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Political Genocide in Latin America: The Need for Reconsidering the Current Internationally Accepted Definition of Genocide in Light of Spanish and Latin American Jurisprudence

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COMMENT

POLITICAL GENOCIDE IN LATIN AMERICA: THE NEED FOR RECONSIDERING THE CURRENT INTERNATIONALLY ACCEPTED DEFINITION OF GENOCIDE IN LIGHT OF SPANISH AND LATIN AMERICAN JURISPRUDENCE

HOWARD SHNEIDER*

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INTRODUCTION

Late one night in March 1977 a dozen armed men burst into the home of Alejandra Aguiar, checked her name off a list, bashed her head against the wall, and whisked her away to a detention center.¹ Military officials later drugged Alejandra, and murdered her by hurling her drugged body from a navy plane over the Atlantic Ocean.² Alejandra was a nineteen-year-old philosophy student whom the Argentine government had labeled a political subversive, just like thousands of other Argentines who disappeared from 1976 to 1983 during military rule.³ Despite the horrific nature of such crimes, international law does not currently consider them to be acts of genocide.

When the international community drafted the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”) in 1948, it formulated the agreement in such a way that it only included four protected groups: “national, ethnical, racial or religious.”⁴ Since the Genocide Convention came into effect the world has borne witness to terrible atrocities—such as those described above in Argentina—that legally do not fit the definition of genocide.⁵ The events in Argentina do not fit in the definition of

1. Ian Black, *Thirty Years On Argentina Still Tries to Come to Terms with its “Dirty War”: Anniversary of Military Coup Proves Fresh Source of Pain for Relatives of the “Disappeared”*, THE GUARDIAN (London), Mar. 22, 2006, Int’l News §, at 23, available at <http://www.guardian.co.uk/world/2006/mar/22/argentina.ianblack>.

2. *Id.*

3. *Id.*

4. Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. See William A. Schabas, *Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia*, 25 FORDHAM INT’L L.J. 23, 36 (2001) (describing this limitation of four protected groups as “one of the most controversial aspects of the definition of genocide”).

5. See, e.g., Hurst Hannum, *International Law and Cambodian Genocide: The Sounds of Silence*, 11 HUM. RTS. Q. 82 (1989), as reprinted in JORDAN J. PAUST ET AL., HUMAN RIGHTS MODULE: ON CRIMES AGAINST HUMANITY, GENOCIDE,

genocide because political groups—like those targeted in Argentina—are specifically excluded under the Genocide Convention.⁶

Most international law supports the current definition of genocide and excludes political groups.⁷ Legal actions involving Spain, Argentina, and Guatemala, however, interpreted the definition of genocide differently. This Comment argues that the courts in these cases utilize questionable legal reasoning in light of prevailing international legal standards, illustrating a frustration with current accepted standards. It goes on to recommend that rather than allow courts to struggle with the current restrictive definition of genocide, the international community should expand the definition to include political groups.

Part I of this Comment describes the creation of the Genocide Convention, and subsequent international case law that attempts to clarify the definition of genocide. Next, Part I gives a brief history of the Dirty War in Argentina and the civil war in Guatemala which serve as the factual backdrop for the legal actions that will be the focus of this piece. Part II introduces and analyzes cases dealing with Argentine and Guatemalan officials accused of genocide. This Comment asserts that although the Spanish and Argentine cases do not coincide with current international standards, they illustrate distinct problems with the definition of genocide as it currently stands. Finally, this Comment suggests some ways to change the currently accepted definition in order to remedy these problems.

I. BACKGROUND

To appreciate the current international understanding of the groups the Genocide Convention protects, one must first appreciate the

OTHER CRIMES AGAINST HUMAN RIGHTS, AND WAR CRIMES 89–92 (2d ed. 2006) (discussing the targeting of political opponents that took place under the Khmer Rouge in Cambodia, and arguing that such acts constitute genocide).

6. See Schabas, *supra* note 4, at 36 (pointing out that various critics have found fault with the Genocide Convention because of its failure to protect political groups).

7. See generally HUMAN RIGHTS MODULE, *supra* note 5, at 73–112 (excerpting various decisions from international tribunals which discuss the definition of genocide).

Convention's history and subsequent interpretations.⁸ A review of the development of the concept of genocide shows that the current international understanding of the term does not envisage the protection of political groups.

A. THE HISTORY OF THE GENOCIDE CONVENTION AND ITS
IMPLICATIONS REGARDING THE INCLUSION OF POLITICAL GROUPS
IN THE DEFINITION OF GENOCIDE

The drafters of the Genocide Convention approved the agreement on December 9, 1948.⁹ The Convention lays out the definition of the crime of genocide in Article 2.¹⁰ The key clause lists “national, ethnical, racial or religious group, as such” as those which the Convention protects.¹¹ The first step a court must therefore take in deciding whether genocide occurred is to determine whether a particular actor intended to eliminate one of the four enumerated groups.¹² If the targeted group does not fit into one of these protected groups, the court must then conclude that genocide did not occur.¹³

8. See generally WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* (2000) (analyzing the definition of genocide by looking at the history of the Genocide Convention and the debates that took place during the drafting of the Convention).

9. See David Lisson, *Defining “National Group” in the Genocide Convention: A Case Study of Timor-Leste*, 60 STAN. L. REV. 1459, 1462 (2008) (indicating that it took over two years after the signing of the Genocide Convention for it to enter into force on January 12, 1951).

10. See *id.* (noting that although Article 1 classifies genocide as a crime under international law, the fact that Article 2 defines the crime makes that article truly important).

11. See Genocide Convention, *supra* note 4, art. 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 . . .”).

12. See JOHN QUIGLEY, *THE GENOCIDE CONVENTION: AN INTERNATIONAL LAW ANALYSIS* 146 (2006) (clarifying that a prosecutor needs to identify a protected group in order to go forward with a criminal prosecution of genocide); Lisson, *supra* note 9, at 1460 (elaborating that the threshold issue in genocide litigation is whether the targeted group constitutes one of the categories that the Genocide Convention protects).

13. See, e.g., *Legality of Use of Force (Yugo. v. Belg.)*, Order, 1999 I.C.J. 124, 138 (June 2) (holding that the North Atlantic Treaty Organization’s (“NATO”) bombing of Yugoslavia was not genocide because NATO did not target a protected group).

These protected groups are fraught with ambiguity that makes their meanings elusive.¹⁴

The history of the Genocide Convention helps shed some light on the meaning behind the listed protected groups. The United Nations General Assembly's Resolution 96(I), a precursor to the Convention, analogizes genocide to the domestic law crime of homicide.¹⁵ Just as the key element of homicide is the taking of another human being's life, regardless of who that human being is, the Resolution argued that the key element of genocide is the taking of a human group's life, regardless of the characteristics that bind the group.¹⁶ As such, the identity of the victim group is not significant in concluding whether genocide occurred under this definition.¹⁷

Resolution 96(I) goes on to list certain groups against whom criminal actors committed genocide in the past.¹⁸ The list includes both political groups and "other" groups, the latter of which could conceivably be a catchall term for various types of groups.¹⁹

14. See *id.* at 146 (claiming that the identification of protected groups has turned out to be an issue of great controversy in international criminal trials).

15. See G.A. Res. 96(I), at 188-89, U.N. Doc. A/64/Add.1 (Dec. 11, 1946) (explaining that the difference between homicide and genocide is that homicide takes place on an individual level while genocide takes place on a group level).

16. See JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 248-59 (4th ed. 2007) (laying out the elements of first degree murder, and emphasizing that the intent element requires only the intent to kill any human being).

17. Eduardo Rodolfo Freiler, *Consideraciones Acerca del Delito de Genocidio, Según Algunos Proyectos Legislativos Tendientes a su Incorporación al Código Penal Argentino* [Considerations Regarding the Crime of Genocide, According to Some Legislative Projects Attempting to Incorporate the Crime into the Argentine Penal Code], in APORTES JURIDICUOS PARA EL ANALISIS Y JUZGAMIENTO DEL GENOCIDIO EN ARGENTINA [A LEGAL APPROACH TO THE ANALYSIS AND JUDGMENT OF GENOCIDE IN ARGENTINA] 33, 41 (Eduardo Rezsés ed., 2007) (quoting Daniel Feierstein and claiming that the analogy between homicide and genocide in Resolution 96(I) implies that the groups listed later in the Genocide Convention's definition are merely examples, and are not meant to be restrictive).

18. See G.A. Res. 96(I), *supra* note 15, at 189 ("Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.").

19. Compare Freiler, *supra* note 17, at 41 (arguing that the term "other" strongly supports the notion that the identity of the victim group is not a vital issue in determining whether genocide occurred), with SCHABAS, *supra* note 8, at 148 (asserting that the debates surrounding Resolution 96(I) do not signal in any way that one should interpret the term "other groups" liberally to include any group).

Considering the implications of the comparison between homicide and genocide, and the inclusion of political and other groups, this earlier definition of genocide is rather expansive.²⁰

The Genocide Convention reined in the more open-ended definition of genocide that Resolution 96(I) endorsed.²¹ The travaux préparatoires of the Genocide Convention show that there was debate on a number of issues when deciding on the definition of genocide.²² The framers of the Convention struggled with conflicting desires and goals when drafting the document.²³ The result was a series of compromises.

Perhaps the most notable exclusion from the Convention was that of political groups as one of the protected groups.²⁴ The countries that opposed the inclusion of political groups claimed that political groups were not stable enough to warrant the Convention's protection because affiliation with such groups was voluntary and subject to change.²⁵ Some delegates argued that political groups

20. See Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later*, 8 TEMP. INT'L & COMP. L.J. 1, 27 (1994) (explaining that the U.N. Secretary General viewed the definition of genocide in Resolution 96(I) in this expansive light, as manifested by the fact that he used the Resolution as the basis for the broad definition of genocide in his Comment on the Draft Convention on the Crime of Genocide).

21. See Beth Van Schaack, Note, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L.J. 2259, 2264 (1997) (characterizing the Genocide Convention's definition as significantly different from the definition included in Resolution 96(I)).

22. See generally SCHABAS, *supra* note 8 (detailing the different debates involved in the drafting of the Genocide Convention in order to supplement our current understanding of the crime).

23. See Developments in the Law: International Criminal Law, *Defining Protected Groups Under the Genocide Convention*, 114 HARV. L. REV. 1943, 2010–11 (2001) [hereinafter *Defining Protected Groups*] (indicating that the drafters wanted to punish the specific acts of the Nazis, but also hoped to establish a definition that was flexible enough to cover potential future genocidal acts that might differ from the specific techniques the Nazis employed).

24. See SCHABAS, *supra* note 8, at 140 (noting that since 1948 various commentators have unrelentingly criticized the lack of political groups in the Genocide Convention's definition).

25. See STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 33–35 (2d ed. 2001) (contrasting political groups with the more stable groups which the drafters ultimately decided to include in the Genocide Convention).

would encompass too imprecise a concept, and thus cause too many problems.²⁶ The drafters of the Convention ultimately left out political groups not due to the logical force of such claims, but rather as a political compromise to placate countries such as the Soviet Union.²⁷ This explicit exclusion of political groups is persuasive evidence that, though the founders contemplated the inclusion of political groups, they did not intend the Convention to protect such groups.²⁸

Since the Convention's entrance into force important international agreements have used the Convention's definition of genocide verbatim.²⁹ The statutes that formed both the International Criminal Tribunal for the former Yugoslavia ("ICTY")³⁰ and the International Criminal Tribunal for Rwanda ("ICTR")³¹ utilize the exact same definition of genocide as the Genocide Convention.³² The Rome Statute of the International Criminal Court also incorporated an identical definition.³³ By choosing to use the Convention's precise

26. See *Defining Protected Groups*, *supra* note 23, at 2011 (referencing the Soviet delegate's rationale that if political groups were included there would be risk that the Genocide Convention would encompass political crimes of all sorts (quoting ALAIN DESTEXHE, *RWANDA AND GENOCIDE IN THE TWENTIETH CENTURY* 5 (Alison Marschner trans., 1995))).

