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## THE ABUSE OF THE CONCEPT OF GENOCIDE IN WAR CRIMES PROSECUTIONS

Genocide is widely regarded as the supreme international crime. It enjoys a special status partly for rhetorical and partly for legal reasons. Rhetorically, any doubts expressed about the validity of international criminal jurisdictions are usually countered with references to the Nazi genocide or to the events in Rwanda in 1994. These are invoked to defend both supranational criminal jurisdiction and the right of military intervention. Legally, genocide has a specific status because, like torture, it is the subject of an international convention which provides for criminal prosecution of perpetrators of it. (Signatory states are required to carry out such prosecutions although the Convention also provides for the possibility that international tribunals might be created for the purpose.) This contrasts with the legal status of the ad hoc international criminal tribunals, brought into being by means of a resolution in the UN Security Council but not by a treaty. Some of the crimes adjudicated by these tribunals (rape, for instance) have also not been the subject of treaties but instead result from judicial activism on the part of the judges.

As I have written elsewhere, modern international criminal law is the opposite of the law developed or confirmed by the International Military Tribunal at Nuremberg.<sup>1</sup> Genocide was not adjudicated there — the 1948 Convention came into being precisely because its author, Raphael Lemkin, thought Nuremberg insufficient in this respect. More importantly, the prosecutions at Nuremberg were brought for crimes against peace or aggressive war. The jurisdiction and the jurisprudence of the IMT explicitly ruled out judicial interventionism in the internal affairs of states, a principle which was then integrated into the structure of the international system as laid down by the charter of the United Nations, where non-interference and the sovereign equality of states are the very bases of the international system.

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<sup>1</sup> See especially Chapter 3 of John LAUGHLAND *Travesty: the Trial of Slobodan Milosevic and the Corruption of International Justice* (London: Pluto Press, 2007).

The modern understanding of international law is so radically different from that adopted at Nuremberg, indeed, that we can speak of a substantial change in the meaning of the word “international”. Nuremberg adjudicated crimes which were “international” in the sense that they violated the rules of the international system: like the crime of which the Kaiser was accused at the Treaty of Versailles — “supreme offence against international morality and the sanctity of treaties” — crimes against peace are crimes which disturb the peace of the world and the normal relations between states. By contrast, the modern understanding of an international crime is one that is so universally abhorrent that it is subject to “universal jurisdiction” — a concept explicitly ruled out by the London conference, the Charter of the International Military Tribunal and the jurisprudence of the Nuremberg judges.

Given this new meaning, it is reasonable to say that genocide is considered to be the worst possible crime. It is very often invoked when there are debates about the merits of interventionism, not only because mass murder is obviously abhorrent but also because genocide is a crime usually attributed to states. As such, it excites particular horror because — just as sexual abuse in a family represents an abuse of fatherly authority — it represents a violation of the fundamental duty of the state to protect its citizens. When it occurs, it seems obvious that everything — including judicial and even military interventionism — must be undertaken to stop it.

Given this status, it is disturbing that so many accusations of genocide have been made abusively since the concept was first invented and given legal form by the Genocide Convention of 1948. A quick survey of some of the judicial accusations of genocide (I have tried to make the list exhaustive) illustrates the problem. Genocide has been alleged in the following cases:

1. against the Cambodian Khmer Rouge, first in 1979<sup>2</sup> and then in the UN-controlled Cambodia Genocide Tribunal which started its first trial in February, following an initiative taken by the US Congress in 1994;
2. against President Francisco Macias Nguema of Equatorial Guinea, overthrown in 1979 and tried by a Special Military Court in September. He was convicted and hanged along with six others;
3. against General Garcia Meza Tejada, president of Bolivia, accused in 1989 of genocide for a massacre of eight people and convicted of that crime, the Harrington Street massacre;<sup>3</sup>
4. in Romania in 1989 and 1990, most spectacularly against Nicolae Ceausescu but also against his brother and son. The Ceausescu trial was not only a kangaroo court: Romania genuinely did have provisions for genocide in its 1976 penal code;

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<sup>2</sup> John QUIGLEY, *The Genocide Convention, An International Law Analysis* (London: Ashgate, 2006), p. 28.

