THE GENOCIDE CONVENTION AND THE POLITICS OF GENOCIDE NON-PREVENTION

A dissertation presented

by

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to
The Law and Public Policy Program

In partial fulfillment of the requirements for the degree of Doctor of Philosophy

in the field of
Law and Public Policy

Northeastern University
Boston, Massachusetts
May 2013
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ABSTRACT OF DISSERTATION

Submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy in Law and Public Policy in the Graduate School of Social Sciences and Humanities of Northeastern University
May, 2013
Abstract

The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) was adopted by the General Assembly sixty-five years ago. Following the Armenian Genocide and the Holocaust, the Genocide Convention’s primary object and purpose was the eradication of the crime through its prevention. Numerous cases of genocide have been committed since the Convention entered into force in 1951, betraying the hope that the Convention would eradicate the world of this ‘odious scourge’. This begged the question: why, despite its universal condemnation and international legal prohibition, has genocide continued to be perpetrated and, in particular, why has the international community failed to take the necessary measures to prevent it?

An analysis of the text of the Genocide Convention and the scholarly literature revealed that the Convention includes weaknesses that diminish its preventive efficacy. Because the Genocide Convention evolved through a negotiating process that produced three formal drafts of the convention, the final draft was compared to the previous two to determine whether the identified weaknesses originated in the initial draft or were negotiated into the adopted text. Only one of the identified weaknesses was present in the initial draft. These findings supported my thesis that the Genocide Convention’s preventive efficacy was intentionally weakened, while also raising the question of whether the five permanent members of the Security Council had other motives when they introduced these changes to the Genocide Convention.

Why would the negotiating parties, the permanent members of the Security Council chief among them, actively work to weaken components of the draft convention? After reviewing the scholarly literature and taking into account the historical context within which the treaty was
being negotiated, I concluded that the negotiating parties privileged considerations of national interest and state sovereignty rights over the development of a treaty capable of achieving the full international prohibition of genocide. The permanent members worked to ensure that they would not be implicated in the commission of genocide and that the Genocide Convention could not be used to justify interference in their internal affairs.

The purposeful weakening of the Genocide Convention’s preventive efficacy, while based in plausible reasons for doing so, demonstrates a lack of commitment to the prevention of genocide. Collectively, the weaknesses combine to relegate the Genocide Convention to a form of symbolic legislation. Because there have been multiple failed attempts to amend the Genocide Convention, the future of genocide prevention likely lies elsewhere. Three recent developments in international law provide some promise for the future. The development of the Responsibility to Protect, the establishment of the International Criminal Court, and the International Court of Justice’s ruling in the case of *Bosnia v. Serbia*, were analyzed to determine their potential to improve on the record of genocide prevention. It was concluded that each offers promise and each contains practical limitations.
Acknowledgments

Over the past decade or so, I have received continuous support from my committee members, former committee members, colleagues, friends, and family. I would like to start by thanking Stephen Nathanson for chairing my committee, which I am certain has involved some patience, and for compelling me to complete the level of work I am capable of. This installment of my dissertation would not have been possible without him. I would also like to thank Michael Tolley and Denise Garcia for joining the committee later in the process and helping me complete it.

I would like to thank those individuals who, at one time or another, were involved in this process. Thank you, Diane Penrod, for having mentored me while I was completing my Master’s Degree. Diane changed my life in so many ways and encouraged me to continue my education. I would like to thank Len and Suzy Buckle for believing in me when they accepted me into the Law and Public Policy program. They made me feel like a part of a familial community from the very beginning. Thanks to Joan Fitzgerald for not giving up on me. Jim Ross aided me in the completion of my preliminary literature review on the role of media in coverage of genocide. Hope Lewis inspired me to focus on genocide and the politics of international law, and more broadly the politics of human rights. I want to give a special thanks to Beth Van Schaack. When Hope needed to step down from the committee, Beth joined the committee based in an email conversation I had with her, despite having no obligations as a professor at a different institution and no previous connection to me.

Completing the dissertation while teaching full-time was a challenge. My colleagues and friends at American University and my friends and former colleagues at University of Rhode
Island encouraged me to keep pushing forward. I would like to thank them for their friendship and support.

I would like to thank my friends and family. My friends were exceptional at employing reverse psychology. It was their questioning whether I would ever finish that gave me another reason to make sure I did. My family, of course, was there for me throughout the process. I cannot thank my dad, Allen, and my sisters, Jennifer and Jodie, enough for being there whenever I needed them. Lastly, I would like to make a special dedication to my mom, Martha, who passed away unexpectedly in October. I wish you could be here to see me achieve what you always knew I would.
# Table of Contents

Abstract 2
Acknowledgements 5
Table of Contents 7
List of Tables 11

Chapter 1: Introduction 12
  A. Overview 12
  B. Project Rationale 18
  C. Methodology 19
  D. Conclusion 26

Chapter 2: Evidence of the Genocide Convention’s Failure 28
  A. Scholarly Perspectives on the Efficacy of the Genocide Convention for the Purpose of Prevention and Suppression 30
  B. Cases on Which There is General Scholarly Agreement that the Crimes Constitute Genocide 33
  C. The Security Council and the Failure to Recognize Genocide 35
    1. Bangladesh 36
    2. Cambodia 40
    3. Guatemala 43
    4. Iraq 46
    5. Bosnia 48
    6. Rwanda 55
Chapter 3: Textual Analysis of the Genocide Convention

A. Overview of the Genocide Convention

B. Weaknesses in the Text

C. Problems of Definition
   1. The Status of Genocide in International Law
   2. The Specific Intent Requirement
   3. The Omission of Political Groups
   4. The Omission of Cultural Genocide

D. Limitations of Territorial Jurisdiction

E. Limits on Available Recourse

F. Evaluation of the Potential Impact of Correcting the Genocide Convention’ Weaknesses
   1. The Status of Genocide in International Law
   2. The Specific Intent Requirement
   3. The Omission of Political Groups
   4. The Omission of Cultural Genocide
   5. Limitations of Territorial Jurisdiction and the Limits on Available Recourse

G. Conclusion

Chapter 4: The Evolution of the Genocide Convention and Its Preventive Efficacy

A. An Overview of the Genocide Convention’s Drafting History
B. Comparative Textual Analysis and Evolution of the Three Formal Drafts of the Genocide Convention

1. The Status of Genocide in International Law
2. The Specific Intent Requirement
3. The Omission of Political Groups
4. The Omission of Cultural Genocide
5. Limitations of Territorial Jurisdiction
   a. The Opt-in Clause
6. Limits on Available Recourse

C. Conclusion

Chapter 5: The Genocide Convention, Considerations of National Interest, and the Privileging of State Sovereignty

A. The Genocide Convention and Considerations of National Interest

1. The Omission of Political Groups
2. The Omission of Cultural Genocide

B. The Genocide Convention and the Privileging of State Sovereignty

C. Conclusion

Chapter 6: Recent Developments for the Future of Genocide Prevention

A. R2P and the Future of Genocide Prevention

1. R2P and Genocide’s Status in International Law
2. R2P and the Genocide Convention’s Specific Intent Requirement
3. R2P and the Genocide Convention’s Omission of Political Groups 208
4. R2P and the Genocide Convention’s Omission of Cultural Genocide 210
5. R2P and the Limitations of Territorial Jurisdiction 212
6. R2P and the Genocide Convention’s Limits on Available Recourse 214
7. R2P’s Practical Limitations 214

B. The International Criminal Court and the Future of Genocide Prevention 218
C. The International Court of Justice and the Future of Genocide Prevention 223
D. Conclusion 229

Appendix B: United Nations General Assembly Resolution 96(I) Dated December 11, 1946 239
Appendix C: Economic and Social Council Resolution 47(IV) Dated March 28, 1947 240
Appendix D: Secretariat Draft of the Genocide Convention 241
Appendix E: Ad Hoc Committee Draft of the Genocide Convention 245
Appendix F: Economic and Social Council Resolution 153(VII) Dated August 26, 1948 248
Appendix G: Synopsis of the Responsibility to Protect 249
Bibliography 252
List of Tables

Table 2.1: Scholarly Positions on Suspected Cases of Genocide 35
Table 2.2: Genocide Recognition in Bangladesh 40
Table 2.3: Genocide Recognition in Cambodia 43
Table 2.4: Genocide Recognition in Guatemala 45
Table 2.5: Genocide Recognition in Iraq 48
Table 2.6: Genocide Recognition in Bosnia 55
Table 2.7: Genocide Recognition in Rwanda 60
Table 2.8: Genocide Recognition in Sudan 64
Table 3.1: Definitional Weaknesses in the Genocide Convention 82-83
Table 3.2: The Establishment of Territorial Jurisdiction in the Genocide Convention 86
Table 3.3: The Means for Recourse in the Genocide Convention 89
Table 3.4: Potential Consequences of Correcting the Genocide Convention’s Weaknesses 115-116
Table 4.1: Summary of Comparative Analysis of the Three Formal Drafts of the Genocide Convention 165-166
Table 4.2: Positions of the Permanent Members in Relation to Each of the Genocide Convention’s Weaknesses 166-167
Chapter 1: Introduction

Overview

In May of 1918, Teddy Roosevelt wrote,

I feel that we are guilty of a peculiarly odious form of hypocrisy….To allow the Turks to massacre the [Armenians] and then solicit permission to help survivors, and then to allege the fact that we are helping survivors as a reason why we should not follow the only policy that will permanently put a stop to such massacres is both foolish and odious. …The Armenian massacre was the greatest crime of the war, and failure to act against Turkey is to condone it (Roosevelt 1954, p. 6328).

Less than three decades after the start of the Armenian Genocide, the world was once again confronted with a plan for the extermination of a group of people. In the aftermath of the Holocaust, Hans Morgenthau wrote,

In the years between 1933 and 1944, the American tradition of sanctuary for the oppressed was uprooted and despoiled. It was replaced by a combination of political expediency, diplomatic evasion, isolationism, indifference and raw bigotry which played directly into the hands of Adolf Hitler even as he set in motion the final plans for the greatest mass murder in history (Morse 1998, p. 99).

The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) was adopted by Resolution 260 (III) A of the United Nations General Assembly on December 9, 1948, and entered into force on January 12, 1951. The adoption and entry into force of the Genocide Convention was meant to be the beginning of a new era, one in which attempts to exterminate entire groups of peoples would not be tolerated. Despite the Genocide Convention’s adoption and entry into force, formally establishing its legal prohibition, the crime of genocide has been perpetrated many times since the Armenian Genocide, the Holocaust and the end of World War II. The number of cases often referred to as genocide that have followed the Genocide Convention’s entry into force and the promise of ‘never again’ betray the hope that the Convention would eradicate the world of this ‘odious scourge’:
• Bangladesh 1971 (250,000-3,000,000 deaths)¹
• Cambodia 1975-1979 (1,700,000-2,000,000)²
• East Timor 1975-1999 (170,000-200,000)³
• Guatemala 1981-1983 (200,000-250,000)⁴
• Iraq 1988 (50,000-100,000)⁵
• Bosnia 1992-1995 (Srebrenica 7,000; total approximately 200,000)⁶
• Rwanda 1994 (500,000-1,000,000)⁷
• Democratic Republic of the Congo 1996- (more than 5,400,000 from civil war and alleged acts of genocide)⁸
• Darfur, Sudan 2003-2008 (200,000-310,000)⁹

More than sixty years after the Genocide Convention entered into force, taking the low estimates, at least 3,077,000 people have been killed by alleged policies of genocide, not including the approximately 200,000 Bosnians killed as part of a campaign of ‘ethnic cleansing’ and those who have been killed as part of what has been described as a reprisal genocide committed by Rwanda against Hutu in the Democratic Republic of the Congo.

¹ Kuper (1981) believes the death toll could have been as many as 3 million. Jones (2011) estimates 1-3 million killed. Kiernan (2007) estimates 300,000 to over 1 million deaths. Kiernan’s estimate more closely aligns with the International Commission of Jurists (1972), which concluded that 250,000 or so were killed.
² Power (2003) puts the death toll at 2 million, Kiernan (2007) at 1.7 million, and Jones at 1.7-1.9 million.
⁴ Jones (2011) puts the death toll at 200,000-250,000 and Kiernan (2007) puts the total at an estimated 200,000.
⁵ Kiernan (2007) estimates at least 50,000 deaths. Jones (2011) estimates the death toll as being between 50,000 and 100,000, with the possibility that as many as 180,000 were killed.
⁶ Jones (2011) and Power (2003) estimate 7,000 killed at Srebrenica.
⁷ Prunier (2005) estimates 800,000-850,000 killed, Jones (2011) and Power (2003) estimate 800,000 deaths, and Kiernan (2007) estimates between 500,000 and 1,000,000.
⁹ Prunier (2005) estimates between 280,000-310,000 by early 2005. Flint and de Waal (2012) cite a total of 200,000 killed throughout the duration of the genocide.
There is an ongoing discussion concerning the principal source of the Genocide Convention’s failure to prevent the crime it prohibits. This discussion includes two primary explanations for the Convention’s failure. Some scholars have tried to explain the Genocide Convention’s failure by citing alleged weaknesses in the legal text. Others have pointed to the role that considerations of national interest play in determining the response of the international community to suspected cases of genocide. Overall, the political and legal debate regarding the failure to prevent genocide remains a contested area within this field of study. I seek to determine whether the two primary explanations for the Genocide Convention’s failure are interconnected. In other words, I seek to determine whether alleged weaknesses in the text of the Genocide Convention resulted from parties to the Convention negotiating out of considerations of national interest, thus potentially illustrating greater concern for national interests than the prevention of genocide.

Kofi Annan, following events in Kosovo and East Timor in 1999, challenged the international community to come to consensus on how to best preserve the sovereign equality of all United Nations members without sacrificing the ability to protect the citizens of the world from the most severe human rights violations. The International Commission on Intervention and State Sovereignty (ICISS) weighed in on the intervention debate with its report, *The Responsibility to Protect* (R2P). The report states, “Humanitarian intervention has been controversial both when it happens, and when it has failed to happen. Rwanda in 1994 laid bare the full horror of inaction” (ICISS 2001a, p. 1). The development of the Responsibility to Protect accentuates the view that the Genocide Convention has failed thus far to fulfill its preventative object and purpose.

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10 See Kofi Annan’s (1999) “Two Concepts of Sovereignty”.
My aim is to take a comprehensive and interdisciplinary approach to answering the central question of why, despite its universal condemnation and international legal prohibition, genocide has continued to be perpetrated and, in particular, why the international community has failed to take the necessary measures to prevent it. In order to address this fundamental question, I will answer the following:

1) Is there evidence that the Genocide Convention has failed to fulfill its object and purpose of preventing and suppressing genocide?

2) Are there weaknesses in the adopted text of the Genocide Convention that may have contributed to the failure to prevent genocide?

3) If there are weaknesses in the text of the Genocide Convention, did they originate in the initial formulation of the convention or were they negotiated into the legal text during the drafting process?

4) Is there evidence that changes that weakened the adopted text of the Genocide Convention were made intentionally out of considerations of national interest?

5) Do recent developments such as the emerging norm of the Responsibility to Protect, the establishment of the International Criminal Court, and the International Court of Justice’s ruling in the case of *Bosnia v. Serbia* correct the weaknesses identified in the adopted text of the Genocide Convention and offer promise for the future of genocide prevention?

In Chapter 2, I consider whether there is evidence that the Genocide Convention has failed to fulfill its object and purpose of preventing genocide. While the list of alleged cases of genocide presented above suggests failure, it was important to demonstrate factually that the Genocide Convention has indeed failed to fulfill its object and purpose. This is especially
important because much of my planned research is based in the premise that the Genocide Convention has failed. Therefore, I will begin by investigating whether there is scholarly consensus that the Genocide Convention has failed to prevent genocide. I will then investigate whether suspected cases of genocide that have followed the Genocide Convention’s entry into force provide factual evidence that the Convention has failed to prevent the commission of genocide. This involves the attempt to answer four important questions: (1) On what alleged cases of genocide post-entry into force of the Genocide Convention is there general scholarly agreement that genocide stricto sensu was committed?11 (2) Did the permanent members of the Security Council recognize these cases as genocide while they were ongoing? (3) Were these cases recognized as genocide by other UN Member States while ongoing? (4) Were these cases recognized as genocide by criminal tribunals ex post facto?

In Chapter 3, I investigate whether the adopted text of the Genocide Convention contains any weaknesses that may have contributed to the failure to prevent genocide. I will also consider whether any of the identified weaknesses were necessary to avoid the creation of other costly liabilities. In other words, I will take into account whether the correction of an identified weakness could weaken other components of the Genocide Convention or conflict with previously established international laws and norms. To do so, I will attempt to answer the following questions through a textual analysis of the Genocide Convention: (1) Does the Genocide Convention contain weaknesses that diminish its preventive efficacy? (2) How do the identified weaknesses affect the Genocide Convention’s preventive efficacy? (3) Would correction of the weaknesses create other liabilities that would make retention of the weaknesses preferable?

11 Latin – “in the narrow sense”
In Chapter 4, I track the evolution of the Genocide Convention from its earliest formulation to the adopted text. Before the text’s adoption, the language and provisions evolved through three formal drafts. I will investigate whether the weaknesses identified through the textual analysis of the Genocide Convention originated in the Original “Secretariat” Draft or were negotiated into the Final Adopted Text during the drafting process. More specifically, I will investigate whether amendments were made to provisions found in the Original “Secretariat” Draft, creating weaknesses in the Final Adopted Text that were not previously present, and whether there were unsuccessful attempts to amend the early drafts of the convention to improve the preventive efficacy of the Final Adopted Text.

In Chapter 5, I investigate whether the changes made to the early drafts of the convention that ultimately weakened the adopted text were made intentionally. To do so, I will investigate whether there is evidence that the permanent members of the Security Council proposed or supported the changes made to the early drafts of the convention that weakened the Final Adopted Text’s preventive efficacy out of considerations of national interest. I will do the same for those proposed changes that could have strengthened the Final Adopted Text’s effectiveness. To do so, I will attempt to answer the following questions: (1) What position did each of the permanent members of the Security Council take in relation to each of the identified weaknesses? (2) What argument was used in support of these positions? (3) Were there other unstated reasons that may have influenced the positions of the permanent members? I will also analyze the reservations attached to the Genocide Convention by the permanent members of the

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12 The three formal drafts include the Secretariat Draft, the Ad Hoc Committee Draft, and the draft that was adopted by the General Assembly. In order to avoid confusion, the drafts are subsequently referred to as the Original “Secretariat” Draft, the Revised Ad Hoc Committee Draft, and the Final Adopted Text.
Security Council because the reservations could provide evidence of their reluctance to support an already weakened instrument for the prevention of genocide.

In Chapter 6, I investigate whether the Responsibility to Protect’s preventive capabilities, the International Criminal Court’s punitive capabilities, and the International Court of Justice’s ruling on state responsibility for genocide in the *Bosnia v. Serbia* case have the potential to ameliorate the sources of the Genocide Convention’s failure to fulfill its object and purpose of the prevention of genocide. I will investigate whether the Responsibility to Protect corrects the weaknesses identified in the Genocide Convention that diminished the Convention’s preventive efficacy. Because the International Criminal Court is essentially a permanent international criminal tribunal with jurisdiction over the crime of genocide, I also seek to determine whether the Court has the potential to aid in preventing genocide by offering a consistent future deterrent through punishing those guilty of planning and committing genocide. Finally, I seek to determine whether the International Court of Justice’s ruling offers a precedent concerning state responsibility for genocide that could deter the commission of genocide at the state level.

**Project Rationale**

While there has been extensive research and analysis into the crime of genocide and the treaty that prohibits it, the research has overwhelmingly focused on the Genocide Convention’s punitive purpose. Perhaps this is due to the Convention’s own overwhelming focus on punishment.¹³ Scholars have tracked the evolution of the Genocide Convention using the Convention’s preparatory work to gain a better understanding of the positions of the negotiating parties and to better interpret the treaty in terms of the responsibilities of contracting parties. Yet,

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holes remain in the scholarly literature in relation to the evolution of the Genocide Convention and its preventive efficacy. Meanwhile, alleged weaknesses in the Genocide Convention and considerations of national interest have both been cited as possible sources of the failure to take preventive and action in response to suspected cases of genocide. However, it has yet to be investigated whether the two possible sources are interconnected.

What my project will contribute to our understanding of genocide prevention is whether there is a connection between the Genocide Convention’s provisions for the prevention of genocide and the national interests of the permanent members of the United Nations Security Council. By beginning with an analysis of the legal text, I will be able to identify weaknesses in the Final Adopted Text, which will allow me to track the process through which the identified weaknesses were included in the Final Adopted Text. Tracking the process through which the identified weaknesses were included in the Final Adopted Text will then allow me to analyze the arguments made in support of and in opposition to their inclusion. Further, I will also be able to evaluate whether the arguments made during the negotiation process were the principal motivation for the inclusion of the identified weaknesses or whether there were other motivations left unsaid because they were based in individual considerations of national interest. Finally, my research and analysis of the Genocide Convention’s preventive efficacy will allow me to analyze whether the Responsibility to Protect, International Criminal Court, and the International Court of Justice are likely to improve upon the Genocide Convention’s poor record of genocide prevention.

**Methodology**
Establishing the failure of the Genocide Convention to prevent the crime it prohibits is an essential underpinning of my project. If the Genocide Convention has succeeded in fulfilling its object and purpose, my primary research question, from which all the others originate, would not be pertinent. Therefore, in Chapter 2, I will investigate whether there is evidence that the Genocide Convention has failed to fulfill its object and purpose of preventing genocide. I will begin by investigating whether there is scholarly consensus that the Genocide Convention has failed to prevent genocide by reviewing scholarly assessments of the general efficacy of the Genocide Convention. Next, I will investigate whether suspected cases of genocide that followed the Genocide Convention’s entry into force provide factual evidence that the Convention has failed to prevent the commission of genocide.

Because the numerous lists of alleged cases of genocide vary depending on the definition used to populate the lists, I will develop a list of those cases of genocide on which there is general scholarly agreement that genocide *stricto sensu* was committed. I will accomplish this by interviewing six experts, asking them to identify those suspected cases of genocide *writ large* that fit the legal definition of genocide found in the Genocide Convention. From their responses, I will compile a list of cases on which the six experts generally agree genocide was committed.

The application and implementation of the prevention prong of the Genocide Convention necessitates the recognition that genocide, or the very real possibility that genocide, is in fact being perpetrated. Lack of recognition of genocide in most or all cases would provide evidence

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14 *Writ large* cases of genocide are those that involve larger losses of life as part of a widespread systematic attack against a protect group as opposed to sporadic acts of genocide.

15 The Genocide Convention has been referred to as a two-prong or dual prong treaty because of its preventive and punitive applications.
of the Convention’s failure through the failure to invoke the Genocide Convention when there was some merit for doing so. Therefore, I will investigate whether the permanent members of the Security Council recognized the generally agreed upon cases of genocide as such while they were ongoing. To do so, I will review the official transcripts of the Security Council meetings that took place while the generally agreed upon cases of genocide were ongoing. I will also review the resolutions passed by the Security Council while the cases were ongoing. As a form of comparison, I will consider whether any of the generally agreed upon cases were recognized as genocide by other UN Member States while ongoing and whether they were recognized as genocide by criminal tribunals *ex post facto*. In order to accomplish the former, I will analyze the official transcripts of the Security Council meetings. To accomplish the latter, I will review the jurisdiction of those judicial bodies created to hold perpetrators of genocide accountable.

If there is evidence that the Genocide Convention has failed to prevent the crime it rhetorically prohibits, the next step will be to investigate potential sources of that failure. I will begin by focusing on the legal text to determine what role, if any, it plays in the failure to prevent genocide. I will investigate whether the Genocide Convention contains weaknesses that diminish its preventive efficacy, what effect the identified weaknesses might have on genocide prevention, and whether correcting the identified weaknesses might cause more harm than good through the creation of other liabilities.

In order to determine whether the Genocide Convention contains weaknesses that affect its preventive efficacy, I will perform a textual analysis of the treaty. Accepted international law as codified by the International Law Commission (ILC) in the *Vienna Convention on the Law of Treaties* (VCLT) provides two principal approaches to treaty interpretation. The first method is textual, also referred to as the objective approach (Shaw 2003) or literal approach (Gardiner
2008), where analysis is generally limited to the ordinary meaning of the words used (Shaw 2003). Article 31(1) of the VCLT states:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The second method is known as the teleological or purposive method, and can be utilized to find solutions to interpretive disagreements regarding ambiguous treaty provisions. The teleological approach deems the object and purpose of the treaty the most important aspect of a treaty and, therefore, the spot from which any further interpretation should begin (Shaw 2003). Shaw (2003) notes, “Any true interpretation of a treaty in international law will have to take into account all aspects of the agreement, from the words employed to the intention of the parties and the aims of the particular document. It is not possible to exclude completely any one of these components” (p. 839).

For my analysis of the Final Adopted Text of the Genocide Convention, I will apply the literal approach as defined by Article 31(1) of the VCLT. I will strictly adhere to the language of the text, evaluating whether there is anything that can be found in the text, or any obvious omissions, that could be viewed as impediments to the fulfillment of the preventive object and purpose of the treaty. For this analysis, I define a weakness as a provision that potentially directly or indirectly inhibits the fulfillment of the Convention’s raison d’être.

Having identified weaknesses in the Final Adopted Text, in order to determine whether the weaknesses originated in the Original “Secretariat” Draft or were negotiated into the Final Adopted Text, I will complete a comparative textual analysis of the Original “Secretariat” Draft, the Revised Ad Hoc Committee Draft, and the Final Adopted Text. Taking the weaknesses that were identified in the Final Adopted Text, I will analyze the two previous drafts of the
convention to determine whether the identified weaknesses were present in either or both of the drafts that preceded the Final Adopted Text.

After having determined whether any or all of the identified weaknesses originated in the early drafts of the convention, I will track the evolution of the Genocide Convention from the Original “Secretariat” Draft to the Final Adopted Text. I will investigate whether amendments were made to provisions found in the Original “Secretariat” Draft, creating weaknesses in the Final Adopted Text that were not previously present, and whether there were unsuccessful attempts to amend the early drafts of the convention to improve the potential efficacy of the Final Adopted Text. In doing so, I will apply the teleological approach to treaty interpretation. The teleological method is grounded in Article 32 of the VCLT. Article 32 provides for supplementary means of interpretation. It states,

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

Changes to the drafts will be tracked using *The Genocide Convention: The Travaux Preparatoires* (2009), which is a historical record of the meetings concerning the Genocide Convention and the amendments that shaped the evolution of the text.\(^\text{16}\) I will use the record of the meetings and the rules for interpretation as set out by Article 32 of the VCLT to determine whether the early drafts of the convention were amended, creating any of the weaknesses identified in the Final Adopted Text and to determine whether there were any attempts to amend

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\(^\text{16}\) Abtahi’s and Webb’s (2009) *The Genocide Convention: The Travaux Préparatoires* is an essential tool for the completion of my research. Abtahi and Webb collected into one multi-volume publication the record of the meetings that led to the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide.
the early drafts of the convention that could have improved the adopted text’s efficacy that were rejected.

Analysis and interpretation of the Genocide Convention could be restricted to the literal meaning of the words employed in the Convention under VCLT Article 31. However, the efficacy of the Genocide Convention is contested. Criticisms include the ambiguity of what the Convention actually requires of its contracting parties and definitional issues. Therefore, though an analysis of the evolution of the language employed by the Convention will not ultimately alter the wording of the Convention or the responsibilities taken on by the contracting parties, it could provide the legal and scholarly community a better understanding of the intentions of the framers of the earliest draft of the convention, as well as the intentions of the negotiating parties in relation to prevention of genocide.

With the textual analysis of the Final Adopted Text completed, I will have identified weaknesses in the text that have the potential to impede timely and effective response to suspected cases of genocide. After completing my analysis of the evolution of the early drafts of the convention, I will have identified which changes were supported and opposed by the permanent members of the Security Council. My next step will be to investigate whether there is evidence that the changes that weakened the Final Adopted Text were made intentionally out of considerations of national interest.

I will investigate whether there is evidence that the permanent members of the Security Council proposed or supported the changes made to the early drafts of the convention that weakened the Final Adopted Text’s preventive efficacy out of considerations of national interest. I will do the same for those proposed changes that could have strengthened the Final Adopted Text’s effectiveness. Historical context is important to understanding what motivates countries to
support and oppose the development of new international law. Therefore, I will consider the changes made and the positions taken by each of the permanent members within the context of historical events to determine whether the permanent members positioned themselves the way they did in relations to the different provisions of the drafts of the convention out of considerations of national interest related to the concern that the convention prohibiting genocide could be applied to their policies. This will be accomplished through utilizing the existing scholarly literature and through consideration of the historical context within which the permanent members of the Security Council were negotiating the treaty’s provisions.

I will also analyze the reservations attached to the Genocide Convention by the permanent members of the Security Council because the reservations have the potential to provide evidence of a reluctance to support an already weakened instrument for the prevention of genocide. At the time of accession and ratification, contracting parties to the Genocide Convention were permitted to document any reservations they had with the provisions of the Convention. Of the 140 contracting parties, 132 had at one time made reservations to the Convention. Reservations allowed contracting parties who, despite its evolution, were not satisfied with the entirety of the adopted text to ratify the treaty nonetheless, while documenting their opposition to specific provisions of the Convention. Analysis of the reservations submitted by the permanent members could provide further insight into their motivations. It is possible that the permanent members may have attached a reservation to a provision that was added to the text through the negotiating process of which they opposed. It is also possible that the permanent members may have attached a reservation to a provision whose removal they sought during the negotiating process, but failed to achieve its removal. A reservation under those circumstances has the potential to inform the record of an intention not to submit to the offending provision. An
analysis of the reservations within the context of the evolution of the Genocide Convention also has the potential to inform the record on how willing the permanent members were to support a treaty that may have already been weakened through the negotiation process.

The emergence of the Responsibility to Protect (R2P), the creation of the International Criminal Court (ICC), and the International Court of Justice’s (ICJ) ruling in the case of Bosnia v. Serbia offer three recent developments that could improve upon the international community’s record on prevention of genocide. R2P offers a new framework for humanitarian intervention that could conceivably work in conjunction with the prevention prong of the Genocide Convention. Having identified what role the text of the Genocide Convention plays in its failure to fulfill its object and purpose, I will perform a comparative analysis of R2P and the Genocide Convention, investigating whether R2P has corrected the weaknesses identified in the Genocide Convention. The ICC offers a permanent judicial body with jurisdiction over the crime of genocide. To evaluate the potential deterrent effect the ICC could have, I will review the scholarly literature and the ICC’s young record relating to punishment of suspected planners and perpetrators of genocide. Finally, the ICJ’s ruling in the case of Bosnia v. Serbia was a result of the Court’s first hearing of a case concerning a dispute between state parties over the application and fulfillment of obligations under the Genocide Convention. Therefore, I will review the Court’s ruling to determine the likelihood it can be applied to future cases before the Court.

Conclusion

The results of this primarily qualitative study will not be definitive, but could provide evidence that the text of the Genocide Convention has contributed to the failure in the prevention of genocide and that the features of the text of the Convention reflect the influence of
considerations of national interest in the drafting and negotiating of the Final Adopted Text. Each of the individual components of my research work in conjunction with one another to expand our knowledge of why, despite its universal condemnation and its international legal prohibition, genocide has continued to be perpetrated and, in particular, why the international community has failed to take the necessary measures to prevent it. Further, my analysis of the recent developments related to genocide prevention will provide some insight into whether the international community is likely to improve on its record concerning the prevention of genocide.
Chapter 2: Evidence of the Genocide Convention’s Failure

As stated in Chapter 1, the purpose of my research for this project was to gain a better understanding of why, despite its universal condemnation and international legal prohibition, genocide has continued to be perpetrated and, in particular, why the international community has failed to take the necessary measures to prevent it. In this chapter, I investigate whether there is evidence that the Genocide Convention has failed to fulfill its preventive object and purpose. Whether the Genocide Convention has failed to fulfill its object and purpose has implications regarding those acts of genocide already committed and those yet to be.

I begin by investigating whether there is scholarly consensus that the Genocide Convention has failed by reviewing scholarly assessments of the preventive efficacy of the Convention. I then investigate whether suspected cases of genocide that followed the Genocide Convention’s entry into force provide factual evidence that the Convention has failed to prevent the commission of genocide. Because the numerous lists of alleged cases of genocide vary depending on the definition used to populate the lists, I will develop a list of those cases on which there is general scholarly agreement that genocide writ large and stricto sensu was committed. I will then take those cases on which there is general scholarly agreement that the crimes perpetrated constituted genocide and investigate whether the Genocide Convention has been invoked by the permanent members of the Security Council while genocide was ongoing. As a form of comparison, I also investigate whether the generally agreed upon cases of genocide were recognized as such while ongoing by other UN Member States or ex post facto by criminal tribunals.
Recognition of genocide is in some ways inherently political because, minus obvious guilty acts accompanied by explicit statements of genocidal intent, it is up to each of the individual states to determine whether or not to recognize genocide in a given situation. Therefore, if other UN Member States have recognized genocide when the permanent members failed to do so, it could illustrate a lack of willingness of the permanent members to fulfill their responsibilities under the UN Charter. Also, while measures to punish alleged perpetrators of genocide are often implemented after the fact, thus perhaps allowing for more clarity, the establishment of judicial bodies with statutes that provide jurisdiction over the crime of genocide should not be discounted. It would be significant if the permanent members of the Security Council have exhibited a willingness to punish perpetrators of genocide and, therefore, a willingness to label crimes genocide, or mandate jurisdiction over the crime of genocide, \textit{ex post facto}, but have failed to label crimes as genocide while they were ongoing.

The law cannot be effective for the purpose of preventing genocide if the permanent members are unwilling to apply the Genocide Convention to suspected cases while ongoing. It is also important to note that the decision to prosecute is an act grounded in the belief that enough evidence exists to move forward with a trial concerning the alleged commission of genocide. The willingness to try individuals is not a definitive statement that the suspect is guilty of perpetrating the crime. Yet, if evidence were to show the permanent members of the Security Council to be willing to establish \textit{ad hoc} tribunals with jurisdiction over crimes of genocide after the crimes have been committed, but unwilling to implement the Genocide Convention for preventive purposes while the crimes are ongoing, it would demonstrate a greater commitment by the permanent members to punishment \textit{ex post facto} than to fulfilling the Convention’s prohibition of genocide through the crime’s proactive prevention.
Scholarly Perspectives on the Efficacy of the Genocide Convention for the Purpose of Prevention and Suppression

There is no shortage of literature that labels the Genocide Convention an abject failure in the fulfillment of its object and purpose, the prevention of the crime of genocide. Lassa Oppenheim (1955), only four years after the Genocide Convention entered into force, opined, “It is apparent that, to a considerable extent, the Convention amounts to a registration of protest against past misdeeds of individual or collective savagery rather than to an effective instrument of their prevention or repression” (p. 751). Barry Schiller argued in 1977 that the Genocide Convention had already become little more than symbolic legislation. Schiller (1977) stated, “Ironically, one of the most palpable examples of man’s inhumanity to man has given birth to an international Convention which presently may be conceptualized as existing primarily in a symbolic universe” (p. 47). What Oppenheim and Schiller essentially argue is that United Nations felt obligated to register some form of protest against the policies that led to the attempted exterminations of the Armenians and the European Jewish people. However, the form it took was a treaty that was missing the teeth needed to prevent the very crime it rhetorically prohibits.

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17 Lassa Francis Lawrence Oppenheim was the Whewell Professor of International Law at Cambridge University. On his death, the American Journal of International Law (January - April 1920), wrote, “His eminence as a teacher, scholar and writer in international law is such as to call for mention in this JOURNAL of his services and achievements” (p. 229).
18 Barry Schiller has previously lectured in Sociology at California State University.
Payam Akhavan and René Provost (2011) view the Genocide Convention as an instrument constructed to create the façade that the international community was making progress in its fight against genocide. ¹⁹ They argue,

The Genocide Convention was hailed as a triumph for international law….But the vow to ‘never again’ allow such horrors to happen soon became an empty mantra as millions more became the targets of genocide….These immeasurable tragedies speak to our repeated failure to give effect to righteous declarations and lofty utterances that create the illusion of progress (Akhavan & Provost 2011, p. 2).

Peter Ronayne (2001) refers to the numerous cases of genocide that followed the Convention’s entry into force as evidence of its failure: “Despite the good intentions of the UNGC [United Nations Genocide Convention], post-World War II history has proven with disturbing clarity that the Holocaust was not the twentieth century’s last genocide” (p. 1). ²⁰

Gareth Evans (2008) criticizes the international community’s failure to invoke the Genocide Convention when it has been appropriate to do so. ²¹ Evans (2008) has made an argument similar to Schiller’s argument that the Genocide Convention is merely symbolic. Evans (2008) argues,

But it was almost as if, with the signing of the Genocide Convention, the task of addressing man-made atrocities was seen as complete. It took the major powers years to ratify it, it was rarely invoked, and has never been effectively applied in practice either to prevent or punish actual atrocities (p. 20).

The failure to invoke the Genocide Convention while a case of genocide is ongoing is an important point. Without recognizing cases of genocide while ongoing, the void in international

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¹⁹ Akhavan is a Professor of Law at McGill University and was the first Legal Advisor to the Prosecutor Office of the International Criminal Tribunals for Former Yugoslavia and Rwanda. Provost is also a Professor of Law at McGill University and is the Director of the Centre for Human Rights and Legal Pluralism.

²⁰ Peter Ronanye is a Senior Faculty Member at the Federal Executive Institute and an adjunct professor at the University of Virginia.

²¹ Gareth Evans is the former president of the International Crisis Group and co-chair of the International Commission on Intervention and Sovereignty, which developed the Responsibility to Protect.
law that existed prior to the adoption and entry into force of the Genocide Convention, for all intents and purposes, remains. Before preventive measures can be taken to remedy the violation of the prohibition against genocide, it must first be recognized that the prohibition of genocide is being violated. During my interview with Samuel Totten, he stated,

> It's not the UNCG that has failed but the way it has been applied and the way nations and the international community have maneuvered their way out of complying with it. Yes, the UNCG has various components that are ambiguous…but ultimately individual nations and those comprising the Permanent Five in the UN Security Council have resorted to realpolitik to undergird their actions/inactions (S. Totten, personal communication, September 17, 2011).

Totten’s position reinforces the importance of my research that will be presented in subsequent chapters concerning the source(s) of the failure to prevent and suppress genocide.

Mary Robinson, Ramesh Thakur, and Leo Kuper echo Totten’s sentiment that the blame for the failure to prevent genocide resides more with the permanent members of the Security Council than with the Genocide Convention. Robinson (1998) implores us to “count up the results of fifty years of human rights mechanisms…and endless high-level rhetoric” because we will find “the general impact is quite underwhelming” and that the “failure of implementation” is of a “scale that shames us all” (p. 6). Thakur (2006) chastised the international community, noting that the continued use of the slogan ‘never again’ “requires chutzpah” (p. 117). Kuper (1981) has conveyed a more aggressive critique: “But I have been driven to this study by the realization that genocide is all too common in our own day, and that the organization charged with its prevention and punishment, the United Nations, responds with indifference, if not with

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22 Samuel Totten is the Professor of Curriculum and Instruction at the University of Arkansas and co-founding editor of *Genocide Studies and Prevention: An International Journal*. Totten generously agreed to allow me to use our email correspondence in my project.

23 Mary Robinson is the former President of Ireland and UN High Commissioner for Human Rights.

24 Ramesh Thakur is currently the Director of the Centre for Nuclear Non-Proliferation and Disarmament at Australian National University and an adjunct professor at Griffith University. He was also a member of the Commission on Intervention and State Sovereignty.
condonation” (p. 9). Interestingly, Kuper wrote those words in 1981, prior to numerous suspected cases of genocide.

Cases on Which There is General Scholarly Agreement that the Crimes Constitute Genocide

The application and implementation of the prevention prong of the Genocide Convention necessitates the recognition that genocide, or the very real possibility that genocide, is being perpetrated. Lack of recognition of genocide in most or all cases would provide evidence of the Convention’s failure. In order to gauge the recognition or failure to recognize cases of genocide while they were ongoing, I needed to first establish on which alleged historical cases of genocide, post the Convention’s entry into force, there is consensus that genocide was committed. Specifically, I sought to create a list of cases on which there is general scholarly agreement that genocide writ large and strico sensu was committed. I interviewed four experts, asking them to identify those suspected cases of genocide that fit the legal definition of genocide found in the Genocide Convention, and reviewed the work of two others. From their responses and my review of the literature, I compiled a list of cases on which the six experts generally agree genocide was committed.


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25 Leo Kuper was Professor Emeritus at the University of California and director of university’s African Studies Center.
26 William Schabas is the Chairman of the Irish Center for Human Rights at the National University of Ireland. Beth Van Schaack is an Associate Professor of Law at Santa Clara Law. She is currently on leave. In 2012, Van Schaack was appointed Deputy to U.S. Ambassador-At-Large for War Crimes. Leila Nadya Sadat is the Henry H. Oberschelp Professor of Law at Washington University Law.
Samuel Totten (S. Totten, personal communication, September 17, 2011) and reviewed the works of Helen Fein (2007), and Ben Kiernan (2007). While Schabas’ list differed significantly, there was general agreement amongst the other five scholars on the large majority of cases. Sadat’s and Van Schaack’s lists were nearly identical. Sadat and Van Schaack differed only in their current positions on West Pakistan’s alleged genocide against the people of then East Pakistan (Bangladesh) and the Khmer Rouge’s alleged genocide in Cambodia. Sadat believes genocide occurred in Bangladesh, but is not sure about Cambodia, and Van Schaack believes events in Cambodia amounted to genocide, but is not sure about Bangladesh. Sadat and Van Schaack agreed that genocide was perpetrated in Guatemala against the Maya in 1982, Iraq against the Kurdish population in 1988, in Rwanda against the Tutsi in 1994, in the former Yugoslavia against Bosnian Muslims during the Balkan wars, and in the Sudan against the Darfurians. Among the genocide scholars, the only difference was Fein’s and Kiernan’s inclusion of the larger atrocities in Bosnia during the Balkan War as genocide, while Totten limited the use of the term to the massacre at Srebrenica. The results are recorded in Table 2.1 on page 35. The table indicates the position of each of the scholars on the seven suspected cases of genocide that repeatedly came up in the responses to my inquiry and Fein’s and Kiernan’s texts.

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27 Helen Fein is an Associate Professor at Harvard University’s International Security Program and the Executive Director of the Institute for the Study of Genocide. Ben Kiernan is a Professor of International and Area Studies and the Director of the Genocide Studies Program with Yale University.
Table 2.1

Scholarly Positions on Suspected Cases of Genocide

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</tr>
<tr>
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</tr>
<tr>
<td>Ben Kiernan</td>
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<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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</tr>
</tbody>
</table>

The Security Council and the Failure to Recognize Genocide

Overall, five of the six scholars agreed that genocide was committed in Guatemala, Iraq, Rwanda, Bosnia, and Sudan, and four out of the six agreed that genocide was committed in Bangladesh and Cambodia, with Sadat open to the possibility that genocide was committed in Cambodia and Van Schaack open to the possibility in Bangladesh. Among the international criminal experts and genocide scholars, there was general agreement that there have been seven cases of genocide writ large since the adoption and entry into force of the Genocide Convention. Yet, in nearly every one of those seven cases, the permanent members of the Security Council did not recognize genocide while it was ongoing or before irreparable harm had already been committed. What follows is an analysis of the Security Council’s meetings concerning each of the generally agreed upon cases of genocide.
As stated earlier, the application and implementation of the prevention prong of the Genocide Convention necessitates recognition of genocide while it is ongoing. Therefore, if the permanent members of the Security Council, as the state actors that dictate whether enforcement measures are authorized, have failed to recognize most or all of the generally agreed upon cases of genocide as such while they were ongoing, it would provide evidence of the failure of the Genocide Convention to facilitate the prevention of the crime it prohibits. Further evidence of failure could be found in the recognition of genocide while ongoing by United Nations Member States outside of the permanent members of the Security Council, as well as recognition by the permanent members ex post facto through the establishment of ad hoc tribunals with temporal jurisdiction over the crime of genocide.

