by a desire for person and territorial gains, continued to preach the same paranoia and falsehoods with respect to the Tribunal.”¹²⁷ Judge McDonald recognizes that more could have been done by the Tribunal to curb this campaign of misinformation, such as through the Outreach Programme that was established in 1999 in order to, “provide a comprehensive pro-active information campaign stressing the [Tribunal’s] impartiality

¹²⁴ Ibid p559.

¹²⁵ Ibid p564.

¹²⁶ Ibid p566.

¹²⁷ Ibid p569.

and independence, as well as countering the endemic misconceptions that had prompted widespread disillusionment with the Tribunal in the former Yugoslavia.”¹²⁸

The shortcomings of the ICTY have had long-lasting impacts in the former Yugoslavia and amongst the ethnic communities attempting to confront the past and move forward. Unfortunately, rather than “helping to establish a broad-based consensus on the basic facts of what happened during the wars, the Tribunal’s judgements have merely served to entrench conflicting and selective ethnic narratives that critically ignore ‘inconvenient facts’ about the war,” as people still cling “to their own ethnic truths about the wars.”¹²⁹ For example, the ICTY’s 2011 convictions of two Croatian generals, Ante Gotovina and Mladen Markač, for crimes against humanity and violations of the laws or customs of war, this judgement, have had overall little impact in Croatia, as both Gotovina and Markač are still widely viewed as war heroes who were “simply defending their country against “Great Serbian aggression.””¹³⁰ The ICTY’s numerous failings have hindered healing and justice, automatically undermining the establishment of the Genocide Convention, as adequate efforts to prevent and punish the crimes in the former Yugoslavia have yet to effectively occur, leaving the deep-seated wounds to fester, at the risk of repetition, as referenced in the various definitions of genocide provided by Lemkin and Stanton.

¹²⁸ Ibid p569.

¹²⁹ Clark, Janine Natalya. “The ICTY and the Challenges of Reconciliation in the Former Yugoslavia.” *E-International Relations*. 2012.

¹³⁰ Ibid.

Notable Photos: ¹³¹ ¹³²



Figure 8: On July 14, 1995, refugees from Srebrenica, who had spent the night in the open air, gather outside the U.N. base at Tuzla airport. (AP Photo/Darko Bandic).



Figure 9: Taken on April 2, 1996, the remains of two bodies lie in mass grave site in the village of Konjevic Polje, 12 miles northwest of Srebrenica. (AP Photo/Vadim Ghirda).

¹³¹ “Scenes From Hell: 1995 Srebrenica Genocide in Photos.” *AP NEWS*. 2020.

¹³² *Ibid.*

Rwandan Genocide

“It always bothers me when I hear Rwanda's genocide described as a product of ‘ancient tribal hatreds.’ I think this is an easy way for Westerners to dismiss the whole thing as a regrettable but pointless bloodbath that happens to primitive brown people.” — Paul Rusesabagina.¹³³

Rwanda is a landlocked nation, south of the Equator in east-central Africa, often referred to as *le pays des mille collines*, French for “land of a thousand hills.”¹³⁴ As shown in *Figure 10*, Rwanda is a small nation, with one of the “highest population densities in sub-Saharan Africa,” boasting a population of almost 13 million.¹³⁵ Interestingly, Rwanda has a long history of monarchical rule,

which ultimately came to a demise through a grassroots upheaval led by the Hutu ethnic group in 1962, generating ethnic strife in the nation and generating conflict and instability that would come to a culmination during the genocide and civil war in 1994, leaving Rwanda’s economy and society in shambles.¹³⁶



Figure 10

The existence of the Bosnian genocide reveals inherent flaws in the Genocide Convention’s efficacy, however, realizing that the Rwandan genocide and Tutsi massacre occurred in 1994, both during the Bosnian genocide and the ICTY proceedings, reveals even deeper flaws in the international community’s ability to effectively combat and prevent crimes of genocide before and

¹³³ Paul Rusesabagina is a Rwandan politician. He worked as the manager of the Hôtel des Mille Collines in Kigali, during a period in which it housed 1,268 Hutu and Tutsi refugees from the Interahamwe militia during the Rwandan genocide. None of these refugees were hurt or killed during the attacks.

¹³⁴ Lemarchand, R. and Clay, Daniel. “Rwanda.” *Encyclopedia Britannica*, August 10, 2021.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

as they occur. By reviewing the case of genocide in Rwanda, many parallels are revealed regarding the crimes that occurred during the Holocaust and the Bosnian genocide, as well as the patterns repeated by the international community that limited the response, such as initially labeling it as an ethnic cleansing, delaying international responses, and prolonging the justice process with the International Criminal Tribunal for Rwanda (ICTR) facing the same issues the ICTY did.

Tutsi Massacre

With a long history of monarchical rule and colonization under Germany and Belgium, Rwanda has never been a stranger to internal conflicts and civil crises. While there are various debates regarding the history of Rwanda and its ethnic tensions, an underlying thread is the role colonization played in inciting ethnic classes, inevitably laying the foundation for the Rwandan genocide. Reviewing Rwanda's history reveals that the nation was already a centralized, hierarchical kingdom with class distinctions by the end of the nineteenth century, meaning that many local populations and communities had not yet been fully incorporated into the Rwandan state, and the distinctions of Hutu and Tutsi were not significant at the time, with traits such as clan, lineage, and familial ties holding a greater importance for political interaction.¹³⁷ While tensions and inequities existed between the Hutu and Tutsi, colonial rule exacerbated the conflict exponential. For example, many scholars have referenced how the many political and social changes that occurred in Rwanda from 1959-1962 were largely "engineered by Belgian colonial authorities and the Catholic Church," as "previously these powerful external actors had supported the monarchy and its political structures dominated by Tutsi chiefs, [but] in the 1950s they switched support to the Hutu majority."¹³⁸

¹³⁷ Newbury, Catharine. "Ethnicity and the Politics of History in Rwanda." *Africa Today* 45, no. 1 (1998) p10.

¹³⁸ *Ibid* p9.

This manipulation by the colonial powers is cited as core reason behind the increase in political violence during the terminal colonial period, as well as “the cause of the collapse of royal power, the reversal of power relations, and the subsequent exodus of many Tutsi into exile.”¹³⁹ The timeline of events, from colonial manipulation, until the massacre in 1994, can be analyzed through the definitions of genocide that Lemkin and Stanton outlined, as the process was much more long-term than the international community recognized. Colonial rule in Rwanda was a catalyst and contributor to genocide, as it “provided the resources, imposed the structures, and asserted the pressures that helped shape the state-building process in a particular way... [with] the propagation of a corporate vision of ethnic groups.”¹⁴⁰

Despite being a small country, Rwanda boasted one of the highest population densities in Africa by the early 1990s, with 85% of the population being Hutu, and the rest being Tutsi or Twa.¹⁴¹ This ethnic distribution largely came about due to continuous conflicts between the Hutu and Tutsi populations, for example, a Hutu revolution in 1959 forced over 300,000 Tutsis to flee the country.¹⁴² By 1961 the Hutus had exiled the Tutsi monarch and declared the country a republic, with ethnically motivated violence increasing and continuing in the years following Rwanda’s independence in 1962.¹⁴³ After Major General Juvenal Habyarimana, a moderate Hutu, gained power through a military coup in 1973 he formed the National Revolutionary Movement for Development (NRMD) and was then elected president under a new constitution, winning in reelection in 1983 and 1988, during which he was the sole candidate.¹⁴⁴ Habyarimana’s administration was tension filled, and in 1990, after forces of the Rwandese Patriotic Front (RPF),

¹³⁹ Ibid p9.

¹⁴⁰ Ibid p11.

¹⁴¹ “Rwandan Genocide.” *HISTORY*, 2022.

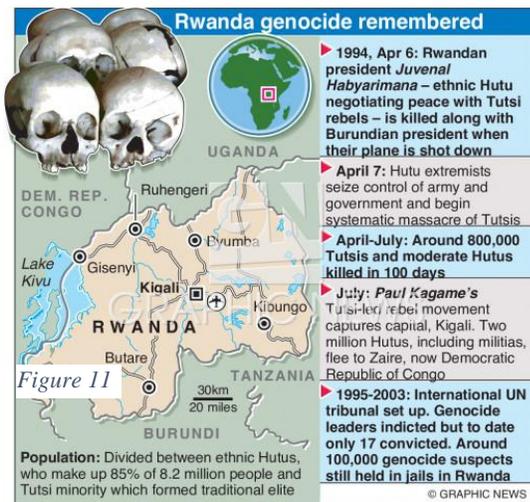
¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

which consisted mostly of Tutsi refugees, invaded Rwanda from Uganda, Habyarimana accused Rwandan Tutsi residents of being RPF accomplices and arrested hundreds of them, with a campaign of violent investigation and torture being carried out by Habyarimana’s regime between 1990 and 1993.¹⁴⁵

Ethnic strife between the Hutu and Tutsi peaked in 1994, resulting in one of the bloodiest massacres of all time, with over 800,000 people murdered in 100 days.¹⁴⁶ As shown in *Figure 11*, the genocide is stated to have officially started on April 6, 1994, as a plane carrying both Habyarimana and Burundi’s president Cyprien Ntaryamira was shot down over the capital city of



Kigali, on their route to negotiate peace with Tutsi rebels.¹⁴⁷ While it has never been conclusively determined who the culprits were, the Presidential Guard, along with members of the Rwandan armed forces (FAR) and Hutu militia groups set up “roadblocks and barricades and began slaughtering Tutsis and moderate Hutus with impunity,” all within

Figure 11 an hour after the plane crash.¹⁴⁸ One of the first victims of the genocide was actually the moderate Hutu Prime Minister Agathe Uwilingiyimana, which effectively created a political vacuum in Rwanda, allowing extremist Hutu Power leaders to set up an interim government and ensure the massacres would be carried out largely unchecked.¹⁴⁹ Though the official start date of the genocide is April 1994, Rwanda’s history and the timeline of events showcases how the

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

genocide and abuses actually began much earlier, cementing the theory that genocide is not an overnight occurrence.

