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A theoretical re-examination of *dolus specialis* in international criminal law with regard to genocidal intent

Sintija Broka-Kovalevska*

Riga Stradiņš University, Riga, Latvia; ORCID: 0000-0001-8711-1894

Abstract

The evidentiary threshold for establishing intent to commit genocide remains one of the most intricate and contested issues in international criminal law. While the 1948 Genocide Convention defines genocide as requiring 'dolus specialis'—the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group, this mental element has proven difficult to substantiate, particularly in instances of systematic or state-orchestrated mass violence. This study critically examines whether the prevailing doctrinal interpretation of genocidal intent adequately reflects the evolving character of contemporary atrocities and assesses the potential of alternative conceptual models, such as inferred or knowledge-based intent, to enhance legal accountability. Employing a doctrinal methodology, it draws upon international jurisprudence from the International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda and International Criminal Court, together with treaty interpretation and theoretical scholarship. The analysis identifies the restrictive construction of intent as a principal impediment to effective prosecution, especially in the absence of explicit statements or documentary evidence. It contends that the current legal framework risks obscuring structural manifestations of genocidal policy by privileging direct proof of subjective intent. The article concludes that a context-sensitive, inferential approach to genocidal intent is both legally tenable and necessary to realise the preventive purpose of the Genocide Convention.

Keywords

foreign policy • genocide • genocide convention • intent • international criminal law

INTRODUCTION

The crime of genocide holds a singular status in international criminal law as 'the crime of crimes', not only for its destructive scale but also for its unique legal composition. Defined in Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention), genocide refers to acts committed 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such' (United Nations, 1948, Art. 2). These acts include killing members of the group, causing serious bodily or mental harm, inflicting life conditions intended to destroy, imposing measures to prevent births, and forcibly transferring children. Unlike other international crimes, genocide is distinguished by the presence of a specific intent (*dolus specialis*)—a deliberate aim not just to harm but also to eliminate a group (United Nations, 1948, Art. 2).

The requirement of *dolus specialis* is both legally significant and notoriously difficult to establish. Courts have wrestled with the standard for proving genocidal intent, leading to restrictive interpretations that have contributed to high thresholds for conviction. The jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) set precedents for inferring intent from patterns of violence, systematic targeting and public statements. However, the evidentiary standard remains high—unless intent is explicit in orders or speech, courts are often reluctant to infer genocidal purpose, especially in complex political and military contexts. This article examines the conceptual and doctrinal tensions surrounding the requirement of genocidal intent in international criminal law. While genocide is recognised as one of the gravest crimes under international criminal law, its legal enforcement is often hindered by the difficulty of proving the perpetrator's specific intent to destroy a protected group. Courts have struggled with this evidentiary burden, particularly in cases involving structural or bureaucratic forms of violence, where explicit statements of intent are rarely available. Despite the development of jurisprudence,

* *Corresponding author: sintija.broka@rsu.lv*

the threshold for proving intent remains high, potentially limiting the capacity of international law to prevent or punish large-scale atrocities committed under the guise of military or political objectives.

This paper aims to explore how genocidal intent is defined, interpreted and applied across international legal instruments and case law, and whether alternative models—such as inferred or knowledge-based intent—could offer a more comprehensive approach to addressing collective violence. The paper applies a doctrinal legal methodology, which is used to analyse and interpret existing legal sources within international criminal law. This approach focuses on examining treaties, case law and scholarly commentary to clarify how the element of *dolus specialis* has been understood and applied in genocide prosecutions. The study combines close textual analysis of the Genocide Convention, the Rome Statute and judgements of the ICTY, ICTR and International Criminal Court (ICC) with a comparative review of interpretative trends in tribunal reasoning. It also considers theoretical perspectives from legal scholarship to evaluate whether knowledge-based or inferred intent models can better reflect the realities of collective violence.