27. See *id.* (observing that many governments could have been threatened by charges of genocide if political groups were included in the crime's definition (quoting Diane F. Orentlicher, *Genocide*, in *CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW* 154 (Roy Gutman & David Rieff eds., 1999))); see also SCHABAS, *supra* note 8, at 133 (emphasizing that the decision to leave out political groups from the Genocide Convention was primarily motivated by an effort to convince a minority of states to sign on to the agreement).

28. See William A. Schabas, *Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda*, 6 ILSA J. INT'L & COMP. L. 375, 377 (2000) (contending that there is "no doubt" that the drafters intended the four enumerated groups in the Genocide Convention to be an exhaustive list).

29. See SCHABAS, *supra* note 8, at 142 (indicating that most states that have codified the crime of genocide also utilize the Genocide Convention's definition verbatim).

30. Statute of the International Tribunal art. 4, May 25, 1993, 32 I.L.M. 1192.

31. Statute of the International Tribunal for Rwanda art. 2, Nov. 8, 1994, 33 I.L.M. 1602.

32. JEFFREY DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 652–53 (2d ed. 2006) (explaining that the international community established the ICTR and ICTY to bring justice to those responsible for gross human rights violations in Rwanda and the former Yugoslavia).

33. Rome Statute of the International Criminal Court art. 6, July 17, 1998, 2187

definition in these agreements, the international community has demonstrated an implicit desire to exclude political groups from protection.³⁴

B. CASE LAW INTERPRETING THE GENOCIDE CONVENTION
ESTABLISHES THAT PROTECTED GROUPS MUST HAVE STABLE
CHARACTERISTICS

Before the establishment of the ICTR and ICTY, some advocates made an effort to interpret the definition of genocide in a different context.³⁵ Human rights activists David Hawk and Hurst Hannum prepared a draft memorial for the International Court of Justice ("ICJ") accusing Pol Pot's Khmer Rouge regime of committing genocide against the Cambodian people.³⁶ In their brief, Hannum and Hawk argued that the protected group was the national group of all Khmer people.³⁷ They further claimed that Pol Pot's regime intended to destroy the part of that national group that did not conform to the regime's political ideology.³⁸ The brief concluded that Pol Pot's regime was therefore guilty of genocide against a national group.

Hannum and Hawk's interpretation has not prevailed in the ICTY and ICTR. Since their establishment, the ICTR and ICTY have interpreted the definition of genocide on multiple occasions and have

U.N.T.S. 93 (July 1, 2002) [hereinafter Rome Statute].

34. See SCHABAS, *supra* note 8, at 143–44 (referencing meetings of various international bodies within the past fifteen years where the participants discussed the definition of genocide, but did not engage in serious debate regarding whether to add political groups to the definition); Lissou, *supra* note 9, at 1463 (acknowledging that the inclusion of the Genocide Convention's definition in recent international instruments makes it hard to argue that customary international law now protects additional groups not included in the Convention's definition).

35. See HUMAN RIGHTS MODULE, *supra* note 5, at 89 (arguing that the Khmer Rouge committed genocide in Cambodia, even though critics sharply contested such a conclusion).

36. See DUNOFF ET AL., *supra* note 32, at 610–11, 617–19 (describing the atrocities that the Khmer Rouge committed and the efforts of Hawk and Hannum to persuade countries to bring a claim against the Khmer Rouge in the ICJ).

37. See Hurst Hannum & David Hawk, The Case Against the Standing Committee of the Communist Party of Kampuchea, Draft I.C.J. Memorial, 133–50 (1986), *as reprinted in* DUNOFF ET AL., *supra* note 32, at 617–19 (describing how the Khmer people are a national group because they share a distinct language and history, among other attributes).

38. See *id.* (claiming that the Khmer Rouge intended to eliminate all those who did not conform to the State's conceptions of social and ideological purity).

held that one cannot read the Genocide Convention to protect political groups.³⁹ A key conclusion these courts have reached is that for the Genocide Convention to protect a particular group, the characteristic which defines the group must be stable and unchanging.⁴⁰

One such decision in which the ICTR reached this conclusion was *Prosecutor v. Akayesu*.⁴¹ In that case the court conceded that protected groups aside from the four listed in the Genocide Convention may exist.⁴² The court focused on the similarities between the four listed groups, and held that a protected group must be “stable and permanent” to warrant the Genocide Convention’s protection.⁴³ *Akayesu* is also important because the court defined national group as “a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.”⁴⁴ This definition of national group has persevered, and the ICTR and ICTY have not significantly developed the concept any further.⁴⁵

39. See Lisson, *supra* note 9, at 1465 (explaining that ICTR cases have held that the Genocide Convention protects only stable and permanent groups, thus excluding political, economic, and other unstable groups). The ICTY has also limited the Convention’s protections to stable groups having immutable characteristics. *Id.*; see also HUMAN RIGHTS MODULE, *supra* note 5, at 76–86, 106–112 (excerpting and discussing the importance of various ICTY and ICTR cases which interpret the definition of genocide); Lisson, *supra* note 9, at 1465–67 (discussing the ICTY’s narrow interpretation of genocide).

40. See QUIGLEY, *supra* note 12, at 147 (explaining that many commentators viewed this interpretation as a major innovation).

41. Case No. ICTR-96-4-T, Trial Judgment (Sept. 2, 1998), *aff’d*, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Appeals Judgment (June 1, 2001); see also Lisson, *supra* note 9, at 1464 (pointing out that *Akayesu* was the ICTR’s first genocide conviction).

42. See *Akayesu*, Case No. ICTR-96-4-T, ¶ 516 (arguing that the four listed groups were not meant to be restrictive, but rather they indicate the types of groups that the Genocide Convention was meant to protect).

43. *Id.* ¶¶ 511, 516 (explaining that group members will often acquire such characteristics automatically at birth, and will not be able to alter them).

44. *Id.* ¶ 512; see also, U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, ¶ 61, U.N. Doc. E/CN.4/Sub.2/416 (July 4, 1978) (prepared by Nicodeme Ruhashyankiko) (explaining that individuals in the same national group share a specific language, culture, and way of life indicative of a particular nation).

45. See Lisson, *supra* note 9, at 1467.

Two cases decided a year after *Akayesu* also held that the Genocide Convention does not protect political groups. The ICTR in *Prosecutor v. Rutaganda*⁴⁶ and the ICTY in *Prosecutor v. Jelusic*⁴⁷ both concluded that the Genocide Convention only protects stable and permanent groups.⁴⁸

Jelusic is also important for the court's discussion of whether a protected group must objectively exist, or if it is enough if the group subjectively exists in the mind of the perpetrator.⁴⁹ The court adopted a purely subjective approach, holding that courts should judge the existence of a national or ethnic group from the perspective of the criminal actors.⁵⁰ Thus, even if a national group does not exist in objective reality, if the group exists in the mind of the perpetrator, the Genocide Convention will still protect that group.⁵¹ Various cases from the ICTR adopt some form of this subjective approach.⁵²

46. Case No. ICTR-96-3-T, Trial Judgment (Dec. 6, 1999), *aff'd*, *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Appeals Judgment (May 26, 2003).

47. Case No. ICTY-95-10-T, Trial Judgment (Dec. 14, 1999), *aff'd*, *Prosecutor v. Jelusic*, Case No. ICTY-95-10-A, Appeals Judgment (July 5, 2001).

48. *See id.* ¶ 69 (explaining that the drafters of the Genocide Convention meant to protect groups whose members had no choice about whether they should be a part of the group or not); *Rutaganda*, Case No. ICTR-96-3-T, ¶ 57 (concluding that the drafters of the Genocide Convention excluded political and economic groups because they are mobile groups that one may join through individual commitment).

49. *See Schabas, supra* note 4, at 38-39 (citing *Jelusic* as illustrative of the ICTY's approach to determining the existence of a protected group).

50. *See Jelusic*, Case No. ICTY-95-10-T, ¶ 70 (reasoning that the subjective approach is preferable because it is those who differentiate the targeted group from other members of the community that define the victim group).

51. *See Lisson, supra* note 9, at 1466 (positing that this approach is necessary to protect various victim groups because collective identities are not based solely on objective facts, but rather emanate from social constructs as well).

52. *See Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Trial Judgment, ¶ 811 (Dec. 1, 2003), *aff'd*, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, Appeals Judgment (May 23, 2005) (emphasizing that courts must look to objective and subjective criteria in determining the existence of a protected group); *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Judgment, ¶ 317 (May 15, 2003), *aff'd*, *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Appeals Judgment (May 20, 2005) (holding that to determine whether a particular group constitutes a protected group, the court should look to the objective traits of the "social or historical context," along with the perpetrator's subjective view regarding the targeted group's existence); *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, ¶ 98 (May 21, 1999), *aff'd*, *Prosecutor v. Kayishema*, Case No. ICTR-95-1-A, Appeals Judgment (June 1, 2001) (explaining that courts can define an ethnic group by an objectively shared language and culture, by the fact the

Another relevant case from the ICTY is *Prosecutor v. Krstic*.⁵³ *Krstic* partially clarifies what the Genocide Convention means when it defines genocide as the destruction of one of the four protected groups in whole or in part. The ICTY held that Bosnian Muslims who lived in Srebrenica formed a part of the protected national group of all Bosnian Muslims in the country.⁵⁴ *Krstic* stands for the proposition that to destroy a group in part, the criminal actors must attempt to destroy that part of a group precisely because it belongs to a larger targeted group.⁵⁵ One such instance is the attempted destruction of the targeted group's population in a particular geographical location.⁵⁶

C. HISTORY OF THE CONFLICTS IN ARGENTINA AND GUATEMALA

The cases to be examined find their grounding in the acts the governments of Argentina and Guatemala perpetrated in the 1970s and 80s.⁵⁷ To truly understand these cases, one must first understand the historical context that made the crimes possible.

1. Argentina's Dirty War

From 1976 to 1983, Argentina lived under a military junta that actively worked to eliminate its so-called enemies.⁵⁸ Many often

group itself subjectively believes that it is a unique ethnic group, or by the fact that the perpetrators of the crime subjectively identify the group as a distinct ethnic group).

53. Case No. IT-98-33-T, Trial Judgment, ¶ 561 (Aug. 2, 2001), *aff'd*, *Prosecutor v. Krstic*, Case No. IT-98-33-A, Appeals Judgment (Apr. 19, 2004).

54. *See id.* ¶ 559 (concluding that one cannot consider the Bosnian Muslims of Srebrenica an entire national group of its own, but rather the national group consists of all Bosnian Muslims).

55. *See id.* ¶¶ 559-60 (stressing that the Bosnian Muslims of Srebrenica constituted a protected group not because of their geographical location, but rather because they were Bosnian Muslims).

56. *See* HUMAN RIGHTS MODULE, *supra* note 5, at 74 (arguing that a group in part may also include such sectors as the "intellectual elite or women who are targeted because they are members of a relevant group").

57. *See* Anne J. Barry, *Argentina: The Dirty War, the Disappeared, the Mothers and the Grandmothers*, http://lacc.fiu.edu/events_outreach/fulbright/project_08.pdf (last visited Jan. 7, 2010) (characterizing the period of the military junta in Argentina as a horrific phase in that country's history).

58. *See* Tribunal Oral Federal de La Plata [Juzg. Fed.] [Federal Court of la Plata], 19/9/2006, "El Estado v. Etchecolatz, Miguel/juzgado penal," [State v. Etchecolatz/criminal case] (Arg.), *aff'd* by Cámara Nacional de Casacion Penal

refer to this period as the Dirty War.⁵⁹ It resulted in the disappearance of an estimated 10,000 to 30,000 people.⁶⁰

After the Dirty War ended in 1983, newly elected President Raul Alfonsín helped facilitate the prosecution of the junta leaders.⁶¹ In *Causa 13/84*⁶² [Suit 13], the Cámara Federal [Federal District Court] of Buenos Aires convicted various junta leaders.⁶³ Soon after the decision, however, fear of a military rebellion led to amnesty laws and pardons which left almost all military leaders immune from prosecution.⁶⁴ At the insistence of human rights activists, Argentina's Congress annulled the amnesty laws in 2003, which allowed prosecutors to reopen their cases against Dirty War participants.⁶⁵

[C.N.C.P.] [Criminal Court of Appeals], 18/5/2007, "Etchecolatz, Miguel Osvaldo/recursos de casación e inconstitucionalidad," [Etchecolatz, Miguel Osvaldo/appeal challenging constitutionality] (Arg.), and Corte Suprema de Justicia [CSJN] [Supreme Court of Justice], 17/2/2009, "Etchecolatz, Miguel Osvaldo/recurso extraordinario," [Etchecolatz, Miguel Osvaldo/Supreme Court appeal] (Arg.), available at <http://www.derechos.org/nizkor/arg/ley/etche.html> (explaining that enemies were those whose political ideologies were incompatible with the military junta's sociopolitical ideologies).