The massacre was deadly and horrific. Accounts reveal that “neighbors killed neighbors and some husbands even killed their Tutsi wives, saying they would be killed if they refused.”¹⁵⁰ Hutu militia had set up roadblocks throughout the country and would slaughter Tutsis attempting to flee, identifying them through ethnicity distinction on ID cards, a striking parallel to previous genocides that utilized identification methods as a means of exterminating a specific group.¹⁵¹ More than thousands of Tutsi women were taken away and kept as sex slaves and weapons and hit lists were handed out to local Hutu groups to aid in the genocide.¹⁵² Alongside the relentless violence, Hutu extremists set up radio stations and newspapers that circulated propaganda and justified the killing, urging people to “weed out the cockroaches” and kill the Tutsis, once again showing how genocide in Rwanda occurred in stages that culminated into a deadly massacre, of which the country is still largely represented by.¹⁵³

However, to critically understand the Rwandan Genocide, it is essential to deviate from “the traditional binary of perpetrators and victims,” as the onslaught of abuses and oppression resulted in blurred lines between victims, perpetrators, and rescuers, as the divide do not fall cleanly between ethnic cleavages, a common misconception when analyzing the Rwandan Genocide.¹⁵⁴ For example, testimonies from Tutsi victims testimony discusses how many Hutu men and women risked their own lives to hide and save Tutsi men, women, and children.¹⁵⁵ These recollections also reveal how “both Hutus and Tutsis were subjected to mass violence, torture, and

¹⁵⁰ “Rwanda Genocide: 100 Days of Slaughter.” *BBC News*, 2022.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

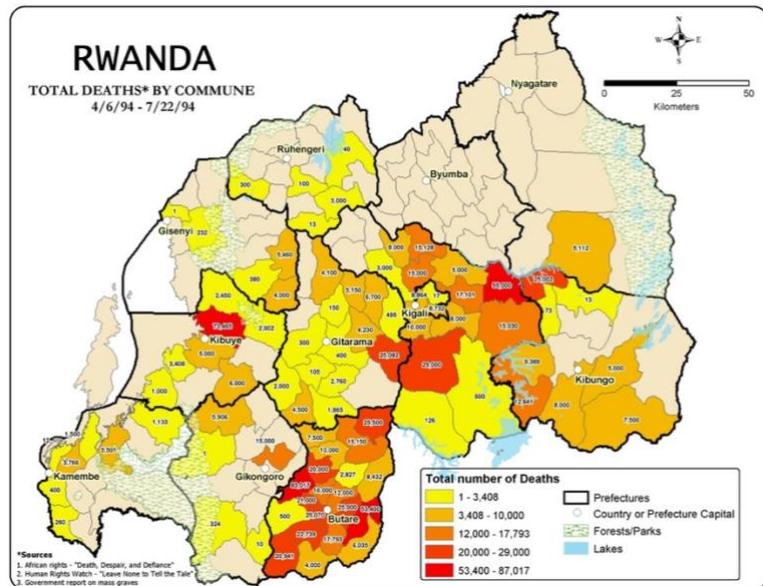
¹⁵³ *Ibid.*

¹⁵⁴ University of Minnesota. “Rwanda.” *Holocaust and Genocide Studies | College of Liberal Arts*. 2022.

¹⁵⁵ *Ibid.*

rape during the genocide,” yet, due to the legal definition of genocide, as outlined in the Genocide Convention, the Tutsi are viewed as the victims, due to the ethnic motivations of the Hutu majority government, ignoring the thousands of Hutu civilians that faced horrific abuses during the genocide.¹⁵⁶ Additionally, as shown in *Figure 12*, the violence and spread of the genocide was contained to just one region, but was spread throughout the nation, as numerous communities and populations were targeted and effected by the organized and structured extermination campaign by the Hutu extremists.

The Rwandan Genocide is,



yet again, another example of how the Genocide Convention and the international community failed in its promise of “Never Again.” Despite the existence of the ICTY at the time of the Rwandan Genocide, as well as numerous international attention and recognition to the atrocities committed over the course of the 100 days, little action was done by international legal institutions to effectively prevent or punish the genocide, leaving scars untreated, and justice unserved. Despite the foundations laid down by the ICTY, in an effort to advance greater individual accountability and persecution for the crime of genocide, review showcases how the ICTR largely faced the same challenges and had numerous shortcomings that failed to effectively address the crime of genocide in Rwanda and its aftermath.

¹⁵⁶ Ibid.

International Criminal Tribunal for Rwanda (ICTR)

The Rwandan Genocide lasted 100 days, from April 6, 1994, to July 19, 1994, resulting in the deaths of over 800,000 Rwandans, Hutus and Tutsi combined. The International Criminal Tribunal for Rwanda (ICTR) was established by the United Nations Security Council through the adoption of Resolution 955 “for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States, between January 1994 and December 1994.”¹⁵⁷ Like the ICTY, the ICTR was an *ad hoc* committee, consisting of three major organs: the Chambers, the Office of the Prosecutor and the Registry.¹⁵⁸ While all three of the lower Trial Chambers were located in Arusha, the ICTR Appeals Chamber also adjudicated for the International Criminal Tribunal for the former Yugoslavia, and was located in The Hague, Netherlands.¹⁵⁹ Since adoption, the ICTR has undergone numerous amendments, such as the establishment of a third chamber, and increases in the number of judges, due to UNSC resolutions that identified a need for greater judicial power reviewing the crimes in Rwanda.

Like the ICTY, the International Criminal Tribunal for Rwanda also set many firsts for the crime of genocide and the international legal community. The ICTR was the “first ever international tribunal to deliver verdicts in relation to genocide, and the first to interpret the definition of genocide set forth in the 1948 Geneva Convention,” particularly regarding the necessity of intent in the Genocide Convention, as well as being, “the first international tribunal to define rape in international criminal law and to recognize rape as a means of perpetrating

¹⁵⁷ United Nations. “Statute of the International Criminal Tribunal for Rwanda.” *UN Audiovisual Library of International Law*. 2012.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

genocide.”¹⁶⁰ Since its establishment in 1995, the Tribunal has indicted 93 individuals whom were considered responsible for “serious violations of international humanitarian law,” including “high-ranking military and government officials, politicians, businessmen, as well as religious, militia, and media leaders.”¹⁶¹

For example, the ICTR’s first trial was held on January 9, 1997, and is considered one of the “most momentous cases in international law,” as Jean-Paul Akayesu, who had served as mayor in the city of Taba during the Rwandan Genocide and oversaw the systematic rape, torture, and murder thousands of Tutsis, was brought to trial for “12 charges of genocide, crimes against humanity and violations of common article 3 of the 1949 Geneva Conventions in the form of murder, torture and cruel treatment,” as well as “three counts of crimes against humanity and violations of common article 3/Additional Protocol II for rape, inhumane acts and indecent assault,” marking the first time in the history of international law that rape was considered a component of genocide.¹⁶² Furthermore, the ICTR did help provide greater clarity around the prerequisite of intent in the Genocide Convention, albeit not perfectly, but by addressing intent in a greater manner than it had been done so previously by the international legal community, a precedent was set to help advance international genocide law towards a conversation it had been skirting for decades thus far, as visible in the Cambodian and Bosnian genocides.

During the conviction for Akayesu in 1998, which also marked the first international conviction for genocide, the ICTR stated that “in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact.”¹⁶³ This conviction helped

¹⁶⁰ "The United Nations International Tribunal for Rwanda in Brief." *United Nations International Residual Mechanism for Criminal Tribunals Legacy*, 2022.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Alonzo-Maizlish, David. “In Whole or In Part: Group Rights, the Intent Element of Genocide, and the ‘Quantitative Criterion.’” *New York University Law Review* ISSUE Volume 77, Number 5. 2002 p1373.

influence the ongoing ICTY proceedings as well.¹⁶⁴ However, despite both Tribunals affirming quantitative criterion, which dictates that the overall outcome of the crimes bears greater weight than the perpetrators vocalized intent, the ICTY and the ICTR have largely failed to clarify the actual “evidentiary requirements” to establish quantitative criterion when reviewing crimes of genocide, lessening the impact of the precedent-setting trial.¹⁶⁵ Additionally, on December 14, 2015 the ICTR delivered its final judgment in the case against the former Minister of Family and Women’s Development, Pauline Nyiramasuhuko, and five co-accused elites.¹⁶⁶ This case was groundbreaking, as Nyiramasuhuko was the “first woman convicted of genocide by an international court,” for organized crimes of rape and crimes against humanity.¹⁶⁷ It is a fair argument to claim that the ICTR played an integral role in establishing important jurisprudence in international criminal law, and served as a precedent for the creation of the International Criminal Court, whose founding treaty was adopted in Rome in 1998.

However, despite these advances in international law, the ICTR showcased much of the same failings as Cambodian ECCC and the ICTY, ultimately leaving behind a legacy of disappointment and ineffective legal justice in response to the crimes of genocide. As discussed earlier, the Extraordinary Chambers in the Courts of Cambodia spent a large portion of their time operating as a financial drain, with expenditures lining corrupt pockets. Despite being a UN mandated structure, the ICTR has faced similar critics as well. For example, many have pointed out how the Tribunal’s criminal proceedings were exceptionally costly, as it “devoured about 2 billion US dollars (1.8 million euros)” over the course of 22 years.¹⁶⁸ Many have denounced the

¹⁶⁴ Ibid p1374.

¹⁶⁵ Ibid p1375.

¹⁶⁶ HRW Staff. “Rwanda: International Tribunal Closing Its Doors.” *Human Rights Watch*. 2015.

¹⁶⁷ Ibid.

¹⁶⁸ Quenum, Frejus, Alex Ngarambe, and Silja Fröhlich. “ICTR: A Tribunal That Failed Rwandan Genocide Victims and Survivors.” *Deutsche Welle*. 2019.

Tribunal's efforts as "artificial justice" due to the repetitive lack of professionalism, corruption, and trends of inefficiency the committee showcased throughout the decades. Additionally, like the ICTY, the ICTR too suffered from misrepresentation and miscommunication, failing to serve the purpose of the committee or uphold the Genocide Convention.¹⁶⁹ Despite the 93 indictments, 61 convictions and 14 acquittals, the Tribunal did not *truly* serve a long-lasting or impactful purpose of the Rwandans or the victims, as "many Rwandans do not even know that such a tribunal ever existed..." a fact that can be attributed due to the fact that the ICTR was based in the north of Tanzania, seemingly detached from the very region it was attempting to help heal.¹⁷⁰

The limitations of the tribunal are frustrating to analyze, especially when acknowledging the sheer extent of horrors unleashed by the Hutu extremists. The Genocide Convention has failed, repetitively, throughout the case studies analyzed thus far, showcasing a dismally ineffective and flawed approach preventing and punishing the crime of genocide, the most heinous crime of all. The last case study will discuss a current and ongoing genocide and explore how the legal responses by the international community present both continued failings in the Convention, but also glimmers of hope for the evolution of the Genocide Convention to finally uphold its promise and adequately prevent and punish the crime of genocide. As Lemkin and Stanton's definitions of genocide continuously remind us, the cycle is pervasive and parasitic, resurfacing at the slightest sign of ignorance and neglect.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

Notable Photos:¹⁷¹



Figure 13: The bodies of a woman and her child lie by a church in Nyarubuye parish, which was the site of an April 14 massacre that survivors say was perpetrated by a militia assisted by government gendarmes, about 95 miles east of the capital Kigali, in Rwanda. (May 31, 1994).

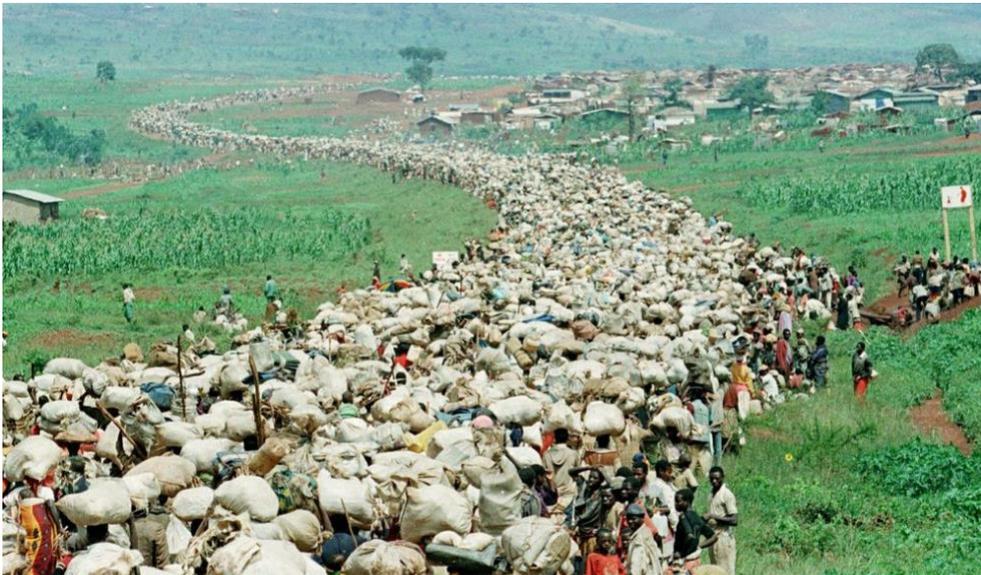


Figure 14: Tens of thousands of Rwandan refugees, who have been forced by the Tanzanian authorities to return to their country despite fears they will be killed upon their return, stream back towards the Rwandan border on a road in Tanzania. (Dec. 19, 1996).

