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The Elimination of Political Groups Under International Law and the Constitution of Political Claims

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THE ELIMINATION OF POLITICAL GROUPS UNDER INTERNATIONAL LAW AND THE CONSTITUTION OF POLITICAL CLAIMS*

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I. INTRODUCTION

As a result of the political negotiations between the Armed Revolutionary Forces of Colombia (FARC) and the Colombian government, several members of different leftist organizations created the Unión Patriótica[a] (UP) political party on May 28, 1985. The party allowed members of several social movements to join a political organization that was an alternative to the closed politics created by the *Frente Nacional.* This agreement set up a system whereby the liberal and conservative parties shared the government for sixteen years, which impeded access by

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1. Patriotic Union [hereinafter UP].

other political forces. Union members, students, state workers, and others joined the party and gave new color to the political panorama in Colombia. In the elections of 1986 and 1988, the UP achieved official positions in the Colombian Congress and government.[2]

The success of the UP triggered efforts to eliminate it by threatening, disappearing, and killing its members.[3] Two presidential candidates for the elections of 1990 (Jaime Pardo Leal and Bernardo Jaramillo Ossa) were killed.[4] As REINICIAR and *Comisión Colombiana de Juristas,* petitioners in *Diaz et al. v. Colombia* under the jurisdiction of the Inter-American Commission on Human Rights (ICHR), pointed out, "the persecution of the membership of the Patriotic Union constitutes an attempt to eliminate the party as a political force through violence and intimidation carried out against its members and leaders."[5] The result of this persecution amounted to the extrajudicial execution of 1163 of its members, the forced disappearance of another 123, unsuccessful assassination attempts against 43, and threats against 225 between 1985 and 1993.[6]

Human rights NGOs, REINICIAR, and *Comisión Colombiana de Juristas* requested the ICHR condemn the Colombian state for the commission of the crime of political genocide against the membership of the UP. The ICHR accepted the case but decided to proceed under the charge of Crimes Against Humanity,[7] a redefinition of the offense in

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2. *See generally* FRANK SAFFORD & MARCO PALACIOS, COLOMBIA: FRAGMENTED LAND DIVIDED SOCIETY (2002) (presents in English a good general history of Colombia).

3. According to Javier Giraldo, in the period 1985-1996 "a UP party member or supporter has been murdered every 53 hours. In the party's first four years of existence, this persecution was even more intense with a murder every 39 hours, and, in the run-up to elections, even more chilling, one every 26 hours." JAVIER GIRALDO S.J., COLOMBIA: THE GENOCIDAL DEMOCRACY 68 (1996).

4. Jaime Pardo Leal, a former Judge in Bogotá and leader of the Union of the Judiciary, was the first UP's presidential candidate. He was killed in 1989. After the assassination of Pardo Leal, Bernardo Jaramillo Ossa, union leader in Urabá, became the second presidential candidate of the UP for the same election. He was killed the same year, after a press conference in which the Minister of Interior, Carlos Lemos said that the UP was FARC's political arm. Two more presidential candidates for the elections of 1990, Carlos Pizarro Leongómez, from the leftist M-19, and Luis Carlos Galán, a former dissident from the liberal party, were killed.

5. Díaz et al. v. Colombia, Case 11.227, Inter.-Am. C.H.R. 5/97, OEA/ser.L./V./II.95 doc. 7 rev. 99 (1997), ¶ 4, *available at* http://www1.umn.edu/humanrts/cases/1996/colombia5-97.htm (last visited June 18, 2003).

6. *Id.* ¶ 26.

7. Human rights investigations in the Inter-American system has the following procedure: A person presents a complaint before the ICHR, this organization investigates the case, hears the government's arguments and tries to reach an agreement between the parties. If it is not possible to reach an agreement, the ICHR takes the case before the Inter-American Human Rights Court, where the process takes all the features of an adversarial system, and the Inter-American Human Rights Court renders a ruling binding on the parties. *See* Rules of Procedure of the Inter-American

accordance with international law. In effect, the ICHR was willing to state that serious violations of human rights had occurred, but not to accept the argument from the Colombian complainant that those violations amounted to genocide. In so doing, it acknowledged that the terms of the U.N. Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) do not cover political groups.

The core of the argument from the complainants was that the Genocide Convention protected the UP as a political group. According to them, under the Genocide Convention, the Colombian state could be held responsible either for direct participation in the elimination of the party or for indirect responsibility by its failure to make any effort to stop it; therefore, the Colombian state was responsible for the political genocide committed against the UP.

The question that arises is: why would a human rights NGO decide to argue that elimination of political groups is a crime of political genocide? This Article will show that until 1990 the confusion of the international doctrine regarding crimes against humanity made the answer unclear. By analyzing this story, I will show that the claims of the NGOs were constituted by the international law, that is, the law determined the way NGOs saw the world and, therefore, determined how they interpreted the UP situation.[8]

Whether the Genocide Convention covers the elimination of groups because of their political beliefs has been a hotly contested question. Some scholars believed that the history of the U.N. General Assembly 1946 Resolution 96(I) permits the definition of political genocide as a crime under international law[9] and that the exclusion of political groups in the drafting of the Genocide Convention was an error on the part of the U.N. General Assembly in 1948 that needs to be fixed.[10] Others, basing their

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Commission on Human Rights, *available at* www.cidh.oas.org/Basicos/basiclb.htm (last visited June 12, 2003).

8. The basis for this argument is constitutive theory. *See* PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE (1977); JOHN BRIGHAM, THE CONSTITUTION OF INTERESTS (1996); ALAN HUNT, EXPLORATIONS IN LAW AND SOCIETY: TOWARDS A CONSTITUTIVE THEORY OF LAW (1993).

9. *See, e.g.*, Myriam Ávila Roldán, *Delitos de Lesa Humanidad, in* FORO REFORMA INTEGRAL AL SISTEMA PENAL (1999); Mario Madrid-Malo Garizábal, *La penalización de las violaciones de los derechos humanos y de las violaciones del derecho internacional humanitario en Colombia, in* SENTIDO Y CONTENIDOS DEL SISTEMA PENAL EN LA GLOBALIZACIÓN (2000); *see also* LAWRENCE LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION 84-88 (1991).

10. *See, e.g.*, M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 203-04 (2d ed. 1999); KURT JONASSOHN & KARIN BJORSON, GENOCIDE AND GROSS HUMAN RIGHTS VIOLATIONS IN COMPARATIVE PERSPECTIVE 9 (1998); LEO KUPER, GENOCIDE: ITS POLITICAL USE IN THE 20TH CENTURY 24-30 (1981); Barbara Harff, *Recognizing Genocide and*

arguments in the history of the drafting of the Genocide Convention, showed that political groups were explicitly excluded from the 1948 Convention and, therefore, must be protected under other provisions of international law.[11]

This debate is rooted in the history of crimes against humanity and particularly in the content of what is called in this Article "the Nuremberg doctrine." The use of the concept of crimes against humanity by the Colombian NGOs led them to ask for punishment for the perpetrators of the extermination of the UP membership through the use of the political genocide argument. In the *Argentinean Military Junta* and the *Chilean Dictator Augusto Pinochet Ugarte* cases,[12] attack against political groups were treated as genocide against a national or a religious group.

The concept of political genocide is based in the use of an ontological conception of genocide. Supporters of the label "political genocide" think that there is a conception of genocide independent from the definition of international law. This ontological approach maintains that in some way the delegates drafting the Genocide Convention took its definition from a platonic world of ideas and improperly narrowed the idealistic meaning of the crime. This conception also makes an ontological distinction between the crime of genocide and crimes against humanity more generally, of which genocide is the gravest. This hierarchy assumes that the illegal transfer of children from a national group to another — a case of genocide — is more evil than the extermination of a group on political grounds, because the first is a genocide and the latter just a crime against humanity. This conception takes the viewpoint that crimes have an independent ontological existence and are not definitions of certain acts as crimes under international law.[13]

There are moral and pragmatic reasons behind this argument. The former can be understood as saying that the elimination of a group with a certain common identity should be punished under international law but following the definition given in the ideal world. The latter is

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Politicide, in GENOCIDE WATCH 27-41 (Helen Fein ed., 1992); ANTONIO CASSESE, HUMAN RIGHTS IN A CHANGING WORLD 75-78 (1990).

11. WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 144-45 (2000); Walter Lippman, *Genocide, in* 1 INTERNATIONAL CRIMINAL LAW 597 (M. Cherif Bassiouni ed., 1999).

12. *See infra* Part VI (detailing these two cases).

13. *See generally* ALESSANDRO BARATTA, CRIMINOLOGIA CRITICA Y CRITICA DEL DERECHO PENAL: INTRODUCCION A LA SOCIOLOGIA JURIDICO PENAL (1986) (regarding the ontological conception of crimes); PETER BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE (1967); COLIN SUMNER, SOCIOLOGY OF DEVIANCE: AN OBITUARY (1994); ROBERTO BERGALLI, EL PENSAMIENTO CRIMINOLÓGICO (1983).

complementary, because it says that the only way to secure punishment for the perpetrators of those acts is by labeling them as genocide, whether cultural, social, or political.

In this Article I will show, first, that there are no grounds to hold that the elimination of political groups can be treated as political genocide under international law, and second, that under the doctrine developed in *ICTY Prosecutor v. Dusko Tadic* there is no need to appeal to that category to obtain the punishment of the perpetrators of crimes against political groups. Nevertheless, I will show that the conceptual structure of crimes against humanity — especially the requirement of being part of a massive or widespread attack — seems to make plausible the question of creating a crime of political genocide. By the end of this Article I hope it will be clear that while theoretically this seems to be an important claim, in actuality current international law provides all the necessary means to punish those responsible for this kind of human rights violation.

