


12-12-2017

## The Violent Persecution of the Iranian Bahá'í: A Call to Take a Human Capabilities Approach to Defining Genocide

Camilia R. Brown

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

 Part of the [Human Rights Law Commons](#), [International Humanitarian Law Commons](#), [International Law Commons](#), and the [Religion Law Commons](#)

---

### Recommended Citation

Camilia R. Brown, *The Violent Persecution of the Iranian Bahá'í: A Call to Take a Human Capabilities Approach to Defining Genocide*, 43 *Brook. J. Int'l L.* 361 (2017).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol43/iss1/33>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

# THE VIOLENT PERSECUTION OF THE IRANIAN BAHÁ'ÍS: A CALL TO TAKE A HUMAN CAPABILITIES APPROACH TO DEFINING GENOCIDE

## INTRODUCTION

On September 25, 2016, in a gruesome act of violence, two men murdered sixty-three year old Farhang Amiri at his home in Yazd, Iran, solely because he was a member of the Bahá'í faith.<sup>1</sup> The night before his murder, two accomplices arrived at his doorstep claiming to have arranged to purchase a car.<sup>2</sup> Mr. Amiri's son answered the door and immediately became skeptical of the two men, telling them repeatedly that he was not aware that his father had a car on sale, but they persisted.<sup>3</sup> Finally, he asked for their contact information so that he could relay a message to his father and they quickly made an excuse and left.<sup>4</sup> The following evening, neighbors heard Mr. Amiri screaming and found him with multiple stab wounds to the chest.<sup>5</sup> Mr. Amiri had been attacked by the same two men who arrived at his doorstep the night before.<sup>6</sup> In the wake of the attack, a representative for the Bahá'í International Community<sup>7</sup>

---

1. *A Bahá'í is Killed in Iran, A Victim of Religious Hatred*, BAHÁ'Í INT'L COMMUNITY (Oct. 26, 2016), <https://www.bic.org/news/bahai-killed-iran-victim-religious-hatred#ZCF5szcCQmbBCwsb.97>.

2. *Id.*

3. *Id.* Bahá'ís have experienced repeated cycles of persecution since the founding of the faith in the mid-nineteenth century. See IRAN HUM. RTS. DOCUMENTATION CENTER, A FAITH DENIED: THE PERSECUTION OF BAHÁ'ÍS IN IRAN 2 (2006), [http://www.iranhrdc.org/files.php?force&file=reports\\_en/A\\_Faith\\_Denied\\_Dec06\\_397039411.pdf](http://www.iranhrdc.org/files.php?force&file=reports_en/A_Faith_Denied_Dec06_397039411.pdf).

3. *Id.* Due to the endemic social persecution they have experienced, Bahá'ís must often approach seemingly innocent situations, like Mr. Amiri's, with caution. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. The Bahá'í International Community (BIC) registered as a nongovernmental organization in 1948 and represents the worldwide Bahá'í community, whose members come from every national, ethnic, religious, cultural, and socio-economic background, representing a cross-section of humanity. See *About Us*, BIC.ORG, <https://www.bic.org/about/about-us#Gv8iMjH6lQG11tYi.99> (last visited Oct. 16, 2017). It maintains U.N. offices in New York and Geneva, as well as regional offices in Addis Ababa, Brussels, and Jakarta. *Id.* The BIC

at the United Nations stated, “unfortunately, such a heinous act is a consequence of a long-standing, systematic effort by Iranian authorities to encourage hate and bigotry against Bahá’ís.”<sup>8</sup>

Unfortunately, this was not an isolated attack against the Amiri family or the Bahá’í faith as a whole. Over the past few years, the Bahá’ís in Yazd have been victims of wrongful arrests, imprisonments, and raids on their residences and businesses.<sup>9</sup> Mr. Amiri’s children have also been targeted victims of persecution, as their businesses, laptops, telephones, and other items were searched and confiscated by the government.<sup>10</sup>

The story of Mr. Amiri and his family is only one example of the many atrocities committed against the Bahá’ís since the religion’s inception. Bahá’ís are not spared the rod of injustice in any aspect of their lives. Not only are they killed, arbitrarily imprisoned, and tortured, but the government also utilizes systemic tactics against them, such as defacing and raiding their personal property and sealing and burning their businesses.<sup>11</sup> The government also prohibits their employment and denies their access to higher education, thus isolating them from the rest of Iranian society.<sup>12</sup> Bahá’í children are also targets of the

views its work through the “framework of capacity building,” seeking the empowerment of larger segments of humanity to work for the spiritual and material betterment of all. *Id.* Focus areas include the realization of the equality of women and men, youth as protagonists of constructive change, and the persecution of the Iranian Bahá’ís. *Id.*

8. *A Bahá’í is Killed in Iran, A Victim of Religious Hatred*, *supra* note 1.

9. *Id.* In November 2016, over one hundred Bahá’í owned businesses in cities across Iran were sealed by Iranian authorities after they were closed to observe Bahá’í holidays on the first two days of the month. *See Forced Closure of Shops in Iran On an Unprecedented Scale*, BAHÁ’Í INT’L COMMUNITY (Feb. 7, 2016), <https://www.bic.org/news/forced-closure-shops-iran-unprecedented-scale#2yJU46XG03UxsMrG.99>. The BIC recently wrote a letter to the President of Iran, explaining that sealing Bahá’í businesses is one of many tactics employed by Iranian authorities in their “economic apartheid” against the Bahá’ís. *Id.* The BIC has called upon the international community to denounce these “unjust actions and exhort the Iranian government to take immediate, visible, and substantive measures to reverse the situation.” *Id.*

10. *A Bahá’í is Killed in Iran, A Victim of Religious Hatred*, *supra* note 1.

11. IRAN HUM. RTS. DOCUMENTATION CENTER, *supra* note 3, at 2.

12. The #NotACrime crime campaign was launched to draw attention to the thousands of Bahá’ís that are barred from access to higher education through the use of old school street art. *See THE CAMPAIGN*, <http://www.notacrime.me/> (last visited Oct. 3, 2017); *Human Rights in Iran*, BAHÁ’Í INT’L COMMUNITY (Mar. 18, 2014), <https://www.bic.org/statements/human-rights->

state's oppression, as they are imprisoned with their mothers from infancy and ridiculed by teachers and school bullies.<sup>13</sup> Media propaganda depicts the faith as a dangerous cult and incites hatred and acts of violence against Bahá'ís.<sup>14</sup>

The Bahá'í religion originated in Persia (now Iran) in 1863, when Bahá'u'lláh ("Glory of God") declared himself to be a prophet of God.<sup>15</sup> Bahá'í means follower of Bahá'u'lláh, whose central teachings are: there is one God, that Divine Revelation is progressive and all the Abrahamic faiths are of the same origin, that people should work to eradicate all forms of prejudices, that there should be gender equality in all aspects of life, that all races are equal, that universal education is essential, and that each individual must independently investigate the truth and develop good character.<sup>16</sup> Because Baha'u'llah claimed to be a Prophet of God after Muhammad, Iran's fundamentalist clergy brands Bahá'ís as heretics.<sup>17</sup> Bahá'ís have traditionally been persecuted on this basis.<sup>18</sup>

Since the Islamic Revolution in 1979,<sup>19</sup> more than 200 Bahá'ís have been executed, hundreds more have been imprisoned and

iran##OpegcjeP16Dzmv.97. Some of the high-profile supporters of the campaign are Nobel Peace Prize Laureates Archbishop Desmond Tutu and Dr. Shirin Ebadi. *Id.* The murals can be found in Harlem, South Africa, Rio De Janeiro, Cape Town, Johannesburg, Sydney, London, Delhi, and Atlanta. *Id.*

13. *Id.*

14. Since the 1950s, high profile Shiite preachers have taken to the media to disseminate their views regarding the falsehood of the Bahá'í faith. See IRAN HUM. RTS. DOCUMENTATION CENTER, *supra* note 3, at 6. In 1955, Tehran Radio broadcasted a series of anti-Bahá'í sermons by Iran's leading preacher. *Id.* The propaganda used during this period created negative stereotypes and incited public outrage against Bahá'ís. *Id.* at 7.