Therefore, the author offers the following research question: How can genocidal intent be interpreted under international criminal law in a way that ensures accountability, given the constraints imposed by limited political will?

Ultimately, the study interrogates whether evolving legal theory can better serve the preventive aims of the Genocide Convention, while recognising that meaningful reform will also require international political will.

RESULTS AND DISCUSSION

Legal architecture of genocide

The term 'genocide' was introduced by Polish-Jewish jurist Raphael Lemkin to capture the systematic brutality he witnessed during Nazi occupation in Europe (Lemkin, 1947: 145. lpp.). Determined to distinguish this crime from both crimes against humanity and war crimes, Lemkin devoted years to advocating for its recognition as a standalone international offence. In his work, 'Axis Rule in Occupied Europe', he defined the term as follows:

> By "genocide" we mean the destruction of a nation or of an ethnic group. This new word, coined by the author to denote an old practice in its modern development, is made from the Greek word genos (race, tribe) and the Latin cide (killing) … genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion and the economic existence of national groups, and the destruction of personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.
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> (Lemkin, 1944: 79. lpp.; Roux, 2017: 99. lpp.).

At the time, the atrocities committed by Nazi Germany were not yet commonly identified as genocide. Rather, they were prosecuted under the broader category of 'crimes against humanity', largely due to their occurrence within the context of war. In 1945, United States government prosecutor Robert H. Jackson submitted a pivotal study titled 'Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders', outlining legal strategies for addressing such crimes (Jackson, 1945). Jackson (1945) proposed that the prosecution of leading Nazi war criminals should be grounded in the 'war crimes and atrocities which have characterized the Nazi regime since 1933'. His memorandum specifically referenced the systematic persecution of minority groups across Europe and emphasised the imperative of denying impunity to those responsible. Following Jackson's proposal for the establishment of an international tribunal, the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis was signed on 8 August 1945, by the United States, United Kingdom, Soviet Union, and France (United Nations, 1945). This agreement laid the legal foundation for the creation of the International Military Tribunal (IMT), tasked with prosecuting key leaders of the European Axis for crimes including aggressive war, war crimes and crimes against humanity. The IMT became a landmark institution in the development of international criminal law, establishing precedent for future tribunals and codifying accountability for mass atrocity. The Tribunal convened its inaugural session in Nuremberg, Germany, on 20 November 1945. It was tasked with trying senior Nazi officials and military commanders charged with war crimes and crimes against humanity. The Tribunal itself was composed of judges appointed by the four Allied powers—the United States, the United Kingdom, the Soviet Union and France (Roux, 2017: 98–102. lpp.). This marked the first occasion on which the newly formulated international crime of 'crimes against humanity' was applied within a legal framework at the global level. The concept was later endorsed by the United Nations General Assembly in

Resolution 95(I), (United Nations, 1946) titled 'Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal'. These principles were subsequently codified by the International Law Commission (ILC) in its 1950 document, 'Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal' (United Nations, 1950 [2005]). At the time, crimes against humanity remained closely intertwined with war crimes, as they were explicitly framed in reference to the atrocities committed by Nazi Germany. The Nuremberg Tribunal found that crimes committed before the outbreak of war in 1939 could not be prosecuted as crimes against humanity unless they were committed 'in execution of or in connection with' war crimes (United Nations, 1949). Consequently, the Tribunal limited its jurisdiction to crimes against humanity that occurred after the onset of the war. A key shift occurred with the adoption of Allied Control Council Law No. 10 on 20 December 1945, in occupied Germany. This law provided the first formal definition of crimes against humanity that separated them conceptually and legally from war crimes, laying the groundwork for future international prosecutions (Roux, 2017: 101–102. lpp.; Control Council, Law No. 10, Art. 2(c); UN, 1968, Art. 1(b)).