**Bangladesh**

The genocide in East Pakistan began in March 1971 and was brought to an end in December 1971. Upwards of one million East Pakistanis were killed and another 10 million were forced to seek refuge in India (Chesterman 2003). Chaudhuri estimates the number of people killed as being 1,247,000 based in “a chart…of the worst affected places in eighteen districts, giving figures for the property damaged, the number of slaughter-houses and mass graves discovered, women ravished, skulls and skeletons found” (Kuper 1981, p. 79). The 10 million refugees, mostly Hindu, that were able to escape the violence faced “conditions of extreme hardship…with an appalling death rate” (Kuper 1981, p. 79). After nine months of fighting, India’s unilateral intervention in East Pakistan, without Security Council authorization, ended the genocidal campaign and pushed back West Pakistani forces. West Pakistan

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28 See also Ahmed (1973), Choudhury (1975), Islam and Hassan (2004), and Zaheer (1994) for detailed accounts of the genocide and liberation war in East Pakistan.
surrendered in less than two weeks, signing the Instrument of Surrender on December 16, 1971, in Dhaka (Chesterman 2003).

The Pakistani military, as directed by the regime in West Pakistan, carried out the genocidal acts, targeting the Bengali people and, more generally, the Hindu population of East Pakistan. The attacks in East Pakistan violated Article II (a), (b), and (c) of the Genocide Convention. Article II (a) prohibits killing members of a national, ethnical, racial, or religious group. Article II (b) prohibits the causing of serious bodily or mental harm to members of a protected group. Article II (c) prohibits deliberately inflicting on a protected group living conditions likely to bring about its destruction.29

Though the conflict began in March 1971, the Security Council did not meet to discuss events on the Indian subcontinent until December 4, 1971, after the large majority of the killings had taken place. The President of the Security Council called a meeting to consider “the recent deteriorating situation which has led to armed clashes between India and Pakistan” (United Nations Security Council 1971, December 4, p. 1).30 Security Council debate was essentially divided between two factions. The United States and China aligned themselves with Pakistan, and the Soviet Union aligned itself with India. The U.S. focused on the conflict between Pakistan and India, fully committed to organizing a ceasefire and the removal of Indian forces from East Pakistan. The U.S. maintained this focus despite being warned early on about the cause and scope of the human suffering in East Pakistan. On April 6, 1971, less than weeks after Pakistan launched ‘Operation Searchlight’, Arthur Blood, General Consul in Dhaka, sent what is known as the “Blood Telegram.” In it he wrote,

29 See Appendix A for the full text of the Genocide Convention.
30 The presidency was held by Sierra Leone in December 1971.
Our government has failed to denounce atrocities. Our government has failed to take forceful measures...while at the same time bending over backwards to placate the West Pak[istan] dominated government...Our government has evidenced what many will consider moral bankruptcy, ironically at a time when the USSR sent President Yahya Khan a message defending democracy, condemning the arrest of a leader of a democratically elected majority party incidentally pro-West, and calling for an end to repressive measures and bloodshed....But we have chosen not to intervene, even morally, on the grounds that the Awami conflict, in which unfortunately the overworked term genocide is applicable, is purely an internal matter of a sovereign state (Islam & Hassan 2004, p. 208).

Blood stated that the label of genocide had been overused, but still concluded it was an appropriate description of what was happening to the population of East Pakistan.

Like the U.S., China dismissed any possibility that India’s intervention in East Pakistan had anything to do with human suffering caused by Pakistan’s actions. Instead, China argued that India had openly invaded a sovereign country, committing acts of aggression in violation of the UN Charter. The Chinese delegate repeatedly referred to events in East Pakistan as an internal affair of Pakistan, in which no one has the right to interfere. China concluded,

The Chinese delegation is of the view that in accordance with the Charter of the United Nations the Security Council should surely condemn the acts of aggression by the Government of India and demand that the Indian Government immediately and unconditionally withdraw all its armed forces from Pakistan (United Nations Security Council1971, December 4, p. 23).

The Soviet Union argued that focusing only on the conflict between India and Pakistan ignored the root cause of the conflict, which was the egregious violations of the rights of the population of East Pakistan.31

Throughout the duration of the genocide, including the two-week period in which the Security Council met to discuss the conflict, none of the members of the Security Council, permanent or otherwise, labeled Pakistan’s actions in East Pakistan as genocide. Though none of

31 See the official transcripts of United Nations Security Council meetings from December 4 and December 6 of 1971 for the permanent members’ full statements.
the members of the Security Council used the term ‘genocide’ to describe West Pakistan’s actions in East Pakistan, India used it on multiple occasions. On December 4, 1971, India stated before the Security Council,

Then there was a great hue and cry to internationalize the problem: diplomatic moves, various moves in the United Nations…all designed to make it into an Indo-Pakistan dispute. Once it turned into an Indo-Pakistan dispute, people will forget what the Pakistan army is doing in East Pakistan. They can go on burning their villages and raping their women and so on. People will then forget and say that it is an Indo-Pakistan dispute. It is extraordinary, therefore, to find today, when pressure for action is so great in some quarters, this background is forgotten” (United Nations Security Council 1971, December 4, p. 16).

During the debate on December 6, India openly asked the members why they were not paying attention to “Pakistan’s campaign of genocide” (United Nations Security Council 1971, December 6, p. 27). India also accused some members of the Security Council of the selective use of international norms to support desired positions. India stated,

This debate has shown that selectivity is the order of the day. Now, several principles have been quoted by various delegations: sovereignty, territorial integrity, noninterference in other peoples’ affairs, and so on…What happened to the Convention on genocide? (United Nations Security Council 1971, December 6, p. 27).

While failing to label West Pakistan’s policies as genocide, members of the Security Council did attempt to formally condemn India’s intervention. These attempts were vetoed by the Soviet Union, though a similar resolution passed overwhelmingly in the General Assembly (Franck 2003).

West Pakistan’s actions in Bangladesh were recognized as genocide *ex post facto* by the International Commission of Jurists, an international nongovernmental organization based in Geneva, and a tribunal established to try individuals suspected of violating international law, including the Genocide Convention. In 1972, The International Commission of Jurists released a report concluding that Pakistan committed genocide in East Pakistan. The report was the result
of an enquiry into the reported violations of human rights and the rule of law. The International Commission of Jurists described the acts perpetrated by West Pakistan’s military as

the indiscriminate killing of civilians, including women and children and the poorest and weakest members of the community; the attempt to exterminate or drive out of the country a large part of the Hindu population;...the raping of women; the destruction of villages and towns; and the looting of property. All this was done on a scale which is difficult to comprehend (International Commission of Jurists 1972, p. 26-27).

The Commission concluded there was “a strong prima facie case that the crime of genocide was committed against the group comprising the Hindu population of East Bengal” (International Commission of Jurists 1972, p. 26-27). The International Crimes Tribunal of Bangladesh became the most recent addition to the list of courts with jurisdiction over the crime of genocide. It grew out of The International Crimes (Tribunals) Act, 1973, which provides “for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law.” See Table 2.2 below for a summary of genocide recognition in the case of Bangladesh.

Table 2.2

<table>
<thead>
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<th>Genocide Recognition in Bangladesh</th>
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<tr>
<td><strong>Genocide</strong></td>
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</table>

Cambodia
The genocide in Cambodia lasted from 1975-1979. After ousting Lon Nol in 1975, the Khmer Rouge, under the leadership of Pol Pot, took power and implemented a plan to fully reorganize society (Van Schaack 2009, June). Though not all were victims of genocide according to its legal definition, more than two million perished. Vietnam invaded Cambodia on December 25, 1978, and succeeded in taking over the country by January 7, 1979. Vietnam’s unilateral intervention in Cambodia, without Security Council authorization, ended the genocidal campaign and forced the Khmer Rouge leadership into exile in Thailand.

The Khmer Rouge was responsible for numerous egregious human rights violations, including acts of genocide. Upon defeating Lon Nol, Pol Pot and the Khmer Rouge forced Cambodians into agricultural labor without pay. They persecuted ethnic Chinese, Vietnamese, Cham Muslim, and Thai. Dissident communists and other undesirables, including members of the peasantry, were targeted for elimination. Others targeted for extermination included the elite, the educated, and ethnic minorities. The Khmer Rouge also dissolved families, separating children from their parents, and prohibited religious practice and education (Van Schaack 2009, June). These and other practices resulted in massive starvation in parts of Cambodia (Cambodian Genocide Program).

Not all of the approximately two million killed were victims of genocide. However, minority ethnic and religious groups were specifically targeted as members of those groups. Ethnic Chinese, Vietnamese and Thai were victims, as well as Christians and Buddhists (Cambodian Genocide Program). Half the population of Cham Muslims was also killed. These actions by the Khmer Rouge violated Article II (a), (b), (c), and possibly (e) of the Genocide

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Convention. Article II (a) prohibits killing members of a national, ethnical, racial, or religious group. Article II (b) prohibits the causing of serious bodily or mental harm to members of a protected group. Article II (c) prohibits deliberately inflicting on a protected group living conditions likely to bring about its destruction. Article II (e) prohibits the forceful transfer of children from one group to another.

From 1975-1979 the Security Council did not pass a single resolution on Cambodia. The term ‘genocide’ was not used by any members of the Security Council to refer to the crimes committed by the Khmer Rouge until after Vietnam’s invasion. It was not until January 1, 1979, a week before the Khmer Rouge regime would fall to the advancing Vietnamese, that the term ‘genocide’ was first applied to events in Cambodia. The Soviet Union accused Pol Pot of genocide against the Kampuchean people stating,

Indeed, how could one remain calm when the criminal clique of Pol Pot, for three years, pursued a policy of open genocide against the Kampuchean people? In a country with a population of 8 million, the rulers destroyed, according to statistics reported in, among others, the Western press, from 2 to 3 million people. The vocabulary used in normal international practice to describe mass violations of human rights is simply inadequate to describe these monstrous crimes ((United Nations Security Council1979, January 1).

The Soviet Union also quoted President Jimmy Carter and Senator George McGovern, both who used the term in 1978. It is important to note that, despite the use of the term by the President of the United States, the U.S. permanent representative to the UN Security Council failed to use the term during the entirety of the genocide. The term ‘genocide’ would be used numerous other times in 1979, mainly in letters to the Security Council from Vietnam accusing the U.S. of genocide in Vietnam and accusing Cambodia of committing genocide against its own people. Yet, it was used only once during the conflict by the Soviet Union, and that was with merely days left before the fall of Pol Pot. While failing to label Khmer Rouge policies as genocide,
members of the Security Council did attempt to formally condemn Vietnam’s intervention. China’s draft resolution harshly condemning the invasion was not voted on. A milder resolution sponsored by seven non-aligned states received widespread support, but was vetoed by the Soviet Union (Franck 2003).

The genocide in Cambodia was recognized as such *ex post facto*. In 1997, Cambodia’s prime ministers wrote to Secretary-General Kofi Annan, asking for aid from the United Nations in creating a judicial body to try senior members of the Khmer Rouge. The Extraordinary Chambers in the Courts of Cambodia (ECCC) was established in 2003 with temporal and territorial jurisdiction. Article 4 of the ECCC’s statute gives the Chambers the power to “bring to trial all Suspects who committed the crimes of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and which were committed during the period from 17 April 1975 to 6 January 1979” (Agreement Between the United Nations and the Royal Government of Cambodia). See Table 2.3 below for a summary of genocide recognition in the case of Cambodia.

Table 2.3

*Genocide Recognition in Cambodia*

<table>
<thead>
<tr>
<th>Genocide</th>
<th>Recognition by Permanent Members</th>
<th>Recognition by Non-Permanent Members</th>
<th>Recognition by Non-Voting Participants</th>
<th>Recognition in Letters to the Security Council</th>
<th>Recognition Ex Post Facto by Criminal Tribunals</th>
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**Guatemala**
The genocide in Guatemala against its indigenous population took place over a three year period beginning in 1981.\footnote{See Esparza et al (2010) and Higgonet (2009) for detailed accounts of the genocide and civil war in Guatemala.} The peak of the killings came following General Efrain Rios Montt’s military coup in March 1982. In all, the Guatemalan army destroyed at least 626 villages and killed or “disappeared” more than 200,000 people. Further, the government of Guatemala implemented a scorched earth policy meant to create conditions unable to sustain life. This policy included destroying shelter, burning agriculture, slaughtering livestock, poisoning water supplies, and desecrating and destroying cultural symbols (Holocaust Museum Houston). The Maya population was specifically targeted as part of the Guatemalan army’s “Operation Sophia,” an operation, first launched in 1980, aimed at eliminating anti-government rebels by physically destroying the civilian areas in which they found respite (Kiernan 2007). The Maya were deemed especially sympathetic and supportive of the rebels. Though violence against the Mayan population continued, the genocide ended with the ousting of Rios Montt by General Mejia Victores through a coup in August 1983.

The Guatemalan army, as directed by its military leadership, carried out the genocidal acts. Special units, known as the Kaibiles, were sent to villages to kill their inhabitants and to destroy the villages. Private death squads, advised by the army, also took part in the genocide (Holocaust Museum Houston). Guatemalan army’s and the private death squads’ actions violated Article II (a), (b), and (c) of the Genocide Convention for killing members of a protected group, causing serious bodily or mental harm to members of a protected group, and deliberately inflicting on a protected group living conditions likely to bring about its destruction.

From 1981-1983, the Security Council did not meet to discuss human rights in Guatemala or pass a single resolution concerning the genocide or any other human rights violations. The
crimes in Guatemala have been recognized as genocide *ex post facto*. In 1997, the UN sponsored Commission for Historical Clarification was established “to clarify human rights violations related to the thirty-six year internal conflict from 1960 to the United Nation's brokered peace agreement of 1996, and to foster tolerance and preserve memory of the victims” (Commission for Historical Clarification, Final Report, English Version). In February 1999, the Commission presented its final report, Guatemala: Memory of Silence. The Commission found that 83% of the victims were Mayan, concluding that “agents of the state committed acts of genocide against groups of Mayan people” (Commission for Historical Clarification, Final Report, English Version, para. 122).

A special tribunal has not been created to punish those responsible for the genocide in Guatemala. The national court system has, however, recently charged Rios Montt with genocide on two counts. The initial charge came in January 2012 for allegedly displacing 29,000 Maya and for the killing of another 1,771. The second charge came in May 2012 for the alleged massacre of 201 Maya in the village of Dos Erres (Ruiz-Goiriena 2012). See Table 2.4 below for a summary of genocide recognition in the case of Guatemala.

Table 2.4

*Genocide Recognition in Guatemala*

<table>
<thead>
<tr>
<th>Genocide</th>
<th>Recognition by Permanent Members</th>
<th>Recognition by Non-Permanent Members</th>
<th>Recognition by Non-Voting Participants</th>
<th>Recognition in Letters to the Security Council</th>
<th>Recognition Ex Post Facto by Criminal Tribunals</th>
</tr>
</thead>
</table>
Iraq

Saddam Hussein’s regime implemented the genocidal Anfal campaign between February and September 1988.\textsuperscript{34} The poisoned gas attacks against the Kurdish population of Iraq in 1988 were part of a systematic plan to remove the Kurds permanently from their ancestral lands (Saeedpour 1992). Saddam Hussein’s Kurdish policy was depicted in an official decision issued in June 1987. It stated,

It is totally forbidden to allow any foodstuff or person and/or machine to reach the forbidden villages which are included in the second stage of the collecting villages…Existence is totally taboo in the forbidden villages of the first stage…On 21/6/87 begins the second stage…After harvesting the winter crops which ends before the 15\textsuperscript{th} of July, cultivation is forbidden for the following summer and winter seasons. Animal grazing is also forbidden in these areas. It is the duty of military forces…to kill any human being or animal that exists in these areas which are considered totally forbidden (Saeedpour 1992, p. 64).

The attack on the town of Halabji on March 16, 1988, exemplified the nature of Hussein’s Kurdish policy. Human Rights Watch’s report, \textit{Iraq’s Crime of Genocide} (1995), states, “Thousands of civilians died…Their photographs, mainly of women, children, and elderly people huddled inertly in the streets or lying on their backs with mouths agape, circulated widely, demonstrating eloquently that the great mass of the dead had been Kurdish civilian noncombatants” (p. 72.). Human Rights Watch cites the death toll from the Anfal campaign as at least 50,000 with the possibility of up to 100,000.

The genocide against the Kurdish population of Iraq ended soon after Iran defeated Iraq in the Iran-Iraq War (1980-1988). Having agreed to the terms of a ceasefire, ending the war, Iraqi troops that had previously been engaged in the war effort, relocated to carry out the final Anfal operation. The operation began on August 25, 1988, and lasted only a matter of days. On

\textsuperscript{34} See Kelly (2008), Black (1993), and Human Rights Watch (1995) for detailed accounts of the genocide in Iraq.
September 6, Saddam Hussein declared victory and announced a general amnesty for all remaining Kurds (Human Rights Watch 1995).

Hussein’s Kurdish policy included the following: (1) summary executions and mass disappearances of civilians, including women and children; (2) the use of chemical weapons, killing thousands and poisoning the environment; (3) the destruction of as many as 2,000 villages; (4) the destruction of civilian infrastructure, including wells and electricity substations; (5) the destruction of schools and mosques; and (6) the looting of property, including livestock (Human Rights Watch 1995). These actions violated Article II (a), (b), and (c) of the Genocide Convention. Article II (a) prohibits killing members of a national, ethnical, racial, or religious group. Article II (b) prohibits the causing of serious bodily or mental harm to members of a protected group. Article II (c) prohibits deliberately inflicting on a protected group living conditions likely to bring about its destruction.

The Security Council passed three resolutions in 1988 without the use of ‘genocide’ to describe the systematic killings of members of the Kurdish population of Iraq. Further, none of the representatives of the permanent members referred to Hussein’s Kurdish policy as genocide. The same can be said for the non-permanent members of the Security Council. The lone accusation of genocide committed by Iraq came in the form of a letter to the Security Council from Iran.

The genocide against the Kurdish people was recognized as such *ex post facto* by the Iraqi Special Tribunal. The Tribunal was established in 2003 by a statute passed by the Coalition Provisional Authority. Article I (ii) states,

The Court shall have jurisdiction over every natural person whether Iraqi or non-Iraqi resident of Iraq and accused of one of the crimes listed in Articles 11 to 14 below, committed during the period from July 17, 1968 and until May 1, 2003, in the Republic
of Iraq or elsewhere, including...the crime of genocide (Statute of the Iraqi Special Tribunal).

In 2006, Saddam Hussein was found guilty of genocide for his attempt to “annihilate” the Kurdish people in 1988, killing 50,000-100,000 and destroying more than 2,000 Kurdish villages (Wong). See Table 2.5 below for a summary of genocide recognition in the case of Iraq.

Table 2.5

Genocide Recognition in Iraq

<table>
<thead>
<tr>
<th>Recognition by Permanent Members</th>
<th>Recognition by Non-Permanent Members</th>
<th>Recognition by Non-Voting Participants</th>
<th>Recognition in Letters to the Security Council</th>
<th>Recognition Ex Post Facto by Criminal Tribunals</th>
</tr>
</thead>
</table>

Bosnia

In March of 1992, Bosnians voted overwhelmingly, without the vote of most Bosnian Serbs who boycotted the referendum, to secede from the former Yugoslavia. Approximately one week later, the European Union recognized Bosnia’s independence. Soon thereafter, Serbs, under the leadership of Radovan Karadzic, began a siege of Sarajevo and other cities in Bosnia. Despite the popular decision to secede, in an effort to territorially expand for the purpose of creating a Greater Serbia, Bosnian Muslims and Croats were systematically murdered or deported in an effort to “cleanse” Bosnian territory of anyone but Serbs. From 1992-1995, as many as 200,000 Muslims were killed by Bosnian Serb forces (Kiernan 2007). It was not until approximately 7,000 Muslim men and boys were massacred at Srebrenica in July 1995 that robust intervention was carried out by NATO, forcing Slobodan Milosevic to sign the Dayton Peace Accords (Power 2003).
While some scholars only recognize the massacre at Srebrenica as genocide, four of the five scholars that I included in my census agreed that genocide in Bosnia was not limited to Srebrenica.\textsuperscript{35} If we only count those acts committed at Srebrenica, the violence perpetrated against Bosnian Muslims by Bosnian Serbs, with the support of Serbia, violated Article II (a). Article II (a) prohibits killing members of a national, ethnical, racial, or religious group. If we include those actions perpetrated throughout the duration of the conflict, Article II (b), (c), and (d) were also violated. Article II (b) prohibits the causing of serious bodily or mental harm to members of a protected group. Article II (c) prohibits deliberately inflicting on a protected group living conditions likely to bring about its destruction. Article II (d) prohibits the imposition of measures intended to prevent births within the group. Article II (d) applies because of the widespread use of rape as a tool of genocide. Though it was the International Criminal Tribunal for Rwanda that established rape as a tool of genocide, the International Criminal Tribunal for the former Yugoslavia (ICTY) investigated and prosecuted seventy individuals for sexual assault and rape perpetrated against both Muslim women and men during the conflict.

The Security Council met regularly during the duration of the conflict in the Balkans. Between 1992 and 1995, the Security Council passed nearly sixty resolutions on the former Yugoslavia and Bosnia without a single mention of ‘genocide’. Over this same period, none of the permanent members of the Security Council used the term ‘genocide’ to describe the treatment of the Muslim population of Bosnia. Instead, the Security Council maintained a significant imbalance of power between the aggressors, the Bosnian Serbs, and the victims, the Bosnian Muslims. Due to the already ongoing hostilities and tensions in the Former Yugoslavia,

the Security Council had passed an arms embargo in 1991, thus ensuring a gross imbalance in military capacity between the Serbs and the Muslims because the Bosnian Serbs were receiving weapons from their benefactors in Serbia (Power 2003).


In 1993 Austria, Belgium, Ecuador, India, and Zimbabwe were replaced by Brazil, Djibouti, New Zealand, Pakistan, and Spain as non-permanent members of the Security Council. On May 23, 1993, Venezuela (United Nations Security Council 1993, May 25) reiterated its position that Bosnian Muslims were victims of genocide. Pakistan joined Venezuela in this
assessment. Numerous formal letters were addressed to the Security Council by both the President of the Republic of Bosnia and Herzegovina and its permanent representative to the United Nations. On May 30, the president of Bosnia wrote to the Security Council out of fear for the people of Gorazde, a UN-designated ‘safe area’. He wrote,

They [the Serbian leadership] fear no reprisal from the international community. The victim continues to be deprived of defensive assistance and weaponry….We again, on the basis of past experience, fear the massacre of a civilian population….We call upon the United Nations Security Council and relevant Member States to take the ‘necessary measures’ to challenge and stop this latest act of aggression and genocide” (United Nations Security Council 1993, June 1).

Over the next year, Gorazde would suffer hundreds of casualties. As the New York Times reported in April 1994, “A United Nations report from Gorazde tonight said 59 people had been killed…bringing the confirmed death toll in the three-week offensive to 594” (Sudetic 1994).

In 1994 the Security Council non-permanent members was comprised of Argentina, Brazil, Czech Republic, Djibouti, New Zealand, Nigeria, Oman, Pakistan, Rwanda, and Spain. Though not the first mention of genocide by Bosnia’s communiques to the Security Council in 1994, its letter of March 30, 1994 was especially damning. It stated, “The international community has been a passive observer of the genocide, unprecedented by its scope and cruelty of its perpetration in the entire period of global peace” (United Nations Security Council 1994, May 30).

On April 21, 1994, the Security Council, per its request, was joined by representatives of Afghanistan, Albania, Algeria, Austria, Bosnia, Bulgaria, Croatia, Egypt, Finland, Greece, Hungary, Indonesia, Iran, Jordan, Malaysia, Morocco, Norway, Poland, Qatar, Saudi Arabia, Senegal, Slovenia, Sweden, Tunisia, Turkey, and UAE. At this meeting, Bosnia, Turkey, Tunisia, Egypt, Afghanistan, Senegal, Algeria, Malaysia, Iran, and Slovenia all referred to
genocide in Bosnia (United Nations Security Council 1994, April 21). Bosnia urged the Security Council to stop calling for more talks because the talks were being used as “weapons of genocide” rather than as “a tool of peace” (United Nations Security Council 1994, April 21). Turkey castigated the Security Council: “On several occasions, we have voiced before this body our deep anguish over the inability of the Security Council to protect the Bosnians from genocide…It is precisely the lack of such decisive action that has sent wrong signals to the aggressors that they might push the imperiled Bosnian people into practical extinction” (United Nations Security Council 1994, April 21). Perhaps the strongest statement came from Iran:

The fact that the Security Council has not shouldered its responsibilities in the face of continued Serbian aggression cannot be brushed aside. The fact that the Council has tied the hands of the victims so that they cannot exercise their inherent right of self-defence cannot be overlooked. And the fact that the Serbs have been given the green light to continue to slaughter the defenseless people of Bosnia and Herzegovina cannot be challenged. Had the Security Council reacted promptly and vigorously when its first resolution was violated by the Serbs, the people of Bosnia and Herzegovina would not have had to face the present situation (United Nations Security Council 1994, April 21).

doing to punish those responsible for the rape of 40,000 thousand Muslim women and young girls in Bosnia and Herzegovina?” (United Nations Security Council 1994, April 27). Egypt said,

This is in fact a flagrant manifestation of genocide, undertaken by the aggressor State - which enjoys significant military superiority over its neighbour …The Security Council has adopted a number of resolutions under Chapter VII of the Charter. But today the problem has reached a climax, for what is at stake here is the credibility of the Council (United Nations Security Council 1994, April 27).

And Afghanistan essentially claimed the Security Council was complicit, due to the arms embargo, in the crimes against the Bosnian Muslims: “No embargo remains valid under international law if there is clear proof that maintaining the embargo in question promotes genocide. Recent events in the north of Bosnia and Herzegovina testify to this fact” (United Nations Security Council 1994, September 23).


It has become a substitute for real peacemaking. After three years of this imposed rule, UNPROFOR…must be judged a failure. Moreover, those behind the strategy of usurping UNPROFOR for the purpose of substituting it for peacemaking must be judged guilty also of allowing aggression and genocide to continue, of endangering international peace and security, and of betraying their responsibilities to this institution, the United Nations (United Nations Security Council 1995, March 31).

And on June 16, 1995:

As a sovereign country facing a most brutal aggression and endeavouring to defend our peoples from premeditated genocide, we have welcomed the assistance of the United Nations mission in our Republic. Yes, this assistance was largely symptomatic relief and, as a whole, has been a poor substitute for a real remedy addressing our victimization at the hands of a relentless aggressor…Maybe by rejecting those halfmeasures, by demanding our full rights and by calling upon the world Powers to meet their clear responsibilities in the face of aggression and genocide, we would have ultimately forced a true remedy (United Nations Security Council 1995, June 16).

Approximately one month later, on July 11, 1995, 8,000-10,000 Muslim men and boys were massacred at Srebrenica, a United Nations designated ‘safe area’. It took the “largest massacre in Europe in fifty years” (Power 2003, p. 392) to elicit a forceful response. As stated by Power (2003), “Thus, in the aftermath of the gravest single act of genocide in the Bosnian war, thanks to America’s belated leadership, NATO jets engaged in a three-week bombing campaign against the Bosnian Serbs that contributed mightily to ending the war” (p. 393).

On December 14, 1995, the Dayton Accords were signed in Paris, ending the three-and-a-half year long war. During the conflict not a single permanent member of the Security Council referred to events in Bosnia as genocide. Meanwhile twenty-two United Nations Member States, as non-permanent members of the Security Council, as non-voting participants in the Security Council discussions, and through communications with the Security Council, referred to the attacks on the Muslim population of Bosnia as genocide.

The permanent members of the Security Council also failed to label the crimes committed as genocide despite unanimously adopting Resolution 827 (1993) on May 25, 1993,
which established the International Criminal Tribunal for the Former Yugoslavia (ICTY). Article 4 of the ICTY Statute states, “The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.” For two-and-a-half years after providing the ICTY with the necessary jurisdiction to try individuals for genocide, the term ‘genocide’ was not spoken by any of the permanent members at the Security Council. Not even after the massacre at Srebrenica was the term used by the permanent members during the remainder of the conflict. See Table 2.6 below for a summary of genocide recognition in the case of Bosnia.

Table 2.6

*Genocide Recognition in Bosnia*

<table>
<thead>
<tr>
<th>Genocide</th>
<th>Recognition by Permanent Members</th>
<th>Recognition by Non-Permanent Members</th>
<th>Recognition by Non-Voting Participants</th>
<th>Recognition in Letters to the Security Council</th>
<th>Recognition Ex Post Facto by Criminal Tribunals</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1993: None</td>
<td>1993: Pakistan, Venezuela</td>
<td>1993: None</td>
<td>1993: None</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1994: None</td>
<td>1994: Djibouti, Pakistan</td>
<td>1994: Afghanistan, Algeria, Bangladesh, Bosnia, Egypt, Honduras, India, Iran, Malaysia, Senegal, Slovenia, Tunisia, Turkey</td>
<td>1994: Bosnia, Croatia, Iran, Sudan</td>
<td></td>
</tr>
</tbody>
</table>

Rwanda
The genocide in Rwanda began on April 7, 1994, and ended mid-July of the same year.\textsuperscript{36} Following the assassination of Rwandan President Habyarimana, the perpetrators still unknown, the Rwandan armed forces and the Interahamwe unleashed a preplanned attack on the Tutsi population of Rwanda. Over approximately 100 days as many as 800,000 Rwandan Tutsi, Hutu moderates, and Tutsi sympathizers were killed. The genocide was halted when the Rwandan Patriotic Front, led by Paul Kagame, defeated the Hutu in Rwanda’s civil war.

The Rwandan military, whose leadership was almost exclusively Hutu, and the Interahamwe, militias made up of Hutu civilians trained and armed by the military, were responsible for the killings. They were led by Theoneste Bagosora, a colonel in the Rwandan military and the usurper of power following the death of President Habyarimana. The violence perpetrated in Rwanda violated Article II (a), (b), (c), and (d) of the Genocide Convention. Article II (a) prohibits killing members of a national, ethnical, racial, or religious group. Article II (b) prohibits the causing of serious bodily or mental harm to members of a protected group. Article II (c) prohibits deliberately inflicting on a protected group living conditions likely to bring about its destruction. Article II (d) prohibits the imposition of measures intended to prevent births within the group. Article II (d) applies because of the widespread use of rape as a tool of genocide. The International Criminal Tribunal for Rwanda (ICTR) set precedent in the trial of Jean-Paul Akayesu establishing that rape, if the intention is to ultimately physically destroy the group through preventing the group from procreating or transferring children from one group to another, is a crime under the Genocide Convention.

The Security Council did not pass its first resolution concerning atrocities in Rwanda until April 21—two weeks after the genocide began. PBS (2004) estimates that at the time of this resolution’s passing, over 100,000 Rwandans had already been killed. A week later, on April 29, New Zealand became the first member of the Security Council to use the term ‘genocide’ within the context of a draft resolution (United Nations Security Council 1994, April 29), which was also supported by the Czech Republic. The resolution was defeated in part because of its inclusion of the term ‘genocide’. As opposition to the use of the term genocide was being expressed by some members of the Security Council, approximately 168,000 Rwandans had been killed. The next reference to genocide in Rwanda came in the form of a letter addressed to the Security Council. On May 12, 1994, Burkina Faso wrote of the “ongoing genocide characterized by intolerable and inhuman atrocities,” expressing its “deep concern at the tragic fate imposed on the Rwandese population” (United Nations Security Council 1994, May 12).

The next Security Council resolution was passed on May 17, again without describing the violence in Rwanda as genocide. By this time, PBS (2004) estimates that over 325,000 had been killed. The following day, on May 18, Greece (United Nations Security Council 1994, May 18) wrote to the Security Council of the European Union’s appeal “to all parties to the conflict to bring an end to the genocide.” Despite this recognition by the EU, the two permanent members of the Security Council who were also members of the EU, the UK and France, did not refer to genocide in Rwanda until June 8. On May 24, Israel (United Nations Security Council 1994, May 24), noting its own experience with genocide, called upon the international community to “act urgently to stop the massacre.” And on May 27, Uganda delivered an impassioned letter, stating,
Even more unacceptable is the obvious attempt to increase the focus of attention of the international community on the war between its government forces and RPF, whereas the main catastrophe in the Rwandese episode is the killing of the civilian population by trained militias all over the country. The outrage is that the killings are not sporadic and aimless ones, but rather they are a calculated extermination of a minority ethnic group, a genocide that has been unleashed on the people by a tyrannical Government (United Nations Security Council 1994, May 27).

The first use of the term ‘genocide’ by any of the permanent members of the Security Council occurred in the speeches made and in the resolution passed on June 8. By this time, PBS (2004) estimated there were 400,000-600,000 deaths. The June 8 resolution stated that the Security Council resolved “with the greatest concern” that it had received “reports indicating that acts of genocide have occurred in Rwanda” (United Nations Security Council Resolution 1994, June 8). The passing of UN Resolution 925 on June 8 was accompanied by a number of speeches in support of the resolution. The Czech Republic spoke of its support for New Zealand’s earlier draft resolution, which was the earliest attempt at recognition of genocide in Rwanda. Spain implored the international community to fulfill the “binding terms of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which can be considered to form part of general international law” (United Nations Security Council 1994, June 8). New Zealand argued that there was no doubt genocide was being perpetrated and that it was “significant that at last the Council has formally recognized this” (United Nations Security Council 1994, June 8).

Resolution 925 stopped short of full recognition, instead referring to “reports” that indicated “acts of genocide” had occurred in Rwanda. This choice of words came primarily at the behest of the permanent members from the West. With over half a million dead, the UK stated, “There have now been some well substantiated accounts of the most appalling massacres, of acts that – we note the Secretary-General’s conclusion – amount to genocide” (United Nations Security Council 1994, June 8). Even in its pseudo recognition of genocide, the UK failed to
come to its own conclusion and instead essentially passed the burden of recognition onto the Secretary-General. France exhibited similar weakness in its statement: “All of this testimony, as well as the report of the Secretary-General, makes overwhelmingly clear the magnitude of the humanitarian tragedy in Rwanda. It is intolerable that massacres and what can only be described as genocide should continue” (United Nations Security Council 1994, June 8). The United States referred to the role Radio Mille Collines broadcasts were playing “in the acts of genocide reported in Rwanda” (United Nations Security Council 1994, June 8).

Resolutions 928 and 929, passed on June 21 and 22 respectively, made no mention of ‘genocide’ despite the death toll having reached over 600,000 (United Nations Security Council Resolutions 1994, June 21 and 22). The final mention of genocide while it was ongoing came in a resolution passed on July 1 (United Nations Security Council 1994, July 1). By the time of its passing, approximately 600,000-800,000 Rwandans had been killed (PBS 2004). Using the generally accepted number of 800,000 deaths over a period of 100 days, 8,000 Rwandans were murdered on average each day. Yet, the Security Council, in the final resolution passed during the course of the genocide, expressed its concern that it was continuing to receive reports “indicating that systematic, widespread and flagrant violations of international humanitarian law, including acts of genocide” and that there was “evidence of possible acts of genocide” (United Nations Security Council 1994, July 1). Even with 600,000-800,000 dead on July 1, only days before the Rwandan Patriotic Front would capture Kigali, essentially ending the genocide, the adopted resolution continued to refer to “acts of genocide.”

In November 1994, the Security Council, acting under Chapter VII of the UN Charter, created the International Criminal Tribunal for Rwanda (ICTR). Resolution 955 (1994), adopted unanimously, established the ICTR’s mandate and jurisdiction. Article 2 (1) states, “The
International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article” (Statute of the International Tribunal 1994). The ICTR’s jurisdiction was limited to

persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute (Statute of the International Tribunal 1994).

It should be noted that genocide is a crime that violates numerous provisions of international human rights law as opposed to international humanitarian law. It is unclear why the Security Council chose to include reference to humanitarian law while omitting reference to human rights law. One could speculate that the chosen verbiage is related to the general focus of the Security Council on the conflict between the Rwandan Hutu military and the Rwandan Patriotic Front. See Table 2.7 below for a summary of genocide recognition in the case of Rwanda.

Table 2.7

*Genocide Recognition in Rwanda*

<table>
<thead>
<tr>
<th>Genocide</th>
<th>Recognition by Permanent Members</th>
<th>Recognition by Non-Permanent Members</th>
<th>Recognition by Non-Voting Participants</th>
<th>Recognition in Letters to the Security Council</th>
<th>Recognition Ex Post Facto by Criminal Tribunals</th>
</tr>
</thead>
</table>
Sudan

According to Ben Kiernan (2007), “the catastrophe in Darfur proved to be the opening genocide of the twenty-first century” (p. 595-596). Kiernan quotes the death toll from 2003 to the time of the printing of his book *Blood and Soil* at more than 300,000. In a CNN article, “U.N.: 100,000 more dead in Darfur than reported,” published April 22, 2008, it stated that “300,000 are believed to have died in the tribal conflict in the past two years, said John Holmes, who also is the United Nations emergency relief coordinator.” When combining the number of deaths quoted by Kiernan with the number of deaths quoted by Holmes, one can conclude that as many as 500,000 civilians had been killed by mid-2008. Though the majority of those killed occurred between 2003 and 2006, the Security Council did not authorize the deployment of the United Nations Assistance Mission in Darfur (UNAMID) until July 31, 2007.

The Sudanese military and Janjaweed, primarily members of nomadic Arab tribes, were responsible for the genocide in the Darfur region of Sudan. The attacks in Darfur were in violation of Article II (a), (b), and (c) of the Genocide Convention. Article II (a) prohibits killing members of a national, ethnical, racial, or religious group. Article II (b) prohibits the causing of serious bodily or mental harm to members of a protected group. Article II (c) prohibits deliberately inflicting on a protected group living conditions likely to bring about its destruction. Article II (c) is especially relevant. In 2010, Belgian scientists published an article in *The Lancet* medical journal in which they concluded that nearly eighty-percent of the deaths in the Darfur region were caused by a “protracted phase of increased disease-related” deaths caused by the living conditions created by the conflict (Degomme and Guha-Sapir 2010).

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37 See Prunier (2005), Flint and De Waal (2008), Black and Williams (2010), Steidle and Wallace (2007), and Marlowe (2006) for detailed accounts of genocide in Darfur.
From 2003-2008, the Security Council did not pass a single resolution that referred to events in the Sudan as ‘genocide’. The United States was the first member of the Security Council to use the term. On July 30, 2004, the U.S. noted that its Congress had already passed resolutions labeling the atrocities in Darfur as genocide (United Nations Security Council 2004, July 30). Also on July 30, The Philippines, a non-permanent member at the time, stated that labels were less important than the need to take action: “Whether what is happening there is genocide or ethnic cleansing should not be the priority question at the moment…The collective conscience of the international community must arrest that catastrophe” (United Nations Security Council 2004, July 30). On September 18, 2004, Algeria spoke of its support for a draft resolution that would create an international commission of inquiry to determine whether genocide had been committed in Darfur (United Nations Security Council 2004, September 18). Also on the September 18, the U.S. reiterated its belief that evidence showed the Government of Sudan was either condoning or perpetrating genocide (United Nations Security Council 2004, September 18). On October 8, the Netherlands forwarded a letter to the UNSC outlining the position of the EU (United Nations Security Council 2004, October 8). The EU was in support of the international commission of inquiry and its mandate to investigate whether “acts of genocide” had occurred.

September 11, 2006, after referencing the need to protect populations from genocide, Slovakia stated, “We must not allow another Rwanda or Srebrenica, where the international community watched helplessly while innocent civilians were slaughtered, to happen again” (United Nations Security Council 2006, September 11). Denmark added,

We must spare no effort to prevent yet another genocide from taking place on the African continent. The horrors of Rwanda still haunt our minds and can only serve to strengthen our resolve. The moral credibility of the Security Council is indeed challenged by this extended crisis (United Nations Security Council 2006, September 11).

Chad also expressed its belief that genocide was being perpetrated in the form of a letter to the Security Council. On December 22, 2006, Chad, sharing its eastern border with the Darfur region of Sudan, communicated in a note to the Council that genocide was being perpetrated at the Chadian-Sudanese border (United Nations Security Council 2006, December 22).

genocide before the Security Council. Costa Rica stated that perpetrators of genocide “are attacking human dignity and the conscience of the international community” and called upon the Sudanese government to cooperate with the International Criminal Court (United Nations Security Council 2008, February 8).

The ICC formally charged Sudanese President Omar with war crimes and crimes against humanity in July 2008. A warrant was issued for his arrest in March of 2009. In July 2010, three counts of genocide were added to Bashir’s indictment and a second warrant for his arrest was issued. The three counts of genocide include: “genocide by killing (article 6-a), genocide by causing serious bodily or mental harm (article 6-b) and genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group’s physical destruction (article 6-c).” See Table 2.8 below for a summary of genocide recognition in the case of Sudan.

Table 2.8

Genocide Recognition in Sudan

<table>
<thead>
<tr>
<th>Genocide</th>
<th>Recognition by Permanent Members</th>
<th>Recognition by Non-Permanent Members</th>
<th>Recognition by Non-Voting Participants</th>
<th>Recognition in Letters to the Security Council</th>
<th>Recognition Ex Post Facto by Criminal Tribunals</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2008: U.S.</td>
<td>2008: None</td>
<td>2008: None</td>
<td></td>
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</tr>
</tbody>
</table>

**Conclusion**

I stated from the outset that the law cannot be effective for the purpose of prevention of genocide if the permanent members are unwilling to apply it to suspected cases of genocide. The
results of my research show that the permanent members of the Security Council failed to recognize genocide in four of the seven generally agreed upon cases while they were ongoing. Thus, the Genocide Convention was not applied to the cases of Bangladesh, Guatemala, Iraq, and Bosnia at any time when preventive action could have been taken. In two of the three remaining cases, recognition was significantly belated. The Soviet Union recognized genocide in Cambodia on January 1, 1979, more than three years into the genocide and only one week prior to Vietnam’s successful intervention. More than two million people had already been killed. France, the UK, and the U.S. recognized “acts of genocide” in Rwanda on June 8, 1994. More than 500,000 Rwandans had been killed in the two months of genocide prior to this recognition. The United States’ recognition of genocide in Darfur in 2004 was arguably the earliest recognition relative to the overall duration of the genocide and the number of those killed by the time of its recognition.

The failure of the permanent members to recognize genocide in Bangladesh offers insight into the politics of genocide recognition. Recall that Arthur Blood, U.S. General Consul in Dhaka, warned his colleagues in Washington that Pakistan was committing genocide. The U.S. had nine months after the “Blood Memo” to recognize the genocide in Bangladesh, but chose not to do so. At the time, China and the U.S. were using Pakistan as an intermediary. Kissinger and Nixon were committed to ‘opening up’ the People’s Republic of China. G.W. Choudhury (1969), a member of the Pakistani cabinet from 1967-1971, wrote that “Nixon gave Yahya the special assignment to act as ‘courier’ between Washington and Peking – an assignment which the latter carried out with the utmost secrecy and conscientiousness” (p. 68). As a reward for Pakistan’s role in opening U.S.-China relations, Kissinger agreed to treat the political turmoil and the atrocities in Pakistan as an ‘internal affair’ (Islam & Hassan 2004).
Rwanda offers another exemplary case. As noted in this chapter, three weeks into the genocide, on April 29, New Zealand became the first member of the Security Council to use the term ‘genocide’ within the context of a draft resolution (United Nations Security Council 1994, April 29). The resolution was defeated in part because of its inclusion of the term ‘genocide’. On May 17, the Security Council passed a resolution that literally included the definition of genocide without using the term. Resolution 918 (1994) stated, “Recalling in this context that the killing of members of an ethnic group with the intention of destroying such a group, in whole or in part, constitutes a crime punishable under international law.” Somehow, the crime under international law being referred to was left out.