<sup>3</sup> QUIGLEY, p. 41.

5. ay Bosnia against Serbia before the ICJ in 1993 (the ruling was delivered in 2007); and in the statute of the ICTY (1993);
6. an Rwanda from 1996 onwards in special national courts, in addition of course to the genocide provisions in the statute of the ICTR;
7. an Ethiopia in the massive so-called 'Red Terror' trials which lasted from 1994 to 2007 (they are still continuing but Colonel Menghistu was sentenced then) and which have some 5000 defendants;
8. an Lithuania which prosecuted former NKVD officials and one Nazi collaborator of genocide in the 1990s on the basis of laws passed in 1992 and 2000;
9. against General Pinochet in 1998;
10. against Saddam Hussein, accused of genocide for the Anfal campaign in Northern Iraq in 1986 – 88 (prosecution brought in 2006);
11. and against President al-Bashir of Sudan, accused *inter alia* of rape as genocide. The genocide part of the indictment was initially rejected by the ICC Trial Chamber but in February 2010 the Appeals Chamber instructed the Trial Chamber to rule again so it seems likely that it will be included after all.

Notably absent from this list are the Nazis at Nuremberg and Adolf Eichmann in Jerusalem in 1960. Genocide had not been formulated at Nuremberg, while Eichmann was not formally prosecuted for genocide but instead for a law modelled on the Genocide Convention but which referred specifically to Jews.

There are various things we notice about these different cases.

The first is that many accusations of genocide are used to legitimise regime change. This is a characteristic of regime trials in general but genocide is a popular accusation in such trials precisely because a head of state or government who has committed genocide against his own people is obviously unfit to be a head of state of government. Unfortunately, however, this inevitably political element to accusations of genocide cuts both ways and means that they are indeed often politicised.

For instance, the first genocide accusation brought against Pol Pot and his Khmer Rouge regime (no doubt with very good cause) was in fact brought by the dissident faction within the Khmer Rouge which overthrew him and then constituted a suitably Communist-sounding "People's Revolutionary Tribunal" to try him.

In other cases, the accusation of genocide, while perhaps superficially plausible, has nonetheless been abused for political purposes. Thus there were reports in 2005 that Rwandan Hutus were still fleeing the so-called "genocide courts" which have been set up in the country but which apparently persecute people for political reasons.<sup>4</sup> Another example is the gargantuan "Red Terror"

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<sup>4</sup> "Rwanda's Hutus flee genocide courts" by Esrdas NDIKUMANA, *The Mail and Guardian* (South Africa), 19 April 2005.

trials against members of the Derg regime in Ethiopia: these trials have 5,000 defendants and have lasted for well over a decade. Political enemies of the new regime have been among the indictees.<sup>5</sup> At the ICTR, only Hutus are prosecuted, not Tutsis, even though the Tutsi RPF is credited with having started two wars in Eastern Congo, at a cost of millions of lives, and even though Tutsi military leaders there are accused of war crimes against Hutu refugees.<sup>6</sup>

A second aspect of politicisation comes in the obvious abuse of the concept of genocide itself, also no doubt for political reasons. Perhaps the most extreme example of this was the indictment and conviction of General Garcia Meza Tejada, ex-president of Bolivia, whose conviction for genocide in 1993 was based on the Harrington Street massacre, a shoot-out in which eight leftist political opponents were killed. The Bolivian authorities simply added into the general definition of genocide the idea that it could be used to prosecute killing directed against a political group (in this case, a small cell of left-wing militants who wanted to overthrow the regime) but it is obvious that such a definition empties the concept of genocide of any proper content. The application of the term genocide to political killings was; moreover, explicitly ruled out during the travaux préparatoires for the Genocide Convention.