¹⁷¹ The Associated Press, “25 years ago, images exposed Rwanda’s genocide.” *Associated Press*. 2019.

Myanmar

“I have no doubt that the Rohingya people have always been one of, if not the, most discriminated people in the world,” – Secretary-General António Guterres. A modern-day genocide case is currently pending before the International Court of Justice (ICJ), the principal judicial organ of the United Nations (UN). On November 11, 2019, The Republic of The Gambia (The Gambia) instituted proceedings against the Republic of the Union of Myanmar (Myanmar), alleging violations of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, of which both The Gambia and Myanmar are signatories, through “acts adopted, taken and condoned by the Government of Myanmar against members of the Rohingya group.”¹⁷² While the ongoing genocide against the Rohingya is, once again, an example of the Genocide Conventions failure to prevent and punish the crime of genocide, the ICJ case has broken new ground in international law, being the first case of its kind brought by one UN Member State against another.

Myanmar, previously known as Burma, is a Southeast Asian nation, surrounded by China, Laos,



Figure 15

Thailand, Bangladesh, and India, as shown in the map in *Figure 15*.¹⁷³ The country has a population of about 55 million people and its administrative capital is located in the central city of Naypyidaw.¹⁷⁴ While the official language of Myanmar is Burmese, it is also home to many diverse ethnic groups and regional languages, such as Kachin, Kayah, Chin, Rakhine, and Shan to

¹⁷² “Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) | Press Release 2019/47” (Pending), ICJ Press Release 2019 p1.

¹⁷³ Steinberg, David I., Aung-Thwin, Michael Arthur and Aung, Maung Htin. “Myanmar.” *Encyclopedia Britannica*, March 10, 2021.

¹⁷⁴ *Ibid.*

name a few.¹⁷⁵ Myanmar became a United Nations Member State on April 19, 1948,¹⁷⁶ but has been struggling with its economic and infrastructural development since independence from Great Britain, due to flawed economic policies and repressive military regimes. The 21st century has resulted in the nation falling under increased scrutiny of the international community, due to the “ethnic cleansing” campaign of the country’s government and military forces against ethnic minority groups, in particular, against the Rohingya people, which are a Muslim ethnic minority group that resides largely in the Rakhine state.

History

The nation of Myanmar has unfortunately had a tumultuous history, with a colonial past, restrictive military rule, and discriminatory policies, that lend some measure of explanation for the current plight the Rohingya people are facing in their borders. After gaining independence from British colonial rule in 1948, The Union of Burma, as it was referred to then, began as a parliamentary democracy, but initial representative democracy only lasted until 1962, when

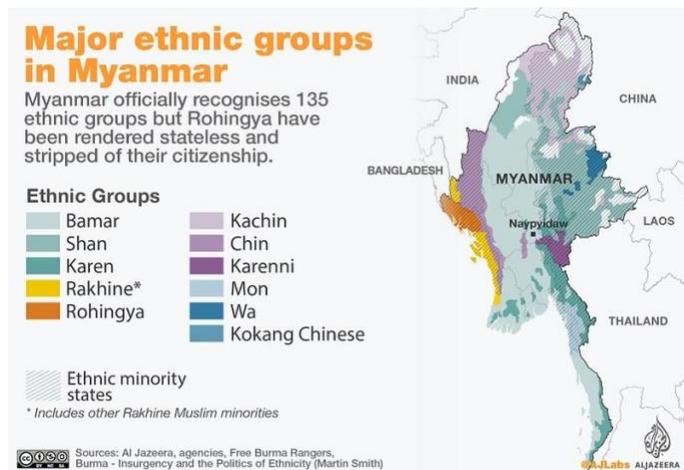


Figure 16

General U Ne Win led a military coup and subsequently held power for the next twenty-six years.¹⁷⁷ Ne Win also instituted a new constitution in 1974, based on an isolationist policy and a

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Maizland, Lindsay. “Myanmar’s Troubled History: Coups, Military Rule, and Ethnic Conflict.” *Council on Foreign Relations*. February 10, 2021

socialist economic program, aiming to nationalize Burma's major enterprises, but ultimately resulting in deteriorating the country's economic situation rapidly.¹⁷⁸

While Myanmar is an extremely diverse country, as observed in *Figure 16*, with over one hundred ethnic groups, there have been consistent inequalities between the experience of ethnic Burmans, who are known as Bamars, and the treatment of the ethnic minority groups in the country.¹⁷⁹ While Bamars, who form around two-thirds of the population, have access to positions of power in society and hold the majority of government and military positions, many of the ethnic minority groups have been subjected to prevalent systematic discrimination, lacking "economic opportunities, experiencing minimal representation in government, [and] suffering consistent abuses at the hands of the military."¹⁸⁰ As observable under the 2008 constitution, only full citizens are entitled to most rights, and the constitution prevents those not considered to be full citizens from "participating in political processes," such as voting and running for office.¹⁸¹

These laws have perhaps impacted the Rohingya ethnic group most harshly, as most Bamars and Myanmar citizens consider the Rohingya to be outsiders, due to both their ethnicity and religion. The Rohingya are a majority Muslim ethnic group that have resided in the Rakhine state of Myanmar for centuries, yet they are not considered part of the country's 135 official ethnic groups.¹⁸² Unfortunately, history reveals how discrimination has been ingrained in Myanmar's laws and political systems since day one. Furthermore, citizenship in the nation is largely based on ethnicity, and the 1982 Citizenship Law states that, "only members of ethnic groups that lived in Myanmar before 1823, when the British first occupied parts of the country, are full citizens."¹⁸³

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Al Jazeera Staff. "Myanmar: Who Are the Rohingya?" *Al Jazeera*, 2021.

¹⁸³ Maizland, Lindsay. "Myanmar's Troubled History." *Council on Foreign Relations*.

This law was based on the principle of *jus sanguinis*, meaning the “right of blood.”¹⁸⁴ The Burmese Law Commission at the time dictated that a racial group would only be recognized if they had settled in Burma prior to the British rule, and that even to become a naturalized citizen, one had to prove that they had family previously residing in Myanmar before independence.¹⁸⁵ This act effectively rendered thousands of Rohingya stateless.

The feelings of animosity against the Rohingya and other ethnic minority groups stem from the years of British rule in Myanmar, which lasted over a century, from 1824-1948.¹⁸⁶ During this period of colonization, the British facilitated a significant amount of labor migration from the regions of India and Bangladesh to Myanmar, of which the Rohingya were a part, but such migration was viewed as internal by the British, due to the fact that they considered Myanmar as a province of India at the time.¹⁸⁷ However, the native population of Myanmar did not look favorably upon the migration, and, after independence, the government took the opportunity to formally declare the migration under British rule as illegal, declaring the Rohingya stateless, and validating the stance to deny them citizenship and equal rights on the basis that they were always “outsiders.”¹⁸⁸ It’s important to note that these ethnic divisions were purposely created by the British during colonial rule, intended to encourage ethnic conflict, and prevent the population from banding together to resist the colonial exploitation.¹⁸⁹ As a result, the country’s long-standing history of friction and discrimination has only served to fuel the oppression against the Rohingya, that persists in the modern era.

¹⁸⁴ Gnanasagar, Angaindrankumar. “The Historical Reality of The Rohingya.” *ASEAN Post*, September 15, 2017.

¹⁸⁵ Ibid.

¹⁸⁶ Al Jazeera Staff. “Myanmar: Who Are the Rohingya?”

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Maizland, Lindsay. “Myanmar’s Troubled History.”

Tatmadaw

This ceaseless friction and violence have effectively produced the world's "longest continuing civil war," as labeled by political analysts and scholars.¹⁹⁰ On one hand is the Tatmadaw, Myanmar's military, and on the other hand are the many ethnic minority armed organizations that have popped up in response to the continuous discrimination, as well as dozens of smaller militia groups.¹⁹¹ Understanding the roles of the Tatmadaw and the continuous efforts of the ethnic minority armed organizations reveals much context in terms of understanding how the ethnic cleansing against the Rohingya have been carried out, as well as showcasing how the Tatmadaw's actions have largely gone unchecked by the international community.

Andrew Selth, a distinguished diplomat, strategic intelligence analyst, and scholar of international security issues, has published over fifteen years of research studying the modern-day security dynamics of Myanmar and its official armed forces, the Tatmadaw. Selth's research reveals that, "There are, in effect, two Tatmadaws. One operates according to formal structures and regulations and places a high value on patriotism, professionalism, and personal integrity... The other Tatmadaw operates from day to day according to a more informal set of rules and practices that allows for considerable flexibility, including in the observance of military directives and humanitarian law."¹⁹² Furthermore, Selth emphasizes the understanding that the Tatmadaw is a "fully functioning military," in that it has a clearly defined organization, division of specialist responsibilities, a hierarchical rank structure, and a chain of command, which allows it to be an effective force that is able to convert its diverse resources into combat power."¹⁹³

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Selth Andrew. "The Rohingya Question: Determining Whom to Hold to Account." In *Interpreting Myanmar: A Decade of Analysis, Australia: ANU Press, 2020* p447.

¹⁹³ Ibid p446.

This effectiveness plays a large role in the human rights violations that are systematically carried out by the Tatmadaw, particularly during operations against ethnic minorities and the Rohingyas, as there is “a high degree of tolerance, at all levels, of egregious human rights abuses.”¹⁹⁴ The degree of tolerance is so high that many abuse observers and activist groups relay the belief that human rights violations in Myanmar are “official policy,” ordered by the Tatmadaw’s high command, and that troops on operations are told to commit atrocities as “deliberate acts of psychological warfare,” to undermine the morale of the opposing forces or to force them to leave contested areas.”¹⁹⁵

If these acts are so widely carried out by members of the Tatmadaw, why has the international community shied away from holding the armed forces accountable? The answer lies in lacking evidence and the difficulty to prove intent; two important factors international law requires before acting. Selth reveals that while it is “not difficult to find evidence of abuses being committed by soldiers and police officers in Myanmar,” it is difficult to find “hard evidence of them specifically being ordered to do so.”¹⁹⁶ This is an important distinction to note regarding the operations of the Tatmadaw and their strategic methodology, that presents a hurdle in outright claiming that systematic state terror is intentionally used by Myanmar’s armed forces against ethnic minority groups and the Rohingya.¹⁹⁷

Political “Reform”

Another factor that plays into the previous lack of action against Myanmar and the Tatmadaw human rights violations is the country’s attempt to present itself as a “reformed” democratic nation, free from military rule. This transition started in 2011, which is often cited as

¹⁹⁴ Ibid p446.

¹⁹⁵ Ibid p447.