15. See WENDI MOMEN & MOOJAN MOMEN, UNDERSTANDING THE BAHÁ'Í FAITH xiii–ix (2006).

16. *Id.*

17. IRAN HUM. RTS. DOCUMENTATION CENTER, *supra* note 3, at 41.

18. *Id.*

19. In the 1960s and 1970s, the Shah's authority was challenged by a growing number of factions in Iranian society, including religious conservatives led by Ayatollah Khomeini. See *id.* at 2. Despite being forced into exile in 1964, growing frustration with the Shah's regime created an enormous following around Khomeini's vision of revitalizing Iran as an Islamic Republic and dismantling the Shah's toxic western agenda. *Id.* Khomeini's message led to a revolution and the overthrow of the Shah. *Id.* The prominence of clerical rule after the 1979 revolution gave rise to a centralized and government-directed anti-Bahá'í campaign. *Id.* at 16. The new Islamic constitution explicitly withheld recognition as a religious minority from the Bahá'ís. *Id.* Instead, the

tortured, and tens of thousands have been denied employment, education, freedom of worship, and other rights.<sup>20</sup> Many human rights advocates have expressed “a fear of looming genocide” against the Bahá’ís, but little has been done to alter their position.<sup>21</sup> Since the Rwandan Genocide, leaders on the international stage have vowed to take affirmative steps towards preventing the occurrence of another mass genocide.<sup>22</sup> The violent persecution of the Bahá’ís in Iran reflects the continued unresponsiveness of international actors to conditions which resemble those that have led to genocide in the past.<sup>23</sup> The dearth of first responders to the plight of Bahá’ís in Iran could be addressed by a

---

Bahá’ís were categorized as a political threat, which was reinforced by propaganda that Bahá’ís were guilty of espionage or other anti-revolutionary criminal activity. *Id.*

20. BAHÁ’Í INT’L COMMUNITY, *VIOLENCE WITHOUT IMPUNITY: ACTS OF AGGRESSION AGAINST THE IRANIAN BAHÁ’Í COMMUNITY 1* (2013).

21. Reza Afashari, *The Discourse and Practice of Human Rights Violations, in THE BAHÁ’ÍS OF IRAN 232, 239* (Dominic Parviz Brookshaw & Seena B. Fazel eds., 2008).

22. On the twentieth anniversary of the Rwandan Genocide, U.N. Secretary General Ban Ki-moon stated:

We have learned important lessons. We know more keenly than ever that genocide is not a single event but a process that evolves over time, and requires planning and resources to carry out. As chilling as that sounds, it also means that with adequate information, mobilization, courage and political will, genocide can be prevented.

Ban Ki-moon, *Remarks at Launch of “Kwibuka20,” UNITED NATIONS* (Feb. 27, 2014), <https://www.un.org/sg/en/content/sg/speeches/2014-02-27/remarks-launch-kwibuka20>.

23. See, e.g., Terry Glavin, *Iran is Tormenting the Bahá’í People—Is Canada Going to do anything about it*, NATIONAL POST (Apr. 20, 2016), <http://news.nationalpost.com/full-comment/terry-glavin-iran-is-tormenting-the-bahai-people-is-canada-going-to-do-anything-about-it>. (“Canada has long shown leadership in shaming the regime about its contempt for human rights. Iran Accountability Week, during which MPs from all parties each ‘adopt’ an Iranian political prisoner, is an annual event on Parliament Hill. Carleton University, the University of Ottawa and McGill University each extend an informal accreditation to the ‘underground’ Bahá’í Institute for Higher Education in Iran. Canada continues to lead in the United Nations’ annual scrutiny of Iran’s human rights record. But with so many lucrative trade deals being dangled in front of us, will Canadians persist in questioning the regime and holding it accountable for its thuggish treatment of religious and ethnic minorities, women, trade unionists, journalists and secularists?”).

more structural construction of the Convention on the Prevention and Punishment of Genocide (the “Convention”), which makes genocide a crime under international law.<sup>24</sup>

As a religious group, the Bahá'í community is protected by the Convention.<sup>25</sup> While the Convention states that genocide can be caused by the deliberate infliction of conditions of life calculated to bring about a group's physical destruction, this language is restrictive, as it requires the intent to bring about the physical destruction of the group *per se*.<sup>26</sup> It has been shown that the systematic denial of economic resources to a group has led to more death than physical annihilation.<sup>27</sup> An early draft of the Convention noted that there was only a “difference of degree” between condemning people to death by depriving them of the means of livelihood and a quick death in a concentration camp.<sup>28</sup> In determining the culpability of Iran's leadership, it should no longer be necessary to show that the current regime has an explicit plan to cause physical harm to the Bahá'í community. Instead, it should be required to show that there are structural devices in place that could foreseeably lead to its dissolution.<sup>29</sup>

---

24. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. Article II of the Convention defines the crime of genocide as follows:

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.

*Id.* art. II.

25. Paul D. Allen, *The Bahá'ís of Iran: A Proposal for Enforcement of International Human Rights Standards*, 20 CORNELL INT'L J. 337, 345 (1987).

26. Thomas W. Simon, *Defining Genocide*, 15 WIS. INT'L L.J. 243, 252 (1996).

27. *Id.* at 249.

28. WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 189 (2000).

29. Simon, *supra* note 26, at 248.

The international women's rights movement provides a strong example of how an area of international law developed to encompass systematic harms.<sup>30</sup> One way of defining genocide more expansively to capture systemic harms may be to apply the human capabilities approach, which was developed by Amartya Sen and greatly expounded upon by Martha Nussbaum.<sup>31</sup> The human capabilities approach provides a framework for looking at life based on the capacity that individuals have to access what is considered necessary to survive.<sup>32</sup> Under this theory, human beings who do not have access to certain fundamental capabilities, such as the ability to bury their dead or educate their young, may be considered deprived of things that are fundamental to life, and at certain extremes, deprived of life itself.<sup>33</sup>

This Note will examine the implications of the Convention's limited and flawed definition, as well as how a broader and more structural definition could resolve the crisis facing the Bahá'í community in Iran. Part I will describe structural oppression of Bahá'ís in Iran, beginning from the retaliatory violence that occurred in the earliest years of the religion to the contours structural devices used by the current regime to completely suppress the progress of the Bahá'ís within Iranian society. Part II will explore the development of the Convention and debate surrounding its definition, highlighting a trend in arguments made for a more structural approach. Part III will then describe the evolution of the substantive approach to human rights that emerged from the international women's rights movement, as well as the human capabilities approach to rights. Finally, Part IV will suggest that the Convention be amended to include a two-prong definition of genocide, which allows for the prosecution of state structures designed to completely incapacitate targeted groups.

## I. THE SYSTEMIC OPPRESSION OF BAHÁ'ÍS IN IRAN

For more than three decades, the Iranian government has "waged widespread and systematic campaigns" against the

---

30. See Dianne Otto, *Women's Rights*, in INTERNATIONAL HUMAN RIGHTS LAW 496 (Moeckli et al. eds., 2014).

31. See generally AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999). See also Martha Nussbaum, *Women and Equality: The Capabilities Approach*, 138 INT'L LAB. REV., 227-46 (1999) [hereinafter Nussbaum, *Women and Equality*].

32. *Id.* at 234.

33. *Id.*

Bahá'í community.<sup>34</sup> The persecution of the Bahá'í community by the current regime is the result of “historical efforts by fundamentalist clergy to devalue and persecute” Bahá'ís.<sup>35</sup> Islamic fundamentalists in Iran believe that Bahá'ís are heretics because of the faith's claim to be a new and independent religion.<sup>36</sup> One of the central teachings of the Bahá'í faith is “progressive revelation,” which is the belief that each of the world's religions represents an evolution in God's message to mankind.<sup>37</sup> The declaration of the Báb<sup>38</sup> as the “Hidden Imam” is particularly offensive to Shi'ites, contributing greatly to the public perception of Bahá'ís as heretics.<sup>39</sup> The equality of men and women, as well as the elimination of institutional clergy, also conflict with some of the more conservative interpretations of Islam that Shi'i fundamentalists fervently uphold.<sup>40</sup>

Within decades of its founding, at least 4,000 Bahá'ís—known then as Bábís—were killed.<sup>41</sup> Violence against Bahá'ís continued until the early part of the twentieth century, with episodes such as a cycle of killing and looting that persisted for a month in the city of Yazd, as well as an incident in 1903, where seventy Bahá'ís were murdered by mobs.<sup>42</sup> After the Constitutional Revolution (1905–1906), the increasingly centralized state of the Reza Shah gave Bahá'ís more security, which allowed them to build and operate dozens of schools and earn a reputation as a

34. BAHÁ'Í INT'L COMMUNITY, *supra* note 20, at 1.

35. Friedrich W. Affolter, *The Specter of Ideological Genocide: The Bahá'ís of Iran*, 1 WAR CRIMES GENOCIDE & CRIMES AGAINST HUMAN 75, 79 (2005).

36. Muslims believe that Muhammad is the final prophet and Islam the final religion. BAHÁ'Í INT'L COMMUNITY, *supra* note 20, at 31.

