

Genocide: Punishing a Moral Wrong 1

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Abstract 4
In 1951 the Genocide Convention pledged to abolish all cruel and unfair forms of torture and 5
death to innocent civilians for religious, national and ethnic reasons. 67 years after its ratification, 6
we seem to be witnessing more international criminal trials for crimes against humanity than ever 7
before. The recent alarming rise in such cases calls into question the morality and punishment of 8
genocide. What impact does the Genocide Convention still have in today's challenging interna- 9
tional climate? Is the crime of genocide simply too complex and too 'evil' to punish appropriately? 10
This article provides an in-depth examination of the offence of genocide, and an analysis of the 11
jurisprudential issues relating to the punishment of genocide. Is it possible to punish genocide 12
appropriately? 13

Keywords 14
1951 Genocide Convention; morality; punishment 15

1. Introduction 16

International criminal law has progressed in leaps and bounds over the last seven 17
decades. The international community is no longer afraid to exert pressure on 18
wayward rulers and their unethical customs. But in the midst of all the develop- 19
ments, the Genocide Convention remains obscure. Close examination of the 20
1951 Convention reveals a surprisingly ambiguous offence, regulatory in nature 21
and almost impossible to fairly apply. The Courts and Tribunals which have juris- 22
diction over genocide have had to canvass the vague wording of the provisions for 23
themselves. This lack of clarity leads to a frustrating reliance on the next available 24
offence: crimes against humanity. This dilemma not only releases the perpetrator 25
from the moral stigma attached to genocide, but includes a risk of humanity 26
crimes becoming the popular 'catch-all category' in international law. In the rare 27
event that an oppressor's behaviour does fall into the provisions of genocide, the 28
mode of punishment (i.e., imprisonment) seems insignificant compared to the 29
horrors of the crime. Aside from regulatory issues, it becomes clear during analysis 30

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31 that genocide is also an offence based on morality. How do we punish a moral
 32 wrong? Genocidal acts continue to be committed despite the introduction of the
 33 Convention,¹ and recent case law has done very little to reinforce the grave nature
 34 of genocide or to close the regulatory loopholes that appear in the provisions.
 35 What are the theoretical approaches to punishment, and which ones are appli-
 36 cable to genocide?

37 2. The Development of Genocide in International Criminal Law

38 ‘Genocide’ loosely signifies an act committed with the intent to destroy in whole
 39 or in part a national, ethnic, racial or religious group. Many definitions of geno-
 40 cide exist, including the following by *Chalk* and *Jonassohn*: “genocide is a form of
 41 one-sided mass killing in which a state or other authority intends to destroy a
 42 group.”²

43 The word itself was thought up by Dr. *Raphael Lemkin* (1900–1959) in his
 44 work *Axis Rule in Occupied Europe*: ‘genocide’ comes from the ancient Greek
 45 word ‘genos’ (tribe, race) and the Latin term ‘cide’ (killing).³

46 The idea that individuals can be personally liable for international crimes was
 47 slow to develop. *Lemkin* proposed an offence of barbarity in 1933.⁴ This included
 48 acts of economic extermination and brutal attacks on the dignity of individuals
 49 causing damage to the collectivity to which they belonged. *Lemkin’s* ground-
 50 breaking legislation proposed: 1) the punishment of acts aimed at destroying the
 51 life, bodily integrity, liberty, dignity and the economic existence of a racial, reli-
 52 gious or social collectivity; 2) both instigators and accomplices to acts of barbarity
 53 carry the same punishment as the author; and 3) all perpetrators were to be pros-
 54 ecuted and punished independently of the place where the act was committed.
 55 This was keeping in line with the principle *forum loci deprehensionis* or ‘universal

¹ For example: the Korean war, the intertribal Burundi killings between the Tutsi and Hutu groups, the reported massacre of Ugandans during the rule of former President Idi Amin, the slaying of dissidents in Equatorial Africa after independence was secured from Spain in 1968, the killing of Cambodians during the reign of Pol Pot, the mass killings of members of the Muslim minority in Chad in 1979, and the deaths of 180,000 Kurds in Northern Iraq as part of Saddam Hussein’s Anfal campaign in the 1980’s (he was hanged in December 2006 for his crimes against humanity). This, of course, does not include the most recent examples of President Robert Mugabe’s violent Zanu-PF party, and the capture and impending trial of Radovan Karadzic in July 2008 for his participation in the Bosnian Genocide.

² *F. Chalk & K. Jonassohn*, (1990). *The History and Sociology of Genocide : Analyses and Case Studies*. Yale University Press, at page 1.

³ From *R. Lemkin*, ‘Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress.’ (1944), available from www.preventgenocide.org/lemkin.

⁴ *R. Lemkin*, ‘Acts Constituting a General Transnational Danger Considered as Offences Against the Law of Nations.’ (1933). Available from www.preventgenocide.org/lemkin.

repression', based on the principle that an offender can be brought to justice in the place where he is apprehended because he is regarded as an enemy of the whole international community.⁵ Lemkin's work was taken very seriously at the end of World War II.

The International Military Tribunals in Nuremberg and Tokyo were *ad hoc* bodies set up to deal with the aftermath of the Second World War. The provisions of the Nuremberg Charter were affirmed by the General Assembly in 1946 in Resolution 95(1).⁶ The International Law Commission (ILC) formulated the following crimes under international criminal law:

Principle 6:
The crimes hereinafter set out are punishable as crimes under international law:
a) crimes against peace; b) war crimes; c) crimes against humanity.⁷

At this point, genocide was still embedded within 'crimes against humanity', but the United Nations General Assembly Resolution 96(I) of 13 December 1946 requested that the Economic and Social Council draft a convention. In December 1948, the General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide.⁸ The Convention came into force on January 12, 1951, and by 1985 there were 96 ratifications. The Convention affirms the criminality of genocide in time of peace as well as in time of war (Article 1), distinguishing it from war crimes into a category of its own. Article 2 defines the offence:

Article 2:
In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
a) killing members of the group;
b) causing serious bodily or mental harm to members of the group;

⁵ Taken from Articles 1, 6 and 7 of Lemkin's proposed legislation to the 5th Conference for the Unification of Penal Law, documented in Lemkin, R. (1933). *Ibid.*

⁶ See: 'Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal', Resolution 95 (I) of the United Nations General Assembly, 11 December 1946. Available at www.icrc.org.