59. See generally IAIN GUEST, *BEHIND THE DISAPPEARANCES: ARGENTINA'S DIRTY WAR AGAINST HUMAN RIGHTS AND THE UNITED NATIONS* (1990) (detailing personal stories of victims of the Dirty War).

60. See Rebecca Lichtenfeld, Case Study Series, *Accountability in Argentina: 20 Years Later, Transitional Justice Maintains Momentum*, INT'L CTR. FOR TRANSITIONAL JUSTICE 1 (Aug. 2005), available at <http://www.ictj.org/images/content/5/2/525.pdf>; Barry, *supra* note 57 (explaining that the Dirty War also involved the forced transfer of detainees' children to military families actively involved in the junta's regime).

61. See Lichtenfeld, *supra* note 60, at 2 (detailing how President Alfonsín pushed the Congress to pass a law which set up military courts to try the junta's key leaders).

62. Cámara Federal de Buenos Aires [CFed.] [Federal District Court of Buenos Aires], 9/12/1985, "Causa 13/84/juzgado penal" [suit 13/84/criminal case] (Arg.), available at <http://www.derechos.org/nizkor/arg/causa13/fallo.html>.

63. See *id.* at para. 10 (sentencing the former leader of the Army, Jorge Rafael Videla, to "reclusión perpetua" (indefinite penalty of 40 years in prison) and the former head of the Navy, Eduardo Massera, to life imprisonment).

64. See Lichtenfeld, *supra* note 60, at 3 (explaining that the full stop law of 1986 established a sixty-day deadline to begin new prosecutions against those responsible for the Dirty War and that the law of due obedience of 1987 gave immunity to all army personnel with the rank of colonel or lower based on the theory that they were following orders); *id.* (recounting that in 1989 President Carlos Menem issued two general pardons for military officers still facing trial and for some officers who the State had previously convicted).

65. See Christian Tomuschat, *Issues of Universal Jurisdiction in the Scilingo*

2. Guatemala's Civil War

From 1960 to 1996, Guatemala was the scene of a civil war targeting the Mayan indigenous population.⁶⁶ State actors killed approximately 200,000 people and another 40,000 were the victims of forced disappearances.⁶⁷ Most of the victims were part of the Mayan indigenous population and were targeted because state officials believed the Mayans served as the support base for an anti-military guerilla movement.⁶⁸

II. ANALYSIS

Three key cases evolved from the aforementioned conflicts in Argentina and Guatemala. Specifically, prosecutors and/or third parties accused defendants from Argentina of genocide in the *Scilingo*⁶⁹ and *Etchecolatz*⁷⁰ cases, and Rigoberta Menchú filed a complaint accusing Guatemalan officials of genocide.⁷¹ Despite the

Case, 3 J. INT'L CRIM. JUST. 1074, 1075 (2005) (noting that in 2005 the Argentine Supreme Court held that the due obedience and full stop laws were unconstitutional, which removed any doubts about the constitutionality of Congress's annulment of the laws in 2003).

66. See Naomi Roht-Arriaza, *Making the State do Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Armed Conflict Guatemala*, 9 CHI. J. INT'L L. 79, 83 (2008) (emphasizing that the State killed and abducted the majority of its victims at the end of the 1970s and the beginning of the 1980s).

67. See *id.* (citing these statistics from a report of the United Nation's Commission on Historical Clarification ("CEH")).

68. See *id.* (pointing out that according to the CEH, the Guatemalan military was responsible for over ninety percent of the deaths in Guatemala's civil war).

69. SAN [Spanish National Appellate Court], Sala de lo Penal [Criminal Chamber], Nov. 4, 1998 (No. 84/98) "Caso Scilingo" [Scilingo Case], *available at* <http://www.derechos.org/nizkor/arg/espana/audi.html>.

70. Tribunal Oral Federal de La Plata [Juzg. Fed.] [Federal Court of la Plata], 19/9/2006, "El Estado v. Etchecolatz, Miguel/juzgado penal," [State v. Etchecolatz/criminal case] (Arg.), *aff'd* by Cámara Nacional de Casación Penal [C.N.C.P.] [Criminal Court of Appeals], 18/5/2007, "Etchecolatz, Miguel Osvaldo/recursos de casación e inconstitucionalidad," [Etchecolatz, Miguel Osvaldo/appeal challenging constitutionality] (Arg.), *and* Corte Suprema de Justicia [CSJN] [Supreme Court of Justice], 17/2/2009, "Etchecolatz, Miguel Osvaldo/recurso extraordinario," [Etchecolatz, Miguel Osvaldo/Supreme Court appeal] (Arg.), *available at* <http://www.derechos.org/nizkor/arg/ley/etche.html>.

71. Querella de Rigoberta Menchú Tum al Juzgado Central de Instrucción de Guardia de la Audiencia Nacional [Rigoberta Menchú Tum's Complaint filed in the National Appellate Court], S. Audiencia Nacional [Spanish National Appellate

fact that the drafters of the Genocide Convention specifically left out political groups, the courts in the cases with Argentine defendants, and Menchú in her complaint, found a way to interpret the Convention as including the types of atrocities at issue.

Though novel and creative, the arguments in the *Scilingo* and *Etchecolatz* cases, and Menchú's complaint, have weak legal analyses. Their claims go against the brunt of international jurisprudence, and are thus suspect. These cases do illustrate, however, a frustration with the currently accepted definition of genocide.

A. THE SPANISH AUDIENCIA NACIONAL HELD IN *SCILINGO* THAT GENOCIDE OCCURRED IN ARGENTINA BECAUSE OF THE GOVERNMENT'S EFFORTS TO DESTROY A NATIONAL GROUP

Of the two cases involving Argentine defendants, the Audiencia Nacional⁷² (the "Audiencia") in Spain decided one of them in 1998.⁷³ The *Scilingo* case involved Adolfo Scilingo, a former Argentine naval officer charged with committing crimes against humanity and genocide.⁷⁴ Although the Audiencia did not ultimately find Scilingo guilty of genocide,⁷⁵ the court held in an interlocutory order that

Court], Dec. 2, 1999 (No. 331/99), *available at* <http://blogderechopenal.blogspot.com/> [hereinafter Menchú's Complaint].

72. RICHARD J. WILSON, *PROSECUTING PINOCHET IN SPAIN*, 6 HUM. RTS. BR. 3, 3 (1999) (describing the Audiencia Nacional as a special court in Madrid with the power to prosecute cases involving serious crimes such as international terrorism and drug trafficking).

73. *See id.* (explaining how through a process known as popular action the complainants were able to bring a complaint against an Argentine citizen for crimes committed against Spanish citizens living in Argentina at the time of the alleged acts).

74. *Scilingo*, (No. 84/98) at "ANTECEDENTES DE HECHO: SEGUNDO"; *see* Julia K. Boyle, Note, *The International Obligation to Prosecute Human Rights Violators: Spain's Jurisdiction over Argentine Dirty War Participants*, 22 HASTINGS INT'L & COMP. L. REV. 187, 191 (1998) (describing Scilingo's participation in the murder of supposed dissidents by throwing them, drugged and unconscious, into the Atlantic Ocean from airplanes above).

75. *See* STS [Spanish Supreme Court], Sala de lo Penal [Criminal Chamber], Oct. 1, 2007 (No. 798/2007), *available at* <http://www.derechos.org/nizkor/espana/juicioral/doc/sentenciats.html> (affirming the lower court's decision that Scilingo was guilty of crimes against humanity, but not genocide).

genocide did take place in Argentina.⁷⁶ The court reached this conclusion based on its interpretation of the term “national group” from the Genocide Convention.⁷⁷ The court’s argument was that “national group” should include groups within a particular nation targeted because of certain characteristics peculiar to that group.⁷⁸ In the case of Argentina, the national group consisted of those in Argentina whom the State considered contrary to its goals.⁷⁹

The court justified its interpretation of national group by invoking the spirit of the Genocide Convention.⁸⁰ The court concluded that one cannot construe the category of national group narrowly to mean a “group formed by people who belong to the same nation,” but rather must interpret the term to mean simply “a national human group, a distinct human group, characterized by something, integrated into a larger community.”⁸¹ Thus, even though the individuals targeted were not all Argentines in the sense that they were Argentine citizens, they all belonged to a human nation residing within the borders of Argentina, and the State singled them out because it believed they were contrary to the Government’s goals.⁸² Because the State targeted this group—which the court considered a national group—the Audiencia held that genocide did occur in Argentina.⁸³

76. See Wilson, *supra* note 72, at 3 (summarizing the procedural steps in the case that led public prosecutor Eduardo Fungairiño to challenge Magistrate Judge Baltazar Garzón’s jurisdiction to proceed with *Scilingo* and a parallel Chilean case, which ultimately led to the Audiencia’s interlocutory order).

77. See *Scilingo*, (No. 84/98) at “FUNDAMENTOS DE DERECHO: QUINTO” (explaining that although the Spanish Penal Code includes the crime of genocide, the court was interpreting the Genocide Convention’s definition because one must interpret Spain’s codification of the crime in light of the Genocide Convention).

78. See *id.* (listing AIDS patients, the elderly, and foreigners living within a country as examples of such a national group).

79. See *id.* (emphasizing that the targeted group included not only those opposed to the regime, but also those indifferent to the regime that the Government nonetheless perceived as a threat).

80. See *id.* (highlighting the strong obligation that the parties to the Genocide Convention felt to ensure that future perpetrators of genocide were not allowed to go unpunished).

81. *Id.* (Howard Shneider trans.).

82. See *id.* (pointing out that the military junta killed Spaniards and other foreigners in addition to Argentine citizens).

83. See *id.* (reiterating that any other reading of national group would go against the spirit of the Genocide Convention).

B. THE AUDIENCIA'S INTERPRETATION OF GENOCIDE IN *SCILINGO*
CONTRADICTS THE ICTR'S HOLDING IN *AKAYESU*

Although a new and interesting interpretation, the *Scilingo* decision presents various problems.⁸⁴ The first issue is that despite the court's efforts to avoid the classification of political group, its arguments that the State targeted the victim group in Argentina for reasons aside from its political ideology are not convincing.⁸⁵ Although it is true that the regime imputed political opinions to some of its victims, the State still targeted the victims for what it perceived to be their political leanings.⁸⁶ Thus, it seems disingenuous to avoid the most obvious issue at play: that the targeted group was a political group, and that if the Genocide Convention does not protect political groups, one should not consider the crimes of the Dirty War to be genocide.⁸⁷

1. The Group the Court Identifies in Scilingo Is not Stable and Permanent

When the Spanish courts decided *Scilingo*, the only relevant genocide case that the ICTY or ICTR had decided was *Akayesu*. The ICTR held that perhaps there were protected groups aside from the four groups the Convention listed. However, those protected groups must be stable and permanent. No matter how the Audiencia

84. See QUIGLEY, *supra* note 12, at 187-88 (observing that *Scilingo* drew much criticism for its interpretation of genocide).

85. See, e.g., Brief of the Allard K. Lowenstein International Human Rights Clinic at Yale Law School as Amicus Curiae Supporting Complainants, STS [Spanish Supreme Court], Sala de lo Penal [Criminal Chamber], Oct. 1, 2007 (No. 798/2007), available at <http://www.derechos.org/nizkor/espana/juicioral/doc/yaleamicus1.html#racial> [hereinafter Amicus Brief] (referencing a 1976 secret order of the armed forces to detain "political dissidents" after the military coup was successful).

