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An Overview of the Crime of Genocide in Latin American Jurisdictions

Elizabeth Santalla Vargas*
Professor of International Criminal Law, Educatis University, Switzerland
External Professor of International Law, Universidad Privada Boliviana, La Paz, Bolivia
Legal Consultant, International Committee of the Red Cross,
Regional Delegation for Bolivia, Ecuador, and Peru

Abstract
Genocide is included in most Latin American Criminal Codes that were enacted long before the adoption of the Rome Statute. Genocide's criminalization in Latin America has, to a large extent, deviated from the Genocide Convention definition with respect to the *actus reus,* mainly concerning the protected groups. However, the existing jurisprudence does not shed much light on the reasons or justifications for such a deviation; it is rather inconsistent in some instances. The implementation of the Rome Statute offers mixed signals as to the legal and policy trends in Latin America with regard to the scope of genocide. The fact that the codification of crimes against humanity has gained momentum with the entry into force of the Rome Statute implies an increasing need to reflect on the coherence of the domestic criminalization of core crimes.

Keywords
genocide; massacre; protected groups; dictatorships; implementation of the Rome Statute

1. Introduction

A deficit of criminalization of conduct amounting to crimes under international law characterizes domestic legislation in Latin America.[1] Such a deficit finds, however, a general exemption in the crime of genocide. Indeed, the criminalization of genocide can be traced back to most[2] of the Criminal Codes of the region

*) The author wishes to thank the Peace Palace Library for kindly providing access to some of the sources from Bolivia.

1) It should be acknowledged that the debate concerning the implementation of the ICC Statute (or Rome Statute) has paved the way for the incorporation of crimes within the jurisdiction of the ICC with the enactment of implementing legislation in some cases, namely Argentina, Uruguay, Brazil, and in most cases such debate has prompted draft legislation, for instance in Bolivia, Peru, and Ecuador.

2) Chile, Venezuela, and Ecuador have not yet criminalized genocide.

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enacted from the 1970s onwards -in some instances even before-[3] and is thus independent of the negotiation of the Rome Statute of the International Criminal Court (Rome Statute) and its subsequent implementation.

While not intending to constitute a comprehensive survey, this article will explore the way genocide has been criminalized and interpreted in Latin American jurisdictions *vis-à-vis* the definition of genocide under current international law. Particular attention will be paid to deviating elements in correlation with available jurisprudential interpretations.

2. Contextualizing the Definition

The definition of genocide under international law was coined by the Convention on the Prevention and Punishment of the Crime of Genocide (1948).[4] This definition was later adopted by the Rome Statute, which recognized genocide as one of the "most serious crimes of concern to the international community as a whole".[5] Article 6 of the Rome Statute defines genocide, in line with the Genocide Convention,[6] as follows:

> For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> a) Killing members of the group;
> b) Causing serious bodily or mental harm to members of the group;
> c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> d) Imposing measures intended to prevent births within the group;
> e) Forcibly transferring children of the group to another group.

The existence of the Genocide Convention may be attributed to the fact that the Nuremberg Trials restricted the notion of crimes against humanity to wartime.[7] Indeed, the Charter of the Nuremberg Trials required a nexus to an armed conflict. Subsequent developments however, abandoned such a nexus, namely the Control Council Law No. 10 and the Statute of the International Criminal Tribunal for Rwanda, while the Statute of the International Criminal Tribunal for

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3) Brazil and Mexico criminalized genocide in 1956 and 1967, respectively.

4) For the previous historical background, see e.g. W. Schabas, 'The 'Odious Scourge': Evolving Interpretations of the Crime of Genocide', in R. Smith (ed.), *The Armenian Genocide,* (2006), pp. 93-106.

5) Art. 5(1) Rome Statute.

6) The definition of the Genocide Convention was previously incorporated into the Statutes of the *ad-hoc* International Criminal Tribunals predecessors to the ICC; Art. 4(2) ICTYSt; Art. 2(2) ICTRSt.