The Bosnian case is in some ways exceptional because of the number of UN Member States that recognized genocide in Bosnia beginning in 1992 and the fact that the permanent members all voted in favor of Resolution 827 (1993) on May 25, 1993, which established the ICTY. Despite the ICTY having jurisdiction over the crime of genocide, the recognition by nearly two dozen Member States, and the pleading by Bosnia’s president and its permanent representative, the permanent members failed to recognize the crimes in Bosnia as genocide throughout its duration.

Despite their general reluctance to recognize genocide in the generally agreed upon cases while they were ongoing, the permanent members were more than willing to recognize genocide through the establishment of the International Criminal Tribunals for the former Yugoslavia while the conflict in Bosnia was ongoing and for Rwanda ex post facto. Further, the permanent members were willing to refer the case of Sudanese President Omar Al Bashir to the International Criminal Court ex post facto. This evidence demonstrates that the permanent members of the Security Council were willing to establish ad hoc tribunals with jurisdiction over
crimes of genocide after the crimes have been committed, but unwilling to implement the Genocide Convention for preventive purposes while the crimes were ongoing. Therefore, it can be concluded that the permanent members were more committed to punishment *ex post facto* than to fulfilling the Convention’s prohibition of genocide through the crime’s proactive prevention. Beginning in Chapter 3, I will investigate whether the text of the Genocide Convention is a source of this lack of recognition.
Chapter 3: Textual Analysis of the Genocide Convention

In Chapter 2, I presented evidence of the Genocide Convention’s failure to prevent the crime it prohibits. Following the development of a list of cases on which there is general scholarly agreement that the crimes committed amounted to genocide, I investigated whether the permanent members of the Security Council invoked the Genocide Convention while the crimes were ongoing. What I found was that the permanent members did not recognize genocide in four of the seven cases while they were ongoing. Two other cases involved significantly belated recognition. The Soviet Union recognized genocide in Cambodia approximately four years into it, after approximately 1.5 million deaths, and less than one week before Vietnam ended it. The Security Council recognized genocide in Rwanda two months after it began, following the deaths of approximately 600,000 Rwandans. Finally, the genocide in Darfur was recognized early on by the United States, but no serious preventive action was taken.

In this chapter, I examine the text of the Genocide Convention to determine whether the adopted text contains any features that make it more difficult to prevent genocide, therefore decreasing the probability of achieving the Convention’s goal of preventing genocide. This chapter begins with an overview of the Genocide Convention, which includes the identification of those articles that are pertinent to the prevention prong of the Convention. Following the overview of the Genocide Convention, I identify, prima facie, weaknesses in the text. I then analyze the suspected weaknesses to determine what role each might play in making it more difficult for the Convention to achieve its object and purpose of the prevention of genocide. Because I am not the first to identify weaknesses in the text of the Genocide Convention, the
work of other scholars is incorporated into this analysis. The potential consequences of correcting the identified weaknesses are also considered.

**Overview of the Genocide Convention**

The Genocide Convention is a two-pronged treaty because of its dual function. The Convention is simultaneously a statute tasked with preventing genocide and a form of punitive legislation in that it aims to punish those guilty of planning and committing genocide. Therefore, the Genocide Convention has two essential purposes. The first is the prevention of the crime of genocide. When prevention fails, the Genocide Convention requires that those who are proved to have planned and perpetrated genocide are punished. The Genocide Convention’s inclusion of an obligation to prevent genocide and an obligation to punish genocide emphasizes the importance of the crime’s prevention. Criminal punishment is inherently reactive; the punishment phase, unless a potential genocide is apprehended in the planning stage, happens after the commission of acts of genocide. Meanwhile, the prevention phase is meant to be proactive; its purpose is to impede a planned genocide or prevent irreparable harm.

The Genocide Convention includes a preamble and nineteen articles. Because my focus is on the prevention prong of the Genocide Convention, I analyzed only those articles that pertain to the prevention of genocide, and those that, while primarily relevant to the punishment of genocide, involve implications for the prevention prong of the Convention. These include the Genocide Convention’s preamble and Articles I, II, V, VIII, IX, and XII. The remaining articles are primarily procedural.

The Genocide Convention’s preamble states,

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38 Schabas (2000) appears to be the first to describe the Genocide Convention as a two-pronged treaty.
The Contracting Parties, Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world, Recognizing that at all periods of history genocide has inflicted great losses on humanity, and Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required. The origin of the Genocide Convention can be found in General Assembly Resolution 96(I),

which defines genocide as a crime under international law and delegates the task of developing a draft convention on the crime of genocide to the Economic and Social Council. Though the Armenian Genocide and the Holocaust were the primary impetuses for the creation of the Genocide Convention, the preamble recognizes that “all periods of history” have suffered from the commission of genocide. The preamble also calls for international cooperation to eradicate genocide.

According to Article I,

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

Article I defines genocide as a criminal act that violates international law. As a human rights treaty, the Genocide Convention recognizes that genocide can be committed in times of peace and in times of war. Article I also commits the Convention’s Contracting Parties to genocide’s prevention.

Article II states,

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to

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40 See Appendix B for the full text of General Assembly Resolution 96(I) dated 11 December 1946.
41 This is important. Genocide can be committed in both times of peace and times of war. However, historically, human rights law was not deemed applicable in times of war. International humanitarian law was considered the lex specialis. For an insightful discussion of the convergence of international human rights law and international humanitarian law, see Greenwood (2010).
members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Article II is the Genocide Convention’s centerpiece. It defines what constitutes the crime of genocide under the Convention. It establishes the Convention’s actus reus and mens rea. The actus reus, or the guilty act, includes any of the acts enumerated in Article II committed against members of a national, ethnical, racial, or religious group because of their membership in the group. The mens rea, or the guilty mind, requires that the planners and perpetrators of the guilty act have the intent to exterminate the group in its entirety or in part. Both the actus reus and the mens rea must be present for acts to constitute genocide.\(^{42}\)

Article V requires that the provisions of the Genocide Convention be incorporated into the domestic laws of the Member States who adopt it. Article V states,

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

Though Article V emphasizes punishment, genocide prevention is included in its reference to the “provisions of the present Convention.” Therefore, Article V requires that Contracting Parties pass domestic legislation that recognizes genocide as an illegal act, requires measures be taken for its prevention, and provides penalties for the planning or commission of the acts enumerated in Article III.

According to Article VIII,

> Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the

\(^{42}\) The commission of guilty acts found in the Genocide Convention without the accompanying guilty mind would likely satisfy the definition of crimes against humanity, but would impede application of the Genocide Convention.
prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

Article VIII recognizes that outlawing genocide does not guarantee its eradication. Therefore, in the case that genocide is being planned or committed, Article VIII allows the Convention’s Contracting Parties to petition UN organs to implement appropriate measures as permitted under the provisions of the UN Charter to prevent the commission of a planned genocide or to suppress an ongoing case.

Article IX states,

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

Article IX allows Contracting Parties involved in a dispute over an alleged case of interstate genocide to submit their dispute to the ICJ for: (1) its interpretation on whether the acts in question constitute genocide; (2) a determination of whether the parties to the dispute are fulfilling their obligations as Contracting Parties to the Convention; and (3) a decision on whether either of the parties to the dispute is responsible for the planning or commission of genocide.

Article XII appears to reflect the era in which the Genocide Convention was adopted. It states,

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

The Genocide Convention was adopted during the colonial era. The United Nations has 51 original members. Many of the members that make up the difference between the original 51
members and the current total of 193 became members after achieving independence from their colonizers. Under Article XII, Contracting Parties may, but are not required to, apply the Genocide Convention to colonies, territories, and trusteeships under their control.

**Weaknesses in the Text**

While completing my examination of the text of the Genocide Convention, I identified six weaknesses. Several of the identified weaknesses have been discussed previously in the scholarly literature. Others I am identifying for the first time or for the first time outside of the Genocide Convention’s punitive purpose: (1) the failure to define genocide as a threat to international peace and security;\(^{43}\) (2) the requirement that specific intent be established prior to recognizing genocide as such for the purpose of its prevention;\(^{44}\) (3) the lack of coverage for political groups under the Convention’s protection;\(^{45}\) (4) the failure to include acts less than physical attacks targeting the existence of a culture as genocide;\(^{46}\) (5) the limiting of preventive jurisdiction to one’s own territory;\(^{47}\) and (6) the limitations on available recourse to victims of

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\(^{43}\) The failure to define genocide as an inherent threat to international peace and security has not been identified previously by scholars as a weakness in the text of the Genocide Convention. The significance of this alleged weakness will be explained in more detail later in this chapter and in subsequent chapters.

\(^{44}\) There is a large body of literature concerning the pros and cons of the specific intent requirement for the purpose of punishing suspected planners and perpetrators of genocide [see LeBlanc (1984), Lippman (1984; 1994), Quigley (2006), and Schabas (2000)]. However, the role of the specific intent requirement in prevention of genocide has received significantly less attention.

\(^{45}\) See Lippman (1984; 1994), Quigley (2006), Schabas (2000), and Van Schaack (1997) for their complete analysis of the significance of the omission of political groups from the Genocide Convention’s protection.

\(^{46}\) See Lippman (1984) and Schabas (2000) for the most detailed accounts of the decision to exclude cultural genocide from the Genocide Convention.

\(^{47}\) There is a large body of literature concerning the limitations of territorial jurisdiction for the purpose of punishing suspected planners and perpetrators of genocide [see LeBlanc (1984), Lippman (1984; 1994), Quigley (2006), Sadat (2001) Schabas (2000), Thalmann (2009), Zappala (2009), and Zhu & Zhang (2011)]. However, jurisdictional issues have almost exclusively focused on how territorial jurisdiction affects punishment at the neglect of how it affects the prevention of genocide.
The six weaknesses are organized into three sections: (1) Problems of Definition; (2) Limitations of Territorial Jurisdiction; and (3) Limits on Available Recourse.

Problems of Definition

Four of the Genocide Convention’s six weaknesses are located in the definition of genocide found in the adopted text. The four definitional weaknesses include: (1) the failure to define genocide as an inherent threat to international peace and security; (2) the requirement that specific intent be established prior to recognizing genocide as such for the purpose of its prevention; (3) the lack of coverage for political groups under the Convention’s protection; and (4) the failure to include acts that threaten the existence of a group’s culture. Articles I and II are the sources of the definitional weaknesses.\textsuperscript{49}

The Status of Genocide in International Law

Article I of the Genocide Convention defines genocide as “a crime under international law.” Article I also makes the logical progression from identifying genocide as a crime under international law to requiring that the Convention’s Contracting Parties undertake its prevention and punishment. Without such a commitment, defining genocide as a violation of international law would have little practical meaning.\textsuperscript{50} Yet, defining genocide as a violation of international

\textsuperscript{48} The limitations on recourse available to groups being targeted for genocide by their own governments has not been identified previously as a weakness in the text of the Genocide Convention. The significance of this alleged weakness will be explained in more detail later in this chapter and in subsequent chapters.

\textsuperscript{49} See Table 3.1 on page 82-83 for a summary of how the identified weaknesses categorized as problems of definition could impede the prevention of genocide.

\textsuperscript{50} The International Court of Justice clarified this point in its ruling on Bosnia and Herzegovina v. Serbia and Montenegro. While defining what obligations are imposed on Genocide Convention Contracting Parties, the Court observed “that what obligations the Convention imposes upon the parties to it depends on the ordinary meaning of the terms of the Convention read in their context and in the light of its object and purpose. It reviews the wording of Article I, which provides inter alia that “[t]he Contracting Parties confirm that genocide, whether
law does not contribute anything new to the body of international law. The systematic murder of innocent people was already a violation of international law. At Nuremberg, crimes against humanity were defined as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in the execution of or in connection with any crime within the jurisdiction of the Tribunal” (Calvocoressi 1948, p. 57).51 Also, during the “Doctors Trial”, the indictment against Nazi physicians stated,

[C]rimes against humanity constitute violations of international conventions, including Article 46 of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed, and of Article II of Control Council Law No. 10.52

While the trials at Nuremberg officially recognized crimes against humanity as violations of international law, it was also maintained that crimes against humanity “fell within the province of international law if they were committed in preparation for or in connection with international war such as aggressive war and War Crimes” (Calvocoressi 1948, p. 57). Thus, the commission of interstate genocide was a violation of international law prior to the adoption of the Genocide Convention.

Meanwhile, intrastate genocide fell outside the province of international law “so as to not infringe in the domestic affairs of a sovereign state merely on the grounds that it was offending against humanitarian principles” (Calvocoressi 1948, p. 57). The motivation for the creation of a

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51 For more on the definition of crimes prosecuted at Nuremberg, see http://www.ushmm.org/wlc/en/article.php?ModuleId=10007102.
treaty that prohibits the crime of genocide was the eradication of the crime through its prevention and its punishment. The definition of genocide does not prohibit the application of the term to acts of genocide committed within one set of territorial borders. Yet, by failing to define genocide as a threat to international peace and security, the Genocide Convention privileged territorial sovereignty, making it more difficult to prevent intrastate genocide.

The commission of genocide can take on a number of different forms. Genocide can be committed: (1) across territorial borders against the will of the authority that maintains jurisdiction over the territory in which the crime is being committed; (2) across territorial borders with the acquiescence of the authority that maintains jurisdiction over the territory in which the crime is being committed; (3) within a single territory by the authority that maintains jurisdiction over the territory; and (4) within a single territory by non-state actors with the acquiescence of the authority that maintains jurisdiction over the territory.

In those cases of genocide that cross territorial borders, the failure to define genocide as a threat to international peace and security is less significant. The primary purpose of the United Nations, as established by the UN Charter, is the maintenance of international peace and security. The UN organ conferred with fulfilling this primary responsibility is the Security Council. By definition, cases of interstate genocide committed without the acquiescence of the authority on whose territory the crime is being committed amount to threats to international peace and security and constitute violations of Article 2(4) of the UN Charter, which states, “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” Acts of genocide committed across territorial borders without the consent of the territorial authority amount to “the use of force against the territorial
integrity” and “political independence” of the state being victimized. Therefore, such cases clearly fall within the UN’s mandate and the Security Council’s responsibilities.

The corollary of the above is that cases of intrastate genocide, including those committed by foreign agents at the behest of the territorial authority, fall outside the mandate of the UN and the Security Council’s responsibilities. Because intrastate genocide is confined to a single territory, intrastate genocide does not constitute a threat to international peace and security. In other words, cases of intrastate genocide, without being defined as inherent threats to international peace and security, fall within the exclusive jurisdiction of the territory’s authority. Thus, if the territorial authority develops and implements a plan of genocide, the very same authority is also responsible for the crime’s prevention.53

The international system is predicated on the principle of non-interference. Article 2(1) of the UN Charter states, “The Organization is based on the principle of the sovereign equality of all its Members.” Article 2(1) establishes that a core UN principle is that all Member States have exclusive control over their defined territory free from the interference of other Member States. Further, as noted above, Article 2(4) prohibits the interference in the internal affairs of another Member State. It is only when violations of international law amount to a threat to international peace and security that they move beyond being an internal matter of state. Therefore, given the conditions required for the legal use of coercive measures as established by the UN Charter, the use of force in response to intrastate genocide is actually forbidden.

The Specific Intent Requirement

53 Such an arrangement is akin to the idiom, “The fox is guarding the henhouse.”
Article II of the Genocide Convention defines genocide as acts “committed with intent to destroy, in whole or in part” a protected group. Therefore, the commission of one or more of the Convention’s enumerated guilty acts against members of a protected group does not constitute genocide unless the intent of the perpetrators is the destruction of the protected group in whole or in part. Criminal intent is an essential element and a standard component of criminal law. Yet, the Genocide Convention, as noted in the overview, is a two-pronged treaty because of its dual purposes of preventing genocide and punishing those guilty of planning and perpetrating genocide. Despite containing two separate, though overlapping, deliberate acts, the Genocide Convention contains the same specific intent requirement for both. In other words, prior to taking action to enforce the Genocide Convention, it is required that the same element of criminal intent required to punish those suspected of planning and perpetrating genocide be established.

It is important to clearly state the burden the specific intent requirement places on those seeking authorization for preventive action. In the absence of statements and/or documents that explicitly demonstrate the intent to commit genocide, establishing specific intent requires proof of something only the alleged planners and perpetrators can know for sure—what the intentions are behind their actions. While it is easy to prove that acts prohibited under the Genocide Convention were committed, proving that the intent behind the guilty acts was the destruction of a group in whole or in part is far more difficult. Therefore, requiring that specific intent be established prior to invoking the Genocide Convention for the purpose of preventing genocide could allow for irreparable harm to be committed prior to even the initial formal recognition of genocide.

The Omission of Political Groups
Article II defines genocide as an act perpetrated against national, ethnical, racial, or
religious groups. Through the inclusion of some groups and the omission of others, the Genocide
Convention is limited in its application to only those guilty acts committed with genocidal intent
against the groups specified. While it could be argued that the omission of political groups is
itself a deficiency, the failure to protect political groups alone is not a deficiency according to my
definition.\textsuperscript{54} The commission of physical acts enumerated in the Genocide Convention against a
political group even with the intent to destroy the group in whole or in part does not constitute
genocide because political groups are not protected by the Convention. Therefore, it cannot be
argued that their omission makes it more difficult to prevent genocide if the only consequence of
their omission is the absence of protection for political groups. However, the omission of
political groups from the Genocide Convention’s protection complicates the recognition of guilty
acts committed against groups that are protected by the Convention and, therefore, makes it more
difficult to prevent genocide.

The omission of political groups from the Genocide Convention created a blind spot in its
coverage into which those groups protected by the Convention can be pushed. The omission of
political groups can serve this purpose by allowing the perpetrators to create and propagate a
political conflict narrative, thus removing actual cases of genocide from the Convention’s
coverage through defining the victimized group as a political group.\textsuperscript{55} The permanent members

\textsuperscript{54} As noted previously, I utilize the legal definition of genocide found in the Genocide Convention in my analysis. I
believe it is important that the legal definition be used because it is the definition consented to be state parties.
Therefore, political groups cannot technically be victims of genocide because they are not protected by the
Genocide Convention.

\textsuperscript{55} For example, during India’s intervention in East Pakistan in 1971, which ultimately apprehended the genocide,
Pakistan argued before the Security Council that it was India’s actions that should have been a concern of “every
State that believes in the principle of territorial integrity of States” and those States “who are in danger of being
overrun by larger, more powerful and predatory neighbors” (United Nations Security Council1971, December 4, p.
7).
of the Security Council can lend legitimacy to this framing of events by propagating the same political conflict narrative in an effort to avoid recognizing genocide out of considerations of national interest or lack of political will.\textsuperscript{56}

Genocide often accompanies some larger conflict, including civil war. Intrastate cases of genocide could be framed as justifiable responses to political turmoil. When committed across territorial borders, the deaths from acts of genocide could be framed as unintentional ‘collateral damage’. Larger conflicts inevitably result in the killing of a significant number of civilians. Therefore, the removal of political groups provides the opportunity for the planners and perpetrators of genocide to claim that the civilian deaths are nothing more than the tragic loss of life that always accompanies war. If members of the international community want to avoid labeling a conflict as genocide, they too can continue to focus on the larger conflict at the expense of those being massacred through acts of genocide. They can refer to peace agreements and ceasefires, and call upon belligerents on all sides to stop killing each other and respect the rights of civilians.\textsuperscript{57} The efficacy of creating false narratives finds its strength in the partial truth the narratives likely contain.

The Omission of Cultural Genocide

While Article II of the Genocide Convention protects the physical integrity of the groups under its protection, it does not protect their continued existence through the preservation of their

\textsuperscript{56} Also during the Indian intervention in East Pakistan, China stated before the Security Council: “The Chinese delegation is of the view that in accordance with the Charter of the United Nations the Security Council should surely condemn the acts of aggression by the Government of India and demand that the Indian Government immediately and unconditionally withdraw all its armed forces from Pakistan” (United Nations Security Council 1971, December 4, p. 23).

\textsuperscript{57} The United States repeatedly called for a ceasefire and an end to the conflict through India’s withdrawal from Pakistan without acknowledging the violence being perpetrated by Pakistani forces in East Pakistan (United Nations Security Council 1971, December 4 and December 6).
cultures. The survival of some groups as such is predicated on the continued existence of their cultures. Without their culture, these groups would cease to exist. However, under the legal definition of genocide, cultural genocide does not exist. Therefore, like the omission of political groups, it cannot be argued that the omission of cultural genocide alone makes it more difficult to prevent genocide.

The exclusion of cultural genocide may have unintended consequences. In combination with the specific intent requirement, the omission of cultural genocide created another blind spot into which actual cases of genocide can be pushed. The perpetrators of genocide can insist that the intent behind the human rights violations, including acts that constitute genocide, is to remove the group and its culture from a given territory. Destruction of all remnants of a culture and the coerced assimilation of the members of a minority culture into the majority culture, including the prohibition of the use of the culture’s language and the practice of its religion, could effectively destroy the group as such, in whole or in part, without employing means for its immediate physical destruction.\(^{58}\) Though it has numerous other applications, with the exclusion of cultural genocide from the Genocide Convention, the actions just described would amount to ‘ethnic cleansing’.

\(^{58}\) In his dissenting opinion in the case of Bosnia v. Serbia, Judge Elihu Lauterpacht argued that crimes committed in Bosnia that were labeled 'ethnic cleansing' were actually acts of genocide. He argued that “the forced migration of civilians, more commonly known as ‘ethnic cleansing,’” is, in truth, part of a deliberate campaign by the Serbs to eliminate Muslim control of, and presence in, substantial parts of Bosnia-Herzegovina....It is difficult to regard the Serbian acts as other than acts of genocide....They are clearly directed against an ethnic or religious group as such, and they are intended to destroy that group, if not in whole certainly in part, to the extent necessary to ensure that the group no longer occupied the parts of Bosnia-Herzegovina coveted by the Serbs” (Bosnia and Herzegovina v. Serbia and Montenegro). The majority opinion in the case of Bosnia v. Serbia disagreed. The judges argued, “The Special Rapporteur of the United Nations Commission on Human Rights was of the view that the siege, including the shelling of population centres and the cutting off of supplies of food and other essential goods, is another tactic used to force Muslims and ethnic Croatians to flee.” If the intent was to force Muslims to flee, the acts do not constitute genocide (Bosnia and Herzegovina v. Serbia and Montenegro).
Had the Genocide Convention included the prohibition of cultural genocide, the acts just described would constitute genocide; without the inclusion of cultural genocide, the acts can be labeled ‘ethnic cleansing’. ‘Ethnic cleansing’ is now commonly used, sometimes arguably as a euphemism for ‘genocide’. Thus, the omission of cultural genocide and the international recognition of the crime of ‘ethnic cleansing’ make ‘ethnic cleansing’ an effective tool both for perpetrators of genocide and the permanent members of the Security Council. Perpetrators can claim the intent of their actions is something other than the physical destruction of the protected group. The permanent members of the Security Council can propagate this claim. More importantly for the permanent members of the Security Council, the invention of the crime of ‘ethnic cleansing’ allows them to recognize the commission of a crime while avoiding use of the ‘g-word’.

Table 3.1

<table>
<thead>
<tr>
<th>Weakness</th>
<th>Relevant Genocide Convention Articles</th>
<th>Summary of How Weaknesses Could Impede the Prevention of Genocide</th>
</tr>
</thead>
<tbody>
<tr>
<td>Problems of Definition</td>
<td>Article I</td>
<td>Article I defines genocide as a crime under international law. By failing to elaborate on this definition or to define the act of genocide as something more than the numerous other crimes under international law, the obligations of Contracting Parties is ambiguous.</td>
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<tr>
<td></td>
<td>Article II</td>
<td>Article II defines a criminal act as genocide only when the guilty act is accompanied by the intent to destroy a protected group in whole or in part. While proving intent is essential during attempts to punish individuals alleged to have planned and/or committed genocide, requiring it for the purpose of prevention could impede timely and effective action.</td>
</tr>
</tbody>
</table>

59 See Schabas (1998) and Shaw (2007) for more on this debate.
The Genocide Convention’s preamble, Article I, Article V, and Article XII establish territorial jurisdiction for the prevention of genocide.\(^{60}\) Territorial jurisdiction for the purpose of crime prevention is a form of jurisdiction that confers the state that governs the territory within which a crime may be committed with exclusive jurisdiction over its prevention. Prior to the development and adoption of the Genocide Convention, the UN Charter established a system of international relations grounded in territorial jurisdiction. Under the UN Charter, there are only two circumstances that allow for the legal use of force in international relations: (1) Security Council authorization under Chapter VII, Article 42, and (2) in self-defense under Article 51. Outside of those two scenarios, the UN Charter prohibits the use of force under Article 2(4).\(^{61}\)

\(^{60}\) See Table 3.2 on page 86 for a summary of how the each of the articles that contributes to a system of territorial jurisdiction for the prevention of genocide.

\(^{61}\) UN Charter, Article 42, states, “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations. Article 51 states, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.” Article 2(4) states, “All Members shall
The Genocide Convention’s preamble and Article I contribute to the formulation of the Convention’s territorial preventive jurisdiction because they do not create any new legal prescriptions that revise those that exist in the UN Charter. The Genocide Convention’s preamble states, “Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required.” The reference in the preamble to international cooperation mirrors the language used in the UN Charter. Article 1(3) of the Charter states that one of the main purposes of the UN is “to achieve international cooperation in solving problems of an economic, social, cultural, or humanitarian character.” As noted above, the UN Charter restricts the use of force unless authorized by the Security Council or when taken in self-defense. Thus, ‘international cooperation’ must be interpreted to mean that states are encouraged to assist one another when such assistance is sought and required to assist the Security Council when it authorizes preventive measures. Article I of the Genocide Convention states that genocide “is a crime under international law which they undertake to prevent and to punish.” Because the Genocide Convention exists within a system of territorial jurisdiction, Article I must be interpreted to mean that states are obligated to prevent genocide only within their territories and to punish those guilty of perpetrating genocide on their territories.

Article V of the Genocide Convention provides more evidence that jurisdiction is territorially limited. Article V requires that Contracting Parties incorporate the Genocide Convention’s provisions into their domestic legislation. Once incorporated, the provisions of the Genocide Convention become part of each state’s domestic law. Each state’s domestic law only

refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”
regulates what happens within each state’s territory. Therefore, states can only prohibit genocide within their own territories through domestic legislation and cannot enact enforcement measures outside of their own territory without Security Council authorization. The combination of an international system grounded in territorial jurisdiction and the limitation on the application of domestic legislation to a state’s own territory firmly establishes territorial jurisdiction for the prevention of genocide.

Article XII of the Genocide Convention further emphasizes territorial jurisdiction. Article XII includes an opt-in clause. I refer to Article XII as the opt-in clause because it allows states to decide whether the Genocide Convention applies to territories under their control. In other words, states have the option of whether their own responsibility for the prevention of genocide extends to their colonies, territories, and trusteeships. This strengthens the argument that the Genocide Convention relies on territorial jurisdiction for the prevention of genocide because territories under the control of foreign state actors, themselves lacking statehood, cannot become parties to the Convention. If a state party to the Genocide Convention can opt-out of being responsible for preventing genocide within a territory under its control, clearly no foreign state actor can claim to have preventive jurisdiction over a territory under the direct and proper control of a state party. Further, by making jurisdiction over foreign territories voluntary, the Genocide Convention contradicts established international law concerning the occupation of foreign land. Occupying forces are extraterritorially responsible for human rights violations committed in areas under their control. Yet, the Genocide Convention includes an opt-in clause.

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The Genocide Convention’s preamble and Articles I, V, and XII prescribe territorial jurisdiction for the prevention of genocide. Territorial jurisdiction makes preventing intrastate genocide more difficult. While cases of interstate genocide constitute threats to international peace and security, allowing the United Nations and the Security Council to claim jurisdiction temporally limited to the duration of the conflict, cases of intrastate genocide remain within the exclusive jurisdiction of the territorial authority.

Table 3.2

*The Establishment of Territorial Jurisdiction in the Genocide Convention*

<table>
<thead>
<tr>
<th>Weakness</th>
<th>Relevant Genocide Convention Articles</th>
<th>Summary of How Weaknesses Could Impede the Prevention of Genocide</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preventive Jurisdictional Limitations</td>
<td>Preamble</td>
<td>The Preamble merely calls for international cooperation for the prevention of genocide. This cooperation is restricted to the confines of international law as established by the UN Charter.</td>
</tr>
<tr>
<td></td>
<td>Article I</td>
<td>Article I commits Contracting Parties to undertake the prevention of genocide. Because the Genocide Convention exists within a system of territorial jurisdiction, Article I only obligates state parties to prevent genocide within their territories. Therefore, if a territorial authority commits genocide against members of its population, the same authority is also responsible for preventing it.</td>
</tr>
<tr>
<td></td>
<td>Article V</td>
<td>Article V requires that Contracting Parties incorporate the Genocide Convention’s provisions into their domestic legislation. Each state’s domestic law only regulates what happens within each state’s territory. Therefore, states can only prohibit genocide within their own territories through domestic legislation.</td>
</tr>
<tr>
<td></td>
<td>Article XII</td>
<td>Article XII gives Contracting Parties the choice of whether or not to be responsible for the prevention of genocide within territories under their control. Therefore, Article XII potentially leaves numerous territories outside of any state’s preventive jurisdiction.</td>
</tr>
</tbody>
</table>

63 I will go into greater detail about the role of historical context in the development of the Genocide Convention, but it is important to note presently that Article XII, when considering the world was still in the colonial era, seems to exemplify the influence considerations of national interest played in the Convention’s development.
**Limits on Available Recourse**

Articles VIII and IX of the Genocide Convention outline the forms of recourse available to Contracting Parties being victimized by genocide.\(^{64}\) Article VIII gives Contracting Parties the right to call upon the competent organs of the United Nations to take appropriate measures under the UN Charter for the prevention of genocide. Article VIII’s reference to the UN Charter also further emphasizes territorial jurisdiction. Action can only be taken under the UN Charter, as noted earlier, when the Security Council authorizes the use of force in response to a threat to international peace and security and in self-defense. Interestingly, Article VIII does not specify the Security Council as the competent organ to which calls should be made. As the only UN organ that can legally authorize coercive measures, it would seem the relevant UN organ for calls to prevent and suppress genocide would be the Security Council. Article IX designates the International Court of Justice as the arbiter of disputes concerning the interpretation, application, and the fulfillment of obligations maintained by the parties to the Convention.

Because only the Genocide Convention’s Contracting Parties may call upon UN organs for preventive action under Article VIII, recourse is limited to victims of interstate genocide, assuming the authority over the territory within which genocide is being committed has not acquiesced to the crime. This can be concluded because for victims of intrastate genocide, the perpetrator and the relevant Contracting Party are one and the same. Yet, even in the case of the acquiescence of the territorial authority, interstate genocide still constitutes a threat to international peace and security, bringing it within the Security Council’s mandate of maintaining international peace and security. Members of a protected group being targeted for

\(^{64}\) See Table 3.3 on page 89 for a summary of how the limitations on available recourse could impede the prevention of genocide.
genocide by their own state or with its acquiescence, however, have no legal standing to petition the competent organs of the United Nations to take action for the purpose of their protection. Therefore, genocide committed within a state’s territorial borders excludes the victims from this avenue of recourse.

Article IX of the Genocide Convention offers an additional means of recourse to that offered under Article VIII. Article IX recognizes the International Court of Justice as the judicial body to which “disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted.” The means of recourse provided by Article IX of the Genocide Convention, like those provided under Article VIII, are limited to Contracting Parties. This is consistent with the ICJ’s rules. Article 34(1) of the Statute of the International Court of Justice establishes that only state actors may be parties in cases before it. Thus, the means of recourse included in the Genocide Convention are only available to victims of interstate genocide through their representation by the state. Individuals targeted by their own government are once again excluded, making it more difficult to prevent cases of intrastate genocide.

So far in this chapter I provided an overview of the Genocide Convention and analyzed the Convention’s text to determine whether it contained any features that make it more difficult to prevent genocide. I identified six weaknesses and explained why I believe they make the task of fulfilling the Genocide Convention’s object and purpose of preventing genocide more difficult. Had genocide been defined as a threat to international peace and security, all cases of

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65 Article 34(1) of the Statute of the International Court of Justice states, “Only states may be parties in cases before the Court.”
genocide would fall within the UN’s mandate and the Security Council’s primary responsibility. If the Genocide Convention contained a separate and less burdensome intent requirement for the purpose of preventing genocide, the Convention could be invoked prior to the commission of irreparable harm. Had political groups been included within the Genocide Convention’s protection, states would not be able to use the blind spot created by their omission to shield genocide committed against protected groups from recognition. Similarly, had cultural genocide been included in the Genocide Convention, the blind spot its omission creates would also be closed. If the Genocide Convention had incorporated a form of limited universal jurisdiction instead of strict territorial jurisdiction for the purpose of preventing genocide, cases of intrastate genocide would be easier to prevent. Finally, if available recourse for victims of genocide was not limited to only state actors, members of protected groups being targeted by their own government would have channels through which they could petition the UN for their protection.

Table 3.3

*The Means for Recourse in the Genocide Convention*

<table>
<thead>
<tr>
<th>Weakness</th>
<th>Relevant Genocide Convention Articles</th>
<th>Summary of How Weaknesses Could Impede the Prevention of Genocide</th>
</tr>
</thead>
<tbody>
<tr>
<td>Limitations on Available Recourse</td>
<td>Article VIII</td>
<td>Under Article VIII, only Contracting Parties can call upon the UN to take appropriate preventive action to apprehend genocide. Article VIII reinforces the State-based system by not providing an avenue of recourse for members of a protected group being destroyed by their own government.</td>
</tr>
<tr>
<td>Article IX</td>
<td>Article IX establishes the International Court of Justice as the judicial body to which disputes concerning the interpretation and application of the Convention, as well as State responsibility for genocide, shall be submitted. Because only parties to the dispute have standing before the Court, Article IX fails to provide a judicial remedy for cases of intrastate genocide.</td>
<td></td>
</tr>
</tbody>
</table>
Evaluation of the Potential Impact of Correcting the Genocide Convention’s Weaknesses

A Genocide Convention free of the identified weaknesses would make it easier to prevent genocide. Yet, correcting the six identified weaknesses could also have other less favorable consequences, such as the creation of other liabilities. If correcting some or all of the weaknesses were to be accompanied by the creation of other liabilities, it is possible that retention of those weaknesses would be preferable. What follows is an evaluation of the possible justifications for the inclusion of the weaknesses and the potential consequences of correcting them. As noted at the beginning of this chapter, because I am not the first to identify weaknesses in the text of the Genocide Convention, the work of other scholars is incorporated into this analysis. The potential consequences of correcting the identified weaknesses are also considered.  

The Status of Genocide in International Law

Under the Genocide Convention, not all cases of genocide constitute threats to international peace and security. I labeled this a weakness because it removes cases of intrastate genocide from the mandate of the UN and the responsibilities of the Security Council. Because the Security Council is the only UN organ that can authorize coercive measures in response to threats to international peace and security, removing cases of intrastate genocide from its responsibilities makes it more difficult to prevent genocide.

There is very little in the scholarly literature concerning the failure to define genocide as a threat to international peace and security. When Article I is a topic of critique for genocide scholars, the failure to define genocide as something more than other violations of international law has not been the focus. William Schabas (2000), for example, states, “Perhaps the most

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66 See Table 3.4 on page 115-116 for a summary of how each weakness affects genocide prevention and the possible consequences of correcting each of the weaknesses.
intriguing phrase in Article I is the obligation upon states to prevent and punish genocide….Yet, while the final Convention has much to say about punishment of genocide, there is little to suggest what prevention of genocide really means” (p. 72). I disagree with Schabas. The Genocide Convention makes clear what is meant by prevention. The text is less ambiguous on this issue than most genocide scholars believe. As noted in the previous section, jurisdiction for the prevention of genocide is territorially limited unless it threatens international peace and security. In the case that genocide threatens international peace and security, the Security Council, under Article VIII of the Genocide Convention, may authorize coercive measures consistent with its powers under the UN Charter. To summarize, the territorial authority is responsible for preventing genocide within the territory it governs. When a case of genocide threatens international peace and security, the responsibility of Member States for its prevention extends only as strictly defined by relevant Security Council resolutions authorizing collective action for the maintenance of international peace and security.

Matthew Lippman has completed two lengthy analyses of the Genocide Convention without including an analysis of Article I in the commentary sections of either. Lippman (1998) does, however, claim that the Genocide Convention “broke the barrier of sovereignty” (p. 505). I disagree with Lippman’s assertion that the Genocide Convention “broke the barrier of sovereignty.” Each of the weaknesses identified in the Convention appears to be the result of the privileging of state sovereignty. The failure to define genocide as a threat to international peace and security would seem to represent a decision that intrastate human rights violations, including those that amount to genocide, must remain within the exclusive domain of the territorial authority. The decision to omit political groups and cultural genocide from the Genocide Convention also represent deference to sovereignty. With their omission, sovereign states can
enact with impunity policies that suppress political opposition and forcibly expel or assimilate cultural minorities. Again, these policies could include genocidal violence. Further, the limits on available recourse clearly privilege sovereign state actors even though doing so leaves victims of intrastate genocide without recourse.

Interestingly, Lippman (1998) recognizes the “contradiction between asserting that genocide is of international concern while relying on a system of territorial jurisdiction” (p. 505). On this we agree, which makes it difficult to reconcile Lippman’s claim concerning the “barrier of sovereignty” and his recognition of the limitations of territorial jurisdiction. Does the Genocide Convention make actions that could be limited to a single territory a violation of international law? Yes. Does that alone break the barrier of sovereignty? It does not. While I believe Lippman’s two claims to be inconsistent, the contradiction Lippman notes emphasizes the importance of the failure to define genocide as a threat to peace and security. The limitations of territorial jurisdiction for the purpose of preventing genocide, something I will discuss in more detail later, would be less significant had all cases of genocide been included within the Security Council’s responsibilities. The Security Council would then, in theory, be responsible for developing, authorizing, and implementing preventive measures.

Legitimate arguments can be made for not defining all cases of genocide as threats to international peace and security. Genocide committed internally without an aggravating factor which would regionalize or internationalize the conflict, such as causing a mass exodus of

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67 This is exemplified by a statement made by India before the Security Council during its intervention in East Pakistan: “This debate has shown that selectivity is the order of the day. Now, several principles have been quoted by various delegations: sovereignty, territorial integrity, noninterference in other peoples’ affairs, and so on...What happened to the Convention on genocide?” (United Nations Security Council1971, December 6, p. 27).

68 Because other scholars have not commented on the failure to define genocide as an inherent threat to international peace and security, I do not include their comments concerning territorial jurisdiction here. They are incorporated into the section concerning the limitations of territorial jurisdiction.
refugees, by definition fails to constitute a threat to international peace and security. Prior to the creation of the United Nations there was a long history of unwarranted violations of territorial sovereignty. The UN was also created in the direct aftermath of World War II, which involved repeated acts of aggression and violations of territorial sovereignty. Further, the world was still deep in the colonial era. Therefore, it could be argued that by not defining all cases of genocide as threats to international peace and security, the territorial sovereignty of weaker states was better protected.

Violence committed across territorial borders, including the commission of genocide, constitutes a threat to international peace and security. The Security Council has a responsibility to respond to such acts for the promotion and preservation of a peaceful and orderly international system. The Security Council does not maintain the same responsibility over the internal affairs of Member States. Therefore, if genocide were defined as an threat to international peace and security, allegations of genocide motivated out of considerations of national interest could be used as a means to justify interference in the internal affairs of a sovereign state.

However, as history has shown, states interfering in the internal affairs of other states has not been prevented by the UN Charter’s prohibition. Therefore, it is not enough to say that defining genocide as an inherent threat to international peace and security would make it easier for one Member State to violate another’s sovereignty simply by invoking the Genocide Convention. Further, the corollary of an argument that suggests defining all cases of genocide as threats to international peace and security would lead to abuse is that by not defining genocide as a threat to international peace and security it was made easier for states to avoid applying the Genocide Convention out of considerations of national interest even when application is warranted.
Ultimately, arguments against defining all cases of genocide as threats to international peace and security are unconvincing. The Genocide Convention’s object and purpose is not limited to the prevention of cases of interstate genocide. Yet, because the Genocide Convention does not define genocide as a threat to international peace and security, cases of intrastate genocide could be treated just like any other violation of international law committed internally unless the Security Council determines them to be threats to international peace and security. Therefore, suspected cases of intrastate genocide are likely to be more difficult to get on the Security Council’s agenda precisely because they do not necessarily threaten international peace and security in the literal sense. While a case could be made that the fragility of sovereignty would have been under greater stress had all cases of genocide been defined as threats to international peace and security, allegations of genocide would still be vetted by the United Nations and the Security Council.

**The Specific Intent Requirement**

Earlier in this chapter I argued that the Genocide Convention’s specific intent requirement makes it more difficult to prevent genocide because it requires the establishment of genocidal intent prior to the application of the Genocide Convention. Without a trail of documents detailing the intent to commit genocide or public proclamations of the intent to destroy the targeted group, the intent behind the guilty acts is literally in the minds of the perpetrators.

Arguments in support of the specific intent requirement have generally focused on the importance of the *mens rea* in judicial proceedings. Because the Genocide Convention is both a treaty tasked with preventing genocide and a punitive statute, and because the Genocide
Convention was created to differentiate genocide from other crimes against humanity, the specific intent requirement is arguably essential. The intent of the perpetrators of the crime is what separates genocide from mass murder or crimes against humanity. Adam Jones (2011) notes that most scholars and legal theorists agree that genocidal intent is an indispensable element of the crime of genocide. John Quigley (2006) explains that genocidal intent is the feature that distinguishes genocide from other serious offenses:

Acts directed against human beings must be committed with an intent to destroy a group to which the immediate victims belong…The act against the immediate victims must reflect a culpable state of mind in regard to the group. Thus, genocide encompasses a dual mental element: one directed against the immediate victims, and a second against the group” (p. 10).

In other words, the crime against individual members of the group must be due to their membership in the group and the attack against the individual must be part of a plan to destroy the rest of the group to which the individual belongs in whole or in part.

Josef Kunz simultaneously recognizes the difficulty in proving specific genocidal intent and its necessity. Kunz (1949) states, “It has been said that this specific criminal intent makes the Convention useless; that governments, less stupid than that of National Socialist Germany, will never admit the intent to destroy a group as such, but will tell the world that they are acting against traitors and so on” (p. 743). Despite the potential difficulty of proving specific intent, Kunz argues that a specific intent requirement is necessary for the distinguishing of genocide from other international criminal acts.

Lippman echoes Kunz’s sentiment, but advances Kunz’s recognition of the potential difficulty in proving specific intent to its logical conclusion; some planners and perpetrators of genocide will not be punished because of a failure to prove an intent to destroy the protected group. According to Lippman (1994), “The intent requirement is thought to be essential in order
to distinguish genocide from homicide. Critics complain, however, that the intent standard permits those who commit genocide to claim that they lacked the intent to exterminate the group” (p. 77). Lippman (1998) also notes that the Genocide Convention’s specific intent requirement “means that some manifestations of mass violence against some protected groups do not fall within the terms of the Treaty” (p. 507). The specific intent requirement, Lippman argues, allows individuals to evade responsibility for genocide by creating narratives in which the violence against members of groups was politically-based or that the deaths of members of group were the unfortunate collateral damage from non-genocidal policies.

