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BRINGING CULTURAL GENOCIDE IN BY THE BACKDOOR: VICTIM PARTICIPATION AT THE ICC

Kristina Hon[*]

I. INTRODUCTION

Cultural genocide is the much-maligned and oft-forgotten companion of the simply-termed concept of "genocide." Unlike genocide—a word used to characterize horrors such as the killings in the former Yugoslavia, Rwanda, and, controversially, Darfur—cultural genocide does not require the killing of a single person.[1] In fact, no physical harm need ever befall a victim of cultural genocide.[2] That is because cultural genocide[3] strips from humanity all manner of cultural contributions by human groups, through the destruction of those artifacts, documents, books, monuments, or even languages

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[1] Daphne Anayiotos, *The Cultural Genocide Debate: Should the UN Genocide Convention Include a Provision on Cultural Genocide or Should the Phenomenon be Encompassed in a Separate International Treaty?*, 22 N.Y. INT'L L. REV. 99, 100 (2009).

[2] *Id.*

[3] Scholars have used various other terms to describe the concept of cultural genocide. "Ethnocide" is the most frequent one; it was originally coined by Raphael Lemkin (who also coined "genocide") who considered it to be interchangeable with "genocide." RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE 79 n.1 (1944) ("Another term could be used for the same idea, namely, *ethnocide*, consisting of the Greek word 'ethnos'—nation—and the Latin word 'cide.'"). Since then, however, it has been interpreted to mean "the [systematic] destruction of a culture without the killing of its bearers," which is more along the lines of the contemporary definition of cultural genocide. Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 67 (2008) (quoting FRANK CHALK & KURT JONASSOHN, THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSES AND CASE STUDIES 8–10 (1990)). This concept has also been directly, as well as indirectly, expressed in international documents. *See, e.g.*, UNESCO Declaration of San Jose (Unesco and the struggle against ethnocide), U.N.E.S.C.O. Doc. FS 82/WF32 (Dec. 11, 1981) ("Ethnocide means that an ethnic group is denied the right to enjoy, develop and transmit its own culture and its own language, whether collectively or individually."). This tautological distinction has no bearing on this Comment or relevant legal analysis.

that embody the group's identity.[4] More simply, it is nothing more or less than the total destruction of a culture so as to obliterate the identity of a people.[5] As such, a culture and identity can be destroyed "even if all the members of the group [are] still alive."[6]

It is, of course, an extraordinarily rare occurrence that cultural genocide happens on its own, without any kind of physical abuse simultaneously inflicted on the victims.[7] More often than not, cultural genocide is wrapped up in, and overshadowed by, physical violence.[8] A prime example of this is occurring today in Darfur, Sudan.[9] The forcible displacement and annihilation of villages and communal societies is wrenching the three primarily-targeted tribes from their land, their communities, and their cultural base.[10] The Government of Sudan forces, in conjunction with the Janjaweed militia, have pursued a ruthless policy of "killings, rapes, [and] burning of villages . . . against non-Arab villagers" in "multiple attacks over a prolonged period [of time resulting in the destruction of the villages] by burning, shelling or bombing, making it impossible for the villagers to return."[11] The Arab versus non-Arab tension fueling the conflict—and generally underpinning the government's "Arab-Islamic supremacist and demonizing policies"—has materialized in the violent struggle for the "incentives" of "[t]he property, possessions, livestock, and the cultivated land itself" of the non-Arabs living in Darfur.[12]

Darfur, while being the most recent illustration of genocide, is

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[4] G.A. Res. 96(1), U.N. Doc. A/RES/96(1) (Dec. 11, 1946); U.N. Secretariat, *First Draft of the Genocide Convention*, U.N. Doc. E/447 (May 1947), *available at* http://www.preventgenocide.org/law/convention/drafts/.

[5] Anayiotos, *supra* note 1, at 100.

[6] *Id.* at 102 (emphasis omitted).

[7] *See, e.g.*, Anayiotos, *supra* note 1, at 104–05 (discussion on Nazi German policies).

[8] *Id.*

[9] HUMAN RIGHTS WATCH, DARFUR DESTROYED: ETHNIC CLEANSING BY GOVERNMENT AND MILITIA FORCES IN WESTERN SUDAN 5 VOL. 16:6(A) (May 2004), *available at* http://www.hrw.org/sites/default/files/reports/sudan0504full.pdf [hereinafter DARFUR DESTROYED].

[10] Micol Sirkin, *Expanding the Crime of Genocide to Include Ethnic Cleansing: A Return to Established Principles in Light of Contemporary Interpretations*, 33 SEATTLE U. L. REV. 489, 516–17 (2010).

[11] *The Crisis in Darfur: Hearing Before the Sen. Foreign Relations Comm.*, 108th Cong. (2004) (statement of Colin L. Powell, Secretary of State), *available at* http://www.voanews.com/english/news/a-13-a-2004-09-09-8-Text.html.

[12] JOHN HAGAN & WENONA RYMOND-RICHMOND, DARFUR AND THE CRIME OF GENOCIDE 5 (2009).

but one in a succession. The term "genocide" was coined in 1943 by a Polish law professor, Raphael Lemkin,[13] as a combination of the Greek word "genos" or "genus" meaning race, and the Latin word "cide" meaning killing (as in homicide or fratricide).[14] He used it to describe the Armenian decimation by the Turks during World War I, but the concept became firmly embedded in legal and political terminology when he applied it to the German Nazis' policies to exterminate the Jews and the Roma throughout Europe prior to and during World War II.[15] Lemkin's definition of genocide was a very broad and holistic one, and reflective of the wide variety of destructive measures employed by the Nazis, encompassing the "disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups."[16] For Lemkin, the destruction of the lives of the victims seemed almost an afterthought, as if taking their lives was, while cruel, an act of mercy in comparison to the annihilation unleashed on their culture, society, and identity.[17]

Applying his own definition of genocide to the Nazi practices during World War II, Lemkin concluded that genocide had occurred

> through a synchronized attack on different aspects of life of the captive peoples: in the political field (by destroying institutions of self-government and imposing a German pattern of administration, and through colonization by

[13] Raphael Lemkin was born in the early 1900s in eastern Poland and worked in Poland "as a lawyer, prosecutor and university teacher." WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 24 (2000). In 1939, he fled Poland, escaping the Jewish persecution, eventually settling in the United States. *Id.* By that time, he was renowned as an international criminal law scholar, and taught at universities across the United States. *Id.* In 1943, he published his seminal book *Axis Rule in Occupied Europe*, consolidating and expounding upon the legal theories behind genocide and exhaustively analyzing Nazi policies and practices within Germany and the occupied territories in light of international criminal law. *Id.* at 26–27.

[14] LEMKIN, *supra* note 3, at xi; Anayiotos, *supra* note 1, at 100.

[15] Anayiotos, *supra* note 1, at 99; *see* LEMKIN, *supra* note 3.

[16] LEMKIN, *supra* note 3, at 79.

[17] In his book, Lemkin wrote,

> Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of life of national groups, with the aim of annihilating the groups themselves.

Id.

> Germans); the social field (by disrupting the social cohesion of the nation involved and killing or removing elements such as the intelligentsia, which provide spiritual leadership—according to Hitler's statement in *Mein Kampf*, "the greatest of spirits can be liquidated if its bearer is beaten to death with a rubber truncheon"); in the cultural field (by prohibiting or destroying cultural institutions and cultural activities; by substituting vocational education for education in the liberal arts, in order to prevent humanistic thinking, which the occupant considers dangerous because it promotes national thinking); in the economic field (by shifting the wealth to Germans and by prohibiting the exercise of trades and occupations by people who do not promote Germanism "without reservations"); in the biological field (by a policy of depopulation and by promoting procreation by Germans in the occupied countries); in the field of physical existence (by introducing a starvation rationing system for non-Germans and by mass killings, mainly of Jews, Poles, Slovenes, and Russians); in the religious field (by interfering with the activities of the Church, which in many countries provides not only spiritual but also national leadership); in the field of morality (by attempts to create an atmosphere of moral debasement through promoting pornographic publications and motion pictures, and the excessive consumption of alcohol).[18]

The literal translation of genocide is "the killing of a race," and of course the most expeditious and easiest way to achieve the physical obliteration of the very existence, nay the very foundation, of a particular group of people is by destroying the people themselves.[19] That is not to say, however, that cultural genocide does not happen, and has not happened, independent of physical violence.[20] Yet it is far more frequently the case that cultural destruction and obliteration occur within the context of an armed conflict, blurring the lines between culture, identity, and regular violence and extermination. Darfur is one such compelling example. When courts and tribunals prosecute the physical genocide, the cultural genocide is subsumed within it, and is thus punished as well.[21] But that still cannot sufficiently address the gravity of the harm being

[18] LEMKIN, *supra* note 3, at xi–xii.
[19] Anayiotos, *supra* note 1, at 100.
[20] Forcible transfer of children is one such example; *see infra* note 4733 for a historical overview.
[21] Anayiotos, *supra* note 1, at 124.

done, as "[t]he living may suffer cultural genocide without death," and without being "vindicated by the prosecution of physical genocide."[22]

The comparative lack of severity, potentially, of cultural genocide compared to physical genocide has led to the marginalization of the concept and a lack of appreciation—legal and societal—for the destructive effect that obliteration of a cultural identity has on its people, whether or not accompanied by killing.[23] While cultural genocide is not a distinct crime under international law and is not included in the Rome Statute of the International Criminal Court (ICC), a new feature in the Statute allowing for the legal participation of qualified victims has the potential to inject a cultural perspective into the proceedings.[24] The concept is still largely theoretical, but this Comment will argue that cultural genocide deserves to be recognized; it would therefore behoove the prosecutor and the legal representatives of the victims to pay special attention to the impact that a more culturally-nuanced approach would have on the prosecution of genocide and war crimes. This could become particularly important in the trial of Sudanese president Omar al-Bashir, the only person thus far to be indicted by the ICC on charges of genocide.[25] More universally, however, establishing a precedent for the inclusion of the cultural background of a conflict and a mechanism for addressing harms inflicted upon that culture is imperative because the unfortunate fact is that cultural genocide is likely to occur again in the future, if the past is any guide. When it does, there must be ways to address it, directly and indirectly.

Part II of this Comment will provide an overview of the evolution of the legal status of cultural genocide. Part III will discuss how the innovative victim participation model at the ICC works and how it can be used to integrate evidence of cultural genocide in proving the specific intent required for the conviction of the crime of genocide. Part IV will apply the theoretical principles enumerated in Part III to the Omar al-Bashir case, by analyzing and extrapolating from the pre-trial chamber's initial refusal but eventual grant of a warrant of arrest for al-Bashir for genocide.

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[22] *Id.* at 125.

[23] *See infra* Part II.A.1 for discussion on the second justification for excluding cultural genocide from the Genocide Convention.

[24] *See* Rome Statute of the International Criminal Court, art. 68, U.N. Doc. A/CONF.183/9, 2187 U.N.T.S. 38544 (July 17, 1998) [hereinafter Rome Statute].

[25] Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber I), No. ICC-02/05-01/09-95, July 12, 2010.

II. THE EVOLUTION OF CULTURAL GENOCIDE

Raphael Lemkin's comprehensive definition of genocide—encompassing harm done to all aspects of human life—provided the ideal starting point for the creation of a legal regime to identify, define, and criminalize genocide.[26] Despite much discussion about, and interpretations of, cultural genocide during the drafting sessions of the Genocide Convention, and several attempts to include it in the final version, the concept was nevertheless excluded. Since then, the international legal community has slowly raised the legal status of cultural genocide to its current role as one means of showing specific intent to commit genocide under the Genocide Convention and the respective statutes of the international criminal tribunals and courts.[27]

A. *The Genocide Convention*

The atrocities committed by the Nazi regime in Europe during the Second World War so shocked the conscience of the international community that the states were galvanized into giving these acts "a name and a legal definition" so as to better come to terms with them.[28] The newly-created United Nations General Assembly (GA) convened in 1946 and passed Resolution 96(1), which made genocide an international crime, requested member states to pass domestic legislation punishing and preventing the crime, and instructed the Economic and Social Council (ECOSOC) to begin drafting an international convention delineating the crime.[29] The committee of experts selected to review the preliminary document included Raphael Lemkin, and his influence was clearly visible in the drafts, especially the first one.[30]

Lemkin's definition of genocide encompassed three primary types of genocide: physical, biological, and cultural.[31] Physical genocide was defined as "the tangible annihilation of the group by killing and maiming its members," and Lemkin provided a range of examples, from Nazi policies of racial discrimination in the distribution or rationing of food, endangering of health, and mass

[26] LEMKIN, *supra* note 3, at 79.
[27] *See infra* Part II.C.1.
[28] Anayiotos, *supra* note 1, at 112.
[29] G.A. Res. 96(1), U.N. Doc. A/RES/96(1) (Dec. 11, 1946); Nehemiah Robinson, *The Genocide Convention: Its Origins and Interpretations*, 40 CASE W. RES. J. INT'L L. 315, app. 2 (2007).
[30] Robinson, *supra* note 29, at 2.
[31] LEMKIN, *supra* note 3, at xi–xii, 82–90; Anayiotos, *supra* note 1, at 102.

killings.[32] He defined biological genocide as the "imposi[tion of] measures calculated to decrease the reproductive capacity of the group," including policies of separation of the sexes and deportation, involuntary sterilization, and undernourishment of the parents.[33] Broadly defined, cultural genocide encompassed "attacks [beyond] the physical and/or biological elements of a group . . . seek[ing] to eliminate its wider institutions."[34] Such an elimination policy could be accomplished through the prohibition of the use of a local language and schools, the restriction or ban of artistic, literary, and cultural activities, and the destruction or confiscation of "national treasures, libraries, archives, museums, artifacts, and art galleries."[35] These three main forms of genocide also subsumed additional dimensions or "techniques" of genocide, including "political, social, . . . economic, . . . religious and moral" genocide.[36]

The provisions on genocide contained in the first draft that Lemkin and his colleagues reviewed bore a striking resemblance to the trichotomy framework Lemkin had enunciated.[37] It made each type of genocide a separate crime, defining it and enumerating the actions that would be punishable under the convention.[38] The crime of cultural genocide was defined as

> [d]estroying the specific characteristics of the group by: (a) forcible transfer of children to another human group; or (b) forced and systematic exile of individuals representing the culture of a group; or (c) prohibition of the use of the national language even in private intercourse; or (d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or (e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of

[32] LEMKIN, *supra* note 3, at 87–90; David Nersessian, *Rethinking Cultural Genocide Under International Law, Human Rights Dialogue: Cultural Rights*, CARNEGIE COUNCIL (Apr. 22, 2005), http://www.carnegiecouncil.org/resources/publications/dialogue/2_12/section_1/5139.html.