The recognition of genocide as a distinct international crime was facilitated by the gradual legal separation of war crimes from crimes against humanity. In this context, R. Lemkin's persistent efforts to define genocide as a standalone offence—legally independent from both categories—ultimately bore fruit (Roux, 2017: 105. lpp.). By omitting any requirement that genocide occur within the context of armed conflict, the emerging legal framework decisively moved away from the traditional war-nexus that had previously constrained atrocity law (Tams et al., 2014: 40. lpp.). Following a request for a draft treaty from UNESCO, the Convention on the Prevention and Punishment of the Crime of Genocide was adopted on 9 December 1948. Notably, the Convention affirmed that genocide could be committed in time of peace or in time of war, solidifying its autonomous legal status. The Convention's definition of genocide—anchored in the intent to destroy, in whole or in part, a national, ethnical, racial or religious group—has since served as the standard in all subsequent international criminal instruments. Although the Rome Statute of the ICC does not include a dedicated provision replicating Article III of the Genocide Convention, it does incorporate the crime of genocide under Article 6, and references to incitement, attempt and complicity appear within Article 25, concerning individual criminal responsibility (Rome Statute, Art. 25(3)(e), 25(3)(b)–(f), 25(a)–(f)). It is now widely recognised in both international legal scholarship and practice that the prohibition of genocide holds the status of a *jus cogens* norm—a peremptory rule of international law—and gives rise to *erga omnes* obligations, meaning duties owed to the international community as a whole (Crawford, 2012: 595–596. lpp.; Frowein, 1991–2001: 65–67. lpp.). In the aftermath of the Holocaust, the international legal order marked a historic advancement with the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948, which established genocide as a punishable crime under international law (UNTS, Vol. 78, No. 1021, 277. lpp.; UK Treaty Series, No. 58, 1970). This development was preceded by UN General Assembly Resolution 96 (I), adopted unanimously in 1946, which formally recognised genocide as an international crime. Under contemporary international law (Convention on the Prevention and Punishment of the Crime of Genocide, 1948), genocide is defined as any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group:

- Killing members of the group.
- Causing serious bodily or mental harm to members of the group.
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.
- Imposing measures intended to prevent births within the group.
- Forcibly transferring children of the group to another group.

On 12 January 1951, the Convention on the Prevention and Punishment of the Crime of Genocide entered into force after receiving the 20 ratifications required under Article 13. Adopted by the UN General Assembly in 1948, the Convention defines genocide and establishes its prohibition under international law. The deliberate destruction, in whole or in part, of a national, ethnic, racial, or religious group is illegal (Currently, the Genocide Convention has been approved or acceded to by 152 countries. This shows that the convention's guiding principles, which include the proscription and penalisation of the crime of genocide, are widely accepted on a global scale. Nonetheless, the definition of crimes against humanity has changed to include crimes against a wider spectrum of people, including during times of peace. States are required to issue an extradition in line with their laws and treaties, and the ICJ has jurisdiction over disputes pertaining to the interpretation and application of the Convention). What makes genocide unique among international crimes is the presence of specific intent (*dolus specialis*). According to Article I of the Genocide Convention, genocide may occur not only in the context of international or non-international armed conflict but also in times of peace—though the latter is less common, it remains legally recognised and possible. Article I further establishes the duty of State Parties to prevent and punish the crime of genocide. While definitions of genocide in political discourse often expand beyond legal thresholds, Article II of the Convention provides a strict and narrow legal definition, requiring two core elements:

- **A mental element**—the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such;
- **A physical element**—acts committed with that intent, such as killing members of the group, inflicting serious harm or imposing life conditions intended to lead to the group's destruction (Prosecutor v. Krstić, 2005: para. 650).

