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THE EVOLVING NATURE OF THE CRIME OF GENOCIDE

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In a 1941 radio broadcast, Winston Churchill announced that "we are in the presence of a crime without a name."[1] The French prosecutor at Nuremberg described it as "'a crime so monstrous, so undreamt of in history . . . that the term 'genocide' had to be coined to define it.'"[2] Professor Raphael Lemkin, an international law scholar who had escaped Nazi Europe, was the driving force to make "an old practice in its modern development"[3] an international crime. He gave it a name in 1944.[4] He combined the ancient Greek word *genos* — race or tribe — and the Latin suffix *cide*—killing,[5] and thus the term genocide made its appearance as a legal and political concept. Lemkin asserted that "genocide must be treated as the most heinous of all crimes. It is the crime of crimes, one that not only shocks our conscience but affects deeply the best interests of mankind."[6]

At the International Military Tribunal in Nuremberg, the indictments charged the major German war criminals with "'deliberate and systematic genocide,'" not as a separate crime, "but only as a distinct manifestation of war crimes and crimes against humanity."[7] The Nuremberg judgment did

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1. WARREN FREEDMAN, GENOCIDE: A PEOPLE'S WILL TO LIVE 11 (1992) (internal quotations omitted). In his book, Freedman mistakenly claims that Churchill's radio broadcast occurred in 1940. *Id.* at 11. *See Prime Minister Winston Churchill's Broadcast to the World about the Meeting with President Roosevelt* (radio broadcast Aug. 24, 1941), *available at* http://www.ibiblio.org/pha/policy/1941/410824a.html (last visited Oct. 12, 2005).

2. WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW 38 (2000).

3. RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS 79 (1944).

4. FREEDMAN, *supra* note 1, at 11.

5. LEMKIN, *supra* note 3, at 79.

6. Raphael Lemkin, *Genocide as a Crime under International Law*, 4 UNITED NATIONS BULLETIN 70 (Jan. 15, 1948).

7. Johan D. van der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 FORDHAM INT'L L.J. 286, 286 & nn.2-3 (1999). The indictment charged the war criminals with "'deliberate and systematic genocide, *viz.*, the extermination of racial and national groups, against the civilian population of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others.'" *Id.* at 286 n.2. *See also* Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide:*

not specifically use the term genocide or refer to genocide as a concept, however, it "dealt at great length . . . with the substance of the charge of genocide."[8] One possible explanation for this omission is the observation of Professor Leo Kuper that "[g]enocide would constitute a crime against humanity, though it could also take the form of a war crime, there being much overlapping between the two categories."[9] Genocide was nonetheless mentioned by the Nuremberg Tribunal at the sentencing stage.[10] As the Rwanda Tribunal observed in the *Prosecutor v. Kambanda* judgment, the crimes of the Holocaust that were prosecuted at Nuremberg "were very much constitutive of genocide, but they could not be defined as such because the crime of genocide was not defined until later."[11]

When Adolf Eichmann stood trial in Israel in 1961, he was not charged with genocide because the Knesset, Israel's Parliament, in enacting the Nazi and Nazi Collaborators Punishment Law of 1950, identified the crimes of the Holocaust as Crimes Against the Jewish People and deferred enacting the law for the Prevention and Punishment of Genocide.[12]

While the judgment of the Supreme Court in *Eichmann v. Attorney General of Israel* recognized that the Genocide Convention could not be applied retroactively,[13] it nonetheless determined that the Convention's definition of genocide corresponded to the Crimes Against the Jewish People.[14] Of greater importance is the finding by the Supreme Court that the principles of the 1948 United Nations Genocide Convention, in contrast to the obligation of nations to prevent genocide, "were already part of customary international law when the dreadful crimes [of the Holocaust] were perpetrated."[15] The court concluded that the acts of genocide were included under "crimes against humanity" that "have always been forbidden by customary international law."[16]

For Lemkin, genocide was:

> a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the

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Fifty Years Later, 15 ARIZ. J. INT'L & COMP. L. 415, 426 (1998).