[33] LEMKIN, *supra* note 3, at 86; Nersessian, *supra* note 32.

[34] Nersessian, *supra* note 32.

[35] LEMKIN, *supra* note 3, at 84; Nersessian, *supra* note 32.

[36] LEMKIN, *supra* note 3, at 87–90; Kurt Mundorff, *Other People's Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(e)*, 50 HARV. INT'L L. J. 61, 74 (2009); Nersessian, *supra* note 32.

[37] *Compare* Lemkin, *supra* note 3, at xi, 82–90, *with First Draft of the Genocide Convention*, *supra* note 4.

[38] *First Draft of the Genocide Convention*, *supra* note 4.

> historical, artistic, or religious value and of objects used in religious worship.[39]

The listing of the specific criminal actions tried to incorporate, as best as possible, the various facets of the destruction of a cultural identity, in some ways going beyond what Lemkin had envisioned, such as with the inclusion of forcible transfer of children.[40]

After the first draft was submitted to the United Nations (U.N.) member states, and ECOSOC had received the states' comments and observations, a new ad hoc committee was formed to draft a second version of the convention.[41] The resulting draft eliminated the previous draft's trichotomy by combining physical and biological genocide into a single article; it also drastically curtailed the definition of cultural genocide, excising all references to acts committed against people, focusing strictly on the destruction of tangible items.[42] The only exception pertained to the use of a local or group language.[43] The punishable actions, therefore, included only the

> prohibiti[on of] the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group; [and the] destr[uction] or preventi[on of] the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.[44]

The final version eventually submitted to the GA for adoption by the states parties—what then became the Convention on the Prevention and Punishment of the Crime of Genocide[45]—had entirely re-worked the breakdown of the types of genocide. The distinctions between physical, biological, and cultural genocide had been removed, leaving only a list of five specifically enumerated acts

[39] *Id.* at art. II(3).

[40] *See generally* LEMKIN, *supra* note 3, at 84–85.

[41] Robinson, *supra* note 29, at 5.

[42] U.N. Econ. & Soc. Council, Ad Hoc Comm., *Second Draft of the Genocide Convention*, U.N. Doc. E/AC.25.1–28, art. III (May 10, 1948), *available at* http://www.preventgenocide.org/law/convention/drafts/.

[43] *Id.* at art. III(1).

[44] *Id.* at art. III.

[45] The Convention entered into force in January 1951, after the UN General Assembly adopted it on 9 October 1948. SCHABAS, *supra* note 13, at 3; Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260A (III), U.N. Doc. A/RES/260 (III)A (Dec. 9, 1948) [hereinafter Genocide Convention].

that were to be considered genocide.[46] The only remnant of cultural genocide was the forcible transfer of children as one of the five acts, the inclusion of which had been proposed by the Greek delegation and approved.[47] Two final attempts had been made to reinstate cultural genocide—in one form or another—into the Convention but neither were able to garner support, and so both failed.[48] The concept had been exhaustively discussed in all drafting sessions and the overwhelming majority of the delegates agreed that the concept was best "addressed elsewhere in the United Nations as a human rights issue."[49]

The failure to include any substantive reference to cultural genocide did not go unnoticed by some delegates, prompting statements of admonition and regret.[50] A Pakistani representative lamented the exclusion of cultural genocide, protesting that the focus only on physical destruction of life was misplaced, because physical genocide is simply the means by which to achieve the end, namely "[the destruction of the] values and the very soul of a national, racial or religious group"—or in other words, a culture.[51]

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[46] Genocide Convention, *supra* note 45, at art. II.

> Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing seriously 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.

Id.

[47] Robinson, *supra* note 29, at 18. The forcible removal and transfer of children—which destroys culture through the forced assimilation of the future generation—has a history of occurrence, as it occurred in Cornwellian England, in Australia, Canada and the United States in the nineteenth century, in Switzerland against the Roma, and in the Soviet Union against indigenous Siberians, in the twentieth century. Mundorff, *supra* note 36, at 63–64; Robinson, *supra* note 29, at 18. More contemporarily, during the Cold War, Romanian dictator Nicolae Ceaucescu severely discriminated against and repressed ethnic Hungarians on such a scale as to constitute cultural genocide. Anayiotos, *supra* note 1, at 128. Examples of governmental policies employed included: "1. elimination of minority educational institutions, 2. suppression of minority languages, 3. falsification of historical data and population statistics, 4. confiscation of cultural archives, 5. obstruction of contact with relatives abroad, and 6. dissolution of ethnic communities." *Id.* at 129.

[48] Mundorff, *supra* note 36, at 77. One proposal was by the Soviet Union, which was voted down, and the other was by Venezuela, which later withdrew it. *Id.*

[49] SCHABAS, *supra* note 13, at 73. For a more in-depth discussion, see Part II.A.1.

[50] *See generally* Anayiotos, *supra* note 1, at 114–15.

[51] *Id.*

Thus, if physical genocide was to be a crime, so too should cultural genocide.[52] Failure to properly deter crimes against culture, religions, or language could lead to brazen attacks against them, which would be outside the scope of international criminal law.[53]

1. Justifications for the Exclusion of Cultural Genocide

Despite such strong arguments in favor of criminalizing cultural genocide, the concept was left out of the Convention for five reasons.[54] The first was that the concept was simply too imprecise.[55] While it is true that the concept encompasses a broad spectrum of crimes, the two definitions promulgated in the drafts of the convention would seem to be evidence that in fact, the concept can be sufficiently concretely defined, even if controversially.[56] The second reason was the comparative lack of severity of the physical harm; the gap between the severity of mass murder and the closure of libraries was just too large.[57] This is an undeniable fact, since human life is not threatened by the banning of books or use of languages to the same extent as physical violence. The underpinnings of society, culture, and communities, however, *are* so threatened by prohibitions on books and languages, thereby lowering quality of life and weakening identity.

The third reason was that many delegations felt that cultural destruction was best dealt with in "the sphere of protection of minorities" or human rights law, and therefore outside the framework of international criminal law.[58] This justification, while valid on its face, does not consider that it is not always the majority that oppresses the minority, and that groups of equal strength and population might also wish to eliminate the other's culture in a fight for dominance and power. Also, it presupposes that cultural genocide—or cultural destruction—will be easier to articulate as a different branch of international law. Relatedly, states felt that there were valid and legitimate justifications for the implementation of

[52] *Id.* at 115.
[53] *Id.*
[54] Anayiotos, *supra* note 1, at 115; Robinson, *supra* note 29, at 18–19; Sirkin, *supra* note 10, at 504.
[55] Robinson, *supra* note 29, at 19.
[56] *See First Draft of the Genocide Convention*, *supra* note 4, at art. I(II)(3); *Second Draft of the Genocide Convention*, *supra* note 42, at art. III.
[57] Robinson, *supra* note 29, at 19.
[58] *Id.*

measures domestically to incorporate and assimilate minorities.[59] Indeed there are such justifiable reasons; the point of the criminalization of cultural genocide, however, is to protect groups against measures and actions that would go beyond the realm of the legitimate and into the realm of outright annihilation and destruction. That is precisely what the concept is designed to safeguard. The final reason was that codification of cultural genocide would be best deferred to a separate international convention, to allow for proper and full development of all its legal nuances.[60] This reason was undoubtedly an altruistic one, but a "Convention on the Prevention and Punishment of *Cultural* Genocide" has never materialized; as such, the international community missed the perfect opportunity to make cultural genocide a definite, punishable crime under international law, leaving its status under international law vague and its potential unrealized.

B. Subsequent Development of Cultural Rights

Since then, various international treaties and declarations have incorporated references to cultural rights, mainly as human rights, but none have ever re-articulated the concept of cultural genocide.[61] For example, the International Bill of Rights—composed of the Universal Declaration on Human Rights (UDHR),[62] the International Covenant on Civil and Political Rights (ICCPR),[63] and the

[59] Sirkin, *supra* note 10, at 504.

[60] Anayiotos, *supra* note 1, at 115.

[61] Another difference is that many of the rights can be classified as "freedom to" (or positive) rights rather than "freedom from" (or negative) rights, meaning that peoples are affirmatively allowed to participate and engage in various cultural activities, as opposed to being granted protection from governmental interference in those activities. Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 864 (2001) (A negative right "is a right to be free from government, while [a positive right] is a right to command government action."). The Genocide Convention enshrines "freedom from" rights. *See generally* Athanasios Yupsanis, *The Concept and Categories of Cultural Rights in International Law—Their Broad Sense and the Relevant Clauses of the International Human Rights Treaties*, 37 SYRACUSE J. INT'L L. & COM. 207, 220–24, 233–34 (2010). The distinction is largely irrelevant for this Comment.

[62] "Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. . . ." Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

[63] "Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone can enjoy his civil and political rights, as well as his economic, social and cultural rights . . . ." International Covenant on Civil and Political Rights, G.A. Res.

International Covenant on Economic, Social, and Cultural Rights (ICESCR)[64]—provides that human rights can be classified into five categories: civil, political, economic, social, and cultural.[65] But of these groups, civil and political rights receive the greatest legal and scholarly attention; cultural, the least.[66] The biggest exception to this is the United Nations Economic, Social and Cultural Organization (UNESCO), whose documents embrace a broad concept of culture as a way of life: a "set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and . . . encompass[ing], in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs."[67] Nevertheless, the UNESCO definition is not a legal definition; it is not contained in a document under which cultures may bring suit against their aggressors (whether domestically or internationally) for encroachment on their social and cultural cohesion.[68]

The international document that comes closest to protecting against interference with, and destruction of, culture—the essence of cultural genocide—is the U.N. Declaration on the Rights of Indigenous Peoples.[69] Articles 7 and 8 both grant affirmative rights stemming from the enjoyment and proliferation of a culture and

2200 (XXI) A, U.N. Doc. A/RES/2200(XXI) (Mar. 23, 1976).

[64] "Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone can enjoy his economic, social and cultural rights, as well as his civil and political rights. . . ." International Covenant in Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI) A, U.N. Doc. A/RES/2200(XXI) (Jan. 3, 1976).

[65] Yupsanis, *supra* note 61, at 207.

[66] *Id.* at 208.

[67] UNESCO Universal Declaration on Cultural Diversity, U.N.E.S.C.O. Res. 31/25, Annex I, U.N. Doc. __ (Nov. 2, 2001), *available at* http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[68] The principles in the Declaration are enumerations of positive rights. *See* discussion *supra* note 47. As they are much harder to enforce, the Declaration confines itself to stating that

> the Member States recommend that the Director-General take the objectives set forth in this Action Plan into account in the implementation of UNESCO's programmes and communicate it to institutions of the United Nations system and to other intergovernmental and non-governmental organizations concerned with a view to enhancing the synergy of actions in favour of cultural diversity.

UNESCO Universal Declaration on Cultural Diversity, *supra* note 67, at Annex II.

[69] U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, art. 7 & 8, U.N. Doc. A/RES/61/295/Annex (Sept. 13, 2007).

protect against "assimilation or destruction of [that] culture."[70] This is a progressive step, but it suffers from two main drawbacks. First, the Declaration was created almost sixty years after the adoption of the Genocide Convention, meaning that any violations in the nature of those two articles committed during that time are essentially sheltered from prosecution.[71] Even still, as with the UNESCO declaration, there is no avenue for international redress.[72] Second, it applies only to the indigenous, leaving out minorities.[73] Most other international documents that deal with culture either protect tangible items or the rights of specific groups.[74]

C. *International Criminal Tribunal for Yugoslavia and its Jurisprudence*

The next impetus for the international community to potentially address the absence of cultural genocide from any international treaty or convention was in the early 1990s, as the United Nations dealt with the aftermath of the wars in Yugoslavia.[75] In order to

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[70] *Id.*

> Article 7. 1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person. 2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group. Article 8. 1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. . . .

Id.

[71] MALCOLM N. SHAW, INTERNATIONAL LAW 926 (6th ed. 2008) ("In the absence of contrary intention, the treaty will not operate retroactively so that its provisions will not bind a party as regards any facts, acts or situations prior to that state's acceptance of the treaty.").

[72] The Declaration confines itself to stating that "the United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration." U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 69, at art. 42.

[73] Yupsanis, *supra* note 61, at 230. The distinction is important because while the indigenous may be a minority within a country, "minorit[ies]" are not otherwise legally defined under international law and are not recognized as a "people" and therefore are not entitled to such rights as self-determination. *Id.* at 230–31.

[74] Such conventions include the 1954 Hague Cultural Property Convention; the 2005 UNESCO Convention on Cultural Diversity; the 1989 Convention on the Rights of the Child; the 2003 Convention on Migrant Workers; and the 1981 Convention on the Elimination of All Forms of Discrimination Against Women. Anayiotos, *supra* note 1, at 115–19; Yupsanis, *supra* note 61, at 219.