Intent as a legal element

In cases involving genocide, intent is the most difficult factor to prove. Only in cases where there is unmistakable proof that the culprit meant to physically wipe out a national, ethnic, racial, or religious group entirely or in part is genocide recognised by law. This threshold is not met by the goal of simply dispersing a community or by cultural devastation. The specific and targeted intent to eradicate a group is the *dolus specialis,* which sets genocide apart from other international crimes. International jurisprudence has often inferred intent from the existence of coordinated plans or systematic acts, suggesting that such frameworks are generally indicative of genocidal aim, even if the Genocide Convention does not explicitly require a state or organisational policy. Crucially, victims are specifically targeted because they are believed to belong to one of the four protected groups under the Convention, whether correctly or not. It's the perpetrator's belief that counts, not the victim's actual identity. So, rather than focussing on single people, the crime aims to destroy the 'organisation' as a whole. Furthermore, if a subgroup is unique and significant—which can include geographically delimited divisions of a population—genocide may be perpetrated against them (United Nations, n.d.).

The ILC's Draft Codes of Crimes against the Peace and Security of Mankind were among the first thorough documents to define 'intent' in relation to genocide. Article 17(5) addresses the crime of genocide:

> a person becomes responsible for the crime of genocide only if one of the forbidden acts is carried out with the intention of destroying, as a group, any part or all of it.
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> (United Nations, 1996, Art. 17(5), 44. lpp.)

Article 17(10) asserts that while the provision explicitly requires intent, such intent may be inferred from the perpetrator's awareness of the discriminatory impact of their actions aimed at destroying a targeted group:

> … The definition of the crime of genocide would be equally applicable to any individual who committed one of the prohibited acts with the necessary intent. The extent of knowledge of the details of a plan or a policy to carry out the crime of genocide would vary depending on the position of the perpetrator in the governmental hierarchy or the military command structure … The definition of the crime of genocide requires a degree of knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail of a comprehensive plan or policy of genocide. A subordinate is presumed to know the intentions of his superiors when he receives orders to commit prohibited acts against individuals who belong to a particular group. He cannot escape responsibility if he carries out the orders to commit destructive acts against victims who are selected because of their membership in a particular group by claiming that he was not privy to all aspects of the comprehensive genocidal plan or policy. The law does not permit an individual to shield himself from criminal responsibility by ignoring the obvious. For example, a soldier who is ordered to go from house to house and kill only persons who are members of a particular group cannot be unaware of the irrelevance of the identity of the victims and the significance of their membership in a particular group. He cannot be unaware of the destructive effect of this criminal conduct on the group itself. Thus, the necessary degree of knowledge and intent may be inferred from the nature of the order to commit the prohibited acts of destruction against individuals who belong to a particular group and are, therefore, singled out as the immediate victims of the massive criminal conduct.
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> (United Nations, 1996, Art. 17(10), 45. lpp.)

This section mentions the 'necessary' intent, but it also says that intent and knowledge alone would be enough to convict someone of genocide. A person would be convicted of genocide, according to the ILC, if they committed one of the actions with knowledge that it was part of a deliberate intention to damage a particular group, as was previously shown. This provides more evidence in favour of the knowledge-based approach to the intent requirement of the Convention. Examples of the degree of culpability for individuals involved in crimes committed by a collective for a common purpose are also provided in Article 25(3)(d) of the Rome Statute of the ICC:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
> (d) In any other way continues to the commission

> or attempted commission of such crime by a group of persons acting with a common purpose. Such contributions shall be intentional and shall either (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime.
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> (International Criminal Court, 2011)

Among other reasons, the Genocide Convention was created to ensure that those responsible for genocide would be held accountable. Although it is not required for a conviction, a plot is usually involved in genocide. Genocide is not a single act; rather, it is a sequence of actions taken by multiple individuals that, if successful, would cause a group to be destroyed entirely or in part. As Ms. Goldsmith argues, genocide is not only a result of organised planning but also of people willingly acting. The individuals who carry out the *actus reus*, or the physical component (Schabas, 2009) of genocide are at the core of the crimes that are forbidden and ought to face consequences. They should be held accountable since they bear responsibility for their acts. A banned act is committed with the aim to destroy a targeted group if the perpetrator is aware of a concerted effort to do so. The *dolus specialis* requirement is inappropriate, as individuals are as much to blame as the people who orchestrated the plan (Goldsmith, 2010: 252).