86. See *id.* (explaining that the junta's plan involved the elimination of all those who were against the idea of a military-run nation, and those who did not support a westernized, Christian society).

87. See *id.* (arguing that the Audiencia should not find *Scilingo* guilty of genocide in part because the Genocide Convention does not protect political groups); SCHABAS, *supra* note 8, at 144 (claiming that the destruction of political groups is not genocide, but that this in no way gives states a license to eliminate such groups).

classifies the victim group in *Scilingo*, the Convention would not protect it under *Akayesu*.⁸⁸

The State did not single out the targeted group during the Dirty War due to stable characteristics that the group could never change.⁸⁹ On the contrary, if the victims had fully supported the military junta, it is unlikely the State would have targeted them.⁹⁰ Although at times the State imputed political ideology to the victim, those perceived ideas were still not something inherently part of the victim that one could consider stable in the sense the court in *Akayesu* discussed.⁹¹ As a result, the Spanish court's reasoning is questionable under *Akayesu*.⁹²

2. The Audiencia's Labeling of the Group as a National Group Is Unconvincing

Even if it were possible to view the group described in the *Scilingo* case as the type of stable group which the Genocide Convention could protect, the court's use of the category of national group is also dubious.⁹³ The generally accepted conception of national group

88. See SCHABAS, *supra* note 8, at 130–31 (reiterating that the major holding of *Akayesu* was that the protected group must be permanent and stable).

89. See Kurt Mundorff, *Other Peoples' Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(e)*, 50 HARV. INT'L L.J. 61, 89 (2009) (detailing the debates surrounding the drafting of the Genocide Convention, in which the British delegation argued for the inclusion of political groups, but recognized that such groups are clearly not stable).

90. See SAN [Spanish National Appellate Court], Pleno de la Sala de lo Penal [Criminal Chamber, en banc], Nov. 4, 1998, "Caso Scilingo" [Scilingo Case], interlocutory order (No. 84/98), available at <http://www.derechos.org/nizkor/arg/es/pana/audi.html> (emphasizing the group consisted of those who the State believed to be getting in the way of the State's objectives).

91. See, e.g., MIRTA MÁNTARAS, GENOCIDIO EN ARGENTINA [GENOCIDE IN ARGENTINA] 68–69 (2005) (illustrating the fluidity of the targeted group with a story of how the Government killed a formerly trusted nurse working in a hospital after the Government suspected she had changed her political leanings).

92. See QUIGLEY, *supra* note 12, at 188 (criticizing the Audiencia for analyzing genocide utilizing a social conception of the term, rather than fully examining the crime's legal definition (citing ALICIA GIL GIL, DERECHO PENAL INTERNACIONAL: ESPECIAL CONSIDERACIÓN DEL DELITO DE GENOCIDIO [INTERNATIONAL CRIMINAL LAW: SPECIAL CONSIDERATION OF THE CRIME OF GENOCIDE] 187 (1999))).

93. See *id.* at 187–88 (arguing that the State's intention to eliminate Argentines of a particular political mindset is not the same as intending to destroy Argentine nationals).

articulated in *Akayesu*⁹⁴ involves “a legal bond based on common citizenship, coupled with reciprocity of rights and duties.”⁹⁵ This definition emphasizes the notion that whatever country the victim group has the most bonds with defines the applicable national group.⁹⁶

This interpretation of national group does not apply to the case of Argentina because the group that the State targeted included members that had close bonds with many different nations.⁹⁷ Although the victims were all in Argentina at the time, there were various immigrants who were part of the victim group who had closer bonds with their countries of origin.⁹⁸ As such, the common link among targeted individuals was not a “legal bond” based on “common citizenship,” but rather the group members’ actual or perceived political opinions.⁹⁹ Thus, under *Akayesu* those that the Argentine Government targeted were not a national group.¹⁰⁰

94. See Lisson, *supra* note 9, at 1467 (conceding that despite its shortcomings, the definition of national group in *Akayesu* is the commonly accepted definition in genocide jurisprudence).

95. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, ¶ 512 (Sept. 2, 1998), *aff’d*, Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Appeals Judgment (June 1, 2001); see Lisson, *supra* note 9, at 1467-68 (explaining that the court lifted this definition from the ICJ’s *Nottebohm* decision, which defined the concept of nationality rather than national group).

96. See *Nottebohm* (Liech. V. Guat.), 1955 I.C.J. 4, 23 (Apr. 6) (holding that a national of a particular state is “more closely connected with the population” of that State “than with that of any other state”); see also SCHABAS, *supra* note 8, at 115 (arguing that it does not make sense to apply the *Nottebohm* decision to the definition of national group, because *Nottebohm* referred to nationality, which is a concept with very different implications than national group).

97. See GUEST, *supra* note 59, at 64–65 (indicating that almost six hundred foreigners disappeared during the Dirty War).

98. See *id.* (explaining that from 1976 to 1983 some fifty governments made inquiries to the Argentine Government regarding 2,928 disappearances).

99. See Lisson, *supra* note 9, at 1468-69 (recognizing that under the *Nottebohm* definition that *Akayesu* utilizes, for an individual to be considered a national of a country there must be a very close relationship between the individual and the state that represents that individual’s interests).

100. See QUIGLEY, *supra* note 12, at 188 (asserting that the Audiencia’s interpretation could have made more sense if it characterized the genocide as the destruction in part of the larger group of all Argentine nationals, rather than defining the national group narrowly as only political dissidents).

Some scholars, viewing the *Akayesu* definition as incomplete, have interpreted national group to mean “national minorities.”¹⁰¹ This idea encompasses a minority population in one state that shares its ethnic, linguistic, or religious identity with each other and a population that constitutes the majority in another state.¹⁰² The Audiencia, however, did not attempt to classify the targeted group as a homogeneous minority population. To the contrary, the court focused on the heterogeneous nature of the targeted group.¹⁰³ As a result, the national minority interpretation does not lend support to the Spanish court’s conclusions.¹⁰⁴

One could argue that it is irrelevant that the *Scilingo* court’s interpretation does not fall in line with *Akayesu* because international case law is not binding on domestic courts.¹⁰⁵ Furthermore, as a trial court decision handed down only three months prior to *Scilingo*, *Akayesu* is not overly persuasive authority. Finally, when the Spanish courts decided *Scilingo*, various human rights advocates had already argued that genocide should encompass the targeting of political groups.¹⁰⁶

101. See *Prosecutor v. Krstic*, Case No. IT-98-33-T, Trial Judgment, ¶ 556 (Aug. 2, 2001), *aff’d*, *Prosecutor v. Krstic*, Case No. IT-98-33-A, Appeals Judgment (Apr. 19, 2004) (arguing that the four protected groups in the Genocide Convention were meant to signal the destruction of any national minority, rather than to limit the Convention’s application to only those four groups); Lisson, *supra* note 9, at 1469 (explaining that in this context scholars use the term national minority in the same manner that people understood the term in early to mid-twentieth century Europe).

102. See Lisson, *supra* note 9, at 1469 (stating that these groups also feel united by their shared identity).

103. See SAN [Spanish National Appellate Court], Pleno de la Sala de lo Penal [Criminal Chamber, en banc], Nov. 4, 1998, “Caso Scilingo” [Scilingo Case], interlocutory order (No. 84/98), available at <http://www.derechos.org/nizkor/arg/espana/audi.html> (pointing out that the victims ranged in their race, language, and cultural roots).

104. See SCHABAS, *supra* note 8, at 150 (characterizing the *Scilingo* court’s reasoning as leading to an absurd result because its loose interpretation of national group essentially covers the entire human race).

105. See Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1, 35 (2006) (explaining that stare decisis does not apply in the context of international law).

106. See DUNOFF ET AL., *supra* note 32, at 616–17 (discussing Hannum and Hawk’s efforts to convince members of the international community that genocide should include the targeting of political groups); Matthew Lippman, *The*

Even though the Audiencia was not bound by *Akayesu*, however, the Audiencia's interpretation of genocide is still unconvincing. Rather than grapple with the actual words and travaux préparatoires of the Genocide Convention, the Audiencia references the amorphous concept of the Convention's spirit, which is not grounded in any textual reality.¹⁰⁷ And rather than engage in analytical legal reasoning, the Audiencia satisfies itself with vague references of a moral imperative to classify the events in Argentina as genocide.¹⁰⁸ While such arguments may be convincing from a philosophical point of view, they are not convincing from a legal reasoning perspective. Keeping in mind the court's lack of coherent legal reasoning, incorporating an analysis of *Akayesu* would have helped add a needed legal foundation to *Scilingo*.

Considering the *Scilingo* court's refusal to mention *Akayesu* and its lack of legal analysis in general, one could view the Spanish court's decision as an attempt to open the door to a new interpretation of the Genocide Convention.¹⁰⁹ The decision shows a frustration with the narrow definition found in the Genocide Convention, as well as with interpretations of the Convention that put emphasis on group stability. Although the ICTR and ICTY did not follow the Audiencia's interpretation in any of its cases, *Scilingo* nonetheless turned out to be significant in the *Etchecolatz* case.¹¹⁰

Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later, 15 ARIZ. J. INT'L & COMP. L. 415, 464 (1998) (asserting that the Genocide Convention should protect political groups because government actors have historically attacked political movements, and similarly to religious groups, political groups are usually bound by a common vision); Van Schaack, *supra* note 21, at 2280–86 (arguing that the jus cogens norm of genocide that has developed over time includes the destruction of political groups, despite their exclusion from the Genocide Convention).

107. See generally *Scilingo*, (No. 84/98).

108. *Id.*

109. See, e.g., DUNOFF ET AL., *supra* note 32, at 79–81 (describing how customary international law develops by many states manifesting their dissatisfaction with the status quo of international law through state practice, such as the decisions of domestic courts).

110. See Tribunal Oral Federal de La Plata [Juzg. Fed.] [Federal Court of la Plata], 19/9/2006, “El Estado v. Etchecolatz, Miguel/juzgado penal,” [State v. Etchecolatz/criminal case] (Arg.), *aff'd* by Cámara Nacional de Casación Penal [C.N.C.P.] [Criminal Court of Appeals], 18/5/2007, “Etchecolatz, Miguel Osvaldo/recursos de casación e inconstitucionalidad,” [Etchecolatz, Miguel Osvaldo/appeal challenging constitutionality] (Arg.), and Corte Suprema de

C. IN *ETCHECOLATZ*, AN ARGENTINE COURT FOUND THAT CRIMES AGAINST HUMANITY OCCURRED IN THE CONTEXT OF GENOCIDE

The case of Miguel Etchecolatz involved the first criminal prosecution of a Dirty War figure in Argentina since the repeal of the amnesty laws.¹¹¹ Etchecolatz, a senior officer of the Buenos Aires Provincial Police during the Dirty War, faced charges of crimes against humanity for committing murder, kidnapping, and torture.¹¹² In 2006 the Tribunal Oral Federal [Federal Trial Court] of La Plata found Miguel Etchecolatz guilty of crimes against humanity.¹¹³ Although the court did not find Etchecolatz guilty of genocide, it held in dicta that his crimes occurred in the “context of genocide,” thus concluding that a genocide did occur in Argentina.¹¹⁴ The Tribunal Oral Federal’s decision was affirmed by both the Cámara Nacional de Casación Penal [Criminal Court of Appeals]¹¹⁵ and the Corte Suprema de Justicia [Supreme Court of Justice],¹¹⁶ but neither

Justicia [CSJN] [Supreme Court of Justice], 17/2/2009, “Etchecolatz, Miguel Osvaldo/recurso extraordinario,” [Etchecolatz, Miguel Osvaldo/Supreme Court appeal] (Arg.), available at <http://www.derechos.org/nizkor/arg/ley/etche.html> (quoting various passages from *Scilingo*).

111. See *Condenaron a reclusion perpetua a Etchecolatz* [Etchecolatz is sentenced to life imprisonment], CLARIN.COM, Sept. 19, 2006, <http://www.clarin.com/diario/2006/09/19/um/m-01274351.html> (stressing the importance of Etchecolatz’s conviction as the first Dirty War participant of many to go on trial since the annulment of the amnesty laws).