Lippman’s recognition that some manifestations of mass violence that satisfy the Genocide Convention’s actus reus will fall outside the scope of the Genocide Convention is an important one when considering the impact the specific intent requirement could have on the failure to prevent genocide. Yet, Lippman does not connect the difficulty in proving specific intent for the purpose of punishing those alleged to have committed genocide to the purpose of preventing genocide. Lawrence LeBlanc (1984) similarly recognizes that, when considering alleged cases of genocide, “arguments are likely to concentrate on the need to prove intent” (p. 582). He continues, “This is a serious problem in applying the Convention even if…the number of victims may be of evidentiary value with respect to proving the necessary intent” (LeBlanc 1984, p. 582). Like Lippman, LeBlanc focuses on the problems associated with the specific intent requirement for the Genocide Convention’s punishment function, but also makes an important point concerning the specific intent requirement and the prevention of genocide.

That proving intent is problematic even after a large number of people have already been killed exemplifies how the specific intent requirement could impede recognition of genocide for the purpose of its prevention before irreparable harm has already been committed. How can the
Genocide Convention be expected to be successful in achieving its object and purpose when such a significant impediment to genocide prevention is built into its text? Imagine a situation in which acts of genocidal violence with genocidal intent are being perpetrated against a defenseless group protected under the Genocide Convention and, yet, preventive action continues to go unauthorized because it cannot be proven that the perpetrators intend to destroy the group in whole or in part. Consider further that even if prosecutors in a criminal trial were unable to prove genocidal intent retroactively against those who perpetrated the violence, the perpetrators could still be punished for crimes against humanity. While the punishment would not entirely fit the crime due to the inability to prove intent, the perpetrators would nonetheless be punished. Those killed, however, would remain victims of genocide that could have been more easily prevented had the Genocide Convention included a separate intent requirement for each of its two functions.

Frank Chalk and Kurt Jonassohn (1992), Ben Kiernan (2007), and Helen Fein (1994) have criticized the specific intent requirement because of its potential to impede the fulfillment of the Genocide Convention’s preventive purpose. As they have noted, genocidal regimes are more aware of the legal provisions of the Genocide Convention, including the specific intent requirement. The results of the Nuremberg Trials provided a stark warning against maintaining a record of genocidal plans and making overt and explicit statements of intent.

Jonassohn and Chalk argue that the specific intent requirement can be satisfied without explicit statements or documentation. Jonassohn and Chalk ask, “What elements do we look for in evaluating situations and events to determine whether we are dealing with a case of genocide?” (Jonassohn 1992, p. 19). Jonassohn’s and Chalk’s criteria includes “evidence, even if only circumstantial, of the intent of the perpetrator” (Jonassohn 1992, p. 19). Jonassohn’s and
Chalk’s creation of a lesser intent requirement illustrates how difficult it is to conclusively prove specific intent. Under their criteria, Jonassohn and Chalk believe the problem of intent resolves itself. They argue that once reliable and accurate information about the killing operations are obtained, it can be treated as circumstantial evidence of the genocidal planning and intent of the perpetrator. Jonassohn and Chalk state emphatically, “It is not plausible that a group of some considerable size is victimized by man-made means without anyone meaning to do it!” (Jonassohn 1992, p. 21). Similarly, Fein (1994) writes, “I am now convinced one can demonstrate intent by showing a pattern of purposeful action, constructing a plausible prima facie case for genocide in terms of the Convention” (p. 97).

Jonassohn’s, Chalk’s, and Fein’s position that specific intent can be proved through circumstantial evidence was later strengthened by numerous rulings of the International Criminal Tribunal for Rwanda (ICTR). The ICTR ruled in a number of cases that circumstantial evidence can be used to prove specific intent. For example, in 2008 the ICTR’s Appeals Chamber stated, “Genocide is a crime requiring specific intent, and…this intent may be proven through inference from the facts and circumstances of a case.” The ICTR also established a list of factors to be assessed when considering circumstantial evidence of specific intent. The Appeals Chamber wrote,

The Trial Chamber, in line with the Appeals Chamber’s previous holdings, stated that the specific intent of genocide may be inferred from certain facts or indicia, including but not limited to (a) the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others, (b) the scale of atrocities committed, (c) their general nature, (d) their execution in a region or a country, (e) the fact that the victims were deliberately and systematically chosen on account of their membership of a particular group, (f) the exclusion, in this regard, of members of other groups, (g) the political doctrine which gave rise to the acts referred to, (h) the repetition of destructive and discriminatory acts and (i) the perpetration of acts which violate the very foundation of the group or
considered as such by their perpetrators (Summary of the Judgment of the Appeals Chamber).

Allowing the use of circumstantial evidence to prove specific intent offers an improvement over rigid specific intent, especially for the purpose of punishment. It is an improvement for the purpose of punishing those suspected of planning and perpetrating genocide because it allows the trial chambers to use the scale of the atrocities committed after they have been committed as circumstantial evidence of specific intent. Therefore, for the purpose of punishment, permitting the use of circumstantial evidence to satisfy the specific intent requirement makes it more difficult for planners and perpetrators of genocide to avoid punishment simply because they did not explicitly state their intent or keep records of it. Yet, for the purpose of prevention of genocide, the essential problem related to the specific intent requirement remains. It is more difficult to prove that Group A intends to exterminate the members of Group B in whole or in part than it is to prove that Group A is acting in ways that threaten the lives of Members of Group B. Thus, the specific intent requirement creates an extra burden which could potentially impede the effective prevention of genocide. Further, using circumstantial evidence to prove specific intent essentially requires that a large number of members of the targeted group be killed for there to be evidence of specific intent. Such irreparable harm is what the adoption of the Genocide Convention was meant to prevent.

I have argued that the Genocide Convention would be more efficacious with a separate and less burdensome intent requirement for the purpose of preventing genocide than for the purpose of punishing those suspected of planning and perpetrating genocide. Further, I have argued that allowing circumstantial evidence to be used to establish specific intent, while lowering the burden, still acts as an impediment to timely action in response to suspected cases
of genocide because it essentially requires that irreparable harm be committed in order to provide this circumstantial evidence. Therefore, it could be argued that a significantly less burdensome intent requirement is necessary to increase the efficacy of the Genocide Convention.

Would a significantly less burdensome intent requirement have unintended consequences? It could be argued that the specific intent requirement acts as a gatekeeper, limiting preventive action to only actual cases of genocide *stricto sensu*. Therefore, removing this gatekeeper would allow the application of the term ‘genocide’ to become even more heavily influenced by political and strategic calculations. Justifiable actions carried out by a state against some members of its population could be framed as genocidal by external opponents of that state. Victims of other forms of oppression and violence could claim to be victims of genocide.

While I believe the term ‘genocide’ has been underused since its inception, a separate and less burdensome intent requirement for the purpose of preventing genocide could lead to the term’s overuse. It can be argued that underuse of the term ‘genocide’ has conceptually constrained its meaning in practice. Yet, it could also be argued that loosening the constraints on the application of the Genocide Convention could have the opposite effect; through its overuse, the term ‘genocide’ could be left devoid of any real meaning beyond what is already considered to be crimes against humanity.

Despite the legitimate arguments that can be made in support of a specific intent requirement for the purpose of genocide prevention, the negative consequences of such a requirement outweigh any good that comes from it. When a suspected case of genocide is ongoing, it is essential that we err on the side of saving innocent lives. ⁶⁹ Requiring the difficult

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⁶⁹ The framers of the original draft of the Genocide Convention recognized this: “It is essential to exercise constant vigilance, and preventive action must be taken, either before the harm is done or before it has assumed wide
task of establishing genocidal intent prior to seeking remedial action potentially allows irreparable harm to be perpetrated before the case even comes under consideration. Proving genocidal intent for punishment purposes has a luxury of time that members of a targeted group do not. Further, the specific intent requirement is not the only gatekeeper preventing illegitimate intrusions into the internal affairs of sovereign states justified by false allegations of genocide. The international system itself acts as a gatekeeper. Allegations of genocide do not alone legalize the use of force. Coercive measures still must be authorized by the UN Security Council. Of course, the Security Council is far from perfect in its role as gatekeeper, but the point is that a separate and less burdensome intent requirement would not lead to an international system that would allow any state to intervene in the affairs of another state simply by alleging genocide. What a separate intent requirement would do, however, is allow for the application of the Genocide Convention to cases early on when evidence suggests a real possibility that genocide is being perpetrated.

The Omission of Political Groups

I argued earlier that the omission of political groups complicates the recognition of guilty acts committed against groups that are protected by the Genocide Convention and, therefore, makes it more difficult to prevent genocide. I noted that the omission of political groups allows perpetrators of genocide to create and propagate a political conflict narrative, thus removing actual cases of genocide from the Convention’s coverage through defining the victimized group as a political group. Members of the international community, including the permanent members

proportions, for then it takes on the nature of a catastrophe, the effects of which are to a great extent irreparable” (Abtahi & Webb 2009, p. 248).
of the Security Council, could also avoid applying the Genocide Convention through promoting these same narratives.

Scholarly criticism of the non-exhaustive list of protected groups under the Genocide Convention generally falls into two categories: those who argue for a general definition of groups and those who argue for the addition of political groups. Jonassohn and Chalk offer a definition of genocide that includes every possible group that can be imagined by allowing the group to be defined by the perpetrator (Jonassohn 1992). Membership in a group protected from genocide would not be determined by the legal definition of genocide or its parties; instead, if the perpetrator recognized its victims as a defined group and the perpetrator’s intentions involved the group’s extermination in whole or in part, the crimes would constitute genocide. According to Jonassohn and Chalk, “The main difference between the U.N. definition and ours is that we have no restrictions on the types of groups to be included. This allows us to include even groups that have no verifiable reality outside of the minds of the perpetrators” (Jonassohn 1992, p. 19). Similarly, Fein’s (2002) group definition includes “victims…selected because they were members of the collectivity” (p. 83).

Jonassohn and Chalk defend their general group definition by arguing that “none of the major victim groups of those genocides that have occurred since its adoption falls within its [the Genocide Convention] restrictive specifications” (Jonassohn 1992, p. 18). They continue, “This seems to be true regardless of whether we are thinking of Bangladesh or Burundi, Cambodia or Indonesia, East Timor or Ethiopia” (Jonassohn 1992, p. 18). They identify the limit on the groups protected by Article II as the crux of the Convention’s definitional problems. They

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70 Some of the cases mentioned by Jonassohn and Chalk have been labeled genocide by other scholars. However, they lack general scholarly agreement in some cases and do not constitute genocide *writ large* in other cases.
believe the Genocide Convention must prohibit “the planned annihilation of any group, no matter how that group is defined and by whom” (Jonassohn 1992, p. 18). Israel Charney (1997) agrees: “The definition of genocide adopted in law and by professional social scientists must match the realities of life, so that there should be no situation in which thousands and even millions of defenseless victims of mass murder do not “qualify” as victims of genocide” (p. 64). Charney (1997) argues that when there is a discrepancy between “the reality of masses of dead people” and the legal definition of genocide “it is the latter which must yield and change” (p. 64).

The problems with a general group definition are multifold. First, the definition proffered is so general that it essentially removes genocide’s status as a unique form of crime against humanity. While the specific intent requirement would still theoretically separate genocide from other crimes against humanity, the reality is that, under a general definition of genocide, attacks on any real or perceived group could be framed as genocide by the victims. Such a definition could lead to a conceptual weakening of the term ‘genocide’ and the convention that prohibits it through the overuse and misuse of the term. Rather than increase the merited application of the Genocide Convention while a case of genocide is ongoing, a general definition might actually have the opposite effect. The cry of ‘genocide’ could become so frequent as to leave genocide scholars debating what is not genocide, rather than what is. In doing so, the value of the term and the Convention could be diminished.

Barbara Harff makes a case in a slightly different context that lends support to my argument. Harff (1992) believes the term ‘genocide’ is fraught with ambiguities. She states that these ambiguities have been used by victims of human rights violations to label violations that clearly fall short of genocide as genocide in order to draw attention to their plight. Harff recognizes the power the term ‘genocide’ contains. The term ‘genocide’ invariably brings to
mind the Holocaust. It also elevates egregious and violent human rights violations to an attempt to physically destroy a group of people. Harff is concerned that the limited definition of genocide that is found in the Genocide Convention has been misused. How much easier would it be for the term ‘genocide’ to be misused and, therefore, overused with a general group definition? What effect would this misuse and overuse have on the Genocide Convention’s application and enforcement? None of this is to say that the intentions of those arguing for a general group definition are misplaced. Protecting oppressed groups from extermination needs little defense. However, one must consider the potential unintended consequences.

Not all genocide scholars seek to expand the definition of genocide to include every potentially identifiable group. Many are primarily concerned with the omission of political groups. Beth Van Schaack (1997) proclaims the omission of political groups to be an oversight that “no legal principle can justify” (p. 2261). Van Schaack (1997) argues that the exclusion of political groups from the Genocide Convention equates to the removal from the scope of the Convention the “very crime they [political leaders] may be most likely to commit: the extermination of politically threatening groups” (p. 2268). Lippman agrees with Van Schaack. 71 In defense of the inclusion of political groups Lippman (1994) states, “Political groups, in particular, historically have been victimized and, like religious groups, are united by a common ideal and vision” (p. 75).

A brief review of the cases of genocide on which there is general scholarly agreement supports Van Schaack’s and Lippman’s arguments. The genocide in Bangladesh occurred after contentious elections that saw candidates based in East Pakistan win the majority of seats in

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71 Lippman (1994) supports a general group definition, but offers the addition of political groups as a more modest and widely acceptable proposal.
Pakistan’s parliament. President Kahn refused to seat the new government, leading to talks of secession from the East. Pakistan responded to these calls with genocide. In Cambodia, genocide was perpetrated as part of a political and social reordering under the Khmer Rouge. In Guatemala, the military regime committed genocide against the Maya in part due to their support of and sympathy for leftist rebels. In Iraq, Saddam Hussein implemented genocidal plans against members of the Kurdish population. The Kurds had long sought either a country of their own or greater autonomy. In Rwanda, members of Hutu Power and the Akuzu movement orchestrated genocide against the Tutsi in the midst of the implementation of a political power sharing agreement. Hutu Power did not want to share political power with Tutsi, deciding it was better to convince members of the Hutu population that they needed to commit genocide or find themselves the victims of genocide at the hands of Tutsi. Notably, during the genocide moderate Hutu, including Rwanda’s prime minister, were also targeted for execution.

LeBlanc (1991) disagrees with those critical of the omission of political groups. LeBlanc believes an argument can be made in support of their exclusion. He argues that it may have been wise and practical to omit political groups from the scope of the Genocide Convention because “violence against political groups may, in some circumstances, be legitimate” (p. 85). LeBlanc also makes the case that political groups present a problem that the groups protected by the legal definition of genocide do not. LeBlanc does not believe it to be possible to develop a definition of what constitutes a political group for the purpose of the Convention. LeBlanc (1991) argues

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72 Van Schaack has written extensively on this topic. In “The Crime of Political Genocide: Repairing the Genocide Convention’s Blind Spot”, Van Schaack (1997) argued, “The history of the Khmer Rouge era in Cambodia shows that while some of the atrocities of the Khmer Rouge fit the legal definition of genocide under the Convention, the mass extermination of ethnic Khmers falls outside the defined scope of the Convention because these victims do not constitute a national, ethnic, racial, or religious group. In fact, as this history reveals, the Khmer Rouge’s genocide campaign began and ended with political persecution: first against individuals affiliated with the ancien régime and later against supposedly treasonous members of the Khmer Rouge itself.
that “exceptions to any proposed definition come readily to mind” (p. 87). For example, LeBlanc (1991) notes that to tie political groups to political parties “would result in an unduly narrow and vague definition” (p. 85). He then offers the possibility of groups being identified through their attachment to political movements. “Examples include,” according to LeBlanc (1991), “groups of protesters and others who are attacked by their governments for their political views” (p. 87). LeBlanc (1991) concludes, though, that it would be “absurd to consider such cases as falling within the meaning of genocide as defined by the convention” (p. 87).

I disagree with LeBlanc’s contentions. While violence against political groups may be legally justifiable, the manner in which the violence is carried out may not be. Political groups peacefully protesting government policies can be dispersed without the use of lethal violence. Take for example a significant number of people, say 100,000, gathered in a central location protesting against their government. If the government response is to surround the protesters and open fire, one could argue that such a response could constitute genocide had political groups been included in the Genocide Convention. Even in the appropriate use of force against an armed insurrection, governments can implement measures aimed at avoiding the intentional targeting of unarmed members of the political opposition. Further, LeBlanc’s argument that tying political groups to political parties “would result in an unduly narrow and vague definition” is problematic. I do not think a definition of political groups for the purpose of inclusion in the Genocide Convention need be as specific as LeBlanc seems to want it to be. The Genocide Convention does not provide a formal definition for each of the groups under its protection. Though it might appear so, the definition of each of the groups protected by the Genocide Convention is not self-evident. What is a religious group? Does a religious group only include
those who are true believers in the religion? What about racial and ethnic groups? Into which group do children of intermarriage belong?

The inclusion of political groups in the Genocide Convention would bring political groups under the Convention’s protection and would strengthen the protection of the groups currently included under its protection by diminishing the effectiveness of creating false narratives aimed at pushing a targeted group outside the scope of the Convention. The inclusion of political groups would not interfere with a state’s right to defend its territorial integrity against internal uprisings and secessionist movements. Therefore, repairing the blind spot created by the omission of political groups could make it easier to prevent genocide without causing unintended negative consequences.

The Omission of Cultural Genocide

The omission of cultural genocide, in conjunction with the inclusion of a specific intent requirement, makes it more difficult to prevent genocide. Like the exclusion of political groups, the omission of cultural genocide created a blind spot into which actual cases of genocide could be pushed. The omission of cultural genocide together with the specific intent requirement can be utilized to frame acts of genocide as something else. It allows perpetrators to insist that the intent behind violations of human rights, including the deprivation of life, is to remove the group and its culture from a given territory.

Jones believes cultural genocide was rightfully excluded from the Genocide Convention. Jones (2011) asks whether means for the destruction of a group less than physically destroying it could constitute genocide: “The question remains, however, whether strategies of social and cultural “destruction” should be considered genocidal in the absence of systematic killing, or at
Lippman (1994) argues the importance of protecting cultures, stating that the crime of genocide reflects a refusal to recognize the inalienable right of a collectivity to express its cultural identity and to contribute to the human mosaic....The central purpose of the Genocide Convention is to preserve and promote pluralism in order to perpetuate the progress which historically has resulted from the clash of cultures (p. 74).

Yet, Lippman recognizes the controversial nature of cultural genocide. He notes that the crime of genocide “imposes unconscionable pain and suffering on its victims. The less dramatic impact is to prevent the perpetuation of a group’s culture and to diminish demographic diversity” (Lippman 1994, p. 76). Lippman opines that deliberate attacks on and destruction of cultural icons, libraries, and monuments, only when combined with physical acts of genocide, could constitute genocide.

There is a need to differentiate physical acts of genocide perpetrated against members of a targeted group with the aim being the group’s immediate physical destruction from those meant to ultimately dissolve the group through the permanent removal of the culture’s existence. However, differentiation is not the same as including one form of genocide while excluding the other. Threats to cultural groups extend beyond the group’s physical integrity. Over a period of time, cultural groups can be destroyed through the prohibition of the use of the culture’s language and the practicing of the culture’s religion, as well as the destruction of those attributes and artifacts that define a culture’s uniqueness.

The term ‘ethnic cleansing’ first became widely used during the Bosnian War (1992-1995) to describe the attempted eradication of all Muslims from Bosnia by the Bosnian Serbs and their benefactors in Serbia. Martin Shaw (2007) argues, however, that, in some cases ‘ethnic cleansing’ is a euphemism for genocide. According to Shaw (2007),

least widespread physical attack [emphasis in original]. I believe they should not be” (p. 32).
Because genocide has been narrowed down to Nazi-like extermination policies, few recent cases have been recognized. Only that of Rwanda has been overwhelmingly accepted….Before this, many commentators also saw Serbian nationalist campaigns in Croatia and Bosnia and Herzegovina as genocidal. Yet the phrase most widely used to describe them was ‘ethnic cleansing’, which quickly achieved an extraordinarily wide currency. Barely a year into the Yugoslav wars, it was ‘adopted as part of the official vocabulary of UN Security Council documents…. (p. 48).

The exclusion of cultural genocide is not a deficiency that individually makes it more difficult to prevent genocide. The inclusion of a specific intent requirement makes the exclusion of cultural genocide an effective impediment. Because of the inclusion of a specific intent requirement, it is likely the crime of ‘ethnic cleansing’ would have been invented even if cultural genocide had been prohibited by the Genocide Convention. Establishing the specific intent to commit genocide will remain a challenge and, therefore, perpetrators of violent acts and bystanders uninterested in apprehending those acts would still be able to point to a lack of evidence of intent regardless of whether cultural genocide was included. Further, the inclusion of cultural genocide in the Convention could also have unintended consequences.

As noted above, acts aimed at the immediate physical destruction of a protected group could be separated from acts that constitute cultural genocide without omitting cultural genocide altogether. A potential problem with this solution, however, is that the term ‘genocide’ would still be used to describe both. Jones’ and Lippman’s concerns over using the term ‘genocide’ to describe attacks on cultural artifacts and other cultural objects are justified. The term ‘genocide’ is important because of what it conveys. It elicits images of the Holocaust and has been referred to as the ‘crime of crimes’. There have been vows of ‘never again’. If the term ‘genocide’ could be applied to attacks on cultural objects, something that happens far more frequently than attempts to physically destroy protected groups in whole or in part, that is how the term would be more commonly applied. Ultimately, this could result in a conceptual weakening of the term.
‘genocide’. Further, plenty of damage has already been done to the promise of ‘never again’ due to the failure to take preventive action in response to cases of genocide. If the term ‘genocide’ were to be correctly applied legally to attacks on cultural objects through the inclusion of cultural genocide in the Genocide Convention, a failure to take some form of preventive action in response to attacks on cultural objects, which would be highly likely and legally sound, the promise of ‘never again’ would continue to be undermined.

**Limitations of Territorial Jurisdiction and the Limits on Available Recourse**

Earlier in this chapter, I argued that relying on territorial jurisdiction for the prevention of genocide makes it more difficult to prevent cases of intrastate genocide. By awarding exclusive jurisdiction for the prevention of genocide to the territorial authority, that same authority could perpetrate genocide against protected groups within the territory over which it holds jurisdiction. Because intrastate genocide, by definition, does not necessarily constitute a threat to international peace and security, it falls outside the jurisdiction of the United Nations and its Security Council.

Article V of the Genocide Convention’s domestic legislation requirement combined with territorial jurisdiction demonstrates a belief that if genocide were outlawed within the territory of every state, genocide would be eradicated. Thus, if genocide were to be committed by the members of one state against a protected group residing in another state, those committing the genocide would be in violation of the international legal prohibition of genocide as established by the Genocide Convention, as well as their domestic laws and those of the victimized state. Therefore, the victimized state would be warranted in, and responsible for, implementing or calling for measures to prevent the crime being perpetrated against members of a protected group within its territory. However, this does not account for cases in which the state is directly
responsible for or acquiesces to the commission of genocide against a protected group within its own territory.

Members of a protected group being targeted for genocide by their own state or with its acquiescence have no legal standing to petition the competent organs of the United Nations to take action for the purpose of their protection. Therefore, genocide committed within a state’s territorial borders is essentially treated as an internal matter of the state. Of course, there are practical considerations that can be cited in defense of prohibiting individuals from having the right to petition the UN and the Security Council. The international system is one in which states are the primary actors. Further, it would be difficult to determine when individuals or members of an allegedly targeted group should be rewarded standing. Would there need to be a certain number of individuals together calling upon the UN for remedial action? Would the individuals need to be interrogated to determine the veracity of their claims? Would allowing individuals standing undermine the ability of the sovereign authority to effectively and efficiently govern the territory under its authority? These are all important questions. However, they do not detract from the need for individuals being targeted by their own government to have some way to challenge governmental policy.

The Genocide Convention repeatedly neglects to address situations in which members of a protected group are targeted by their own government. Article VIII of the Convention does not allow targets of genocide perpetrated by their own government to call upon UN organs for their protection. Article IX offers another avenue of recourse, but only state parties to a conflict may submit a case to the International Court of Justice. Thus, what recourse does the Genocide Convention offer to victims of genocide when it is their own state killing them?
The limitations of territorial jurisdiction and the limited recourse available are connected in that the source of their inclusion in the Genocide Convention is the privileging of state sovereignty and the establishment of territorial jurisdiction. There is not a lack of justification for the privileging of sovereignty in a system of state actors who have varied economic and military power. The reciprocation of respect for state sovereignty protects weaker states from the ambitions of stronger states. Ian Brownlie (1990) believes sovereignty and the sovereign equality of states is essential to an international community consisting of states with uniform legal personalities. Brownlie (1990) lists the principle corollaries of sovereign equality as: “(1) a jurisdiction, prima facie exclusive, over a territory and the permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states; and (3) the dependence of obligations arising from customary law and treaties on the consent of the obligor” (287).

Brownlie expresses support for an international system built on the foundation of sovereign equality of all states. If all states at all times fulfilled their customary law and treaty obligations, the system Brownlie advocates would be ideal. However, states do not always respect their obligations under international law, including their obligations under the Genocide Convention. Therefore, Brownlie’s first two corollaries conflict with his third. What does international law prescribe for when a state actor who has exclusive control over its territory is committing genocide against its own people, and interference within that territory by other state actors is prohibited?

Kuper (1981) utilizes a statement made by Henry Morgenthau related to the Armenian Genocide to demonstrate the dangers inherent in jurisdiction based in territorial sovereignty. According to Morgenthau, “Technically, of course, I had no right to interfere. According to the
cold-blooded legalities of the situation, the treatment of Turkish subjects by the Turkish
government was purely a domestic affair” (Kuper 1981, p. 161). Kuper (1981) goes on to say
that “sovereign territorial state claims, as an integral part of its sovereignty, the right to commit
genocide, or engage in genocidal massacres, against peoples under its rule, and that the United
Nations, for all practical purposes, defends this right” (p. 161). Kuper (1981) notes that no state
explicitly claims the right to commit genocide within its territorial borders; rather “the right is
exercised under other more acceptable rubrics, notably the duty to maintain law and order, or the
seemingly sacred mission to preserve the territorial integrity of the state” (p. 161). What might
seem like a hyperbolic conclusion is actually a logical extension of the obligations inherent to a
system that privileges state sovereignty.

As with debate over the specific intent requirement, the majority of scholars have focused
on territorial jurisdiction’s effect on the Genocide Convention’s punishment purpose. As noted
previously, Lippman questions the international community’s assertion that genocide is of
international concern while relying on a system of territorial jurisdiction. Following this
assertion, however, Lippman (1998) immediately turns to the question of whether Nazi Germany
would have voluntarily prosecuted its officials or extradited them to a venue where they would
be tried. Leila Sadat (2000) emphasizes the consequences of what Lippman describes:

One of the primary obstacles to establishing the rule of law has been the culture of
impunity that has prevailed to date. Genocidal leaders flout their crimes openly,
unconcerned about international reactions, which they suspect will probably range from
willful blindness (at best, from their perspective) to diplomatic censure (at worst) (p.
241).

Schabas (2000) adds,

The fundamental difficulty with genocide prosecutions based on territorial jurisdiction is
a practical one. States where the crime took place are unlikely to be willing to proceed,
either because the perpetrators remain in power or influence, or perhaps because a post-
genocide social and political *modus vivendi* is built upon forgetting the crimes of the past” (p. 354).

The arguments made by Lippman, Sadat, and Schabas are also relevant to the problems associated with preventing genocide when committed internally. Using Schabas’ words, the fundamental difficulty with genocide prevention based on territorial jurisdiction is a practical one. States where the crime is taking place are unlikely to be willing to proceed with preventive measures because it is the perpetrators who are holding power or because those holding power have acquiesced to the commission of the crime. With available recourse limited to state actors under Article VIII of the Genocide Convention and to states party to a dispute under Article IX, the opportunity to mitigate the worst consequences of a system of territorial jurisdiction was lost. The true significance of this is clear when considering that genocide committed across state borders, likely in combination with other aggressive acts, plainly fits the definition of a threat to international peace and security. Such a breach of the peace would fall within the mandate of the UN and the Security Council’s responsibilities. Yet, cases of intrastate genocide find themselves outside this mandate, while leaving the targeted group with little or no recourse.

While the limitations created by a system of territorial jurisdiction for the prevention of genocide and the limiting of recourse to state actors clearly make preventing genocide more difficult, they were also the only practical options. Universal preventive jurisdiction would have undermined the entire international system. The sovereign equality of all members would have been undermined in practice more than it has been without universal preventive jurisdiction. Universal preventive jurisdiction would have removed decision making regarding the legal use of force from the Security Council’s jurisdiction. In other words, universal jurisdiction would allow Member States to use force against other Member States based in allegations of genocide.
If non-state actors were given access to recourse within the international system, state sovereignty would again have been undermined. While universal preventive jurisdiction would have legitimized interference by one state in the internal affairs of another state based in allegations of genocide, allowing non-state actors to petition the United Nations and its Security Council would have undermined the ability of the state to govern its territory. It cannot be assumed that non-state actors would solicit measures against their governments only when allegations of genocide were credible. Further, it cannot be assumed that the credibility of non-state actor accusations would be the principal determining factor in whether the individual permanent members of the Security Council validate the accusations. Therefore, it is possible that the correction of these weaknesses would cause more harm than good.

Table 3.4

<table>
<thead>
<tr>
<th>Weakness</th>
<th>How Weakness Makes Genocide Prevention More Difficult</th>
<th>Possible Consequences of Correcting the Weakness</th>
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<tbody>
<tr>
<td><strong>Genocide’s Status in International Law</strong></td>
<td>By failing to define genocide as an inherent threat to international peace and security, cases that do not constitute such a threat fall outside the UN’s mandate and the UNSC’s primary responsibility.</td>
<td>Correcting this deficiency would bring cases of intrastate genocide within the UN’s mandate and the UNSC’s primary responsibility. Because the UNSC would still be responsible for determining whether allegations of genocide were true and, if so, how to respond, correction of this deficiency would not result in the creation of other liabilities.</td>
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<tr>
<td><strong>Specific Intent Requirement</strong></td>
<td>The specific intent requirement prohibits the application of the Genocide Convention to a suspected case of genocide until the intent of the perpetrator is established.</td>
<td>While the correction of this deficiency could result in an increase in allegations of genocide, the international system would still act as a check on the credibility of the allegations through limiting the use of coercive measures to those authorized by the UNSC. Therefore, correcting the deficiency would allow for earlier recognition of genocide without the creation of other serious liabilities.</td>
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<tr>
<td><strong>Omission of Political Groups</strong></td>
<td>The omission of political groups creates a blind spot into which those groups that are protected by the Genocide Convention can be pushed through the creation and propagation of a political conflict narrative.</td>
<td>Correcting this deficiency would remove the blind spot creating by the omission of political groups and would also bring political groups under the Genocide Convention’s protection. Because the inclusion of political groups would not impede the right of states to take action against internal insurrection, correcting the deficiency would not result in the creation of</td>
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The omission of cultural genocide creates a blind spot into which actual cases of genocide could be pushed when utilized in combination with the specific intent requirement. The blind spot allows perpetrators to insist that the intent behind violations of human rights, including the deprivation of life, is to remove the group and its culture from a given territory. The correction of this deficiency would conceptually weaken the term ‘genocide’ by allowing it to be applied to attacks on cultural objects and other actions aimed at suppressing a group’s right to practice its culture. Because other human rights instruments protect cultural rights, it is more important that the term ‘genocide’ continues to represent the most egregious violation of human rights.

Territorial jurisdiction confers jurisdiction for the prevention of genocide onto the territorial authority. Under this form of jurisdiction, the authority planning to commit genocide could also be responsible for its prevention. Correcting this deficiency would create other serious liabilities. Universal jurisdiction would undermine the international rules on the use of force by allowing states to use force against other states based on allegations of genocide.

Because the Genocide Convention only provides recourse to state actors, victims of intrastate genocide have no means through which to seek protection from their own government. Correction of this deficiency would undermine the ability of the state to govern its territory by providing non-state actors access to the UNSC. Non-state actors could solicit action against their governments under false pretenses. Further, the individual permanent members of the UNSC could knowingly validate false allegations out of considerations of national interest.

### Conclusion

Each of the provisions identified as weaknesses stand up to this categorization because each makes it more difficult to prevent genocide. The failure to define genocide as a threat to international peace and security leaves cases of intrastate genocide outside the mandate of the UN and the primary responsibility of the Security Council, the only UN organ legally able to authorize the use of coercive measures for human rights purposes. The specific intent requirement impedes preventive action by making the establishment of the intent to exterminate a protected group in whole or in part a prerequisite to applying the Genocide Convention. Because any attempt to satisfy the specific intent requirement occurs while a case of genocide is ongoing, it increases the likelihood that irreparable harm will occur prior to recognition of genocide, if genocide is recognized at all. The omission of political groups and cultural genocide
created blind spots into which actual cases of genocide can be pushed. If efforts to push such cases into the blind spots created by their omission succeed, genocide would go unrecognized, impeding preventive action. Territorial jurisdiction for the prevention of genocide gives exclusive responsibility for the prevention of genocide to the territorial authority unless the case of genocide amounts to a threat to international peace and security. Therefore, the territorial authority could at once be the perpetrator of genocide and the authority responsible for preventing it. Finally, limiting available recourse to only contracting parties and state actors leaves victims of intrastate genocide without any means of redress.

While each identified weakness is rightfully categorized as such, correcting each weakness does not guarantee an overall improvement in how the international community responds to suspected cases of genocide. In some cases, correcting the weakness could result in negative consequences that outweigh any benefits that would be gained from the weakness’s correction. Those weaknesses that could be corrected without the creation of other liabilities include: (1) the failure to define all cases of genocide as threats to international peace and security; (2) the specific intent requirement for the purpose of preventing genocide; and (3) the omission of political groups from the Genocide Convention. Those weaknesses that if corrected would create other liabilities include: (1) the omission of cultural genocide from the Genocide Convention; (2) the limitations of territorial jurisdiction; and (3) the limits on available recourse.

Correcting the failure to define genocide as a threat to international peace and security would bring intrastate cases of genocide within the Security Council’s responsibilities under a form of subsidiary jurisdiction. When the territorial authority is unable or unwilling to take preventive action, with genocide defined as a threat to international peace and security, the Security Council would have the authority to implement preventive measures under its
enforcement powers. Thus, the Security Council would be in a better position to fulfill the Genocide Convention’s object and purpose of preventing genocide. A separate and less burdensome intent requirement for the purpose of preventing genocide would allow the application of the Genocide Convention to cases early on when evidence suggests a real possibility that genocide is being perpetrated. Therefore, the potential for timely action, action that could stave off irreparable harm, would be increased. Further, the Security Council would still act as a gatekeeper regarding the legal use of force, so allegations of genocide, even with a less burdensome intent requirement, would still be vetted. The inclusion of political groups would improve the Genocide Convention twofold. First, it would bring political groups under the Convention’s protection. Second, it would impede the creation of false narratives that aim to push protected groups into the blind spot created by the exclusion of political groups.

Correcting the omission of cultural genocide, the limitations of territorial jurisdiction, and the limits on available recourse could have negative consequences. Correcting the omission of cultural genocide could conceptually weaken the term ‘genocide’ by allowing the term to be used to describe the attempt to physically destroy members of a protected group and to describe attempts to destroy a group’s cultural objects. Correcting the limitations of territorial jurisdiction by implementing a form of universal jurisdiction for the prevention of genocide would give all contracting parties preventive jurisdiction over all other parties’ territories. This would allow for allegations of genocide to be used as a political tool in that it would allow interference in the internal affairs of states to be justified by genocide accusations. Finally, if available recourse was not limited to state actors, the ability of states to govern their territories would be undermined. Members of groups could solicit action against their governments under false pretenses.
In the next chapter, I will investigate the origins of the weaknesses I have discussed in this chapter. I will try to answer the following questions: (1) Were the weaknesses identified in this chapter present in the initial draft of the Genocide Convention (Original “Secretariat” Draft); (2) If not, how did they end up included in the Ad Hoc Committee Draft (Revised Ad Hoc Committee Draft) and/or the adopted text (Final Adopted Text)?
Chapter 4: The Evolution of the Genocide Convention and Its Preventive Efficacy

In Chapter 3, I completed a textual analysis of the Genocide Convention, identifying six weaknesses that potentially diminish the Convention’s preventive efficacy. The identified weaknesses include: (1) the failure to define genocide as a threat to international peace and security; (2) the requirement that specific intent be established prior to recognizing genocide as such for the purpose of its prevention; (3) the lack of coverage for political groups under the Convention’s protection; (4) the failure to include acts that seek to remove a culture from existence; (5) the limiting of preventive jurisdiction to one’s own territory; and (6) the absence of available recourse for victims of intrastate genocide. I described how each of the identified weaknesses has the potential to weaken the Genocide Convention’s ability to fulfill its object and purpose of the prevention of genocide. I also evaluated what effect correcting each weakness could have on the efficacy of the Genocide Convention, as well as the potential liabilities that could result from their correction. I concluded that the failure to define genocide as a threat to international peace and security, the inclusion of a specific intent requirement for the purpose of preventing genocide, and the omission of political groups could be corrected without the creation of other unintended liabilities. I also concluded that correcting the omission of cultural genocide, the limitations of universal jurisdiction, and the limits on available recourse would create other liabilities and, therefore, might cause more harm than good.

This chapter begins with a brief summary of the Genocide Convention’s drafting history. There were three formal drafts, the Original “Secretariat” Draft, the Revised Ad Hoc Committee Draft, and the Final Adopted Text. Following the overview of the Convention’s drafting history, the texts of the three formal drafts of the Genocide Convention are compared in order to
determine whether the weaknesses identified in Chapter 3 were present in the Original “Secretariat” Draft or were negotiated into the Revised Ad Hoc Committee Draft and/or the Final Adopted Text during the drafting process.\textsuperscript{73} For those weaknesses not present in the Original “Secretariat” Draft, Abtahi’s and Webb’s (2009) \textit{The Genocide Convention: The Travaux Préparatoires}, a full collection of the Genocide Convention’s preparatory work, is used to track the evolution of the Convention through its drafting.\textsuperscript{74} The results of this analysis have potential significance in that if the weaknesses were negotiated into the Final Adopted Text it could illustrate an overriding concern for promoting and protecting national interests over a true commitment to the eradication of genocide.

\textbf{An Overview of the Genocide Convention’s Drafting History}

The mandate for a legal text outlawing genocide began with the United Nations General Assembly’s unanimous adoption of Resolution 96(I) on December 11, 1946.\textsuperscript{75} The Economic and Social Council passed a resolution on March 28, 1947, instructing Secretary-General Trygve Halvdan Lie to undertake the study of genocide and the preparation of a draft convention.\textsuperscript{76} The Secretary-General delegated this duty to the Division of Human Rights and solicited the aid in this task of Mr. Donnedieu de Vabres, Professor at the Paris Faculty of Law, Professor Vespasian Pella, President of the International Association for Penal Law, and Professor Raphael Lemkin, a Polish jurist and the individual who coined the term ‘genocide’. The three experts consulted representatives of the Division of Human Rights and the Legal Department in the completion of

\textsuperscript{73} See Appendix D for the full text of the Original “Secretariat” Draft, Appendix E for the full text of the Revised Ad Hoc Committee Draft and, Appendix A for the full text of the Final Adopted Text (Genocide Convention).

\textsuperscript{74} Abtahi’s and Webb’s (2009) \textit{The Genocide Convention: The Travaux Préparatoires} was an essential tool in the completion of my research. Abtahi and Webb collected into one multi-volume publication the record of the meetings that led to the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide.

\textsuperscript{75} See Appendix B for the full text of General Assembly Resolution 96(I) dated 11 December 1946.

\textsuperscript{76} See Appendix C for the full text of Economic and Social Council Resolution 47(IV) dated 28 March 1947.
the Original “Secretariat” Draft. The Original “Secretariat” Draft was then submitted to the Economic and Social Council in May 1947 (Lippman 1984).

The Economic and Social Council appointed the Ad Hoc Committee on Genocide to continue the drafting of the convention (Lippman 1984). The Ad Hoc Committee voted on its draft of the convention at its twenty-sixth meeting on May 10, 1948. With five votes in favor, one vote against, and one abstention, the Revised Ad Hoc Committee Draft was sent to the Economic and Social Council. With the passing of Resolution 153 (VII) dated August 26, 1948, the Economic and Social Council sent the Revised Ad Hoc Committee Draft to the General Assembly (Lippman 1984). The General Assembly, at its third session, referred the Revised Ad Hoc Committee Draft to its Sixth Committee (Quigley 2006). The Sixth Committee produced a new draft of the convention, which was sent back to the General Assembly. On December 9, 1948, the General Assembly unanimously adopted Resolution 260(A)(III), the Convention on the Prevention and Punishment of the Crime of Genocide.

**Comparative Textual Analysis and Evolution of the Three Formal Drafts of the Genocide Convention**

The three formal drafts of the Genocide Convention were compared to determine whether each weakness identified in Chapter 3 was present in the Original “Secretariat” Draft or was negotiated into the Revised Ad Hoc Committee Draft and/or the Final Adopted Text. After

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77 The Ad Hoc Committee was made up of seven members: China, France, Lebanon, Poland, Soviet Union, United States, and Venezuela. The United Kingdom was the only permanent member of the Security Council not represented at the Ad Hoc Committee.

78 See Appendix F for the full text of Economic and Social Council Resolution 153(VII) dated 26 August 1948.

79 The Sixth Committee acts as the General Assembly’s standing committee and primary forum for the consideration of legal questions. All UN Member States retain representation on the Sixth Committee due to its connection to the General Assembly. Therefore, all five permanent members were represented at the Sixth Committee.

80 See Table 4.1 on page 165-166 for a summary of the changes made from the Original “Secretariat” Draft to the Revised Ad Hoc Committee Draft to the Final Adopted Text.
completing my comparative analysis, I found that five of the six weaknesses identified in the text of the Genocide Convention were absent from the Original “Secretariat” Draft. Therefore, it is clear changes were made to the Genocide Convention that weakened its preventive efficacy.81 The analysis follows the same order in which the weaknesses were identified in Chapter 3: (1) genocide’s status in international law; (2) the specific intent requirement; (3) the omission of political groups; (4) the omission of cultural genocide; (5) the limitations of territorial jurisdiction; and (6) the limits on available recourse.

The Status of Genocide in International Law

In Chapter 3, I argued that the failure to define genocide as a threat to international peace and security was significant because the United Nations’ principal mandate is the maintenance of international peace and security. The Security Council was given the power to authorize collective measures to fulfill the UN’s mandate. However, the Security Council’s power to authorize measures that encroach on state sovereignty is checked by the UN Charter’s protection of that same sovereignty. Therefore, the Security Council’s power to authorize collective action is limited to cases that pose a threat to international peace and security. Those cases that do not pose such a threat are internal matters of the individual states. By failing to define genocide as a threat to international peace and security, cases of intrastate genocide fall within the exclusive responsibilities of the individual states.82 Because this weakness has serious implications for the prevention of intrastate genocide, it is important to determine whether it was present in the

81 See Table 4.2 on page 166-167 for a summary of the positions taken by the permanent members of the Security Council in relation to each of the identified weaknesses.
82 For the full discussion of the significance of this alleged weakness, see Chapter 2 beginning on page 88.
Original “Secretariat” Draft or was negotiated into the Revised Ad Hoc Committee Draft and/or the Final Adopted Text.