8. LEO KUPER, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY 22 (1981).

9. *Id.* at 21-22. *See also* LAWRENCE J. LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION 24 (1991) (discussing that the Nuremberg Tribunal was authorized to try Nazi war criminals for crimes against humanity, which are included in genocide as defined by the Genocide Convention).

10. KUPER, *supra* note 8, at 25.

11. Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Judgement, ¶ 14 (Sept. 4, 1998), *available at* http://www.ictr.org/ENGLISH/cases/Kambanda/judgement/kambanda.html (last visited Oct. 12, 2005).

12. HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 269 (1963). *See also* GIDEON HAUSNER, JUSTICE IN JERUSALEM 299-300 (4th ed., Schocken Books, Inc. 1977) (1966).

13. CrimA 336/61 Eichmann v. Att'y Gen. of Isr. [1962] IsrSC 16(1) 2033, *reprinted in* 36 I.L.R. 277 (1968).

14. *Id.* at 287.

15. *Id.* at 297 (internal quotations omitted).

16. *Id.*

> groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.[17]

His definition was both broad and narrow: broad because he did not limit the effect of genocide to biological extinction of a national group. For Lemkin, genocide not only extinguishes the existence of a national group; ultimately it destroys the cultural contributions of that group. Consequently, "[w]orld culture is impoverished."[18] On the other hand, it was narrow because he limited genocide to national, religious, or racial groups, thereby excluding other groups.

A 1946 United Nations General Assembly Resolution affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal."[19] The definition of genocide in another Resolution, passed on the same day, surpassed Lemkin's conception of the crime to include as targets of genocide "racial, religious, political and other groups."[20] That formulation was narrowed, however, two years later, in 1948, when the United Nations adopted unanimously the Convention on the Prevention and Punishment of Genocide. As a political statement, driven by intense negotiations and compromises,[21] the Convention defines genocide as follows:

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.[22]

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17. LEMKIN, *supra* note 3, at 79.

18. LEMKIN, *supra* note 6, at 70.

19. G.A. Res. 95(I), U.N. GAOR 6th Comm., 55th plen. mtg. at 188, U.N. Doc. A/64/Add.1 (Dec. 11, 1946).

20. G.A. Res. 96(I), U.N. GAOR 6th Comm., 55th plen. mtg. at 189, U.N. Doc. A/64/Add.1 (Dec. 11, 1946).

21. KUPER, *supra* note 8, at 32. For example, the United States and the Soviet Union opposed certain provisions for fear that they would be used against their countries' own conduct. Sonali B. Shah, *The Oversight of the Last Great International Institution of the Twentieth Century: The International Criminal Court's Definition of Genocide*, 16 EMORY INT'L L. REV. 351, 356 (2002). Also, during the drafting period, Stalin had already begun targeting social and political groups. *Id.* Thus, a "conservative definition of genocide" was created to deal with such political influences. *Id.* at 355.

22. Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, 280.

Critics of the definition of genocide have argued that it is over-inclusive because it goes beyond biological destruction of a cognizable group to include cultural genocide.[23] Others counter that "the essence of genocide is the cultural disappearance of a group."[24] There are those who argue that the current definition of genocide in the Convention is under-inclusive, pointing to the exclusion of political, social and economic groups.[25]

The harshest criticism is directed at the ambiguities of certain terms in the Convention. Critics argue, for example, that the *mens rea* of the crime of genocide, namely the "intent to destroy, in whole or in part,"[26] and the *actus reus* of "causing serious bodily or mental harm to members of the group," are unacceptably vague.[27] Professor M. Cherif Bassiouni has argued that the specific intent element of the crime may be too difficult to prove against a person who merely carries out or executes a genocidal plan.[28] Others reply that "[t]he concept of genocide . . . [is] one of the best defined" but least adhered to "in the lexicon of modern times."[29]

In 1993, the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia. The crime of genocide as defined by the Genocide Convention was included in the Tribunal's jurisdiction.[30] A year later, in 1994, the Security Council established a similar tribunal for Rwanda using once again the Genocide Convention's definition of the crime.[31] The 1998 Rome Statute of the

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23. *See, e.g.,* Ruti Teitel, *The International Criminal Court: Contemporary Perspectives and Prospects for Ratification*, 16 N.Y.L. SCH. J. HUM. RTS. 505, 525-26 (2000) (comments of Professor George Fletcher).