112. See *Etchecolatz*, 19/9/2006, at “RESULTA” [HOLDING] (describing Etchecolatz’s involvement in various clandestine torture facilities throughout Buenos Aires and surrounding towns).

113. See *id.* at Sec. IV.(a) “DELITOS DE LESA HUMANIDAD” [CRIMES AGAINST HUMANITY] (analyzing why Etchecolatz’s crimes constitute crimes against humanity).

114. See *id.* at Sec. IV.(b) “EL GENOCIDIO” [THE GENOCIDE] (mentioning at the outset of the genocide analysis that there exists an ethical and judicial need to classify the events in Argentina during the Dirty War as genocide).

115. See Cámara Nacional de Casación Penal [C.N.C.P.] [Criminal Court of Appeals], 18/5/2007, “Etchecolatz, Miguel Osvaldo/recursos de casación e inconstitucionalidad,” [Etchecolatz, Miguel Osvaldo/appeal challenging constitutionality] (Arg.), *aff’d*, Corte Suprema de Justicia [CSJN] [Supreme Court of Justice], 17/2/2009, “Etchecolatz, Miguel Osvaldo/recurso extraordinario,” [Etchecolatz, Miguel Osvaldo/Supreme Court appeal] (Arg.) (affirming the Tribunal Oral Federal’s decision, but failing to discuss the crime of genocide in its affirmance).

116. See Corte Suprema de Justicia [CSJN] [Supreme Court of Justice], 17/2/2009, “Etchecolatz, Miguel Osvaldo/recurso extraordinario,” [Etchecolatz, Miguel Osvaldo/Supreme Court appeal] (Arg.), available at

court discussed the issue of genocide.¹¹⁷ Accordingly, although the Tribunal Oral Federal's treatment of genocide was not necessary to the holding, considering that higher courts have not analyzed the issue, the Tribunal Oral Federal's discussion lays the groundwork for future Argentine courts' analysis of the crime of genocide in the context of the Dirty War.¹¹⁸

The court's analysis of genocide begins by referencing Resolution 96(I), the precursor to the Genocide Convention. The court acknowledged that while Resolution 96(I) included political groups as a protected group, the drafters of the Genocide Convention purposely excluded political groups. The court glossed over this exclusion, however, attributing it solely to the political environment at the time.¹¹⁹

The court next discussed previous cases dealing with the Dirty War. The opinion first referenced *Causa 13/84*,¹²⁰ in which the Cámara Federal [Federal District Court] of Buenos Aires convicted former junta leaders before President Menem subsequently pardoned them.¹²¹ The court in *Causa 13/84* described the systematic

<http://www.cij.gov.ar/adj/pdfs/ADJ-0.288435001237979621.pdf> (affirming the decision of the Cámara Nacional de Casacion Penal, but neglecting to discuss the crime of genocide in its affirmance).

117. See Alejandra Dandan, *A encariñarse con la celda* [Set to spend a long time in a prison cell], PAGINA12.COM, May 24, 2007, <http://www.pagina12.com.ar/diario/pais/1-85457-2007-05-24.html> (last visited Jan. 24, 2010) (explaining that the Cámara Nacional de Casacion Penal was not required to discuss the crime of genocide in its decision since the Tribunal Oral Federal's treatment of the issue was not part of that court's holding).

118. See *Etchecolatz*, 19/9/2006, at Sec. IV.(b) "EL GENOCIDIO" [THE GENOCIDE] (observing that the court's ruling will be the first of many dealing with Dirty War participants).

119. See *id.* (noting that the first draft of the Genocide Convention included political groups, but failing to mention any legitimate reasons other than "political circumstances" as to why the final draft excluded political groups).

120. See *id.* (referring to *Causa 13/84* as a historic case because it held State officials responsible for their actions).

121. Cámara Federal de Buenos Aires [CFed.] [Federal District Court of Buenos Aires], 9/12/1985, "Causa 13/84/juzgado penal" [suit 13/84/criminal case] (Arg.), available at <http://www.derechos.org/nizkor/arg/causa13/fallo.html>; see also Sang Wook Daniel Han, *Transnational Justice: When Justice Strikes Back—Case Studies of Delayed Justice in Argentina and South Korea*, HOUS. J. INT'L L. 653, 661 (2008) (discussing President Menem's pardon of sentenced junta leaders)

widespread operation of the junta that inflicted large-scale death, torture, and persecution on the local population.¹²² The court next quoted portions of the Audiencia Nacional's *Scilingo* decision to further illustrate the systematic plan of the military junta.¹²³ This portion of the opinion characterized the targeted group in the same way the Audiencia did in *Scilingo*—as perceived political subversives.

The court concluded its genocide analysis by identifying the protected “national group” as all Argentines.¹²⁴ The court reasoned that “because the Genocide Convention includes the terms ‘in whole or in part,’ it is evident the Argentine national group was eliminated ‘in part,’ and a part sufficiently substantial to alter social relations throughout the nation.”¹²⁵ As a result, the court concluded that genocide did occur in Argentina during the Dirty War.¹²⁶

D. THE INTERPRETATION OF NATIONAL GROUP IN *ETCHECOLATZ* CONTRADICTS INTERNATIONAL JURISPRUDENCE AND SCHOLARSHIP

One should consider the *Etchecolatz* court's conclusions in light of the more extensive set of international jurisprudence and scholarship regarding genocide at the time of the decision. Keeping such international decisions in mind, the *Etchecolatz* decision is flawed.

The court in *Etchecolatz* argued that genocide occurred in Argentina in a way that vacillates at times in its conception of national group.¹²⁷ When the court quotes *Scilingo*, it conceptualizes a national group made up only of political dissidents.¹²⁸ However, at

122. See *Etchecolatz*, 19/9/2006, at Sec. IV.(b) “EL GENOCIDIO” [THE GENOCIDE] (listing kidnapping, violent interrogations, and killing of victims as some of the methods used).

123. See *id.* (emphasizing that the State had no intention of changing the group members' political opinions, but rather wanted to eliminate the group).

124. See *id.* (implying that the state intended to eliminate a part of the Argentine population in order to alter and modify the life of *all* Argentines).

125. *Id.* (Howard Shneider trans.). Indicating that the phrase “in part” from the Genocide Convention was meant to apply precisely to situations such as the Dirty War. *Id.*

126. See *id.* (drawing similarities to the Armenian genocide, the Holocaust, and the Rwandan genocide).

127. See *id.* (quoting sources that classify the national group differently).

128. See *id.*; see also QUIGLEY, *supra* note 12, at 187-88 (emphasizing that the court in *Scilingo* defined the genocide in Argentina as involving the intended

the end of its genocide analysis, the court characterizes the national group as the entire Argentine population.¹²⁹ Whether one interprets the court's description of the protected group as the narrower group of perceived political dissidents, or as the larger group of all Argentines, the court's analysis is flawed in light of international jurisprudence.

1. The Court's Interpretation of National Group as Political Subversives Goes Against Recent International Jurisprudence and Scholarship

The first idea of national group the court discusses is the same as that formulated in *Scilingo*. The conception of national group in this part of the court's decision is the group that the military junta felt was a threat to the State's goals. This vision of a protected group not only goes against *Akayesu*, but also contradicts *Rutaganda*¹³⁰ and *Jelesic*¹³¹, which the ICTY and ICTR handed down well before *Etchecolatz*.

All three cases from the ICTY and ICTR held that protected groups under the Genocide Convention must have stable and permanent characteristics.¹³² *Akayesu* also noted that the drafters of the Genocide Convention excluded political groups because of the

destruction of a whole national group, rather than the elimination in part of a group).

129. See *Etchecolatz*, 19/9/2006, at Sec. IV.(b) "EL GENOCIDIO" [THE GENOCIDE] (referring to the genocide as the intended destruction in part of a national group consisting of everyone in Argentina during the Dirty War).

130. *Rutaganda v. Prosecutor*, Case No. ICTR 96-3-T, Trial Judgment, ¶¶ 374-75 (Dec. 6, 1999), *aff'd*, *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Appeals Judgment (May 26, 2003).

131. *Prosecutor v. Jelesic*, Case No. ICTY-95-10-T, Trial Judgment, ¶¶ 69-70 (Dec. 14, 1999), *aff'd*, *Prosecutor v. Jelesic*, Case No. ICTY-95-10-A, Appeals Judgment (July 5, 2001).

132. See *Jelesic*, Case No. ICTY-95-10-T (highlighting the dangers of defining groups without using objective criteria and adopting "stable" groups as the applicable objective standard); *Rutaganda*, Case No. ICTR 96-3-T, Trial Judgment (identifying the factors establishing the Tutsi's identity as an ethnic group, including customary rules in Rwanda that determined ethnic groups based on patrilineal standards); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, ¶ 511 (Sept. 2, 1998), *aff'd*, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Appeals Judgment (June 1, 2001) (concluding that members of a protected group are generally unable to choose to leave that group).

groups' mobile and changing nature.¹³³ The group of political subversives the court discussed in *Etchecolatz*, however, was by no means stable and unchanging—people were able to change their political affiliations if they so desired. As such, just as the Audiencia's interpretation in *Scilingo* failed under the international jurisprudence which existed at the time, so too does the court's interpretation in *Etchecolatz*.

One could again argue that such international cases are not binding on the Argentine court. The *Etchecolatz* court, however, chose to cite other nonbinding international law sources in order to bolster its conclusions regarding genocide.¹³⁴ Rather than only cherry-pick international law authority that supported its conclusions, the court should have also engaged with all relevant sources, even if such sources went against the court's conclusions.¹³⁵

Furthermore, although the ICTY and ICTR decisions were not binding on the *Etchecolatz* court, the reasoning of those cases is persuasive because international tribunals have handed down multiple decisions defining protected groups. It is easier to understand the *Scilingo* court's failure to engage with international case law because *Akayesu* was the only case at the time undertaking the "permanent and stable" analysis.¹³⁶ When the Tribunal Oral Federal decided *Etchecolatz*, however, the ICTR had decided *Akayesu* and *Rutaganda*, and the ICTY had decided *Jelusic*.¹³⁷ As a result, although the ICTY and ICTR cases were not binding upon the court, it makes sense to analyze *Etchecolatz* in light of such case law.

Recent scholarship suggests an alternative view of national group, arguing that if a particular group has the right to self-determination,

133. See *Akayesu*, Case No. ICTR-96-4-T, ¶ 511 (explaining that the genocide pertained to "stable" groups generally determined by birth as opposed to "mobile" groups in which membership is voluntary).

134. See *Etchecolatz*, 19/9/2006, at Sec. IV.(b) "EL GENOCIDIO" [THE GENOCIDE] (citing *Scilingo* and Resolution 96(I) to support its interpretation of genocide).

135. See *id.* (failing to even mention *Akayesu*, *Rutaganda*, or *Jelusic* in the court's discussion of genocide).

136. See LINDA H. EDWARDS, LEGAL WRITING AND ANALYSIS 27 (2d ed. 2007) (implying that when only one decision supports a particular holding, that decision may not be very persuasive authority).

137. See *id.* (suggesting that the more courts there are that endorse a holding, the more persuasive that holding becomes).

then courts should consider that group to be a national group.¹³⁸ However, one cannot characterize the targeted group in *Etchecolatz* as a group legally entitled to self-determination.¹³⁹ This is the case because the targeted group was not a group that had any sort of legal claim to its own independent country. Thus, even this alternative view of national group focusing on a right to self-determination does not lend support to the *Etchecolatz* court's interpretation.

2. The Court's Interpretation of a National Group from the Criminal Actor's Subjective Perspective Does not Lend Support to its Conclusions

The way the court in *Etchecolatz* envisages a national group also invokes the idea that the State itself defines the protected group. Since the national group consisted of those the State believed to be against Argentina's interests, it was the State that determined who would be part of the targeted group.¹⁴⁰ In other words, the State subjectively defined the group, as opposed to targeting a group with characteristics grounded in objective reality.¹⁴¹

Various academics argue that one should determine the existence of a protected group by focusing on the criminal actor's subjective definition of the group.¹⁴² Some of these authors not only support the

138. See, e.g., Lisson, *supra* note 9, at 1491–94 (arguing that the international community should view the East Timorese as a national group because they have a right to self-determination).

