

Expanding the Crime of Genocide to Include Ethnic Cleansing: A Return to Established Principles in Light of Contemporary Interpretations

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“The only alternative to ethnic minorities is ethnically pure states created by slaughter or *expulsion*.”¹

I. INTRODUCTION

It may be surprising to discover that ethnic cleansing is legally distinct from genocide considering that the media use these terms interchangeably.² Currently, no formal legal definition of ethnic cleansing exists.³ In characterizing the acts of the Yugoslav war, however, the United Nations Security Council’s Commission of Experts on violations of humanitarian law stated that “‘ethnic cleansing’ means rendering an area ethnically homogenous by using force or intimidation to remove

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1. Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice*, in 41 INT’L STUD. IN HUM. RTS. 1, 108 (1995) (quoting *Fearful Name from a Nazi Past*, L.A. TIMES, June 22, 1994, at B6) (emphasis added).

2. See, e.g., Andy Segal, ‘Bombs for Peace’ After Slaughter in Bosnia, CNN, Dec. 4, 2004, <http://www.cnn.com/2008/WORLD/europe/11/20/sbm.bosnia.holbrooke/> (“Three years later, [Richard Holbrooke] would become one of the most influential U.S. figures working to end a war that had introduced a new euphemism for genocide: ethnic cleansing.”); Steven R. Weisman, *Powell Declares Genocide in Sudan in Bid to Raise Pressure*, N.Y. TIMES, Sept. 9, 2004, available at <http://www.nytimes.com/2004/09/09/international/africa/09CND-SUDA.html?scp=1&sq=Powell%20Declares%20Genocide%20in%20Sudan%20in%20Bid%20to%20Raise%20Pressure,&st=cse> (quoting former Secretary of State Colin L. Powell, who, in describing the atrocities occurring in western Sudan, said “‘Call it civil war. Call it ethnic cleansing. Call it genocide. Call it ‘none of the above.’ The reality is the same.”).

3. *Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan*, HUM. RTS. WATCH REP. (Human Rights Watch, New York, N.Y.), May 6, 2004, at 1, 39 [hereinafter *Darfur Destroyed*].

persons of given groups from the area.”⁴ Consequently, various U.N. resolutions and reports, international criminal courts and tribunals, international organizations, and legal scholars have defined ethnic cleansing as the forcible removal, displacement, deportation, and expulsion of an ethnic group from a given territory.⁵ The forcible displacement of a particular group does not fall within the crime of genocide.⁶ The Genocide Convention defines genocide as

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; and (e) forcibly transferring children of the group to another group.⁷

4. *Letter Dated 9 February 1993 from the Secretary-General Addressed to the President of the Security Council*, ¶ 55, Annex No. 1, U.N. Doc. S/25274 (Feb. 9, 1993) [hereinafter *Secretary-General Letter*].

5. See, e.g., U.N. GAOR, 47th Sess., 91st plen. mtg., at 2, U.N. Doc. A/RES/47/121 (Dec. 18, 1992) (declaring that a consistent pattern of gross human rights violations, mass expulsions of defenseless civilians from their homes, and the existence of concentration camps and detention centers were carried out in pursuit of an “abhorrent policy of ‘ethnic cleansing,’ which is a form of genocide”); Comm’n on Human Rights, *Report of the Commission on Human Rights on its First Special Session*, at 2, delivered to the Economic and Social Council, U.N. Doc. E/CN.4/1992/S-1/8 (Aug. 14, 1992) (claiming that, at a minimum, ethnic cleansing entails “deportations and forcible mass removal or expulsion of persons from their homes” and is “aimed at the dislocation or destruction of national, ethnic, racial or religious groups”); Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-3, Decision on the Prosecutor’s Application for a Warrant of Arrest, ¶ 143 (Mar. 4, 2009); Prosecutor v. Simić, Tadić, & Zarić, Case No. IT-95-9-T, Judgment, ¶ 133 (Oct. 17, 2003); Drazen Pretrovic, *Ethnic Cleansing—An Attempt at Methodology*, 5 EUR. J. INT’L L. 342, 351–52 (1994) (“Ethnic cleansing is a well-defined policy of a particular group of persons to systematically eliminate another group from a given territory on the basis of religious, ethnic or national origin.”); *Human Rights Watch World Report 1994: Events of 1993*, HUM. RTS. WATCH REP. (Human Rights Watch, New York, N.Y.), 1994, at 201, (defining the practice of ethnic cleansing as “[t]he forcible deportation and displacement, execution, confinement in detention camps or ghettos, and the use of siege of warfare, to force the flight of the ‘enemy’ ethnic population”).

6. The crime of genocide was first codified under the Genocide Convention. Convention on the Prevention and Punishment of the Crime of Genocide, art. II, *opened for signature* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*]. To date, 140 states have ratified the Genocide Convention, and the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR) have adopted its provisions. Rome Statute of the International Criminal Court, art. 6, *opened for signature* July 17, 1998, 2187 U.N.T.S. 3 [hereinafter *Rome Statute*]; Statute of the International Tribunal for Rwanda, art. 2, ¶ 2, 33 I.L.M. 1598 [hereinafter *ICTR Statute*]; Statute of the International Tribunal for the Former Yugoslavia art. 4, § 2, May 25, 1993, 32 I.L.M. 1203 [hereinafter *ICTY Statute*].

7. Genocide Convention, *supra* note 6, art. II.

While ethnic cleansing could be construed as one of the foregoing genocidal acts,⁸ it is typically understood to be a separate offense—a crime against humanity.⁹

The crime of genocide also excludes a policy of ethnic cleansing. Genocide is a specific intent crime; thus, to be held liable, the accused must possess the general intent to commit the act as well as the specific intent “to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such.”¹⁰ Because the crime of genocide requires the specific intent to destroy, international tribunals and legal scholars consider displacing an ethnic group to achieve an ethnically homogenous territory incompatible with genocidal intent.¹¹ By interpreting an intention to destroy as distinct from an intention to displace, international tribunals have lost sight of the principal evil that the crime of genocide is meant to prevent and punish—denying a particular group of people the right to exist.¹²

Although the legal similarities between genocide and ethnic cleansing have received some discussion from the International Criminal Court (ICC),¹³ international tribunals,¹⁴ and various commentators,¹⁵ an

8. For example, deliberately inflicting conditions of life calculated to bring about a group's physical destruction, imposing measures to prevent births within the group, or forcibly transferring children could be construed as genocidal acts. See, e.g., Pretrovic, *supra* note 5, at 356–57 (stating that certain methods of ethnic cleansing, such as torture, rape, and destruction of cultural and religious monuments, may fall within the genocidal acts of causing serious bodily or mental harm to members of a group and of deliberately inflicting on the group the conditions of life calculated to bring about its physical destruction).

9. International courts and tribunals typically criminalize ethnic cleansing under the crime of persecution or the crime of deportation or forcible transfer, which are both crimes against humanity. See *Al Bashir*, Case No. ICC-02/05-01/09-3, ¶ 143; *Simić*, Case No. IT-95-9-T, ¶ 133.

10. Rome Statute, *supra* note 6, art. 6; ICTR Statute, *supra* note 6, art. 2, ¶ 2; ICTY Statute, *supra* note 6, art. 4, ¶ 2; Genocide Convention, *supra* note 6, art. II.

11. See, e.g., *Prosecutor v. Brđjanin*, Case No. IT-99-36-T, Judgment, ¶¶ 977–78 (Sept. 1, 2004) (holding that a plan intended solely to displace a population is insufficient to establish genocidal intent); WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 234 (Cambridge Univ. Press) (2d ed. 2009) [hereinafter SCHABAS, *GENOCIDE IN INTERNATIONAL LAW*] (“The issue is one of intent and it is logically inconceivable that the two agendas [of ethnic cleansing and genocide] coexist.”).

12. G.A. Res. 96(I), at 188–89, (Dec. 11, 1946) (“Genocide is a denial of the right of existence of entire human groups.”).

13. See, e.g., *Al Bashir*, Case No. ICC-02/05-01/09-3, ¶ 145 (holding that the practice of ethnic cleansing may result in genocide if it brings about the commission of the objective elements of genocide with the specific intent to destroy).

14. See, e.g., *Brđjanin*, Case No. IT-99-36-T, ¶ 981 (holding “there are obvious similarities between genocidal policy and the policy known as ethnic cleansing. The underlying criminal acts for each may often be the same.”); *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, ¶ 31 (Apr. 19, 2004).

15. See, e.g., Damir Mirković, *Ethnic Conflict and Genocide: Reflections on Ethnic Cleansing in the Former Yugoslavia*, 548 ANNALS AM. ACAD. POL. & SOC. SCI. 191, 197 (1996) (“[I]n its broader meaning, [ethnic cleansing] implies differential treatment and discrimination with a view to

elaborate discussion of (1) the legal consequences of preserving a distinction versus incorporating the two acts; (2) the persuasiveness of states' reasons for refusing to include ethnic cleansing within the Genocide Convention; or (3) how to incorporate ethnic cleansing into the Genocide Convention is still lacking.

This Comment specifies how ethnic cleansing fits into genocide's distinctly destructive purpose and effect. I argue that because ethnic cleansing and genocide result in similar harms and derive from similar agendas, international courts ought to find perpetrators guilty of the crime of genocide when genocidal acts are committed with the intent to create an ethnically homogenous territory. A policy of ethnic cleansing is a genocidal policy.

Part II of this Comment reviews the legislative history of the Genocide Convention to provide a justification for preserving the heightened legal and political status currently attributed to the crime of genocide. Part III summarizes recent international courts' interpretations of destruction as it applies to genocidal acts and genocidal intent, particularly their refusal to incorporate cultural destruction within their understanding of genocidal intent. By excluding cultural destruction from the crime of genocide, the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the ICC have demonstrated that they are averse to equating a policy of ethnic cleansing with the intent to destroy. Part IV argues that the aim of genocide—the intent to destroy a human group—actually parallels a policy of ethnic cleansing. Intending to expel a certain ethnic group to achieve an ethnically homogenous territory is an intention to destroy that ethnic group. Part V explains how already developed limits on genocidal intent may be used to interpret a policy of ethnic cleansing as the intent to destroy.

putting on pressure to comply, to emigrate, to give up and to assimilate, and in its narrower or restrictive meaning, it denotes destruction, which through acts of terrorism, forceful relocation, and expulsion, leads ultimately to genocide.”); Pretrovic, *supra* note 5, at 356 (claiming that some methods of ethnic cleansing fall within the parameters of genocidal acts); John Webb, *Genocide Treaty—Ethnic Cleansing—Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia*, 23 GA. J. INT’L & COMP. L. 377, 402 (1993) (acts of ethnic cleansing are intended to destroy the victimized group in whole or in part and therefore are acts of genocide within the meaning of Article II of the Genocide Convention); Linnea D. Manashaw, Comment, *Genocide and Ethnic Cleansing: Why the Distinction? A Discussion in the Context of Atrocities Occurring in Sudan*, 35 CAL. W. INT’L L.J. 303, 329 (2005) (in recognition of the similarities and differences between genocide and ethnic cleansing, a Convention on Ethnic Cleansing could narrowly define ethnic cleansing as either a crime against humanity or a separate strict international crime).

II. GENOCIDE AS THE CRIME OF CRIMES

Currently, genocide is an offense separate from crimes against humanity,¹⁶ whereas ethnic cleansing is generally classified as a crime against humanity.¹⁷ Crimes against humanity include a long list of inhumane acts, such as murder; extermination; enslavement; torture; persecution on political, racial, and religious grounds; and deportation or forcible transfer of a population.¹⁸ However, the commission of one of the foregoing acts is not enough. To be held liable for a crime against humanity, the act must be “committed as part of a widespread or systematic attack directed against any civilian population.”¹⁹

In comparing crimes against humanity with the crime of genocide, the similarities between the crimes’ acts are apparent.²⁰ However, there are three notable distinctions between the two crimes: (1) genocide pertains only to crimes whose victims belong to protected groups (race, ethnicity, nationality, or religion), while crimes against humanity may be committed against any civilian population; (2) genocide requires a specific intent to destroy a group because its members share a common national, racial, ethnic, or religious identity, while crimes against humanity do not require any specific intent; and (3) a single isolated act could qualify as genocide, while a single isolated act against a civilian is unlikely to qualify as a crime against humanity because the latter must be committed within the context of a widespread or systematic attack.²¹

The first distinction is insufficient to differentiate the two crimes because an ethnic group is one of the protected groups within the crime of genocide. The third distinction is both uncommon and insignificant: although in theory a genocidal act could be completed in isolation from a widespread or systematic attack, history suggests that genocide is commonly committed as part of a state policy or shared plan.²² Furthermore,

16. See Rome Statute, *supra* note 6, arts. 6–7; ICTR Statute, *supra* note 6, arts. 2–3; ICTY Statute, *supra* note 6, arts. 4–5.