37. Bahá'ís believe that Abraham, Krishna, Zoroaster, Moses, Buddha, Jesus, and Muhammad were all divine messengers. See *The Bahá'í Faith and Other Religions*, BAHÁ'Í INT'L COMMUNITY, [http://www.bahai.org/dir/other\\_religions](http://www.bahai.org/dir/other_religions) (last visited Nov. 13, 2016).

38. The precursor to the Bahá'í faith, the Bábí faith, began in 1844, when Seyyed 'Ali Muhammad proclaimed that he was “The Báb” [the Gate], the personification of the “Hidden Imam,” whose return has been awaited by Shi'i Muslims since the ninth century. See IRAN HUM. RTS. DOCUMENTATION CENTER, *supra* note 3, at 3. The Báb also foretold that his appearance signaled the advent of another prophet, whose teachings would establish unity, peace, and order on earth. *Id.*

39. Denis MacEoin, *The Bahá'ís of Iran: The Roots of Controversy*, 14 BRITISH SOC'Y MIDDLE EASTERN STUD. BULL. 75, 77 (1987).

40. BAHÁ'Í INT'L COMMUNITY, *supra* note 20, at 31.

41. *Id.*

42. *Id.*



progressive force within society.<sup>43</sup> Even during this relatively tolerant period, however, Bahá'ís continued to be victims of attacks, which served as reminders of their marginalized status and illegitimacy.<sup>44</sup>

Despite experiencing intense violence and persecution throughout the years, the religion steadily expanded from 100,000 followers in the late 1800s to an estimated 300,000 by the mid-1900s.<sup>45</sup> Since the growth of the Bahá'í community is what fundamentalist clerics in Iran ultimately feared, it is little surprise that attacks against the Bahá'ís surged during the Islamic Revolution.<sup>46</sup> The Revolution marked the genesis of the broad outlines of the modern systemic and state sanctioned violence against the Bahá'í community that continues today.<sup>47</sup> Between 1979 and 1988, more than a thousand Bahá'ís were imprisoned, while tens of thousands lost jobs, pensions, and were deprived of education.<sup>48</sup> In the 1990s, the most egregious forms of persecution ebbed, this time in response to international pressure.<sup>49</sup> During this quiet period, however, a high-level govern-

---

43. *Id.*

44. In 1944, 4,000 people looted and destroyed a Bahá'í Center in Abadih. *Id.* In 1955, a prominent Islamic clergyman labeled the Bahá'í faith as a "false religion" and attacked them on his radio program during the month of Ramadan, inciting a series of widespread attacks on Bahá'ís and their property and holy places. *Id.* The bodies of Bahá'ís were also mutilated and disinterred from gravesites. *Id.*

45. *Id.* at 32, 36 ("History has shown that the only real protection for Iranian Bahá'ís comes from continued international outcry and action. The last three decades have proved that Iranian authorities are indeed cognizant of international opinion and that pressure to meet their obligations under international human rights law can have an effect.").

46. *Id.* at 32.

47. *Id.*

48. *Id.*

49. *Id.*

ment memorandum was released to address the “Bahá'í question,”<sup>50</sup> in which the government made its intent to block the progress and development of the Bahá'í community clear.<sup>51</sup>

In the 2000s, there was a surge in the harassment of Bahá'ís that reflected the reassertion of fundamentalist values by the regime.<sup>52</sup> One of the most alarming developments was the arrest of seven Bahá'ís leaders in 2008.<sup>53</sup> This was ominously reminiscent of the disappearance of nine Bahá'í leaders in 1981, whom disappeared without a trace and are presumed dead.<sup>54</sup> The arrested Bahá'í leaders have been jailed in Iran’s Evin Prison since 2008, solely for being members of the Bahá'í faith.<sup>55</sup> The stories

50. The memorandum, which was drafted by the Supreme Council of Cultural Revolution and approved by then President Khamenei, has been more influential than any codified statute or regulation on the issue. Shahin Milani, *The Situation of the Bahá'í Minority in Iran and the Existing Legal Framework*, COLUMBIA SIPA J. INT'L AFF. (June 6, 2016), <https://jia.sipa.columbia.edu/situation-bahai-minority-iran-existing-legal-framework>. It states that Bahá'ís should be barred from entering universities, denied employment, and prevented from reaching positions of influence. *Id.* The “Bahá'í question,” however, first became politicized in 1955, when Seyyed Ahmad Safa'i, a member of the Iranian parliament, introduced a bill which offered a four-part solution to the “problem.” *Id.* The bill declared that being a member of the Bahá'í faith constituted a misdemeanor and that any “perpetrator” would be subject to solitary confinement for two to ten years and be deprived of all civil rights. IRAN HUM. RTS. DOCUMENTATION CENTER, *supra* note 3, at 10 (citing SHAHROUGH AKHAVI, RELIGION AND POLITICS IN CONTEMPORARY IRAN: CLERGY-STATE RELATIONS IN THE PAHLAVI PERIOD 80–83 (1980)).

51. *Id.* at 53.

52. *Id.* at 2.

53. In 2010, the seven Bahá'í leaders were each sentenced to twenty years in prison. See Bahá'í World News Service, *Profiles of the Seven Bahá'í “Leaders,”* BAHÁ'Í WORLD NEWS SERV., <http://news.bahai.org/human-rights/iran/yaran-special-report/profiles> (last visited Jan. 16, 2017). In addition to the national security charges that Bahá'ís are typically charged with, they were also charged with espionage against the state, with their appeals ultimately being rejected. Milani, *supra* note 50. All seven were sentenced to twenty years in prison after being held incommunicado for weeks and not allowed to access legal counsel for over a year. *Id.* All seven currently remain in Iran’s Evin Prison. *Id.*

54. BAHÁ'Í INT'L COMMUNITY, THE BAHÁ'Í QUESTION: A CULTURAL CLEANSING IN IRAN 13 (Sept. 2008), <https://www.bic.org/sites/default/files/pdf/TheBahai-Question.pdf>.

55. In a report published by Frontline, Evin Prison is described as “every Iranian’s worst nightmare.” *Inside Iran: Tehran’s Most Notorious Evin Prison*, AL ARABIYA (June 14, 2015), <http://english.alarabiya.net/en/perspective/features/2015/06/14/Inside-Iran-Tehran-s-notorious-Evin-Prison.html>; Michael

of these leaders and their families demonstrate the multi-generational impact of persecution and the cyclical pattern of state-sponsored persecution.<sup>56</sup> Beyond imprisonment, the Iranian gov-

---

Theodoulou, *In Iran's Evin Prison, Fear Stalks the Corridors*, NATIONAL (Feb. 27, 2013), <http://www.thenational.ae/news/world/middle-east/in-irans-evin-prison-fear-stalks-the-corridors#page2>. The prison has been nicknamed "Evin University," due to the large number of intellectuals, political prisoners, journalists, and academics that have been incarcerated there. *Id.* It has a common reputation for grossly abusing prisoners, with prison guards "beating prisoners, dragging them across the floor and verbally insulting them." *Id.* Most prisoners in Evin are held in solitary confinement and most of the cells contain neither a toilet nor bed. See D. Parvaz, *16 Days in Evin Prison*, FRONTLINE: TEHRAN BUREAU (Jan. 25, 2012), <http://www.pbs.org/wgbh/pages/frontline/tehranbureau/2012/01/notebook-16-days-in-evin-prison.html>. Lights within the facility are left on for twenty-four hours a day so that prisoners have difficulty sleeping. *Id.* Moreover, whenever prisoners leave their cell, they are blindfolded. *Id.* Former inmates describe harsh interrogation tactics, as well as denial of phone calls, family visits, and access to legal counsel. *Id.*

56. Jamaloddin Khanjani is an eighty-one-year-old man and one of the seven Bahá'í leaders who has been imprisoned in Evin. See Bahá'í International Community, *Honoring Jamaloddin Khanjani: Day Three of the #7Bahais7years Campaign*, BAHÁ'Í INT'L COMMUNITY (May 16, 2015), <https://www.bic.org/news/honoring-jamaloddin-khanjani-day-three-7bahais7years-campaign#5SxJP6aABAIE4EXw.97>. Mr. Khanjani is one of seven Bahá'ís arrested between May 2008–2009. *Id.* All seven of the Bahá'ís were visible and active members of the Bahá'í, who were known for their service within the community, as well as Iranian society. *Id.* Mr. Khanjani was born in 1933 in the city of Sangsar, where he grew up on a dairy farm and never received more than a high school education. *Id.* Mr. Khanjani, however, defied the odds and became the successful owner of a brick factory, only to lose his entire livelihood in the wake of the Islamic Revolution in 1979, solely for being a Bahá'í. *Id.* Before his current incarceration, Mr. Khanjani was arrested and jailed by the Iranian government at least three different times, each time solely for being a Bahá'í. *Id.* In 2011, when his wife of fifty years passed away, Mr. Khanjani was denied leave from prison to be by her side during her final days of life. *Id.* He was even denied leave to attend her funeral. *Id.* Other members of his family have experienced severe persecution, including his son, nephew, granddaughter, grandson, and grandnephew. *Id.*