139. See *id.* at 1471–75 (conceding that the concept of self-determination is highly complicated, but explaining that on a general level the term refers to a group right to form an independent country).

140. See *Etchecolatz*, 19/9/2006, at Sec. IV.(b) “EL GENOCIDIO” [THE GENOCIDE] (emphasizing that the perpetrators of the crimes in Argentina did not randomly target their victims, but targeted those that the perpetrators had previously decided were against the State's interests).

141. Cf. QUIGLEY, *supra* note 12, at 155–56 (exploring the relevance of objective factors and asserting that although these should be present, subjective perceptions inevitably play a role in determining whether a targeted group constitutes one of the four protected groups).

142. See, e.g., FRANK CHALK & KURT JONASSOHN, *THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSES AND CASE STUDIES* 23 (1990) (characterizing genocide as a one-sided criminal act in which the perpetrator defines a group and its members, and then attempts to eliminate both); THOMAS W. SIMON, *THE LAWS OF GENOCIDE: PRESCRIPTION FOR A JUST WORLD* 98 (2007) (arguing that courts should focus on the point of view of the individuals who intend to harm members of a particular group).

Etchecolatz decision, but go a step further and view any limitation on the protected groups as undesirable.¹⁴³ This viewpoint focuses entirely on the perspective of the perpetrator, in the sense that any group the criminal actor chooses to target is sufficient for genocide, as long as the perpetrator intends to eliminate that group in whole or in part.¹⁴⁴

The ICTY's holding in *Jelisić* regarding the determination of protected groups seems at first blush to support the subjective approach these academics have championed. In *Jelisić* the ICTY held that courts should determine the existence of protected groups based on the criminal actor's subjective point of view.¹⁴⁵ This interpretation only applies, however, if in the perpetrator's mind he or she intends to destroy one of the groups that the Genocide Convention protects.¹⁴⁶ The major difference between the holding in *Jelisić* and the view of the academics is that the academics do not limit the

143. See, e.g., Israel W. Charney, *Toward A Generic Definition of Genocide*, in GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS 64, 74 (George J. Andreopoulos ed., 1994) (arguing that one should consider any mass killing a criminal actor perpetrates to be genocide regardless of whether it involves one of the four protected groups).

144. See, e.g., Eduardo Rezsés, *La Figura de Genocidio y el Caso Argentino: La Posibilidad de Adecuar Juridicamente una Figura Penal a Una Realidad Política* [Genocide and the Case of Argentina: The Possibility of Formulating a Legal Definition that Corresponds to a Political Reality], in APORTES JURIDICOS PARA EL ANALISIS Y JUZGAMIENTO DEL GENOCIDIO EN ARGENTINA [A LEGAL APPROACH TO THE ANALYSIS AND JUDGMENT OF GENOCIDE IN ARGENTINA] 53, 61 (Eduardo Rezsés ed., 2007) (arguing that with genocide, one cannot confine the victim groups to legal enumeration, because it is the perpetrator who determines what characteristics it will hone in on in the group it intends to destroy).

145. See Case No. ICTY 95-10-T, ¶ 70 (noting the significant difficulty of using purely objective factors to determine ethnic, racial, or national groups); see also SIMON, *supra* note 142, at 101 (clarifying that when the ICTY referred to the standard in *Jelisić* as subjective, it was signaling the perpetrator's perspective, and not that of the targeted group); QUIGLEY, *supra* note 12, at 155 (arguing that although cases like *Jelisić* focus on the perpetrator's mind, some minimal objective factors are also necessary to conclude the existence of a protected group); Schabas, *supra* note 4, at 38-39 (asserting that the purely subjective view is flawed, and that the better approach is to have some objective grounding for determining the existence of a protected group).

146. See *Jelisić*, Case No. ICTY-95-10-T, ¶ 70 (limiting its interpretation to instances where the targeted group is either a racial, national, or ethnic group).

subjective view to the enumerated groups.¹⁴⁷ Thus, *Jelusic* does not lend meaningful support to these academics' point of view.

Jelusic also does not lend support to the *Etchecolatz* decision, because even if one focused solely on the State's subjective views about the group it was victimizing, one still cannot reach the conclusion that the State intended to eliminate a legally recognized protected group. This is the case because the group viewed from the State's subjective view is a group of perceived political enemies.¹⁴⁸ The Genocide Convention, however, does not protect a group of subjectively perceived political subversives any more than it does a group of objectively real political dissidents.¹⁴⁹ Since the victim group from the Argentine Government's perspective was certainly a political group, the *Jelusic* decision does not support the argument that the Genocide Convention protects the targeted group in *Etchecolatz*.

147. See, e.g., MÁNTARAS, *supra* note 91, at 68 (positing that the junta destroyed a national group which did not exist prior to the Dirty War, but rather was a group that the Government created fluidly as people displayed their disagreement with the State's objectives).

148. See Tribunal Oral Federal de La Plata [Juzg. Fed.] [Federal Court of la Plata], 19/9/2006, "El Estado v. Etchecolatz, Miguel/juzgado penal," [State v. Etchecolatz/criminal case] (Arg.), *aff'd* by Cámara Nacional de Casacion Penal [C.N.C.P.] [Criminal Court of Appeals], 18/5/2007, "Etchecolatz, Miguel Osvaldo/recursos de casación e inconstitucionalidad," [Etchecolatz, Miguel Osvaldo/appeal challenging constitutionality] (Arg.), and Corte Suprema de Justicia [CSJN] [Supreme Court of Justice], 17/2/2009, "Etchecolatz, Miguel Osvaldo/recurso extraordinario," [Etchecolatz, Miguel Osvaldo/Supreme Court appeal] (Arg.), available at <http://www.derechos.org/nizkor/arg/ley/etche.html> (suggesting that the junta sometimes targeted people that it subjectively believed to be subversive, despite the fact that in objective reality the victims were completely indifferent to the regime).

149. See, e.g., Diaz et al. v. Columbia, Case 11.227, Inter-Am. C.H.R., Report No. 5/97, OEA/Ser.L/V/II.95, doc. 7 rev. ¶¶ 24-25 (1997) (holding inadmissible a claim brought by a Colombian political party alleging genocide because the targeting of political groups does not constitute genocide).

3. The Court's Interpretation of National Group as all Argentines Is more Consistent with International Jurisprudence, but its Interpretation of the Destruction of a National Group "in Part" Goes Against Internationally Accepted Interpretations

At the end of its genocide analysis the court in *Etchecolatz* refers to the national group as all Argentines.¹⁵⁰ Although the court does not explicitly say so at this point in the opinion, it appears that the court is referring to everyone in the country during the Dirty War, and not just those who were Argentine citizens.¹⁵¹ Under the previously explored conceptions of national group, the court's characterization of national group as everyone in Argentina is more acceptable.

Under the cases that hold a protected group must be permanent or stable, it is possible to view the group of all Argentines as such a group. Although an estimated 30,000 Argentines disappeared during the Dirty War, the country's borders did not change and there was no large-scale shift of Argentines to another nationality.¹⁵² Therefore, the Argentine population was stable.¹⁵³

The group of all Argentines also coincides with the *Akayesu* definition of national group, which focuses on the strength of a national's bond with the country of which he or she is a national. By viewing the group as all people in Argentina, it logically follows that such a group did have strong bonds with the country in which it lived. However, that group would not include those immigrants or foreigners in Argentina who had stronger bonds with their home countries.¹⁵⁴ Although the national group would not include such immigrants and foreigners, the national group of all other Argentines would still be viable.¹⁵⁵

150. See *Etchecolatz*, 19/9/2006, at Sec. IV.(b) "EL GENOCIDIO" [THE GENOCIDE] (contending that the State intended to destroy this group in part).

151. See *id.* (referring to foreigners as part of the national group of Argentina).

152. *C.f.* SCHABAS, *supra* note 8, at 133 (explaining that dramatic changes in nationality usually occur when countries' borders are altered and new countries are formed).

153. See *id.* (discussing the concept of stable and permanent groups).

154. See *Nottebohm* (Liech. V. Guat.), 1955 I.C.J. 4, 22 (Apr. 6) (clarifying that one should consider a person a national of the state with which that person has the closest bonds).

155. See GUEST, *supra* note 59, at 64–65 (implying that the number of foreigners who disappeared in the Dirty War was rather small compared to the total number of disappearances).

But even if the group of all Argentines is a legitimate protected group, the court in *Etchecolatz* fails to prove that the State destroyed the national group in part.¹⁵⁶ The court's reasoning clashes with accepted international interpretations of the phrase "in part" from the Genocide Convention.¹⁵⁷

The problem with the court's interpretation relates to the requisite *mens rea*. The Genocide Convention establishes that for acts to rise to the level of genocide, the criminal actor must carry out the prohibited act with the specific intent to destroy in whole or in part one of the Convention's four protected groups "as such."¹⁵⁸ Academics and courts have interpreted the "as such" clause to mean that the criminal actor must be targeting members of a protected group precisely because they belong to that protected group.¹⁵⁹ If the criminal actor targets members of a protected group for reasons other than their group membership, the requisite *mens rea* is not present and the crime is not genocide.

An example of where criminal actors did not have the required intent is Pol Pot's regime in Cambodia. In their ICJ draft memorial, Hannum and Hawk argued that genocide occurred in Cambodia because Pol Pot's government intended to kill the Cambodian population in part.¹⁶⁰ The problem with their argument, however, is that the Government did not target the Khmer people by virtue of the fact that they were of Khmer origin, but rather because the

156. See *Etchecolatz*, 19/9/2006, at Sec. IV.(b) "EL GENOCIDIO" [THE GENOCIDE] ("Given the inclusion of the term 'in part' in the 1948 Genocide Convention's definition, it is evident that the Argentine national group has been destroyed 'in part' . . .") (Howard Shneider trans.).

157. See generally QUIGLEY, *supra* note 12, at 140–45 (discussing different conceptions of group destruction in part).

158. Genocide Convention, *supra* note 4, art. 2.

159. See, e.g., *Prosecutor v. Krstic*, Case No. IT-98-33-T, Trial Judgment, ¶ 561 (Aug. 2, 2001), *aff'd*, *Prosecutor v. Krstic*, Case No. IT-98-33-A, Appeals Judgment (Apr. 19, 2004) (emphasizing that mere coincidence that the victimized individuals were part of the same group is not sufficient); RATNER & ABRAMS, *supra* note 25, at 286–87 (arguing that the victims of random, widespread violence are not victims of genocide because the inclusion of "as such" leads to the conclusion that the perpetrators must have targeted the victims because they belonged to a protected group).

160. See HUMAN RIGHTS MODULE, *supra* note 5, at 89, 92–93 (admonishing state parties to the ICJ for refusing to file a claim against Cambodia in the ICJ).

Government viewed them as subversive.¹⁶¹ As a result, the criminal actors lacked the requisite intent, and their crimes were not genocide.

The *Etchecolatz* court's interpretation has the same problem as Hannum and Hawk's ICJ draft memorial. If the national group is all Argentines, in order to have the required intent the State must have targeted members of the group because of their Argentine nationality. What really happened, however, was that the State targeted an entire group of individuals it viewed as subversive, and in an attempt to destroy that entire group, successfully eliminated that group in part.¹⁶² The court therefore did not establish the necessary intent. The criminal actors did not intend to eliminate their victims because of their membership in the protected group of Argentine nationals.

a. The Concept of Group Destruction in Part as Confined to a Particular Geographical Region Does not Support the Court's Interpretation

The interpretation of "in part" in the *Krstic* case also goes against the *Etchecolatz* view. In *Krstic* the ICTY held that genocide occurred because the perpetrators targeted the Bosnian Muslims of Srebrenica, and intended to eliminate all the Bosnian Muslims in that region.¹⁶³ *Krstic* supports the conclusion then that if criminal actors intend to destroy a national group in a specific geographical region, then partial destruction of that group in that region constitutes genocide.¹⁶⁴

161. See RATNER & ABRAMS, *supra* note 25, at 286–87 (conceding that the Khmer people constitute a national group, but arguing that the Khmer Rouge did not target them because of their membership in that national group); QUIGLEY, *supra* note 12, at 127 (maintaining that the Khmer Rouge targeted the majority of its victims as members of economic or political groups, which are groups the Genocide Convention does not protect (quoting Jason Abrams, *The Atrocities in Cambodia and Kosovo: Observations on the Codification of Genocide*, 35 NEW ENG. L. REV. 303, 307 (2001))).