II. THE CRIME OF GENOCIDE: FROM THE U.N. GENERAL ASSEMBLY 1946 RESOLUTION 96(I) TO THE GENOCIDE CONVENTION OF 1948

The first work on the topic of genocide was a book by Raphael Lemkin, *Axis Rule in Occupied Europe*.[14] In his book, Lemkin analyzed the crimes committed against national, ethnic, and religious groups and coined the word genocide, through the combination of the Greek word *genos* and the Latin *cide*, to refer to the attacks against such groups. Lemkin had been concerned about intergroup hatred for many years. In the Fifth Conference for the Unification of Penal Law, in Madrid in 1933, he proposed an international treaty "declaring that attacks upon national, religious, and ethnic groups should be made international crimes."[15] Lemkin also proposed the creation of the crimes of vandalism and barbarity. He defined those crimes in the following terms:

> Whosoever, out of hatred towards a racial, religious or social collectivity, or with a view to the extermination thereof, undertakes a punishable action against the life, bodily integrity, liberty, dignity or economic existence of a person belonging to such collectivity, is liable for the crime of barbarity, to a penalty of . . . . unless his deed falls within a more severe provision of the given code.

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

15. *Id.* at xiii.

> Whosoever, either out of hatred towards a racial, religious or social collectivity, or with a view to the extermination thereof, destroys its cultural or artistic works, will be liable for the crime of vandalism unless his deed falls within a more severe provision of the given code.[16]

The key feature of those crimes was the fact that they were committed out of hatred against the attacked group. In the first attempt to define a crime protecting the groups, Lemkin highlighted the reasons the agent gave for committing the crime. However, in *Axis Rule* Lemkin went further and highlighted the element of intent; that is to say, in that book the important feature was not the reasons that drove the agent to commit the crime — hatred, economics, and so forth — but the intention to eliminate the group as such.[17] To Lemkin, genocide does not require the elimination of the group as a whole but the agent does have to have the intention of eliminating it partially or completely: "Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group."[18]

Lemkin realized that some groups were protected under international law, but he emphasized the need for the creation of the crime in order to protect those who were not.[19] It is interesting to point out that Lemkin did not mention political groups as one of the groups requiring that protection:

> *De lege ferenda*, the definition of genocide in the Hague Regulations thus amended should consist of two essential parts: in the first should be included every action infringing upon the life, honor, liberty, health, corporal integrity, economic existence, and the honor of the inhabitants when committed because they belong to a national, religious or racial group; and in the second, every policy aiming at the destruction or the aggrandizement of one of such groups to the prejudice or detriment of another.[20]

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16. Raphael Lemkin, *Genocide as a Crime Under International Law*, 41 AM. J. INT'L L. 146 n.3 (1947). Another definition can be found in an earlier work by Lemkin. LEMKIN, *supra* note 14, at 91.

17. *See* ALICIA GIL GIL, EL GENOCIDIO Y OTROS CRÍMENES INTERNACIONALES (1999) (on this difference and its relevance in the civil law tradition).

18. LEMKIN, *supra* note 14, at 79. Initially Lemkin mentioned only national groups, but he later included all the groups contained in the Genocide Convention. When he wrote his book he had in mind the Germanization of Poland and other European nations. *Id.* at 79-82.

19. *Id.*

20. *Id.* at 93.

It was in the drafting of the 1946 Resolution 96(I) that the question of including political groups arose as part of the concept of genocide. The governments of Cuba, India, and Panama, with legal assistance from Lemkin, requested on November 2nd, 1946, that the Secretary General of the United Nations include in the agenda of the U.N. General Assembly an item on the prevention and punishment of the crime of genocide. The request was accompanied with a draft of a resolution, prepared by Lemkin, condemning the crime of genocide.

The U.N. General Assembly discussed the question on November 9th and 12th, 1946 and then sent it to the Sixth Committee, which created a subcommittee to discuss the issue. After a heated debate in the subcommittee, political groups were included in the draft of the Resolution. The issue then went back to the Sixth Committee, which approved the decision of the subcommittee and reported the result to the U.N. General Assembly with a draft of the Resolution. The Resolution was adopted unanimously and without debate on December 11th 1946.[21]

The preamble of the 1946 Resolution 96(I) states:

> 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 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.[22]

Then the Resolution affirms that "Genocide is a crime under international law which 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.[23]

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21. NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION: A COMMENTARY 17 (1960).

22. G.A. Res. 96(I), U.N. GAOR, 1st Sess., at 189, U.N. Doc. A/64/Add.1 (1946).

23. *Id.* The Language of the Resolution requested by Cuba, India, and Panama differs from that suggested by Lemkin. While Lemkin mentioned national, racial, and religious groups whose "biological, cultural or political existence was imperiled," Resolution 96(I) clearly states that "genocide is a crime under international law which the civilized world condemns, and accomplices

The reasons for the inclusion of political groups are unknown, but the fact is that Lemkin disagreed with it. It was a decision taken in the subcommittee created by the Sixth Committee without any explanation. However, the inclusion of political groups in the text of the Resolution has been the basis of the claim that political genocide must be considered a crime under international law. According to Schabas, it has been

> argued that the presence of political groups within the 1946 definition suggests the existence of a broader concept of genocide than that expressed in the [Genocide] Convention, one that reflects customary law. But given the very meagre record of the debates, the haste with which the resolution was adopted, the novelty of the term, and the fact that the subsequent Convention excludes reference to political groups, such a conclusion seems adventuresome at best.[24]

That is to say, the process of drafting Resolution 96(I) does not allow any interpretation aimed at including political genocide within the scope of the Genocide Convention or as a crime under international law. As Schabas goes on to point out, "[t]he fact that the enumeration in Resolution 96(I) also omits ethnic and national groups is a further argument against its authority on the issue."[25]

In Resolution 96(I), the Economic and Social Council (ECOSOC) was requested 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."[26] The Secretary General suggested that the ECOSOC assign the discussion to the Commission on Human Rights, but due to the opposition of the United Kingdom and because of the heavy schedule of the Commission, the issue returned to the Secretariat, which "would prepare a draft convention for a subsequent review by a commission of ECOSOC."[27]

— whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds — are punishable." Lippman, *supra* note 11, at 591, 594.

24. SCHABAS, *supra* note 11, at 134 (emphasis omitted).

25. *Id.*

26. *Id.* at 51.

27. *Id.*

Analyzing the issue in the ECOSOC, it adopted a resolution asking the Secretary General to draw a draft of a convention,[28] returning in this way the issue to the Secretariat.[29] The Secretary General requested the Human Rights Division of the Secretariat to draw up the draft. This draft was discussed with Raphael Lemkin, Donnedieu de Vabres, and Vespasiano Pella, the three experts appointed to analyze the matter. The draft included political groups within the scope of the future convention but Lemkin regarded political groups as lacking permanence and specific characteristics the other groups had. This was his consistent position on the topic. From his first article in 1933 to his article in the *American Journal of International Law* in 1946, he held that genocide conveys a specific loss "to civilization in the form of the cultural contributions which can be made only by groups of people united through national, racial or cultural characteristics."[30] On the other hand, de Vabres, the French expert and former Judge in the Nuremberg Tribunal, responded that genocide was such a heinous crime that excluding political groups could be regarded as justifying their elimination.[31] Despite the disagreement of Lemkin, the draft from the Secretariat became the first draft of the Genocide Convention.

The draft included ethnic, racial, national, religious, and political groups[32] and was presented to the ECOSOC at its fifth session, in July-August 1947.[33] The draft was sent to the state members to receive their comments, but only seven of them answered the request. On August 6th, 1947, the ECOSOC instructed the Secretary General to transmit the draft with the comments to the U.N. General Assembly in order to discuss the draft at the earliest possible time and reach an agreement on it.[34]

The draft of the Genocide Convention was put in the agenda of the U.N. General Assembly at its second session, in September-December 1947, and the U.N. General Assembly submitted the issue to the Sixth Committee. The members of the Sixth Committee were in disagreement

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28. *See generally* NEHEMIAH ROBINSON, THE ATTITUDE OF THE AMERICAN BAR ASSOCIATION TOWARD THE GENOCIDE CONVENTION (1949); NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION: ITS ORIGINS AND INTERPRETATION (1949).

29. According to LeBlanc, this difficult path is the result of second thoughts that some states were having about the importance of a convention on genocide. LEBLANC, *supra* note 9, at 26.

30. Lemkin, *supra* note 16, at 147.

31. SCHABAS, *supra* note 11, at 134.

32. The draft stated in Article I.I: "The purpose of this Convention is to prevent the destruction of racial, national, linguistic, religious or political groups of human beings." ROBINSON, *supra* note 21, at 123.

33. SCHABAS, *supra* note 11, at 55.

34. *Id.* at 135.

about the topic because it included political groups within the scope of the future convention.

The Sixth Committee created an Ad-Hoc Committee to solve the differences. In this Ad-Hoc Committee, there was further disagreement as to the inclusion of political groups. In the sessions of the Ad-Hoc Committee, the representative from China questioned the inclusion of political groups because it "had neither the stability nor the homogeneity of an ethnical group,"[35] and suggested that there could be confusion between the idea of political genocide and political crime.[36] The Soviet representative shared the same opinion and rejected the inclusion of political groups on the grounds that the word genocide "meant essentially persecution of a racial, national or religious group."[37] The Soviet representative argued that it was against the scientific definition to include political groups. In *Nuremberg*, he said, "the term 'genocide' . . . was defined as follows: extermination of racial and religious groups, . . . Genocide was essentially bound up with fascist and Nazi ideologies, and other similar racial theories spreading national and racial hatred, and aiming at the domination of the so-called 'superior' races and the extermination of the so-called 'inferior' races."[38] According to the Soviet representative, the term needed objective and not subjective characteristics; "[o]n the basis of that fundamental concept, the groups could easily be distinguished: they were the racial and national groups which constituted distinct, clearly determinable communities."[39]

The Iranian representative said that in racial and other groups membership was permanent and inevitable, whereas in political groups membership was voluntary.[40] Many representatives, like those from Venezuela and the Dominican Republic, were concerned about the

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35. *Id.*

36. *Id.* According to such a view, the perpetrator of an attack of a political group could not be extradited because that act could be considered a political crime. However, it is clear that acts like those of genocide lack the privilege of being considered political crimes.