⁷ Documented in the International Law Commission's Report on 'Principles of the Nuremberg Tribunal', Yearbook of the I.L.C., 1950, Vol. II, at page 195.

⁸ 78 UNTS 277 (1951). Adopted by Resolution 260 (III) of the United Nations General Assembly on 9 December 1948: United Nations, Treaty Series, Vol. 78, at page 277. Available from <http://www.unhchr.ch/html/>.

- 84 c) deliberately inflicting on the group conditions of life calculated to
 85 bring about its physical destruction in whole or in part;
 86 d) imposing measures intended to prevent births within the group;
 87 e) forcibly transferring children of the group to another group.

88 Persons committing conspiracy, incitement, attempt and complicity to genocide
 89 are also punishable, whether they are constitutional rulers, public officials, or
 90 private individuals (Articles 3 and 4). Article 5 states that the parties to the
 91 Convention are under an obligation to enact the necessary domestic legislation to
 92 give effect to the Convention and to provide effective penalties.⁹ Article 5 keeps
 93 in line with Lemkin's *forum loci deprehensionis* or 'universal repression' idea, which
 94 he describes as 'the symbol and practical application of the higher doctrine of
 95 moral and legal solidarity' in his 1947 work.¹⁰

96 3. The Crime of Genocide in Detail

97 Because the Genocide Convention has been adopted into customary international
 98 criminal law, the Convention has its own *actus reus* and *mens rea*. International
 99 criminal responsibility is a difficult concept. Can a State carry a legal intent? It
 100 seems appropriate to genocide to separate the culpable individuals from the State
 101 and then instigate international proceedings against the individuals.¹¹ A break-
 102 down of genocide follows below, which allows us to identify the punishable ele-
 103 ments of the offence.

104 3.1. *The Actus Reus of Genocide*

105 Article 2 of the Convention clearly defines the conduct that may amount to
 106 genocide:

- 107 a) *killing* members of a national or ethnic, racial or religious group;
 108 b) causing *serious bodily or mental harm* to members of the group;
 109 c) deliberately inflicting on the group *conditions of life calculated to bring*
 110 *about its physical destruction* in whole or in part;
 111 d) imposing *measures intended to prevent birth* within the group;
 112 e) *forcibly transferring children* of the group to another group.

⁹ To take the United Kingdom as an example, see the Genocide Act 1969.

¹⁰ Lemkin, R. 'Genocide as a Crime under International Law' (1947) A.J.I.L. Vol. 41(1): 145-151.

¹¹ Suggested by Gardiner, R.K. (2003). *International Law*. Pearson, Longman, at page 125.

*Akayesu*¹² tightly defined the above list: a) killing is ‘murder’; b) serious bodily and mental harm should not necessarily be permanent or irremediable; c) conditions of life calculated to bring about its physical destruction include subjecting a group of people to a subsistence diet,¹³ systematic expulsion from homes, and the reduction of essential medical services below minimum requirements; d) measures intended to prevent births within the group consist of sexual mutilation, sterilization, forced birth control, separation of the sexes and prohibition of marriages; e) forcibly transferring children can include physical and mental measures.¹⁴

On first impressions this is an impressive and all-encompassing definition: one can not imagine an individual instigating an offence above and beyond those listed. But each case of genocide is individual to the perpetrator, making each act of genocide completely unique from all other acts of genocide. Fitting such distinctive fantasies into a general definition is difficult.

How are each of the four ‘groups’ (national, ethnical, racial, religious) under the Convention defined? The ICTR and the ICTY have intervened on these points. In *Akayesu*¹⁵ the Trial Chamber of the ICTR set out a definition of each group. ‘National groups’ are a collection of people who are perceived to share a legal bond of common citizenship coupled with reciprocity of rights and duties. An ‘ethnic group’ is a group whose members share a common language or culture, a ‘racial group’ is a group based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors, and a ‘religious group’ is a group whose members share the same religion, denomination or mode of worship. Whilst this list appears to incorporate every conceivable type of group, it was thought by the ICTR that the groups protected against genocide should not be limited to the four groups envisaged in the provisions but should include ‘any stable and permanent group’.¹⁶ This would be logical, as it would take into account both minority groups and the rather large category of ‘political’ groups which does not seem to have been considered. Professor *Cassese* - who used to sit as a judge in the ICTY - remains unconvinced, and controversially believes that the framers of the Convention explicitly intended only the four groups mentioned to be protected.¹⁷ Victims must be chosen

¹² *Akayesu*, ICTR, Trial Chamber I, Judgment of 2 September 1998, case no. ICTR-96-4-I.

¹³ Argued to be a ‘*slow death*’ by Akhavan, P. (2005) ‘Focusing on ICTR Case Law - The Crime of Genocide in the ICTR Jurisprudence’ I.C.J. 3 4 (1989), at page 10.

¹⁴ *Akayesu*, op. cit. at f.n. 12, at paras. 502-509. Lemkin considered the deliberate separation of families for depopulation purposes to be genocidal activity in his 1947 work: R. Lemkin (1947) loc. cit. at f.n. 10.

¹⁵ *Akayesu*, op. cit. at f.n. 12.

¹⁶ Ibid., at paras. 512-515.

¹⁷ See A. Cassese, (2003). *International Criminal Law*. Oxford University Press, at page 101. In *Akayesu* the Trial Chambers went to great lengths to characterise the Tutsi group as an ‘ethnic’ group in order to justify the label of genocide. In the end the Tutsi’s were labelled as an ‘ethnic’ group for