Genocide was also abused in the initial arrest warrant issued against General Pinochet, the former president of Chile whose arrest in London in 1998 on a Spanish warrant generated so much excitement in the international human rights community. The original warrant issued by the Spanish judge on 16 October 1998 aimed to circumvent the normal rules on sovereign immunity by accusing Pinochet of “terrorism and genocide”.<sup>7</sup> It was on the basis of this that he was arrested on the same day (16 October 1998). The Spanish judge then issued an amplified statement on 18 October, also alleging “terrorism and genocide”.<sup>8</sup> The new warrant named 85 people allegedly killed or “disappeared” by the Chilean authorities — again, hardly genocide, especially since the people in question were obviously political opponents and not members of an ethnic or religious group. In the event, the claims about “genocide” were quickly discarded, no doubt in part because they were so implausible. However, the memory of the charge lives on. Pinochet is listed as a “Perpetrator of genocide” in the “Encyclopedia of Genocide” edited by Israel W. Charney.<sup>9</sup>

<sup>5</sup> “Accused of genocide, Ethiopian NSU prof fights for his life” by Bronwyn Lance CHESTER, *www.ethiomdeia.com*, 5 January 2006.

<sup>6</sup> “Congo and Rwanda forces arrest rebel leader Laurent Nkunda” Matthew WEAVER and agencies, *The Guardian*, 23 January 2009.

<sup>7</sup> The text of the original arrest warrant can be seen here.  
<http://www.derechos.org/nizkor/chile/juicio/captura.html>.

<sup>8</sup> <http://www.derechos.org/nizkor/chile/juicio/funda.html>. See also the reference to “genocide and terrorism” in *The Guardian*’s report on 18 October 1998.

<http://www.guardian.co.uk/world/1998/oct/18/pinochet.chile>. The sequence of events is outlined in Lord Slynn’s remark to the House of Lords in the hearing of 25 November 1998.

<http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd981125/pino01.htm>

<sup>9</sup> Israel W. CHARNY, ed. *Encyclopaedia of Genocide*, (Oxford: ABC-CLIO, 1999) p. 460.

A similar point can be made about the accusation against Nicolae Ceausescu. In this case the numbers of people allegedly killed were vastly inflated beyond the reality — a figure of 63,000 was mentioned during his trial — whereas in fact the death toll from the fighting which eventually overthrew him was about 200. Although this might be excused because of the heat of the moment, prosecutions for genocide were also brought against his brother and son the following year, long after the true figures had become known. In any case, a massacre, however awful, is not genocide unless genocidal intent is demonstrated. It is obvious that the word was used during the various trials in a very rhetorical and legally unsound manner.

Abusive too, it seems to me, albeit in a different way, is the accusation of genocide issued against Omar Al-Bashir, the president of Sudan, by the ICC Prosecutor on Bastille Day 2008. The indictment includes the claim that genocide was being practised in Darfur because women were being raped and because the children born of these marriages were not racially pure: as a result, ran the argument, the tribe (the ‘genos’ in question) was being destroyed. According to the indictment,

The systematic nature of the rapes and the statements which accompany these rapes (if we “*could find any Fur woman ...we would rape them again to change the colour of their children*”) are indication of an intention to destroy the group as such. [NAME REDACTED], a victim of rape [TEXT REDACTED] summed up the situation as follows — “*they kill our males and then dilute our blood with rape. [They]...want to finish us as a people, end our history*”.<sup>10</sup>

This concept of “genos”, a people which is destroyed by miscegenation, is the most primitive type of tribal identity and owes more to the 1935 Nuremberg race laws than to the 1945 Nuremberg trials.

Miscegenation as genocide also formed part of the case brought by Bosnia against Serbia also formed part of the case brought by Bosnia against Serbia to the ICJ — a case which, again, was largely thrown out, in 2007. In the ICJ judgement of February 2007, reference was made to the claim made over a decade by Bosnia:

The Applicant claims that rape was used “as a way of affecting the demographic balance by impregnating Muslim women with the sperm of Serb males” or, in other words, as “procreative rape”. The Applicant argues that children born as a result of these “forced pregnancies” would not be considered to be part of the protected group and considers that the intent of the perpetrators was to transfer the unborn children to the group of Bosnian Serbs.<sup>11</sup>

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<sup>10</sup> International Criminal Court, Pre-Trial Chamber I, The Situation in Darfur, Public Redacted Version of the Prosecutor’s Application Under Article 58, 14 July 2008, Paragraph 395.