37. *Id.*

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

39. *Id.* This is the same argument used in *Prosecutor v. Jean-Paul Akayesu* to reject the inclusion of other groups than those included in the Genocide Convention. In *Prosecutor v. Georges Rutaganda*, the ICTR wrote that only racial groups could be considered as stable groups. In the ICTY Statute, women were protected under Article 40, because they "comprise a stable and identifiable and stable group. This group would not be subject to the argument relating to changing of membership or instability which led to the exclusion of 'political groups.'" VIRGINIA MORRIS & MICHAEL SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 88 (1995).

40. KUPER, *supra* note 10, at 26.

possibility that the inclusion of political groups could affect anti-subversive activities of the states.[41] The Venezuelan representative said in the drafting of the Genocide Convention that "[s]ubversive elements might make use of the convention to weaken attempts of their own Government to suppress them."[42] The Soviet Union delegate supported the Venezuelan argument and said that an attack on political groups would belong to the category of crimes against humanity.[43]

Those who opposed the inclusion of political groups generally argued that those groups "should be [protected] by national legislation, and that the international level, the appropriate instruments were those being prepared by the Human Rights Commission."[44] In support of the inclusion of political groups, the U.S. ambassador said that political groups were identifiable enough to be exterminated, therefore, they should be included in the protected groups. The delegate of Haiti supported the inclusion of political groups within the scope of the Genocide Convention and held that "the Government which was responsible would always be able to allege that the extermination of any group had been dictated by political considerations, such as the necessity for quelling an insurrection or maintaining public order."[45]

Despite the discussion, at the end there was agreement on the inclusion of political groups. The draft rendered by the Ad-Hoc Committee offered this definition of genocide in Article II: "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."[46]

The issue returned for discussion in the Sixth Committee. In the first reading of the draft the inclusion of political groups was approved and in a second reading political groups were still within the scope of the Genocide Convention. The Sixth Committee decided, by 29 votes to 13

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41. In a letter to John Foster Dulles, the Chair of the Genocide Convention, James Rosenberg mentioned the importance of having good relations with Latin American countries and how the word "political" was of concern to these countries. He suggested to Dulles the deletion of the word political to ease not only the process of signing the Genocide Convention but also its ratification. Letter from James Rosenberg to John Foster Dulles (Nov. 3, 1948) (on file as part of the Raphael Lemkin Papers, Rare Books and Manuscripts Division, New York City Public University (Lemkin Papers, Box 1)).

42. SCHABAS, *supra* note 11, at 137.

43. KUPER, *supra* note 10, at 26.

44. *Id.* at 28-29.

45. *Id.*

46. *Id.* at 32.

with 9 abstentions, to include political groups within the scope of the Genocide Convention.[47]

However the debate was not over. A proposal made by Egypt, Uruguay, and Iran called for the exclusion of political groups. The Soviet Union, China,[48] and Venezuela[49] supported this proposal. According to Kuper, that proposal was the result of the pressure made by some governments, who were against the inclusion because they needed "to retain an unrestricted freedom to suppress political opposition."[50] However, the fact that some of the states supporting the proposal were strong democracies at the time, like Uruguay, makes the argument by Kuper untenable.

The main obstacle for the elimination of political groups was U.S. support for their inclusion, but after several negotiations the United States decided to support the exclusion of those groups. The position was expressed with the following words:

> The United States delegation continued to think that its point of view was correct but, in a conciliatory spirit and in order to avoid the possibility that the application of the convention to political groups might prevent certain countries from acceding to it, he would support the proposal to delete from article II the provisions relating to political groups.[51]

As the result of the negotiations, the Sixth Committee voted for the exclusion of political groups by 22 to 6 and 12 abstentions.[52] Once the differences were solved in the Sixth Committee, the Genocide Convention was sent to the U.N. General Assembly, which approved the following text for Article II of the Genocide Convention of 1948:

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47. SCHABAS, *supra* note 11, at 138.

48. Although China supported the deletion of political groups at the beginning of the discussion, once they were excluded from the Genocide Convention, the representative from China expressed his concern for this exclusion because "at a time of ideological strife political groups were in greater need of protection than national and religious groups." *Id.* at 139.

49. Lebanon, Sweden, Brazil, Peru, Venezuela, the Philippines, the Dominican Republic, Iran, Egypt, Belgium, Uruguay, and the Soviet Union were in favor of the exclusion of political groups. *Id.* at 140.

50. KUPER, *supra* note 10, at 30.

51. SCHABAS, *supra* note 11, at 139.

52. *Id.*

> 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:
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> (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.[53]

Besides excluding political groups, the U.N. General Assembly took up the definition of genocide belonging to Lemkin that it is an act in which the key feature was the intention to eliminate in whole or in part the group as such. That means that the intent element replaced the idea or grounds or motives of hatred present in the definition of the crime of barbarity proposed by Lemkin in the Fifth Conference for the Unification of Penal Law, held in Madrid in 1933. The reasons for the exclusion of political groups are not clear. Some scholars, like Kuper[54] and Cassese,[55] wrote that it was the result of Soviet pressure and the power showed by the so-called Soviet bloc. However, LeBlanc, in his excellent analysis of the history of the exclusion of political groups, shows that this was not the case. He divided the arguments for and against exclusion in the following way: In favor: (1) scientific reasons call for the exclusion of political groups; (2) it was an issue of the Human Rights Commission; (3) political groups lack stability or permanence; and (4) the inclusion of political groups would jeopardize ratification, since some countries were concerned about their anti-subversive activities. Against: (1) many states define in its legislation political groups; (2) many groups, not only political groups, could be involved in subversive activities; and (3) the decision not to follow the result of Resolution 96(I) could weaken the credibility of the United Nations.[56]

LeBlanc shows that the Soviet bloc alone lacked the power to control the pace and directions of the negotiations. The fact that many different states, with completely different ideologies, agreed in the exclusion of political groups has to be taken into account, because it challenges the idea

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53. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

54. *See generally* KUPER, *supra* note 10.

55. CASSESE, *supra* note 10, at 75.

56. LEBLANC, *supra* note 9, at 61-64.

of some invisible hand determining the outcome of the discussions. Moreover, the inclusion of political groups was not a suggestion of the Soviet bloc but one of the Secretary General in the first draft of the Genocide Convention; therefore, it cannot be said that it was part of a hidden Soviet strategy. In his analysis, LeBlanc shows that a majority of the countries were in favor of eliminating political groups from the text of the Genocide Convention. Supporters included 50% of African countries, 38.5% of Asian, 50% of Oceania, 10% of the Americas, and 23.5% of European, whereas 0% of African countries, 23.1% of Asian, 0% of Oceania, 9.1% of the Americas, and 5.9% of European were against that deletion.[57]

Kuper, Cassese, and others made the same argument about the Soviet bloc pressure to obtain the deletion of political groups. However, the so-called Soviet bloc was made only of six states.[58] The history of the votes of every country shows that most of them divided their preferences, sometimes supporting the position of the United States, others supporting the position of the Soviet Union. Moreover, the idea that the exclusion was the result of a totalitarian conspiracy loses its basis when we realize that amongst the countries that supported the deletion of political groups were Sweden and Uruguay, two strong democracies at the time.[59] The opposition of institutions like the World Jewish Congress in the United States itself calls for the rejection of this thesis.

In sum, there is no evidence that demonstrates that the exclusion of political groups was not the result of the difficulties in treating political groups as though they had the same stability and identity as national and religious groups. But in the event that political groups had been excluded because of the dark intention some countries had in order to avoid punishment, the question remains: Is there any need to treat the extermination of political groups as a crime of genocide? Under current international law, there is no basis to hold such a claim. Even though those in favor of the inclusion of political groups in the category of genocide use the history of the Genocide Convention to support their claim, it is clear that this does not help them and that it is useless to appeal to history to demonstrate their thesis. This claim is based in an ontological conception of the crime of genocide, and the desire to punish those crimes as a stronger category than crimes against humanity.

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57. *Id.* at 67.

58. LEBLANC, *supra* note 9, at 66.

59. The idea that totalitarian states support the exclusion of political groups is challenged with the example of Haiti, in that time governed by dictator Jean Paul Duvalier, commonly known as *Papa Doc*.

In the following section, I will present the scholarship on the specific topic of political genocide and its development in international law in order to demonstrate that the claim to include political groups within the scope of the Genocide Convention is based on the Nuremberg doctrine, which means that after the *Tadic* doctrine those claims are unsupported.

III. THE DISCUSSION ABOUT POLITICAL GENOCIDE

The debate about the inclusion of political groups within the scope of the Genocide Convention did not end with the Convention's approval. From time to time in different international negotiations in which the crime of genocide is subject to analysis, there are delegates who advocate the inclusion of political groups within the scope of the definition of the crime of genocide. Such was the case in the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY), where some delegations suggested expanding the scope of the Genocide Convention "to encompass social and political groups."[60] Others delegations rejected this proposal on the grounds that it could create confusion between crimes against humanity and genocide. A similar discussion took place in the debates over the Statute of the International Criminal Court in Rome (Rome Statute) in 1998, where the delegation of Cuba suggested the inclusion of social and political groups as protected in Article 6 of the Statute. The delegation from Ireland responded to this proposal, pointing out that while the delegates could improve upon the definition if they were drafting a new Genocide Convention, as that was not the case, the U.N. General Assembly should not examine the content of the crime.[61]

In this section, I will examine the discussion about the concept of political genocide and some of the arguments supporting the idea of treating the extermination of political groups as a crime of genocide, in order to show how their claims are based in an ontological conception of the crime of genocide. In the first judicial interpretation of the Genocide Convention of 1948, the International Criminal Tribunal for Rwanda (ICTR) wrote that only stable groups should be protected by the Genocide Convention. Although in the indictment of the Nuremberg trials the crime

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60. Lippman, *supra* note 11, at 608.

61. COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT OBSERVER'S NOTES, ARTICLE BY ARTICLE 110 (Nomos, Baden.Baden, Triffterer, Otto ed., 1999). However in some other matters the U.N. General Assembly did modify the content of some crimes, as it was the case of the crime of enforced pregnancy, taking into account the comments made by the Holy See. *See* ROY S. LEE, THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 365-69 (1999).

of genocide is mentioned, the judgment sentenced the defendants for the commission of crimes against humanity:[62]

> 511. On reading through the *travaux préparatoires* of the Genocide Convention, it appears that the crime of genocide was allegedly perceived as targeting only "stable" groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more "mobile" groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner. . . .
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> 516. Moreover, the Chamber considered whether the groups protected by the Genocide Convention, echoed in Article 2 of the Statute, should be limited to only the four groups expressly mentioned and whether they should not also include any group which is stable and permanent like the said four groups. In other words, the question that arises is whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention, if the said group, although stable and membership is by birth, does not meet the definition of any one of the four groups expressly protected by the Genocide Convention. In the opinion of the Chamber, it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was patently to ensure the protection of any stable and permanent group.[63]

This official interpretation appears to avoid any discussion on the topic of political genocide because neither the Genocide Convention nor its judicial interpretation can be used as sources to support any reference to political genocide. However, to authors like Bassiouni, the Genocide Convention has some flaws derived from the exclusion of political groups.[64] He advocates the inclusion of political groups within the Genocide Convention, because since 1948 "there have been several mass

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62. *Cf.* HOWARD FERTIG, LAW REPORTS OF TRIALS OF WAR CRIMINALS (1992).

63. Case No. ICTR-96-4, ICTR Prosecutor v. Jean Paul Akayesu (Sept. 2, 1998) (citations omitted).

64. BASSIOUNI, *supra* note 10, at 67.

killings that could be called genocide. Nevertheless the political response to those events has not been addressed by the international community."[65] Even though he advocates for the inclusion, he seems to acknowledge that neither the Resolution nor the Genocide Convention are a basis for the inclusion of political groups, since he provides pragmatic arguments for the protection of political groups. In so doing, he seems to regard current international law as insufficient to provide for the protection of those groups. However, he does not give any further reason to support his comments.

Since the drafting of the Genocide Convention, the exclusion of political groups has been criticized because it left political groups without any protection under international law, due to the belief that crimes against humanity had to be committed in times of war in order to be punished. After 1948, several scholars proposed the inclusion of political groups within the scope of the Genocide Convention and others maintained that those groups were already protected under international law. Chalk and Jonassohn, for instance, wrote that with the deletion of political groups, the Genocide Convention does not cover any of the killings that have occurred since 1948 and "potential perpetrators have taken care to victimize only those groups that are not covered by the convention's definition."[66] This theory does not take into account that the mass killing of the members of a political group is still a crime under international law, namely, a crime against humanity. Therefore, it is hard under current international law to claim that the perpetrator of such a crime can be considered non-punishable for the crimes committed.

Critics of excluding political groups argue that

> one consequence of this exclusion is the difficulty in determining whether victims are part of one of the protected groups in those cases where political divisions tend to fall along ethnic, racial or religious lines . . . a protected group does not lose its protected status under the Convention because it happens to include or even consist entirely of political opponents.[67]

They argue that the definition reflects the cold war and the post-holocaust times. According to them, "the limitation of that definition — particularly the restricted list of protected groups and the intent requirement — impose significant obstacles to making out a case of genocide in many situations.

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65. *Id.*
66. SCHABAS, *supra* note 11, at 102 (quoting Frank Chalk and Kurt Jonassohn).
67. *Id.* at 35.

In many cases, it may be difficult to determine whether victims constitute a cohesive group that the Convention protects."[68]

In their analysis of the issue, Ratner and Abrams confound the element of intention with that of motives to commit the crime.[69] It is clear under the Genocide Convention that the key element to determine when an attack against a group is genocide is the intention of the agent. If the agent does not have the intention of eliminating the protected group in whole or in part, it is clear that the act is not a crime of genocide. But if the intention is to eliminate the protected group as such, then no matter what the reasons were, the attack is still a crime of genocide.

But no matter the clarity of the definition of genocide, scholars like Kurt Jonassohn hold that the definition of the 1948 Genocide Convention is unsatisfactory for "none of the major victims groups of those genocides that have occurred since its adoption fall within its respective specifications."[70] The exclusion of some groups, like political groups, made it impossible for them to qualify as victims of genocide because they were omitted from the definition. According to him, the failure to amend the Genocide Convention is surprising, mostly taking into account that the 1951 U.N. Convention Relating to the Status of Refugees (1951 Refugee Convention) specifies that a refugee is "[a]ny person who owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality."[71] The interpretation of Jonassohn is that these two conflicting definitions, the one included in the Genocide Convention and the other one included in the 1951 Refugee Convention, "arising from the same organization, seem to produce the paradox that some people fleeing from a genocide are being recognized as refugees, while those unable to flee from the same genocide are not acknowledged as being its victims."[72] This analysis fails to take into account that the persecution of a group can be considered either genocide, if it has all the elements of the Genocide Convention, or a crime against humanity, provided it is part of a widespread or systematic attack against a civilian population. In the case of the elimination of political groups, it is clear that it has to be considered

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68. *Id.* at 42.

69. *See generally* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (2001).

70. JONASSOHN & BJORSON, *supra* note 10, at 9. Jonassohn & Bjorson do not take into account the cases of Yugoslavia and Rwanda. The article discussing the crime of genocide was written in 1989 and it was published in the book without further revision.

71. *Id.*

72. *Id.* at 9-10.

a crime against humanity, since political groups are not under the scope of the Genocide Convention.

But Jonassohn misinterprets the 1951 Refugee Convention. According to the Refugee Convention, a person who is persecuted for political motives has the status of refugee. The perpetrator of the crime could be punished for the commission of a crime of genocide — if it is an attack against a national, racial, ethnic, or religious group with the intention of eliminating the group — or a crime against humanity, where the motives of the perpetrator are irrelevant to determine whether the act should be tried as a genocide or a crime against humanity. The 1951 Refugee Convention does not determine the status of the author of the crime but only the conditions under which a person could be considered a refugee. In sum, Jonassohn mistakenly takes the 1951 Refugee Convention as support for his claim that after 1951 the United Nations considered political genocide a crime under international law, and in seeing a contradiction between this and the 1948 Genocide Convention. In his sociological definition made for the purposes of his analysis, Jonassohn confounded the crime of genocide with a crime against humanity and put aside the other acts prohibited under the 1948 Genocide Convention.

His proposed definition is: "Genocide is a form of one-sided mass killing in which a state or other authority intends to destroy a group, as that group and membership in it are defined by the perpetrator."[73] With such a definition, Jonassohn not only leaves aside all the legal development of the concept of genocide, but also it trivializes it by broadening its application. The definition seems to give ontological value to the concept of genocide, and in so doing it ends up treating all groups as victims of the crime of genocide, making the distinction between genocide and crimes against humanity impossible.

The ontological conception of genocide is based on the Advisory Opinion on the Reservations of the Genocide Convention rendered by the International Court of Justice (ICJ) on May 28th, 1951. Those scholars who call on the authority of Resolution 96(I) and the interpretation of the ICJ in this opinion do not take into account that this decision only provides a conclusion; namely, that the principles recognized in the 1948 Genocide Convention are binding for all the states, regardless of conventional obligation. The language of the advisory opinion does not allow an interpretation of political groups as protected under the label of genocide

73. Other scholars, like Barbara Harff propose the creation of the crime of "politicide," on the basis that without its creation the act will be unpunished. Harff, *supra* note 10, at 29.

by international law.[74] Moreover, the decision of the ICJ aims only at determining whether it is possible to have reservations on the Genocide Convention or if it is binding even for states that were not parties to the Convention.[75] According to Drost, the 1946 Resolution 96(I) does not include political groups and only refers to the motives or grounds whereby a crime of genocide can be committed.[76] Despite this interpretation, he deems the deletion of political groups as regrettable because those groups have often been the victims of "acts of genocide."[77]

The ontological conception is based in the misunderstanding of the history of the Genocide Convention and the nature of crimes against humanity. We have seen that the history of Resolution 96(I) and the Genocide Convention shows that political groups were explicitly excluded

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74. In the San Francisco Conference in 1945 those proposals aiming at granting legislative power to the U.N. General Assembly were rejected. Instead, the U.N. Charter states that the U.N. General Assembly resolutions "on matters other than internal U.N. operations are recommendations to the members." M.J. PETERSON, THE GENERAL ASSEMBLY IN WORLD POLITICS 138 (1986).

75. The text of the opinion examines

> What kind of reservations may be made and what kind of objections may be taken to them. The solution must be found in the special characteristics of the Genocide Convention. . . . [T]he principles underlying the Convention are recognized by civilized nations as binding on States even without any conventional obligation. . . . The Genocide Convention was therefore intended . . . to be definitely universal in scope. . . . [It] was manifestly adopted for a purely humanitarian and civilizing purpose . . . [T]he contracting States do not have any interests of their own; they merely have, one and all, a common interest . . . The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. . . . It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce [complete exclusion from the Convention.] But even less could the contracting parties have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible. . . . It follows that it is the compatibility of a reservation with the object and the purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation . . . as well as for the appraisal by a State in objecting to the reservation. . . . [Consequently,] Question I, on account of its abstract character, cannot be given an absolute answer. The appraisal of a reservation and the effect of objections depend upon the particular circumstances of each individual case.