[75] Anayiotos, *supra* note 1, at 119.

provide accountability for the terrible crimes being committed, the U.N. Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993.[76] The tribunal was accompanied by, and founded on, a statute by which to prosecute those accused of the crimes enumerated within it.[77] The statute included provisions for the punishment of grave breaches of the Geneva Conventions of 1949 (article 2); violations of the laws or customs of war (article 3); genocide (article 4); and crimes against humanity (article 5).[78] In articulating the definition of genocide, the statute repeats verbatim the iteration contained in the Genocide Convention.[79] Accordingly, it does not include cultural genocide as a punishable crime.

That did not mean, however, that cultural genocide as a concept was legally irrelevant; the ICTY first encountered the task of determining the legal status of cultural genocide in *Prosecutor v. Radislav Krstić*.[80] Krstić was charged with genocide, complicity to commit genocide, extermination as a crime against humanity, murder as a crime against humanity, murder as a violation of the laws of war, and persecution.[81]

Krstić had been a commander in the Bosnian Serb Army whose corps had participated in the attack on the United Nations safe area at Srebrenica, resulting in the deaths of thousands of Bosnian Muslim men and boys.[82] In its 260-page judgment, the trial chamber[83] was obliged to assess the meaning of the words "intent to destroy," proof

[76] *Id.*

[77] *Id.* at 119–20.

[78] The Secretary General, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), Annex, delivered to the Security Council, U.N. Doc. S/25704 (May 3, 1993) [hereinafter Report of the Secretary-General].

[79] Anayiotos, *supra* note 1, at 120.

[80] *Id.* at 121.

[81] Prosecutor v. Krstić, Case No. IT-98-33-T, Initial Indictment, ¶¶ 20–30 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 30, 1998).

[82] *Id.* at ¶¶ 2–12.

[83] The ICTY is composed of the following organs: three trial chambers and an appeals chamber, the prosecutor, and the registry. Report of the Secretary-General, *supra* note 78, at Annex art. 11. The trial chamber is charged with reviewing the indictments of each accused, confirming or dismissing them; issuing "orders and warrants for the arrest, detention, surrender or transfer" of the accused; conducting the trial; rendering a judgment; and "impos[ing] sentences and penalties on persons convicted of serious violations of international humanitarian law." *Id.* at art. 19–20, 23.

of which is requisite for a conviction of genocide.[84] After it determined that specific intent—or *dolus specialis*—was required for genocide, and not merely a "general awareness" of the consequences of one's actions, the chamber discussed the "manner in which the destruction of a group may be implemented . . . ."[85] The chamber acknowledged that, aside from physical acts, "one may also conceive of destroying a group through purposeful eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community."[86]

Continuing its analysis, the trial chamber conceded that as Lemkin had originally conceived, genocide encompassed "all forms of destruction of a group as a distinct social entity."[87] Such a broad interpretation of the definition resembled what had been incorporated as a crime against humanity into the Statute of the Nuremberg Tribunal established after World War II.[88] This definition was then later subsumed into the ICTY statute (and even later into the Rome Statute forming the ICC), as persecution under the category of crime against humanity.[89]

Nevertheless, and despite other developments in international law,[90] the trial chamber stayed within the conservative parameters of the language in the statute and limited the definition of genocide to

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[84] Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment (Trial Chamber), ¶¶ 569–70 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001). This high standard of intent is present in the Genocide Convention, the ICTY statute, the statute of the International Criminal Tribunal for Rwanda, and the Rome Statute of the ICC. *See* Rome Statute, *supra* note 24, at art. 6; Genocide Convention, *supra* note 45, at art. 2; S.C. Res. 955, Annex, art. 2, U.N. Doc. S/RES/955 (Nov. 8, 1994); Report of the Secretary-General, *supra* note 78, at Annex art. 4.

[85] *Krstić* (trial chamber judgment), at ¶¶ 571, 574.

[86] *Id.* at ¶ 574.

[87] *Id.* at ¶ 575.

[88] *Id.* At Nuremberg, the U.S. Military Tribunal had interpreted persecution in the *Ulrich Greifelt et al.* case broadly, to cover extermination of the characteristics of ethnic and national groups. *Id.* at ¶ 575. "The acts, conduct, plans and enterprises . . . were carried out as part of a systematic program of genocide, aimed at the destruction of foreign nations and ethnic groups, in part by murderous extermination, and in part by elimination and suppression of national characteristics." *Id.* at n.1282 (quoting *U.S.A. v. Ulrich Greifelt et al.*, TRIALS OF WAR CRIMINALS, VOL. XIV (1948)).

[89] *Krstić* (trial chamber judgment), at ¶ 575.

[90] Such developments include a U.N. General Assembly resolution and a decision by the German Federal Constitutional Court, both of which recognized ethnic cleansing as a form of genocide. *Id.* at ¶¶ 578–79. A judicial opinion by a domestic court is not generally considered as a source of international law. *See generally* Statute of the International Court of Justice art. 38, U.N. Charter Annex.

those physical and biological acts that cause the destruction of a group—those five specifically enumerated in its statute, as taken from the Genocide Convention.[91] "Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide."[92]

1. Cultural Genocide as Proof of Specific Intent

The chamber did recognize, however, that very often, physical and biological attacks are accompanied by destruction of "cultural and religious property and symbols of the targeted group," in an effort to obliterate all evidence of that group's identity.[93] As such, those types of acts—if substantiated by the evidence—may well be considered as part of the proof of the specific intent to physically destroy that group.[94] Indeed, that is what the trial chamber did; in finding Krstić guilty of genocide, it considered as evidence of the requisite specific intent "the deliberate destruction of mosques and houses belonging to" the Bosnian Muslims.[95]

Appeal Chamber Judge Mohamed Shahabuddeen supported the proposition the trial chamber enumerated in its judgment against Krstić—that evidence of cultural genocide or destruction can be used to supplement a finding of specific intent.[96] In his partial dissenting opinion appended to the chamber's judgment of the Krstić case, Judge Shahabuddeen articulated a more nuanced version of cultural genocide.[97] He recognized that cultural genocide was intentionally left out of the Genocide Convention, but stated that:

> If those characteristics [—often intangible—that 'bind . . . together a collection of people as a social unit'] have been

[91] *Krstić* (trial chamber judgment), at ¶ 580.
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] Krstić's conviction of genocide was replaced by a conviction of aiding and abetting the commission of genocide, based on a finding by the Appeals Chamber of a lack of specific intent, but the legal principles enumerated by the trial chamber as regards evidence of cultural destruction as one indication of such intent remained unchanged. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment (Appeals Chamber), ¶¶ 134, 144 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).
[97] *Id.* (appeals chamber, partial dissenting opinion of Judge Shahabuddeen); William A. Schabas, *Genocide Law in a Time of Transition: Recent Developments in the Law of Genocide*, 61 RUTGERS L. REV. 161, 171–72 (2008).

> destroyed in pursuance of the intent with which a listed act of a physical or biological nature was done, it is not convincing to say that the destruction, though effectively obliterating the group, is not genocide because the obliteration was not physical or biological.[98]

The crime of genocide "is a crime against human groups," "not a crime against individuals."[99] As such, if acts taken to destroy the tangible and intangible characteristics of such a human group effectively lead to its destruction, it should be no defense against a charge of genocide that the specific acts committed were not those specifically listed as physical or biological in the ICTY Statute or the Genocide Convention.[100] The genocidal intent must always be to destroy the group; but evidence of such intent should not be—and historically is not—limited to physical or biological acts.[101] Therefore, acts of cultural destruction should be weighed as heavily as the physical and biological acts in determining genocide.

ICTY chambers adjudicating other genocide cases have interpreted Judge Shahabuddeen's dissent to support an expansion of the definition of genocide in the grey areas, where ethnic hatred—and resulting cultural crimes—is rampant, but there is little evidence that actual physical destruction of the people was intended.[102] "The destruction of culture may serve evidentially to confirm an intent, to be gathered from other circumstances, to destroy the group, as such," without any manifestation of physical violence.[103]

The trial chamber in *Prosecutor v. Blagojević* adopted the dichotomy between requiring the criminal acts to be physical or biological, but allowing the intent to take other forms enumerated by Judge Shahabuddeen.[104] The chamber recognized, as Judge

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[98] *Krstić* (appeals chamber judgment, partial dissenting opinion of Judge Shahabuddeen), at ¶ 50.

[99] *Id.* (internal citations omitted).

[100] *Id.*

[101] *Id.* at ¶ 51.

[102] Schabas, *supra* note 97, at 172.

[103] *Krstić* (appeals chamber judgment, partial dissenting opinion of Judge Shahabuddeen), at ¶ 53.

[104] Prosecutor v. Blagojević, Case No. IT-02-60-T, Trial Judgment, ¶ 659 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005). Blagojević was charged with complicity in genocide, crimes against humanity, and violations of the laws or customs of war. Prosecutor v. Blagojević, Case No. IT-02-53-PT, Initial Joinder Indictment (Int'l Crim. Trib. for the Former Yugoslavia Jan. 22, 2002). He was in command of one of the brigades in charge of securing the "safe area" of Srebrenica, "and directly participated in the actual capture" of the area and resulting executions. *Id.* at ¶ 1.

Shahabuddeen had made clear, that while the "listed acts of genocide" must be physical or biological in nature, "the same is not required for the intent."[105] The intent need not be limited to inferences from physical and biological acts. Cultural acts may be considered, since a group whose destruction is intended "is comprised [not only] of its individuals, but also of its history, traditions, the relationship between its members, the relationship with other groups, [and] the relationship with the land."[106] Accordingly, the *Blagojevich* court recognized that forcible transfer (exceeding "mere displacement") can be genocide if "the consequence is dissolution of the group."[107] Forced migration of civilians and large-scale deportation would also fall under the same category.[108] Rape and other acts of sexual violence, as acknowledged by the International Criminal Tribunal for Rwanda (ICTR), also serve as evidence used to show intent to destroy.[109]

The chamber also looked favorably upon a decision by the Federal Constitutional Court of Germany,[110] which, in deciding to expand the interpretation of Germany's statutory definition of genocide beyond physical and biological extermination, "found that [doing so] would not be in violation of international law and that 'it has generally been accepted that the limit of the meaning of the text has been exceeded only when the intention to destroy relates *solely* to a group's cultural identity,' that is, cultural genocide."[111] While the ICTY has not extended the statutory interpretation of genocide to include cultural genocide, the premise behind such an expansion was further expounded upon in *Prosecutor v. Krajisnik*,[112] as the court

[105] *Blagojević* (trial chamber judgment), at ¶ 659.
[106] *Id.* at ¶ 666.
[107] *Id.* at ¶ 660.
[108] *Id.* at ¶ 663.
[109] *Id.* at ¶ 662.
[110] Prosecutor v. Nikola Jorgić, Judgment, Federal Constitutional Court, 2 BvR 1290/00 (Dec. 12, 2000).
[111] *Blagojević* (trial chamber judgment), at ¶ 664 (emphasis added). The Federal Constitutional Court of Germany in *Jorgić* upheld an interpretation of "destroy" to mean "the destruction of 'the group as a social unit in its specificity, uniqueness and feeling of belonging [and that] the biological-physical destruction of the group is not required.'" *Id.* (internal citation omitted).
[112] Prosecutor v. Krajisnik, Case No. IT-00-39-T, Trial Judgment, ¶ 854 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2006). Krajisnik was charged with genocide, crimes against humanity, violations of the laws and [*sic*] customs of war, and grave breaches of the Geneva Conventions. Prosecutor v. Krajisnik, Case No. IT-00-39-T, Amended Indictment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 21, 2000). With the goal of freeing Bosnia from unwanted Serbs, Krajisnik engaged in

dissected some of the philosophy behind the actus reus/mens rea dichotomy:

> It is not accurate to speak of 'the group' as being amenable to physical or biological destruction. Its members are, of course, physical or biological beings, but the bonds among its members, as well as such aspects of the group as its members' culture and beliefs, are neither physical nor biological. Hence [under] the Genocide Convention's 'intent to destroy' the group cannot sensibly be regarded as reducible to an intent to destroy the group physically or biologically. . . .[113]

Nevertheless, the court declined to extend genocide beyond the physical and biological acts listed in the ICTY Statute.[114]

2. Additional Cultural Provisions in the ICTY Statute

Aside from Article 4 of the ICTY statute, which deals with genocide, Articles 2 and 3—on grave breaches of the Geneva Conventions and violations of the laws of war, respectively—allow for the prosecution of crimes against property. These could potentially encompass cultural property, under provisions relating to: "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;" "wanton destruction of cities, towns or villages, or devastation not justified by military necessity;" "seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science" from Article 3(d); and finally "plunder of public or private property."[115]

But none of these four provisions provide for any kind of protection against destruction of culture through means other than the destruction of tangible objects. Yet culture, as the cumulative sense of identity that is built through both its embodiment in physical objects, as well as intangible ephemera, can be threatened through other means. There is no comparable criminalization of acts such as the prohibition of the use of local and native languages and forcible

"the creation of impossible conditions of life, involving persecution and terror tactics . . . ; the deportation of those who were reluctant to leave; and the liquidation of others." *Id.* at ¶ 6.

[113] *Krajisnik* (trial chamber judgment), at ¶ 854 n.1701.

[114] *See generally id.* at ¶ 854, as a general statement of the legal use of other types of proof of intent, including, for example, the transfer of children, severing of bonds among group members, and deliberate forcible transfer.