144 *by reason* of their membership in the group whose destruction was sought. The
 145 current case law tells us that what matters is the intent to attack victims *on account*
 146 *of* their ethnic, racial, or religious characteristics. This is, however, difficult to
 147 prove and easy to deny. As a result of *Krstic* and *Zoran Kupreskic* it must currently
 148 be established that: (i) the victims were in fact treated as belonging to one of the
 149 protected groups; and (ii) they considered themselves as belonging to one of such
 150 groups.¹⁸ Can we take from this that the test for ‘groups’ is both objective (the
 151 victim’s view) and subjective (the perpetrator’s view)? A further mixture of objec-
 152 tivity and subjectivity appeared in *Kayishema and Ruzindana* where ‘self-identifi-
 153 cation’ and ‘identification by others’ were considered to be key factors when
 154 identifying an ethnic group.¹⁹ *Rutaganda* pushed the subjective standard even
 155 further by suggesting that for the purposes of applying the Genocide Convention,
 156 membership of a group is a completely subjective concept.²⁰ The ICTY Trial
 157 Chambers applied this strictly subjective approach in *Jelusic*²¹ and *Krstic*.²²
 158 Akhavan strongly condemns this approach, claiming that whilst a constructivist
 159 approach to identity is appealing, this solely subjective test leads to a theoretical
 160 absurdity: a perpetrator could define virtually any group as ethnic, irrespective of
 161 its objective attributes, and be guilty of genocide.²³ Should not a fair and liberal
 162 criminal system take an objective view? *Rutaganda* was quick to define its defini-
 163 tion of the subjective test, concluding that certain groups - such as political and
 164 economic groups - were excluded from the Convention definition because of
 165 their ‘mobile’ status, suggesting that the Convention intended to cover relatively
 166 stable and permanent groups.²⁴ This is disappointing. Did the United Nations
 167 when drafting the Genocide Convention intend to turn a blind eye to political
 168 victims? Most mass killings take place during political upheavals. This would
 169 allow President Robert Mugabe to slip through a loophole in the Convention, as
 170 his Zanu-PF party no doubt acted on political motives. Adolf Hitler also har-
 171 boured political reasons for exterminating over one million people. Would he be
 172 able to escape liability under the Genocide Convention too?

the purposes of the 1951 Convention as the result of official documents labelling them as such. For further discussion see P. Akhavan, (2005) op. cit. at f.n. 13, at page 1.

¹⁸ See in particular *Krstic*, ICTY, Trial Chamber, decision of 2nd August 2001, case no. IT-98-33-T, at para 561 and *The Prosecutor v Zoran Kupreskic* IT-95-16-T (14 Jan 2000) at para. 636.

¹⁹ *Kayishema and Ruzindana*, ICTR, Trial Chamber II, judgment of 21 May 1999, case no. ICTR-95-1-T, at para. 98.

²⁰ *Rutaganda* ICTR, Trial Chamber, judgment of 6 December 1999, case no. ICTR-96-3-T, at para. 56.

²¹ *Jelusic*, ICTY Trial Chamber I, judgment of 14 December 1999, case no. IT-95-10-T, at paras. 70-71.

²² *Krstic*, op. cit. at f.n. 18, at paras. 556 – 560.

²³ P. Akhavan, (2005) loc. cit. at f.n. 13, at page 8.

²⁴ *Rutaganda*, op. cit. at f.n. 20, at para. 56.

‘In whole or in part’ is a very vague element of the *actus reus* of genocide. 173
 The ‘part’ of the group which is exterminated must represent a large number 174
 relative to the whole size of the group and the destruction must target a qualita- 175
 tively significant part of the group i.e. the elite part of the group.²⁵ *Krstic* held that 176
 the perpetrator must view the part of the group they wish to destroy as a distinct 177
 entity.²⁶ Geographic location will not indicate whether the targeted group is ‘sub- 178
 stantial’, but it can, in combination with other factors, inform the analysis.²⁷ This 179
 all seems a little vague, but is likely to develop on an *ad hoc* basis on individual 180
 merits. 181

3.2. *The Mens Rea of Genocide* 182

The *mens rea* for genocide is provided very clearly in Article 2 of the Convention, 183
 which is the intent to destroy, in whole or in part, a national, ethnical, racial or 184
 religious group. *Jorgic* described the visions of such a perpetrator: “[they] do not 185
 see the victim as a human being, but only as a member of the persecuted 186
 group.”²⁸ 187

Interestingly, *Shaw* notes that States may deny genocide by claiming that the 188
 intent to destroy a group in whole or in part was in fact absent.²⁹ In such a sce- 189
 nario, *Akayesu* held that intention is almost impossible to determine, and so in 190
 the absence of a confession from the accused, his intent can be inferred from a 191
 certain number of presumptions of fact.³⁰ What evidence would be required for 192
 this? The ICTY in *Krstic* considered evidence relating to the cultural or social 193
 destruction of a group in relation to implying intention. Despite only physical 194
 and biological destruction of a group coming within the ambit of the Convention, 195
 the ICTY held that simultaneous attacks on the cultural and religious property 196
 and symbols of the targeted group may be considered as evidence of an intent to 197
 physically destroy the group.³¹ This practice by the ICTY seems to be a long 198
 stretch to establish a *mens rea* for genocide, as logically, the destruction of religious 199
 symbols can simply mean just that. However, attacks on religious symbols may be 200
 coupled with physical or biological destruction, and these widespread symbolic 201

²⁵ *Jelusic*, op. cit. at f.n. 21, at para. 82.

²⁶ *Krstic*, op. cit. at f.n. 18, at paras. 590-597.

²⁷ *Ibid.*

²⁸ *Jorgic*, Germany, Federal Constitutional Court, judgment of 30th April 1999, at para. 401. See also 12th December 2000 and the judgment of 26 September 1997 in 3 *Strafrecht* 215/98. On-line at www.bverf.de.

²⁹ M.N. Shaw, (2003). ‘International Law’ 5th Edition. Cambridge University Press, at page 263.

³⁰ *Akayesu*, op. cit. at f.n. 12, at para. 523.

³¹ *Krstic*, op. cit. at f.n. 18, at para. 580; and *Karadzic and Mladic*, (Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence) ICTY, Trial Chamber, decision of 11 July 1996, case no. IT-95-5-R61 and IT-95-18-R61, at para 94.

202 attacks may take a more evidential standpoint when coupled with witness accounts
 203 in future cases to aid the verification of the required *mens rea*.