56. Paul D. Allen, *supra* note 25, at 340. In 2011, his brother was attacked twice in one month by unknown individuals who threw firebombs into his window. See Baha'i International Community, *supra* note 55. In 2014, his son was arrested, along with four other Bahá'ís, in a raid on an optical shop in Semnan where he was employed. *Id.* The story of Mr. Khanjani and his family is not exceptional, but rather the common experience of many Bahá'í families in Iran.

ernment denies Bahá'ís jobs, pensions, education, and the freedom to marry.<sup>57</sup> Bahá'ís have no rights or protections under the 1979 Iranian Constitution, as they are not considered citizens.<sup>58</sup>

Recently, the Iranian government has intensified its use of economic persecution to further suppress the Bahá'í community. In June 2016, the Iranian government shut down twenty-seven stores in the city of Ormieh and six stores in Sanandaj, all of which were owned by the Bahá'í.<sup>59</sup> This was not an isolated occurrence, but rather, only the most recent example of what has been a growing trend since the 2013 election of President Hassan Rouhani.<sup>60</sup> In the last two years, hundreds of shops belonging to Bahá'ís were shut down by the Iranian authorities because they were closed on Bahá'í Holy Days.<sup>61</sup> The “economic strangulation” of Bahá'ís in Iran is not a recent phenomenon. Instead, it is one of the many state-sanctioned tactics that has been used since the Revolution to exclude Bahá'ís from social and economic life.<sup>62</sup> Owning a small business has become the only option for many Bahá'ís, and now the closure of these stores seems to be the final step in a series of persecutions.<sup>63</sup>

After over 150 years, the recent flux of economic persecution is but one of many mechanisms that has been used to suppress the Bahá'ís. In an interview given shortly before his return to Iran in 1979, Ayatollah Khomeini was asked about the position of religious minorities in the future of the Islamic Republic, to which he replied, “they are a political faction; they are harmful; they will not be accepted.”<sup>64</sup> Since then, evidence has been found of

57. Paul D. Allen, *supra* note 25, at 340.

58. *Id.*

59. Bahá'í International Community, *End Economic Discrimination in Iran* (June 22, 2016) BAHÁ'Í INT'L COMMUNITY, <https://www.bic.org/statements/end-economic-discrimination-iran#DB78MbmF9cw1rZhv.97>.

60. *Id.*

61. The Iranian government has justified its actions by stating that the closure of businesses on holy days was a violation of the law and a disruption to the market. *Id.*

62. Since the inception of the Islamic Revolution, Bahá'ís have not been able to work in the public sector, as agents from the Ministry of Information pressure their employers to dismiss them. *Id.* Further, factories and businesses have been shut down or confiscated, while farmlands belonging to Bahá'ís have been appropriated. *Id.*

63. *Id.*

64. Denis MacEoin, *supra* note 39, at 75; See also Abbas Amanat, *The Historical Roots of the Persecution of Bahá'ís in Iran*, in *THE BAHÁ'ÍS OF IRAN 170* (Dominic Parviz Brookshaw and Seena B. Fazel eds., 2008).

the current regime's agenda, which is intended to suppress the "progress and development" of the Bahá'í community.<sup>65</sup> The history of the religion's persecution, taken together with the regime's current scheme, lays bare a sophisticated and multi-faceted process to destroy the Bahá'í community that is tantamount to genocide.<sup>66</sup>

## II. THE CONTROVERSIAL DEFINITION OF GENOCIDE AND THE PUSH FOR CHANGE

This Part will examine the historical development of the definition of genocide by detailing its implementation into the Convention. It will then discuss the debate surrounding its narrow definition under Article II of the Convention by comparing it to the broader definition of crimes against humanity. Finally, this Part will present arguments posed by scholars and jurists for a more structural approach to the definition of genocide.

### A. *The Convention: History and Evolution*

The Convention is one of the most widely accepted international instruments.<sup>67</sup> It has widely been recognized that a crime

---

65. Memorandum from Dr. Seyyed Mohammad Golpaygani (Feb. 25, 1991), <https://www.bic.org/sites/default/files/pdf/ran/1991%20Bahai%20Question%20Memo%20ENG.pdf>.

66. In 1983, the New York Times published an article with the headline, "Iran's Bahá'ís: Some Call it Genocide" after twenty Bahá'ís were condemned to death. R.W. Apple Jr., *Iran's Bahá'ís: Some Call it Genocide*, N.Y. TIMES (Feb. 27, 1983), <http://www.nytimes.com/1983/02/27/weekinreview/iran-s-baha-is-some-call-it-genocide.html>. Other reports have been published by various human rights groups exposing the threat of genocide to the Bahá'í community, including a 2010 report, which emphasized the volatility of the situation and how it could take one "trigger event" for a genocide against the Bahá'ís to occur. SENTINEL PROJECT FOR GENOCIDE PREVENTION, SUPPLEMENTARY REPORT: THE THREAT OF GENOCIDE TO BAHÁ'ÍS IN IRAN 7 (Sept. 20, 2010), <https://thesentinelproject.org/wp-content/uploads/2010/11/Supplementary-Report-Bahais-of-Iran-2010.pdf>.

67. The development of genocide as a crime is rooted in the history of international criminal law and the post-World War II efforts to prosecute Nazis in the wake of the Holocaust. See Robin Cryer, *International Criminal Law*, in INTERNATIONAL HUMAN RIGHTS LAW 498 (Moeckli et al. eds. 2014). The Convention occupies "a prominent place among post-war efforts" by "transcending the states focused nature of international law" and identifying genocide as an "odious scourge" that "has inflicted great losses on humanity." *Id.* In 1946, the United Nations General Assembly, in Resolution 96(I), stated that:

of genocide is part of customary international law.<sup>68</sup> The International Court of Justice (ICJ)<sup>69</sup> has asserted that the prohibition of genocide is a norm that has reached *jus cogens* status.<sup>70</sup> In 1948, the drafting of the Convention was completed, with Article I confirming that genocide is a crime under international law and Article II defining the crime of genocide.<sup>71</sup> The designation of *jus cogens* means that the principles underlying the Convention are binding on states.<sup>72</sup> The criminal prosecution of genocide begins with the recognition that persecution of ethnic, national, or religious minorities is not only “morally outrageous, but might incur legal liability.”<sup>73</sup>

The post-1948 history of the Convention has shown mixed results.<sup>74</sup> Decades of inaction has led the Convention to serve as a “symbolic reminder of the international community’s promises.”<sup>75</sup> One reason for this may be because accusations of genocide are “colored by the paradigm case still very much within our

---

Genocide is the denial of the right of existence of entire human groups, . . . such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations. . . . The General Assembly, therefore affirms that genocide is a crime under international law.

*Id.*

68. Payam Akhavan, *Enforcement of the Genocide Convention: A Challenge to Civilization*, 8 HARV. HUM. RTS. J. 229, 229–30 (1995).

69. The ICJ is the principal organ of the United Nations. Jane Connors & Markus Schmit, *United Nations*, in INTERNATIONAL HUMAN RIGHTS LAW 395 (Daniel Moeckli et al. eds., 2013). Its role is to settle legal disputes submitted by states and provide advisory opinions on legal questions referred by other U.N. organs and specialized agencies. *Id.* Individuals cannot bring cases to the ICJ. *Id.*

70. See Case Concerning the Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v. Rwanda), 2006, I.C.J. Rep. 6, ¶ 64 (Feb. 23).

71. *Id.*; Genocide Convention, *supra* note 24.

72. See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion), 1951 I.C.J. Rep 15, 23.

73. SCHABAS, *supra* note 28, at 17.

74. Alexander K. A. Greenawalt, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV 2259, 2260 (1999).

75. *Id.* at 2264; See also Payam Akhavan, *Enforcement of the Genocide Convention: A Challenge to Civilization*, 8 HARV. HUM. RTS. J. 229, 230 (1995). (“The

living memory” and that the term genocide itself was born out of the Holocaust.<sup>76</sup> Due to the strong correlation between the term genocide and the Holocaust, there is a tendency to compare injuries to groups protected by the Convention to the atrocities inflicted upon the Jewish people during the Holocaust.<sup>77</sup> As such, perpetrators of genocidal acts evade harm by not falling within the “genocidal rubric.”<sup>78</sup> This has led to an often contentious debate surrounding the definition of genocide used within the Convention.