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 23-24, 26 (May 28).

76. The fact is that Resolution 96(I) did include political groups as an example of genocides in the history of humanity. However the binding value of that Resolution is limited.

77. 2 PIETER DROST, THE CRIME OF STATE: GENOCIDE 60 (1959).

from the scope of the Genocide Convention. In the following section we will see why some perceived a need to have an ontological conception of genocide.

IV. CRIMES AGAINST HUMANITY: THE HISTORY OF THE CONCEPT

According to Dixon,[78] the definition of crimes against humanity has evolved since it was first mentioned in the Declaration of St. Petersburg in 1868. The purpose of the Declaration was limitation of the use of weapons "contrary to the laws of humanity,"[79] showing an interest for bringing the law and limitations to warfare, an activity traditionally defined as lawless.[80] At the First Conference of Peace in The Hague in 1899, the word "humanity" was mentioned again with the approval of the so-called Martens Clause in the preamble of the Convention Respecting the Laws and Customs of War on Land.[81] The clause established that civilian population and belligerents are under the protection of the principles of international law, the laws of humanity, and the requirements of public consciousness. In the Declaration of the European governments, in May 24th, 1915, that investigated the atrocities committed in World

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78. *See* Rodney Dixon, *Article 7 Crimes Against Humanity, in* COMMENTARY ON THE ROME STATUTE, *supra* note 61.

79. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grams Weight, Nov. 29th (Dec. 11th) 1868, 18 Marteus Nouveau Recueil (ser. 1) 474.

80. This is implicit in the expression written by Von Clausewitz according to which "war is a mere continuation of policy by other means." *Cf.* CARL VON CLAUSEWITZ, 1 ON WAR 23 (J.J. Grahamm trans. Barnes & Noble 1966).

81. The clause named after Russian diplomat Fiodor Martens is as follows:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 31.

War I, the governments of France, Great Britain, and Russia considered the Armenian case a crime against humanity.[82] Even so, there was no definition of the acts amounting to crimes against humanity.[83]

Article 6 of the Charter of the International Military Tribunal at Nuremberg (Nuremberg Charter) provided the first definition of crimes against humanity in the following terms:

> 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 execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[84]

This definition created several problems regarding the jurisdiction of the Nuremberg Tribunal.[85] Due to the so-called "incident of the comma," there was no certainty about the jurisdiction of the Nuremberg Tribunal regarding crimes against humanity. According to the American and French translation of the Nuremberg Charter, only the crime of persecution had

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82. Nowadays the Armenian atrocities are considered a case of genocide rather than a crime against humanity. *See, e.g.*, Vahakn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications*, 14 YALE J. INT'L L. 221 (1989). Dadrian considers this case as a crime of genocide. He pointed out that between 1894 to 1896 and 1909, 200,000 Armenians were killed and in all over one million were put to death. *Id.* at 223. Only in 1985 the United Nations took note of the genocide committed. *Id.* at 224. In 1987, the European Union labeled the crime as a crime of genocide under the Genocide Convention of 1948 and required that Turkey acknowledge the genocide before the European Parliament would consider Turkey's application for membership. *Id.*

83. Since there was no previous definition of crimes against humanity, the Nuremberg Trial might be considered a violation of the rule of law, especially of the principle of *nullum crimen sine lege, nulla poena sine lege praevin.* BASSIOUNI, *supra* note 10, at 153. However, several scholars considered that in this case justice overweighed the rule of law and therefore the trial was legitimate. The first definition in the modern criminal law of the civil law tradition of the principle "nulla crime" is found in Feuerbach. Bassiouni holds that the Nuremberg and Tokyo trials violate the rule of law. *Id.* at 158-67; *see also* RICHARD H. MINEAR, VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIAL (1971); GIL, *supra* note 17.

84. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis Aug. 8, 1945, Charter of the International Military Tribunal, art. 6(c), 59 Stat. 1544, 1556, 82 U.N.T.S. 279, 288; *see also* BASSIOUNI, *supra* note 10, at 521-88; Marie-Claude Roberge, *Jurisdicción de los Tribunales ad hoc para ex Yugoslavia y Ruanda por lo que respecta a los crímenes de lesa humanidad y de genocidio, En* REVISTA DE LA CRUZ ROJA 144 (1997).

85. *See* BASSIOUNI, *supra* note 10 (regarding the following discussion); GIL, *supra* note 17 (about this history and the discussion with respect of whether before the crime of persecution it was a comma or a semicolon).

to be connected to another crime under the jurisdiction of the Nuremburg Tribunal, because there was a semicolon before the text "or persecution" in Article 6. According to the Russian translation, there was a comma before "or persecution," and therefore all the crimes against humanity had to be linked to a crime under the jurisdiction of the Nuremberg Tribunal. Once the delegates analyzed the translation and the records, they found that the Russian translation was the correct one.

The wording of Article 6 meant that the main problem facing the Nuremberg Tribunal was that the crimes against humanity had to be connected to one of the crimes within the jurisdiction of the Tribunal. That means that to consider an act a crime against humanity, this particular act had to be committed in execution of or in connection with any crime within the jurisdiction of the Nuremberg Tribunal. This meant that crimes committed before 1939, that is, before the beginning of World War II, went unpunished.

The notion that crimes against humanity occur only during wars — the Nuremberg doctrine — was considered the mainstream doctrine for more than forty years, despite the fact that the Principles of Nuremberg and Law No. 10 of the Council of Control defined these crimes regardless of its connection to the armed conflict. According to the definition of the Nuremberg Tribunal's jurisdiction, it did not investigate any major criminal for crimes committed before 1939, but the military tribunals in the occupied zones could try minor criminals of war for crimes committed before 1939. The International Law Commission (ILC) did not follow the definition made by the Nuremberg Charter and in 1954 defined crimes against humanity as crimes that could be committed in times of war or in times of peace. In Article 2 of the Draft Code of Offences Against the Peace and Security of Mankind, the ILC defined all the crimes under the jurisdiction of the international tribunal they wanted to create. Crimes against humanity are defined in the following terms:

> The following acts are offences against the peace and security of mankind . . .
> (11) Inhumane acts such as murder, extermination, enslavement[,] deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with toleration of such authorities.[86]

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86. 1954 Draft Code of Offenses Against the Peace and Security of mankind, 9 U.N. GAOR, Supp. No. 9, at 11-12, U.N. Doc. A/2693 (1954), *available at* http://www.un.org/law/ilc/texts/offfra.htm (last visited May 24, 2003).

In Article 6 of the Nuremberg Charter, the crime of persecution involves an attack on political, racial, or religious grounds, whereas in the ILC definition persecution on social or cultural grounds was qualified as a crime against humanity. The draft presents these crimes in a similar fashion to the crime of genocide, but the latter is defined as a crime committed with the intention of eliminating the group as such. However, in the definition of Article 2-11, the crime has to be committed on political, social, racial, religious, or cultural grounds — that is to say, the reason for committing the crime is the characteristic of the group, but the agent does not intend to eliminate the group as such. This distinction is important because some crimes against humanity can be distinguished from genocide only by taking into account the element of intent, i.e. the crime of extermination.

The Nuremberg doctrine was discussed in some of the decisions taken by the Trial Chamber of the ICTY in *Dusko Tadic*.[87] In the discussion of the motion on the issue of jurisdiction, the *Tadic* defense counsel raised the issue of jurisdiction by claiming that

> the Tribunal only has jurisdiction under Article 5 of the Statute if it involves crimes that have been committed in the execution of or in connection with an international armed conflict. [] It purports to find authority for this proposition requiring the existence of an armed conflict of an international nature in the Nuremberg Charter which, in its definition of crimes against humanity, spoke of inhumane acts committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal . . ." and in the affirmation given to the principles of international law recognized by the Charter of the Nuremberg Tribunal and Judgment of the Tribunal in General Assembly resolution 95(1) of 1948. The Defence further contends that the broadening of the scope of Article 5 to crimes when committed in armed conflicts of an internal character offends the *nullum crimen* principle.[88]

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87. According to former prosecutor of the ICTY, Richard Goldstone, the ICTY was created due to the Serbian policy of ethnic cleansing, the existence of concentration camps and the provision existing in the Genocide Convention. RICHARD GOLDSTONE, FOR HUMANITY: REFLECTIONS OF A WAR CRIME INVESTIGATOR 78-79 (2000).

88. Prosecutor v. Dusko Tadic, Case No. IT-94-T, Decision on the Defence Motion on Jurisdication (Trial Chamber, Int'l Crim. Trib. Former Yugo., Aug. 10, 1995), ¶ 77 *available at* http://www.un.org/icty/tadic/trialc2/decision-e/100895.htm (last visited May 23, 2003) (emphasis omitted).

The Trial Chamber in the decision of this motion disagreed with the opinion of the defense counsel, and showed that international law allowed for a broader interpretation of the concept of crimes against humanity. The Trial Chamber found that the language used in the ICTY Statute does not allow an interpretation aiming at linking crimes against humanity to an armed conflict. But since the Statute required this link for this particular conflict, the jurisdiction of the ICTY certainly linked those crimes with the conflict. The Trial Chamber wrote in this decision responding to the claim of the defense counsel:

> The Trial Chamber does not agree. The nexus in the Nuremberg Charter between crimes against humanity and the other two categories, crimes against peace and war crimes, was peculiar to the context of the Nuremberg Tribunal established specifically "for the just and prompt trial and punishment of the major war criminals of the European Axis countries." (Nuremberg Charter, Article 1). . . .
>
> In conclusion, the Trial Chamber emphasizes that the definition of Article 5 is in fact more restrictive than the general definition of crimes against humanity recognized by customary international law. The inclusion of the nexus with armed conflict in the article imposes a limitation on the jurisdiction of the International Tribunal and certainly can in no way offend the *nullum crimen* principle so as to bar the International Tribunal from trying the crimes enumerated therein. Because the language of Article 5 is clear, the crimes against humanity to be tried in the International Tribunal must have a nexus with an armed conflict, be it international or internal.[89]

The doctrine rendered in *Tadic* can be seen as a change in the conception of crimes against humanity. Even though in this decision the ICTY states that those crimes against humanity under the jurisdiction of the tribunal have to be committed in connection with the Yugoslavian conflict, this is so because of the jurisdiction *rationae temporis* of the tribunal. But it also implies that this is a limitation of the ICTY Statute and it cannot be considered a feature of the concept of crimes against humanity, as it was the case in the Nuremberg doctrine, because under customary international law crimes against humanity can be punished whether they have committed in times of peace or in times of war.