204 ‘Ethnic cleansing’ - where a certain group of people are ‘weeded out’ of the
 205 larger race - is not in itself provided for under Article 2 of the Genocide
 206 Convention,³² and the ICTY has refused to label ethnic cleansing as genocide.³³
 207 *Vuckovic* recently confirmed that ‘the forced expulsion of a population with an
 208 acceptance that a consequence may be death’ does not characterise the intent to
 209 destroy an ethnic group in whole or in part.³⁴ Is this is a wise decision? In similar
 210 cases, ‘ethnic cleansing’ has been characterised as genocide. For example, Judge
 211 Riad in *Karadzic and Mladic* held that ethnic cleansing can lead to new borders
 212 ‘by violently changing the national or religious composition of the population,
 213 therefore presenting genocidal characteristics.’³⁵ Could this rationale pave the
 214 way to a new offence of cultural genocide in the future? In *Krstic*, Bosnian Serb
 215 forces killed all military-aged men, thus eliminating all likelihood that they could
 216 ever re-establish themselves on that territory. The physical disappearance of
 217 the group did not amount to a ‘physical destruction’ of the group under the
 218 Convention, but the ICTY held that the group had been ‘destroyed’.³⁶ Did the
 219 Chamber flirt with the notion of cultural genocide by treating the combination
 220 of the massacres and their forcible transfer as the ‘destruction’ of the group?³⁷ It
 221 must be noted that Lemkin did not limit genocide to physical destruction but
 222 suggested many forms of genocide, including political, social, cultural, language,
 223 national feeling, religious, economic, personal security, liberty, health, and dig-
 224 nity. If the Convention covered *all* acts of murder motivated by discrimination,
 225 surely this would send a message to world leaders that their unlawful behaviour is
 226 in no uncertain terms to be categorised as genocide.³⁸ Either way, ‘ethnic cleans-
 227 ing’ is currently only an act from which genocidal intent can be inferred.

³² During drafting, Syria proposed a sixth class of acts of genocide: ‘imposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment’. This was rejected: UN Doc. A/C6/234.

³³ *Krstic*, op. cit. at f.n. 18, at para 580; *Jelusic*, op. cit. at f.n. 21, at paras 78-83. However, The United Nations General Assembly has previously labelled ethnic cleansing as a form of genocide: UN Doc AG/Res./47/121 of 18 Dec 1992.

³⁴ *Vuckovic*, Federal Republic of Yugoslavia, Supreme Court of Kosovo, decision of 31 August 2001, AP.156/2001, at paras 2-3. See also *Kusljic*, Germany, Federal Higher Court of Justice, judgment of 21 February 2001, 3 StR 244/00, at paras. 7-10.

³⁵ *Karadzic and Mladic* (Review of the Indictment pursuant to Rule 61 of the rules of Procedure and Evidence) ICTY, Trial Chamber, decision of 11 July 1996, case no. IT-95-5-R61 and IT-95-18, at para. 94.

³⁶ *Krstic*, op. cit. at f.n. 18, at paras. 590-597.

³⁷ For further discussion see Tournaye, C. (2003) ‘Shorter Articles, Comments, and Notes Genocidal Intent before the ICTY’ (2003) I.C.L.Q. 52 2 (447), at page 9.

³⁸ R. Lemkin, (1944) loc. cit. at f.n. 3. A more detailed list appeared later in R. Lemkin, ‘*Genocide - A Modern Crime*’ (1945) Free World, Vol. 4. It has been submitted that Lemkin’s suggestions

Whereas both genocide and crimes against humanity require the intent to commit the *actus reus*, genocide also requires a special intent to destroy, in whole or in part, a particular group. Otherwise known as *dolus specialis*, this is a unique mental element to genocide.³⁹ In addition, there can be no reckless genocide.⁴⁰ *Dolus specialis* applies to all acts of genocide under Article 2 of the Convention. This special intent requires the perpetrator to ‘clearly intend the result’, signifying ‘a psychological nexus between the physical result and the mental state of the perpetrator’.⁴¹ In *Jorgic*, the *dolus specialis* was deduced from the circumstances of an attack carried out through the structurally organized control of a group, of which the perpetrator was ‘aware’.⁴² ‘Awareness’ appears to play an important part in establishing the *dolus specialis* of genocide. *Akayesu* may have confused this aggravated intent with recklessness, as the Trial Chamber held in that case that the offender was culpable because he knew or *should have known* that the act committed would destroy, in whole or in part, a group.⁴³ International criminal law must be careful not to include recklessness into the Genocide Convention definition, as this would soften the evil element which distinguishes genocide from all other crimes. At the other end of the spectrum, a perhaps too lenient judgement can be found in *Jelusic*, where the defendant could not be found guilty of genocide because he killed ‘arbitrarily’: it had not been proved beyond all reasonable doubt that the accused was motivated by the *dolus specialis* of the crime.⁴⁴ *Jelusic* can be accused of narrowing the law. If evidence is found that links the perpetrator’s intent to destroy a group to the actual destruction of that group, can it not then be assumed that the *dolus specialis* is made out? What other evidence would be required short of a confession? Perhaps *Jorgic* is a better alternative, where systematic expulsion can be an *indication* of the required intent?

3.3. Punishing a Moral Wrong: Theory

Looking back at Lemkin’s work before the Genocide Convention came into being, it becomes very clear that the offence of genocide is based on morality.

should be read with caution. This wide-ranging offence could do more harm than good. For further criticism see C. Tournay, *ibid.*, at page 5.

³⁹ *Kayishema*, *op. cit.* at f.n. 19, at para. 91 states that this aggravated intention is unique to genocide.

⁴⁰ This is the ICTR’s interpretation from *Akayesu*, *op. cit.* at f.n. 12, paras. 497, 544-7; *Kambanda* (ICTR 97-23-S), Trial Chamber I, 4 September 1998, para. 16; *Kayishema and Ruzindana* *op. cit.* at f.n. 19, para. 91; *Rutaganda* *op. cit.* at f.n. 20, para. 59; *Musema*, ICTR, Trial Chamber, judgment of 27 January 2000, ICTR-96-13-T, para. 164.

⁴¹ *Musema*, *ibid.*, at paras. 164 and 166.

⁴² See *Jorgic*, Germany, Federal Constitutional Court, judgment of 30th April 1999, at paras. 19-22. *op. cit.* at f.n. 75.

⁴³ *Akayesu*, *op. cit.* at f.n. 12, at para 520.

⁴⁴ *Jelusic*, *op. cit.* at f.n. 21, at paras. 107-108.