162. See Amicus Brief, *supra* note 85 (positing that the Argentine Government targeted its victims for ideological and political reasons).

163. Case No. IT-98-33-A, ¶ 598.

164. See *id.* at ¶ 559 (describing how the criminal actors targeted the Bosnian Muslims of Srebrenica specifically because they were part of the larger national group of all Bosnian Muslims). But see Katherine G. Southwick, Note, *Srebrenica as Genocide? The Krstic Decision and the Language of the Unspeakable*, 8 YALE HUM. RTS. & DEV. L.J. 188, 206–08 (2005) (criticizing the reasoning in *Krstic* because the court failed to consider the possibility that the criminal actors targeted

Krstic does not support the *Etchecolatz* interpretation.¹⁶⁵ The court in *Etchecolatz* did not argue that the Argentine Government intended to destroy a part of the Argentine national group that resided in a particular region of the country. Instead, the court argued that the State intended to kill a part of the Argentine national group which lived throughout the entire country.¹⁶⁶ Therefore the idea of targeting a larger national group's population that is confined to a particular geographical location does not apply in the case of Argentina.

b. The Concept of Group Destruction in Part as the Destruction of a Substantial Part of the Group Does not Support the Court's Interpretation

Another way to measure what constitutes a group in part relates to the portion of that group that the criminal actors intend to eliminate.¹⁶⁷ Under *Jelusic*, for example, for the actions of a criminal actor to constitute partial group destruction, that actor must intend to destroy a "substantial part of the group."¹⁶⁸ To determine whether the

the group due to the fact that it consisted mostly of men of military age rather than because of the group's Bosnian Muslim heritage).

165. See Southwick, *supra* note 164, at 195–96 (observing that an essential part of the *Krstic* court's reasoning was its conclusion that the criminal actors intended to eliminate the Bosnian Muslim population of the particular region of Srebrenica).

166. See Tribunal Oral Federal de La Plata [Juzg. Fed.] [Federal Court of la Plata], 19/9/2006, "El Estado v. Etchecolatz, Miguel/juzgado penal," [State v. Etchecolatz/criminal case] (Arg.), *aff'd* by Cámara Nacional de Casacion Penal [C.N.C.P.] [Criminal Court of Appeals], 18/5/2007, "Etchecolatz, Miguel Osvaldo/recursos de casación e inconstitucionalidad," [Etchecolatz, Miguel Osvaldo/appeal challenging constitutionality] (Arg.), and Corte Suprema de Justicia [CSJN] [Supreme Court of Justice], 17/2/2009, "Etchecolatz, Miguel Osvaldo/recurso extraordinario," [Etchecolatz, Miguel Osvaldo/Supreme Court appeal] (Arg.), available at <http://www.derechos.org/nizkor/arg/ley/etche.html> (referring to attacks on supposed enemies of the state throughout Argentina as a whole, rather than any specified region).

167. See QUIGLEY, *supra* note 12, at 139–42 (articulating how the travaux préparatoires of the Genocide Convention do not shed much light on what constitutes group destruction in part, but that subsequent interpretations of "in part" have breathed some life into the term).

168. See Prosecutor v. Jelusic, Case No. ICTY-95-10-T, Trial Judgment, ¶ 82 (Dec. 14, 1999), *aff'd*, Prosecutor v. Jelusic, Case No. ICTY-95-10-A, Appeals Judgment (July 5, 2001) (claiming that it is well established that criminal actors must destroy a substantial part of the protected group to constitute group destruction in part); see also *Krstic*, Case No. IT-98-33-T, ¶¶ 582-90 (discussing the prevalence of the requirement of destruction of a "substantial part" of a

criminal actor intended to destroy a substantial part of a protected group, courts have looked to the number of actual victims in proportion to the total number of people in the protected group.¹⁶⁹ If the perpetrators eliminated only a very low percentage of the protected group, it is unlikely that a court will infer the intent to destroy the group in part.¹⁷⁰

Although the military junta killed approximately 30,000 Argentines during the Dirty War, that number is probably insufficient to infer intent under the substantial part standard.¹⁷¹ With a population of over 29.3 million in 1983 at the end of the Dirty War, the 30,000 disappeared made up approximately one tenth of a percent of Argentina's total population at the time.¹⁷² Although most cases have not set a minimum percentage from which one can infer the intent to destroy a substantial part of a group, it seems unlikely that this small ratio would qualify.¹⁷³

protected group, but refusing to endorse that reading); QUIGLEY, *supra* note 12, at 141 (describing the United States' interpretation of the Genocide Convention, which asserts that the criminal actor must destroy the protected group to a point that it can no longer survive as a "viable entity" in the country where the destruction occurred). *But see id.* at 144 (arguing that the substantial part interpretation is not appropriate because it would not cover situations like the one in Argentina where many people were killed, but the number of victims only constitutes a small fraction of the country's total population); Lippman, *supra* note 106, at 464 (criticizing the standard of group destruction in substantial part, because such a conception creates too ambiguous a numerical limit for determining the occurrence of genocide).

169. *See, e.g.,* Prosecutor v. Sikirica, Case No. IT-95-8-T, Judgment on Def. Mots. to Acq., ¶ 69 (Sept. 3, 2001) (utilizing this formula to establish whether the accused had the specific intent to destroy a protected group in part).

170. *See id.* at ¶ 75 (explaining that the percentage of the group which the criminal actor actually eliminated is not the sole factor for determining the requisite intent, but implying that it is an important factor).

171. *Cf. id.* at ¶¶ 69–75 (Sept. 3, 2001) (finding that the defendant victimized between 2 and 2.8 percent of the Bosnian Muslims in his municipality, which the court held was not a substantial enough part of the population of Bosnian Muslims in the municipality from which to infer the intent to destroy the protected group in part).

172. *See Argentina*, INDEX MUNDI, <http://www.indexmundi.com/argentina/population.html> (last visited Jan. 6, 2010) (listing key statistics regarding Argentina's population since 1980).

173. *See* QUIGLEY, *supra* note 12, at 142 (pointing out that in at least one ICTY case—*Prosecutor v. Sikirica*—the court did seem to require an actual minimum percentage of group elimination to find partial group destruction).

E. THE ARGUMENT IN MENCHÚ'S COMPLAINT THAT GENOCIDE
OCCURRED IN GUATEMALA IS FLAWED IN THE SAME WAY AS
SCILINGO

Guatemalan Nobel Peace Prize winner Rigoberta Menchú and others filed a complaint in Spanish courts alleging that certain Guatemalan officials committed acts of genocide, torture, terrorism, summary execution, and unlawful detention during the Guatemalan civil war.¹⁷⁴ After a long series of challenges involving both Spanish and Guatemalan courts, it appears that Menchú's complaint will ultimately not go forward.¹⁷⁵ Nonetheless, Menchú's complaint is telling in that it alleges genocide using reasoning similar to that in *Scilingo*.¹⁷⁶

Menchú's complaint made two arguments. First, it argued that genocide occurred in Guatemala because state officials targeted an ethnic group—the Mayan people.¹⁷⁷ Second, the complaint claimed that the State perpetrated genocide against a national group of Guatemalans.¹⁷⁸ The State identified this national group based on the State's belief that the members of the group posed a threat to the

174. See Menchú's Complaint, *supra* note 71, at paras. 4-8; Roht-Arriaza, *supra* note 66, at 84-85 (explaining that the investigating judge of the Audiencia accepted the complaint because it involved Spanish victims and Guatemalan courts had refused to prosecute the crimes).

175. See Roht-Arriaza, *supra* note 66, at 94-101 (summarizing the Guatemalan Constitutional Court's December 2007 decision invalidating Spain's arrest warrants against the Guatemalan defendants).

176. See Menchú's Complaint, *supra* note 71, at Sec. B "HECHOS" [FACTS] (discussing the historical targeting of a group based on the group's political motivations).

177. See STS [Spanish Supreme Court], Sala de lo Penal [Criminal Chamber], Feb. 25, 2003 (No. 327/2003), *translated in* Judicial and Similar Proceedings, *Spanish Supreme Court: Guatemala Genocide Case*, 42 I.L.M. 686, 696 (2003) (accepting, *arguendo*, in an opinion that did not reach the merits of the case, that the Guatemalan Government perpetrated genocide against the "Mayan people as an ethnic group"); Menchú's Complaint, *supra* note 73, at Sec. B "HECHOS" [FACTS] (arguing that the State targeted Guatemalans of Mayan origin because they belonged to the ethnic group of Mayan people, which the Government considered to be a group working against the State's interests).

178. See Menchú's Complaint, *supra* note 73, at Sec. C "CRONOLOGIA SOBRE EL CARACTER DE LOS GOBIERNOS" [CHRONOLOGY OF THE GOVERNMENTS' CHARACTER] (focusing on the State's detailed and systematic plan to eliminate perceived enemies as proof that the State committed genocide against a national group).

Guatemalan Government.¹⁷⁹ This argument is parallel to the Audiencia's decision in *Scilingo*; and like *Scilingo*, Menchú's claim is also unconvincing in light of relevant international jurisprudence and scholarship. However, the argument further shows dissatisfaction with the current narrow definition of genocide,¹⁸⁰ and illustrates the precedential value of *Scilingo* for future complainants alleging genocide in Spanish courts.¹⁸¹

F. MENCHÚ'S COMPLAINT PRESENTS A CONVINCING ARGUMENT
THAT THE OVERLAP BETWEEN CRIMES AGAINST HUMANITY AND
GENOCIDE SHOULD NOT LIMIT THE SCOPE OF WHAT THE
INTERNATIONAL COMMUNITY CONSIDERS GENOCIDE

Menchú's complaint also takes note of the fact that the definition of crimes against humanity protects political groups.¹⁸² Despite the fact that prosecutors can charge those who attempt to destroy a political group with committing crimes against humanity, Menchú's complaint asserts that this should not affect how courts interpret the definition of genocide.¹⁸³ Despite the potential overlap of crimes against humanity and genocide, Menchú's complaint claims that

179. See *id.* (emphasizing that even a person's mere physical presence in a certain place at a certain time could give the State a reason to perceive that person as a dissident, and subsequently eliminate that person).

180. See also Charney, *supra* note 143, at 71 (expressing frustration that under the current understanding of genocide, killings on a mass scale will not qualify as genocide if the victim group is either heterogeneous or made up of native citizens of the same country that is eliminating them).

181. See EDWARDS, *supra* note 136, at 25–28 (implying that the prior decisions of the court in which you are arguing a case are mandatory authority).

182. See Charter of the International Military Tribunal at Nuremberg art. 6(c), Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 279 (“*Crimes against humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on *political*, racial, or religious grounds”) (emphasis added); Menchú's Complaint, *supra* note 71, at Sec. J “Análisis de los Actos de Genocidio Consignados en el Informe de la CEH a la Luz de la Legislación Española” [Analysis on the Acts of Genocide Identified in the CEH Report in Light of Spanish Legislation] (referencing the definition of crimes against humanity in the Charter of the International Military Tribunal at Nuremberg).

183. See Menchú's Complaint, *supra* note 73, at Sec. J (recognizing that throughout history the attempted destructions of the four protected groups from the Genocide Convention have invariably involved political motivations).

courts still should interpret the targeting of a group because of its perceived or actual political ideology as genocide.¹⁸⁴

Human rights scholarship both supports and contradicts the complaint's claim. Some argue that because a prosecutor could charge the destruction of political groups under crimes against humanity, it would cause unnecessary confusion to allow such crimes to constitute genocide as well.¹⁸⁵ Others argue simply that the intention of the drafters is clear, and since they specifically left out political groups, the only remedy is to prosecute crimes against such groups as crimes against humanity.¹⁸⁶

Different scholars, however, point out that despite the overlap between crimes against humanity and genocide, there are times when there is a gap between the two crimes.¹⁸⁷ Genocide is a crime that requires the specific intent to destroy a group in whole or in part, but does not require any particular context in which that intent arises.¹⁸⁸ Crimes against humanity, on the other hand, require that the criminal actor commit the prohibited acts "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."¹⁸⁹ There could conceivably be a situation

184. See *id.* (arguing that one should not read the Genocide Convention to exclude political motivations, but rather interpret it as requiring that the political motivations manifest themselves in the destruction of one of the four protected groups—which in the case of Guatemala involved a national group).