¹⁹⁶ Ibid p477.

¹⁹⁷ Ibid p447.

the year of “Myanmar’s turning point,” when President Thein Sein spearheaded a series of reforms, including “granting amnesty to political prisoners, relaxing media censorship, and implementing economic policies to encourage foreign investment.”¹⁹⁸ Additionally, in 2015, Myanmar held its first nationwide, multiparty elections since the country’s shift away from military rule, where Aung San Suu Kyi’s opposition NLD party won a landslide victory by securing a majority in the upper and lower houses of parliament.¹⁹⁹ Suu Kyi, who had already amassed international recognition as the daughter of independence hero General Aung San and a Nobel Peace Prize in recognition of her continuous activism for democracy and human rights, was appointed to the newly created position of state counselor and became the “de facto” head of the civilian government.²⁰⁰ Suu Kyi’s election in 2015 shone as a beacon of hope for comprehensive democratic reforms in the nation, but forces behind the scenes, and perhaps Suu Kyi herself, played a large role in preventing the democratic course Myanmar had claimed to step on.

Research revealed that despite the result of the 2015 elections, the Tatmadaw continued to wield much control, in accordance with the 2008 constitution that safeguarded several provisions ensuring the military’s dominance.²⁰¹ For example, the constitution dictates that 25 percent of parliament’s seats are reserved for the military, and since any changes to the constitution need approval from more than 75 percent of parliament, the military effectively holds veto power over any amendment.²⁰² Additionally, the military’s proxy party, the Union Solidarity and Development Party (USDP), maintained seats in the powerful defense, home affairs, and border affairs

¹⁹⁸ Maizland, Lindsay. “Myanmar’s Troubled History.”

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Ibid.

ministries, and organized a series of demonstrations claiming irregularities in the voter lists used during 2015 elections.²⁰³

Despite the country's best efforts to attempt democratic reforms, the military has continued to wield influence and power in the nation, resulting in continued human rights violations and abuses against the Rohingya. However, it is also important to note that with regard to the Rohingyas, there is a "rare consensus" between the government, armed forces, and even population, that strengthens the abusive agenda against the ethnic group.²⁰⁴ This "unity of attitude" allows the country to prevent acknowledging the human rights violations occurring in its borders, shield the global community from taking a stance against crimes Myanmar's government, armed forces, and population are not willing to admit to in the first place. This behavior has allowed the Rohingya genocide to effectively go unchecked by the international community for numerous years, resulting in the loss of countless lives and a severe lack of accountability for Myanmar's "progressive" attempts to cover it up.

Rohingya Genocide

Reviewing the timeline and severity of abuses against the Rohingya population reveal how the measures taken by the government and military of Myanmar align with the outlined definition of genocide. While the history of abuse against the Rohingya dates back to the 1982 Citizenship Law, and numerous military operations in the 1990's to oppress Rakhine villages, it wasn't until 2017 that the Tatmadaw launched a systematic crackdown on the population, that resulted in pushing out hundreds of thousands Rohingya members from their homes in the northern Rakhine State.²⁰⁵ The basis for this crackdown began in October 2016, when a group of Rohingya fighters

²⁰³ Bynum, Elliott. "Myanmar: At risk of dormant conflicts reigniting" In *Ten Conflicts to Worry About In 2021*, 2021 p12.

²⁰⁴ Selth Andrew. "The Rohingya Question" p448.

²⁰⁵ "The Rohingya: Tracking the History of Today's Refugee Crisis." *The New Humanitarian*, August 24, 2020

in the Arakan Rohingya Salvation Army (ARSA) attempted to organize attacks on border posts in northern Rakhine State in response to the restrictive policies on the Rohingya community.²⁰⁶ The attacks by the ARSA resulted in the deaths of nine border officers and four soldiers, prompting Myanmar's military to retaliate with the crackdown, forcing 87,000 Rohingya civilians to flee to Bangladesh over the next year.

The “exodus,” as it is often referred to, began officially on August 25, 2017, with at least 6,700 Rohingya, including at least 730 children under the age of five, killed in the month after the violence broke out.²⁰⁷ Additionally, despite the government's statements that the loss of life was minimal and that the “clearance operations against the militants” ended after a month, the Human Rights Watch released statistics and satellite data that revealed at least 288 villages were partially or totally destroyed by fire in the northern Rakhine state after August 2017, as shown in *Figure 17*, and that the “situation that led to killings, rapes and gang rapes, torture, forced displacement and other grave rights violations in 2017 remain[s] unchanged.”²⁰⁸

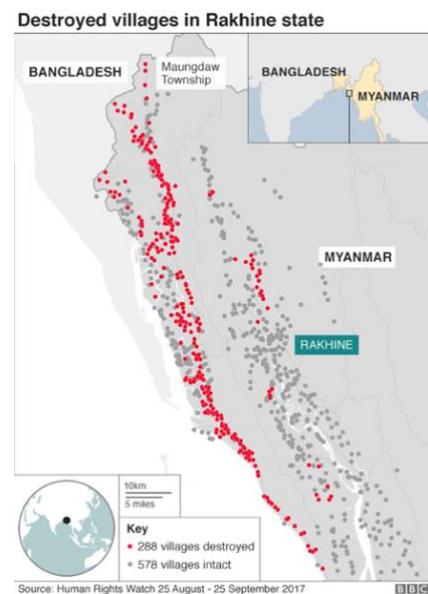


Figure 17

Testimony from Tatmadaw soldiers also reveals the full extent of the crimes carried out by the armed forces against the Rohingya and sheds an incriminating light on the military's systematic genocidal intent. Pvt. Myo Win Tun and Pvt. Zaw Naing Tun, recorded by a rebel militia, became the first members of Myanmar's military to “openly confess” to taking part in what United Nations

²⁰⁶ Ibid.

²⁰⁷ “Myanmar - Rohingya: What You Need to Know About the Crisis.” *BBC News*, January 23, 2020.

²⁰⁸ Ibid.

officials recognize as a genocidal campaign against the country's Rohingya Muslim minority.²⁰⁹ Pvt. Myo Win Tun stated that, "the August 2017 order from his commanding officer was clear... 'Shoot all you see and all you hear.'" Pvt. Myo Win Tun obeyed the command, carrying out the massacre of 30 Rohingya Muslims and burying them in a mass grave near a military base.²¹⁰ In the same month, in a neighboring township, Pvt. Zaw Naing Tun confessed that he and his comrades were directed to follow a nearly identical directive from their superior, "Kill all you see, whether children or adults," and in response Pvt. Zaw Naing Tun and his battalion "wiped out about 20 villages," and then disposed of the murdered bodies in a mass grave.²¹¹ The soldiers also revealed that the crimes they were instructed to carry out through their infantry battalions and other security forces, such as decapitating old men, raping women and young girls, and destroying villages through fire and explosives, were "just a part of Myanmar's long campaign against the Rohingya," which portrayed a "concerted, calculated operation to exterminate a single ethnic minority group."²¹² Pvt. Myo Win Tun also confessed in his video testimony how his commanding officer, Colonel Than Htike, had instructed the battalion to "exterminate" the Rohingya, stating that "I was involved in the killing of 30 innocent Muslim men, women and children buried in one grave."²¹³

The United Nations estimated that as of 2020, 470,000 non-displaced Rohingya still live in Rakhine State, continuously undergoing abuses and human rights violations at the hands of Myanmar's government, which refuses to admit to the atrocities taking place in its borders and carried out by the armed forces of the Tatmadaw. Additionally, investigations by UN agencies

²⁰⁹ Beech, Hannah, Saw Nang and Marlise Simons. "'Kill All You See': In a First, Myanmar Soldiers Tell of Rohingya Slaughter." *New York Times*, September 8, 2020.

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² Ibid.

²¹³ Ibid.

have shown there is an “alarming” rate of malnutrition among children in northern Rakhine, and that the Rohingya civilians still living in northern Rakhine face “heavy restrictions on working, going to school, and accessing healthcare.”²¹⁴ Furthermore, intelligence from fact-finding missions revealed that some 125,000 Rohingya live in barricaded camps in central Rakhine State, which were created by the government to further impose severe restrictions on the Rohingya and bar them from receiving aid or essential resources.²¹⁵

Rohingya Exodus

Over a million Rohingya refugees have fled violence in Myanmar in “successive waves of displacement” since the early 1990s.²¹⁶ However, after the systematic crackdown on August 25, 2017, when violence broke out in Myanmar’s Rakhine State, more than 742,000 Rohingya refugees fled the country to seek refuge in Cox’s Bazar, Bangladesh, which is now home to the world’s largest refugee camp, Kutupalong, joining the some 213,000 Rohingya who had fled to Bangladesh in previous years²¹⁷ The mega-settlement of the Kutupalong Refugee Camp Site has a “larger population than Lyon, France’s third-largest city,” and was built in only five months to accommodate the mass exodus of refugees, leading to a severe lack of developed infrastructure to sustain the congested population, and inevitable overcrowding that exacerbates risks from “landslides, disease outbreaks and tensions within the community.”²¹⁸

The mass exodus and displacement of Rohingya refugees has also resulted in developing new plights to affect their status, such as health concerns and inadequate standards of life. Nutrition surveys conducted in Kutupalong between October 22 – November 20, 2017, revealed a “public

²¹⁴ “The Rohingya: Tracking the History of Today’s Refugee Crisis.”

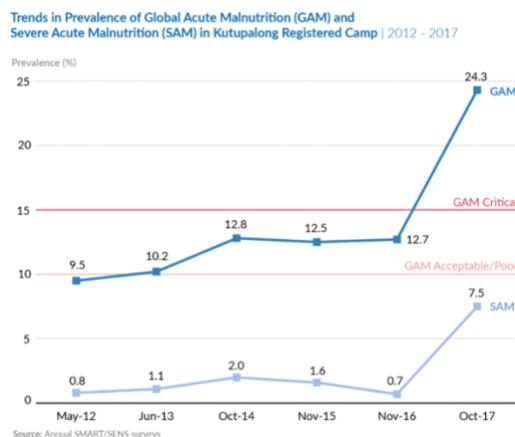
²¹⁵ Ibid.

²¹⁶ United Nations Refugee Agency. “Rohingya Emergency.” *UNHCR*, July 31, 2019.

²¹⁷ Ibid.

²¹⁸ Ibid.

health and nutrition emergency amongst children 6-59 months old,” and, “nearly all indicators highlighted greater levels of vulnerability amongst younger children and refugees who arrived after August 2017.”²¹⁹ The prevalence of acute malnutrition among children 6-59 months exceeds the emergency threshold, as shown in *Figure 18*, particularly in the Kutupalong Registered Camp.²²⁰ The chart displays the data that nearly half of all children aged 6-59 months in the Kutupalong Registered Camp suffer from anemia, highlighting that “an alarmingly low percentage of Rohingya refugee children are consuming a minimum acceptable diet.”²²¹



There is a serious public health and nutrition emergency among all Rohingya children in Cox’s Bazar, which cannot be viewed as separate from the genocide they are fleeing from in Myanmar. The deliberate abuses carried out by the Tatmadaw, intended to kill and remove Rohingya people from Myanmar, has imposed on them experiences that align with the legal criminal definition of genocide, such as “causing serious bodily or mental harm to members of the group,” and “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.”²²² Even while fleeing the direct line of systematic killings and severe human rights abuses carried out by the Tatmadaw, the Rohingya have not regained any measure of safety or security as refugees, but rather are continuing to experience conditions that are further exacerbating their plight.