256 Lemkin believed that by violating the natural right of existence, genocide is not
 257 only a crime against the rules of war, but a crime against humanity.⁴⁵ He submit-
 258 ted that the practice of genocide anywhere in the world curtails the vital interests
 259 of all civilised people:

260 “Minorities of one sort or another exist in all countries, and if persecution of any minority by
 261 any country is tolerated anywhere, then the very moral and legal foundations of constitutional
 262 government may be shaken.”⁴⁶

263 Morality strikes at the very heart of genocide, but punishing a moral wrong has
 264 jurisprudential difficulties. Genocide is considered to be a ‘peremptory norm’ or
 265 ‘*jus cogens*’, which is a fundamental legal obligation owed by States to all others
 266 (*erga omnes*).⁴⁷ Gardiner asserts that *jus cogens* are rules that are ‘blindingly obvi-
 267 ous’ and are ‘clearly a part of international law’.⁴⁸ A good example of the nature
 268 of *jus cogens* is provided in the *Nicaragua* case,⁴⁹ which described the prohibition
 269 of the use of force expressed in Article 2, paragraph 4 of the Charter of the United
 270 Nations to be:

271 “A ‘universal norm’, a ‘universal international law’, a ‘universally recognized principle of inter-
 272 national law’, and a ‘principle of *jus cogens*’.”⁵⁰

273 Considering the moral significance of the individual when making political
 274 assessments is one of the main features of liberalism, endorsed by *Dworkin*,⁵¹
 275 *Rawls*,⁵² and *Nozick*.⁵³ This approach allows civilians to be taken seriously as moral
 276 agents worthy of respect and appears in many different guises: *Dworkin* wrote of
 277 equal respect and concern,⁵⁴ *Hart* wrote of a principle of fairness,⁵⁵ and the

⁴⁵ See *R. Lemkin, ‘American Scholar’* (1946) Vol. 15, No. 2, at pages 227–230.

⁴⁶ *R. Lemkin*, (1945) loc. cit. at f.n. 38. Even the United Nations General Assembly Resolution 96(I) of 13 December 1946 claimed that genocide ‘shocked the conscious of mankind, resulted in great losses to humanity and was contrary to moral law and to the spirit and aims of the United Nations’. See Resolution 96(I): ‘The Crime of Genocide’ available at www.un.org/documents.

⁴⁷ ‘The rights and obligations enshrined in the [genocide] convention are rights and obligations erga omnes ...’ *Bosnia and Herzegovina v Yugoslavia* [1993] ICJ Rep. 407, at para. 616. On 26 February 2007 this case was updated on <http://www.icj-cij.org>.

⁴⁸ See R.K. Gardiner, op. cit. at f.n. 11, at p. 124.

⁴⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] I.C.J. Rep. 14.

⁵⁰ *Ibid.*, at para. 190.

⁵¹ R. Dworkin, ‘Liberalism’, in *S. Hampshire* (ed.), *Public and Private Morality*, Cambridge University Press, 1978; *Taking Rights Seriously*, London, Duckworth, 1977; and *Law’s Empire*, London, Fontana, 1986.

⁵² *J. Rawls, A Theory of Justice*, Oxford University Press, 1971.

⁵³ *R. Nozick, Anarchy, State and Utopia*, Oxford, Blackwell, 1974.

⁵⁴ R. Dworkin, op. cit. f.n. 51, at pps. 180-3 and 272-8.

⁵⁵ *H.L.A. Hart, Punishment and Responsibility*, Oxford University Press, 1968, at pps. 11-13 and 21-4.

utilitarian theory believes that each person should count for one and no more than one.⁵⁶

Utilitarianism is concerned with the greatest happiness of the greatest number of people. The threat of punishment is believed to have a deterrent effect on potential offenders, and the negative effect of punishment is outweighed by the saving of pain and increased happiness amongst the secure public.⁵⁷ In direct contrast to utilitarianism, it is also thought that there is a need to inflict an unpleasant punishment upon a culpable offender for the simple reason that they ‘deserve it’. This is the classical retributivist view, typically found in the guise of the ‘desert principle’ in the work of *Kant*.⁵⁸ This school of thought dates back to the *lex talionis*: an eye for an eye, a tooth for a tooth, etc, except the retributivist view also takes into account the knowledge and capacity of the defendant to control his or her actions: the offender must be culpable, and not simply an innocent man in the wrong place at the wrong time or sacrificed for the ‘greater good’. Both deterrence theorists and retributivists believe that it is morally just to inflict punishment upon offenders. What separates the two positions is how they go about justifying the punishment.

3.3.1. *Utilitarianism, Deterrence and Genocide*

A common criticism directed towards the utilitarian approach to punishment is that individuals are treated as ‘a means to an ends’ as opposed to ‘ends in themselves’⁵⁹ and are sacrificed merely to achieve a general social goal with no consideration as to the effect of the punishment on the incapacitated individual:

“This cost/benefit approach to the justification of punishment is at the same time the theory’s greatest strength and its greatest weakness. It is the former because it is such an eminently sensible and intuitively compelling rationale. We punish in order to keep the levels of crime to a reasonable minimum. It is as simple as that. It is the latter, a great weakness, for on these terms the duty or right to punish an offender is straightforwardly contingent on how much good the punishment will do. It is easy to conjure up hypothetical cases in which deterrence theory would require punishing the innocent, excessively, punishing.”⁶⁰

What does this mean in relation to genocide? Will an innocent man be slain as an example to others? Will the perpetrator himself be punished as a warning from

⁵⁶ *J. Bentham, Introduction to the Principles of Morals and Legislation*, J. Burns and H.L.A. Hart, (eds.), London, Methuen, 1982, at pps. 11-16 and 38-41.

⁵⁷ *J. Bentham*, op. cit. f.n. 56, at pps. 70, 145, 165, 166, 186, and chapter 13 generally. These arguments match Durkheim’s idea that one function of the criminal law is to reinforce the collective moral consciousness of the society. See *E. Durkheim, The Division of Labour in Society*, 1893, Glencoe, Free Press, 1960, vol. 1, see chapter 2.

⁵⁸ See in particular the book: *I. Kant, The Philosophy of Law*, transl. W. Hastie, Edinburgh, 1887.

⁵⁹ See particularly N. Lacey, *State punishment: Political Principles and Community Values*, Routledge, 1988, at p. 29.

⁶⁰ *Barron et al., Jurisprudence and Legal Theory*, Oxford University Press, 2002, at p. 541.