7) Schabas, *supra* note 4, at 105.

the former Yugoslavia maintained it.[8] In the same line of development, the Rome Statute has departed from the wartime nexus and reflects the recognition under customary international law that crimes against humanity, as well as genocide, may be committed in time of peace (or war).

In such a context, the *raison d'être* of genocide can be only explained by the special intent –to destroy in whole or in part– one of the protected national, ethnic, racial or religious groups, that characterizes its definition. While the former *mens rea* element is generally accepted as inherent to the definition -although with divergent approaches as to its interpretation - the latter has become the crux of the matter for those who seek to expand its scope.[9] The Latin American region is a case in point in such discussion.

Several decades of confrontation, in many cases amounting to non-international armed conflicts, were experienced by various countries within the region, especially in El Salvador, Nicaragua, Guatemala, Peru, and Colombia. In Colombia a transitional justice process is currently taking place within the still ongoing, although reduced, conflict. Such conflicts generally involved a State policy of systematic attack against civilian populations and in many instances against particular political groups.[10] By the same token, the so-called "doctrine of national security" that served as a justification for the emergence of repressive regimes in the 1970s, was politically motivated and targeted.[11] Such a context may explain the enlargement of the definition of genocide undertaken by several penal laws within the region, mainly with respect to the incorporation of the political group and other even more general groups within the protected groups, as will be further analyzed in this article.

3. National Provisions on Genocide

While the *dolus specialis*[12] is inherent to all provisions on genocide analyzed in this article, the deviations from the international definition revolve around the *actus*

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[8] For background information and interpretation, see e.g., H. von Hebel, 'Crimes Against Humanity under the Rome Statute', in P. van Krieken (ed.), *Refugee Law in Context: The Exclusion Clause,* (1999), p. 105 at 107.

[9] See, e.g., D. Feierstein, 'Las violaciones sistemáticas a los derechos humanos en América Latina: la necesidad de pensar estos conceptos desde el "margen latinoamericano", *Foro Regional sobre Prevención del Genocidio* <http://www.nodo50.org/codoacodo/feirstein.pdf> (last visited on 14 April 2010). Also: B. van Schaack, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot', (1997) 106 (7) *Yale L.J.* 2259; L.J. Leblanc, 'The United Nations Genocide Convention and Political Groups: Should the United States Propose and Amendment?', (1988) 13 *Yale J. Int'l L.* 268.

[10] Feierstein, *ibid.,* 3.

[11] *Ibid., supra* note 9, 7.

[12] For a thorough study on the 'intent to destroy' requirement, see K. Ambos, 'What Does 'Intent to Destroy' in Genocide Mean?', (2009) 91 (876) *International Review of the Red Cross,* 833 – 858.

reus -understood as encompassing the protected groups and the modalities of commission.[13]

Some national legislations follow the wording of the Genocide Convention, namely: Argentina[14] and Brazil.[15] While endorsing the four protected groups of the Genocide Convention, Mexico[16] and Cuba[17] adopted some variations in the *actus reus*. The majority of national legislations, however, have altered the definition, making it either over-inclusive or under-inclusive.[18] Over-inclusive definitions extend the category of *protected groups* to "political groups", "social groups", and other various groups. Under-inclusive definitions are the result of curtailing the protected groups recognized by the Genocide Convention[19] -mainly with respect to the racial group. And in various cases, both over-inclusive and under-inclusive features can be found.

The political group has been incorporated in the Criminal Codes of Colombia,[20] Panama,[21] and Costa Rica.[22] It should be highlighted that while including the political group, the Colombian provision had restricted its scope to those political groups operating within the confines of the law. Such a qualification was later overturned by the Constitutional Court as further commented (section 4.1). It is also interesting to note that the Bolivian understanding of genocide, as expressed during the negotiation of the Genocide Convention, was the protection of groups defined by their common ideology.[23] This understanding, however, was not echoed by the later criminalization of genocide.