### *B. The Debate Surrounding the Definition of Genocide*

Since the adoption of the Convention, there has been debate surrounding the definition of genocide.<sup>79</sup> The Convention sets out a narrow definition of the crime that is limited, in large part, to the physical destruction or extermination of a group.<sup>80</sup> Scholars have often compared the language within the Convention to the broader definition of crimes against humanity, which extends to various forms of persecution that involve “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”<sup>81</sup> In spite of calls for a revised definition, the language within the Convention remains narrow, while the definition of what constitutes a crime against humanity has broadened to address a range of atrocities against both groups and individuals.<sup>82</sup> Over the years, the development of case law has reflected a

---

failure to prevent and punish genocide betrays a lack of political will to confront effectively the intentional mass destruction of entire human groups. The lack of political will, in turn, betrays a cynical and short-sighted policy on the part of world leaders that fails to comprehend the immense moral and political consequences of inaction against such gross abuses of power.”)

76. Hugo Adam Bedau, *Genocide in Vietnam*, 53 B.U. L. REV. 574, 577 (1973).

77. *Id.*

78. *Id.*

79. William A. Schabas, *Genocide Law in a Time of Transition: Recent Developments in the Law of Genocide*, 61 RUTGERS L. REV. 161 (2008).

80. *Id.*

81. *Id.*

82. The adoption of the Rome Statute in 1998 was the “ideal forum” for developments in the definition of genocide as a response to the many proposals that had been made over the years. *Id.* at 162. Cuba, however, was the only country to suggest a change to the definition. *Id.*

sharp distinction between genocide and crimes against humanity, where the latter encompasses persecution that falls short of physical destruction and applies to national, ethnic, racial, and religious groups, as well as a broader range of victim groups not contemplated by the Convention.<sup>83</sup> Another way in which crimes against humanity are defined more broadly than genocide is through the *mens rea* element.<sup>84</sup> In order for an actor to meet the bar for the *mens rea* requirement under Article II, he/she must intend to destroy the group.<sup>85</sup> An actor who commits a crime against humanity, however, “selects victims because of their group membership.”<sup>86</sup> The hazy line between the two makes it difficult to distinguish between persecution against members of a group because of their membership and inflicting harm upon a group with intent of destructing it in its entirety.<sup>87</sup>

The scholarly debate surrounding the definition of genocide is predominantly divided between two camps: restrictivists and expansionists.<sup>88</sup> Restrictivists follow a strict interpretation of the Convention and expansionists advocate for a broader understanding of genocide.<sup>89</sup> The debate between these two groups is tied to a larger debate in the human rights field between universalists and relativists.<sup>90</sup> Universalists argue that human rights derive power from their ability to transcend local, national, and international laws, both geographically and temporally.<sup>91</sup> Relativists, however, argue that human rights should not be imposed uniformly across cultures.<sup>92</sup> Restrictivists adhere to the interpretive approach employed by universalists and expansionists view human rights more generally, similar to relativists.<sup>93</sup> The

---

83. *Id.* at 192.

84. JOHN QUIGLEY, *THE GENOCIDE CONVENTION: AN INTERNATIONAL LAW ANALYSIS* 12 (2013).

85. *Id.*

86. *Id.*

87. *Id.*

88. See Tatiana E. Sainati, *Toward a Comparative Approach to Genocide*, 62 *DUKE L. J.* 161, 165 (2012).

89. *Id.*; See also Michael J. Kelly, “Genocide”—*The Power of a Label*, 40 *CASE W. RES. J. INT’L L.* 147, 157 (2008) (“Restrictivists seek to restrain the label’s usage to atrocities more akin to the Holocaust, while expansionists seek to broaden the labels usage to include tangential atrocities.”).

90. *Id.* at 166.

91. *Id.*

92. *Id.*

93. *Id.*



dichotomy between the restrictivist and expansionist approach is harmful, not only within debate about the Convention, but the broader framework of international human rights law.<sup>94</sup> For example, an expansionist approach may put judicial bodies in a position where they are redefining the law to “fit idiosyncratic social needs.”<sup>95</sup> Alternatively, taking a restrictivist approach will mandate a uniform application of the law across cultures<sup>96</sup> that will have the impact of constraining courts to a strict interpretation of the law’s text.<sup>97</sup>

The Convention’s intent prong has also been a source of contention. It has been referred to as the Convention’s “achilles heel” because of the ambiguity associated with proving it.<sup>98</sup> The introductory paragraph of Article II of the Convention states that acts must be committed with the “intent to destroy in whole or in part.”<sup>99</sup> The most ubiquitous definition of genocide requires that “the perpetrator select victims on the basis of their group identity and must desire the destruction of the group.”<sup>100</sup> The tension between the restrictivist and expansionist approach can also be found within the analysis of the intent prong.<sup>101</sup> The debate surrounding the intent prong, however, is also where the argument for a more structuralist approach to genocide is taking shape. The focus of scholars who take a more structural approach to genocide “turns from the individual to the structural elements that give rise to genocide and other mass atrocities.”<sup>102</sup>

In order for an individual to be charged with the crime of genocide, he/she must have the requisite *mens rea*, requiring him or

---

94. *Id.* at 169.

95. *Id.*

96. *Id.*

97. See Ryan Park, *Proving Genocidal Intent: International Precedent and ECCC Case 002*, 63 RUTGERS L. REV. 129, 137 (2010).

98. John Quigley, A Useful Legal Category, 19 INT’L CRIM. JUST. REV. 115, 117 (2009) (“Could it be through statements that accompany acts of violence, statements that might bespeak an aim to destroy the group? Or might such an intent be deduced from the very acts of violence?”).

99. Genocide Convention, *supra* note 24, art. 2.

100. Greenawalt, *supra* note 74, at 2294.

101. See Schabas, *supra* note 79, 163 (2008) (“The limited scope of the Genocide Convention definition has led many academics and human rights activists in two distinct directions. There have been frequent attempts to stretch the Genocide Convention definition, often going beyond all reason, in order to fit particular atrocities within the meaning of Article II. Other commentators have also proposed new definitions to enlarge the scope of the term.”).

102. THOMAS W. SIMON, THE LAW OF GENOCIDE 71 (2007).

her to have a direct connection with the criminal act.<sup>103</sup> Those who argue for a more structural approach to genocide contend that genocide is a “less direct, more meditated connection to a criminal act.”<sup>104</sup> The *mens rea* for genocide also includes a knowledge-based test, which requires defendants to have the requisite intent or knowledge of the alleged crime.<sup>105</sup> Proponents of a more structural approach to intent argue that a court should examine how the individual functioned within the organization’s structure.<sup>106</sup> Advocates of the structural approach hone in on the systemic foundations of genocide and for alterations within the systems that produce genocide.<sup>107</sup> At the heart of the argument for a more structural definition of intent is that in “a bureaucratic world dominated by anonymous forces, it becomes increasingly difficult to locate intentional actors.”<sup>108</sup> Structuralists argue that the inherent difficulty of detecting specific agents of genocide should not create an impossible standard for meeting the intent prong of Article II.<sup>109</sup>

Another barrier to prosecuting genocide is that the perpetrator defines the victim’s status as a member of a group protected by the Convention.<sup>110</sup> Victim groups, however, are defined not only by state actors, but by the structures put into place to identify who belongs to the targeted group.<sup>111</sup> For example, Nazis developed a system to delineate between who was considered to be a

---

103. *Id.*; see also Greenawalt, *supra* note 74, at 2294 (“With its use of the word “intent,” the Genocide Convention appeals to a central concept of criminal culpability. The problem is that the historical understanding of criminal intent has eluded uniform understanding. According to the traditional common-law doctrine, criminal perpetrators intended the consequences of their actions if they knew to a practical certainty what the consequences of those actions would be, regardless of whether or not they deliberately sought to realize those consequences. At the same time, however, common law jurisdictions have also employed an alternate model of intent-based liability. In the case of so-called “specific intent” crimes, liability attaches only to perpetrators whose actual aim or purpose is to realize certain forbidden consequences.”).