309 the state? Or, will the ‘greater good’ he was trying to achieve be recognised and
 310 will he be free to go? Sprigge applies the utilitarian theory directly to a scenario
 311 of war:

312 “... it is within the bounds of possibility that a commander whose chances of victory demanded
 313 some sort of co-operation from the local people, and who had good reason to believe that
 314 without this victory the common good of humanity would suffer, finding this method of
 315 securing the population’s co-operation the only workable one, would rightly consider that it
 316 was justified. If the circumstances really were as described most people who condone war at all
 317 would probably think the act was right.”⁶¹

318 The outcome of this argument is disturbing. Most genocidal leaders indeed have
 319 a political or religious justification for their acts. Hitler believed that the extermin-
 320 ation of the Jewish population would allow the larger Arian race to flourish.
 321 Offenders could argue: “the best interests of the majority were at heart ... it was
 322 a decision taken for the good of the people.” Could the application of the utili-
 323 tarianism theory of punishment to the act of genocide effectively abolish the
 324 crime of genocide?

325 3.3.2. *Retributivism and Genocide*

326 Genocide is a crime against morality. Described as the ‘crime of crimes’ by
 327 *Kambanda*,⁶² a feeling of ‘just deserts’ usually springs to mind when one thinks of
 328 punishing genocide. Would it be appropriate to save from punishment the state
 329 leader who abused his power to kill many innocent civilians? *Kant* makes himself
 330 very clear: it is a matter of justice that the offender must be punished:

331 “... the right to pardon a criminal ... is certainly the most slippery of all the rights of the
 332 sovereign. With respect to a crime of one subject against another, he absolutely cannot exer-
 333 cise this right, for in such cases exemption from punishment constitutes the greatest injustice
 334 toward his subjects. If legal justice perishes, then it is no longer worthwhile for men to remain
 335 alive on this earth.”⁶³

336 If international criminal law was to take the retributivist view when punishing
 337 genocide, two questions would inevitably arise: 1) how is the unit of punishment
 338 to be measured; and 2) what is the justification for the punishment? Why hang
 339 or shoot an offender because he made orders to kill one million people? Why not
 340 community service, or a fine, or freedom? The challenge facing retribution is that
 341 it can be labelled as nothing more than revenge: an irrational and emotional

⁶¹ *T.L.S. Sprigge*, ‘A Utilitarian Reply to Dr. McCloskey’ 8 *Inquiry* 264-91, (1965) at pp. 274-84.

⁶² *Kambanda*, (ICTR 97-23-S), Trial Chamber I, 4 September 1998, at para. 16.

⁶³ *I. Kant*, *The Metaphysical Elements of Justice* (1965) (translated by J. Ladd) London, Collier Macmillan, taken from *Barron*, op. cit. f.n. 60, at page 564.



display of hurt feelings through the infliction of violence upon the offender. 342
 Other retributivist writers believe it is about justice and re-payment: 343

“... punishment must be related to the gravity of the wrong because it must signify nothing 344
 but the recoiling of the criminal’s own act against itself. To fix penalties according to the 345
 requirements of deterrence or correction is to degrade him to an object or tool; were a fine the 346
 penalty for murder, we would feel that murder had not been sufficiently repaid.”⁶⁴ 347

This is an interesting argument, but how are crimes against humanity ‘repaid’? 348
 Let us assume that Hitler was captured after the Second World War. Could we 349
 have simply taken all his luxuries and power away from him in order to punish 350
 him, or could we have allowed the surviving relatives of the genocide victims to 351
 kill him and each take a piece of his body to replace their missing relative in order 352
 to ‘repay’ his crime? What is the unit of measurement? 353

McCloskey was part of the retributivist revival in the 1960’s. His views on 354
 retributivism are very illustrative of some the challenges facing the desert 355
 theory: 356

“Punishment, to be justly administered, must involve care in determining whether the offend- 357
 ing person *is really a responsible agent*. The punishment must not exceed what is appropriate to 358
 the crime. A general principle of justice [is] that equals should be treated equally *and unequal’s* 359
unequally. Unequal treatment amounts to deliberate infliction of evils: suffering or death. 360
 Production of the greatest good is obviously a relevant consideration when determining *which* 361
 punishment may properly be inflicted, but the question as to which punishment is *just* is a 362
 much more basic and important consideration. The fact that we reach different conclusions 363
 about the relative gravity of different crimes constitutes no difficulty for the retributive theory. 364
 Most of us would agree that murder is a very serious crime and that shoplifting a cake of soap 365
 is a considerably lesser offence.”⁶⁵ 366

McCloskey makes some interesting - if not rather ambiguous - arguments about 367
 justice. He states that ‘unequals’ must be treated ‘unequally’ and this would lead 368
 to justice. What makes an offender ‘unequal’? Are there varying degrees of 369
 unequalness? How is this measured? Some offences present simple solutions for 370
 retributivists: a rapist could be raped, a murderer could be shot, etc. But if a murder- 371
 er kills one person and receives the ‘just’ penalty of death, what would a leader 372
 who kills many people receive? The same sentence? Would he receive an addi- 373
 tional torturing? Does this not make his punishment unequal to his crime? 374

When it comes to punishment, retributivists can not provide a clear answer to 375
 the question of measurement. Indistinctly, *McCloskey* states that if we all agree 376

⁶⁴ A. Brudner, ‘Retribution and the Death Penalty’ 30 *University of Toronto Law Journal*, 337-355, 1980, at p. 350.

⁶⁵ All emphasis my own. See *H.J. McCloskey*, ‘A Non-Utilitarian Approach to Punishment’ 8 *Inquiry* 249, 1965, at p. 263.



377 that murder is wrong, we can therefore adequately measure which punishments
 378 match other offences. In practice, we see this in our court systems today. Parking
 379 offences are met with fines, murders are met with mandatory life sentences. But
 380 judges are allowed to take into account defenses and personal circumstances.
 381 Retribution allows for no such thing. If Saddam Hussein was clinically insane
 382 and committed genocide in a cloud of confusion, would he have still been
 383 hanged?