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13) For a comprehensive analysis of the elements of crimes as codified by the Rome Statute system, see K. Ambos, 'Selected Issues Regarding the 'Core Crimes' in International Criminal Law', in *International Criminal Law: quo vadis?* (Proceedings of the International Conference held in Siracusa, Italy, 28 November – 3 December 2002) (2004), 219 – 241.

14) The implementation of the Rome Statute in Argentina, with respect to core crimes, was undertaken by direct reference to the crimes enshrined in Articles 6-8 of the Rome Statute, see Art. 2 of Law 26200 of Implementation of the Rome Statute of 5 January 2007.

15) Law 2889 of 1 October 1956.

16) Federal Criminal Code, Art. 149 bis (Decree of 20 January 1967).

17) Criminal Code, Art. 116 (Amended by Law No. 87).

18) W. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (2006), 23-4.

19) *Ibid.*

20) Criminal Code, Art. 101 (Amended by Law No. 599 of 24 July 2000). For a background on the legislative history and discussion, see A. Aponte, 'Report on Colombia', in K. Ambos and E. Malarino (eds.), *Persecución Penal Nacional de Crímenes Internacionales en América Latina y España*, Montevideo: Fundación Konrad-Adenauer (2003), 201 at 207-8.

21) Criminal Code, Art. 431 (Law No. 14 of 18 May 2007).

22) Criminal Code, Art. 375 (Law 4573 of 15 November 1970).

23) Summary record of 74th meeting held at Palais de Chaillot, Paris on 14 October 1948, UN Doc A/C.6/SR.74 (Medeiros, Bolivia), cited by R. Young, 'How Do We Know Them When We See Them? The Subjective Evolution in the Identification of Victim Groups for the Purpose of Genocide', (2010) 10 *International Criminal Law Review* 1, at 8.

The social group is found in the Criminal Codes of Peru[24] and Paraguay.[25] The provision on genocide of Paraguay includes a "community", which is protected independently from its categorization into any other group.[26] In the same vein, the Bolivian Criminal Code has included the so-called "bloody massacres".[27] And a whole range of groups –besides the four conventional categories- are protected by the law implementing the Rome Statute in Uruguay, namely the political, syndical, and any other group identified by reasons of gender, sexual orientation, cultural or social background, age, disability or health.[28]

On the other spectrum, some States have curtailed the categories of protected groups recognized by the Genocide Convention. The racial group was excluded by the Criminal Codes of Bolivia[29], Paraguay,[30] Peru,[31] Honduras,[32] and Guatemala.[33] Nicaragua omitted both racial and national groups,[34] while the ethnic group was omitted by El Salvador[35] and Costa Rica.[36]

With respect to the acts that constitute genocide, the variations mainly refer to:

(i) extending the forcible transfer of children to include adults (Bolivia[37] and Guatemala[38]), and extending the coverage of a "forcible transfer" to any person (El Salvador),[39] any group (Uruguay),[40] and the community (Paraguay);[41]

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24) Criminal Code, Art. 319 (Amended by Law No. 26926 of 19 February 1998). As pointed out by Carlos Caro, the racial group was replaced by the social group, without any explanation or justification, in the Criminal Code enacted in 1991. This was the first time that genocide was criminalized in Peruvian criminal law. See, C. Caro, 'Report on Peru', in Ambos and Malarino (eds.), *Persecución Penal, supra* note 20, 447 at 448.

25) Criminal Code, Art. 319 (Amended by Law No. 1160 of 1997)

26) Criminal Code, Art. 319.

27) Criminal Code, Art. 138 (Initially amended by Law 1768 of 10 March 1997). For an analysis on the parallels between Art. 138 and Art. 6 of the Rome Statute, see E. Santalla Vargas, 'Report on Bolivia', in Ambos and Malarino (eds.), *Persecución Penal, supra* note 20, 83 at 86-7.