<sup>11</sup> International Court of Justice, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, paragraph 362.

In this case as in the Bashir indictment, however, it is surely grotesque to use the term “genocide” to allege forced miscegenation because the “genos” is being “killed” only in the sense that children born of these alleged rapes are supposedly not of the same ethnic group as their mothers. Such racialism should have no place in modern international humanitarian law; it is in any case absurd because the Bosnian Muslims are “ethnically” Serbs. A religious group cannot be wiped out by miscegenation since it is not an ethnic group.

In fact, the allegation that Yugoslavia or Serbia was committing genocide against the Bosnian Muslims was originally made in 1993 when Bosnia-Herzegovina took Yugoslavia to the International Court of Justice alleging that the Serbs were trying to wipe out the Muslims as a race by killing and terrorising them. New allegations were added in 1996 once the war had ended and the case was eventually adjudicated in 2007 when the ICJ found against Bosnia and in favour of Serbia, both on the substantial question of whether genocide was being committed and also on the question of whether Belgrade controlled the Bosnian Serbs.

The single part of the original accusations which was retained was the allegation that genocide had been committed at Srebrenica alone: the ICJ was more or less obliged to retain this part of the indictment because in 2001 (i.e. in the intervening period between the application and the final judgement) the ICTY had handed down its first conviction for genocide to General Krstić (even though he was not in Srebrenica at the time — his conviction was later amended to “aiding and abetting” genocide). But if the original allegation of genocide against the Bosnian Muslims as a whole has been thrown out, then what value is the finding that genocide was committed in one single place and that the genocidal intent was to destroy the “Bosnian Muslims of Srebrenica” or “the Muslims of Eastern Bosnia” alone, as the Krstić conviction alleges?<sup>12</sup> The suspicion is that the definition of “the group” against which genocide has been committed has been artificially narrowed in order to ensure the headline conviction, but such a narrowing in fact seriously undermines the validity of the judgement itself, especially when the original claim was that the Bosnian Serbs were trying to exterminate the Bosnian Muslims as such.

This manipulation of the definition of the group to achieve the conviction for genocide is made additionally doubtful because the whole conviction of Krstić turned on whether or not he shared or knew about General Mladić’s supposed genocidal intent (which has of course itself not been tested in court since General Mladić has not faced trial). The Appeals Chamber concluded that Krstić did know about Mladić’s intent but that he did not share it himself.<sup>13</sup> But surely one cannot be guilty of a crime unless one intended to commit it, especially with a grave crime like genocide. Can one really commit genocide by accident?

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<sup>12</sup> See ICTY Appeals Chamber Judgement Summary 19 April 2004 (as read out in Court by the President of the ICTY, Judge Theodore Meron, 1 (a) (pp. 3–5)

<sup>13</sup> Summary of Appeals Chamber Judgement, 19 April 2004, p. 12.

This brings us to a third category of abuses of the concept of genocide, the convictions entered on the basis of allegations of indirect forms of liability for the crime. The inventive jurisprudence of the International Criminal Tribunals for Rwanda and Yugoslavia has concocted a doctrine known as “joint criminal enterprise”. This is a form of conspiracy theory which, in its so-called “third category” provides for “horizontal” liability pertaining to all members of the group for all acts committed by all its members, even for acts which the individual convicted did not commit, order, intend or even necessarily know about.<sup>14</sup>

It seems clear that this form of liability is incompatible with the ICTY statute, which provides for five different forms of liability but not joint criminal enterprise: according to the statute of the ICTY, one is guilty of a crime if one “planned, instigated, ordered, committed or otherwise aided and abetted ...” it.<sup>15</sup> There is no mention of joint criminal enterprise and certainly not of “third category” JCE.