104. *Id.*

105. *Id.*

106. *Id.*

107. Simon, *supra* note 26, at 249.

108. *Id.*

109. *Id.*

110. Schabas, *supra* note 79, at 164.

111. Simon, *supra* note 102, at 250 (“Acts of genocide do not occur randomly, accidentally, or indiscriminately. The perpetrator identifies the targeted group

Jewish and non-Jewish person during the Holocaust.<sup>112</sup> The Iranian government utilizes the education system to identify other Bahá'ís.<sup>113</sup> The Ministry of Justice states that Bahá'ís are only permitted to sit for a university entrance examination and enroll in institutions of higher education if they do not formally identify as Bahá'ís.<sup>114</sup> In order for states to be held accountable for genocidal acts, it is crucial for links to be drawn between individuals and the state, as opposed to narrowly focusing on the intent of individuals.<sup>115</sup>

Advocates for a more structural definition under the intent prong also envision less distinction between the physical and nonphysical harm.<sup>116</sup> In *Prosecutor v. Krstic*, Judge Shahabuddeen of the Appeals Chamber of the International Tribunal for the Former Yugoslavia stated:

A group is constituted by characteristics—often intangible—binding together a collection of people as a social unit. If those characteristics have been destroyed in pursuance of the intent with which a listed act of a physical or biological nature was done, it is not convincing to say that the destruction, though effectively obliterating the group, is not genocide because the obliteration was not physical or biological.<sup>117</sup>

Judge Shahabuddeen goes on to state that while intent to destroy should be required for culpability, destruction need not be defined narrowly to be solely physical or biological.<sup>118</sup> He asserts that the destruction of culture “may serve evidentially to confirm an intent,” pointing to the destruction of holy places as an example.<sup>119</sup> Judge Shahabuddeen’s views regarding allowing cultural forms of destruction to be used in order to establish the *mens rea*

in some way, however perverse, generally through accompanying state structures, such as laws, and then fully employs the state apparatus to eliminate members of the group.”)

112. *Id.*

113. See U.S. DEP'T OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, INTERNATIONAL RELIGIOUS FREEDOM REPORT FOR 2013: IRAN 5 (July 28, 2014), <https://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper>.

114. *Id.*

115. *Id.*

116. See *Prosecutor v. Krstic*, Case No. IT-98-33-A, ¶ 50 (Apr. 19, 2004) (partial dissenting opinion of Judge Shahabuddeen).

117. *Id.*

118. *Id.* ¶ 51.

119. *Id.* ¶ 53 (“[T]he razing of the principal mosque confirms an intent to destroy the Srebrenica part of the Bosnian Muslim Group.”).

element of the intent prong were adopted by several trial chambers.<sup>120</sup> Furthermore, judicial bodies that have adopted Judge Shahabuddeen's standard have employed a more nuanced definition of physical or biological destruction that "enlarges the definition of intent to include borderline cases where there are abundant examples of ethnic hatred but an absence of evidence that physical destruction occurred."<sup>121</sup> The impact of Judge Shahabuddeen's opinion on lower courts demonstrates a shift towards a more structural application of the Convention. While Judge Shahabuddeen utilized the bench to espouse his point of view regarding the Convention's limitations, a stronger antidote for the Convention's limitations would be to amend it to be a more robust instrument.

### III. SUBSTANTIVE APPROACHES WITHIN INTERNATIONAL LAW: WOMEN'S RIGHTS MOVEMENT AND THE HUMAN CAPABILITIES APPROACH

This Part will explore substantive approaches within the realm of international human rights law. It will begin by examining the enactment of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)—which was the result of an organized effort by feminists within the human rights community. It will then look to the human capabilities approach as a framework for enforcing a more structural defini-

---

120. See, e.g., *Prosecutor v. Blagojevic*, Case No. IT-02-60-T, Judgment, ¶ 659–60 (Jan. 17, 2005); *Prosecutor v. Krajisnik*, Case No. IT-00-39-T, Judgment, ¶ 854 (Sept. 27, 2006) ("'Destruction,' as a component of the mens rea of genocide, is not limited to physical or biological destruction of the group's members, since the group (or a part of it) can be destroyed in other ways, such as by transferring children out of the group (or the part) or by severing the bonds among its members.").

121. In *Prosecutor v. Krajisnik*, the court included a footnote that expands upon the intent requirement for physical or biological genocide, stating that while members of a group are:

[P]hysical or biological beings . . . bonds among its members, as well as cultural beliefs, are neither physical nor biological. Hence, the Genocide Convention's 'intent to destroy' the group cannot sensibly be regarded as reducible to an intent to destroy the group both physically or biologically, as has occasionally been said.

SCHABAS, *supra* note 28, at 61.

tion of rights. Finally, this Part will suggest applying the framework of CEDAW and the human capabilities theory to create a definition of genocide that not only takes a more systemic approach to describing harms, but also allows for the Convention to serve both penal and preventative purposes.

#### A. CEDAW: A More Robust Definition of Rights for Women

Increased dissatisfaction with the marginalization of women<sup>122</sup> within the framework of the implementation of international human rights law led to the creation of CEDAW.<sup>123</sup> While not disparate in its approach, CEDAW distinguishes itself from the International Covenant on Civil and Human Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which provide guidelines for how states can treat both individuals and groups under international law<sup>124</sup> by focusing specifically on nondiscrimination.<sup>125</sup> Among the omissions within the ICCPR and ICESCR were that the terms “equality” and “discrimination” were not defined, which led to some states having minimum human rights safeguards in place for women.<sup>126</sup> One of the strategies employed by CEDAW in promoting a more comprehensive understanding of women’s equality was the adoption of a comprehensive definition of what it meant to discriminate against women.<sup>127</sup> The definition covers a

---

122. Otto, *supra* note 30, at 322.

123. *Id.*

124. After World War II, the primary means for establishing women’s equality was adopted by the drafter of the Universal Declaration on Human Rights (UDHR) through “prohibiting discrimination based on sex in the enjoyment of universal rights and freedoms which, notably, does not single women out as the disadvantaged gender group.” *Id.* at 319–20. When the UDHR became a legally binding instrument, the ICESCR and the ICCPR also mirrored its language. *Id.*

125. *Id.* at 322.

126. *Id.* at 320

127. In Article I of CEDAW:

[D]iscrimination against women is defined to mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, cultural, civil or any other field.

wide range of conduct, such as direct and indirect discrimination and unintended and intended discrimination.<sup>128</sup> Moreover, it promotes substantive equality by requiring that women be able to “enjoy” or “exercise” their human rights and fundamental freedoms, making it clear that the prohibition of discrimination against women applies to all realms of life, not just the public sphere.<sup>129</sup> The CEDAW committee monitors the Convention’s implementation and works to clarify many of the other obligations required by its substantive approaches, through urging states to take a gender-inclusive approach to addressing different issues that fundamentally influence both women and men.<sup>130</sup>

Substantive equality goes beyond a notion of formal, or *de jure*, equality.<sup>131</sup> Instead, substantive equality focuses on eliminating individual, institutional, and systemic discrimination against disadvantaged groups that inhibits their “full and equal social, economic, political, and cultural participation in society.”<sup>132</sup> From a substantive equality point of view, treating people equally does not mean treating them the same.<sup>133</sup> Based on the discrimination a group has faced, along with existing discriminatory attitudes, a law that facially puts two groups, such as men and women, on par with each other does not necessarily treat them equally under the substantive equality model.<sup>134</sup> Thus, a substantive approach to equality embraces that discrimination must be addressed systematically in order to account for the disparities in privilege held by groups throughout a society.<sup>135</sup> In order to do this, substantive equality requires that states take additional measures to account for the reality that groups are differently situated across society.<sup>136</sup>

---

*Id.* at 323.

128. *Id.*

129. *Id.*

130. For example, the CEDAW committee urges states to adopt criteria in the determination of equal pay that address the distinctive features and factors that differ for women in comparison to men. *Id.*

131. Jennifer S. Hainsfurther, *A Rights-Based Approach: Using CEDAW to Protect the Human Rights of Migrant Workers*, 24 AM. U. INT’L L. REV. 843, 862 (2009).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 865.