28) Law 18026 of 25 September 2006, Art. 16. For a critique in the light of the principle of legality, see D. Camaño Viera, 'La Implementación del Estatuto de Roma en el Uruguay', (2008) 1 *Boletín Jurídico.*

29) Criminal Code, Art. 138.

30) Criminal Code, Art. 319 (Amended by Law No. 1160 of 1997).

31) Criminal Code, Art. 319.

32) Criminal Code, Art. 319 (Decree 144-83).

33) Criminal Code, Art. 376 (Decree 17/73).

34) Criminal Code, Art. 549.

35) Criminal Code, Art. 361 (Amended by Legislative Decree 745 of 5 November 2008).

36) Criminal Code, Art. 375.

37) Criminal Code, Art. 138.

38) Criminal Code, Art. 376.

39) Criminal Code, Art. 361.

40) Law 18026 of 25 September 2006, Art. 16.

41) Criminal Code, Art. 319.

(ii) rephrasing the wording of Article 6(c) to read "deliberately inflicting on the group inhuman living conditions" (Bolivia),[42] "conditions that would render difficult its survival" (El Salvador),[43] "subjecting the members of the group to precarious living conditions capable of causing the extinction, total or partial of the group" (Costa Rica)[44], and extending the coverage of this modality of commission to a deprivation of resources indispensable for survival, a serious health disturbance, a systematic removal from the homeland, or conditions that could alter the traditional way of life (Uruguay);[45]
(iii) restricting the wording of Article 6(d) to: "imposing massive sterilization with the purpose of preventing the reproduction of the group" (Mexico);[46]
(iv) incorporating as part of the *actus reus* "forced pregnancy" (Colombia),[47] the curtailment to the exercise of the group's worship or customs (Paraguay),[48] and torture, forced disappearance, deprivation of liberty, sexual assault, forced pregnancy, inhuman or degrading treatment (Uruguay).[49]

4. The Elements of Genocide as Interpreted by the Latin American Jurisprudence

Although Latin American judgments on genocide – or related – are scant, there are a few judgments that ought to be mentioned.[50] In this endeavour, the focus will be on the relevant aspects of such judgments, distinct from the generally accepted interpretations of the conventional definition that they endorse.[51] One reference in the latter sense, however, is worth mentioning.

While referring to the *mens rea* requirement, and in line with the international jurisprudence, the Supreme Court of Mexico has distinguished between intent and motive in the context of the Spanish request of extradition of *Cavallo*.

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42) Criminal Code, Art. 138. For a critique see, Santalla Vargas, *supra* note 27, at 87.
43) Criminal Code, Art. 361.
44) Criminal Code, Art. 375.
45) Law 18026 of 25 September 2006, Art. 16 (c). Such criteria are reminiscent of the *Akayesu* Judgment of the ICTR which exemplified the expression "conditions of life calculated to bring about its physical destruction" with the scenarios spelled out in Art. 16(c) of Law 18026. See *Prosecutor* v. *Jean-Paul Akayesu,* Judgment, Case No. ICTR-96-4-T, T.Ch. I, 2 September 1998, para. 506.
46) Federal Criminal Code, Art. 149 *bis.*
47) Criminal Code, Art. 101.
48) Criminal Code, Art. 319.
49) Law 18026 of 25 September 2006, Art. 16 (b).
50) For a comprehensive overview and extracts (in Spanish) from the Judgments, see Fundación para el Debido Proceso Legal, *Digesto de Jurisprudencia Latinoamericana sobre Crímenes de Derecho Internacional* (2009), 13-28.
51) See, e.g. Corte Constitucional de Colombia, *Demanda de inconstitucionalidad contra el artículo 322 de la Ley 589 de 2000 (Código Penal),* Considerando 3, Sentencia C-177/01, Expediente D-3120, de 14 de febrero de 2001. The Judgment is emphatic with regard to the *jus cogens* nature attributed to genocide. See also Mexico, *Amparo en revisión promovido por Ricardo Miguel Cavallo*, considerando décimo primero.