384 McCloskey states that 'unequal treatment amounts to deliberate infliction of
 385 evils'. Why does unequal treatment automatically equate to suffering or death?
 386 What if the offence was non-violent, such as adultery? Or an offence with no
 387 victim, such as money laundering? Brudner adds a welcome theory of propor-
 388 tionality to retributivism, but he also removes the consideration of *mens rea* when
 389 punishing. This is controversial - moving away from the retributivist view of cul-
 390 pability - and may make a considerable difference to the proportion of punish-
 391 ment inflicted:

392 "The commensurability of crimes and punishments would be destroyed as soon as we added
 393 considerations of *mens rea* to the balance. The measure of punishment is properly derived not
 394 from the qualitative or quantitative aspects of the crime (as in revenge) but from its moral
 395 significance."⁶⁶

396 Brudner prefers to look at the moral significance of an offence rather than the
 397 characteristics of the defendant and the circumstances surrounding the crime.
 398 Could this be applied effectively to genocide? Would it have mattered to the
 399 Kurdish survivors whether Saddam Hussein was insane or not? Brudner's com-
 400 ments present one significant discrepancy. By removing the consideration of *mens*
 401 *rea* when deciding punishment, the elements of wickedness and culpability are
 402 also removed from consideration. These are the very elements that make an
 403 offence 'morally wrong'. Let us say that an epileptic man begins to take a seizure
 404 in the street, and kicks a small child to within an inch of her life. He has no
 405 intent. He has no wickedness. How is this man's action *morally* wrong if he did
 406 not 'act' in the relevant sense? Let us now take a man who repeatedly kicks a small
 407 child with the intention to kill that child. He carries a vicious and dangerous
 408 intent which is dangerous to society. This man is more *deserving* of punishment.
 409 It is in society's moral interests to punish a dangerous man as opposed to an epi-
 410 leptic man. Brudner's version of retributivism does not take into account the
 411 intent or the rationale behind the defendant's actions, which may, in today's legal
 412 systems, equate to a defense. The only consideration upon which to decide what
 413 would amount to a 'just' punishment appears to be the resulting harm from
 414 the victim's point of view. Could this approach illustrate more clearly the 'moral

⁶⁶ A. Brudner, op. cit. f.n. 64, at p. 350.

significance' of the offence? If we were to punish offences from the victim's point of view, the punishment could potentially be much more severe than that of an offender who had an excuse or a defense taken into account (i.e. duress). Additionally, how would such punishments be measured and applied by the court system? The punishment of genocide - from the view of a retributivist such as Brudner - would certainly be death. Although this may seem 'just' in the eyes of the surviving relatives of the victims, there is a concern when applying the retributivist theory that by putting to death the offender, without acknowledging the offender's motives or state of mind, the state is as bad as the offender himself. Is there a compromise?

3.3.3. *Combined Theories to Punish Genocide*

Whilst retributivism is more appropriate to punish genocide than utilitarianism, one cannot help but feel that retributivism is merely a revenge tactic with no logic, no rational thought, and no deterrent message. Hart famously presented a compromise theory.⁶⁷ He believed that the general aim of punishment concerned general deterrence and social protection - the cornerstones of utilitarianism. However, when considering who may be punished, he limited the options, using the retributivist principle of fairness and distribution, to the culpable offender, placing a heavy emphasis on the offender's voluntary conduct and blameworthiness.⁶⁸ This theory appears, at first glance, to fit quite well to genocide. One of the main reasons behind the Nuremberg Trials was to send a message to future generations that such atrocities should never be allowed to happen again, yet it was also satisfying to know that Auschwitz Commandant Rudolf Hoess was hanged on the grounds of Auschwitz where he had killed so many innocent people. Is it possible that the combined theory suggested by Hart could apply to the punishment of genocide? On the one hand, we would punish to deter, but on the other hand, we would limit the pursuit of the utilitarian goal by only punishing the culpable individual. But what of leaders like Adolf Hitler and Saddam Hussein, who merely gave orders to kill as opposed to shooting or gassing civilians themselves? Were they less culpable under Hart's theory than the servants who carried out the commands?

Perhaps it is best to think of punishment as a combination of deterrence and defiance when it comes to genocide. The message from the international community appears to be: "we will not tolerate such behaviour, and if it occurs, the culpable party will be called to account."

⁶⁷ *H.L.A. Hart*, op. cit. f.n. 55, at pages 5-6.

⁶⁸ This idea is similar to that of Rawls, who argued that the justification for the institution of punishment was a utilitarian one, but within the institution, individual punishments were justified on an essentially retributive basis. See *J. Rawls*, 'Two Concepts of Rules', *Philosophical Review*, vol. 64, 1955, at page 3; and *A.H. Goldman*, 'The Paradox of Punishment', *Philosophy and Public Affairs*, Vol. 9, 1979, at page 42.

449 **4. Punishing a Moral Wrong: Sanctions**

450 As a result of the mass killings in both Yugoslavia and Rwanda in the 1990's, two
 451 International Criminal Tribunals were established by the UN Security Council
 452 under Chapter 7 of the UN Charter. The Statutes of the International Tribunal
 453 for the Former Yugoslavia (ICTY)⁶⁹ and the International Tribunal for Rwanda
 454 (ICTR)⁷⁰ have both provided for the prosecution of individuals accused of geno-
 455 cide despite their limited jurisdiction. *Akayesu*⁷¹ was hailed by UN Secretary-
 456 General Kofi Annan as:

457 "A landmark decision in the history of international criminal law that brings to life for the first
 458 time the ideals of the Genocide Convention adopted over 50 years ago."⁷²

459 Two days later the decision in *Kambanda* crowned genocide as the 'crime of
 460 crimes'.⁷³ These were followed by *Kayishema and Ruzindana*⁷⁴ in the ICTR and
 461 *Jeliscic*⁷⁵ and *Krstic*⁷⁶ in the ICTY.

462 What is interesting about the punishment of genocide is that even though
 463 many States are expected to indict this 'crime of crimes', they will sanction geno-
 464 cide differently. The death penalty seems to be the natural response to a genocide
 465 conviction as it is the 'worst' and most 'final' punishment. Saddam Hussain was
 466 hanged after his trial in December 2006, and ten of the defendants sentenced to
 467 death during the Nuremberg Trials in 1949 were also hanged (considered not
 468 worthy to face a firing squad), but most genocide cases in recent times have
 469 ended in either imprisonment or appeals. In Rwanda, the death penalty was
 470 outlawed in 2007, and only then were the perpetrators of the Tutsi and Hutu

⁶⁹ 'Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991' (International Tribunal for the Former Yugoslavia - ICTY). Genocide is found at Article 4. Adopted by Security Council Resolution 827 (1993) on 25 May 1993. See Annex to the Report of the Secretary-General pursuant to s. 2 of the Security Council Resolution 808 (1993), UN doc. S/25704, 3 May 1993. Available at www.ohchr.org/english/law/.