²¹⁹ Ibid.

²²⁰ Ibid.

²²¹ Ibid.

²²² United Nations. “Genocide Prevention and the Responsibility to Protect.” *United Nations*, 2021.

The Gambia

Situated on the west coast, The Gambia is Africa's smallest non-island country, but considered one of the most densely populated countries in the continent, with a population of 2.5 people.²²³ In The Gambia, the major ethnic groups are similar to those in Senegal, which surrounds the nation on both sides, and consist of the majority Malinke, as well as the Wolof, Fulani (Fulbe), Diola (Jola), and Soninke peoples.²²⁴ The Gambia's unconventional shape and size, as viewed in *Figure 19*, is a result of the country's colonial past and the



Figure 19

territorial compromises made during the 19th century by Great Britain, which controlled the lower Gambia River, and France, which ruled the neighboring colony of Senegal.²²⁵ The Gambia's population is largely Muslim, with a small number of Roman Catholic Christians, and a minimal representation of traditional beliefs.²²⁶

The Gambia became a United Nations Member State on September 21, 1965, after it gained independence on February 18, 1965.²²⁷ There has been increased attention towards the nation after its decision to institute proceedings against Myanmar, alleging violations of the Genocide Convention. As a fairly small nation, both in terms of size and global influence, The Gambia's decision to bring Myanmar in front of the ICJ is both politically and academically intriguing, as many scholars have delved into The Gambia's specific motivations behind this action, as well as

²²³ Gailey, Harry A., Clark, Andrew and Forde, Enid R.A. "The Gambia." *Encyclopedia Britannica*. 2020

²²⁴ Ibid

²²⁵ Ibid.

²²⁶ Ibid.

²²⁷ Ibid.

inquired whether The Gambia's personal history with human rights issues is related to their modern-day decision.

History

The Gambia achieved independence from Great Britain in 1965, becoming one of the last of Britain's West African colonies to attain independence.²²⁸ The political parties that had formed and exerted pressure on the British to gain independence were successful, and after gaining independence from the Commonwealth in February 1965, The Gambia went on to officially become a republic on April 24, 1970.²²⁹ The first president of The Gambia was Sir Dawda Jawara, who was head of the People's Progressive Party (PPP) at the time.²³⁰ The Gambia is no stranger to political coups, and experienced its first attempt to overthrow the government in 1981, however, the attempt was quickly put down with the aid of Senegalese troops.²³¹ As a result, leaders of both countries created the confederation of Senegambia, which called for each state to retain independence in most areas, but military and economic resources were to be integrated.²³² A Senegambian executive and legislature were also established in response to this plan, but the confederation was short-lived, and dissolved in 1989.²³³

However, in July of 1994 a military group, led by Captain Yahya Jammeh, staged a coup, justifying their actions of seizing power by citing the "corruption and mismanagement of Jawara and the PPP."²³⁴ However, this time the Senegalese government did not intervene and assist in preventing the coup, as they had done for the attempt in 1981, resulting in Jammeh gaining

²²⁸ Edie, Carlene J. "Democracy in The Gambia: Past, Present and Prospect for the Future." *Africa Development / Afrique Et Développement*, vol. 25, no. 3/4, 2000, p162.

²²⁹ Gailey, Harry A., Clark, Andrew and Forde, Enid R.A. "The Gambia."

²³⁰ Ibid.

²³¹ Ibid.

²³² Ibid.

²³³ Ibid.

²³⁴ Ibid.

power.²³⁵ Although the military leaders promised a return to civilian rule “once corruption had been eliminated,” any dissent was brutally repressed and political activity was banned until August 1996.²³⁶ When presidential elections were eventually held in early 1997, Jammeh was elected president, having then retired from the military, and his political party, the Alliance for Patriotic Reorientation and Construction (APRC), dominated the National Assembly.²³⁷

The APRC operated with the textbook guide of military takeovers, initially promising that “a dictatorship would not be imposed in the country,” but demonstrating the contrast, as they seized power, suspended the Constitution, banned all political parties, and imposed a curfew.²³⁸ Additionally, the APRC arrested political opponents and banned the press, arresting journalists and news editors, and exerting an authoritarian rule over the nation.²³⁹ Jammeh served as the second president of Gambia from November 6, 1996 to January 19, 2017, winning re-election in 2001, 2006 and 2011.²⁴⁰ Jammeh’s time in office was synonymous with consistent human rights violations and oppression, and his foreign policies resulted in further plunging The Gambia’s condition, as he “strained relationships” with the neighboring country of Senegal, and withdrew The Gambia from the Commonwealth of Nations, resulting in decreasing The Gambia’s foreign aid opportunities, and exuding an isolationist and antagonistic stance from the nation.²⁴¹

Yahya Jammeh finally stepped down as the president in 2017, after 22 years of rule, admitting defeat to Adama Barrow, who had won the 2016 elections.²⁴² Jammeh’s departure is considered “the first democratic transition of power the Gambia has seen.”²⁴³ Though it is

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ Ibid.

²³⁸ Edie, Carlene J. “Democracy in The Gambia: Past, Present and Prospect for the Future.” p182.

²³⁹ Ibid p182.

²⁴⁰ Gailey, Harry A., Clark, Andrew and Forde, Enid R.A. “The Gambia.”

²⁴¹ Ibid.

²⁴² Maclean, Ruth. “Yahya Jammeh Leaves the Gambia After 22 Years of Rule”. The Guardian, January 21, 2017.

²⁴³ Ibid.

important to note that Jammeh had attempted to reject the election results and declared a national state of emergency to remain in power, but the threat of a regional military conflict swayed his control, in the form of the Guinean president, Alpha Condé, and the UN's regional chief, Mohamed Ibn Chambas, who had remained in the capital with a regional force "positioned to move in if Jammeh changed his mind and refused to cede power."²⁴⁴ As Jammeh and his family went into political exile, Barrow spoke up on the state of the Gambia's future, promising a democratic and open society, and urged Gambians to return home to usher in the new dawn: "to all of you who were forced by political circumstances to flee the country, you now have the liberty to return home."²⁴⁵

Global Role

In context of The Gambia's history, it seems evident that the country has failed to maintain a consistent foreign policy for much of its independent existence, and observation showcases that the country's foreign policy has always been "greatly influenced by the personalities" of its political leaders.²⁴⁶ For example, President Jawara, due to his key role in the establishment of the independent republic in 1970, was largely influential in The Gambia's initial start as an actor on the global stage, and, therefore, his abrupt removal from power dominated Gambian politics and the nation's foreign affairs attitude for many decades, as the coup was largely viewed by Gambians and the international community as unconstitutional and problematic.²⁴⁷

Subsequently, President Jammeh also exerted powerful influence over the nation's foreign policies. His entrance in office was parallel with the state's economic crises, and poverty

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ Jannah, Fatou. "The Gambia's Foreign Relations: Does Leadership Make a Difference?" *JSTOR, Journal of African Foreign Affairs*, vol. 4, no. 1/2, 2017, p25.

²⁴⁷ Ibid p25.

“remained an acute problem” for The Gambia in the 1990s, even resulting in the state being ranked 161st out of 170 countries on the UNDP Human Development Index rankings as a least developed country.²⁴⁸ Furthermore, Jammeh’s dictatorial nature of his regime, often described as “a personal fiefdom in which he alone had the final say,” provided very little roles for experts or advisors, cementing Jammeh’s personal agenda and influence over the nation’s foreign policies, which were created on his terms, to benefit him and his authoritarian vision of what The Gambia should look like.²⁴⁹ For example, Jammeh severing ties with mainland China in 1995 was “not done through any consultation,” and considered a poor move by political analysts, due to China being one of The Gambia’s biggest donors, “especially in its health sector,” but Jammeh silenced any dissent with violent means and maintained his personal agenda regarding The Gambia’s international relations.²⁵⁰

With a history such as this, questions have risen regarding The Gambia’s role in the ICJ proceedings against Myanmar, and the decision for The Gambia to highlight and publicly condemn Myanmar’s human rights violations. There has also been skepticism regarding the Gambia’s own human rights violations, under the Jammeh regime, and the country’s own past concerning ethnic tensions and oppression. For example, as recent as 2016, Jammeh threatened to eliminate the Mandinka ethnic group at a political rally, arguing they were “enemies, foreigners” and wishing to place them “where even a fly cannot see.”²⁵¹ The Gambia’s own list of human rights violations includes, “government’s harassment and abuse of its critics; torture, arrest and detention, enforced disappearance of its citizens; and executions as a result of a flawed, problematic, and politically

²⁴⁸ Ibid p25.

²⁴⁹ Ibid p26.

²⁵⁰ Ibid p26.

²⁵¹ Ibid p34.

charged legal process.”²⁵² However, it seems that the results of the 2017 election have served to change The Gambia’s political and international path, which can be credited to Barrow’s entrance as The Gambia’s third president.

Abdoulie Fatty, a Barrister on the Supreme Court of The Gambia provided some perspective on The Gambia’s role in the ICJ case, as well as shed valuable insight on the motivations behind The Gambia’s decision to institute proceedings against Myanmar. Fatty stated that the case was, “the work of fate, perhaps, or some bit of a coincidence,” as when the Justice Minister of the Gambia, Abubacarr Tambadou, visited Cox’s Bazaar in Bangladesh, he was “troubled by the severity of the atrocities that he saw on the ground.”²⁵³ Fatty emphasized that Tambadou had previously worked on the International Criminal Tribunal for Rwanda, and that witnessing the plight of the Rohingya people in the refugee camp in Bangladesh “affected his conscience,” which sparked the beginning of The Gambia taking the case to the ICJ against Myanmar.²⁵⁴ Fatty also underlined factors that resulted in “The Gambia, [believing] that as a party, it had a legal, moral and political responsibility to actually act on behalf of the Rohingya, who perhaps, at the time, could not speak for themselves or could not do this or on their own behalf.”²⁵⁵

One factor that resulted in this belief by The Gambia, was the recognition that Gambia is a member of the Organization of Islamic Cooperation (OIC), and as the Rohingya are persecuted in part due to their religious faith as a Muslim ethnic group, The Gambia felt personally affected by that aspect of their plight due to its own role as a Muslim majority country and membership in the OIC.²⁵⁶ However, Fatty also made a point to emphasize that, “the case is also symbolic because

²⁵² Ibid p34.

²⁵³ Cochrane, Logan & Fatty, Abdoulie. “A Gambian Perspective on The Gambia v. Myanmar Case on the Crimes of Genocide at the ICJ.” *NokokoPod, Hamad bin Khalifa University*, January 23, 2020, p3.

²⁵⁴ Ibid p3.

²⁵⁵ Ibid p5.

²⁵⁶ Ibid p5.