The Judgment has emphasized that what matters for the crime of genocide is the evidence of the specific intent to destroy –in whole or in part– one of the protected groups, irrespective of whether the purpose behind the destruction is political, economical, revenge, etc.[52] Such a distinction is arguably relevant in light of an increasing tendency, particularly in Latin America, to portray as genocide any conflict that may involve some degree of violence and victims of ethnic minorities or socially perceived as excluded groups.

One of the few judgments that elaborates on the characterization of the group is the so-called Argentinean case *Circuito Camps and Others*.[53] The case concerned the Argentinean dictatorship that commenced in 1976 and involved blatant violations of human rights. One of the issues posed by the Judgment was whether the thousands of victims of the so-called State terrorism –who were mainly political opponents– could constitute a national group for the purpose of the crime of genocide. The question was answered in the affirmative, based upon the consideration that the targeted group constituted anyone who would oppose the dictatorship's political views, and that the intention behind the repressive actions was not to change the mentality within the group but rather to exterminate the group.[54]

In doing so, the Judgment appears to assimilate the political group with the national group. Such an approach may pave the way for construing the various crimes committed during the dictatorial regimes of the 1970s, which embody the history of Latin America, as genocide. However, it may be deemed to embrace a conceptual blur that could ultimately "circumvent by way of interpretation the conscious choice [of the Genocide Convention] of an exhaustive list of protected groups".[55]

Notwithstanding the fact that, as seen above, the most relevant Latin American deviation from the international definition refers to the protected groups, jurisprudence has not shed much light on the underlying rationale or justification for such a deviation and/or its scope of interpretation. In this connection, the challenges to the constitutionality of some of the elements as incorporated in the Colombian and Bolivian provisions on genocide, as well as a conviction of genocide in the latter, ought to be mentioned.

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52) *Amparo en Revisión Promovido por Ricardo Miguel Cavallo,* Amparo en Revisión 140/2002, Suprema Corte de Justicia de la Nación de México, 10 de junio de 2003 (considerando décimo primero).

53) *Caso 'Circuito Camps' y otros (Miguel Osvaldo Etchecolatz),* Causa No. 2251/06, Tribunal Oral en lo Criminal Federal (La Plata), 19 de septiembre de 2006.

54) *Ibid.,* considerando IV.b.

55) C. Kreß, 'The Crime of Genocide under International Law', (2006) 6 *International Criminal Law Review* 461, at 476.

4.1. *The Colombian Case*

The constitutionality of the Colombian provision on genocide has been subjected to judicial review on two occasions. In 2001, the Constitutional Court overturned the initial incorporation of the political groups operating only within the confines of the law, considering that such a qualification could have paved the way for impunity. To put it differently, maintaining the qualification would have posed a legal hurdle for genocide prosecutions where the political group may be regarded as an irregular or illegal group.[56] In the other instance, the Constitutional Court upheld the constitutionality of the "serious" qualification of the *actus reus*, i.e. causing serious bodily or mental harm to members of the group, by reaffirming the underlying rationale embedded in the Genocide Convention, namely that considering the specific intention and specific groups protected by the crime of genocide, a certain degree of seriousness in the bodily or mental harm is coherent.[57]

The inclusion of the political group within the protected groups has not been the specific subject of judicial review. However, while pronouncing on the aforementioned challenges to constitutionality, the Constitutional Court has emphasized that the domestic definition of genocide is not confined to international law but rather finds its justification on the very same protections afforded by the Constitution, namely on the right to assembly and to constitute political organizations or groups, as well as on the prohibition of discrimination *inter alia* on the grounds of political opinion.[58]

4.2. *The Bolivian Case*

The *"bloody massacre"* expression inserted in Article 138 of the Bolivian Criminal Code, which criminalizes genocide, was the vehicle for the prosecution of the crimes under the label of genocide, as the victims could not have been classified under any of the three protected groups by the provision (national, ethnic, and religious) in the impeachment proceedings conducted against former dictator General Luis García Meza[59] and his closest collaborators.[60] Based upon the

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[56] *Demanda de inconstitucionalidad contra el artículo 322 de la Ley 589 de 2000 (Código Penal),* Sentencia C-177/01, Expediente D-3120, Corte Constitucional, 14 de febrero de 2001.