If intent is not expressed clearly, it may be difficult to prove because it is a subjective state of mind. Mr. Stanton claims that denial is the eighth and last step of genocide and that it happens throughout the entire process. The reason for this is that the goal of the act of genocide is to completely destroy any evidence of a group's existence (Stanton, 1998). Criminals usually assign blame for the events to the victims and 'deny' ever committing any crimes. They resist investigations into the crime and continue to hold onto power until they are compelled to step down and leave the country. The perpetrators always assert that they are not committing genocide, but in reality, their denial fuels the crime. As part of the overall genocidal strategy, the criminals may also eliminate any evidence of their conduct in addition to denying that the crime is taking place (Goldsmith, 2010: 253).

The main objective of the Genocide Convention is to prevent the annihilation of certain groups because doing so would deprive humanity of its unique contribution. During the Convention's drafting process, this idea was developed further, leaving 'intent' open to interpretation. Because the Genocide Convention stipulates that specific acts must be performed with the intent to destroy, determining whether a crime of genocide has been committed necessitates interpreting intent. Realising that physical evidence of purpose might occasionally be hard to come by, courts and tribunals have debated how to demonstrate intent in cases involving genocide. Rather, the nature of the crime, the setting in which it took place, the comments or policies of the offenders and the effect of their actions on the target community can all be used to infer the intentions of the criminals. Because different international tribunals may employ slightly different criteria or techniques to determine intent in cases involving genocide, there may be some degree of interpretation and variation in practice. Furthermore, legal interpretation has continued to be improved and debated as our knowledge of genocidal intent has changed via case law. The ICC has taken a restrictive approach, while the ICTR has convicted many defendants due to Rwanda's clear case of genocide. There is a clear shift towards a knowledge-based approach in Article 30 of the Statute (International Criminal Court, 2011: 15–16). Some contend that the clause 'unless otherwise provided' ought to allude to the part of the Convention that lists the forbidden conduct. Nonetheless, the application of *dolus specialis* as the necessary intent surpasses both Mr. Lemkin's and the original aim of the Convention's drafters.

According to Mr. Stanton, there are eight predictable—but not insurmountable—stages in the genocide process. It can be stopped at any point by preventive measures. The earlier steps must logically come before the later ones, even though the process is not linear. It makes sense that the process continues from previous stages. Classification, symbolisation, dehumanisation, organisation, polarisation, preparation and extermination denial are the stages he has mentioned (Stanton, 1998). Early intervention is essential to preventing genocide, and some contend that the Genocide Convention's shift away from the basic definition of purpose intended by its drafters and creators urgently needs to be amended. The knowledge-based interpretation is the best way to accomplish this goal because it restores the Convention's original objective and gives it new authority that has been undermined by arguments over whether atrocities had the 'specific intent' necessary to be considered genocide.

CONCLUSIONS

This paper has critically evaluated the concept of *dolus specialis* in the crime of genocide, interrogating whether current legal standards sufficiently account for the realities of modern atrocities. It concludes that the prevailing interpretation of genocidal intent—requiring direct proof of an actor's specific desire to destroy a group—is both conceptually narrow and evidentially demanding. As a result, this threshold has often constrained the effectiveness of genocide prosecutions and has contributed to the under-recognition of mass violence that is systematic and group-targeted. While intent remains the legal element that distinguishes genocide from other international crimes, jurisprudence from international tribunals reveals a growing acceptance of inferring intent from patterns of conduct, organised policy frameworks, and the foreseeability of group destruction. The ICTR, for example, has acknowledged that genocidal intent can be deduced from the nature and scale of attacks, the selection of victims and the discriminatory character of policies. Similarly, evolving interpretations in the International Law Commission and Rome Statute (particularly Art. 25(3)(d)) (United Nations, 2024) suggest a movement toward incorporating knowledge-based standards. The research has demonstrated that inferred and contextual approaches to intent—anchored in the totality of the circumstances rather than isolated declarations—offer a more realistic and legally sound framework. Such an approach is better suited to capturing the bureaucratic and structural dimensions of mass atrocities, especially when perpetrators use indirect means of destruction or operate within state machinery.