Gambia is a very small country,” and elaborated by explaining,” in context of international geopolitics and international discourse, it is the last country that one would expect to actually take a leading role in the crusade, of what it is aimed to be, an assault on the conscience of the international community as a whole.”²⁵⁷ For The Gambia, this case represents an opportunity to step back into the international community as a participating member, that openly stands on the democratic side of things. Fatty made a point to address the “irony” of The Gambia’s past as well, and demonstrated that The Gambia’s efforts to obtain justice for the Rohingya people from the Myanmar government is a positive step for The Gambia to also look inwardly at the Gambian victims who had experienced human rights violations and ensure they were granted justice as well: “The same effort internationally that The Gambia has generated in trying to pursue justice for the Rohingya people...[is related to the efforts of] The Gambia government on behalf of victims of human rights abuses and violations in The Gambia. To really reinforce this point, sometime around [summer] of last year, some individuals, members of the military and the police intervention force testified before the TRRC [in The Gambia].”²⁵⁸

With this we can see that The Gambia is attempting to both obtain justice for the Rohingya people, but also, arguably, attempting to craft a new global role for itself, in its efforts to transition from Jammeh’s oppressive and undemocratic rule. The ICJ case allows The Gambia to step onto the international stage as not just a Member State upholding its international responsibilities, but also as a nation setting a precedent to address and confront injustices both externally and internally.

²⁵⁷ Ibid p5.

²⁵⁸ Ibid p9.

Reviewing the ICJ Proceedings

On November 11, 2019, The Gambia instituted proceedings against Myanmar before the International Court of Justice (ICJ). The International Court of Justice is the principal judicial organ of the United Nations, established by the United Nations Charter in June 1945, and is composed of 15 judges that are elected for a nine-year term by the General Assembly and the Security Council of the United Nations.²⁵⁹ The Court has a “twofold role” in the international judicial system: “first, to settle, in accordance with international law, legal disputes submitted to it by States (its judgments have binding force and are without appeal for the parties concerned); and second, to give advisory opinions on legal questions referred to it by duly authorized United Nations organs and agencies of the system.”²⁶⁰ Additionally, as Article IX of the Genocide Convention declares that any dispute between states that have ratified the Convention should be “resolved by the ICJ,” both The Gambia and Myanmar, as state parties to the Genocide Convention, must comply with the ICJ’s authority to review and issue provisional measures regarding the case.²⁶¹

Provisional measures can be considered as the “equivalent of injunctions, or even, temporary restraining orders against a country,” and are often requested when one state believes that there is an “ongoing legal violation” from which it or the situation will continue to suffer harm while the Court considers the underlying claims.²⁶² In the case of *The Gambia vs Myanmar*, The Gambia fears further harm to the Rohingya population and asked the Court to authorize the following provisional measures:

²⁵⁹ “Application of the Convention on the Prevention and Punishment of the Crime of Genocide” p3.

²⁶⁰ Ibid p3.

²⁶¹ Rist, D Wes. “What Does the ICJ Decision on The Gambia V. Myanmar Mean?” *American Society of International Law*, 2020.

²⁶² Ibid.

- “Require Myanmar to immediately stop all acts that could possibly be construed as violations of the Genocide Convention;
- Require Myanmar to exert control over any non-state actors (like militias or paramilitary groups) that might also be committing such acts;
- Require Myanmar to preserve evidence (and explicitly forbid it from destroying evidence) which might relate to genocidal acts;
- Order both The Gambia and Myanmar not to do anything that would further ‘aggravate or extend the existing dispute’;
- Require both states to provide regular written reports to the Court about their compliance with any provisional measures the Court might order; and
- Require Myanmar to cooperate with the United Nations and any of its bodies that might seek to investigate ongoing violence related to the case.”²⁶³

In the January 23, 2020 hearing the Court did not determine that the nation of Myanmar had committed genocide, requiring additional hearings and reports to be submitted before issuing a decision on the case, however, the Court did conclude that the conditions required by its Statute to indicate provisional measures are met and thereby ordered Myanmar to, “in accordance with its obligations under *the Convention on the Prevention and Punishment of the Crime of Genocide*, in relation to the members of the Rohingya group in its territory, take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention.”²⁶⁴ The Court also stated that, “The Republic of the Union of Myanmar shall, in relation to the members of the Rohingya group in its territory, ensure that its military, as well as any irregular armed units which may be directed or supported by it and any organizations and persons which may be subject

²⁶³ Ibid.

²⁶⁴ “Application of the Convention on the Prevention and Punishment of the Crime of Genocide” p3.

to its control, direction or influence, do not commit any... incitement to commit genocide, of attempt to commit genocide, or of complicity in genocide.”²⁶⁵ The ICJ's orders are binding on Myanmar and create “legal obligations that must be enforced.”²⁶⁶ Additionally, the Court’s decision to authorize these provisional measures is being recognized as a “momentous and unanimous decision,” by the international community, and global scholars have weighed in emphasizing that a ruling against Myanmar by the ICJ could not only hurt its international reputation, but also establish an important legal precedent.²⁶⁷

Current Case Complexities

However, the proceedings of the case have experienced present day issues, most notably in the form of the global COVID-19 health pandemic and the 2021 military coup in Myanmar that has once again intensified internal conflicts in the nation and predicts trouble regarding Myanmar’s cooperation with the ICJ proceedings. In response to the COVID-19 outbreak, the Court decided, on May 26, 2021, to approve the request of The Gambia and extend from “23 July 2020 to 23 October 2020” and “from 25 January 2021 to 23 July 2021” the time-limits for the filing of the Memorial of the Republic of The Gambia and the Counter-Memorial of the Republic of the Union of Myanmar for the case concerning the Genocide Convention.²⁶⁸ While extending the pending case timeline in response to the unprecedented COVID-19 crisis was a fairly manageable concern for the ICJ to combat regarding the case, the military coup that assumed power in February 2021 adds a deeper level of complexity to the issue.

²⁶⁵ Ibid p4-5.

²⁶⁶ “The ICJ Ruling: On Legal Efficacy.” *Dhaka Courier* January 31, 2020, NA. *Gale in Context: Global Issues*.

²⁶⁷ Ibid.

²⁶⁸ “Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) | Extension of the time-limits for the filing of the initial pleadings.” *ICJ Press Release*, May 26, 2020

On February 1, 2021, the Tatmadaw executed a successful military takeover, in response to the 2021 elections that granted Aung San Suu Kyi and her National League for Democracy (NLD) party a landslide victory.²⁶⁹ The military justified its actions by claiming that the election results were “plagued by irregularities,” and warning that the country’s constitution could be “revoked” if not respected.²⁷⁰ During the coup, the military carried out early morning raids detaining elected NLD officials, and declared a state of emergency for one year, while simultaneously announcing that they would be reconstituting the Union Election Commission and holding new elections.²⁷¹ Naturally protests broke out following these undemocratic actions from the Tatmadaw, but they held firm to the stance that their seizure of power is allowed under the 2008 military-drafted constitution, which states that a military takeover is justified in situations where the country’s “sovereignty or national unity are threatened.”²⁷²

It is imperative to recognize that the Tatmadaw’s actions have sparked a resurgence of violence and civil disputes in Myanmar’s borders, as observed by the statistics shown in *Figure 20*, as almost 3,000 civilians have been arrested for protesting the military takeover, while close to 500 civilians have been killed, as of March 2021.²⁷³ By detaining not just members of the NLD party, but also political activists and protesting civilians, the military is attempting to “undermine the ability of the public” to organize in protest and demand democratic accountability.²⁷⁴ Furthermore, as demonstrations by the Burmese diaspora have increasingly been reported in “Thailand, Japan, and the United States,” political experts and analysts predict that, as 2021 progresses, the threat that dormant armed conflicts could reignite remains large, due to the

²⁶⁹ “Myanmar Coup Explained.” *Khaleej Times*, March 19, 2021.

²⁷⁰ Bynum, Elliott. “Myanmar: At risk of dormant conflicts reigniting” p12.

²⁷¹ Ibid p12.

²⁷² Ibid p12.

²⁷³ “Myanmar Coup Explained.” *Khaleej Times*.

²⁷⁴ Bynum, Elliott. “Myanmar: At risk of dormant conflicts reigniting” p12.

widespread reach of the Tatmadaw’s actions on both internal and external Burmese civilians, along with the increased oppression of ethnic minority groups in the Myanmar borders.²⁷⁵ As the civil crisis comes in the midst of the ICJ case, observers are concerned about whether Myanmar will continue to comply with the provisional measures outlined by the Court and meet future deadlines for review. This is certain to prolong the plight of the Rohingya people, and worsen their current conditions, which have been exacerbated due to the COVID-19 pandemic and the lack of restraints the Tatmadaw now face to fully exert their genocidal actions.

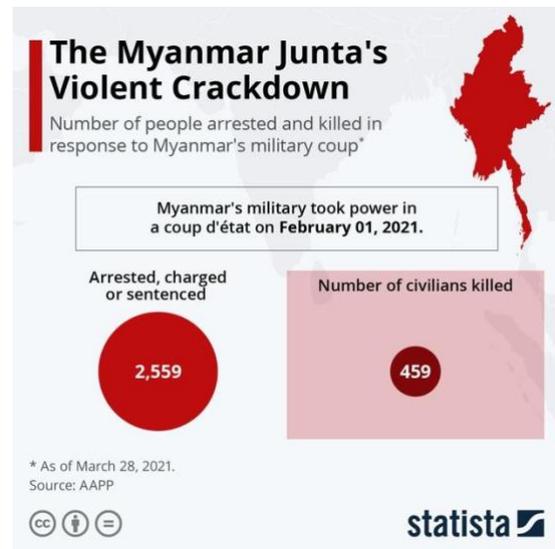


Figure 20

Obligations of the International Community for Myanmar

While the ICJ case, on behalf of the Rohingya people, has broken important international precedents, and the role of The Gambia for initiating the process cannot be understated, it is now imperative for the rest of the international community to acknowledge the atrocities being committed by the Myanmar military and government against the Rohingya, and uphold their duty as signatories to the Genocide Convention to openly condemn this crime. Even the Rohingya themselves have been imploring states to act on their behalf with the ICJ case, as the Court will likely recognize the greater extent of the crimes if multiple Member States uphold their international duties and vocally support the Rohingya people.²⁷⁶

²⁷⁵ Ibid p12.

²⁷⁶ Ibrahim, Azeem. “The UK should join the ICJ case against the Myanmar genocide.” *Arab News* December 31, 2020. *Gale in Context: Global Issues*.

In fact, many global actors and scholars have been vocal about the need for the UK to step in and take a more proactive role regarding this crisis, by lending its full backing to the ICJ proceedings by The Gambia.²⁷⁷ Many cite that the UK, additionally, has a greater responsibility to step in, as Myanmar is a former British colony, and the British state does, therefore, “bear some responsibility for the manner in which borders were drawn” when the numerous countries under it received independence, resulting in the ethnic clashes that have continued for decades after.²⁷⁸ Fortunately, this step seems to have become more likely, as “over 100 members of parliament” signed a letter addressing that the UK “should be joining the legal action led by The Gambia.”²⁷⁹ Notably, among the signatories was the former UK Foreign Secretary, Rt Hon Jeremy Hunt MP, which lends further weight to the initiative by the British parliament.²⁸⁰ Following this, the European Union (EU) has also considered authorizing a human rights monitoring mission, in the form of a six-month review process, on whether to strip Myanmar of its “Everything but Arms” designation, due to the intensity of the crimes committed against the Rohingya.²⁸¹ However, the EU monitoring mission was stalled due to Covid-19, but in September 2020, at the Human Rights Council in September, the OIC and EU jointly called for Myanmar to “ensure accountability, comply with the ruling of the International Court of Justice on the prevention of genocide, allow full and safe access to UN agencies, and mandate holders and human rights mechanisms.”²⁸²

The atrocities committed against the Rohingya people are unforgivable and inhumane and require adequate justice. The ICJ case is one step towards obtaining that justice, but as demonstrated through reviewing both the history of Myanmar and The Gambia, prompt

²⁷⁷ Ibid.