17. See *supra* note 9.

18. Rome Statute, *supra* note 6, art. 7; see also ICTR Statute, *supra* note 6, art. 3 (excluding enforced disappearance of people and the crime of apartheid); ICTY Statute, *supra* note 6, art. 5 (excluding enforced disappearance of people and the crime of apartheid).

19. *Id.*

20. It takes no stretch of the imagination to see how genocidal acts—killing, causing serious bodily or mental harm, inflicting conditions of life calculated to bring about a group’s physical destruction, imposing measures intended to prevent birth, and forcibly transferring children—fit into at least one of the acts enumerated under crimes against humanity, if not inhumane acts in general. *E.g.*, RONALD C. SLYE & BETH VAN SCHAACK, INTERNATIONAL CRIMINAL LAW: THE ESSENTIALS 235 (2009).

21. See *id.* at 210–11.

22. See, *e.g.*, Application of Convention on Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 1, 73 (Judgment of Feb. 26) (holding “when part of the group is targeted, that part must be significant enough for its destruction to have an impact on

because widespread or systematic attacks result in considerable suffering and are likely to recur, the international community is most concerned with mass atrocities rather than isolated acts. Therefore, the essential distinction between genocide and ethnic cleansing is intent.

Given that the distinction between crimes against humanity and genocide is narrow, several legal scholars downplay differences and even suggest converging the two crimes.²³ To appreciate the significance of the distinctions and similarities, this section will provide an overview of the events and legislative history prompting the formation of the international crime of genocide, the legal status attributed to genocide, and the unique features of genocidal intent. Ultimately, the policy underlying genocidal intent justifies preserving genocide as a separate offense.

A. *The Formation of the Crime of Genocide*

Although the systematic killing of national, racial, ethnic, and religious groups has occurred throughout world history, it was not until 1944 that Raphael Lemkin coined the term “genocide.”²⁴ Lemkin recognized the absence of any crime aimed to prevent and punish the murder and destruction of millions.²⁵ Genocide is not just mass murder or the destruction of a nation; genocide is the eradication of a people.²⁶ Consequently, Lemkin proposed criminalizing genocide to account for the discriminatory nature and the destructive impact of acts that are now collectively known as genocide.²⁷ Lemkin’s definition provided that, ““Whoever, while participating in a conspiracy to destroy a national, racial or religious group, undertakes an attack against life, liberty or prop-

the group as a whole”); *Report of the International Law Commission to the General Assembly*, 51 GAOR Supp. (No. 10) at 88, U.N. A/51/10 (1996), *reprinted in* [1996] 2 Y.B. INT’L L. COMM’N 17, U.N. Doc. A/CN.4/L.527/Add.8 (finding that crimes like genocide and other crimes against humanity are “of such magnitude that they often require some type of involvement on the part of high level government officials or military commanders”); William A. Schabas, *Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry’s Findings on Genocide*, 27 CARDOZO L. REV. 1703, 1711 (2006) [hereinafter Schabas, *Genocide, Crimes Against Humanity, and Darfur*].

23. See SLYE & VAN SCHAACK, *supra* note 20, at 239; Schabas, *Genocide, Crimes Against Humanity, and Darfur*, *supra* note 22, at 1719–21 (claiming that since the adoption of the Rome Statute, the legal distinctions between genocide and crimes against humanity has been largely eliminated).

24. RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 79 (1944). Lemkin was born in eastern Poland and later became an influential lawyer, prosecutor, and university teacher. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW*, *supra* note 11, at 28. By the 1930s, he was internationally known as a scholar in the field of international criminal law. *Id.* at 28–29.

25. Raphael Lemkin, in *Genocide*, 15 AMERICAN SCHOLAR, 227, 227 (1946) [hereinafter Lemkin, *Genocide*].

26. *Id.*

27. *Id.*

erty of members of such groups is guilty of the crime of genocide.”²⁸ The underlying premise of Lemkin’s definition is that the harm is qualitatively different from the individual lives lost; the harm is the loss of an entire people.²⁹

The first opportunity to apply Lemkin’s definition of genocide arose during the Nuremberg Trial of the Major War Criminals in 1945. Although the war criminals were charged with genocide, they were convicted of war crimes and crimes against humanity.³⁰ The reason for this result was that genocide was outside the International Military Tribunal’s (IMT) jurisdiction.³¹ The Charter of the IMT provided no definition, or even mention, of genocide.³² Moreover, the Charter required that for a crime to constitute a crime against humanity, it must be committed “before or during the war”—in connection with the international armed conflict.³³

Partly in response to the IMT’s inability to convict defendants of genocide or crimes against humanity committed during peacetime,³⁴ and partly in response to the emerging acceptance of the term genocide,³⁵ the United Nations General Assembly passed Resolution 96(I) unanimously and without debate.³⁶ General Assembly Resolution 96(I) established genocide as a crime under international law and invited U.N. member states to enact legislation aimed at preventing and punishing genocide,³⁷ which, in turn, prompted the drafting of the Genocide Convention.³⁸

The U.N. Secretariat’s Human Rights Division was first assigned the task of drafting a genocide convention.³⁹ The Division relied on Lemkin and two other experts—a former judge of the IMT and a Romanian law professor—as well as the U.N. Secretary-General for guidance.⁴⁰ Among the various issues that arose during the drafting process were whether and how to distinguish genocide from crimes against hu-

28. *Id.* at 230.

29. *Id.*

30. SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 11, at 43, 47–48.

31. *Id.* at 42.

32. *Id.*

33. *Id.*

34. *Id.* at 52. The fear was that atrocities not committed in connection with an armed conflict would go unpunished due to the principle of *nullum crimen sine lege*—no crime can be committed and no punishment imposed without an established law. *Id.*

35. National military tribunals began referencing and describing genocide in their indictments, judgments, and oral arguments. SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 11, at 48–52.

36. *Id.* at 55.

37. G.A. Res. 96 (I), at 188–89 (Dec. 11, 1946).

38. Genocide Convention, G.A. Res. 260 (III), pmbl., (Dec. 9, 1948).

39. SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 11, at 60.

40. *Id.*

manity.⁴¹ In the end, the drafters decided to move forward with a genocide convention, making genocide an international crime punishable “whether committed in time of peace or in time of war.”⁴² This provision, combined with the Genocide Convention’s exclusion of any reference to the Nuremberg judgment,⁴³ suggests that a majority of states treated genocide as a crime separate from crimes against humanity.

Although crimes against humanity were punishable only in the context of war at the time the Genocide Convention was finalized in 1948, today, crimes against humanity are punishable during both times of war and times of peace.⁴⁴ Despite this similarity, there remain key distinctions that justify preserving genocide as a separate offense.

B. The Legal Import of the Crime of Genocide

Both the crime of genocide and crimes against humanity prohibit the most inhumane, cruel, and violent acts known to man. However, classifying an atrocity as genocide has a much greater legal and political effect than classifying it as a crime against humanity. The legal significance does not lie in the severity of the sentence⁴⁵ but rather in the stability and certainty that the Genocide Convention provides. Crimes against humanity are articulated only in statutes founding international criminal courts or tribunals and not in any multilateral treaty or agreement like the Genocide Convention. The Genocide Convention and its legislative history have generated special legal duties and remedies.⁴⁶ Unlike crimes against humanity, the crime of genocide clearly creates obligations on state parties to the Convention and provides state parties with civil remedies not available to states victimized by crimes against humanity.

41. *Id.* at 60–61.

42. Genocide Convention, *supra* note 6, art. I.

43. SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 11, at 87–88. States wished to avoid confusion between genocide and crimes against humanity and adopted the IMT’s restrictive war nexus requirement. *Id.*

44. Compare ICTY Statute, *supra* note 6, art. 5, with Rome Statute, *supra* note 6, art. 7, and ICTR Statute, *supra* note 6, art. 3. See also SLYE & VAN SCHAACK, *supra* note 20, at 213–14, 231.

45. The Genocide Convention, the Rome Statute, the ICTR Statute, and the ICTY Statute do not provide any specific sentencing guidelines, leaving sentencing to the discretion of domestic or international courts. See Rome Statute, *supra* note 6; ICTR Statute, *supra* note 6; ICTY Statute, *supra* note 6. Therefore, classifying a crime as a crime against humanity or as genocide does not accurately predict the punishment imposed.

46. SLYE & VAN SCHAACK, *supra* note 20, at 213 (“Unlike the crimes of genocide, torture, and war crimes, crimes against humanity never became the subject of a comprehensive penal treaty in the postwar period.”).

1. The Duty to Prevent

Under the Genocide Convention, state parties have the duties to prevent and to punish the crime of genocide⁴⁷—and the obligation not to commit genocide—through their organs, persons, or groups whose conduct is attributable to them.⁴⁸ By imposing a duty to prevent, the Convention permits state parties to take action against perpetrators before genocide becomes a reality. In contrast, a duty to punish compels states to wait for the actual atrocities to occur before any action may be taken. Testament of the crime of genocide's duty to prevent requirement is the additional responsibility imposed on those who directly or publicly incite genocide.⁴⁹ While inciting others to commit genocide generates criminal responsibility, inciting others to commit crimes against humanity does not.⁵⁰

State parties have a duty not only to prevent genocide on their own but also to encourage international preventative efforts. The Genocide Convention explicitly permits any contracting party to “call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide.”⁵¹ Although the U.N. Charter already demands that effective measures be taken to prevent and remove threats to international peace and security,⁵² an article specifying the role of the U.N. in preventing and suppressing genocide is especially significant because it promotes international efforts to stop the atrocities from commencing or continuing.⁵³ Thus, by specifically permitting not

47. Application of Convention on Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), 1996 I.C.J. 595, 616 (Preliminary Objections Judgment of July 11) (holding that each state has the obligation to prevent and to punish the crime of genocide).

48. Application of Convention on Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 1, 67 (Judgment of Feb. 26).

49. Rome Statute, *supra* note 6, art. 25, ¶ 3(e); ICTR Statute, *supra* note 6, art. 2, ¶ 3(c); ICTY Statute, *supra* note 6, art. 4, ¶ 3(c); Genocide Convention, *supra* note 6, art. III.

50. See Rome Statute, *supra* note 6, art. 25, ¶ 3; ICTR Statute, *supra* note 6, art. 6, ¶ 1; ICTY Statute, *supra* note 6, art. 7, ¶ 1.

51. Genocide Convention, *supra* note 6, art. VIII.

52. U.N. Charter art. 1, ¶ 1; see also *id.* art. 35, ¶ 1 (“Any Member of the United Nations may bring any dispute, or any situation [which might lead to international friction or give rise to a dispute], to the attention of the Security Council or of the General Assembly.”).

53. See U.N. Econ. & Soc. Council, Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, ¶ 68, U.N. Doc. E/CN.4/Sub.2/1985/6 (July 2, 1985) (prepared by B. Whitaker) (“The value of an article specifying the role of the United Nations in the prevention and suppression of genocide is especially evident, because until some special agency is set up, there is no other international organization to see to the implementation of the Convention.”).

only the Security Council but also the U.N. to prevent genocide, the Genocide Convention provides additional authority for intervention.⁵⁴

2. International Court of Justice Jurisdiction

Providing the International Court of Justice (ICJ) with automatic jurisdiction over disputes involving state parties to the Genocide Convention evidences strong state interests in preventing genocide and attaining appropriate redress. Article IX of the Genocide Convention grants, upon the request of one of the contracting parties, the ICJ jurisdiction to decide disputes relating to the interpretation, application, or fulfillment of the Convention, including those relating to the responsibility of a state for genocide.⁵⁵ The ICJ has interpreted Article IX as conferring personal jurisdiction over any state that is a party to the Convention⁵⁶ and subject matter jurisdiction over any state acts that fall under the Convention's provisions.⁵⁷ In contrast, treaties and customary international law comprising crimes against humanity, even if closely related to the provisions of the Genocide Convention, do not fall under the jurisdiction of the ICJ.⁵⁸ Thus, a state cannot seek relief—in the form of an injunction or reparations—before the ICJ for the commission of a crime against humanity unless both states consent to ICJ jurisdiction.⁵⁹

C. Genocidal Intent as the Crucial Distinction

What makes genocide distinct from crimes against humanity? International criminal courts and legal scholars assert that genocide's specific intent requirement, or genocidal intent, establishes its reputation as

54. Some may argue that this merely reflects a failure of the U.N. structure and function and that, therefore, crimes against humanity should invoke the same U.N. attention and involvement as genocide. Nonetheless, genocide continues to receive this special status, which is not shared by crimes against humanity.