[115] Report of the Secretary-General, *supra* note 78, at Annex arts. 2(d), 3(b), 3(d), 3(e).

displacement.[116]

Such types of activities are also legally considered to be components of the concept of ethnic cleansing.[117] The first problem with such a characterization is that there is no formal legal definition, although a U.N. Commission of Experts—investigating the atrocities in Yugoslavia—defined it as a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas. . . [for the] purpose [of] occupation of territory to the exclusion of the purged group or groups.[118]

The second problem is that under the development of international tribunals' jurisprudence, ethnic cleansing is recognized neither as a stand-alone genocidal policy nor as a crime unto itself.[119] Interpretation of the phrase "to destroy" in the definition of genocide "excludes" cultural genocide because destruction of a culture does not physically destroy the victims; by extension, ethnic cleansing, which also does not intentionally destroy the people—rather only displaces them—is equally precluded from falling under the crime of genocide.[120] Ethnic cleansing has only been acknowledged as evidence of genocidal intent (like cultural genocide), meaning that barring the additional commission of an enumerated crime in the Genocide Convention (or ICTY Statute or Rome Statute), a state policy of ethnic cleansing is not genocide.[121] In the same vein, the acts committed under a policy of ethnic cleansing are not punishable as one coherent crime; rather, each act is prosecuted on an individual basis either as a war crime or crime against humanity under the various provisions of the international criminal statutes.[122] This disconnect is notwithstanding the fact that the U.N. GA passed a resolution in 1992 recognizing ethnic cleansing as a form of

[116] Deportation is made criminal as a breach of the Geneva Conventions under article 2(g)—"unlawful deportation or transfer or unlawful confinement of a civilian"—and as a crime against humanity under article 5(d)—"deportation." *Id.* at art. 2(g).

[117] Sirkin, *supra* note 10, at 500.

[118] Final Rep. of the U.N. Comm'n of Experts Established Pursuant to S.C. Res. 780 (1992), § III.B, U.N. Doc. S/1994/674 (May 27, 1994), *available at* http://www.his.com/~twarrick/commxyu4.htm.

[119] *See* Sirkin, *supra* note 10, at 489–91.

[120] *Id.* at 502.

[121] *Id.* at 500, 506.

[122] *Id.* at 500 ("International courts and tribunals commonly criminalize ethnic cleansing under the crime of deportation or forcible transfer or the crime of persecution—both crimes against humanity.").

genocide.[123]

In its jurisprudence, the ICTY helped to resurrect what seemed to be the legally moribund concept of cultural genocide.[124] The court essentially carved a niche for cultural genocide: the acts considered genocide were restricted to the five enumerated in the ICTY statute, but other physical and cultural acts and motivations not explicitly stated in the statute could be used to prove the specific intent behind genocide.[125]

D. The International Criminal Court

The 1990s thus saw a huge "dynamism" in, or development of, international criminal law due to the jurisprudence produced by the international criminal tribunals established to adjudicate the crimes committed during the wars in Yugoslavia and Rwanda.[126] These events also led to a newfound recognition of a need to create a permanent international institution by which to prosecute perpetrators of international crimes—the creation of which had been stalled for the previous fifty years, despite numerous inclinations to act upon it.[127] Finally doing so, the U.N. GA convened the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, in Rome, Italy in June 1998.[128]

Among other important issues, the Conference addressed whether the statute of this new court—called the Rome Statute—would adopt verbatim the definition of genocide contained in the Genocide Convention or whether the definition would be expanded to incorporate the newly emerging jurisprudence and analysis from

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[123] Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment (Trial Chamber), ¶¶ 578–79 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001); G.A. Res. 47/121, U.N. Doc. AG/RES/47/121 (Dec. 18, 1992). GA resolutions are not law; they are only evidence of what the international community believes is law. SHAW, *supra* note 71, at 88. The only way international tribunals may get around the strict parameters of their statutes is by finding, for example, that cultural genocide or ethnic cleansing has become criminalized under customary international law by showing widespread conformance of state practice and *opinio juris*, or belief by the states that it is law. *See generally id.* at 76–89.

[124] *See supra* Part II.C.

[125] *See generally Krstić* (trial chamber judgment), at ¶¶ 574–80.

[126] Schabas, *supra* note 97, at 162.

[127] For example, in 1989, the prime minister of Trinidad and Tobago suggested that the international illegal drug trade be dealt with by the establishment of a permanent international tribunal. *See* SCHABAS, *supra* note 13, at 90.

[128] 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, 372 (2002).

the criminal tribunals.[129] Rather than engage in the same divisive debates over the expansion of the definition that had so plagued the committees drafting the Genocide Convention, the delegates "resist[ed] the temptation to add new categories" and decided to use the same language as in the Convention.[130] Cuba was the only country to suggest incorporating new components into the definition, but its proposal received little support.[131] Thus even though its motivation was strategic, the international community failed to capitalize on an auspicious opportunity to remedy the deficiencies in the definition, and prosecution, of genocide by including the concepts of cultural genocide and ethnic cleansing. The provisions for the punishment of genocide contained in the Rome Statute, which created the ICC, therefore, are identical to those contained in the Genocide Convention and the statute for the ICTY—excluding cultural genocide once again.[132]

The Rome Statute does, however, take from the ICTY statute its provision on the illegality of the seizures of, and destruction or damage to, cultural institutions.[133] It incorporates as a war crime, in the context of both an international and non-international armed conflict, attacking protected objects.[134] Those objects are "buildings dedicated to religion, education, art, science or charitable purposes, [and] historical monuments."[135] In addition to this second-best option, the ICC will presumably adopt the principle of using cultural destruction as evidence of the specific intent necessary for genocide once it is confronted with a defendant charged with genocide.[136] Sudanese president Omar al-Bashir is currently the only person thus far that the ICC has indicted for genocide, but he remains at large.[137]

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[129] *Id.* at 376 n.136; Schabas, *supra* note 97, at 162.

[130] Shah, *supra* note 128, at 377 (quoting Press Release, Preparatory Committee for Establishment of International Criminal Court Discusses Definitions of "Genocide," "Crimes Against Humanity," U.N. Press Release L/2762 (Mar. 26, 1996)).

[131] Schabas, *supra* note 97, at 162.

[132] *See* Rome Statute, *supra* note 24, at art. 6.

[133] *See id.* at art. 8(2)(b)(ix), 8(2)(e)(iv).

[134] *Id.*

[135] *Id.* The crime also includes "hospitals or places where the sick and wounded are collected." *Id.*

[136] Within international law, there is no hierarchy of courts and so the ICC need not, but may if it so chooses, accept the rather well-established principle that attacks on, and destruction of, culture may substantiate a finding of specific intent. *See* SHAW, *supra* note 71, at 123, 1116.

[137] *See, e.g.*, *Sudan's Omar al-Bashir in Malawi: ICC wants answers*, BBC NEWS (Oct. 20, 2011), http://www.bbc.co.uk/news/world-africa-15384163.

Despite a promising beginning for the criminalization of cultural genocide, incorporation of the concept has been withheld from international criminal conventions and statutes.[138] It has made piecemeal appearances in international jurisprudence, but while its exclusion has been bemoaned by some, it has consistently been relegated to the sidelines. Nevertheless, the ICC birthed a new theory of legal participation, allowing for victims of the crimes committed by ICC-accused to be represented before the court.[139] This radical mechanism has the potential to influence the way cultural destruction is treated in international criminal law.[140] The ICC will soon face the task of analyzing its own interpretation of genocide during which time it will undoubtedly rely heavily on previous interpretations by the ICTY.[141] Until then, or until the Rome Statute is amended by the states[142] to include a separate provision for the prosecution of cultural genocide—a desirable event—there is another, more subtle way by which cultural considerations should be presented to the court: by the certification of both natural persons and cultural institutions as official victims of the various conflict situations under the purview of the ICC. The ICC would be well served by letting the victims carve a niche for themselves by presenting to the court the cultural context of the conflicts and crimes.

III. THE NOVEL APPROACH TO VICTIM PARTICIPATION

The Rome Statute of the ICC contains a new and revolutionary provision that allows for victims to participate in a legal capacity—not merely as witnesses or recipients of reparations—throughout most stages of the accountability process, from the investigation stage through the trial itself.[143] Neither the ICTY nor its sister tribunal set

[138] *See Genocide Convention*, *supra* note 45; *Report of the Secretary-General*, supra note 78; *Rome Statute*, *supra* note 24.

[139] *See* Rome Statute, *supra* note 24, at art. 68(3).

[140] Gioia Greco, *Victims' Rights Overview Under the ICC Legal Framework: A Jurisprudential Analysis*, 7 INT'L CRIM. L. REV. 531, 533 (2007) ("[Victims'] involvement in trials and cooperation in the pursuit of criminal prosecution advanced . . . the application of international criminal law.").

[141] *See* Amal Alamuddin, *Collection of Evidence*, *in* PRINCIPLES OF EVIDENCE IN INTERNATIONAL CRIMINAL JUSTICE 235–36 (Karim A.A. Khan et al. ed., 2010).

[142] Amendments may be proposed by any state party to the Rome Statute. Rome Statute, *supra* note 24, at art. 121 ("After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto.").

[143] *Id.*; Miriam Cohen, *Victims' Participation Rights Within the International Criminal Court: A Critical Overview*, 37 DENV. J. INT'L L. & POL'Y 351, 351 (2009).

up for Rwanda provide for a similar participatory-rights scheme.[144] One of the main justifications for this novel institution is that the overwhelming function of the ICC is truth-finding, and victims, having experienced first-hand the crimes at issue, are in a good position to help the ICC accomplish that mission.[145] Granting victims a larger participatory role also ensures that the ICC will address their concerns—not only for accountability but also for justice (both communal and individual) and reconciliation.[146] As with much at the ICC, one of the drawbacks of this scheme is that the jurisprudence assessing and analyzing the boundaries, scope, and modalities of victim participation is still developing and is therefore quite fluid (as well as vague and contradictory).[147]

A. *Modes of Participation*

The Rome Statute provides primarily for two avenues of participatory rights: (1) a very narrow and specific route based on Articles 15(3) and 19, which strictly delineates what role victims may play in initiating investigations and challenging jurisdiction and admissibility,[148] respectively; and (2) a much broader, and therefore more ambiguous, route founded on Article 68(3), which allows victims to generally participate in "proceedings."[149]

1. Narrow Preliminary Rights

Article 15 allows "victims [to] make representations to the Pre-Trial Chamber" (PTC)[150] when the prosecutor has decided that she

[144] Cohen, *supra* note 143, at 352. Some civil law systems, however, mainly in Europe, do allow for active participation by the victims. *Id.* at 352 n.11.

[145] *Id.* at 351, 353.

[146] *Id.* at 353.

[147] *Id.*

[148] The concept of admissibility refers to whether the ICC may hear the case in the first place. The court must decline cases that are "being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry" it out; "the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned;" "the person concerned has already been tried for conduct which is the subject of the complaint;" and "the case is not of sufficient gravity." *Rome Statute*, *supra* note 24, at art. 17(1).

[149] Cohen, *supra* note 143, at 353, 358, 360.

[150] The court is composed of the presidency, the appeals division, the trial division and the pre-trial division, the office of the prosecutor, and the registry. Rome Statute, *supra* note 24, at art. 34. The pre-trial chambers are tasked with, *inter alia,* evaluating the legal and evidentiary requirements—a "reasonable basis"—for initiating an investigation; taking preliminary steps to "ensure the efficiency and

has sufficient evidence to request an authorization of an investigation from the PTC.[151] In that way, the victims may help to support the prosecutor's case before the chamber, as the chamber makes a determination as to whether "there is a reasonable basis" that the case "fall[s] within the jurisdiction of the court" and that therefore an investigation into the alleged crimes would be substantiated.[152] Aside from receiving authorization from the PTC, the prosecutor "may initiate investigations *proprio motu*[153] on the basis of information" that may be provided by various victims' organizations and non-governmental organizations, thus "triggering" the investigation.[154] Direct victim participation may also put some pressure on the prosecutor to begin an investigation even if it is within the prosecutor's discretion whether to proceed—or at least begin making preliminary inquiries.[155] Having such roles is very important for the victims because they will be able to gain access to all public information about the conflict at issue from a very early stage in the proceedings, as well as be able to add to the accumulation of information, which will be to the benefit of the prosecutor.[156]

Article 19 allows for victims who have already engaged with the court in some legal capacity to raise questions of jurisdiction or admissibility to the PTC.[157] There are two principal restrictions to this right of participation. The first is that it is only available to those victims who have "already communicated with the Court in relation to the case," thereby precluding new participants.[158] The second is that it can only be exercised within a case, and not merely a situation.[159] This distinction between a situation and a case—

integrity of the proceedings" and "protect the rights of the defence [sic];" issuing warrants and summonses; protecting the privacy and security of victims and witnesses, preserving evidence, protecting those arrested, and protecting national security information. *Id.* at art. 53, 56–58.

[151] *Id.* at art. 15(3).

[152] *Id.* at art. 15(4).

[153] Of one's own accord. *Ex Proprio Motu*, BLACK'S LAW DICTIONARY 662 (9th ed. 2009).

[154] Rome Statute, *supra* note 24, at art. 15(1); Elisabeth Baumgartner, *Aspects of Victim Participation in the Proceedings of the International Criminal Court*, 90 INT'L REV. OF THE RED CROSS 870, 427 (2008).

[155] Baumgartner, *supra* note 154, at 427.

[156] Cohen, *supra* note 143, at 358.

[157] Rome Statute, *supra* note 24, at art. 19(3); Rules of Procedure and Evidence of the International Criminal Court, ICC-ASP/1/3, Sept. 3–10 2002, Rule 59 [hereinafter Rules of Procedure and Evidence].

[158] Rules of Procedure and Evidence, *supra* note 157, at rule 59.