²⁷⁸ Ibid.

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ “World Report 2021: Myanmar.” *Human Rights Watch*, 2021.

²⁸² Ibid.

accountability and collective action by the international community is necessary to address the genocide being carried out by Myanmar and alleviate the plight of the Rohingya people. Additionally, the outbreak of the COVID-19 pandemic has only further negatively impacted and exacerbated the conditions of the Rohingya refugees, presenting the very real fear that by the time the ICJ has reviewed and ruled on the case, the Rohingya people may no longer be around to witness the result and gain justice for the crimes and systematic abuses committed against them. This case requires a higher level of global attention and action, to both preserve the precedents set by the international legal organizations, and, just as importantly, to protect and save an ethnic group that has been brutally victimized for far too many years. As stated by the United Nations' Universal Declaration of Human Rights "All human beings are born with equal and inalienable rights and fundamental freedoms. The United Nations is committed to upholding, promoting, and protecting the human rights of every individual."²⁸³

²⁸³ United Nations. "UN Office on Genocide Prevention and the Responsibility to Protect."

Reforming the Genocide Convention

“A sad truth of human nature is that it is hard to care for people when they are abstractions, hard to care when it is not you or somebody close to you. Unless the world community can stop finding ways to dither in the face of this monstrous threat to humanity those words “*Never Again*” will persist in being one of the most abused phrases in the English language and one of the greatest lies of our time.”

— Paul Rusesabagina

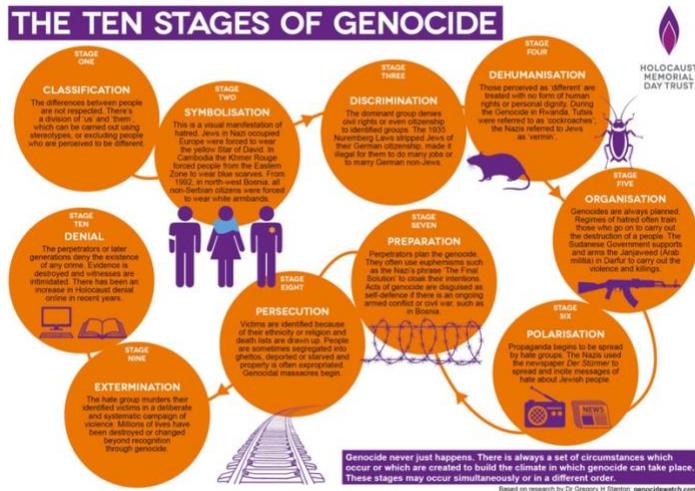
Seven decades have passed since the drafting of the Genocide Convention, but it has yet to live up to its promise of preventing crimes of genocide as they occur and then effectively punishing them afterwards. Cambodia, Rwanda, Yugoslavia, Myanmar, and the countless cases of systematic persecution and violence throughout the pages of human history and around the world today are proof of this disappointing fact. Why does the Genocide Convention not work as it is supposed to? Numerous international law scholars have dissected and analyzed the Genocide Convention since its inception, during moments of crisis, and as the international community has watched tribunals condemning persecutors *after* millions of lives had been lost with mounting frustration; “The Convention establishes two mandates: The prevention and punishment of the crime of genocide. The former has gone unfilled.... prevention of this extreme violence has eluded the international community for decades.”²⁸⁴ There seems to be a consensus surrounding core flaws in the Genocide Convention, such as the necessity to prove intent before responding, the lack of impactful transformative justice measures dictated by the Convention, as well the lackluster prevention mechanisms, which allow tragedy after tragedy to occur. These critical flaws have cemented the Genocide Convention to function as a hallow deterrent, with persecutors avoiding clear-cut statements that showcase intent, and allowing continued structural violence and abuse against targeted groups. Furthermore, with limited vision towards transitional justice, officials and perpetrators alike are able to exploit the Convention to their ends, effectively diminishing their crimes and avoiding the label of genocide and international legal prosecution. The Genocide Convention, if it hopes to live up to the promise of preventing and persecuting the crime of genocide *needs* to strengthen its clauses and structures to actively be utilized as a legal instrument capable of upholding justice and security for all in the global community.

²⁸⁴ Karazsia. “An Unfulfilled Promise.” p28.

Education

“Education is, quite simply, peacebuilding by another name. It is the most effective form of defense spending there is.” — Kofi Annan, Seventh Secretary-General of the United Nations.

At this point it would be beneficial to circle back to the initial definitions we explored surrounding the crime of genocide, in particular, Stanton’s 10 Stages of Genocide, shown again in *Figure 21*.



The final stage, *denial*, is essential to any conversation surrounding critique and reform of the Genocide Convention, as it lies at the crux of why the Convention has continuously failed. Stanton attests this, with the argument that the denial stage is often

Figure 21 deliberately overlooked, despite holding the central piece in understanding why genocides are still able to occur, decade after decade. During the denial stage, as mentioned above, the genocide and its crimes are often “swept under the rug,” with copious amounts of blame shifting and dodging responsibility by both perpetrators and witnesses, allowing the cycle to remain open and at constant risk of repetition.²⁸⁵

Genocide denial is no new phenomenon, and scholars have spent decades analyzing the lasting impacts that denial plays in the genocide cycle, as it is continuously an obstacle to “meaningful reconciliation” and “detrimental to peace and justice in societies that have a legacy of atrocities.”²⁸⁶ Furthermore, genocide denial is often as systematic as the discrimination and violence, as genocide deniers “negate the facts of history... manufacture doubt, seed discord and

²⁸⁵ “Ten Stages of Genocide” *Holocaust Memorial Day Trust*. p5.

²⁸⁶ “The Role of Education in Combatting Genocide Denial.” *Global Centre for the Responsibility to Protect*. 2021.

mistrust... and create conditions that may lead to the recurrence of atrocities.”²⁸⁷ Genocide denial doesn’t just minimize or misconstrue the “scale and severity of the crimes committed,” but also contributes to the “dehumanization of survivors and victims,” preventing them from gaining legal or emotional justice, and hindering transitional justice and healing measures for the communities affected by the crimes.²⁸⁸

So how does one truly address the crime of genocide and attempt to halt the atrocities before they occur? Especially when taking into account the increased usage of technology and globalized social media platforms that allow a broader range of unregulated communication, which are being increasingly used to “contradict, distort or entirely deny genocides and spread hateful messages that may influence offline violence,” contributing heavily to the cycles of genocide and violence across the globe.”²⁸⁹ Education is the prominent answer, and plays perhaps one of the most important roles in preventing genocide denial through providing a comprehensive forum through which the global community can effectively recognize and address past atrocities while also “promoting the knowledge, skills, values and attitudes that can help prevent future identity-based violence.”²⁹⁰ Numerous studies have shown that “countries with a higher level of accessible education are less likely to commit acts of mass violence or acts of genocide,” reinforcing the theory that proactive education and coverage of the crime of genocide and previous genocides will thereby “educate a population to the point where such acts are statistically less likely to occur.”²⁹¹

Unfortunately, most states and institutions lack sufficient education regarding the subject of genocide, and when the topic is covered, is it often limited to coverage of the Holocaust only,

²⁸⁷ Ibid.

²⁸⁸ Ibid.

²⁸⁹ Ibid.

²⁹⁰ Ibid.

²⁹¹ McCormick, Christina. “GENOCIDE EDUCATION: PREVENTING FUTURE ATROCITIES The Role of Education in the Prevention of Mass Atrocities.” *George Mason University*. 2019 p4.

providing a severe dismissal of the genocides that have occurred since, and offering a limited scope through which students and communities can understand the crime of genocide and the many forms it takes. Even in the United States the Holocaust is the most widely studied genocide, and while there are justified reasons for why the Holocaust is the primary education students receive regarding crimes of genocide, such as being a “cataclysmic event” that paved the way for the establishment of the Genocide Convention, and “one of the most well documented historical events in the history of humanity,” the lack of education on other genocides is troubling and directly contributes to the rise in violence and genocide across the world since the Holocaust.²⁹²

For example, since WWII, the following countries have experienced cases of genocide, human rights violations, and crimes against humanity: “Guatemala (1960-1996); Indonesia (1965-1966); Bangladesh (1971); Bangladesh (1971); Burundi (1972 & 1993); East Timor (1975 – 1999); Cambodia (1975-1979); Iraq (1986-1989); Somalia (1988-1991); Nuba Mountains of Sudan (1989-1995); Rwanda (1994); Bosnia (1995); Democratic Republic of the Congo (2002-2003), Darfur (2003-Present), and Myanmar (2017-Present),” yet rarely any, if at all, are known by the general populace.²⁹³ Perpetuating ignorance of genocide plays a role in perpetuating the genocide itself, whether it’s avoiding learning about a historical case or an ongoing tragedy, as Elliot Eisner, esteemed professor at Stanford Graduate School commented, “...what schools do not teach may be as important as what they do teach.... because ignorance is not simply a neutral void; it has important effects on the kinds of options one is available to consider, the alternatives that one can examine, and the perspectives from which one can view a situation or problem. The absences of

²⁹² Ibid p12.

²⁹³ Totten, Samuel. “Addressing the Null Curriculum: Teaching About Genocides Other than the Holocaust.” *Social Education*, vol. 65, no. 5, Sept. 2001.

a set of considerations or perspectives or the inability to use certain processes for appraising a context biases the evidence one is able to take into account.²⁹⁴

When our educational institutions fail to teach about the realities of genocides, we cling on to ignorant biases when faced with the information later on, feeding into the cycle of denial and perpetuating further violence and injustice, ensuring that the genocide continues on. Education can play a critical role, not just in preventing genocide, but also by providing a foundational understanding of what genocide looks like and how we can stop it. To be fair, international institutions do understand the necessity of education for effective genocide prevention. For example, the 2014 United Nations Security Council Resolution 2150 “Recommitment to Fight Against Genocide,” or the 2015 Human Rights Council Resolution A/HRC/28/L.25 highlight and reaffirm the importance of education as a means to raise awareness about the causes, dynamics and consequences of genocide.²⁹⁵ However, the prevention element of the Genocide Convention will continue to fail the world until foundational educational initiatives are comprehensively established and circulated universally, to curb the advancements of denial, misinformation, and flawed interpretations of the scores of genocides that have occurred and are currently on-going. Campaigns and educational programs that discuss cases of genocides beyond just the Holocaust are critical and necessary to help broaden the international community’s understanding to the crime of genocide, in order to bolster both awareness and prevention, so that the Genocide Convention can actually fulfill its promise.

²⁹⁴ Ibid.

²⁹⁵ Ibid.