Section two of the Original “Secretariat” Draft’s preamble states,

They [Contracting Parties] proclaim that the acts of genocide defined by the present Convention are crimes against the Law of Nations, and that the fundamental exigencies of civilization, *international order and peace* [emphasis added] require their prevention and punishment.\(^{83}\)

The analogous text is located in Article I of the Revised Ad Hoc Committee Draft and the Final Adopted Text. Article I of the Revised Ad Hoc Committee Draft states,

Genocide is a crime under international law whether committed in time of peace or in time of war.

Article I of the Final Adopted Text states,

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

All three formal drafts of the Genocide Convention recognize genocide to be a violation of international law.\(^{84}\) Yet, while the Revised Ad Hoc Committee Draft and the Final Adopted Text left genocide on par with other violations of international law, the Original “Secretariat” Draft elevated genocide to a threat to international peace and security.\(^{85,86}\) This is significant because, as noted above, it is only when a violation of international law amounts to a threat to international peace and security that it falls within the mandate of the United Nations and the Security Council’s responsibilities. Therefore, because genocide was not defined as a threat to

\(^{83}\) The pertinent part of the text is italicized for the purpose of highlighting it. This practice is continued throughout the remainder of the chapter.

\(^{84}\) The Original “Secretariat” Draft use of “Law of Nations” is analogous to “international law”. The use of the “law of nations” to refer to international law originated with Emerich de Vattel’s classic work, *The Law of Nations.*

\(^{85}\) This appears to be the first time this has been noticed or at least discussed.

\(^{86}\) As noted in Chapter 3, “international order and peace” is interpreted as analogous to “international peace and security”.

international peace and security in the Final Adopted Text and because, by definition, cases of intrastate genocide do not constitute a threat to international peace and security, such cases remain within the exclusive jurisdiction of the territorial authority.

The Original “Secretariat” Draft defined genocide as a threat to “international order and peace”. With this elevated legal status, all cases of genocide, regardless of whether they are committed entirely within one territory or across territorial borders, would fall within the United Nations’ mandate and the responsibilities of the Security Council.

Why was this classification omitted from the Revised Ad Hoc Committee Draft and the Final Adopted Text? After reviewing the Genocide Convention’s preparatory work, there is no clear answer to this question. The preparatory work includes only six mentions of “international order and peace”. All six mentions came in the form of reproductions of the Original “Secretariat” Draft. Those negotiating parties who provided comments on the Original “Secretariat” Draft did not provide any insight into whether they believed that classifying genocide as a threat to international peace and security ought to be retained (Abtahi & Webb 2009).

Though there was no debate over whether “international order and peace” ought to be retained, lively debate over the status of genocide in international law ensued in a different context. While debating Article XII of the Original “Secretariat” Draft, which outlines the actions that can be taken by Contracting Parties in response to a suspected case of genocide, the Soviet Union argued that all cases of genocide, as threats to international peace and security,
should be referred to the Security Council, rather than the more general “competent organs of the United Nations”.  

During Ad Hoc Committee negotiations, the Soviet Union proposed the following text for Article VIII.  
The high contracting parties pledge themselves to communicate to the Security Council all the cases of genocide as well as all the cases of violations of the commitments provided for by this Convention to take necessary measures in accordance with Chapter VI [and VII if necessary] of the United Nations Charter.

The Soviet Union argued that all cases of genocide should be dealt with under Chapters VI and VII of the UN Charter (Abtahi & Webb 2009). Chapters VI and VII of the UN Charter define the Security Council’s powers. Chapter VI details the ways in which the Security Council can promote the pacific settlements of disputes, giving the Security Council the authority to “recommend appropriate procedures or methods” for this purpose. Chapter VII outlines the Security Council’s primary authority to determine what coercive action, including the use of military force, ought to be taken in response to threats to international peace and security.  

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87 Article XII states, “Irrespective of any provision in the foregoing articles, should the crimes as defined in this Convention be committed in any part of the world, or should there be serious reasons for suspecting that such crimes have been committed, the High Contracting Parties may call upon the competent organs of the United Nation to take measures for the suppression or prevention of such crimes (emphasis added to highlight the relevant text).”

88 The substance of Article XII was moved to Article VIII by the Ad Hoc Committee.

89 Chapter VI, Article 36, Section 1 of the UN Charter states, “The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation [situations likely to endanger international peace and security] of like nature, recommend appropriate procedures or methods of adjustment.”

90 Chapter VII, Article 41 of the UN Charter states, “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.” Chapter VII, Article 42 adds, “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”
Poland supported the Soviet position, adding that the prevention of genocide was of significant importance and that linking genocide with threats to international peace and security would act as a useful deterrent (Abtahi & Webb 2009). The Soviet and Polish positions are consistent with my own. Because genocide involves the one-sided attempt to destroy a protected group in whole or in part, time is of the essence. In order to prevent irreparable harm, debate over how to respond must be expedited. Because only the Security Council can authorize coercive measures, including the use of military force, it is the only pertinent UN organ for such discussions. In other words, if preventive action is to be taken, it must be authorized by the Security Council. Therefore, it would be illogical to call upon any other UN organ because doing so would only serve to delay the case from reaching the Security Council. This was not lost on the framers of the Original “Secretariat” Draft. As noted in Chapter 3, according to the framers, “It is essential to exercise constant vigilance, and preventive action must be taken, either before the harm is done or before it has assumed wide proportions, for then it takes on the nature of a catastrophe, the effects of which are to a great extent irreparable” (Abtahi & Webb 2009, p. 248).

There was opposition to classifying genocide as a threat to international peace and security. Greece and Belgium challenged the Soviet and Polish positions. Greece argued that it was doubtful whether action could always be taken under Chapters VI and VII of the Charter in response to all cases of genocide (Abtahi & Webb 2009). Had Greece argued that it was doubtful that action would be taken in all cases, we would be in agreement. Calling upon the Security Council to take preventive action does not guarantee preventive action will be taken, nor should it. Such decisions must be left to the discretion of the permanent members. Because Greece claimed that it was doubtful action could be taken under Chapters VI and VII of the UN Charter
in response to all cases of genocide, it is clear Greece did not believe all cases of genocide constitute a threat to international peace and security.

Belgium argued that it was possible that some cases of genocide might not threaten international peace and security (Abtahi & Webb 2009). As noted in Chapter 3, Belgium’s position is not without merit. Genocide committed internally without an aggravating factor which would regionalize or internationalize the conflict by definition fails to constitute a threat to international peace and security. Yet, the purpose of the treaty that was being negotiated was the eradication of genocide through its prevention and punishment. The negotiating parties were not limited to the literal meaning of a threat to international peace and security. The drafting process allowed the negotiating parties to make the determination of whether genocide ought to be defined as a threat to international peace and security. With the Soviet proposal, negotiating parties had the opportunity to elevate genocide’s legal status to that which such a crime deserved.

The Soviet proposal that genocide be defined as a threat to international peace and security and that all cases be referred to the Security Council as the only UN organ with the competency to deal with suspected cases of genocide was rejected by five votes to two.91 With defeat of the Soviet proposal, the Ad Hoc Committee voted on China’s proposal. China proposed:

Any signatory to this Convention may call upon any competent organ of the United Nations to take such action as may be appropriate under the Charter for the prevention and suppression of genocide (Abtahi & Webb 2009, p. 1007).

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91 This was not a roll-call vote. It is likely that Poland joined the Soviet Union, voting in favor of making the Security Council the UN organ to which all genocide referrals should be made. If my assumption is accurate, it would mean China, France, Lebanon, the United States, and Venezuela voted against the Soviet proposal.
China’s proposal was approved five votes to one, with one abstention.\textsuperscript{92} Having been approved, China’s proposed amendment became Article VIII of the Revised Ad Hoc Committee Draft with minor adjustments.\textsuperscript{93}

The Soviet Union continued its effort to include in the convention the obligation that state parties refer all suspected cases of genocide as threats to international peace and security to the Security Council at the Sixth Committee. According to the Soviet Union, The basic thought underlying the convention was that every violation was of the greatest importance. Any act of genocide was always a threat to international peace and security and as such should be dealt with under Chapters VI and VII of the Charter….Chapters VI and VII of the Charter provided means for the prevention and punishment of genocide, means far more concrete and effective than anything possible in the sphere of international jurisdiction (Abtahi & Webb 2009, p. 1734).

France offered to jointly submit the Soviet proposed amendment if the Soviet Union accepted a few minor revisions. France’s revisions removed obligatory notification and reference to any specific articles of the UN Charter because the relevant articles could change from case to case. The Soviet proposal with France’s revisions read:

The High Contracting Parties may call the attention of the Security Council to the cases of genocide and of violations of the present Convention likely to constitute a threat to international peace and security in order that the Security Council may take such measures as it deems necessary to stop the threat (Abtahi & Webb 2009, p. 1735).

France noted that the intention behind the proposed amendment was not to replace the current standards of international jurisdiction, but rather to “fulfill a useful function in the prevention of genocide, since that jurisdiction did not exist” (Abtahi & Webb 2009, p. 1735). This is a significant point. France explicitly recognized an absence of any provisions within the

\textsuperscript{92} This was not a roll-call vote. It is likely that the Soviet Union was the lone no vote and that Poland abstained. Therefore, China would have been joined in support of its resolution by France, Lebanon, the United States, and Venezuela.

\textsuperscript{93} “Any signatory” was replaced with “any party” in Article VIII of the Revised Ad Hoc Committee Draft.
draft resolution that established the draft convention’s preventive jurisdiction. Had the Security Council been named as a UN organ that parties to the convention may call upon, genocide would have been defined as a threat to international peace and security, albeit in a less direct way than found in the Original “Secretariat” Draft or the Soviet Union’s initial proposal. In other words, because the Security Council’s power to authorize collective measures is limited to threats to international peace and security, the mere fact that the joint Soviet-French proposal would have allowed parties to call upon the Security Council implicitly defined genocide as a threat to international peace and security. Thus, the Security Council would have been awarded subsidiary jurisdiction for the prevention of genocide. Subsidiary jurisdiction is a form of jurisdiction that leaves primary jurisdiction in the hands of one party, in this case the territorial authority, while awarding secondary jurisdiction to another party, in this case the Security Council.

The Soviet Union endorsed France’s remarks, stating,

It was not simply a question of repeating the provisions of the Charter. The underlying purpose of the joint amendment was to state in the convention that acts of genocide necessitated the intervention of the most important organ of the United Nations. It was essential to state clearly that acts of genocide were likely to bring about threats to international peace and security (Abtahi & Webb 2009, p. 1743).

Neither the Soviet Union nor France was arguing for universal preventive jurisdiction. Because the purpose of a convention prohibiting genocide was, first and foremost, the prevention of the crime prohibited, the Soviet Union and France essentially argued that the convention ought to say something regarding preventive jurisdiction. The Soviet Union argued that the Security Council should have sole preventive jurisdiction for the prevention of genocide when the territorial authority is unable to prevent genocide or is actively taking part in it. France’s amendment to the Soviet proposal alleviated disagreement over whether notification ought to be
compulsory. However, disagreement remained over the requirement that all suspected cases of genocide that are referred be referred to the Security Council.

Iran offered an amendment to the Soviet-French proposal that would have included the General Assembly alongside the Security Council as another competent organ to which genocide referrals could be made. The Soviet Union and France accepted Iran’s amendment. The Soviet, French, and Iranian delegations agreed on the following text:

The High Contracting Parties may call the attention of the Security Council or, if necessary, of the General Assembly to the cases of genocide and of violations of the present Convention likely to constitute a threat to international peace and security, in order that the Security Council may take such measures as it may deem necessary to stop that threat (Abtahi & Webb 2009, p. 1750).

The Soviet Union called for a roll-call vote on the triple amendment. The amendment was rejected twenty-seven votes to thirteen, with five abstentions. Among the P-5, the Soviet Union and France voted in favor of the amendment, while China, the United States, and the United Kingdom voted against it.

Because the triple amendment placed the General Assembly alongside the Security Council, albeit in a secondary role, as the competent organs for dealing with suspected cases of genocide, it is difficult to come up with an explanation for why the amendment was rejected. The prevention of genocide requires that all cases of genocide fall within the mandate of the United Nations and the responsibilities of the Security Council. Allowing cases of intrastate genocide to escape the UN’s mandate and the Security Council’s responsibilities acts as a clear impediment to the fulfillment of the Genocide Convention’s object and purpose. The framers of the Original “Secretariat” Draft recognized this, choosing to define genocide as a threat to international peace and security. While the language that defined genocide as such was excluded from the Revised Ad Hoc Committee Draft and the Final Adopt Text, there was an effort by some negotiating
parties to reinsert it. These efforts were rebuked even though defining genocide as a threat to international peace and security would have strengthened the Genocide Convention’s preventive efficacy without creating other liabilities. Because defining all cases of genocide as threats to international peace and security would have made the Genocide Convention stronger without causing a ripple of unintended consequences, it is plausible to conclude that the reason behind the rejection of the Soviet proposal was political gamesmanship and the privileging of territorial sovereignty over a full commitment to the prevention of genocide.94

**The Specific Intent Requirement**

In Chapter 3, I argued that the Genocide Convention should have included separate intent requirements for the prevention of genocide and for the punishment of genocide. The basis of my argument was that efforts to establish genocidal intent for the purpose of preventing genocide occurred while the crime was being committed, while those same efforts for the purpose of punishing those suspected of planning and perpetrating genocide occurred after the crime had been apprehended. I identified this as a weakness because it is significantly easier to verify actions and their effects than it is to verify the intent behind the actions. I did not argue that the specific intent requirement should have been excluded from the Genocide Convention. Rather, I argued that the Genocide Convention should have included a separate and less burdensome intent requirement for the purpose of preventing genocide than that required for the punishment of genocide. A separate and less burdensome intent requirement for the prevention of genocide would have permitted the authorization of preventive measures prior to the establishment of

94 Morgenthau’s criticism of territorial sovereignty in relation to the Armenian Genocide is once again relevant here. According to Morgenthau, “Technically, of course, I had no right to interfere. According to the cold-blooded legalities of the situation, the treatment of Turkish subjects by the Turkish government was purely a domestic affair” (Kuper 1981, p. 161).
specific genocidal intent, thus increasing the possibility that irreparable harm could be avoided.

A separate intent requirement would also have allowed the Genocide Convention to retain the specific intent requirement for punitive purposes, an essential element of criminal law.

All three formal drafts of the Genocide Convention contain a specific intent requirement.

Article II of the Original “Secretariat” Draft states,

In this Convention, the word 'genocide' means a criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying it in whole or in part or of preventing its preservation or development.\(^{95}\)

Article II of the Revised Ad Hoc Committee Draft states,

In this Convention genocide means any of the following deliberate acts committed with the intent to destroy a national, racial, religious or political group, on grounds of the national or racial origin, religious belief, or political opinion of its members.

Article II of the Final Adopted Text states,

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

At first glance, it appeared that the specific intent requirement for the purpose of preventing genocide originated in the Original “Secretariat” Draft. However, a broader look at the Original “Secretariat” Draft revealed that the first formal draft of the Genocide Convention contained a separate intent requirement for the purpose of preventing genocide from the purpose of punishing genocide.\(^{96}\)

Article XII of the Original “Secretariat” Draft states,

Should the crimes as defined in this Convention be committed in any part of the world, or should there be serious reasons for suspecting that such crimes have been committed

\(^{95}\) In this context, 'purpose' and 'intent' are interchangeable (Van Schaack, 2011, November 19).

\(^{96}\) As far as I can tell, this is the first time the existence of a separate intent requirement for preventing genocide has been noticed or at least discussed.
[emphasis added], the High Contracting Parties may call upon the competent organs of the United Nations to take measures for the suppression or prevention of such crimes.

Article XII of the Original “Secretariat” Draft clearly allowed for parties to the convention to solicit action to prevent genocide prior to the establishment of specific genocidal intent. Under Article XII of the Original “Secretariat” Draft, if prohibited acts were being perpetrated against one of the protected groups and there was reason to believe the intention behind the guilty acts was the destruction of the group in whole or in part, parties to the convention could seek preventive measures. Language similar to that found in Article XII of the Original “Secretariat” Draft is located in Article VIII of the Revised Ad Hoc Committee Draft and the Final Adopted Text. However, neither retained the language that established a separate and less burdensome intent requirement for the purpose of genocide prevention.97

The Original “Secretariat” Draft did not require proof that the atrocities unequivocally amounted to genocide as legally defined prior to petitioning the UN for preventive action. In their comments on the Original “Secretariat” Draft, the framers noted that for a law to have the preventive effect desired, threats of action for the prevention of genocide alone would not suffice. They argued,

It is essential to exercise constant vigilance, and preventive action must be taken, either before the harm is done or before it has assumed wide proportions, for then it takes on the nature of a catastrophe, the effects of which are to a great extent irreparable” (Abtahi & Webb 2009, p. 248).

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97 Article VIII of the Revised Ad Hoc Committee Draft states, “A party to this Convention may call upon any competent organ of the United Nations to take such action as may be appropriate under the Charter for the prevention and suppression of genocide.” Article VIII of the Final Adopted Text states, “Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.”
The framers of the Original “Secretariat” Draft recognized the importance of active engagement in the prevention of genocide and the deterring effect preventive action could have on the future.

The weakness caused by the inclusion of the same specific intent requirement for the purpose of preventing and punishing genocide did not originate in the Original “Secretariat” Draft. The framers of the Original “Secretariat” Draft recognized that each of the convention’s two prongs ought to have separate standards for their fulfillment. Had the separate and less burdensome intent requirement been retained in the Genocide Convention, the Convention would have been applicable to suspected cases of genocide prior to the establishment of specific genocidal intent. This would have allowed for the authorization of preventive measures prior to the commission of irreparable harm. If one of the Genocide Convention’s purposes was the prevention of the crime it prohibits, why was the separate intent requirement for the prevention of genocide omitted from the Final Adopted Text?

After reviewing the Genocide Convention’s preparatory work, there is no clear answer to this question. The negotiating parties did not discuss a separate intent requirement for the purpose of preventing genocide despite its presence in the Original “Secretariat” Draft. The debate was exclusively over the essential role specific intent plays in criminal proceedings and its potential impediment to the successful prosecution of suspected planners and perpetrators of genocide. The framers of the Original “Secretariat” Draft were not immune from this overriding focus.98 The framers were in agreement over the need for there to be an intent requirement, which was incorporated into Article I of the Original “Secretariat” Draft. They also recognized

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98 It is important to note here that, as previously noted, the framers of the Original “Secretariat” Draft included a separate intent requirement for the prevention of genocide in Article XII of the Original “Secretariat” Draft. Therefore, their commitment to a specific intent requirement in Article I of the Original “Secretariat” Draft was warranted.
the difficulty in proving specific intent for the purpose of punishing suspected planners and perpetrators of genocide. The framers used concentration camps to exemplify this difficulty:

Obviously, if members of a group of human beings are placed in concentration camps where the annual death rate is thirty percent to forty percent, the intention to commit genocide is unquestionable. There may be borderline cases where a relatively high death rate might be ascribed to lack of attention, negligence or inhumanity, which, though highly reprehensible, would not constitute evidence of intention to commit genocide (Lippman 1984, p. 11).

The Revised Ad Hoc Committee Draft included a specific intent requirement, but replaced the term “purpose,” which was used in the Original “Secretariat” Draft, with the term “intent”. At the Sixth Committee, the Soviet Union attempted to replace the phrase “committed with the intent to destroy” a protected group with “aimed at the physical destruction” of a protected group (Lippman 1984). The Soviet Union argued that “perpetrators of acts of genocide would in certain cases be able to claim that they were not in fact guilty of genocide, having had no intent to destroy a given group” (Lippman 1984, p. 41). The Soviet proposal aimed to broaden the acts that could constitute genocide from strictly positive acts with genocidal intent to include acts of negligence “resulting in destruction” of a protected group (Lippman 1994, p. 26). This would also, therefore, expand the convention’s intent requirement to include purposeful negligence.

The Sixth Committee rejected the Soviet proposal by thirty-six votes to eleven, with four abstentions. The United States was adamant about the convention containing a specific intent requirement, arguing that the removal of specific intent would alter the definition of genocide because specific genocidal intent is what separated genocide from other crimes (Lippman 1994).

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Brazil’s explanation for its vote against the Soviet proposal succinctly summarized the importance of the element of criminal intent:

Genocide was characterized by the factor of particular intent to destroy a group. In the absence of that factor, whatever the degree of atrocity of an act and however similar it might be to the acts described in the convention, that act could still not be called genocide....[I]t was important to retain the concept of dolus specialis. 100

The Sixth Committee retained the specific intent requirement and its inclusion in the Final Adopted Text was approved through its adoption. Because any consideration of the inclusion of separate intent requirements for the purposes of preventing and punishing genocide was absent, the negotiating parties had to choose between including a less burdensome intent requirement for both purposes or not at all. A less burdensome intent requirement would have permitted the authorization of measures to prevent genocide prior to the establishment of the specific intent of the planners and perpetrators. However, a less burdensome intent requirement would have also conflicted with criminal law’s essential element of specific intent. The majority of the negotiating parties chose the latter.

With one intent requirement for both prevention and punishment of genocide, the decision of the majority of negotiating parties to support the latter is defensible. While the Genocide Convention aims to prevent the commission of genocide, it is also a form of punitive legislation. Therefore, as already noted, criminal intent is an essential element. Yet, this conclusion does not vindicate the negotiating parties. They still decided to omit the separate intent requirement for the purpose of preventing genocide from the drafts of the convention subsequent to the Original “Secretariat” Draft without even debating its merits. The negotiating parties either failed to consider that prevention of genocide and punishment of genocide required

100 Dolus specialis is Latin for specific intent.
different standards for their achievement or intentionally saddled both with the same standards. A separate and less burdensome intent requirement for the purpose of preventing genocide was essential. A separate and less burdensome intent requirement would have allowed for the application of the Genocide Convention to cases early on when evidence suggested a real possibility that genocide was being perpetrated and that was what the framers of the Original “Secretariat” Draft envisioned. Further, attempts to exploit a separate and less burdensome intent requirement through making false allegations of genocide would still have required the authorization of preventive measures by the Security Council. Therefore, a separate intent requirement would not have created other liabilities beyond those that already existed.\(^\text{101}\)

The Omission of Political Groups

In Chapter 3, I argued that the omission of political groups from the Genocide Convention’s protection was a weakness because it complicates the recognition of acts committed against groups that are protected by the Genocide Convention and, therefore, makes it more difficult to prevent genocide.\(^\text{102}\) I noted that the omission of political groups allows the planners and perpetrators of genocide to create a political conflict narrative, thus removing actual cases of genocide from the Convention’s coverage through defining the victimized group as a political group and framing the deaths of members of the group as unintended consequences of a political armed conflict.

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\(^{101}\) As noted previously, the Security Council is far from a perfect decision maker when it comes to authorizing or restricting the use of coercive measures, but it would have provided a check regarding a less burdensome intent requirement for the prevention of genocide.

\(^{102}\) As noted in Chapter 3, I do not consider the absence of protection for political groups a weakness in relation to the prevention of genocide because political groups are not protected by the Genocide Convention. However, because the omission of political groups from the Genocide Convention’s protection may have consequences for those groups that are protected by the Genocide Convention, I identified it as a weakness.
The Original “Secretariat” Draft defines which groups it protects in Article I. Article I of the Original “Secretariat” Draft states:

The purpose of this Convention is to prevent destruction of racial, national, linguistic, religious or political [emphasis added] groups [of] human beings.

The Revised Ad Hoc Committee Draft defines which groups it protects in Article II. Article II of the Revised Ad Hoc Committee Draft states:

In this Convention genocide means any of the following deliberate acts committed with the intent to destroy a national, racial, religious or political [emphasis added] group, on grounds of the national or racial origin, religious belief, or political opinion of its members.

The Final Adopted Text also defines which groups it protects in Article II. Article II of the Final Adopted Text states:

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

General Assembly Resolution 96(I) dated December 11, 1946, states that “many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.”

The Original “Secretariat” Draft and the Revised Ad Hoc Committee Draft included political groups within their protection, just as the General Assembly resolution that was the impetus for development of a convention prohibiting the crime of genocide did. Having been included in the first two formal drafts of the Genocide Convention, why were political groups omitted from the Final Adopted Text?

Despite being included in the first two of the three formal drafts of the Genocide Convention, there were disagreements over whether political groups ought to be protected from the very beginning. The framers of the Original “Secretariat” Draft strongly disagreed over whether protection for political groups against genocide was warranted. Lemkin was opposed to
their inclusion in the Original “Secretariat” Draft. He argued that only permanent groups should be protected by a convention prohibiting genocide. Essentially, Lemkin argued that groups protected under the Genocide Convention ought to be groups into which individuals were born. The inclusion of groups seen as fluid, those individuals might move in and out of during their lifetime, lacked the “permanency and the specific characteristics of the other groups referred to” (Lippman 1984, p. 11). Lemkin also urged a pragmatic approach to the convention, arguing that provisions that would lead the convention to “run the risk of failure by introducing ideas on which the world is deeply divided” ought to be avoided (Lippman 1984, p. 11). Meanwhile, de Vabres argued that “genocide was an odious crime, regardless of the group which fell victim to it and that the exclusion of political groups might be regarded as justifying genocide in the case of such groups” (Lippman 1984, p. 11-12).

Disagreement amongst the framers of the Original “Secretariat” Draft did not result in the omission of political groups from the Original “Secretariat” Draft. In the end, the framers of the Original “Secretariat” Draft chose to respect the General Assembly’s intentions that political groups be protected. And by a narrow margin of four votes to three, the Revised Ad Hoc Committee Draft retained protection for political groups.

Arguments made at the Ad Hoc Committee in support of and in opposition to the inclusion of political groups mirrored those made by the framers of the Original “Secretariat” Draft. For example, the Soviet Union argued that political groups lacked the stability of the other groups protected and that their inclusion could dissuade some states from ratifying the convention out of fear that efforts to combat domestic subversives would be labeled genocide. Ecuador challenged the Soviet argument, noting that the police powers necessary to respond to

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103 See General Assembly Resolution 96(I) dated 11 December 1946 in Appendix B.
domestic insurrection were distinct from acts of genocide (Lippman 1984). Thus, according to Ecuador, the inclusion of political groups would not interfere with a state’s right to protect itself against internal subversion free from the fear of being accused of genocide unless the measures taken involved an attempt to exterminate the political group in whole or in part.

Arguments in favor of retaining political groups under the protection of the convention were numerous. The United States referred back to General Assembly Resolution 96(I), arguing that the convention should incorporate the expressed intent of the General Assembly. Bolivia noted that political groups, like the other groups protected, “were united by a common ideal” (Lippman 1984, p. 42). The Netherlands added that “while the Nazis had destroyed millions of human beings…on account of their race or their nationality, they had also destroyed a great many others for their political opinions” (Van Schaack 1997, p. 2265). The United Kingdom noted that the same argument against the inclusion of political groups could be used against the inclusion of national and religious groups (Van Schaack 1997).

The Revised Ad Hoc Committee Draft was submitted to the Sixth Committee by the General Assembly for further debate. Arguments made before the Sixth Committee were essentially an extension of those made previously. Opponents of the inclusion of political groups reiterated their weakly veiled threat to abandon the convention if political groups were included. Thus, the primary concern among those who supported the inclusion of political groups was ensuring the convention would achieve enough favorable votes for its adoption. Otherwise, all the effort to create a convention preventing genocide would be for naught. This concern, rather than any substantive arguments against the inclusion of political groups, would be the driving force behind their omission from the Final Adopted Text.
The Sixth Committee held two separate votes over whether political groups would be included in the final draft of the convention to be submitted to the General Assembly for adoption. The first vote approved the retention of political groups by twenty-nine votes to thirteen, with nine abstentions (Schabas 2000). Later in the Sixth Committee meetings, disagreement over whether political groups ought to be included in the final draft was revisited, despite, as noted by Schabas (2000), “an apparently convincing majority” support for their inclusion (p. 138). Once again, the principal argument for the omission of political groups was not that political groups did not deserve protection, though there were certainly negotiating parties that made such a case; rather, its opposition to the inclusion of political groups was, as Egypt put it, “primarily for practical reasons” (Schabas 2000, p. 139). In other words, the opposition to the inclusion of political groups was political calculation. With the possibility that the final text could be rejected due to the inclusion of political groups, the United States and other supporters of the inclusion of political groups bowed under the pressure. The renewed movement for the omission of political groups succeeded by a vote of twenty-two to six, with twelve abstentions (Abtahi & Webb 2009).

Political groups were omitted from the Final Adopted Text despite being included in the General Assembly resolution that authorized the Genocide Convention’s creation. Political groups were also omitted despite their inclusion in the Original “Secretariat” Draft and the Revised Ad Hoc Committee Draft. Further, the arguments made in opposition to the inclusion of political groups were unconvincing. The Soviet Union’s argument that political groups lacked permanency could be applied to other groups protected by the Genocide Convention. As noted in Chapter 3, religious groups similarly lack permanency. One may be born into a family that practices a certain religion. While growing up in an environment that promotes the practice of
this religion increases the likelihood of continued identification with the religious group, it by no means ensures or requires continued identification with the group. The inclusion of ethnic groups seems to assume the members of one ethnic group will only marry other members of the same ethnic group, producing children of the same ethnicity. Neither of these are realities in any absolute sense. Also, the inclusion of political groups would not have interfered with a state’s right to defend its territorial integrity against internal uprisings and secessionist movements as some negotiating parties claimed.

The omission of political groups is arguably the Genocide Convention’s most criticized weakness.\(^\text{104}\) Their omission from the Final Adopted Text left political groups unprotected and created a blind spot into which those groups protected could be pushed through the creation of political conflict narratives. Significantly, the most effective argument made by opponents of the inclusion of political groups was not that political groups did not belong in a convention prohibiting genocide; rather, the most effective argument against their inclusion was that opponents would reject the Final Adopted Text if political groups were included.

**The Omission of Cultural Genocide**

In Chapter 3, I argued that, like the omission of political groups from the Genocide Convention, the omission of cultural genocide created a blind spot into which actual cases of genocide could be pushed. I argued that the omission of cultural genocide together with the Genocide Convention’s specific intent requirement allows perpetrators to insist that the intent behind violations of human rights, including the deprivation of life, is the removal of the group and its culture from a given territory.

United Nations General Assembly Resolution 96(I) stated that genocide “is a denial of the right of existence of entire human groups” that “results in great losses to humanity in the form of cultural and other contributions represented by these human groups.” The Original “Secretariat” Draft and the Revised Ad Hoc Committee Draft preserved the intentions of the General Assembly through the inclusion of cultural genocide. However, cultural genocide was omitted from the Final Adopted Text. Article II of the Original “Secretariat” Draft defines cultural genocide as:

Destroying 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 historical, artistic, or religious value and of objects used in religious worship.

Article III of the Revised Ad Hoc Committee Draft defines cultural genocide as:

In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial or religious group on grounds of the national or racial origin or the religious belief of its members such as:
1. Prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;
2. Destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.

The circumstances surrounding the omission of cultural genocide from the Final Adopted Text are not all that different from those surrounding the omission of political groups. The General Assembly resolution that authorized the Genocide Convention’s creation noted the importance of protecting cultures against extinction, and the Original “Secretariat” Draft and the
Ad Hoc Committee Draft included the prohibition of cultural genocide. Despite this, cultural genocide was omitted from the Final Adopted Text.

As with political groups, there was disagreement from the start over whether cultures ought to be included in a convention prohibiting genocide. In this case, the roles of the framers were reversed. Lemkin argued in favor of the inclusion of cultural genocide in the Original “Secretariat” Draft, meanwhile de Vabres and Pella argued for its exclusion. Lemkin insisted on the need for the protection against cultural genocide, arguing that the existence of a group required the preservation of “its spirit and moral unity” (Abtahi & Webb 2009, p. 11). In 1946, before the General Assembly passed its resolution affirming genocide to be a violation of international law, Lemkin (1946) wrote,

Our whole heritage is a product of the contributions of all nations. We can best understand this when we realize how impoverished our culture would be if the peoples doomed by Germany, such as the Jews, had not been permitted to create the Bible, or to give birth to an Einstein, a Spinoza; if the Poles had not had the opportunity to give to the world a Copernicus, a Chopin, a Curie; the Czechs, a Huss, a Dvorak; the Greeks, a Plato and a Socrates; the Russians, a Tolstoy and a Shostakovich (p. 228).

For Lemkin, the destruction of a group’s culture would be just as effective in destroying a group’s existence as through the group’s physical destruction. Pella and de Vabres disagreed not necessarily with Lemkin’s concern, but rather with whether a convention against genocide was the appropriate place to approach crimes against cultures. They saw the prohibition of cultural genocide as “an undue extension of the notion of genocide” to the protection of minorities “under cover of the term genocide” (Lippman 1984, p. 11). As with protection for political groups, the framers of the Original “Secretariat” Draft chose to respect the General Assembly’s intentions that cultural genocide be prohibited.
The Ad Hoc Committee voted six to one in favor of retaining the prohibition of cultural genocide. During negotiations in the Ad Hoc Committee, two competing arguments were made concerning the extermination of a culture, resulting in a compromise. One argument was that a group could be exterminated through either its physical destruction or the destruction of the culture that defines the group and to which the group’s identity is entwined. The opposing argument was that a convention prohibiting genocide should be restricted to the most severe acts; the protection of cultures and minority rights could be dealt with by UN organs concerned with human rights and discrimination against minority groups. The Ad Hoc Committee secured the vote in favor of retention through a compromise. The Ad Hoc Committee separated cultural genocide from physical and biological genocide as suggested by the U.S. and France. The U.S. recommended the separation so as to “enable Governments to make reservations on a particular point of the Convention” (Schabas 2000, p. 181). Cultural genocide was included in an article separate from that which included physical and biological genocide in the Revised Ad Hoc Committee Draft.  

Despite the compromise, the lone dissenting vote was cast by the United States. According to the U.S., “The decision to make genocide a new international crime was extremely serious, and the United States believed that the crime should be limited to barbarous acts committed against individuals, which, in the eyes of the public, constituted the basic concept of genocide” (Schabas 2000, p. 181). Further, the U.S. adopted a similar strategy to that used by negotiating parties opposed to the inclusion of political groups: “Were the Committee to attempt to cover too wide a field in the preparation of a draft convention for example, in attempting to

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105 Cultural genocide is included in Article III of the Revised Ad Hoc Committee Draft while physical and biological genocide are included in Article II.
define cultural genocide – however reprehensible that crime might be – it might well run the risk to find some States would refuse to ratify the convention” (Schabas 2000, p. 181). The U.S. position became increasingly hostile even as its previous demands were met. Though the U.S. opposed the inclusion of cultural genocide from the start, it proposed, along with France, the terms of the compromise that led to the separation of cultural genocide from the other forms of genocide. This allowed the U.S. and other negotiating parties to submit a reservation to the article containing cultural genocide. The U.S. also implicitly claimed that, “in the eyes of the public”, attempts to destroy a culture’s existence did not constitute genocide. It is unclear whether the U.S. had polling information to support this claim. Finally, the U.S. argued that “some States” would not vote in favor of adopting the draft convention if cultural genocide was included.

The Revised Ad Hoc Committee Draft was submitted to the Sixth Committee for further debate, where the question of cultural genocide was revisited. Pakistan argued in favor of retaining cultural genocide in the Final Adopted Text. Pakistan argued that the physical destruction of a group and the destruction of a group’s culture were inextricably intertwined. Pakistan stated that the motive for genocide was the destruction of the ideas and values of the group’s culture and that physical destruction was just one means to achieving that end. According to Pakistan,

Thus, the end and the means were closely linked together; cultural genocide and physical genocide were indivisible. It would be against all reason to treat physical genocide as a crime and not to do the same for cultural genocide (Lippman 1984, p. 44).

Pakistan also noted that Resolution 96(I) recognized that genocide had inflicted “great losses on humanity in the form of cultural and other contributions.” Thus, Pakistan argued, the General Assembly had intended that cultures be protected. In response to those who brought up the
importance of cultural assimilation, Pakistan noted that assimilation could be used as a “euphemism concealing measures of coercion designed to eliminate certain forms of culture” (Lippman 1984, p. 44).

Denmark, the Netherlands, France, and the U.S. were vocal opponents of retaining cultural genocide during debate in the Sixth Committee. Denmark argued that the inclusion of cultural genocide would relegate the convention to being “a tool for political propaganda instead of an international legal instrument” (Lippman 1984, p. 45). Denmark added that equating mass murder and the closing of libraries demonstrated a clear lack of logic and proportionality (Lippman 1984). The Netherlands argued that cultural genocide was too vague to be pinned down in a clear and concise definition. Further, according to the Netherlands, it was questionable whether “all cultures, even the most barbarous, deserved protection, and whether the assimilation resulting from the civilizing action of a State also constituted genocide” (Lippman 1984, p. 45). France argued that protection of cultures was a human rights issue and, therefore, ought to be protected “within the framework of the international declaration on human rights” (Schabas 2000, p. 183). Finally, the U.S. argued that the convention should be limited to those acts that “shocked the conscience of mankind” (Abtahi & Webb 2009, p. 727).

The negotiating parties that opposed the inclusion of cultural genocide in the Final Adopted Text succeeded in its omission at the Sixth Committee by a vote of twenty-five to sixteen, with four abstentions. The Soviet Union attempted one last effort to include cultural...
genocide at the General Assembly prior to the official vote on the Final Adopted Text. The proposed inclusion of cultural genocide was soundly defeated with fourteen votes in favor of inclusion, thirty-one against, and ten abstentions.

During negotiations, plausible arguments were made in support of and in opposition to the inclusion of cultural genocide. The importance of preserving cultures is difficult to understate. As Lemkin made clear, restrictions against members of a culture and their practices intended to exterminate the culture could deprive present and future generations of the contributions of the exterminated cultures. Pakistan was also correct to argue that physical genocide and cultural genocide were simply two different means to the same end. Protected groups could be destroyed through the annihilation of their cultures. Yet, the means of achieving the destruction of a group through prohibiting its cultural practices is vastly different from the means of achieving the group’s immediate physical destruction. This is why I agree with some components of the arguments made by Denmark, France, and the United States.

Denmark, France, and the United States were correct that attacks on cultural objects should not be morally equated to physical attacks on the actual human members of a group protected by the draft convention. Yet, that is not the reason why I support the omission of cultural genocide. As noted in Chapter 3, I believe the compromise that led to separating cultural genocide from physical and biological genocide was appropriate. I agree with Pakistan’s argument that the extermination of a protected group could be achieved either through its immediate physical destruction or through a slower policy of eliminating all remnants of its cultural heritage. Therefore, in principle, I support the prohibition of cultural genocide. Pragmatically, however, I support the omission of cultural genocide from the Genocide Convention. As I argued in Chapter 3, because acts that constitute cultural genocide include
prohibition of the use of the language of the group and the destruction of cultural objects and artifacts, I concluded that correcting the weakness would allow the term ‘genocide’ to be used to describe both killing members of a protected group and the destruction of cultural objects, the latter of which happens far more frequently than the former. Therefore, had cultural genocide been included in the Final Adopted Text, the term ‘genocide’ would have been applied far more often to acts that constitute cultural genocide than the relatively more egregious attempt to physically destroy a protected group in whole or in part. This, as argued previously, would conceptually weaken the term genocide, which was created to differentiate genocide from other forms of mass murder.

Before moving onto the limitations of territorial jurisdiction, it is important that the argument made by the Netherlands and the threat made by the U.S. to reject the draft convention are fully analyzed. I was especially troubled by the argument made by the Netherlands. To reiterate, the Netherlands questioned whether “all cultures, even the most barbarous, deserved protection, and whether the assimilation resulting from the civilizing action of a State also constituted genocide” (Lippman 1984, p. 45). It is possible the Netherlands was referring strictly to Nazi culture, but there is also the possibility the Netherlands was concerned more generally about its treatment of the cultures of its colonies. At the time revisions to the Revised Ad Hoc Committee Draft were being negotiated, the Netherlands was fighting to maintain its Indonesian colony. The Netherlands also maintained control over Suriname and the Netherlands Antilles. Meanwhile, the United States copied the Soviet Union’s tactic, threatening to torpedo adoption of the draft convention if cultural genocide was included. Therefore, it is important to note that the most effective argument made by opponents of the inclusion of cultural genocide was that they would reject the Final Adopted Text if cultural genocide was included.
Limitations of Territorial Jurisdiction

In Chapter 3, I argued that the combination of the Genocide Convention’s preamble and Articles I, V, and XII clearly establish territorial jurisdiction for prevention of genocide. Under territorial preventive jurisdiction, the territorial authority, the same authority that could perpetrate genocide, holds exclusive jurisdiction for the prevention of genocide within its territorial borders. There were options other than territorial jurisdiction. The negotiating parties could have provided universal jurisdiction for the prevention of genocide. However, universal jurisdiction would have undermined territorial sovereignty beyond what would and should be acceptable by essentially permitting accusations of genocide to be a pretense for the interference in internal state matters by external state actors.

There was a reasonable alternative to the above absolutist forms of jurisdiction. The negotiating parties could have defined genocide as a threat to international peace and security, which would have awarded subsidiary preventive jurisdiction to the Security Council. This would have been consistent with the existing rules established by the UN Charter. The Security Council already held subsidiary jurisdiction over threats to international peace and security. Therefore, had genocide been elevated to a threat to international peace and security, the Security Council would have held subsidiary preventive jurisdiction over genocide. Instead, the negotiating parties chose to limit preventive jurisdiction to each of the individual territorial authorities.

The preamble of the Genocide Convention states, “Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required.” This reference to international cooperation mirrors the language used in the UN Charter. Article 1(3) states that one of the main purposes of the UN is “to achieve international cooperation in solving
problems of an economic, social, cultural, or humanitarian character.” Article I of the Genocide Convention commits Contracting Parties to undertake the prevention and punishment of genocide without specifying when or where Contracting Parties are to fulfill this duty. The UN Charter provides the answer to the questions of when and where. States may use force if necessary against perpetrators of genocide within their own territory and against external actors when the external actors are committing genocide within the territory of the other state. States cannot legally prevent genocide through the use of force in any other territory unless authorized first by the Security Council under its UN Charter Chapter VII enforcement powers. However, even the Security Council’s subsidiary jurisdiction is limited to cases of interstate genocide because, as noted above, genocide was not defined as a threat to international peace and security. Therefore, intrastate genocide falls within the jurisdiction of the territorial authority.

Article V of the Genocide Convention states, “The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention.” States cannot cite domestic legislation to justify interfering in the internal affairs of another state. Therefore, Article V provides further evidence of a system of territorial jurisdiction for the prevention of genocide. Finally, Article XII of the Genocide Convention allows Contracting Parties to decide whether the Genocide Convention applies to foreign territories under their control. I referred to this as an opt-in clause. I argued that because the Genocide Convention does not automatically confer preventive jurisdiction over territories under foreign control to the foreign state actor, it must be concluded that no foreign actor can claim to have preventive jurisdiction over a territory under the direct and proper control of another Contracting Party.
A number of significant changes were made concerning the Genocide Convention’s system of preventive jurisdiction as the convention evolved from the Original “Secretariat” Draft to the Final Adopted Text. While all three formal drafts of the convention require that domestic legislation be passed to give full effect to the convention’s provisions, the Original “Secretariat” Draft included a jurisdictional phrase not found in the subsequent drafts.  