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89. *Id.* ¶¶ 78, 83.

The Appeals Chamber affirmed the decision of the Trial Chamber on October 2nd, 1995. In this decision the Appeals Chamber wrote:

> It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law. There is no question, however, that the definition of crimes against humanity adopted by the Security Council in Article 5 comports with the principle of *nullum crimen sine lege.*[90]

Regarding this point, Virginia Morris and Michael Scharf, in their analysis of the ICTY Statute, pointed out that the statute is not pretending to change the doctrine regarding the link to an armed conflict, but it is just establishing a temporal limitation, to be applied only in the conflict of the former Yugoslavia.[91] According to these scholars, the concept of crime against humanity does not require any link to an armed conflict and Article 5 of the ICTY Statute does not modify this customary law.[92]

In the judgment rendered on May 7th, 1997, the Trial Chamber of the ICTY analyzed the conduct of Dusko Tadic in the conflict of Yugoslavia. Since Tadic was charged with the commission of crimes against humanity, the Trial Chamber analyzed this category in order to summarize the state of the doctrine in international criminal law. The Trial Chamber wrote that the category was applied in the Nuremberg Tribunal with the intention to punish those who did not commit war crimes in a traditional sense but "to include those who committed other serious crimes that fall outside the ambit of traditional war crimes, such as crimes where the victim is

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90. Prosecutor v. Dusko Tadic, Case IT-94-1-T, Decision on the Defence Mtion for Interlocutory Appeal on Jurisdiction (Appeals Chamber, Int'l Crim. Trib. Former Yugo., Oct. 2, 1995), ¶ 141, *available at* http://www.un.org/icty/tadic/appeal/decision-e/51002.htm (last visited May 23, 2003).

91. *See* MORRIS & SCHARF, *supra* note 39, at 82-84.

92. *Id.*

stateless, has the same nationality as the perpetrator, or that of a state allied with that of the perpetrator."[93]

The Trial Chamber analyzed in detail the requirements to constitute a crime against humanity[94] and affirmed the doctrines held in its previous decisions, particularly the one of August 10th, 1995, mentioned earlier. It was clear for the ICTY that crimes against humanity do not have to be linked to an armed conflict and that this is the current mainstream doctrine. This doctrine was affirmed in the decision of the Appeals Chamber on July 15th, 1999. The Appeals Chamber accepted the interpretation of the Prosecution regarding the link to an armed conflict in the following terms:

> The Appeals Chamber would also agree with the Prosecution that the words "committed in armed conflict" in Article 5 of the Statute require nothing more than the *existence* of an armed conflict at the relevant time and place. The Prosecution is, moreover, correct in asserting that the armed conflict requirement is a *jurisdictional* element, not "a substantive element of the *mens rea* of crimes against humanity" (i.e. not a legal ingredient of the subjective element of the crime).[95]

Summarizing, in *Tadic*, the ICTY considered whether crimes against humanity must be linked to an armed conflict in order for the person to be accountable for the commission of those acts. The Appeals Chamber, found that customary international law did not suggest such an interpretation; that the limits imposed by the ICTY Statute were only a matter of jurisdiction and not a matter of the substantive definition of the crimes against humanity. After the decision of the Appeals Chamber it was clear that those crimes could be committed in times of peace or in times of war, and that they did not need a nexus with an armed conflict.[96]

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93. Prosecutor v. Dusko Tadic, Case No. IT-94-1-T, Opinion and Judgment (Trial Chamber, Int'l Crim. Trib. Former Yugo., May 7, 1997), ¶ 619, *available at* http://www.un.org/icty/tadic/trialc2/judgement/index.htm (last visited May 23, 2003) (hereinafter Tadic I).

94. Whether this conflict has to be international or not international — that is under the scope of common Article 3 to Geneva Conventions of 1949 — was discussed by the International Tribunal for Rwanda (ICTR) in *Akayesu.* Prosecutor v. Jean Paul Akayesu, Case No. ICTR-96-4-T, Judgement (Chamber I, Int'l Crim. Trib. Rwanda, Sept. 2, 1998) § 1.3, *available at* http://www.ictr.org/wwwroot/ENGLISH/cases/Akayesu/judgement/akay001.htm (last visited May 23, 2003).

95. Prosecutor v. Dusko Tadic, Case No. IT-94-I-A, Judgment, (Appeals Chamber, Int'l Crim. Trib. Former Yugo., July 15, 1999), ¶ 249, *available at* www.un.org/icty/ (last visited Mar. 4, 2003).

96. *See id.* ¶ 251.

This doctrine was repeated in the decisions of the ICTR, but *Akayesu* also showed that a crime against humanity could be committed in a non-international conflict.[97] The question arose again during the drafting of the Rome Statute. In Article 7 of the Rome Statute, crimes against humanity are defined as a widespread or systematic attack against a civilian population. The drafters of the Rome Statute discussed the relation of the act to an armed conflict, and clearly rejected the revival of the Nuremberg doctrine, because if crimes against humanity were connected to armed conflict, there would not be any distinction between them and crimes of war; that is to say, the category would be useless.[98] The Preparatory Commission, in charge of the drafting of the elements of crime, took into account the *Tadic* doctrine and followed almost literally the ICTY Statute on this topic.[99]

Before the *Tadic* doctrine, it was clear why some scholars were advocating the inclusion of political groups within the scope of the Genocide Convention. Once the Nuremberg doctrine was officially modified, it became necessary to justify the reasons to include a political group in the Genocide Convention, since both crimes (genocide and crimes against humanity) are crimes under international law and can be committed in times of peace or in times of war.

In the following section, we will see that because petitioners in the *Diaz* case before the ICHR used the Nuremberg doctrine, they had to adopt an ontological conception of genocide. Under such a conception, since the elimination of the membership of the UP occurred in times of peace, it seemed to impose the conclusion that the only way to secure punishment for the perpetrators of that crime was by labeling it as a political genocide.

V. THE ELIMINATION OF THE UP AS A CRIME OF GENOCIDE

As mentioned earlier, the UP party was the result of the peace negotiations between Colombian government and the guerrilla organization FARC. According to the ICHR, "the State further confirmed that it would ensure that the leadership of the FARC would be allowed to

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97. *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 565. The Court wrote: "Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character." *Id.*

98. ROY LEE, THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 91-93 (1999).

99. *See* Report of the Preparatory Commission for the International Criminal Court, Addendum: Finalized Draft Text of the Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

participate in political activities."[100] The purpose of the UP party was to ensure FARC a political vehicle to make possible assimilation into civilian life.[101] According to the petitioners, the acts committed against the members of the UP constitute genocide and the violation of the human rights protected in the ICHR.[102]

The petitioners in *Diaz* based their claim on the assumption that the crimes committed against this political group would go unpunished under the category of crimes against humanity, because the crime was not committed in connection with a crime of war or a crime of aggression or in the context of an internal armed conflict. Since they held the ontological conception of genocide and saw the need of punishment against the perpetrators of this crime, they used the category of genocide to obtain the punishment of those crimes committed in times of peace. In this case, the ontological conception and the Nuremberg doctrine contributed to make the claim under the nonexistent category of political genocide.

In analyzing the claims made by the petitioners, the ICHR observed that they had not alleged facts that

> would tend to show that the Patriotic Union is a "national, ethnical, racial or religious group." Instead, the petitioners have alleged that the members of the Patriotic Union have been persecuted solely because of their membership in a political group. Although political affiliation may be intertwined with national, ethnic or racial identity under certain circumstances, the petitioners have not alleged that such a situation exists in relation to the membership of the Patriotic Union.[103]

Given that the charges were made on the basis that the deeds against the members of the UP were acts of persecution against a political group with the purpose of eliminating it as such and the fact that the Genocide Convention does not include political groups amongst the protected groups of the Convention, the ICHR concluded that the case does not fall within

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100. Diaz et al. v. Colombia, Case 11.227, Inter.-Am. C.H.R. 5/97, OEA/ser.L./V./II.95 doc. 7 rev. 99 (1997), ¶ 2, *available at* http://www1.umn.edu/humanrts/cases/1996/colombia5-97.htm (last visited June 18, 2003). The ICHR made different visits in situ to Colombia in which it had the opportunity to receive information from the government and human rights NGOs regarding the situation of human rights in Colombia and particularly in the *UP*. The ICHR also relied on the report of human rights presented by the then Defensor del Pueblo (Ombudsman) Jaime Córdoba Triviño. *Id.*

101. *Id.* ¶ 3.

102. *Id.* ¶ 4.

103. *Id.* ¶ 23.

the current definition of genocide provided by international law. The ICHR, however, found that there were several acts of persecution, mass killing, and forced disappearance against the members of the UP. Based on the evidence, the ICHR found that there was "a pattern and practice of persecution of the membership of the Patriotic Union with the involvement or at least with the tolerance of the Colombian State."[104] Given the weight of the evidence, the ICHR found that the Colombian state violated several provisions of the Inter-American Human Rights Convention and, therefore, declared the case before them admissible for further proceedings.