24. Letter from Matthew Lippman, Professor, University of Illinois at Chicago, to Ralph Ruebner, Professor, The John Marshall Law School (May 5, 2005) (on file with author). *See* Hurst Hannum, *International Law and Cambodian Genocide: The Sounds of Silence*, 11 HUM. RTS. Q. 82, 106 (1989) (arguing that "[t]he concept of cultural genocide was ultimately excluded from the Convention"); KUPER, *supra* note 8, at 31 (noting that cultural genocide was not included in the Convention). *See also*, JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW CASES AND MATERIALS 917 n.2 (2d ed. 2000) ("Cultural groups are not directly included within the customary definition of genocide, but cultural characteristics might similarly relate to conclusions about other groupings.").

25. Kurt Jonassohn, *What is Genocide?*, *in* GENOCIDE WATCH 17, 18 (Helen Fein ed. 1992); KUPER, *supra* note 8, at 32.

26. *See, e.g.,* LEBLANC, *supra* note 9, at 34-36; RICHARD ARENS, GENOCIDE IN PARAGUAY 8-16, 141 (1976).

27. BARBARA HARFF, GENOCIDE AND HUMAN RIGHTS: INTERNATIONAL LEGAL AND POLITICAL ISSUES 11-12 (Karen A. Feste ed., 1984).

28. PAUST, *supra* note 24, at 918.

29. IRVING HOROWITZ, TAKING LIVES: GENOCIDE AND STATE POWER 15 (5th ed., rev. 1982).

30. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 808, art. 4(2), U.N. Doc. S/RES/25704 (May 25, 1993), *amended by* S.C. Res. 1166, U.N. Doc. S/RES/1166 (1998).

31. Statute of the International Criminal Tribunal for the Prosecution of 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 Neighbouring States, between 1 January 1994 and 31 December 1994, S.C. Res. 955, art. 2(2), U.N. Doc.

International Criminal Court identified genocide as the first crime in the court's jurisdiction and incorporated the Genocide Convention's definition of the crime.[32]

To assist the International Criminal Court in the interpretation of the crime of genocide, the 2000 text of the Preparatory Commission for the Court[33] clarified some, but not all, of the terms that had been challenged previously for being vague. For example, the elements of genocide by killing are identified in part as follows: "[t]he perpetrator killed one or more persons . . . [who] belonged to a particular national, ethnical, racial or religious group" with the intent "to destroy, in whole or in part" that group, and that this "conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction."[34]

Vagueness in the Genocide Convention can be easily attributed to the fact that the definition of genocide is political in nature. As such, it is intentionally imprecise in order to accommodate one distinct aim of the Convention, the prevention of genocide, which must be separated from the other purpose of the convention, namely the punishment of genocidal acts. Conceptually, flexibility in language helps a political decision to intervene in the early stages of genocide through diplomacy, humanitarian aid and, if necessary, military use, as a preventive measure. Thus, in instances where the evidence of genocide is not clear cut, vagueness in the Convention's terms allows nations to err in favor of prevention through intervention.

But what has happened in Cambodia, Bosnia, Rwanda, Kosovo, Darfur, and other places around the globe since World War II, illustrates that the vague contours of the term "genocide" have served an unintended consequence, one of doing nothing, or little, to prevent genocide. There are many reasons: *realpolitik*, geo-political and economic interests, domestic politics, and just plain indifference.[35] To avoid their collective and

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S/RES/955 (Nov. 8, 1994), *amended by* S.C. Res. 1165, U.N. Doc. S/RES/1165 (1998).

32. *Rome Statute of the International Criminal Court*, art. 5-6, U.N. Doc. A/CONF.183/9 (1998) [as corrected by the process-verbaux of November 10, 1998 and July 12, 1999], *reprinted in* 37 I.L.M. 999 (1998), amended text *available at* www.un.org/law/icc/statute/99_corr/corr.html (last visited on Oct. 16, 2005).