55. Genocide Convention, *supra* note 6, art. IX.

56. Application of Convention on Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), 1996 I.C.J. 595, 610, (Preliminary Objections Judgment of July 11) (holding that Yugoslavia is bound by the provisions of the Genocide Convention because it was party to the Convention at the time it filed the Application).

57. *Id.* at 614 (to determine whether the ICJ has jurisdiction, it must verify that the dispute between the parties falls within the scope of that provision).

58. Application of Convention on Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), 1993 I.C.J. 325, 341, (Judgment of Sept. 13) (the customary and conventional international laws of war and international humanitarian law—including but not limited to the four Geneva Conventions, the Hague Regulations on Land and Warfare of 1907, and the Nuremberg Charter, Judgment, and Principles—do not establish *prima facie* jurisdiction because the texts do not confer jurisdiction upon the ICJ).

59. U.N. Charter app. art. 34, ¶ 1 (Statute of the International Court of Justice).

the “crime of crimes.”⁶⁰ Unlike genocide, crimes against humanity are not specific intent crimes; the perpetrator need intend only the prohibited act. Although the ICTY and ICTR have required that the perpetrator also have knowledge that his or her actions were part of a widespread or systematic attack, the *mens rea* element of crimes against humanity is still easier to prove than genocidal intent.⁶¹

To be convicted of genocide, the perpetrator must not only intend to commit the genocidal act but also intend “to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such.”⁶² To find genocidal intent, it is not enough to target a person because of his nationality, ethnicity, race, or religion.⁶³ This discriminatory intent must be accompanied by the intent to destroy the group.⁶⁴ That is, the perpetrator must target individuals because of their membership in a protected group *and* do so with the overall objective of destroying the group.⁶⁵ Thus, the victim of genocide is the group, not the individual.⁶⁶

Although both genocide and crimes against humanity cause extreme suffering and pain on a massive scale, genocide is especially evil because a group’s very existence is at stake. Because of this additional harm, genocidal intent is the distinguishing characteristic that justifies

60. Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Judgment and Sentence, ¶ 16 (Sept. 4, 1998) (“The crime of genocide is unique because of its element of *dolus specialis* (special intent) . . . hence the Chamber is of the opinion that genocide constitutes the crime of crimes.”); Prosecutor v. Serushago, Case No. ICTR-98-39-S, Sentence, ¶ 15 (Feb. 5, 1999). Although the ICTR later held that there is no hierarchical gradation of crimes and that all crimes under the ICTR Statute constitute serious violations of international humanitarian law, the Appeals Chamber made this remark only to demonstrate that both genocide and crimes against humanity are capable of attracting the same sentence. Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-A, Judgment (Reasons), ¶ 367 (June 1, 2001). The Appeals Chamber held that “the Trial Chamber’s description of the genocide as the ‘crime of crimes’ was at the level of general appreciation.” *Id.* See also Prosecutor v. Brđjanin, Case No. IT-99-36-T, Judgment, ¶ 699 (Sept. 1, 2004) (“The intent to destroy makes genocide an exceptionally grave crime and distinguishes it from other serious crimes.”); Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 134 (Apr. 19, 2004) (“Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent.”); U.N. Econ. & Soc. Council, Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, ¶ 38, U.N. Doc. E/CN.4/Sub.2/1985/6 (July 2, 1985) (prepared by B. Whitaker) (“It is the element of intent to destroy a designated group wholly or partially which raises crimes of mass murder and against humanity to qualify as the special crime of genocide.”).

61. SLYE & VAN SCHAACK, *supra* note 20, at 218.

62. Rome Statute, *supra* note 6, art. 6; ICTR Statute, *supra* note 6, art. 2, ¶ 2; ICTY Statute, *supra* note 6, art. 4, ¶ 2; Genocide Convention, *supra* note 6, art. II.

63. *Report of the International Law Commission to the General Assembly*, *supra* note 22, at 88. See also Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶ 20 (Mar. 22, 2006).

64. *Report of the International Law Commission to the General Assembly*, *supra* note 22, at 88.

65. *Id.*

66. *Id.*; Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 552 (Aug. 2, 2001); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 731 (Sept. 2, 1998).

the unqualified duties, international intervention, and universal condemnation resulting from the Genocide Convention. This is not to say that crimes against humanity are insignificant or undeserving of punishment or prevention. However, lumping the crimes together will weaken the stigma attached to the crime of genocide and will make universal cooperation more difficult. Therefore, the crime of genocide should remain the “crime of crimes” with little room for expansion.

III. THE MEANING OF “DESTROY”: THE EXCLUSION OF CULTURAL DESTRUCTION FROM THE CRIME OF GENOCIDE

The Genocide Convention’s legislative history and judicial interpretations of the crime of genocide define “destroy” as physical or biological destruction, deliberately leaving out cultural destruction. When international courts discuss acts of ethnic cleansing, they typically refer to the forcible removal of a population. Acts of forcibly removing a population can be used as evidence of physical or biological destruction in support of establishing genocide. However, because they classify forcible removals as cultural destruction, international courts will not interpret a policy of ethnic cleansing as a genocidal policy. The premise behind the courts’ reasoning is that intent to displace is not intent to destroy. This Part begins with an introduction to what ethnic cleansing is and how the U.N. and international courts and tribunals have defined destruction. This Part ends with a discussion of how international courts and tribunals interpret ethnic cleansing—first as an act and then as a policy—as distinct from destruction.

A. What is Ethnic Cleansing?

To understand judicial decisions interpreting ethnic cleansing, one must understand what ethnic cleansing is. International courts and tribunals most frequently define ethnic cleansing as rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area.⁶⁷ Yet, it is still not a formal crime of its own.⁶⁸ Thus, international courts and tribunals commonly criminalize ethnic cleansing under the crime of deportation or forcible transfer or the crime of persecution—both crimes against humanity.⁶⁹

67. See, e.g., Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-3, Decision on the Prosecutor’s Application for a Warrant of Arrest, ¶ 143 (Mar. 4, 2009); *Secretary-General Letter*, *supra* note 4, at ¶ 55.

68. Application of Convention on Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 1, 71 (Judgment of Feb. 26).

69. See, e.g., *Al Bashir*, Case No. ICC-02/05-01/09-3, ¶ 143; Prosecutor v. Simić, Tadić, & Zarić, Case No. IT-95-9-T, Judgment, ¶ 133 (Oct. 17, 2003).

International courts and tribunals have punished perpetrators of ethnic cleansing by prosecuting them for the crime of deportation or forcible transfer.⁷⁰ Deportation and forcible transfer relate to the unlawful displacement, expulsion, relocation, or removal of persons from the territory in which they reside.⁷¹ Thus, ethnic cleansing describes both transfers outside a state as well as transfers within a state.⁷² What matters is not the destination but rather the forced character of the displacement.⁷³ However, forcible transfer is not restricted to physical force; it may include the threat of force or coercion, such as that caused by fear of violence, duress, detention, or psychological oppression.⁷⁴ Because removal may be accomplished by threats or fear of violence, ethnic cleansing includes means such as murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assault, confinement of civilian population in ghetto areas, deliberate military attacks or threats of attacks, and wanton destruction of property.⁷⁵ Therefore, ethnic cleansing may be achieved by physically transferring an ethnic group from a territory and by threatening or coercing removal through violent acts. In addition, the crime of deportation or forcible transfer requires that the perpetrator unlawfully displace a person with the intent to *permanently* displace that person.⁷⁶ Although the displacement does not in fact need to be permanent, the perpetrator must still intend that the victim not return.⁷⁷

Ethnic cleansing is also criminalized as persecution.⁷⁸ Persecution is “the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity” as the other acts that constitute crimes against hu-

70. See, e.g., *Simić*, Case No. IT-95-9-T, ¶ 133.

71. *Simić*, Case No. IT-95-9-T, ¶¶ 121–24.

72. *Id.* ¶ 122.

73. *Id.* ¶ 125.

74. Preparatory Comm’n for the Int’l Criminal Court, *Report of the Preparatory Commission for the International Criminal Court*, 11 n.12, U.N. Doc. PCNICC/2000/Add.2 (Nov. 2, 2000).

75. *Secretary-General Letter*, *supra* note 4, ¶ 56. See also The Secretary-General, *Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Territory of the Former Yugoslavia*, ¶ 9, delivered to the Security Council and the General Assembly, U.N. Doc. S/24809, A/47/666 (Nov. 17, 1992) (prepared by Tadeusz Mazowiecki) [hereinafter *Third Mazowiecki Report of 1992*].

76. See *Prosecutor v. Karadžić & Mladić*, Cases No. IT-95-5-R61, IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 62 (July 11, 1996) (citing expert witness Professor Garde, who testified that “‘ethnic cleansing is a practice which means that you act in such a way that in a given territory the members of a given ethnic group are eliminated, aiming that a given territory be ‘ethnically pure’, in other words, that that territory would contain only members of the ethnic group that took the initiative of cleansing the territory’”).

77. *Prosecutor v. Simić, Tadić, & Zarić*, Case No. IT-95-9-T, Judgment, ¶¶ 133–34 (Oct. 17, 2003). The duration of the displacement has no impact on its legality. *Id.* ¶ 134.

78. *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgment, ¶¶ 606–07 (Jan. 14, 2000).

manity.⁷⁹ No exhaustive or complete list of persecutory acts exists. Rather, persecution consists of a variety of inhumane acts,⁸⁰ including killing, detention, deportation, expulsion, destruction of homes and property, and passing and implementing discriminatory laws.⁸¹ Because persecution comprises other crimes against humanity, persecution's distinct element is the discriminatory basis for the act:⁸² the intent to attack any identifiable group on political, racial, national, ethnic, cultural, gender, or other grounds that are universally recognized as impermissible under international law.⁸³ Although perpetrators of ethnic cleansing are prosecuted for crimes that entail the use of violent force and discriminatory intent, destruction is an exclusively genocidal element.

B. The Meaning of Destroy

Both the drafters of the Genocide Convention and the international criminal tribunals have interpreted the term destroy to exclude cultural genocide, which, in turn, bars ethnic cleansing from the crime of genocide. Despite Lemkin and the initial drafters' efforts to include cultural genocide, states found reasons for keeping it out.

In drafting the Genocide Convention, the drafters considered three different types of genocide: physical, biological, and cultural. Physical genocide "involves acts intended to 'cause the death of members of a group, or injuring their health or physical integrity.'"⁸⁴ For example, physical genocide includes: massacres and executions; subjection to conditions of life that are likely to result in the debilitation or death of the individuals ("slow death");⁸⁵ mutilation and biological experiments imposed with no curative purpose; deprivation of all means of livelihood by confiscation of property, looting, curtailment of work; and denial of housing and of supplies otherwise available to the other inhabitants of the territory concerned.⁸⁶ Biological genocide is characterized by measures aimed at the extinction of a group of human beings by systematic

79. *Id.* ¶ 621.

80. *Id.* ¶ 623.

81. *Id.* ¶¶ 610–12, 628–31.

82. *Id.* ¶ 636.

83. Rome Statute, *supra* note 6, art. 7, paras. 1(h), 2(g). See also ICTR Statute, *supra* note 6, art. 3, para. (h) (prohibiting "persecutions on political, racial and religious grounds"); ICTY Statute, *supra* note 6, art. 5, para. (h) (prohibiting "persecutions on political, racial and religious grounds").

84. The Secretary-General, *Draft Convention on the Crime of Genocide*, 25, delivered to the Economic and Social Council, U.N. Doc. E/447 (June 26, 1947) [hereinafter The Secretary-General, *Draft Convention on the Crime of Genocide*].

85. Examples include the lack of proper housing, clothing, food, hygiene and medical care, and excessive work or physical exertion. *Id.*

86. *Id.* at 24–25.

restrictions on births without which the group cannot survive.⁸⁷ For example, biological genocide includes: sterilization, compulsory abortion; segregation of the sexes; and obstacles to marriage.⁸⁸ Cultural genocide consists of “the destruction by brutal means of the specific characteristics of a group.”⁸⁹ For example, cultural genocide includes: forced transfer of children to another group; forced and systematic exile of individuals representing the culture of a group; prohibition of the use of the national language in private intercourse; systematic destruction of books printed in the national language, or of religious works, or prohibition of new publications; systematic destruction of historical or religious monuments or their diversion to alien uses; and destruction or dispersion of documents and objects of historical, artistic, or religious value.⁹⁰

There was little debate as to the inclusion in the Genocide Convention of physical and biological genocide.⁹¹ However, the three experts appointed to assist in the initial drafting of the Genocide Convention, one of whom was Lemkin, debated the inclusion of cultural genocide.⁹² In support of including cultural genocide, Lemkin argued that the destruction of the diversity of cultures is as disastrous as the physical destruction of nations.⁹³ For Lemkin, cultural genocide was more than just a policy of forced assimilation by moderate coercion; it was “a policy which by drastic methods, aimed at the rapid and complete disappearance of the cultural, moral and religious life of a group of human beings.”⁹⁴ The other two experts, on the other hand, argued that cultural genocide constituted the protection of minorities, which overextends the scope of genocide.⁹⁵ However, Lemkin’s arguments proved successful. The draft convention that the U.N. Secretary-General submitted to the Economic and Social Council (ECOSOC) in 1947 included cultural genocide,⁹⁶ as

87. *Id.* at 26.