Section three of the Original “Secretariat” Draft’s preamble states,

They [Contracting Parties] pledge themselves to prevent and to repress such acts wherever they may occur [emphasis added].

Because the Original “Secretariat” Draft does not contain language calling for international cooperation for the prevention of genocide and because the Revised Ad Hoc Committee Draft does not contain the jurisdictional phrase, “wherever they may occur,” it can be concluded that the jurisdiction phrase found in the Original “Secretariat” Draft” was replaced in the Revised Ad Hoc Committee Draft’s preamble by:

Being convinced that the prevention and punishment of genocide requires international co-operation.

Similarly, the Final Adopted Text states,

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required.

There is a clear difference between requiring international cooperation for the prevention of genocide and requiring that Contracting Parties undertake the prevention of genocide wherever it may occur. “Wherever they may occur” is an explicit statement regarding preventive jurisdiction.

Had this phrase been retained in the Revised Ad Hoc Committee Draft and the Final Adopted

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107 See Article VI of the Original “Secretariat” Draft (Appendix D) and the Revised Ad Hoc Committee Draft (Appendix E), and Article V of the Final Adopted Text (Appendix A) for the common domestic legislation requirement.
Text, it would have created a commitment of Contracting Parties to the universal prevention of genocide.

The Original “Secretariat” Draft required that Contracting Parties “pledge themselves to prevent and to repress such acts wherever they may occur.” This jurisdictional phrase was excluded from the Revised Ad Hoc Committee Draft and the Final Adopted Text without any debate over its substance. The only direct reference to this provision came from the United States. The U.S. criticized the inclusion of questions of jurisdiction in the Original “Secretariat” Draft’s preamble, arguing that such questions should be addressed in the body of the treaty (Abtahi & Webb 2009). Retention of this jurisdictional phrase would have designated responsibility for the prevention of all cases of genocide to all Contracting Parties. In other words, had “wherever they may occur” been included in the Final Adopted Text, jurisdiction for the prevention of genocide would have been universal. Because the negotiating parties ultimately adopted territorial jurisdiction for the prevention of genocide, cases of intrastate genocide leave the authority most likely to perpetrate genocide responsible for its prevention.

The jurisdictional phrase “wherever they may occur” played a similar role to that played by the less burdensome intent provision, “or should there be serious reasons for suspecting that such crimes have been committed.” They both created separate standards for the prevention prong of the convention from the punishment prong. As was noted in Chapter 3, though the purposes of the two prongs overlap, fulfillment of each of the two prongs involves divergent acts. Therefore, separate procedures and standards for each would have been completely justified.

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108 See Article XII of the Original “Secretariat” Draft in Appendix D for the full text.
During meetings of the Sixth Committee, Iran submitted an amendment that would have established a form of subsidiary punitive jurisdiction for the crime of genocide. While not directly related to preventive jurisdiction, the arguments made for and against subsidiary punitive jurisdiction are instructive. Iran argued that its amendment “was intended to remedy a deficiency in the system of punishment of genocide” (Abtahi & Webb 2009, p. 1715). Iran argued that primary jurisdiction for trying those suspected of planning and perpetrating genocide rested with the state on whose territory the alleged crimes were committed. However, according to Iran, “if it [the territorial authority] expressed no such desire, it thereby tacitly renounced its right to try him” (Abtahi & Webb 2009, p. 1716). Essentially, Iran was arguing that if the authority with jurisdiction over the territory on which genocide was committed was unable or unwilling to try genocide suspects, or was an alleged participant in the perpetration of genocide, a form of subsidiary punitive jurisdiction was needed.

Iran explained that its position was the right balance between state sovereignty rights and the need to ensure those who plan and perpetrate genocide are punished. Iran argued that opposition to subsidiary punitive jurisdiction grounded in the principle of the sovereignty of states was misguided because subsidiary punitive jurisdiction allowed the state on whose territory the crime had been committed to seek the extradition of the alleged violator for trial. Thus, Iran asked, without subsidiary punitive jurisdiction, what would happen to a violator of the prohibition of genocide if extradition was not requested? The suspect would not be extradited and would not be punished. This, Iran argued, must be avoided (Abtahi & Webb 2009).

Opposing states argued that subsidiary punitive jurisdiction for punishment of genocide would stand in contrast with the accepted traditional principles of international law by allowing a state to punish a foreigner for crimes committed outside of the punishing state. Further, the
opposition argued, because states are often implicated in the commission of genocide, the Iranian position would allow the courts of one state to punish the leaders of another state for crimes committed outside of the punishing state. This, the opposition argued, could result in dangerous international tension (Abtahi & Webb 2009). The United States concluded that subsidiary punitive jurisdiction was “one of the most dangerous and unacceptable of principles” (Abtahi & Webb 2009, p. 1721). The Iranian amendment was rejected by twenty-nine votes against, six votes in favor, and ten abstentions (Abtahi & Webb 2009).

Iran’s proposed amendment and the debate that followed highlights the fact that a similar and necessary discussion was never held over preventive jurisdiction. Consider Iran’s argument in support of subsidiary punitive jurisdiction. Iran argued that subsidiary punitive jurisdiction was not a threat to existing international law because it worked in cooperation with state sovereignty rather than against it. The territorial authority maintained primary responsibility for and jurisdiction over punishing the planners and perpetrators of genocide within the territory it governs. However, if the territorial authority demonstrated itself to be unable or unwilling to enforce the punishment prong of the convention, other members of the international community would be awarded subsidiary punitive jurisdiction, thus making it more likely that the punishment prong would be enforced. In further support of this position, Iran stated,

The source of the jurisdiction vested in national courts was the need for maintaining order in their respective territories. Genocide, however, involved not only the law and order of the State on whose territory the crime was committed, but also the law and order of all States constituting the family of nations (Abtahi & Webb 2009, p. 1717).

Clearly, the same arguments made by Iran in support of subsidiary punitive jurisdiction could have been made in support of a system of subsidiary preventive jurisdiction. To allow planners and perpetrators of genocide to get away with their crimes because the authority over
the territory on which genocide was committed lacks the desire or ability to prosecute the
individuals, as Iran argued, must be avoided. It is arguably even more important that prevention
of genocide not rely on the willingness of the territorial authority alone for the crime’s
prevention because the territorial authority might also be responsible for the commission of the
crime. If the territorial authority is actively engaged in intrastate genocide or complicit in its
commission, some form of subsidiary preventive jurisdiction is necessary to increase the
likelihood that the prevention prong of the convention is enforced. Primary preventive
jurisdiction would remain with the territorial authority. The explicit establishment of a form of
subsidiary preventive jurisdiction would have remedied a deficiency in the system of prevention
of genocide.

The problem, therefore, is not that the Genocide Convention does not include universal
preventive jurisdiction. As argued previously, correcting the limitations of territorial jurisdiction
with a form of universal preventive jurisdiction would create other liabilities, most significantly
universal preventive jurisdiction would undermine the international system’s ability to regulate
the use of force in international affairs. The problem is that there was a sweeping lack of debate
concerning the enforcement of the convention’s prevention prong. While universal preventive
jurisdiction was not the answer, ensuring that prevention of intrastate genocide did not rest
exclusively within the jurisdiction of the territorial authority was essential. Yet, the negotiating
parties failed to compliment territorial jurisdiction with some form of subsidiary preventive
jurisdiction. This emphasizes why the failure to define genocide as an inherent threat to
international peace and security is so significant. Had all cases of genocide been classified as
threats to international peace and security, the Security Council would hold subsidiary preventive
jurisdiction. Delegating subsidiary preventive jurisdiction to the Security Council would have
involved correcting one of the Genocide Convention’s weaknesses without creating other liabilities because it would have worked within the same system previously established by the UN Charter.

**The Opt-In Clause.** Article XII of the Final Adopted Text was added to the draft convention at the Sixth Committee. Article XII states:

> Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

There is absolutely no language in either the Original “Secretariat” Draft or the Revised Ad Hoc Committee Draft that even suggests such an option for Contracting Parties. I nicknamed Article XII of the Final Adopted Text the “opt-in clause” because it allowed Contracting Parties to choose whether to “extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.” There is surprisingly little mention of Article XII of the Genocide Convention in the scholarly literature. Where it or related language is discussed in the literature, the debate during negotiations is typically absent.

The United Kingdom, which was not a member of the Ad Hoc Committee proposed the addition of the opt-in clause, arguing,

> It had been the custom during the last twenty or thirty years to include an article similar to the one proposed by his delegation in all multilateral treaties. It was only in recent years that any objections had been raised to the practice and those objections were based on purely political motives and designed to create difficulties for the colonial Powers (Abtahi & Webb 2009, p. 1815).

The United Kingdom argued further in defense of its proposal by stating that it would be constitutionally impossible for it to decide for its territories, especially those territories that were
completely self-governing, whether they would accept and be bound by the provisions of the convention without first consulting them. The United States supported the UK’s position, stating that it was “extremely reasonable” (Abtahi & Webb 2009, p. 1816). Essentially, the United Kingdom argued that because colonial territories were not present to represent themselves at the negotiations, colonial territories could not be obligated to abide by the terms of the Genocide Convention by the colonial powers without first obtaining their consent.

Ukraine challenged the UK’s position. Ukraine argued that it was of the utmost importance that the convention applied to all countries and especially non-self-governing territories. According to Ukraine, “[T]he peoples of non-self-governing territories were most likely to become the victims of acts of genocide because they did not possess the highly developed organs of information necessary to inform the whole world immediately of the commission of the crime” (Abtahi & Webb 2009, p. 1816).

The Soviet Union also challenged the UK, referring to the proposal as the “colonial clause” (Abtahi & Webb 2009). The Soviet Union asked two questions of the United Kingdom: (1) how many of the UK’s territories were self-governing and how many were non-self-governing, and (2) would the UK accept compulsory responsibility for its non-self-governing territories? The representative from the UK responded that he was not a colonial expert and, therefore, could not respond to the Soviet Union’s first question with precise numbers. He did claim that at least three-quarters of the UK’s territories were self-governing. In response to the Soviet Union’s second question, the UK answered that it was technically possible for the UK to extend the application of the Genocide Convention to non-self-governing territories, but the UK “did not choose to adopt this course” (Abtahi & Webb 2009, p. 1817). The UK essentially argued that almost all of the territories under its control maintained some form of local
administration and, therefore, it was not up to the UK to commit those territories to the Genocide Convention’s obligations even though, technically, only it could do so because its colonies lacked the statehood required to be a Contracting Party.

The Soviet Union continued to press the issue. It stated that the convention was atypical and that in order to avoid furthering the dark days of the colonial legacy, the “Committee should bear in mind that millions must not be allowed to remain outside the scope of the convention and left to the arbitrary action of the colonial Powers” (Abtahi & Webb 2009, p. 1817). The Soviet Union questioned the sincerity of the UK, arguing that it must be concluded from the UK’s position that it believes “that there might be peoples who wished to become victims of genocide” (Abtahi & Webb 2009, p. 1818). The UK retorted that the Soviet Union and Ukraine were asking the UK (and other colonial powers) to impose its decision on its territories. The Ukraine and UK proposals were voted on in that order, neither of which was a roll-call vote. The Ukraine proposal of extending application of the convention to all territories under the control of a colonial power was defeated by nineteen votes to ten, with fourteen abstentions. The UK proposal was adopted by eighteen votes to nine, with fourteen abstentions.

Ukraine and the Soviet Union attempted to ensure that all territories under the control of a colonial power were protected against genocide. The United Kingdom opposed the compulsory application of the convention to self-governing and non-self-governing territories. While technically valid, the UK’s arguments against compulsory application of the convention lacked legitimacy. Each of the UK’s arguments, in the words of the Soviet Union, lacked sincerity. First, the UK noted that such an opt-in clause was typical of international conventions and that it was only in the years leading up to the negotiations concerning the draft convention prohibiting genocide that objections began to be raised. Following World War II and the creation of the
United Nations, there was growing opposition to the continued maintenance of colonies by the colonial powers. Therefore, the UK’s reference to what had been acceptable for the two-to-three previous decades lacked clear relevance to the then current negotiations. The UK added that the newly founded objections to such a clause were politically motivated. Presumably, that was certainly at least partially the case. However, whether the Soviet Union and Ukraine were motivated by politics based in an effort to “create difficulties for the colonial Powers” does not invalidate the substance of Ukraine’s proposal and the positions stated in support of it by Ukraine and the Soviet Union.

During the debate, other negotiating parties made it seem as if the Ukraine proposal would only have affected the United Kingdom. It is difficult to believe, especially when considering the tallies from the vote, that other negotiating parties did not think the Ukrainian proposal would apply to them. Because the UK was far from the only negotiating party maintaining control over foreign territories, the vote reflected an unwillingness of colonial powers to accept the application of the prohibition of genocide to the territories under their control. Whether this was due to a fear that their own policies could have constituted acts of genocide or a fear that their policies were creating schisms between different groups residing in their territories, which could constitute one of the relatively lesser crimes under the convention, such as incitement to genocide, complicity in genocide, or conspiracy to commit genocide, is unclear.

**Limits on Available Recourse**

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109 See Abtahi & Webb (2009), pages 1814-1823, for the entire debate over Article XII.

110 Article III of the Genocide Convention (Appendix A) enumerates the punishable acts under the Convention.
The Genocide Convention provides means for recourse when genocide is suspected of being perpetrated. The Genocide Convention offers two avenues of recourse: (1) the right to call upon the United Nations to take appropriate measures under the Charter for the prevention of genocide, and (2) the right to submit disputes over the interpretation, application, and fulfillment of the Genocide Convention to the International Court of Justice.

Because it is unlikely that perpetrators of genocide will take it upon themselves to prevent themselves from continuing to commit genocide, the Genocide Convention permits contracting parties to call upon the United Nations to take preventive measures under Article VIII.111 Article VIII states:

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article 3.

The Genocide Convention also permits contracting parties to submit disputes concerning allegations of genocide to the International Court of Justice. Article IX of the Genocide Convention states:

Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.112

All three formal drafts of the Genocide Convention limit available recourse to Contracting Parties and, therefore, state actors. This limitation is consistent with the international system. Article 4(1) of the UN Charter states, “Membership in the United Nations is open to all

111 See Article XII of the Original “Secretariat” Draft (Appendix D) and Article VIII of the Revised Ad Hoc Committee Draft (Appendix E) for the analogous text.
112 See Article XIV of the Original “Secretariat” Draft and Article X of the Revised Ad Hoc Committee Draft for the analogous text.
other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.” Article 34 of the Statute of the International Court of Justice states, “Only states may be parties in cases before the Court.”

There was only one challenge to this limitation on available recourse. At the Sixth Committee, Haiti proposed giving the affected human groups legal standing to call upon the United Nations for their protection, arguing that if only contracting parties were to report genocide the possibility existed that a Contracting Party could be the perpetrator of genocide or complicit in its commission (Abtahi & Webb 2009). Haiti’s proposal failed to elicit debate during negotiations over the Revised Ad Hoc Committee Draft. The chairman of the Sixth Committee noted that Haiti’s amendment had been read at the 101st meeting. Unfortunately, the chairman noted, the Haitian delegation was not present at the time. None of the negotiating parties present at the meeting spoke in favor of the Haitian amendment, so it was presumed that minds were made up on the subject (Abtahi & Webb 2009). This raises some questions: Why wasn’t Haiti present? Was the Haitian delegation aware that its amendment would be read at the 101st meeting? Why didn’t any other negotiating parties speak in favor of the amendment?

Because Haiti’s proposed amendment was never debated, it is difficult to comment on the positions of the negotiating parties. However, it is possible that Haiti’s proposal, like the subsidiary punitive jurisdiction proposal, was considered by negotiating parties to be a dangerous affront to established international norms. Allowing non-state actors to challenge the policies of their governments before the United Nations and the Security Council would undermine the state’s ability to effectively govern. As I argued in Chapter 3, awarding non-state actors standing to call upon the competent organs of the UN would ultimately erode a system based in state
sovereignty. Non-state actors could make unwarranted claims of genocide for political purposes. Because the United Nations, and especially the Security Council, is essentially a political entity, evaluation of non-state actor allegations would not be based in objectivity, but rather in considerations of national interest. Further, imagine the logistical nightmare if citizens of the world had the legal right to petition the United Nations. Therefore, the consequences of correcting the limits on available recourse through the means proposed by Haiti would have been unacceptable.

Despite this conclusion, the impediments to preventing intrastate genocide are once again highlighted. As previously noted, the Genocide Convention offers two avenues of recourse: (1) the right to call upon the United Nations to take appropriate measures under the Charter for the prevention of genocide, and (2) the right to submit disputes over the interpretation, application, and fulfillment of the Genocide Convention to the International Court of Justice. Both avenues of recourse require that the entity calling upon the UN or submitting a dispute to the ICJ be a state actor. This leaves victims of intrastate genocide in a perilous position. Regarding the second avenue of recourse, whether victims of intrastate genocide should have access was out of the hands of the negotiating parties. The ICJ’s rules, established in 1945, require that parties to disputes before the Court be state actors. A similar argument, though less definitive, can be made regarding access to the UN. The UN system is based in states being the primary actors in international relations. However, the negotiating parties had some flexibility here. While only states can be members of the United Nations, the UN Charter does not explicitly ban the participation of non-state actors in its proceedings. Therefore, the Genocide Convention could have opened the first avenue of recourse to victims of intrastate genocide.
Haiti attempted to include access to the UN for victims of intrastate genocide. While the circumstances around the lack of debate over Haiti’s proposal are somewhat odd, Haiti’s proposal would likely have been rejected had it come to a vote. Considering the privileging of sovereignty throughout the negotiations, it is not a stretch to conclude that the majority of the negotiating parties would not have voted in favor of an amendment to the convention that would have allowed their citizens to circumvent their authority through access to the UN. Lack of access to the avenues of recourse for victims of intrastate genocide is not a weakness that could have been easily corrected without creating other liabilities. Because it would have at least provided the Security Council with subsidiary preventive jurisdiction over cases of intrastate genocide, the failure to define genocide as a threat to international security is once again highlighted as a glaring weakness in the text of the Genocide Convention.

Table 4.1

*Summary of Comparative Analysis of the Three Formal Drafts of the Genocide Convention*

<table>
<thead>
<tr>
<th>Weakness</th>
<th>Original “Secretariat” Draft</th>
<th>Revised Ad Hoc Committee Draft</th>
<th>Final Adopted Text</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Genocide’s Status in International Law</strong></td>
<td>Crime under international law that threatens international peace and security</td>
<td>Crime under international law, but no longer elevated to a threat to international peace and security</td>
<td>Crime under international law, but no longer elevated to a threat to international peace and security</td>
</tr>
<tr>
<td><strong>Specific Intent Requirement</strong></td>
<td>Action can be taken for the purpose of preventing genocide “should there be serious reasons for suspecting that such crimes have been committed”</td>
<td>Specific genocidal intent must be established prior to action being taken for the purpose of preventing genocide</td>
<td>Specific genocidal intent must be established prior to action being taken for the purpose of preventing genocide</td>
</tr>
<tr>
<td><strong>Omission of Political Groups</strong></td>
<td>Political groups protected along with racial, national, linguistic, and religious groups</td>
<td>Political groups protected along with national, racial, and religious groups</td>
<td>Political groups no longer protected, while national, ethnical, racial, and religious groups protected</td>
</tr>
</tbody>
</table>
Table 4.2

Positions of the Permanent Members in Relation to Each of the Genocide Convention’s Weaknesses

<table>
<thead>
<tr>
<th>Weakness</th>
<th>China</th>
<th>France</th>
<th>Soviet Union</th>
<th>United Kingdom</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Elevating Genocide’s Status to a Threat to International Peace and Security</td>
<td>Opposed</td>
<td>Opposed/Supported*</td>
<td>Supported</td>
<td>Opposed</td>
<td>Opposed</td>
</tr>
<tr>
<td>Specific Intent Requirement</td>
<td>Supported</td>
<td>Opposed</td>
<td>Opposed</td>
<td>Supported</td>
<td>Supported</td>
</tr>
<tr>
<td>Omission of Political Groups</td>
<td>Opposed**</td>
<td>Opposed</td>
<td>Supported</td>
<td>Opposed</td>
<td>Opposed</td>
</tr>
<tr>
<td>Omission of Cultural Genocide</td>
<td>Opposed</td>
<td>Opposed/Supported</td>
<td>Opposed</td>
<td>Supported</td>
<td>Supported</td>
</tr>
<tr>
<td>Territorial Jurisdiction</td>
<td>Supported</td>
<td>Supported</td>
<td>Supported</td>
<td>Supported</td>
<td>Supported</td>
</tr>
</tbody>
</table>
The “Opt-In” Clause

<table>
<thead>
<tr>
<th>The “Opt-In” Clause</th>
<th>Supported</th>
<th>Supported</th>
<th>Opposed</th>
<th>Supported</th>
<th>Supported</th>
</tr>
</thead>
<tbody>
<tr>
<td>Recourse Limited to State Actors</td>
<td>Supported</td>
<td>Supported</td>
<td>Supported</td>
<td>Supported</td>
<td>Supported</td>
</tr>
</tbody>
</table>

* France originally opposed defining genocide as a threat to international peace and security, but changed its position when it submitted a joint amendment with the Soviet Union, specifically naming the Security Council as a competent organ to which cases of genocide ought to be referred.

** China originally opposed protection for political groups, but changed its position, voting for their inclusion in the Ad Hoc Committee Draft and the Final Adopted Text.

Conclusion

Five of the six weaknesses identified in the Genocide Convention did not originate in the Original “Secretariat” Draft. That means five of the six identified weaknesses were negotiated into the Final Adopted Text. In order to emphasize the significance of the changes made, the following highlights the language included in the Original “Secretariat” Draft in comparison to the language found in the Final Adopted Text.

The Original “Secretariat” Draft’s preamble states,

They [Contracting Parties] proclaim that the acts of genocide defined by the present Convention are crimes against the Law of Nations, and that the fundamental exigencies of civilization, international order and peace (emphasis added) require their prevention and punishment.

Article I of the Final Adopted Text states,

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

As noted earlier in this chapter, the Original “Secretariat” Draft defines genocide as a threat to international peace and security. Without this elevated status in the Final Adopted Text, intrastate genocide falls outside of the Security Council’s subsidiary preventive jurisdiction.
The Original “Secretariat” Draft contained a separate and less burdensome intent requirement for the purpose of preventing genocide from that required for the purpose of punishing genocide. Article XII of the Original “Secretariat” Draft states,

Should the crimes as defined in this Convention be committed in any part of the world, or should there be serious reasons for suspecting that such crimes have been committed (emphasis added), the High Contracting Parties may call upon the competent organs of the United Nations to take measures for the suppression or prevention of such crimes.

Article VIII of the Final Adopted Text states,

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

The separate and less burdensome intent requirement for the purpose of preventing genocide found in the Original “Secretariat” Draft was omitted from the subsequent drafts without a word of debate. Without a separate and less burdensome intent requirement, the authorization of proactive measures prior to the commission of irreparable harm is significantly less likely.

The Original “Secretariat” Draft included protection for political groups. Article I states,

The purpose of this Convention is to prevent destruction of racial, national, linguistic, religious or political groups (emphasis added) [of] human beings.

Protection for political groups was omitted from the Final Adopted Text. Article II states,

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

Whether political groups ought to be protected under the Genocide Convention was contentious. Both the arguments for and against inclusion had plausible components. Proponents of their inclusion argued that their omission could be seen as justification for genocidal violence against their members. Opponents of their inclusion argued that political groups lacked permanency.
Significantly, the argument that seemed to carry the most weight was the argument that the inclusion of political groups would impede the adoption of the convention because enough of the negotiating parties would vote against the convention if they were included.

The evolution of the convention related to cultural genocide and the accompanying debate were similar to the question concerning political groups. As with political groups, the Original “Secretariat” Draft prohibited cultural genocide, while the Final Adopted Text did not. Proponents of the inclusion of cultural genocide argued that both the physical destruction of the members of a protected group and the elimination of a protected group’s culture share the same result. Opponents of the inclusion of cultural genocide did not necessarily disagree with the proponents. Instead, they argued that a convention prohibiting genocide ought to include only the physical destruction of protected groups, leaving other human rights treaties to deal with the protection of culture and other minority group rights. Yet, it appears as though the most successful argument leading to the omission of cultural genocide was the threat made by some negotiating parties to reject the convention if cultural genocide was included.

The Original “Secretariat” Draft contained a provision that would have established a form of universal preventive jurisdiction over the crime of genocide. Section three of the Original “Secretariat” Draft’s preamble states,

They [Contracting Parties] pledge themselves to prevent and to repress such acts wherever they may occur (emphasis added).

The jurisdictional phrase, “wherever they may occur,” was excluded from the Final Adopted Text. The Final Adopted Text states,

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required.
The extent of the debate over the Original “Secretariat” Draft’s preventive jurisdictional phrase came when the United States argued that matters of jurisdiction ought to be addressed in the body of the convention rather than the preamble. The lack of debate speaks volumes concerning the commitment of the majority of the negotiating parties to preserving their territorial sovereignty.

The Original “Secretariat” Draft did not include an opt-in clause or, as it was named by the Soviet Union, the “colonial clause.” Also, there was not even any debate over whether such a provision ought to be included until the draft convention reached the Sixth Committee. Article XII of the Final Adopted Text states,

> Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

The opt-in clause unnecessarily undermined the object and purpose of the treaty. In order to eradicate genocide, prohibition of the crime must extend to every single territory. The opt-in clause allowed for some territories to be excluded from its protection.

The Original “Secretariat” Draft and the Final Adopted Text shared the same limits on available recourse. Both permitted Contracting Parties to call upon the United Nations to take appropriate measures under the UN Charter for the prevention of genocide. Both also designated the International Court of Justice as the judicial body to which disputes concerning the interpretation, application, and fulfillment of the convention were to be submitted. Haiti attempted to provide standing for members of a targeted group to call upon the UN to take preventive action on their behalf in the case of intrastate genocide, but Haiti’s proposal was never debated or voted on.
In Chapter 5 I attempt to determine whether there were reasons other than those proffered during negotiations for why the permanent members supported or opposed the inclusion of the identified weaknesses. The primary question I seek to answer in Chapter 5 is: with its adoption following the Armenian Genocide and the Holocaust, separated by less than thirty years, was the weakening of the Final Adopted Text of the Genocide Convention motivated by considerations of national interest.
Chapter 5: The Genocide Convention, Considerations of National Interest, and the Privileging of State Sovereignty

Because the creation, adoption, and entry into force of the Genocide Convention was meant to eradicate genocide, the purposeful weakening of the text during the negotiating process raises serious questions concerning the positions taken by the permanent members and their commitment to the prevention of future cases of genocide. If the negotiating parties were truly committed to preventing genocide, why would they actively work to weaken components of the draft convention that would have made preventing genocide an easier proposition?

In 1951, Hans Morgenthau’s *In Defense of the National Interest* was first published. In it Morgenthau wrote,

> And, above all, remember always that it is not only a political necessity, but also a moral duty for a nation to always follow in its dealings with other nations but one guiding star, one standard for thought, one rule for action: The National Interest (p. 241-242).

In 1952, Morgenthau expanded upon the above, essentially arguing that the state is required to take whatever steps necessary for its survival, a kind of primal national interest from which all other national interests grow:

> Despite the profound changes which have occurred in the world, it still remains true, as it has always been true, that a nation confronted with the hostile aspirations of other nations has one prime obligation—to take care of its own interests. The moral justification for this prime duty of all nations—for it is not only a moral right but also a moral obligation—arises from the fact that if this particular nation does not take care of its interests, nobody else will. Hence the counsel that we ought to subordinate our national interest to some other standard is unworthy of a nation great in human civilization. A nation which would take that counsel and act consistently on it would commit suicide and become the prey and victim of other nations which know how to take care of their interests (Morgenthau 1952, p. 4).

At the start of this project, much of my focus was on the potential role considerations of national interest may have played in the weakening of the Genocide Convention’s preventive
efficacy. Morgenthau’s worldview held that protecting and promoting the national interest above all else was a moral obligation of the state. This included prioritizing the national interest over other morally worthy objectives when promoting those objectives could undermine the primary national interest. It is my hypothesis that the permanent members negotiated the terms of the Genocide Convention, weighing more heavily their individual national interests than the competing morally worthy objective of creating a treaty capable of fulfilling its preventive object and purpose. I believe this was especially true in relation to negotiations over whether political groups would be protected and cultural genocide would be prohibited.

It became clear through my research that considerations of national interest were not the only factor in the weakening of the Genocide Convention’s preventive efficacy. Just as influential as considerations of national interest was the privileging of state sovereignty. It is generally agreed that the Westphalian concept of sovereignty was incorporated into the international system via the UN Charter. Krasner (2001) defines Westphalian sovereignty:

> The basic rule of Westphalian sovereignty is that external authority structures should be excluded from the territory of a state. Sovereign states are not only de jure independent; they are also de facto autonomous. Rulers are always to some extent constrained by the external environment. Other states…may limit the options available to a particular government, but that government is still able to freely choose within a constrained set. Moreover, the government of a Westphalian sovereign can determine the character of its own domestic sovereignty, its own authoritative institutions (p. 10-11).

The Genocide Convention’s negotiating parties were tasked with creating a treaty capable of fulfilling its preventive object and purpose while also preserving their state sovereignty. It is my hypothesis that the permanent members failed to adequately reconcile these conflicting objectives because they erred on the side of ensuring the Genocide Convention could not be used as a vehicle to undermine their state sovereignty rights rather than ensuring it could be an

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effective instrument for the prevention of genocide. I believe this was especially evident in the failure to elevate genocide to the status of a threat to international peace and security, the reliance on territorial jurisdiction for the prevention of genocide, and the associated lack of attention to the prevention of intrastate genocide.

In this chapter, I will test the hypotheses presented above. To do so, I will answer the following: (1) What role, if any, did considerations of national interest play in the incorporation of weaknesses into the Genocide Convention? (2) What role, if any, did the privileging of state sovereignty play in the incorporation of weaknesses into the Genocide Convention?

The Genocide Convention and Considerations of National Interest

At the start of this chapter, I opined that considerations of national interest played a significant role in the omission of political groups and the prohibition of cultural genocide from the Genocide Convention. In 1997, Van Schaack, after completing her own review of the Genocide Convention’s preparatory work, wrote:

This examination of the travaux preparatoires of the Genocide Convention and the concomitant scope of the instrument reveals the way in which political bodies may attempt to limit their obligations under international law when they reduce customary law norms to positivistic expression in multilateral treaties. In this case, the Convention had to respond to the tragedy of the Nazi Holocaust. At the same time, however, the Convention could not implicate member nations on the drafting committee (p. 2268).

The omission of political groups and cultural genocide are two possible expressions of this commitment to the elimination of provisions from the Genocide Convention that could implicate the permanent members.

Both political groups and cultural genocide were included in the Original “Secretariat” Draft and the Revised Ad Hoc Committee Draft before being omitted from the Final Adopted Text. Of the permanent members, only the Soviet Union was opposed to protection for political
groups. Meanwhile, the Soviet Union and China supported the inclusion of cultural genocide; France, the United States, and the United Kingdom opposed it. Because political groups and cultural genocide were included in the first two of three formal drafts of the Genocide Convention, it is important that it be determined whether considerations of national interest played a significant role in their omission from the Final Adopted Text.

**The Omission of Political Groups**

Concerning the omission of political groups and the implications of doing so, Van Schaack (1997) writes,

> The exclusion of political groups...resulted in a legal regime that insulates political leaders from being charged with the very crime that they may be most likely to commit: the extermination of politically threatening groups. As such, the Genocide Convention is more pertinent as a retrospective condemnation of the Nazi enterprise than as a forward-looking guide for the application of the full international prohibition of genocide (p. 2268).

Despite being included in General Assembly Resolution 96(I), which authorized the creation of the Genocide Convention, and the first two of three formal drafts of the convention, political groups were ultimately omitted from the Final Adopted Text. Both the arguments in support of and in opposition to the inclusion of political groups were plausible. Proponents argued that the treaty should retain the spirit of Resolution 96(I) and that, due to growing ideological divides, political groups were likely to be at risk of genocide in the future. Therefore, political groups ought to be protected under the Genocide Convention. Opponents argued that political groups were not the primary targets in historical cases of genocide and that they lacked the permanency necessary to be protected by the Genocide Convention. They also argued that the inclusion of political groups would interfere with a state’s ability and right to respond to
domestic insurrection because appropriate action taken against internal uprisings could be inappropriately labeled genocide.

Nersessian (2010) notes that on pragmatic grounds, “there simply was a greater need (emphasis in original) to protect certain groups as historically-victimized collectives” (p. 62). Racial and religious groups were the victims of “the most extreme examples of genocide in the 20th century—chief among them the Nazi Holocaust against Jews and the Ottoman genocide against Armenians” (Nersessian 2010, p. 62). Yet, Nersessian (2010) finds this argument insufficient because members of political groups were slaughtered in Germany and the Soviet Union before the Genocide Convention had evolved into its final form and was adopted by the General Assembly. According to Nersessian (2010),

Historic vulnerability and future needs certainly are sensible factors in choosing (emphasis in original) among groups to cover. But they are not sufficient in and of themselves to explain the groups ultimately selected for inclusion in the Convention (p. 63).

Nersessian’s point is a significant one, especially when inverted. If the permanent members were limited in their commitment to the creation of a convention prohibiting genocide that would not implicate them, as Van Schaack argues, then it would make perfect sense for each of the individual permanent members to negotiate for the exclusion of groups within their territories that have been historically vulnerable and/or could be in the future. In the case of political groups, at the time of the Genocide Convention’s negotiations, there was a recent history of vulnerability in the Soviet Union and a strong potential for such vulnerability to carry into the future.

As already noted, the Soviet Union was the only permanent member to oppose the inclusion of political groups in the Genocide Convention. According to Power (2002), Stalin
feared “that the convention would invite outside powers to punish Stalin” (p. 69). Soviet history preceding the Genocide Convention’s negotiations provides evidence that the Soviet Union’s position concerning the question of protection for political groups was motivated at least in part by considerations of national interest such as that highlighted by Power..

Feinstein (2002) argues that it is easy to understand why the Soviet Union was opposed to the inclusion of political groups, “since Soviet ideology and practice had destroyed both opposition political groups as well as having maintained a concerted attack on religion from 1917” (p. 41). Kuper (1981) references the massive number of deaths in the Soviet Union stemming from state repression:

As to the loss in human life, Solzhenitsyn quotes a figure of 66,000,000…from the beginning of the October Revolution to 1959. For the decade 1929-39 alone, Gouldner gives an estimate of 20,000,000 shot, or dying of famine or disease or exposure, as the direct result of punitive action by the Soviet government, to which must be added the slaughter in the decade immediately following the October Revolution, and in the decade of the war years. However unreliable the estimates, it is clear that we are in the presence of the major holocaust of our time” (p. 97).

Nersessian (2010) adds crimes committed by the Soviet Union in Poland:

This position is not surprising when seen in context. In the late 1940s, it is impossible to think that the Soviet Union could sanction a treaty that covered political groups without putting its own recent (emphasis in original) crimes directly into issue. Upon the eve of its entry into World War II, Russian soldiers massacred 4,000 Polish political prisoners. Another 15,000 Polish officers and intellectuals were shot en masse in the Katyn Forest because the Soviets believed that they would oppose efforts to ‘Communize’ Poland. Earlier examples included 10 million deaths during the liquidation of Kukak peasant classes and the deliberate organization of wide-spread famine in Ukraine 1932-33 (p. 106).

While the Genocide Convention could not have been applied to the Soviet Union’s treatment of political groups prior to the entry into force of the Genocide Convention due to the legal principle nullum crimen sine lege, literally “no crime without law”, the same cannot be said
for future acts. Because, as Nersessian noted, it was sensible for negotiating parties to consider the “historic vulnerability and future needs…in choosing among groups to cover,” it was also sensible for negotiating parties to consider their historic treatment of specific groups under consideration for protection under the Genocide Convention. In the case of the Soviet Union, it must have been aware of its record on the treatment of political groups and must have had some idea that such treatment was likely to persist.

While the Soviet Union offered plausible arguments for the exclusion of political groups from the Genocide Convention, the above evidence suggests that considerations of national interest were a significant factor in the Soviet position. This conclusion is supported by the fact that crimes committed by the Soviet Union prior to the entry into force of the Genocide Convention, and subsequent to it, would have, with the establishment of intent, constituted genocide with the inclusion of political groups.

China offers an interesting study. As the Genocide Convention was being negotiated, China was split by the resumption of civil war. Chinese nationalists and Chinese communists had been involved in a civil war when the Second World War broke out, but temporarily united against a common enemy in the form of Japan. Immediately following the end of World War II, the Chinese civil war resumed (USC US-China Institute). Thus, while negotiations over the text of the Genocide Convention were ongoing, opposing political groups in China were involved in a brutal civil war. From 1945-1949 alone, casualties are estimated at 2.5 million (Akhtar 2008). Further, during the siege of Changchun, which occurred in 1948, ending only two months prior to the adoption of the Genocide Convention, Mao Zedong’s Communist army allegedly starved 150,000 civilians to death (Zhenglong 1989). Forced starvation of members of a population is an act that clearly falls under Article II(c) of the Final Adopted Text of the Genocide Convention,
which states, “Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.”

China’s seat at the United Nations was held by the Chinese nationalists at the time of negotiations. China initially opposed the inclusion of political groups “suggesting that they lacked homogeneity and posed difficulties in application” (Nersessian 2010). China would change its position and even offered a draft of the convention with their inclusion. Nersessian (2010) states that the reasons for China’s shift are unclear. Though it cannot be said with certainty, it is conceivable that it was Mao’s policies during the civil war that led China to change its position and support the inclusion of political groups. As noted above, the Chinese communists perpetrated acts that clearly qualify as punishable acts under the Genocide Convention. The Chinese nationalists were losing the civil war. With the inclusion of political groups, the Chinese nationalists would have kept alive the possibility of implicating the Chinese communists in the commission of genocide, which would have fallen within the interests of the Chinese nationalists.

Based in historical context, the Chinese nationalists and Chinese communists had different interests to promote. China’s position concerning the question of protection for political groups may have depended on which political entity was representing China during the negotiations. Had the Chinese communists been the negotiators, it is conceivable that China would have opposed the protection of political groups. However, with the Chinese nationalists representing China while losing a brutal civil war, the Chinese nationalists’ position may have evolved from opposition to the inclusion of political groups to support for their protection out of considerations of their specific interests.
The Western Powers all supported protection for political groups. As well-established democracies, the motivation for their support for protection of political groups could have included: (1) a belief in the importance of political participation and the protection of that right; (2) a belief that political groups were most likely to be targeted for elimination; and (3) confidence that they would not be implicated in the commission of genocide against political groups. Yet, the prospect remains that, especially for the United States, support for protection for political groups was also founded in the likelihood that the Soviet Union and other non-allied states would be implicated in the commission of genocide against political groups if protected under the convention.

With tension between the Soviet Union and the United States growing post-World War II, the Soviet Union and the U.S. often held conflicting positions over provisions “which each anticipated might be used to criticize or condemn their conduct” (Lippman 1998, p. 452). There was a concern among the Soviet Union and the U.S. that if certain provisions were included in the Genocide Convention while others were excluded, one would be more likely to be implicated than the other. Generally, for the Soviet Union this was the inclusion of political groups.114 The American Bar Association (ABA) was apprehensive about the possibility that the Soviet Union could evade charges of genocide. According to LeBlanc (1991), “Although they couched their arguments in legal terms, the preoccupation of the ABA representatives with Soviet policies suggests that their objections to the Genocide Convention were as much political as they were legal, and perhaps more so” (p. 41-42). Thus, there are reasons to suppose that the U.S.

114 The U.S. was primarily concerned with cultural genocide and the specific intent requirement, both of which I will return to later in this chapter.
supported the inclusion of political groups not only for their protection, but also because their inclusion would have increased the likelihood of the Soviet Union being implicated in genocide.

At the start of this chapter, I quoted Morgenthau who argued that the state that accepts the counsel that it ought to subordinate its national interest to some other purpose also paves the way for its own demise. As stated by Morgenthau, “A nation which would take that counsel and act consistently on it would commit suicide and become the prey and victim of other nations which know how to take care of their interests” (Morgenthau 1952, p. 4). I also cited Van Schaack’s (1997) argument that the Genocide Convention “had to respond to the tragedy of the Nazi Holocaust. At the same time, however, the Convention could not implicate member nations on the drafting committee” (p. 2268).

The arguments made by Morgenthau and Van Schaack can be applied in essentially opposite ways depending on individual state interests. For the Soviet Union, it was in its national interest for political groups to be excluded from the Genocide Convention’s protection because of its historical treatment of political groups. The exclusion of political groups would, therefore, diminish the likelihood that the Soviet Union would be implicated in genocide, reducing the Genocide Convention’s threat to Soviet national interests. For the U.S., not fearing being implicated in genocide against political groups, it was within its national interest that political groups be included in the Genocide Convention because of the likelihood of the Soviet Union being implicated in genocide against political groups in the future. Thus, as Morgenthau advised, the Soviet Union and the U.S. promoted their individual national interests during the negotiations regarding political groups in an effort to avoid becoming “the prey and victim of other nations which know how to take care of their interests” (Morgenthau 1952, p. 4).
The Omission of Cultural Genocide

In such instances the marginalization of indigenous culture becomes cultural genocide or ethnocide. Ethnocide means that an ethnic group, collectively or individually, is denied its right to enjoy, develop and disseminate its own culture and language. Where indigenous peoples do not face physical destruction, they may nevertheless face disintegration as a distinct ethnic group through the destruction of their specific cultural characteristics (Burger 1987, p. 31).

The commission of cultural genocide may involve a different set of means for its achievement than those employed in the commission of physical genocide, but, as Burger argues, both result in the destruction of the targeted group. Burger identifies indigenous populations as victims of cultural genocide. Kuper has written extensively about cultural genocide against indigenous populations committed as a part of colonial conquest. Kuper (1981) argues:

Since victory, easily achieved by overwhelming fire-power, provokes the hatred of the civilian population, and since civilians are potentially rebels and soldiers, the colonial troops maintain their authority by the terror of perpetual massacre, genocidal in character. This is accompanied by cultural genocide, made necessary by colonialism as an economic system of unequal exchange in which the colony sells its raw materials and agricultural products at a reduced price to the colonizing power, and the latter in return sells its manufactured goods to the colony at world market prices. However, the dependence of the settlers on the sub-proletariat of the colonized protects the latter, to a certain extent, against physical genocide (p. 44).

According to Kuper, the only thing that prevented colonial administrators from taking the next step from committing cultural genocide to committing physical genocide was the usefulness of members of the indigenous populations in “the colonial economy”.

Davis and Zannis (1983) address the element of intent, which they argue is inherent to colonization:

The intention to replace independence with dependence, an integral factor for all colonial systems, is proof of intent to destroy. Colonialism controls through the deliberate and systematic destruction of racial, political and cultural groups. Genocide is the means by which colonialism creates, sustains and extends its control to enrich itself (p. 30).
Establishing a colony typically involved the expedient forced assimilation of indigenous populations into the colonizer’s culture. In some cases, it involved the annihilation of members of the indigenous population (Mako 2012). Makos writes that for colonial administrations, cultural genocide was a means to expedite indigenous integration without committing genocide in the physical sense.

Adam Jones (2011) writes, “Unsurprisingly, it was the settler-colonial regimes who were most anxious to exclude cultural genocide from the Genocide Convention” (p. 30). At the time the provisions of the Genocide Convention were being negotiated, France held seventeen colonies and two UN trusteeships in Africa alone. According to Kuper, Algeria offers a prime example of genocide committed by a colonial ruler against the colonized.