Meanwhile, some members of Colombian NGOs exerted pressure to obtain a bill establishing political genocide as a crime in Colombia. As the result of that pressure and after more than five years of negotiations, the Colombian Congress passed the Forced Disappearance Act (*Ley 589 de 2000 "por medio de la cual se tipifica el genocidio, la desaparición forzada, el desplzamiento forzado y la tortura y se dictan otras disposiciones"*).[105] This Act is the result of a long process in which several NGOs and members of the government were involved in order to obtain the punishment of the crime of forced disappearance. However, in the process some delegates in the special commission created to draft the bill suggested the inclusion of other crimes like torture, genocide and forced displacement. During the negotiation of the bill in the Colombian Congress, some representatives asked the inclusion of these crimes, with the same definition, in the bill of penal code that was being discussed in the Colombian Congress.

Proposals to include political groups in the definition of the crime of genocide elicited criticism from members of the military forces who argued that the definition would impede the anti-subversive activities carried on by the military forces and, therefore, they would be unable to fulfill their constitutional duties. Even though the argument in favor was weak under Colombian Law, the Colombian Congress passed a definition of the crime covering political groups provided they develop legitimate activities. In other words, since FARC has been recognized as political actors only for the purposes of the peace process, an act of extermination of a group with the intention of eliminating members of FARC would not

104. *Id.* ¶ 38.

105. The text of the act was included in the new Penal Code (Ley 599 de 2000). *See* CÓD. PEN. (Ley 599 de 2000) (Co.), *available at* http://bib.minjusticia.gov.co/normas/leyes/2000/L5992000.htm (last visited May 23, 2003).

be deemed genocide under Colombian Penal Law.[106] Supporters of the inclusion of political groups in the definition of the crime of genocide[107] argued that organizations like the UP[108] and the Communist Party could also be victims of genocide, without any punishment whatsoever, because they were not considered political parties under the law and, therefore, they were groups acting outside the law.[109]

The Colombian Constitutional Court exerted judicial review on the Act, in response to the petition filed to eliminate the words "acting legally." The Colombian Constitutional Court found that the exclusion of political groups in the Genocide Convention does not prevent nation-states from including those groups in its own definition of the crime of genocide, provided the definition retains the core of the Genocide Convention, that is, the systematic and deliberate destruction of a human group with a definite identity.[110] According to the Colombian Constitutional Court, there is no doubt that a political group has that sort of identity.[111]

With respect to the scope of the legal definition, the Colombian Constitutional Court found that it violated the Colombian Constitution, for it made a distinction amongst political groups not allowed in the Colombian Constitution. The Colombian Constitutional Court concluded that "the liberty of human dignity and the right to life and personal

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106. The wording of the article is the result of the pressure exerted by the Military Forces. According to the law, those organizations involved in a peace process with the government are recognized as political organizations. Since the process is being held without any truce, anti-subversive activities would not be considered an attack against a political group and therefore an act of genocide.

107. Comisión Colombiana de Juristas, Colectivo de Abogados José Alvear Restrepo, ASFADDES, and other human rights NGOs.

108. Due to the principle *nulla crimen sine lege*, the acts committed against the UP before June 2001, where the penal code came into force, have to be punished as homicide.

109. The Political Parties Act recognized the status of political parties to those organizations that obtained a certain number of votes in the past election and had a certain number of representatives in the Colombian Congress.

110. The Political Parties Act will be applied to those crimes committed in Colombia. However, Colombian Penal Law recognizes the principle of universal jurisdiction. *See* CÓD. PEN. art. 16 (Co.). That means that in theory the Colombian definition of genocide would be applied to a foreigner who committed a crime against a political group outside Colombia and is within the Colombian territory. It is clear the contradiction that would be between the Colombian law and international law. Since international law has more weight than national law, the Genocide Convention is part of the Colombian Constitution. It is clear that in a case like that a Colombian court would have to apply the Genocide Convention and not the penal code.

111. Sentencia No. C-177 de 2001, Corte Constitucional de la Republica de Colombia, Feb. 14, 2001, *available at* http://bib.minjusticia.gov.co/jurisprudencia/CorteConstitucional/2001/Constitucionalidad/C-177-01.htm (last visited May 23, 2001) (Justice Fabio Morón Díaz wrote the opinion of the Colombian Court).

integrity does not admit differentiations based on the legality of the activity displayed by the subjects protected in the law."[112] Both the petition before the ICHR and the creation of the crime of genocide in Colombia are the result of the same misunderstanding of international law. The definition in Colombian criminal law is the result of the pressure exerted by Colombian NGOs in the Colombian Congress. Their interpretation of international law indicated that the only way to punish acts like the one committed against the UP was by creating a new crime and including political groups within the scope of the definition of genocide.

According to Drost, national and political groups are closely related and a national group will most likely come within the term of the Genocide Convention because of its political nature.[113] Judge Baltazar Garzon in *Argentinean* and *Pinochet* took the same position.[114] In those cases, the political group was protected under the label of a national and even a religious group. In the next section, we will see how Garzón analyzed and misunderstood the 1948 Genocide Convention in order to keep jurisdiction on both cases.

VI. THE ELIMINATION OF POLITICAL GROUPS IN *ARGENTINEAN* AND *PINOCHET*

On September 11th, 1973, Chilean president Salvador Allende was killed and the first socialist government in Latin America elected by democratic means was replaced by an authoritarian dictatorship ruled by General Augusto Pinochet Ugarte. In the days following the establishment of the dictatorship, Pinochet and his secret service, the DINA, began the *Caravana de la Muerte*,[115] as a result of which more than one hundred people were killed or forcibly disappeared.

The Chilean dictatorship was not alone in its attempt to establish a new form of government in its country. Other dictators of Latin America, particularly of the South Cone, were interested in sharing information about political dissidents in order to take the proper measures to stop

112. *Id.* The translation is that of the author.

113. DROST, *supra* note 77, at 61.

114. *See* Equipo Nizkor web site, *available at* http://www.derechos.org/nizkor/chile/juicio (last visited May 23, 2003) (presenting the collected documents pertaining to these cases).

115. The investigation for these crimes is under the jurisdiction of Judge Guzmán, who had ordered the arrest of Pinochet but the Chilean Supreme Court, with Judges appointed by Pinochet, overturned his decision. *See Chilean Court Overturns Pinochet Indictment*, CNN.COM, Dec. 20, 2000, *available at* http://www.cnn.com/2000/WORLD/americas/12/20/chile.pinochet.02 (last visited May 23, 2003).

political opposition in their countries. In doing so, these countries began Operation Condor, an operation aimed at eliminating political dissidents wherever they were hidden. Investigations directed by human rights NGOs demonstrated that Chileans seeking refuge in Uruguay or Argentina were kidnapped and sent to Chile, wherein they forcibly disappeared.[116]

Margarita Lacabe describes Operation Condor in the following way:

> Operation Condor was organized by the head of the Chilean National Intelligence Directorate (DINA) as a way to collect and exchange intelligence information related to leftist, communist and Marxist activists, so as to facilitate the "elimination of communism" and defend the "Western-Christian" society. In the framework of Operation Condor, mutual-aid agreements were accorded by the Intelligence Services of Argentina, Bolivia, Chile, Paraguay and Uruguay — with the added participation of Brazil and Peru. The agreements facilitated the free acting of intelligence services throughout the region, and the execution of common repressive operations. The agreement also allowed for the deployment of special task forces to countries party to the agreement that would eliminate opposition politicians, subversives and suspected subversives.
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> Dozens of Chileans, Uruguayans, Paraguayans, Brazilians and Bolivians who had sought refuge in Argentina were captured by their own Intelligence Forces in Argentina; others were directly killed. In addition, Chilean political activists were arrested by the Argentinian police and handed to the DINA; many of these disappeared.[117]

On October 16th, 1996, about eight years after the transition to a new government in Chile, several human rights activists denounced Pinochet before the *Juzgado Central de Instrucción No. 5* in Madrid, in order to bring him to Spain and try him for the crimes he committed while dictator of Chile. Other activists presented a claim before Spanish justice in order to get the trial of *Argentinean Military Junta*, since the process of

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116. Stella Calloni, *Los Archivos del Horror de la Operación Cóndor*, *available at* http://www.derechos.org/nizkor/doc/condor/calloni.html (last visited May 23, 2003) (The original in English was published by *Covert Action* in Fall 1994.).

117. Margarita Lacabe, *The Criminal Procedures Against Chilean and Argentinian Repressors in Spain* (1998), *available at* http://www.derechos.net/marga/papers/spain.html (last visited May 23, 2003).

transition in that country ended in a general amnesty for all the people involved, thanks to the *Ley de Obediencia Debida* (Superior Orders Act) and the *Ley de Punto Final* (Final Stage Act).

The claim presented in both cases included the crime of genocide, since both dictatorships eliminated political groups. According to Paz Rojas, the charge of genocide was supported in the most recent interpretation of the Special Rapporteur to the implementation of the Genocide Convention in 1985. In his report the Special Rapporteur admitted genocide as the wanton and systematic destruction, deliberate and planned, of a meaningful part of the own national group — for instance, the elimination of their leaders.[118] According to Paz Rojas, the systematic, planned, and deliberate destruction of the democratic leadership of about 50% of the Chilean nation — taking into account the results of the 1971 and 1973 elections in which the *Unidad Popular*, the political party of Allende, obtained 50% and 44.3% of the votes respectively — amount to a genocide against a national group, namely, the Chilean nation.[119]

In deciding the claim presented by the victims of the Chilean dictatorship, Judge Garzón held that the dictatorship attacked the Mapuches (an Indian community) and some members of the Jewish population,[120] which amounted to genocide against an ethnic and a racial group. Nevertheless, Garzón acknowledged that repression was not directed against those people as a group but it did have a special influence in the treatment they received by the authorities, mainly the cruelty of the torture they received. In the decision, Garzón held that the idea of a national group did not exclude the idea of genocide of groups with a common origin but differentiated within the same nation. Garzón wrote that he would understand the group of inhabitants living in the same territory and under the same government as forming a "nation."