88. *Id.*

89. The Secretary-General, *Draft Convention on the Crime of Genocide*, *supra* note 84, at 26.

90. *Id.* at 27–28.

91. SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 11, at 74–75.

92. *Id.* at 61.

93. The Secretary-General, *Draft Convention on the Crime of Genocide*, *supra* note 84, at 27.

94. *Id.*

95. *Id.*

96. See *id.* at 26–28 for the Secretary-General’s draft convention’s cultural genocide provisions. Note, however, that the Secretary-General’s draft convention does not include forced assimilation or mass displacement as a genocidal act. *Id.* at 24. The drafters excluded forced assimilation because it was considered part of a policy aimed at protecting minorities, which was beyond the scope of genocide. *Id.* The drafters also excluded mass displacement unless it led to slow death of the whole or part of the group. *Id.*

did the Ad Hoc Committee⁹⁷ draft convention submitted to the Commission on Human Rights in 1948.⁹⁸ It was not until the General Assembly weighed in that cultural genocide was excluded from the Convention.

The Sixth Committee of the General Assembly debated the inclusion of cultural genocide but ultimately decided—by 25 votes to 16, with 4 abstentions and 13 delegations absent—to exclude provisions relating to cultural genocide from its final draft.⁹⁹ State representatives presented various arguments for excluding cultural genocide: human rights law is better suited to protect against cultural genocide than international criminal law; there are legitimate and justifiable reasons for a state to assimilate or amalgamate minorities and indigenous inhabitants; acts of cultural genocide, such as closing down a library or destroying a school, are not proportionally serious or violent; and the definition of cultural genocide proffered was too vague and broad.¹⁰⁰

Since then, the International Law Commission (ILC) has affirmed that genocide is “the destruction of a group either by physical or biological means, not the destruction of the national, linguistic, cultural or other identity of a particular group,”¹⁰¹ and international courts and tribunals have interpreted destruction as purely physical and biological, excluding cultural destruction.¹⁰²

97. The ECOSOC put together the Ad Hoc Committee, which was comprised of seven state representatives from China, France, Lebanon, Poland, the Soviet Union, the United States, and Venezuela. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW*, *supra* note 11, at 69–70.

98. *Id.* at 75. The Ad Hoc Committee’s draft cultural genocide provision, which was adopted five votes to two, stated:

[G]enocide also means any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial or religious group on grounds of national or racial origin or religious belief such as:

(1) prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;

(2) destroying, or preventing the use of, libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.

U.N. Econ. & Soc. Council [ECOSOC], Ad Hoc Committee on Genocide, *Report of the Ad Hoc Committee on Genocide*, 17, delivered to the General Assembly, U.N. Doc E/794 (May 24, 1948).

99. U.N. GAOR, 3d Sess., 83d mtg. at 206, U.N. Doc A/C.6/SR.83 (Oct. 25, 1948).

100. *Id.*

101. *Report of the International Law Commission to the General Assembly*, *supra* note 22, at 90–91.

102. See, e.g., Application of Convention on Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 1, 124 (Judgment of Feb. 26); Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 25 (Apr. 19, 2004) (relying on the ILC report in holding that the Genocide Convention and customary international law prohibit only the physical or biological destruction of a human group); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment, ¶ 315 (May 15, 2003) (the meaning of “destroy” encompasses only acts that amount to physical or biological genocide).

C. Ethnic Cleansing as a Genocidal Act?

The ICTY uses the term destruction to establish both the *actus reus* and the *mens rea* elements of the crime of genocide. In other words, the perpetrator must not only intend to destroy a particular group, but he or she must also contribute to the destruction of that particular group through his or her actions.¹⁰³ This section discusses the interpretation of destruction as a genocidal act, while the following section will discuss the interpretation of destruction as genocidal intent. In determining genocide's *actus reus*, the ICTY has held that the forcible removal of an ethnic group is not itself a genocidal act but may be a condition calculated to bring about its physical destruction.

On one hand, the ICTY precludes the forcible removal of an ethnic group from the *actus reus* element of the crime of genocide, limiting its use to proof of genocidal intent.¹⁰⁴ The ICTY has made a conscious effort to exclude the forcible transfer, displacement, expulsion, and deportation of an ethnic group from constituting genocidal acts.¹⁰⁵ Instead, forcible removal is prosecuted as either persecution or the forcible transfer of a population.¹⁰⁶

On the other hand, when the forcible removal of an ethnic group constructively causes physical destruction, it may constitute a genocidal act, specifically, a condition of life calculated to bring about a group's physical destruction.¹⁰⁷ A condition calculated to bring about such physical destruction is construed as "the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction."¹⁰⁸ Examples of such conditions include systematic expulsion from homes¹⁰⁹ or the creation of

103. See, e.g., *Krstić*, Case No. IT-98-33-A, ¶ 9.

104. See, e.g., *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Judgment, ¶ 854 (Sept. 27, 2006) (evidence of deliberate forcible transfer may be relied on as evidence of the *mens rea* of genocide); *Prosecutor v. Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 975 (Sept. 1, 2004) ("whilst forcible displacement does not constitute in and of itself a genocidal act, it does not preclude a Trial Chamber from relying on it as evidence of intent"); *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, ¶ 33 (Apr. 19, 2004) ("The fact that the forcible transfer does not constitute in and of itself a genocidal act does not preclude a Trial Chamber from relying on it as evidence of the intentions of [the accused persons].").

105. See, e.g., *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, ¶ 519 (July 31, 2003) ("It does not suffice to deport a group or a part of a group. A clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide.").

106. See *supra* note 9.

107. Genocide Convention, *supra* note 6, art. II, ¶ (c).

108. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 505 (Sept. 2, 1998). See *Stakić*, Case No. IT-97-24-T, ¶ 517.

109. *Brđjanin*, Case No. IT-99-36-T, ¶ 691; *Stakić*, Case No. IT 97-24-T, ¶ 517; *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment and Sentence, ¶ 52 (Dec. 6, 1999).

circumstances that would lead to a slow death, such as the lack of proper housing, clothing, hygiene, and excessive work or physical exertion.¹¹⁰ Physical destruction is inevitable when people are driven from their homes and forced to travel long distances in a country where they are exposed to starvation, thirst, heat, cold, and epidemics.¹¹¹ Both the ICJ and the ILC have supported this interpretation.¹¹² Therefore, ethnic cleansing qualifies as a genocidal act when the process of forcibly removing a population causes physical destruction.

Thus, international courts and tribunals permit evidence of ethnic cleansing in finding a condition calculated to bring about a group's physical destruction but preclude ethnic cleansing from constituting a genocidal act in and of itself. But even when forcible removals ultimately lead to the physical destruction of an ethnic group, ethnic cleansing is not genocide without a showing of genocidal intent.

D. A Policy of Ethnic Cleansing Does Not Constitute Genocidal Intent

Just as acts of ethnic cleansing may be used as support for, but do not constitute genocidal acts, a policy of ethnic cleansing may be used as evidence of, but does not itself constitute, genocidal intent. That is, the *act* of forcibly displacing a population may amount to genocide if it is in furtherance of a genocidal policy. But a *policy* of ethnic cleansing does not establish genocidal intent, even if the implementation of such a policy entails genocidal acts that cause physical or biological destruction. According to the ICTY and the ICJ, the basis for classifying ethnic cleansing separately from genocide is simple: a policy of ethnic cleansing is not the same as the intent to destroy. The cases below illustrate how the courts make such a distinction.

First, the act of forcibly displacing a population may be used to infer genocidal intent, but does not itself establish genocidal intent.¹¹³ For

110. *Brđjanin*, Case No. IT-99-36-T, ¶ 691; *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment, ¶¶ 115–16 (May 21, 1999); *Stakić*, Case No. IT-97-24-T, ¶ 517; *Rutaganda*, Case No. ICTR-96-3-T, ¶ 52.

111. The Secretary-General, *Draft Convention on the Crime of Genocide*, *supra* note 84, at 24.

112. *Report of the International Law Commission to the General Assembly*, *supra* note 22, at 90–92 (claiming that deportation is a condition of life calculated to bring about a group's physical destruction if carried out with genocidal intent); *Application of Convention on Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)*, 2007 I.C.J. 1, 71 (Judgment of Feb. 26) (holding acts of ethnic cleansing that may be characterized as a condition of life calculated to bring about a group's physical destruction constitute genocide if carried out with genocidal intent).

113. *See Bosn. & Herz. v. Serb. & Mont.*, 2007 I.C.J. at 71 (acts of ethnic cleansing “may be significant as indicative of the presence of a specific intent inspiring [genocidal] acts”); *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-A, Judgment, ¶ 123 (May 9, 2007) (holding that forcible

example, in *Krstić*, the ICTY trial chamber convicted the accused of genocide, using forcible displacement to support a finding of genocidal intent. The trial chamber held that the accused had the requisite genocidal intent because he sought to eliminate all of the Bosnian Muslims in Srebrenica as a community.¹¹⁴ By killing all military-aged men and forcibly transferring women, children, and the elderly, the Bosnian Serb forces effectively destroyed the community of the Bosnian Muslims in Srebrenica and eliminated all likelihood that the community could ever reestablish itself on that territory.¹¹⁵ On appeal, the accused claimed that the trial chamber impermissibly broadened the definition of genocide by using displacement as evidence of destruction.¹¹⁶ However, the appeals chamber affirmed the trial chamber's decision because evidence of the forcible transfer of women was used in support of the trial chamber's finding of intent to physically destroy.¹¹⁷ Given the patriarchal character of the Bosnian Muslim population, killing the men and removing the women "had severe procreative implications for the Srebrenica Muslim community, potentially consigning the community to extinction."¹¹⁸ Thus, the accused was found to have intended to destroy the Bosnian Muslim population because he must have known that the displacement of the women would contribute to the physical destruction of the Bosnian Muslim population,¹¹⁹ the long-term impact on the group's survival was inevitable.¹²⁰ The chambers made a point to use the act of forcible transfer in conjunction with mass killings to establish only the intent to physically destroy the group.

The appeals chamber also interpreted the Bosnian Serb forces' decision to transfer, rather than kill, Muslim women and children as evidence of genocidal intent because the forcible transfer was "an additional means by which to ensure the physical destruction of the Bosnian Muslim community in Srebrenica" meant to eliminate even the residual possibility that the Muslim community could reconstitute itself.¹²¹ At the time that the Bosnian Serb forces decided to transfer Muslim women and

transfers and separations are relevant considerations in inferring genocidal intent but do not themselves suffice to demonstrate the intent to destroy).

114. *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, ¶ 594 (Aug. 2, 2001).

115. *Id.* ¶¶ 594–99. See also *Prosecutor v. Blagojević & Jović*, Case No. IT-02-60-T, Judgment, ¶ 666 (Jan. 17, 2005) (the Trial Chamber found that physical or biological destruction was the likely outcome of a forcible transfer if the group could no longer reconstitute itself—particularly when it involves the separation of its members).

116. *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, ¶ 24 (Apr. 19, 2004).

117. *Id.* ¶ 29.

118. *Id.* ¶ 28.

119. *Krstić*, Case No. IT-98-33-T, ¶ 595.

120. *Krstić*, Case No. IT-98-33-A, ¶ 28.

121. *Id.* ¶ 31.

children, Srebrenica had attracted international attention and U.N. troops occupied nearby territories.¹²² Thus, the forcible transfer was the best method, under the circumstances, for implementing the genocidal design because it minimized the risk of retribution.¹²³ Because the forcible transfer of a community was interpreted as an additional, lesser means of implementing the genocidal policy, it is unlikely that it alone, unaccompanied by killings, would be enough to prove genocidal intent.