The ICTY ruled in 2004 that convictions could be entered for genocide on the basis of the third category of joint criminal enterprise. As the Trial Chamber made clear,

It is not necessary for the Prosecution to prove that the Accused possessed the required intent for genocide before a conviction can be entered on this basis of liability’ [the third category of JCE].<sup>16</sup>

Yet the words used in the Genocide Convention of 1948, where the crime is defined as acts “committed *with intent* to destroy” a group, precludes any conviction for an act not committed with such an intent. This requirement for a high level of proof of *mens rea* is also emphasised in the discussion about genocide in the ruling handed down by the ICJ in the case opposing Bosnia and Serbia in 2007, where the ICTY’s own statements to the same effect are quoted.<sup>17</sup> Four years before the statement quoted above, for instance, the same ICTY Trial Chamber had ruled that

Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in

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<sup>14</sup> See John LAUGHLAND, “Travesty: the Trial of Slobodan Milosevic and the Corruption of International Justice” (London: Pluto Press, 2007), p. 121.

<sup>15</sup> ICTY Statute Article 7 (1)

<sup>16</sup> Prosecutor v. Slobodan Milošević, Trial Chamber Decision on Motion for Acquittal, 16 June 2004, paragraph 291.

<sup>17</sup> International Court of Justice, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, paragraphs 186 and 188.



a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong.<sup>18</sup>

Similar problems are associated with the doctrine of liability known as “command responsibility”. According to this doctrine, which remains as controversial as it was when first employed to hang General Yamashita in 1945, commanders can be convicted for crimes committed by their subordinates if they “had reason to know” or “should have known” that they were committing them or about to commit them.<sup>19</sup> But the phrases “has reason to know” or “should have known” seem incapable of legal definition. How can a defendant plead that he “should not have known”? Are the phrases euphemisms for wilful ignorance or is criminal negligence being alleged? Negligence is certainly a punishable offence but can it really be applied to war crimes prosecutions, the formulations of all of which are replete with adverbs emphasising intent?<sup>20</sup> The clear danger is that the advanced forms of command responsibility now used in the international criminal tribunals convict people not for what they did but instead for what they failed to do and for who they are.

This in turn raises another question related to genocide. As the phrase “intent to destroy” in the original Genocide Convention makes clear, genocide is a planned activity. The ICTY has sought to reduce the amount of “planning” required for genocide convictions under joint criminal enterprise, saying that such criminal plans need not really be plans at all: in 1999 it ruled that, “There is no necessity for this plan, design or common purpose to have been previously arranged or formulated.”<sup>21</sup> But while it may be true that perpetrators can act spontaneously — recklessness, indeed, is surely a frequent cause of war crimes — it is rather more difficult to prove spontaneous intent for commanders if, as is usually the case, there is no proof of a criminal order. Spontaneity and the concept of command seem incompatible.

Problems have arisen with this especially in the Rwanda tribunal. To some extent, the issues raised here resemble those raised by Srebrenica. Ever since the statute of the Rwanda tribunal was drawn up, the Prosecution has argued that the massacre of Tutsis and moderate Hutus was planned by extremist Hutus months or even years in advance of the events of April — July 1994. It even alleged that these extremists murdered their own President by shooting down his plane on 6 April 1994 so as to have a pretext for putting the plan into action. It is because

<sup>18</sup> In *Kupreškić*, IT-95-16-T, Judgment, 14 January 2000, para. 636, emphasis added.

<sup>19</sup> See Jenny S MARTINEZ, *Understanding Mens Rea in Command Responsibility, From Yamashita to Blaškić and Beyond*, *Journal of International Criminal Justice* 5 (2007), 638–664, who expresses her own dissatisfaction with the doctrine and summarises the concerns expressed by other scholars.

<sup>20</sup> See on this William A. SCHABAS, *Mens Rea and The International Criminal Tribunal for the Former Yugoslavia*, *New England Law Review* 37 : 4 (2003), especially his discussion of the concept of wilful blindness, p. 1029 ff.