Redefining Genocide and Intent

“Genocide is not just a murderous madness; it is, more deeply, a politics that promises a utopia beyond politics - one people, one land, one truth, the end of difference. Since genocide is a form of political utopia, it remains an enduring temptation in any multiethnic and multicultural society in crisis.” – Michael Ignatieff. As discussed above, the inclusion of *intent* inherently weakens the Genocide Convention, opening it to loopholes and exploitation, and lessens the definition of genocide as a two-prong process, when really, genocide as a crime does not materialize into being simply after intent has been transparently vocalized, as argued in Stanton’s Ten Stages of Genocide, which can be witnessed through countless genocides in history, such as analyzed in the Holocaust, Cambodia, the former Yugoslavia, Rwanda, and Myanmar. The definition of genocide in the Convention employs the deliberate use of the word “intent” when establishing the parameters of the crime: “Any of the following acts committed with *intent* to destroy, in whole or in part,” however, despite the United Nations’ attempts to establish a precise definition to ensure the crime could be quantified in order to prevent and punish, the Convention’s definition has, in actuality, only further complicated things.²⁹⁶

As noted above, most cases of genocide are met with denials, often through the following two types of claims: “(1) that the events being called genocide are not happening or did not happen at all or (2) that they are or were something other than genocide.”²⁹⁷ While both require a “falsification of facts,” it’s important to note that, as the current definition of genocide, and, in particular, the intent component of genocide, stand, that the second form claim is often extremely effective, “because it does not rely on as extreme a falsification of facts,” and typically approaches

²⁹⁶ UN General Assembly, “Convention on the Prevention and Punishment of the Crime of Genocide,” *United Nations*, 1948.

²⁹⁷ Theriault, Henry C. “Genocidal Mutation and the Challenge of Definition.” *Metaphilosophy* 41, No. 4 (2010) p483.

the denial with the argument that the genocide does not fit the definition outlined in the Genocide Convention; this line of denial is often referred to as “definitional denial” or “definitionalism” and has gained greater frequency and prominence since the 1990s, even after the ICTY’s and ICTR’s efforts to expand on the intent element for the crime of genocide.²⁹⁸ Perpetrators engage in semantics charades and cite national security and preservation, absolving themselves from the atrocities and evading persecution.

The necessity of intent for the crime of genocide *can* be beneficial, in that the creators of the Genocide Convention hoped that tangible intent would be enough to condemn a perpetrator, before violence would ever occur, but the decades since the Conventions’ establishment has disproven this hope, revealing an urgent need to evolve with the times and realities and install definitions that accurately describe cases of genocide and effectively allow legal action to prevent and punish them.²⁹⁹ For example, Siswo Pramono, the Ambassador of Indonesia to Australia, authored a paper entitled “An Account of the Theory of Genocide” with comprehensive suggestions for redefining the international legal definition of the crime of genocide. Pramono firstly argues that the definition of genocide should be “end-oriented,” meaning that “a standard of knowledge on the course and outcome of genocidal acts should be introduced to ensure genocidal acts can actually be punished,” deviating from the previous methods of more contextual persecution of crimes of genocide, as seen through the ICTY and ICTR.³⁰⁰ Pramono also critiques that “the current political and legal system to deal with genocide is best described as ‘paralysis by design,’” and that there is a necessity for a switch from the current a “top-down approach” led by states in favor of a “bottom-up resistance” against the crime, which should be organized and

²⁹⁸ Ibid p485.

²⁹⁹ Schertow, John. “The Need to Redefine Genocide.” *Intercontinental Cry*. 2007.

³⁰⁰ Ibid.

punished by civil society.³⁰¹ The argument of reclaiming power of punishment to the populace actually affected by the crime is compelling, and one that works in tangent with greater education surrounding the crime as well.

Pramono also introduces, in his words, a more realistic definition of genocide. Contrary to the definitions provided by Lemkin and Stanton thus far, Pramono chooses firstly to classify genocides based on *type*, with the follow five categories: “Progressive (towards the ‘classless’

Table 1: Gradient of genocidal criminality

	First Degree	Second Degree	Third Degree
Mental Element (intent or knowledge on genocide)	+	-	-
Material Elements (genocidal acts)	+	+	-
Destruction of a human group in whole or in part	+	+	+

Note: + = existence of clear evidence; - = lacking of clear evidence

society), Reactionary (towards the ‘racially pure’ state or ‘common marketisation’ of the world), Developmental (eliminating ‘backward’ peoples and their

economies), Retributive (taking revenge); and Hegemonic (seizing and holding power.)”³⁰² After having identified the various types of genocides, Pramono outlined a “gradient of genocidal criminality,” as shown in *Figure 22*, which showcases a multi-layered chart in an effort to curb

Figure 22 excuses from prospective perpetrators. As shown, the chart attempts to discern the various aspects of the crime, including the mental element, or intent, of the perpetrators, the material acts that occurred, and the level of destruction, giving all elements an equal weight for judgement and persecution, something the current definition stalls due to the intent prerequisite.³⁰³

³⁰¹ Ibid.

³⁰² Ibid.

³⁰³ Ibid.

There is no doubt that the definition of genocide is outdated and ineffective. Scholars, victims, and even perpetrators have highlighted the shortcomings and defects in the current definition, which impresses the necessity for multi-layered amendments to ensure the Genocide Convention gains efficacy and credibility and acts as an actual deterrent for the crime. Both Stanton's Ten Stages of Genocide, along with Pramono's five categories and gradient of criminality would be valuable additions to the definition of genocide, as they dissect and layout the crime across numerous layouts, ensuring that perpetrators find little room to wiggle out of their crimes. The foundation to any solution lies in the effective identification of its problem. In the case of genocide, the definition has been ineffective for far too long, and demands critical review, reform, and advancement to adequately address crimes of genocide, before, when, and after they occur, in order to terminate all transgressions effectively, so that "Never Again" truly becomes a reality.

Continuous Justice

"Concepts of justice must have hands and feet or they remain sterile abstractions. The hands and feet we need are efficient means and methods to carry out justice," – Warren E Burger. Merely educating the globe and updating definitions is not enough to effectively combat genocide, not when humankind has spent centuries trying to eradicate each other. Though repetitive, the subject of denial is a consistent one when discussing genocide, as the crime exists so long as people choose to pretend it doesn't. When scholar Ernest Renan said, "historical amnesia" was necessary to "the building of a nation," recent developments in human rights and transitional justice have actually shown a turn towards collective remembrance and memory work for nation building,

particularly in the aftermath of conflict and tragedy.³⁰⁴ Strategies and practices such as, “truth Commissions, trials, administrative reorganization, memorial commemorations, and reparations,” are an active process of “moral and social repair” in the wake of genocide, violence, and human rights abuses, lending themselves to healing scars and psyches, as well as rebuilding political, economics, and social spheres, so that communities and nations can acknowledge their pasts, heal, and move forward with renewed commitments to never allow the atrocities again; everything the Genocide Convention promised to do.³⁰⁵

Though the study of transitional justice is relatively a new field, it has received very contrasting views from academics and scholars already, as some advocate for extremely hands-on reconciliation measures, while others still tend to cling to forgive and forget methods for healing. For example, “countries such as Mozambique and Spain have chosen to forget in order to move on, and are considered today as ‘successful’ transitions... However, according to Renan’s definition of a nation, advocating forgetfulness is ‘the political correlate of suicide’ since nations are defined as ‘the possession in common of a rich legacy of memories.’”³⁰⁶ One of the most dangerous things a nation can do in the “aftermath of mass atrocity” is remain silent, as “democracies can only be built on unfettered communication and a public space dominated by the use of public reason.”³⁰⁷ As analyzed in the various cases of genocide, and the definitions of genocide, the crime occurs through a structured and authoritarian chain of communication, as mass propaganda, weapon distribution, and orders to kill and rape and pillage are filtered throughout a region with little room for dissent or discussion. If silence is undemocratic, it serves logical that it would fail to offer any comprehensive remedy to the undemocratic act of genocide, affirming then

³⁰⁴ Kora, Andrieu. “Transitional Justice: A New Discipline in Human Rights.” *SciencesPo*. 2010.

³⁰⁵ Ibid.

³⁰⁶ Ibid.

³⁰⁷ Ibid.

that genocide requires democratic acts of justice, communication, and reconciliation in order to effectively face the scars of the past and move forward without the chains still lingering around for another round.

Even the United Nations itself acknowledges the shortcomings of the Genocide Convention and wholeheartedly advocates for accountability and continuous justice measures to combat impunity. UN High Commissioner for Human Rights Michelle Bachelet has said that “accountability matters – not only because it provides justice for victims and punishment for perpetrators. It matters because ending impunity is central to ending genocide.”³⁰⁸ She also identified the core dual goals of the Convention, reaffirming that “prevention and punishment can never be seen in isolation from each other. Punishment is key to prevention. Impunity is an enabler of genocide: accountability is its nemesis.” Transitional justice cannot be understated in the mission to uphold these twin aims, as, “numerous indicators demonstrate that it can contribute to sustainable peace and security by helping to break cycles of violence and atrocities, delivering a sense of justice to victims, and prompting examinations of deficiencies in State institutions that may have enabled, if not promoted, those cycles.”³⁰⁹ These suggestions all reiterate common flaws in the Genocide Convention, and highlight, in particular, the inherent shortcomings and lack of power it truly wields as an instrument of prevention, punishment, and justice. The Genocide Convention needs to gain instrumental and executive power, in order to invoke transitional justice measures and processes in the aftermath of atrocities that come under its definition. Wounds left untreated always fester and reopen, and the Genocide Convention has an obligation to prevent any future instances of genocide to uphold its promise.

³⁰⁸ “Genocide: ‘Never again’ has become ‘time and again.’” *United Nations*. 2018.

³⁰⁹ *Ibid.*

Conclusion

We are not unique beings, we are prone to flaws and faults and fights, tragedy is human nature, but atrocity does not need to be. Many say that history does not repeat, but that it rhymes, this too depends on our own capacities for change, growth, and progress. We witness crimes and then promise to never let them occur again, but promises fade quickly, and memories even swifter. What the international community *needs* is a commitment to justice. Analyzing cases of genocides since the Holocaust reveal limitations and deficiencies in the Genocide Convention, arguably since establishment, as it failed to prevent the reign of terror and millions of lives exterminated in Cambodia; failed to prevent the thousands of lives murdered in senseless ethnic wars in the former Yugoslavia; failed to prevent the tragedies heaped on the hundreds of thousands of Rwandan citizens who endured a massacre of rape and torture and death after a legacy of colonial oppression; failed to prevent the loss of millions of Rohingya who have suffered for decades at the hands of a tyrannical military regime, forced to die in mass graves and drownings and refugee camps; failed to effectively punish any of these atrocities in any impactful and transitional way as of yet, along with the countless other genocides that have occurred and are continuing to occur since the establishment of the Genocide Convention.

This is not okay. This has never been okay. The Genocide Convention has been critiqued for decades, justifiably so, as it requires a massive facelift and comprehensive reform in order to offer any substantive justice at all. The Convention exists currently as an international treaty, but requires elevation to an authority that can effectively prevent genocide through updating its own definitions of the crime, rolling out universally reaching education campaigns to ensure global awareness and understanding of the crime of genocide and genocides that have occurred, as well as holding executive power that can sufficiently judge and persecute crimes of genocide as they

occur and ensure adequate justice is received, both legally through international judicial institutions, as well as socially through transitional justice measures and processes. Hate only holds as much power as we allow it to gain, and inaction is as good as action on behalf of the perpetrator. Justice, liberty, and democracy always require effort and hard work, but the world owes it to the millions of lives that have been lost at the hands of merciless hatred and deliberate ignorance. As Holocaust survivor Elie Wiesel³¹⁰ said, “Indifference, to me, is the epitome of evil... To forget the dead would be akin to killing them a second time.”

³¹⁰ Elie Wiesel was a Romanian-born American writer, professor, political activist, Nobel laureate, and Holocaust survivor. He authored 57 books, written mostly in French and English, including *Night*, a work based on his experiences as a Jewish prisoner in the Auschwitz and Buchenwald concentration camps.

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