Second, perpetrators who fail to employ physically destructive means available to them do not intend to destroy. In *Brđjanin*, the ICTY declined to hold the accused, a leading political figure amongst the Bosnian Serbs in the Bosnian Krajina region, criminally responsible for the crime of genocide because he lacked genocidal intent.¹²⁴ The trial chamber found that the policy of deportation and forcible transfer targeted specifically at the Bosnian Muslim and Bosnian Croat communities was implemented through armed force, expulsion, intimidation, the imposition of intolerable living conditions, and the establishment of punitive departure conditions.¹²⁵ Although the trial chamber acknowledged the similarities between the acts and policies of genocide and ethnic cleansing,¹²⁶ it distinguished a policy of ethnic cleansing from a genocidal policy; the ethnic cleansing policy aimed to achieve an ethnically homogeneous state by permanently removing non-Serbs through the use of force and fear, not by destroying Bosnian Muslim and Bosnian Croat groups.¹²⁷ The trial chamber reasoned that, because the Serb forces were capable of mustering the logistical resources (guns, ammunition, etc.) to forcibly displace tens of thousands of Bosnian Muslims and Bosnian Croats, the accused could have employed the same resources to destroy them if such had been his intent.¹²⁸ Ultimately, the trial chamber found that the accused lacked genocidal intent¹²⁹ because using force and fear to displace a population is not indicative of the intent to destroy when enough weapons are available to kill off the population. In other words, because a policy of ethnic cleansing entails less extreme means, its aim is not destruction.

122. *Id.* ¶¶ 31–32.

123. *Id.* ¶ 32.

124. Prosecutor v. Brđjanin, Case No. IT-99-36-T, Judgment, ¶ 989 (Sept. 1, 2004).

125. *Id.* ¶ 1027.

126. *Id.* ¶ 981 (“[T]here are obvious similarities between genocidal policy and the policy known as ethnic cleansing. The underlying criminal acts for each may often be the same.”).

127. *Id.*

128. *Id.* ¶ 978. This conclusion may conflict with the ICTY’s holding in *Krstić*, which held that “the offence of genocide does not require proof that the perpetrator chose the most efficient method to accomplish his objective of destroying the targeted part.” Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 32 (Apr. 19, 2004).

129. *Brđjanin*, Case No. IT-99-36-T, ¶ 989.

Third, the intent to displace is not the intent to destroy. In *Bosnia & Herzegovina v. Serbia & Montenegro*, the ICJ acknowledged that acts of ethnic cleansing may fall within the acts listed under Article II of the Genocide Convention.¹³⁰ However, the ICJ held that a policy of ethnic cleansing, defined as rendering an area ethnically homogenous, cannot be characterized as genocide because the forcible deportation or displacement of the members of a group “is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement.”¹³¹ Although the ICJ did not elaborate on the precise rationale for the distinction, it relied upon the premise that dislocation does not necessarily destroy a group.¹³² Similarly, the ICC has held that the practice of ethnic cleansing may result in the commission of the crime of genocide when genocide’s objective elements are committed with the intent to destroy.¹³³ In its decision, however, the pre-trial chamber did not elaborate on whether a policy of ethnic cleansing was sufficient to establish genocidal intent.

Through these distinctions, the ICTY, the ICJ, and the ICC have established that a policy of ethnic cleansing, whether or not accompanied by genocidal acts, fails to demonstrate an intention to destroy a group. Their justification is simply that displacement of a group is not destruction of that group.

IV. ETHNIC CLEANSING IS GENOCIDE

Problems of interpretation arise when genocidal acts are committed with the general intent to displace an ethnic group in addition to the specific intent to create an ethnically homogenous region. The current international jurisprudence on ethnic cleansing fails to thoroughly explain why displacement is not equivalent to destruction, and therefore, why ethnic cleansing is not equivalent to genocide. While its literal interpretation would suggest a distinction, destruction within the context of genocide actually suggests a similarity. Because genocide denies human groups the right to exist, displacement of ethnic groups bears a strong resemblance to genocidal destruction. This Part first suggests that the Genocide Convention’s legislative history and its final provisions prohibit cultural destruction, despite the ICTY’s and the ICJ’s attempts to exclude it. Second, this Part describes how methods of ethnic cleansing

130. Application of Convention on Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 1, 71 (Judgment of Feb. 26).

131. *Id.*

132. *Id.*

133. Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-3, Decision on the Prosecutor’s Application for a Warrant of Arrest, ¶ 145 (Mar. 4, 2009).

seclude or dismember the targeted group, which effectively destroys that group. Finally, this Part identifies international courts and tribunals' use of an inaccurate basis for comparison: the ICTY and the ICJ mistakenly regard the intent to displace as ethnic cleansing's specific intent. Once ethnic homogeneity is recognized as ethnic cleansing's ultimate goal, it is easier to see how a policy of ethnic cleansing threatens the same values protected by the prohibition against genocide. Both the practice and the purpose of ethnic cleansing are genocidal: forcibly transferring an ethnic group from a region effectively destroys the ethnic group, and desiring ethnic homogeneity is equivalent to denying an ethnic group the right to exist.

A. *Genocide Is Cultural Destruction*

The drafters of the Genocide Convention, the ILC, and international courts have been fervent in their exclusion of cultural destruction from the crime of genocide.¹³⁴ Despite these efforts, cultural destruction is a fundamental principle upon which the crime of genocide was originally formulated as well as an aspect of its current definition.

1. Genocide as the Inexistence of Culturally Significant Human Groups

The crime of genocide does not protect every group's right to exist. It protects only those groups that make significant cultural contributions that cannot be disassociated from the community in which they have thrived.

Depriving society of a particular group's social and cultural contributions is the principal evil that the crime of genocide aimed to punish.¹³⁵ In formulating the crime of genocide, Lemkin and the U.N. General Assembly defined genocide as denying entire human groups the right of existence.¹³⁶ Underlying the denial of a group's right to exist is the cultural loss to humanity.¹³⁷ For "[i]f the diversity of cultures were de-

134. U.N. GAOR, 3d Sess., 83d mtg., *supra* note 99, at 206; *Report of the International Law Commission to the General Assembly*, *supra* note 22, at 90–91; *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, ¶ 576 (Aug. 2, 2001); *Bosn. & Herz. v. Serb. & Mont.*, 2007 I.C.J. at 124.

135. *See, e.g.*, U.N. GAOR, 3d Sess., 83d mtg., *supra* note 99, at 195 (“[T]he concept of genocide should extend to the inclusion of acts less terrible in themselves but resulting ‘in great losses to humanity in the form of cultural and other contributions,’ for which it was indebted to the destroyed human group.”).

136. Lemkin, *Genocide*, *supra* note 25, at 229 (“[B]y the formulation of genocide as a crime, the principle that every national, racial and religious group has a natural right of existence is claimed.”); G.A. Res. 96(I), at 188 (Dec. 11, 1946) (“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.”).

137. *See* The Secretary-General, *Draft Convention on the Crime of Genocide*, *supra* note 84, at 27 (Genocide aims “at the rapid and complete disappearance of the cultural, moral and religious life of a group of human beings.”); G.A. Res. 96(I), at 188–89 (Dec. 11, 1946) (“[D]enial of the right of

stroyed, it would be as disastrous for civilization as the physical destruction of nations.”¹³⁸

We can best understand this when we realize how impoverished our culture would be if the peoples doomed by Germany, such as the Jews, had not been permitted to create the Bible, or to give birth to an Einstein, a Spinoza; if the Poles had not had the opportunity to give the world a Copernicus, a Chopin, a Curie; the Czechs, a Huss, a Dvorak; the Greeks, a Plato and a Socrates; the Russians, a Tolstoy and a Shostakovich.¹³⁹

Because certain human groups provide important moral, intellectual, and spiritual contributions, the crime of genocide was principally concerned with protecting such groups.

Not all groups of people enjoy the same protection under the crime of genocide; only permanent and stable groups¹⁴⁰ identified by cultural characteristics are protected. The Genocide Convention applies to victimized national, ethnic, racial, or religious groups¹⁴¹ and purposely excludes groups defined by their politics, economic and social status, language, gender, sexual orientation, physical or mental disability, and age.¹⁴² While national, ethnic, racial, and religious groups were accepted with little disagreement,¹⁴³ the international courts still faced the challenge of identifying such groups.

In determining whether a group of people constitutes one of the protected groups, international courts must ascertain particular characte-

existence shocks the conscience of mankind, [and] results in great losses to humanity in the form of cultural and other contributions represented by these human groups.”).

138. The Secretary-General, *Draft Convention on the Crime of Genocide*, *supra* note 84, at 27.

139. Lemkin, *Genocide*, *supra* note 25, at 228.

140. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 511 (Sept. 2, 1998) (holding that genocide targets stable and permanent groups determined by birth, “with the exclusion of the more ‘mobile’ groups which one joins through individual voluntary commitment, such as political and economic groups.”); U.N. GAOR, 3d Sess., 69th mtg. at 56–61, U.N. Doc A/C.6/SR.69 (Oct. 7, 1948); The International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur*, ¶ 501, delivered to the Security Council, U.N. Doc. S/2005/60 (Sept. 18, 2004).

141. Genocide Convention, *supra* note 6, art. II.

142. SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 11, at 150–71. During the drafting of the Genocide Convention, the Sixth Committee left out political and economic groups because nationality, race, and religion were deemed more stable and permanent and less contentious among state representatives. U.N. GAOR, 3d Sess., 69th mtg. at 56–61, U.N. Doc A/C.6/SR.69 (Oct. 7, 1948). It was not until its 128th meeting that the Sixth Committee decided to delete political groups from the listed groups under article II. U.N. GAOR, 3d Sess., 128th mtg. at 664, U.N. Doc A/C.6/SR.128 (Nov. 29, 1948).

143. U.N. GAOR, 3d Sess., 69th mtg. at 56–61, U.N. Doc A/C.6/SR.69 (Oct. 7, 1948).

ristics of the group that set it apart from the rest of society.¹⁴⁴ The characteristics relied upon tend to be cultural.¹⁴⁵ The crime of genocide defines groups by their culture—suggesting that the ultimate evil is cultural destruction. Although it is beyond the scope of this Comment to discuss sociological explanations for the special protection afforded to these groups, one compelling argument is that the cultures of national, ethnic, racial, and religious groups are deeply embedded in the land.¹⁴⁶ These groups are commonly defined by beliefs, customs, and connections to the land in which they live.¹⁴⁷ Consequently, removing members of these groups from their homes not only deprives members of their basic survival needs, but it also destroys the group as a culturally significant unit.

Contrary to the accepted justifications for excluding cultural destruction,¹⁴⁸ genocide is cultural destruction not as a coincidental consequence, but as an intended consequence. Lemkin and the General Assembly sought to criminalize this intent to destroy when they defined genocide as the denial of a group's right to exist and selected culturally significant human groups for protection.

2. The Crime of Genocide Explicitly Includes Cultural Destruction

In addition to the implied inclusion of cultural destruction, the crime of genocide also explicitly includes acts categorized as cultural destruction. The forcible transfer of children is a genocidal act that can-

144. See *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, ¶ 521 (July 31, 2003) (“The group must be targeted because of characteristics peculiar to it, and the specific intent must be to destroy the group as a separate and distinct entity.”).

145. See *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Judgment, ¶ 666 (Jan. 17, 2005) (a group is considered separate and distinct based on “its history, traditions, the relationship between its members, the relationship with other groups, [and] the relationship with the land.”); *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, ¶ 557 (Aug. 2, 2001) (“A group’s cultural, religious, ethnical, or national characteristics must be identified within the socio-historic context which it inhabits.”); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 513 (Sept. 2, 1998) (defining an ethnic group as a group whose members share a common language or culture and defining a religious group as one whose members share the same religion, denomination or mode of worship). But see *id.* ¶ 514 (holding the definition of racial group is “based on the hereditary physical traits often identified within a geographical region, irrespective of linguistic, cultural, national or religious factors.”).

146. See Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313 (2008) (arguing that land is essential to the identity and cultural survival of collective groups); Margaret Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (arguing that individuality and selfhood are intertwined with property such that property cannot be replaced without pain).

147. See *Al Bashir*, Case No. ICC-02/05-01/09-3, ¶ 137 (defining a distinct ethnic group by its own language, its own tribal customs, and “its own traditional links to its lands.”) (emphasis added); *Blagojević*, Case No. IT-02-60-T, ¶ 666 (holding that a group is considered separate and distinct based on “its history, traditions, the relationship between its members, the relationship with other groups, [and] the relationship with the land.”) (emphasis added).