Kuper (1981) believes that the colonization and decolonization of Algeria are among the bloodiest conflicts in history. The conquest of Algeria fits the pattern of events described by Kuper in the lengthy quote presented above. The suppression of rights, especially cultural rights, angers the population being subjected to the oppression. Muhammad el-Farra (1956) wrote of France’s use of force to suppress the legitimate rights of Algerians. As the suppression of cultural rights intensifies, some members of the oppressed population may begin to organize and consider armed resistance. This, Kuper argues, is inevitable. Therefore, the colonial power must resort to force to maintain its control over the colonized. This is precisely what happened in Algeria, argues el-Farra (1956):

Entire villages are shelled, bombed, or burned; acts of genocide are committed against the inhabitants of towns and villages; an indiscriminate campaign of extermination is now taking place… These are acts of genocide committed against people whose only crime is

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115 France’s African territories included Algeria, Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Republic of the Congo, Côte d’Ivoire, Djibouti, Gabon, Guinea, Madagascar, Mali, Mauritania, Morocco, Niger, Senegal, Togo, and Tunisia.
their love for liberty and their desire to preserve their own culture [emphasis added] (p. 7).

The United Kingdom maintained seventeen African colonies and kept close ties with the apartheid regime in South Africa. Kuper (1981) refers to British policies in Sudan and Nigeria as examples of cultural genocide. In the case of Sudan, Kuper (1981) cites the deaths in the South, from between 1955 and 1972, at 500,000 or more. He states the cleavages between the north and south stemmed from “ethnic and religious differences, from historical relationships, from differential development and discrimination, and from hostile stereotypes and attitudes” (p. 70).

Kuper (1981) notes the influence of British colonial policies in the creation and exacerbation of the schisms he describes. Kuper also argues that these divides contributed to cultural genocide. Institutionally, Kuper refers to the basic principles for governing the south that were implemented in 1930 as a primary source:

(a) The building up in the Southern Sudan of a ‘series of self-contained racial or tribal units’ with structure and organization based on traditional usage and beliefs.
(b) The gradual elimination of the Northern Sudanese administrators, clerks and technicians in the South, and their replacement by Southern Sudanese.
(c) The use of English where communication in the local vernacular was impossible (p. 71).

Kuper argues that these policies exacerbated existing group divisions and created new ones. British policy also limited the use of languages other than English and partially eliminated Arab cultural influence in the South through the elimination of the presence of Northern Sudanese officials in the South.

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116 The United Kingdom’s African territories included Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Nigeria, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Uganda, Zambia, Zimbabwe.
In Nigeria, British policies divided the country into three regions, each dominated by a different ethnic group, with each region incorporating ethnic minorities that were dominated. In the North, Muslims were predominant, making up seventy-five percent of the population. The West was about evenly split between Muslims and Christians. And in the East, Christians made up approximately ninety percent of the population, dominating the animists who made up the other ten percent (Kuper 1981). According to Kuper (1981), “British colonial administration contributed to the divisions between the disparate groups they had so arbitrarily brought together, though in the later years policy was directed to establishing a secure basis for federation” (p. 74).

In the case of Nigeria, cultural genocide was less a result of direct British rule and more a result of British policies that facilitated the commission of cultural genocide by the dominant groups in the different regions against the minority groups that cohabited the regions.

The United States was less concerned with its treatment of individuals in foreign lands and more concerned with its treatment of minority cultural groups residing in the U.S. At the Ad Hoc Committee, the U.S. attempted to get the following declaration added to an Ad Hoc Committee report:

The prohibition of the use of language, systematic destruction of books, and destruction and dispersion of documents and objects of historical or artistic value, commonly known in this Convention to those who wish to include it, as "cultural genocide" is a matter which certainly should not be included in this Convention. The act of creating the new international crime of genocide is one of extreme gravity and the United States feels that it should be confined to those barbarous acts directed against individuals which form the basic concept of public opinion on this subject. The acts provided for in these paragraphs are acts which should appropriately be dealt with in connection with the protection of minorities (Abtahi & Webb 2009, p. 1061).

While some of the arguments made by the U.S. are plausible, they also underestimate the significance of language and other cultural attributes to the survival of a group as such.
This was not the first time the U.S. seemingly trivialized the importance of a culture’s language. Explaining the U.S. vote against the inclusion of cultural genocide at the Sixth Committee, Mr. Gross stated,

There were, in fact, grounds for asking whether it was more important to protect the right of a group to express its opinions in the language of its choice, [which is what Article III did,] or to protect its right to free expression of thought, whatever the language. If the object were to protect the culture of a group, then it was primarily freedom of thought and expression for the members of the group which needed protection (Morsink 1999, p. 1039).

Consider Mr. Gross’ claim. He argued that protecting the rights of different cultures to speak their ancestral language was not actually that important as long as the right to freedom of expression is protected. That, according to Mr. Gross, qualifies as protecting a group’s culture from extinction.

Had U.S. opposition to protection of minority cultural rights been limited to the Genocide Convention, despite statements like that made by Mr. Gross, one could still make the case that U.S. opposition to the inclusion of cultural genocide was primarily rooted in a belief that the Genocide Convention should not cover the acts that constituted cultural genocide. However, U.S. opposition to minority rights and cultural rights was not limited to the Genocide Convention.

The Genocide Convention and the Universal Declaration of Human Rights (UDHR) were being negotiated concurrently. If U.S. opposition to the inclusion of cultural genocide was grounded only in the merits of the arguments made during the Genocide Convention’s negotiations, one could expect the U.S. to support the protection of minority cultural rights in the UDHR. After all, according to the U.S., “The acts provided for in these paragraphs are acts which should appropriately be dealt with in connection with the protection of minorities” (Morsink 1999, p. 1024).
Such expectations would have been misguided. According to Mrs. Roosevelt, the U.S. delegate negotiating the UDHR, “provisions relating to rights of minorities had no place in a declaration of human rights” (Morsink 1999, p. 1024). She noted further that “minority questions did not exist on the American continent”, implicitly rebutting the argument that U.S. opposition to protecting minority cultural rights was due to its treatment of minority groups (Morsink 1999, p. 1024). The U.S. position expressed by Mrs. Roosevelt directly contradicts the U.S. position proffered during the Genocide Convention’s negotiations that protection and preservation of cultural groups fell within the domain of human rights (Mako 2012).

U.S. opposition to the inclusion of cultural genocide was at least in part due to a fear that if included in the Genocide Convention the U.S. would be left open to allegations of genocide (Power 2003). Numerous scholars have written about U.S. fears that the Genocide Convention would be applied to its own policies. According to Jacobs (2002), U.S. reluctance to ratify the Genocide Convention was based in “the fear that this country, too, could conceivably, (sic) be brought before the “bars of justice” because of its enslavement of Africans during the nineteenth century or its treatment of Native Americans even earlier and conterminous with its treatment of Blacks in both the nineteenth and the twentieth centuries” (Jacobs 2002, p. 37).

According to Makos (2012),

Within North America, the American-Indian experience is one rooted in both physical and cultural dissipation. This becomes evident upon a closer examination of the way in which law and colonialism were instruments of genocide, both in the physical and cultural forms. In Georgia, the 1789 statute legalized the indiscriminate slaughter of Creek Indians by declaring them beyond the protection of the State. Beyond physical extermination, the State implemented policies of acculturalization by enacting laws that restricted land entitlements to Indians who had renounced tribal citizenship (p. 177).

Some of these policies of acculturalization included restriction on the use of language and the forcing of children into special schools (Feinstein 2002),
During initial U.S. Senate hearings concerning the ratification of the Genocide Convention, some officials focused on what they saw as “the possibility of stretching the new law’s language to apply to practices too mild to warrant interference in another state’s domestic affairs” (Power 2003, p. 67). This reference to “practices too mild to warrant interference” mirrors the arguments made against the inclusion of cultural genocide. Acts that would have constituted cultural genocide, had it been included in the Genocide Convention, were considered by the U.S. to be not egregious enough to be included. Further, Southern senators “feared that inventive lawyers might argue that segregation in the South inflicted ‘mental harm’ and thus counted as genocide” (Power 2003, p. 67).

Related to U.S. opposition to the inclusion of cultural genocide was its preferred interpretation of the Genocide Convention’s intent requirement and what was meant by destruction of a group ‘in part’. During the Genocide Convention’s negotiations, the U.S. insisted on the need for a rigid specific intent requirement and that ‘in part’ be interpreted to mean that the term ‘genocide’ could be applied only to situations in which the intent was to destroy the entire group even if only a substantial part of the group was successfully killed.

Debate in the U.S. over the intent requirement and the definition of ‘in part’ continued after the General Assembly adopted the Genocide Convention. This debate provides further insight into why the U.S. was so concerned during the Genocide Convention’s negotiations. In a 1950 understanding drafted by the Truman administration regarding the phrase ‘in whole or in part’, it was stated that the United States understood the phrase “to mean that the *intent* (emphasis in original) must be to destroy an *entire* (emphasis in original) group and that the actions taken against the group had to affect a *substantial* (emphasis in original) portion of it” (LeBlanc 1991, p. 45). In 1950, Raphael Lemkin wrote to the U.S. Foreign Relations Committee
during Senate hearings on the Genocide Convention, seeking to clarify what was meant by ‘in part’. Lemkin wrote that for the destruction of a group in part to be genocide “destruction in part must be of a substantial nature”.\textsuperscript{117} The portion of the meeting during which the Senate discussed Lemkin’s letter was not released until 1976. LeBlanc (1984) believes this portion of the meeting was not made public for twenty-six years because of what it revealed:

Perhaps the reason for the delay was that those portions of the hearings provide more evidence than those previously published that a major basis for the opposition to ratification in 1950 was the fear that the language of Article II made the Convention applicable to lynchings and race riots (p. 377).

The ABA was also concerned that the destruction of a group ‘in part’ could be applied to the treatment of blacks and other minorities in the U.S. (Ronayne 2001). Further, ABA opponents of ratification believed segregation laws and other forms of institutional discrimination could be interpreted as causing serious mental harm in violation of Article II(b) of the Genocide Convention.\textsuperscript{118}

There is also documentary evidence that U.S. insistence on its interpretation of what was meant by specific intent and the meaning of intent as it relates to the phrase ‘in whole or in part’ was due to its treatment of marginalized groups. According to an internal U.S. State Department memo from 1947,

The possibility exists that sporadic outbreaks against the Negro population in the United States may be brought to the attention of the United Nations, since the treaty, if ratified, would place this offense in the realm of international jurisdiction and remove the “safeguard” of article 2(7) of the Charter. However, since the offense will not exist unless part of an overall plan to destroy a human group, and since the Federal Government would under the treaty acquire jurisdiction over such offenses, no possibility can be foreseen of the United States being held in violation of the treaty (Schabas 2000, p. 238).


\textsuperscript{118} Article II(b) states, “Causing serious bodily or mental harm to members of the group.”
What is clear in the internal State Department memo is that there were some U.S. officials who believed the U.S. was in danger of violating the prohibition of genocide if the United States’ interpretation of the meaning of intent as it relates to the phrase ‘in whole or in part’ was not the adopted interpretation.

During the Genocide Convention’s negotiations, the U.S. made valid arguments in defense of its opposition to the inclusion of cultural genocide. However, when the U.S. had the opportunity to support inclusion of minority cultural rights as human rights in the UDHR, the U.S. demonstrated a more general opposition to any international laws and norms that would codify protection of these rights. It is plausible that the U.S. believed its treatment of indigenous populations and minority groups increased the likelihood that it would be implicated in genocide under a convention that included cultural genocide. Therefore, it is also plausible that considerations of national interest were a significant factor in U.S. opposition to the inclusion in the Genocide Convention of cultural genocide. The plausibility of this was further strengthened by United States’ desired interpretation of what was meant by ‘in part’.

China supported the inclusion of cultural genocide in the Genocide Convention. China made the case that, while cultural genocide can be perceived as less brutal than physical genocide, “it might be even more harmful than physical genocide or biological genocide, since it worked below the surface and attacked a whole population attempting to deprive it of its ancestral culture and to destroy its very language” (Morsink 1999, p. 1036). During negotiations over the text of the UDHR, China offered insight into its position concerning cultural genocide. China stated that “in the whole of China’s history there had been no religious or racial persecution. There were five main races in China, but none had been added by military conquest. The minorities in China were given more than equal representation” (Morsink 1999, p. 1036).
Whether or not China’s claim is entirely true, it is clear that China did not believe the inclusion of cultural genocide would threaten its national interests.

The Soviet Union, along with its Communist bloc, was consistent in its support for the inclusion of cultural genocide in the Genocide Convention throughout the negotiating process. It is unclear whether such unwavering support was due to a commitment to the protection of cultural groups alone or because it was in the Soviet Union’s national interest to support inclusion. What is clear is that the Soviet Union felt the crime of cultural genocide would not apply to its own actions, but would implicate the colonial powers. This became evident when comity was lost during negotiations over the UDHR.

Belarus, one of many members of the Communist bloc, openly accused the U.S. and the UK of cultural genocide, stating

North American Indian had almost ceased to exist in the United States. [He went on to say that in] colonial territories too there were no signs that indigenous culture was being developed and encouraged. . . . Ninety percent of the people living in the British colonies were illiterate, for the development of culture and the colonial yoke were mutually exclusive” (Morsink 1999, p. 1048).119

The UK delegate responded, “There had been considerable progress in the colonies toward self-determination. No evidence had been produced that the use of Native tongues was being restricted in any British colony” (Morsink 1999, p. 1048).

At this point, the Ukrainian delegate, another member of the Communist bloc, jumped into the fray. Ukraine stated that

a petition by Natives of Tanganyika (part of present day Tanzania) complaining that a proposed law affecting their interests and ostensibly supported by them had not even been translated into their Native tongue. . . . On the whole Natives were prevented from using their language and developing their own culture. It was enough to cite the

119 Morsink (1999) notes that it was standard procedure for members of the Communist bloc to back the amendments and positions of the Soviet Union.
following figures: on the Gold Coast 90,000 out of a population of 3,500,000 Natives attended schools; in Kenya, the Government spent 500 times as much on each European child as on each African child (Morsink 1999, p. 1048-1049).

Along with the scholars cited previously, the members of the Communist bloc provided a number of reasons why the UK could have feared being implicated by a convention including cultural genocide. Therefore, it is plausible that UK opposition to the inclusion of cultural genocide was based in considerations of national interest.

The rhetorical conflict between the Communist bloc and the UK was not limited to Genocide Convention and UDHR negotiations. The conflict continued to play out over Article XII of the Genocide Convention as reservations were submitted to the Genocide Convention. Recall that Article XII made the extension of the Genocide Convention to territories under foreign control optional, meaning it was up to the foreign actor or colonizer to decide. As noted in Chapter 4, the UK was primarily responsible for the inclusion of Article XII of the Genocide Convention, which I have referred to as the ‘opt-in clause’ and the Soviet Union referred to as the ‘colonial clause’.

The Soviet Union was adamantly opposed to the inclusion of Article XII in the Genocide Convention and was the only permanent member to submit a reservation to Article XII. The Soviet Union’s reservation states,

The Union of Soviet Socialist Republics declares that it is not in agreement with Article XII of the Convention and considers that all provisions of the Convention should extend to Non-Self-Governing Territories, including Trust Territories (Declarations and reservations).

The UK accused the Soviet Union of opposing Article XII for political reasons. There is reason to suspect that the UK was correct in this determination. Both the UK and the Soviet Union were negotiating out of differing considerations of national interest. For the UK, the
inclusion of Article XII was within its national interests, as well as other colonial powers, because it would leave it up to the UK to decide whether application of the Genocide Convention extended to its colonies. The exclusion of cultural genocide was one safeguard against being implicated by the Genocide Convention due to its colonial policies. In the case that cultural genocide was to devolve into physical genocide, Article XII provided further safeguards against being implicated in genocide.

For the Soviet Union, as stated previously, it was within its national interests that the Genocide Convention not be limited in its ability to implicate Western powers. Therefore, it was within the Soviet interest for the Genocide Convention to extend to all territories irrespective of whether they were independent states. Regardless of whether the Soviet position was motivated by politics, the merit of the Soviet position was firmly grounded. The Genocide Convention was adopted during the colonial era. The United Nations has 51 original members. Many of the members that make up the difference between the original 51 members and the current total of 193 became members after achieving independence from their colonizers. Therefore, adoption of Article XII of the Genocide Convention left a significant number of territories outside of its protection unless the foreign powers maintaining control over them opted to apply the Convention to the territories.

The UK, France, and the U.S. had reasons based in considerations of national interest to oppose the inclusion of cultural genocide and to support the inclusion of Article XII. The well-being of their respective states required that they take positions against provisions that could be used to implicate them in genocide. Inversely, for the Soviet Union it is conceivable that the strength of its conviction concerning cultural genocide was also founded in the likelihood that the colonial powers would be implicated by a convention that included cultural genocide, which
would have been within its national interests. It is feasible that it was this that produced such aggressive support for cultural genocide’s inclusion.

According to Morsink (1999), the rancor embedded in the verbal attacks on the UK may have actually worked against the interests of the Communist bloc:

Attacks like these, however much truth they contained, caused the colonial powers to stiffen their backs and withhold their votes. They felt drawn into the anti-imperialist campaign that the communist nations had started the previous spring and resisted it in indirect ways. One of those ways was their refusal to side with the communists on this issue of minority rights…(p. 1049).

That remains a possibility. It is also possible that the U.S., UK, and France were not about to let the Genocide Convention include the crime of cultural genocide, which had the potential to implicate them, after having compromised on protection for political groups, the group most likely to implicate the Soviet Union.

**The Genocide Convention and the Privileging of State Sovereignty**

In 1928, Judge Huber asserted in his ruling on the *Island of Palmas* case,

Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the function of a State. The development of the national organization of states during the last few centuries and, as a corollary, the development of International Law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern International Relations (Harris 2002, p. 376).

In his ruling, Judge Huber did not attempt to enter a value judgment concerning the principle of sovereignty. Instead, as the sole arbiter in the case, Huber simply applied the conventional legal understanding of sovereignty to the case before him.

Value judgments were left to scholars. According to Errol Harris (2002),

National sovereign independence is a persistent obstacle to the rule of law in international affairs, to the maintenance of world peace and to the conservation of the global
environment. The problem which it presents is rarely recognized, yet unless it is faced, the prospect for mankind in the 21st century is likely to be extremely bleak (p. 371).

Huber essentially states in his ruling that sovereignty is central to international law itself and relations between states. Meanwhile, Harris argues that sovereignty undermines the rule of law in international affairs and the maintenance of world peace.

Can state sovereignty simultaneously promote respect for international legal norms and permit the same to be violated? This is the conundrum that the permanent members faced as they negotiated the text of the Genocide Convention. They were tasked with developing new international law in the aftermath of the Armenian Genocide and the Holocaust. Yet, this task also arrived in the aftermath of World War I and World War II, both of which involved aggressive violations of sovereignty.

At the start of this chapter, I stated my hypothesis that the permanent members failed to adequately reconcile the protection of state sovereignty rights with the development of a treaty capable of fulfilling its preventive object and purpose. I opined that the permanent members erred on the side of ensuring the Genocide Convention could not be used as a vehicle to undermine their state sovereignty rights rather than ensuring it could be an effective instrument for the prevention of genocide. This privileging of state sovereignty over an effective Genocide Convention is most evident in how the permanent members treated intrastate genocide.

In Chapters 3 and 4, I argued that the failure to define genocide as a threat to international peace and security, when coupled with the limitations of territorial jurisdiction, essentially excluded intrastate genocide from the United Nations’ mandate and the Security Council’s responsibility of maintaining international peace and security. I emphasized the significance of these decisions by noting how interstate genocide, even without the existence of the Genocide
Convention, would still fall within the UN’s mandate and the Security Council’s responsibilities because it involves the unauthorized cross-border use of force and, thus, constitutes a threat to international peace and security.

The same cannot be said for cases of intrastate genocide. Cases of intrastate genocide do not constitute threats to international peace and security according to the ordinary meaning of the words. Therefore, because the Genocide Convention does not define genocide as a threat to international peace and security and because jurisdiction for the prevention of genocide is limited to the territorial authority, cases of intrastate genocide were for all intents and purposes excluded from the Genocide Convention’s protection.

The Original “Secretariat” Draft contained provisions that would have conferred primary jurisdiction for the prevention of genocide with the territorial authority and subsidiary jurisdiction for the prevention of intrastate genocide with the Security Council when the territorial authority was unable or unwilling to fulfill its responsibility, or when the territorial authority was actively involved in the commission of the crime. Therefore, it can be deduced that conscious decisions were made to exclude these provisions. The question remains, then: were these conscious decisions based solely in a commitment to promoting and protecting state sovereignty rights or, within the context of the Genocide Convention, was the strict commitment to promoting and protecting state sovereignty rights a means to shielding the permanent members from the reaches of the Genocide Convention?

There are plausible reasons for why the permanent members privileged state sovereignty. Intrastate genocide, as previously noted, does not constitute a threat to international peace and security. Therefore, intrastate genocide, technically speaking, is an internal matter for the state authority that holds territorial jurisdiction. This was an argument made by some parties to the
Genocide Convention’s negotiations. This was also a view shared by the ABA. ABA Committee Vice Chairman Carl Rix expressed concern over the Convention’s effect on U.S. sovereignty. He referred to genocide as a problem of a “domestic nature” (Ronayne 2001, p. 21). Further, according to Ronanye (2001), “Opponents [of ratification] argued that genocide represents an internal domestic issue rather than an international crime” (p. 22). Power (2003) adds,

American opposition was rooted in a traditional hostility toward any infringement on U.S. sovereignty, which was only amplified by the red scare of the 1950s. If the United States ratified the pact, senators worried they would thus authorize outsiders to poke around in the internal affairs of the United States or embroil the country in an ‘entangling alliance’ (p. 69).

The above argument is also consistent with international law and the international system as established by the UN Charter. Recall that the primary purpose of the UN under Article 1(1) of the Charter is the maintenance of international peace and security. Article 2(1) establishes “the principle of the sovereign equality of all its Members.” Article 2(4) prohibits “the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” And Article 24(1) confers the Security Council with the “primary responsibility for the maintenance of international peace and security.” Therefore, because intrastate genocide does not threaten international peace and security, external interference would violate the prohibition of the use of force against the territorial integrity of another state and would violate the principle of sovereign equality. Further, the UN’s mandate and the Security Council’s responsibilities would not extend to cases of intrastate genocide, again, because they do not threaten international peace and security.

Another plausible argument for treating intrastate genocide as an internal matter is that allowing for some erosion of state sovereignty even for the purpose of ensuring a more effective Genocide Convention could lead to further erosion in the future. State security is the primary
national interest and protecting state sovereignty rights is required for the preservation of the
state. As previously noted, prior to the creation of the United Nations there was a long history of
unwarranted violations of territorial sovereignty. State actors give up some portion of state
sovereignty when they join the United Nations. Essentially, states trade some of their sovereign
independence for the benefits of a system of collective security. Because states do give up some
portion of their sovereign rights when they join the United Nations, it is understandable why
state actors would be wary of giving up more of their sovereign rights, which could also
ultimately lead to an inevitable unraveling of state sovereignty rights. The ABA feared that a
growing body of human rights law would threaten state sovereignty in exactly this way (LeBlanc

ABA Committee Vice Chairman Rix also expressed concern over an “apparent attempt to
expand the scope of international law beyond sovereign states and to both domestic issues and
individuals” (Ronayne 2001, p. 22). Rix indirectly identifies a relationship between
considerations of national interests and the privileging of state sovereignty. This relationship
between considerations of national interest and the privileging of state sovereignty potentially
sheds some light on whether the permanent members privileged state sovereignty in the name of
the principle itself or because it was a means of shielding the permanent members from the
reaches of the Genocide Convention.

The positions of the permanent members concerning which groups are protected under
the Genocide Convention and which acts are prohibited were at least based in part in
considerations of national interest. Yet, because protection for political groups and the
prohibition of cultural genocide, especially for the Soviet Union and the U.S. respectively, were
directly linked to “domestic issues and individuals”, they were also connected to state sovereignty rights.

For the Soviet Union, the exclusion of political groups from the Genocide Convention was within its national interest because of its historical treatment of political groups and the likelihood that such treatment would continue on after the adoption of the Genocide Convention. Yet, the exclusion of political groups also reinforced Soviet sovereignty. With the exclusion of political groups from the Genocide Convention, the treaty was less likely to be used to justify interference in Soviet internal affairs. The same can be said regarding cultural genocide. For the U.S., France, and UK, the omission of cultural genocide from the Genocide Convention was within their national interests, but the omission also reduced the likelihood the Genocide Convention could be used to justify the violation of their state sovereignty rights.

It is not necessarily wrong to negotiate out of considerations of national interest and to privilege state sovereignty. In fact, as stated by Morgenthau, it is arguably an obligation. It would have been irrational for the permanent members to support provisions in the Genocide Convention that would potentially implicate them upon the Convention’s entry into force. The inclusion of these same provisions could also have been used to justify interference in their internal affairs. Therefore, the positions of the permanent members were what one would expect considering the circumstances and the context within which negotiations took place.

However, the story is not so simple. Whether it was the actual goal of the permanent members to create a treaty that, as Van Schaack (1997) described, was a “retrospective condemnation of the Nazi enterprise” as opposed to a “forward-looking guide for the application of the full international prohibition of genocide”, that was the end result. The permanent members were tasked with a difficult proposition. They had to decide between prioritizing their
national interests and their sovereignty rights or prioritizing human rights and the prevention of
genocide. The easy route was to ensure their policies would not implicate them under the
Genocide Convention by removing provisions from the Convention that their policies would
likely violate. The more difficult path would have been to ensure the Genocide Convention was
capable of achieving the full international prohibition of genocide. Doing so would have required
the permanent members to adjust some of their policies to bring them into conformity with the
Genocide Convention. Bringing their policies into conformity with what the Genocide
Convention required would have aided in achieving the international prohibition of genocide,
which is what the Genocide Convention was, in theory, created for.

**Conclusion**

As the previous chapters and the analysis in this chapter have demonstrated, serious
tensions existed at the time the Genocide Convention was being negotiated between legitimate
concerns over the protection of state sovereignty and the desire to eradicate the crime of
 genocide. For the permanent members, as well as the other negotiating parties, it was within their
national interests to ensure that the Genocide Convention did not contain any provision that
could implicate them in the commission of genocide. It was also important, for a variety of
reasons, some general to all states and others unique to the individual states, that state
sovereignty rights were protected against intrusions based in the Genocide Convention.

From the negotiating standpoints of each of the permanent members, the positions they
took were sensible. It made sense for the Soviet Union to oppose the inclusion of political groups
under the Genocide Convention’s protection. The same can be said for American, French, and
British opposition to the inclusion of cultural genocide. It also made sense for the permanent
members to oppose universal preventive jurisdiction. Universal preventive jurisdiction would have undermined state sovereignty rights by allowing allegations of genocide to be used as justification for the interference in the internal affairs of states.

Yet, as noted previously, there is more to this story. The object and purpose of the Genocide Convention is the eradication of genocide. By omitting political groups and cultural genocide, the permanent members removed the forms the crime of genocide was most likely to take. Removing political groups and cultural genocide did not promote the prevention of future cases of genocide; rather, their removal prevents them from being counted as cases of genocide. In Chapter 2, I compiled a list of seven cases on which there was general scholarly agreement that the crimes committed constituted genocide. Consider how many more cases those same scholars might have added to the list had protection for political groups and the prohibition of cultural genocide been retained in the Genocide Convention.

The permanent members also privileged state sovereignty to such an extent that cases of intrastate genocide were for all intents and purposes removed from the scope and the reach of the Genocide Convention. The permanent members did not need to choose between giving up their sovereignty rights under a system of universal preventive jurisdiction and not giving up their sovereignty rights under a system of territorial jurisdiction. There was a middle ground. The Original “Secretariat” Draft defined genocide as a threat to international peace and security. This definition was excluded from the subsequent drafts, but the Soviet Union attempted to reinsert it. These attempts were rejected. Had genocide been defined as a threat to international peace and security, the Genocide Convention would have employed territorial jurisdiction as the primary form of jurisdiction for the prevention of genocide. State sovereignty rights would have been protected. However, if the territorial authority was unable or unwilling to prevent the
commission of genocide within its territory, or was actively engaged in the commission of genocide, the Security Council would have held subsidiary preventive jurisdiction. As the organ responsible for the maintenance of international peace and security, the Security Council would have had the authority to intervene for the purpose of preventing genocide when the territorial authority failed to do so.

Choices were made by the permanent members that led to the weakening of the Genocide Convention’s preventive efficacy. Did the permanent members have plausible reasons for the decisions they made? Absolutely. Could they have made different decisions? Absolutely. In the development of international human rights law, of which the Genocide Convention is a part, considerations of national interest and the privileging of state sovereignty, no matter how rational it is to do so, cannot be treated as sacrosanct. Otherwise, Saeedpour’s (1992) conclusion concerning the prevention of genocide will maintain its accuracy: “Until the priorities of the international community are reordered to place human life in a loftier position, I fear that our efforts will be largely relegated to recording atrocities in history books” (p. 60).

The Genocide Convention is a treaty with little chance of being amended to correct the weaknesses embedded within its text. As noted previously, there have been attempts to amend the Convention. They have failed. There have been opportunities to revise the definition of genocide with the creation of the International Criminal Tribunals for the former Yugoslavia and for Rwanda. The ICTY and ICTR mandates, provided by the Security Council, utilized the Genocide Convention’s definition of genocide. The Rome Statute to the International Criminal Court also uses the Genocide Convention’s definition of genocide.

Fortunately, all is not lost. There have been recent developments in international law that have the potential to mitigate the weaknesses identified in the Genocide Convention. In Chapter
6. I will provide an overview of these recent developments, which include the emerging norm of the Responsibility to Protect, the establishment of the International Criminal Court, and the International Court of Justice’s ruling in the case of *Bosnia v. Serbia*.
Chapter 6: Recent Developments for the Future of Genocide Prevention

Despite the international community’s general failure to prevent genocide, I concluded Chapter 5 with some optimism that three recent developments in international law could mitigate the weaknesses identified in the Genocide Convention. The Genocide Convention is static; its text is not going to change. Even efforts to amend the definition of genocide in other forums have failed. When the International Criminal Tribunals for the Former Yugoslavia and for Rwanda were established, the Security Council chose to use the same definition of genocide as found in the Genocide Convention. Further, according to Schabas (1999-2000), “There were isolated attempts to amend the definition of genocide during the drafting of the Rome Statute (italics in original), but the final version also repeats the 1948 text without modification” (p. 378).

A brighter future for genocide prevention will not emanate from an amended Genocide Convention with stronger preventive mechanisms. Yet, as I concluded in Chapter 5, all is not lost. The combination of the development of the Responsibility to Protect, the establishment of the International Criminal Court, and the International Court of Justice’s ruling in the case of Bosnia v. Serbia together provide hope for the future of genocide prevention. Each of these three developments approaches genocide prevention from different directions. In this chapter I provide a synopsis of the potential role each of these three developments has the potential to play in preventing future cases of genocide. For each of the three developments, I begin by providing a brief overview of the development. I then explain in more detail the actual role each development can play in preventing future cases of genocide. Finally, I identify the strengths of each development, as well as their shortcomings.
R2P and the Future of Genocide Prevention

R2P represents an effort initiated by then Secretary-General Kofi Annan to reconcile the sovereign rights of states with the need to protect individuals and groups against egregious human rights violations, including genocide. In September 1999, Annan wrote in *The Economist*,

The tragedy of East Timor, coming so soon after that of Kosovo, has focused attention once again on the need for timely intervention by the international community when death and suffering are being inflicted on large numbers of people, and when the state nominally in charge is unable or unwilling to stop it. In Kosovo a group of states intervened without seeking authority from the United Nations Security Council. In Timor the council has now authorised intervention, but only after obtaining an invitation from Indonesia. We all hope that this will rapidly stabilise the situation, but many hundreds—probably thousands—of innocent people have already perished. As in Rwanda five years ago, the international community stands accused of doing too little, too late.

Annan challenged the international community to come to consensus on how to promote and protect state sovereignty without impeding intervention for the protection of the citizens of the world from the most severe human rights violations. In response to Annan’s challenge, the Canadian government, along with a group of major foundations, established the International Commission on Intervention and State Sovereignty (ICISS). The ICISS wrestled “with the whole range of questions – legal, moral, operational and political – rolled up in this debate” and consulted “with the widest possible range of opinion around the world” before completing its report, *The Responsibility to Protect* (ICISS 2001, p. VII).

A few years later, R2P’s promise advanced from a new framework to an emerging norm. In 2005, 150 heads of state and 41 other dignitaries, representing each of the then 191 UN members, convened for the World Summit in New York City to follow up on the 2000 Millennium Summit. Progress made during the duration of the 2005 summit was collected into the World Summit Outcome Document, which was adopted by the General Assembly later that
same year. Two of the articles included in the World Summit Outcome Document pertained to R2P. Article 138 states,

> Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means (2005 World Summit Outcome Document, Article 138).

With the endorsement of Article 138, the members of the international community endorsed the reconceptualization of sovereignty from the unconditional right of states to enact policies free of external interference to the responsibility of states to protect their populations from crimes such as genocide. Article 139 states,

> The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity (2005 World Summit Outcomes Document, Article 139).

With the endorsement of Article 139, the members of the international community also endorsed the responsibility of the international community to use diplomatic and other means to protect populations from genocide and other egregious violations of human rights law and humanitarian law.

> There are two main reasons why R2P offers promise for the future of genocide prevention. First, R2P is focused only on prevention of the crimes it covers. Second, R2P groups genocide with crimes against humanity, war crimes, and ethnic cleansing. Because it deals only with the prevention, R2P did not need to simultaneously address questions of international
criminal law. Because R2P groups genocide with other international crimes, amending the
definition of genocide for the purpose of prevention is no longer needed. Thus, R2P was able to
address the majority of the weaknesses identified in the Genocide Convention.

**R2P and Genocide’s Status in International Law**

In Chapter 3, I argued that the failure to define genocide as a threat to international peace
and security makes prevention of genocide more difficult by removing cases of intrastate
genocide from the United Nation’s mandate and the Security Council’s responsibilities. R2P
corrects this deficiency by including genocide alongside crimes against humanity, war crimes,
and ethnic cleansing, all of which can be committed within one specific territory without being
excluded from R2P’s preventive jurisdiction.

**R2P and the Genocide Convention’s Specific Intent Requirement**

I also argued that the Genocide Convention should have contained a separate and less
burdensome intent requirement for the purpose of preventing genocide from that required for the
purpose of punishing genocide. As noted earlier in this chapter, R2P did not need to address
questions of criminal law. Therefore, R2P was able to incorporate a less burdensome intent
requirement without needing to separate it from the intent requirement for the purpose of
punishing the crimes it seeks to prevent. R2P’s intent requirement is included in its just cause
threshold principle. This principle states,

Military intervention for human protection purposes is an exceptional and extraordinary
measure. To be warranted, there must be serious and irreparable harm occurring to
human beings, or imminently likely to occur, of the following kind:
A. large scale loss of life, actual or apprehended, with genocidal intent or not (emphasis
added), which is the product either of deliberate state action, or state neglect or
inability to act, or a failed state situation (ICISS 2001, p. XII).
R2P explicitly eliminates the specific intent requirement present in the Genocide Convention. R2P’s just cause threshold states that military intervention for human protection is warranted when there is “large scale loss of life, actual or apprehended, with genocidal intent or not.” Therefore, establishing specific genocidal intent prior to taking preventive action is not a requirement under R2P.

R2P and the Genocide Convention’s Omission of Political Groups

In Chapter 3, I argued that the omission of political groups from the Genocide Convention’s protection is a weakness because it makes the prevention of genocide more difficult by creating a blind spot into which genocidal acts perpetrated against those groups protected by the Convention can be pushed. The perpetrators of genocide can take advantage of this blind spot by creating misleading narratives, framing the deaths resulting from a policy of genocide as unfortunate collateral damage caused by politically motivated violence. The permanent members of the Security Council, whether out of considerations of national interest or lack of political will, could also utilize this blind spot if they prefer not to recognize a case of genocide.

R2P eliminates the blind spot created by the omission of political groups from the Genocide Convention. As just noted, according to R2P’s just cause threshold, military intervention for human protection is warranted when there is “large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation.” The 2005 World Summit Outcome Document adds specificity to the ambiguous “large scale loss of life.” Article 139 includes genocide, crimes against humanity, war crimes, and ethnic cleansing as acts that could involve
large scale loss of life. While ‘ethnic cleansing’ includes a defined group component, crimes against humanity and war crimes do not. Therefore, by grouping genocide with these crimes, the omission of political groups is corrected.

In order to emphasize this point, it is instructive to consider the Rome Statute to the International Criminal Court’s definition of crimes against humanity and war crimes. The Rome Statute defines crimes against humanity as acts committed “as part of a widespread or systematic attack directed against any (emphasis added) civilian population” (Rome Statute). Acts that constitute crimes against humanity that also constitute acts of genocide under the Genocide Convention include murder, extermination, and enforced sterilization. Further, the Rome Statute includes the following as a crime against humanity:

Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court (Rome Statute).

Any of the acts that constitute genocide committed against any identifiable group or collectivity amount to crimes against humanity.

The Rome Statute defines war crimes as “grave breaches of the Geneva Conventions of 12 August 1949,” particularly when “committed as part of a plan or policy or as part of a large-scale commission of such crimes” (Rome Statute). Acts that constitute war crimes that are relevant to the crime of genocide include: “willful killings,” “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities,” and “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions” (Rome Statute). As with the Rome Statute’s
definition of crimes against humanity, its definition of war crimes includes acts that constitute genocide under the Genocide Convention without a limitation on who is protected against these acts. Therefore, for the purpose of prevention, under R2P it is no longer necessary to prove that the group is protected by the Genocide Convention, thus removing the ability of perpetrators to create false or misleading narratives as a means to avoiding application of the Convention.

**R2P and the Genocide Convention’s Omission of Cultural Genocide**

In Chapter 3, I argued that the omission of cultural genocide from the Genocide Convention was warranted not because I believe a group cannot be destroyed through the destruction of its culture, but rather because equating attacks on cultural objects with physical attacks on the members of a protected group could conceptually weaken the term ‘genocide’. Because destruction of cultural objects and the enactment of limitations on cultural practices occur far more frequently than attempts to destroy groups in whole or in part, the inclusion of cultural genocide in the Genocide Convention could have led to frequent application of the term ‘genocide’ to attacks on physical objects rather than the individuals that make up a protected group.

I also argued that the exclusion of cultural genocide could have unintended consequences. As with the omission of political groups, I argued that the exclusion of cultural genocide from the Genocide Convention created another blind spot into which actual cases of genocide can be pushed. The perpetrators of genocide can insist that the intent behind the human rights violations is the removal of a group and its culture from a given territory. This is generally referred to as ‘ethnic cleansing’. I noted that the permanent members of the Security Council could also use this blind spot by accepting and validating this narrative. R2P’s just cause
threshold includes “large scale ‘ethnic cleansing’, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.” By including ethnic cleansing among those crimes R2P aims to prevent, the omission of cultural genocide is partially corrected by impeding the purposeful use of the crime of ethnic cleansing so at to avoid the application of the Genocide Convention.

The inclusion of genocide alongside crimes against humanity and war crimes completes the correction of the exclusion of cultural genocide. The Original “Secretariat” Draft defined cultural genocide as:

Destroying 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 historical, artistic, or religious value and of objects used in religious worship (Secretariat Draft).

Under the Rome Statute’s definition of crimes against humanity, the deportation or transfer of populations is prohibited, as are enforced disappearances. Actions related to cultural genocide that constitute war crimes under the Rome Statute include: destruction and appropriation of property not of a military necessity, unlawful deportation or transfer of persons, the transfer “by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory,” and “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments…provided they are not military objectives” (Rome Statute). As noted concerning political groups, for the purpose of prevention the omission of cultural genocide is addressed by R2P.
R2P and the Limitations of Territorial Jurisdiction

In Chapter 3, I identified territorial jurisdiction for the prevention of genocide as a deficiency in the Genocide Convention because it makes it more difficult to prevent cases of intrastate genocide. By awarding the territorial authority with jurisdiction over the prevention of genocide within its territory, the Genocide Convention tasked the very authority likely to commit genocide with preventing it. R2P corrects this weakness without incorporating the flaws that would have been included with the establishment of universal preventive jurisdiction.

R2P’s two core basic principles are:

A. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.
B. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect (ICISS 2001, p. XI).

The first basic principle recognizes the sovereign rights of states to govern their territories, but with a caveat not found in the concept of sovereignty established at the Peace of Westphalia and reinforced in the *Charter of the United Nations*. The traditional concept of sovereignty is that the governing authority has the right to enact those policies internally it deems necessary free of external interference. The UN Charter reinforces traditional sovereignty, establishing that the organization is “based on the principle of the sovereign equality of all its Members” and that its Members “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”. R2P’s conception of sovereignty, unlike Westphalian sovereignty, emphasizes the responsibility of the governing authority for the welfare of its population.
The second basic principle essentially establishes a form of subsidiary preventive jurisdiction for the enforcement of human rights protection against violations that cause serious human suffering. Together, the basic principles form an international system grounded in complementarity, meaning that the right to govern and the responsibility for a given territory rests first with the government of that territory. However, if the governing authority over a given territory fails to defend and/or protect its people, the responsibility for their protection falls on the international community.

The basic principles represent two significant achievements for the international community. The first basic principle challenges the previous conception of sovereignty, that state sovereignty equated to the right to enact policies within a State as the sovereign authority deemed necessary and the right to do so without external interference, and incorporates tenets of social contract theory. Sovereignty is derived from the consent of the citizenry of the state and the recognition of sovereignty by the other members of the international community. The failure of a government to protect its population from serious human suffering caused by genocide or other mass atrocity crimes constitutes a breach of the contract between the state and its citizens.

The second basic principle makes the logical extension of the first. Whereas sovereignty involves responsibility for the wellbeing of the people living within the sovereign territory, failure to protect the people, either due to direct state action, negligence of the state or the state’s inability to provide a remedy, the international community temporarily assumes responsibility for the protection of the people. The basic principles of R2P are significant because they have advanced proclamations of how sovereignty ought to be defined to what is now the generally accepted definition of sovereignty and because, in theory, the basic principles move human rights from a subservient position in relation to state sovereignty to a position of equal footing.
R2P corrects the limitations of territorial jurisdiction included in the Genocide Convention through its reconceptualization of state sovereignty and the responsibilities of the members of the international community. Further, by including genocide alongside crimes against humanity, war crimes, and ethnic cleansing, all of which can be perpetrated within territorial borders, it does not matter under R2P if acts of genocide are intrastate.

**R2P and the Genocide Convention’s Limits on Available Recourse**

In Chapter 3, I argued that victims of intrastate genocide have no recourse available to them under the Genocide Convention. Victims of intrastate genocide can neither call upon the competent organs of the United Nations to take appropriate action under the UN Charter for the prevention of genocide nor submit a dispute concerning the application of the Genocide Convention to the International Court of Justice. This is the one deficiency that R2P fails to correct. While it has been noted above that R2P corrects the impediment to prevention of intrastate genocide by incorporating a form of complimentary jurisdiction, it does not guarantee action will be taken. When there is a failure to act for the prevention of intrastate genocide, the victims still lack recourse.

**R2P’s Practical Limitations**

On paper, R2P makes it significantly easier to prevent genocide through its correction of the vast majority of the Genocide Convention’s weaknesses. However, R2P retains and even explicitly authorizes practical impediments to genocide prevention. Under its principle of right authority, R2P states,

The Permanent Five members of the Security Council should agree not to apply their veto power, in matters where their vital state interests are not involved, to obstruct the passage
of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support (ICISS 2001, p. XIII).