However, achieving greater legal accountability for genocide is not merely a matter of refining legal doctrine. The practical implementation of broader standards for intent remains heavily limited by the political architecture of international relations. States' foreign policies play a decisive role in whether and how allegations of genocide are addressed. Strategic alliances, regional interests, and economic or military dependencies frequently override normative commitments to justice. States often avoid engaging with or endorsing genocide accusations for fear of diplomatic fallout, reciprocal claims or jeopardising geopolitical alliances. Consequently, legal determinations of genocidal intent are deeply entangled with *realpolitik* considerations, leading to selective enforcement and inconsistent application of international criminal law.

Politics affects how international criminal law is applied as well as how genocidal intent is interpreted doctrinally. Because states have always attempted to limit the extent of genocide in order to escape possible accountability for their own conduct, the emergence of *dolus specialis* reflects broader political concessions. Particularly throughout the Cold War and postcolonial eras, restricted interpretations of intent frequently reflected dominant geopolitical objectives during the formulation of the Genocide Convention and the tribunal practice that followed. A predilection for specific, limited evidential standards that shield state actors while ignoring systemic or policy-based forms of group disintegration has been strengthened by this politicisation. As a result, the balance of political power has impacted the understanding of genocidal intent in addition to legal reasoning, highlighting the need for increased normative independence and transparency in its doctrinal evolution.

Moreover, the enforcement landscape remains structurally weak and dependent on voluntary state cooperation. Prosecutions are often delayed or blocked altogether due to a lack of access, political shielding of suspects, or institutional inertia within international bodies. As a result, foreign policy choices can either enable or obstruct legal accountability. Therefore, while a more flexible and context-sensitive interpretation of genocidal intent is both legally plausible and normatively compelling, its effective realisation depends on a fundamental shift in the international political environment. This includes stronger commitments to universal jurisdiction, depoliticised investigatory frameworks, robust support for international tribunals, and the political will to confront atrocity crimes regardless of the perpetrator's status. To improve accountability for genocide, a number of tangible legislative measures are needed in addition to these structural and political factors. First, a more precise interpretation of *dolus specialis* should be provided by international criminal law, acknowledging that genocidal intent can be deduced from structural and contextual evidence rather than from overt statements. To increase uniformity across cases and lessen evidentiary confusion, the Elements of Crimes or ICC prosecution guidelines should formally acknowledge the knowledge-based approach, which is reflected in evolving tribunal practice.

Second, an extra explanatory report or interpretative protocol created under the ILC's auspices that explains the connection between intent, knowledge and foreseeability in collective destruction would be beneficial to the Genocide Convention. This would assist in bringing governmental responsibilities into line with the contemporary realities of bureaucratic, organised violence.

Third, to guarantee that domestic courts can successfully apply the idea of genocidal intent, model legislation and judicial training should be implemented to improve national jurisdictions' practices. A more cohesive body of jurisprudence would result from more collaboration between the ICC and national prosecutors in interpreting intent standards.

Finally, international procedural law would improve preventive capacity and bridge the gap between normative commitments and enforcement practice by codifying contextual and policy-based indicators of genocidal intent, such as evidentiary criteria for mass atrocity cases. Only when states align their foreign policies with the preventive aims of the Genocide Convention—prioritising justice over geopolitical convenience—can the legal promise of genocide prevention and punishment be fulfilled. Enhancing accountability thus requires not only legal reform but also sustained moral and political courage from the global community.

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