33. Preparatory Commission on the Establishment of an International Criminal Court, *Report of the Preparatory Commission on the Establishment of an International Criminal Court*, Addendum, Part II, Finalized Draft Text of the Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

34. *Id.* at art. 6(a) (footnote omitted).

35. Bill Clinton explained why he did not intervene in Rwanda this way:

> A plane crash killing the Rwandan president and the president of Burundi sparked the beginning of a horrendous slaughter inflicted by leaders of the majority Hutu on the Tutsis and their Hutu sympathizers. The Tutsis constituted only 15 percent of the population but were thought to have disproportionate economic and political power. I ordered the evacuation of all Americans and sent troops to guarantee their safety. Within one hundred days, more than 800,000 people in a country of only 8 million would be murdered, most of them with machetes. We were so preoccupied with Bosnia, with the memory of Somalia just six months old, and with opposition in Congress to military deployments in faraway places not vital to our national

individual responsibilities to prevent genocide, nations have avoided the "g" word, choosing instead to describe genocidal acts as "mass violence," "horrendous slaughter" or "ethnic cleansing."

While vagueness in terms may serve political ends, an imprecise definition of genocide as a legal description of a crime is unacceptable as a basis for prosecuting and punishing offenders. Such vagueness runs counter to the universally recognized norms of legality and due process. Can we cure this problem? One possible solution is for the United Nations to revisit the Genocide Convention and make its terms more precise. Other options include further clarifications of the Genocide Convention by the Preparatory Commission and judicial construction of the Convention's terms by international tribunals. Given the long and difficult road to ratification of the Genocide Convention and the uncertainties that may arise out of future political debates and new compromises, the latter approaches seem more promising.

The first international court to ever convict an individual of genocide, the International Criminal Tribunal for Rwanda, for example, has demonstrated a willingness to shore up the ambiguities of certain terms through liberal judicial construction in order to facilitate future prosecutions of genocide. As an example, that court cleared up the vagueness problem that is associated with the element of intent. The *Prosecutor v. Akayesu* judgment explained that the Genocide Convention's term "intent" is a "special intent" or "*dolus specialis*."[36] It held that:

> Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in 'the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'. Thus, for a crime of genocide to have been committed, it is necessary that one of the acts listed under [Article II of the Convention] be committed, that the particular act be committed against a specifically targeted group, it being a national, ethnical, racial or religious group.[37]

Another example of judicial construction is the Rwanda Tribunal's interpretation of the term imposing "measures intended to prevent births within the group" to include "sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages."[38]

> interests that neither I nor anyone on my foreign policy team adequately focused on sending troops to stop the slaughter. With a few thousand troops and help from our allies, even making allowances for the time it would have taken to deploy them, we could have saved lives. The failure to try to stop Rwanda's tragedies became one of the greatest regrets of my presidency.

BILL CLINTON, MY LIFE 592-93 (2004).

36. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶¶ 498–499 (Sept. 2, 1998) *available at* http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm (last visited Aug. 24, 2005).

37. *Id.*

38. *Id.* ¶ 507.

The ultimate use of judicial construction is the Rwanda Tribunal's attempt to clarify the term "ethnic group." Recognizing that "[t]he term ethnic group is, in general, used to refer to a group whose members speak the same language and/or have the same culture,"[39] nonetheless, the Tribunal determined that the Hutu and the Tutsi, who share the same language and culture, are distinct ethnic groups as a consequence of their separate treatment by their Belgian colonizers and their self identification as separate groups. These two groups were part of a single ethnic group that was fractured socially, economically and politically, and therefore objectively they are not separate cognizable groups under the Convention.[40] Yet the *Prosecutor v. Rutaganda* judgment declared that "membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group."[41] This new definition of what constitutes a group requires a tribunal to engage in "a case-by-case" analysis which "tak[es] into account both the relevant evidence proffered and the [social,] political and cultural context."[42]

Professor George Fletcher argues that genocide is a collective crime and criticizes the focus of international criminal law "that has prevailed since Nuremberg,"[43] which he says, "emphasized the responsibility of individuals"[44] for the crime of genocide. He claims that "[t]he façade of individual criminal responsibility obscures basic truths" about the crime of genocide, which he concludes, are "collective crimes" involving "deeds that by their very nature are committed by groups and typically against individuals [who are] members of [other] groups."[45] Professor Fletcher argues that central to the crime of genocide is the collective "ambition [of one group] to eliminate the hated [other] group."[46]

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39. *Id.* ¶ 122 n.56.