136. *Id.*

### B. The Human Capabilities Theory and Rights

Aligned with the substantive definition of women's rights behind CEDAW, the human capabilities approach was born out of the scholarship of Amartya Sen.<sup>137</sup> Although it mainly applies in an economic context, Martha Nussbaum has pioneered its application within the domain of women's rights.<sup>138</sup> The idea behind the capabilities approach is that there are "certain functions that are particularly central to human life, in the sense that their presence or absence is typically understood to be a mark of the presence or absence of human life."<sup>139</sup> The human capabilities approach has been used to answer certain questions, such as: What is the living standard? What is the quality of life?<sup>140</sup> Nussbaum suggests that the absence of a capability can be judged as so central to the functioning of a human that without it the person is not really a human being at all.<sup>141</sup> Furthermore, the level at which a human's capability is truly human is when it is worthy of the human being.<sup>142</sup> At the heart of the approach is that each person is a bearer of value.<sup>143</sup> This combats the fact that behind all exploitation is the objectification of human beings for the use of others.<sup>144</sup> Nussbaum provides the following list<sup>145</sup> as central human functional capabilities: life, bodily

---

137. AMARTYA SEN, DEVELOPMENT AS FREEDOM 87 (2001) ("There is a strong case for judging individual advantage in terms of the capabilities that a person has, that is the substantive freedoms he or she enjoys to lead the kind of life he or she has reason to value. In this perspective, poverty must be seen as a deprivation of basic capabilities rather than a lowness of incomes, which is the standard criterion of identification of poverty.").

138. See generally Nussbaum, *supra* note 31, at 227–46; Martha C. Nussbaum, *Capabilities and Human Rights*, 66 *FORDHAM L. REV.*, 273–300 (1997) [hereinafter Nussbaum, *Capabilities*].

139. See Nussbaum, *Women and Equality*, *supra* note 31, at 234 ("The core idea [of the human capabilities approach] is that of the human being is a dignified free being who shapes his or her own life, rather than being passively shaped or pushed around by the world in the manner of a flock or herd animal.").

140. Nussbaum, *Capabilities*, *supra* note 138, at 279.

141. *Id.* at 282.

142. *Id.* at 279.

143. *Id.*

144. *Id.* at 286.

145. The list is the result of years of cross-cultural discussions and is designed so that its items can be more concretely applied to local beliefs and circumstances. *Id.* at 277. In describing the methodology that went toward compiling the list, Nussbaum states:

health, imagination and thought, emotion, practical reason, affiliation, interaction with other species, play, and control over one's environment.<sup>146</sup>

Each item on Nussbaum's list is of equal importance and is related to one another in "complex ways."<sup>147</sup> Among the capabilities, however, Nussbaum designates practical reason and affiliation<sup>148</sup> as being particularly significant.<sup>149</sup> The capabilities approach begins with the moral claim that human beings, with the right education and material support, are able to perform the functions in question.<sup>150</sup> Nussbaum highlights that for women, and for all humans, a life without dignity and choice is a death to one's humanity.<sup>151</sup> Capabilities, under Nussbaum's view, have a very close relationship to human rights, in that "they effect the terrain between so-called first generation rights (political and civil liberties) and the so-called second-generation rights (economic and social rights)."<sup>152</sup>

Human rights and capabilities are similar in that they "provide the philosophical underpinning for basic constitutional

The list is an attempt to summarize the empirical findings of a broad and ongoing cross-cultural inquiry. As such, it is open-ended and humble; it can always be contested and remade. It does not claim to read facts of 'human nature' off of biological observation, although it does of course take account of biology as a relatively constant element in human experience. Nor does it deny that the items on the list are to some extent differently constructed by different societies. Indeed, part of the idea of the list is that its members can be more concretely specified in accordance with local beliefs and circumstances.

*Id.* at 286.

146. *Id.* at 287.

147. Nussbaum, *Women and Equality*, *supra* note 31, at 236.

148. "Affiliation" is defined as "having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails protections against discrimination on the basis of race, sex, sexual orientation, religion, caste, ethnicity, or national origin." *Id.* at 235. Practical reason is defined as "being able to form a conception of the good and to engage in critical reflection about the planning of one's life (which entails protection for the liberty of conscience)." *Id.*

149. *Id.* at 236.

150. *Id.* at 239.

151. *Id.* at 237.

152. *Id.* at 239.



principles.”<sup>153</sup> Nussbaum, however, suggests that certain rights, such as the right to religious exercise and speech, should be looked at as capabilities.<sup>154</sup> In doing this, the issue of countries having “rights” documented on paper, while not effectively applying or protecting them, can be avoided by critiquing the existence or non-existence of rights by whether people have the capability to function within that area.<sup>155</sup> Nussbaum views human capability as a means of providing a new conceptual framework for what it means to define human rights that goes beyond a mere nominal presentation of what a group or individuals rights are.<sup>156</sup> One further advantage of taking a capabilities approach verses a rights approach is that the term “rights” is associated with the European Enlightenment and Western thought, while capabilities are much more universal and are not linked to one cultural or historical tradition.<sup>157</sup> There are also complex theoretical questions surrounding rights, such as whether the individual is the only bearer of rights, or whether rights belong to other entities, such as families, religious, ethnic, and linguistic groups.<sup>158</sup>

The enactment of CEDAW demonstrates that when rights are defined more comprehensively, they provide greater protections to the individuals they are designed to protect. Correspondingly, Nussbaum’s approach to human capabilities serves as a reminder that rights, specifically the right to life, cannot just be nominally defined and cosmetically applied. Rather, in order to

---

153. *Id.* at 240.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 241. (“So ‘rights’ are not exclusively Western, in the sense that matters most; they can be endorsed from a variety of perspectives. None the less, the language of capabilities enables us to bypass this troublesome debate. When we speak simply to what people can do and be, we do not even speak of what people are actually able to do and to be, we do not even give the appearance of privileging a Western idea. Ideas of activity and ability are everywhere, and there is no culture in which people do not ask themselves what they are able to do, what opportunities they have for functioning.”).

158. Nussbaum further asserts that the language of rights “to some extent cuts across this debate and obscures the issues it may have articulated.” Nussbaum, *Capabilities*, *supra* note 138, at 274–75. Thus, it can be concluded that the language of rights is “not especially informative, despite of its uplifting character, unless its users link their references to rights to theory that at least answers some of these questions.” *Id.* According to Nussbaum, the language of human capabilities and functioning emerged out of this need. *Id.*

define what it means to be denied life, one must rigorously explore what it means to live. Both the systemic protections provided to women by CEDAW and the human capabilities approach reflect that in order for the Convention to guard groups from physical extinction, it must also protect groups from social extinction, which not only serves as a symbolic denial of life, but also creates the conditions necessary for the physical annihilation of a group to take place.

#### IV. SOLUTION: A MORE SUBSTANTIVE DEFINITION OF GENOCIDE THAT INCORPORATES HUMAN CAPABILITIES THEORY

Modifying the intent requirement to include systems that have been designed to incapacitate a certain group would provide for less ambiguity surrounding what actions are expressly prohibited under Article II.<sup>159</sup> Under the current definition of genocide, unless there is a clear intent to destroy a group in whole or in part, a situation cannot be considered a genocide.<sup>160</sup> Since this heightened standard for *mens rea* is thought to make genocide what it is, it becomes incredibly difficult for victim groups, like the Bahá'ís in Iran, to bring genocide claims under the Convention.<sup>161</sup> To change this, the United Nations Secretariat<sup>162</sup> should use Nussbaum's human capabilities framework<sup>163</sup> to clarify the circumstances under which various acts, such as denial of access

---

159. Matthew Lippman, *Genocide: The Crime of the Century—The Jurisprudence of Death at the Dawn of the New Millennium*, 23 HOUS. J. INT'L L. 467, 465 (2001).

160. Mai-Linh K. Hong, *A Genocide by Any Other Name: Language, Law, and the Response to Darfur*, 49 VA. J. INT'L L. 235, 240 (2008).

161. *Id.* at 260.

162. Article XVI of the Genocide Convention states, “[a] request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General. The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.” See Genocide Convention, *supra* note 24.

163. See generally Nussbaum, *Capabilities*, *supra* note 138.

to higher education, inability to bury the dead,<sup>164</sup> and the systematic closure of shops and businesses, constitute genocide.<sup>165</sup> By following the innovative approach taken by CEDAW drafters, revising the definition of genocide can allow for Article II to serve as more than a “symbolic denunciation of Nazi depredations.”<sup>166</sup> The strong association between genocide and the Holocaust has made victim groups like the Bahá’ís reluctant to concede that they are victims of genocide.<sup>167</sup> Matthew Lippman, a Professor at University of Illinois-Chicago, whose research focuses specifically on the development of the Convention, describes harmed groups that are unable to “capture the flag” of genocide as conceding to ethnic cleansing.<sup>168</sup>

There should be two standards for showing intent, including a specific intent standard that is reserved for executive decision-makers, as well as a general intent requirement imposed on functionaries.<sup>169</sup> Creating a general intent standard that encompasses structural and deeply embedded state sanctioned devices reinforces that the Convention is not just designed to prosecute, but also to prohibit extermination and infliction of potentially lethal pain and suffering.<sup>170</sup> Advocates of broadening Article II to encompass cultural cleansing argue that acts, such as the deliberate desecration of icons, libraries, monuments, and coercive religious conversions, should be included in the definition.<sup>171</sup> The capabilities approach can be used to create not only a broader

---

164. Since the Islamic Revolution in 1979, the desecration of Bahá’í cemeteries has occurred across Iran. See IRAN HUM. RTS. DOCUMENTATION CENTER, *supra* note 3, at 38–39. Family graves have been exhumed by vandals and in such cases, authorities have prevented families from reburying their dead. *Id.* In 1981, a Bahá’í cemetery in Tehran was closed and thirteen cemetery employees were arrested. *Id.* Bahá’ís have been compelled to bury their dead in an area reserved by authorities specifically for “infidels.” *Id.*

165. Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 ARIZ. J. INT’L & COMP. L. 415, 514 (1998).