<sup>21</sup> *Tadić Appeals Chamber Judgment*, 15 July 1999, paragraph 227.



the allegation was of a fully pre-meditated genocide that no Tutsi has even been prosecuted by the Tribunal: the Tribunal was created specifically to try the architects and perpetrators of this pre-conceived plan. It is because of the allegation of a pre-existing plan that no credence is given, either in the Prosecution cases or even in the Statute itself (which limits the jurisdiction of the Tribunal to the period April – July 1994, the point at which the alleged victims of genocide in fact seized power in Rwanda) to the idea that there might have been racially-motivated killing on both sides, or even to the idea that the killing might have been spontaneous, the result of mass panic.

As a result, the Court rigorously excludes from its rulings any examination of the context in which the crimes were committed – the assassination of the Hutu President of Burundi in October 1993; the likely role of Paul Kagame and his RPF in shooting down the plane which killed President Habyarimana and the next Burundi president on 6 April 1994; or the genocide committed by Tutsis against Hutus in 1972 in neighbouring Burundi.<sup>22</sup>

Moreover, it is only because genocide is a state crime that has been planned that commanders and other people like radio journalists can be prosecuted and convicted for it. Were genocide to encompass spontaneous acts, then presumably there would be no commanders of it to prosecute. The essentially planned nature of the crime of genocide was actually discussed and confirmed in the landmark judgement in *Akayesu*

At the time the Convention on Genocide was adopted, the delegates agreed to expressly spell out direct and public incitement to commit genocide as a specific crime, in particular, because of its critical role in the planning of a genocide, with the delegate from the USSR stating in this regard that, “It was impossible that hundreds of thousands of people should commit so many crimes unless they had been incited to do so and unless the crimes had been premeditated and carefully organized. He asked how in those circumstances, the inciters and organizers of the crime could be allowed to escape punishment, when they were the ones really responsible for the atrocities committed.”<sup>23</sup>

Yet the monster trial which has just finished at the ICTR, known as Military I (Bagosora et. al.) in December 2008, that of the alleged major ringleaders of the genocide, has recently resulted in an acquittal of the defendants on the charge of conspiracy to commit genocide.<sup>24</sup> As the Tribunal says of acts which occurred before April 1994, “These preparations are completely consistent with

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<sup>22</sup> See on these matters Charles ONANA, *Les Secrets de la Justice Internationale, Enquête truquées sur le génocide rwandais* (Paris: Editions Duboiris, 2005)

<sup>23</sup> ICTR Prosecutor v. Jean-Paul Akayesu, Judgement, 2 September 1998, paragraph 551; footnote refers to Summary Records of the meetings of the Sixth Committee of the General Assembly, 21 September – 10 December 1948, Official Records of the General Assembly, statements by Mr. Morozov, p. 241.

<sup>24</sup> ICTR Prosecutor v. Bagosora et. al., Judgement, 18 Dec 2008, Section 2, p. 538 ff., especially paragraphs 2110–2113.

a plan to commit genocide. However, they are also consistent with preparations for a political or military power struggle.”<sup>25</sup> But if this is true of the planning then surely it is true of the acts themselves, which in any case are hardly intelligible as genocide if there was, after all, no plan or conspiracy to commit it (or at least not proof of such). Even the Prosecution admits that its own evidence for a conspiracy is “circumstantial”.<sup>26</sup> The Prosecution closing brief said, “The inference to be drawn from the evidence is *not* that each of the accused sat in the same room at the same time and agreed to a plan, nor that such a plan consisted of a single course of equally-divided or unified conduct.”<sup>27</sup> But if not, then what sort of a “plan” is it?