148. See *supra* text accompanying note 100.

not be appropriately categorized as either physical or biological destruction. The process by which the forcible transfer of children was eventually adopted may have caused confusion: the U.N. Secretary-General's draft included the forcible transfer of children as a form of cultural genocide;¹⁴⁹ the Ad Hoc Committee's draft included cultural genocide but excluded the forcible transfer of children;¹⁵⁰ and the Sixth Committee's draft excluded cultural destruction¹⁵¹ but included the forcible transfer of children.¹⁵² Thus, when the General Assembly adopted the Sixth Committee's draft, the Genocide Convention was understood to exclude cultural genocide but to retain the genocidal act of forcibly transferring children.

In maintaining an interpretation consistent with the drafters' ultimate decision to exclude cultural destruction, the ILC claimed that the forcible transfer of children is an act of biological genocide.¹⁵³ Without further elaboration, the ILC depicted the forcible transfer of children as having "particularly serious consequences for future viability of a group as such."¹⁵⁴ However, it is difficult to understand how the forcible transfer of children destroys the viability of the group. If, by viability, the ILC meant the biological survival of the group, then there is no destruction, for surely children of a group can procreate with one another in a different territory. The destruction is cultural.¹⁵⁵ By transferring children of a group to another territory, the children are forced to assimilate into a new community—a community with different practices, traditions, customs, and beliefs.¹⁵⁶ Thus, uprooting children from their families and

149. The Secretary-General, *Draft Convention on the Crime of Genocide*, *supra* note 84, at 27.

150. *Report of the Ad Hoc Committee on Genocide*, *supra* note 98, at 15, 17–19.

151. U.N. GAOR, 3d Sess., 83d mtg., *supra* note 99, at 206.

152. U.N. GAOR, 3d Sess., 82d mtg. at 190, U.N. Doc. A/C.6/SR.82 (Oct. 23, 1948).

153. *Report of the International Law Commission to the General Assembly*, *supra* note 22, at 90–92.

154. *Id.*

155. Schabas conceded this point when he stated that the forcible transfer of children is "somewhat anomalous, because it contemplates what is in reality a form of cultural genocide . . . the prosecution would be required to prove the intent 'to destroy' the group in a cultural sense rather than in a physical or biological sense." SCHABAS, *GENOCIDE IN INTERNATIONAL LAW*, *supra* note 11, at 294. Similarly, in *Krajišnik*, the ICTY held that destruction is not limited to physical or biological destruction of the group's members "since the group (or a part of it) can be destroyed in other ways, such as by transferring children out of the group." *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Judgment, ¶ 854 (Sept. 27, 2006).

156. The process of forcing children at an impressionable and receptive age to a culture and mentality different from their parents' "tends to bring about the disappearance of the group as a cultural unit in a relatively short time." The Secretary-General, *Draft Convention on the Crime of Genocide*, *supra* note 84, at 27. In arguing for the inclusion of cultural genocide, the delegate from Venezuela reminded the other Sixth Committee members that the forcible transfer of children was adopted because the children of a group will be transferred to a place "where they would be given an education different from that of their own group, and would have new customs, a new religion and

communities, in effect, precludes children from learning and identifying with their ethnic heritage. The harm is the disappearance of an ethnicity.

While the ICTY, the ICJ, and the ILC have followed the drafters' intent in interpreting the Genocide Convention to exclude cultural destruction,¹⁵⁷ the inclusion of the act of forcibly transferring children within the final draft and subsequent international court and tribunal statutes¹⁵⁸ perpetuates the ambiguous relationship between cultural destruction and genocide. Given the confusion regarding cultural destruction, inclusion of ethnic cleansing within the crime of genocide may actually be consistent with the aims and purposes of the crime of genocide.

B. Forcible Displacement Is a Method of Permanent Destruction

To determine whether a policy of ethnic cleansing intends to destroy, ethnic cleansing must constitute destruction. Several commentators and the ICTY distinguish between ethnic cleansing and genocide based on genocide's irreversible destruction.¹⁵⁹ They argue that the ethnic group, once removed, still exists, while a group, once exterminated, does not.¹⁶⁰ However, history suggests otherwise: displacing a group permanently destroys it. There are two means by which displacement leads to destruction: seclusion and dismemberment.

Even if the members of an ethnic group survive, secluding an ethnic group so that it can no longer participate in society effectively destroys the group. Although, in practice, ethnic cleansing has been confined to only one or a few territories,¹⁶¹ it is easy to realize the devastating consequences that a policy of ethnic cleansing has when shared by many

probably a new language." U.N. GAOR, 3d Sess., 83d mtg., *supra* note 99. The forcible transfer of children is "tantamount to the destruction of their group, whose future depended on that generation of children." *Id.*

157. See *supra* Part III.B.

158. See Rome Statute, *supra* note 6, art. 6, ¶ (e); ICTR Statute, *supra* note 6, art. 2, ¶ 2(e); ICTY Statute, *supra* note 6, art. 4, ¶ 2(e); Genocide Convention, *supra* note 6, art. II, ¶ (e).

159. E.g., Paul Behrens, *A Moment of Kindness? Consistency and Genocidal Intent*, in *THE CRIMINAL LAW OF GENOCIDE*, 125, 133 (Ralph Henham & Paul Behrens eds., 2007).

160. See, e.g., SCHABAS, *GENOCIDE IN INTERNATIONAL LAW*, *supra* note 11, at 234 ("ethnic cleansing tolerates the existence of the group elsewhere whereas genocide may not"); Behrens, *supra* note 159, at 133 ("'Destruction' carries a distinct notion of permanence which does not inhabit the concept of 'expulsion': the group still exists, and it cannot even be said with certainty that it will never again re-form on its accustomed territory.").

161. For example, during the Nazi Holocaust, victimized groups were cleansed from Germany, Poland, and Czechoslovakia; during the Yugoslav war, Serb forces cleansed Bosnia and Herzegovina of Muslims and Croats; and in Darfur, the Sudanese government and militia aim to cleanse Darfur of certain African tribal groups. See Part V for a more detailed discussion of the geographic limitations of genocide and ethnic cleansing.

states.¹⁶² If a particular ethnic group is purged from every territory in which it resides or seeks refuge, what is to become of the group? A group that is completely isolated from the rest of society can no longer interact with or contribute to the outside world. Consequently, an ethnic group's physical existence becomes meaningless because its social value—its culture, language, customs, scriptures, etc.—ceases to exist.

A second method by which an ethnic group may be destroyed is dismemberment. Displacing an ethnic group effectively dismembers the group by severing the bonds between members. In several decisions, the ICTY has acknowledged the cultural destruction that often accompanies the removal of entire human groups from a given region.¹⁶³ For example, in *Krajišnik*, the trial chamber held that destruction is not limited to physical or biological destruction because a group can be destroyed by severing the bonds among its members.¹⁶⁴ The chamber claimed, “[i]t is not accurate to speak of ‘the group’ as being amenable to physical or biological destruction” because the bonds among group members as well as the group's culture and beliefs are neither physical nor biological.¹⁶⁵ Similarly, in *Blagojević*, the trial chamber held that physical destruction included dismemberment of the group by means of forcible transfer.¹⁶⁶ The chamber reasoned that the group ceases to exist as a group when the forcible transfer of group members prevents the group from reconstituting itself.¹⁶⁷ Although these decisions were not applied or upheld,¹⁶⁸ they

162. Although it is easier to comprehend the large-scale effects of seclusion, the small-scale effects are the same. When only one or a few states share a policy of ethnic cleansing, secluding an ethnic group from the rest of society has the same destructive effect: deprivation of the moral and social value that that group has to offer.

163. See *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Judgment, ¶ 854 (Sept. 27, 2006); *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Judgment, ¶ 666 (Jan. 17, 2005); *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, ¶ 574 (Aug. 2, 2001); *Prosecutor v. Karadžić & Mladić*, Cases No. IT-95-5-R61, IT-95-18-R-61, Review of Indictment Pursuant to Rule 61, ¶ 94 (July 11, 1996).

164. *Krajišnik*, Case No. IT-00-39-T, ¶ 854.

165. *Id.* ¶ 854 n.1701. See also *Krstić*, in which the trial chamber held that, in addition to physical destruction, “one may also conceive of destroying a group through purposeful eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community.” *Krstić*, Case No. IT-98-33-T, ¶ 574.

166. *Blagojević*, Case No. IT-02-60-T, ¶ 666. See also *Karadžić*, in which the trial chamber notes that acts that serve to dismember the group are designed to reach the very foundations of the group. *Karadžić*, Case Nos. IT-95-5-R61, IT-95-18-R-61, ¶ 94.

167. *Blagojević*, Case No. IT-02-60-T, ¶ 666.

168. In *Krajišnik*, the trial chamber did not explicitly apply a definition of destruction that incorporated cultural destruction. *Krajišnik*, Case No. IT-00-39-T, ¶ 854. Rather, the chamber held that the accused's principal objective to forcibly remove Muslims and Croats from certain territories did not constitute genocidal intent. *Id.* ¶ 1092. In *Blagojević*, the appeals chamber, while acknowledging that forcible transfers were relevant considerations in assessing whether the perpetrators had genocidal intent, overturned the trial chamber's finding of complicity to commit genocide because the forcible transfer operation alone, or coupled with the murders and mistreatment in Bratunac

serve to demonstrate the permanent cultural loss that results from dividing and disconnecting an ethnic group.

The cultural loss experienced after severing the bonds between individual members of an ethnic group is often permanent. During the Yugoslav war, Serb forces committed murder and other inhumane acts against Bosnian Muslims and Bosnian Croats to instill fear and to force the population to leave.¹⁶⁹ To ensure that members of these groups would not return, Serb forces demolished and appropriated Bosnian Muslim and Bosnian Croat property, homes, and places of worship.¹⁷⁰ These and similar methods of ethnic cleansing proved successful in their goal, as the demography of Bosnia and Herzegovina rapidly changed.¹⁷¹ In 1993, 810,000 Croats and Muslims were displaced internally and 700,000 refugees were located in other countries.¹⁷² Those who survived the attacks could not return or successfully re-establish their lives: the homes demolished by the attacks were no longer standing; survivors could not contemplate going back due to the pain and fear associated with the attacks; Bosnian Muslim women, accustomed to the patriarchal society in which they lived, suddenly became the heads of households but could not find employment; and dismembered family units caused irreparable damage to children's development.¹⁷³

Similarly, in Darfur, government forces and militias have carried out large-scale forcible displacement,¹⁷⁴ destruction of villages, pillaging, killings, torture, rape, and other inhumane treatment against ethnically African groups (specifically, the Fur, the Masalit, and the Zaghawa tribes, which are distinguishable from Arab tribes in the region).¹⁷⁵ Reports indicate that the attacks committed against these African tribes constitute ethnic cleansing.¹⁷⁶ The deliberate destruction of villages and forcible displacement of African tribes from the region has essentially led to the

town, did not suffice to demonstrate intent to destroy the protected group. *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-A, ¶ 123 (May 9, 2007).

169. *Krajišnik*, Case No. IT-00-39-T, ¶ 1093.

170. *Id.* ¶ 1095.

171. Tadeusz Mazowiecki, *Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Territory of the Former Yugoslavia*, ¶ 20, submitted to the Economic and Social Council, U.N. Doc. E/CN.4/1993/50 (Feb. 10, 1993) [hereinafter *Mazowiecki Report of 1993*].

172. *Id.*

173. *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, ¶¶ 90–94 (Aug. 2, 2001). *See also* *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Judgment, ¶¶ 162–64 (Jan. 17, 2005).

174. As of 2007, the conflict in Darfur had generated 1.25 million internally displaced persons and over 200,000 refugees. United Nations High Commissioner for Refugees, *Trends in Displacement, Protection and Solutions*, 2007 UNHCR STAT. Y.B. 66.

175. *Report of the International Commission of Inquiry on Darfur*, *supra* note 140, ¶¶ 186, 192–93.

176. *Id.* ¶ 194. *E.g., Darfur Destroyed*, *supra* note 3, at 39–40.

permanent expulsion of these groups from their places of habitation.¹⁷⁷ Historical accounts suggest that the effects of the attacks are permanent: internally displaced persons remain afraid to return to their places of origin out of fear of renewed attacks,¹⁷⁸ and Arab populations have settled in areas previously occupied by the displaced populations.¹⁷⁹ Without the possibility of returning and reconstituting themselves, the displaced African tribes from Darfur can no longer carry on their existence as sedentary farmers on tribal land.¹⁸⁰

Forcible removals like those in the former Yugoslavia and Darfur demonstrate the permanent effect that ethnic cleansing has within a region. The irreversible ethnic recomposition of a territory manifests itself as a form of destruction because members of an ethnic group are uprooted from their homes without the possibility of reestablishing the communal ties, traditions, or practices that once defined them.