[57] Actor: Gonzalo Rodrigo Paz Mahecha, *Demanda de inconstitucionalidad contra las expresiones 'grave' contenida en el numeral 1 del artículo 101 y 'graves' contenida en los artículos 137 y 178 de la Ley 599 de 2000 por la cual se expide el Código Penal,* Sentencia C-148/05, Corte Constitucional de Colombia, de 22 de febrero de 2005.

[58] *Ibid.*

[59] His dictatorship spanned the years 1980-81. It is considered as one of the most nefarious *coup d'état* and repressive regimes of Bolivian history.

[60] García Meza Tejada, Luis y Otros *(Caso Dirigentes del Movimiento de Izquierda Revolucionaria),* Supreme Court of Justice, Judgment of 21 April 1993.

available information, these impeachment proceedings constitute the only prosecution and conviction on the basis of genocide so far attained in Latin America. The use of the term "bloody massacre", however, has been criticized for its lack of legal certainty in the light of the principle of legality.[61] In the words of Semelin, '[t]here are various definitional problems inherent in the notion of massacre',[62] which pose a whole host of difficulties when the notion is transposed to the definition of the crime. Bolivia is a case in point.

The impeachment proceedings conducted against García Meza and others comprised various categories of crimes, the most serious of which was genocide. Genocide was charged regarding the incident on Harrington Street in La Paz. On 15 January, 1981, a death squad operation took place on Harrington Street where a secret meeting of the opposition party, Revolutionary Leftist Movement (Movimiento de Izquierda Revolucionario, or MIR) was being held. A group of armed agents sent by the government broke into a private house where the meeting was taking place and killed eight of the nine unarmed political leaders after they had already been captured. The incident is known as "The Harrington Massacre".

The evidence led to the conclusion that the incident was part of a plan to exterminate MIR political leaders, and designed with the knowledge and participation of García Meza. The Harrington Street operation had been planned a day before in a meeting held on 14 January, 1981. Notwithstanding the fact that neither García Meza nor Arce Gomez (former Minister of the Interior) was present at that meeting, the evidence was conclusive as to their orders and knowledge of such a plan.

The aforementioned facts were characterized by the Judgment rendered by the Supreme Court of Justice on 21 April, 1993 as encompassing the elimination of a group of politicians and intellectuals. However, such a characterization finds no explanation in the Judgment as to the protected group element of Article 138 of the Criminal Code, which criminalizes genocide, but does not protect a racial group or, in particular, a political group. Nor did the Judgment elaborate on the genocidal intent. Thus, no analysis occurred as to whether the evidence presented could have led the Supreme Court of Justice to conclude that the accused intended to destroy a protected group in whole or in part.

As mentioned earlier, the notion of "bloody massacres" in the second paragraph of the crime of genocide (Article 138 Criminal Code), paved the way for charging and convicting the former dictator and Minister of the Interior for genocide for the acts perpetrated on Harrington Street.

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61) E. Santalla Vargas, 'Report on Bolivia', in K. Ambos, Gisela Elsner and Ezequiel Malarino (eds.), *Justicia de Transición. Con Informes de América Latina, Alemania, Italia y España*, Montevideo: Fundación Konrad-Adenauer (2009), 153 at 163-4. PURL: http://www.legal-tools.org/doc/0ecf1a/

62) J. Semelin, 'Massacres', in S. Totten and P.R. Bartrop (eds.), *The Genocide Studies Reader*, Routledge (2009), at 86.