40. *Id.* ¶¶ 122 n.56, 702 (acknowledging that generally since the Hutus and Tutsis spoke the same language and had the same culture, they would therefore constitute a single ethnic group; however, due to societal treatment, the tribunal concluded they were, in fact, treated as separate groups). *See also* Shah, *supra* note 21, at 369-70 (stating that the Rwandan Tribunal contradicted itself by finding that Hutus and Tutsis constituted separate ethnic groups); van der Vyver, *supra* note 7, at 303-04 (noting that the two Rwandan groups shared the same nationality, race and similar religion and, therefore, under the Genocide Convention, should not be deemed to compose a single ethnic group). The difference between the Hutus and the Tutsis was largely based on "material means" such as the ownership of cattle and societal status. *Id.* at 304.

41. Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgement, ¶ 56 (Dec. 6, 1999) *available at* http://www.ictr.org/ENGLISH/cases/Rutaganda/judgement/index.htm (last visited Aug. 24, 2005).

42. *Id.* ¶ 58.

43. GEORGE P. FLETCHER, ROMANTICS AT WAR: GLORY AND GUILT IN THE AGE OF TERRORISM 45 (2002).

44. *Id.* at 44.

45. *Id.* at 45.

46. *Id.* at 68.

When it comes to genocide, he claims, "there are in fact two perpetrators – the individual [leader] and the nation."[47] He maintains that a nation shoulders guilt for the genocidal policies of its leader when it fails to protest the ways of the leader.[48] He concludes that a dictator like Milosevic did not carry out ethnic cleansing in a vacuum. "To muster power [a dictator] must enjoy the support of the military, the implicit emotional consent of business leaders and professionals, and the tolerance of the public as a whole."[49]

Professor Fletcher is quite correct when he says that the implementation of a genocidal plan would not be possible without the active support, or at a minimum, the acquiescence of the collective nation. Daniel Goldhagen made the same charge that it was ordinary Germans,[50] men and women,[51] who wholeheartedly embraced Hitler's genocidal plan[52] and who became the "assenting mass executioners."[53] Collectively, leader and nation capitalized on historically rooted "virulent racial"[54] and "demonological anti-semitism"[55] to view Jews as the eternal enemies, whose annihilation was "just and necessary."[56] Complicity by silence and the failure of individuals to oppose a leader's genocidal plan is equally reprehensible, a phenomenon which Hannah Arendt described as the "banality of evil."[57]

Finding that a leader cannot be guilty of genocide alone, Professor Fletcher opines that the nation's complicity should mitigate "the penalties of those who commit horrendous crimes."[58] According to Fletcher, criminal liability and punishment should be assessed "according to relative fault."[59] He justifies this on a principle that "distribut[es] responsibility and guilt among all parties — and only those parties — that actively participate in the occurrence of evil."[60]

His views should be rejected. I am concerned that the refocusing of genocide as a collective crime may, in the long run, water down the criminal liability and punishment of the most culpable individuals, namely the architects of genocide. As the Nuremberg Tribunal noted: "Crimes against international law are committed by men, not by abstract entities, and only by

47. *Id.* at 163.
48. *Id.* at 159.
49. *Id.*
50. DANIEL JONAH GOLDHAGEN, HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST 393 (1996).
51. *Id.* at 416.
52. *Id.* at 418-19.
53. *Id.* at 393.
54. *Id.* at 392.
55. *Id.*
56. *Id.* at 394.
57. *See generally* ARENDT, *supra* note 12 (reporting the atrocities of genocide committed by the Nazi regime as "the banality of evil").
58. FLETCHER, *supra* note 43, at 176.
59. *Id.* at 158.
60. *Id.* at 157-58.

punishing individuals who commit such crimes can the provisions of international law be enforced."[61]