The concept of genocide, according to him, does not exclude the concept of an autogenocide, like that one committed in Kampuchea, which many scholars agreed to label as an act of genocide. Moreover, he argued that the 1948 Genocide Convention does not exclude the destruction of protected groups for political reasons.

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118. PAZ ROJAS ET AL., TARDA PERO LLEGA. PINOCHET ANTE LA JUSTICIA ESPAÑOLA 51-52 (1998); *see also* FERNANDO MAS, DE NUREMBERG A MADRID: HISTORIA INTIMA DE UN JUICIO (1999) (about the whole history of the process from a view point of the organization).

119. ROJAS ET AL., *supra* note 118, at 51-52.

120. Fernando Mas shows that some people whose last name ended in s (as Rodrigues) were killed because that meant that those people were converted jews, even though that conversion happened more than 300 years ago. MAS, *supra* note 118, at 241. In the history of the Jews in Europe, this can also be seen. NORMAN COHN, EN POS DEL MILENIO (1988).

Garzón stated:

> [I]n the crime of genocide the group to be destroyed totally or partially serve for determining the specific subjective element, motive or intention pursued with their destruction. The genocide conduct is not only realized with the intention of destroying a group, but, also, because of its belonging to a nation, ethnicity, race or religion. This idea does not exclude, obviously, from the genocide of national groups, the destruction of groups of common origin, but differentiated within a same nation, this understood as a territorial ambit or the whole of the inhabitants ruled by the same government. It is evident that there are such groups with national identity within one nation. Generally, in these cases, the cohesion of the group is ethnic, which would explain the restrictive Spanish legislation prior to 1983, racial or religious, but other differentiating marks such as territory, history or language, for example, would not be foreign to it. To totally or partially destroy Scots, Catalans, Basques or Corsicans for the lone fact of being it, would be, undoubtedly, a genocide of national groups not necessarily ethnic, independently of whether this was done because of their language, their traditions, their territorial pretensions, or their ideology — as what is decisive is that the destruction of the group would have been caused, precisely, because they belonged to such a national group made cohesive around any permanent differentiating common trait.[121]

Lacabe goes on to say: "In the same manner, the definition of national group that does not exclude the cases in which the victims belong to the same group than the transgressor, that is to say, the alleged cases of 'autogenocide,' as is the case of the mass murders in Cambodia."[122]

Garzón based his arguments in the Whitaker report, which makes clear that eliminating only a part of the group is genocide, that is, a partial genocide is still genocide. This interpretation accords with the text of the Genocide Convention, but the interpretation made by Garzón has the purpose of demonstrating that a person can partially destroy a national group by attacking the members of a political group. In such a case, that would be a partial autogenocide. Garzon wrote:

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121. Lacabe, *supra* note 117.
122. *Id.*

> This does not mean that the destruction of groups for political purposes be left outside [the concept of] genocide. More precisely what it means is that these political motives must fall on a national, ethnic, racial or religious group for the conduct of their total or partial destruction be able to constitute genocide.[123]

In *Pinochet*, according to Garzón, Pinochet aimed at destroying the structure of the national group by attacking those people exerting functions of leadership or ideological initiative in the Communist party, the Mapuches, the unions, and others. The political group was attacked on political grounds and that was the essential impulse of the conduct. In this case, Garzón held, there is no doubt that the destruction of the group as a whole by an aggressor with those motives amounts to a crime of genocide.[124] The same can be said when the national group is attacked — this is essentially a political concept — and that mirrors the dynamic character of the concept of genocide. Taking into account the dynamic nature of national groups and the political characteristic of the concept of nation, Garzón concludes that political parties are an inherent part of national groups which share a common identity, and therefore demand the same protection against extermination. This concept of genocide can be applied to every group in which there is a real, cultural, professional, social, and political identity.[125]

In sum, given the totalitarian character of the Chilean dictatorship and the fact that it attacked people of Chilean nationality, all the elements to label those acts as genocide were present. In analyzing the attacks against the Communist Party, Garzón labeled it a religious genocide, for they were persecuted because of their atheist conception of the world. Garzón wrote that in the same way that Christians were persecuted in communist regimes for religious reasons, in Chile communists were persecuted for

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123. *Id.*
124. *Id.*
125. According to Lacabe,

> Garzon goes on to cite the Whitaker report (Study on the Question of the Prevention and Repression of the Crime of Genocide, undertaken by the Special Rapporteur of the Sub-Commission, Mr. Benjamin Whitaker) for the propositions that the group in question need not be destroyed fully, that the victims be a majority group in the country in question, and that they belong to the same group as the author of the violation. Garzon then acknowledges that the destruction of political groups as a form of genocide was left out explicitly from the Convention.

Id.

atheist reasons. In this way, he defines religion in a negative way, that is to say, those who do not hold a religious belief have themselves a religious belief that needs protection and is protected by the 1948 Genocide Convention.

The decision taken in *Pinochet* is based on a misinterpretation of the Genocide Convention and a bad understanding of the concept of national groups. First of all, Garzón confounds the concept of intentions with the concept of motives. Even though in *Pinochet* many political dissidents were attacked because of their political beliefs, the fact is that the dictatorship did not want to eliminate the Chilean nationality as such. The government of Pinochet did want to eliminate political dissidents who happened to share the same nationality, but that was because they were trying to bring a democratic regime to their home country; that was the reason why Pinochet regime persecuted them. If we accepted Garzón's arguments, we would have to accept that every crime against humanity is genocide because all the victims share the same nationality.

The argument he made in favor of treating the attack against communists as genocide against a religious groups missed the point, because the identity of a religious group is determined by its worship, its beliefs in a god, and its members. A communist group shares none of these features, unless we accept a very broad definition of religious groups. The confusion is worse in *Argentinean*. In this case, Garzón repeated his arguments about the attack against a national group, the idea of the autogenocide, and the conception of the communist party as a religious group in a negative sense. In the decision of May 11th, 1998, Garzón insisted in writing that the junta wanted to eliminate the Communist Party because it was contrary to Christian morality.[126] But that interpretation does not take into account that the reasons for the persecution of this party were not only its atheist conception. Rather, its goal to create an egalitarian society in Argentina spurred the persecution on. To think that the dictatorship was fighting a sort of crusade is just accepting what it used as a way of legitimizing its terror against the Argentinean population. The Audiencia Nacional goes further in this misinterpretation of the 1948 Genocide Convention. In the Auto of November 4th, 1998, during the appeal of the decision by Garzon, the Audiencia denies that the drafters of the Genocide Convention wanted to exclude political groups from the definition of genocide:

126. Lacabe, *supra* note 117.

> We know that in the 1948 [Genocide C]onvention the term "political" or the words "or others" do not appear, when it relates in article 2 the characteristics of the group object of the destruction proper of genocide. But silence is not the equivalent of unfailing exclusion. Whatever the intentions of the writers of the text were, the Convention acquires life by virtue of the successive signatures and ratifications of the treaty by member of the United Nations who shared the idea of genocide as an odious scourge that they should commit themselves to prevent[ing] and sanction[ing].[127]

We have already seen that it was the clear purpose of the U.N. General Assembly to exclude political groups from that definition. Therefore, the rationale of the Audiencia Nacional for affirming the decision by Garzón is wrong and it is also founded in a wrong understanding of the lawmaking process regarding the crime of genocide. *Argentinean* and *Pinochet* show that a misunderstanding of international law, the ontological conception of genocide — as a crime even more evil than crimes against humanity — and symbolic conceptions of the law, made Judge Garzón label as genocide an act that clearly was a crime against humanity. The Whitaker report and the autogenocide in Kampuchea were used to demonstrate that political groups could be considered victims of genocide against a national group. The intention behind this strategy was to obtain the punishment of crimes against humanity committed in times of peace; therefore in this case Garzón was applying the Nuremberg doctrine to secure the punishment of Pinochet, and of the members of the military junta in Argentina.

VII. CONCLUSION

In this Article, I have discussed different aspects of genocide and the so-called political genocide:

- The history of the 1948 Genocide Convention shows that political groups were excluded from the definition of the Convention.
- The label political genocide is the result of the need to punish certain crimes against humanity committed in times of peace and under the interpretation of the Nuremberg doctrine.
- After the *Tadic* doctrine there is no need to appeal to the concept of genocide to punish persecution against political groups with the

127. *Id.*

purpose of eliminating them as such; therefore international law allows the punishment of crimes against humanity, whether they have been committed in times of peace or in times of war.

- The decision taken by the ICHR in *Diaz* accords with international law, and the claim of petitioners were within existing doctrine regarding crimes against humanity.
- *Argentinean* and *Pinochet* and the decisions of the Spanish judges were the result of a clear misunderstanding of the Genocide Convention and an interpretation that is not allowed by the wording of the Genocide Convention or by the history of the exclusion of political groups from the scope of the Convention.

This Article has demonstrated that there are no grounds to hold that political genocide is a crime under international law. But it also has demonstrated that there is no need to modify current international law, for the category of crimes against humanity is enough to guarantee the punishment of the perpetrators of crimes like those committed in *Diaz* or in *Argentinean* and *Pinochet*. Under international criminal law, applied to individuals, or under the international law of human rights, applied to states, the actions of Colombia and the South Cone dictatorships can be treated as crimes against humanity or as a human rights violation, respectively. The label genocide does not add any further punishment or make the act more serious. The victims of the crime would not acquire a symbolic dimension for the fact that the act is called a crime of genocide. All three cases are crimes under international law and can be punished with the instruments that the law provides.

Some could argue that the requirement that the act be part of a systematic or widespread attack to be considered a crime against humanity imposes the need of creating a concept of political genocide. However the experience of the tribunals and the history of genocides show that none of them have been isolated acts and instead are part of systematic or widespread attacks against a civilian population.