[159] Cohen, *supra* note 143, at 361.

extrapolated from the structure of the Rome Statute—is very important, as it features heavily in the nature of proceedings at the ICC and often determines the extent of victim participation at a particular stage of a trial.[160] The difference between a "situation" and a "case" is that a situation is defined by "temporal, territorial and personal parameters" and is the proceeding by which a determination is made as to "whether the facts alleged should give rise to a criminal investigation."[161] More colloquially, it is the investigation into an event, incident, or spate of violence during which time the prosecutor determines who, if anyone, bears responsibility for international criminal law violations.[162] The end result is the filing of a request for a warrant of arrest (or summons to appear) with a pre-trial chamber charging the alleged perpetrators with crimes under the Rome Statute.[163] A case, on the other hand, refers to the adjudication of "specific incidents . . . among the crimes within the jurisdiction of the Court"[164] "with one or more specific suspects occurring within a situation under investigation,"[165] which follows "the issuance of an arrest warrant or a summons to appear."[166] In essence, a case encompasses the full spectrum of a trial of an accused, from indictment to final judgment on the merits.

2. Broad Rights in a Situation and Case

The broader rights that victims have under the Rome Statute, while seemingly explicit, are much less straightforward and are therefore more open to interpretation.[167] There are more requirements for participation and distinctions exist between who qualifies to participate in a situation and a case.[168] But the modes of participation are much greater once these qualifications are met,

[160] Baumgartner, *supra* note 154, at 414; *see, e.g.*, Prosecution's Reply under Rule 89(1) to the Application for Participation of Applicants a/0106/06 to a/0110/06, a/0128/06 to a/0162/06, a/0188/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06 and a/0224/06 to a/0250/06 (Pre-Trial Chamber I), No. ICC-01/04-346 (June 25, 2007) (the Prosecutor makes a distinction between "situation victims" and "case victims").

[161] Greco, *supra* note 140, at 537 n.30.

[162] Baumgartner, *supra* note 154, at 414.

[163] Rome Statute, *supra* note 24, at art. 58.

[164] Greco, *supra* note 140, at 537 n.31.

[165] Baumgartner, *supra* note 154, at 414.

[166] Greco, *supra* note 140, at 537 n.31.

[167] *See* Cohen, *supra* note 143, at 365–65.

[168] *See generally* Rome Statute, *supra* note 24, at art. 68(3); Rules of Procedure and Evidence, *supra* note 157, at Rule 85.

increasing the role that victims may play.

a. Statutory Criteria for Participation

Article 68(3), along with Rule 85 of the Rules of Procedure and Evidence, provide the participatory framework by which the legal rights of victims are granted for the various proceedings within a situation and a case.[169] It is this portion of the victim participation mechanism that is the most fluid, as the pre-trial chambers struggle to articulate a coherent set of standards and tests for admitting qualified victims and delineating their modes of participation. In its first decision regarding victim participation, PTC I relied on the strict language of Rule 85(a) to enumerate the four requirements a victim must satisfy to gain the legal right to participate: the victim must be (1) a natural person; (2) who has suffered harm; (3) resulting from a crime under the jurisdiction of the court; and (4) there must be a causal link between the alleged crime and the harm.[170]

Subsequent decisions by the pre-trial chambers and the appeals chamber have provided more specific guidelines for these criteria.[171] With regard to the first criterion, Single Judge Kuenyehia of PTC I, overseeing the Darfur situation, determined that a deceased person is not a "natural person" within the meaning of Rule 85.[172] Therefore, victims may only file on behalf of themselves as natural persons, as well as on behalf of minors, the disabled, and any individual who has given his or her consent, as in a situation where the person is still in a conflict zone and is unable to file on his or her own behalf.[173] Regarding the second criterion, the harm suffered by the person seeking victim status may be material or economic, physical, and/or

[169] Rome Statute, *supra* note 24, at art. 68(3); Rules of Procedure and Evidence, *supra* note 157, at Rule 85.

[170] Decision on the Applications for the Participation of the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Pre-Trial Chamber I), ¶ 79, No. ICC-01/04-101-tEN-Corr (Jan. 17, 2006); Rules of Procedure and Evidence, *supra* note 157, at Rule 85(a); Cohen, *supra* note 143, at 367.

[171] *See generally* Cohen, *supra* note 143, at 366–70.

[172] Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 (Pre-Trial Chamber I, Single Judge) ¶ 36, No. ICC-02/05-111-Corr (Dec. 14, 2007) [hereinafter *Corrigendum to Decision on Applicants 2007*]; Cohen, *supra* note 143, at 368.

[173] *See generally* Standard Application Form to Participate in Proceedings Before the International Criminal Court for Individual Victims and Persons Acting on Their Behalf [hereinafter Old Application Form]; Application Form for Individuals: Request for Participation in Proceedings and Reparations at the ICC for Individual Victims [hereinafter New Application Form].

emotional or psychological.[174] So long as the individual suffered personally, he or she qualifies, regardless of whether the suffering was direct or indirect.[175]

The criteria necessary to qualify as an institutional victim under Rule 85(b) are virtually identical to those required for individuals, save that the victim must be an organization or institution, the property of which is "dedicated to religion, education, art or science or charitable purposes," or is a "historic monument . . . , hospital . . . or other place . . . and object . . . for humanitarian purposes."[176] The only difference—and it is a significant one—is that with regard to the harm criterion, an institution or organization must suffer *direct* harm; the institution or organization cannot become a victim through indirect harm.[177] In addition, the person filing on behalf of such an institution or organization must submit documents sufficient to establish *locus standi* (standing) to act on that institution's behalf.[178] The court will consider any document in accordance with the domestic law of the country in question for proof of the legal status of the institution and proof of the applicant's own standing within the institution when determining whether to allow the individual to file on its behalf.[179] Thus the requirements for obtaining victim status as an institution or organization are slightly more onerous than those for an individual, given that the harm suffered by the property must be direct and that the person who is filing on its behalf must legally be permitted to do so under the laws of his or her own country.[180]

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[174] *Corrigendum to Decision on Applicants 2007*, at ¶¶ 30, 38–50; Judgment on the appeals of the Prosecutor and the Defense against Trial Chamber I's Decision on Victims' Participation of 18 January 2008 (Appeals Chamber), ¶ 1, No. ICC-01/04-01/06-1432, July 11, 2008 [hereinafter *Judgment on the Appeals 2008*].

[175] *Judgment on the Appeals 2008*, at ¶¶ 38–39. The distinction between direct and indirect harm comes into play when "harm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court . . . give[s] rise to harm suffered by other victims." *Id.* at ¶ 32. The court gives the example of the child soldier: the child suffers directly and his parents suffer indirectly; both would qualify as victims in the ICC (so long as they met the other requirements). *Id.*

[176] Corrigendum to the Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-423-Corr-tENG, ¶ 140 (Jan. 31, 2008) [hereinafter *Corrigendum to Investigation in DRC*]; Rules of Procedure and Evidence, *supra* note 157, at Rule 85(b).

[177] *Corrigendum to Investigation in DRC*, at ¶ 141; Rules of Procedure and Evidence, *supra* note 157, at Rule 85(b).

[178] *Corrigendum to Investigation in DRC*, at ¶142.

[179] Fourth Decision on Victims' Participation (Pre-Trial Chamber III, Single Judge), ¶ 53, No. ICC-01/05-01/08-320 (Dec. 12, 2008).

[180] *See id.*

The provision allowing for institutions and organizations to qualify as victims in order to be legally represented before the court is heavily under-utilized.[181] What is particularly curious and useful about the definition of qualified institutions is that the language mirrors, almost precisely, that contained in the article on the war crime of attacking protected objects.[182] Thus, there is enormous potential for a wide array of cultural institutions to be able to promote their interests before the court—not just for reparations[183] but also with regard to their purposeful destruction. To date, however, only two institutions have availed themselves of this mechanism. In the first, a headmaster filed on behalf of his destroyed school, in the situation of the Democratic Republic of the Congo.[184] His application was granted, as the court determined that his application met all of the Rule 85(b) requirements and was properly substantiated by legal documents showing standing.[185] In the second, a priest filed on behalf of his destroyed church, in the *Bemba* case in the Central African Republic situation.[186] His application was denied because he had filled out the application form incorrectly—he had filed on behalf of himself and the institution on the same form—and he had also failed to provide sufficient documentation of his legal standing.[187]

Aside from meeting the objective criteria of a victim, there is one final requirement that both a human victim and an institutional victim must meet.[188] In order to participate in proceedings, the "personal interests" of that victim must be affected.[189] The interpretation of this phrase has caused some controversy.[190] The ICC

[181] Only two institutions have thus far filed for status. *See generally* THE OFFICE OF THE PUBLIC COUNSEL FOR VICTIMS, REPRESENTING VICTIMS BEFORE THE INTERNATIONAL CRIMINAL COURT: A MANUAL FOR LEGAL REPRESENTATIVES 50 (2011) [hereinafter OPCV MANUAL].

[182] *See* Rome Statute, *supra* note 24, at art. 8(b)(2)(ix); Rules of Procedure and Evidence, *supra* note 157, at Rule 85(b).

[183] This Comment will not address the question of reparations.

[184] OPCV MANUAL, *supra* note 181, at 50.

[185] *See* Corrigendum to the Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo (Pre-Trial Chamber I, Single Judge), ¶ 139–143, No. ICC-01/04-423-Corr-tENG (Jan. 31, 2008).

[186] OPCV MANUAL, *supra* note 181, at 50.

[187] *See* Fourth Decision on Victims' Participation (Pre-Trial Chamber III, Single Judge), ¶ 53–56, No. ICC-01/05-01/08-320 (Dec. 12, 2008).

[188] Cohen, s*upra* note 143, at 368.

[189] Rules of Procedure and Evidence, *supra* note 157, at Rule 68(3).

[190] *Compare* Décision sur les demandes de participation à la procédure de VPRS1,

chambers have interpreted it to require a reassessment of personal interest for every new proceeding in which a victim wishes to participate; this is separate and distinct from "the entire proceedings," or the trial itself.[191] Accordingly, in some types of proceedings—largely procedural—victims' requests to participate will be denied because the personal interests will be too tenuous.[192] Recent jurisprudence has in fact established that, contrary to previous decisions by the three pre-trial chambers, a victim does not have a general procedural status of victim in the situation or investigation phase.[193] This, however, does not preclude victims from petitioning to participate in each individual proceeding *taking place within* the investigative phase.[194] But it does require them to restate their personal interests in the specific proceeding in which they would like to participate; once they qualify, the victims are not automatically allowed to participate in every proceeding brought before the chamber in the situation.[195]

Participation in a case, on the other hand, is not so rigid. Once the prosecutor files charges, the chamber reassesses the victims who have already been accepted into the situation phase to determine whether they fulfill the additional requirement for participation in a case.[196] There must be a "sufficient causal link between the harm they have suffered and the crimes for which there are reasonable grounds to believe that [the accused] bears criminal responsibility."[197] For new applications, the prospective victim must meet all of the objective criteria from Rule 85(a) or (b), allege sufficient personal interest, and establish a sufficient causal link between the harm and the

VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6 (Pre-Trial Chamber I), No. ICC-01/04-101-tEN-Corr (Jan. 17, 2006), *with* Decision on Victims' Participation in Proceedings Relating to the Situation in the Democratic Republic of the Congo (Pre-Trial Chamber I), No. ICC-01/04-593 (Apr. 11, 2011) [hereinafter *Decision on Victims' Participation in DRC*].

[191] Cohen, *supra* note 143, at 368.

[192] *Id.*

[193] *See* Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya (Pre-Trial Chamber II), No. ICC-01/09-24, 3 November 2010 [hereinafter *Decision on Victims' Participation in Kenya*]; *Decision on Victims' Participation in DRC.*

[194] *Decision on Victims' Participation in DRC*, at ¶ 9 (emphasis added).

[195] *See generally Decision on Victims' Participation in Kenya, supra* note 193.

[196] Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case of Prosecutor v. Thomas Lubanga Dyilo (Pre-Trial Chamber I), No. ICC-01/04-01/06-172-tEN, at pg. 6/9 (June 29, 2006).

[197] *Id.*

crimes for which the accused was indicted.[198] Once a person has been granted victim status in a case, that status is permanent for the entire duration of the trial, as the trial itself is considered a proceeding.[199] The person need not resubmit a reassessment of personal interest for each phase or proceeding within the trial.

b. Participatory Rights

In addition to the more restricted right to participate in the prosecution process such as in initiating investigations and challenging jurisdiction and admissibility, there are various other ways and other proceedings by which victims may participate.[200] One such proceeding is the confirmation of charges hearing.[201] Once the accused is brought before the court, the charges against him must be confirmed so that the trial may begin.[202] In *Prosecutor v. Thomas Lubanga*,[203] the first before the ICC, the victims' legal representatives were allowed to give opening and closing statements, although they were limited to making only legal observations and not presenting facts or personal statements.[204] The same four *Lubanga* victims who participated in the confirmation of charges hearing were, during the actual trial phase, "allowed to present their view in written and oral form with regard to all the procedural and substantive issues that arose."[205]

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[198] *See generally id.*

[199] Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of the Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, No. ICC-01/04-556, ¶ 45 (Dec. 19, 2008), (a "proceeding" is "a term denoting a judicial cause pending before a Chamber.").

[200] *See* Baumgartner, *supra* note 154, at 425–30.

[201] *Id.* at 428.

[202] Rome Statute, *supra* note 24, at art. 61.

[203] Thomas Lubanga Dyilo was the alleged commander-in-chief of the UPC and FPLC militia forces in the Democratic Republic of Congo, from September 2002 until at least the end of 2003. *Democratic Republic of Congo—ICC-01/04-01/06, The Prosecutor v. Thomas Lubanga Dyilo*, INT'L CRIM. COURT, http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0106/Democratic+Republic+of+the+Congo.htm (last visited Jan. 20, 2012). He is charged with the war crimes of "enlisting and conscripting of children under the age of 15 into the [FPLC] and using them to participate actively in hostilities" in an international armed conflict and non-international armed conflict. *Id.*

[204] Baumgartner, *supra* note 154, at 429.