To label genocide as a collective crime, I fear, will not, as Professor Fletcher asserts, "enhance[] the principle of individual responsibility."[62] Instead, it may make it easier for a political leader, like a Milosevic, who conceives the idea and then devises a plan for genocide as a policy for his nation, to avoid maximal responsibility, escape the harshest possible punishment and shift liability onto those individuals down the hierarchy who execute his genocidal plan. They will shoulder most, if not all, of the blame. Assessing liability and punishment "according to relative fault" presupposes that a tribunal, be it a permanent or an *ad hoc* court, can make this determination objectively. But what criteria shall it apply? Is the one who conceives the idea and designs a genocidal plan more reprehensible and culpable, or less, than the commander who orders the execution of the plan or the individual who finally commits the genocidal act, or perhaps, are they equally culpable?

Isn't "relative fault" after all a subjective standard? And if it is, how can it serve the interests of justice? Fletcher eventually concedes that "these questions elude objective determination; the court conducting the inquiry could well be influenced by its own political agenda."[63]

Professor Fletcher's analogy to an automobile collision involving two drivers who "cause damage to each other and their respective passengers,"[64] and therefore, should be liable and "pay for the damage in proportion to the negligence of each,"[65] does not hold up in this context. The two drivers in his example are completely independent actors whose separate negligent conduct accounts for the collective damage. In contrast, the dictator wields absolute power over the nation and controls and directs each and every individual who carries out his genocidal plan. The executioner is but a mere extension of the leader.

The recent United Nations Darfur Commission Investigation Report illustrates the problem of identifying genocide as a collective crime. Chaired by Professor Antonio Cassese, who previously served as the first president of the International Tribunal for the former Yugoslavia, the report was released earlier this year, one day after a special session of the U.N. General Assembly to observe the 60th anniversary of the liberation of Auschwitz.[66]

The Commission, using a very low threshold for proof, one of reasonable suspicion,[67] and not probable cause or proof beyond a reasonable doubt, absolved the Government of the Sudan of pursuing or implementing a

61. 22 INTERNATIONAL MILITARY TRIBUNAL, TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 466 (1948).

62. FLETCHER, *supra* note 43, at 157.

63. *Id.* at 163.

64. *Id.* at 158.

65. *Id.*

66. International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur*, ¶ 1, *delivered to the United Nations Secretary-General*, U.N. Doc. S/2005/60 (Jan. 25, 2005).

67. *Id.* ¶ 15.

policy of genocide, directly by its military or through the Janjaweed militias under its control.[68] It recommended instead that the Security Council refer the circumstances of Darfur to the International Criminal Court for further investigation.[69] On March 31, 2005, the Security Council did make that referral to the court without any further elaboration.[70] Implicit in this recommendation is that the names of the leaders who conceived, organized and directed the Darfur genocide were not included in the sealed envelope.

In conclusion, the road from Nuremberg to Jerusalem, Rome, and finally The Hague has been slow, circuitous, and bumpy. Vagueness and ambiguity of terms can be fixed judicially. The dual purposes of the Convention — the prevention of genocide and the punishment for genocidal acts — must be respected and fully enforced. If there is a will, there is a way.

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68. *Id.* ¶¶ 518-522, 640-642. The report stated that arguably the elements of genocide, the *actus reus* and a protected group, could be shown from the human rights violations perpetrated directly and indirectly by the Sudan Government. *Id.* ¶¶ 518, 640. Notably lacking, the commission observed, was the element of genocidal intent. *Id.* According to the commission:

> Generally . . . the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, . . . the intent [seems to be] to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.

Id. The report further states that certain individuals, including Sudan officials, may have acted with genocidal intent, but it is for "a competent court to make such a determination on a case by case basis." *Id.* ¶ 520. *See also id.* ¶ 641 (reiterating the above stated proposition).

69. *See id.* ¶ 647 (stating that pursuant to Article 13(b) of the Statute of the International Criminal Court, the situation in Darfur should be referred to the court by the Security Council). Implicit in this referral is that the court can look at specific cases to determine if individuals may have committed acts with genocidal intent and therefore the court could prosecute accordingly. *See id.* ¶¶ 520, 641 (stating that whether specific individuals acted with genocidal intent is a decision to be made by a capable court).

70. S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005).