166. *Id.* at 536.

167. Lippman, *supra* note 159, at 536.

168. Further, the 1978 report from the Special Rapporteur on genocide lacked effective international measures to prevent and punish genocide, while also failing to provide an obstacle to the perpetration of genocide. *Id.* The 1985 report echoed the same sentiment, stating, “[i]n its present form, the Convention . . . must be judged to be not enough.” *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 486.

intent requirement, but also one that is preventative by identifying functions that are central to human life and tied to the dignity of human beings.<sup>172</sup> Under the capabilities approach, the intent prong should ask whether the state deprived a victim group of basic human capabilities.<sup>173</sup>

Under a broader definition of physical destruction, a life without dignity and choice for a particular victim group may be viewed as death to the humanity of its members.<sup>174</sup> Incorporating the language of human capabilities into the Convention allows the definition to encompass the concept of human dignity.<sup>175</sup> As previously mentioned, scholars lament over the fact that it has taken atrocities like the Holocaust and gruesome genocides to create awareness of what may constitute a threat or deprivation of human dignity.<sup>176</sup> Nussbaum identifies human dignity, not by nominal characteristics that human beings have, but rather, by whether humans manifest those qualities through action.<sup>177</sup> By taking this approach, Nussbaum re-conceptualizes what it means to be deprived of life.<sup>178</sup> Furthermore, using the human capabilities framework allows the Convention to include bodily integrity and health.<sup>179</sup> A definition that places a greater emphasis on bodily integrity provides a standard under which a state or its actors may be held accountable for threatening a victim group with violence or using physical violence to seclude or suppress it.<sup>180</sup>

While protecting the concept of genocide from becoming too amorphous is a valid concern, it should be balanced with the re-

172. Nussbaum, *Women and Equality*, *supra* note 31, at 234.

173. *Id.* at 243.

174. *Id.* at 237.

175. Paola Bernardini, *Human Dignity and Human Capabilities in Martha C. Nussbaum*, 6 *IUSTUM AEQUUM SALUTARE* 45, 51 (2010).

176. *Id.*

177. *Id.* at 49.

178. Martha Nussbaum, *Human Rights and Human Capabilities*, 20 *HARV. HUM. RTS. J.* 21, 24 (2007) [hereinafter Nussbaum, *Human Rights*] (“Life. Being able to live to the end of human life of normal length; not dying prematurely, or before one’s life is so reduced as to not being worth living.”).

179. Nussbaum defines bodily integrity as “being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence.” Nussbaum, *Capabilities*, *supra* note 138, at 287. Bodily health is defined as “being able to have good health; to be adequately nourished; to have adequate shelter.” *Id.*

180. *Id.* at 294.

ality that showing specific intent has become increasingly difficult in a post-colonial world.<sup>181</sup> Critics of a broader definition of genocide argue that conflating genocide with other forms of harm dilutes the fundamental meaning of genocide.<sup>182</sup> A predominant concern is that the definition of genocide will become too far removed from the concept that it is killing.<sup>183</sup> Proponents of a narrow definition of genocide argue, however, that while systemic structures may lead to an actual genocide, these acts must be in a different category than killing *per se*, due to the difference in magnitude.<sup>184</sup> The advantage of codifying the human capabilities approach within a general definition of intent is that it will protect groups like the Bahá'ís in Iran from actors whose behaviors do not fall within the narrow definition of specific intent.<sup>185</sup>

The ramifications of Bahá'ís having no legal standing under the Iranian Constitution manifests itself in numerous ways, from the government's refusal to recognize Bahá'í marriages to the fact that Bahá'ís of all ages can be expelled from their schools at any time with no explanation.<sup>186</sup> Lastly, one of the most egregious harms to the Bahá'ís is that they are not afforded freedom of expression or assembly<sup>187</sup> and are forced to worship clandestinely to avoid harm.<sup>188</sup> Under Nussbaum's theory, each of these would be individually considered a denial of a basic capability.<sup>189</sup> Thus, Bahá'ís are living under a regime that completely blights their ability to act and express themselves.<sup>190</sup> Under the capabilities frameworks, Bahá'ís should, at a minimum, have basic entitlements granted to them by the Iranian government.<sup>191</sup> One of

---

181. Hong, *supra* note 160, at 242.

182. Simon, *supra* note 26, at 251.

183. During the drafting of the Convention, there were national representatives who tried to include a separate article about cultural genocide. *Id.* They were met, however, with resistance by representatives who insisted that genocide should be restricted solely to physical acts. *Id.*

184. *Id.*

185. *Id.* at 270.

186. IRAN HUM. RTS. DOCUMENTATION CENTER, *supra* note 3, at 23. Nussbaum writes that "control of one's environment" includes "being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers." Nussbaum, *Human Rights*, *supra* note 178, at 25.

187. *Id.*

188. Iran Hum. Rts. Documentation Center, *supra* note 3, at 23.

189. Nussbaum, *Human Rights*, *supra* note 178, at 25.

190. Nussbaum, *Women and Equality*, *supra* note 31, at 236.

191. *See generally id.*

the benefits of a general intent prong that incorporates Nussbaum's framework is that it will allow victim groups, like the Iranian Bahá'ís, to show that the state has created mechanisms to deny them of basic human entitlements that are crucial to both human survival and progress.<sup>192</sup> Having a more systemic definition of genocide will create a common framework, under which the global community can agree on the minimum standard of life that should be available to all humans.<sup>193</sup> Under this standard, the presence or absence of basic capabilities will be a mark of the presence or absence of human life.<sup>194</sup>

### CONCLUSION

The endemic and long-term violence and persecution inflicted upon the Bahá'í community in Iran reaffirms the importance of broadening the definition of genocide and incorporating a more structural approach. The current regime has yet to commit a mass killing, but instead has created sophisticated state mechanisms designed to slowly erase the existence of the Bahá'í community. Through an incredible show of resilience, the Bahá'í community in Iran continues to survive. The international community, however, should be asking at what cost. A community deprived of the ability to educate its youth, maintain ownership of its own businesses, and bury its dead is being denied basic and foundational capabilities that enable communities to meaningfully and equally live within society. Aside from these systemic injustices, Bahá'ís are being killed and imprisoned regularly. A definition of genocide that encompasses devices utilized by the state to debilitate a group would allow for actors, like the Iranian government, to be held accountable for their actions, without having to go through the painstaking process of showing that they had the requisite intent to bring about the physical annihilation of an entire population. While the Convention was created to punish mass killings, it was also created to prevent them from occurring. Amending the Convention will enable human rights activists to take a less reactive and more preventative approach to protecting vulnerable groups. Genocide will no longer be characterized by death but the preservation of life. Furthermore,

---

192. *Id.* at 242–43.

193. *Id.* at 235.

194. *Id.*

amending the Convention may have the broader impact of influencing and broadening discourse surrounding what it means to live. Life will no longer be defined solely by corporeal existence but more holistically and fully by what individuals and communities are fundamentally capable of doing. For the Iranian Bahá'ís, a change in the definition of genocide will immediately impact their ability to meaningfully engage with the most fundamental aspects of life.

*Camillia R. Brown\**

---

\* B.A., Emory University (2011); M.S.W. Columbia University; J.D., Brooklyn Law School (Expected 2018); Notes and Comments Editor of the *Brooklyn Journal of International Law*. First, this note is entirely dedicated to the precious Iranian Bahá'í community—your fortitude and sacrifice inspire me every day. I would also like to thank all of my Bahá'í brothers and sisters for walking this path of service with me and showing me constant love and encouragement along the way. To my endlessly loving and supportive parents, brother, and grandmother—none of this would be possible without all of you. Thank you. Thanks also to Professor Samuel Murumba for helping shape my topic and discussing my early draft. Lastly, I am grateful to all my *Journal* colleagues for their hard work and dedication. All errors and omission are my own.