R2P calls upon the permanent members of the Security Council to refrain from using their veto power “in matters where their vital state interests are not involved” (ICISS 2001, p. XIII). R2P’s position on the veto power exemplifies how little R2P changes the political realm, which is where decisions are made. What happens within the borders of each of the permanent members is vital to their state interests. R2P explicitly justifies the use of the veto by the permanent members to thwart the taking of preventive action against any one of them. More importantly, vital state interests do not begin and end within a state’s territory. This is even more the case for the permanent members of the Security Council. Therefore, R2P justifies the use of the veto to preclude preventive measures against any other state that falls within the vital interests of the permanent members. Thus, from the start R2P is limited in its application to states other than the permanent members and their allies.

It is also important to recall the text of Article 139 of the 2005 World Summit Outcome Document. The heads of state in attendance at the 2005 World Summit explicitly endorsed a policy of genocide prevention that acknowledges beforehand that some legitimate cases of genocide will effectively be responded to while others will not. Article 139 of the World Summit Outcomes Document states,

In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis [emphasis added]… should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity (2005 World Summit Outcomes Document, Article 139).

R2P and the components endorsed by heads of state in the 2005 World Summit Outcomes Document offer significant advancements in the relationship between human rights,
human rights protection, and state sovereignty. Within the bigger picture, R2P is practically an infant. Time will ultimately tell whether R2P is able to achieve more than just a theoretical evolution. Some might hold up the intervention in Libya as a practical expression of R2P’s effect on the commitment to humanitarian action. Stark (2011) has even described R2P as the policy realization of the promise of “never again”. However, I believe this to be hyperbole at best and a complete misrepresentation at worst.

The intervention in Libya offers one case of intervention post-R2P, while a number of conflicts rage on with varying degrees of intensity. There is the obvious case of Syria. There is also the less obvious case of Bahrain. Bahrain may appear to be less violent, but the number of deaths, arrests, and disappearance must be considered in relation to the overall size of the population. Hehir (2011) refers to slaughter in Sri Lanka, Darfur and the Democratic Republic of the Congo as cases that warranted external intervention, but did not receive it. Hehir (2011) concludes,

If RtoP meant something and had real influence, why was this? Supporters argue that RtoP constitutes more than military intervention and such action is not always prudent. A more accurate explanation, however, is that the response of the ‘international community’ remains dependent on the interests of the P-5 (p. 18).

Weiss (2011) is dismissive of those who would criticize R2P. While dismissing criticism of R2P, Weiss (2011) himself criticizes the “Security Council’s dithering since 2003 [in relation to Darfur]” and its “inability to address the even longer-running woes and the millions dead in the DRC” (p. 290). Weiss laments the lack of international political will to stop atrocities, thus acknowledging the selective mustering of said political will for the use of military force for alleged humanitarian purposes without using the term ‘selective’. He then fails to address why intervention occurs in some cases and not others, and criticizes those who would offer
considerations of national interest as the source of the selectivity he implicitly acknowledges. Ramesh Thakur falls into a similar trap. Despite all the evidence of selectivity that even proponents of R2P acknowledge, Ramesh Thakur (2011) argues that without R2P, interventions are more likely to be “ad hoc, unilateral, self-interested and deeply divisive” (p. 12). Thus, Thakur fails to make the connection between selectively intervening on a case-by-case basis and the role played by considerations of national interest.

Selective intervention undermines R2P and raises questions about the intent of the intervention, especially when intervention occurs in crises of less necessity relative to other ongoing crises. R2P is further undermined when intervention takes place against those regimes with poor relationships with some members of the international community, but not against those regimes with good relationships with those same members of the international community. Taking coercive measures against only those oppressive regimes deemed to be enemies is not a principle of R2P. R2P does not state that the responsibility to protect falls to the international community only when states out of favor with those countries supportive of humanitarian intervention are unable or unwilling to protect their populations from mass atrocity crimes.

Gareth Evans, co-chair of the ICISS at the time of the writing of the Responsibility to Protect, acknowledges the difficulty in reforming a system through the creation of a new legal order. Even success in reforming the system’s theoretical underpinnings does not necessarily translate into changes in the behavior of the state actors who make up the international system. Recognizing the similarities between the difficulties in implementing and enforcing the Genocide Convention and R2P, Evans (2008) quotes Adlai Stevenson: “Everything [still] depends on the active participation, pacific intentions and good faith of the Big Five” (p. 130). Bellamy (2009), one of R2P’s strongest advocates, goes further than Evans stating,
Ultimately, even when armed with the criteria for using force set out by the ICISS...decisions about intervention will continue to be made in an ad hoc fashion by political leaders balancing national interests, legal considerations, world opinion, perceived costs and humanitarian impulses—much as they were prior to the advent of R2P (p. 3).

It is difficult to reconcile these admissions with Evans’ and Bellamy’s insistence that R2P is part of a new global order within which, when warranted, intervention will be timely and driven primarily by human rights interests.

Considerations of national interest remain a significant driving force behind when and where military intervention occurs. Without changing the systemic impediments to intervention driven by necessity, as opposed to considerations of national interest, selective application of international human rights and humanitarian norms and laws to justify intervention in some cases and not others is inevitable. While R2P succeeded in reconceptualizing sovereignty, covering all groups, removing the impediment of establishing intent prior to preventive action, and establishing a form of subsidiary preventive jurisdiction, it fails to reform the procedures through which decision-making for the purpose of preventing genocide occurs. Hehir (2011) provides an apt conclusion:

The problem with R2P is precisely that which rendered ‘Never Again!’ and the Genocide Convention impotent, namely that its enforcement is predicated in the assent of the Security Council...Only the very naïve imagine that the P5 honor Article 24.1 of the Charter and act on behalf of UN member states; each state’s respective national interest determines their position on a particular issue much more so than their commitment to legal or moral principles (p. 18).

The International Criminal Court and the Future of Genocide Prevention

I argued previously that a significant flaw in the Genocide Convention was the failure to include a separate form of jurisdiction for the purpose of preventing genocide from the purpose
of punishing genocide. Shany (2009) provides an excellent defense of this position. Shany (2009) argues that the eradication of genocide requires

the commitment to set up strong preventive mechanisms engaging, when necessary, the use of force. The preference for post-factum criminal processes, while not surprising, is disappointing: insofar as punishment indicates the failure of prevention, it would appear that the drafters inserted a duty to prevent that was designed to be honored by its breach (pp. 29-30).

When I made this argument, I was doing so specifically in relation to the need to take preventive action in a timely and effective manner. I maintain this position because punishment does not occur until after the crime has been committed. However, this argument should not be interpreted to mean that the role punishment can play in the prevention of genocide is insignificant. Consistent and effective punishment of those guilty of planning and perpetrating genocide could act as a significant deterrent to those considering doing the same in the future.

According to Sikkink (2011),

Many commentators have long claimed that we shouldn’t expect human rights norms to have any important effects because they don’t have any enforcement or teeth. But I believe that human rights prosecutions can be conceptualized as a form of enforcement or sanction for violations of…international criminal and human rights law. If enforcement is necessary to get countries to comply with the law, we would expect prosecutions to lead to better practices (p. 170).

Deterrence has been one of the core moral foundations for punishing those who violate laws. Unless the deterrent effect of punishment is and has been illusory, Sikkink’s conclusion that enforcement of the law through punishing those who violate it ought to lead to better practices is warranted.

As noted above, the key to ensuring punishment of genocide acts as a deterrent is a need for consistent and effective punishment. A permanent international criminal tribunal with jurisdiction over the crime of genocide offers promise of consistency that ad hoc tribunals
cannot. The Genocide Convention’s negotiating parties, however, were wary of the power of a permanent international criminal court. According to Schabas (1998), “The Cold War was beginning, and there were fears that an international court would inevitably lead to abuse, becoming a forum for politically motivated settling of scores between superpowers” (p. 5). The negotiating parties settled on the prospect of a future international criminal court, relying on state tribunals or ad hoc international tribunals for the purpose of punishment. Article VI of the Genocide Convention states,

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

Prior to the adoption of the Rome Statute and the establishment of the ICC, the international community twice relied on ad hoc criminal tribunals established by the United Nations Security Council to try and punish genocide suspects. The International Criminal Tribunal for the former Yugoslavia (ICTY) was created by Resolution 827 dated May 25, 1993. The International Criminal Tribunal for Rwanda (ICTR) was created by Resolution 955 dated November 8, 1994. A judge for the ICTY has stated that “retribution and deterrence serve as a primary purposes of sentence” (Schabas 2004, p. 164). Further, according to the ICTR,

> It is clear that the penalties imposed on accused persons found guilty by the Tribunal must be directed, on the one hand, at retribution of the said accused, who must see their crimes punished, and over and above that, on the other hand, at deterrence, namely to dissuade for good, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights (Schabas 2004, p. 164).

Despite the obvious progress made as exemplified by the Security Council’s successful creation of the ICTY and the ICTR, I would argue that for the threat of punishment to be an effective deterrent against the future commission of genocide, a permanent international criminal
court was necessary. Without one, the prospect of being punished was arguably a relatively remote one. That changed with the creation of the International Criminal Court. The Rome Statute of the International Criminal Court (ICC) was adopted by the United Nations General Assembly on July 17, 1998, with 120 votes in favor, seven against, and twenty-one abstentions (Schabas 2004). The Rome Statute became binding on April 11, 2001, when it was ratified by its sixtieth party. The ICC officially came into being on July 1, 2002, when the Rome Statute entered into force.

Article 6 of the Rome Statute confers the ICC with punitive jurisdiction over the crime of genocide. Article 6 states,

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

The Rome Statute’s definition of genocide is the same as that found in the Genocide Convention. This is not surprising. The parties to the Genocide Convention consented to its definition of genocide. Attempts to incorporate a revised definition of genocide into the Rome Statute may have thwarted its adoption. So, while the Rome Statute does not correct the weaknesses in the Genocide Convention’s definition of genocide, what it does is offer a permanent venue for the punishment of those guilty of genocide.

The key to the ICC’s role in the future of genocide prevention is its ability to function as a judicial body that consistently and effectively punishes those guilty of participating in genocide. This is where some of the shine wears off. The ICC has ongoing investigations into
situations in Uganda, the Democratic Republic of the Congo, the Central African Republic, Sudan, Kenya, Libya, Cote d'Ivoire, and Mali. Yet, as of today, the ICC has handed down only one guilty verdict in the case of The Prosecutor v. Thomas Lubanga Dyilo. Meanwhile, the only individual currently charged with genocide, Omar Al Bashir, remains at large as the president of Sudan. Bashir was reelected to office in 2010 despite the existence of a warrant for his arrest.

Burke-White (2008) notes that states, non-governmental organizations, and the citizens of the world had high expectations that the ICC would provide widespread accountability for international crimes. Burke-White (2008) essentially argues that such expectations were unwarranted. He states, “These high hopes largely failed to reflect the reality of the ICC’s modest capabilities” (White-Burk 2008, p. 54). Due to the ICC’s limited resources, Burke-White (2008) concludes the ICC “will, at best, make a far more limited contribution to ending impunity” (p. 54). Yet, Burke-White sees another way in which the ICC can contribute indirectly to ending impunity for the perpetrators of international crimes through the proactive embracing of its status as a court of complementarity.

Burke-White notes that the ICC’s simple act of opening an investigation into the situation in the DRC has activated the Congolese domestic judiciary. This Burke-White labels proactive complementarity. According to Burke-White (2008),

Not only does the D.R. Congo situation highlight the potential for the ICC to prompt domestic governments to take action, it also demonstrates how the Rome System of Justice in fact empowers domestic governments to take action. In each of these cases, Congolese military courts directly applied the Rome Statute of the ICC as the operative law and basis for convictions (p. 106).

The threat of international prosecution could have a catalyzing effect on domestic institutions and domestic accountability. Burke-White argues that such cataclysm would allow the ICC’s
Office of the Prosecutor to focus its limited resources on those cases on which there is little room for hope that the domestic judiciary will ensure accountability. Burke-White (2008) concludes,

Though the Court is likely, over the long term, to be judged on the success of its own investigations and prosecutions, it is also likely to be blamed for its own inaction and the ability of a number of serious international criminals to evade accountability. Pursuing a policy of proactive complementarity can help the Office of the Prosecutor close the impunity gap and make the greatest contribution toward the success of the Rome System (p. 108).

Though I would like to end this overview on a positive note, there is one caveat to Burke-White’s excellent contribution; it requires universal acceptance of the ICC’s jurisdiction. In order to catalyze domestic institutions into action, the threat of international punishment must be tangible. Yet, every state has not ratified the Rome Statute, which means the ICC does not hold jurisdiction over nationals from those states. This is not a failsafe for all states that have not ratified the Rome Statute. Article 13(b) of the Rome Statute confers the ICC with jurisdiction in [a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.

Therefore, the Security Council can refer cases involving non-state parties to the ICC. This is the means through which the ICC gained jurisdiction over President Bashir. Sudan is not a party to the Rome Statute. Yet, an obvious flaw remains. The veto-wielding members of the Security Council who have not ratified the Rome Statute can veto any attempt to refer them to the Court. This includes China, Russia, and the United States. Therefore, China, Russia, and the United States have practical immunity from prosecution at the ICC. Further, other states that have not ratified the Rome Statute retain the same if they have benefactors in the permanent members willing to veto attempts at a referral.

The International Court of Justice and the Future of Genocide Prevention
As with almost all research projects, my project evolved from what I had originally envisioned to what it has become. I had and I have retained an interest in what role the International Court of Justice could play in deterring third-party actors from indirectly and directly supporting genocidal regimes. It was my belief that genocidal regimes could not successfully commit genocide free of external interference without some level of support from their more powerful benefactors, whether that support comes in the form of political, economic, or military aid, or simply through efforts to impede preventive action. Without going into great detail, one need only consider the relationships of the permanent members to the regimes that committed genocide in the generally agreed upon cases. China and the United States had a relationship with Pakistan when it committed genocide in East Pakistan. While less of a direct relationship, the U.S. facilitated the rise of the Khmer Rouge in Cambodia through its destabilizing war in Vietnam, which included the bombing of Cambodia. The U.S. also maintained relationships with Guatemala’s military junta and Saddam Hussein in Iraq. France had a strong relationship with the Hutu government in Rwanda. Russia had the same with Serbia. Finally, China had and retains a strong economic relationship with Sudan.

Subsequent to that original vision, the ICJ ruled in the case of the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro). In its 2007 ruling, the ICJ concluded that Serbia failed to fulfill its obligation to prevent genocide. Prior to this finding, the Court also considered whether Serbia was guilty of the positive acts under Article III of the Genocide Convention, which include the commission of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.
Because of its significance, it is worth quoting the ICJ’s ruling at length. The ICJ needed to first ascertain what the Genocide Convention obligates of its parties:

The Court finds that Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles….In the view of the Court, taking into account the established purpose of the Convention, the effects of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that Article I categorizes genocide as “a crime under international law”: by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. It would be paradoxical, if States were thus under an obligation to prevent, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of commission of genocide (Bosnia v. Serbia).

The ICJ essentially ruled that parties to the Genocide Convention are obligated not only to prevent genocide within their own territories, but are also obligated to refrain from committing genocide in the territories of other states, both directly and through “persons over whom they have such firm control that their conduct is attributable to the State concerned under international law” (Bosnia v. Serbia). Further addressing the extent to which parties to the Convention’s obligations extend, the ICJ found, “The Court observes that the substantive obligations arising from Articles I and III are not on their face limited by territory. They apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question (emphasis added)” (Bosnia v. Serbia).

The ICJ then turned to the question of whether Serbia could be said to have had the necessary influence over the Bosnian Serbs to be potentially responsible for any of the Bosnian Serbs’ actions. The Court considered three questions in order to ascertain what level of, if any, responsibility could be attributed to Serbia:
First, it needs to be determined whether the acts of genocide could be attributed to the Respondent on the basis that those acts were committed by its organs or persons whose acts are attributable to it under customary rules of State Responsibility. Second, the Court needs to ascertain whether acts of the kind referred to in Article III, paragraphs (b) to (e), of the Convention, other than genocide itself, were committed by persons or organs whose conduct is attributable to the Respondent. Finally, it will be for the Court to rule on the issue as to whether the Respondent complied with its twofold obligation deriving from Article I of the Convention to prevent and punish genocide (Bosnia v. Serbia).

The ICJ sought to determine whether Serbia was a direct participant in the genocide at Srebrenica or directly oversaw the commission of genocide by the Bosnian Serbs. Failing that, the Court sought to determine whether Serbia was responsible for the other punishable acts under Article III of the Genocide Convention. Finally, if Serbia was not found responsible for the positive acts under Article III, the Court sought to determine whether Serbia failed to use its influence over the Bosnian Serbs to uphold its obligation to prevent genocide.

In its answer to the first question concerning direct responsibility for the genocide at Srebrenica, the ICJ found that it has not been established that the massacres at Srebrenica were committed by persons or entities ranking as organs of the Respondent. It finds also that it has not been established that those massacres were committed on the instructions, or under the direction of organs of the Respondent State, nor that the Respondent exercised effective control over the operations in the course of which those massacres, which constituted the crime of genocide, were perpetrated (Bosnia v. Serbia).

In its answer to the first question, the ICJ found that, based in the evidence before it, Serbia neither directly participated in the genocide at Srebrenica nor commanded the Bosnian Serbs to commit genocide. Therefore, Serbia was neither an active participant in the genocide nor responsible for the commission of genocide.

The ICJ’s second question basically asked whether Serbia could be found to have incited the genocide, conspired with the Bosnian Serbs to commit genocide, or was complicit in the commission of genocide. The Court dismissed the first two punishable acts, stating, “It notes
that it is clear from an examination of the facts that only alleged acts of complicity in genocide, within the meaning of Article III, paragraph (e), are relevant in the present case” (Bosnia v. Serbia). In order to establish complicity in genocide the Court sought to determine whether Serbia “furnished ‘aid or assistance’ in the commission of the genocide in Srebrenica” (Bosnia v. Serbia). Further, for a finding of complicity, Serbia would have needed to be “aware or should have been aware of the specific intent (dolus specialis) of the principal perpetrator” (Bosnia v. Serbia). The Court found that it had “not been established beyond any doubt in the argument” that the

authorities of the FRY supplied – and continued to supply – the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities were clearly aware that genocide was about to take place or was under way (Bosnia v. Serbia).

The Court found that, while complicity does not require shared intent to commit genocide, Serbia must have been aware of the genocidal intent of the Bosnian Serbs for Serbia to have committed the positive act of complicity in genocide.

Clearly, establishing that a third-party actor committed one of the positive punishable acts under Article III of the Genocide Convention is a difficult endeavor. This is apparent in the level of difficulty there is in proving the least egregious of the positive punishable acts, complicity in genocide. Palchetti (2009) notes, “[T]he scope of responsibility for complicity in genocide is limited by the requirement that the assisting state be fully aware that the supply of aid or assistance will facilitate the commission of genocide” (p. 393). It is this difficulty that makes the ICJ’s ruling on the final question so significant.

The ICJ’s final question concerned whether Serbia fulfilled its obligation to prevent genocide. Establishing failure to prevent genocide involves a lesser standard of proof than that of
the punishable acts under Article III of the Genocide Convention. The standard of proof for the failure to prevent genocide appears to mirror the concept of the “reasonable person” in cases of negligence under common law. The Court found that Serbia failed to fulfill its obligation to prevent genocide at Srebrenica under the following rationale:

In view of their undeniable influence…the Yugoslav federal authorities should…have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised. The FRY leadership, and President Milošević above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region. Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed. It must therefore be concluded that the organs of the Respondent did nothing to prevent the Srebrenica massacres, claiming that they were powerless to do so, which hardly tallies with their known influence over the VRS. As indicated above, for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them.

The ICJ’s ruling on state responsibility for the prevention of genocide offers promise for the future of genocide prevention. Seibert-Fohr (2009) notes, “The Genocide Convention, though criticized as excessively focused on criminal measures, offers potentials which have not been fully exhausted so far. Among them is the concept of state responsibility” (p. 371). As noted above, the ICJ’s rulings in favor of Serbia on each of the punishable positive acts made its final ruling so important for the future of genocide prevention. A final ruling in favor of Serbia would have failed to establish any precedent beyond the willingness of the Court to hear cases involving the application of the Genocide Convention to third-party actors. While that would have been important, a finding in favor of Serbia on all counts, despite its close relationship with the Bosnian Serbs, would have demonstrated the difficulty of winning a case before the Court. Such a result could have created a deterrent against bringing future cases before the Court. For the ICJ to play a significant role in the future of genocide prevention, its ruling in *Bosnia v.*
Serbia needed to offer a warning to third-party actors against aiding in the commission of genocide and from shirking their obligation to prevent genocide.

Despite the ICJ’s ruling that Serbia failed to prevent genocide, limitations remain on the role the ICJ can play. Sixteen parties to the Genocide Convention submitted reservations to Article IX of the Convention. While eleven of the sixteen parties have withdrawn their reservations, two of the most powerful state actors, China and the United States, retain their reservations. As noted earlier in this chapter, of the seven generally agreed upon cases of genocide, China had some relationship to the genocidal regime in the cases of Bangladesh and Sudan, and the United States had some relationship to the genocidal regime in the cases of Bangladesh, Guatemala, and Iraq. Further, if Rwanda has committed genocide in the Democratic Republic of the Congo, the U.S. would also have had a relationship with Rwanda. There are currently 142 state parties to the Genocide Convention. China and the U.S. are among a total of five state parties who do not recognize the compulsory jurisdiction of the ICJ over the Genocide Convention. It is time for that to change.

**Conclusion**

As I noted at the beginning of this chapter, the recent developments discussed in this chapter provide some promise for the future of genocide prevention because each development attacks the crime of genocide from a different front. The responsibility to protect seeks to prevent cases of genocide from causing irreparable harm by confronting cases of genocide early on through the use of coercive measures, including military force. The International Criminal Court seeks to deter future cases of genocide by punishing those who plan and participate in genocide.

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120 Interestingly, Rwanda also maintains its reservation to Article IX of the Genocide Convention.
The International Court of Justice’s ruling in the Bosnia v. Serbia case demonstrated the ICJ’s willingness to act on its jurisdiction over disputes concerning the application of the Genocide Convention. This triumvirate, therefore, includes efforts towards proactive prevention of genocide, individual criminal accountability for genocide, and state responsibility for genocide.

As I stated in this chapter, R2P addresses five of the six identified weaknesses in the text of the Genocide Convention. It corrected the failure to define genocide as a threat to international peace and security by grouping genocide with crimes against humanity, war crimes, and ethnic cleansing, all of which can be committed within one specific territory without being excluded from R2P’s preventive jurisdiction. R2P excludes the specific intent requirement included in the Genocide Convention. R2P’s just cause threshold states that military intervention for human protection is warranted when there is “large scale loss of life, actual or apprehended, with genocidal intent or not (emphasis added)” (ICISS 2001, p. XII). R2P also eliminated the blind spot created through the omission of political groups from the Genocide Convention’s protection. R2P’s more general protection against large scale loss of life and the 2005 World Summit’s inclusion of genocide, crimes against humanity, war crimes, and ethnic cleansing as acts that could involve large scale loss of life, the omission of political groups is corrected.

As with the correction of the omission of political groups from the Genocide Convention’s protection, the inclusion of genocide alongside crimes against humanity, war crimes, and ‘ethnic cleansing’, the exclusion of cultural genocide was also corrected. Each of the crimes included alongside genocide contains elements of the crime of cultural genocide that was included in the Original “Secretariat” Draft and the Revised Ad Hoc Committee Draft. R2P’s two basic principles and their endorsement at the 2005 World Summit correct the limitations of territorial jurisdiction for the prevention of genocide. R2P corrects the limitations of territorial
jurisdiction included in the Genocide Convention through its reconceptualization of state sovereignty and the responsibilities of the members of the international community. Further, by including genocide alongside crimes against humanity, war crimes, and ethnic cleansing, all of which can be perpetrated within territorial borders, it does not matter under R2P if acts of genocide are intrastate. The one identified weakness R2P did not correct is the limits on available recourse. However, this is also the one weakness that arguably could not have been corrected. Despite R2P’s successful reconceptualization of state sovereignty, the international system remains a system within which states are the primary actors.

The establishment of the ICC created a permanent international criminal tribunal with punitive jurisdiction over the crime of genocide. Because consistent criminal prosecution of genocide suspects has the potential to be an effective deterrent against the commission of genocide in the future, the ICC could aid in the prevention of genocide. Prior to the establishment of the ICC, the international community relied on national courts and ad hoc tribunals for the punishment of genocide. Until the current trial of Rios Montt in Guatemala, national courts had demonstrated a lack of willingness to try genocide suspects. The establishment of the ICTY and ICTR relied on there being consensus among the permanent members of the Security Council for their creation. As I argued earlier in this chapter, the ICTY and ICTR represented significant progress, however for the threat of punishment to be an effective deterrent against the future commission of genocide, a permanent international criminal court was needed. Otherwise, the prospect of being punished was arguably a relatively remote one. That changed with the opening of the ICC on July 1, 2002.

In its ruling in the case of *Bosnia v. Serbia*, the ICJ set a precedent that third-party actors have a responsibility under the Genocide Convention to prevent genocide beyond their territorial
borders. The ICJ essentially ruled that parties to the Genocide Convention are obligated not only to prevent genocide within their own territories, but are also obligated to refrain from committing genocide in the territories of other states, both directly and through “persons over whom they have such firm control that their conduct is attributable to the State concerned under international law” (Bosnia v. Serbia). Further addressing the extent to which parties to the Convention’s obligations extend, the ICJ found, “The Court observes that the substantive obligations arising from Articles I and III are not on their face limited by territory. They apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question” (emphasis added)” (Bosnia v. Serbia). The ICJ concluded that Serbia had the necessary influence over the Bosnian Serbs to have had some responsibility to use its influence to deter the Bosnian Serbs from committing genocide at Srebrenica. This was an historic ruling, its significance bound to the fact that in each of the generally agreed upon cases of genocide, one or more of the permanent members of the Security Council maintained influential relationships with the genocidal regime.

Unfortunately, with the promise of each of the three recent developments comes cause for concern. R2P essentially immunizes the permanent members and their allies from R2P’s scope. According to Evans (2008), “It will be the case that some human beings simply cannot be rescued except at unacceptable cost—perhaps of a larger regional conflagration, involving major military powers” (p. 145). Evans’ argument is incorporated into R2P. R2P calls upon the permanent members of the Security Council to refrain from using their veto power “in matters where their vital state interests are not involved” (ICISS 2001, p. XIII). Of course, the “vital interests” of the permanent members extend far beyond their territorial borders. R2P’s position
on the veto power exemplifies how little R2P changes the political realm, which is where decisions are made. Hehir’s (2011) conclusion stated previously is worth repeating:

The problem with R2P is precisely that which rendered ‘Never Again!’ and the Genocide Convention impotent, namely that its enforcement is predicated in the assent of the Security Council...Only the very naive imagine that the P5 honor Article 24.1 of the Charter and act on behalf of UN member states; each state’s respective national interest determines their position on a particular issue much more so than their commitment to legal or moral principles (p. 18).

For it to be truly effective, the ICC requires universal ratification of the Rome Statute. Without universal ratification, some states are able to escape the ICC’s punitive jurisdiction and, therefore, can mitigate the pressure on domestic judiciaries that the ICC’s complementarity status is meant to exert. While a decision not to ratify the Rome Statute is not a failsafe because the Security Council can refer cases involving non-state parties to the ICC, the veto-wielding members of the Security Council who have not ratified the Rome Statute can veto any attempt to refer themselves and their allies to the ICC. This includes China, Russia, and the United States.

Finally, despite the ICJ’s ruling that Serbia failed to prevent genocide, limitations remain on the role the ICJ can play. In 2002, the DRC attempted to bring proceedings against Rwanda before the ICJ. In order to establish the jurisdiction of the ICJ over proceedings, the DCR cited Article IX of the Genocide Convention. In the ICJ’s decision to deny itself jurisdiction, it stated,

The Court notes that both the DRC and Rwanda are parties to the Genocide Convention, the DRC having acceded on 31 May 1962 and Rwanda on 16 April 1975. The Court observes, however, that Rwanda’s instrument of accession to the Convention, as deposited with the Secretary-General of the United Nations, contains a reservation worded as follows: ‘The Rwandese Republic does not consider itself as bound by Article IX of the Convention’ (Armed Activities on the Territory of the Congo 2006, p. 4).

As previously noted, China and the United States maintain reservations to Article IX of the Genocide Convention. Both China and the U.S. also maintained relationship with more than one of the regimes that committed genocide in the generally agreed upon cases.
The UN system is predicated on the theory of the sovereign equality of every member of the international community. This is clearly not the case in practice. Each of the three recent developments offer promise for an improvement upon the international community’s previous record on genocide prevention. However, to truly eradicate genocide as much as is humanly possible, R2P must not be allowed to become a political tool that offers impunity for some states and military intervention for others. This would require that the permanent members and their “vital interests” share the same level of accountability as every other member of the international community. This same necessity carries over to the two international judicial bodies. The International Criminal Court cannot continue down the path towards becoming a judiciary that only punishes individuals residing in weaker states while immunizing those from the more powerful state actors. It cannot be ignored that the eight situations currently under investigation all involve African countries. Meanwhile, the U.S. illegally invaded Iraq, authorized systematic torture, and is currently under investigation by two UN special rapporteurs for war crimes related to its targeted killing program. The ICC cannot fulfill its potential without universal acceptance of its punitive jurisdiction. Finally, for the ICJ to fulfill its potential, one of two things must happen. Either the remaining reservations to Article IX of the Genocide Convention must be withdrawn or the ICJ must do what it should have done a long time ago; it must find that reservations to Article IX conflict with the object and purpose of the treaty and, therefore, invalidate them.
Appendix A
Convention on the Prevention and Punishment of the Crime of Genocide

The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world,

Recognizing that at all periods of history genocide has inflicted great losses on humanity, and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,

Hereby agree as hereinafter provided:

Article 1

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

Article 2

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

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

Article 3

The following acts shall be punishable:

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

Article 4
Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article 5

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3.

Article 6

Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article 7

Genocide and the other acts enumerated in Article 3 shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article 8

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article 3.

Article 9

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Article 10
The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

Article 11

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 12

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

Article 13

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a proces-verbal and transmit a copy of it to each Member of the United Nations and to each of the non-member States contemplated in Article 11.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

Article 14

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.
Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

Article 15

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

Article 16

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

Article 17

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in Article 11 of the following:

- (a) Signatures, ratifications and accessions received in accordance with Article 11;
- (b) Notifications received in accordance with Article 12;
- (c) The date upon which the present Convention comes into force in accordance with Article 13;
- (d) Denunciations received in accordance with Article 14;
- (e) The abrogation of the Convention in accordance with Article 15;
- (f) Notifications received in accordance with Article 16.

Article 18

The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to all Members of the United Nations and to the non-member States contemplated in Article 11.

Article 19

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.
Appendix B
United Nations General Assembly Resolution 96(I) Dated December 11, 1946

The Crime of Genocide

Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.

Many instances of such crimes of genocide have occurred when racial, religious, political, and other groups have been destroyed, entirely or in part.

The punishment of the crime of genocide is a matter of international concern.

The General Assembly, therefore,

Affirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices - whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds --are punishable;

Invites the Member States to enact the necessary legislation for the prevention and punishment of this crime;

 Recommends that international co-operation be organized between States with a view to facilitating the speedy prevention and punishment of the crime of genocide, and, to this end, Requests the Economic and Social Council to undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly.

Fifty-fifth plenary meeting,
11 December 1946

(RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY DURING THE SECOND PART OF ITS FIRST SESSION FROM 23 OCTOBER TO 15 DECEMBER 1946, Lake Success, New York, 1947.)
Appendix C
Economic and Social Council Resolution 47(IV) Dated March 28, 1947

The Economic and Social Council,

Taking cognizance of the General Assembly resolution No. 96 (I) of 11 December 1946

Instructs the Secretary General

(a) To undertake, with the assistance of experts in the field of international and criminal law, the necessary studies with a view to drawing up a draft convention in accordance with the resolution of the General Assembly; and

(b) After consultation with the General Assembly Committee on the Development and Codification of International Law and, if feasible, the Commission on Human Rights and, after reference to all Member Governments for comments, to submit to the next session of the Economic and Social Council a draft convention on the crime of genocide.
Preamble: The High Contracting Parties proclaim that Genocide, which is the intentional destruction of a group of human beings, defies universal conscience, inflicts irreparable loss on humanity by depriving it of the cultural and other contributions of the group so destroyed, and is in contradiction with the spirit and aims of the United Nations.

1. They appeal to the feelings of solidarity of all members of the international community and call upon them to oppose this odious crime.
2. They proclaim that the acts of genocide defined by the present Convention are crimes against the Law of Nations, and that the fundamental exigencies of civilization, international order and peace require their prevention and punishment.
3. They pledge themselves to prevent and to repress such acts wherever they may occur.

Article I: Definitions

I. [Protected groups] The purpose of this Convention is to prevent destruction of racial, national, linguistic, religious or political groups human beings.

II. [Acts qualified as Genocide] In this Convention, the word 'genocide' means a criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying it in whole or in part or of preventing its preservation or development.

Such acts consist of:

1. [Physical genocide] Causing the death of members of a group or injuring their health or physical integrity by:

   (a) group massacres or individual executions; or
   (b) subjection to conditions of life which, by lack of proper housing, clothing, food, hygiene and medical care, or excessive work or physical exertion are likely to result in the debilitation or death of the individuals; or
   (c) mutilations and biological experiments imposed for other than curative purposes; or
   (d) deprivation of all means of livelihood, by confiscation of property, looting, curtailment of work, denial of housing and of supplies otherwise available to the other inhabitants of the territory concerned.

2. [Biological genocide] Restricting births by:
(a) sterilization and/or compulsory abortion; or
(b) segregation of the sexes; or
(c) obstacles to marriage.

3. [Cultural genocide] Destroying 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 historical, artistic, or religious value and of objects used in religious worship.

Article II: [Punishable offences]

I. The following are likewise deemed to be crimes of genocide:

1. Any attempt to commit genocide;
2. the following preparatory acts:

(a) studies and research for the purpose of developing the technique of genocide;
(b) setting up of installations, manufacturing, obtaining, possessing or supplying of articles or substances with the knowledge that they are intended for genocide;
(c) issuing instructions or orders, and distributing tasks with a view to committing genocide.

II. The following shall likewise be punishable:

1. wilful participation in acts of genocide of whatever description;
2. direct public incitement to any act of genocide whether the incitement be successful or not;
3. conspiracy to commit acts of genocide.

Article III: [Punishment of a Particular Offence] All forms of public propaganda tending by their systematic and hateful character to promote genocide, or tending to make it appear as a necessary, legitimate or excusable act shall be punished.

Article IV: [Persons Liable] Those committing genocide shall be punished, be they rulers, public officials or private individuals.

Article V: [Command of the Law and Superior Orders] Command of the law or superior orders shall not justify genocide.
Article VI: [Provisions Concerning Genocide in Municipal Criminal Law] The High Contracting Parties shall make provision in their municipal law for acts of genocide as defined by Articles I, II, and III, above, and for their effective punishment.

Article VII: [Universal Enforcement of Municipal Criminal Law] The High Contracting Parties pledge themselves to punish any offender under this Convention within any territory under their jurisdiction, irrespective of the nationality of the offender or of the place where the offence has been committed.

Article VIII [Extradition]
The High Contracting Parties declare that genocide shall not be considered as a political crime and therefore shall be grounds for extradition.

Article IX: [Trial of Genocide by an International Court] The High Contracting Parties pledge themselves to commit all persons guilty of genocide under this Convention for trial to an international court in the following cases:

1. When they are unwilling to try such offenders themselves under Article VII or to grant their extradition under Article VIII.
2. If the acts of genocide have been committed by individuals acting as organs of the State or with the support or toleration of the State.

Article X: [International Court Competent to Try Genocide] Two drafts are submitted for this section:

1st draft: The court of criminal jurisdiction under Article IX shall be the International Court having jurisdiction in all matters connected with international crimes.
2nd draft: An international court shall be set up to try crimes of genocide (vide Annexes).

Article XI: [Disbanding of Groups or Organizations Having Participated in Genocide] The High Contracting Parties pledge themselves to disband any group or organization which has participated in any act of genocide mentioned in Articles I, II, and III, above.

Article XII: [Action by the United Nations to Prevent or to Stop Genocide] Irrespective of any provision in the foregoing articles, should the crimes as defined in this Convention be committed in any part of the world, or should there be serious reasons for suspecting that such crimes have been committed, the High Contracting Parties may call upon the competent organs of the United Nation to take measures for the suppression or prevention of such crimes. In such case the said Parties shall do everything in their power to give full effect to the intervention of the United Nations.

Article XIII: [Reparations to Victims of Genocide] When genocide is committed in a country by the government in power or by sections of the population, and if the government fails to resist it
successfully, the State shall grant to the survivors of the human group that is a victim of genocide redress of a nature and in an amount to be determined by the United Nations.

Article XIV: [Settlement of Disputes on Interpretation or Application of the Convention] Disputes relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice.

[Omitted: final clauses, Articles IX to XXIV]
Appendix E
Ad Hoc Committee Draft
Second Draft Genocide Convention
Prepared by the Ad Hoc Committee of the Economic and Social Council (ECOSOC),
meeting between April 5, 1948 and May 10, 1948 [UN Doc. E/AC.25/SR.1 to 28 ]

The High Contracting Parties

Declaring that genocide is a grave crime against mankind which is contrary to the spirit and aims
of the United Nations and which the civilized world condemns;

Having been profoundly shocked by many recent instances of genocide;

Having taken note of the fact that the International Military Tribunal at Nürnberg in its judgment
of 30 September-1 October 1946 has punished under a different legal description certain persons
who have committed acts similar to those which the present Convention aims at punishing; and

Being convinced that the prevention and punishment of genocide requires international co-
operation,

Hereby agree to prevent and punish the crime as hereinafter provided:

[Substantive articles]

Article I: [Genocide a crime under international law]
Genocide is a crime under international law whether committed in time of peace or in time of
war.

Article II: ['Physical and biological' genocide]
In this Convention genocide means any of the following deliberate acts committed with the
intent to destroy a national, racial, religious or political group, on grounds of the national or
racial origin, religious belief, or political opinion of its members:

1. Killing members of the group;
2. Impairing the physical integrity of members of the group;
3. Inflicting on members of the group measures or conditions of life aimed at causing their
deaths;
4. Imposing measures intended to prevent births within the group.

Article III ['Cultural' genocide]
In this Convention genocide also means any deliberate act committed with the intent to destroy
the language, religion, or culture of a national, racial or religious group on grounds of the
national or racial origin or the religious belief of its members such as:
1. Prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;
2. Destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.

Article IV: [Punishable acts]
The following acts shall be punishable:

(a) Genocide as defined in Articles II and III;
(b) Conspiracy to commit genocide;
(c) Direct incitement in public or in private to commit genocide whether such incitement be successful or not;
(d) Attempt to commit genocide;
(e) Complicity in any of the acts enumerated in this article.

Article V: [Persons liable]
Those committing genocide or any of the other acts enumerated in Article IV shall be punished whether they are heads of State, public officials or private individuals.

Article VI: [Domestic legislation]
The High Contracting Parties undertake to enact the necessary legislation in accordance with their constitutional procedures to give effect to the provisions of this Convention.

Article VII [Jurisdiction]
Persons charged with genocide or any of the other acts enumerated in Article IV shall be tried by a competent tribunal of the State in the territory of which the act was committed or by a competent international tribunal.

Article VIII: [Action of the United Nations]

1. A party to this Convention may call upon any competent organ of the United Nations to take such action as may be appropriate under the Charter for the prevention and suppression of genocide.
2. A party to this Convention may bring to the attention of any competent organ of the United Nations any case of violation of this Convention.

Article IX: [Extradition]

1. Genocide and the other acts enumerated in Article IV shall not be considered as political crimes and therefore shall be grounds for extradition.
2. Each party to this Convention pledges itself to grant extradition in such cases in accordance with its laws and treaties in force.
Article X: [Settlement of disputes by the International Court of Justice]
Disputes between the High Contracting Parties relating to the interpretation or application of this Convention shall be submitted to the International Court of justice provided that no dispute shall be submitted to the International Court of justice involving an issue which has been referred to and is pending before or has been passed upon by a competent international criminal tribunal.

[Omitted: final clauses, Articles X to IX]
Appendix F
Economic and Social Council Resolution 153(VII) Dated August 26, 1948

The Economic and Social Council

Decides to transmit to the General Assembly the draft Convention on the Prevention and Punishment of the Crime of Genocide submitted to the Council in the report of the ad hoc Committee on Genocide; together with the remainder of this report and the records of the proceedings of the Council at its seventh session on this subject.
Appendix G

Synopsis
The Responsibility to Protect

Core Principles

(1) Basic Principles
A. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.
B. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.

(2) Foundations
The foundations of the responsibility to protect, as a guiding principle for the international community of states, lie in:
A. obligations inherent in the concept of sovereignty;
B. the responsibility of the Security Council, under Article 24 of the UN Charter, for the maintenance of international peace and security;
C. specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law;
D. the developing practice of states, regional organizations and the Security Council itself.

(3) Elements
The responsibility to protect embraces three specific responsibilities:
A. The responsibility to prevent: to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.
B. The responsibility to react: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.
C. The responsibility to rebuild: to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.

(4) Priorities
A. Prevention is the single most important dimension of the responsibility to protect: prevention options should always be exhausted before intervention is contemplated, and more commitment and resources must be devoted to it.
B. The exercise of the responsibility to both prevent and react should always involve less intrusive and coercive measures being considered before more coercive and intrusive ones are applied.

Principles for Military Intervention
(1) The Just Cause Threshold
Military intervention for human protection purposes is an exceptional and extraordinary measure. To be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur, of the following kind:
A. Large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
B. Large scale ‘ethnic cleansing’, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.

(2) The Precautionary Principles
A. Right intention: The primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering. Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned.
B. Last resort: Military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded.
C. Proportional means: The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective.
D. Reasonable prospects: There must be a reasonable chance of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than the consequences of inaction.

(3) Right Authority
A. There is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has.
B. Security Council authorization should be sought prior to any military intervention action being carried out. Those calling for an intervention should formally request such authorization, or have the Council raise the matter on its own initiative, or have the Secretary-General raise it under Article 99 of the UN Charter.
C. The Security Council should deal promptly with any request for authority to intervene where there are allegations of large scale loss of human life or ethnic cleansing. It should in this context seek adequate verification of facts or conditions on the ground that might support a military intervention.
D. The Permanent Five members of the Security Council should agree not to apply their veto power, in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support.
E. If the Security Council rejects a proposal or fails to deal with it in a reasonable time, alternative options are:
   I. Consideration of the matter by the General Assembly in Emergency Special Session under the “Uniting for Peace” procedure; and
II. action within area of jurisdiction by regional or sub-regional organizations under Chapter VIII of the Charter, subject to their seeking subsequent authorization from the Security Council.

F. The Security Council should take into account in all its deliberations that, if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation – and that the stature and credibility of the United Nations may suffer thereby.

Operational Principles

A. Clear objectives; clear and unambiguous mandate at all times; and resources to match.
B. Common military approach among involved partners; unity of command; clear and unequivocal communications and chain of command.
C. Acceptance of limitations, incrementalism and gradualism in the application of force, the objective being protection of a population, not defeat of a state.
D. Rules of engagement which fit the operational concept; are precise; reflect the principle of proportionality; and involve total adherence to international humanitarian law.
E. Acceptance that force protection cannot become the principal objective.
F. Maximum possible coordination with humanitarian organizations.
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