[205] *Id.*

One of the principal decisions[206] handed down on victim participation also stated that victims may present and examine evidence; ask appropriate questions whenever the evidence presented affects their personal interests; access all public (and therefore redacted) information presented by the prosecution and defense; and "participate in closed and *ex parte* hearings depending on the circumstances."[207] For those victims who also have legal representation—whether individual or common, court-appointed or chosen—their participatory rights can extend past procedural rights and include the "questioning of witnesses, experts or the accused."[208]

Nevertheless, to some extent, victim participation is at the discretion of the court, which must decide whether such participation is appropriate.[209] A determination of appropriateness must balance the rights of the accused, including the "right to a fair and expeditious trial," with the rights of the victims to present their views and concerns when their personal interests are affected.[210] The court must also make sure that the burden of proof remains with the prosecutor so that the victims do not become like a second prosecutor.[211] As such, victims should refrain from making factual accusations or independent legal conjectures about the evidence that would disturb the prosecution's case or inhibit the accused's defense.[212]

Still, even within what would seem to be a rather limited or restricted manner of participation by qualified victims, there is a great deal of potential to influence the outcome of a proceeding. An astute victim legal team would particularly tailor its representation to highlight the weaker portions of the prosecutor's case, buttress the prosecutor's evidence with strong witnesses and evidence of its own, and, depending on the charges, paint for the court a more nuanced cultural landscape than the prosecution might need to. The success of this mechanism for victim participation—and apparent

[206] Decision on Victims' Participation (Trial Chamber I), No. ICC-01/04-01/06-1119 (Jan. 18, 2008).

[207] *Id.* at ¶¶ 108, 110, 113; Baumgartner, *supra* note 154, at 429–30.

[208] Baumgartner, *supra* note 154, at 430.

[209] "The Court shall permit [participation by the victims] at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." Rome Statute, *supra* note 24, at Art. 68(3).

[210] Cohen, *supra* note 143, at 371.

[211] *Id.*

[212] *Id.* at 373.

recognition of the myriad benefits it brings—is evidenced by the onslaught of victim applications that swamped the Victims Participation and Reparations Section (VPRS) during the brief window that the court had set in anticipation of the confirmation of charges hearing of Callixte Mbarushimana.[213] VPRS strongly requested an extension so that it might process the 783 applications it had received, of which 530 seemed to be complete.[214]

The victim participation framework is a new mechanism in the accountability process at the ICC, but its innovative features have proved appealing to the international community and many victims have applied for victim status in order to avail themselves of the benefits.[215] The potential to influence and enhance the trial process is enormous for victims and their legal representatives. Specifically, there are many opportunities during the proceedings to inject into the process a different, more culture-oriented perspective.

Cultural genocide has been somewhat sidelined as a distinct legal concept, even as it has been acknowledged as one way to prove genocidal intent.[216] It has, however, a more versatile use in highlighting the cultural background against which conflicts can be analyzed; victim participation at the ICC can help to strengthen this cultural context. It is important to note that victim participation is not a way to get the crime of cultural genocide back into the Rome

[213] First transmission to the Pre-Trial Chamber of applications to participate in the proceedings (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/10-166, at pg. 3/6, 4/6 (May 20, 2011) [hereinafter First transmission to participate]. Mbarushimana was the "alleged executive secretary of the . . . FDLR-FCA," a Rwandan rebel group participating in the conflict in the DRC. *Democratic Republic of the Congo—ICC-01/04-01/10, the Prosecutor v. Callixte Mbarushimana*, INT'L CRIM. COURT, http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations /situation%20icc%200104/related%20cases/icc01040110/icc01040110?lan=en-GB (last visited Jan. 20, 2012). He was charged with the crimes against humanity of murder, torture, rape, inhuman acts, and persecution; and the war crimes of attacks against the civilian population, murder, mutilation, torture, rape, inhuman treatment, destruction of property, and pillaging. *Id.*

[214] First transmission to participate, at pg. 3/6. The request was denied. *Id.* at pg. 5/6. On December 16, 2011, the PTC I declined to confirm the charges against Mbarushimana and declared his release from ICC custody upon completion of the necessary arrangements. Decision on the confirmation of charges (Pre-Trial Chamber I) pg. 149/150, No. ICC-01/04-01/10-465-Red (Dec. 16, 2011).

[215] REGISTRY AND TRUST FUND FOR VICTIMS FACT SHEET, MARCH 2011, COALITION FOR THE INTERNATIONAL CRIMINAL COURT 1, *available at* www.coalitionfortheicc.org/documents/Victims_Factsheet_March_2011.18apr1832.pdf ("Since 2005, the [VPRS] has received a total of 4773 victims' applications for participation and 2031 for reparation" as of March 31, 2011).

[216] *See supra* Part II.C.1.

Statute in its own right. Cultural genocide is substantive law which is not presently contained in the Rome Statute; the victim participation mechanism is one procedure that can significantly affect the ICC's interpretation of genocide by infusing culture into the cases. As such, victim participation can be an extremely useful instrument in expressing the foundation of the concept that culture is an undeniable and intertwined part of all proceedings by reminding the court of past attacks on cultural life, buildings, and artifacts, and the continuing decimating effects such acts are having on local culture and identity.[217]

In this sense, participation by both natural persons and institutions or organizations will allow for slightly different perspectives to be advanced and will reinforce different aspects of a nation's or group's culture. The legal representatives of the victims would be well-advised to take advantage of their unique position within the trial proceedings to advance the charge for recognition of cultural destruction as a legitimate consequence and oft-desired result of attacks on individuals, villages, and communities. In the absence of any provisions on cultural genocide or ethnic cleansing in the Rome Statute—which would require that this type of evidence be presented—the victims' legal representatives would be able to supplement the prosecutor's case for other crimes[218] and heighten awareness of the cultural context in which the events at issue occurred.

IV. APPLICATION TO THE CASE AGAINST SUDANESE PRESIDENT OMAR AL-BASHIR

The victim participation framework, while still fluid, was tested and tried in the first-ever case before the ICC, *Prosecutor v. Lubanga*.[219] Submitted for deliberation in August 2011, Trial Chamber I issued the ICC's first-ever verdict in March 2012, finding Lubanga guilty of "the war crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities."[220] This

[217] *See, e.g.*, *Air strikes and clashes continue in Darfur*, RADIO DABANGA (Dec. 27, 2011), http://www.radiodabanga.org/node/22943.

[218] It is important to note that the prosecutor cannot charge an accused with cultural genocide because it is not contained in the Rome Statute. *See generally* Rome Statute, *supra* note 24. She must therefore be careful about how to color her genocide allegations—cultural harms can only be used to fortify her case as proof of intent. *See supra* Part II.C.1.

[219] Greco, *supra* note 140, at 546.

[220] Press Release, Trial Chamber I to Deliberate on the Case Against Thomas

Comment does not analyze the *Lubanga* victims' participation and instead focuses on the case against Sudanese President al-Bashir because al-Bashir is the only person so far to have been indicted for genocide, the crime most sensitive to cultural considerations—and the reason why the al-Bashir case is so significant.[221]

A. *Charging Bashir with Genocide*

The pre-trial chamber denied the prosecutor's original request for an arrest warrant for al-Bashir[222] on charges of genocide—by killing, causing serious bodily or mental harm, and deliberately inflicting destructive conditions of life[223]—on the grounds that, despite the drawing of various inferences from the presentation of evidence by the prosecutor, a conclusion of genocidal intent by al-Bashir could not be the *only* reasonable conclusion drawn.[224] The chamber reasoned that since there were other plausible conclusions—for example, discrimination or persecution—there was

Lubanga Dyilo, ICC-CPI-20110826-PR714 (Aug. 26, 2011), *available at* http://www.icc-cpi.int/Menus/ICC/Press+and+Media/Press+Releases/ (page 2, "26.08.2011"); Press Release, ICC First verdict: Thomas Lubanga guilty of conscripting and enlisting children under the age of 15 and using them to participate in hostilities, ICC-CPI-20120314-PR776 (Mar. 14, 2012), *available at* http://www.icc-cpi.int/NR/exeres/A70A5D27-18B4-4294-816F-BE68155242E0.htm.

[221] Second Decision on the Prosecution's Application for a Warrant of Arrest (Pre-Trial Chamber I), ¶¶ 23–24, 30–31, 39–40, 43, No. ICC-02/05-01/09-94 (July 12, 2010) [hereinafter *Second Decision on Arrest Warrant*].

[222] Omar Hassan Ahmad Al Bashir is the President of the Republic of Sudan; he has been in power since 1993. *Darfur, Sudan—ICC-02/05-01/09, The Prosecutor v. Omar Hassan Ahmad Al Bashir*, INT'L CRIM. COURT, http://www.icccpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/icc02050109?lan=en-GB (last visited Jan. 20, 2012). He is alleged to be at the head of a Government of Sudan counter-insurgency campaign "to unlawfully attack . . . the [Fur, Masalit, and Zaghawa] civilian population of Darfur" as part of the conflict against the SLM/A, JEM, and other militia groups, which are composed of members of those tribes. Warrant of Arrest for Omar Hassan Ahmad Al Bashir, No. ICC-02/05-01/09-1 at pg. 5/8, (March 4, 2009). As such, he is charged with the crimes against humanity of murder, extermination, forcible transfer, torture, and rape; the war crimes of intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities, and pillaging; and genocide by killing, by causing serious bodily or mental harm, and by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction. *Id.* at pg. 7/8, 8/8; *Second Decision on Arrest Warrant*, at pg. 28/30.

[223] Rome Statute, *supra* note 24, at articles 6(a)–(c).

[224] Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber I), ¶¶ 159, 205, No. ICC-02/05-01/09-3, Mar. 4, 2009 [hereinafter *First Decision on Arrest Warrant*].

no specific intent to commit genocide.[225]

The prosecutor appealed the PTC's decision not to issue an arrest warrant on charges of genocide—though the chamber did issue one for various war crimes and crimes against humanity.[226] The appeals chamber determined that the PTC had applied the incorrect standard for determining genocidal intent—at least for the arrest warrant stage—and that the proper standard is that only *one* of the reasonable conclusions derived from the evidence presented need be genocidal intent.[227] Upon remand, the PTC determined that the inferences from the evidence did lead to a reasonable potential conclusion of genocidal intent and issued a second warrant of arrest for al-Bashir for charges of genocide by killing, causing serious bodily or mental harm, and deliberately inflicting conditions of life calculated to bring about physical destruction.[228]

In its analysis of genocide and the intent necessary to warrant charges, the PTC made a distinction between genocidal intent and what it called persecutory intent—or the intent to "discriminate on political, racial, national, ethnic, cultural, religious, gender, or other grounds."[229] Both require *dolus specialis*, or specific intent, but the objectives of the intention behind the targeting are different.[230] One is the intent to destroy in whole or in part; the other is intent to discriminate.[231] Such a distinction is highlighted in an analysis of the

[225] *Id.* at ¶ 167.

[226] *Id.* at pg. 92/95; Prosecution's Application for Leave to Appeal the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir," (Pre-Trial Chamber I), No. ICC-02/05-01/09-12 (Mar. 13, 2009) [hereinafter Prosecutor's Appeal of Arrest Warrant].

[227] Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir" (Appeals Chamber), No. ICC-02/05-01/09-73, ¶¶ 30, 39 (Feb. 3, 2010) [hereinafter *Judgment on Appeal of Arrest Warrant*] (emphasis added). There is a multi-tiered approach within the Rome Statue for the burden of proof to be met by the prosecutor during various stages of the trial: for the issuance of an arrest warrant, "reasonable grounds to believe" suffices. *Id.* at ¶ 30. This is heightened to "substantial grounds to believe" for the confirmation of charges hearing. *Id.*; Rome Statute, *supra* note 24, at art. 61(7). The final threshold to be met for conviction is "beyond a reasonable doubt." *Judgment on Appeal of Arrest Warrant*, at ¶ 30; Rome Statute, *supra* note 24, at art. 66(3).

[228] Second Decision on the Prosecution's Application for a Warrant of Arrest (Pre-Trial Chamber I), No. ICC-02/05-01/09-94, ¶¶ 4–5 (July 12, 2010); Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber I), No. ICC-02/05-01/09-95, at pg. 8/9 (July 12, 2010).

[229] *First Decision on Arrest Warrant*, *supra* note 224 at ¶ 141.

[230] *Id.*

[231] *Id.*

policies of ethnic cleansing.[232] Ethnic cleansing does not necessarily result in the destruction of a people; genocide is not the "automatic consequence" of forcible displacement policies.[233] As noted above, ethnic cleansing by itself is not considered a genocidal policy; it can only be considered as evidence of genocidal intent.[234] "Genocide, [however], is an extreme and most inhuman form of persecution" and ethnic cleansing.[235] This means that it may be the case that a policy of ethnic cleansing or persecution escalates into genocide; if the objective elements are met along with the specific intent, such policies may reach the level of prosecutable genocide.[236]

Al-Bashir is not charged with persecution,[237] a crime against humanity, but elements of what would be evidence of persecution may be used as evidence of genocide and genocidal intent because the difference is one of degree.[238] That does not mean, however, that such evidence would be sufficient on its own.[239] On the contrary, it would need to be accompanied by direct or indirect evidence of, for example: (1) a strategy to "deny and conceal the crimes" being committed against the targeted groups; (2) official statements and documents referencing or providing inferences of a genocidal policy, whether already in existence or in formation; and (3) "the nature and extent of the acts of violence" being committed.[240] Proving al-Bashir's specific intent to commit genocide, required for a conviction of genocide, will be extremely difficult for the prosecutor, as was evidenced by the PTC's initial rejection of the prosecutor's request for an arrest warrant on charges of genocide—despite its initial application of the incorrect standard.[241]

In its impugned first decision on the application for the arrest

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[232] Sirkin, *supra* note 10, at 505–09.