Article 138 of the Bolivian Criminal Code reads in part:

> One who, with the aim of destroying in whole or in part a national, ethnic, or religious group, kills or injures members of the group, or subjects them to inhuman living conditions, or imposes measures designed to impede their reproduction, or by violence removes children or adults to other groups shall be imprisoned from ten to twenty years.
> The same penalty applies to the actor or instigators or other directly or indirectly responsible for bloody massacres in the country.[63]

However, the Judgment sheds no light on what objective and subjective elements constitute a "bloody massacre", in particular as to their relation to the elements of genocide.[64] This issue came up in 2006, pursuant to a judicial review of the constitutionality of the "bloody massacres" clause requested by a member of Parliament. The Constitutional Court, however, upheld its constitutionality despite the confusion and uncertainty of the concept.[65]

The main arguments advanced by the Constitutional Court can be summarized as follows: (i) the principle of legality finds no infringement as the second paragraph of Article 138 constitutes *lex certa* by *defining* the conduct and its consequence. As to the definition, the Constitutional Court refers to the definition of "massacre" in the dictionary of the Spanish Royal Academy;[66] (ii) the second paragraph of Article 138 is distinguished from the first paragraph since, as interpreted by the Constitutional Court, the notion of "bloody massacres" does not share the specific genocidal intent (*dolus specialis*), nor the protected groups, as enshrined in the first paragraph of the provision.[67]

The criticism that has been levelled against the Judgment is straightforward.[68] If the "bloody massacre" notion does not share the objective or subjective elements of genocide, there is no rational basis for its inclusion within the provision on genocide. Hence, any prosecution (and conviction) that on its basis is labelled as genocide is, to say the least, devoid of legitimacy. Furthermore, if the objective and subjective elements of the expression are to be found in a dictionary, the *lex certa* component of the principle of legality is undoubtedly eroded. It is striking that the Constitutional Court, concurring with the President of Parliament, held

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63) Translation by John Quigley, *The Genocide Convention: an International Law Analysis* (2006), 40-1.

64) Along the same view, see *ibid.*

65) *Leigue Hurtado Diputado Nacional v. Sandra Giordano Presidente de la Cámara de Senadores,* Constitutional Judgment 0034/2006, Constitutional Court of Bolivia, 10 May 2006.

66) Constitutional Judgment, *ibid.,* (section II.3.2, second and eight paras.).

67) *Ibid.,* sixth para.

68) For a detailed critique of the Judgment, highlighting its implications on the implementation of the Rome Statute, see E. Santalla Vargas, 'Report on Bolivia', in K. Ambos, Ezequiel Malarino and Gisela Elsner (eds.), *Jurisprudencia Latinoamericana sobre Derecho Penal Internacional*, Montevideo: Fundación Konrad-Adenauer (2008) 67 at 75-81.

that the implementation of crimes as enshrined in the Rome Statute may go beyond and be more protective at the national level,[69] when the provision in question was not the one of implementation but rather Article 138 of the Criminal Code –currently in force at the time of writing (April 2010) - which has not been amended since its incorporation in 1973.[70]

Furthermore, the assimilation of massacres with genocide is ultimately outweighed by countervailing considerations that emerge beyond a purely legalistic purview. Indeed, a sociological viewpoint avers that "[b]ecause groups are social constructions, they can be neither constituted nor destroyed simply through the bodies of their individual members",[71] and hence group destruction is to involve "a nexus between the destruction of collective ways of life and institutions and bodily and other harm to individuals".[72] Since the term *massacre* is commonly understood "as a form of action, usually collective, aimed at the elimination of civilians or non-combatants including men, women, children, or elderly people unable to defend themselves",[73] a conceptual dichotomy of "massacre" and "genocide" becomes apparent.