The judgement in Military I means that a key plank of the Prosecution case has collapsed, and especially the claim that plans existed since 1990 or so for a genocide. I believe that this is a structural problem with regime trials of the kind the ICTR holds: ever since Nuremberg and Tokyo, conspiracy theory has been used to adjudicate politics. In some cases, the conspiracy theory can be made to stick; in other cases, such as in the trial of the Japanese leaders after the Second World War, which was based on the claim that they had conspired since 1927, the allegation is evidently ridiculous.<sup>28</sup> It is ridiculous in both human and in legal terms: in human terms because politics is simply not like that — especially in wartime, but in politics generally, the acts of one side are determined by the acts of others, especially the enemy, and therefore it is quite wrong to speak of the implementation of a pre-existing plan; and in legal terms because the concept of conspiracy itself as a crime is dangerously unstable. Many jurisdictions do not even recognise it as a crime, only the acts themselves.

The problems associated with prosecutions for genocide, in other words, reflect the overall problems associated with “regime trials”, that is, trials of political and military commanders. International humanitarian law has long since been colonised by liberal human rights activists who have never been near a gun but who are pursuing a one-world supranational agenda. The law generated by their tribunals is therefore departing more and more from the best canons of civilised jurisprudence, often leading to outright violation of due process, and also from any sense of reality about what it is like to be in a combat situation or a political leader fighting a war.

I therefore conclude my analysis with a modest proposal. I am personally sceptical about the possibility of regime trials ever being fair. However, if they must be conducted, then I suggest that an august principle of English law be applied, the principle that a defendant should be tried by his peers. Many of the violations of due process in today’s ad hoc tribunals flow from the fact that the

<sup>25</sup> Bagosora et. al. Judgement, 18 December 2008, Paragraph 2110.

<sup>26</sup> Bagosora et. al. Judgement, 18 December 2008, Paragraph 2097.

<sup>27</sup> Prosecution closing brief, paragraph 35, quoted in footnote 2321 of Bagosora Judgement, p. 535.

<sup>28</sup> See Chapter 12 of John LAUGHLAND *A History of Political Trials from Charles I to Saddam Hussein* (Oxford: Peter Lang, 2008).

trials are conducted in front of judges who often have very little experience as actual judges. It is partly for this reason that they last so long. Instead, I propose that they be conducted before juries — juries of retired generals for trials of military commanders, juries of retired heads of state and government for ex-presidents and political leaders. Only then can a sense of realism be brought back into a judicial process which is rapidly spinning out of control.

John Laughland

#### THE ABUSE OF THE CONCEPT OF GENOCIDE IN WAR CRIMES PROSECUTIONS

Genocide is widely regarded as the supreme international crime; invocation of it has been used to justify military intervention and supranational judicial prosecutions by international tribunals. But a study of the history of accusations of genocide shows that very often the term is used abusively. This article looks at the history of such accusations and concludes that the abuses should cause new accusations to be treated sceptically. It also argues that the accusation of genocide highlights a problem which bedevils all war crimes prosecutions, namely the theories of liability used to prosecute commanders. Just as with the accusation itself, theories of criminal liability are now common in international tribunals which themselves need to be comprehensively reassessed if such tribunals are to command respect.

Джон Локланд

#### ЗЛОУПОТРЕБЛЕНИЕ ПОНЯТИЯ «ГЕНОЦИД» В ОБВИНЕНИЯХ В ВОЕННЫХ ПРЕСТУПЛЕНИЯХ

Геноцид считается самым тяжелым международным преступлением. Военные интервенции и уголовные преследования наднациональными судами обосновывались якобы совершенными геноцидами. Однако, история обвинений в геноциде указывает на то, что данное понятие часто злоупотреблялось. Ряд таких обвинений являются предметом данного реферата и приводят к выводу, что злоупотребления были достаточно серьезными, чтобы вызвать скептическое отношение ко всем новым обвинениям такого типа. Кроме того, подчеркивается, что обвинения в геноциде чаще всего имеют слабое место, общее для всех судебных процессов по военным преступлениям, а именно — неясное обоснование ответственности, в соответствии с которой преследуется командный персонал. Как и в случае с самими обвинениями, теории ответственности, которыми обычно международные суды пользуются, должны основательно пересмотреться для того, чтобы эти суды заслужили почтение как серьезные правосудные органы.