⁷⁰ 'Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide' (ICTR). Genocide is found at Article 2. See Annex to UN Security Council Resolution (1994) 955, 8 November 1994. Available at www.ohchr.org/english/law/.

⁷¹ *Akayesu*, op. cit. at f.n. 12.

⁷² UN Information Centre (Pretoria), Statement by U.N. Secretary-General Kofi Annan on the Occasion of the Announcement of the First Judgement in a Case of Genocide by the International Criminal Tribunal For Rwanda. UN Doc. PR/10/98/UNIC, 1998.

⁷³ *Kambanda*, op. cit. at f.n. 62, at para. 16.

⁷⁴ *Kayishema and Ruzindana*, op. cit. at f.n. 19, at paras. 41-49.

⁷⁵ *Jeliscic*, op. cit. at f.n. 21, at paras. 78-83.

⁷⁶ *Krstic*, op. cit. at f.n. 18, at paras. 539-569.

genocides extradited to Rwanda for prosecution. This is interesting. The international community prefer not to allow perpetrators to be extradited to a State which uses the death penalty and torture, despite the nature of the indictment. Is the international community showing a new sense of maturity, or are they leaving behind a more retributivist view? In *Kayishema and Ruzindana* the ICTR Appeals Chamber remarked that *all* of the crimes under the ICTR Statute are serious violations of international humanitarian law capable of attracting the same sentence, and genocide - as the 'crime of crimes' - does not impact on the sentence imposed.⁷⁷ This is disappointing. *Akhavan* finds this difficult to accept, submitting that it is inappropriate to apply a 'general appreciation' to 'the pinnacle of evil'.⁷⁸ Even *Lemkin* saw the evil of genocide as an aggravating factor for punishment:

“... criminal intent to kill or destroy all the members of such a group shows premeditation and deliberation and a state of systematic criminality which is only an aggravated circumstance for punishment.”⁷⁹

In real terms, is the international community sending out a message to leaders that genocide is no longer as morally culpable as it once was? Several signatories to the 1951 Convention - namely Bahrain, Bangladesh, India, Malaysia, the Philippines, Singapore, the United States, Vietnam, Yemen, and Yugoslavia - signed with the proviso that no claim of genocide could be brought against them at the International Court of Justice without their consent. This caused considerable controversy. Perhaps the notion of *jus cogens* is not so far-reaching after all? It seems unlikely in the future that the international community will suddenly become 'tougher' on genocide; every day the horrors of the holocaust become more distant in our memory. There does not seem to be the same urgency - the same conviction - to punish this 'crime of crimes' as there used to be.

If one looks closely, criminal proceedings are still happening. Genocide is unlikely to stay out of the news in the foreseeable future, and this is evidence that the Genocide Convention is still having an impact. Radovan Karadzic is now awaiting trial for his part in the Bosnian genocide, and on July 14, 2008, prosecutors at the International Criminal Court (ICC) filed ten charges of war crimes against Sudan's President Omar al-Bashir in relation to the Sudan genocide. These developments are positive; it sends a message to the international community that individuals will still be called upon to defend their genocidal behaviour in front of a judge and jury, no matter how highly-regarded they are.

⁷⁷) Judgement, *Kayishema*, op. cit. at f.n. 19, at para. 367.

⁷⁸) *P. Akhavan*, (2005) op. cit. f.n. 13, at page 6.

⁷⁹) *R. Lemkin*, (1946) loc. cit. at f.n. 45.

506 **5. Conclusion**

507 In 1996, *Gregory Stanton*, the president of Genocide Watch,⁸⁰ presented a briefing
508 paper called ‘The 8 Stages of Genocide’ to the United States Department of State.
509 In it, he identified eight stages of behaviour characteristic of leaders who set out
510 to exterminate a group of people. 1) Classification: people are divided into ‘us
511 and them’; 2) Symbolization: symbols can be combined with hatred and forced
512 upon a group i.e. hate speech; 3) Dehumanisation: one group denies the human-
513 ity of the other group and members of it are equated with animals and vermin;
514 4) Organisation: special units of armies or militia are trained and armed;
515 5) Polarisation: hate groups broadcast polarising propaganda; 6) Preparation: vic-
516 tims are identified and separated out because of their ethnic or religious identity;
517 7) Extermination: it is ‘extermination’ to the killers because they do not believe
518 their victims to be human; 8) Denial: the perpetrators deny they committed any
519 crime. Can it be argued that genocide may only be identifiable when the physical
520 effects of the crime (i.e. missing groups of people) begin to show? There have been
521 times, particularly as a result of the creation of the ICTY and the ICTR, where
522 the response to genocide has been re-active rather than pro-active. By the time
523 targeted ethnic or religious groups are separated, or broadcasts appear from hate-
524 groups, or armies are trained and equipped, the intent to commit genocide on the
525 part of the perpetrator has probably been rooted, manifesting, and practiced in
526 private for some time. In May 2008, President Robert Mugabe was faced with
527 worldwide criticism when it emerged that the members of his Zanu-PF party
528 tortured and killed civilians because they wanted to bring to an end their eco-
529 nomic crisis and supported the opposition party. No State took action despite the
530 strong evidence filtering out of the country through the international press.
531 Whilst Gregory Stanton’s work does ring true - victims of genocide are visibly
532 persecuted before extermination begins - the international community clearly
533 will not take action until the bitter end. Additionally, political groups are not part
534 of the 1951 Convention. Is President Robert Mugabe ‘free to go’?

535 Most people saw the trial of Saddam Hussein and his defiance against the
536 judge and the Court which tried him. Did it feel as though he was being pun-
537 ished for the deaths of many? On the face of it, he received the same treatment,
538 the same trial, and the same penalty as what the next man would have received
539 for the death of one victim. It may be difficult for retributivists, and the surviving
540 families of genocide victims, to accept that we can not offer a greater punishment
541 for the crime of genocide than we can for the killing of one man. This was reflected
542 most recently in Rwanda when the trials for the Tutsi and Hutu genocide offend-
543 ers finally began because Rwanda outlawed the death penalty. However, the

⁸⁰) www.genocidewatch.org

international community are still willing to punish the offence of genocide and 544
the culpable perpetrators behind genocidal acts, and the Courts are still sending 545
out a message that the offence will not be tolerated. The only difference today, as 546
opposed to Nuremberg sixty years ago, is that we do not want to punish the 547
offenders in the same way that the offenders punished their victims. 548