After all, the sociological conclusion may be purported to be in tandem with the developments in international jurisprudence. As pointed out by Schabas,[74] the *Krstić* delimitation of the definition of genocide under customary international law "to those acts seeking the physical or biological destruction of all or part of the group"[75] becomes blurred by subsequent case law that has admitted the commission of genocide even in the absence of evidence of a planned physical extermination.[76]

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69) Constitutional Judgment, *supra* note 65, section II.3.2.

70) The original version of the Bolivian Criminal Code was enacted by Law-Decree 10426 of 1973. The amendment of the crime - deleting the controversial second paragraph, and incorporating the racial group as well as introducing other modifications in the *actus reus* in line with Art. 6 of the Rome Statute - was proposed by the consultancy on the implementation of the Rome Statute, see E. Santalla Vargas, 'Implementación del Estatuto de Roma de la Corte Penal Internacional en Bolivia: Análisis del Ordenamiento Jurídico Interno y de los Procesos de Implementación en la Legislación Comparada', in Defensor del Pueblo de Bolivia (ed.), *Implementación del Estatuto de la Corte Penal Internacional en Bolivia* (2005), 85 at 119. Also, E. Santalla Vargas, 'Report on Bolivia', in K. Ambos, Ezequiel Malarino and Jan Woischnick (eds.), *Dificultades Jurídicas y Políticas para la Ratificación o Implementación del Estatuto de Roma de la Corte Penal Internacional. Contribuciones de América Latina y Alemania*, Montevideo: Fundación Konrad-Adenauer 2006, 99 at 121-2.

71) M. Shaw, 'Elements of Genocidal Conflict: Social Groups, Social Destruction and War', in A. Jones (ed.), *Genocide in Theory and Law*, Sage Publ. (2008), Vol. I, 123 at 131.

72) *Ibid.*

73) Semelin, *supra* note 62, at 86.

74) *Ibid., supra* note 4, at 103.

75) *Prosecutor* v. *Krstić,* Judgment, Case No. IT-98-33-T, 2 August 2001, para. 580.

76) *Prosecutor* v. *Blagojević et al.*, Judgment, Case No. IT-02-60-T, T.Ch.I, 17 January 2005, para. 650.

5. Conclusions

Although this article has not focused on implementation, and is mindful of the risks embedded in attempting to delve into legislative intentions in the absence of specific *travaux préparatoires*, an *a priori* assertion may be advanced with respect to the rationale underlying the variations that the definition of genocide has encountered, to a large extent, in Latin American domestic criminal laws. The fact that crimes against humanity were generally unknown to national legislations –arguably up to the entry into force of the Rome Statute which paved the way for its implementation or serious consideration– may explain why genocide provisions did not conform to the scope of the Genocide Convention definition.[77] The strong moral condemnation that a conviction on genocide entails should also be acknowledged, since such a condemnation is probably linked to the particular stigma that the crime of genocide has historically provoked.

As illustrated above, national provisions on genocide in Latin America confirm the structure of the crime as a specific intent crime that differs as to the protected groups and acts that make up the genocidal conduct. Nonetheless, jurisprudential interpretation as to the rationale or justification of such divergent legislative approaches is almost inexistent or precarious.

There remains to be seen what legal and policy choices will be undertaken by the gradual enactment of implementing legislation of the Rome Statute in Latin America. It is unclear whether states will opt to maintain the enlarged scope of genocide, or avoid perilous juxtapositions that may arise mainly with respect to crimes against humanity, by creating clearer parameters between crimes. The current trend offers mixed signals on this point.[78] The time is ripe to reflect on the reasons behind the intention to label a particular situation as genocide at a time when the codification of the other core crimes has gained momentum.

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77) An exception to this assertion exists in the law on implementation of the Rome Statute of Uruguay that, as explained above, has over expanded the scope of genocide. Law 18026 of 25 September 2006, Art. 16.

78) For instance, while Argentina has implemented the Rome Statute adopting the definition of the Genocide Convention, Uruguay has done so by expanding the notion of genocide to a wide range of groups, including political ones.