185. See, e.g., Amicus Brief, *supra* note 85 (arguing that since Scilingo's actions constitute crimes against humanity, the Audiencia's broad interpretation of genocide was inappropriate).

186. See, e.g., SCHABAS, *supra* note 8, at 119–20, 144 (positing that mass killings like the ones carried out by the Khmer Rouge clearly fit the definition of crimes against humanity).

187. See, e.g., David L. Nersessian, *Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes Against Humanity*, 43 STAN. J. INT'L L. 221, 246–63 (2007) (analyzing the differences between the crime against humanity of persecution and the crime of genocide, including the policy elements of the crimes and the necessity that persecution be committed along with another international crime).

188. See *id.* at 263 (distinguishing genocide from other international crimes because it can be charged as an inchoate offense, relying on the importance of proving intent).

189. Rome Statute, *supra* note 33, art. 7(1); see Nersessian, *supra* note 187, at 259 (explaining that crimes against humanity are not attacks on groups—as is genocide—but rather are attacks on individuals in the context of a systematic attack).

where a systematic plan to destroy a political group is not yet being executed, but a criminal actor does have the specific intent required for genocide.¹⁹⁰ In such a case, in the absence of the crime of political genocide, prosecutors would not be able to charge the criminal actor with either a crime against humanity or genocide, thus leaving an important gap.¹⁹¹

Moreover, because specific intent is the key component to genocide, the genocide does not need to be complete in order to charge someone with the crime.¹⁹² Conversely, prosecutors cannot legitimately charge an individual with crimes against humanity until a widespread attack on civilians is well established.¹⁹³ Thus, as a crime against humanity, one would be powerless to stop attacks on a political group until a widespread attack is clearly in effect.¹⁹⁴ If political genocide were a crime, however, international law would have the tools to prevent such acts before they flourish into a full-blown systematic attack.¹⁹⁵

Others argue that despite the overlap between crimes against humanity and genocide, there is nothing impeding courts from taking a more expansive view of genocide.¹⁹⁶ Rather than focus on

190. See M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 203-04 (2d ed. 1999) (recognizing that the intentional killing of only one person can constitute genocide if the criminal actor has the specific intent to eliminate the protected group in whole or in part).

191. See Nersessian, *supra* note 187, at 258-59 (referencing other gaps between crimes against humanity and genocide, such as the targeting of military forces, which genocide covers but crimes against humanity do not).

192. See *id.* at 263 (recognizing that because genocide is an inchoate offense, international law can intervene to stop acts of genocide before the criminal actors meet their goal of group destruction).

193. See *id.* (emphasizing that the perpetrator's knowledge that an act of violence is a part of an already established large-scale attack is required to satisfy the mens rea of a crime against humanity).

194. See *id.* (positing that political groups will suffer substantial harm before prosecutors have the chance to charge criminal actors with crimes against humanity).

195. See *id.* at 261 (explaining that the drafters of the Genocide Convention chose to make genocide an inchoate crime because waiting for criminal actors to translate their intent to destroy a group into reality would make intervention futile).

196. See Van Schaack, *supra* note 21, at 2283-84 (asserting that the inclusion of political groups in the definition of crimes against humanity reflects a jus cogens norm against the targeting of such groups, and thus actually supports the claim that the Genocide Convention also protects political groups).

jurisprudence and the drafters' intent, these critics argue the focus should be on the present will of the international community.¹⁹⁷ Since various victim groups feel more vindicated when courts classify the crimes against them as genocide, prosecutors should be able to freely charge defendants with both genocide and crimes against humanity in situations where the two crimes seem to overlap.¹⁹⁸ The claim in Menchú's complaint regarding the intersection of crimes against humanity and genocide seems to be a further manifestation of the common concern of victim groups.¹⁹⁹

These arguments support the claim in Menchú's complaint that the overlap between crimes against humanity and genocide should not prevent labeling the targeting of political groups as genocide.²⁰⁰ Nonetheless, even if the complaint is correct in claiming that prosecutors should be able to charge the victimization of political groups as either crimes against humanity or genocide, the weight of international jurisprudence still holds that such actions are not genocide. As a result, until international law considers the targeting of political groups as a valid form of genocide, prosecutors will continue to be wary of charging the perpetrators of such crimes with genocide.

III. RECOMMENDATIONS

Although the expanded interpretation of genocide in the cases discussed above are positive in the sense that they allow for more accountability, they do not conform to the internationally accepted

197. See, e.g., Patricia M. Wald, *Genocide and Crimes Against Humanity*, 6 WASH. U. GLOBAL STUDIES L.R. 621, 633 (2006) (suggesting that in the popular psyche of the international community, the concept of genocide "has taken on a life of its own").

198. See *id.* (stressing that often the survivors and families of victims of mass killings do not feel that justice has been served when such courts find the criminal actors guilty of only crimes against humanity and not genocide).

199. See *id.* (speculating that ultimately the international community may have to satisfy the popular will of victim groups by developing a new legal term that will condemn mass killings in a more comprehensive and effective manner).

200. See Menchú's Complaint, *supra* note 71, at Sec. K "Procedencia de la Jurisdicción Española para Entender en Estos Casos de Genocidio" [Origins of Spanish Jurisprudence] (arguing that although the Nuremberg Charter codifies the targeting of political groups as a crime against humanity, this does not imply that one cannot consider crimes motivated solely for political reasons to be genocide).

definition of genocide. Moreover, the courts' expansive view of national group could swallow the definition and open the door to classifying almost any mass killing as genocide.²⁰¹ Considering that these interpretations cut against traditional views and endanger the definition of genocide itself, they are too expansive.²⁰²

Nonetheless, such interpretations show a distinct frustration with the current definition of genocide, and illustrate the definition's shortcomings. Rather than continue the proliferation of this expansive interpretation, the international community should reconsider the definition itself, and explicitly add political groups.²⁰³

A. ADOPTING DOMESTIC LEGISLATION

One option for working to change the definition of genocide is to legislate nationally.²⁰⁴ If enough countries pass legislation that includes political groups as a protected group, such state practice could eventually blossom into customary international law.²⁰⁵ Moreover, if countries implement an expanded domestic definition of genocide, the restrictive international interpretation will not force local courts to use torturous reasoning to conclude that genocide occurred if criminal actors target a political group.²⁰⁶ Multiple

201. See SCHABAS, *supra* note 8, at 150 (asserting that if one can consider any human group to be a national group, as the court did in *Scilingo*, then there is little to prevent the crime of genocide from applying to any mass killing, thereby potentially trivializing the crime).

202. See SIMON, *supra* note 142, at 96 (arguing against the elimination of enumerated protected groups, because such an approach would take away the key *genos* element of genocide, which is what makes genocide the worst international crime).

203. See QUIGLEY, *supra* note 12, at 83 (noting that various analysts have argued that the international community should add political groups to the list of protected groups, though recognizing that the possibility of this redefinition occurring is minimal).

204. See SCHABAS, *supra* note 8, at 141–42 (observing that most states have domestic genocide statutes that track the Genocide Convention's definition verbatim).

205. See DUNOFF ET AL., *supra* note 32, at 79–81 (elaborating how state practice is the first step towards creating customary international law which will theoretically be binding on the international community).

206. See, e.g., SCHABAS, *supra* note 8, at 141 (referencing Ethiopia as a country that prosecuted the crime of genocide against a political group, based on the country's genocide statute).

countries have already adopted such legislation.²⁰⁷ Nonetheless, not nearly enough countries have such legislation that one could claim a new custom has formed.²⁰⁸

B. AMENDING THE GENOCIDE CONVENTION

Another option for including political group as a protected group is to amend the Genocide Convention itself.²⁰⁹ Countries may argue that it is unnecessary to amend the definition of genocide because crimes against humanity already cover the targeting of political groups. While courts often can prosecute such crimes as crimes against humanity, as discussed above, there are instances when crimes against humanity are not adequate to prevent the targeting of political groups. In particular, when a systematic plan to eliminate political opponents is in its nascent stages, prosecutors cannot yet charge those planning the attack with crimes against humanity. If, on the other hand, genocide also protected political groups, then such criminal actors could face charges of genocide if they had the requisite specific intent and carried out just one of the acts prohibited by the Genocide Convention.

Furthermore, the value of convicting someone of a crime is not only in meting out punishment, but also in serving as a deterrent. Although people certainly view crimes against humanity as horrific, such crimes do not bring to mind the same scale of tragedy as genocide.²¹⁰ That is why people commonly consider genocide, and

207. See *id.* (recognizing that the penal codes of Ethiopia, Bangladesh, Panama, Costa Rica, Peru, Slovenia, and Lithuania all include the targeting of political groups in their domestic legislation punishing genocide).

208. Compare *id.* at 150 (arguing that it is “wishful thinking” to conclude that the requisite *opinio juris* and state practice exists to the point that customary international law embraces a definition of genocide which includes political groups), with Van Schaack, *supra* note 21, at 2280–86 (claiming that the combination of Resolution 96(I), national legislation defining genocide, other international agreements protecting political groups, and popular community standards regarding genocide add up to a *jus cogens* norm that defines genocide as including the destruction of political groups).

209. See SCHABAS, *supra* note 8, at 518–19 (describing the procedures envisaged by the Genocide Convention for amending the Convention, and explaining that the state parties could conceivably amend the Convention even though no attempts to do so have taken place thus far).

210. See *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Trial Judgment, ¶ 16 (Sept. 4, 1998), *aff’d*, *Prosecutor v. Kambanda*, Case No. ICTR 97-23-A,

not crimes against humanity, as the worst type of international crime one can commit.²¹¹ By expanding the definition, nations can help ensure that the international community more roundly condemns the targeting of political groups, and more effectively stigmatizes those who perpetrate such acts by labeling them perpetrators of genocide.²¹²

Finally, expanding the definition of genocide in an international instrument will help meet the requirements of fair labeling.²¹³ If a criminal actor carries out acts prohibited by the Genocide Convention with the specific intent to destroy a political group in whole or in part, such a crime is more serious than a crime against humanity.²¹⁴ This is the case because if the criminal actor succeeds in his or her goal, the result will be the elimination of an entire group, rather than just an individual, or individuals, as occurs with a crime against humanity.²¹⁵ If the international community expands the definition of genocide to include political groups, then the more accurate label of genocide could apply to acts aimed at eliminating a political group in whole or in part.²¹⁶

CONCLUSION

The internationally accepted definition of genocide is unnecessarily restrictive. The interpretations of genocide in cases

Appeals Judgment (Sept. 19, 2000) (characterizing genocide as the “crime of crimes”).

211. *See* Nersessian, *supra* note 187, at 262 (recognizing that genocide is widely viewed as the most serious crime in existence, both domestically and internationally).

212. *See id.* at 256 (explaining that the label society attaches to a crime both stigmatizes the offender for conduct contrary to societal norms and communicates to the public the type of offense committed).

213. *See id.* at 255 (defining fair labeling as a principle aimed at ensuring that a label for a criminal act correctly reflects that crime’s wrongfulness and severity).

214. *See id.* at 262 (arguing that the conduct and mens rea associated with genocide result in a higher level of injury to society than the acts and mens rea associated with crimes against humanity).

215. *See id.* (explaining that differentiating between crimes against humanity and genocide “validates an important distinction between serious discrimination against individuals and acts aimed at destroying the larger groups to which those individuals belong”).

216. *See id.* at 263-64 (asserting that crimes against humanity cannot simply serve as a substitute for the more serious crime of genocide).

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arising out of the Argentine Dirty War and Guatemalan civil war are unconvincing in light of prevailing international standards. Nonetheless, these cases show a distinct frustration with the current definition of genocide. Rather than leave courts to struggle with this restrictive definition, the international community should work to expand the definition to include the victimization of political groups.