[233] *Id.* at ¶ 144 (quoting Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro) 2007 I.C.J. 7, ¶ 190 (Feb. 26) [hereinafter *ICJ Judgment on Genocide*].

[234] *See supra* Part II.C.2.

[235] Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber I), No. ICC-02/05-01/09-3, ¶ 142 (Mar. 4, 2009) (quoting *ICJ Judgment on Genocide*, 2007 I.C.J. 7 at ¶ 188).

[236] *Id.* at ¶¶ 142, 145.

[237] *See id.*

[238] *Id.* at ¶¶ 142–43.

[239] *Id.* at ¶ 145.

[240] *Id.* at ¶ 164.

[241] *See* Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber I), No. ICC-02/05-01/09-3, ¶¶ 159, 205 (Mar. 4, 2009).

warrant, the PTC pointed to the International Court of Justice's (ICJ) Decision on Genocide that analyzed whether genocide had been committed anywhere else outside of Srebrenica during the Yugoslav wars.[242] The ICJ found that despite

> the mass killings of tens of thousands of Bosnian Muslim civilians and prisoners of war; the mass rapes of tens of thousands of Bosnian Muslim civilian women; the deportation and forcible displacement of hundreds of thousands of Bosnian Muslim civilians; the widespread and systematic beatings, torture and inhumane treatment (malnutrition and poor health conditions) in dozens of detention camps throughout Bosnia and Herzegovina; the siege of Bosnian Muslim civilians in cities through Bosnia and Herzegovina, such as Sarajevo, where shelling, sniping and starvation by hindering humanitarian aid was a matter of course; and *the destruction of cultural, religious and historical property in an attempt to wipe out traces of the existence of the Bosnian-Muslim group from Bosnia and Herzegovina,*

such evidence was *insufficient* to support an inference of genocidal intent by Bosnian-Serb leadership.[243] The chamber then compared the evidence that had been presented to the ICJ in the Bosnia genocide case with that which had been presented to the ICC chamber in the Bashir genocide case, namely that the Government of Sudan forces had

> carried out numerous unlawful attacks, followed by systematic acts of pillage, on towns and villages, mainly inhabited by civilians belonging to the Fur, Masalit and Zaghawa groups; subjected thousands of civilians, belonging primarily to the Fur, Masalit and Zaghawa groups to acts of murder, as well as acts of extermination; subjected thousands of civilian women, belonging primarily to the said groups to acts of rape; subjected hundreds of thousands of civilians belonging primarily to the said groups to acts of forcible transfer; and subjected civilians belonging primarily to the said groups to acts of torture,

and found that while such evidence strongly supported a finding of serious war crimes and crimes against humanity, it could not be extended to a finding of the commission of genocide (or a finding of the specific intent for genocide).[244]

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[242] *Id.* at ¶ 194.
[243] *Id.* at ¶ 194 (emphasis added) (citation omitted).
[244] *Id.* at ¶¶ 192–93.

Of the evidence presented by the prosecutor to show genocidal intent, the only reference to any kind of cultural destruction was the "unlawful arrest of community leaders and [their] subsequent mistreatment/torture" at the hands of the former members of the Sudanese secret police.[245] Since the prosecutor will be fighting an increasingly uphill battle in proving genocide as the trial process proceeds, she should use every possible method to bolster his case for showing specific intent. This includes evidence of ethnic cleansing, persecution, and cultural destruction.

B. Using Culture to Prove the Specific Intent of Genocide in Darfur

The insertion of a cultural perspective into the future proceedings of the case against Sudanese President al-Bashir is not only going to be a useful exercise, but also an imperative one. The media has been hesitant to call the violence occurring in Darfur, raging since 2003, a genocide.[246] The first high-profile political actor to brand Darfur a genocide was then-U.S. Secretary of State Colin Powell in 2004, who presented to the United Nations and to the U.S. Congress the findings of a U.S. Department of State report.[247] Powell's testimony was immediately followed by an official statement from former President George W. Bush.[248] In fact, most countries and organizations have shied away from labeling the atrocities a genocide, sticking instead to the lesser designation of crimes against humanity.[249] The United States, as well, later backpedaled on its statements.[250]

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[245] *Id.* at ¶ 178.

[246] *See generally* HAGAN & RYMOND-RICHMOND, *supra* note 12, at 79–93.

[247] *The Crisis in Darfur: Hearing Before the Sen. Foreign Relations Comm.*, *supra* note 11 ("When we reviewed the evidence . . . we concluded, I concluded, that genocide has been committed in Darfur and that the Government of Sudan and the Jingaweit bear responsibility—and that genocide may still be occurring. . . .").

[248] HAGAN & RYMOND-RICHMOND, *supra* note 12, at 80 ("As a result of [Secretary Powell's team of investigators] we have concluded that genocide has taken place in Darfur. We urge the international community to work with us to prevent and suppress acts of genocide. We call on the United Nations to undertake a full investigation of the genocide and other crimes in Darfur.") (quoting Office of the Press Secretary, President's Statement on Violence in Darfur, Sudan, Sept. 9, 2004, *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2004/09/20040909-10.html).

[249] Mai-Linh K. Hong, Note, *A Genocide by Any Other Name: Language, Law, and the Response to Darfur*, 49 VA. J. INT'L L. 235, 237–38 (2008).

[250] *See* HAGAN & RYMOND-RICHMOND, *supra* note 12, at 85–93.

1. The Specter of the Holocaust

The main reason for such an aversion to the use of the term is the fact that the inspiration behind the Genocide Convention—and the clearest, most unequivocal example of genocide to date—was the Holocaust; the "genocides" occurring in today's world do not and will not look anything like the Holocaust.[251] Thus because Darfur does not look and feel like Europe in the 1940s, it cannot actually be a true or real genocide.[252] Such a comparison is absurd and counter-productive—how many people must die, in what manner, and with how much governmental documentation before the world calls it genocide? One of the legacies of the Holocaust was the thousands of laws, orders, and documents (including diary entries)[253] that systematically and in great detail illustrated the evolution of the Nazis' "gigantic scheme to change, in favor of Germany, the balance of biological forces between it and the captive nations for many years to come."[254] The Nuremberg Tribunal used this evidence to conclude that the crime against humanity with which the first set of defendants was charged—and under which genocide was subsumed—"ha[d] been proved in the greatest detail."[255]

It is true that in Darfur, there is no "absolutely clear, well-documented intent to destroy."[256] There are "[n]o public

[251] *See* Hong, *supra* note 249, at 261.

[252] "If this is a genocide, it doesn't look very much like those we've known before." Scott Anderson, *How Did Darfur Happen?*, N.Y. TIMES, Oct. 17, 2004, § 6 (Magazine) at 52, 56, *available at* http://nytimes.com/2004/10/17/magainze/17DARFUR.html.

[253] SCHABAS, *supra* note 13, at 39 (Hans Frank testified before the Nuremberg Tribunal in his own defense and said, "[W]e have allowed ourselves to make utterances and my own diary has become a witness against me in this connection. . . .").

[254] LEMKIN, *supra* note 3, at xi. Lemkin's book contains hundreds of pages of painstakingly analyzed and transcribed laws, orders, decrees, acts, proclamations, and instructions that underpinned the Nazi policies. *See id.* at xvii–xxxviii [Contents].

[255] France et al. v. Goering et al., 22 IMT 203, 408 (1946). There were twenty-three defendants, among whom perhaps the most infamous was Hermann Wilhelm Goering. OFFICE OF THE UNITED STATES CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, 1 NAZI CONSPIRACY AND AGGRESSION III (1946). Some of the documents relied on by the Tribunal included "the personal and official correspondence of Alfred Rosenberg, together with a great quantity of Nazi Party correspondence;" "thirty-nine leather-bound volumes containing detailed inventories of the art treasures of Europe that had been looted;" "485 tons of crated papers [which contained] the records of the German Foreign Office from 1837 to 1944;" and over "300 crates of German High Command files, 85 notebooks containing minutes from Hitler's conferences, and the complete files of the German Navy." *Id.* at vi.

[256] Hong, *supra* note 249, at 262.

proclamations about 'the enemy within,' no extermination lists."[257] "Instead, it is shadowy, informal; the killing takes place offstage. It is the destruction of a people in a place where it is virtually impossible to distinguish incompetence from conspiracy. Is that by design, the sheer evil genius of it all, or just more evidence of a government's utter haplessness?"[258] Thus, the fundamental question is whether there can be genocide where "there has never been a stable, technocratic regime or a bureaucracy to plan, execute, and document an orderly mass killing."[259] Or perhaps the more pertinent question would be, in light of the condemnatory nature of the German official records, whether there will ever be another genocide with such an obvious paper trail. The answer would seem to be no. The representatives present during the drafting of the Genocide Convention wanted to include a requirement for government involvement in the definition of genocide, but did not.[260] Therefore, while as a general rule government is usually complicit in the commission of genocide, it is not beyond the scope of interpretation that the definition could be applied to genocide occurring without any governmental oversight.[261] Even putting that aside, there will be nary a government that would risk enacting laws or publishing decrees that would enumerate genocidal policies.

This Comment will assume that, for the purposes of the following analysis, genocide can indeed occur under circumstances where there seems to be little or no coordination with the government. Of course, "without documentation produced by a state bureaucracy with a genocidal mission, the burden of proving intent is great."[262] The PTC acknowledged as much when it concluded that, *inter alia*, the paucity of official statements from the Government of Sudan was insufficient to lead to a conclusion that genocidal intent was the only reasonable inference drawn from the evidence.[263] It therefore becomes crucial for the cultural context in which the violence has taken place to be vividly painted for the trial chamber so

[257] Anderson, *supra* note 252.
[258] *Id.*
[259] Hong, *supra* note 249, at 262.
[260] SCHABAS, *supra* note 13, at 65.
[261] *Id.* Nevertheless, this restriction on the definition was left out largely due to "practical difficulties." *Id.* (quoting U.N. Doc. E/AC.25/SR.4, at 6).
[262] Hong, *supra* note 249, at 262.
[263] Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber I), No. ICC-02/05-01/09-3, ¶ 165 (Mar. 4, 2009).

that the chamber can make the determination that while Darfur does not bear the same features as the Holocaust, it could also be a genocide. The legal representatives of the victims are uniquely situated to take on this important task, as they have the most direct and sustained contact with Darfuris—either on the ground as internally-displaced persons (IDPs) or as refugees.

2. Cultural Life in Darfur

The territory of Darfur—meaning "Land of the Fur"—is in West Sudan and is approximately the size of France.[264] It is home to anywhere from forty to ninety tribes, members of which are primarily identified both internally and externally as either Arab or non-Arab.[265] The three main non-Arab tribes, the tribes almost exclusively targeted by Sudanese military forces and the Janjaweed militia,[266] are the Fur, Masalit, and Zaghawa.[267] They speak Arabic, as it is the *lingua franca* of the country, but also maintain their tribal languages, which play very important roles in passing down histories, stories, and culture by way of oral tradition.[268] Each tribe also has its own customs, traditions, and religious beliefs, the hybridization of which creates the overarching, all-encompassing Darfuri culture.[269] Still, each tribe protects its own personalized part of the culture, with art forms, dances, and celebrations.[270]

The tribal village is traditionally based on kinship and a sense of familial community, as most of the people living in the village are related to each other.[271] Every Darfuri tribe and its culture is very closely attached to its land, which has sustained it for centuries.[272] Each village has a central meeting area called the *dara*, where

[264] Hong, *supra* note 249, at 244; DARFUR DESTROYED, *supra* note 9, at 5.

[265] MEENU MENON, PHYSICIANS FOR HUMAN RIGHTS, DARFUR: THE CULTURE AND THE PEOPLE, *available at* http://rhin.org/documents/DARFUR_THE_CULTURE_AND_THE_PEOPLE_English.pdf (last visited Nov. 7, 2011).

[266] The Janjaweed are informally organized Arab militias, who have joined with the Sudanese government in attacking the Darfuri tribes. HAGAN & RYMOND-RICHMOND, *supra* note 12, at 108. The translation of "Janjaweed" is "evil [or devil] on horseback." Rebecca Leung, *Witnessing Genocide In Sudan*, CBS NEWS (Feb. 11, 2009, 7:49 PM), http://www.cbsnews.com/stories/2004/10/08/60minutes/main648277.shtml.

[267] MENON, *supra* note 265.

[268] *Id.*

[269] *Id.*

[270] *Id.*

[271] *Id.*

[272] *Id.*

villagers eat meals, socialize, resolve disputes, and discuss the news.[273] The children of the village are also schooled in the *dara*, learning their tribal history, genealogy, and culture from their grandparents, particularly their grandmothers.[274] Special religious scholars also hold sessions for villagers to learn and read the Quran.[275] These scholars, along with the tribal village chief and the traditional healers—whose vocation is passed down from generation to generation—are the most important members of the community and are highly respected.