C. A Policy of Ethnic Cleansing Intends to Destroy

Even though international courts and tribunals have determined that acts of ethnic cleansing constitute destruction, they have excluded ethnic cleansing from the crime of genocide because of its distinguishable specific intent—the intent to displace. What the courts and tribunals have failed to realize is that ethnic cleansing’s specific intent is not the intent to displace, but rather the intent to achieve ethnic homogeneity. This misconception has led to the exclusion of ethnic cleansing from the crime of genocide. By categorizing ethnic cleansing as persecution and not as genocide,¹⁸¹ international courts and tribunals devalue the permanent destruction that ethnic cleansing causes. Ethnic cleansing is more than just discriminatory. Therefore, because ethnic cleansing is capable of destruction and the ethnic cleanser’s mental state is one of extreme intolerance, a policy of ethnic cleansing intends to destroy.

177. *Report of the International Commission of Inquiry on Darfur*, *supra* note 140, ¶ 195 (concluding from observations and eyewitness accounts that militias are occupying the villages previously occupied by displaced groups, continuing to raid and attack the villages, and destroying essential food stocks and water sources to ensure that no one will return).

178. *Report of the International Commission of Inquiry on Darfur*, *supra* note 140, ¶ 197; *Darfur Destroyed*, *supra* note 3, at 35.

179. *Id.*

180. Prior to the attacks, the African tribes consisted of settled farmers who had thrived on the same land for years. *Report of the International Commission of Inquiry on Darfur*, *supra* note 140, ¶ 194 n.107.

181. *See, e.g.*, Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-3, Decision on the Prosecutor’s Application for a Warrant of Arrest, ¶ 142 (Mar. 4, 2009); Application of Convention on Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 1, 70 (Judgment of Feb. 26); Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 636 (Jan. 14, 2000).

1. Ethnic Cleansing's Specific Intent

To accurately compare genocide to ethnic cleansing, the elements of each crime must be clearly articulated. Because genocide's distinguishing feature is its specific intent, the intent to destroy must be compared to a policy of ethnic cleansing. Without a formal statute, the *mens rea* requirement of ethnic cleansing is unclear. Genocide scholars and the ICTY have attempted to define ethnic cleansing's specific intent as the intent to displace. However, in doing so, they have confused ethnic cleansing's specific intent with its general intent, thus making erroneous distinctions determinative. A proper comparison addresses ethnic cleansing's intent to create ethnically homogenous regions, not merely its intent to displace.

In his comprehensive book, *Genocide in International Law*, William A. Schabas discounts the claim that ethnic cleansing is a form of genocide because of the crimes' conflicting intents.¹⁸² He argues that although ethnic cleansing and genocide may share the goal of eliminating the persecuted group from a given area, the crimes have different specific intents: "One is intended to displace a population, the other to destroy it. The issue is one of intent and it is logically inconceivable that the two agendas coexist."¹⁸³ While one may argue that the intent to displace is separate from the intent to destroy, the problem with Schabas's claim is that ethnic cleansing's specific intent is to create an ethnically homogenous territory, not to displace a population.

Unfortunately, the ICTY applies Schabas's argument in drawing a distinction between ethnic cleansing's specific intent—the intent to displace—and genocide's intent to destroy.¹⁸⁴ By attaching the wrong specific intent to ethnic cleansing, the ICTY's analysis is inherently flawed. For example, in *Krstić*, the ICTY Appeals Chamber found that the accused lacked genocidal intent because his specific intent to carry out forcible displacement could be distinguished from the specific intent of other members of the Serb military who saw the forcible displacement as a means of advancing a genocidal plan.¹⁸⁵ Both the accused and the oth-

182. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW*, *supra* note 11, at 234.

183. *Id.*

184. See Prosecutor v. Brđjanin, Case No. IT-99-36-T, Judgment, ¶ 982 n.2472 (Sept. 1, 2004) (citing Schabas's *Genocide in International Law* to support the Chamber's holding that a genocidal campaign is distinct from a campaign of massive displacement); Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 33 n.53 (Apr. 19, 2004); (citing Schabas's *Genocide in International Law* to support the Chamber's reliance on forcible transfer only to infer, not to exclusively establish genocidal intent); Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 519 n.1097 (July 31, 2003) (citing Schabas's *Genocide in International Law* to support the Chamber's holding that expulsion of a group does not in itself suffice to establish genocide).

185. *Krstić*, Case No. IT-98-33-A, ¶ 133.

er members of the Serb military intended to displace the population. The accused, however, did not intend to displace as a means of destroying the Bosnian Muslim population. Thus, the intent to displace an ethnic group is both consistent with genocidal intent (in the case of the other members of the Serb military) and inconsistent with genocidal intent (in the case of the accused). When the general intent to displace is accompanied by the specific intent to destroy, the intent to destroy and the intent to displace coexist, contrary to Schabas's claim. Because the displacement of a group can further both a genocidal policy and a policy of ethnic cleansing, the intent to displace is not the proper basis for distinction.

The proper basis for comparison is the overall objective of each crime, which, for ethnic cleansing, is the intent to create ethnically homogenous regions, not the intent to displace. The displacement of a group can be achieved either directly or indirectly. Where the displacement of a group is achieved directly by physically removing the group—for example, taking people from their homes and involuntarily deporting them outside the state or region—the *actus reus* is the physical removal of the group.¹⁸⁶ Because the general intent of a crime requires nothing more than the intent to commit a particular act,¹⁸⁷ the intent to displace is ethnic cleansing's general intent. Just as the acts enumerated in provisions (a), (b), and (e) of the crime of genocide require, respectively, the intent to kill, the intent to cause serious bodily or mental harm, and the intent to forcibly transfer children,¹⁸⁸ the *act* of displacing a group requires the intent to displace.¹⁸⁹ In contrast, a *policy* of ethnic cleansing entails displacing a group for the purpose of rendering an area ethnically homogenous.¹⁹⁰ Creating an ethnically pure area is the end,¹⁹¹ while dis-

186. "The action taken against the individual members of the group is the means used to achieve the ultimate criminal objective with respect to the group." *Report of the International Law Commission to the General Assembly*, *supra* note 22, at 88.

187. A general-intent crime is one "that involves performing a particular act without intending a further act or a further result." BLACK'S LAW DICTIONARY 428 (9th ed. 2009). *Cf. Report of the International Law Commission to the General Assembly*, *supra* note 22, at 88 (holding that the crime of genocide, in addition to a general intent to commit the act, requires "a specific intent with respect to the overall consequences of the prohibited act").

188. *See Report of the International Law Commission to the General Assembly*, *supra* note 22, at 88 (stating that the crime of genocide requires a general intent to commit one of the prohibited acts enumerated in sub-paragraphs of Article II of the Genocide Convention).

189. *See infra* Part V.A for a discussion of how the general intent to displace may be incorporated into the crime of genocide.

190. *Secretary-General Letter*, *supra* note 4, ¶ 55 ("'[E]thnic cleansing' means rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area.").

191. During the Yugoslav war, ethnic cleansing was used as a military term, meaning "to clean the territory" of ethnic contamination in the final phases of combat. Pretrovic, *supra* note 5, at 343. In English and in French, reference is made to ethnic purification. *Id.*

placing is the means. Thus, the specific intent is not to displace but to ethnically cleanse.

Where the displacement of a group is achieved indirectly—through coercive means such as threats of violence, destruction of homes, or contaminating a community's only source of food or water—the intent to displace does not adequately describe the perpetrator's specific intent. Displacing a group is the physical result, but it does not explain why the perpetrator desires to displace a certain group; it does not fully capture the underlying motive.¹⁹² When acts are committed in furtherance of a policy of ethnic cleansing, intending to create an ethnically homogenous region is the specific intent. The principal evil is the establishment of ethnically homogenous regions, not merely as an accidental or unintended consequence, but as the ultimate goal.¹⁹³

Therefore, in determining whether a policy of ethnic cleansing constitutes genocidal intent, the real issue is whether the intent to create an ethnically homogenous territory is equivalent to the intent to destroy.

2. Ethnic Cleansing Is More Than Just Discriminatory

Ethnic cleansing, like genocide, is more than just discriminatory—it is destructive. International courts and tribunals continue to prosecute ethnic cleansing as the crime of persecution because persecution requires a discriminatory intent. Persecution is broadly defined¹⁹⁴ as the “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”¹⁹⁵ Persecutory acts are directed against individuals of a protected group because they belong to that group.¹⁹⁶ While ethnic cleansing clearly falls within the crime of persecution because of its discriminatory nature,¹⁹⁷

192. The specific intent of a crime like genocide “is characterized by the psychological relationship between the physical result and the mental state of the perpetrator.” *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 518 (Sept. 2, 1998). See also 22 C.J.S. *Crim Law* § 40 (2008) (“The term ‘specific intent’ is used to designate a specific mental element which is required above and beyond any mental state required with respect to the actus reus of the crime.”).

193. Tadeusz Mazowiecki, *Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Territory of the Former Yugoslavia*, ¶ 6, submitted to the Economic and Social Council, U.N. Doc. E/CN.4/1992/S-1/10 (Oct. 27, 1992) (“[T]he principal objective of the military conflict in Bosnia and Herzegovina is the establishment of ethnically-homogeneous regions. Ethnic cleansing does not appear to be the consequence of the war but rather its goal.”).

194. *Prosecutor v. Kupre{ki}*, Case No. IT-95-16-T, Judgment, ¶ 623 (Jan. 14, 2000).

195. Rome Statute, *supra* note 6, art. 7, ¶ 2(g). See also *Kupre{ki}*, Case No. IT-95-16-T, ¶ 621.

196. *Kupre{ki}*, Case No. IT-95-16-T, ¶ 636.

197. By virtue of targeting undesirable ethnic groups, ethnic cleansing is discriminatory. Even though the label “ethnic cleansing” would suggest that groups are targeted based on negative characteristics (e.g., non-German, non-Serb, or non-Arab), policies of ethnic cleansing typically identify

this does not justify its exclusion from the crime of genocide because genocide, like ethnic cleansing, is a form of persecution.¹⁹⁸ Even though both persecution and genocide require the intent to discriminate, genocide's distinct intent to destroy elevates the level of culpability.¹⁹⁹ Thus, if a policy of ethnic cleansing is more than just discriminatory, and also intends to destroy, then ethnic cleansing is more appropriately categorized as a form of genocide.

3. A Policy of Ethnic Cleansing Intends to Destroy

Destruction of an ethnic group is not just the probable consequence of implementing a policy of ethnic cleansing; it is also the desired consequence. The impermanence of forcibly removing a group is an obstacle for meeting not only the crime of genocide's *actus reus* requirements, but also its *mens rea* requirements. Many would agree that Hitler's intention to destroy all of the Jews in Europe constituted genocidal intent. However, Schabas argues that this was a "modest ambition," one amounting to only ethnic cleansing.²⁰⁰ What made Hitler's policy genocidal, according to Schabas, was his intention to extend his murderous campaign to the rest of the world.²⁰¹ This argument is inconsistent with the crime of genocide's elements and underlying principles. In fact, the ICTY Appeals Chamber has explicitly refuted such an argument.²⁰²

A genocidal policy is not required to stretch the entire globe.²⁰³ Recall that genocidal intent is the intent to destroy a group "in whole or in part."²⁰⁴ Thus, the intent to destroy may be geographically limited to a

victims according to positive characteristics (e.g., Jews, Bosnian Muslims, or African tribes). See, e.g., *Application of Convention on Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)*, 2007 I.C.J. 1, 73–74 (Judgment of Feb. 26) (holding that while a protected group must be identified according to particular positive characteristics, Bosnian Muslims were referenced according to their particular group identity).

198. *Kupreški*, Case No. IT-95-16-T, ¶ 636 ("[F]rom the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution.").

199. *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09-3, Decision on the Prosecutor's Application for a Warrant of Arrest, ¶ 142 (Mar. 4, 2009); *Bosn. & Herz. v. Serb. & Mont.*, 2007 I.C.J. at 70; *Kupreški*, Case No. IT-95-16-T, ¶ 636.

200. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW*, *supra* note 11, at 234.

201. *Id.*

202. Even though the Nazis intended to eliminate only the Jews within Europe, and the Hutus did not intend to eliminate the Tutsis beyond Rwanda's borders, the ICTY Appeals Chamber recognized that both genocidal campaigns targeted a substantial part of the ethnic groups. *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, ¶ 13 (Apr. 19, 2004).

203. E.g., *Al Bashir*, Case No. ICC-02/05-01/09-3, ¶ 146; *Bosn. & Herz. v. Serb. & Mont.*, 2007 I.C.J. at 74; *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, ¶ 586 (Aug. 2, 2001); *Report of the International Law Commission to the General Assembly*, *supra* note 22, at 89.