3. Effect of the Violence on Cultural Life

The widespread atrocities occurring in Darfur have certainly not gone unnoticed and there is much documentation detailing the violence.[276] One of the most comprehensive reports of the violations of international human rights and humanitarian law in Darfur is contained in the "Report of the International Commission of Inquiry on Darfur to the Secretary-General" ("Darfur Report"), the compilation of which was authorized by the U.N. Security Council in Resolution 1564 in September 2004.[277] The Commission requested, and received, materials from various sources "including Governments, intergovernmental organizations, various United Nations mechanisms or bodies, . . . non-governmental organizations," and "international and regional organizations."[278] Witness interviews provided most of the information contained in the reports that flooded the Commission, though some information was also gleaned from satellite imagery tracing destruction of, and attacks on, villages and field visits.[279]

Despite the fact that the Commission did not find sufficient evidence to justify a conclusion that genocide was being committed,[280]

[273] MENON, *supra* note 265.
[274] *Id.*
[275] *Id.*
[276] Reports have been compiled by the U.N., governments, and non-governmental organizations. *See* HAGAN & RYMOND-RICHMOND, *supra* note 12, at xvii–xx, 3 (The Atrocities Documentation Survey conducted by the U.S. State Department); Int'l Comm'n of Inquiry on Darfur, *Report of the Commission of Inquiry on Darfur to the Secretary-General* [hereinafter *Darfur Report*], delivered to the Secretary-General, U.N. Doc. S/2005/60 (Jan. 31, 2005); DARFUR DESTROYED, *supra* note 9.
[277] *Darfur Report*, *supra* note 276, at 2.
[278] *Id.* at ¶ 182.
[279] *Id.* at ¶ 183.
[280] "There is no doubt that some of the objective elements of genocide materialized in Darfur. . . . However, . . . other . . . elements . . . show a lack of

there is much to support such a finding once the cultural nuances are properly taken into account. In reviewing all of the materials sent to the Commission, it reported "hundreds of incidents . . . involving the killing of civilians, massacres, summary executions, rape and other forms of sexual violence, torture, abduction, looting of property and livestock, as well as deliberate destruction and torching of villages."[281] The villages are left "burned, completely or partially, with only shells of outer walls of the traditional circular houses left standing[, with w]ater pumps and wells . . . destroyed, implements for food processing wrecked, [and] trees and crops burned and cut down."[282] But it is not just the villages and rural areas being attacked—towns and cities are not immune either.[283] Many towns "show signs of damage to homes and essential infrastructure such as hospitals, schools and police stations."[284]

Another comprehensive report is "Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan," compiled independently by Human Rights Watch (HRW); the report is the result of a twenty-five day field mission by members of HRW into Darfur.[285] In addition to many of the same findings of bombings, mass and summary killings, and rape, HRW also found "systematic destruction of mosques and the desecration of articles of Islam."[286] Government forces and the Janjaweed militia "have killed imams[, second imams, and muezzins], destroyed mosques and prayer mats, [and] torn up and defecated on Qorans."[287]

Such arbitrary and disproportionate violence has led to "massive displacement of large parts of the civilian population within Darfur and to neighboring Chad."[288] The severity and repetition of attacks against the same or surrounding villages often spread fear throughout the area, leading entire villages to evacuate and flee to more relatively safe areas.[289] At the time that the Darfur Commission

genocidal intent. . . . On the basis of the foregoing observations, the Commission concludes that the Government of the Sudan has not pursued a policy of genocide." *Id.* at ¶¶ 507, 513, 518.

[281] *Id.* at ¶ 186.

[282] *Id.* at ¶ 235.

[283] *Darfur Report*, *supra* note 276, at ¶ 235.

[284] *Id.*

[285] DARFUR DESTROYED, *supra* note 9, at 2.

[286] *Id.* at 27.

[287] *Id.* at 28.

[288] *Id.*

[289] *Darfur Report*, *supra* note 276, at ¶ 186.

submitted its report to the United Nations, the estimate for refugees and internally displaced persons (IDPs) numbered around 1.2 million, with over 700 villages destroyed.[290] Those in the IDP camps do not fare any better, being akin to "virtual prisoners."[291] They are "confined to camps and settlements with inadequate food, shelter and humanitarian assistance, at constant risk of further attacks, rape and looting of their remaining possessions."[292] The displaced do not want to stay in the camps, yet they fear even more returning to their homes because of the probability of more attacks, attacks occurring with impunity against the civilians.[293] In addition, members of the Janjaweed sometimes "camp" in the villages they have burned, thus ensuring that its inhabitants do not return.[294] From these makeshift bases, the Janjaweed "mount[] raids across the border into Chad and exert[] some control over the movement of displaced persons. Their mere presence close to the border ensure[s] that refugees in Chad [do] not attempt to cross back into Darfur to salvage buried grain or other belongings."[295]

The destruction of entire villages' and communities' ways of life is undeniably having a profound impact on local tribal culture. HRW concluded in its report that the human rights violations it witnessed "amount[ed] to a government policy of 'ethnic cleansing' of certain ethnic groups, namely the Fur and the Masalit, from their areas of residence."[296] Ethnic cleansing, which has a cultural element to it, is also evidence of a genocidal policy.[297] Civilians are being subjected to "attacks directed against [them], the burning of their villages, the mass killings of persons under their control, the forced displacement of populations, the destruction of their food stocks, livelihoods and the looting of their livestock by government and militia forces," the mistreatment, arrest, imprisonment, and torture of their tribal chiefs,

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[290] *Id.* at ¶¶ 226, 236. The report was submitted in 2005. *See id.*

[291] *Id.* at ¶ 196.

[292] *Id.* For example, Kalma camp, located in South Darfur near the city of Nyala, is facing dire food and water shortages. Radio Dabanga, *Sudan: Food and Water Shortage in Kalma Camp*, ALL AFRICA, Nov. 1, 2011, http://allafrica.com/stories/201111021026.html. The humanitarian coordinator for the camp said that the camp has not received food for two months, and they are low on fuel so they cannot run the water pumps. *Id.* He accused the Sudanese government of intentionally restricting the delivery of supplies to the camp. *Id.*

[293] *Darfur Report*, *supra* note 276, at ¶ 197.

[294] DARFUR DESTROYED, *supra* note 9, at 34.

[295] *Id.*

[296] *Id.* at 39.

[297] *See supra* Part II.C.2.

and the violation and destruction of their religious buildings and objects.[298] These hardships are wrenching the tightly knit and kinship-based tribes from their land and tearing family members apart. Once they are forced off their land, these bonds are further eroded at the IDP camps, which are in unenviable humanitarian condition, and are themselves subject to more attacks.[299] All of these actions have the cumulative effect of destroying the cultural ties that bind the Fur, Masalit, and Zaghawa tribes.

C. Linking Cultural Destruction to Proving Genocide

Being able to depict this cultural state of affairs accurately and prominently for the trial chamber at the ICC will have profound consequences for the prosecution of Sudanese President al-Bashir for genocide. The legal representatives of the victims should seize the opportunity to increase the role that they play at the ICC—within the modalities of participation that the court has granted them, of course. This is important to note; there are limitations to the role that victims can play.[300] They can only use the methods of participation that are specified by the statute and authorized by the court.[301] Nevertheless, by complementing the evidence that the prosecutor will be presenting, the representative of the victims can help to buttress her argument for genocide by helping to show two elements of the crime of genocide: the first is whether the Fur, Masalit and Zaghawa tribes fall under the four enumerated "protected groups;" the second is whether there was a specific intent to commit genocide.[302]

Scholars have thoroughly dealt with the first element, on the status of the three tribes as protected groups under the Genocide Convention, elsewhere and it will not be re-analyzed here.[303] The second, however, has not yet been sufficiently assessed. The PTC, in denying a warrant of arrest for al-Bashir for genocide due to lack of specific intent, noted that the documents and official statements that the prosecutor submitted as evidence of such intent could just as easily be proof of discrimination or persecution.[304] What will help to

[298] DARFUR DESTROYED, *supra* note 9, at 40.

[299] *Darfur Report*, *supra* note 276, at ¶ 327. Women in particular are in danger of rape at the camps. *Id.*

[300] *See* Cohen, *supra* note 143, at 352–55.

[301] Baumgartner, *supra* note 154, at 425.

[302] *See supra* Part II.C and II.D.

[303] *See, e.g.*, Hong, *supra* note 249.

[304] Decision on the Prosecution's Application for a Warrant of Arrest against

support those documents will be a strong showing of persecution and ethnic cleansing policies pursued by the joint and separate attacks by the Sudanese military forces and the Janjaweed militia.

In fact, there is such evidence suggesting that the intent of the Government of Sudan and its proxies, the Janjaweed militia, is to destroy, whether in its entirety or partially, the non-Arab tribes of the Fur, Masalit, and Zaghawa.[305] The powerful findings of the clear commission of the crime against humanity of persecution,[306] the crime against humanity of extermination,[307] and the undeniable ethnic cleansing[308]—primarily through forced displacement and forcible transfer—attest to this. Persecution and ethnic cleansing are both policies on a sliding scale of specific intent, and their coupling provides at least a strong argument that those policies are genocidal.[309]

Of the three types of genocide with which the prosecutor has charged al-Bashir—genocide by killing, genocide by causing serious bodily or mental harm, and genocide by deliberately inflicting conditions of life calculated to bring about physical destruction[310]—the charge most amenable to cultural buttressing as articulated above is the final one. The shattering of entire communities and villages forcing displacement into camps, which are not safe from attack either, is wrenching apart the strong cultural bonds between tribal members and forcing them from the land they have occupied and claimed for hundreds of years.[311] In addition to atrocious living conditions, the loss of their support system, cultural histories and genealogies, and traditional forms of livelihood is straining the

Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber I), No. ICC-02/05-01/09-3, ¶ 167 (Mar. 4, 2009).

[305] Second Decision on the Prosecution's Application for a Warrant of Arrest (Pre-Trial Chamber I), No. ICC-02/05-01/09-94, ¶ 5 (July 12, 2010).

[306] Bashir is not charged with the crime against humanity of persecution, interestingly, even though the Commission of Inquiry on Darfur came to the conclusion that such a crime was being committed. *See Darfur Report*, *supra* note 276, at ¶ 321.

[307] *See id.* at ¶ 294 ("The Commission leaves it to the competent court that will pronounce on these alleged crimes to determine whether the mass killings may amount to extermination as a crime against humanity.").

[308] *See* DARFUR DESTROYED, *supra* note 9, at 39.

[309] *See generally supra* Parts II.C.2 and IV.A.

[310] While the one provision of the definition of cultural genocide was included in the Rome Statute—that of forcibly transferring children of the group to another group—and as such would be the greatest beneficiary of cultural context, al-Bashir is not charged with genocide by forcible transfer of children.

[311] MENON, *supra* note 265.

identity of the Fur, Masalit, and Zaghawa tribes.[312] As Raphael Lemkin stated in his seminal articulation of genocide, the destruction of the foundational elements of the life of national groups is the means by which to annihilate the groups themselves.[313] Accordingly, culture, and the impact that the violence in Darfur is having on it, will play a very important role in the prosecution for genocide. By incorporating numerous and powerful references to the culture of the tribes and the disastrous consequences of the attacks, the legal representatives of the victims will be able to help develop modern genocide jurisprudence, leaving behind the more structured example of the Holocaust,[314] and bringing to justice arguably one of the savviest (or most "hapless"[315]) perpetrators of genocide the world has ever seen.

V. CONCLUSION

The creation of the Genocide Convention following the horrors of World War II was a missed opportunity for the international community to criminalize the intentional destruction, "in whole or in part," of a nation's culture and identity—cultural genocide.[316] While the first two drafts contained strong provisions for the protection of culture and its tangible manifestations, the final result contained none.[317] Subsequent events in the world, namely the wars in Yugoslavia and Rwanda, forced the international community to rethink its position on the complete absence of cultural genocide as a legal concept. The ICTY's jurisprudence carved out a niche for the use of cultural genocide as one method for contributing to the showing of specific intent for the conviction of traditional genocide.[318]

The establishment of the ICC, a permanent institution dedicated to the pursuance of accountability and justice of perpetrators of international criminal law violations, briefly reopened debate about whether to incorporate cultural genocide as a separate crime in its founding statute.[319] Despite the fact that the international community

[312] *Id.*
[313] *See supra* Part I and II.A.
[314] *See supra* Part IV.B.1.
[315] Hong, *supra* note 249, at 261.
[316] *See* Rome Statute, *supra* note 24, at art. 5.
[317] *See supra* Part II.A.
[318] *See supra* Part II.C.1.
[319] *See supra* Part II.D.

declined to do so, the statute does contain a unique and revolutionary provision: it provides for the legal representation of certified victims before the court in a capacity comparable to a third party in a case.[320] Some modes of participation are proscribed for those representatives, but they are nevertheless allowed to engage in many of the same proceedings, and participate within them, as the prosecution and the defense do. This novel mechanism has the potential to inject cultural recognition and awareness into the trials, as the representatives will have the closest contact with the victims who experienced the attacks, and will have as great an interest in securing convictions for genocide as the prosecutor.

The case against Sudanese President Omar al-Bashir is the perfect test case for the use of victim participation as a means of getting evidence of cultural genocide in as evidence of genocidal intent, as contemplated and acknowledged by the ICTY.[321] The attacks and destruction on tribal villages in Darfur are ripping communities apart and uprooting centuries-old villages that have strong ties to the land and surrounding area. The killing of civilians, arrest and torture of tribal chiefs, and herding of the survivors into camps for the internally-displaced is only continuing to threaten the tribal identities of the Fur, Masalit, and Zaghawa.[322] The prosecution will have a difficult time as it is proving genocide because of the dearth of concrete documentary evidence of specific intent to destroy. It would behoove the legal representatives of the victims to take advantage of their unique position within the legal structure of the court to fervently present to the court the cultural context in which the violence is taking place. Because the events in Darfur do not resemble what is considered the epitome of genocide, the Holocaust,[323] the representatives should urge that without the cultural context, the genocidal attacks occurring cannot be properly interpreted, and justice cannot be served.[324]

[320] *See supra* Part III.
[321] *See supra* Part IV.A.
[322] *See supra* Part IV.B.2–3.
[323] *See supra* Part IV.B.1.
[324] *See supra* Part IV.B.