204. Genocide Convention, *supra* note 6, art. II.

region of a country or even a municipality.²⁰⁵ Still, the part of the group must be substantial so as to affect the entirety.²⁰⁶ In determining whether the part of the group is substantial, international courts and tribunals look to quantitative factors, such as the numeric size of the targeted group and the number of individuals in relation to the overall size of the group, and qualitative factors, such as the prominence of the targeted portion within the group (for example, if a specific part of a group is emblematic of the overall group or essential to its survival).²⁰⁷ Therefore, the geographic scope of a genocidal policy is not the deciding factor. Rather, the intention to significantly impact the group's continued existence is the key determination.²⁰⁸ In other words, a policy of ethnic cleansing does not need to have a permanent effect; it needs to intend to have a permanent effect.

Even if, as Schabas proclaims, it is true that genocide is the last resort of the frustrated ethnic cleanser,²⁰⁹ the goals of each crime are the same. Frustrated that he is not getting the desired effect, the ethnic cleanser may expand or speed up his efforts, but this does not change his original intent. Generating a more effective or successful policy—one that targets a greater number of people or that causes immediate harm—does not transform the desire to eradicate an ethnic group. The possibility of an ethnic group reestablishing itself elsewhere is near impossible once group members are removed or forced to flee. Consequently, the ethnic cleanser is well aware of the subsequent whole or partial destruction of the displaced ethnic group. It is this awareness of the permanent effect that warrants expansion of the crime of genocide to include ethnic cleansing.

A policy of ethnic cleansing aims to permanently rid a region of an ethnic group to achieve ethnic homogeneity.²¹⁰ The sole purpose of the ethnic cleanser is to achieve ethnic purity. There is no other, legitimate

205. See *Krstić*, Case No. IT-98-33-A, ¶ 8. See also *Al Bashir*, Case No. ICC-02/05-01/09-3, ¶ 146; *Bosn. & Herz. v. Serb. & Mont.*, 2007 I.C.J. at 74; *Prosecutor v. Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 703 (Sept. 1, 2004).

206. *Krstić*, Case No. IT-98-33-A, ¶¶ 9–10. See also *Al Bashir*, Case No. ICC-02/05-01/09-3, ¶ 146; *Bosn. & Herz. v. Serb. & Mont.*, 2007 I.C.J. at 74; *Report of the International Law Commission to the General Assembly*, *supra* note 22, at 89.

207. *Krstić*, Case No. IT 98-33-A, ¶ 12. See also *Al Bashir*, Case No. ICC-02/05-01/09-3, ¶ 146; *Bosn. & Herz. v. Serb. & Mont.*, 2007 I.C.J. at 74.

208. *Bosn. & Herz. v. Serb. & Mont.*, 2007 I.C.J. at 74.

209. SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 11, at 234.

210. See, e.g., *Brđjanin*, Case No. IT-99-36-T, ¶¶ 3, 10–11 (alleging that to create an ethnically pure Serbian state, Serb forces needed to permanently remove, or ethnically cleanse, almost all Bosnian Muslims and Bosnian Croats from the area); *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, ¶¶ 562–63 (Aug. 2, 2001) (claiming that Serb forces terrorized civilian populations with the objective of ethnically cleansing the area, or forcing their flight to ensure the region would remain Serbian forever).

or illegitimate, reason or justification,²¹¹ and the desired effect is permanent. Intending to create an ethnically pure territory conveys to members of the supposedly impure group, residents of the cleansed territory, and the international community that a particular ethnic group is unworthy of existence, and that this ethnic group is socially undesirable for reasons stemming from utter hatred and disgust. This extreme intolerance denies the group the right to exist, which is precisely the evil that the crime of genocide was designed to prohibit.²¹²

In sum, a policy of ethnic cleansing aims to eliminate an entire people from a region²¹³ because society—defined regionally or globally—is thought better off without it. In this way, ethnic purity poses the greatest threat to the peace and security of mankind,²¹⁴ and therefore, demands the same level of mental culpability as genocide.

V. INTERPRETING THE CRIME OF GENOCIDE TO INCLUDE ETHNIC CLEANSING

This Part is intended to provide a rough sketch of how to interpret ethnic cleansing as genocide. This Part discusses first how ethnic cleansing establishes the *actus reus* of the crime of genocide and second how a policy of ethnic cleansing can be interpreted as genocidal intent.

211. Legitimate reasons for removing an ethnic minority may include: to preclude insurgence, to ensure the safety of innocent civilians during a time of war, or to protect fundamental rights and freedoms. See, e.g., U.N. GAOR, 3d Sess., 83d mtg., *supra* note 99, at 197–203 (in discussing whether to include cultural genocide within the Genocide Convention, several delegates argued that precluding a state government from interfering with a protected group’s customs or structures could threaten the political and social advancement of its members and may overlook constructive efforts to establish a common culture); U.N. GAOR, 3d Sess., 82d mtg., *supra* note 152, at 188 (The Polish delegate expressed concern with adopting a provision prohibiting the transfer of children because it “could also be applied to the evacuation of children from a theatre of war. Such evacuation had in fact been carried out by agencies working under the auspices of the United Nations.”). Likewise, illegitimate but distinct reasons would not constitute the intent to ethnically cleanse. For example, the U.S.’s internment of Japanese citizens was not implemented under a policy of ethnic cleansing because it stemmed from a belief, although unsupported, that Japanese-Americans were assisting enemy forces.

212. G.A. Res. 96(I), at 188–89, (Dec. 11, 1946) (“Genocide is a denial of the right of existence of entire human groups.”); Lemkin, *Genocide*, *supra* note 25, at 229 (“[B]y the formulation of genocide as a crime, the principle that every national, racial and religious group has a natural right of existence is claimed.”).

213. See *supra* note 76; *Third Mazowiecki Report of 1992*, *supra* note 75, ¶ 9 (“The term ethnic cleansing refers to the elimination by the ethnic group exercising control over a given territory of members of other ethnic groups.”).

214. See *generally Report of the International Law Commission to the General Assembly*, *supra* note 22; UN Charter pmb., arts. 1–2.

A. Establishing the Actus Reus of the Crime of Genocide

For the purposes of this Comment, ethnic cleansing can be categorized as forcible actual or constructive displacement of a group. Actual displacement of a group occurs when people are physically taken from their homes and involuntarily deported outside the state or region.²¹⁵ Constructive displacement occurs when an ethnic group is displaced from a given area by destroying group members' homes, threatening them with violence, or contaminating their only source of food or water.

One can easily construe acts involving either the actual or the constructive removal of a population as one of the genocidal acts specified in the Rome Statute. The most obvious is the forcible displacement of children. Additionally, constructive efforts to remove an ethnic group can also be construed as killing members of the group,²¹⁶ a condition of life calculated to bring about a group's physical destruction,²¹⁷ or a measure intended to prevent births within the group.²¹⁸ Note that acts without a violent or coercive component—such as burning books, destroying monuments, and prohibiting cultural education or the use of a language—do not suffice. The perpetrator must use “terror-inspiring violence to inhibit any potential return by those expelled.”²¹⁹ Terror-inspiring acts include murder, rape, torture, imprisonment, theft, and destruction of public and private property.²²⁰

215. In the case of actual displacement, the *actus reus* is the physical removal of the group. “The action taken against the individual members of the group is the means used to achieve the ultimate criminal objective with respect to the group.” *Report of the International Law Commission to the General Assembly*, *supra* note 22, at 88.

216. For example, one constructive effort might include killing some members of a group to send a message to other members of an ethnic group that they will be subject to the same fate if they do not leave.

217. For example, another constructive effort might include contaminating a community's food or water supply or destroying people's homes and belongings so that group members are forced to flee with no means of survival.

218. For example, a constructive effort could also include raping women who belong to a culture in which premarital sex or extramarital sex leads to banishment from the community. The resulting banishment would effectively preclude women from both belonging to the group and reproducing with members of their own ethnicity. Another example may include “procreative rape,” which entails forcibly impregnating women of a protected group so that they give birth to children who do not belong to the protected group. *See Application of Convention on Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)*, 2007 I.C.J. 1, 129–30 (Judgment of Feb. 26).

219. M. CHERIF BASSIOURI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 609 (1996).

220. *Id.*

B. Interpreting a Policy of Ethnic Cleansing as Genocidal Intent

To fully capture the mindset of the ethnic cleanser, international courts and tribunals ought to apply the limitations they already employ in establishing genocidal intent. Because the perpetrator need only intend to destroy a part of the group,²²¹ international courts and tribunals can expect to find the intent to destroy when the targeted ethnic group constitutes a substantial part of the group within a geographically limited area.²²² Where a policy of ethnic cleansing aims to forcibly remove an ethnic group from a substantial geographic region and the portion of the group constitutes either a large or a significant portion of the entire ethnic group, the intent to destroy is established.

Instead of interpreting the intent to achieve ethnic homogeneity as distinct from the intent to destroy,²²³ international courts and tribunals ought to interpret a policy of ethnic cleansing as a genocidal policy where evidence sufficiently meets the stringent requirements for genocidal intent—the specific intent to destroy a protected group “as such.”²²⁴ The already-imposed limitations on genocidal intent will preclude over-expansion of the crime of genocide while appropriately criminalizing ethnic cleansing as genocide.

VI. CONCLUSION

In light of the recent formation of the ICC, it is crucial that international tribunals, courts, and institutions adopt a consistent and conscientious interpretation of genocide. Genocide is the worst crime known to man not only because it causes immense and widespread suffering, but because it eliminates a human group. Losing a human group deprives society of the group’s cultural contributions.²²⁵ While international courts and tribunals acknowledge that the victim of genocide is the group, they refuse to interpret the crime of genocide in a manner that reflects its culturally destructive harm. Only by acknowledging the cultural value of protected groups, can international courts and tribunals fully realize genocide’s harm to humanity.

Once international courts and tribunals recognize that genocide and ethnic cleansing cause equally permanent and destructive effects, they

221. Genocide Convention, *supra* note 6, art. II.

222. *See* Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶¶ 9–10 (Apr. 19, 2004). *See also* Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-3, Decision on the Prosecutor’s Application for a Warrant of Arrest, ¶ 146 (Mar. 4, 2009); *Bosn. & Herz. v. Serb. & Mont.*, 2007 I.C.J. at 74; *Report of the International Law Commission to the General Assembly*, *supra* note 22, at 89.

223. *See supra* Part III.D.

224. *See* Prosecutor v. Brđjanin, Case No. IT-99-36-T, Judgment, ¶¶ 681–703 (Sept. 1, 2004); Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶¶ 551, 569, 581 (Aug. 2, 2001).

225. *See* text accompanying note 139.

can properly interpret the crime of genocide and apply its provisions. Ethnic cleansers who knowingly deprive an ethnic group of the opportunity to return or reconstitute itself permanently dismember that group.²²⁶ This permanent removal fulfills the meaning of destruction originally contemplated by Lemkin and the drafters of the Genocide Convention,²²⁷ for driving an ethnic group out of a region so that its members will never truly return denies the group's existence. In this way, ethnic cleansing satisfies both the *actus reus* and the *mens rea* elements of genocide. Ethnic cleansers employ the same violent and forcible means as genocide—such as causing slow death or serious bodily or mental harm, depriving persons of all means of livelihood, and forcibly transferring children. Moreover, their desire for ethnic homogeneity stems from the same degree of intolerance as those who commit genocide. Thus, those who carry out genocidal acts under a policy of ethnic cleansing should be convicted of genocide by international courts and tribunals. Otherwise, ethnic cleansers may continue using terror-inspiring violence to achieve ethnic purity until the “impure” have nowhere on this earth to go.

226. See, e.g., *Brđjanin*, Case No. IT-99-36-T, ¶ 977 (holding that “the Bosnian Serb authorities in the ARK implemented a policy to create an ethnically homogeneous ARK [territory], which entailed the forcible, unlawful and permanent removal of the Bosnian Muslims and Bosnian Croats from the ARK”); *Krstić*, Case No. IT-98-33-A, ¶ 31 (“The transfer completed the removal of all Bosnian Muslims from Srebrenica, thereby eliminating even the residual possibility that the Muslim community in the area could reconstitute itself.”).

227. See G.A. Res. 96(I), at 188–89, (Dec. 11, 1946) (“Genocide is a denial of the right of existence of entire human groups.”); Lemkin, *Genocide*, *supra* note 25, at 229 (“[B]y the formulation of genocide as a crime, the principle that every national, racial and religious group has a natural right of existence is claimed.”); *supra* Part IV.A.